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ARTICLE SYMPOSIUM

RELIGIOUS FREEDOM WITHOUT EQUALITY? RELIGIOUS MINORITIES AND THE ESTABLISHMENT OF RELIGION IN ARGENTINA

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ABSTRACT

The Argentine Constitution contains two provisions regarding church-state relations. The first one recognizes the right of all people to the free exercise of religion. The second one provides that the state must financially support the Catholic Church. Based on this latter clause, over the years a complex regulatory scheme has been developed that differentiates that church from all the other churches and religions. Those differences are addressed in this article. The author argues that the religious establishment does not depend only on how the state defines itself (e.g., through a declaration in the constitution), but also on the way in which it treats people based on their religion. If that treatment is unequal—for example, when there are legal privileges only to a single church—then there is a kind of establishment of religion. It has been claimed that the religious establishment is not itself incompatible with religious freedom. In arguing that religious minorities can hold a different opinion, the author offers a brief account of the problems faced by non-Catholic faith communities in Argentina because of the state's unequal treatment. Finally, the author analyzes whether the reasons given to justify the legal differences between religions are acceptable. Otherwise, it could be said that there is discrimination—at least, in a broad sense—against religious minorities. While this article focuses on the Argentine case, the issues addressed are relevant to any country dealing with the unequal treatment of people based on their religion.

KEYWORDS: church and state, religious establishment, religious minorities, law and religion in Argentina, religious equality

INTRODUCTION

Too often, religious establishment systems are identified following statements on the matter made by the state. Thus, in many countries, the granting of privileges to one or more religions is accepted, even if this results in detriment to the others, within a so-called nonestablishment model. Usually, the favored religion is that followed by the majority of the population, and the disadvantaged religions are the minority ones. That is the case in Argentina. As in many other Western countries, the Constitution of Argentina has two provisions directly regarding church-state relations.[1] The first of these recognizes the right of all

1 When it is called "the church," as a representative of institutionalized religious power, it is a simplification, an abstraction from any particular religious denomination. On the contrary, Argentine scholars often use "the

people to freely exercise their religions. The other one stipulates that the state should support the Catholic Church financially. Based on this latter short clause, a complex regulatory scheme that distinguishes that church from all the other churches and religions has been developed.

This article describes the model of church-state relations in Argentina and addresses the following questions: Can one consider a legal framework of religious inequality, as in the Argentine case, as a kind of religious establishment? It has been argued that mere religious establishment is not itself incompatible with religious liberty, but is this also true from the viewpoint of disadvantaged religious minorities? And finally, are the reasons given to justify legal differences among religions good enough? If, on the contrary, they are unjustifiable, is it fair enough to say that they are thus discriminatory against religious minorities?

While this article focuses on the Argentine case, these questions—and their corresponding answers—are relevant to any country dealing with religious establishment rules within a framework of religious majority and minorities. The first section is devoted to the analysis of the current Argentine legal system of church-state relations, including a revision of the relevant constitutional clauses, and a proposal of the model for classifying that system. The second section addresses how the current legal system affects religious minorities. The third section discusses reasons commonly offered to justify the legal inequalities among religions and provides a critical assessment. Finally, the conclusion raises the need to ensure both religious freedom and religious equality.

A BRIEF OVERVIEW OF THE RELIGIOUS LANDSCAPE IN ARGENTINA

Before analyzing the system of church-state relations in Argentina, it is worth noting that in the last few decades, the religious landscape has been becoming increasingly complex and diverse. This is a major development in a region where—for centuries—there was a religious monopoly. Even subsequently, the religious hegemony of Catholicism continued to be strongly marked.

Only three official censuses in Argentine history inquired about the religious affiliation of the population, the first of these taking place in 1895. Previously, it was estimated that almost every inhabitant of Argentina was Catholic.[2] Although, doubtlessly, at that time the vast majority of the population was Catholic, even a brief analysis shows a tendency to magnify that proportion. In the census of 1895, for example, those who defined themselves as "Catholics" were included in that category, but so were those whom the census worker suspected to be Catholics, as were those who declared that they did not to belong to any religion.[3] On the other hand, the strong social resistance to religious dissidents impelled many to hide their religions, as has happened throughout history with Jewish people, and more recently with Muslims. The census question itself—"If you are not Catholic, to which religion do you belong?"—seems to imply that the natural thing was to be Catholic and that having another belief was anomalous. Not having a religious belief was not a possibility at all. In that context, the 1895 census revealed that Protestants represented 0.7

Church" to refer to the Catholic Church. In some contexts, it seems more appropriate to talk about "churches" as a way to highlight the plurality that is always at the base of the religious phenomenon.

2 Juan Gregorio Navarro Floria, "Derecho eclesiástico y libertad religiosa en la República Argentina" [Law and religion and religious freedom in the Argentine Republic], in *Estado, Derecho y religión en América Latina* [State, law, and religion in Latin America], ed. Juan Gregorio Navarro Floria and Carmen Asiaín Pereira, Colección Panóptico (Buenos Aires: Marcial Pons, 2009), 53–70, at 53.

3 Dirección General de Estadística y Censos de Buenos Aires, "La ciudad en los dos primeros censos nacionales" [The city in the two first national censuses], *Población de Buenos Aires* 4, no. 5 (2007): 77–94, at 79.

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percent of the population, while Jews accounted for 0.15 percent.[4] The same census revealed the presence of 37 Asian people, a suspiciously low figure. Among them there would be some "Mohammedans" (as the Muslims were then called), as well as some Buddhists.[5]

The question about religious affiliation was once again included in the 1947 official census.[6] Per its results, 2 percent of the population declared themselves Protestants, while 1.5 percent recognized themselves as Jews. The Muslim population remained very small (0.1 percent), while the intercensal growth of the Jewish community—as a consequence of migration policies—impressive. The last national census that included the question regarding religion took place in 1960.[7] Protestants grew proportionally with respect to the total, reaching 2.6 percent of the population. The proportional growth of Jews came to a halt, and in fact, decreased in relative terms to 1.3 percent. The Muslims continued to account for barely 0.1 percent.[8]

Henceforth, the question about religious affiliation was removed from the official census. Even so, more recent private surveys and polls have shown a constant decrease in the proportion of Catholics in the population. The last large-scale survey carried out on religious affiliation in Argentina confirms this trend.[9] To the question "What is your current religion?," the answers were Catholic, 76.5 percent; indifferent,[10] 11.3 percent; Protestant,[11] 9 percent (of which 7.9 percent were Pentecostal); Jehovah's Witness, 1.2 percent; Mormon: 0.9 percent; and other, 1.2 percent. It is interesting to note that members of religious minorities constitute, as a whole, 12.3 percent of the population. This figure increases to a remarkable 23.5 percent if the category "indifferent" is added. Beyond this significant diversity, it is undoubtedly true that a Christian culture "of a long historical thickness" prevails.[12]

The source of most recent data is a survey conducted by Pew Research Center in 2013 and 2014 in Latin America.[13] The results confirmed the existing trend: The number of people who identify themselves as Catholic (71 percent) continues to fall, while the proportion of Protestants (15 percent) increases. The unaffiliated have risen to 11 percent (including 6 percent without religious preference, 4 percent atheist, and 1 percent agnostic). Adherents of other religions constitute 3 percent.

4 Officially, "Second census of the Argentine Republic." It was carried out during the administration of President José Evaristo Uriburu.

5 Norberto Raúl Méndez, "El rol de las colectividades árabe/islámica y judía en la Argentina respecto del Medio Oriente (1947/2007)" [The role of the Arab/Islamic and Jewish communities in Argentina regarding the Middle East (1947/2007)] (PhD diss., Universidad Nacional de La Plata, 2008), 29.

6 Officially, "Cuarto censo general de la nación" [Fourth general national census]. It was carried out during the administration of President Juan Domingo Perón.

7 Officially, "Censo nacional de población, viviendas y agropecuario" [National population, housing, and agricultural census]. It was carried out during the administration of President Arturo Frondizi.

8 Various explanations have been offered about the gradual decrease in the number of Muslims: small base populations, small families, geographical isolation, marked imbalance between the genders (and the consequent mixed unions), assimilating pressure of the Catholic environment, schooling in Christian schools. For the period between 1947 and 1960, the reduction factors would be the same, exacerbated by the aging of the population, the intensification of assimilation, and the relative irrelevance of the migratory rate. Gladys Jozami, "La Argentina del Islam manifiesto" [The Argentina of manifest Islam], *Encuentro Islamo-Cristiano*, no. 314 (1998): 1–10, at 6.

9 Fortunato Mallimaci, *Primera encuesta sobre creencias y actitudes religiosas en Argentina* [First survey of religious beliefs and attitudes in Argentina] (Buenos Aires: CEIL-PIETTE, 2008).

10 Including agnostics, atheists, and people without religion affiliation.

11 "Evangelicals" in the original. It includes Pentecostals, Baptists, Lutherans, Methodists, Adventists, and the Universal Church of the Kingdom of God.

12 Mallimaci, *Primera encuesta*. (All translations from the Spanish are by the author.)

13 Pew Forum on Religion and Public Life, *Religion in Latin America: Widespread Change in a Historically Catholic Region* (Washington, DC: Pew Research Center, 2014).

The total proportion of population belonging to religious minorities is 18 percent, a figure that rises to 29 percent if the religiously unaffiliated are included.[14]

When considering the religious landscape in Argentina, at least brief mention should be made about the existence of a variety of indigenous religions and traditions that have been historically overlooked and neglected. In fact, the first heterodoxy to be fought by the Spanish conquerors in its effort to impose a religious monopoly was the religions of the original peoples. Using diverse methods and with varying intensity, these beliefs were suppressed. However, in many cases, it "did not mean the disappearance of indigenous religiosity, but its concealing, often in the form of syncretism with devotions proper to Catholicism, imposed by the conquerors."[15]

As a result of the extermination, the native peoples suffered, first from the Spanish conquest and afterward under the first Argentine governments. Their presence in Argentina is scarcer than in other Latin American countries. However, there are still at least eighteen aboriginal ethnic groups, among them the Kolla, Guaraní, Wichi, Toba, Mapuche, Quilmes, and the Huarpe.

Concerning the religion of native peoples, the former United Nations special rapporteur on freedom of religion or belief, Abdelfattah Amor, reported that "An official of the Department of Worship explained that indigenous peoples did not have their own religious structures, but did have spiritual and religious practices. He said that no application for recognition as a religious group had been submitted by the indigenous peoples to the Department of Worship, but that did not mean that they did not have their own religious identity."[16] This seems to be too simplistic an interpretation and quite detached from reality. As the human rights expert Waldo Villalpando explains, the problem is that the conception of the divine and the sacred of the native peoples is different from the scholastic doctrine: "In general, they do not adhere to the binary differentiation between spirit and matter and, instead, consider the cosmos is a whole, and the human being is part of it. That is why many indigenous peoples prefer to talk about worldview instead of religion."[17] Despite the current Christian predominance among the native peoples of Argentina, many maintain their worldview, their sacred places, and their ceremonies. In any case, it is a complex reality that is beyond the scope of the present work.

In sum, the religious landscape in Argentina shows there is no homogeneity in terms of religion. On the contrary, the majority religion coexists with various minority religions, as well as with other worldviews (like those of the native peoples) and an increasing number of people without religious affiliation. Despite the deep transformations in the religious composition of the Argentine society, the model of church-state relations continues being virtually the same as that of 1853, when the first federal constitution was enacted.

THE ARGENTINIAN MODEL OF CHURCH-STATE RELATIONS

There are probably as many theoretical models of church-state relations as observers of this relation. The reason for this is that any model implies several nondebatable assumptions. The current

14 According to the survey, 55 percent of those who identify themselves as Protestants were raised as Catholics, which shows the demographic transfer that has been taking place between these two religions.

15 Navarro Floria, introduction to *Estado, Derecho y religión en América Latina*, 11–16, at 12–13.

16 Abdelfattah Amor, *Civil and Political Rights, Including the Question of: Religious Intolerance. Addendum: Visit to Argentina*, E/CN.4/2002/73/Add.1 16 January 2002, 13–14, http://digitallibrary.un.org/record/464431/files/E_CN-4_2002_73_Add-1-EN.pdf.

17 Waldo Villalpando, *Hacia un plan nacional contra la discriminación: la discriminación en Argentina* [Toward a national plan against discrimination: discrimination in Argentina] (Buenos Aires: Inadi, 2005), 208.

state of the debate excludes, at least in modern Western democracies, the chance of any kind of *exclusive* religious establishment. The result is, at least in one extreme of the issue,[18] a discussion that focuses on the different forms of nonestablishment. In other words, what is debated is how much establishment can still be acceptable without affecting fundamental principles and rights.

Arguably, any system of church-state relations should meet, to follow the current concepts of human rights, at least three conditions: (1) some degree of separation between civil and religious powers, (2) basic respect for religious liberty, and (3) equality in religious affairs. Every nonestablishment system in Western democracies meets these criteria,[19] up to some point.

Naturally, there are no actual *pure* models. Instead, all legal systems, or some aspects of them, tend to one extreme or the other. These nuances have been presented in different ways: neutrality versus cooperation,[20] nearness versus equality,[21] and accommodation versus separation.[22] However, each of these distinctions is always viewed against the backdrop of religious nonestablishment, and these three conditions mentioned above are always taken for granted in nonestablishment models.

According to this theoretical basis, how to classify the Argentine model of church-state relations? Furthermore, what implications does this have for religious minorities in the country? To start answering these questions, it is necessary to briefly review the two main premises of Argentine constitutional model of church-state relations: section 2 of the Constitution, which demands that the government support Catholicism, and section 14, which guarantees the free exercise of religion to all inhabitants.

THE CONSTITUTIONAL STATUS OF THE CATHOLIC CHURCH

In the short clause that reads, "The Federal Government supports the Roman Catholic Apostolic religion," section 2 of the Constitution of Argentina swerved from its two most influential sources. It differs from the United States Constitution—the source of many other Argentine institutions[23]—which in the First Amendment states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." It also deviates from the other core source of inspiration for the constituents in 1853: Juan Batista Alberdi's constitutional draft.[24] Indeed, Alberdi had proposed that the constitution should state, "The Confederation embraces and adopts

18 In the other extreme, there remains the problem of the total exclusion of religion in society (not just the established religion), or its replacement by other ways of interpreting the world, for example humanist philosophy.

19 Winfried Brugger, "Separation, Equality, Nearness: Three Church-State Models," in "Nation, Identity and Multiculturalism: A Socio-Semiotic Perspective," ed. Anne Wagner, Le Cheng, Jixian Pang, special issue, *International Journal for the Semiotics of Law/Revue internationale de Sémiotique juridique* 25, no. 2 (2012): 263–81, at 265.

20 The cooperation system is sometimes known as "positive nonestablishment." See, for example, regarding the Spanish system, Alex Seglers Gómez-Quintero, *La laicidad y sus matices* [Laicité and its nuances] (Granada: Editorial Comares, 2005), 31.

21 Brugger, "Separation, Equality, Nearness."

22 Oscar Celador Angón, *Estatuto jurídico de los confesiones religiosas en el ordenamiento jurídico estadounidense* [Legal status of religious confessions in the United States legal system] (Madrid: Dykinson, 1998), 47.

23 Celso Ramón Lorenzo, *Manual de historia constitucional argentina* [Manual of Argentine constitutional history] (Santa Fe, Argentina: Editorial Juris, 1997), 252.

24 Juan Bautista Alberdi (1810–1884) is known as the "intellectual father" of the Constitution of Argentina. His work, particularly the book *Bases y puntos de partida para la organización política de la República Argentina*, is widely recognized as the main inspiration of the Constitutional Convention.

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the Catholic religion, and guarantees the freedom of the rest."[25] Clearly, Alberdi's clause added embrace of Catholicism to the state's adoption. In Alberdi's view, the first revolutionary government (1810) offered to respect all the privileges of Catholicism. However, by the time the Constitution was enacted, in 1853, it was necessary to continue establishing Catholicism as the state religion, but without excluding the public exercise of other Christian religions, in order to encourage immigration.[26] Nonetheless, the clause's definitive version did not include the word "embraces," which suggests that the Constitutional Convention chose a less binding formula for the religious establishment. Consequently, the "support" prescribed by the constitutional clause must be interpreted restrictively. It only implies state economic support for the Catholic Church. It does not mean, on the contrary, that the state is authorized to grant any other kind of privileges to that religion.[27]

The debate tone and the vote outcome (approved only by simple majority)[28] show that the final text of section 2 was a compromise. That was considerable progress considering the political conditions at the time. As a result, nowadays the government supports the Catholic faith but makes no profession of faith,[29] nor does it uphold the truth or falsity of any religious doctrine[30] or exclude

25 Juan Bautista Alberdi, *Bases y puntos de partida para la organización política de la República Argentina* [Bases and starting points for the political organization of the Argentine Republic] (Buenos Aires: La Cultura Argentina, 1915), 261. Unless otherwise noted, all translations into English are my own.

26 Agustín de Vedia, *Constitución Argentina* [Argentine Constitution] (Buenos Aires: Coni Hermanos, 1907), 42.

27 Many authors have opined thus, especially amid the liberals. Among others is, for example, Domingo Faustino Sarmiento, one of the most important intellectual figures of Argentina in the nineteenth century. Sarmiento says that "speaking of denominations, Catholic legislators do not choose between Protestantism and Catholicism. When one wants to establish a state official religion, with the exclusion or the admission of other religions, the legislator says clearly 'Catholicism is the religion of the state' … It only remains the economic question that arises from this statement." Domingo Faustino Sarmiento, *Comentarios de la Constitucion de la Confederacion Argentina, con numerosos documentos illustrativos del texto* [Comments on the Argentine Confederation Constitution, with numerous illustrative documents of the text] (Buenos Aires: Talleres Gráficos Argentinos de L. J. Rosso, 1929), 126–28.

The committee responsible for drafting this constitutional clause elaborated a report clarifying that "by this article it is the obligation of the federal state to maintain and sustain Catholic, Apostolic, Roman Church at the expense of the national treasury." Lorenzo, *Manual de historia constitucional Argentina*, 223.

The Supreme Court has also followed the same line of interpretation, deciding that Article 2 "is limited to privilege the Catholic Church in its relations with the state by, both supporting and providing economic protection for the expenses of that church, which would be paid by the National Treasury, included into its budget, and therefore subject to the authority of Congress … This interpretation of the scope and content that the constituents would wish the clause under examination had is corroborated by the fact that they swerved from the inveterate texts of the Provisional Statutes of 1815 and 1816, the Provisional Regulations of 1817, and the Constitutions of 1819 and 1826, which expressly established the Roman Apostolic Catholicism as the official religion of the state, by suppressing the expression 'adopt' used by Alberdi in his draft." Corte Suprema de Justicia [CSJN] [National Supreme Court of Justice], 2/9/1989, "Villacampa, Ignacio c. Almos de Villacampa, Maria Angelica," Fallos (1989-312-I-122) (Arg.) (General Attorney opinion, joined by the Court).

28 Eduardo A. Ibarra, *Congreso constituyente de 1852, Constitución de 1853* [Constituent Congress of 1852, Constitution of 1853] (Buenos Aires: Establecimiento gráfico Enrique L. Frigerio é hijo, 1933), 118.

29 Agustín de Vedia, *Constitución Argentina* [Argentine Constitution] (Buenos Aries: Imprenta y Casa Editora de Coni Hermanos, 1907), 42.

30 "[After] a bitter argument, it has come out as a result, as a compromise, that is, to regard Catholicism as a preferred religion by the state, that the state pays, but not as a religion that the state embraces, following perhaps the ideas of Royer-Collard, who said, 'since the state has no soul, it cannot have either religion.'" M. A. Montes de Oca, *Lecciones de derecho constitucional* [Constitutional law lessons], vol. 2 (Buenos Aires: Imprenta y Litografía La Buenos Aires, 1902), 135–36.

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the presence of other religions. In short, it is a mild form of religious establishment. There have been several attempts to modify section 2 since 1853, but without success.[31]

FREE EXERCISE OF RELIGION

Section 14 of the Constitution of Argentina contains a list of rights that the newly formed Argentine state recognized to its inhabitants at the time it was enacted in 1853. In this sense, the model of nineteenth-century constitutionalism, granting a catalog of first-generation civil and political rights, has inspired the Constitution,[32] which states, "All inhabitants of the Nation enjoy the following rights, under the laws that regulate their exercise; namely … to freely exercise their religion."

The conciseness of the section 14 clause on religious freedom, which simply states that inhabitants have the right to freely practice their religion under the laws that regulate their exercise, has originated a debate over the precise meaning of these words. Since the enjoyment and exercise of human rights are essential to confer on men and women the status of legal freedom into the political community, the right to freely exercise religion is identified as a basic freedom—namely religious freedom.[33] However, the identification between religious freedom and the right to free exercise of religion is not absolute and religious freedom is the broader, more comprehensive concept. In this vein, the Argentine Supreme Court has defined religious freedom as "a natural, inviolable right of the human person, whereby when it comes to religion nobody can be forced to act against his conscience, or prevented from acting according to it, both privately and publicly, whether alone or in association with others, within due limits."[34]

As a general rule, the freedom of worship has been identified as the outer side of the complex right called "religious freedom." The inner aspect, or freedom of conscience, implies a guarantee that there shall not be coercive interference in matters of human thought, either by the government or by others.[35] Therefore, freedom of conscience is a manifestation of freedom of thought on religious matters,[36] while freedom of worship is the free externalization of those religious beliefs

31 Arnoldo Canclini, *La libertad de cultos: historia, contenido y situación constitucional Argentina* [Freedom of religion: history, theme, and constitutional situation of Argentina] (Buenos Aires: Asociación Bautista Argentina de Publicaciones, 1987), 95.

32 Lorenzo, *Manual de historia constitucional*, 164.

33 Germán J. Bidart Campos, *Teoría general de los derechos humanos* [General theory of human rights] (México: Universidad Nacional Autónoma de México, 1989), 29–30 ("In the political-constitutional aspect, the legal freedom … is a status or situation of the person (and by projection, of society and human groups, in a broad sense) that, assuming free will, balances the dualism 'individual-state' … Every individual right is, somehow, a freedom, and so are used daily expressions like 'individual (or personal) freedoms' and 'public freedoms.' [Therefore, the] right to profess their religion amounts to religious freedom.").

34 CSJN, 6/4/1993, "Bahamondez, Marcelo S/ Medida Cautelar," Fallos (1993-316-479) (Arg.) (joint opinion of Justice Cavagna Martínez and Justice Boggiano, section 9).

35 *Manual de la Constitución reformada* [Manual of the reformed constitution], vol. 1 (Buenos Aires: Ediar, 1996), 151–52. Also, Humberto Quiroga Lavié, *Constitución de la Nación Argentina comentada* [The Argentine Nation Constitution, annotated] (Buenos Aires: Zavalía, 2000), 77; Gregorio Badeni, *Tratado de derecho constitucional* [Treatise of constitutional law], 2nd ed., vol. 1 (Buenos Aires: La Ley, 2006), 532; Montes de Oca, *Lecciones de derecho constitucional*, 119–20.

36 Although, freedom of conscience is not limited to the realm of religious beliefs, but it includes any type of strong intimate convictions. Dionisio Llamazares Fernández, *Derecho de la libertad de conciencia. Libertad de conciencia, identidad personal y solidaridad* [The right of freedom of conscience. Freedom of conscience, personal identity, and solidarity], 2nd ed., vol. 2 *Tratados y manuales* [Treatises and manuals] (Madrid: Civitas, 2002), 12.

through rituals and practices. In Argentina, the phrase "free exercise of religion" has been used in a comprehensive sense of both freedom of conscience and freedom of worship. It includes the freedom to believe (or not believe) certain metaphysical principles, and to externalize those beliefs freely, practicing religion without obligating any individual to practice a determined religion.[37]

Although the Constitution only briefly mentions freedom of worship, there is also an implicit protection of freedom of conscience, for there cannot be a religion not based on certain religious convictions.[38] Religious belief and practice of religion are two sides of the same coin. In fact, the Supreme Court has recognized this nexus between freedom of conscience and freedom of worship in many findings. Since 1983, coinciding with the restoration of the democracy in Argentina, the term "religious freedom" appears in the Court's case law covering the two aforementioned freedoms.[39]

The Supreme Court has recognized that religious freedom has its constitutional foundation in the clause in section 14,[40] which guarantees all inhabitants the right to freely practice their religion.[41] According to the highest court, the freedom of religion is particularly valuable, and humanity has achieved it through struggles and tribulations[42] so that this freedom is part of the pluralistic system of religions the Constitution has adopted.[43] The Court has also stated that religious freedom does not protect only members of a particular religion, but all "those who establish a hierarchy of their ethical values."[44] Therefore, the phrase "freedom of worship," seems more adequate than "freedom of cults," often used by scholars in Argentina to refer to the outer side of religious freedom, since the right to freely express religious beliefs belongs to the individuals and only indirectly to religious groups (sometimes called "cults" when it comes to religious minorities).

Religious liberty admits another distinction: it has positive and negative facets. The former involves the right to make all external acts of reverence, homage, worship, and participation in religious liturgy; the latter implies the right not to be compelled to participate in religious ceremonies, and that having no religious affiliation does not generate any prejudicial legal effect.[45]

37 Badeni, *Tratado de Derecho Constitucional*, 532.

38 Adolfo G. Ziulu, "La libertad religiosa en los 150 años de la Constitución Nacional" [Religious freedom in the 150th anniversary of the national constitution], *Jurisprudencia Argentina*, no. JA 2003 II 917 (2003): 917–42, at 920.

39 Norberto Padilla, "Derecho a practicar la propia religión: Argentina" [The right to exercise one's own religion: Argentina], in *La libertad religiosa en España y Argentina* [Religious freedom in Spain and Argentina], ed. Isidoro Martín Sánchez and Juan G. Navarro Floria (Madrid: Fundación Universitaria Española, 2006), 38–64, at 43.

40 CSJN, 5/8/2005, "Asociación De Testigos De Jehová c. Consejo Provincial De Educación Del Neuquén," Fallos (2005-328-2966) (Arg.).

41 CSJN, 21/9/1966, "Glaser, Benjamin Abel," Fallos (1966-265-336) (Arg.).

42 CSJN, "Bahamondez," Fallos (1993-316-479) (Justice Cavagna Martínez and Justice Boggiano, dissenting, section 8).

43 CSJN, 7/7/1992, "Ekmekdjian, Miguel Angel c. Sofovich, Gerado y Otros," Fallos (1992-315-II-1492) (Arg.) (majority opinion, section 27).

44 CSJN, 18/4/1989, "Portillo, Alfredo S/ Infr. Art. 44 Ley 17.531," Fallos (1989-312-496) (majority opinion, section 9). The Court added, "[T]he scope of possible state violence to the internal forum is expanded considerably, covering the not necessarily religious system of values on which the subject builds his own life project. A different interpretation would lead to contradiction to protect the right to freedom of religion, as a way of externalizing the right to freedom of conscience, and not address the latter as an object of protection on itself." This way, religious freedom and freedom of conscience seem to be mixed again.

45 María Angélica Gelli, *Constitución de la Nación Argentina: comentada y concordada* [Constitution of the Argentine nation: commented and annotated], 4th ed. (Buenos Aires: La Ley, 2008), 174.

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The Supreme Court has accepted this distinction. The Justices have declared that this negative side of religious liberty involves "the existence of a sphere of immunity from coercion on the part of individuals and groups and the public authority. This excludes absolutely any state interference that may result in the forced choice of a particular religious belief, thus restricting the free adherence to the principles in conscience to be correct or true."[46] As for the positive face of religious liberty, it is "an area of legal autonomy that allows men to act freely regarding their religion, having the government no legitimate interest thereon, as long as such action does not offend, appreciably, the common good."[47] Such autonomy is extended to religious groups, "which also imports the right to establish their own rules, not bearing restrictions to the free choice of its authorities, nor prohibitions in the public profession of their faith."[48]

This raises the interesting issue of how to respect the positive freedom of the majority of society and, at the same time, recognize the rights of minorities who do not share those beliefs. In Argentina, the most contentious issues have arisen when the use of public space is at stake.[49] In a democratic, pluralistic society, the conflict arising from the exercise of the positive freedom of some and the negative freedom of others "cannot be resolved through the principle of the majority, because the fundamental right to freedom of beliefs involves, in a special way, respect for minorities."[50] In such circumstances, therefore, the negative freedom of minorities should be preferred.

HOW TO CLASSIFY THE ARGENTINE MODEL OF CHURCH-STATE RELATIONS

Scholars have discussed extensively how to classify Argentina's system of church-state relationships. As mentioned, the Constitution itself is ambiguous when defining that system.[51] Naturally, that classification depends on the typology applied and the criteria on which that model is based. As a general rule, in Argentina the paradigms usually proposed only took into consideration the state's relationship with the majority religion, that is, the Catholic Church. Some scholars argue that Catholicism is established as an official religion in Argentina. Others claim there is a "moral union" between the Argentine state and the Catholic Church. Others say that there is a separation of church and state, but with the state's obligation to financially support the majority religion.[52]

46 CSJN, 6/4/1993, "Bahamondez, Marcelo S/ Medida Cautelar," Fallos (1993-316-479) (Arg.) (joint opinion of Justice Cavagna Martínez and Justice Boggiano, section 9).

47 Ibid.

48 Ibid.

49 In Argentina, Catholic religious symbols are often placed in public spaces, from squares and boulevards to schools, hospitals, and courthouses. When challenged about this issue, a then minister of justice opined that "the presence of Christian religious symbols in public buildings reflected the continuing existence of traditions, but did not constitute discrimination." Amor, *Civil and Political Rights*, section 61, p. 12. The only time the issue has been analyzed by the Supreme Court was in a case in which the Court itself was sued in order to remove a statue of the Virgin Mary placed in the Courthouse. The Justices decided to remove the statue by an administrative decision, and then in the ruling of the case they found that it was no longer necessary to decide on the constitutionality of the matter. CSJN, 21/11/2006, "Asociacion por los Derechos Civiles y Otros c. Poder Judicial de la Nación," Fallos (2006-329-IV-5261) (Arg.).

50 Gelli, *Constitución de la Nación*, 177–78.

51 Diego Lerena Rodríguez, "Principios reguladores del derecho eclesiástico de la República Argentina" [Regulatory principles of law and religion in the Argentine Republic] (PhD diss., University of Barcelona, 2008), 182.

52 For an overview of different classifications proposed, see Montes de Oca, *Lecciones de Derecho*, 121; Bidart Campos, *Manual de la Constitución* 1:147–48; Carlos María Bidegain, *Curso de derecho constitucional* [Constitutional law course], 2 (Buenos Aires: Abeledo-Perrot, 1995), 109; Ziulu, "La libertad religiosa," 2;

Many of the proposed typologies are inadequate to represent the variety of existing systems. In brief, they fail to establish the precise criteria for distinguishing between different models, or if they do distinguish between models, they do so in a highly generic way. This difficulty in classifying the Argentine system can be overcome by using a model that is for one part more comprehensive, meaning it covers the widest possible situation, and also more accurate regarding the definition of the essential elements that belong in each category.[53]

The typology may be summarized as follows: There are three types of state, the ideologically *monistic*, the ideologically *dualistic*, and the ideologically *pluralistic*. The *monistic* state is one where there it is an official truth, from which no dissent is allowed. As a result, intolerance and dogmatism prevail. In this kind of state, only two models of relations with religion are possible: the *identity model* and the *exclusivity model*. In the identity model, there is no differentiation between religious power and political power, so it cannot properly be relations between church and state. When the dominant pole in the binomial is the religious power, it is *a* theocracy; when it is political power, it is Caesaropapism. Exclusivity is the other possible model. There, one pole has a negative view on the opposite pole. Consequently, both battle until one prevails over the other. Thus, it leads either to a persecuting state, or to an excommunicating church, that is, a church that excommunicates the state.

The ideologically *dualistic* state is one where reality is considered to be composed of two elements that are irreducible to one or other. These elements, church and state, have respective areas of autonomy, and limits are hard to demarcate that lead to disputes. If the dispute is resolved in favor of religious power, it is a *confessional state*. If, on the contrary, political power prevails, it is a *state church*. In any case, both autonomy and subordination combine to different degrees. If subordination prevails, the system approximates the identity model already outlined. In both submodels, the state adopts an official dogma, and therefore dissent and unbelief are negatively valued. Within the category of confessional state, there is a variation called a *historically*, or *sociologically*, *confessional state*. It is a form of tempered religious establishment, where the preference for one religion does not imply the exclusion of other beliefs (or disbeliefs). In general, this sub-model is based either on the idea that the state's preferred religion is the faith of the majority of the population, or that religion has contributed to the formation of the national identity. This preference implies granting the favorite church certain privileges that other religions do not receive. Nevertheless, it is sometimes a gradual transition from a pure confessional state to a neutral one.

Finally, there is the ideologically *pluralistic* state. In it, there is no absolute truth. This coexistence is based on mutual tolerance and consensus. The diversity is not understood as a necessary evil but as a substantive value. The institutions are at the service of individuals, and not vice versa. In this framework, the model that prevails is the *neutral state*. The term neutrality does not mean indifference to religion; it is an indication of impartiality towards the plurality of religious

Navarro Floria, "Derecho eclesiástico y libertad religiosa en la República Argentina," 58; Padilla, "Derecho a practicar"; de Vedia, *Constitución Argentina*, 440.

53 Erik Wolf, *Ordnung Der Kirche: Lehr—Und Handbuch des Kirchenrechts auf ökumenischer Basis* [Order of the church: teaching and handbook of ecclesiastical law on an ecumenical basis] (Frankfurt: V. Klostermann, 1961). The analysis model proposed by Wolf is more complex. I have taken here only the elements that were necessary for this work. Llamazares Fernández has introduced Wolf's model to Spain. See Dionisio Llamazares Fernández, "Principios, técnicas y modelos de relación entre estado y grupos ideológicos religiosos (confesiones religiosas) y no religiosos" [Principles, techniques, and models of relationships between the state and religious ideological (religious confessions) and nonreligious groups], *Revista de estudios políticos*, no. 88 (1995), 29–61; and Llamazares Fernández and Llamazares Calzadilla, *Tratados y manuales* [Treatises and manuals], 57–180.

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manifestations. It means that the state ensures equal legal treatment for believers of all religions (majorities and minorities) as well as for those who do not have religious beliefs.

Under the proposed scheme, Argentina probably classifies as a *historically and sociologically confessional state*. In fact, scholars coincide in pointing out that there were two main reasons for giving the Catholic Church a privileged place in the Constitution: the church presence before the federal state organization, and the enormous social participation of Catholicism in the times the Constitution was enacted.[54] The characteristics that define the sub-model can thus be observed: the existence of legal privileges granted to a particular religion on the basis of historical and sociological reasons, tolerance to other religions, and the tension between autonomy and subordination that have governed the relationship between the state and the church throughout the national history. This tension also explains the calculated ambiguity[55] of the Constitutional Convention in addressing the issue of religion in the Constitution's text. The Congressmen tried to preserve the prerogatives of the Catholic Church while putting them under state control in certain aspects, and at the same time offered tolerance to religious minorities. It is a model of religious freedom without religious equality.[56]

THE STRUGGLES OF RELIGIOUS MINORITIES

It could be argued that if there is religious freedom for all the people, then granting some benefits to a particular religion and denying them to others should not pose a problem. However, it should be emphasized that without equality there cannot be complete freedom. Arguably, at some point, religious freedom and the right to equality without discrimination based on religion are virtually interchangeable.[57] Therefore, when the Constitution of Argentina attempts to offer full freedom in a framework of inequality, it falls into a contradiction.

The list of inequalities on religion in Argentina's statutory law is extensive. Beginning with the aforementioned section 2 of the Constitution, which provides direct funding to the Catholic Church by the state, and continuing with a long list of regulations, inequality is evident.[58] Here are some cases worth noting as examples. The Civil Code specifies that the Catholic Church is a "public legal entity," while other churches are "private legal entities."[59] That means that the former are granted certain privileges that the latter are not. Additionally, there are many governmental orders—most of them enacted during the various military dictatorships—granting benefits exclusively to the Catholic Church. Among other grants, for example, is a lifetime allowance for priests of certain ecclesiastical hierarchies equivalent to a percentage of what a trial court judge of the city of

54 Lerena Rodríguez, "Principios reguladores del," 165. In the same vein, Alejandro Gancedo, *Reformas á la constitución nacional* [Amendments to the national constitution] (Buenos Aires: Coni Hermanos, 1909), 9–10.

55 The idea of "calculated ambiguity" to the Argentine Constitution has been taken from Seglers Gómez-Quintero, *La laicidad y sus matices*, 11.

56 Ziulu, "La libertad religiosa," 2.

57 Pierre Bosset, "Les fondements juridiques et l'évolution de l'obligation d'accommodement raisonnable" [The legal foundation and the evolution of the duty of reasonable accommodation], in *Les accommodements raisonnables: quoi, comment, jusqu'où? Des outils pour tous* [Reasonable accommodations: What, how, how far? Tools for everyone], ed. Myriam Jézéquel (Cowansville: Yvon Biais, 2007), 15.

58 Juan Cruz Esquivel, "Cultura política y poder eclesiástico: encrucijadas para la construcción del estado laico en Argentina" [Political culture and ecclesiastical power: crossroads for the building of a secular state in Argentina], *Archives des Sciences Sociales des Religions* 54e, no. 146 (2009): 41–59, at 51–52.

59 Cod. Civ., arts. 146(c), 148(e).

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Buenos Aires receives;[60] a monthly allowance to archbishops and bishops equivalent to a percentage of what a trial court judge of the city of Buenos Aires receives;[61] a monthly allowance to parsons or bursar vicars of parishes located in border areas;[62] a lifetime monthly allowance for secular Roman Catholic priests who are not under any official social security system;[63] the same monthly allowance for vicar capitulars and apostolic administrators acting as interim in any of the positions expressed in Decree-Law 21.950;[64] the federal government's support for the training of clergy emerged from the native population;[65] the granting of free airfare for those cooperating with the apostolic purpose of the Catholic Church, either clergy or lay;[66] the inclusion of the ecclesiastical hierarchy of the Catholic Church among the beneficiaries of the official passport,[67] along with members of the legislative and judicial branches of the federal government.

The other religious communities and groups do not receive direct support from the state or have any other kind of privileges similar to those granted to the Catholic Church. They are granted different types of tax exemptions; nonetheless, this is not in fact because of their religious activities, but because they are nonprofit associations according to the law. In that sense, they receive the same benefits other types of cultural, sports, or social associations receive. In fact, Executive Decree-Law 21.745, enacted during the military dictatorship in effect in 1978, provides a double registration system, which makes the process all the more difficult for religious associations than for other types of entities because they are required to register in the National Cults Registry to obtain the private nature legal entity status.

As I stated earlier, the Argentine constitutional system is a model of religious freedom without religious equality.[68] Those who stand for this system of *freedom without equality* do not find a contradiction between this denial of equality and the principle of nondiscrimination.[69] Meanwhile,

60 Executive Decree-Law 21.540 (1982), http://servicios.infoleg.gob.ar/infolegInternet/anexos/65000-69999/65159/norma.htm.

61 Executive Decree-Law 21.950 (1979), http://servicios.infoleg.gob.ar/infolegInternet/anexos/195000-199999/196543/norma.htm.

62 Executive Decree-Law 22.162 (1980), http://servicios.infoleg.gob.ar/infolegInternet/anexos/195000-199999/196334/norma.htm.

63 Executive Decree-Law 22.430 (1981), http://servicios.infoleg.gob.ar/infolegInternet/anexos/60000-64999/64612/norma.htm.

64 Executive Decree-Law 22.552 (1982), http://servicios.infoleg.gob.ar/infolegInternet/anexos/195000-199999/196684/norma.htm.

65 Executive Decree-Law 22.950 (1983), http://servicios.infoleg.gob.ar/infolegInternet/anexos/195000-199999/196519/norma.htm.

66 Executive Decree 1.991 (1980), http://servicios.infoleg.gob.ar/infolegInternet/anexos/195000-199999/196414/norma.htm.

67 Executive Decree, 1.636 (2001), http://servicios.infoleg.gob.ar/infolegInternet/anexos/70000-74999/70788/norma.htm.

68 Thus, for instance, Justice Borda has said that there was no inconvenience in granting special benefits to Catholic seminarians and ministers—but not to those from other religions—as the equality before the law "does not apply to religious matters, since the Constitution gives preeminence to the Catholic religion." *Glaser*, Fallos (1966-265-336) (Borda, J., dissenting, in part).

69 "When we say that there is religious freedom but not religious equality, we are far from understanding that the Constitution provides an arbitrary discrimination regarding religious freedom of non-Catholic people and communities . . . . 'Non-equality' of religions and churches, without restricting the right to religious freedom on a strict basis of equality among all people and communities, only means that the relationship between Argentina [state] and the Roman Catholic Church is different than that between Argentina [state] and other religions and churches, because it has a special recognition. Hence, we have previously referred to 'preeminence.' Could it possibly be expressed through the Latin adage '*primus inter pares*'?" Bidart Campos, *Manual de la Constitución*, 148.

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Argentine religious minorities, especially Protestant churches, have repeatedly claimed that this system is discriminatory. According to the report by Abdulfattah Amor, then United Nations special rapporteur on freedom of religion or belief, "problems are raised by the religious minorities, or at least some of them, relating mainly to the principle of equal treatment."[70] The core of this complaint usually points to two facts: (1) the inequality caused by the direct financial support that only the Catholic Church receives, and (2) the differential legal status it enjoys. As mentioned above, Argentine law provides that the Catholic Church is a "public nature legal entity," while other religions must organize themselves as "private nature" associations.[71] This entails that only the latter are subject to a state registration and control system. For minority religions, the law provides a double registration system, one religious and one civil, which makes the process even harder for religious associations than it is for other types of organizations.

The aforementioned problem regarding the recognition of the legal status of minority religions is closely related to the artificiality of the legal structure required by law. Argentine law requires minority religions to organize their internal structures according to a specific pattern characteristic of certain civil organizations, but not necessarily according to the way they might consider appropriate. As a result, even if they can obtain their registration, the bureaucratic path they have to go through generates distortions that affect the normal enjoyment of the right of religious freedom to its full extent.

Another difficulty of the current system of freedom without equality is related to the obstacles for minorities to provide spiritual assistance in some spaces. Religious assistance refers to the state regulation of church services offered to people who are interned in places such as prisons, hospitals, and military facilities. Three elements define the religious assistance. First, the direct link between the service and the religious freedom. Second, the public nature of the places. Thirdly, the inmates' inability to leave, which makes it necessary that the public authorities facilitate the exercise of religious freedom in situations such as military discipline, illness, or deprivation of liberty.[72]

Inequality is also shown here, as Catholic groups and ministers have better chances to provide religious assistance in public spaces than other religions. It should be noted that religious assistance is not denied, but such assistance is institutionalized around the Catholic Church. Chaplains of different government agencies, including military facilities, penitentiaries, and hospitals, are Catholic priests, as a general rule, while ministers and followers from other religions can only access these places following a visiting schedule. It is therefore not surprising that "one of the frequent claims of the Protestant religions" is "for ministers not only to have access to hospitals and jails as required by their followers but also to have chaplaincies like the Catholic ones."[73] Other issues

70 Amor, *Civil and Political Rights*, section 138, p. 30; see also sections 139–58, pp. 30–34.

71 Amor, *Civil and Political Rights*, sections 139, 141, p. 30. Thus, it creates a bureaucratic control of the registrations, which (along with the arbitrary actions of other state officials, such as the police), may hinder or obstruct the daily activities in temples and churches. Alejandro Frigerio and Hilario Wynarczyk, "Diversidad no es lo mismo que pluralismo: cambios en el campo religioso argentino (1985–2000) y lucha de los evangélicos por sus derechos religiosos" [Diversity is not the same as pluralism: changes in Argentina's religious field (1985–2000) and the evangelicals' fight for their religious rights], *Sociedade e Estado* 23, no. 2 (2008): 227–60, at 249. The enactment of the new Civil Code in late 2015 is supposed to change the registration system. Nonetheless, the Civil Code continues to be unregulated in this regard, and there is no certainty about how the new system will be. Chances are that the minority churches registration system continue to exist.

72 José María Contreras Mazario, *El régimen jurídico de la asistencia religiosa a las fuerzas armadas en el sistema español* [The legal regime of religious assistance to the armed forces in the Spanish system will] (Madrid: Ministerio de Justicia, 1989), 53.

73 Padilla, "Derecho a practicar," 52.

intensify inequality, but these examples should suffice to make a statement that there is different treatment between the majority religion and the minority religions.

REASONS FOR LEGAL INEQUALITIES

Historical and Sociological Grounds

An unequal system of this nature must be somehow justified because failing to justify the inequality amounts to admitting unfair discrimination. The reasons that have been offered to support these inequalities can be summarized in two kinds: the *historical* and the *sociological* ones. Regarding the historical reasons, it has been said that the privileged position of the Catholic religion is due to the fact that Catholicism had been established on Argentine territory even before the creation of the modern state called the Argentine Republic. Therefore, it is concluded that the state cannot affect rights and interests acquired by the Catholic Church.[74] This is a very weak argument: following this very reasoning, the rights of the monarchy or slave traders should still be in force. Society changes, rights evolve, and legal institutions should undergo these changes. There is a stronger argument in favor of state subsidies to the Catholic Church. Traditionally, it has been argued that the direct funding is compensation for the confiscations to the Catholic Church during the first years of the Argentine independence.[75] In fact, during the administration of President Bernardino Rivadavia (1821–1824), a fair amount of Catholic property, mainly in Buenos Aires, was confiscated.

Nevertheless, although the expropriations by Rivadavia occurred, it is not clear how that justifies the state subsidy to the Catholic Church.[76] This thesis has several weak points. The contemporary church historian Ricardo Di Stéfano[77] has noted some of them. His objections to this opinion—in the light of which, by the way, many generations of clerics and lawyers have been

74 Lerena Rodríguez, "Principios reguladores," 165; Gancedo, *Reformas*, 9.

75 This is the explanation given by the national authorities to the concern raised by the Human Rights Committee regarding the preferential treatment granted to the Catholic Church in relation to other religious denominations. At that time, the Committee expressed its concern about "'[t]he preferential treatment, including financial subsidies, accorded to the Catholic Church over other religious denominations constitutes religious discrimination under article 26 of the Covenant'" (as quoted in Amor, *Civil and Political Rights*, section 57, p. 10). In this regard, both the then president and the then secretary of religious affairs explained that "[s]uch subsidies are historically justified because they compensate the Catholic Church for the nineteenth century confiscation of most of its property and income." Amor, section 57, p. 11.

76 The theory that the budget item currently assigned to subsidize the Catholic Church comes from the confiscations in the early nineteenth century seems to arise from a mid-twentieth-century book by Enrique Udaondo. In that work, Udaondo calculates the value the properties expropriated to the cathedral and several convents by the Buenos Aires government would have had in 1949, to conclude that there is a debt of the federal state with the Catholic Church. He eventually states "The origin of the religious budget item is known: the [Catholic] Church had its own assets and resources. Rivadavia took the real estate of the church, which value was very high, and on December 21, 1822, he abolished those resources, the tithes. . . . Therefore, the religious budget item is not charity, but duty." Enrique Udaondo, *Antecedentes del presupuesto de culto en la República Argentina* [Background of the budget of worship in the Argentine Republic] (Buenos Aires: San Pablo, 1949).

77 Roberto Di Stefano, "En torno del presupuesto de culto y sus raíces históricas" [About the budget of worship and its historical roots], *Revista Criterio*, no. 2366 (2010), https://www.revistacriterio.com.ar/bloginst_new/2010/12/06/en-torno-del-presupuesto-de-culto-y-sus-raices-historicas/. There is another element that is essential to define the inappropriateness of keeping the economic support of Catholic Church based on historical reasons. The Catholic Church goods confiscated by the Buenos Aires province's government were of little value. In fact, the set of all goods that different Catholic institutions possessed in the Río de la Plata at that time were very modest.

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trained—can be summarized as follows: Firstly, expropriations did not affect the Catholic Church in Argentina, as claimed, but only the Catholic Church in Buenos Aires, which was only partly affected. For example, only some local ecclesiastical institutions were expropriated. Secondly, the reforms imposed by Rivadavia to these institutions had a disparate impact. It affected the cathedral clergy, the parish clergy, and the religious orders to different extents; while it damaged some of them, others were benefited by this action (which, for instance, abolished tithes but offered to pay the wage of some priests in exchange). Thirdly, at the time the ecclesiastical property was confiscated, there was no federal state,[78] nor Argentine Catholic Church, but rather a group of Catholic institutions quite independent one from each other. Finally, ecclesiastical institutions affected by confiscation were never financially independent from the king or from the patriotic government that followed. On the contrary, they always needed government assistance to survive.

Di Stefano concludes that the state subsidy to the Catholic Church was not the result of Rivadavia's reform but was linked to the right of patronage (then held by the state) which was abrogated many years ago. However, even when the economic support could be grounded, whether in the government confiscations or in the official patronage, it remains unclear how any of those reasons would justify other inequalities, such as the different legal entity nature and the access to state chaplaincies.

Regarding the sociological reasons, they are based on the "catholicity" of society, for example, in the fact that the vast majority of the inhabitants adhere to Catholicism.[79] This would justify the fact that the state favors this religion above the rest.

It is hard to agree with the fact that the state can choose a particular religion, thus considering it valuable, without simultaneously assessing its philosophical content—a problem to solve for any model that claims to be secular while keeping some religious bias. In fact, because of this regulatory framework, Argentina has been rated highly inequitable in terms of the government's religious favoritism, with an index of partiality almost twice higher than the Latin American average.[80]

Therefore, it can hardly be justified that up to this day the federal government continues to allocate part of the federal budget to compensate the Catholic Church for properties whose total historical value are not so very important. In this regard, Navarro Floria says that confiscation "was more than compensated by the transfer of a huge amount of goods that since has been made by the [federal] state in favor of the church through dioceses, parishes, religious congregations, and other institutions" Juan Gregorio Navarro Floria, "Sobre el 'Presupuesto de culto'," [On the 'Budget of worship'] *Revista Criterio*, no. 2368 (2011), https://www.revistacriterio.com.ar/bloginst_new/2011/03/01/sobre-el-presupuesto-de-culto/. On the other hand, in his comment, Navarro Floria softens Di Stefano's position referring to continuation of the religious budget item. He argues that, on several occasions, the Supreme Court has held the constitutionality of the subsidy to the Catholic Church. He also argues that the Catholic Church receives contributions for only 6 percent of its total expenditure. However, Navarro Floria states that it is urgent to "develop a serious and consistent proposal that addresses the objections over the current system, and propose a better one for the future."

78 Between 1820 and 1853, autonomous local governments ruled in what was then called United Provinces.

79 So it is interpreted by Lerena Rodriguez, who argues that the federal state "chooses to sustain a certain religion—the Catholic one—professed by most of the population, which is economically subsidized for being considered 'valuable and positive' for society; which does not necessarily mean 'to make an assessment about the philosophical content of Catholicism,' or to regard it as 'the one true religion,' which would be typical of a denominational thought." Lerena Rodríguez, "Principios reguladores," 171. Quiroga Lavie writes, "[I]t is true that the Roman Catholic religion is the religion that creates greater spiritual bonds between the Argentine people. This was what determined the argumentative force to establish provisions for the economic support of this church [in] the Constitution, and that is the 'strong' argument used to not innovate in that privilege." Humberto Quiroga Lavie, *Propuesta para reforma de la Constitución Argentina* [Proposal to reform the Argentine constitution], vol. 1 (San Luis: Editorial Universitaria San Luis, 1992), 50.

80 Association of Religion Data Archives, "Argentina. Religious Freedom Indexes," accessed November 1, 2016, http://www.thearda.com/internationalData/countries/Country_11_3.asp#S_3. The Government Favoritism of

However, the question remains as to whether the support of worship is socially approved. Several studies clearly show the opposite.[81] Moreover, there still is a need to explain how the percentage of adherents in the total population justifies granting the aforementioned special privileges. What would happen if, instead of religion, the government applied this kind of unequal treatment based on gender or race?

EQUAL TREATMENT FOR EQUAL ENTITIES IN EQUAL CIRCUMSTANCES

Many Argentine law scholars have considered the unequal treatment of religious groups to be justifiable. They base their opinions on the principle that constitutional equality should be understood as equal treatment for equal entities in equal circumstances. In their view, since no other church has the same historical background or the same number of parishioners, legal inequalities granted to the Catholic Church are justified.

It is true that the Argentine Supreme Court expressed in an 1875 opinion the view that equality before the law "consists in not establishing exceptions or privileges which exclude some of what is granted to others in equal circumstances."[82] Since then, the Court interpretation has not advanced too far from such concept.[83] However, this way of reasoning—rooted in an anachronistic understanding of equality as solely formal equality—does not seem to solve the fundamental question: Is belonging to one religion or another sufficient ground to justify an unequal treatment? In these terms, the question does not seem to be so simple. Perhaps clarifying some concepts could help elucidate the issue.

The argument that only equals should be treated equally in equal circumstances does not seem to add too much and, in fact, leads people to confuse equality with identity. However, identity only applies to an object in relation to itself, while equality is a relative concept that involves equating a plurality of entities considering a particular aspect, even if disparity is accepted in other respects. Therefore, proclaiming the equality of people does not mean to exclude the differences that may

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Religion Index is based on the US Department of State's International Religious Freedom reports. It ranges from 0 to 10, where 0 means no favoritism. Argentina scores 8.1, while the Latin America average is 4.7.

81 According to a recent survey, 59.9 percent of the population is in disagreement with the Catholic Church's being the only one receiving federal state funding (the figure rises to 88.3 percent if one considers only people belonging to religious minorities). Marcos Carbonelli and Mariela Mosqueira, "Minorías religiosas en Argentina: posicionamientos frente a lo político y al Estado" [Religious minorities in Argentina: positioning in the face of politics and the state], *Nómadas. Revista crítica de ciencias sociales y jurídicas* 28, no. 4 (2010): 333–45. While it is clear that there is little public support for the exclusive funding of the Catholic Church, there is some uncertainty regarding a possible alternative system. Drawing on two different studies, in both, the proportion of the population that supports the exclusive funding is a meager 12 percent. However, the support for the two main alternatives was distributed: in the first survey, 41 percent thought the best alternative is to fund all religions, while 42 percent thought the state should not provide financial support to any religion. Poliarquía Consultores, "Actitudes y prácticas religiosas en la República Argentina" [Religious attitudes and practices in the Argentine Republic] (Buenos Aires: Exclusiva para La Nación, 2010). In the second survey, the number of those who prefer the state not give financial support to any religion rose to 68 percent. D'Alessio IROL, "Estudio sobre religión, sociedad y Estado en Argentina" [Survey on religion, society, and the state in Argentina] (Buenos Aires: CALIR, 2008).

82 CSJN, 1/5/1875, "Criminal c. Olivar, Guillermo," Fallos (1875-16-118) (Arg.).

83 Among many others: "Equality before the law means that the law must be equal for equals in the equal circumstances." CSJN, 12/20/1944, "Nuevo Banco Italiano c. Municipalidad de la Capital," Fallos (1944-200-424). "The equality principle, presented in section 16 of the Constitution, is nothing but the right not to establish exceptions nor privileges that exclude some people from those in equal circumstances." CSJN, 9/28/1916, "Santoro, Cayetano c. Frias, Estela," Fallos (1916-124-122).

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exist between them, for example, of religion, but precisely to recognize those differences as part of the identity of such people.[84] Moreover, it is necessary to distinguish differences in that sense from inequalities. Inequalities are not related to the identity of a person. On the contrary, they are the different legal and social positions attributed to them. Equality, ultimately, should pursue the recognition of differences, but the disappearance of inequalities.[85]

Finally, a distinction should be pointed out between formal equality and equal content. In Section 16, the Constitution seems to refer only to the first aspect of equality. As mentioned, the Court seems to sustain a similar concept in many cases. This principle of equality before the law is satisfied merely through equal treatment, that is to say, by parity in law enforcement. This precludes the privileges and immunities of the ancien régime, ensuring that the law rules equally for all. However, the full content of the idea of equality before the law also requires that the legislator respect the principle of equality in developing the content of regulations.[86] In other words, a rule intrinsically unequal can be equitably applied, but that situation cannot be admitted as complete equality.[87]

Now, it has been rightly argued that not every difference in treatment is in itself reprehensible.[88] In fact, the use of differential treatment is part of the normal operation of the rule of law. Therefore, the problem is reduced to the justification of differences in treatment, which is the crucial requirement for the principle of equality.[89] This allows us to distinguish between differences in treatment that are justified and those that are unjustified, arbitrary or unreasonable. Broadly, the latter are called "discrimination."[90] The prohibition of discrimination in a wide sense is a manifestation of the general principle of equal treatment. Additionally, the scope of the concept of discrimination *strictu sensu* is more intense than the mere blanket prohibition of arbitrary unequal treatment.[91] It must also be noted that discrimination, as unfair degradation of people, can show different degrees of intensity, and can be manifested in different ways.[92] Thus, it must be asked how to determine whether inequality is unjustified, arbitrary, or unreasonable, and as a result, discriminatory.

84 Luigi Ferrajoli, *Derechos y garantías: La ley del más débil* [Rights and guarantees: the law of the weakest], 2nd ed. (Madrid: Trotta, 2001), 73–83.

85 Encarnación Fernández, "Uguaglianza, differenza e disuguaglianza (alcune obiezioni al neoliberalismo)" [Equality, difference and inequality (some objections to neoliberalism)], *Per la filosofía*, no. 42 (1998): 16–26.

86 Javier Jiménez Campo, "La igualdad jurídica como límite frente al legislador" [Legal equality as a limit before the legislator], *Revista española de derecho constitucional*, no. 9 (1983): 71–114, at 76.

87 H. L. A. Hart, *The Concept of Law*, 3rd. ed., Clarendon Law Series (Oxford: Oxford University Press, 2012), 160.

88 "[E]quality does not mean that religions cannot be considered differently in different situations, as long as those distinctions are not arbitrary or unreasonable. Indeed, different legal treatment is not necessarily discriminatory, nor does it violate constitutional rights, since factual inequalities sometimes justify unequal treatment." Octavio Lo Prete, "The Protection of Religious Freedom by the National Constitution and by Human Rights Treaties in the Republic of Argentina," *Brigham Young University Law Review*, no. 3 (2009): 673–95, at 686.

89 In a strict sense, discrimination would be defined by some particular characteristics: (a) the criteria used to distinguish between people is based on immutable individual characteristics, membership in social groups that are difficult or undesirable to leave, or choices that are legitimate for any person to make; (b) discrimination is systemic, it is not purely legal but is also a social phenomenon; and (c) discrimination has an important cultural component, namely the devaluation of people to be ascribed to a particular group, and the subordination of this group as inferior by the dominant group. Encarnación Fernández, *Igualdad y derechos humanos*, *ventana abierta* [Equality and human rights, open window] (Madrid: Tecnos, 2003), 70–75.

90 Fernández, *Igualdad y derechos humanos*, 92–94.

91 Fernández, 92–94.

92 Iris Marion Young, *La justicia y la política de la diferencia* [Justice and the politics of difference], trans. Silvina Álvarez (Madrid: Ediciones Cátedra, 2000), 71.

There are several methods to assess whether laws meet the requirements of the principle of equality. Different national and supranational courts have their own techniques and tests. In brief, it can be said that almost all these methods involve some kind of reasonableness test for differences in treatment. Nonetheless, to apply unequal treatment based on religious affiliation, a stricter criterion than mere reasonableness should be applied. Religious affiliation belongs to a category of specific reasons, such as race, nationality, and gender, that are expected to be irrelevant to establish a differentiated statutory treatment. These features are particularly prone to trigger discrimination, and such discrimination is especially odious. That is why discrimination based on these categories is the subject of sharp moral disapproval. Hence, inequalities based on any of these specific categories, sometimes also called "suspect classifications,"[93] are automatically placed under the presumption of discrimination. In Argentina, "suspect selection criteria specified in the [antidiscrimination] law are race, religion, nationality, ideology, political or union opinion, sex, economic status, social status, or physical characteristics."[94] In these cases, especially when it comes to rights recognized by the Constitution and international human rights treaties, the presumption of unreasonableness is more intense.

At this point, it seems that the Constitution—and, therefore, the entire legal system—contradicts itself. On the one hand, it grants some privileges to one religion; on the other hand, it guarantees religious liberty and equality for all. Be that as it may, it should be recalled that the Constitution only grants economic support to the Catholic Church.[95] Therefore, any other privileges can and should be a matter of revision. Consequently, if the law provides unequal treatment based on any of the suspect criteria, a rigorous method of analysis should be applied to ensure compliance with the principle of equality. Thus, for instance, the Supreme Court of the United States has used the "strict scrutiny" test for this kind of analysis.[96] Of course, strict scrutiny is only one option among many other possible standards. What remains beyond doubt is the fact that the presumption of illegitimacy over laws establishing inequalities based on religion requires a rigorous examination to rule out discrimination. Ultimately, the crux of the matter is the will of the Argentine government to recognize that devotees of every religion should be equal before the law.

CONCLUSION

The 1853 Constitution of Argentina dealt with the religious factor regulation in a pragmatic spirit. It recognized the free exercise of religion to all people but kept in force the privileged status of the

93 An antecedent of this theory, related to racial discrimination, can be found in Hirabayashi v. United States, 320 U.S. 81 (1943) ("Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality. For that reason, legislative classification or discrimination based on race alone has often been held to be a denial of equal protection.").

94 Gelli, *Constitución de la Nación*, 257.

95 See above, note 14.

96 "[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can." Korematsu v. United States, 323 U.S. 214 (1944). The same level of scrutiny is applied to regulations that discriminate among religious groups. The Court said, "[W]hen it is claimed that a denominational preference exists, the initial inquiry is whether the law facially differentiates among religions. If no such facial preference exists, we proceed to apply the customary three pronged Establishment Clause inquiry derived from *Lemon v. Kurtzman*." Hernandez v. Commissioner, 490 U.S. 680 (1989).

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Catholic Church. This solution was the result of a compromise between Catholic liberals, who saw religious freedom as an invaluable tool for attracting immigration from developed countries, and those Catholics who wanted to keep the privileges the Catholic Church enjoyed since the conquest time unaltered. Consequently, the Argentine federal government has been committed to the support of the religion of the majority, reserving the rights of patronage, and guaranteeing freedom to religious minorities.

This tempered form of religious establishment was the point at which the Argentine Constitution demonstrated its originality, having been fully differentiated not only from the United States Constitution but from all other Latin American constitutions enacted before 1853. The Constitutional Convention designed a system of religious freedom without religious equality, where the privileged status of the Catholic Church does not mean the existence of a state church. It is, in short, a system of historical and sociological religious establishment, a tempered form of establishment. Such a system proved to be an effective solution in the historical context of the constitutional organization. The challenge then was to build a modern country, open to all faiths, to boost the growth of the population. At the same time, common sense and consideration were used at a time when the religious homogeneity among the population was almost complete, and even some regional leaders had a strong repudiation of religious freedom.[97]

One hundred and fifty years later, the challenge is different; society has substantially changed. Today, Argentina is a country that boasts of its pluralism and multiculturalism. The system of religious establishment, though tempered, does not match with this pluralistic approach, and unjustifiably harms religious minorities living in the country. Inequalities that once could be justified nowadays are discriminatory, at least in the broad interpretation of discrimination as unjustified, arbitrary, or unreasonably different treatment. Both historical arguments to do with the existence of the Catholic Church before the state and the expropriation of Catholic Church property and sociological arguments pointing out that the majority of the population is affiliated with Catholicism are insufficient to justify the prominence given to the majority religion at the expense of the minority religions.

The argument that equality is for equals in equal circumstances and that majority and minority religions are not equal in their circumstances seems not strong enough. Certainly there are differences in the number of adherents, form of organization, roots in popular culture, and other factors. Nevertheless, legal inequalities based on those differences cannot be accepted. Indeed, equality means recognizing the parity of all people in a particular aspect—in this case, regarding their innermost convictions. From this point of view, Catholics and Protestants, Jews and Animists, Orthodox and Sikhs are equal, not because their beliefs are equal, but because each and every one has their religious convictions, and all are deserving of equal respect.[98]

It may be argued that religion has two dimensions: individual and collective. The Argentine statutory law creates an inequality in the latter dimension but guarantees religious freedom in the

97 For example, one of these local leaders headed a violent revolution when a provincial constitution granting religious liberty for all was enacted. In support of Catholic exclusivity, his militia used a sadly famous black flag with a red cross and the motto "Religion or Death." Juan Carlos Zuretti, *Nueva historia eclesiástica argentina: del Concilio de Trento al Vaticano II* [New Argentine ecclesiastical history: from the Council of Trent to the Second Vatican Council] (Buenos Aires: Itinerarium, 1972), 224. The rebels deposed the governor and burned the constitution in the main square because it "was introduced among us by the hand of the devil, to corrupt us and make us forget our Catholic religion." Fermín Chávez, *La recuperación de la conciencia nacional* [The recovery of the national conscience] (Buenos Aires: Peña Lillo Editor, 1983), 29.

98 While there is an interesting discussion of the differential value of religion over other types of intimate convictions, this debate far exceeds the scope of this article.

former, and both situations are perfectly compatible: religious freedom without religious equality. It is a subterfuge. It is futile to argue that there is individual equality if people affiliated with a particular religion can practice their worship without any difficulty, yet others must overcome a number of bureaucratic requirements to achieve the same goal. Those who practice their religion without difficulty have secured the existence of the faith community to which they belong. However, for those who have not, the recognition of their religion is, ultimately, a grant from the state. Inequality of denominations necessarily means inequality of individuals.

By establishing these discriminatory inequalities, the Argentine legislation harms not only the right to equality before the law but also the right of religious freedom. In the current sociocultural Argentine paradigm, religious freedom takes on a new look. It is not based on mere tolerance of those who are different but on building a community that respects all those who have different beliefs. It stems from the sincere conviction of the value that diversity and pluralism have in democratic life. All this entails the need for a thorough review of the constitutional and statutory law to continue to improve religious liberty and equality in Argentina.

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