

## Religion and the Secular State in Brazil

### I. SOCIAL CONTEXT

According to data furnished by the general census in Brazil in 2000, Brazil had a total population of approximately 170 million inhabitants.<sup>1</sup> The next general census, in 2010, revealed that the Brazilian population had reached approximately 200 million.<sup>2</sup> In religious terms, Brazil was and continues to be a nation in which Roman Catholicism predominates, low church attendance by the Catholic faithful notwithstanding. Since the beginning of the 20th century, however, there has been a continuous decline in the number of Catholics in the composition of the Brazilian population. This tendency was more acute after the 1960s and is shown every ten years by the official census.<sup>3</sup> An accentuated religious syncretism also exists, with believers frequenting the worship services of more than one religious confession at the same time. Meanwhile, recent decades have witnessed the strong phenomenon of religious diversification, with a significant reduction in the percentage of Catholics in the makeup of the Brazilian population,<sup>4</sup> owing to the growth of other religious groups, especially the so-called Evangelical or Pentecostal churches.<sup>5</sup>

A 2007 study by the Getúlio Vargas Foundation, Centre for Social Policies, demonstrated, however, a trend in recent years towards stabilization of these percentages, as observed in the number of Roman Catholics.<sup>6</sup> Even so, the changes in the composition of the Brazilian population that have occurred in the last few decades have created a diverse

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1. Exactly 169,799,170 inhabitants. “Censo Demográfico 2000,” *Estatísticas do Século XX*, Brazilian Institute of Geography and Statistics (IBGE), Rio de Janeiro, 2007.

2. The Census of 2010 announced that the Brazilian Population had reached exactly 190,755,799.

3. The percentage of Catholics in the total population in the year 2000 was 73.6 percent, and in 2010 it was 64.6 percent. In 1872, it was 99.7 percent. Protestantism, on the other hand, is the religious segment that grows more in Brazil. In the year 2000, they were 15.4 percent of the total population and in 2010 they arrived at 22.2 percent.

4. In 1890, out of a total population of 14,333,915 inhabitants, 14,179,615 or 98.9 percent, were declared Catholics. The decline in the percentage of Catholics in the Brazilian population continued until reaching 73.89 percent in 2000.

5. In 1991, so-called Evangelical believers constituted only 9 percent of the population; by 2000, Evangelicals constituted 16.2 percent of the population (of which the three largest churches were Assembly of God 47 percent, Christian Congregation of Brazil 14.04 percent, and Universal Church of the Kingdom of God 11.85 percent). The so-called Evangelical Mission (under the new name used by the Census of 2000 to designate the mainline Protestant churches) of predominantly European origin made up about 5 percent of the population (of which the largest groups were Baptists 37.31 percent, Adventists 14.27 percent, and Lutherans 12.53 percent). The presence of non-Christian groups in the Brazilian population is insignificant, seen in the fact that, considering the total population, the percentage of the following groups according to the data of the Census in 2000 are as follows: Buddhism 0.126, Candomblé 0.075, Judaism 0.051, Islam 0.016. Table 2.1 – “População Presente, Segundo o Sexo, os Grupos de Idade, o Estado Conjugal, a Religião, a Nacionalidade e a Alfabetização 1872/2000 [Population by Sex, Age Group, Marital Status, Religion, Nationality and Literacy – 1872-2000],” Brazilian Institute of Geography and Statistics (IBGE), [http://www.ibge.gov.br/seculoxx/arquivos\\_xls/palavra\\_chave/populacao/religiao.shtm](http://www.ibge.gov.br/seculoxx/arquivos_xls/palavra_chave/populacao/religiao.shtm).

6. This study showed that the percentage of Catholics in Brazil has begun to show signs of stability since 2000. Marcelo Cortês Neri, *Economia das Religiões: Mudanças Recentes* (Rio de Janeiro: O Centro de Políticas Sociais (CPS/IBRE/FGV), 2007).

and competitive religious panorama.<sup>7</sup> Even though they are a group whose presence on the Brazilian scene is relatively recent, the Evangelical churches exercise a strong influence on society<sup>8</sup> and in politics, as the Evangelical Bench caucus of the National Congress attests.

A relatively recent phenomenon in the Brazilian religious and social context is that of religious intolerance. In the last few years especially, there were recorded episodes principally involving followers of neo-Pentecostal and Evangelical churches against members of Afro-Brazilian religions. There was strong condemnation of these conflicts by the State, as well as by religious groups and Brazilian society in general.<sup>9</sup> The episodes are sporadic and not numerous, but even so it raises concerns, seeing that despite complaints offered by defenders of human rights and entities representing Afro-Brazilian religions, there lacks the adoption of effective measures on the part of public authorities.<sup>10</sup> Anti-discrimination legislation alone is not an effective tool to combat it, considering that in many geographical areas of the vast Brazilian territory, State presence is weak and inoperative. Groups of faithful Afro-Brazilians have threatened to respond to these attacks by way of violence. This new phenomenon must be effectively combated by the national authorities so that different denominations and religious beliefs can live peacefully in the same territory.<sup>11</sup>

## II. THE PREDOMINANT VIEW OF STATE AND RELIGION RELATIONS

The understanding of the relationship between church and state in Brazil still reflects concepts of secular philosophy that governed the birth of the Republic. One of its principle theorists was the Brazilian jurist, Rui Barbosa (1849-1923), for which the separation between church and state was one of the foundations of the modern state. This jurist was one of those responsible for the separation of the Catholic Church and the Brazilian State and for the consequent extinction of the patronage system in the nascent Republic. Rui Barbosa was not anti-clerical, much less anti-Catholic. According to his theory, the alliance between the sovereignty and the altar was an alliance of mutual slavery that was bad for both the Church and the State.<sup>12</sup> According to this view, the objective of religious liberty, considered as the liberty for excellence, was to become a fundamental element in the political and social organization of the country.<sup>13</sup> Within the Brazilian conception of the

7. Cesar Romero Jacob et al., *Atlas da Filiação Religiosa e Indicadores Sociais no Brasil* (São Paulo: Edições Loyola, 2003).

8. There is even a bill, already passed in the House of Representatives, which instituted the Day of the National Evangelical. Bill 3541/08, Mr. Green Cleber, the PRB-MA].

9. Vagner Gonçalves da Silva, ed., *Intolerância Religiosa: Impactos do Neopentecostalismo no Campo Religioso Afro-Brasileiro* (São Paulo: EDUSP, 2007).

10. Recently a Federal Court did consider that African-Brazilian religious cults are not under the protection of freedom of religion, as they cannot be considered a true religion. The sentence considered that only beliefs which are based on a text, for example, the Bible or the Koran, can be considered a religion. In addition to the existence of "text", to consider a belief a religion, it is necessary to demonstrate the existence of a hierarchical structure and revelation of God. As all of these three elements lack in Afro-Brazilian beliefs, the Federal Court of Rio de Janeiro considered that they could not be under the umbrella of the right to freedom of religion. (Ação Civil Pública, Processo No. 0004747-33.2014.4.02.5101 (2014.51.01.004747-2), *Ministério Público Federal vs. Google Brasil Internet Ltda.* (28 April 2014).

11. Adam Kowalik, "Problemas Actuais da Liberdade Religiosa no Brasil - Intolerância Religiosa no Brasil, 2008," *Adam Kowalik - Religioni - Libertá Religiosa*, [www.libertareligiosa.blogspot.com/2008/07/umbanda-intolerancia-religiosa.html-59k-](http://www.libertareligiosa.blogspot.com/2008/07/umbanda-intolerancia-religiosa.html-59k-).

12. "O pacto de aliança entre a soberania e o altar é, foi, e há de ser sempre, pela força das coisas, um pacto de mútua e alternativa servidão. A religião, apoiada no monopólio civil, não pode senão adular-se, enfraquecer-se, decair [The pact of alliance between sovereignty and the altar is, was, and ever will be, by force of circumstances, a pact of mutual and alternative servitude. The religion under the Civil monopoly can only misrepresent themselves, weaken, and decline]." Rui Barbosa, *Teoria Política* (Rio de Janeiro: W.M. Jackson, 1952/1964), 214-215.

13. "Por isso, entre outros motivos, é que sobre todas as liberdades está para nós a liberdade religiosa [So, among other reasons, freedom for us is all about religious freedom]." Rui Barbosa, *Teoria Política*, supra n. 12 at 220.

separation of church and state, it is not considered an offense to secularism if, for example, the State creates an ecumenical chapel within the annex of the Federal Senate.<sup>14</sup>

A synthesis of the Brazilian legal understanding of the separation of church and state was given by the Federal Court of the Fourth Region. Considering the secularism of the State under a non-denominational rubric, the court affirmed four fundamental pillars of state secularism: (a) the State cannot adopt any religion or make any official statements about religious questions; (b) in the State's official acts and protocols, it cannot observe religious symbols; (c) the State cannot program education or culture according to religious guidelines; (d) public education cannot be confessional.<sup>15</sup>

### III. STATE AND RELIGION RELATIONS: CONSTITUTIONAL PROVISIONS AND PRINCIPLES

Contrary to the great majority of Latin-American nations, the Brazilian territory was colonized by the Kingdom of Portugal and not by the Spanish Crown. The Portuguese colonization implies distinctions from, as well as similarities with, the many nations in the same geographical area. Religiously, the most significant point in common with neighboring countries is the strong presence and influence of Roman Catholicism in the formation of the nation and in the religious composition of the country's population. As soon as it broke colonial ties with Portugal, an independent Brazil adopted the same system of privileged relations between the State and the Catholic Church as that which existed during the colonial period.<sup>16</sup>

A short while after the declaration of independence from Portugal, the recently created Brazilian Empire solicited the Holy See to maintain its system of patronage, with the Emperor of Brazil occupying the role that had been filled by the Portuguese monarch. For this reason, Roman Catholicism was declared the religion of the Empire<sup>17</sup> in the first Brazilian constitution, known as the Imperial Constitution of 1824.<sup>18</sup> Explicitly, the constitutional text, referring to Roman Catholicism, used the expression, "it will continue to be the religion of the Empire." The Imperial Constitution provided that before an Emperor could be acclaimed, he had to swear before Parliament "to maintain the Roman Catholic religion" (Article 103). Also in religious matters, the Imperial Constitutional Charter of 1824 restricted the voting rights of clergy and the religious (Article 92) and also limited the political rights of those who did not profess the official religion of the State by not allowing them to be voted into office (Article 95). This first Brazilian constitutional text was in effect for 77 years, until 1891. Dom Pedro I, who declared Brazil's independence and was the first emperor, desired to obtain the same privileges for Brazil that the Holy See granted to Catholic monarchies in Europe, like Lisboa, Madrid, Paris, or Vienna. The response from the Holy See came in 1827 by the papal edict, "Praelara Portugaliae Algarbiorunque Regnum," granted by Pope Leo XII on 27 May 27 1827, which established the system of patronage in independent Brazil.<sup>19</sup> This was the system that governed the

14. *Resolução do Senado Federal* – "cria capela ecuménica em dependências do Senado Federal", 18 de Abril de 2001, pub. DOU-E 09 04 2001 (*Projeto de Resolução do Senado*, nº 25 de 1999), 03.

15. TRF4 - *Apelação em Mandado de Segurança*. AMS 17703 PR 2003.70.00.017703-1, Julg.: 16/10/2007, pub.: D.E. 07/11/2007.

16. Reza a Constituição Imperial de 1824: "Art. 5. A Religião Catholica Apostolica Romana continuará a ser a Religião do Imperio. Todas as outras Religiões serão permitidas com seu culto domestico, ou particular em casas para isso destinadas, sem fôrma alguma exterior do Templo." *Constituição Política do Imperio do Brazil de 1824* [Reza Imperial Constitution of 1824: "Art 5. Roman Catholicism will continue to be the religion of the Empire. All other religions are allowed in your household, or worship in private homes designed for it, without in any way outside of the Temple."]

17. Francisco Iglésias, *História Geral e do Brasil* (São Paulo: Ática, 1989), 114.

18. *Supra* n. 16.

19. O privilégio do Padroado foi inicialmente concedido ao Império do Brasil logo após a independência pelo período de quatro anos, por meio do [The privilege of patronage was initially granted to the Empire of Brazil after independence for a period of four years, through the] *Breve Carissime Quam Intima* do Papa Leão XII, de 15 de Abril de 1826 (Arquivo Secreto Vaticano – *Epistolae ad Principes*, índice n.1146, nº1, reg. 254, anno 1825-1827, p. 86-90). Posteriormente foi reconfirmado pela [It was subsequently reconfirmed by] Bula

relations between the State and Catholic Church during the whole Brazilian imperial period which lasted from independence on 7 September 1822 until the proclamation of the Republic on 15 November 1889.

With the proclamation of the Republic, a system of separation between church and state was adopted. Approximately two months after the establishment of the republican system,<sup>20</sup> the new government approved Decree Number 119-A<sup>21</sup> that terminated the system of patronage, introduced the freedom of religion, and gave legal recognition to religious confessions. This decree is one basic instrument in the relations between the State and the Church in Brazil.<sup>22</sup> Its text prohibits the public power, in all its spheres, from establishing or prohibiting a religion, as well as practicing discrimination (“to create differences”) because of “beliefs, or religious or philosophical opinions” (Article 1). This decree granted the freedom of worship to all religious confessions.

The decisive step for the final separation between church and state occurred with the promulgation of the first republican constitution, the Constitutional Charter of 1891, which secured in all Brazilian territories the right to religious freedom.<sup>23</sup> The Constitutional Charter of 1891 brought few provisions of a religious nature. Beyond the right to religious freedom, it also established the secular character of public education<sup>24</sup> and civil marriage.<sup>25</sup> All of the constitutional charters that followed, the Constitutions of 1934,<sup>26</sup> 1937,<sup>27</sup> 1946,<sup>28</sup> 1967,<sup>29</sup> and 1988, established with little variance the form of protection of

*Praeclara Portugalia*, de 15 de maio de 1827 (*Jus Pontificium de Propaganda Fide*. “Pars I, Complaetgens Bullas, Brevia,” *Acta S. Sedis*, vol. IV, Roma: 1888, 685).

20. The Republic was proclaimed on 15 November 1889, and Decree No. 119-A was approved on 7 January 1890.

21. PUB, *Coleção de Leis do Brasil*, Rio 1890, vol. 1, col. 1, 010.

22. Its validity was restored by Decree No. 4.496 of 2002.

23. Art. 72 - The Constitution guarantees Brazilians and foreigners residing in the country concerning the inviolability of the rights to liberty, security of person and property, as follows: § 3 - All individuals and religious groups can exert publicly and freely their worship, associating for the purpose and purchasing goods, subject to the provisions of the common law. § 7 - No cult or church shall enjoy official grant or have relations of dependence or alliance with the Union Government or the States. *Constituição da República dos Estados Unidos do Brasil* (24 February 1891), [http://www.presidencia.gov.br/ccivil\\_03/Constituicao/Constitui% C3%A7ao91.htm](http://www.presidencia.gov.br/ccivil_03/Constituicao/Constitui% C3%A7ao91.htm).

24. Art. 72 - The Constitution guarantees Brazilians and foreigners residing in the country inviolability of the rights to liberty, security of person and property, as follows: § 6 - Will provide teaching in public establishments. Id.

25. Art. 72, § 4 - The Republic recognizes only civil marriage, the conclusion of which will be voluntary. Id.

26. Art. 17 - It is forbidden for the Union, the States, the Federal District and Municipalities: II - to establish, subsidize or hinder the exercise of religious cults. Art. 113 - The Constitution guarantees Brazilians and foreigners residing in the country concerning the inviolability of freedom rights, livelihoods, individual safety and property, as follows: 1) All persons are equal before the law. There will be no privileges or distinctions by reason of birth, sex, race, professions themselves or parents, social class, wealth, religious beliefs or political ideas. *Constituição da República dos Estados Unidos do Brasil* (16 July 1934).

27. Art. 32 - It is forbidden for the Union, States and Municipalities: (b) to establish, subsidize or hinder the exercise of religious cults. Art. 122 - The Constitution guarantees to Brazilians and foreigners residing in the country the right to liberty, security of person and property, as follows: 4) all individuals and religious groups can exert publicly and freely their worship, associating for the purpose and purchasing goods, subject to the provisions of the common law, and the requirements of public order and morality. *Constituição dos Estados Unidos do Brasil* (10 November 1937).

28. Art. 31 - The Union, the states, the Federal District and the municipalities shall not: II - establish or subsidize religious worship, or hinder them to exercise; III - have alliance or dependence relationship with any denomination or church, without prejudice to mutual cooperation in favor of collective interest. Art. 141 - The Constitution guarantees to Brazilians and foreigners residing in the country inviolability concerning rights to life, liberty, security of person and property, as follows: § 7 - freedom of conscience and religion is inviolable and the free exercise of religious cults is ensure, unless they are contrary to the public order or good morals. Religious associations shall acquire legal personality in the form of civil law; § 8 - For reasons of religious, philosophical or political conviction, no one shall be deprived of any of their rights, unless the claim to be exempted from obligation, charge or service is imposed by law upon Brazilians in general, or the person declines to settle upon replacement of those duties in order to meet excuse of conscience. *Constituição dos Estados Unidos do Brasil* (18 September 1946).

29. Art. 9 - The Union, the States, the Federal District and the municipalities shall not: II - establish religious cults or churches; subsidize them; hinder them from exercising; or keep with them or their representatives

the right to religious freedom. The current constitution in force establishes the right to the freedom of religion in Paragraph VI of Article 5 in the following terms:

Article 5: Everyone is equal before the law, with no distinction whatsoever, guaranteeing to Brazilians and foreigners residing in the country the inviolability of the rights to life, liberty, equality, security, and property, on the following terms...

Item VI: Freedom of conscience and belief is inviolable, assuring free exercise of religious beliefs and guaranteeing, as set forth in law, protection of places of worship and their rights.

The same Article 5 guarantees the right to religious assistances (Item VII) and the inviolability of political rights for reasons of religious affiliation (Item VIII). It also adopts a principle contrary to discrimination on the basis of religion (Item XLI). Another important aspect is the fact that the current constitution protects the right of association of religious communities in accordance with the provisions of Article 5. Article 19 (Item I) on one hand prohibits financing churches and religious confessions and on the other hand vetoes the public power from imposing any unjustified restrictions on the activities of churches or religious confessions. One exception to the financing of religions and religious organizations contemplated by the constitutional text is cooperation with these religious institutions in cases of public interest (Article 19).<sup>30</sup> In short, the current Brazilian Constitutional Charter guarantees the exercise of rights like the freedom of religion and conscience; protection of places of worship and their rituals; peaceful assembly and the creation of churches; religious assistance in civil and military establishments and establishments of collective internment; collaboration between the State and religious communities for the convenience and interest of the public; and finally, recognition of the civil effects of religious marriages. Simultaneously, it prohibits the public power from establishing a state religion; financing church or religious confessions; creating obstacles to the activities of churches and the performance of church worship; maintaining privileged relations or alliances with any religious group; and collecting taxes or duties on temples or places of religious worship.

#### IV. LEGAL CONTEXT: LEGISLATION AND JURISPRUDENCE ON STATE AND RELIGION

Both the Union or federal government and states and municipalities have the power to legislate for the political organization of Brazil. For this reason, there exists a large number of legal instruments dealing with religious issues on the national level but also in the diverse states of the Federation and the thousands of municipalities.

In recent years, there has been a major influence by religious groups on Brazilian society, not only in relation to new religions and churches, but also in relation to Afro-Brazilian cults like Umbanda and Candomblé. One example of this phenomenon is the Code of Garbage Collection of Porto Alegre,<sup>31</sup> altered by the Complementary Law Num-

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dependency relationships or alliances, except for the collaboration in the public interest, notably in education, health care and hospital sectors. Art. 150 - The Constitution guarantees to Brazilians and foreigners residing in the country the inviolability of rights concerning to life, liberty, security and property, as follows: § 1 - All are equal before the law, without distinction of sex, race, work, religious beliefs and political convictions. The prejudice of race will be punished by law; § 5 - Full freedom of conscience is guaranteed to believers in their exercise of religious worship, which is not contrary to public order and morality; § 6 - On the grounds of religious belief or philosophical or political conviction, no one shall be deprived of any of their rights, unless he invokes it to exempt himself from a legal requirement for all, in which case the law may determine an incompatibility with the rights of conscience excuse. *Constituição do Brasil* (24 January 1967).

30. Art. 19. The Union, the States, the Federal District and the Municipalities are forbidden to: I – to establish religious cults or churches, subsidize them, hamper their operation, or maintain with them or their representatives relations of dependency or alliance, with the exception of cooperation for the public interest, as set forth in the law (“Federal Constitution of Brazil of 5 October 1988,” International Constitutional Law English translation, document status 11 February 2014, [http://www.servat.unibe.ch/icl/br00000\\_.html](http://www.servat.unibe.ch/icl/br00000_.html)).

31. Art. 43 Supplementary Law No. 234 (Municipal Code of Garbage Collection).

ber 602/2008, which expressly accepted from sanctions any disposal in public places of dead animals used in the worship of African religions and in Umbanda.<sup>32</sup> This practice is ordinarily punished, but, for religious reasons, it is now permitted.

### A. Jurisprudence

There is a great deal of jurisprudence in the Brazilian courts, dealing with religious liberty. There are decisions that deal with issues such as religious teaching in public schools,<sup>33</sup> taxation of churches and religious associations,<sup>34</sup> the involvement of churches and religious groups in the electoral process,<sup>35</sup> religious assistance in the armed forces,<sup>36</sup> etc. In some cases, an evident contradiction and lack of uniformity in the application of the laws of religious liberty by Brazilian courts is noted. A good example of this contradictory jurisprudential position can be found in cases involving disputes about Sabbath day observance according to an individual's personal religious precepts. Many of these cases involve members of the Seventh-day Adventist Church that ask colleges to hold exams on days other than Saturday because it is the Sabbath day of their religion, as well as for Jews<sup>37</sup> and members of other religions. Some courts, including the Federal Supreme Court,<sup>38</sup> deny them the enjoyment of this right. According to some decisions, conceding the benefit of holding the exam on a different day than that determined for the majority of the other students would be an unwarranted discrimination. Based on this position, the right to religious liberty, protected by Article 5 of the Federal Constitution of 1988 (CF-88), cannot be invoked to support an exemption from a legal obligation imposed on all or to exempt a refusal to perform an alternative obligation provided by law.<sup>39</sup> Other courts

32. This legislation prior to its amendment by Complementary Law No. 602/2008, was, considering the violation of the religious freedom of African-Brazilian cults, as it was filed, a Direct Action of unconstitutionality on the grounds of constitutional protection. Ver TJRS. *Ação Direta de Inconstitucionalidade*. ADI 70024938946 RS, julg.: 13/04/2009, pub.: DJ, 30/04/2009.

33. In 2001, the Court of Rio de Janeiro found a type of unconstitutionality against provisions of State Law N. 3459/2000 of 14 September 2000, the State of Rio de Janeiro, that "provides for confessional religious education in the schools of the public schools system in the state of Rio de Janeiro." The court held that the use of the word "confessional" in the legislation did not imply offense to religious freedom. As interpreted by the court in the context of state law "confessional expression means nothing more than religious belief" and the law in question did not constitute violation of the principle of freedom of religion, as it does not discriminate against adherents of different religions. Following state law, also the city of Rio de Janeiro approved by law regulating religious education in municipal public schools (Municipal Law No. 3228, of 26 April 2001: Rio de Janeiro "provides for confessional religious education in public schools teaching the municipality of Rio de Janeiro"). Both state and municipal law propose regulating "confessional" religious teaching. *Tribunal de Justiça do Rio de Janeiro – Ação Direta de Inconstitucionalidade*: ADI 141 RJ 2000.007.00141, Julgamento: 02/04/2001.

34. The Court of the State of Espírito Santo also found that religious associations, though nonprofit, must pay royalties when they engage in frequent collective local events. In *Tribunal de Justiça do Estado do Espírito Santo - Apelação Cível*: AC 24020188538 ES 24020188538, Julgamento: 26/09/2006, Apelante: Escritório Central de Arrecadação e Distribuição ECAD. Apelado: Mitra Arquidiocesana de Vitória.

35. TRE-PA - Recurso Eleitoral: RE 4092 PA, 09/12/2008, *Diário Oficial do Estado*, vol. CE4, 14.

36. One of the rare times when the Brazilian judiciary has intervened in the matter of religious assistance to the armed forces is through the Newsletter N° 546 of the Federal Supreme Court of 11-15 May 2009, which establishes the competence of military courts to judge a chaplain in case of crime of misappropriation. *Informativo N° 546*, Brasília, 11 a 15 de Maio de 2009: *Competência da Justiça Militar e Capelania Castrense*. Processo: RHC – 96814. rel. Min. Eros Grau.

37. Deciding whether to impose upon a Jewish teacher who did not join the strike movement, the obligation to give lessons on the Sabbath, the Court of Justice of the Federal District considered this illegal. Whereas the right to religious freedom is a natural right, according to the opinion of this Court, the government cannot deny the right to respect "the right to the day reserved for the profession of faith" (*Tribunal de Justiça do Distrito Federal - Apelação Cível*: AC 3910196 DF, Julg.: 19/08/1996, Pub.: DJU 19/08/1996: 17.912).

38. STJ - *Recurso Ordinário em Mandado de Segurança*: RMS 16107 PA 2003/0045071-3, 30/05/2005, DJ 1 August 2005, 555.

39. TRF1 - *Apelação em Mandado de Segurança*: AMS 6643 RO 1997.01.00.006643-4, 25/02/2003, DJ, 96. Also denying a member of the Seventh-day Adventist Church, the right to a different treatment according to their religious convictions, considering it an offense against the principle of equality and impersonality. TRF2 - *Apelação em Mandado de Segurança*. Ams 69012, ES 2005.50.01.012623-0, julg.: 19/09/2007, pub.: DJU, 08/10/2007, 201 / TRF2 - *Agravo de Instrumento*: AG 167044 RJ 2008.02.01.010237-7, julg.: 16/07/2008, pub.: DJU, 28/07/2008, 119.

consider this issue differently and hold that the precepts of a religious order can fall under Article 5 of the CF-88 and thus justify holding exams on a different date other than that established for the majority of the candidates.<sup>40</sup>

In tax matters, a consolidated jurisprudence, confirmed by the Federal Supreme Court, considers the tax immunities provided by Article 150(VI)(b) of the Federal Constitution of 1988 to reach not only buildings designated by a church for religious worship, but also all the religious institution's assets, including their rent and essential services.<sup>41</sup> Other questions addressed by Brazilian courts on the issue of religious liberty are: religion and the liberty to come and go<sup>42</sup>; anti-Semitism and crimes of racism<sup>43</sup>; and freedom to worship and travel for religious reasons.<sup>44</sup>

### B. Religion and Propaganda

The risk of misuse of political influence by churches and religious communities for electoral ends brought the Superior Electoral Court in 2008 to issue Resolution Number 22.718<sup>45</sup> that prohibited religious advertising by way of speakers or sound amplifiers at a distance more than two hundred meters from a church (art. 12, § 1, III). The same resolution considers temples as common areas, similar to public light posts and traffic signals, viaducts, walkways, bridges, bus stops, and other urban facilities, in which advertising of any nature is prohibited, "including graffiti, ink signs, or the hanging of signs, standards, banners, or the like" (art. 13, § 2).<sup>46</sup>

40. TRF 1 - Remessa Ex Officio: Reo 68143 PR 2002.70.00.068143-9, 22/06/2004, DJ 11/08/2004, p.: 419. Also in the sense that a member of a minority religious group is entitled to differential treatment was the pronouncement of TRF4, according to which the principle of equality beyond the "prohibition of differentiation" also implies an "obligation of differentiation," corresponding to "existing inequalities arising in the case of religious beliefs, political and social institutions incorporate the needs and interests of the majority confession." TRF4 - Apelação em Mandado de Segurança: AMS 17703 PR 2003.70.00.017703-1, julg.: 16/10/2007, pub.: D.E. 07/11/2007. A curious decision was made by the Court of Maranhão whereby between the application of the principle of religious freedom and the public administration, the latter shall prevail. In this case, considering the admissibility of the practice of differential treatment by the public administration, it cannot be allowed to grant preferential treatment in public examinations for reasons of a religious belief to a Seventh-day Adventist who petitioned to be able to sit exams on another day than Saturday (TJMA - *Agravo de Instrumento*. AI 236972006 MA, julg.: 04/10/2007). The Supreme Court granted interlocutory relief to a Union in a decision denying the effectiveness of the TRF 3rd Region which required the Union to schedule an alternative date to the Sabbath day for public qualifying exams for a candidate of Jewish faith (STF - *Suspensão de Tutela Antecipada*. STA/389 - MG).

41. AI-AgR 651138 / Rio de Janeiro - AG.REG. Agravo de Instrumento, 26/06/2007 (DJe-082, Divulg. 16-08-2007, Public. 17-08-2007, DJ 17-08-2007 PP-00085). Ementário: vol-02285-18 PP-03636, RT v. 96, n. 866, 2007, p. 130-131 // AI-AgR-AgR 389602 / Paraná -AG.REG. Agravo de Instrumento, 22/03/2005 (DJ 15-04-2005 PP-00030). Ementário: vol-02187-05 PP-00902 // RE 325822 / SP - São Paulo, Recurso Extraordinário, 18/12/2002 (DJ 14-05-2004 PP-00033). Ementário: vol.-02151-02 PP-00246.

42. Analyzing whether the collection of tickets for access to Corcovado ("Christ the Redeemer") in Rio de Janeiro by public authority constitutes breach of freedom of religion. TRF2 - *Apelação em Mandado de Segurança*, AMS 24778 99.02.06197-4, julg.: 30/11/2004, pub.: DJU, 16/12/2004, 231.

43. Under Article 20 of Law 7716/89 (alterada pela Law No. 9.459, de 13 de Maio de 1997), writing, editing, distributing, and trading in books "defending prejudiced and discriminatory ideas" against the Jewish community constitutes a crime of racism subject to the provisions of inafiançabilidade ("unbailability") and imprescriptibility. The application and scope of such legislation were objects of attention of the Supreme Court, which denied the benefit of the remedy of habeas corpus in case of conviction for condoning anti-Semitism through literary work. Ver: STF. *Habeas Corpus*. Hc 82424 RS, julg. 16/09/2003, pub. DJ 19-03-2004, 17.

44. The Supreme Court - STF, in a trial of an Extraordinary Appeal, considered violations of religious freedom from a judgment of the lower court in favor of prohibiting the appellants from "attending, or helping to develop religious cults which are concluded in homes or in places that are not specifically designed for the cult." STF - Recurso Extraordinário: RE 92916 PR, 18/05/1981, DJ 26-06-1981 PP-06307 EMENT VOL-01218-02 PP-00391 RTJ VOL-00100-01 PP-00329.

45. Resolução TSE nº 22.718, de 28.2.2008 - Propaganda eleitoral [TSE Resolution No. 22.718 of 28.2.2008 - Electioneering].

46. A good definition of the *mens legis* of this Resolution was given by the Regional Electoral Tribunal of Pará, which provides: "Art. 13, § 2 of Resolution No. TSE. 22.718, to prohibit political propaganda in religious sanctuaries, considering them property of common use, for electoral purposes, aims to prevent privileged access by a local candidate of a great flow of people, where the faithful can be induced to close ranks by dint of professing the same religion, violating the freedom of choice." TRE-PA - Recurso Eleitoral: RE 4092 PA,

### C. *The Service of Religious Assistance in Armed Forces – SARFA*

One of the few provisions of Brazilian law regarding the establishment of a religious body within the State apparatus is known as SARFA (Service of Religious Assistance in the Armed Forces), whose current form is contained in Federal Law Number 6.923 of 29 June 1981. According to this law, SARFA's purpose is to provide religious and spiritual assistance to soldiers and civilians that work in military organizations, as well as to their families, and also to give assistance in activities involving moral education provided by the Armed Forces (Article 2). SARFA acts in military units, ships, hospitals, bases, and other military establishments (Article 3, I). It allows for the integration of military chaplains, priests, religious ministers, or pastors of any religion as long as its creed does not offend the discipline, morals, or legislation in effect (Article 4). The chaplain must be a native Brazilian, a volunteer of an age between 30 and 40 years old, be graduated from a program of theology at the university level, have a minimum of three years of ministerial experience, have the express authorization of his religious authority, and have the assent of a superior military official of the Armed Forces. The law states that SARFA should reflect the religious diversity of the Brazilian people. With this purpose, the law's text states that military chaplains should be proportional in number and religion to the members of the armed forces (Article 10).

### D. *The Agreements between Brazil and the Holy See*

The Roman Catholic Church is the only religious confession to have agreements with Brazil. Currently there exist three agreements between Brazil and the Holy See. The first is the "Administrative Agreement for the Exchange of Diplomatic Correspondence in Special Bags," signed on 2 October 1935,<sup>47</sup> which deals with diplomatic correspondence. The second agreement is the "Agreement about Religious Assistance in the Armed Forces" of 23 October 1989, which entered into force upon its signing. Finally, the last agreement with the Holy See was signed in 2008. Of the three, the agreement of 2008 is the broadest and deals with a large number of different issues. Therefore, it is the only one that approaches the classic model of a contract, even if the contracting parties have opted to use the label "agreement."

#### 1. The Agreement about Religious Assistance in the Armed Forces

On the 23rd of October 1989, the Brazilian government and the Holy See signed the "Agreement between the Federal Republic of Brazil and the Holy See about Religious Assistance in the Armed Forces." In the agreement's preamble, the intention of the contracting parties is declared as promoting the services of religious assistance of a stable and convenient character for the Catholic members of the armed forces. This treaty guarantees the exercise of the right guaranteed by Article 5, Item VII of the Federal Constitution of 1988. Through this agreement, the "Military Ordinary" was created as part of the General Staff of the Armed Forces.<sup>48</sup> Before this agreement, the spiritual health of Catholic members of the armed forces was organized by the Military Vicariate of Brazil, created by Pope Pius XII on 6 November 1950. Applying the provisions of the agreement of 1989, the Congregation of Bishops transformed the existing Military Vicariate into the Military Ordinary of Brazil on 2 January 1990. Based on the 1989 agreement, its principal characteristics and competencies are: it is canonically similar to a diocese (Article 2); it is directed by an Ordinary with the dignity of an Archbishop, with the same rights and duties

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09/12/2008, Diário Oficial do Estado, Volume CE4, 14.

47. Entered into force on 2 December 1935.

48. The text of the Agreement between Brazil and the Holy See on religious assistance in the military uses the Military Ordinariate terminology in correspondence with the provisions of the Apostolic Constitution *Spirituali Militum Curae*. See PP. John Paul II, *Constitución Apostólica "Spirituali Militum Curae,"* 24 April 1986.



of diocesan bishops (Article I, 2) and bound administratively to the General Staff of the Armed Forces (Article III, 1); the service is done by priests of the secular clergy or by monks (Article VII, 1); the military chaplains are priests, designated to form a stable religious service in the Armed Forces and admitted in a military career, according to the provisions of the Brazilian legislation (Article VIII)<sup>49</sup>; the number of Catholic military chaplains must be proportional to the number of faithful Catholics (Article XI)<sup>50</sup>; and finally, the curia of the Military Ordinary is maintained by the General Staff of the Armed Forces which provides for its material needs, budget, and personnel (Article XIII).

2. The Agreement between the Federal Republic of Brazil and the Holy See related to the Legal Status of the Catholic Church in Brazil (Agreement of 2008)

On 13 November 2008, during his first official visit to the Vatican, President Luiz Inácio Lula da Silva signed the “Agreement between the Federal Republic of Brazil and the Holy See related to the Legal Status of the Catholic Church in Brazil” in the Vatican library. In the 1980s, by the initiative of the National Conference of Brazilian Bishops (CNBB), the process of the agreement had been started.

A provision of the Federal Constitution of 1988 (Article 49, I) provides that treaties must be approved exclusively and finally by the National Congress.<sup>51</sup> For this reason, the Agreement with the Holy See of 2008 had to be approved by the two houses of the National Congress, the Chamber of Deputies and the Federal Senate, before the agreement could finally enter into effect. The signing of such a broad agreement with a specific religious confession gave rise to a series of debates in the National Congress, in the press, and in society in general. Some sectors of society opposed the approval of the agreement, considering it an offense to the secularism of the State and a violation of the separation between church and state in effect since the proclamation of the Republic in the distant year of 1889. Still, the process of approval by the National Congress was relatively swift. The diverse delays in the session for the approval is evidence of the existence to the agreement’s approval.<sup>52</sup> A large part of the resistance to the Agreement with the Holy See

49. As determined by Federal Constitution of 1988, access to public offices and positions depends on anticipated approval in a public tender of evidence, or evidence and bonds: “Art 37, “II - investiture in a public office or position depends on previously passing an entrance examination consisting of tests or tests and presentation of academic and professional credentials, according to the nature and the complexity of the office or position, as provided by law, except for appointment to a commission office declared by law as being of free appointment and discharge” (Federal Constitution of Brazil of 1988, see supra n. 30).

In Brazil’s federal republic, the federal government and the states have, each in their own spheres of competence, jurisdiction over their military bodies. An example of state regulation of the military chaplaincy is N 1672 Act of 25 June 1990, of the Government of the State of Rio de Janeiro, laying down the criteria for entry and creating the cadre of Evangelical Chaplain in the Military Police and the Fire Department of the State of Rio de Janeiro. At the federal level, the Law No. 9.519 of 26 November 1997 provides for the cadres of naval officers, and determines in its art. 7, § 4 that the Official Auxiliary Marine Corps “will enter the Board of Chaplains Corps candidates in the selection process, Training Course and Internship Application of Officers.”

50. The same criterion ratio can be found in Article 10 of Federal Law No. 6.923 of 29 June 1981. Article 8 of the same law fixes the maximum effective number of Military Chaplains for each of the active Armed Forces.

51. Art. 49: “It is exclusively incumbent upon Congress: I – to resolve conclusively on international acts, agreements, or treaties, which involve charges or commitments against the national patrimony; . . .” Federal Constitution of Brazil, supra n. 49.

52. Initially the vote in the House was scheduled for 14 July 2009, but for lack of a quorum new dates were established for 5 August and again for 12 August. All this occurred while there was still a declaration of emergency adopted by the Foreign Affairs Committee of the House of Representatives. Finally, the agreement was approved in this house of Congress by a plenary meeting in special session on the evening of Wednesday, 26 August 2009 (*House of Representatives - Draft Legislative Decree 1.736/2009* - “Approves the Agreement between the Federative Republic of Brazil and on the legal status of the Catholic Church, signed in the City-State of the Vatican, 13 November 2008 the Holy See.” Rapporteur: Chico Abreu). Once the bill was approved by the House of Representatives, it was sent to the Senate, where it was approved on 7 October 2009 unanimously on a symbolic vote (the rapporteur of the project was the former president and current Senator Fernando Collor de Mello - *Assent, under No. 1,657, 2009, the Committee on External Affairs and National Defence*) / PDS - *Draft Legislative Decree (SF) No 716/2009* - Discussion in a single session of the Draft Legislative Decree No. 716 of 2009 approving the text of the Agreement between the Federative Republic of Brazil and on the legal status of the Catholic Church in Brazil Holy See, signed in the City-State of the Vatican,

was provoked by evangelical groups in parliament that considered the concessions of privileges to the Catholic Church illegitimate, making a compromise necessary in order for the National Congress to approve the agreement. Accordingly, the compromise was introduced whereby parallel to the approval of the agreement of 2008 with the Holy See was the approval of Law PLC 160/09, known as the Law of Religions, which had similar content and extended the same rights given to the Catholic Church to other religious confessions.<sup>53</sup>

Overall, the general terms of the Agreement of 2008 did not mean the introduction of new guarantees for the Catholic Church in Brazil.<sup>54</sup> The real significance was the assembling of the already existing rights and privileges of the Catholic Church into a single legal instrument.<sup>55</sup> In its 20 articles, the text practically reproduces the religious provisions already established in the Federal Constitution of 1988 and other ecclesiastical legislation already in effect.<sup>56</sup>

The first reason for the signing of the Agreement, as Stated in the preamble, is the historic relation between the Catholic Church and Brazil.<sup>57</sup> Another reason is the recognition of the mutual responsibility of the State and the Church in relation to society and the good of all human persons.<sup>58</sup> The content of the agreement recognizes that each through its proper order, autonomy, independence, and sovereignty will cooperate to build a more

on 13 November 2008.

53. Like the Agreement with the Holy See, the PLC 160/09 regulates provisions of the Federal Constitution of 1988 and guarantees the free exercise of religious worship and other rights, protection of places of worship, their liturgies, inviolability and freedom of belief of religious expression in public spaces (by Congressman George Hilton, who is Evangelical, presented on 2 September 2009). (Projeto de Lei da Câmara (PLC) No. 160/2009 - Provides for the Fundamental Rights and Guarantees Free Exercise of Belief and Religious Cults, established in sections VI, VII and VIII of art. 5 and in § 1 of Art. 210 of the Constitution of the Federative Republic of Brazil).

54. The use of the term “agreement” rather than “concordat” was purposeful. Though the latter term is more in tune with the ecclesiastical juridical tradition and most appropriate for the description of such an instrument, the use of the term “agreement” could eliminate any possible confusion with the “concordat” of Brazilian commercial law. The main reason was, however, to consider “agreement,” was that it is a more modern term, more in tune with the concept of secularism and, therefore, more palatable in the complex context of the relations between church and state in Brazil.

55. The initial proposal of the text of the agreement presented by the ecclesiastical faction mentioned a broader recognition of rights and was rejected by the Brazilian government. This proposal provided the guarantee of respect for religious festivals like Christmas and the feast of Our Lady of Aparecida, patroness of Brazil, which is celebrated on the 12th of October. This proposal to ensure through the concordatária instrument adherence to these festivities as a public holiday was rejected by the government on the grounds of state sovereignty. Another proposal, also rejected, was to ensure free access of Catholic religious missionaries to the entire national territory, including the protected indigenous areas. According to Brazilian law, access to indigenous areas is subject to special control by the State.

56. The 2008 Agreement merely addresses the major issues of less relevant topics ecclesiastical law left out of the text. This is the case, for example, for rules on criminal law which provide for the granting of a special cell in case of an arrest of a minister of a religious confession, according to the provision of Art. 295 of the Code of Criminal Procedure and the pronouncement of the Supreme Court (STJ - *Habeas Corpus*: 4386 MG 1996/0007824-6, Quinta Turma, pub.: 5 August 1996, RSTJ vol. 90, 307).

57. In these 500 years of history, from the discovery by the Portuguese, the Catholic Church has played an important role in Brazilian society. [Sebastião da Rocha Pita, *História da América Portuguesa* (Belo Horizonte: Itatiaia, 1976); Afonso de E. Taunay, *IV Centenário da Fundação da Cidade de São Paulo* (São Paulo: Gráfica Municipal, 1954)]. The first missionaries founded some of the most important Brazilian cities, like São Paulo and Salvador da Bahia, and had a decisive role in the expansion and maintenance of the territory [Serafim Lette, *História da Companhia de Jesus no Brasil* (Rio de Janeiro: Civilização Brasileira, 1938)].

58. The expression “integral good of the human person” is common in the ecclesiastical milieu, as demonstrated by pronouncements of the popes and some documents. E. g.: Benedict XVI, *Discurso del Papa Benedicto XVI a los Participantes en la XXXIV Conferencia de la FAO*, 22 November 2007; Benedict XVI, *Mensaje Urbi et Orbi*, Natal, 25 December 2006; John Paul II, *Discurso del Santo Padre Juan Pablo II con Ocasión del XXIII Congreso Internacional de la Sociedad de Trasplantes*, 29 August 2000; n. 19 - Benedict XVI, *Deus Caritas Est*, “del Sumo Pontífice Benedicto XVI a los obispos, a los presbíteros y diáconos, a las personas consagradas y a todos los fieles laicos sobre el amor cristiano [The Supreme Pontiff Benedict XVI to the bishops, priests and deacons, consecrated persons and stands all the lay faithful on Christian love],” Carta Encíclica, 25 December 2005; n. 4 - Congregação para a Doutrina da Fé, *Nota Doutrinal Sobre las Cuestiones Relativas al Empeño y al Comportamiento de los Católicos en la Vida Política*, 24 November 2002.

just, peaceful, and fraternal society. The statement of the mutual autonomy of the Church and the State also enjoys solid doctrine.<sup>59</sup> In the preface, the contracting parties declare that the Agreement of 2008 is based in the Brazilian legal system, the documents of the Vatican II, and the Code of Canon Law. Finally, the parties declare their adherence to the internationally recognized principle of religious freedom.

### 3. Principal Elements of the Agreement of 2008

As demonstrated by the name of the Agreement of 2008 “relating to the legal status of the Catholic Church in Brazil,” the principal element of the Agreement of 2008 is a reaffirmation of the recognition of the legal personality of the Catholic Church, already guaranteed since 1890 by the Decree Number 119-A on January 7 of that year, and that now, as explained by the new Agreement, is extended to all the ecclesiastical institutions under the provisions of canon law. Being a legal instrument of ample scope, the Agreement of 2008 provided for various aspects of the relations between the State and the Catholic Church.

#### a. Religious teaching in public schools

The agreement provided the guarantee of religious teaching in public schools. In order to reject a system of religious discrimination, the Agreement of 2008 declares that this guarantee is extended to other religious confessions. In terms of religious education, the text of the Agreement practically reproduces the normal Brazilian legal tradition<sup>60</sup> and repeats the provisions of the first paragraph of Article 210 of the Federal Constitution of 1988 and also repeats Article 33 of the Law of Guidelines and Bases of Education (LDB)<sup>61</sup> that establishes the individual right of students to have at their disposal an optional course of religious study in public schools. With respect to religious education, the Agreement of 2008, referring to the teaching of the Catholic religion and of other religious confessions, does not confer privileges or advantages to the Catholic Church, nor does it create a distinction between Catholicism and other beliefs. In practical terms, the text of the Agreement of 2008 translates into a succinct form, Article 33 of the Law of Guidelines and Bases of Education (LDB), by which enrolling in religious teaching is optional, religious teaching is a compulsory subject in the curriculum, and schools must respect the religious diversity of Brazil and not allow proselytism.<sup>62</sup>

#### b. The extension to the Catholic Church of benefits conceded to charities

Article 5 of the Agreement of 2008 confers a tax exemption to temples and to activities of a religious nature. This benefit is already the subject of Brazilian legal provisions.

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59. Close in time is the doctrine of the sovereignty and independence of both ecclesiastical and civil powers; each one in his own order was strongly emphasized during the pontificate of Pope Leo XIII. Such is the nature of these relationships as described in his encyclicals *Diuturnum illud* (1881), *Immortale Dei* (1885) and *Christianae Sapientiae* (1890), in which he states that the ecclesiastical authority and the power of the state are equally sovereign, each within its order. The same doctrine also appears in the *Pastoral Constitution Gaudium et Spes*, the Second Vatican Council, according to which “the political community and the Church are each independent and autonomous in its own sphere itself” (No. 76), and the pronouncements of past popes: *Discurso del Santo Padre Juan Pablo II a los Miembros del Cuerpo Diplomático Acreditado Ante la Santa Sede*, 16 de Janeiro de 1982; *Discurso de su Santidad Juan Pablo II a una Delegación Croata con Motivo del Intercambio de los Instrumentos de Ratificación de Tres Acuerdos Estipulados Entre la Santa Sede y la República de Croacia*, 10 de Abril de 1997.

60. See art. 48. “Organic Law of Agricultural Education.” Decree-Law No. 9.613, 20 August 1946.

61. Law No. 9.394, of 20 December 1996 - Establishing guidelines and bases for national education. Modified by Law No. 9.475, of 22 July 1997 - Giving new wording to article 33 of Law No. 9394 of 20 December 1996 laying down the guidelines and bases for national education.

62. Proselytizing as such is not explicitly prohibited under Brazilian law. However, there are specific rules which forbid this practice in certain cases, as occurs for example with the prohibition of the practice of proselytism in the programming of broadcasters (art. 3 – Law No. 11.652, of 7 April 2008 and art. 4 – Federal Law No. 9.612, of 19 February 1988).

Besides protecting the exercise of free worship given to religious confessions, it represented freedom from the burden of taxation. The scope of this provision was to guarantee the development of humanitarian and social work done by the Catholic Church in Brazil.

c. Ratification of ecclesiastical court rulings in matrimonial matters

One of the major innovations introduced by the Agreement of 2008 is the possible ratification of ecclesiastical court rulings in matrimonial matters. The text of Article 12 contemplates this possibility. In the Brazilian judicial system, the Superior Justice Court<sup>63</sup> is the competent organ for the ratification of foreign sentences.

d. The right to spiritual assistance in establishments of collective internment

Article 8 secures the right to the Catholic Church to give spiritual assistance in establishments of collective internment, such as hospitals, prisons, asylums, and other similar institutions. This right was provided generically in the Federal Constitution of 1988, which guarantees the providing of religious assistance at civilian and military establishments for collective confinement,<sup>64</sup> and is now recognized specifically as a right of the Catholic Church.

Federal Law Number 9982 of 14 July 2000, deals with the topic, determining that to the religious of all confessions is secured access to establishments for civil and military incarceration. This same law guarantees the concession of spiritual assistance by a minister of the same faith of those who find themselves deprived of liberty. The Spiritual Assistance in establishments of collective confinement is also regulated by the laws of various Brazilian states<sup>65</sup> and municipalities.<sup>66</sup>

e. The exclusion of labor contracts between the Catholic Church and its members

Affirming the “peculiar religious and charitable character of the Catholic Church and its institutions,” Article 16 of the Agreement of 2008 excludes from the reach of the labor justice system relations between Catholic and religious institutions and those that do any type of voluntary work within those institutions. These types of relations have now become exclusively regulated by canon law.

## V. SOCIAL INSURANCE AND RELIGIONS

A pension is guaranteed to monks, priests, pastors, and ministers of any denomination. They are considered “individual contributors”<sup>67</sup> (in previous legislation they were treated as “autonomous workers”<sup>68</sup>) and it is seen as necessary to place them on social security.<sup>69</sup> Also, for the purpose of social security, there exists the national Register of

63. According to the norm of Art. 102, I, of the Federal Constitution of 1988, the approval process was originally the jurisdiction of the Supreme Court. Subsequently, as an effect of Constitutional Amendment No. 45, dated December 30, 2004, that original jurisdiction became the STJ.

64. Number VII, Art. 5 (Constituição da República Federativa do Brasil de 5 de outubro de 1988).

65. In the state of Rio de Janeiro there are rules governing the religious assistance in “off-shore oil” drilling platforms. Law No. 4.712, of 23 January 2006, of the State of Rio de Janeiro.

66. Law No. 1310, de 12 July 2004, of Palmas – “provides for access to ministers of religious cults and their agents in dependencies and entities mentioned in the municipality of Palmas.”

67. Law No. 9.876/99, of 26 November 1999 – “Treats the social security contributions of the individual taxpayer, the calculation of the benefit, amending provisions of Laws in 8.212 and 8.213, both of 24 July 1991, and other provisions.”

68. Law No. 6.696, of 8 October 1979 – “Equates with regard to urban welfare, ministers of religious confessions and members of institutes of consecrated life, religious congregation or order to freelance workers and other measures.”

69. Art. 6 – Decree No. 611, of 21 July 1992, DOU, of 22 July 1992 (derogado). Decree No. 2.172, of 5 March 1997, DOU, of 6 March 1997. Decree No. ° 3.048, of 6 May 1999, DOU, of 7 May 1999. Decree No. 4.079, of 9 January 2002, DOU of 10 January 2002.

Religious Entities – CER<sup>70</sup> in which all religious organizations must register or lose their position in social security.

#### A. Other Rights Recognized by the Agreement of 2008

The other important provisions of the Agreement of 2008 are: the allocation of spaces for religious purposes in urban planning projects and master plans; the recognition of the civil effects of Catholic marriages; the recognition of the right of the Catholic Church to publicly exercise its apostolic mission; the prohibition on a Brazilian archdiocese, depending on a bishop whose Episcopal seat is outside the national territory; the declaration that the historical, artistic, and cultural heritage of the Catholic Church is part of the Brazilian cultural heritage; the duty of the Estate to protect Catholic places of worship as well as its “rituals, symbols, images, and objects of worship,” against any form of violation, lack of respect, or illegitimate use (Article 7); the prohibition against demolishing, occupying, transporting, or expropriating Catholic buildings of worship; the mutual recognition of titles and qualifications of the graduate and post-graduate level (Article 9); the recognition of the right of the church to construct and administer seminaries and other ecclesiastical institutions of training (§ 1, Article 10); the recognition of the civil effects of the titles and degrees issued by seminaries and other ecclesiastical institutions of religious training; the guarantee of respect for the secrets of the priestly office, especially in relation to sacramental confession; and finally, the possibility of consular visas for foreign missionaries.

### VI. RELIGION AND THE AUTONOMY OF THE STATE

In terms of religion, it is significant that there is a group of members of the National Congress in Brasília that are called the “Evangelical Parliamentary Front,”<sup>71</sup> also known as the “Evangelical Bench.” Its members are deputies and senators, as well as members of different Evangelical religions. In 1986, the first Evangelical pastors were elected to the National Congress. Initially they were pastors of the Assembly of God, but today the group consists of Evangelicals of various denominations. The Evangelical Bench is not a political party because its members belong to different political parties and have distinct affiliations. Its members are grouped together through their religious affiliation, and they are guided by these principles as they decide on issues of common interest. The Statute of the Evangelical Parliamentary Front states among its objectives to influence the legislative process “according to its objectives, the combined purposes of God, and according to His word.”<sup>72</sup> The number of members in the Evangelical Bench has reached about 70; it suffered a large reduction in the legislative sessions in 2007/11 and now has 45 deputies and 4 senators.<sup>73</sup> This reduction is attributed in large part to a lack of reelection of its members and various allegations of corruption involving its members. Even so, this group continues to exercise great influence on the National Congress. Despite the direct influence on the National Congress, the Evangelical Parliamentary Front promotes events for reflection and discussion of issues considered relevant, such as the National Campaign in Defense of Life and Family.

In the last few years, there has been an intense debate in Brazilian society about state recognition of the civil effects of same sex unions. Actually, Brazilian law does not legislate about same sex unions. A decision of the National Council of Justice (Resolution No.

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70. *Service Order - Director of the National Social Insurance Institute of Social Security - Dir. SS - INSS No. 536 of 10 June 1996, DOU of 10 June 1996 - “Establishing the Registry of Religious Entities.”* Director: Ramon Eduardo Barros Barreto. This Service Order (ODS) complements the provision of paragraph INPS/SB-052.7 of 13 February 1980, which was the religious Orders and Congregations.

71. The Statute of the Evangelical Parliamentary Front defines it as “. . . a civil, non-governmental nature, constituted under the National Congress and integrated by Federal Representatives and Senators of the Federal Republic of Brazil” (Article - Statute of the Evangelical Parliamentary Front, September 2003).

72. *Id.* at Article 2, III.

73. As stated in the “Charter on Indigenous Missions” that the Evangelical Parliamentary Front addressed to the Minister Dilma Rousseff, Chief of Staff, on 16 December 2008.

175, 14 May 2013), however, establishes that civil officers cannot refuse to celebrate same sex marriages. Against this Resolution some reactions did rise, many of which were reactions as projects of laws in Congress and even the call of a plebiscite.

## VII. LEGAL REGULATION OF RELIGION AS A SOCIAL PHENOMENON

There is ample case law in the Brazilian courts relating to the recognition of labor rights of monks, pastors, priests, and religious ministers in general. Much of the judiciary<sup>74</sup> and labor doctrine<sup>75</sup> does not consider religious work to form a labor contract. The question, however, is not settled; there is a growing case law which adopts the contrary opinion that religious work is protected by the labor courts.<sup>76</sup>

Numerous Brazilian municipalities<sup>77</sup> provide spaces reserved for religious services in urban planning projects. This is the case in the municipality of Ribeirão Preto in São Paulo, and specific laws prohibit imposing administrative restrictions on the construction of religious buildings.<sup>78</sup>

Other municipalities impose obstacles to the construction of buildings of worship. Overall, these restrictions relate to noise ordinances emitted by temples and buildings of religious worship.<sup>79</sup>

In some Brazilian municipalities, they refer to buildings of worship in the urban plan.<sup>80</sup> Others treat the question by specific legislation, regulating issues like the exemption of the requirement of previous authorization to operate a building of worship;<sup>81</sup> granting municipal tax exemptions to temples and religious institutions;<sup>82</sup> the authorization for the construction of religious buildings in specific zones;<sup>83</sup> and special privileges relating to the construction,<sup>84</sup> as well as other issues.<sup>85</sup>

74. TRT-12ª Região - RO-V 457/2003 - Acórdão COAD 109946 - 1ª Turma - Rel. Juiz Gerson Conrado - Publ. em 22-3-2004). *Tribunal Regional do Trabalho*-3ª Região; RO 870-2006-038-03-00-9 - Acórdão COAD 121121 - 2ª Turma - Rel. Juiz Marcio Flávio Salem Vidigal - Publ. em 23-2-2007). TST - *Acórdão nº 4842*, 29 de Setembro de 1994, Proc: RR nº 104323/1994, 3ª Região, 1ª Turma - DJ, 25/11/1994, p. 32430.

75. Alice Monteiro de Barros, *Revista Decisório Trabalhista*, No. 75, 09 - 2. Délio Maranhão, *Instituições de Direito do Trabalho*, 14th ed. (Rio de Janeiro: Freitas Bastos, 1994), 303.

76. See *Agravo de Instrumento em Recurso de Revista*, TST-AIRR-357/2005-202-01-40.9, *Agravante*: Igreja Internacional da Graça de Deus - *Agravado*: Carlos Eduardo Ramos dos Santos. Acórdão, 2ª Turma, JSF/MGC/saf; TRT da 9ª Região, Rel.ª Juíza Sueli Gil El-Rafih, publ. em 14-5-2004 / *Recurso Ordinário* - 27789/2002-002-11-00; TRT - 11ª Região Rel. Juiz Eduardo Barbosa Penna Ribeiro, publ. em 10-12-2003.

77. For the provision of Art. 182 of the Federal Constitution of 1988, the implementation of urban policies is the responsibility of "Municipal Government", i.e. for each municipality. There is, however, a federal law, called the "Statute of Cities" (Federal Law No. 10.257, of 10 July 2001 which "regulates the arts. 182 and 183 of the Constitution and lays down general guidelines for urban policy and other measures"), which defines national urban policy.

78. Municipal Law No. 5.896, 20 November 1990, Ribeirão Preto provides for administrative rules pertaining to reserve areas and construction of religious temples in subdivision projects, housing complexes and residential neighborhoods.

79. For example, Law No. 296 of 18 July 2005, of the City of Itaperuna, which regulates the control of noise pollution emitted by "church worship" and allows "noises and sounds" of church bells at certain times. And also other municipalities like the city of São Paulo (Law No. 13.190, of 18 October 2001, São Paulo / Law No. 13.287, of 9 January 2002, city of São Paulo) - provides for the inclusion in Law No. 13.190 of 18 October 2001 of the fines to be applied to churches in the city of São Paulo, concerning the control of noise pollution emitted.

80. This is the case, for example, of the Master Plan of the Municipality of Belo Horizonte, which determines vaguely that the occupation and use of urban land must ensure the right to free religious expression (Art. 4º, IX. Law No. 7165, of 27 August 1996, pf Belo Horizonte).

81. E.g.: Law No. 9054, of 26 December de 2002, of Porto Alegre; Law No. 1022, of 1996, of the Federal District; Law No. 3590, of 25 September 2000, of São José dos Campos; Law No.3077, of 19 August 2002, of Viamão.

82. Law No. 956, de 23 de Março de 2006, de Manaus; Law No. 4861, de 23 de Dezembro de 2003, de Canoas; Law No. 4014, of 13 November 1995, of Pelotas.

83. As occurs, for example, in the city of Rio de Janeiro, which by means of Law No. 521, of 6 January 1982, authorizes the construction of "buildings for religious institutions" in residential areas.

84. O município de Osasco no Estado de São Paulo, por meio da Law No. 1704, de 10 de Setembro de 1982, permite que os "Templos Religiosos" ocupem até 80% de todo o terreno, dispensando-os também de outras

## VIII. CIVIL LEGAL EFFECTS OF RELIGIOUS ACTS

The Brazilian legal system recognizes the civil effects of religious marriage. The recognition of the civil effects of religious marriage first appeared in the Republican period in Article 146 of the Constitution of 1934.<sup>86</sup> Later, it was also recognized in Article 163 of the Constitution of 1946 and all the constitutions that followed.<sup>87</sup> The Federal Constitution of 1988 which is currently in effect guarantees the recognition of the civil effects of religious marriages in Article 226 of Section 2.<sup>88</sup>

The civil effects of religious marriage are governed by the Civil Code.<sup>89</sup> The section on “marriage” is part of the fourth book, “From Family Law;” title I, “The Personal Right;” subtitle I, “Of Wedding.” In Article 1511, marriage is defined as “the full communion of life, with foundations in the equality of rights and duties of the spouses.”<sup>90</sup> The second part, respecting the doctrine of marriage, is defined as “the union of two people of different sexes, permanent psychological integration”<sup>91</sup>; “society solemnly contracted by a man and a woman to place under the sanction of the law their sexual union and any resulting offspring”<sup>92</sup>; “the permanent union of man and woman, according to the law, in order to produce and help one another to mutually raise children.”<sup>93</sup> Also provided by the rules of the Civil Code, the civil effects of religious marriages occurs at the time of religious marriages’ conclusion, with the condition that the religious marriage complied with following basic requirements. The Brazilian Civil Code does not list the religions and cults able to perform religious marriages that will be given civil effects.<sup>94</sup> However, the doctrine does distinguish between cults and religions suitable to perform marriages that qualify for civil effects.<sup>95</sup> Even though it is widely accepted among the Brazilian population, most judges do not recognize the civil effects of a marriage performed in a spiritual center<sup>96</sup> or by the Afro-Brazilian religions of “macumba” or “candomblé.”<sup>97</sup>

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exigências como o “recuo frontal e de fundos” e da obrigação de haver um determinado número de vagas de garagem [The municipality of Osasco in the State of São Paulo, through Law No. 1704, of 10 September 1982, allows “Religious Temples” to occupy up to 80% of all land and also exempts them from other requirements like “front setback and funds” and the obligation for there to be a certain number of parking spaces].

85. The municipality of Diadema, in São Paulo, determined by bylaw, that “motels and drive-ins,” structures to encounters of a sexual nature, should be a minimum distance of “five hundred (500) linear feet” from schools, hospitals and religious buildings” (Law No. 625 of 19 June 1979, municipality of Diadema). Another example of urban restriction due to respect for religious beliefs is Law No. 10.684, in Ribeirão Preto, which prohibits operation of houses of gambling, known as bingo, at distances less than 300 meters from a religious worship building (Law No. 10.684, of 9 March 2006, municipality of Ribeirão Preto - provides for the granting of an operation permit for bingo halls near elementary schools and secondary schools, churches, and congregations).

86. See Waldemar Martins Ferreira, *O Casamento Religioso de Efeitos Civil* (São Paulo: Siqueira, 1935).

87. Federal Constitution of 1967 (art. 167, § 2, 3), 1969 (art. 175, § 2, 3) e 1988 (art. 266, §2).

88. According to Prof. Dilvanir Costa, Federal University of Minas Gerais, the Federal Constitution of 1988 recognizes three types of marriage “formal and full form”: civil marriage, religious marriage, and “stable union.” Dilvanir José da Costa, “A Família nas Constituições,” *Revista do Instituto dos Advogados de Minas Gerais* 12 (2006): 21.

89. Law No. 10.406, of 10 January 2002.

90. The term, “full communion of life,” used in Article 1511 of the Civil Code, refers to the expression used by the *Pastoral Constitution Gaudium et Spes*, # 48, the Second Vatican Council, which defines the family founded on marriage as an “intimate communion of life and love marriage.”

91. See Caio Mário da Silva Pereira, *Instituições de Direito Civil*, 16th ed., vol. 5 (Rio de Janeiro: Forense), n. 373, 33.

92. See Orlando Gomes, *Direito Civil*, n. 25, 46.

93. See Washington de Barros Monteiro, *Direito de Família* (São Paulo: Saraiva), n. 95, 11.

94. Previous legislation established a 1937 list suitable for the recognition of civil effects of marriage in religious denominations. “Art 1: A civil law judge is permitted to require qualification for the Competent betrothed and that their marriage be celebrated by the Minister of the Catholic Church, the Protestant worship, Greek Orthodox, or Israeli, or another whose rites are not contrary to public order or good morals” Law No. 379, 16 January 1937.

95. The absence of a legal norm that defines or confirms elements of a definition of the religious services that are deemed suitable for recognition of the civil effects of marriage is because of uncertainty, as demonstrated by the doubts generated by celebrated religious marriage in Knights of Light Spiritual Center in Bahia (Case No. 34739-8/2005 – Injunction, Court of the State of Bahia).

96. The doubt about the suitability of marriages celebrated in a spiritual center, is demonstrated in the article

## IX. RELIGIOUS EDUCATION OF THE YOUTH

According to the administrative and political organization of the federal government and the states and municipalities, all are equally competent to legislate on issues of teaching in public schools.<sup>98</sup> Each system of teaching, whether federal, state, or local, defines the contents of courses in religion,<sup>99</sup> as well as the standards for admitting teachers.<sup>100</sup> Several states<sup>101</sup> and municipalities<sup>102</sup> have their own legislation that regulates religious education. There does not exist in Brazilian legislation a legal definition for religious education. Some characteristics of religious education can be found in legal texts which might include competences and descriptions but never a precise definition appropriately stated. The only attempt to give a legal definition of religious education based in Brazilian law was given in a 1997 opinion by the National Council of Education which stated:

By religious education, it means the time in public school open to students to optionally begin or improve upon their determined religions. From this point of view, only the churches, individually or as associations, can accredit their representatives to occupy this time and meet the demand of students in a particular school.<sup>103</sup>

There is scarcely any case law dealing with the issue of religious education in public schools. One impactful decision was given by the Court of the State of Rio de Janeiro,<sup>104</sup> judging against a direct appeal of unconstitutionality, saying that the teaching of ecumenism in the content of religious education and the established requirements for the admission of religious teachers was in harmony with the constitutional law Number 3459/2000.

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by Judge Antonio Cardoso, which states: "The statutes and teachings show that a spiritualist cult does not have the requirement of religious organization in relationship with the State. . ." Antônio Pessoa Cardoso, "Casamento Religioso com Efeitos Cívicos," *Artigos de Associados, Associação dos Magistrados Brasileiros*, Abril 2006, [http://www.amb.com.br/?secao=artigo\\_detalhe&art\\_id=311&](http://www.amb.com.br/?secao=artigo_detalhe&art_id=311&).

97. This sense is the understanding of elite Brazilian jurists, such as Caio Mario da Silva Pereira, according to which "valid marriage is officiated by a Minister of a recognized religious denomination (Catholic, Protestant, Muslim, Israeli). Not admitted, however, is that which takes place in a macumba area, centers for low spiritism, Umbanda sects, or other forms of popular beliefs which do not bear configuring as religious sects and are not recognized as such." In Caio Mario da Silva Pereira, *Instituições de Direito Civil*, supra n. 91 at 43.

98. An example of the exercise of the legislative powers of the municipalities in the area of religious education is the Municipal Law No. 3479/2006 of the city of Patos, Paraíba State, according to which religious instruction is optional for students, but is mandatory for schools.

99. Although there are no legal impediments, unlike the case when there is direct state intervention in defining the content of religious instruction. The National Board of Education in Opinion 097/99, claimed "the need for the State not to interfere and therefore to not express itself on the content or validity of this or that religious position and much less decide on the more or less ecumenical character of the proposed contents. Even less should be put into arbitration when the latter were an ecumenical position, when different sects or churches challenge those contents from the perspective of their religious position, or argue that they are not included in the scheduling process" (*Opinion No. 097/99 - Formation of teachers for religious education in public elementary schools*, National Board of Education, 6 April 1999).

100. There is no rule in Brazilian law that establishes specific requirements for the qualification and admission of religion teachers in public school. Law No. 9.475, of 22 September 1997 (which amended the Law of Guidelines and Bases of Education), does not mention the creation of courses that enable the teaching of religion, but merely give school systems the allocation of such jurisdiction. Thus the training of teachers of religion could be performed exclusively by religious bodies or similar organizations.

101. As is the case, for example, of the State of Rio de Janeiro: Law No. 3459, 14 September 2000 - "governing confessional religious education in public schools teaching in the State of Rio de Janeiro."

102. Like the state government, the city of Rio de Janeiro also approved their own legislation on religious education in municipal schools (Municipal Law No. 3228, of 26 April 2001, in Rio de Janeiro - "governing confessional religious education in schools of public schools in the municipality of Rio de Janeiro.")

103. *Opinion n. ° 05/97*, "Interpretation of Article 33 of Law 9394/96," National Board of Education, 11 March 1997.

104. ADI 2000.007.00141 – Ação Direta de Inconstitucionalidade - 1ª Ementa - Julgamento: 02/04/2001 - Representação por Inconstitucionalidade / Lei Estadual N. 3459, de 2000 Ensino Religioso. Ementário: 36/2001 - N. 32 - 22/11/2001 Rev. Direito do T.J.E.R.J., vol 51, 178.



Deciding on the constitutionality of a law (Law Number 11.830 of the State of Rio Grande do Sul), the court said the law aimed at releasing public schools to guard various religious holidays was unconstitutional.<sup>105</sup>

#### X. RELIGIOUS SYMBOLS IN PUBLIC PLACES

There has been an intense debate in the Brazilian judiciary about the exhibition of religious symbols in public buildings. The issue originated from a cause of action<sup>106</sup> that sought to make the Federal Government removal all religious symbols (crosses, images, etc.) displayed in prominent locations, in locations of high visibility, and locations of public service in Federal Buildings in São Paulo. The citizen, Daniel Sottomaior Pereira, President of the Brazilian Association of Atheists and Agnostics, filed a cause of action with the Regional Attorney for Citizens' Rights, demanding the removal of a "cross" behind the seat of the Regional Federal Court (pages 7-62). Previously, the same citizen filed a similar suit with the Attorney General, requesting the State remove a crucifix from the plenary assembly in the City Hall of São Paulo, but the cause of action was filed by State prosecutors. In deciding the case, the federal court rejected the claim, opining that the presence of religious symbols in public buildings does not offend constitutional principles of state secularism or religious liberty and that the secular state must not be understood to be an anti-religious or anti-clerical institution. According to the decision, the secular, provided in the Brazilian Constitution of 1988, "prohibits the Union, the States, the Federal District, and municipalities from establishing cults or churches, subsidizing them to hinder their function, or maintaining with churches or their representatives a relationship of dependence or an alliance; the provisions do not involve prohibiting the presence of religious symbols in a public organ."

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105. ADI 2806 / Rio Grande Do Sul, Ação Direta de Inconstitucionalidade, 23/04/2003, DJ 27-06-2003 PP-00029. Ementário: vol. - 02116-02, PP-00359, RTJ, vol.-00191-02, PP-00479.

106. Ação Civil Pública nº 2009.61.00.017604-0, 3ª Vara Cível Federal de São Paulo.