

Religion and the Secular State: Uruguayan Report

I. INTRODUCTION

Uruguay has been categorized as a prototype secular State, together with Mexico, following the trend of France, which is also shared by Turkey. Nevertheless, some peculiarities of its statutory setting – which, in terms of secularism, go beyond the words and spirit of the Constitution and contradict the principles of International Human Rights norms – detaches it from the rest of its colleague secular states. While the rest of its former parallel states have positively evolved in terms of State/Church relationships, Uruguay has not. Mexico, for instance, has developed a more open-minded attitude towards religion by (1) reforming its preceding restrictive Constitution in terms of freedom of religion or belief, (2) creating a public office for religious affairs and (3) approving the Religious Freedom Frame Act.

Although still maintaining overt violations of the right to exhibit one's own religious identity in public spaces, France pays some attention to religious concerns as it cooperates with the preservation of churches and other edifices of worship of cultural or historical significance, and carries out charity actions in coordination with religious entities, amongst other areas of encounter. Uruguay's uniqueness lies on the fact that it seems still attached to a model of a liberal State with rigid separation, which goes back to the nineteenth century in terms of religious freedom.

And yet, Uruguay is still complex to categorize. In terms of its position with respect to secularity, because while neutral and even cooperationist in its Constitutional and international binding norms, its legal framework, its administrative regulations and resolutions, and overall, the customary interpretation (or misinterpretation) of law and of the entire legal system, tend to meet a high commitment to secularism as a result of hostile separation between State and Church,¹ very proximate to secular fundamentalism.²

The very definition of “secular” or “lay” needs to be reviewed in our legal forum. In fact, the concept is under debate and will be submitted to thorough analysis and revision in the near future.³ Since secularity is frequently identified as an imposed *prescidence*⁴ of religious issues by the State – or even misunderstood under the belief that the State must be abstentionist⁵ for the reason that the Constitution (Article 5⁶) establishes an abstentionist form of secularism since the separation of State from Church in 1917⁷ - these misinterpretations of law and of human rights call for urgent eradication in order to approach the minimum standards of religious liberty.

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1: Asiaín Pereira, C., *Algunas Reflexiones acerca de la Libertad Religiosa en el Uruguay*, Anuario Argentino de Derecho Canónico T. X, 2003.

2: Martínez- Torrón, J. and Navarro-Valls, R., “The Protection of Religious Freedom in the System of the Council of Europe,” in *Facilitating Freedom of Religion or Belief: A Deskbook*, Lindholm, T., Durham, Jr., W.C., Tahzib-Lie, B.G., editors, Koninklijke Brill NV, Leiden, Martinus Nijhoff Publishers, 2004, 235.

3: Brito, Mariano, conference on Education which will deal with the revision of the concept of “lay” or “secularism” in Uruguayan Law, Congress on “Contemporary Transformations in Administrative Law,” Administrative Law Institute Academic Week, 6-9 October 2009.

4: Cassinelli Muñoz, H. *Derecho Público*. Montevideo: Fundación de Cultura Universitaria, 2002, 63.

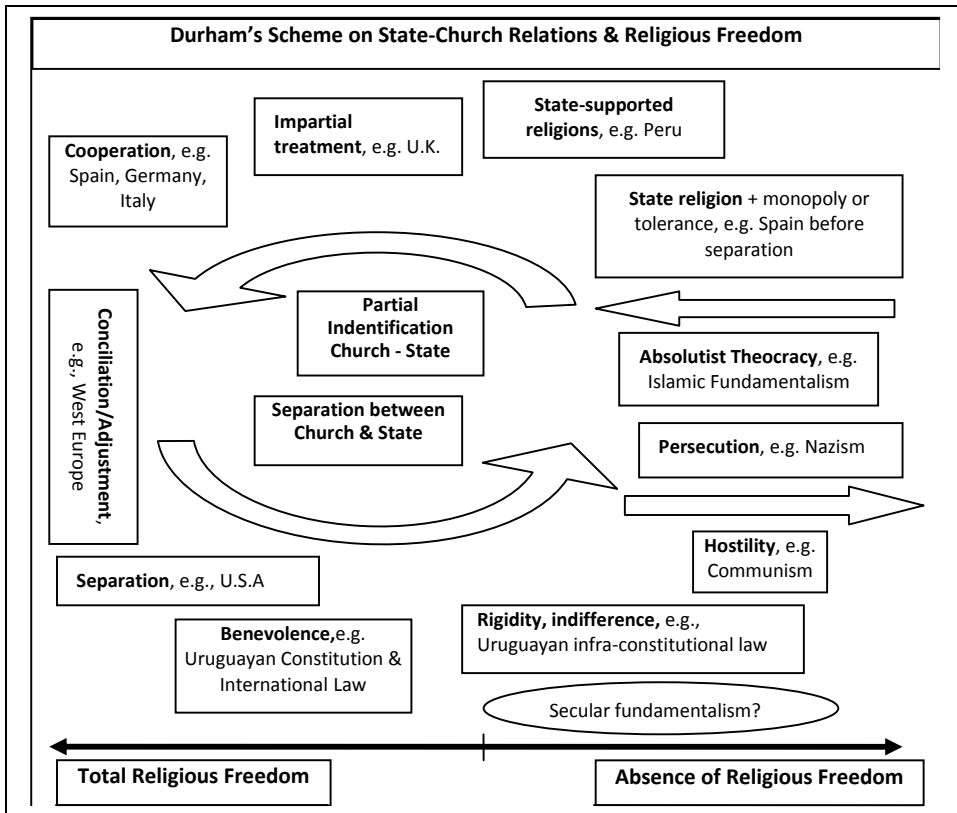
5: Semino, M. A., *Estado y Religión, Semanario Búsqueda*, 17/4/08, Montevideo, p. 47, and *La enseñanza y la laicidad, Semanario Búsqueda*, 20/11/08, pp. 83 & 84 and in *¿Y la laicidad?*, http://www.forobatlLista.com/showaNews.asp?tf_newsId=4245#.

6: Article 5 of the Constitution: “All religious cults are free in Uruguay. The State doesn't endorse any religion. It recognizes the Catholic Church's ownership of all temples that have been partially or completely built with funds from the National Treasury, with the exception of chapels that have been designated to serve as shelters, hospitals, jails, or other public settlements. In like manner, the State declares all churches consecrated to the worship of the various religions exempt of any form of taxes.”

7: Semino, supra n. 6.

At the same time, another current of opinion underlines a positive assessment that our Constitution shows towards religion, specifically, where it grants tax exemptions to churches, recognizes the pre-existing Roman Catholic Church as a legal entity and owner of property, and incorporates the principles of Natural Law in Article 72.⁸ The incorporation itself leads to the conclusion that the regime as a whole, being based on the recognition of human dignity and the respect of human rights as well as on the principles of democracy and republic, is mandatorily respectful of freedom of Religion or Belief in its constitutional and international law context. Infra-constitutional law and regulations must therefore be adapted to suit the elevated norms, and interpretation of the whole legal system ought to be enlightened by and redirected to harmonize the mandates of International Human Rights norms and the Constitution.

This being the state of the question in our forum, we will attempt to apply W. Cole Durham’s methodology and model in his essay “Basis for a Comparative Analysis of Religious Freedom”⁹ to approach a categorization of Uruguay’s posture on religion and the type of secularism it embraces. By denouncing the position that Uruguay deserves in Durham’s scheme of Religious Freedom according to State-Church relationships, we intend to (1) shake the theoretical foundations of scholars who still neglect the presence of religion in the public sphere and consider freedom of religion thoroughly complied with through abstentionism, perhaps awaking decision-makers to become conscious about the weakness of the system, and (2) finally influence in State spheres to hopefully provoke a reformation process in order to attain full respect of religious freedom deserving a position closer to “Total Religious Freedom” in Durham’s scheme.



8: Art. 72: The enumeration of rights, duties and guarantees made by the Constitution doesn't exclude others that are inherent to human personality or are derived from a republican form of government."

9: Durham, W. C. Jr., "Basis for a comparative analysis of religious freedom," in Anuario de Derecho Eclesiástico del Estado, Vol X (1194), 471-478, transcribed by Navarro-Vals, Rafael & Palomino, Rafael, Estado Y Religión. Textos para una reflexión crítica, Ariel, 2003, España, 213- 222. Examples are mine.

This analysis will try to explain this categorization, as well as the dichotomy between the Magna Carta and the International Human Rights norms on one hand, and legal and administrative regulations as well as the secularist interpretation of law on the other.¹⁰

II. SOCIAL CONTEXT IN URUGUAY

As in the rest of the New World, various native peoples inhabited our lands prior to Spanish colonization, mainly nomadic and either polytheistic or pantheist. As Spaniards disembarked, they brought the Christian cross with them as a sign of appurtenance, evangelization, discovery and conquest in the name and under the protection of religion.¹¹

Unlike the rest of the American countries, the multiplicity of pre-existing indigenous populations living in this country resisted integration of European culture in general terms, either through struggle against the invader or through compulsory and self-imposed isolation from the conqueror. As a result, those who were not submitted to slavery, condemned to confusing misery or assimilated to European blood through crossbreeding, were gradually decimated in battles against the enemy. Finally, the remains of the last rebel native groups were exterminated in 1831,¹² immediately after our birth as an independent country.

So the shameful fact of our history is the present absence of hardly any religions of native origin, at least in the form of organized and identified native groups. Our national identity was hence forged on the basis of a homogeneous European population. This initial uniformity of the population in general terms of culture, language, ethnicity and religion had a strong influence on its attitude towards the “different,” undermining the development of an open-minded tradition. Sharing the “only child syndrome,” Uruguayans found themselves in no need to resolve the challenge of coexistence with the “alter.” This peculiar historical fact conditioned our nation since its birth, making it prone to holding a monolithic ideology and a single truth.

Foreign native peoples – Guaranis from the Jesuitical missions – immigrated in thousands from Paraguay and Argentina to Uruguay in an 1828 exodus,¹³ presumably after the expulsion of the Company of Jesus (1768-1803). These peoples settled in Uruguayan territory in an unprecedented International Law action, bringing their authorities and representatives with them, but refused assimilation to our population, desegregated and absorbed by us, after being sunk in misery. Because of integration to our population, and due to the fact that these peoples had already been evangelized by Jesuits and had converted to Catholicism, they didn’t represent a threat to our religious uniformity. And therefore, their integration to Uruguayan society didn’t challenge its homogeneity, in terms of religion.

The Roman Catholic Church preceded our independent State and, being the majority religion, it was crucial in determining the denominational structure adopted by our 1830 Constitution, which followed the Patronage model. Soon the religious hegemonic scenario was gradually nourished by other Christian protestant groups migrating from Europe. These groups shared religions with some minimal expressions of native cults which had survived annihilation or assimilation by the white conqueror. Also present was a small sample of African natives submitted to slavery, who brought their cults with them, which became a determining fact for the birth of syncretism later on in history. So despite catholic hegemony and the privileged status of the Roman Catholic Church, tolerance of other non-historically rooted cults was due in the name of the principles of freedom of expression,¹⁴ association, and equality.

10. Examples belong to the author of this article.

11. Asiaín Pereira, C., *La presencia de lo religioso en el ámbito público en el Uruguay*, Anales Derecho, IV Colloquium, Latin American Consortium for Freedom of Religion or Belief, Pontificia Universidad Católica de Chile, 2005.

12. Battle of Salsipuedes, Puntas del Queguay, 11 April 1831.

13. Padrón Favre, Oscar, *Ocaso de un pueblo Indio, Historia del Éxodo guaraní-misionero al Uruguay*, Ed. Tierradentro, Durazno, Uruguay, 2009.

14. Gros Espiell, H., “Evolución Constitucional del Uruguay,” Fundación de Cultura Universitaria, Montevideo, 2003, 35.

Masonry was very strong in these latitudes, especially in Uruguay. This presence, together with the nineteenth century ideas of liberalism and Jacobinism dating back to the French Revolution, determined the development of a secularization process in Uruguay – beginning in law and validated half a century later by the 1917 Constitution which established the separation of State and Church. Uruguay was a pioneer in secularization.

As for religious composition of society, Roman Catholics are still the majority group, but the number of its adepts is slowly decreasing presently, on behalf of new religious movements, comprised mainly of neo-Pentecostals of Brazilian origin and neo-Christians.

Sociologists outline¹⁵ the fact that historical protestant churches (Anglican, Lutheran, Calvinist, Mennonites) coexist with modern evangelical churches from different origins grouped in confederations: Baptists, Salvation Army, Seventh Day Adventists, Pentecostals, neo-Pentecostals (the Worldwide Church of God (from Brazil)), and neo-Christians or post-protestants (Jehovah's Witnesses and the Church of Jesus Christ of Latter-day Saints ((Mormons)), from U.S.A., and Scientology beliefs). Nowadays the number of non-Catholic Christians are the second largest religious group. Armenian, Greek and Russian Orthodox churches are also present, though minimally.

Jewish communities of diverse movements have established in Uruguay. Orthodox Jews stand side by side Conservatives and Reformists.

Islam has arrived relatively recently and established small but growing communities, especially in the frontiers.

Buddhist and Hinduistic groups are also present, as well as Spiritualists of different schools, Theosophical schools and Rosae Crucis.

The Moon Sect (Unification Church) used to have a strong economic power, somehow diminished nowadays.

The Bahá'í faith collects some sympathizers and volunteers as well.

Afro-Brazilian religions such as Candomblé, Quimbanda and Umbanda have a strong presence, greater than that of movements stemming from African groups clustered together in different communities.

A particular Latin American phenomenon very typical of Uruguay occurred by means of mingling of African cults with Brazilian faiths and Catholic ingredients, giving place to the emergence of syncretism. One belief – borrowing its typical elements of faith, such as Christ, the Virgin Mary, or saints, and renaming them or assimilating them to its own deities, or performing Catholic rites together with native cults, or embraces Catholic faith without rendering alien beliefs – tends to encourage the practice of other religious beliefs or to incorporate some elements of other faiths, or tries to disguise itself as Catholic. A new religious creed is born, known as religious “Syncretism, a symbiosis of religions.”¹⁶

Masonry may be considered a form of belief, in the sense that its members practice cults and have temples.¹⁷ Like the Roman Catholic Church, it is historically-rooted and exercises a very powerful influence in politics, government, and culture. Masonry also has undermining effects on freedom of religion or belief, particularly on the public dimension of religion, i.e., on its “forum externum.” Very often it finds support from militant forms of agnosticism and atheism, formerly linked or not, with historical anti-clericalism.

According to some statistical data,¹⁸ the population breakdown is as follows: Roman Catholics: 66 percent; Protestants: 2 percent; Jews: 1 percent; and others, including those who don't profess a religion: 31 percent. Other statistics throw different results: “Research studies from social sciences have reported the recent religious pluralisation and diversification in our country. All studies agree in establishing that slightly more than 80

15. Geymonat, Roger (compiler), “Las religiones en el Uruguay,” eds. La Gotera, Montevideo, 2004.

16. Asiaín Pereira, C., “Law and Religion in Latin America. General Aspects of Law and Current Concerns,” march, 2009, (pending publishing) Law and Justice the Christian Law Review, Worcester WR2 4PB UK, United Kingdom, <http://www.lawandjustice.org.uk/LAWJUSTICE>.

17. Korseniak, J., “Primer Curso de Derecho Constitucional,” Fundación de Cultura Universitaria, Montevideo, 2006, 347.

18. Available at http://go.hrw.com/atlas/span_hm/uruguay.htm.

percent of Uruguayans assert to believe in God.”¹⁹ This fact was provided by the National Statistics Institute (INE),²⁰ which for the first time in our history inquired about religious beliefs published.²¹

So our societies have passed from diversity to uniformity, and back to diversity in the religious arena. This has occurred after immigration and after the resurrection of native cults and culture, giving place to the presence of many religious denominations.

III. THEORETICAL AND SCHOLARLY CONTEXT

As was outlined, two major trends govern the theoretical and scholarly context in Uruguay.

The laicist approach may be considered “prescinding” (abstentionist) in terms of religion, and highly committed to secularity. This leading school of thought prevailed till the dawn of the twentieth century and has deeply influenced scholars and academics, lawyers and students, and in general, the entire Uruguayan culture. The label of “secular” – in the sense of strict separation between the two spheres of religion and the political community – rises as the spontaneous answer to the question about Uruguay’s State–Church relations. The non-denominational nature of our State, consecrated by Article 5 of the Constitution, is interpreted as implying that besides being non-denominational, the government should abstain from supporting any religion, even on an equitable basis, and is even prohibited to involve itself with religion entirely. The State must disregard (“rescind from”)²² religious expressions as alien to State affairs.

Therefore, religion must be absolutely absent from public schools, public premises and outcast from public spheres in general. Religion is confined to the forum internum and to private practice,²³ receiving hardly any attention or consideration by authorities. Religious communities are regarded as civil institutions, entitled to rights and duties once they are recognized as legal entities. The trend is closely linked to positivism and receives support from the Masonry and forms of agnostic or atheist proselytism, and within it, two vectors are distinguishable.

Some radical interpretations of secularity actually qualify as forms of “secular fundamentalism.”²⁴ An advocate has said “the only governmental attitude compatible to religious pluralism is that of prescidence, indifference, the State’s abstention from the religious phenomenon; . . . not only in the sense that it tolerates that diversity, but also in that it shouldn’t tip the balance of the juridical and political organization of the community in favour or against one or other religious or non-religious posture.”²⁵

Sometimes religion is presented as restricting freedom, creating slavery which is an obstacle to progress and even to democracy.²⁶ Religiously-based arguments are disqualified, “acting as if illiberal policing of religion were mandatory for a religiously neutral state.”²⁷ This “strident laicism” has held its own truth as absolute, but under the appearance of impartiality. As the State cannot support any religion, and moreover, as the State is impeded from even considering religion, this stance is the only guarantee of neutrality. In fact, in Lindholm’s words, the former hegemony of the Roman Catholic Church has been replaced by another hegemony, that of an antireligious rationalism, “rather than achieving genuine neutrality.” This rigid version of secularism has, however, been very successful in imposing this vision as general to past and present generations,

19. Da Costa, N. (compiler) “Guía de la Diversidad Religiosa de Montevideo,” CLAEH (Centro Latinoamericano de Economía Humana), 2008, Ed. Santillana S.A., Montevideo, 16 (translation by the author).

20. Amplified National Homes Poll, published December 2006.

21. Da Costa, supra n. 19 at 35.

22. Cassinelli Muñoz, H., *Derecho Público*, Montevideo, Fundación de Cultura Universitaria, 2002, 63

23. Korseniak.

24. Martínez-Torrón.

25. Cajarville Peluffo, J. P., *Pluralismo religioso y acción estatal*. Cuadernos No. 7, 161, quoted by Rotondo, *La Religión en la Educación Pública Uruguaya: Régimen Legal*.

26. Sanguinetti, J. M., *Semino*.

27. Lindholm, T., “Philosophical and Religious Justifications of Freedom of Religion of Belief,” in *Deskbook*, supra n. 2 at 45.

thus undermining the very foundations of freedom of religion or belief in the minds and souls of Uruguayans.

The other laicist vector poses an attitude of cold indifference, underestimating religions in general, leading to freedom of indifference more than freedom of religion or belief.

Both constitute true forms of intolerance in the end, led by an erratic understanding of neutrality, revealing a denial of the religious fact in society as natural to the human being and uncaring of his dignity.

The *pluralistic approach* regards religion as part of reality and natural to the human being, entitled to due respect from the State as well as from all layers of society on behalf of human dignity. It clearly distinguishes between the two philosophical concepts of secularism (“laicidad,” stemming from lay) as a synonym of genuine neutrality, and (“laicismo,” as opposed to laicism), as committed secularism deriving in denial of the religious dimension of the human being manifested in society, and as anti-religious.

This approach praises separation between State and religion because the State is ontologically secular or non-religious, while the churches are religious by nature.²⁸ As a consequence, the State doesn’t sustain, support, nor bear any religion in particular, since the State is incompetent in spiritual affairs. As the main agent of the well being of the population,

Only a totalitarian model of society can justify the domain of a one and absolute truth ideology. What is particular of the Rule of Law is not to hold uniform theoretical foundations, but a common method, which is Democracy. And democratic method implies considering the prevalent pluralism living in our societies.

Religion is essential to human culture. Therefore the State, as the main agent of the general interest of its population, is compelled to create the suitable conditions to allow individuals to choose their ways to relate themselves with the Creator.²⁹ It isn’t enough for the government to simply abstain from involvement in religious issues, but rather it should intervene in order to insure the effective and legitimate enforcement of fundamental rights.³⁰

There are certain principles containing values common to mankind, which prevail over national regulations, amongst which Freedom of Religion or Belief stands as a “first freedom”³¹ and as “the origin of all freedoms.”³² Embodied in the proclaimed human rights, these core values are fundamental, non-derogable, and considered part of customary law and part of *ius cogens* or imperative mandatory law. The principles, rights, and liberties established or recognized by Humanitarian International Law form a nucleus, or Human Rights block,³³ which represents a minimum standard in terms of Human Rights. This binds every State, and is even superior to Constitutions, otherwise it compromises the State’s international and public responsibility.

IV. CONSTITUTIONAL CONTEXT

A. Outline of the political history with regard to relations between State and Religion.

During the colonial period Uruguay was part of the Diocese of Buenos Aires. The

28: Cagnoni, Aníbal, “Laicidad y Constitución,” in IX Coloquio del Centro de Estudios de Derecho Público, Sept., 2006, Ministry of Foreign Affairs, Uruguay

29: Durán Martínez, A., “Enseñanza Estatal y Laicidad,” *Vivir es Combatir*, eds. De la Plaza, Montevideo, 2004, 227-228

30: Riso Ferrand, M., “Derecho Constitucional” Vol. I, Fundación de Cultura Universitaria, Montevideo, 2005, 360 and 424.

31: See <http://www.firstfreedom.gov/>, United States Department of Justice, First Freedom Project. “Religious liberty is often referred to as the “First Freedom” because the Framers placed it first in the Bill of Rights. Yet it is not merely first in order: it is a fundamental freedom on which so many of our other freedoms rest.”

32: Congreso Internacional del Consejo Argentino para la Libertad Religiosa (CALIR), “*La Libertad Religiosa, Origen de Todas las Libertades*,” Buenos Aires, abril, 2008.

33: Riso Ferrand, Martín, *Derecho Constitucional I*, F.C.U., Montevideo, 2006

Roman Catholic Church was significantly influential in leading the social and spiritual life of the people, and a main character in the revolutionary movement,³⁴ which concluded with the declaration of independence in 1825. It was not before 1878 that the Diocese of Montevideo was erected.

The fact that the Roman Catholic Church preceded the existence of our independent State was crucial in determining the denominational structure adopted in the 1830 Constitution.³⁵ Notwithstanding the absence of a Concordat between the Holy See and the State, most scholars consider that the State followed a Patronage model, at least “*de facto*,” due to the powers arrogated to the State over the Church – like the right of bestowing offices or *church benefices*, and the right to appeal to the Supreme Court against ecclesial court decisions. Freedom of religion in regard to other faiths was acknowledged as part of freedom of expression,³⁶ and it followed a main principle of our foundations: “We shall promote civil and religious liberty to its maximum imaginable extension.”³⁷

Now, Masonry counted on adepts since the times of the independent movement and has kept its presence and strong influence in power, even today. So our secularization process began very early, in the second half of the nineteenth century, as a consequence of the alliances between a fortified masonry that had gained important positions in government, positivism, rationalism and enlightenment,³⁸ following the “French laïcité” model in their plans of strict secularization. After the first State-Church conflict over a jurisdiction contest in 1861,³⁹ secularization was inaugurated with the secularization of cemeteries.⁴⁰

The secularization process (1861-1918) is apparent through reforms carried out in diverse terrains: religious instruction is substituted by “Lay, Free of expense, and Compulsory School” as a motto, deprivation of civil effects to religious marriage, prohibition of religious symbols in the public sphere, restrictions on immigration and social activities of nuns, divorce, secularization of religious holidays, State Civil Registry, and suppression of religious oaths amongst other measures which lead a school of thought to the assertion that “Free-thinking tendencies soundly start to open their, definitely driving our country to be the least religious of the world.”⁴¹

The process – unconstitutional under the 1830 denominational Constitution – is legitimized after the separation of Church and State in the 1918 Constitution. With insignificant changes, the same text has been ratified through each of the constitutional reforms until our current 1967 Constitution, with its amendments. In 2004 it read:

Article 5: “All religious cults are free in Uruguay. The State does not endorse any religion. It recognizes the Catholic Church’s ownership of all temples that have been partially or completely built with funds from the National Treasury, with the exception of chapels that have been designated to serve as shelters, hospitals, jails, or other public settlements. In like manner, the State declares all churches consecrated to the worship of the various religions exempt of any form of taxes.”

34. Acevedo, E., “Anales históricos del Uruguay,” Barreiro y Ramos, Mvdeo, 1933; Zum Felde, A. “Proceso histórico del Uruguay”. Arca, Mvdeo, 1967; Cayota, M., “Historia de la Evangelización en la Banda Oriental (1516-1830) Ucdal-Cefradohis, Mvdeo, 1994.

35. Asiain Pereira, C., *Law and Religion in Latin America. General Aspects of Law and Current Concerns*, Law and Justice, The Christian Review, N° 162, 2009, The Edmund Plowden Trust, 63.

36. Gros Espiell, H., *Evolución Constitucional del Uruguay*, Fundación de Cultura Universitaria, Montevideo, 2003, 35.

37. Instructions of the year XIII to the representatives of our province to the 1813 Constitutional Convention in Buenos Aires, by José Artigas, 3rd Instruction.

38. Lisiero, Darío, “Iglesia y Estado del Uruguay en el lustro definitorio. 1859-1863,” *Revista Histórica LXV –Segunda época -tomo XLII (1971) 12.*

39. Asiain, C., “Algunas Reflexiones acerca de la Libertad Religiosa en el Uruguay,” *Anuario Argentino de Derecho Canónico T. X*, 2003, 17-36

40. 18 April 1861, Alonso y Criado, “Colección legislativa de la República Oriental del Uruguay,” T. 1-30, Mvdeo., 1876-1908, Ed. Palacio Legislativo

41. Eirin Fava, S., “Libertad Religiosa y Neutralidad: Normativa Jurídica,” “Jornadas: Estado de Derecho, Educación y Laicidad,” Cuadernos de la Facultad de Derecho y Ciencias Sociales, Montevideo., 1988, 177.

It is accurate to affirm – as most analyzers assert – that our Constitution establishes a secular State in terms of its posture towards religion. But this statement is true only after acknowledging that our Constitution proclaims Freedom of Religion or Belief as a fundamental principle, and subsequently establishing its non-denominational stance with regard to religion. Therefore, when describing Uruguay’s stance on religion, we should identify the State as a “Religious Liberty State,” and only after, as a non-denominational State. The Constitution itself has chosen this prevalence.

B. Constitutional Provisions and Governing Principles

A Human Rights Respectful State: The Constitution acknowledges – does not create – the basic Human Rights, and grants their protection. Amongst these rights are the guaranteed protection of the enjoyment of the right to life, honour, liberty, security, labour and property (Article 7). The *forum internum* is exempt from the arm of the authority, as are private actions, provided they do not interfere with public order or impede others (Article 10) in enjoying the *Principle of Legality*).

Uruguay is part of International Humanitarian Law, having ratified the key international instruments affirming freedom of religion or belief, and thus is obliged to respect and take action in order to guarantee and facilitate the universally applicable human rights codified in its instruments.⁴²

As part of *ius cogens*, or imperative mandatory law, the principles, rights and liberties form a nucleus, or Human Rights block.⁴³ This represents a minimum standard in terms of Human Rights, which is considered non-derogable under Customary International Law as an application of the Vienna Convention on the Law of Treaties (1969), and binds every State, being superior even to Constitutions, otherwise compromising the State’s international and public responsibility. So, these rights and liberties may be directly invoked by individuals and communities.

Article 72 of the Constitution “The enumeration of rights, duties and guarantees made by the Constitution, does not exclude others that are inherent to the human person or derived from the republican model of the government” constitutes an innominate or general guarantee for human rights compliance, as well as a tool to demand the authorities to accomplish the duties and secure the guarantees due to human dignity and proper to a republican government, notwithstanding their explicitation in the text. Therefore, all recognized human rights and guarantees are included as part of the guiding principles and are executable under the enforcement of Article 332 of the Constitution, which consecrates the *direct applicability of the articles that acknowledge rights to individuals and those that assign powers and impose duties to public authorities*. These precepts are *directly applicable*, which constitute the “generic constitutionalization of the founding principles of justice of classical Natural Law,”⁴⁴ may be invoked even in the absence of regulation, and will be replaced by looking at analogous laws, the general principles of law, and the overall accepted theoretical foundations of law.”

Non-derogability of Rights: Limitation of rights – true and perfect subjective rights – would be ineffective even if it were attempted by law,⁴⁵ as they are regarded as independent from the will of the sovereign.⁴⁶

A Pluralistic State: The phrasing “All religious cults are free in Uruguay” (Article 5) embodies the recognition of different religious denominations coexisting in our nation, receiving the same or similar treatment from the State. “The Republic of Uruguay is the political association of all the inhabitants of its territory (Article 1) comprises all

42. Lindholm, T., Durham, Jr., W.C., Tahzib-Lie, B.G. with Ghanea, Nazila, “Introduction,” *Deskbook*, supra n. 2 at xxxvii and xli.

43. Risso Ferrand, M., *Derecho Constitucional I*, F.C.U., Montevideo, 2006.

44. Real, A. R., “Responsabilidad del Estado,” *infra* n. 45.

45. Cassinelli Muñoz, H., “Responsabilidad del Estado por Lesión del Interés Legítimo” 4º Coloq. Contencioso de Derecho Público, Responsabilidad del Estado y Jurisdicción y “El Interés Legítimo como situación jurídica garantida en la Constitución Uruguaya,” *Perspectiva del Derecho Público en la 2ª mitad del S. XX*, Estudios de Homenaje al Prof. Enrique Sayagués Laso, T.III.

46. *Id.* at 93 y sigs.

individuals living in the country, in an association of equals.

The Rule of Law: “The Nation adopts the democratic republican form of government. Its sovereignty will be directly exercised by the Electoral Body in the cases of election, popular initiative and referendum, and indirectly through the representative powers established by this Constitution; all according to the rules expressed in it” (Article 82), embeds a State, governed under the Rule of Law, whose juridical manifestation is Democracy.

The Principle of Equality outlined by Article 8, “All persons are equal before the law, with no distinction among them other than their talents or virtues” provides the premise for the Principle of Non-Discrimination and for Pacific Coexistence and Tolerance – the latter only after due respect fails to be attained.

A Religious Freedom State: Not only does the Constitution proclaim freedom of religion or belief with outdated terms of “*religious cults*” – which should be interpreted as modern Freedom of Religion or Belief under the historical-evolutive and teleological method of interpretation – but it moreover esteems religion highly, which is partially revealed by tax exemption “to churches consecrated to worship of the different religions.”⁴⁷

The Constitution automatically acknowledges the Roman Catholic Church as a legal entity, incurring a slight detriment in the principle of equality with regard to the rest of the faiths. However, religious freedom in its full extent is acknowledged, with its manifestations stemming from a republican form of government. Freedom and independence of the conscience are specifically shielded (Article 54), which provides the foundation for conscientious objection. Allusions to morals abound throughout the Magna Carta, as well as the reference to virtues, revealing that the Constitution recognizes spirituality in the individual.

A Secular State in terms of its separation from religion and non-denominational nature, yet pluralistic at the same time.

The Principle of Cooperation between the State and religious communities is in force by means of the several coordinated actions taken to assist the unprivileged, regardless of the absence of provisions in legal documents. In sharing the common aims of peace, solidarity, equality, and respect of others, the focus of both the State and religions is set on the human being, which creates cooperation in some charitable actions. Regrettably, some areas – like spiritual assistance to confined people, education and direct promotion of religion in order to facilitate freedom of religion of belief – are still ignored.

We are in debt to the *Principle of Autonomy* of religious congregations and academic autonomy in teaching and studying this discipline of Law and Religion. With regard to religions, the State still vindicates its supposed power to meddle in religious affairs or disqualifies opinions or intervention of Church authorities in the public sphere. As for Law and Religion, it is still subsumed by Constitutional and Civil Law, and is thus hindered from developing proper theoretics and foundations of its own. Moreover, issues directly concerning freedom of religion or belief are frequently addressed as issues alien to its principles, and therefore, not solved but neglected or denied.

The Rule of Law proclaimed by our Constitution and the comprehensive respect of human dignity demands the harmonization of human rights and constitutional principles in order to comply with the essentials of Freedom of Religion or Belief. The State must face religious issues with the legal frameworks necessary to address, in a systematic and human-focused attitude, the upcoming concerns that religions are posing to modern pluralistic societies. Because “it isn’t enough nor easy to simply proclaim the existence of specific liberties in the Constitution if they are not completed with the adequate guarantees.”⁴⁸ Scholars and academic production must declare its independence from other branches of Law, in order to deal with religious issues in an appropriately autonomous way.

47. Durán Martínez, A., *Enseñanza Religiosa en la Educación Pública. Marco Constitucional Uruguayo*, IX Colloquium of the Latin American Consortium for Freedom of Religion or Belief, Montevideo, August 2009.

48. Cassinelli Muñoz, H., *Derecho Público*, surpa n. 45 at 109.

The Principle of Liberty generally guards Freedom of Religion or Belief, but it is undeniable that some specificities are irreparably lost without a deep reflection and development of the discipline. Following Descartes, we will only be able to assert that Law and Religion exists in Uruguay, after having demonstrated that it thinks.⁴⁹

V. LEGAL CONTEXT

There is *no specific legislation* dealing with religion or religious freedom in an integral manner. While our legislation provides regulation for very specific religious features, it lacks a framework, like in a General Law on Freedom of Religion or Belief, as other countries possess. The same happens with case law and court decisions; scarcely does the judiciary deal with religious issues, from a freedom of religion perspective.

This legal desert of ours may be partially mitigated by means of the direct applicability of International Humanitarian Law. As we have outlined, Uruguay has ratified most, if not all, of the International Covenants and documents on Human Rights which, together with the Constitution, form the “constitutionality block”⁵⁰ or “Human Rights Block”⁵¹ and may be invoked as national binding law.

This posture on International Humanitarian Law hierarchy is not shared by all scholars; some grant international treaties the same hierarchy as statutory law,⁵² which may be abolished by subsequent law or be declared unconstitutional by the Supreme Court and made inapplicable to the case in question.

There are no specific bodies – like councils, agencies, or directorates – in the State structure that deal with religious affairs and religious communities. This is a huge deficiency in our legal system, which is repeatedly denounced as a means of neglecting Freedom of Religion, against both individuals and communities.

A shallow attempt towards establishing a public link with religions involved the creation of the Honorary Commission against Racism, Xenophobia, and any kind of Discrimination, as a portion of the Human Rights Office of the Ministry of Education and Culture.⁵³ The norm specifies as possible forms of discrimination “any distinction, exclusion, restriction, preference, or the use of physical or moral violence, motivated by race, skin color, religion, national or ethnic origin,” amongst other reasons, resulting in impairment of human rights in any possible sphere. This Commission, however, doesn’t qualify as the demanded institutional type of relation between the State and religious communities as legal entities. It is limited to give response to and arbitrate specific conflict situations, lacking mandatory effects.

A National Human Rights Institute was recently created⁵⁴ as an autonomic Parliamentary office, to deal with the defense, promotion, and protection of Human Rights proclaimed by the Constitution and International Law. Despite the fact that the term religion is absent from the extensive text of the norm, it appears as a useful tool to protect religious freedom as comprised by the “Human Rights Block.”

The State’s posture with regard to religion is not clear yet and is undergoing revision, frequently incurring in contradiction. For example, notwithstanding the fact that religious issues are amongst the purposed of the outlined Human Rights Commission in the

49: Asiaín Pereira, C., “El gran desafío del Derecho Eclesiástico del Estado en el Uruguay: Su Existencia misma como Rama del Derecho,” Secretaría de Gobernación de México, actas del V Coloquio Internacional del Consorcio Latinoamericano de Libertad Religiosa, México, D.F., 2006 y Anuario D. Administrativo T. XIII, F.C.U., Montevideo, 2006.

50: Durán Martínez, A., *Enseñanza Religiosa en la Educación Pública. Marco Constitucional Uruguayo*, IX Coloquio del Consorcio Latinoamericano de Libertad Religiosa Montevideo, agosto, 2009.

51: Risso Ferrand, M., *Derecho Constitucional*, T.I, Montevideo, Fundación de Cultura Universitaria, 2006

52: Korseniak, J., *Derecho Público. Derecho Constitucional*, Montevideo, Fundación de Cultura Universitaria, 2006, p. 465 and Jiménez De Aréchaga, Justino. “La Constitución Nacional” T VIII, 182; y “El Poder Legislativo,” T. II, Escuela Nacional de Artes y Oficios, Mvdeo., 1906, 314 y sigs.; Esteva, E. y Nicolliello, N. “Declaración de Inconstitucionalidad de Actos Legislativos,” R. Uru. D.Const. y Pol. 1, 1989, 97; Informe de la Comisión de Constitución y Legislación, Cámara de Senadores, 1962, Doc.X, 61.

53: Created by Law Nº 17.817 from 6 September 2004.

54: Law Nº 18.846, from 27 January 2009.

Executive – when the Ministry of Education and Culture lists the Human Rights in its report about the “Expenditure on Human Rights in Uruguay 2004-2008” – Freedom of Religion is left aside.⁵⁵ As a counterpart, the same Ministry has recently organized a seminar on “Religious Pluralism and Secularity (“laicidad”) in the Uruguayan society,”⁵⁶ showing a very open minded attitude towards the religious phenomenon, even considering its presence in public spheres.

Needless to say that this setting accounts for the absence of bilateral formal relations between the State and religious communities. As a consequence, religious communities and churches are not recognized as interlocutors at the same level as the State. On the contrary, as we have previously noticed, opinions and locution from religious organizations are often disqualified.

VI. THE STATE AND RELIGIOUS AUTONOMY

Following the “two separate spheres” model, public authorities do not intervene in the life or organization of religious communities, partly because they lack jurisdiction over religious groups and affairs and partly because it just pays little or no attention to religion at all. Secular law has no provisions on the subject and religious communities govern themselves and act freely in the secular sphere, provided public or common interest is not challenged. Although the State has no specific legal provisions to facilitate peaceful coexistence and respect between religious communities, this philosophy underlies most of State actions and is currently developing. An example was the recent seminar on Religious Pluralism, which gathered representatives from the diverse religions in Uruguay, side by side with scholars from different disciplines.

There are some specificities, however, that may be considered as recognizing religious autonomy. One is the issue declaring that religious property – objects, goods or real estate – destined to worship are unattachable, according to several laws regarding the question, redounding in its universal scope.⁵⁷

Another special consideration of religious autonomy is that related to religious secrecy. Proceedings Law allows ministers of religion – amongst others holders of professional secret – to abstain from testifying in court.⁵⁸ Although clergymen are not directly addressed by the provision, they are undoubtedly secret-holders, and may therefore invoke the exemption. The same is established for pleas (reports requested on paper), in which case the request may be denied if the matter is classified or under secrecy (Article 190.2).

A negative example in the fields of the State interfering in religious autonomy did take place, though, when the Executive ordered the Catholic Church authorities to replace a Jesus Cross to its original location in a temple, based on the fact that it entailed a historical and cultural value for the Nation.⁵⁹

The issue regarding secularization of religious holidays may be considered another case of State interference in religious autonomy, or more exactly, a case of State invasion of religious holidays specifically of the Roman Catholic Church. What are the foundations of this bold statement? We are aware that secularization of religious holidays did take place in many other countries and yet, they could hardly be considered as interfering with religious autonomy. This non-interference is due to the manner in which it was implemented or the features that were designed to encompass the measure. For example,

55: Beretta, N., *Expenditure of Human Rights in Uruguay 2004-2008*, Ministry of Education and Culture, CINVE, U.N. System in Uruguay United in Action, 2009, 18-45.

56: Seminar “Pluralismo religioso y laicidad en la sociedad uruguaya,” National Library, 30 September 2009, organised by the Human Rights Office, Ministry of Education and Culture.

57: Civil Code, Art. 2363 “Sacred and religious objects and goods destined to worship of any religion”; Proceedings Law Art. 381 “The following goods are unattachable: 9) Goods destined to worship of any religion”.

58: Proceedings Law Art. 156 “Exemptions to the duty to testify: ... (2) the holders of professional secret, or those who must keep secrets by virtue of law.”

59: See Asiain Pereira, C., “Declaración de Patrimonio Histórico o Cultural versus Libertad Religiosa,” May, 2006, www.libertadreligiosa.net, for an extensive description of this case. The decision was subsequently abolished.

other countries have adopted religious holidays from other major religions as holidays or non-working days, together with Catholic festivities.

The Romans built their edifice to their gods on the Jewish Temple Mount and later the Dome of the Rock and Al-Aksa were built by Arab Muslims on the ruins of the Roman structures.⁶⁰ Muslim mosques were erected in the holiest site in Judaism, the Temple Mount, where the Temple of Jerusalem once stood. Thus, Jews consider their main holy place profaned, and therefore cannot legitimately render a proper worship, a reason why they express their sorrow in the Wailing Wall. When a new antagonist religious community or a conquering political authority has intended to overthrow the native or traditional religious groups existing in the conquered or dominated territories, it either substitutes the original religious elements with elements of its own, or erects other buildings or monuments in or on top of sacred places, thus, profaning the place and intending to change its nature. History abounds examples of this sort.

More than interfering in religious autonomy, our argument is that the State has invaded the religious holidays of the Christian faith (Catholic, more specifically) rather than having “borrowed” and secularized them. This is part of a strategy to relegate and nullify religious manifestation, with a very deliberate purpose which was made explicit by the lawmaker: to “empty churches.”⁶¹ In order to accomplish that goal, Catholic religious holidays which were traditionally kept as non-working days, and were confiscated by the State with their names being substituted by pagan nomenclature. As a result, Uruguay’s eccentricity stands out from the rest of the world, being the only country which has made the Easter Week – whose name was changed to “Tourism Week” – entirely non-working days (seven days). The measure turned out to be very effective: many Christians choose to take all the non-working week off, leaving their parishes to engage in tourism, leisure or travelling. As a result, churches have in fact been considerably emptied, or at least their congregation during the most important celebration of their Christian calendar.

A proof of our statement is the fact that, being the Holy Week a mobile holiday, State authorities depend on or must wait for the religious authority (Holy See, mainly) to determine when the Holy Week will be every year, and then to set the “Tourism Week” in that particular period of the year by themselves. The same happens with Carnival and is eloquent of the intention to invade, more than to secularize, a religious holiday.

Table 1. National Holidays as Proscribed by the 1979 Law

RELIGIOUS HOLIDAY	Date	HOLIDAY (non-working)	Change of Denomination by Law
Epiphany	January 6 th	YES	Children’s day
Carnival	Set by RC Church	2 days	Amplified: Carnival week
Easter week	Set by RC Church	7 days	Tourism week
All Saints	November 1 st	NO	
Faithful deceased	November 2 nd	YES	Deceased Memorial Day
Immaculate Conception	December 8 th	NO	Beaches Day
Christmas	December 25 th	YES	Family Day

A 1920 law establishes a weekly rest after every six working days, setting it on Sundays, allowing the exceptions necessary to cover the requirements of the give service.⁶² The later 1979 law of “National Holidays” separates “traditional holidays” from

60. Winston, E. A., “The Imminent Collapse of the Jewish Temple Mount,” http://74.125.93.132/search?q=cache:CeNo719yJIoJ:www.freeman.org/m_online/apr02/winston.htm+al-aksa+profanation+of+jerusalem+templew&cd=5&hl=es&ct=clnk&gl=ar.

61. Asiaín, C., “Algunas Reflexiones acerca de la Libertad Religiosa en el Uruguay,” *Anuario Argentino de Derecho Canónico* T. X, 2003 and Asiaín Pereira, C., “Law and Religion in Latin America. General Aspects of Law and Current Concerns,” *Hilary/Easter*, 2009, “Law and Justice The Christian Law Review,” *Worcester WR2 4PB UK, Reino Unido*, <http://www.lawandjustice.org.uk/LAWJUSTICE>, 62-78.

62. Law N° 7.318, 10 December 1920, arts. 1 and 2 Art. 1 “... notwithstanding the nature of the establishment, public or private, secular or religious, and even if it has a professional teaching or charitable character ...”

“patriotic” commemoration and exaltations days. Included as “traditional” holidays are these Christian religious holidays, but without mentioning their religious origin⁶³: 1 and 6 January, Monday and Tuesday of the Carnival Week, “the sixth week after the Carnival Week, which will be denominated “Tourism Week,” 2 November and 25 December. N.b.: Monday and Tuesday of the “Carnival Week” are the two days before the beginning of Lent, that is, before Ash Wednesday, which is also set by the Roman Catholic Church authorities (see Table 1).

VII. RELIGION AND THE AUTONOMY OF THE STATE

No religious community is entitled to a specific role in the secular governance of the country, nor given some power to control other religious communities under the State law. However, some religious authorities or representatives (members of the clergy, priests, and religious personnel) have occupied places in the Executive,⁶⁴ or have been appointed honorary members of public commissions. There is no restriction on members of the clergy to exercise political rights or to access public office.

VIII. LEGAL REGULATION OF RELIGION AS A SOCIAL PHENOMENON

With the exception of tax exemption, the State deals with religious communities in the same way it does with other associations in terms of granting legal personality, registration of religious entities for this purpose, cemeteries, regulation of places of worship, distribution of literature, data protection, and slaughtering of animals.

Until May 2009, the only administrative regulation on slaughtering of animals⁶⁵ mandated the use of humanitarian methods in slaughterhouses authorized by the Ministry of Agriculture, *with the exception of ritual sacrifice methods*. Ritual slaughtering may be permitted on demand – kosher or Islamic cases. Provided they comply with sanitary regulations, the activity is control-free.

The recent Law on “Responsible Tenancy of Animals”⁶⁶ is destined to protect animal life and well-being. Therefore, ill-treatment of animals is banned, and animal sacrifice is strictly regulated, except those for “productive activities or religious rites” (Article 3).

As Afro-Brazilian religions sacrifice birds or goats as ritual offerings to their gods, some animal-protection associations have raised their voices against this practice, and some bills on animal protection have been under consideration.⁶⁷ The paradox is that, while animals are banned from entering public beaches⁶⁸ for sanitary and other reasons, dead animals are left alongside the coast, with impunity. The Law authorizes sacrifice, but omits regulating about the destiny of the dead bodies.

As for data protection, privacy is generically guaranteed by the Constitution and International Humanitarian Law. The “Habeas Data” Law⁶⁹ regulates the treatment of personal data contained in registries, and is intended to provide reliable commercial reports. It explicitly leaves religious affiliation information out of the scope of the law, treating these as “sensitive information to people’s privacy.” Similar treatment is provided by later “Personal data protection and habeas data action” Law,⁷⁰ proclaiming personal

63. Law N° 14.977, 14 December 1979 of National Holidays, Art. 1.

64. As recent examples, during this administration, Father Mateo Méndez was head of the Juvenile Rehabilitation Institute, and Father Uberfil Monzón was head of the Food National Institute; previously, during the Batlle Administration, Archbishop of Montevideo, Mons. Nicolás Cotugno was appointed President of the Peace Commission created 9 August 2000, to investigate the whereabouts of the disappeared during the military dictatorship, which was also composed by other members of the clergy.

65. Decree N° 369/983, art. 181.

66. Law N° 18.471, 21 April 2009.

67. See <http://www.vet-uy.com/publicidad/animalesinhogar.htm>.

68. Local Law N° 27.379, Municipality of Montevideo, 12 December 1996 and its administrative regulations

69. Law N° 17.838, 1 October 2004. Art. 2° establishes that the law excepts “sensitive information about people’s privacy, understanding by these, those referring to people’s racial or ethnic origin, their political preference, religious, philosophical or moral belief, trade union affiliation or information regarding their health or sexuality or any other area reserved to individual freedom.”

70. Law N° 18.331, 18 August 2008, arts. 1, 4 and 18.

data protection as a human right. It includes information related to racial and ethnic origin, political preference, religious or moral beliefs, trade union affiliation, and information related to health or social life as “sensitive information” which is specially protected. While data bases collecting “sensitive information” are banned, those possessed by churches and religious communities, associations and other non-profit entities with “political, religious, philosophical, trade union purposes.”

Distribution of literature is absolutely free. Previous censorship doesn’t exist, and freedom of expression is often privileged both by law and court-rulings – even over eventual offence of racial or religious feelings – provided it doesn’t incur in crime, which we will discuss.

Regulation of places of worship follows the general criteria, with no specificities.

In regard to cemeteries, they were the first religious sites to be secularized – more accurately, expropriated – in 1863, unilaterally by the State.⁷¹ As a result, the Roman Catholic Church owns no cemetery. However, Jewish cemeteries exist at least since 1917,⁷² and the British cemetery is even older. Other private cemeteries have been authorized fairly recently.

As for the issue of legal entity, there are no specific structures for religious congregations or organizations with religious objectives. Therefore, all religious organizations must try to “fit” into existing civil or commercial structures, or as non-profit civil societies, given the absence of a particular legal religious association type.

The Constitution recognizes the Roman Catholic Church as an entity distinct from its members (Article 5), and as the owner of patrimonial rights. The Roman Catholic Church legal status is therefore implicit. Its rights are acknowledged, not granted. This status may be explained as the result of an agreement that goes back to the separation of Church and State where separation was achieved and the State granted legal recognition to institutions existing prior to the State, thus recognizing certain rights that the Church already had.

Likewise, the Civil Code (Article 21⁷³), treats the Roman Catholic Church the same as governmental institutions. Legal personality of the Roman Catholic Church is automatic. For example, there is no required approval of its statutes, as its status is recognized as a package deal that includes all the guidelines, authorities, and regulations set forth by the institution, without the government requiring them to be presented for approval.⁷⁴ No other institution that wishes to obtain legal status has this luxury. A decree from the Holy See may create a new Diocese in Uruguay, and hence, a new legal entity is born in the country, without governmental approval.⁷⁵ The rest of the religious corporations, institutions, and associations should be recognized by civil authority.

71. Secularization of Cemeteries Decree, 4 April 1861.

72. <http://74.125.47.132/search?q=cache:TCsgPSRXaogJ:jai.com.uy/histocementerios.htm+cementerio+israelita+uy&cd=1&hl=es&ct=clnk&gl=ar>.

73. Civil Code, art. 21 “All individuals of the human race are recognized as persons. The following are considered legal entities, and therefore are entitled to civil rights and obligations: the State, the Treasury, the Municipality, the Church, and those corporations, institutions and associations acknowledged by public authority.”

74. Asiaín Pereira, C., “El gran desafío del Derecho Eclesiástico del Estado en el Uruguay: Su Existencia misma como Rama del Derecho,” Secretaría de Gobernación de México, actas del V Coloquio Internacional del Consorcio Latinoamericano de Libertad Religiosa, México, D.F., 2006 y Anuario D. Administrativo T. XIII, F.C.U., Montevideo, 2006

75. Interpretative Law N° 12.802, art. 134: “The following are recognized as cultural institutions in Article 69 of the Constitution, and therefore are tax exempt: seminaries or instructional buildings of the congregations or institutions of any religion, libraries, buildings for public events, edifices designed for classes on commerce, music, employment, and domestic economy, all sports fields, centers, and entertainment for youth established and sustained by a non-profit church or institution. In addition, all cultural institutions, and those instructive in nature, sports federations or associations, as well as any institution incorporated therein is declared exempt from all national or local taxes, as well as all tributes, national security taxes, and/or contributions, inasmuch as said entity has been legally recognized. Equally exempt from any national or local tax, as well as any tribute, and/or contribution of goods of any kind, are all current and/or future Dioceses of the Roman Catholic Church, as well as any other religion that has, receives or acquires, for the purpose of worship, welfare and educational assistance. In the case previously mentioned, the reason for the exemption would be justified by the Minister of Finance. The legal bodies of the Dioceses of the Roman Catholic Church, created or that will be created in the future, as they formulate their respective legal declarations, will indicate which assets are not tax exempt.”

Recognition means they should go through the process of receiving legal status – a process that requires that their statutes be presented and approved – and that a series of administrative controls be put in place for the duration of their existence.⁷⁶

The Ministry of Education and Culture is authorized to apply sanctions that range from a fine, to termination of all legal status of the institution. Administrative intervention is seen as a precautionary means when (1) violation of law, regulations, or statutes may be challenged, (2) necessary to protect the state interest, (3) necessary to safeguard the integrity of its members, and (4) when necessary to protect moral or material goods that are the property of the organization. (Outline of legal implications, Table 2, below.)

Discrimination against the rest of the religious communities is undeniable, notwithstanding the historical explanations that may be given to justify it.⁷⁷ The Principle of equality is overruled as well as is Article 5 of the Constitution, which doesn't distinguish between “all churches consecrated to the worship of the various religions” when granting tax exemption.

One might ask, where lays the so called “abstentionist” secularism when the State is favouring one religion over the others? The truth is that neutrality is a myth. We will look into tax exemption later.

Table 2. Legal Implications of Authorized Discretionary Treatment of Religions Organizations

	ROMAN CATHOLIC CHURCH	OTHER RELIGIOUS GROUPS
Legal personality	Automatically granted	Must follow procedures to attain it (Law N° 15.089)
Creation of new associated entities with legal status	A decree from the Holy See automatically creates a new legal entity in Uruguay	Must follow administrative procedures and registration before the government
Statutes	Canon Law (C.I.C.), ⁷⁸ constitutions and conciliatory documents rule as the R.C.C.'s statutory law	Need approval
Controls	Exempt of controls → consequences in civil life	Ministry of Education controls, with powers to punish and intervene
Change of statutes	Without notifying the State	Submitted to administrative control
Tax exemption	Per se (Const. Article 5)	Depends on: legal status, tax authority approval, be non-profit, plus historical rooting for tax exemption for employer
Need to prove worship objective ?	Exempt	Must prove
Type of association/ legal structure	Original legal entity (recognition together with the State)	Acquisition of a generic type of legal association, thus “forced to fit” into existing associative typology
Private or public?	Private legal entity for legal business and civil life (dioceses, parishes, congregations, schools); recognition of the Holy See as an international public entity or subject. ⁷⁹	Always private.

76. Law of civil organizations N° 15.089, 23 December 1980, art. 1: “The Department of Education and Culture has administrative power over all civil bodies, and as a consequence, will control their creation, function, dissolution, and sale.”

77. Asíaín Pereira, C., “Personalidad Jurídica de las Congregaciones Religiosas en el Uruguay. Desigualdades Jurídicas,” in “Religion, Identity and Stability: Legal Challenges of Religious Difference,” 14th Annual International Law and Religion Symposium, 7-9 October 2007, Brigham Young University, Utah, U.S.A.

78. Codex Iuris Canonici, Canon Law of the Roman Catholic Church.

79. Executive Power Res. (1990-1995), Brito, M., Yearly Report on Administrative Law Group, June 2006, <http://www.mrree.gub.uy/protocolo/PrecedenciaEmbajadores.htm> and <http://www.mrree.gub.uy/protocolo/pais2.asp>.

The State has no official record of the religious affiliation of individuals, at least not a complete and universal record. The National Statistics Institute, however, did carry out a poll in 2006,⁸⁰ and inquired about religious affiliation. According to the poll, 80 percent of the population declared to believe in God, or belonged to a religion or belief.⁸¹ While it was the first time that the State asked about religious membership or sympathy – which is a huge step if compared to prior inquiries – it isn't conclusive since the poll was not universal and cannot be considered complete, like a census. In fact, some initiatives to include the question in the next census were rejected, so the issue will continue to be absent from official records.

As the State ignores the religious affiliation of its inhabitants, it eludes designing and enforcing suitable policies to assure freedom of religion or belief. Again, the issue is neglected. This legal desert has undermined important concerns such as freedom of conscience, amongst others. In this atmosphere, conscientious objection was hardly recognized as a right till very recently, even though our Constitution recognizes the independence of the moral and civic conscience,⁸² and commits authorities and individuals to further physical, moral, and social health and perfection.⁸³

As compulsory military service is not operative in our country, there were no complaints in this area, so the issue of conscientious objection wasn't raised as early as it was in other countries in which academic reflection was enabled.

The question was opened by Jehovah's Witnesses objecting to medical treatment, challenging scholars and decision-makers to take a stance on the point. Few cases reached the courts – the claims being generally ruled in favour of the objector – on the grounds of freedom of conscience and of belief, or enhancing self-determination.⁸⁴

In spite of the fact that the right is not yet granted full recognition – at least by some conservative scholars or secular fundamentalist postures – conscientious objection to blood transfusion is generally accepted both by private and public hospital authorities, as a reason to avoid the prescribed treatment, provided the person is capable of deciding and has been thoroughly informed of the risks he is facing.

Based on the patient's right to self-determination, the Clinics Hospital – a university hospital part of the public university – has approved a medical Protocol to deal with these cases, founded on the two governing principles of valid and informed consent by a capable adult. In the case of minors or mentally disabled whose guardians refuse the treatment, as in the case of pregnancy, a Family Judge will make the determination.⁸⁵

Several "progressive" bills have been under consideration in Parliament during the last administration, and several laws have been passed, which have introduced innovations in the area of bioethics which challenge religions, beliefs, and consciences.⁸⁶

80. National Statistics Institute (INE), Homes National Poll (Amplified), 2006, http://www.ine.gub.uy/biblioteca/metodologias/ech/metodologia_percent20encha_percent202006.pdf.

81. Da Costa, Néstor (compilador), *Guía de la Diversidad Religiosa de Montevideo*, CLAEH, Montevideo, 2008, Ed. Santillana SA, 16.

82. Art. 54 "Law must recognize independence of the moral and civic conscience of those involved in labour or service relation, as well as a fair salary, limitation of the working day, weekly rest and physical and moral hygiene."

83. Art. 44: "The State will legislate in all matters related to public health and hygiene, seeking physical, moral and social perfecting of all inhabitants. All inhabitants are due to care for their health and submit to treatment in case of illness. The State will provide free means of prevention and assistance only to the poor or those lacking the necessary resources."

84. A court ruled that the judge lacked jurisdiction to substitute the free will of a capable person exercising his right to self-determination inherent to human nature (Juzgado Letrado de Primer Instancia en lo Penal de 5º turno, 21.X.1998, La Justicia Uruguaya, T. 120). In another case, the judge quoted the "Dignitatis humanae" Declaration of Vatican Council II as "a religious text of universal scope" (Juz. Let. Pen. 13º T, Nº "omissus", 30 January 1997 (Cecilia Schroeder), La Justicia Uruguaya, T 115, caso 115006).

85. Cendoya, N. y otros, "*Relevancia del consentimiento del paciente y situaciones en que éste no acepta el procedimiento terapéutico propuesto en centros asistenciales públicos*," Yearly Report on Administrative Law, Vol. XIV, Fundación de Cultura Universitaria, Montevideo, 2007, 659.

86. For a further analysis, see Asiain Pereira, C., "Derecho Sanitario y Libertad de Conciencia en Uruguay," May, 2009 (publishing), chapter on Uruguay, "Estudio comparado de libertad de conciencia y Derecho Sanitario en Iberoamérica," Universidad Autónoma de Madrid, Spain.

Some of them have foreseen the legitimacy of posing conscientious objection. Others have limited the right to the extreme of denying it.

The “Human Assisted Reproduction Bill”⁸⁷ deals with manipulation of embryo and other techniques. As the “Defence of the Right to Sexual and Reproductive Health Bill” – which intended to legalize abortion and recognize conscientious objection,⁸⁸ – was vetoed, Law N° 18.426 (the few articles of the vetoed bill which prevailed) committed the State to enforce national programs to implement sterilization techniques and to provide birth-control methods universally. The Law on the Rights and Duties of Patients and Health Services Users⁸⁹ and the “Law on Anticipated Statement of Will”⁹⁰ (which enables termination of life under certain conditions) both regulate the right to conscientious objection, with limits.

The Bill on the “Right to Genre Identity and Change of Name and Sex in Identification Documents,”⁹¹ recently approved by both chambers of Parliament, has no provision on conscientious objection. In spite of this law, some public servants, physicians, surgeons and other medical personnel assigned to a sex operation will refuse to comply when facing the change of name and sex in documents.

IX. STATE FINANCIAL SUPPORT FOR RELIGION

A. State Financial Support for Religion Is Indirectly Specified through Tax Exemption

Article 5 of the Constitution exempts *all temples consecrated to the worship of the various religions from any form of taxes.*

Several problems have risen when interpreting the meaning of the term “temple” or church, as well as of the concept of “taxes.” Tax specialists have interpreted the concept of “taxes” as referring to any kind of tribute and consequently including property taxes and payroll taxes in the scope of the tax exemption, defining it as “immunity” or objective exemption.⁹² It has also been defined this way by interpretative laws, as well as by the jurisprudence of the Supreme Court. Constitutionalists have argued, instead, that by the time of the last reform of the Constitution, which maintained the term “taxes” in Article 5, three types of tributes were clearly differentiated in Tax Law,⁹³ and thus the term “taxes” is not comprehensive of the rest of the tributes.⁹⁴

Another problem was raised when interpreting the term “temple” or “church” alluded to by Article 5. In general, scholars – tax specialists and constitutionalists⁹⁵ – have understood that the temple should be permanently dedicated to worship to be considered for exemption. Others, on the contrary, have outlined that as Article 5 doesn’t require it, the interpreter shouldn’t go beyond the text of the Constitution, exacting stricter

87. Bill www.parlamento.gub.uy, *Cám. Representantes*, Carpeta N° 3181, 2003, Repartido N° 334. Jule, 2005

88. The bill also contained legalization of abortion, which was vetoed by President Tabaré Vázquez, Dec., 2008. For a detailed analysis, see Asiaín Pereira, C., “El Aborto de la Ley de Aborto,” IUSTEL, *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado*, España, N° 19, enero de 2009, (RI §407323), http://www.iustel.com/v2/revistas/detalle_revista.asp?id=2&id_noticia=407323&id_categoria=8481&texto.

89. Law N° 18.335, August 2008.

90. Law N° 18.473, 21 April 2009.

91. At http://www.parlamento.gub.uy/texrobados/ AccesoTextoAprobado.asp?Url=/textos_ aprobados/camara/d20090915-34607-1167.htm was approved by the Chamber of Deputies and subsequently by the Senate on 10 October 2009, still pending pronouncement by the Executive, as for 15 October 2009, to become a Law.

92. Valdes Costa, R. y Shaw, J. L., Tax Law Code.

93. Tax Law Code, Arts 10 to 13 distinguishes three kinds of tributes: *Tax* (impuesto) as the tribute paid regardless of the State’s counter parting activity in favor of the taxpayer, e.g., consumer taxes; *Rate* (tasa) as the tribute paid in relation to a specific governmental activity for the taxpayer, e.g. registration costs and administrative charges; and *Special Contributions*, such as those paid as a counterpart to an economic benefit provided to the taxpayer, derived from public works or activities, e.g., special contributions due to improvements in property, and payroll taxes.

94. Risso Ferrand, M., *Derecho Constitucional*, T.I, Montevideo, Fundación de Cultura Universitaria, 2006.

95. Shaw and others, (Tax Code) and Korseniak, José, *Derecho Público. Derecho Constitucional*, Montevideo, Fundación de Cultura Universitaria, 2006.

requirements.⁹⁶

But the meaning of the term “temple” has been debated in courts and the legal forum. Some judicial decisions have considered that the idea that religion entails an integral development of all aspects of life and culture,⁹⁷ acknowledging the global aspect of religion.⁹⁸ These decisions proceeded to rule that not only is the area of the temple exempt, but also its annex buildings – such as pastoral classrooms, clergymen’s premises, etc. This ruling favors the subjective nature of the exemption, that is, that religions were the subjects of exemption, not only the temple’s building.

Others have leaned towards interpreting the exemption as objectively directed to temples and not to religious congregations or communities as a whole.⁹⁹

Some scholars have even held that Masonic temples may be included in the exemption, given the fact that Masons call their meeting premises “temples.” Such an inclusion calls upon a definition of the concept of religion.¹⁰⁰

Annex buildings used for educational purposes may sometimes be exempted by Article 69,¹⁰¹ which exempts private schools and cultural institutions from taxes, as a subsidy for their services. Schools owned or operated by religious communities – the majority of which are Roman Catholic – are reached by tax exemption of Article 69 on behalf of the cultural nature. The last reform in Tax Law raised some doubts about payroll taxes due from religious communities for the schools, charitable institutions, congregations, and associated institutions with religious or religiously-related purposes, as the reform appeared to abolish the tax exemption. The question was temporarily solved by an administrative regulation,¹⁰² declaring tax exemption for these groups complied with the three requisites: be non-profit, have legal personality, and have historical rooting. The exemption is explicitly granted on behalf of their “cultural nature” (Article 69 of the Constitution, not Article 5). Religious nature is hence ignored.

There are no other State subsidies of religious organizations or activities, at least not based on their religious nature. The maintenance of religious structures of historical or cultural value is not subsidized, but as the Constitution orders the State to lawfully implement all suitable means to protect “all artistic or historical riches of the country, no matter who its owner is” (Article 34). Therefore, once a building, part of a building, monument, or piece of art is declared part of the cultural or historical heritage of the nation,¹⁰³ a burden is put on its owners. This burden implies that the cultural object may not be disposed of or modified, amongst others, and are exempt of some taxes.

There was a particular incident which compromised the Roman Catholic Church’s autonomy. A parish priest had removed a sculpture of Christ in a Cross which had stood as the main image of the church for more than 30 years. A Resolution of the Executive Power of 2006, recalling a prior Resolution that had declared the Church a historical monument, declared the sculpture itself a historical monument too, as it formed a unit with the church, and in the same Resolution, established that the piece should remain in

96. Torres, G., *Derecho Tributario y Confesiones Religiosas*, Paper for the IX Colloquium of the Latin American Consortium for Freedom of Religion or Belief, Aug, 5-8, 2009, University of Montevideo, Uruguay

97.. Case ruled by the Court of Administrative Litigation, Sentence N° 827, 23 October 1996.

98.. Case ruled by the Court of Administrative Litigation, Sentence N° 4, 5 February 1997.

99.. Case ruled by the Court of Administrative Litigation, Sentence N° 157, 4 April 2005.

100.: Korseniak, J., *Derecho Público. Derecho Constitucional*, Montevideo, Fundación de Cultura Universitaria, 2006, 347.

101.: Constitution, article 69 : “Private education institutions and cultural institutions of the same nature are exempted of national and provincial taxes, as subsidy for the services they provide.

102.: Administrative Regulation N° 183/008, regulating payroll tax exemption, when schools belong to a religious community, under certain circumstances: “Article 3 Bis. The activities of religious institutions, in regard to worship and in regard to diffusion of their doctrine, are considered of cultural nature and therefore included in the benefits regulated by this decree. The cultural nature also includes social and human promotion activities carried out by religious institutions. Religious institutions must accomplish the following requisites: a) be a legitimate legal entity; b) be non-profit; c) possess historical rooting in the country. The Administrative authority must control the effective fulfillment of these requisites when enforcing this regulation.”

103.: Law N° 14.040, Oct., 20th, 1971, art. 5, 15 and 21, establish that real estate will be affected by certain burdens which ban modification, destination to incompatible uses, the obligation to maintain them and allow inspections, and prohibits their departure from the country, while establishing some tax exemptions.

the church, for artistic reasons,¹⁰⁴ when it had been already removed.

X. CIVIL LEGAL EFFECTS OF RELIGIOUS ACTS

There is no legal recognition of legal effects to acts performed according to religion or within the realm of the internal autonomy of religious communities.

Religious marriage, for instance, is deprived of civil effects or invalid, since 1885.¹⁰⁵ Previous civil marriage and its registration in the State Civil register is compulsory, in order to be granted official effect. As an exception, “in extremis” marriage is allowed, though deprived of civil effect.¹⁰⁶ Punitive sanctions in the form of criminal offenses are established against members of the clergy who celebrate religious weddings without previously verifying the celebration of the civil marriage. As for dissolution of marriage and divorce, they are of the exclusive jurisdiction of State authorities, “with complete disregard of ecclesiastical authorities.”¹⁰⁷ At the same time, equal legal treatment has been approved by law for non-married couples (heterosexual as well as homosexual),¹⁰⁸ with the same or similar effects and rights as those of married couples, and adoption by either is legitimate. As the Parliament is legislating in accordance to “progressive” streams, forwarding impairment of genre rights and sexual diversity, it hasn’t shown to be so concerned about religious pluralism. As a result, we must face the paradox that the only element proscribed from matrimonial law, is religion, per se.¹⁰⁹

Likewise, secular courts do not intervene nor enforce decisions adopted by religious courts or hierarchical bodies, following the “two separate spheres” model. Canon Law rules as the Roman Catholic Church’s statutory law, as do the statutes of any other association.¹¹⁰ Therefore, transmission of property from this church must follow the procedures and requirements of Canon Law, a fact which is often disregarded by notaries and public property registries with serious consequences in real estate.

XI. RELIGIOUS EDUCATION OF THE YOUTH

The Constitution guarantees academic freedom (Article 68), establishing that “State intervention will be limited to assuring the maintenance of hygiene, morality, security and public order.” It recognizes “the right of every parent or guardian to choose the suitable teachers or institutions for their sons or children under their care.”

So religious communities are free to create private schools, but in order to acquire official recognition, they must either adapt their curricula to the State’s curricula and submit to public controls, or make their students sit for an examination before public authorities which will evaluate the student’s capacity in accordance to official standards. This occurs both in primary schools as well as in college or high school levels. Private universities were authorized fairly recently, and their diplomas and career degrees were subsequently recognized – in general – by secular law, in spite of the arguments that were

104.: Res. of the Executive Power N° 13/006, 16 January 2006, recalled Res. N° 141/997, 29 July 1997 which had declared the Church of San Pedro de Durazno by Architect Eladio Dieste a historical monument, and alluded that as sculpture by national artist Claudio Silveira Silva forms a unit with the building, and therefore it should be declared a historical monument for itself, in order to reaffirm the interaction between artistic elements, as the work of art was conceived as part of the architecture of the temple. Thus, its permanence in the Temple is ordained (when the cross had been already removed). This resolution was later abolished.

105.: Civil Code Art. 83. “Civil marriage is the only valid marriage all throughout the territory of the State, and no other type are recognized as for 21 July 1885....”

106.: Civil Code Art. 84. “Once the civil marriage is prosecuted . . . spouses may freely request religious ceremony to the church they belong to, but no priest of the Catholic Church or pastor of the different dissident religions in the country, may proceed to bridal blessing without previously verifying the celebration of civil marriage . . . either incurring in a six months imprisonment penalty and one year in case of second offense. As an exception, “in extremis” marriage is unpunished, though deprived of civil effects.”

107.: Civil Code, arts. art. 145 y 146.

108.: Law N° 18.246, “Concubinary free-union” Law.

109.: Asiain Pereira, C., “Efectos Civiles del Matrimonio Religioso en el Uruguay,” in publication by Consorcio Latinoamericano de Libertad Religiosa, VII Coloquio, 2007 and in www.libertadreligiosa.net.

110.: Conclusion of Dr. Gabriel Gonzalez Merlano, Latin American Consortium for Freedom of Religion or Belief.

raised – and still interfere – to oppose it.

Our legal system doesn't prohibit the inclusion of religion as a subject in public schools. Moreover, it has the duty to impart religion as the manager of public interest,¹¹¹ or at least instruct about the existence of *the diverse religions* existing in the country in compliance with binding International documents.¹¹² Religion is in fact absolutely absent from public schools curricula, as a result of the misinterpretation that the State must have a prescinding attitude towards the religious phenomenon, thus incurring in "strident laicism."

Not only does the Constitution value and favour religion – as we have outlined – but so does Law. The recent Law on Education¹¹³ recognizes education as a basic human right, and proclaims that it will follow the guidance of International Humanitarian Law, as well as the Constitution in its implementation. On proclaiming the governing principles of public education (Article 17), it defines the principle of secularism ("laicidad") as that *assuring the integral and egalitarian treatment of all topics in the ambit of public education, by means of implementing free access to all sources of information and knowledge, enabling pupils to adopt a conscious posture. Plurality of opinions and rational and democratic confrontation of knowledge and beliefs is guaranteed.* Notwithstanding this mandate, religion is still absent from schools.

Despite these flaws, religion has received some special consideration by Education authorities,¹¹⁴ recognizing the teacher's freedom of conscience and opinion whether it be *religious, philosophical, political or any other sort, within the strictest secular context, preserving the pupil's freedom against any form of coercion.*

Some measures are given as examples of "positive" secularism.¹¹⁵ Absences for religious reasons may be justified¹¹⁶ for Jews and Seventh Day Adventists. Refusal to take compulsory oath or reverence to the flag and national symbols may be excused, or not taken into account as essential for continuing scholarship,¹¹⁷ on the grounds of Freedom of Religion or Belief and the right to education. An administrative resolution provided the correct interpretation of secularism ("laicidad"): "the fact that religion is not taught in public education and that religious practice is not promoted doesn't mean disrespect of all of them in equal terms, as well as the right not to have any religion at all." The resolution provides that no absences for religious reasons should be counted, as long as they don't exceed 4 days per year; that teachers should be instructed not to set exams or tests "in those days in which one or more pupils have requested and have been exempted to attend school for religious reasons," among similar criteria.¹¹⁸

The opposite criterion was held by the Public University when dealing with the same issue; students and professors were denied the possibility of being waived from university activities for religious reasons,¹¹⁹ arguing that "freedom also implies that people should impose upon the University a certain religion."

XII. RELIGIOUS SYMBOLS IN PUBLIC PLACES

Citizens are free to wear religious symbols in public places, in general. Resistance to this public manifestation of faith comes not from the legal setting, but from the rest of

111: Durán Martínez, A., *Enseñanza Religiosa en la Educación Pública*. Marco Constitucional Uruguayo, IX Colloquium of the Latin American Consortium for Freedom of Religion or Belief, Montevideo, Aug., 2009

112: Asiain Pereira, C., "Religión en la Educación Pública: Deberes del Estado Uruguayo a la luz del Derecho Humanitario Internacional," IX Colloquium of the Latin American Consortium for Freedom of Religion or Belief, Montevideo, Aug., 2009.

113: Law N° 18.437, 12 December 2008, arts. 1, 4 and 17.

114: National Administration for Public Education (ANEP), Public Teachers Statute.

115: Rotondo Tornaría, F., "La Religión en la Educación Pública Uruguaya: Régimen Legal," IX Colloquium of the Latin American Consortium for Freedom of Religion or Belief, Montevideo, August, 2009

116: Ordinance N° 31, ANEP, from 1986. Parents must notify the headmaster beforehand about planned absences. Resolution N° 7 from 1994 justified absences from Friday afternoon till Saturday afternoon, for religious reasons.

117: Res. of the High School Council, 20 July 2005, session N° 37, circular N° 2666/005.

118: ANEP, Res. N° 20, Act. N° 14, 25 March 2009.

119: Res. N° 15, Oct., 28th, 2008, Central Governing Board, University of the Republic

society and by those enforcing or interpreting law in different areas of life.

There was a case which revealed the lack of tolerance of fellow students at the Public University. A Catholic Nun attended class wearing her religious dress, to which the students association opposed on the grounds of the sacred “laïcité” of the State, and demanded a resolution to be adopted by the authorities banning such garment, with no success.

Schools, hospitals,¹²⁰ courtrooms, and public offices are in fact devoid of religious symbols. However, common places (like streets, squares, and open spaces) have been gradually inhabited by statues representing religious symbols or images of more than one religion.

After the visit of Pope John Paul II in 1987, a white cross was erected in his honor, and the controversy about the presence of religious symbols in public spaces was reanimated and strongly debated in Parliament.¹²¹ Ultimately, the statue was allowed to stay by law,¹²² as a commemorative monument. “From iconoclasm to tolerance,” the battle fought by the cross opened the way to the presence of religious symbols in the public space for other faiths.¹²³

The “Yemanjá” Goddess, of the afro-Brazilian cult, has her monument in riverside of Montevideo since 1994; Confucius has a statue very near; there is a homage to the holocaust and one to a Great Rabine; the Rotaries and Lions welcome visitors in routes, crosses and images of the Virgin in her different advocations are erected in the countryside. When Pope John Paul II died, a monument was erected next to his commemorative cross, an event which awakened protests by evangelicals and other Christian churches.

XIII. FREEDOM OF EXPRESSION AND OFFENSES AGAINST RELIGION

The Penal Code¹²⁴ specially protects religion in the public arena against offensive expressions, punishing several criminal offenses committed against religious elements.

In the chapter destined to protect Freedom, it sanctions four types of “offenses against religious practice and religious sentiment,” punishing outrage against religious worship by impeding or disturbing a *religious ceremony or rite*, against *places or elements of worship and against individuals professing it or ministers of religion*.¹²⁵ It deals with the deceased separately.¹²⁶ As the norms refer to “all cults [religions] tolerated in the country” this protection is equally applied to all religions and beliefs.

In 1989, and as an answer to the demands of the Jewish community, the Parliament passed a law to punish “incitement of hatred, scorn or violence against certain individuals because of the color of their skin, their race, religion, or national or ethnical origin” as well as the *commission* of such acts.¹²⁷ On demand of the genre-equality lobby, a 2003

120: Religious symbols in public hospitals were prohibited in 1906, a “Jacobin” measure for some critics (José Enrique Rodó), which ignited a harsh and long debate nationwide.

121: Asiaín, C., “Algunas Reflexiones acerca de la Libertad Religiosa en el Uruguay,” Anuario Argentino de Derecho Canónico T. X, 2003.

122: Law Nº 15.870 “Pope John Paul II,” 9 July 1987.

123: Asiaín, C., “La presencia de lo religioso en el ámbito público en el Uruguay,” “Anales Derecho, IV Col. Latinoam. de Libertad Religiosa,” Pont. Univ. Católica Chile, 2005.

124: Penal Code of 1889, with its 1934 reform, updated. Title XI, Chapter V, protecting Freedom.

125: Penal Code, Art. 304 “Offence against religion by impeding or disturbing the ceremony . . . the practice of a rite or any ceremonial act of some of the religions tolerated in the country, either in temples, in spaces open to the public, or in private, if assisted by a minister of religion in this last case” Art. 305 “Offense . . . by outrage against places or elements of worship . . . either by word or by action, or even by spoilage or destruction . . . provided that the offence is perpetrated in public or being notorious, is made public” Art. 306 “Offense against religion by outrage against individuals professing it or ministers of religion”

126: Penal Code Art. 308 “Vilification of tombs, urns and objects destined to reverence of the deceased”

127: Law Nº 16.048, of 16 June 1989, incorporated as articles 149 BIS and TER to the Penal Code.

law included the motives of sex discrimination among the criminalized conducts.¹²⁸ These provisions may account for the criminalization of blasphemy, defamation of religion, or religious hate speech, whenever an individual or group of a certain religion feels offended or attacked in his or their religious feelings and integrity, and therefore decides to denounce the situation. Their scope widely covers all religions, provided the criminalized conduct is proved to have occurred and the offensive consequences of that conduct was foreseeable. In the area of Freedom of Expression¹²⁹ we also count on some legal provisions.

Our Constitution specifically and explicitly recognizes freedom of expression in Article 29,¹³⁰ and our Penal Code criminalizes Defamation and Insult as a means of shielding individual honor.¹³¹ Defamation is committed when someone, “in a manner that could be made public, attributes to another person a certain event, which if it were true, might give place to penal or disciplinary proceedings against her, or that might expose her to public hatred or scorn.” By Insult (“injurias”), criminal law understands “that person who, apart from the cases foreseen in the precedent article, offends in any way, by means of words, writing or acts, another person’s honour, rectitude or propriety.” Perpetration of these acts by means of “writings, drawings or paintings, publicly disclosed or exposed to the public” are penalty aggravating circumstances. The perpetrator may, however, be exempted of responsibility in certain circumstances related with public interest, thus privileging this value over the value of honor, even when the disclosure is made by means of funny or artistic manifestations. If “actual malice” is found in the offender, then his responsibility re-emerges. If disclosed facts or qualities attributed to the person are proved to be true or verisimilar, then the perpetrator of the offence may be exempted, except when his “actual malice” is demonstrated. Very rarely do cases based on religious offence reach the courts, mainly because they are solved by pacific means, or either disregarded.

Law defines as a media offense, or crime committed through media, the perpetration of acts qualified as criminal offences, if committed through the media. They usually entail media-abuse by the perpetrator.¹³² The right to rectification and answer is assured, and may even exempt the media representative of responsibility, privileging the right to inform and to acquire information over other values involved.

128: Law N° 17.677, 29 July 2003. Arts. 1 and 2 substitute art. 149 BIS and TER of the Penal Code, incorporated to it by Law 16.048, and include “sexual orientation or identity” as a motive for criminalization of “incitement to hatred, scorn or any kind of moral or physical violence, by any means suitable for public diffusion, against one or more individuals because of the color of their skin, their race, religion, national or ethnic origin, sexual orientation or sexual identity . . .” as well as the “commission of acts of hatred, scorn or violence” against such individuals, for the given reasons.

129: For an extensive analysis, Asiaín Pereira, C., “Libertad de Expresión y Derecho de Expresión de las Confesiones Religiosas en el Uruguay,” 2006, in publishing, Consorcio Latinoamericano de Libertad Religiosa, actas del VI Coloquio, and in www.libertadreligiosa.net.

130: Constitution Art. 29: “Communication of thought either by means of words, writing - private or published by the press - or by any other form of disclosure is entirely free, without previous censorship; the author, or in its case, the printer or transmitter, being lawfully responsible for the abuse they might commit.”

131: Penal Code Arts. 333 to 336. art. 336 were substituted by Law N° 18.515 (15 July 2009), arts. 4: “Responsibility will be exempted to those who: a) made or disclosed a public statement about public interest matters, either referred to public servants or to individuals who, because of the profession or office, have relevant social exposure, or to any person who has voluntarily got involved in matters of public interest; b) reproduced any sort of statement in regards to matters of public interest, provided its author has been identified; c) made or disclosed any kind of public humorous or artistic manifestation, provided it refers to the precedent hypothesis. Responsibility exemption will not proceed when the author’s actual malice (or intention) to offend other people or harm their lives. Those accused of having committed the offences of articles 333 and even 334, when prosecuted, have the right to prove the truth of the facts and the verisimilitude of the qualities attributed to the person, except when the case refers to the person’s private life or when disclosure of facts is of no public interest. If truth or verisimilitude is proved, the perpetrator of the accusation will be exempt of punishment, except in the case he had acted with actual malice.”

132: Law N° 18.515, Art. 7: “The perpetration of an act qualified as a criminal offence by the Penal Code or special laws, through the media, constitutes a media offense.” Art. 8: “He who, disclosed fake news, knowing that they are false, in order to commit one of the criminal offences” Art. 9: “The legal proceeding will be immediately closed, no matter its stage, in case the person responsible for the media shows he has published or made public the requested reply to the offence, with an outlining similar to the information provoking it”

XIV. FINAL REMARKS

As the present report contains a considerable amount of regulations on Religion, one might be tempted to promptly conclude that Uruguay has paid a relevant attention to the phenomenon. If we look closer, though, we can appreciate that most regulations are intended to intervene in cases where coercion is required, that is, the State unfolds its repressive arm to stop and punish law trespassers (the negative phase of Freedom of Religion, to prevent coercion and abuse). Regrettably, evidence shows that our State is not so concerned with the positive aspect of Religious Freedom, which is customarily enforced through measures aimed at promoting Freedom of religion or Belief. The focus is put into shielding attacks from abusive interference, not so much in providing the wheels and wings for human promotion.

The religious phenomenon demands a special regard from the Legislative and positive action from the State, not the State's indolence or indifference towards it, which results in despair and lack of protection. Borrowing Juan Navarro Floria's idea, and concretizing it to the case of Uruguay, we may say that if we are here today and in this part of the world talking about religious freedom, it would be because of the influence of what is taking place at a planetary level. Close and homogeneous societies – like ours in its origin – are not concerned by these issues, because they ignore the complexity and depth of the conflicts posed by plurality, and among them, those related to Freedom of Religion or Belief.¹³³

Uruguay was born as a fairly homogenous European-rooted society, which didn't find itself in the need to develop terms of coexistence with the "diverse," due to the regrettable historical fact that indigenous peoples were almost exterminated, if not absorbed and nullified by the European invader. This peculiar and uniform social composition may explain our society's narrow-mindedness in its youth and forthcoming years. But despite that probable determination, self-awareness of the plural quality of its society, as well as of their legitimate demands, is crucial. We cannot keep on applying old structures and perished ideas to an evolving, mutable and diversified society in terms of religious pluralism.

As we have outlined, our social composition has dramatically changed, becoming diversely pluralistic. At the same time, the international community has made substantial progress in recognizing Human Rights and implementing effective means to enforce them. Now Uruguay must make an introspective and acknowledge the "alter" or "otherness" coexisting in the realm of our society, as well as glance outdoors to encompass the progress of International Humanitarian Law, in order to meet the demands of Freedom of Religion or Belief of its plural inhabitants.

133: Navarro Floria, J., "El Derecho Eclesiástico en la República Argentina: asignaturas pendientes," *Anuario de Derecho Eclesiástico del Estado*, Spain, Vol. XXV (2009), 513-532.