


ARTISTIC FREEDOM AND RELIGIOUS SENTIMENT

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ABSTRACT

This article analyzes the relationship between artistic freedom and religious sentiment, exploring the limits of freedom of expression in contexts of cultural and religious plurality. Through the study of national and international cases, such as *The Last Temptation of Christ*, *The Life of Brian* and the special of *Porta dos Fundos*, the conflicts between artistic manifestations and the protection of religious beliefs are evaluated. The approach considers Brazilian and comparative jurisprudence, in addition to highlighting the role of the principle of proportionality in balancing fundamental rights in democratic societies.

Keywords: Artistic Freedom. Religious Sentiment. Freedom of Expression. Comparative Jurisprudence. Principle of Proportionality.

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INTRODUCTION

Artistic freedom is a fundamental expression of human creativity, protected in virtually all contemporary constitutional democracies². This right derives intimately from the freedom of expression of thought (or freedom of expression), and may be provided for in a specific legal or constitutional provision³, due to the peculiarities of this right.

This freedom, ranging from traditional cultural manifestations to modern works of art and satire, reflects the plurality of ideas and the individual's ability to criticize and question the *status quo*⁴. As Luís Roberto Barroso emphasizes, "freedom of expression, including artistic expression, is not only an individual right, but also an essential pillar for the formation of a democratic, pluralistic and tolerant society".⁵

The history of art demonstrates that it often defies social and religious conventions. From Renaissance works that reinterpreted biblical scenes to modern films and satire, art has served as a vehicle for social inquiry and transformation⁶.

And that's not all: art has the power to awaken in the individual emotions of the most diverse, such as love, joy, longing, sadness or even discontent. There are not a few artists who, throughout history, have faced strong social resistance because of their art considered "uncomfortable".⁷ For this reason, because art is not made solely to please the individual preferences of the people who have access to it, nor does it find limits in society's religious or political beliefs, it often encounters resistance, especially when it confronts religious dogmas or ingrained cultural values⁸. Also for this reason, artistic freedom should be seen as a more amplified aspect of the right to freedom of expression,

² Luís Roberto Barroso, *Contemporary Constitutional Law: Fundamental Issues*, p. 112.

³ This is what happens in Brazil, because article 5, IX, of the Federal Constitution, recognizes that "the expression of intellectual, artistic, scientific and communication activity is free, regardless of censorship or license".

⁴ J. J. Gomes Canotilho, *Direito Constitucional e Teoria da Constituição*, p. 578.

⁵ Luís Roberto Barroso, *Op. Cit.*, p. 115.

⁶ Norberto Bobbio, *The Era of Rights*, Elsevier Publishing, São Paulo, 2004, p. 89.

⁷ Throughout history, many artists have faced controversy and repression from the Church due to the content of their works. Caravaggio, in the seventeenth century, shocked the ecclesiastical authorities by portraying sacred figures with brutal realism, often using models from marginal classes. Giotto, centuries earlier, was criticized for his boldness in humanizing biblical scenes, moving away from the idealized representations of medieval art. During the Renaissance, Michelangelo caused controversy with the nudes present on the ceiling of the Sistine Chapel, especially after the *Counter-Reformation* (a movement of the Catholic Church, from the sixteenth century, as a conservative response to the Protestant Reformation), which resulted in the commission to cover some figures. As early as the nineteenth century, Gustave Courbet was harshly criticized for depicting Christ in an earthly way in *The Burial at Ornans*, a work that eliminated any trace of divine transcendence.

⁸ Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, p. 134.

and should be interpreted as such, as we argue in our book *Curso de Direito Constitucional*⁹.

The conflicts between artistic freedom and religious freedom have intensified in the contemporary world, for two reasons: on the one hand, a resurgence of many religious groups, accompanied by a growing wave of theocratic constitutionalism (which seeks to transform the religious values of *some* into values of *all*, endorsed by the State and its Constitution), as well as the growth of digital media and global sharing platforms¹⁰element. Works of humor, satire or criticism that address religious themes cause certain reactions that can be legal (such as actions to suspend the work) or not legal (such as violent acts against the work or its directors).

Emblematic cases, such as the English film *Life of Brian* (1979) and the Brazilian comedy show *Porta dos Fundos*, demonstrate how artistic manifestations can be interpreted as disrespectful or offensive by religious communities¹¹. Before reaching a conclusion on how Constitutional Law should resolve any tensions between the rights to artistic freedom and religious freedom, let's look at some emblematic cases that occurred in the recent past.

NOTORIOUS CASES IN THE INTERNATIONAL CONTEXT

Let's see below some relevant cases that have occurred in recent decades, which involve artistic freedom and religious freedom.

THE FILM "THE LAST TEMPTATION OF CHRIST"

Released in 1988, the film *The Last Temptation of Christ*, directed by Martin Scorsese, caused great controversy due to its humanized depiction of Jesus, including doubts, temptations, and a hypothetical relationship with Mary Magdalene¹². Based on the novel by Nikos Kazantzakis, the film was immediately the target of protests in several countries, with Christian leaders accusing it of blasphemy.

⁹ As we stated in our book, "there is consensus that art should be interpreted in an open way and also encompass unusual and surprising expressive forms. In the same way, the fact that the work sought a political or religious end does not alter its classification as a work" (*Op. Cit.*, p. 761).

¹⁰ Cass Sunstein, *Democracy and the Problem of Free Speech*, p. 190.

¹¹ J. J. Gomes Canotilho, *Op. Cit.*, p. 580.

¹² Nikos Kazantzakis, *The Last Temptation of Christ*, 1955.

In the United States, the film faced boycotts organized by religious groups and attempts at censorship¹³. In response to lawsuits, the Supreme Court reaffirmed that freedom of artistic expression is protected by the First Amendment, noting that "the right to criticism and interpretation of religious symbols is inherent in cultural freedom in a pluralistic society."¹⁴

In France, the controversies were even more intense. After protests and acts of vandalism in cinemas showing the film, the Council of State reiterated that "freedom of artistic expression is fundamental, even in works that offend religious sensibilities, as long as they do not incite hatred or discrimination".¹⁵ Norberto Bobbio points out that this case exemplifies how the State must balance the protection of religious beliefs and creative freedom¹⁶.

In South America, the most prominent event occurred in Chile, in 1988. The Chilean government, pressured by religious groups, banned the screening of the film, claiming that it offended mainstream Christian values¹⁷. In 2001, the Inter-American Court of Human Rights condemned Chile, stating that censorship violated the American Convention on Human Rights, especially Article 13, which protects freedom of thought and expression. The Court stressed that "the expression of an idea or artistic manifestation cannot be restricted just because it is offensive to certain persons or groups," emphasizing that freedom of expression includes "those ideas that displease, disturb or disturb the *status quo*."¹⁸

THE FILM "LIFE OF BRIAN"

The film *Life of Brian*, released in 1979 by the English comedy group Monty Python, is a satire on religion that follows the life of Brian, a man who is born on the same day as Jesus and is mistakenly mistaken as the Messiah¹⁹. The humorous approach was considered offensive by many religious groups, especially in the United Kingdom and the United States²⁰.

¹³ Cass Sunstein, *Democracy and the Problem of Free Speech*, p. 189.

¹⁴ Suprema Corte dos EUA, *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

¹⁵ Council of State of France, 1988 decision on *La Dernière Tentation du Christ*.

¹⁶ Norberto Bobbio, *Op. Cit.*, p. 137.

¹⁷ Government of Chile, Decree No. 47/1988, which prohibited the exhibition of the film *The Last Temptation of Christ*.

¹⁸ Inter-American Court of Human Rights, Case of *The Last Temptation of Christ (Olmedo Bustos et al.) v. Chile*, Judgment of February 5, 2001, paragraphs 66-68.

¹⁹ Monty Python, *The Life of Brian*, 1979.

²⁰ Robert Alexy, *Theory of Fundamental Rights*, p. 92.

In the United Kingdom, some local authorities banned the screening of the film, while Christian leaders accused it of blasphemy²¹. In a later analysis, the European Court of Human Rights stated that "the restrictions imposed on film were not proportionate in a democratic society that values artistic freedom."²²

German jurist Robert Alexy argues that "humor and criticism, even when directed at religions, are essential components of freedom of expression, as long as they do not turn into hate speech."²³ This perspective is corroborated by Cass Sunstein, who emphasizes that "modern societies must tolerate even controversial expressions to ensure cultural diversity."²⁴

OTHER CASES OF CONFLICT BETWEEN ART AND RELIGION

Cases involving satirical cartoons of a religious nature also illustrate the complexity of the theme. A striking example is the attack on the French newspaper Charlie Hebdo, in France, in 2015, after the publication of cartoons considered offensive to Islam²⁵. The case has sparked a global debate about the limits of freedom of expression and protection against religious offenses²⁶. The European Court of Human Rights reiterated that "criticism of public religious figures does not automatically amount to hate speech, but must be analyzed in the context of a pluralistic society."²⁷

In the United States, Terrence McNally's play *Corpus Christi*, which portrays Jesus as homosexual, has faced censorship and protests²⁸. Despite this, the courts reinforced that "the right to artistic freedom includes unconventional interpretations of religious figures, as long as they do not violate fundamental rights of other individuals".²⁹

In Brazil there was a very similar case in 2018. The play *"The Gospel According to Jesus, Queen of Heaven"*, written by British playwright Jo Clifford, was staged in the interior of São Paulo. The play presented Jesus as a transsexual woman. Religious and political groups argued that the piece offended Christian values and even filed a lawsuit to suspend the artistic work. In Jundiaí, an injunction suspended the presentation of the play,

²¹ Human Rights Watch, *Freedom of Expression and Religion in Europe*, 2020.

²² European Court of Human Rights, *Wingrove v. United Kingdom*, 1996 decision.

²³ Robert Alexy, *Op. Cit.*, p. 96.

²⁴ Cass Sunstein, *Op. Cit.*, p. 191.

²⁵ Human Rights Watch, *Charlie Hebdo and the Limits of Free Speech*, 2015.

²⁶ French Supreme Court, *Le Monde v. France*, 2016 decision.

²⁷ European Court of Human Rights, *E.S. v. Austria*, 2018 decision.

²⁸ Terrence McNally, *Corpus Christi*, 1998.

²⁹ Suprema Corte dos EUA, *Miller v. California*, 413 U.S. 15 (1973).

claiming that it disrespected religious symbols and could cause offense to the Christian faith³⁰. The injunction generated intense discussions about artistic freedom and censorship. Subsequently, the Court of Justice of São Paulo (TJ/SP) reversed the decision, stating that "freedom of artistic expression, guaranteed by the Constitution, cannot be restricted based on the subjective perception of religious offense".³¹

In countries with greater religious influence, such as India and Iran, similar cases often result in explicit censorship. In India, the film *PK* (2014), a satire on religion in India, generated intense controversy for criticizing religious practices and spiritual leaders³². Religious groups demanded a ban on the film, claiming that it offended majority beliefs. The Indian Supreme Court, however, rejected the censorship demands, stating that "freedom of speech includes the right to criticize religious practices as long as there is no incitement to hatred or violence."³³

In countries such as India and Saudi Arabia, legislation tends to prioritize the protection of religious beliefs over artistic freedom. In India, censorship of films or works deemed offensive to religions is common, based on legislation such as the Indian Penal Code, which criminalizes deliberate offenses to religious sentiments (Article 295A).³⁴

In Saudi Arabia, the restrictions are even more severe, with Sharia-based laws prohibiting any depiction deemed contrary to Islamic teachings³⁵. This results in an extremely restrictive approach to artistic freedom.

THE BRAZILIAN CASE: PORTA DOS FUNDOS

The case involving the 2019 Christmas special, produced by the comedy group *Porta dos Fundos*, entitled *The First Temptation of Christ*, is a milestone in the debates on artistic and religious freedom in Brazil³⁶. The production, shown on the streaming platform *Netflix*, portrayed Jesus Christ in a satirical way, insinuating a homosexual relationship, which generated a strong reaction from religious and conservative groups³⁷.

³⁰ Court of Justice of São Paulo, preliminary decision on the play *The Gospel According to Jesus, Queen of Heaven*, 2018.

³¹ Court of Appeals of São Paulo, final decision that released the piece, 2018, paragraph 14.

³² Rajkumar Hirani, *PK*, Vinod Chopra Films, India, 2014.

³³ Supreme Court of India, 2014 decision on the film *PK*, paragraph 12.

³⁴ Indian Penal Code, art. 295A.

³⁵ Sharia, censorship laws in Saudi Arabia.

³⁶ *Porta dos Fundos*, *The First Temptation of Christ*, Netflix, 2019.

³⁷ Marcelo Figueiredo, *Estado Laico e Direitos Humanos no Brasil Contemporâneo*, p. 134.

Several Christian leaders, religious associations and parliamentarians criticized the work, considering it offensive to the Christian faith³⁸. In addition to public demonstrations and boycotts, lawsuits were filed to remove the special from the air. One of these actions culminated in the granting of an injunction by Judge Benedicto Abicair, of the Court of Justice of Rio de Janeiro, determining the suspension of the exhibition of the work³⁹.

Benedicto Abicair's decision, granted in January 2020, was based on the allegation that the Christmas special "hurt majority Christian values in Brazil" and generated "potential damage to society".⁴⁰ The judge argued that the suspension of the exhibition was a necessary measure to "calm the spirits of Brazilian society".⁴¹

Subsequently, the Federal Supreme Court (STF) revoked the injunction, in a decision by Minister Dias Toffoli, who highlighted that "it is not up to the Judiciary to restrict artistic or cultural manifestations based on the subjective perception of religious offense".⁴² The decision reaffirmed that artistic freedom, guaranteed by article 5, IX, of the Federal Constitution, is a fundamental right, especially in contexts that involve criticism of religious institutions or dogmas⁴³.

In the trial, Toffoli stressed that "satire and humor are legitimate instruments of social and political criticism, and any form of prior censorship is inadmissible."⁴⁴

THE NECESSARY BALANCE BETWEEN ARTISTIC FREEDOM AND RELIGIOUS BELIEFS

The Porta dos Fundos case exemplifies the challenges of reconciling artistic freedom with the protection of religious beliefs in a country marked by strong cultural and religious diversity. In Brazil, the Constitution guarantees both freedom of expression and freedom of belief, requiring that conflicts between these rights be resolved based on the principle of proportionality⁴⁵.

The Brazilian doctrine is clear in stating that artistic freedom cannot be censored except in exceptional situations. Marcelo Figueiredo argues that "art, even when

³⁸ Luís Roberto Barroso, *Contemporary Constitutional Law: Fundamental Issues*, p. 78.

³⁹ Court of Justice of Rio de Janeiro, 2020 decision, rel. Des. Benedicto Abicair.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² Federal Supreme Court, ADPF 558, Rel. Min. Dias Toffoli, 2020 decision.

⁴³ Constitution of the Federative Republic of Brazil, art. 5, IX.

⁴⁴ STF, ADPF 558, 2020 decision.

⁴⁵ Constitution of the Federative Republic of Brazil, art. 5, VI and IX.

controversial, contributes to the enrichment of public debate and should not be restricted just because it hurts religious sensibilities".⁴⁶

At the same time, the protection of religious beliefs is equally relevant. For this reason, jurist Paulo Bonavides observes that "the right to religious freedom includes protection against speech that incites hatred or discrimination, but it cannot be used to justify the censorship of legitimate criticism"⁴⁷ (emphasis added).

In Brazil, the Federal Supreme Court (STF) has reiterated the importance of freedom of artistic expression as an essential component of democracy. In decisions such as the one that analyzed the Porta dos Fundos Christmas special, the STF emphasized that criticism, even if acid or controversial, is inherent to the public debate and cannot be censored, except in cases of incitement to violence or explicit discrimination⁴⁸. This position reflects a modern understanding of the role of art in society, in line with international treaties such as the International Covenant on Civil and Political Rights (ICCPR), which protects both freedom of expression and religious freedom⁴⁹.

Cass Sunstein, when addressing the topic in the North American context, emphasizes that "freedom of artistic expression is a crucial component of public discourse, even when it provokes discomfort or offense. Limitations are only admissible in cases of speech that incites hatred or violence."⁵⁰

In Europe, in the case *of E.S. v. Austria (2018)*, the European Court of Human Rights (ECHR) emphasized that criticism of public religious figures is not automatically hate speech, highlighting that "freedom of expression includes ideas that shock, offend and disturb".⁵¹ This decision underlined the need to contextualize each case to determine whether there is incitement to hatred.

In the United States, the First Amendment broadly protects freedom of expression, including artistic expression. In *Hustler Magazine v. Falwell (1988)*, the Supreme Court ruled in favor of Hustler magazine, which had published an offensive parody of a religious leader⁵². The court stated that "public criticism, even if offensive, is protected in a society that values open debate."⁵³

⁴⁶ Marcelo Figueiredo, *Op. Cit.*, p. 141.

⁴⁷ Paulo Bonavides, *From Constitutional Law to the Law of Democracy*, p. 102.

⁴⁸ Federal Supreme Court, ADPF 558, Rel. Min. Dias Toffoli, judged in 2020.

⁴⁹ International Covenant on Civil and Political Rights (ICCPR), art. 19.

⁵⁰ Cass Sunstein, *Democracy and the Problem of Free Speech*, p. 134.

⁵¹ CEDH, *E.S. v. Austria*, 2018 decision.

⁵² Suprema Corte dos EUA, *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

⁵³ *Ibid.*

However, limits were established in *Miller v. California* (1973), where the Supreme Court ruled that expressions considered obscene are not protected by the First Amendment, as long as they meet specific criteria, such as patent sex appeal and lack of artistic value⁵⁴.

Therefore, in the light of what has already been decided by several courts, as well as has been affirmed by constitutionalists around the world, we can affirm that:

- 1) As a *Artistic freedom* and the *Religious Freedom* are constitutional principles (and not constitutional rules), they must be applied as intensely as possible, which is why the collision between both rights is frequent. Robert Alexy suggests that "the balance between fundamental rights must take into account the social impact of each right in conflict, prioritizing the preservation of the essential core of both"⁵⁵. For example, artistic manifestations that satirize religions must be protected, as long as they do not incite hatred or discrimination⁵⁶.
- 2) *Artistic freedom* has not only an individual dimension (a subjective public right of the artist), but a collective dimension, since it is one of the pillars of democracy and a pluralistic society. For this reason, the hypotheses of restriction of this right must be exceptional.

Thus, we argue that *artistic freedom* can only be limited in one of the following cases:

- a) when the work consists of a criminal act or "hate speech" (which incites violence or discrimination); or
- b) when the offending work is clearly devoid of artistic value⁵⁷. As for this last hypothesis of restriction (the absence of artistic value), it consists of the application of the *Miller Test*, resulting from North American jurisprudence⁵⁸.

⁵⁴ Suprema Corte dos EUA, *Miller v. California*, 413 U.S. 15 (1973).

⁵⁵ Robert Alexy, *Op. Cit.*, p. 138.

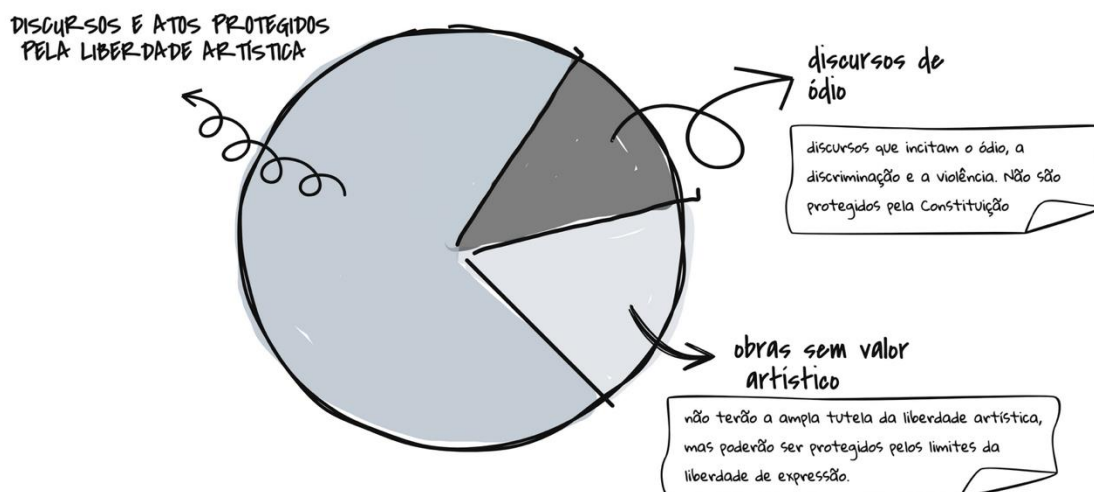
⁵⁶ Luís Roberto Barroso, *Op. Cit.*, p. 145.

⁵⁷ Remembering that art, as we have seen above, must be interpreted in a very broad way and, only in very exceptional cases, it must be considered an illicit offense devoid of artistic content.

⁵⁸ In this test to verify whether or not there should be constitutional protection, one of the criteria is to verify that "the work, as a whole, does not have a serious literary, artistic, political or scientific value" (*Op. Cit.*, p. 727).

Image 1: created by the author himself

LIMITES DA LIBERDADE ARTÍSTICA



As can be seen in the diagram above, we understand that not all manifestations considered artistic are under the canopy of constitutional protection. Artistic manifestations that constitute hate speech (and the same goes for any manifestation of thought: a speech, a book, a program, etc.) are not constitutionally protected, just as works that have no artistic value cannot receive broad constitutional protection, as if they had artistic value.

To reach this conclusion, it is appropriate to remember that fundamental rights can be subject to *external* and *internal* restrictions. While the former result from weighing, in case of eventual conflict with other constitutional rights, the latter (*internal limitations* or *immanent limits*) arise from an individual analysis of the right itself, in search of its essence and the breadth of its protection. The question is: should the constitutional right of *artistic freedom* unlimitedly protect any kind of artistic manifestation, even those that spread hate speech? We understand that it is not.

As we stated in our book *Curso de Direito Constitucional*, "immanent limits are limits existing within the law itself, by an internal process, not defined or influenced by external aspects (such as collisions with other rights). Thus, without the need to weigh the fundamental right with other equally protected rights, we would analyze *a priori* the extension of the right, verifying what its amplitude would be, what its limits would be".⁵⁹ The

⁵⁹ *Op. Cit.*, p. 654. In our work, we came to the conclusion that "hate speech is an internal limit (or immanent limit) of the right to free expression of thought. This means that the fundamental right does not protect any and

German constitutionalists Bodo Pieroeth and Bernhard Schlink, in their work *Grundrechte: Staatsrecht II*, defend the idea that fundamental rights have a "restricted factual support" (faktisch begrenzte Geltung), that is, not all facts that apparently subsume themselves to the constitutional text that defines a right are protected ⁶⁰by it. In other words, not every manifestation of thought is protected by Article 5, IV and not every artistic manifestation is protected by Article 5, IX, both of the Federal Constitution. A speech or an artistic manifestation that consists of a vehicle for the dissemination of hate speech will not be protected, *prima facie*, by the constitutional norm. It is not a balancing judgment, but an initial exclusion made by the interpreter of the rule⁶¹.

In addition to these internal limits, artistic freedom may also be the object of a balance with another right if, in a specific case, it collides with it. For example, in March 2013, the São Paulo Court prohibited the exhibition of the play "Edifício London", by the theater group Os Satyros, inspired by the Isabella Nardoni case. The decision met the request of Ana Carolina de Oliveira, Isabella's mother, who claimed that the play distorted her personality and that of her daughter, causing her suffering. Judge Fortes Barbosa, of the 6th Chamber of Private Law of the Court of Justice of São Paulo, granted an injunction suspending the premiere of the play, scheduled for March 2, 2013, under penalty of a fine of R\$ 10 thousand in case of non-compliance. Without examining the merits of the decision, whether correct or incorrect, it resulted from a judgment of balance between *artistic freedom* and the *victim's* intimacy.

However, as we have stated before, without the need for any balancing judgment, we can affirm that artistic manifestations that propagate *hate speech* and those that, without a doubt, *lack artistic value will not be protected by the constitutional rule*. Let's look at the two hypotheses.

ART AS AN INSTRUMENT OF HATE SPEECH

The conflict between artistic freedom and religious sentiment is not only legal, but also cultural and social, reflecting the complexity of modern societies⁶². Norberto Bobbio

all speech, since the law has a limited factual assumption. Thus, hate speech is not covered by constitutional protection" (*Op. Cit.*, p. 733).

⁶⁰ Bodo Pieroeth; Bernhard Schlink, *Fundamental Rights: Constitutional Law II*, 31.^a ed., C.F. Müller Verlag, Heidelberg, 2017, p. 45.

⁶¹ "There is nothing to justify a tendency to expand this support. On the contrary, this would mean a trivialization of fundamental rights and would require a constitutional justification for any state action, since any action could be considered an intervention in the context of the protection of a fundamental right" (*Op. Cit.*, p. 654).

⁶² Luís Roberto Barroso, *Contemporary Constitutional Law: Fundamental Issues*, p. 140.

observes that "the dialogue between art and religion is essential for the construction of a pluralistic society, as it allows differences to be recognized and respected without resorting to censorship or silencing".⁶³ Art can deal with any theme, including religion, as André Gustavo Corrêa Andrade states: "Faith and religious feeling, subjective components, integral to the individual conscience, cannot serve as a basis for censoring anyone who expresses their opinion about a religion. (...) There are no themes or subjects that are a priori forbidden to humor, which, as a legitimate and traditional form of human expression, can only be restricted in cases of violation of the rights of others. And feelings are not to be confused with rights"⁶⁴ (emphasis added).

Cases such as *The Last Temptation of Christ* and *The Life of Brian* illustrate that art can serve as an instrument for questioning religious structures, without necessarily disrespecting their core values⁶⁵. For Robert Alexy, "freedom of artistic expression has the power to challenge established beliefs, promoting healthy debate in democratic societies".⁶⁶ This debate, however, must take place within parameters that respect both the right to artistic freedom and the protection against hate speech or discrimination⁶⁷ (emphasis added).

As Ronald Dworkin states, "restrictions on freedom of expression should be exceptional and justified only when there is a clear violation of fundamental rights, such as incitement to hatred"⁶⁸ (emphasis added). In the same vein, Cass Sunstein states that "freedom of artistic expression is a crucial component of public discourse, even when it provokes discomfort or offense. Limitations are only admissible in cases of speech that incites hatred or violence"⁶⁹ (emphasis added). It is also the thought of Robert Alexy, according to which "humor and criticism, even when directed at religions, are essential components of freedom of expression, as long as they do not turn into hate speech"⁷⁰ (emphasis added).

This perspective has guided jurisprudence in democratic countries, where the protection of art and religion are equally relevant components of public life. That is also our thinking.

⁶³ Norberto Bobbio, *The Age of Rights*, p. 89.

⁶⁴ *Op. cit.*, p. 136.

⁶⁵ Nikos Kazantzakis, *The Last Temptation of Christ*, 1955.

⁶⁶ Robert Alexy, *Theory of Fundamental Rights*, p. 134.

⁶⁷ Suprema Corte dos EUA, *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

⁶⁸ Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, p. 112.

⁶⁹ Cass Sunstein, *Democracy and the Problem of Free Speech*, p. 134.

⁷⁰ Robert Alexy, *Op. Cit.*, p. 96.

Hate speech

One of the most debated topics in contemporary constitutionalism is the exact definition of what "hate speech" would be.

Martha Nussbaum, in her work *Hiding from Humanity*, defines hate speech as "expressions that dehumanize individuals or groups, treating them as unworthy of respect or moral consideration, often appealing to deep-rooted social prejudices."⁷¹ For Nussbaum, hate speech is especially pernicious because it reinforces hierarchies of exclusion, traditional oppressive and unworthy structures of power, hindering social equality.

However, in our opinion, as we have already stated in our *Constitutional Law Course*, hate speech goes beyond prejudiced, undignified speech that attempts to demean certain groups by reasserting oppressive power structures (although this is also an integral part of hate speech). For us, "hate speech they are words that have the ability to instigate⁷² violence, hatred or discrimination against persons, due to race, color, ethnicity, nationality, sex, religion, or other factor of discrimination"⁷³, reasserting oppressive power structures. Thus, incitement to discrimination is a core element to identify hate speech.

This seems to be the majority understanding in Brazilian and international constitutional doctrine. For example, Cass Sunstein emphasizes that "hate speech is one that fosters discrimination and violence, especially against vulnerable minorities."⁷⁴ In the same sense, Laurence Tribe defines hate speech as "verbal or symbolic manifestations that not only offend, but promote or incite systematic discrimination and violence against individuals or groups".⁷⁵ Canotilho, a Portuguese constitutionalist, states that "hate speech is an expression that exceeds the limits of freedom of expression by inciting hatred or violence, especially in contexts of structural discrimination".⁷⁶ Samanta Ribeiro Meyer-

⁷¹ Martha Nussbaum, *Hiding from Humanity: Disgust, Shame, and the Law*, Harvard University Press, Cambridge, 2004, p. 102. A similar definition is that of Mark Tushnet, according to which "hate speech is a form of expression that attacks equality, seeking to demean marginalized groups and reaffirm oppressive power structures". (*Free Speech and Social Justice*, p. 122)

⁷² As can be seen, in our understanding, this "incitement" to hatred, discrimination and violence does not need to be so vehement, explicit, directly calling people to indignity (as is often defended in American discourse), but this latent potentiality.

⁷³ *Op. Cit.*, p. 733.

⁷⁴ Cass Sunstein, *Democracy and the Problem of Free Speech*, The Free Press, New York, 1995, p. 98. For Sunstein, freedom of expression cannot serve as a shield to justify demonstrations that directly threaten the dignity or safety of individuals.

⁷⁵ Laurence Tribe, *American Constitutional Law*, The Foundation Press, New York, 2000, p. 1238.

⁷⁶ J. J. Gomes Canotilho, *Direito Constitucional e Teoria da Constituição*, Almedina, Coimbra, 2003, p. 389. This seems to be the interpretation of the STF, which, in ADO 26, decided that hate speech is "externalizations

Pflug defines hate speech as the manifestation of "ideas that incite racial, social or religious discrimination in certain groups, most of the time, minorities".⁷⁷

Thus, although it is a plural expression and far from a doctrinal consensus on its meaning⁷⁸, we can define "hate speech" as *words that have the capacity to instigate violence, hatred, or discrimination against people, due to race, color, ethnicity, nationality, sex, religion, or other factor of discrimination*⁷⁹, *dehumanizing individuals or groups, treating them as unworthy of respect or moral consideration, often appealing to deep-rooted social prejudices, reasserting oppressive power structures*.

If the doctrinal understanding were not enough, the prohibition on "hate speech" also finds support in international treaties and conventions. For example, Article 20, item 2, of the Covenant on Civil and Political Rights states that "any apology for national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law". In the Inter-American Convention against Racism, Discrimination and Other Forms of Intolerance, which entered the Brazilian legal system with the force of a constitutional norm (!), the States undertake to eliminate, prohibit and punish any "publication, circulation or dissemination, by any form and/or means of communication, including the Internet, of any material that: a) defends, promotes or incites hatred, discrimination and intolerance" (art. 4). In this way, States commit to repressing the various demonstrations of hate speech, and may criminalize some of them, as Brazil and, very broadly, Germany have done⁸⁰.

that incite discrimination, hostility or violence against people because of their sexual orientation or gender identity" (emphasis added).

⁷⁷ *Freedom of Speech and Hate Speech*, p. 97.

⁷⁸ "The expression hate speech refers to a non-univocal concept, with relatively imprecise limits, and is used to designate very heterogeneous expressive conducts, which, when looked at together, do not have a defining essence or characteristic" (André Gustavo Corrêa de Andrade, *Freedom of Expression in Times of Cholera*, p. 151).

⁷⁹ By adopting the generic expression "another factor of discrimination", we accept the view of Schafer, Leivas and Santos, for whom "hate speech consists of the manifestation of intolerant, prejudiced and discriminatory ideas against vulnerable individuals or groups, with the intention of offending their dignity and inciting hatred due to the following criteria: age, gender, sexual orientation, gender identity and expression, language, religion, cultural identity, political or other opinion, social origin, socioeconomic position, educational level, condition of migrant, refugee, repatriate, stateless or internally displaced, disability, genetic characteristic, state of physical or mental health, including infectious contagious, and psychic incapacity or any other condition" (*Hate speech. From the conceptual approach to parliamentary discourse*, p. 144).

⁸⁰ In Germany, hate speech, as we have defined it here, is a crime (§ 130 of the German Criminal Code - Strafgesetzbuch - StGB). This provision is known as the norm against *Volksverhetzung* (incitement to hatred). It reflects Germany's historical concern with preventing speech that could foment discrimination, hatred or violence, especially as a result of experiences with Nazism. According to the aforementioned provision, a crime is committed "who: publicly incites hatred against a national, racial, religious or ethnic group, or against parts of the population, or against an individual for belonging to one of these groups". For Hassemer, § 130 is an example of how German criminal law balances freedom of expression with protection against hatred and

In Brazil, article 20 of law 7.716/89 provides as a crime "to practice, induce or incite discrimination or prejudice of race, color, ethnicity, religion or national origin". The penalty provided for is imprisonment from 1 to 3 years and a fine and, if the practice occurs through the media or publication of any nature, the penalty will be aggravated to 2 to 5 years of imprisonment and a fine. Although the initial focus of Law No. 7,716/1989 was the fight against racism, judicial interpretations have expanded its application to cover other forms of discrimination, such as religious attacks and prejudice against certain nationalities or even different regions of the country itself⁸¹. The Federal Supreme Court (STF) has already taken a position on the scope of Law No. 7,716/1989 in cases of hate speech. In a recent judgment, the Supreme Court decided that homotransphobia should be equated with racism, using Law No. 7,716/1989 as a basis for punishing manifestations that promote discrimination against LGBTQIA+ people.² This decision reinforces the understanding that hate speech, even if not explicitly racial, can be framed as a crime when it violates the dignity of vulnerable groups.

In 2004, in the famous *Ellwanger case* (HC 82.424/RS, Rel. Min. Maurício Corrêa, judgment on 09.17.2003, DJ 03.19.2004), the STF understood that "Anti-Semitism is a clear and unequivocal manifestation of racism, as it is based on the idea of superiority of certain human groups to the detriment of others, promoting exclusion and segregation" (excerpt from the opinion of Justice Celso de Mello). The most recent decision was the trial of a person who published, on social networks, offensive and discriminatory messages against Jews. The Superior Labor Court (TST), in a related decision, highlighted that speeches of this nature, when directed at specific groups, represent a violation of the constitutional principles of equality and human dignity and can be typified in article 20 of Law No. 7,716/1989⁸².

discrimination. He argues that the rule does not punish opinions per se, but rather public demonstrations that directly offend human dignity or incite violence, and is therefore compatible with the principle of proportionality. (Winfried Hassemer, Introduction to Criminal Law and Criminal Policy, Marcial Pons, Madrid, 2007, p. 152)

⁸¹ In a historic decision, the Federal Supreme Court (STF) recognized that prejudiced manifestations directed at people from certain regions of Brazil, such as the Northeast, constitute a crime of racism, as they represent discrimination against a socially identifiable group. In the judgment of HC 154.248, in 2020, the STF stated that regional prejudice fits into the expanded concept of racism, as it violates the constitutional principles of equality and human dignity. Justice Gilmar Mendes, rapporteur of the case, highlighted: "Prejudice against regionally identifiable groups implies social exclusion and perpetuation of historical stigmas, and should be treated with the same severity given to racist practices." The decision reinforced the understanding that protection against discrimination covers all forms of intolerance that violate the dignity of specific groups (STF, HC 154.248/DF, Rel. Min. Gilmar Mendes, judgment on 02.17.2020, DJ 03.23.2020).

⁸² Superior Labor Court, Case No. TST-AR-1920-10.2015.5.04.0028.

THE ABSENCE OF ARTISTIC VALUE

Inspired by American doctrine and jurisprudence, we also understand that the expression of thought clearly devoid of artistic value will lack the broad constitutional protection of artistic freedom. Now, two people having sex in a parking lot commit the crime of obscene act, even though they claim to be rehearsing a play about *Aphrodite*, the Greek goddess of love⁸³.

The U.S. Supreme Court, in order to determine whether a material could be excluded from the protection of the First Amendment (especially artistic freedom), created the *Miller Test*, in the case *Miller v. California* (1973).⁸⁴ One of the measurement criteria is related to the "lack of literary, artistic, political or scientific value".

In the *Miller* case, the Supreme Court stressed that "the material must be evaluated as a whole, and not on the basis of isolated excerpts, to determine whether it has any recognizable literary, artistic, political or scientific value."⁸⁵ This criterion seeks to ensure that works with significant merit, even if they contain potentially offensive elements, are not unprotected by the constitutional rule.

Laurence Tribe notes that "the assessment of literary value in a context of obscenity cannot depend exclusively on the standards of a local community, at the risk of arbitrary censorship."⁸⁶ For Tribe, the analysis should consider broader perspectives, including scholarly opinions and literary criticism, to prevent individual or community sensibilities from restricting works with merit. This view is corroborated by Mark Tushnet, who emphasizes that "the concept of literary value should be analyzed on the basis of universal criteria, and not on local prejudices".⁸⁷

It is worth emphasizing: it is not enough for a work to be controversial or uncomfortable; it is necessary to demonstrate that it lacks any literary, artistic, or scientific merit. According to Brazilian law, once specific intent is proven, the act of mocking, mocking, ridiculing a person, publicly, on account of their religious belief or function, can

⁸³ Eventually, some people will see this sex scene and say that it is a work of art, a demonstration of an impactful theatrical play, and they can pay a ticket for it. However, this will not be the conclusion of the "average man", that is, a normal person, in the current social, economic and cultural context. It is important to emphasize, as we will state below, that this vision of the "average man" does not refer to the specific place where the act takes place (a place that can be a stronghold of conservatives, or racists, or homophobes, etc.), but a global vision of what can be considered art or not.

⁸⁴ Suprema Corte dos EUA, *Miller v. California*, 413 U.S. 15 (1973).

⁸⁵ *Ibid.*, p. 24.

⁸⁶ Laurence Tribe, *American Constitutional Law*, p. 940.

⁸⁷ Mark Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law*, p. 104.

constitute the crime provided for in article 208, 1st part, of the Penal Code ("mocking someone publicly, by reason of religious belief or function")⁸⁸.

An important point: as the U.S. Supreme Court states, in deciding the Miller case, "not every work with literary elements is automatically protected by the First Amendment, but the lack of value must be evident and unequivocal"⁸⁹ (emphasis added). In other words, the artistic manifestation has a relative presumption that it effectively has artistic value, constitutionally protected, even if the discourse contained therein contradicts the preferences of the majority. Only in unequivocal cases will the work be considered as devoid of artistic value, giving rise to civil (and, in very exceptional cases, criminal) liability of those who practiced it.

This is the only way to minimize the main criticism of this criterion that is part of the Miller Test: its inherent subjectivity. As Laurence Tribe observes, "literary value cannot be evaluated exclusively on the basis of rigid criteria, but must be seen as part of an ongoing dialogue between culture and society."⁹⁰

Finally, even if a speech, act or representation is not considered to have artistic value, because it is a manifestation of thought, it may be protected by the fundamental right to freedom of expression, as long as it does not constitute hate speech or the practice of a crime, for example.

CONCLUSION

The relationship between artistic freedom and religious sentiment is a theme that reflects the complexity of contemporary societies, marked by cultural plurality and the coexistence of often conflicting values. As analyzed in the article, artistic freedom is a fundamental right that not only promotes individual expression, but also encourages public debate, being crucial for the strengthening of democracy. However, art, in its various forms, often challenges religious dogma and cultural sensibilities, which generates inevitable tensions.

⁸⁸ "To mock" derives from the Latin *excarniāre*, which means "to take away the flesh" or "to undress", a term that suggests an act of vexatious or humiliating exposure, loaded with contempt. In the criminal context, mockery is more than a trivial offense: it implies conduct intentionally aimed at demoralizing the belief or religious exercise of a person or group. It is important to emphasize that, in a parody, satire or any artistic manifestation of humor, even if it deals with religion in a controversial, acidic, polemical, rude way, it will not constitute a crime, unless, in the general context, the lack of artistic value is verified. In other words, a bad joke, by itself, does not constitute a crime, especially when the artist's intention was not to offend, belittle, ridicule.

⁸⁹ U.S. Supreme Court, *Miller v. California*, Op. Cit., p. 28.

⁹⁰ Laurence Tribe, *Op. Cit.*, p. 943.

Emblematic cases, such as the films *The Last Temptation of Christ* and *The Life of Brian*, as well as the *Porta dos Fundos* special, illustrate how art can provoke intense reactions, ranging from judicial censorship to physical violence. These episodes demonstrate that artistic manifestations often serve as catalysts for fundamental discussions about the limits of freedom of expression and the protection of religious beliefs. Jurisprudence of courts around the world has sought to balance these rights, highlighting the need to protect cultural diversity without neglecting the dignity and values of religious communities.

In Brazil, as observed in the *Porta dos Fundos* case and in other judicial decisions, the Judiciary has reiterated the importance of artistic freedom as a protected constitutional right, except in situations involving hate speech or the clear absence of artistic value. The application of the principle of proportionality has been the main tool to resolve conflicts between artistic freedom and religious freedom, considering the social and cultural impact of each case.

At the international level, the different approaches of countries such as France, the United States and Germany highlight the peculiarities of each legal system. While some prioritize freedom of expression, others give more weight to the protection of religious feelings. These experiences reveal the need for a delicate balance, one that respects both the artists' right to expression and the preservation of the cultural and spiritual identities of communities.

Therefore, the coexistence between artistic freedom and religious sentiment requires a balanced posture, which promotes dialogue and respects diversity. The challenge is to ensure that the right to artistic creativity is not stifled by undue censorship, but also that art is not used as a vehicle for hate speech or intolerance.

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