

Religious Freedom in Brazil – some precedents.

Marcelo Moscogliato¹

OUTLINE

Introduction

I. The Constitutions – Freedom of Religion

II. But, how does it work?

III. Ecclesiastical authority

IV. The dispute over estate property between a parish association and the diocese

V. Taxation of temples and religious services

VI. Conclusion

INTRODUCTION

In writing and *ceteris paribus*, there is no doubt that the Brazilian Constitution embraces the freedom of religion as a right.

¹ Federal Prosecutor, Ministério Público Federal. Office for the 3rd Federal Circuit Court – Sao Paulo, Brazil (marcelo@moscogliato.com.br). M.A. UC Davis, CA. This paper was produced for the 2008 -symposium on the “International Protection of Religious Freedom: National Implementation”, sponsored by the International Center for Law and Religion Studies at Brigham Young University – BYU. I thank BYU for the opportunity to work with the subject matter. I thank Luciano Guimarães for his advice and comments on my writing in my second language. Finally, my inspiration came from the late Maria da Conceição Moscogliato Freitas, the Catholic who introduced me to religion. The positions expressed in this paper do not necessarily reflect those of any of the people listed above, and any errors are mine alone.

In order to understand the context of religion in Brazil, three cases from the Brazilian Supreme Court were selected to introduce some issues: - ecclesiastical authority; - the dispute over estate property between a parish and the diocese; - taxation of temples and religious services.

Before proceeding, an advice comes handy for tracking any case in the Brazilian Supreme Court: “Judicial review in Brazil is an extraordinarily complex hybrid institution that attempts to marry the civil and common law traditions. Its level of complexity and the volume of constitutional cases have increased dramatically since adoption of the 1988 Constitution. ... Forcing the highest court in the country to deal with routine and unimportant cases makes little sense and prevents the STF from devoting its time and attention to the cases with national importance. The lower courts, however, have displayed substantial resistance to being required to follow decisions of a higher court. ... On paper, constitutional rights are better protected in Brazil than in virtually any other country. ... The reality, however, is that many important constitutional rights are honored in the breach. ... The paradox of judicial review in Brazil is that despite an incredibly detailed constitution and an elaborate system of judicial enforcement that decides a staggering number of constitutional cases, many constitutional guarantees have not been implemented and still others are regularly disregarded”².

I. The Constitutions – Freedom of Religion

² ROSENN, Keith S. 7 Sw. J.L. & Trade Am. 291 (2000). “Judicial Review in Brazil: Developments Under the 1988 Constitution”.

The first Brazilian Constitution, dated 1824, enacted after the Brazilian declaration of independence from Portugal, stated in its article 5³ that the Roman Catholic Church religion was the religion of the country. Other religions were allowed in private or in temples, yet not in public. At the time, church and state were practically one and the King protected and governed the church in his vast domains, by divine right⁴.

On November 15th, 1889, Republic was proclaimed and, as a consequence, a second Brazilian Constitution came to light in 1891, recognizing religious freedom in its article 72⁵, sections 3, 5, 7, 28 and 29, allowing individuals and religious organizations to publicly worship, and the separation between the State and the Catholic Church was declared. Actually, before that, by the Decree 119-A from January 7, 1890⁶, Deodoro da Fonseca, the military chief of the Republican Revolution, had ordered the separation of church and state and, at the time, the decision was applauded by the majority of the ecclesiastical Roman Catholic hierarchy in Brazil, which was eager for a freedom similar to that ensured to the church in the United States⁷.

The principles of separation between church and state and the freedom of religion were guaranteed in the following six Brazilian Constitutions (1934, 1937, 1946, 1967, 1969, 1988), including the last one, dated 1988⁸, where it's written that: - freedom of conscience and of belief is inviolable, the free exercise of religious cults being ensured

³ Constituição Federal de 1824, Art. 5 (The Constitution is available at http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao24.htm, last visited 08.20.2008).

⁴ BURNS, E. Bradford, A history of Brazil: Columbia University Press. 1993. NY – USA (p.82).

⁵ Constituição Federal de 1891, Article 72 (The Constitution is available at http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao91.htm, last visited 08.20.2008).

⁶ S.T.F. REX 31.179, Relator: Hahnemann Guimarães, 04.08.1958, DJ 06.25.1958 (D. Jairo de Barros Câmara VS. Irmandade do Santíssimo Sacramento da Antiga Sé).

⁷ BURNS, E. Bradford. A history of Brazil: Columbia University Press. 1993. NY – USA (p.236).

⁸ Constituição Federal de 1988, Article 5, sections VI, VII, VIII (The Constitution is available at http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm, last visited 08.20.2008).

and, under the terms of the law, the protection of places of worship and their rites being guaranteed; - under the terms of the law, the rendering of religious assistance in civil and military establishments of collective confinement is ensured; - no one shall be deprived of any rights by reason of religious belief or philosophical or political conviction, unless he invokes it to exempt himself from a legal obligation required of all and refuses to perform an alternative obligation established by law.

There is no doubt that the Brazilian Constitution embraces the freedom of religion as a right.

II. But, how does it work?

Of course, making a statement of right, by itself, is not enough⁹. According to a simple lesson, Law is, above all, a collective action and the legal system includes, first of all, a body of rules - “the laws” themselves¹⁰. But all these, in themselves, are nothing but pieces of paper¹¹. What makes them come alive (when they do) are the people and the institutions¹² that produce, interpret, and enforce them¹³. Institutions, by the way, are

⁹ ROSEN, Keith S. 7 Sw. J.L. & Trade Am. 291 (2000). “Judicial Review in Brazil: Developments Under the 1988 Constitution”.

¹⁰ FRIEDMAN, Lawrence M. Law in America: A short History; The Modern Library, NY, 2002.

¹¹ FRIEDMAN, Lawrence M. Law in America: A short History; The Modern Library, NY, 2002.

¹² See: BRINKS, Daniel. 40 Tex. Int'l L.J. 595 (2005). “Judicial Reform and Independence in Brazil and Argentina: The Beginning of a New Millennium?”: “The courts in Brazil have been criticized for many things - they are allegedly too slow, formalistic, inefficient, and out of touch with current social and economic realities. In contrast to the Argentine Supreme Court, however, the courts in Brazil have been accused of being overly rather than insufficiently independent and for hampering the ability of the executive to carry out needed reforms. ... In terms of inefficiency and delays, one of the main targets for criticism has been the possibility of multiple interlocutory appeals and the lack of binding precedent, both of which encourage procedural delays and continuing appeals on issues that have been repeatedly settled by the Supreme Court. During periods of high inflation, for example, the government itself had an official policy of appealing all judgments against it, regardless of the merits of an appeal, simply to delay payment and allow inflation to erode the value of the judgment. The current debate over judicial reform began more than ten years ago against this double backdrop of concern regarding an unaccountable and inefficient judiciary.”

very important to understand a social organization, because they are sets of rules, compliance procedures, and moral and ethical behavior of individuals in the interest of maximizing the wealth or utility of principals¹⁴.

Brazil is the largest Catholic nation in the world and it's clear that the Roman Catholic Church is influential. Some papers have been produced about it. For example, as a result of an anthropology research, Eric W. Kramer has observed that historically, and in practice, formal separation has been blurred by legislation and symbolism identifying the nation state with the Catholic Church¹⁵. Studying a criminal case before the State Justice of Sao Paulo related to a bishop of the Universal Church of the Kingdom of God and offenses to a plaster statue of a catholic saint, Eric W. Kramer concluded that "Public iconoclasm has exposed the contradictions between the Brazilian state's explicit support of Our Lady of Aparecida as a public religious symbol and the rhetoric in defense of the constitutional principle of religious freedom"¹⁶.

Despite this political contradiction, not a monopoly of Brazil, it is true that religious conflicts are rare in Brazil and that today every group enjoys religious freedom¹⁷.

In order to understand the religious context in Brazil, three cases from the Brazilian Supreme Court were selected to introduce some issues: - ecclesiastical authority; - the dispute over estate property between a parish and the diocese; - local taxation over temples and religious services.

¹³ FRIEDMAN, Lawrence M. *Law in America: A short History*; The Modern Library, NY, 2002.

¹⁴ NORTH, Douglass C. North, available at http://nobelprize.org/nobel_prizes/economics/laureates/1993/press.html, last visited 07.20.2008.

¹⁵ KRAMER, Eric W. 26 *Law & Soc. Inquiry* 35. Symposium: Law, Religion, and Identity: Law and the Image of a Nation: Religious Conflict and Religious Freedom in a Brazilian Criminal Case.

¹⁶ KRAMER, Eric W. 26 *Law & Soc. Inquiry* 35. Symposium: Law, Religion, and Identity: Law and the Image of a Nation: Religious Conflict and Religious Freedom in a Brazilian Criminal Case.

III. Ecclesiastical authority

In a case ruled by the Brazilian Supreme Court¹⁸ on April 8th, 1958, the relationship between the church and the state was presented by a dispute over the power to control the sacraments and faith in a Catholic association. On one side were a Catholic association and a priest and, on the other side was an ecclesiastical authority in charge of sacrament and faith.

The core issue was related to the rites of the religious confession and the ecclesiastical authority had done an intervention in the association, breaking an agreement made under the canon law, not allowing the members to elect a new board of directors. After acknowledging the facts, the Court ruled that a temporal authority could not decide issues of faith and religion – like the religious confession – arisen between the ecclesiastical authority and a religious association¹⁹.

The Court affirmed that any government authority could not decide issues of faith and religion as a result of the “complete spiritual freedom, a republican policy principle that carried out the separation of Church and State”²⁰.

¹⁷ KRAMER, Eric W. 26 *Law & Soc. Inquiry* 35. Symposium: Law, Religion, and Identity: Law and the Image of a Nation: Religious Conflict and Religious Freedom in a Brazilian Criminal Case.

¹⁸ S.T.F. (Brazil) REX 31.179, Relator: Hahnemann Guimarães, 04.08.1958, DJ 06.25.1958 (D. Jairo de Barros Câmara VS. Irmandade do Santíssimo Sacramento da Antiga Sé).

¹⁹ S.T.F. (Brazil) REX 31.179, Relator: Hahnemann Guimarães, 04.08.1958, DJ 06.25.1958 (D. Jairo de Barros Câmara VS. Irmandade do Santíssimo Sacramento da Antiga Sé).

²⁰ S.T.F. (Brazil) REX 31.179, Relator: Hahnemann Guimarães, 04.08.1958, DJ 06.25.1958 (D. Jairo de Barros Câmara VS. Irmandade do Santíssimo Sacramento da Antiga Sé).

IV. The dispute over estate property between a parish and the diocese

In a 1977 case²¹, the Brazilian Supreme Court ruled a dispute between a parish and the diocese, both belonging to the Brazilian Orthodox Church. In the local Court and in the Appellate Court, the issue was considered according to canon law. The Supreme Court reversed²², applying only state property law and affirming it lacks jurisdiction over religious issues.

The parish was established as a private association, with statutes and properties, including a temple and its annexes, submitted to the members of the parish²³, whose faith could be expressed through the Brazilian Orthodox Church or any other Church at will.

To crack down on a rebel religious leader, the diocese decided to reclaim possession of the temple and filed suit against the rebel priest²⁴. As a third party in the dispute, the local parish association filed suit to protect its assets and the result was that the parish association had its title of property affirmed, but only in the Supreme Court. The Brazilian Orthodox Church diocese was recognized as an ecclesiastical entity according

²¹ S.T.F. (BRAZIL) REX 80.340 – RJ. Relator: Bilac Pinto, 05.10.1977, DJ05.27.1977 (Paróquia da Igreja Ortodoxa Santa Zenaide VS. Diocese Brasileira da Igreja Ortodoxa).

²² S.T.F. (BRAZIL) REX 80.340 – RJ. Relator: Bilac Pinto, 05.10.1977, DJ 05.27.1977 (Paróquia da Igreja Ortodoxa Santa Zenaide VS. Diocese Brasileira da Igreja Ortodoxa).

²³ S.T.F. (BRAZIL) REX 80.340 – RJ. Relator: Bilac Pinto, 05.10.1977, DJ 05.27.1977 (Paróquia da Igreja Ortodoxa Santa Zenaide VS. Diocese Brasileira da Igreja Ortodoxa).

²⁴ To compare, see: 19 Mass. L. Rep. 330, Superior Court of Massachusetts, at Barnstable, Brazilian Assembly of God in Hyannis et al vs. Assembly of God of Boston et al.

to its canon law, with powers to punish the rebel priest according to it²⁵. Not an entity with title to regain possession over a real estate according to the state property law²⁶.

V. Taxation of temples and religious services

According to the Brazilian Constitution²⁷, temples and assets related to the main place of worship are immune from taxation.

In a 2002 leading case²⁸, the Brazilian Supreme Court ruled in favor of granting tax immunity to temples and religious services²⁹.

The facts were related to a Roman Catholic Diocese in a mid-sized city, Jales, in Sao Paulo State. The city mayor took action to levy local property taxes on 61 real estate properties belonging to the Diocese, with the exception of the main temple³⁰.

The issue arose because, among the 61 real estate properties, some were allocated to house priests and religious servants and others were leased in order to grant funding for the Church³¹.

²⁵ S.T.F. (BRAZIL) REX 80.340 – RJ. Relator: Bilac Pinto, 05.10.1977, DJ 05.27.1977 (Paróquia da Igreja Ortodoxa Santa Zenaide VS. Diocese Brasileira da Igreja Ortodoxa).

²⁶ S.T.F. (BRAZIL) REX 80.340 – RJ. Relator: Bilac Pinto, 05.10.1977, DJ 05.27.1977 (Paróquia da Igreja Ortodoxa Santa Zenaide VS. Diocese Brasileira da Igreja Ortodoxa).

²⁷ Constituição Federal de 1988, Art. 150 (VI)(b)(§4) (The Constitution is available at http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm, last visited 08.20.2008).

²⁸ S.T.F. (BRAZIL) REX 325.822-2 – SP. Relator: Gilmar Mendes, 12.18.2002, DJ 05.14.2004 (Mitra Diocesana de Jales VS. Prefeito Municipal de Jales).

²⁹ S.T.F. (BRAZIL) REX 325.822-2 – SP. Relator: Gilmar Mendes, 12.18.2002, DJ 05.14.2004 (Mitra Diocesana de Jales VS. Prefeito Municipal de Jales).

³⁰ S.T.F. (BRAZIL) REX 325.822-2 – SP. Relator: Gilmar Mendes, 12.18.2002, DJ 05.14.2004 (Mitra Diocesana de Jales VS. Prefeito Municipal de Jales).

In a 7-4 vote, the Supreme Court granted tax immunity to the Diocese affirming that, according to the Brazilian Constitution, the immunity covered the property, the assets, the income and services of temples of any cult³².

This broad view was criticized by the minority opinion and, as an example, Justice Sepulveda Pertence³³ noted that the immunity covered the temple and the cult annexes to it, not the resulting religion proselytism, from the free publications to the confessional speech through television.

Representing the majority opinion in the Court, Justice Gilmar Mendes³⁴, citing jurist Ives Gandra da Silva Martins³⁵, voted that all the profits and capital gains amassed from the financial operations used to sustain the immune entity's scope represent immune income and gains. The Brazilian Supreme Court created an incentive for Churches.

VI. Conclusion

³¹ S.T.F. (BRAZIL) REX 325.822-2 – SP. Relator: Gilmar Mendes, 12.18.2002, DJ 05.14.2004 (Mitra Diocesana de Jales VS. Prefeito Municipal de Jales).

³² S.T.F. (BRAZIL) REX 325.822-2 – SP. Relator: Gilmar Mendes, 12.18.2002, DJ 05.14.2004 (Mitra Diocesana de Jales VS. Prefeito Municipal de Jales).

³³ S.T.F. (BRAZIL) REX 325.822-2 – SP. Relator: Gilmar Mendes, 12.18.2002, DJ 05.14.2004 (Mitra Diocesana de Jales VS. Prefeito Municipal de Jales).

³⁴ S.T.F. (BRAZIL) REX 325.822-2 – SP. Relator: Gilmar Mendes, 12.18.2002, DJ 05.14.2004 (Mitra Diocesana de Jales VS. Prefeito Municipal de Jales).

³⁵ Note that in the case, the influential scholar Ives Gandra da Silva Martins, a famous Catholic and tax lawyer, represented the Catholic Diocese and, among other jurists, was the most cited, 5 times, in the Justice Gilmar Mendes' majority vote. This important fact about the Brazilian way of judging was observed in the Brazilian legal system before, according to STRINGER, Dana. 44 Colum. J. Transnat'l L. 959 (2006). "Choice of Law and Choice of Forum in Brazilian International Commercial Contracts: Party Autonomy, International Jurisdiction, and the Emerging Third Way": "Brazilian judges often refer to the writings of law professors when they confront legal questions that are not solved on the face of the code. It is difficult to apply the vague and generalized language of Brazil's code provisions to modern legal problems without recourse to these scholarly materials. The doctrinal teachings of these scholars are at least as influential to Brazilian lawyers as persuasive case law is to the common law lawyer - perhaps even more so. In fact, Brazilian judges sometimes quote the textual interpretations of esteemed law professors verbatim to dispose of a case, at times in foreign languages and without translation. n21 For this reason, this Note gives due deference to the writings of influential legal scholars whose theories on Brazilian private international law are widely employed by judges when debating Brazilian conflicts norms and advancing proposals for reform".

In Brazil, since the first Constitution of 1824, enacted following the Portuguese Crown tradition, it's clear that the Roman Catholic Church is influential and it's yet the main religion in the nation. The official numbers in the census from 1960 to 2000 have shown that in 1960 there were 93,1% declared Roman Catholics, 4,0% Evangelic and 1,4% Spiritualists. In 2000, among those who declared a religion, the numbers were different: 73,6 % were Roman Catholics, 15,4 % were Evangelic and 1,6 % were Spiritualists³⁶. A big change is on the move.

The Brazilian Constitution embraces freedom of religion as a fundamental right. However, in real life, things can be different³⁷⁻³⁸. The facts must be well known and the consequences of interpretations and rulings should also be well understood by the legal profession³⁹. Even the clearest law and the most brilliantly drawn and articulated set of policies will lead people to disagree⁴⁰. Despite this risk, it is true that religious conflicts are rare in Brazil and that today every group enjoys religious freedom⁴¹, even to not believe or worship God. Tolerance for the difference and freedom of speech are the key.

³⁶ The numbers are available at:
http://www.ibge.gov.br/home/estatistica/populacao/censo2000/tendencias_demograficas/tabela02.pdf, last visited 09.01.2008.

³⁷ KRAMER, Eric W. 26 *Law & Soc. Inquiry* 35. Symposium: Law, Religion, and Identity: Law and the Image of a Nation: Religious Conflict and Religious Freedom in a Brazilian Criminal Case.

³⁸ ROSENN, Keith S. 7 *Sw. J.L. & Trade Am.* 291 (2000). "Judicial Review in Brazil: Developments Under the 1988 Constitution".

³⁹ KRAMER, Eric W. 26 *Law & Soc. Inquiry* 35. Symposium: Law, Religion, and Identity: Law and the Image of a Nation: Religious Conflict and Religious Freedom in a Brazilian Criminal Case.

⁴⁰ MILLER III, James C. 13 *Geo. Mason L. Rev.* 269. Fall 2004 Antitrust Symposium: The New European Antitrust Regime: Implications for Multinationals.

⁴¹ KRAMER, Eric W. 26 *Law & Soc. Inquiry* 35. Symposium: Law, Religion, and Identity: Law and the Image of a Nation: Religious Conflict and Religious Freedom in a Brazilian Criminal Case.