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Law and tensions between religious freedom and religious diversity in Brazil

Direito e tensões entre liberdade religiosa e diversidade religiosa no Brasil

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Abstract

Based on some examples drawn from empirical research, this article proposes to present, from the perspective of legal anthropology, the tensions between religious diversity and religious freedom in Brazil, especially concerning Afro-Brazilian religions. In conclusion, it argues in two correlated directions. The first insists that the ethnic-racial component has different weight and content in the context of specific demands. The second, in turn, highlights the fact that the law, here considered in a very restrictive way as the manifestation of judicial decisions, arbitrates in a contingent manner such tensions and, in doing so, participates in the shaping of religious freedom itself.

Keywords: Religion; Race; Anthropology of law; Empirical research.

Resumo

Com base em alguns exemplos retirados de pesquisas empíricas, este artigo propõe apresentar, sob a ótica da antropologia do direito, as tensões entre diversidade religiosa e liberdade religiosa no Brasil, especialmente no que diz respeito às religiões afro-brasileiras. Em conclusão, argumenta-se em dois sentidos correlacionados. O primeiro insiste em que o componente étnico-racial se reveste de peso e conteúdo diversos no contexto de demandas específicas. O segundo, por sua vez, realça o fato de que o direito, aqui considerado de forma mui restritiva como a manifestação de decisões judiciais, arbitra de modo contingencial tais tensões e, ao fazê-lo, participa da modelagem da liberdade religiosa propriamente dita.

Palavras-chave: Religião; Raça; Antropologia do direito; Pesquisa empírica.

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Introduction

In presenting my argument, I offer a statement that should no longer surprise anyone: religion is not confined to the "closet," the private sphere of individuals and groups, but rather resides in the public sphere, and this fact can generate tensions and challenges in various parts of the contemporary world.

Contrary to the predictions of secularization theorists who envisioned a decline of religion's public role in the wake of modernity, religions remain deeply significant to billions of people and continue to shape discussions and influence decisions on a wide range of social issues. These issues span from abortion and euthanasia to same-sex marriage and stem cell research, encompassing the education of children and adolescents as well as medical interventions and treatments.

The pervasive influence of religion in the public sphere extends far beyond the confines of the Global South, where the intertwined relationship between religion and political power is a well-established historical phenomenon. This influence is also deeply embedded within nations often touted as exemplars of democracy, such as the United States. This reality underscores the limitations of the "American exception" narrative, which emerged in the 1970s to describe the perceived resistance of the United States to the secularization trends observed in Europe. Instead, French sociologist Jean-Paul Willaime (2006) proposes the term "European exception," particularly in reference to France, to highlight the unique context of certain European countries where religions have been largely relegated to the margins of political discourse.

Although sociologists had reasons to believe in the gradual disappearance of religion, if we take into account the empirical data identified since the 1960s about the decline in the number of believers, the decrease in affiliation with creeds and church attendance, the thesis of secularization has not been confirmed on a global scale. On the contrary, it has become particularly problematic in Asian, African and Latin American contexts.

Thus, in the 1990s, some authors evoked the "return of the religious" (DORTIER; TESTOT, 2005), which helped to update the theme of secularization as a decline in the institutional predominance of churches, without necessarily implying a decrease in personal beliefs, according to the famous expression "believing without belonging", important to Gracie Davie (1990).

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Thus, years after defending the thesis of secularization, Peter Berger distanced himself from it, stating that "The idea that we live in a secularized world is false. Today's world, with a few exceptions (...) is as fiercely religious as it ever was; in some places, it is even more so" (2001, p. 15). For the author, the worldwide rise of sects, the growth of radical Islam, the Protestant evangelical movement and Catholic diplomacy represent a "desecularization" rather than a secularization.

In Brazil, the country I'm particularly concerned with, religions have always been part of institutional history, and the separation of Church and State that occurred in the late 19th century did not represent a necessary loss or reduction of their social importance (MONTERO, 2006).

The protection of religious freedom in Brazil has a long and complex history that cannot be fully explored here. For our purposes, it is sufficient to note that since the republican constitution of 1891, religious freedom has been enshrined as a comprehensive and unrestricted right for all creeds. Reaffirmed as a fundamental right in the 1988 Constitution, religious freedom[1] is now part of a context of pluralism in which various practices still struggle to be recognized as religious, especially those linked to African heritage and presence, such as Candomblé and Umbanda.[2]

Identified as part of the country's Afro-descendant culture, Afro-Brazilian religions struggle to be recognized in their "moral quality," as Paula Montero (1994) states.

Persecuted by the State for over two centuries, these religions remain, according to the scarce data available [3], the main target of religious intolerance in Brazil, especially in what has been coined as "attacks" by members of Pentecostal and Neo-Pentecostal churches (GIUMBELLI, 2007; MARIANO, 2007). This intolerance is recognized by some

[1] The Brazilian Constitution of 1988 enshrines religious freedom as a fundamental right for all individuals. Several articles within the Constitution specifically address religious freedom, including: Article 5, VI: Establishes the inviolability of freedom of conscience and belief, guaranteeing the free exercise of religious worship, as well as the protection of places of worship and their liturgies. Article 5, VII: Guarantees religious assistance in civilian and military institutions of collective internment. Article 5, VIII: Covers conscientious objection. Article 19, I: Establishes the separation of Church and State and allows for cooperation between them in the public interest. Article 150, VI: Prohibits the taxation of temples, goods, income, and services related to their essential purposes. Article 120: Establishes religious education as an optional subject in public schools of basic education. Article 226: Covers the civil effects of religious marriage.

[2] Afro-Brazilian religions are based on the worship of natural elements and the possession of the human body by spirits in a trance, in a mixture of beliefs tinged with Catholicism and animism. In Brazil, Candomblé and Umbanda are the two best known.

[3] On a national level, the Brazilian State has produced to date only one more comprehensive diagnosis of religious intolerance, carried out by the then Secretariat of Human Rights of the Presidency of the Republic and already obsolete (SDH - 2016). There is no, for example, a systematic study on the profile of complaints and ongoing and/or finalized processes about such violence, with the exception of scattered works (NICÁCIO, 2020; 2021).

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authors as an "epiphenomenon" or a "double" of racism (SILVA JÚNIOR, 2007; MIRANDA, 2021).

In a previous work, I demonstrated, in co-authorship, how racially and ethnically demarcated religions, which were denied recognition under the framework of past Catholic exclusivity, still struggle, under the current framework of pluralism, to obtain equal treatment from the State, especially in what concerns their official bureaucracies. The conclusion of this approach was that religious freedom, understood and operated in different ways by the state apparatus - and despite the legal affirmation of equality - contributes to the denial of religious diversity itself (MONTERO, NICÁCIO, VAGGIONE, 2021).

It is precisely in the wake of the aforementioned work that this reflection is inscribed, as a necessary continuation of research and analysis. Thus, based on this inscription and the general background data presented here, I will present below my current problem of interest, as well as some results already obtained.

What is the role of law in resolving tensions between religious freedom and religious diversity? To approach it, I start from at least three assumptions.

The first is that the assumption of an unrestricted legal framework for religious freedom, as seen in Brazil, may tend to enrich religious diversity. This, in turn, may tend to generate religious conflicts. I say "tendencially" because such statements are not normative, but need to be carefully observed in the light of social relations.

The second premise is that law, narrowly understood here as the decisions issued by courts, is an interesting place to examine the treatment of such tensions. Firstly, because judges, when judging, are pressured by decidability and must justify their decisions by taking a position; and secondly, because in doing so, they reveal the perceptions of what a legal order does or does not support and why.

The third premise, which also serves as an empirical framework, is that in Brazil, the relationships between religious and ethnic-racial diversity, on the one hand, and religious freedom, on the other, offer a very rich context for observing such tensions, whether from the analysis of long-term or current events.

Through the analysis of some judgments, intentionally identified in the media and collected from courts, I will then try to show that the justification of decisions in cases where there is an ethnic-racial component oscillates between positions that sometimes radicalize religious freedom, overriding it over other rights, sometimes shaping it more

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restrictively, containing it in relation to other rights. The ethnic-racial component, as we will see, thus assumes different weights in different cases, at the crossroads of numerous factors involved in the decision, and cannot be considered from the outset as what will inevitably determine the success or failure of the demand.

I will present this reflection in two distinct steps, starting by establishing some of the main characteristics of the long process that historically resulted in the hierarchization of religions in Brazil, as well as the place of race in this phenomenon (I) and, subsequently, with the presentation and analysis of some empirical cases that put into relation rights such as equality and freedom (II). I will conclude with some considerations about the relationship between the first and second steps, according to the prism of anthropology of law.

I – Recognition and social legitimacy of religions in Brazil: the problem of race

A substantial body of literature already established in Brazilian social sciences helps us understand how it has been possible throughout our history to hierarchize different religious practices. And how, even today, this type of hierarchy persists.

At the turn of the 20th century in Brazil, racialist thought imported from Europe played a central role in, on the one hand, organizing the bureaucratic apparatus of a newly independent country and, on the other hand, shaping the features of a national identity disassociated from colonial ties.

The task of elaborating sanitary and legal guidelines to control what was perceived as "deviance" and maintain social order in a country convulsed by the transition from Empire to Republic fell primarily to doctors, physicians, and law graduates.

The massive Black and mixed-race presence, until then considered a solution for forced labor on plantations, became a social problem once slavery was abolished and the problematic insertion of former slaves into free society took place.

The racial issue in Brazil was considered at that time as a matter of state, and it was urgent to whiten the population so that the new nation could finally establish itself as a viable project. An unusual and unlikely combination of liberalism, evolutionism, and social Darwinism, imported from Europe, was made by the Brazilian intelligentsia with this objective (SCHWARCZ, 1993). Individual autonomy and freedom should coexist with the

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postulate that, being inferior, some men would not escape the yoke and domination of those considered more apt and well-situated socially.

Black people were seen as an obstacle to social progress, and even more so than they, mixed-race people, understood as the result of racial degradation that corresponded equally to physical, intellectual, and moral degradation.

Not exempt from the evolutionist frenzy, the religious practices and beliefs of Black people were considered as inferior stages in the evolution of human rationality and often associated with magical thinking (MONTERO, 1994). In the author's critique, such thinking would still be considered today in a dualistic and simplistic way, as:

> [...] an archaic practice destined for disappearance. In this context, modernization would entail the expansion of an educational process capable of liberating the consciousness of the masses by inculcating more rational intellectual procedures for understanding the world. From this perspective, magical thinking would represent an obstacle to the flourishing of modernity and, more than that, a hindrance to the emergence of a truly democratic political citizenship (1994, p. 3).

In a study that analyzed how magistrates judged defendants accused of quackery and healing between 1900 and 1990, Ana Lúcia Pastore Schritzmeyer argues that judges made extensive use of positivist and evolutionist theories in their arguments to distinguish between magic, religion, and science. In the author's words:

> Any magical-healing practices that competed with official medicine and the dogmas of the Catholic religion, even if they caused no harm to anyone's health, were characterized as "cultural backwardness" to be vehemently fought against and overcome. Any dissonance with what was considered "evolved" was the object of persecution, and to define evolution and backwardness, theoretical aid was sought from evolutionary anthropology and positivism (2010, p. 138).

While the predominance of the Catholic Church made it difficult for other religions to be recognized as "authentic" in the Brazilian Empire, the issue of race seems to have posed an additional challenge to the beliefs of black people in the Republican era as well, hence the crucial role of religious syncretism for their survival.

In this sense, established literature explains Afro-Catholic syncretism as a form of cultural resistance of those beliefs (FERRETI, 1998; PRANDI, 2007). In addition to the expansion of religious freedom with the arrival of the Republic, the Catholic "mask" seemed decisive for its arduous and, still incomplete, social legitimization. Prandi affirms the relationship between Catholic hegemony and religious legitimacy in this way:

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> The oldest Afro-Brazilian religions emerged in the 19th century, when Catholicism was the only tolerated religion in the country and the primary source of social legitimacy. To live in Brazil, even as a slave, and especially later, as a free black person, it was essential to be Catholic above all else. Therefore, the black people who recreated the African religions of the orishas, voduns, and inquices in Brazil identified as Catholics and behaved as such. In addition to their ancestral rituals, they also attended Catholic rites. They continued to be and identify as Catholics, even with the advent of the Republic, when Catholicism lost its status as the official religion (2007, p. 16).

The denial of a "specific religious character" (FERRETI, 1998, p. 188) to Afro-Brazilian religions has persisted over time, reemerging in contemporary times in the persecution of their adherents by some neo-Pentecostal churches, in what is known, according to available literature, as "holy war" (SOARES, 1990). Still called "sects," "superstitions," "beliefs," "witchcraft," "sorcery," "animism," or "fetishism," Afro-Brazilian religions, from this perspective, must be fought against, as a testimony of faith of those who seek the "stubborn defense of the rescue and dissemination of beliefs and practices of primitive Christianity" (MARIANO, 2007, p. 129). Because they believe in an "agonistic relationship between God and the devil" (MARIANO, 2007, p. 129), it is then up to some of the faithful to fight "evil," embodied in the orishas of the pantheon of Afro-Brazilian religions.

This brief reconstruction brings us back to the general outlines of a long process, still underway, of demanding recognition and public acceptance of racially demarcated religions, of which the specific cases discussed below constitute the most recent pieces.

II – Diversity and Religious Freedom in the Light of Empirical Evidence

A partir de tal contexto, apresento alguns exemplos que, encontrados em minha pesquisa atual, ajudam, quero crer, a pensar o que qualifico como tensão entre diversidade religiosa e diversidade étnico-racial e liberdade religiosa.

From this context, I present some examples that, found in my current research, help, I believe, to think about what I qualify as the tension between religious diversity and ethnic-racial diversity and religious freedom.

Since I became interested in the topic four years ago, I have been looking at different places to try to identify and understand the main characteristics of this tension and, above all, the dynamics and role of law in relation to it.

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I began my research by analyzing police records related to discrimination and religious intolerance against Afro-Brazilian religions. Within the scope of this investigation, I identified the difficulty for the police system to understand such demands as relevant in the social context and, therefore, deserving of organized state intervention (NICÁCIO, 2020; 2021). In fact, there are very few cases that, having successfully passed through the police system, were the subject of subsequent legal actions. In other words, there is a bottleneck right at the entrance of the justice system, referring to police stations, where religious violence, especially against Afro-Brazilian religions, is systematically subjugated.

Due to its nature as an ethnography of documents, the research did not allow for a definitive identification of the reasons for this treatment. It is plausible to consider, however, that the difficulties in the institutional treatment of religious discrimination and intolerance by the bureaucracy of official counters are related to the persistent perception, still rooted, that Afro-Brazilian religions are not properly religions and that, for this reason, they are not covered by the protection of religious freedom.

In a second moment, I analyzed lawsuits related to the suspension or loss of custody of children by their mothers, against the backdrop of religious conflict between family members (NICÁCIO, 2022). I will focus on these actions from here on.

What exactly do these cases involve? Based on complaints from family members, especially fathers, then ex-spouses, or grandparents, aunts, or neighbors, mothers are taken to police stations and then to court on charges of violating the physical and moral integrity of their children by taking them to Afro-Brazilian religious services.

The justification for these complaints is the fact that, in these services, a type of initiation ritual may occur in which the person suffers small superficial cuts to the skin, called "scarification". Although they are not at all deep, the complainants refer to these cuts as "domestic violence by mothers against their children".

As a result of these accusations, there can be two legal consequences: in the criminal sphere, there may be a lawsuit against the mothers for bodily injury; in the civil sphere, and for the same reason, a lawsuit for suspension or loss of parental custody.

These court cases are protected by judicial secrecy and access to them depends, ultimately, on specific requests to the courts, for investigation purposes, and sensitive data must be preserved. Throughout my research, I became aware of at least one of these processes in its entirety, whose main characteristics I will briefly describe.

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A woman is reported by her ex-husband after he noticed small scars on her eleven-year-old daughter's shoulder. The child had told him about the religious ritual she had participated in with her mother. After taking the girl to the police station to examine her and finding small superficial scars on her skin, the father filed a complaint against his ex-wife, accusing her of violence against children, aggravated by family and gender relationships, in accordance with the Law Maria da Penha.

A decision was made in summary proceedings and the mother was prohibited from approaching the child until the merits of the case were heard. Two lawsuits were filed.

In a still very conservative judicial context, the criminal judge, upholding the mother's defense argument, surprisingly did not accept the charges, considering them to be the result of intolerance towards the mother's religion, summarily acquitting her. In addition, the magistrate stated that subjecting the child to a body examination at a police station would have caused more harm to her than the scarification itself.[4]

The defense argued that scarification is a "micro-incision that only reaches the surface of the skin, equivalent to a tattoo and much less invasive than the circumcision practiced by Jews and Muslims in the context of their religion"[5].

The judge criticized the fact that the girl was not interviewed during the police investigation, despite the fact that, according to the mother, they had attended religious services together for five years and the daughter had given her consent to do so.

> She participated with me in the sacred ritual. When I told her I was going to do the initiation, I explained what it was about, what it consisted of and how it would happen, asking her if she wanted to do it too. I never forced her to come. It was a joy, like a baptism in church. My ex-husband knew I had this belief, our own daughter told him.[6]

The Public Prosecutor's Office appealed the judge's decision, and the case is still pending. It is known that twelve months after the first instance judge's decision, the mother has still not been able to see her daughter. Although the criminal and civil proceedings are being conducted independently, it is reasonable to suppose that the appeal in the criminal sphere will not contribute to a favorable outcome for the mother in terms of suspension or loss of custody.

[4] Information taken from judicial proceedings under confidentiality.
[5] Information taken from judicial proceedings under confidentiality.
[6] Information taken from judicial proceedings under confidentiality.

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According to the Brazilian press, there are similar cases to what I have just described. I will return to your analysis later.

Alongside the aforementioned judicial process, the NGO Educafro, dedicated to the inclusion and defense of the interests of the Black population, sent two representations to the Public Prosecutor's Office (MP) and to the National Council of the Public Prosecutor's Office (CNMP) against the prosecutor who had accused the mother of injuries in the previous case. The NGO's argument was that he had acted with religious intolerance towards Afro-Brazilian religions. The representations also accused the prosecutor of the crime of racism, considering that his actions constituted "practicing, inducing or inciting discrimination or prejudice based on race, color, ethnicity, religion or national origin," prohibited by Law 7,716 of 1989 (Anti-Racism Law). In this case, the Public Prosecutor's Office and its National Council did not accept the representations, considering that the functional freedom of the prosecutor should prevail over the religious freedom of the accused mother.

In a third case, the Court of Justice of the State of Minas Gerais (TJMG) condemned the distribution of books containing offensive content towards African-origin religions in a public school. [7]. This case addressed the issue of religious freedom in a different light. Prompted by the expressions of civil society associations such as the "National Center for Africanities and Afro-Brazilian Resistance" and the "Unified Black Movement," the Public Prosecutor's Office filed a complaint against the Municipal Chamber of the capital city of Minas Gerais, which was required to withdraw from circulation the books it had acquired for free distribution in the municipal school network.

The prosecution's argument was that, although it was a work of fiction, the book portrayed African-derived religions in a harmful and discriminatory manner. In the work in question, such religions were associated with rituals and acts of malice and revenge. According to the Public Prosecutor's Office, the harmful and discriminatory effect was particularly amplified considering that the target audience of the distributed book were children in the early years of primary school.

[7] State Court of Justice of Minas Gerais, Case No. 1.0024.06.073260-9/001. It is noted that in Brazil, an important case regarding the distribution of offensive books towards Afro-Brazilian religions involves a public civil action filed by the Federal Public Prosecutor's Office against the founder of the Universal Church of the Kingdom of God, Bishop Edir Macedo, author of "Orixás, caboclos e guias: Deuses ou demônios?". For an exemplary approach to said action, especially regarding controversial stances of the judiciary and its judges, refer to: Santos Júnior; Monteiro, 2021.

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Once the books were collected and their redistribution prohibited by the municipal administration, the author of the work, dissatisfied with the decision, filed a lawsuit claiming damages to his right to freedom of expression. The lawsuit was unsuccessful, and the books ended up being withdrawn from schools. In their reasoning, the justices of the Court of Justice of Minas Gerais (TJMG) stated, in addition to the necessary protection of religious freedom, the cornerstone of the current social pluralism in Brazil, and finally, the duty to respect the secular nature of the State. I will return to these elements.

Considered together, the actions raise interesting points for analysis. In the first case, which involved private parties with necessary state intervention, concerning a minor victim, the mother's religious freedom to impart her beliefs to her daughter, as well as the daughter's religious freedom to choose her own beliefs[8], though acknowledged by the authorities, were overshadowed by the state's duty to protect the physical integrity of the child. In other words, according to the prosecution's argument, it was sufficient for the formally authorized conditions for criminal action to be present for the action to proceed, without deeper considerations regarding the specifics of the religious practice in question. Thus, the prosecutors were convinced of the violence committed by the mother against her daughter, considering the marks on the child's skin and the mother's admission that she had taken her to religious initiation.

[8] As stated earlier, religious freedom in Brazil is extensively protected for both adults and children and adolescents. Regarding this specific demographic, both domestic and international law provide provisions ensuring their right to religious freedom. The Statute of the Child and Adolescent (ECA) guarantees "[…] physical, mental, moral, spiritual, and social development in conditions of freedom and dignity," as stated in Article 3, and explicitly recognizes the right to belief and religious worship as aspects of the right to freedom in Article 16, III. This statute was further amended by Law No. 13,257, Article 22, expressly ensuring parents or legal guardians the right to transmit their beliefs. In a specific context, the Sinase law, the National System for Socio-Educational Assistance, mandates that the State provide religious assistance according to the beliefs of the individuals in its care, should they wish for it. Moreover, non-discrimination, including based on religious orientation, is a fundamental principle in the execution of socio-educational measures in Brazil (Law 12,954/2012, Article 35, VIII). Regarding children and adolescents living on the streets or in institutional care, several provisions in resolutions and technical guidelines from the National Council for Children and Adolescents' Rights (CONANDA) ensure respect for freedom of belief and religion. Regarding elementary education, the Guidelines and Bases of National Education Law of 1996 stipulates optional religious education while ensuring respect for religious diversity and prohibiting proselytism. Additionally, it emphasizes the right of parents and legal guardians to participate in defining educational proposals regarding religious instruction for their children.Internationally, under the UN Convention on the Rights of the Child (1989), ratified by Brazil, children's right to religious freedom is recognized. From a simple reading of these legal provisions, it is clear there is a direct connection between the religious beliefs and practices of children and adolescents and the rights of their parents or legal guardians. In other words, while children and adolescents cannot be prevented from holding their own beliefs and engaging in religious practices, parents and legal guardians also cannot be denied the right to guide their children religiously, whether toward a specific belief or none at all. This right is, in fact, a corollary of the duty of care.

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In his ruling, however, the judge immediately dismissed the possibility that, in that specific context, religious scarification constituted a criminal offense, stating the conduct was not criminal. Unconvinced of any violence or aggression, the judge had no choice but to uphold the protection of religious freedom for parents and children under national and international law, concluding that: "treating as criminal a citizen who lives by faith and acts according to the tenets of their religion is odious and blatantly unconstitutional"[9].

In responding to complaints to the Public Prosecutor's Office (MP) and the National Council of Public Prosecutors (CNMP), while defending themselves against accusations of religious intolerance, the prosecutors refuted the allegation. They asserted that the charges against the mother were not due to the initiation into Candomblé itself, but rather because of the minor and nearly imperceptible physical injuries inflicted on her daughter.

However, the prosecutors did not address the mother's argument about the unequal treatment of different religious rituals that may cause varying degrees of injury, such as circumcision in Jewish and Muslim traditions or ear piercings and enlargements typical in some indigenous communities. They also did not respond to the argument put forth by the criminal judge that these rituals are "symbols of sharing a collective identity and a sense of belonging to the group, through recognition by the community and integration into the whole"[10]. Indeed, this reasoning was further affirmed by the judge in the decision that ultimately acquitted the mother, citing the anthropologist Victor Turner, who stated that "the importance of ritual acts in different societies cannot be measured or quantified, as they are fundamental to the dynamics of the community"[11].

On the other hand, the issue of the defense regarding how to distinguish minor injuries, in this case, scarifications, from the religious initiation itself was not addressed by the prosecution either, especially considering what is deemed a common practice in other religions – circumcision and the consequent removal of the foreskin are again recalled – without any criminal proceedings being initiated or having occurred against its practitioners.

Furthermore, two factors are particularly notable in this case. The first pertains to the fact that Candomblé is referred to as a "sect" rather than a "religion" in the judicial documents produced by the prosecution, which brings us back to the already established

[9] Information taken from judicial proceedings under confidentiality.
[10] Information taken from judicial proceedings under confidentiality.
[11] Information taken from judicial proceedings under confidentiality.

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discussion in the literature regarding who classifies what as a religion, when, and for what reason (GIUMBELLI, 2001; 2016; 2017)[12]. The other element pertains to the fact that this case received extensive media coverage, with repercussions in various print newspapers and on the Internet. Although it is not possible to advance further considerations regarding this aspect, given the limitations of my analysis, the impact of intense media coverage on the consideration of facts by the justice system cannot be overlooked and may warrant more detailed examination in future research.

Finally, as mentioned above, the trial court's decision was appealed, and so far, the case has not had any further progress.

On the other hand, the accusations by the NGO Educafro against the prosecutor for alleged racism and religious intolerance were unsuccessful due to the argument that the action did not exceed the limits of his functional freedom and did not harm the religious freedom of the accused.

One can see here the clash between two diametrically opposed positions: on one hand, the prosecutor's religious intolerance, affirmed by the criminal judge in the first case; on the other hand, the non-recognition of religious intolerance and the affirmation of functional freedom by the Council of Prosecutors in the second case. I believe that the strength of the corporate element is essential in this confrontation, defending the power of action of an entire category. Additionally, the complaints against the prosecutor himself can be seen as a way to pressure the justice system, publicly expressing disapproval of positions potentially perceived as unequal treatment of religions. Filing complaints against the prosecutor means, in this sense, affirming that there is vigilance and mobilization around interests. The law also moves in this direction.

Regarding the third case, we see the balancing of two rights considered equivalent and non-hierarchical: freedom of religion and freedom of expression. In this case, it is interesting to note that the presence of children and their "best interest" is mobilized in

[12] Additionally, in international literature, there are works that warn about the difficulties of addressing religions through law, as well as their side effects. Speaking of the "legal construction of religions," Anna Su states that: "*Even if we accept that legal definitions cannot and need not fully capture the complexity of lived religion, used as they are in an entirely different normative enterprise, the danger is that judicial constructions of religion do not simply describe it. Religion never simply appears before the law. It is rendered visible and intelligible by the law, inside and outside the courts, in a way that is least in tension with the underlying majority culture. Thus legal constructions of religion establish a normative framework for regulating social and legal relations among those who might have different ideas and attitudes about religion and what exercises of it are entitled to legal protection. As a familiar complaint goes, such constructions more often than not incorporate particular social and cultural attitudes that might hew towards the preferred majority religion and culture, and disadvantage minority faiths*" (2016).

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a completely different manner. The judicial decision asserts that it is the State's duty to provide literature that supports the inclusive and pluralistic Constitution, rather than the opposite, with books that promote discrimination and interracial hatred. The protection of children, which in the first case was used in an argument that ended up being considered intolerant towards Afro religions, was here used to reinforce the practice of tolerance in public schools.

On a different line of reasoning, in the third case, it was not a relationship between private individuals as in the first, but rather between the public administration, a private individual—the author of the book in question—and civil society associations. I believe that the presence of organizations historically active in Brazilian society, such as the Unified Black Movement, as one of the actors in the process, tends to intensify the demand, as it transfers the request for recognition to a specific group rather than just an individual. This argument becomes more plausible when we compare this case with the numerous complaints of religious intolerance mentioned earlier, which have been indefinitely stalled in police stations.

Final Considerations

In conclusion, I would like to emphasize that the study of these cases was conducted through the lens of Bruno Latour's legal anthropology (2019), or as he himself described it, his "legal ethnology."

As it is not possible to dissociate law and society, according to this author, it is necessary to overcome both "externalist" and "internalist" positions that characterize the understanding of law by social sciences. Overcoming this dichotomy is only possible through an ethnography that pays attention to the materiality of law. Thus, his program of work proposes to examine the role and agency of authors; the different forms of legal practice impressed upon it; the authorities at play; the interests of the cases; the "medium" or foundation that links texts and cases; coherence; limits; and hesitations. Accordingly, according to Latourian criticism, a judgment cannot simply be seen as a "disguised ideology" (2019) or an automatic application of the law.

In his broader anthropology of Western forms of truth, Latour asserts the impossibility of believing in an abstract "truth," as it is something constructed through a

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series of processes that define "regimes of truth," whether scientific, religious, or legal. From this perspective, it is possible to believe in processes that produce truths. Law, as a particular mode of truth-making, or as a "thing" in Latour's words, although it suffers from a foundational problem by labeling as "law" what is legally grounded, can be observed and analyzed from its contingency.

Based on these theoretical tools, the analysis of the above cases shows that in justifying their decisions, judges and magistrates do not only adhere to unrestricted formalism internal to the system, or to interests and passions external to it. Indeed, such elements appear to constitute an effort for the decision to hold up amidst a series of other influential factors, such as the need for a reasonable position; the desire for prestige among peers; the rise of national and international standings; pressures from organized groups; ideologies and prejudices at play; influences from the media; or even the timing of the judgment in relation to the social moment. It is within this tangle, and not through blind adherence to strict formalism or dominant ideologies, that what Bruno Latour calls the "passage of law" (2019) occurs, wherein the law explicitly articulates how and why it will label as "legal" what it itself produces.

In these terms, Latour's theoretical framework helps us understand how law, beyond its character as an instituted norm where religious freedom is guaranteed in an equal and unrestricted manner, coexists with another dimension, an instituting one, which updates religious freedom based on numerous factors, including the dimension that ethnic-racial elements assume in different demands and in relation to other equally influential elements.

Thus, the hierarchy among different religions that existed in the past and to some extent persists today can be observed not only through an immediate and necessary return to what occurred, but also in light of updated relationships that are established punctually each time groups and individuals engage in the struggle for rights, in this case, religious freedom.

The separation between mother and daughter on grounds of bodily harm, for example, cannot be considered solely in light of the argument of unequal competition among different religions, but must also take into account a context where the rights of children and adolescents carry an undeniable weight in contemporary times, unlike any other moment in Brazilian institutional history. Such weight justifies, for some, the extreme and absolutely exceptional measure of separating children from their parents.

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On the other hand, the protection of childhood and adolescence, especially considering their importance for the inclusive and pluralistic future envisioned by the 1988 Constitution, must be ensured against intolerant conduct and attitudes opposed to pluralism itself, such as the distribution of books within the municipal network that promote interracial and interreligious hatred, given that "it must be taken into account that not all pluralism is emancipatory and dialogical" (CATTONI, REPOLÊS, PRATES, 2022, p. 47).

The mixed signals with which Afro-Brazilian religions are seemingly perceived from these examples can be interpreted not as a denial of the difficulty in being recognized and legitimized socially and within the state apparatus—after all, this would contradict numerous other data and studies that have long demonstrated their vulnerability in relation to other religions in a demonopolized and open religious market, especially considering the persistent reference to "demons," "evil," and "spells" that must be combated. These mixed signals appear to indicate only the complexity surrounding the struggle for rights in general and the right to religious freedom in particular.

Finally, as several recent issues confirm, as Paula Montero (2021) asserted, the "longevity, in Brazil, of a perception that shifts epistemologies from immanence to the realm of magic, rendering them unintelligible in their moral claims" (p. 58), analyses like the one I attempted to perform show that the sphere of religious freedom remains open and that the ethnic-racial component, although seemingly decisive, assumes different relevance in different cases under various influences and contingencies. Thus, religious and ethnic-racial diversities remain in tension while religious freedom is gradually delineated by state bureaucracies, decision by decision.

Translation

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References

BERGER, Peter. *Le réenchantement du monde.* Paris: Bayard, 2001.

CATTONI DE OLIVEIRA, Marcelo A.; REPOLÊS, Maria Fernanda S.; PRATES, Francisco de C. *Liberdades comunicativas.* 2ª edição, revista e ampliada. Belo Horizonte: Editora Conhecimento, 2022.

https://doi.org/10.1590/2179-8966/2023/72359i | ISSN: 2179-8966 | e72359i

DAVIE, Grace. Believing without belonging: is this the future of religion in Britain, *Social compass,* 1990, *37*, 4, p. 455-469.

DORTIER, Jean-François ; TESTOT, Laurent. Le retour du religieux, un phénomène mondial, 2005, *Sciences Humaines*, vol. 160, no. 5, p. 17-17.

FERRETI, Sérgio E. Sincretismo afro-brasileiro e resistência cultural, Horizontes Antropológicos, 1998, v. 4, n. 8, p. 182-198.

GIUMBELLI, Emerson. Liberdade religiosa no Brasil contemporâneo: uma discussão a partir do caso da Igreja Universal do Reino de Deus. *In:* KANT DE LIMA, R. (org.). *Antropologia e direitos humanos*. Niterói: EdUFF, 2001, p. 75-96.

GIUMBELLI, Emerson. Um projeto de cristianismo hegemônico. *In:* SILVA, V. G. da. (org.). *Intolerância religiosa:* impactos do neopentecostalismo no campo religioso afro-brasileiro. São Paulo: Edusp, 2007, p. 149-170.

GIUMBELLI, E. Regulação do religioso: discussões conceituais e panorama da situação em quatro países latino-americanos, 2016. *Ciencias sociales y religión* (Online), v. 18, p. 14-37.

GIUMBELLI, Emerson. A vida jurídica das igrejas: considerações sobre minorias religiosas em quatro países (Argentina, Brasil, México e Uruguai, 2017. *Religião e Sociedade.,* v. 37 (2), p. 121-143.

LATOUR, Bruno. *A fabricação do direito*. Um estudo de etnologia jurídica. São Paulo: Editora Unesp, 2019.

MARIANO, Ricardo. Pentecostais em ação: a demonização dos cultos afro-brasileiros. *In:* SILVA, V. G. da. (org.). *Intolerância religiosa:* impactos do neopentecostalismo no campo religioso afro-brasileiro. São Paulo: Edusp, 2007, p. 119-148.

MIRANDA, Ana Paula Mendes de. A "política dos terreiros" contra o racismo religioso e as políticas "cristofascistas", *Debates do NER*, Porto Alegre, ano 21, n. 40, p. 17-54, 2021.

MONTERO, Paula. Magia, racionalidade e sujeitos políticos, *Revista Brasileira de Ciências Sociais*, 1994, *9* (26), p. 72-90.

MONTERO, Paula. Religião, pluralismo e esfera pública no Brasil, *Novos Estudos*, Cebrap, 74, março 2006, p. 47-65.

MONTERO, Paula. Secularismo brasileiro à luz das categorias de "injúria" e "intolerância religiosa", *Debates do NER*, 2021, Porto Alegre, n. 40, p. 55-60.

https://doi.org/10.1590/2179-8966/2023/72359i | ISSN: 2179-8966 | e72359i

MONTERO, Paula; NICÁCIO, Camila S.; VAGGIONE, Juan Marco. Percepções da diversidade étnico-racial e religiosa no Brasil e na Argentina e suas expressões político-jurídicas, *Religião & Sociedade,* 2021, v. 41, n. 03, p. 99-126.

NICÁCIO, Camila S. A formalização da intolerância religiosa em registros policiais: retrato de um problema em (des)construção, 2020, *Contemporânea Revista de Sociologia da UFSCAR*, v. 10, p. 557-583.

NICÁCIO, Camila S. Intolerância religiosa no Estado de Minas Gerais: considerações a partir de uma pesquisa com boletins de ocorrências, 2021, *Revista Direito GV*, v. 17, p. 1-25.

NICÁCIO, Camila S. Liberdade religiosa de pais e filhos e criminalização das religiões: reflexões preliminares acerca de uma decisão judicial. *In:* III Seminário internacional de direito e religião da FDRP-USP (2022), *Anais do Seminário: Ambiente cultural, direito e religião: perspectivas femininas?* Ribeirão Preto: Faculdade de Direito da USP - Ribeirão Preto, 2022. v. 1. p. 9-21.

PRANDI, R. As religiões afro-brasileiras e seus seguidores,2007, *Civitas:* revista de Ciências Sociais, v. 3, n. 1, p. 15-33.

SANTOS JUNIOR, J. E. do., & MONTEIRO, L. M. (2021). A judicialização da intolerância religiosa: Um estudo do caso “Edir Macedo”. *Revista Direito E Práxis*, *12*(4), 2518–2541. https://doi.org/10.1590/2179-8966/2020/48487

SCHWARCZ, Lilia M. *O espetáculo das raças*. Cientistas, instituições e questão racial no Brasil 1870-1930. São Paulo: Companhia das Letras, 1993.

SCHRITZMEYER, Ana Lúcia P. *Sortilégios de saberes:* curandeiros e juízes nos tribunais brasileiros. São Paulo: Instituto Brasileiro de Ciências Criminais, 2004.

SCHRITZMEYER, Ana Lúcia P. O ensino da antropologia jurídica e a pesquisa em direitos humanos. *In:* NALINI, José Renato; CARLINI, Angélica Luciá (coord.). *Direitos Humanos e Formação Jurídica*. Rio de Janeiro: Forense, 2010, p. 137-153.

SECRETARIA DE DIREITOS HUMANOS (SDH), Ministério de Estado das Mulheres, da Igualdade Racial, da Juventude e dos Direitos Humanos. *Relatório sobre Intolerância e Violência Religiosa no Brasil (RIVIR)*, 2016.

SILVA JUNIOR, Hédio. Notas sobre o Sistema Jurídico e Intolerância. *In:* Silva, V. G. da (org.). *Intolerância Religiosa:* impactos do neopentecostalismo no campo-religioso brasileiro. São Paulo: EDUSP, 2007.

https://doi.org/10.1590/2179-8966/2023/72359i | ISSN: 2179-8966 | e72359i

SOARES, M. de C. Guerra Santa no país do sincretismo. *In.* LANDIM, L. (Org.) *Sinais dos tempos:* diversidade religiosa no Brasil. Cadernos do ISER. Nº 23, Rio de Janeiro. 1990, p. 75-104.

SU, Anna. Judging Religious Sincerity. *Oxford Journal of Law and Religion,* volume 5, pp. 28-48 (2016).

WILLAIME, Jean-Paul. La sécularisation : une exception européenne ? Retour sur um concept et sa discussion en sociologie des religions, *Revue française de sociologie* 2006/4 (Vol. 47), p. 755-783.

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