REVISTA DA FACULDADE DE DIREITO DA UNIVERSIDADE DE LISBOA

LISBON LAW REVIEW

ANO LXII 2021 NÚMERO 2

REVISTA DA FACULDADE DE DIREITO
DA UNIVERSIDADE DE LISBOA
Periodicidade Semestral
Vol. LXII (2021) 2

LISBON LAW REVIEW

PROPRIEDADE E SECRETARIADO

Faculdade de Direito da Universidade de Lisboa
Alameda da Universidade – 1649-014 Lisboa – Portugal

EDIÇÃO, EXECUÇÃO GRÁFICA E DISTRIBUIÇÃO
LISBON LAW EDITIONS

Alameda da Universidade – Cidade Universitária – 1649-014 Lisboa – Portugal

ISSN 0870-3116 Depósito Legal n.º 75611/95

Data: Março, 2022

ÍNDICE 2021

ESTUDOS REVISITADOS

VULTOS DO(S) DIREITO(S)

JURISPRUDÊNCIA CRÍTICA

VIDA CIENTÍFICA DA FACULDADE

Religious freedom and constitutional elements at the social-political integration process: a theoretical-methodological approach

Liberdade religiosa e elementos constitucionais no processo de integração sociopolítica: uma abordagem teorético-metodológica

Rodrigo Lobato Oliveira de Souza*

Abstract: This Article discusses religious freedom's capacity as a fundamental right to actively promote a process of social-political integration within democratic-pluralistic societies. As normally perceived, religion, although a powerful indispensable element on the development of individual personality and on promoting social-cultural advancements, is responsible for multiple social conflicts generally related to issues of intolerance, discrimination and social stigmatization. The multiple and different forms of exercising religious freedom are normally comprehended as the foundations of those social conflicts. Supposedly, the free movement of diverse theological-cultural claims would lead to social exclusion and stigmatization, as conflicting claims would clash against each other. Conversely, what the present Article intends to demonstrate is that this common vision is actually a result of a misleading comprehension of religious freedom's theoretical-dogmatic basis. As a fundamental right, religious freedom must be taken

Resumo: O presente Artigo discute a capacidade da liberdade religiosa, como direito fundamental, para promover um processo de integração sociopolítica no âmbito de sociedades democráticas e pluralistas. Como comumente compreendida, a religião, conquanto um elemento poderoso e indispensável ao desenvolvimento da personalidade individual, bem como elemento relevante na promoção de evoluções socioculturais, é responsável por inúmeros conflitos sociais normalmente relacionados a questões como intolerância, discriminação e estigmatização social. Em geral, as distintas e múltiplas formas de exercício da liberdade religiosa são compreendidas como a razão para tais conflitos sociais. Supostamente, o livre tráfego de distintas pretensões teológico-culturais é capaz de conduzir à exclusão e estigmatização sociais, uma vez que pretensões conflitantes tendem à colisão. Porém, o que o presente Artigo intenta demonstrar é que essa visão constitui, na verdade, produto da compreensão equivocada acerca das bases teorético-dogmáticas

* Doctoral Student of Law. Master of Law. E-mail: rodrigolbt.advogado@gmail.com

seriously, especially in what it concerns its constitutional theoretical-methodological framework. Once religious freedom's core theoretical-dogmatic elements are adequately comprehended and respected, and also once they are functioning alongside other indispensable elements of liberal constitutionalism, religious freedom can be turned into an active factor for the social-political integration process, avoiding issues of social isolation, discrimination, exclusion and stigmatization, and yet functioning as a cross-cultural dialogue promoting factor.

Keywords: constitutional law; fundamental rights; religious freedom; intercultural dialogue; social-political integration process.

da liberdade religiosa. Como direito fundamental, a liberdade religiosa deve ser levada a sério, em especial no que concerne ao seu enquadramento constitutional teorético-metodológico. Uma vez escorreitamente compreendidos e respeitados os elementos teorético-dogmáticos da liberdade religiosa, e uma vez operacionalizados ao lado de outros elementos de base inerentes ao constitucionalismo liberal, a liberdade religiosa pode ser transmutada em fator ativo no processo de integração sóciopolítica, evitando problemáticas relativas à discriminação, estigmatização, isolamento e exclusão sociais, funcionando, assim, como fator de promoção de um diálogo sociocultural.

Palavras-chave: direito constitucional; direitos fundamentais; liberdade religiosa; diálogo intercultural; processo de integração sociopolítica.

1. Introduction

Assuming a theoretical approach, this Article deals with the possibilities and implications of specific constitutional elements that have the capacity of furthering a process of social-political integration[1] within democratic-pluralistic societies,

[1] It worth noting that the idea of such a social-political integration process is related to an empathic accommodation and mutual comprehension between different religious, cultural and social expressions, developing a dialogue capable of absorbing multiple kinds of manifestations, thus improving the level of political participation, namely by taking part at the decision-making processes.

avoiding issues of social disintegration (exclusion and isolation) and stigmatization. As a condition to set forward these constitutional elements, this Article highlights the need for developing a renewed comprehension of religious freedom as a genuine fundamental right. It is known, and sometimes also spectated, that religious freedom's individual and collective exercises, notably within a multifaceted-pluralistic society, imply some level of social conflict[2]. Factors like the increased religious diversity in modern societies[3], the lack of effective religious accommodation[4] and the existence of governmental acts that seem to underneath religious minorities' beliefs and practices in benefit of specific religious majorities, all these factors make a negative pressure over the exercise of religious freedom, evoking controverted questions and situations that must be analyzed in the light of a refreshed theoretical-methodological basis.

Religious freedom is a well-known constitutional fundamental right, recognized by most, rather all Constitutions of democratic (western) societies[5] and by multiple international/supranational legal documents[6]. Through this core fundamental right, all individuals and groups are entitled with legitimate capacity to exercise, internally and externally, their religious beliefs and practices, be it in public or in private, individually or collectively. Regarding the exercise of its internal dimension,

---

[2] "Social conflict" is referred here as the lack of a minimum level of social cohesion, implying social dividedness into multiple different and incommunicable groups, whose claims are publicly expressed by regarding the withdraw of others' moral, cultural and theological claims. In this sense, regarding the religious diversity of modern societies, see DAVID E. CAMPBELL, Religious Tolerance in Contemporary America, *DePaul Law Review*, Vol. 62, n.º 4, 2013, p. 1012, stating that "we might expect a combination of devotion and diversity to be explosive, perhaps even leading to violence".

[3] For instance, this diversity is evident in the American society, embracing a multitude of religious groups and denominations. See DAVID E. CAMPBELL, Religious Tolerance, cit. (nt. 2), pp. 1010-1011.

[4] See MARIANNE C. DELPO, Never on Sunday: Workplace Religious Freedom in the New Millennium, *Maine Law Review*, Vol. 51, n.º 2, 1999, pp. 356-357, contending that over the past years, and because of the diverse workforce that has been formed, many employees began to claim more fiercely for respect, reason why the number of conflicts regarding discrimination on behalf of religious beliefs and practices has increased.

[5] E. g., U.S. Const. amend. I; Federal Republic of Germany Const. article 4.º, n.º 1; Spanish Const. article 16.º, n.º 1; Portuguese Const. article 41.º, n.º 1; Brazilian Const. article 5.º, VI; Colombian Const. article 19.º; Republic of Uruguay Const. article 5.º; Greece Const. article 13.º, n.º 1.

[6] E. g., Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); International Covenant on Civil and Political Rights, UN General Assembly res. 2200 A (XXI), article 18.º, n.º 1 (1966); European Convention on Human Rights, Council of Europe, article 9.º, n.º 1 (1950). See JONATAS E. M. MACHADO, Freedom of Religion: A View from Europe, *Roger Williams University Law* Review, Vol. 10, n.º2, 2005, p. 467.

religious freedom turns religious conscience into an absolute entity, intangible in all its extension[7]. At the external dimension, religious freedom entitles individuals and groups with the right to express and disseminate their own beliefs through multiple manners, be it written, spoken, or by using attire and symbols that directly express religious affiliation.

One of the strongest features common to the majority, if not all of religious beliefs, is that the religious discourse normally comes attached to an assumption of absolute and objective truth inherently incapable of being contested, and that should also be respected in all aspects of social and individual life[8]. Therefore, acts of proselytism normally raise arguments with a heavy load of religious *pathos* directed to convert believers and non-believers by arguing the moral and theological righteousness of their own religious beliefs[9]. Another common feature (and also an issue) that can be appointed in the context of religious exercise is related to the use of attire and symbols that, directly or indirectly, express and disseminate

---

[7] In this sense, in Cantwell v. Connecticut, 310 U.S. 296, 303-4 (1940), the Supreme Court of the United States of America uttered that "Under the constitutional guaranty, freedom of conscience and of religious belief is absolute; although freedom to act in the exercise of religion is subject to regulation for the protection of society". For instance, at the time of colonial America, the inviolability of religious conscience was Roger Williams's core argument for religious freedom, for conscience was considered not only an inalienable part of human beings but the most important channel of communication between man and God. Also, see EDWARD J. EBERLE, Roger Williams on Liberty of Conscience, *Roger Williams University Law* Review, Vol. 10, n.º 2, 2005, pp. 289-290, contending, "At the core of Williams's thought is the identification of conscience as inviolable both because it is a path to God and because it is an inalienable aspect of being human".

[8] On one hand, the inherent discourse of truth carried by most religious doctrines is a common feature of their argumentative process. At the other hand, it must be distinguished from the idea of fundamentalism, a movement that defends the return to the fundamentals of faith. Although fundamentalism also carries an inherent discourse of doctrinal truth, it goes beyond that of common religious beliefs, entering the realm of discourse absolutization, where religious beliefs are hermetically comprehended and interpreted according to its doctrinal texts and origins. For that, see LESLIE C. GRIFFIN, Fundamentalism from the Perspective of Liberal Tolerance, *Cardozo Law Review*, Vol. 24, 2003, pp. 1631-1634, appointing five features of fundamentalism: "opposition to modernity", "selective appropriation of the past", "totalitarian impulse", "commitment to patriarchy" and "militancy". Despite these features, it worth mentioning that the idea of a "totalitarian impulse" of all fundamentalists should not be noted as common element, rather as a borderline that once trespassed leads to the realm of terrorist fundamentalism.

[9] It is important to assign that, despite the concept of proselytism carries a (non-academic) negative meaning, its real function implies, essentially, the connection of two basic rights: the freedom to change religion and the freedom to be informed about religious beliefs. In this sense, see TED STAHNKE, Proselytism and the Freedom to Change Religion in International Human Rights Law, *Brigham Young University Law Review*, Vol. 1999, n.º 1, 1999, p. 255, contending that proselytism is strictly bounded to the idea of "changing minds".

religious beliefs, attesting the theological affiliation of the user. These are also manifestations of proselytism, for they bring in its essence the will to make religious beliefs and theological affiliation public, especially with a desire to affect others.

Observing the liberal constitutional framework of modern democratic pluralistic societies, where it is expected that religious freedom be freely developed and equally exercised, claims related to the dissemination of religious beliefs are capable of raising social conflicts urging resolution under constitutional reasoning, namely through constitutional balancing[10]. In this sense, it should be asked: Can these religious manifestations be freely exteriorized at the public sphere? Are they submitted to any limitations or restrictions? Does proselytism encounter constitutional boundaries? Can symbols and attire that express religious affiliation be freely used in places considered state property or that are directly subjected to state control[11]?

Acknowledging that the exercise of religious freedom within a plural religious market of most democratic societies is capable of raising conflicting situations[12], it is undisputable that a harmonization process between contradictory rights' claims is needed. For instance, in France, students of primary and secondary public schools, and also of public universities were prohibited using religious attire and symbols that strongly indicate religious affiliation or imply acts of proselytism (Law nº 2004-228 of 15 March 2004)[13]; later, at 2010, the French parliament approved a general prohibition over the complete head and face covering at the public sphere (Law nº 2010-1192 of 11 October 2010)[14]; in Germany, the Federal

---

[10] This stems directly from the nature of religious freedom as a constitutionally protected fundamental right. Commonly structured and construed as a constitutional principle, religious freedom must be developed through an optimization process, raising different normative claims to be balanced through the application of the proportionality test. See Martin Borowski, *Grundrechte als Prinzipien*, 3rd ed., Baden-Baden, Nomos Verlag, 2018, p. 135, contending that the necessity of balancing within proportionality is a natural consequence of fundamental rights constitutionally assumed as "*Optimierungsgebote*" ("duty of optimization").

[11] Despite the relevance of the questions, answering them are not the main purpose of this Article. For that, see Rodrigo Lobato Oliveira de Souza, *Liberdade Religiosa. Direito Fundamental numa Sociedade Democrática e Pluralista*, Belo Horizonte, Editora D'Plácido, 2021.

[12] Although in a different historical context, see Isaac Kramnick & R. Laurence Moore, *The Godless Constitution: A Moral Defense of the Secular State*, London, W.W. Norton Company, 1997, p. 64, stating that "Those of us who champion Roger Williams, the radical, should concede that religious toleration, and the pluralism it produces, often carries with it a possibility of troublesome social disharmony".

[13] The French issue involving the use of *foulard* will be properly assessed at Section 4 of this Article.

[14] At this point, it is noteworthy that, although the French parliament has approved a general prohibition concerning the public covering of body and face at the public sphere, justifying it with security reasons, it is notorious that this measure was essentially directed against Muslim women's

Constitutional Court (*Bundesverfassungsgericht*) decided over the constitutional illegitimacy of a resolution enacted by a State Board of Education that obligated all public schools to set crucifixes on the wall of its classrooms[15], and also dealt with the question of teachers using the Islamic veil (*hijab*) during the classes at a public school[16]; the case law of the Supreme Court of the United States of America has also treated countless situations where the use of religious symbols was sometimes granted and in others prohibited in accordance to different interpretations of the First Amendment's religious clauses[17]. Besides these examples, there are cases of directly driven restrictions imposed over religious minorities, like those related to the construction of churches and buildings that serve religious functions, notably for cults, prayers and doctrinal education. For instance, in Switzerland, a popular plebiscite, ideologically promoted by the Swiss Popular Party (SVP), approved a constitutional amendment prohibiting the constructions of minarets[18], leaving Muslims without an adequate place for their daily ritual prayers. In addition, some religious segments, due to a (pre)comprehension over its propensity on committing dangerous acts towards its believers, are submitted to excessive surveillance measures, thus being constantly controlled by state security agencies[19].

The internal dimension of religious freedom's exercise, at least superficially, does not raise profound issues, for its sphere of action is bounded to individual conscience as an absolute entity, immune from any external act of coercion. At the other hand, the external dimension, through which a multiplicity of beliefs is

---

veiling (religious) practices, especially towards the use of *hijab*, *niqab* and *burka*. See MOHAMMAD MAZHER IDRISS, Laïcité and the banning of the 'hijab' in France, *Legal Studies*, Vol. 25, n.º 2, 2006, p. 279, arguing that the French government's posture towards the problem is due to a (pre)comprehension of Islam as a violent fundamentalist system of belief, attaching it to terrorism and religious extremism, as if Islam would naturally further a theological war.

[15] *BVerfGE* 93, 1 (1995).

[16] *BVerfGE* 108, 282 (2003).

[17] For instance, McCreary County v. ACLU, 545 U.S. 844 (2005); Cantwell v. Connecticut, 310 U.S. 296 (1940); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); County Allegheny v. ACLU, 492 U.S. 573 (1989); Lynch v. Donnely, 465 U.S. 668 (1984); Stone v. Graham, 449 U.S. 39 (1980); Van Orden v. Perry, 545 U.S. 677 (2005).

[18] Switzerland Const. article 72.º, n.º 3. See YASCHA MOUNK, *O povo contra a democracia: por que nossa liberdade corre perigo e como salvá-la*, São Paulo, Companhia das Letras, 2019, 2.ª reimpr., pp. 66-68.

[19] This is the situation faced by the Church of Scientology in Germany, where it is not officially recognized as a Religion and is constantly monitored by the German government's security agency (*Verfassungsschutz*). See MICHAEL BROWNE, Should Germany Stop Worrying and Love the Octopus? Freedom of Religion and The Church of Scientology in Germany and the United States, *Indiana International & Comparative Law Review*, Vol. 9, 1998, pp. 194-195.

brought into the flow of a free religious market, is marked by a potentiality of social conflicts and opposite claims, urging a balancing process as to achieve a state of constitutional harmony. For instance, from the connection between religious freedom and freedom of speech, through which religious speech can be disseminated, some remarkable reflexes can be here outlined. In 2005, a Danish newspaper published cartoons representing the Prophet Muhammad in a comic expression, raising critical manifestations throughout the Islamic world[20]; in a similar manner, distinguished only for its brutal consequences, the French journal *Charlie Hebdo* published in 2015 several cartoons of the Prophet Muhammad using "*Je Suis Charlie*" as an opening phrase, which led to a violent reaction perpetrated by a known extremist Islamic group[21].

Be at workplaces, at the state public sphere or at the large public context, believers face many intolerance and discrimination issues, notably those from religious minorities, especially Muslims. The lack of tolerance[22] over their religious beliefs and practices, and also the presence, at a major scale, of biases responsible for a misinterpretation that attaches totalitarian (fundamentalists)[23] tendencies to some religious denominations, move them to a peripherical and marginalized sphere of society, thus generating a sense of exclusion and social disaggregation, supposedly distinguishing between community's "insiders" and "outsiders"[24].

---

[20] See generally Jytte Klausen, The Danish Cartoons and Modern Iconoclasm in the Cosmopolitan Muslim Diaspora, *Harvard Middle Eastern and Islamic Review*, Vol. 8, 2009, p. 86.

[21] See generally Neville Cox, The Freedom to Publish 'Irreligious' Cartoons, *Human Rights Law Review*, Vol. 16, n.º 2, 2016, p. 195.

[22] Tolerance must be here comprehended as an empathic and reciprocal accommodation between different beliefs and opinions, embracing them as substantively equal. In this sense, see L. John Van Til, *Liberty of Conscience: The History of a Puritan Idea*, New Jersey, Craig Press, 1972, p. 5, affirming that tolerance "means to possess a fair and objective attitude toward those whose opinions, practices, race, religion, or nationality differ from one's own; it is a freedom from bigotry".

[23] See Andrew Paine, Religious Fundamentalism and Legal Systems: Methods and Rationales in the Fight to Control the Political Apparatus, *Indiana Journal of Global Legal Studies*, Vol. 5, n.º 1, 1997, pp. 263-266, appointing that this negative perception over religious fundamentalists is due to their discourse of absolutization and their constant militancy against evolutionary principles, especially against modernity. Nonetheless, these features do not automatically entail violence and extremism. See also *Id.*, pp. 293-294, contending that those groups of religious extremists are more plausible to rise at non-secular states, like Egypt, Iran and Sri Lanka, where there is a dominant religious majority that supports and encourages their acts of violence.

[24] The dichotomy "insiders/outsiders" makes clear reference to Justice Sandra O'Connor's concurring in Lynch v. Donnelly, 465 U.S. 668, 688 (1984), where it was stated: "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community".

Moreover, the lack of social and political accommodation of some religious and cultural practices, be it by not recognizing religious holidays or religious exemptions towards general legal obligations, only increase even more the problem of social disintegration.

As a reaction to those issues, believers of religious minorities begun turning themselves to their own doctrines, attaching themselves to their own religious social sphere in an essentialized manner[25]. Hence, instead of exercising religious beliefs and practices through a balanced process of mutual comprehension, tolerance and a cross education within theological-cultural differences, religion has been, for many, functioning as a social detachment factor, as a reason of moral disagreement and social disaffection. Nonetheless, the appointed issue (social disintegration process) is actually a negative consequence that stems from the misunderstanding over religious freedom's theoretical-constitutional framework. As a constitutional fundamental right, religious freedom must be taken really seriously.

Within a democratic-pluralistic society, religious freedom commonly raises contradictory rights' claims[26], for each religious doctrine, through an immanent discourse of truth, aims imposing it upon others, increasing potential social conflicts. Nevertheless, if core elements of the theoretical-methodological basis of religious freedom are rightly applied and respected, a balancing process is raised with the capacity to achieve an optimized constitutional harmony between those claims, thus avoiding profound social issues. Therefore, by applying core elements at the theoretical-methodological constitutional level, as the different types of constitutional openness, the idea of "Constitution of the Middle", the inviolability of religious freedom's core essence (essential content), and through methodological steps that must be furthered, if all these are taken seriously, a process of social-political integration can be properly raised.

Commenting over the headscarf ban at French public schools, see Nisar Mohammad bin Ahmad, The Islamic and International Human Rights Law Perspectives of Headscarf: The Case of Europe, *International Journal of Business and Social Science*, Vol. 2, n.º 16, 2011, p. 170, affirming that the measure directly affects the integration process, blocking it instead of furthering it.

[25] See Adrien Katherine Wing and Monica Nigh Smith, Critical Race Feminism Lifts the Veil? Muslim Women, France, and the Headscarf Ban, *UC Davis Law Review*, Vol. 39, 2006, p. 771, appointing, under the example of the headscarf ban debate in France, that the feeling of exclusion is due to a "risk of extremism" that supposedly leads to a process of massive radicalization.

[26] Illustrating some opposed rights' claims, see Ted Stahnke, Proselytism and the Freedom, cit. (nt. 9), pp. 275-304, contending that proselytism implies a possible conflictual relation between the freedom to manifest religion or belief, freedom of expression, freedom to change religion, freedom to receive information, freedom to have or maintain a religion, freedom from injury to religious feelings, and freedom to maintain religious traditions and identity.

Once these previous considerations were made, Section 2 will deal with the most relevant constitutional elements able to enact and further a process of social-political integration within the constitutional framework of democratic-pluralistic societies, especially through four theoretical instances: the whole complex of fundamental rights as an institutional organism, the opened constitutional structure and its components, the mutual influence between Culture and Constitutional law, and the idea of "Constitution of the Middle" (*Verfassung der Mitte*); Section 3 offers, with a methodological approach, the theoretical instrumentals required to start and operate that social-political process of integration, the diatopical hermeneutics and the protection offered by religious freedom's essential content (*Wesensgehalt*); Section 4 raises some practical implications stemmed from the offered theoretical-methodological approach, bringing out questions as those related to the use of attire and symbols that directly demonstrate religious affiliation at the public sphere; and at Section 5, the Conclusion, it is contended – at least at the argumentative level – that these theoretical-methodological elements should be taken seriously, especially for the fulfillment and improvement of the social-political integration process.

2. Constitutional elements on the integration process

At this section, core constitutional elements indispensable for the social-political integration process within democratic-pluralistic societies are outlined. Assuming a theoretical-constitutional approach under the idea of "constitutional *topoi*"[27], four basic elements raise as capable of enabling the desired social-political integration process: the entire complex of fundamental rights as an institutional organism, the structural openness of constitutional order, the mutual influence between Culture and Constitutional law, and the idea of "Constitution of the Middle".

2.1. Fundamental rights

From the outset, it worth mentioning that the most important idea underpinning the present topic is that the whole structure of fundamental rights must be here

[27] Among these constitutionalism's *topoi* are democracy, pluralism, fundamental rights, separation of powers (checks and balances), judicial review, value and moral argumentation, and also political accountability. For that, see *generally* Veit Bader, Constitutionalizing secularism, alternative secularisms or liberal-democratic constitutionalism? A critical reading of some Turkish, ECtHR and Indian Supreme Court cases on secularism, *Utrecht Law Review*, Vol. 6, n.º 3, 2010, pp. 10-11.

comprehended as an institutionalized organism of protection in a dual perspective. On one hand, as Dworkin have already defended, fundamental rights are in some manner "trumps" against government's political actions, protecting individual interests within a sphere immune to state intervention[28]; on the other hand, fundamental rights raise as an institutional guarantee that objectively sustain the entire constitutional order[29]. Endowed with a double-character[30], fundamental rights represent both the legitimizing substrate of individual liberty within a democratic-pluralistic society[31], through which every individual or group can exercise their freedoms, actively take place at the political decision-making processes, demand political accountability of those who represent them, and they also constitute the most important feedback channel of legitimacy for the political order[32].

---

[28] See Mark D. Rosen, When are Constitutional Rights Non-Absolute? McCutcheon, Conflicts, and the Sufficiency Question, *William & Mary Law Review*, Vol. 56, n.º 4, 2015, pp. 1543-1544.

[29] Therefore, it can be argued that the constitutional rights are an essential element of the political order, especially in the way asserted by the article 16.º of the French Declaration of Human Rights from 26 August 1789: "Any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution". In this sense, see Akhil Reed Amar, The Bill of Rights as a Constitution, *Yale Law Journal*, Vol. 100, n.º 5, 1992, pp. 1205-1210, arguing that the fundamental rights encrusted in the Bill of Rights should be understood in a view that conjugates the idea of minorities' rights protection and government's constitutional structure.

[30] The double-character of fundamental rights expresses the dual dimension of its proper functionality. Essentially, fundamental rights act in the service of individual protection (subjective dimension) against state action (a defense function known by German constitutional doctrine as *Abwehrrechte*), but also operate an institutional function towards the protection and defense of the whole constitutional order, acting within an objective dimension (*Grundrechte als Elemente objektiver Ordnung*). For that, see Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 20th ed. Heidelberg, C.H. Beck Verlag, 1999, p. 127 and ss.

[31] The legitimation of liberty must be viewed as a mere constitutional recognition of individual freedoms, because, as it is known, human freedom is inherent to human essence and precedes government. Thus, it does not compete government the creation of basic (human) rights, rather its mere recognition. See Roger Pilon, On the First Principles of Constitutionalism: Liberty, Then Democracy, *American University Journal of International Law and Policy*, Vol. 8, n.º 2, 1993, p. 539, stating that fundamental rights have its origins in moral value, pre-existing government and its powers.

[32] In what concerns the idea of fundamental rights as institutional elements relevant for the integration process, see Dieter Grimm, Integration by Constitution, *International Journal of Constitutional Law*, Vol. 3, n.º 2-3, 2005, p. 199, recognizing as indispensable to these matters, the recognition of common shared values in society as a factor of the Constitution's "symbolic power". In this sense, the entire complex of fundamental rights serves as a constitutional basis for the recognition of the most important values of society. Although, this must not be comprehended as a way for universalistic claims that would hinder the desired process; rather, it has to operate through a way that recognizes and legitimates social-cultural differences, furthering the integration process with empathy and

Concerning the social-political integration process, fundamental rights function as a constitutional instance of legitimation on the free movement of individual and collective actions, endowing individuals and groups with plenty legal-political faculties and with a free spectrum of decisions, seeking to achieve an optimized dialogue between state, society and Constitutional Law in the sense contended by Rudolf Smend in his seminal work *Verfassung und Verfassungsrecht* ("Constitution and Constitutional Law"). According to Smend, the Constitution does not represent a mere political document entitled with an organizational function or with a decisional appeal expressed in a hermetical-normative language, rather it assumes a semiotic that stimulates and further a live, dynamical and interchangeable relation between Constitutional law and social reality[33]. In what concerns the material integration, Smend appoints, as elements of the process, the constitutional preamble, and also constitutional principles that embrace the state form, the national flag and human rights[34]. Smend puts special importance over fundamental rights as a special integration device, notably for its capacity to legitimate the social-political order through common shared values[35]. At the integration process, fundamental rights serve the function of value legitimation for all individuals, groups and entities within the political community, furthering social-political integration through communicative action in public reason[36]. Looking at the core of this process, three dimensions of analysis can be properly outlined.

First dimension. The entire structure of fundamental rights, working in order to legitimize the free development and exteriorization of human liberty (free spectrum of decisions), allows all subjects of society to live freely within the boundaries of the constitutional order[37], thus furthering an integration process across both

---

mutual comprehension. In this sense, see Francesco Belvisi, The Common Constitutional Traditions and the Integration of the EU, *D&Q*, Vol. 6, 2006, p. 24.

[33] Rudolf Smend, *Verfassung und Verfassungsrecht*, Berlin, Duncker & Humblot, 1928, p. 18. Smend contends that exist three elements through which the integration process occurs. First, individuals (*persönliche Integration*), by which the public life of the state is legitimated (pp. 25-26); second, social and political functions (*funktionelle Integration*), as elections, parliamentary actions and the exercise of popular sovereignty, whereby the formation of common will is made possible (pp. 32-34); and third, a material integration (*sachliche Integration*) whereby public programs and state interests are assumed as institutional political goals (p. 45).

[34] *Id.*, p. 109, regarding the constitutional elements that enable material integration.

[35] *Id.*, p. 164, appointing the relevance of constitutional fundamental rights as a source of shared values.

[36] See Francesco Belvisi, The Common Constitutional, cit. (nt. 32), p. 26.

[37] In this sense, individual and collective free action encounter their proper limits in the objective duty to respect the fundamental values embraced and protected by the entire constitutional order,

substantive and formal channels[38]. Among these channels, liberty of conscience, freedom of religion, freedom of speech, freedom of assembly, right to freely develop personality, right to physical and psychological inviolability, right to petition, right to privacy and image, right to property, all these freedoms operate in favor of a dual legitimation process: first, as subjective channels, legitimate individuals, groups and entities, under the boundaries of the constitutional order, to actively participate as political insiders; and second, as objective channels, legitimate the social-political order as a complex of shared core values and principles.

Second dimension. The whole institutional structure of fundamental rights assumes a procedural function that is materialized on its capacity to dynamically further and develop the influx (input and output) of multifaceted values within democratic-pluralistic societies, whereby all social subsystems are made able to express, manifest, develop, claim and disseminate its own ideological, theological and cultural data, willing to influence others and the social-political order as a whole. In this same token, fundamental rights operate as a formal channel to the development of a free market of values that are legitimated to compete freely at the social-political sphere.

Third dimension. Some shared fundamental values are embraced by the social-political order through an objective recognition, as occurs with the recognition and protection granted to constitutional goods as life, honor, privacy, intimacy and tolerance. As decided by the German Federal Constitutional Court in the leading case *Lüth-Urteil*[39], the entire constitutional structure of fundamental rights

---

essentially expressed in the necessity (and duty) to respect the rights of others, a principle encrusted in the philosophical Latin cannon *neminem laedere*. In this sense, the Federal Republic of Germany Const. article 2.º, n.º 1, states that "*Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmässige Ordnung oder das Sittengesetz verstößt*" ("Everyone has the right to freely develop its personality, as long as it does not violate the right of orders and undermine the constitutional order or the moral order").

[38] The difference between these channels is related only to their functions. Substantive channels, as liberty of conscience and religious freedom, promote an input and output process of values, allowing a plenty of ethnical, cultural and social manifestations within society. On the other hand, formal (or procedural) channels, as freedom of speech, affects the level of political participation and the capacity to influence political decisions. Actually, it is worth noticing that freedom of speech is related both to substantive as objective matters. See Stanley Ingber, The Marketplace of Ideas: A Legitimizing Myth, *Duke Law Journal*, Vol. 1984, n.º 1, 1984, p. 8, arguing that freedom of speech functions as a channel towards finding the truth and also as a way to self-government.

[39] *BVerfGE* 7, 198 (1958). For the historical and theoretical backgrounds of the case, see Peter E. Quint, Free Speech and Private Law in German Constitutional Theory, *Maryland Law Review*, Vol. 48, n.º 2, 1989, pp. 252-258. Indeed, this objective recognition of values embodied in constitutional principles and that ought to be applied and protected by Constitutional Courts has

embodies an objective order of values upon which the social-political order must be structured and further developed[40]. Instead of viewing a potential danger on establishing a dictatorship of values – as argued by Carl Schmitt –[41], the mentioned approach ought to be comprehended as an open axiological framework expressed throughout a minimum amount of flexible moral principles[42] based upon the recognition of human dignity as the higher fundamental value[43].

Although the entire constitutional structure of fundamental rights systematically operates an optimized function on the social-political integration process, each right performs its own contribution in a certain manner. Thus, for the purpose of this Article, religious freedom assumes a special function within democratic-pluralistic constitutionalism, embodying proper capacities to contribute for the social-political integration process, then receiving special treatment. The constitutional recognition of religious freedom within democratic-pluralistic societies appoints, essentially, two core legal-political vectors: first, it affirms the relevance of religion as a phenomenon with positive effects over the relationship between state and society, notably for its capacity to develop, in a positive way, human personality; and second, despite of the adopted relationship between state and religion (with

---

its doctrinal background in Rudolf Smend; also see Jan-Werner Müller, On the Origins of Constitutional Patriotism, *Contemporary Political Theory*, Vol. 5, 2006, pp. 282-283.

[40] See Edward J. Eberle, Free Exercise of Religion in Germany and the United States, *Tulane Law Review*, Vol. 78, n.º 4, 2004, p. 1037, stating that "The objective dimension of basic rights is tied to the value-ordered nature of the German constitutional scheme, obligating government to realize in society the set of objective values embodied in the Basic Law".

[41] See Carl Schmitt, *Die Tyrannei der Wert*, 3rd ed., Berlin, Duncker & Humblot, 2016.

[42] See Jeffrey B. Hall, Taking "Rechts" Seriously: Ronald Dworkin and the Federal Constitutional Court of Germany, *German Law Journal*, Vol. 9, n.º 6, 2008, p. 776.

[43] Undoubtedly, human dignity is a constitutional value inherent to constitutional discourse. Its expressed assumption by constitutional texts, despite its desirability, is not indispensable to its recognition. Actually, human dignity is already integrated into the constitutional discourse as a normative-discursive element of the constitutional *pathos*, an object of intercultural constitutionalism, transconstitutionalism and also a material pertaining to Global Constitutionalism's discourse. In this sense, see Vicki C. Jackson, Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse, *Montana Law Review*, Vol. 65, 2004, pp. 15-16, contending that the idea of human dignity as a value is integrated to the "transnational vocabulary of constitutionalism and human rights", and despite its non-textual recognition by the U. S. Constitution, it can be objectively deduced from other provisions, as also recognized in the Supreme Court's constitutional decisions. In the context of Global Constitutionalism academic discourse, see Anne Peters, The Merits of Global Constitutionalism, *Indiana Journal of Global Legal Studies*, Vol. 16, n.º 2, 2009, pp. 397-400, affirming that, among other constitutional elements that legitimate the constitutionalization of international law, human rights are at the center of the argument, especially through the recognition of human dignity.

religious establishment or not)[44], a fundamental constitutional (and moral) duty of tolerance is raised, through which all religious beliefs must be equally respected and protected[45].

Functioning as a legitimizing channel for the embracement and protection of different theological approaches of life, then yielding a free pluralistic field to a multitude of religious expressions, religious freedom thus further the social-political integration process by transforming individuals and groups into community-political insiders. Through this channel of legitimation, a concrete possibility to influence the social, political, cultural and economic spheres of society according to one's own religious beliefs is acknowledged to all individuals and groups[46]. As such, being religion a social factor and a social subsystem that assumes the function of dealing with different manners of transcendental justification of life, religious freedom raises as a constitutional substrate for plural theological doctrines and

---

[44] It is noteworthy that at least in an abstract constitutional theorization of religious freedom, the complete separation of state and religion, avoiding religious establishment, is surely desirable. For that, see RODRIGO DE SOUZA, *Liberdade Religiosa*, cit. (nt. 11), pp. 62-64. Of course, as the British constitutional experience demonstrates, the recognition of the Church of England as the official state religion does not hinder religious freedom's constitutional embracement, its protection and development. On the other hand, the mere constitutional recognition of religious freedom does not further, at least not automatically, its free enjoyment and enforcement, as the constitutional experiences from Israel and Iran both demonstrate. Moreover, see JÜRGEN HABERMAS, Religion in the Public Sphere, *European Journal of Philosophy*, Vol. 14, n.º 1, 2006, p. 4, arguing that the secular character of a state does not imply and promote "equal religious freedom for everybody". In the case of Israel, see S. I. STRONG, Law and Religion in Israel and Iran: How the Integration of Secular and Spiritual Laws Affects Human Rights and the Potential for Violence, *Michigan Journal of International Law*, Vol. 19, n.º 1, 1997, pp. 145-146, arguing that, although the state affirms itself as secular and proscribes discrimination under the pale of religion, all spheres of social-political life are directly connected to Judaism. Also, in the Iranian context, see *Id.*, pp. 152-153, stating that, though it prohibits religious persecution and recognizes some religious minorities, the constitutional text bonds the exercise of religious faiths other than Islam to the respect and act in accordance with Islamic principles encrusted and recognized at the constitutional level.

[45] *See* GERHARD ROBBERS, Religious Freedom in Germany, *Brigham Young University Law Review*, Vol. 2001, n.º 2, 2001, p. 647, affirming, "The primary idea of freedom means that all religious creeds are tolerated and free to flourish".

[46] *See* HABERMAS, Religion in the Public Sphere, cit. (nt. 44), pp. 9-16, arguing that religious arguments that seek to influence the political sphere and shape the formation of political will must be translated into arguments that use the semiotics of public reason, otherwise they would not be regarded as valid arguments of a reasonable discourse. See also *Id.*, p. 4, contending that religious freedom is "the appropriate political answer to the challenges of religious pluralism". In this line of reasoning, it can be contended that the constitutional recognition of religious freedom has the capacity to actively further the social-political integration process.

values, then playing a relevant role at the social-political integration process, both as an instrument and as an object[47].

2.2. Constitutional openness

Within the scope of constitutional theory[48], it is commonly argued that a proper constitutional text, engendered to regulate a social-political order continuously throughout spacetime, stretching its provisions towards future generations, must have a flexible, open and dynamical semiotic structure as to stabilize itself in the face of different values, challenges, goals and social desires[49]. In this sense, the constitutional text must be sufficiently open as to allow its adaptation over spacetime[50], whereby its articulation with the social, political, economic and cultural realities can be adequately operationalized. On behalf of this claim for (normative) eternity, Constitutions should only embrace those matters considered essential to society's structure and indispensable to its subsistence[51], objectively recognizing only the most fundamental shared values and the order's constituent elements, yet always

---

[47] As an instrument, religious freedom functions to achieve social-political integration, as long as its theoretical-constitutional elements are respected and fulfilled. On the other hand, as an object of the integration process, religious freedom emerges as the legal realm where social equilibrium is achieved by fulfilling duties of tolerance, respect and mutual comprehension.

[48] See generally Elaine Mak, Understanding Legal Evolution Through Constitutional Theory: The Concept of Constitutional (In-)Flexibility, *Erasmus Law Review*, Vol. 4, n.º 4, 2011, pp. 196-197.

[49] This desired openness plays a much more significant role within written Constitutions, where the provisions must not assume a rigid language. Historical constitutional experiences, as the British unwritten Constitution, are naturally subjected (and open) to factual flows over time. Nonetheless, distinctions between written and unwritten Constitutions, and its consequences over practical instances are no more self-evident. About that, see David A. Strauss, Common Law Constitutional Interpretation, *Chicago Law Review*, Vol. 63, n.º 3, 1996, p. 883, arguing that text has a mere "nominal role", as doctrinal approach, moral principles and public policy arguments have a much heavier presence.

[50] In this line of thought, Bruce Ackerman asserts that, aside the normal procedure of constitutional amendment in American Constitutional Law, there also exists an informal process of constitutional alteration, whereby the semantic of the constitutional text is modified by factual movements legitimated by popular (tacit) consent. See Paul M. Schwartz, Constitutional Change and Constitutional Legitimation: The Example of German Unification", *Houston Law Review*, Vol. 31, n.º 4, 1994, p. 1035, contending that Bruce Ackerman calls it "structural constitutional amendment"). See also David A. Strauss, Common Law Constitutional Interpretation, cit. (nt. 49), p. 905, arguing the relevance of these "extratextual amendments".

[51] See David. A. Strauss, Common Law Constitutional Interpretation, cit. (nt. 49), p. 880, stating that "following a written constitution means accepting the judgments of people who lived centuries ago in a society that was very different from ours".

subjected to factual-political adaptation. It worth appointing, according to Giuseppe Martinico, that this idea of constitutional openness embraces two fundamental consequences: first, the "porousness" of the constitutional text; and second, concerning the interconnection between Constitutional Law and International Law, especially in the field of human rights' recognition and protection, the constitutional text is made permeable to the material incidence of international legal treaties and other instruments on matters of basic human rights[52].

Normative structural openness. What is about structure in Constitutional law? It is common ground in Constitutional Law that when constitutional structure is at stake it relates to the necessity of assuming the whole order as incomplete in its isolated written provisions, making indispensable, in its practical instances, the integrative application of all normative precepts as a live and unified organism[53]. Though the idea of structure in Constitutional law appoints to a global and systematic comprehension of the order, the normative structure indicated here relates to the kind of structural substrate that embrace the normative mandate. The referred normative structure assumes a dual character, rising both as rules and as principles[54]. Assuming the structural form of rules, constitutional precepts demand full compliance through a mandatory binary manner that comports only one type of resolution within a conflictual situation: the constitutional mandate is either valid or not[55]. On the other hand, assuming the structural form of normative principles, constitutional norms can be realized in different levels according to the underpinning variable normative and factual circumstances[56]. Distinguishing from constitutional norms that assume the structure of rules, constitutional norms

---

[52] See Giuseppe Martinico, Constitutions, Openness and Comparative Law, *Estudios de Deusto*, Vol. 67, n.º 1, 2019, pp. 115-117. E. g., the Brazilian Constitution, article 5.º, §2.º, and the Portuguese Constitution, article 16.º, n.º 1, where the constitutional rights embraced by their respective texts are not limited to the textual provisions, being constantly integrated by international legal documents embracing other human rights.

[53] See Zephyr Teachout, The Anticorruption Principle, *Cornell Law Review*, Vol. 94, n.º 2, 2009, pp. 400-401, appointing constitutional structure as an interpretative mechanism. Teachout also states that the constitutional text must be analysed and applied in its integrity, beyond its pure textualism.

[54] For a deep discussion over this distinction, see Ronald Dworkin, *Taking Rights Seriously*, Massachusetts, Harvard University Press, 1977. See also Robert Alexy, *Theory of Constitutional Rights*, Oxford, Oxford University Press, 2010.

[55] In this sense, if a rule "X" determines that a certain act must be accomplished, while a rule "Y" determines that the same act is prohibited, the only possible answer to this conflict is that one of the rules is invalid. Thus, in the case of conflicting rules, just one is valid, demanding compliance.

[56] See Robert Alexy, Constitutional Rights and Proportionality, *Journal for Constitutional Theory and Philosophy of Law*, Vol. 22, 2014, p. 52.

structurally manifested through principles demand a balancing process to achieve a state of constitutional harmony, for situations of conflictual claims are not resolved in the binary basis "valid/invalid", rather through different levels of optimization, a place upon which the test of proportionality must act[57].

Regarding the principiological structure of most constitutional norms (thus, constitutional rights)[58], one of the most important features is the generality of the textual-structural basis. This textual generality is directly responsible for the open texture that characterizes most of constitutional provisions, serving as a device that allows a constant flow (in and out; input and output) of substantive data (values, interests and arguments) interchangeable between Constitutional law and the underpinning factual reality[59], independently of formal alterations. In general, constitutional texts, at least on their core provisions[60], embrace the open and fluid texture of principles as an effective feedback channel for the constant legitimation of their content within a pluralistic perspective. Therefore, concerning the social-political integration process under analysis, the referred structural openness allows different social, political, theological and cultural values to be constitutionally embraced within a pluralistic approach, avoiding any issue related to discrimination, social isolation and exclusion.

---

[57] See Jamal Greene, The Supreme Court 2017 Term – Foreword: Rights as Trumps(?), *Harvard Law Review*, Vol. 132, n.º 1, 2018, pp. 600-601, contending that proportionality's reason for existence lays upon the distinction between "rules and standards", following Robert Alexy's comprehension of constitutional rights as "optimization requirements", for its structural nature of principles, thus requiring proportionality as a way to achieve balance within conflictual normative situations. See also Bernhard Schlink, Proportionality in Constitutional Law: Why Everywhere but Here(?), *Duke Journal of Comparative & International Law*, Vol. 22, 2012, p. 292, affirming that "In law the principle of proportionality arises in those cases where specific norms contending or prohibiting specific means or, to be more precise, actions that serve people as means, are lacking".

[58] See Jamal Greene, The Supreme Court 2017 Term, cit. (nt. 57), p. 61, affirming, "I am sympathetic to Alexy's framework and to its application to the U.S. Constitution: most of the rights Americans care about are grounded in norms best described as standards or principles".

[59] See Cass R. Sunstein, Problems with Rules, *California Law Review*, Vol. 83, n.º 4, 1995, p. 966, offering two possible understandings over the idea of principles, stating that principles can work as a kind of moral arguments of justification to legal rules, and as legal propositions that, being more flexible than rules, act actively in the resolution of cases.

[60] Commonly, the organizational part of Constitutions is expressed by rules, submitting itself to amendments procedures when core alterations are needed. On the other hand, constitutional fundamental rights are manifested in the flexible texture of principles. As fundamental rights represent one of the most important pieces of the constitutional text, embracing the core values of political community, and because these values are in constant evolution and actualization, expressing them with a principiological structure is the best way to achieve their optimization throughout spacetime.

For instance, the fluid semiotic that structures the First Amendment's text of the United States Federal Constitution clearly ratify the argument when it states that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press"[61]. Reading the amendment's text, it should be asked what is the meaning that underlies the word "religion", and the expressions "free exercise" and "freedom of speech". When the Constitution guarantees "freedom of speech", it does not restrict the constitutional protection only to a certain kind[62], rather embraces, through its fluid semiotic, a constant flow of pluralistic meanings that allows an open comprehension within the order of democratic-pluralistic societies[63]. Under this same light, the constitutional text does not grant free exercise of religion only to Christians, Jews, Muslims or Buddhists, rather guarantees it to all kinds of beliefs and believers in a free marketplace of religious ideas[64].

Semantic openness. Directly related to the previous kind of constitutional openness, this one features the textual capacity to embody a plurality of meanings through the words of constitutional provisions, especially those that grant fundamental rights. The open constitutional semantic rejects the idea of taking the constitutional order as a closed set of standards isolated from any possibility of dialoguing with

---

[61] U.S. Const. amend. I. Paying special attention to the establishment clause's main purpose, see Daniel O. Conkle, Toward a General Theory of the Establishment Clause, *Northwestern University Law Review*, Vol. 82, n.º 4, 1988, pp. 1176-1179, contending that its purpose is the construction and maintenance of a free multifaceted religious society.

[62] Appointing the difficulties on interpreting and attaching any meaning to the word "speech" in First Amendment's grounds, see Frederick Schauer, Speech and Speech – Obscenity and Obscenity: An Exercise in the Interpretation of Constitutional Language, *Georgetown Law Journal*, Vol. 67, 1979, pp. 905-910, affirming that it should not be bound to an ordinary or common meaning. Nonetheless, this text's openness does not preclude judicial review based in differentiation between kinds of speech in regard to its proximity to First Amendment's core value, that is government's responsiveness towards popular sovereignty. See also Cass R. Sunstein, Pornography and the First Amendment, *Duke Law Journal*, Vol. 1986, n.º 4, 1986, pp. 603-604.

[63] See Jonatas Machado, Freedom of Religion, cit. (nt. 6), p. 479, contending that "In constitutional law, religion must be defined in a way that affords protection to minoritarian, unfamiliar and unconventional beliefs".

[64] See generally Michael Stokes Paulsen, The Priority of God: A Theory of Religious Liberty, *Pepperdine Law Review*, Vo. 39, n.º 5, 2013, p. 1196, affirming that the constitutional text must be broadly construed, especially to offer a broader protection. See also Harrop A. Freeman, A Remonstrance for Conscience, *University of Pennsylvania Law Review*, Vol. 106, 1958, p. 824, contending that "The word 'religion' used in the first amendment had a meaning, and that was what the amendment aimed to protect, fully. It included all branches of Christianity. But it embraced more. It included the great systems of religion recognized by civilization".

the underpinning factual circumstances. Thus, this fluid semantic (flexibility of the constitutional language and discourse) turns the constitutional order permeable to new substantive data brought through interpretative evolution, turning the whole order adaptable, especially on the face of renewed conceptions, moral principles and values that emerge within new generations throughout space and time[65]. The flexibility and plurality of meanings are stemmed from the constitutional order's textual elasticity and permeability, making its semantic possibilities broader and avoiding isolation from new alternatives and possibilities.

For example, the Equal Protection Clause, granted under the Fourteenth Amendment of the United States Constitution, especially through its broad terms and open texture ("nor deny to any person within its jurisdiction the equal protection of the laws")[66] made possible for the U.S. Supreme Court to achieve an evolutionary jurisprudence in *Brown v. Board of Education*[67]. This broad and evolutionary constitutional comprehension was made possible due to the semantic openness that stems from the open texture, especially through the expression "equal protection of the laws", which is endowed with a plethora of possible meanings. These meanings flow from the interchange process of substantive data between Constitutional law and underpinning social, political, cultural and economic realities. Accordingly, assuming a flexible language and a fluid semantic, the constitutional text avoids its own petrification within the hermeneutic process. Another example on the matter can be seen in *Obergefell v. Hodges*[68]. In this case, the U.S. Supreme Court decided whether same-sex marriage could be comprehended and thus protected under the constitutional meaning of "marriage". Based on the due process clause[69],

---

[65] See Frederick Schauer, An Essay on Constitutional Language, *UCLA Law Review*, Vol. 29, 1982, p. 816, contending that "this methodology appeals to us because it captures at a rather high level of abstraction, the intuitive feeling that the Constitution is incomplete. It also reflects the sense in which not only particular applications, but also more general principles must change to accommodate changing circumstances".

[66] U.S. Const. amend. XIV.

[67] Brown v. Board of Education, 347 U.S. 483 (1954). See Steven Siegel, Race, Education, and the Equal Protection Clause in the 1990s: The Meaning of Brown v. Board of Education Re-Examined in Light of Milwaukee's Schools of African-American Immersion, *Marquette Law Review*, Vol. 74, n.º 3, 1991, p. 503, arguing that the Supreme Court's decision in the case assented upon three fundamental principles: first, the psychological negative consequences over students; second, factors that must be respected in behalf of the maintenance of an integrated educational environment; and third, the special role played by public schools in the modern society.

[68] Obergefell v. Hodges, 576 U.S. 644 (2015).

[69] Through an evolutionary approach, the U.S. Supreme Court recognized under the due process clause, that the right to marry and the right of intimate association, both constitutionally protected,

the Court decided through the majority opinion expressed by Justice Kennedy, that same-sex marriage, besides protected under the fundamental right of marriage, is directly protected under the right to privacy (*Lawrence v. Texas*)[70], and is also a matter of exercising citizenship[71].

Procedural-interpretative openness. Under this type of constitutional openness, the Constitution is assumed as an ongoing "public process", whereby all society's members (broadly understood) participate on its interpretation, application and actualization. From the outset, the interpretation and application of constitutional norms must not be limited to a narrow sphere of recognized "officials" (agents of public authority, especially from the governmental branches), rather must be expanded to lawyers, professors, legal scholars, students, citizens, groups and entities, in light of what Peter Häberle comprehends as an "open society of constitutional interpreters" (*die offene Gesellschaft der Verfassungsinterpreten*)[72]. As a living process[73], the constitutional normative provisions embody a dynamic instance of legitimation, a public place where public reason encounters an optimized forum for development. Thus, all those within the realm of the constitutional order are not only its subjects, but above all, its interpreters and actively appliers.

Assuming the spirit of an ongoing "public process"[74], the entire constitutional order is allocated within the influx of multifaceted social actions, ideologies and cultural expressions, furthering a process of broad legitimation capable of turning all those submitted to its normative regulations into active members of society, especially into active participants of the political decision-making process. Hence, everyone becomes a social-political "insider" by taking part on this open-public

---

grant protection to same-sex marriages. See generally Jill C. Engle, Comparing Supreme Court Jurisprudence in Obergefell v. Hodges and Town of Castle Rock v. Gonzales: A Watershed Moment for Due Process Liberty, *Georgetown Journal of Gender and the Law*, Vol. 17, 2016, pp. 583-584.

[70] Lawrence v. Texas, 539 U.S. 558 (2003).

[71] See generally Kerry Abrams, The Rights of Marriage: Obergefell, Din, and the Future of Constitutional Family Law, *Cornell Law Review*, Vol. 103, 2018, pp. 520-527.

[72] Peter Häberle, *Verfassungslehre als Kulturwissenschaft*, Berlin, Duncker & Humblot, 1982, pp. 36-38.

[73] See David A. Strauss, Do We Have a Living Constitution(?), *Drake Law Review*, Vol. 59, 2011, p. 974, arguing that many substantial changes over core elements of American Constitutional Law, like the scope of federal power and fundamental rights' protection of women and minorities, were achieved by an informal alteration of the Constitution.

[74] See Angela M. Banks, Expanding Participation in Constitution Making: Challenges and Opportunities, *William & Mary Law Review*, Vol. 49, n.º 4, 2008, p. 1051, arguing that the idea of "public process" has its substantive justification through the constitutional right of self-determination.

process, contributing through communicative action[75] to the daily actualization of the constitutional order[76]. According to Peter Häberle, this idea of public process turns the constitutional interpretation and application into a democratic-pluralistic process[77], notably through the activation of two proper constitutional channels: first, the use of constitutional writs presented before Supreme Courts or Constitutional Courts, furthering the actualization of fundamental rights through discourse, argumentation and balancing processes; and second, the exercise of substantive constitutional devices, as freedom of speech and freedom of press, allowing an active public participation at the constitutional dynamics[78]. For instance, one constitutional mechanism that stems from this procedural-interpretative openness is the possibility granted to *Amicus Curiae* to offer briefings in lawsuits before Constitutional Courts and Supreme Courts. Functioning as a procedural constitutional channel through which different social-political actors are allowed to contribute with substantive reasoning and argumentation, offering constitutional data (doctrinal, moral, political and cultural arguments) intended to influence and affect positively the underpinning analysis and the respective decision, it also worth noting that judicial review serves as a broad spectrum of legitimation furthered within a multilevel social-political integration process[79].

---

[75] See Lawrence Byard Solum, Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech, *Northwestern University Law Review*, Vol. 83, n.º 1-2, 1989, p. 91, referring to Habermas's comprehension over communicative action, representing dynamic acts of "illocutionary aims". See also Mark Modak-Truran, Habermas's Discourse Theory of Law and the Relationship Between Law and Religion, *Capital University Law Review*, Vol. 26, n.º 3, 1997, p. 474, comprehending communicative action as "rational intersubjective consensus".

[76] See Peter Häberle, *Pluralismo y Constitución: Estudios de Teoría Constitucional de la Sociedad abierta*, Madrid, Dykinson, 2002, 2.ª reimpr., p. 89, explaining that the concept of "constitutional interpretation" (*Verfassungsinterpretation*) must be broadly comprehended, including, in this public process, all individuals that are involved and submitted to the constitutional provisions, all persons that live under the "constitutional law in public action".

[77] *Id.*, pp. 94-95, explaining that granting a broad subjective participation at the process of interpreting and applying the Constitution turns the entire constitutional dynamics into a democratic process.

[78] Moreover, see *Id.*, p. 98, where Häberle states that the simple possibility of taking part in the process of balancing and reasoning on constitutional rights demonstrates the relevance of procedures on democratizing the constitutional process, transforming it into a public process.

[79] See generally Joseph D. Kearrney and Thomas W. Merrill, The Influence of Amicus Curiae Briefs on the Supreme Court, *University of Pennsylvania Law Review*, Vol. 148, 2000, pp. 748 and 768. See also Andrew M. Siegel, Constitutional Theory, Constitutional Culture, *Journal of Constitutional Law*, Vol. 18, 2016, pp. 1093-1097.

2.3. The mutual influence between culture and constitutional law

From the outset, two major interconnections between Culture[80] and Constitutional law must be outlined: first, when Constitutional law, as a society's normative, political and cultural subsystem, turns a free marketplace of expressions possible, especially across the embracement of multifaceted cultural manifestations, it consequently furthers a social-political integration process within which multiple cultural subsystems are embraced as equally legitimate; and second (as a consequence of the first), Culture, also comprehended as a social subsystem, is endowed with the capacity to turn itself into an effective factor of influence on Constitutional law, offering different perspectives, approaches, possibilities and alternatives to many moral, ethical and political issues.

The constitutional substrate of Culture. The three above referred types of constitutional openness (open texture, semantics and hermeneutics) turn the constitutional order of democratic-pluralistic societies into an open instance for receiving a plethora of cultural data, as an effective normative substrate for Culture, thus furthering a process of social-political integration capable of transforming common "outsiders" into "insiders". Fundamental rights, as freedom of conscience, religious freedom and freedom of speech are indispensable substantive mechanisms on the matter, for they grant a broad access to the public forum independently of one's cultural backgrounds, allowing every cultural sphere of society to freely express itself and to take part at the public decision-making process through the dissemination of different ideas and cultural elements within the political community[81]. Hence, every cultural expression is, from a constitutional perspective, *a priori* legitimized to take part as a social-political insider, avoiding confrontations throughout stigmatizing polarizations between majority and minority, all being originally regarded as equals at the constitutional level[82].

From this theoretical outset, the isolation, discrimination or rejection of cultural values and expressions is constitutionally forbidden. Across this constitutional framework, a multitude of cultural subsystems is encouraged to come to light and

---

[80] For some concepts of Culture, see Naomi Mezey, Law as Culture, *Yale Journal of Law and the Humanities*, Vol. 13, 2001, pp. 40-45.

[81] See Peter Häberle, La Constitución como Cultura, *Anuario Iberoamericano de Justicia Constitucional*, Vol. 6, 2002, p. 190, contending that Religion, Science and Art are the fundamental elements responsible for the construction of a "Constitutional Law of Culture".

[82] See Peter Häberle, La Constitución como Cultura, cit. (nt. 81), p. 189, defending an open concept and a broad constitutional comprehension about Culture.

to leave any fear on disseminating their cultural elements (beliefs, practices, traditions, etc.). In short, the idea of *constitutional substrate of Culture* highlights the fact that the constitutional framework of democratic-pluralistic societies embodies a broad protection over a plethora of cultural expressions. For instance, the U.S. Supreme Court decided in *Wisconsin v. Yoder*[83], that the cultural past and tradition of the Amish people should be constitutionally protected, thus granting them legal exemption against a state education statute that obligated Amish children attending school after the eighth grade[84]. At its core, the decision in *Yoder* recognized the need to protect a cultural subsystem – the Amish culture – on behalf of its centuries of history and tradition[85].

Nevertheless, it is noteworthy that this broad perspective over the constitutional recognition of multiple cultural backgrounds has an inherently constitutional limitation that cannot be trespassed, for this constitutional broadness must not protect postures that burden other rights, values, goods and interests at the constitutional level. For example, in *Employment Division, Department of Human Resources v. Smith*[86], although the U.S. Supreme Court has decided not to grant the claimed legal exemption based on the protection of Indian native's religious practices (the sacramental use of peyote), the decision has not implied religious or cultural discrimination, because the Court recognized that the Free Exercise clause does not embrace legal exemptions against general applicable laws, especially when the contested act is legally regarded as crime, thus demanding protection of other rights, values, goods and interests[87].

The active constitutional force of cultural subsystems. Through another theoretical perspective, and also supported by the above referred constitutional substrate of Culture, cultural subsystems and their data have also the capacity to objectively

---

[83] Wisconsin v. Yoder, 406 U.S. 205 (1971).

[84] See generally Cynthia B. Smith, Compulsory Education: Weak Justifications in the Aftermath of Wisconsin v. Yoder, *North Carolina Law Review*, Vol. 62, n.º 6, 1984, p. 1168.

[85] See generally Marc H. Pullman, Wisconsin v. Yoder: The Right to be Different – First Amendment Exemption for Amish under the Free Exercise Clause, *DePaul Law Review*, Vol. 22, n.º 2, 1972, p. 540.

[86] Employment Division, Department of Human Resources v. Smith, 494 U.S. 872 (1990).

[87] See Kathleen P. Kelly, Abandoning the Compelling Interest Test in Free Exercise Cases: Employment Division, Department of Human Resources v. Smith, *Catholic University Law Review*, Vol. 40, n.º 4, 1991, pp. 932-955. See also Kenneth Marin, Employment Division v. Smith: The Supreme Court Alters the State of Free Exercise Doctrine, *American University Law Review*, Vol. 40, 1991, pp. 1474-1476, criticizing the decision in light of distinguishing between majority and minority religion.

affect Constitutional law[88]. Three core implications can be appointed on the matter. First, the diversity of cultural data in constant flow within the social marketplace through the above mentioned types of constitutional openness feed the entire constitutional order, especially actualizing the content of fundamental rights, as religious freedom's content that must be comprehended within the context of a palette of cultural backgrounds[89]; second, the diversity of cultural data within the constitutional order densify balancing operations between conflicting rights' claims, notably for its capacity to offer substantial information able to affect the reasoning and decisioning processes[90]; and third, the cultural data push the constitutional order into a perennial process of evolution throughout spacetime[91].

2.4. The "Constitution of the middle"

The idea of "Middle Constitution" was already introduced in Aristotle's thought, where it represented an ideal type of political order to be developed through, among other elements, democracy, the using of instruments capable of achieving social peace, harmony between social classes and different political claims (democracy and oligarchy for example), and mutual institutional control, all as a

---

[88] See Peter Häberle, La Constitución como Cultura, cit. (nt. 81), p. 194, affirming that Constitutional Law is not an isolated legal complex of norms, rather an active reflex of society's cultural heritage, whereby every constitutional principle has a cultural foundation.

[89] For example, "human dignity" as a constitutional value must be comprehended not only in the context of legal and historical elements, rather in the context of a multifaceted cultural background. Thus, human dignity has to be understood within spacetime as a substantive material submitted to the influence of cultural backgrounds from Muslims, Christian, Jews, Buddhists (and others) social subsystems. As a practical matter, it must be questioned what human dignity has to do with Muslims women's use of headscarf in public. See Adeno Addis, The Role of Human Dignity in a World of Plural Values and Ethical Commitments, *Netherlands Quarterly of Human Rights*, Vol. 31, n.º 4, 2013, p. 439, arguing that the idea and concept of human dignity must be a product of "intersystemic and intercultural dialogues".

[90] In the realm of constitutional rights' conflicts, balancing operations and reasoning processes become fed by cultural data, especially by the injection of deep moral arguments inducted by these diverse cultural backgrounds.

[91] When the constitutional order opens itself to the influence of external cultural data, its provisions begin to be irrigated by a plethora of social-cultural forces, hence inducing a constant necessity of evolution throughout space and time. The porousness of Constitutional law to a variety of cultural expressions implies its reading in an evolutionary manner, actualizing its normative provisions independently of any textual alteration. It worth mentioning that Constitutional law is not restricted to constitutional text, rather it involves Constitutional law as science, as jurisprudence, literature, doctrine and culture. See Steven Siegel, Race, Education, and the Equal, cit. (nt. 67), pp. 1125-1127.

means to achieve a kind of "middle state" posture, a balanced and optimized one[92]. At this section, this "middle" constitutional ideal will be further discussed through the arguments advanced by Andreas Voßkuhle in his seminal work *Die Verfassung der Mitte* ("The Constitution of the Middle")[93].

According to Voßkuhle, the idea of "middle" represents: first, more than any claim for a kind of equalization process, it intends to establish and develop an effective dialogue between originally different static spheres, emerging as the proper *locus* for substantive conflictual values and positions to be mutually influenced[94]; second, the "middle" does not exist in a static state, rather establishes itself as a mobile entity in which a plethora of values, interests, possibilities and positions are allocated in reciprocal relation[95]; third, the "middle" stems from an argumentative, rational and discursive effort, seeking to achieve a "good compromise" (*gute Kompromiss*) between different values, interests, possibilities and positions[96]; fourth, the "middle" must discharge an integrational function, emerging as a place for tolerance, reciprocity, empathy and mutual comprehension[97]; and fifth, Voßkuhle concludes that the "middle" is a model of "maximal practical intelligibility" (*Maxime praktischer Klugheit*), a mobile constant of optimization[98].

Applying this "middle" constitutional ideal over the possible institutional relations between State and Religion, Voßkuhle argues that, for instance, regarding the current modern tensions over the presence of religious symbols at the public sphere (cross in courtrooms and headscarves used by teachers of primary and secondary public schools)[99], the best optimized constitutional response must arise within the context of an open State religious neutrality (*offenen Neutralität*), through which not only religion will be prevented of being restricted to a private sphere

---

[92] See Curtis Johnson, Aristotle's Polity: Mixed or Middle Constitution(?), *History of Political Thought*, Vol. 9, n.º 2, 1988, pp. 197-199.

[93] Andreas Vosskuhle, *Die Verfassung der Mitte*, München, Carl Friedrich Von Siemens Stiftung, 2015.

[94] *Id*., p. 20, highlighting the Constitution as a middle stand position proper for the promoting dialogue.

[95] *Id*., pp. 20-21, appointing the middle (*die Mitte*) not as a fixed position, rather a moving and dynamical one, where any form of expression is equally valid.

[96] *Id*., p. 21, highlighting the middle as the product of a "*gute Kompromiss*" (good compromise) between conflicting positions.

[97] See *Id*., p. 22, where the middle is held to be structuring the proper place for tolerance and equality.

[98] *Id*., p. 24, highlighting the middle as a practical instance for achieving a state of balance.

[99] *Id*., p. 33. For instance, see the jurisprudence of the German Federal Constitutional Court in *BVerfGE* 35, 366.

of practice, but also will avoid any excessive negative posture from the State[100]. Moreover, Voßkuhle contends that this "middle" constitutional posture ought not to be restricted to a form of neutral distance of the State towards religion at the public sphere, rather must function as a legitimate way of granting, also by positive actions, reasonable material possibilities through which different religious groups will be able to express and develop themselves at the free marketplace of religious ideas[101].

At the adjudication of constitutional rights, practical concordance and proportionality[102] are indispensable mechanisms on furthering a constitutional "middle" conception. Whereas practical concordance enables the mutual accommodation between different values within the free traffic of constitutional rights, values, goods and interests[103], proportionality emerges as an effective device control of restrictive measures inflicted upon constitutional rights, balancing conflicting claims as a means to achieve a "middle" optimized posture[104]. In this sense, concerning religious freedom and the desired constitutional State posture on matters of religion, Voßkuhle argues that proportionality must be used as a measure to identify, beyond the binomial neutrality/identification, a reasonable and optimal response for conflictual claims, neutrally accommodating them within the constitutional order[105]. Therefore, proportionality emerges as the most effective instrumental on the task of furthering an open neutrality posture towards religious beliefs and practices under religious freedom at the constitutional level, making the constitutional order open towards all forms of cultural-religious values and expressions. Beyond a simple "invitation to dialogue" (*Einladung zum Gespräch*),

---

[100] *Id.*, p. 35. According to Voßkuhle, the open constitutional neutrality principle must be chosen as the proper way to protect, develop and further religious pluralism within a democratic-pluralistic society.

[101] Andreas Vosskuhle, *Die Verfassung der Mitte*, cit. (nt. 93), p. 36.

[102] See Bernhard Schlink, *Abwägung im Verfassungsrecht*, Berlin, Duncker & Humblot, 1976, p. 129, noting balancing as a means to configure the content and the respective limits of fundamental rights, and also as the proper method for resolving concrete conflicts between different rights, values, interests and goods within the constitutional traffic.

[103] See Matthias Klatt, Judicial review and institutional balance: Comments on Dimitrios Kyritsis, *Journal for Constitutional Theory and Philosophy*, Vol. 38, 2019, p. 25, contending that within the conflict between fundamental rights, practical concordance acts "in such a way that both gain reality. In other words, both rights need to be limited to a certain extent so that both attain optimal effectiveness as far as possible".

[104] Andreas Vosskuhle, *Die Verfassung der Mitte*, cit. (nt. 93), p. 45.

[105] *Id.*, p. 45, appointing the balancing process within the practice of constitutional review as one of the most important devices on construing a middle constitutional standpoint.

Voßkuhle contends that this "middle" posture must be assumed as a concrete duty to be effectively deployed on discursive and argumentative terms at the level of the praxis of constitutional rights' balancing, especially when involving the exercise of religious freedom[106].

After this brief presentation over what should be properly understood as a "Constitution of the Middle", it is noteworthy to remark what kind of influence this ideal yield for the process of social-political integration. Essentially, the "Constitution of the Middle" ideal, departing from an open conception of the political order, furthers the reasonable accommodation of competing cultural, religious, moral and political values within the social flow of expressions throughout a reasoning process that seeks constitutional homeostasis, thus furthering an integration process through which believers and non-believers are both equal insiders of the political community, as long as their conflicting claims are constitutionally balanced. Accordingly, a social-political integration process to take place, especially within an optimal context for exercising religious freedom, must assume a "middle" constitutional posture in resolving competing claims of cultural-religious values, applying proportionality as the proper device for achieving practical concordance, and thus avoiding negative consequences as social exclusion, discrimination, rejection or stigmatization. As a matter of fact, embracing this "middle" constitutional perspective is the most suitable measure on achieving a balanced religious pluralism within the political-constitutional order.

3. Methodological approach

Once Section 2 offered the constitutional elements and concepts indispensable for supporting the desired social-political integration process, the present Section will deal, from a methodological perspective, with the proper constitutional channels by which that process can be furthered. This methodological approach is construed upon two constitutional channels: first, diatopical hermeneutics as an operational device furthering the development of cross-cultural dialogue and mutual comprehension between originally static social subsystems; and second, religious freedom's essential content (*Wesensgehalt*), identifying and protecting it as an absolute part of this fundamental right.

---

[106] *Id.*, p. 49, arguing that the organs responsible for constitutional adjudication have a duty of argumentation as a means to achieve balance in the middle.

3.1. Diatopical hermeneutics

Diatopical hermeneutics raises as an argumentative-discursive method of interpretation that seeks achieving an empathic comprehension between originally incommunicable social and cultural spheres of society. Boaventura de Sousa Santos, analyzing the core tensions that stem from two opposed trends within the dissemination of human rights' language[107], brings to light the concept of diatopical hermeneutics as an interpretative device on the development of an intercultural dialogue. On the matter, recognizing that human rights' discourse has been construed upon multifaceted cultural subsystems, Boaventura de Sousa Santos contends that, instead of multiple cultural clashes or different processes of unilateral cultural assimilation, a powerful and effective dialogue between diverse cultural spheres ought to be established as a basis for a "*cross-cultural conversation*"[108].

Essential for the process, Boaventura de Sousa Santos states that some conditions ought to be respected: first, the argumentative dichotomy "universalism and cultural relativism" has to be overcome; second, although every cultural subsystem of the global society has its own concept of "human dignity", not all of them embody human rights' discourse on a general common basis; third, each cultural subsystem is not itself an absolute value, rather an incomplete one; fourth, the diversity of cultural concepts about "human dignity" are different in kind, length and approach, one being naturally wider than others; and fifth, different cultural subsystems embrace different kinds of hierarchical distinguishing, reason why not every condition of equality presumes an ideal characterization, and not every condition of differentiation engenders stigmatization[109].

Concerning the process, Boaventura de Sousa Santos explains that applying diatopical hermeneutics, one recognizes the incompleteness of "the other" and also his own lack of completeness, acknowledging that each cultural subsystem has strong cultural elements (cultural *topoi*) that if imposed upon another cultural context would probably create a conflictual environment and would also raise

---

[107] Boaventura de Sousa Santos, Toward a Multicultural Conception of Human Rights, in *Moral Imperialism: A Critical Anthology*, Berta Esperanza & Hernández-Truyol, New York, New York University Press, 2002, pp. 44-47, noting human rights as a universal-political agenda opposed to the idea of emancipatory-political discourse.

[108] Boaventura de Sousa Santos, Toward a Multicultural, cit. (n. 107), p. 47.

[109] *Id.*, pp. 46-47. Essentially, what Boaventura Santos argues is that the idea of understanding, comprehending and accepting different values, from different cultural backgrounds, entails a process of differentiation in light of the cultural data underlying each cultural context.

issues related to cultural imperialism[110]. This proposal on assuming a posture of mutual incompleteness, as Boaventura de Sousa Santos contends, is indeed indispensable for establishing an effective intercultural dialogue. Nevertheless, Boaventura de Sousa Santos also recognizes a feasible danger stemming from this dialogical scenario, a potential process toward the extinction of a cultural spectrum when the dialogue faces cultural imperialist postures[111].

Acknowledging this possibility, Boaventura de Sousa Santos notes that certain conditions must be respected in order to block that problem: first, each cultural subsystem must have self-awareness over its own, and also over the others cultural values' incompleteness; second, among different perspectives over one's cultural subsystem, the wider one must be embraced[112]; third, the process of cross-cultural dialogue must be developed through a mutual and reciprocal manner; and fourth, observing the above referred hierarchical distinguish within different cultural subsystems, whereas circumstances of stigmatization urge an equalization process, hypothesis of mischaracterization ought to be reverted through differentiation measures[113].

Concerning the interconnection with religious freedom and the desired process of social-political integration, diatopical hermeneutics raises itself as an indispensable methodological device on the issue. Both theoretical (constitutional openness) and practical (the idea of "Constitution of the Middle") conditions enable the

---

[110] *Id.*, pp. 47-48. According to Boaventura Santos, every cultural *topoi* embraces a value in itself, reason why, in order to avoid any clash between them, a sense of incompleteness must be a part of the intended intercultural dialogue.

[111] *Id.*, p. 54. In this sense, Boaventura Santos recognizes that this intercultural dialogical process must be made with caution, otherwise reception and integration would turn into cultural imposition.

[112] Within the Islamic religious context, see *Id.*, pp. 55-56, offering as example, concerning diatopical hermeneutics, the need to embrace, between two distinct interpretations over the Qur'an, the one that considers, in more broadly terms, Muslims and non-Muslims, also men and women as equally members of society and equally endowed with human rights.

[113] Boaventura de Sousa Santos, Toward a Multicultural, cit. (n. 107), pp. 55-57. For instance, within a cross-cultural dialogue between western legal-cultural background and Muslims cultural subsystems, any hypothesis of blocking Muslim women's political rights ought to be rejected through diatopical hermeneutics, because an equalization process emerges as an argumentative-discursive response to measures of stigmatization. On the other hand, against measures of mischaracterization, as the French response to the issue of head covering (*hijab* and *niqab*) by Muslim students at public schools, a differentiation process also emerges as an argumentative-discursive device towards the recognition and integration, not assimilation, of strong cultural *topoi*. In this sense, see Gerhard Robbers, Religious Freedom in Germany, cit. (nt. 45), p. 666, affirming that "To safeguard religious liberty, the correct paradigm is equal rights, not identical rights. The paradigm of identical rights cannot appreciate the societal function of a religion, its historical impact, or its cultural background".

exercise (interpretation and application) of fundamental rights, especially religious freedom, within a wide ideological, cultural, political and theological context, transforming the constitutional order into a democratic, pluralistic and integrative community of values. Nevertheless, to be possible, this broad open approach requires diatopical hermeneutics. Accordingly, diatopical hermeneutics enables the exercise of religious freedom within an intercultural dialogue between a plethora of theological and cultural expressions, balancing conflicting claims to achieve a middle-optimized constitutional posture[114]. Instead of any possibility of cultural clash, intolerance, discrimination, stigmatization or cultural rejection, diatopical hermeneutics brings all expressions together into the light of a "middle" constitutional community[115].

3.2. The essence (*Wesensgehalt*) of religious freedom

Is there an identifiable nuclear content in all fundamental rights? What this essence is and what does it represents? What composes it? Regarding religious freedom, is there an identifiable essence to which must be granted constitutional protection? Does this nuclear content of religious freedom perform any function at the process of social-political integration? What are its theoretical meanings and dogmatic possibilities?

The idea of "essential content" or "nuclear content" has its origins on the postwar German constitutionalism, where the "essential content guarantee" (*Wesensgehaltsgarantie*) was recognized by the Basic Law from 1949 (*Grundgesetz*), stating that "*In no case may the essence of a basic right be affected*"[116]. In short, this

---

[114] See Heidi Libesman, Between Modernity and Postmodernity, *Yale Journal of Law and the Humanities*, Vol. 16, n.º 2, 2004, p. 419, contending that "grounded in a process of cross-cultural dialogue, diatopical hermeneutics treats each culture as a partial expression of our common humanity".

[115] See Alex L. Pieterse and Noah M. Collins, A Socialization-Based Values Approach to Embracing Diversity and Confronting Resistance in Intercultural Dialogues, *The College Student Affairs Journal*, Vol. 26, n.º 2, 2007, pp. 146-147, offering some steps that should be respect within this methodological approach, he argues that the participants of a cross-cultural dialogue must bring and recognize all values brought into discussion as equally valid; once they are aware of these values, they must identify the various ways theses values can be put forward; they must identify in which level their respective values and *topoi* conflict; they must identify the strongest *topoi* of each cultural sphere; and they must try to comprehend other cultural *topoi* with normality, understanding them as multiple valid worldviews.

[116] Federal Republic of Germany Const. article 19.º, n.º 2: "*In keinem Falle, darf ein Grundrecht in seinem Wesensgehalt angetastet werden*". A translated version is available at https://www.btg-bestellservice.de/pdf/80201000.pdf.

constitutional guarantee arose as an institutional response towards the atrocities committed at the Second World War period, under the Weimar Constitution from 1919 (*Weimarer Reichsverfassung*)[117]. Against the German legislature posture from the war period, especially on matters of fundamental rights' regulation, the German Basic Law brought to light the idea of "essential content", identifying in every fundamental right, at least abstractly, an essence to be given absolute constitutional protection[118]. Among its different meanings, the idea of "essence" can assume subjective, objective, relative, absolute and also mixed functions, giving rise to many different theoretical explanations.

Subjective and objective theories. Across a subjective-theoretical perspective, this constitutional guarantee assumes a limited function of protecting a specific individual right's position that does not go beyond the figure of its entitled subject. Thus, to protect the essence of a fundamental right is to guarantee an individual sphere of faculties under an individual right's exercise[119]. On the other hand, through an objective-theoretical perspective, the essence assumes an institutional function as an objective entity, granting protection beyond only an individual sphere of exercise[120]. Therefore, whereas understood as a subjective device of protection the essence represents only an intangible sphere of a right's content, through the lens of an objective function the essence equates protecting the entire structure of fundamental rights as a constitutional democracy's institutional guarantee.

Relative and absolute theories. Attaching it to a relative meaning, the idea of essence is tantamount to the product of balancing within the proportionality test[121]. Thus, the protection granted is considered relative because its assimilation into the balancing process, varying according to the underpinning factual and legal circumstances. Hence, respecting the product stemmed from the harmonization

---

[117] See Werner Frotscher & Bodo Pieroth, *Verfassungsgeschichte*, 14th ed., München, C.H. Beck Verlag, 2015, pp. 395-396.

[118] The German Federal Constitutional Court has already discussed over the guarantee's many feasible meanings. For instance, at the decision *Tagebuch Urteil*, *BVerfGE* 80, 367 (1989), the Federal Constitutional Court dealt with the dogmatic possibility of comprehending the right to intimacy as the "nuclear content" (*Kernbereich*) of the right to privacy.

[119] See Martin Borowski, *Grundrechte als Prinzipien*, cit. (nt. 10), p. 363.

[120] See Claudia Drews, *Die Wesensgehaltsgarantie des Art. 19 II GG*, Baden-Baden, Nomos Verlag, 2005, pp. 62-66. See also Martin Borowski, *Grundrechte als Prinzipien*, cit. (nt. 10), p. 363.

[121] See Maja Brkan, The Essence of the Fundamental Rights to Privacy and Data Protection: Finding the Way Through the Maze of the CJEU's Constitutional Reasoning, *German Law Journal*, Vol. 20, n.º 6, 2019, p. 867, arguing that this equivalence between the essential content's guarantee and proportionality within the relative-theoretical perspective makes multiple scholars to defend that the idea of essence is dispensable.

process led through the proportionality test implies respecting the relative essence of the fundamental right at stake[122]. On the other hand, through the eyes of the absolute-theoretical perspective, an absolute (static) essence is identifiable on every single fundamental right, regarding it as an inviolable quantity different from proportionality's result, thus incapable of being relativized through a balancing process[123]. Accordingly, from this absolute-theoretical perspective, the product of balancing stemmed from proportionality is totally different from that granted by the constitutional guarantee[124].

Beyond these theoretical perspectives, there is also another that comprehends the guarantee as deploying a function of institutional protection, thus arguing that given the practical impossibility of identifying a single absolute content on each fundamental right, the idea of essence must be regarded as an objective mandate towards all government's branches, immunizing the entire structure of fundamental rights from any measure intended to reduce it to a point of institutional decharacterization or annihilation[125]. As a matter of fact, this is exactly what Peter Häberle intends by bonding the guarantee to an institutional meaning, especially when comprehending fundamental rights through an objective dimension, regarding them as an indispensable device for the constitutional order's self-subsistence[126].

Despite these different theoretical perspectives, this Article embraces the theoretical approach offered by Ludwig Schneider, especially in what it concerns identifying religious freedom's nuclear content. According to Schneider's theoretical approach, identifying the essence of a fundamental right requires the embracement of a subjective-absolute approach[127]. In order to do that, Schneider begins contending

---

[122] See Martin Borowski, *Grundrechte als Prinzipien*, cit. (nt. 10), p 363.

[123] See *Id.*, pp. 363-365. See also Maja Brkan, The Essence of the Fundamental Rights, cit. (nt. 121), pp. 866-867.

[124] See Takis Tridimas / Giulia Gentile, The Essence of Rights: An Unreliable Boundary(?), *German Law Journal*, Vol. 20, 2019, p. 803, noting that "proportionality begins where essence stops".

[125] See *Id.*, p. 803, arguing that "a third way is to interpret essence as meaning that it is inflicted when the right is extinguished. This equates essence to the abolition of a right".

[126] See Peter Häberle, *La garantia del contenido esencial de los derechos fundamentales: una contribución a la concepción institucional de los derechos fundamentales y a la teoría de la reserva de la ley*, Madrid, Dykinson, 2003, pp. 51 and 127. See also Takis Tridimas / Giulia Gentile, The Essence of Rights, cit. (nt. 124), p. 803, contending that "it serves as a reminder that the legislature is not free to override constitutional commands but the judicial enquiry centers on the definition of a right and whether it has been totally destroyed".

[127] See Ludwig Schneider, *Der Schutz des Wesensgehalts von Grundrechten nach Art. 19 Abs. 2 GG*, Berlin, Duncker & Humblot, 1983, pp. 201, 211, 229 and 262.

that the fundamental rights must be distinguished into two different structural types: whereas one group embodies positive claims of self-determination, the other group embodies a mere function of negative defense (*Abwehrrechte*)[128]. The first group of rights, endowed with a positive function of self-determination, develops its normative content from the inside towards outside, having both internal and external implications[129]. On the other hand, the second group, embracing a mere function of negative defense, develops its content in a unidimensional manner, thus having only external implications, the protection of positive or negative acts that are immune to state interference[130]. Once outlined, Schneider affirms that these groups embody different implications on identifying a right's nuclear content. Within the first group of rights, the one that embodies a dual dimension (inside to outside) of development, the essence refers to an absolute entity residing on the inside dimension, whereas the external dimension corresponds to the product stemmed from balancing at proportionality test. Concerning the other group of rights, endowed with a unidimensional (only the external one) area of protection, the essence equates to the product of balancing through proportionality, thus being considered a relative mobile entity.

Once it was stated, now is the time to bring religious freedom once again to the equation. First, which group of rights does religious freedom pertain to? Observing that religious freedom is a fundamental right that develops itself along two different dimensions, one internal that embodies all individual internal faculties related to conscience (*forum internum*), and the other embodying all faculties to be externally exercised (*forum externum*), namely through acts of religious expressions, we are able to conclude that religious freedom has an identifiable autonomous nuclear content[131]. In this sense, Schneider identifies that religious freedom has a dynamic content, for it develops itself from inside towards outside, recognizing

---

[128] *Id.*, pp. 201, 211 and 229. See also Claudia Drews, *Die Wesensgehaltsgarantie*, cit. (nt. 120), pp. 91-92.

[129] It must be remarked that these rights, despite assuming a function of self-determination, are also rights raised upon an ideal of granting a sphere of negative protection, as those classical rights of liberal theory. Accordingly, religious freedom, besides guaranteeing a sphere of negative defense, over which state interference is forbidden, has also a dimension of self-determination, a guaranteed sphere of actions that emerge as a channel of self-autonomous action.

[130] See Martin Borowski, *Grundrechte als Prinzipien*, cit. (nt. 10), p. 289, stating that this type of negative rights discharges a function that corresponds to Jellinek's *status negativus*. For instance, within this group, the right to the inviolability of home and the right to the inviolability of postal communication are rights that play only a function of negative defense, developing themselves through a unilateral dimension.

[131] See Ludwig Schneider, *Der Schutz des Wesensgehalts*, cit. (nt. 127), p. 231.

an absolute protection to be granted for the internal dimension (*forum internum*), whereas a relative protection for the external dimension (*forum externum*), this one being generally subjected to balancing through proportionality[132]. Therefore, in sum, religious freedom's essential content represents the absolute protection given to its internal sphere of faculties (*forum internum*).

Besides that, it worth mentioning other two elements that ought to be integrated into religious freedom's essence. First, the essence must also be integrated by the subjective-institutional dimension of religious freedom's exercise, recognizing a core element within the institutional dimension, thus granting absolute protection for the doctrinal-confessional self-determination of religious entities[133]; and second, religious freedom's essential content is also recognized within an objective dimension, turning "religion" into a constitutional value to be protected through the principle of state neutrality[134]. In sum, three elements compose the religious freedom's nuclear content, all of them guaranteed under absolute constitutional protection: a) the subjective faculties of conscience (*forum internum*); b) the subjective faculties related to the doctrinal self-determination of religious entities; and c) the duties stemmed from the neutrality principle as an institutional guarantee.

Once those elements were properly identified, it is time to assess how they can influence the referred process of social-political integration. First, it should be remarked that, whereas diatopical hermeneutics rises as a methodological device furthering that integration process, the absolute protection granted over religious freedom's essential content seeks avoiding excesses upon it. In a nutshell, the absolute protection over the internal sphere (*forum internum*) avoids any violation upon the individual religious conscience; through the absolute protection over religious entities' doctrinal self-determination, any violation or restriction upon the religious institutional-conscience is avoided, thus allowing each religious group to develop their doctrines within a free and fair religious marketplace; and through

---

[132] See Ludwig Schneider, *Der Schutz des Wesensgehalts*, cit. (nt. 127), p. 210.

[133] See Gerhard Robbers, Religious Freedom in Germany, cit. (nt. 45), pp. 654-655, noting that the absolute protection granted over the self-determination of religious communities encompasses only the inner sphere, namely over doctrinal matters, whereas the external implication of this type of self-determination, involving religious communities' capacity to deal with public matters as business activities, encounters objective limits in laws of general application.

[134] See Carsten Pagels, *Schutz- und förderpflichtrechtliche Aspekte der Religionsfreiheit: Zugleich ein Beitrag zur Auslegung eines speziellen Freiheitsrechts*, Frankfurt am Main, Peter Lang Verlag, 1999, p. 201, highlighting this institutional approach. See also Gerhard Robbers, Religious Freedom in Germany, cit. (nt. 45), p. 649, contending that state neutrality demands non-identification and non-intervention.

the recognition of a state duty towards religious neutrality, any governmental inclination towards religious establishment or a fundamentalist secularism[135] is precluded. Therefore, the protection granted to the essence of religious freedom functions as the unsurmountable constitutional boundary upon diatopical hermeneutics. When diatopical hermeneutics enables the religious marketplace to be permeable towards a diverse social flow of multifaceted cultural values, acknowledging their reciprocal incompleteness, some hypothesis of constitutional violation can emerge, specially by embracing strong cultural elements (*topoi*) in clear conflict with core elements of the constitutional order, as the individual physical and psychological inviolability, the right to free development of personality, the right to life, right to health, and other values as social order and national security. Hence, as a limit, religious freedom's essential content emerges demanding that the social-political integration process's methodological operationalization through diatopical hermeneutic not to push it into a sphere of unconstitutionality.

4. Practical implications

The theoretical-constitutional elements and the methodological instrumentals above referred imply, at a practical level, different consequences on the living process of social-political integration, especially raising as a powerful factor on furthering it. Embracing an analytical purpose, this Section of the Article will deal with the positive influence that these theoretical elements and methodological devices can exert on the integration process. For practical purposes, the application of those elements will be analyzed in light of such issues as the use of religious clothes at the public sphere, notably at public schools and workplaces, referring to some related case law on the matter.

A short theoretical background. It is an unchallengeable fact that religious freedom, as a proper fundamental right, embraces the right of individuals to express themselves using religious attire or symbols as a way of externalizing their own beliefs and disseminating them at the large public sphere[136]. The right to use religious attire and

[135] This expression denotes a negative use of state neutrality in prejudice of religion, as a means to keep it away from the public sphere. As a matter of fact, this idea of secularism implies excesses that bears social discrimination and exclusion. See Iain McLean & Scot M. Peterson, Secularity and Secularism in the United Kingdom: On the Way to the First Amendment, *Brigham Young University Law Review*, Vol. 2011, n.º 3, 2011, p. 638, arguing that "A secularist state actively tries to keep religion out of the public arena. A secular state is neutral between religions, and between religion and non-religion".

[136] This form of religious expression is ostensibly recognized within Human Rights International

symbols stems from one's individual right to conform her or his life in accordance with the professed religious beliefs. Therefore, Muslim women are entitled with the right to use forms of body covering (*hijab*, *niqab* and *burka*), Jews can use *yarmulkes* and Indian *Sikhs* are allowed to use turbans[137]. Be it a type of religious clothing or other religious symbol to be publicly displayed, the main purpose of the user is to publicly declare one's religious beliefs or religious affiliation, whereby the believer can be identified as a member of a specific religious group, entity or denomination. From a theoretical standpoint, religious freedom's external dimension (*forum externum*), whereby a multitude of religious expressions receive broad constitutional protection, can only be restricted under a legitimate (compelling) reason stemmed from balancing operations in the realm of proportionality test, thus seeking a state of constitutional harmony. On one hand, to control restrictions inflicted upon fundamental rights and also as a means to seek constitutional balance, proportionality is a suitable legal device for such task, at least within a theoretical-dogmatic perspective. On the other hand, in what concerns furthering the social-political integration process, operating balancing through proportionality is not enough, rather demanding compliance with those theoretical elements and methodological devices above outlined.

The theoretical-methodological elements and some implications on the integration process.

Fundamental rights. Through the exercise of core constitutional rights, as religious freedom, freedom of speech, freedom of assembly, freedom of petition and others, individuals and groups are openly recognized as general subjects of freedom, therefore legitimated to act within a broad sphere of self-determination. As being able to freely develop themselves, individuals, groups and different social subsystems integrate themselves into the political order not merely as observers or passive subjects, rather as equal active members of the political community independently of their ideological posture or their professed religious-cultural expressions[138]. In light of that, concrete expressions as the use of religious garb or

---

Law. For instance, see Lucy Vickers, Religious Freedom: Expressing Religion, Attire, and Public Spaces, *Journal of Law and Policy*, Vol. 22, n.º 2, 2014, p. 591.

[137] See Kendyl L. Green, Courts Rule Too Narrowly Regarding the Right to Wear Religious Clothing in Public, *Hasting Women Law Journal*, Vol. 29, n.º 2, 2018, pp. 261-262, acknowledging that religious attire is a common practice within believers observing Judaism, Islam and Sikhism.

[138] See Tarunabh Khaitan / jane Calderwood Norton, The right to freedom of religion and the right against religious discrimination: Theoretical distinctions, *International Journal of Constitutional Law*, Vol. 17, n.º 4, 2019, p. 1142, arguing that the core reason for protecting individuals and groups against religious discrimination, and also other types of it, is guaranteeing them an equal and effective access to basic goods, opportunities and freedom.

the display of religious symbols at the public sphere should not be a matter of social-cultural isolation, rejection or exclusion. Regarded as "insiders", as active members of the political community, thus equally endowed with freedom to self-development and self-expression, believers and non-believers, although possibly having conflictual claims on religious matters, their equal status must act as a contributive factor on the social-political integration process. In sum, the mindset must be changed. Religious freedom, rather being comprehended as a factor for social divisiveness, should be seen as a factor that works in favor of the integration process.

Constitutional openness. Through the above referred types of constitutional openness (structural, semantic and procedural-interpretative), the constitutional order emerges as an open order of values constantly submitted to the influx of multiple cultural, moral, theological and political data. In what it concerns religious beliefs and expressions, the constitutional order neither limits itself to the recognition of one set of religious values, nor identify itself with one, rather enables and furthers a free marketplace of religious ideas by embracing all as equally capable to develop and disseminate their own discourse of truth.

Mutual influence between Culture and Constitutional Law. Opening the constitutional order is not an end in itself, nor is a one-way process. Whereas Constitutional law structures a broad sphere of protection inside which multiple cultural subsystems can be freely developed, this idea also implies a wide acceptance of different cultures at the constitutional level, allowing different cultural data to also influence the constitutional order as a whole. Under this idea, a religious culture is not a mere passive framework of cultural-theological information available within the broad cultural system, rather it actively serves as an input of values, constantly actualizing the entire political order. Hence, independently of their doctrinal-substantive aspects, different religious subsystems are equal internal participants of the constitutional order and of the political community, and not mere outside observers.

The Constitution of the Middle. Managing constitutional provisions as middle institutional instances, especially on seeking a neutral posture at a practical level, all cultural, theological, ideological and political data can be broadly and equally embraced by the constitutional order and the political community. Under a middle posture, handling hard cases demands neutral actions, those capable of achieving a balanced decision without harming, discriminating, isolating, excluding and rejecting any participant (social subsystem). In respect of different religious beliefs, a constitutional order of "the middle" is thus achieved by openly receiving and respecting all religious data available within the free marketplace of religious ideas,

balancing them through the lens of proportionality and furthering religion as a protected constitutional good, but without privileges, preferences or even official establishment. A middle constitutional posture does not choose or prefer a religion, denomination or a specific value, it recognizes all of them as equal, independently of their professed truth.

Applying the methodological devices (diatopical hermeneutics and the essence of religious freedom). Through diatopical hermeneutics, the basic assumption to be considered is that all religious-cultural *topoi* involved in the cross-cultural dialogue are essentially value incomplete, a basic condition to avoid totalitarian assimilations and discursive clashes, enabling a favorable interchange of cultural data within a multifaceted and pluralistic context. Simultaneously, to avoid any nuclear constitutional violation throughout this process of cross-cultural dialogue as a step to achieve social-political integration, those above referred elements that integrate religious freedom's essence (*forum internum*, doctrinal-substantive self-determination and the neutrality principle) perform a special function on controlling the equilibrium of the process.

Practical implications and some related case law. The French experience on the use of *foulard* (headscarf) at the public sphere offers some interesting analytical aspects. The two major normative expressions on the matter (Law nº 2004-228 from 15 March 2004 and Law nº 2010-1192 from 11 October 2010) yielded, from a constitutional perspective, wide restrictions on religious freedom, notably upon the right of believers to wear clothes that directly or indirectly express their religious beliefs. Confronted with those theoretical-methodological approaches outlined above, both legislative acts seem to incur in substantial unconstitutionalities, especially for their motives and *telos*, which can be objectively put under question.

From a technical point of view, the first legislative act (Law nº 2004-228 from 15 March 2004)[139], although primarily directed to guarantee the constitutional principle of secularism[140] on its effectiveness, and also motivated by a hypothetical governmental interest on the prevention of alleged potential social disorder at public schools, violated proportionality for one core reason: it was not strictly

---

[139] *Loi* 2004-228 *du 15 mars* 2004, *Journal Officiel de la République Française*, *Official Gazette of France*, Mar. 17, 2004, p. 5190.

[140] See MOHAMED ABDELAAL, Extreme Secularism vs. Religious Radicalism: The case of the French Burkini, *ILSA Journal of International and Comparative Law*, Vol. 23, n.º 3, 2017, p. 448, contending that, although intended to protect the idea of secularism as a constitutional premise, the French government turned it into a policy of "militant secularism", almost assumed as a "supra-constitutional value".

proper and necessary for preventing any social riot, insecurity or exclusion at the public teaching educational environment[141]. As a matter of fact, it is self-evident that this French law was directly enacted to restrict the expression and dissemination of Islamic beliefs[142]. Concerning the second legislative act (Law nº 2010-1192 from 11 October 2010)[143], despite its appearance of compliance towards proportionality, it incurs in undisputable unconstitutionality, for it imposed a heavy burden on Muslims, especially when prohibiting the practice of veiling (*niqab* and *burka*) at the public sphere without any reasonable constitutional justification. Though the act seeks to protect the public order by increasing security measures, it has grounds on discriminative assumptions over Islamic believers[144].

Analyzing the French experience through the lens of the theoretical-methodological approach outlined throughout the present Article, some interesting findings must be briefly remarked. First, through both legislative acts, the restrictions inflicted upon religious freedom have been clearly excessive, for their reasons have been not objectively legitimized under the light of proportionality; second, handling the matter under a hermetic way, the educational authorities and the French government led the principle of secularism to a level of exhaustion, hypothetically as a means to maintain a historical framework of strict separation between church and state[145], thus avoiding a broad embracement of other cultural data, notably by rejecting the

---

[141] See Mohammad Idriss, Laïcité and the banning, cit. (nt. 14), p. 281, stating that, if the aim was to curb violence and terrorism, the suitable measure would not be to enact a general prohibition on the use of headscarves at public schools, rather to treat the problem throughout reasonable criminal law. See also Gowri Ramachandran, Freedom of Dress: State and Private Regulation of Clothing, Hairstyle, Jewelry, Makeup, Tattoos, and Piercing, *Maryland Law Review*, Vol. 66, n.º 1, 2006, p. 88, contending that this legislative measure emerged also under a hypothetical need to protect Muslim students against being coerced by their parents and by religious fundamentalist leaders to use the headscarf.

[142] See Mohamed Abdelaal, Extreme Secularism vs. Religious Radicalism, cit. (nt. 140), p. 451. See also *Id.*, p. 467, stressing that, in France, secularism is interpreted as a constitutional device directed to "curb Islamic social incursion". Moreover, see Jonatas Machado, Freedom of Religion, cit. (nt. 6), p. 490, stating that "The aim of the law was really to address the question of the Islamic head scarf".

[143] *Loi* 2010-1192 *du 11 octobre* 2010, *Journal Officiel de la République Française*, *Official Gazette of France*, Oct. 11, 2010, p. 18344.

[144] See Steven G. Gey, Free Will, Religious Liberty, and a Partial Defense of the French Approach to Religious Expressions in Public Schools, *Houston Law Review*, Vol. 42, n.º 1, 2005, p. 14, opposing this idea by arguing that, as a matter of fact, this is a product of a perspective only from outside observers.

[145] See Jonatas Machado, Freedom of Religion, cit. (nt. 6), p. 490, contending that a spirit of "civic atheism" underlined the legislative posture of the French government.

Islamic ones[146]; third, the natural porousness of the constitutional order has also not been adequately attended, notably when the French government enacted those acts hypothetically lead by an extreme secularist spirit, provoking the isolation of Islamic religious values and the rejection of Muslims religious practices; and fourth, an optimized posture under the idea of a Constitution of "the Middle" has been not considered by the French governmental institutions, because both legislative acts led the value of secularism to its extreme, transforming it into a negative state ideology, provoking dangerous discriminative effects. In sum, both legislative acts promoted cultural isolation and social exclusion, violating religious freedom at its core elements and thus hindering the social-political integration process[147].

Once those brief remarks were made, it is necessary to ask: What would be the result if those theoretical-methodological elements had been correctly applied on handling the issue? Essentially, instead of furthering cultural isolation, exclusion and stigmatization, the above-mentioned theoretical elements and appointed methodological mechanisms, if they had been reasonably applied, would certainly have furthered the social-political integration process throughout a cross-cultural dialogue between social subsystems originally assumed as incommunicable (between French and Islamic ones).

From the outset, it would be indispensable to acknowledge that religious freedom is a fundamental right that demands further development within an open-pluralistic constitutional framework, one that embraces religious values and theological data through a neutral posture, thus allowing a free flow of beliefs and religious expressions. In this sense, concerning veiling practices, especially those practiced by Muslims women using *hijab*, should have not been prohibited both at the large public sphere and at public schools. Without any reasonable constitutional justification, this kind of restriction violates proportionality.

---

[146] See Jennifer Heider, Unveiling the Truth Behind the French Burqa Ban: the Unwarranted Restriction of the Right to Freedom of Religion and the European Court of Human Rights, *Indiana International and Comparative Law Review*, Vol. 22, n.º 1, 2012, p. 99, arguing that this excessive application of the principle of secularism is most problematic for Muslims, notably because their religious-cultural elements are present in all aspect of individual and social life.

[147] See Hera Hashmi, Too Much to Bare(?) A Comparative Analysis of the Headscarf in France, Turkey, and the United States, *Maryland Law Journal of Race, Religion, Gender & Class*, Vol. 10, n.º 2, 2010, p. 445, contending that the French negative and discriminative response to Muslims' claims concerning the using of the headscarf at public schools as an expression of religious beliefs forced students "to choose between two worlds – between religion and education". See also Mohammad Idriss, Laïcité and the banning, cit. (nt. 14), p. 267, arguing that the French policy towards religion and minority religious groups is regarded as "assimilation" – instead of integration –, causing a posture of rejection and isolation from the part of these groups as a response to the "superiority of Western (or French) culture and values".

A second step would be to develop the French ideal of secularism (constitutional principle of secularism) through an open guided constitutional interpretation as a means to avoid any extremist posture by the government[148]. A secular constitutional order does not demand negative and extremist state measures against religious beliefs and groups as a proof to be secular. Conversely, it demands a balanced distinguishing between state and religious activities without burdening one another. Therefore, prohibiting religious practices as those related to veiling does not further secularism in a balanced way, rather leads secularism to an extreme level, an exhaustion that yields social discrimination and stigmatization. To allow those veiling practices at the public schools and also at the large public sphere would not endanger the expected governmental neutral posture towards religion, rather would confirm it as a part of the social-political integration process.

Third, through acknowledging the natural reciprocal influence between Culture and the constitutional order, not only the constitutional normative precepts emerge as the realm within cultural expressions can freely develop themselves, but also cultural data can transform the whole political order into a pluralistic complex of values, serving as an input channel of legitimation. Through these open lenses of mutual influence, any cultural-religious expression must be, at least *a priori*, regarded as capable of being integrated into the complex of values of a political order originally opposed to its original one. Concerning the veiling practices, and once this reciprocal influence is acknowledged, to recognize Muslims (and others) practices on the matter must be embraced as equally valid, furthering social-political integration within an open and free social-religious market.

As a last theoretical step, it would be at least reasonable to the French government to adopt any normative and administrative responses under the ideal of a "Constitution of the Middle", demanding a neutral posture from all state institutions. Seeking a middle constitutional posture, any state measure must be reasonably justified through balancing within proportionality. In this vein, religious claims have to be considered through an optimized process of reasoning, withdrawing extremist responses that would promptly hinder the social-political integration process only for their theological-cultural background. Legislative prohibitions directed against Muslims practices of veiling are not an expression of a "middle" constitutional posture, rather represent discriminative, excessive and repressive measures. A reasonable "middle" constitutional

[148] See Tarunabh Khaitan / jane Calderwood Norton, The right to freedom of religion, cit. (nt. 138), pp. 98-99, affirming, "It arose during the French Revolution and is based on the belief that France should promote a unified national identity and ignore religious and ethnic differences". Therefore, it would be necessary to rebuild this original and hermetic understanding over the principle.

response would be to regulate these kinds of religious practices through an optimized manner, especially one that would further social-political integration[149].

At the methodological level, it would be necessary both to apply diatopical hermeneutics and also to respect those elements that integrate religious freedom's essence. Through diatopical hermeneutics, if adequately applied, it would demand, in a dialogical cross-cultural process, that French cultural values be assumed as equally incomplete as the Islamic ones, preventing French strong cultural *topoi* (like secularism) from being imposed upon Islamic believers[150]. In this sense, to allow Muslim students to use *hijab* at public schools would confirm their capacity and freedom to be themselves not only at their homes and places of worship, but also at their sphere of education without been seen as "outsiders", then contributing to the construction of a pluralistic and tolerant environment of public education.

Additionally, the essence of religious freedom rises as a form to block any possibility of violation within that cross-cultural dialogue furthered throughout the process of social-political integration. Essentially, three basic duties are stemmed from the absolute protection granted over religious freedom's essence: first, to not violate one's internal religious choices (*forum internum*); second, to not violate the doctrinal-substantive autonomy of religious entities as to respect their right of religious self-determination; and third, it is necessary to further state neutrality in an optimized and balanced way, avoiding social discriminations and exclusions. Thus, three core questions must be properly answered: first, is the use of the *hijab* by Muslim students at a public school a decision that violate their internal religious choices?; second, does this veiling practice respect the doctrinal self-determination of Islamic (and other) religious entities?; and third, does use of *hijab* put state neutrality under risk? In sum, all the answers are negative, reason why the intended cross-cultural dialogue does not endanger the constitutional order, it rather reasonably balances the veiling religious practice of those students with other rights, values, goods and interests.

---

[149] As a matter of fact, an optimized "middle" constitutional response on the issue would be to lift the ban on Muslim students to use the headscarf as a form of furthering a cross-cultural dialogue. In this sense, see Gowri Ramachandran, Freedom of Dress, cit. (nt. 141), p. 88, stating that "Granting this accommodation, even where the state believes that a child's choice is anything but freely made, can provide the necessary demonstration of good will to begin a dialogue that empowers children within their communities".

[150] See Tarunabh Khaitan / jane Calderwood Norton, The right to freedom of religion, cit. (nt. 138), p. 99, referring to the French posture on the matter as a "complete assimilation". Conversely, diatopical hermeneutics would transform the French process of assimilation into an open process of social-political integration.

If all these constitutional elements and methodological mechanisms were correctly applied in its maximum optimization, the French government's posture would be surely different, furthering the integration of Muslims into the social-political order. At public schools, the exercise of religious freedom by using religious garb or symbols that express theological commitments and beliefs by students, if granted throughout those theoretical and methodological terms above appointed, would further cross-cultural education, toleration and integration within an environment of intercultural dialogue between different and originally uncommunicable cultural spheres (French and Muslims)[151].

In a much different context, the decision taken by the German Federal Constitutional Court (*Bundesverfassungsgericht*) in *Kopftuch-Urteil*[152] brings another perspective on the matter. The case involved a constitutional request made by Fereshta Ludin, a Muslim teacher, against an administrative decision taken by the State Board of Education of Baden-Württemberg that denied her a position as a teacher at a public school in reason of her petition to use the veil (*hijab*) during the classes[153]. The teacher questioned the administrative decision before the Federal Constitutional Court arguing that the administrative act violated her free exercise of religion. When deciding, the Federal Constitutional Court contended that the administrative decision was unconstitutional, for the administrative body that took the decision lacked constitutional competence to rule on the matter.[154] Despite the

---

[151] See Mohammad Idriss, Laïcité and the banning, cit. (nt. 14), p. 295, noting that if the ban on *hijab* was lifted and Muslims schoolgirls were permitted to wear it, a bridge between French and Islamic values would be constructed upon a continually intercultural dialogue. See also Jonatas Machado, Freedom of Religion, cit. (nt. 6), p. 491, affirming, "In a pluralistic society, schools should be expected to reflect that pluralism and to teach students, by words and deeds, how to deal with difference in a respectful way". Nonetheless, it should be noted that, if the claim to use religious clothes were from the part of the teachers at public schools, the result would be different. As will be argued below, teachers of public-schools act on behalf of the state, reason why a duty of neutrality must be fulfilled, restricting their religious expression on the matter. Thus, the intercultural dialogue would have to be constructed in conformation to the boundaries established by the neutrality principle.

[152] *BVerfGE* 108, 282 (2003).

[153] See Axel Frhr. von Campenhausen, The German Headscarf Debate, *Brigham Young University Law Review*, Vol. 2004, n.º 2, 2004, pp. 672-676.

[154] See Mathias Mahlmann, Religious Tolerance, Pluralist Society and the Neutrality of the State: The Federal Constitutional Court's Decision in the Headscarf Case, *German Law Journal*, Vol. 4, n.º 11, 2003, p. 1105, stating that the German Federal Constitutional Court decided by allocating the problem in the context of the so-called "theory of essentiality" – *Wesentlichkeitstheorie* –, whereby the essential matters over the regulation of constitutional rights must be treated only through a legislative act, reason why the Court stated that the state administrative body on educational matter had no competence to decide through the assumed formal-argumentative basis.

appointed unconstitutionality, the Federal Constitutional Court has not discussed the substantive question underpinning the issue, the one concerning the legitimacy of the restriction on the use of *hijab* and other types of veiling by teachers at a public school, leaving the question to be locally addressed by the *Länder*[155].

Analyzing the issue through the theoretical-methodological lens proposed along the present Article, is there any justification for restricting the exercise of religious freedom on the matter?

From the very beginning, it is necessary to acknowledge that the exercise of religious freedom by teachers of a public educational institution, as the Muslim teacher at the public school in the case, although broadly granted within an open and wide constitutional theoretical-dogmatic basis, cannot be exercised on its full length, for the underpinning quality of her relation towards the state turns her into a public institutional agent[156]. Therefore, despite entitled with a fundamental right capable of being broadly exercised, guaranteeing her free religious expression also at the public sphere, her specific institutional relation with the state, as being a teacher of a public educational institution, partially restricts her religious freedom[157]. Within the institutional educational environment, the teacher performs an institutional function as acting on behalf of the state, reason why her constitutional right of religious freedom encounters an objective boundary[158].

Conversely, among the abovementioned constitutional elements needed for the integration process, applying the idea of a "Constitution of the Middle" would reach another conclusion, notably by entirely granting the teacher her right to freely express her religious affiliation through veiling itself. Nevertheless, this would lead to a violation at the core of the neutrality principle, thus violating the absolute protection granted under religious freedom's essence[159]. Allowing Fereshta Ludin

---

[155] See Axel Campenhausen, The German Headscarf Debate, cit. (nt. 153), pp. 683-685, contending that this critic was constantly stressed by the dissenting opinions.

[156] In this sense, see Edward Eberle, Free Exercise of Religion, cit. (nt. 40), p. 1066, contending that "civil servants are traditionally viewed as neutral agents of the legal order and, therefore, not able to exercise full basic rights in their official capacity".

[157] See Inke Muehlhoff, Freedom of Religion in Public Schools in Germany and in the United States, *Georgia Journal of International and Comparative Law*, Vol. 28, n.º 3, 2000, p. 481, contending that, besides the required neutrality as acting as an institutional agent of the state, the use of a religious garb by teachers of public schools would be confronted with the free exercise of religion of the students and their parents, for young students are normally influenced by the behavior and posture of their teachers.

[158] See Mathias Mahlmann, Religious Tolerance, cit. (nt. 154), p. 1107.

[159] As referred at 2.4., one of the core elements for achieving a "middle" constitutional posture within a "Middle Constitution" is respect for proportionality. Respecting state religious neutrality, restricting the exercise of religious freedom by teachers of a public educational institution, on behalf of their relationship

to wear a headscarf (*hijab*) during her classes at a public school, the State Board of Education – thus, the state – would violate the neutrality principle by actively embracing and expressing a theological belief, engendering a cluster of rights' conflicts, especially those involving the right of the parents to the religious education of their children and the negative right of the children to be not involuntarily faced with the religious beliefs of their teachers. Therefore, despite the need to further an intercultural dialogue, the essence (nuclear content) of religious freedom emerges as a blocking reason, especially through the neutrality principle, ratifying the reasonableness of restricting the teacher's religious freedom on the matter.

Instead of furthering a blind cross-cultural dialogue, lacking proper awareness over the multiple legal and factual underpinning circumstances, certainly leading to claims of inequality and social disaffection, thus hindering the integration process, the application of those constitutional theoretical elements and methodological mechanisms would have conducted the Court's reasoning towards a different resolution, notably by recognizing that although being legitim the teacher's claim of free religious exercise, the constitutional order cannot be trespassed on its objective boundaries, as with the necessity to respect state religious neutrality. Unfortunately, the German Federal Constitutional Court has not confronted the core issue in the case (if an institutional agent of the state can fully exercise religious freedom), and took a mere procedural posture[160], deciding in a formalistic way and leaving the discussion in a substantive blankness[161].

In a similar context, at *United States v. Board of Education for School District of Philadelphia*[162], a public school teacher was denied using a religious garb that covered her entire body except her face and hands during the classes because of a Pennsylvania's statute prohibited teachers to use any cloth or symbol expressing religious beliefs[163].

---

with the state as an institutional agent, the essence of this constitutional right is protected. Yet, this protection presupposes, despite the reciprocal dogmatic autonomy, the respect and fulfillment of proportionality. Thus, by fulfilling the duty of neutrality, the idea of a "Middle Constitution" is optimized in the hypothesis.

[160] See TINA MIRZAZADEH, Discrimination in the Name of Secularism: A Ban on Religious Symbols in Québec, *Global Business and Development Law Journal*, Vol. 28, n.º 2, 2005, p. 412, arguing that the Court decided for "administrative reasons".

[161] If the Court has had recognized the special status of the Muslim teacher as an institutional educational agent acting on behalf of the state, probably would have concluded that the Constitution has itself a substantive justification to support that restriction. See MATHIAS MAHLMANN, Religious Tolerance, cit. (nt. 154), p. 1107.

[162] United States v. Board of Education for School District of Philadelphia, 911 F.2d 882 (3d Cir. 1990).

[163] See KENDYL GREEN, Courts Rule Too Narrowly, cit. (nt. 137), p. 282. See also KRISTINA BENSON, The Freedom to Believe and the Freedom to Practice: Title VII, Muslim Women, and Hijab, *UCLA Journal of Islamic & Near Eastern Law*, Vol. 13, 2014, pp. 8-9.

The Court ruled that granting the teacher a religious accommodation in the case, allowing her religious expression by using the referred attire during her classes, besides burdening the students by confronting and forcing them to be in touch with the teacher's religious expression, would also imply the violation of the public school's duty towards religious neutrality, then denying her claim[164]. Distinguishing from the case judged by the German Federal Constitutional Court mentioned above (*Kopftuch-Urteil*), the Court instead, balanced the rights, values, goods and interests at stake affirming that the claimed religious expression would unreasonably burden the State Board of Education and also the students, recognizing the existence of objective boundaries, especially those raised by the neutrality principle. Even if the State Board of Education had desired to promote an empathic accommodation between different religious values, furthering an open dialogue within the public educational system, the essence of religious freedom, notably expressed by the neutrality principle, raises as an objective limit prohibiting a state institution – a public school – to express any religious affiliation, even if it did in an indirect way.

Another example can be found in *Goldman v. Weinberger*[165], where S. Simcha Goldman, an Orthodox Jewish and ordained rabbi, claimed before the Supreme Court that his constitutional right to religious freedom, protected under the First and Fourteenth Amendments, was violated, arguing that he was denied using a *yarmulke* as a source of religious expression and affiliation during his service as a psychologist at an Air Force hospital[166]. According to the military authorities, an Air Force Regulation (AFR 35-10) prohibited the use of any headgear during the military service, reason why Goldman was prohibited using a *yarmulke*, even if used simultaneously with the military service cap[167]. Justice Rehnquist delivered the opinion to the Court contending that, although the use of religious garb is protected under the First Amendment, Goldman's claim could not impinge a duty of accommodation upon the military, affirming that the Air Force, through the normative regulation on the matter, drove adequately the balancing process between the values and interests at stake, thus reasonably restricting the petitioner's right to religiously express himself[168]. In sum, the Court recognized that, acting as an institutional agent of the state, being a military

---

[164] See KENDYL GREEN, Courts Rule Too Narrowly, cit. (nt. 137), p. 283.
[165] Goldman v. Weinberger, 475 U.S. 503 (1986).
[166] See KENDYL GREEN, Courts Rule Too Narrowly, cit. (nt. 137), p. 269.
[167] *Id.*, p. 270. In essence, underlying the prohibition, was the very idea that a public servant (military), as a representant of the state, could not use any garb or symbol that would possibility entail connection between the state and any religion.
[168] 475 U.S. 503, 510 (1986).

agent, Goldman could not fully exercise his right to religious expression, otherwise would imply an indirect affiliation of the state to a specific religious denomination.

Applying the abovementioned theoretical elements and methodological mechanisms to the hypothesis, the result would be similar to other already referred. Although the claimed religious accommodation would be desired as a form of furthering an intercultural dialogue between believers and non-believers in the context, ensuring Goldman's right to wear the *yarmulke* during his military service, religious freedom's essence, operating through the constitutional duty towards neutrality, reaffirms the correctness of the Court's decision on denying it[169]. Goldman, as long as in the military service, acts as a state agent, an institutional member of the state, thus having the exercise of his religious freedom submitted to some institutional-objective boundaries, even if it implies a prohibition to express his own religious beliefs, otherwise it would permit an act of (indirect) religious establishment, violating the First Amendment and weakening the entire constitutional order.

5. Conclusion

Religious freedom is a constitutional right that must be seriously taken. Religion, as a social factor and a value neutrally embraced by the constitutional order, must be balanced within the context of other constitutional and political elements, such as secularism, pluralism, democracy and other fundamental rights. Involving competing values and interests, moral and political claims seem to engender social disintegration and isolation within a democratic-pluralistic society. Nonetheless, these negative effects are nothing but a consequence of the misapplication of core theoretical elements and methodological mechanisms responsible for furthering an effective social-political integration process. More and more, the misleading comprehension over religious freedom's constitutional framework is leading society to an erroneous perspective on religion, comprehending it as a negative and conflictual social factor.

Across a theoretical approach, it can be appointed that the constitutional order of democratic-pluralistic societies naturally embraces in its spirit and structure core elements that, as long they be fully respected, the exercise of religious freedom can be transformed into a key element on the social-political integration process.

---

[169] It is noteworthy that, unfortunately, the Court, despite has affirmed the reasonableness of the military authority on the matter, did not reasoned in the form proposed here. See Dale E. Carpenter, Free Exercise and Dress Codes: Toward a More Consistent Protection of a Fundamental Right, *Indiana Law Journal*, Vol. 63, n.º 3, 1988, p. 608, contending that Goldman v. Weinberger "was decided on its own facts".

The theoretical elements and methodological mechanisms outlined above were offered as optimizing devices capable of actively yielding that process of integration, avoiding an institutional hermetic view on the multiple cultural-religious expressions in constant flow at the social religious market, mostly by blocking any social or cultural isolation. Throughout the analysis of some practical implications and offering some remarks on it, the decisions taken on the referred cases were at some point confronted with those theoretical-methodological approaches offered in this Article, whereby it could be observed that, at least in a theoretical sense, some results, if respected and fulfilled the indicated premises, could have led to different effects on religious freedom and its capacity to further social-political integration. In this sense, some short remarks can be outlined.

First, religious freedom's theoretical framework as a constitutional right must be properly comprehended, notably by acknowledging its broad constitutional protection, the objective boundaries that it must respect on its development process, the reciprocal limits it must face within the flow of constitutional rights, values, goods and interests, the important role played by proportionality test on controlling restrictions, and also the function of religious freedom's essence are all indispensable elements integrating this complex constitutional framework that need to be taken seriously; second, core elements within liberal constitutionalism emerge as substantial and formal channels throughout which the openness of the constitutional order is led to an optimal level, furthering the social-political integration process from inside towards outside; and third, as the proper method to enact and achieve this process, diatopical hermeneutics and the essence of fundamental rights, especially religious freedom's essence (nuclear-absolute content), rise as operational devices that simultaneously promote and serve as a threshold to the intended cross-cultural dialogue.

Detached from a specific constitutional order or text, the theoretical-methodological approach offered across this Article stem from the proper idea of liberal constitutionalism, assumed as an objective legal quantum that, be it implicit or explicit, is naturally bonded to the political structure of democratic-pluralistic societies. It is unchallenged that the theoretical-methodological approach and the practical remarks offered above constitute only a potential device and parameter to discuss the issue of social-political integration throughout religious practices and also to come up with concrete solutions to it. Nonetheless, it does not imply the automatic rejection of its plausibility mostly because religious freedom's constitutional structure seems to continue being misunderstood. Conversely, religious freedom must be respected and improved, notably through the operation of the referred theoretical elements and methodological mechanisms, avoiding that the balanced relation between the role of religion in society, constitutional rights and democracy be transformed in a mere chimera.