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Artigos Originais

THE 2008 AGREEMENT BETWEEN THE HOLY SEE AND BRAZIL ON THE JURIDICAL STATUTE OF THE CATHOLIC CHURCH IN BRAZIL IN THE EYES OF THE BRAZILIAN SUPERIOR COURTS

O ACORDO DE 2008 ENTRE A SANTA SÉ E O BRASIL SOBRE O ESTATUTO JURÍDICO DA IGREJA CATÓLICA NO BRASIL AOS OLHOS DOS TRIBUNAIS SUPERIORES BRASILEIROS

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Abstract:
In 2008, Brazil and the Holy See entered into an Agreement on the Juridical Statute of the Catholic Church and its Ecclesiastical Institutions in Brazil (the "Agreement"). The Agreement was approved by the Brazilian Congress by Legislative Decree 698 on October 7, 2009 and entered into force in the international sphere on December 10, 2009. On February 11, 2010, by Presidential Decree 7.107, it entered into force in the domestic sphere. The purpose of this essay is assessing the consistency of the Agreement with the State laicity enshrined in the 1988 Brazilian Constitution. The hypothesis is the validity of the Agreement due to the special status of the Holy See in International Law. The methodology of study consisted in describing the historical background of the relationship between State and Church in Brazil as a preamble for surveying cases which have dealt with the 2008 Agreement and the corresponding decisions at the Brazilian Superior Courts. As a result, we have found out that the Brazilian Judiciary sustained the compatibility of the Agreement with the laicity of the Brazilian State enshrined in its 1988 Constitution in two leading cases that addressed, respectively, the possibility of confirmation, by Brazilian Courts, of ecclesiastical declarations of nullity issued by marriage tribunals under the Code of Cannon Law, and the possibility of confessional classes in public schools. Both possibilities were eventually upheld by Brazilian Superior Courts in landmark rulings on the status of the Holy See in the Brazilian practice of international law.

Keywords: International Law; Brazil; Holy See; Legal Statute; Catholic Church; confessional instruction; marriage nullity.

Resumo
Em 2008, o Brasil e a Santa Sé firmaram um Acordo sobre o Estatuto Jurídico da Igreja Católica e suas Instituições Eclesiásticas no Brasil (o "Acordo"). O Acordo foi aprovado pelo Congresso Nacional pelo Decreto Legislativo 698 em 7 de outubro de 2009 e

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entrou em vigor na esfera internacional em 10 de dezembro de 2009. Em 11 de fevereiro de 2010, pelo Decreto Presidencial 7.107, entrou em vigor na esfera nacional. O objetivo deste ensaio é avaliar a consistência do Acordo com a laicidade do Estado consagrada na Constituição brasileira de 1988. A hipótese é a validade do Acordo devido ao status especial da Santa Sé no Direito Internacional. A metodologia de estudo consistiu em uma descrição da relação histórica entre Estado e Igreja no Brasil como preâmbulo para o levantamento de casos que trataram do Convênio de 2008 e das correspondentes decisões nos Tribunais Superiores brasileiros. Como resultado, apuramos que o Judiciário brasileiro sustentou a compatibilidade do Acordo com a laicidade do Estado brasileiro em dois casos que discutiram, respectivamente, a possibilidade de homologação, pela Justiça brasileira, de atos eclesiásticos de declaração de nulidade emitidas por tribunais de casamento ao abrigo do Código de Direito Canônico, e a possibilidade de aulas confessionais em escolas públicas. Ambas as possibilidades foram confirmadas pelos tribunais superiores brasileiros em decisões históricas sobre o status da Santa Sé na prática brasileira de direito internacional.

Palavras-chave: Direito internacional; Brasil; Santa Sé; Estatuto Legal; Igreja Católica; instrução confessional; nulidade do casamento.

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1 INTRODUCTION

The purpose of this essay is assessing the consistency of the Agreement with the State laicity enshrined in the 1988 Brazilian Constitution. The hypothesis is the validity of the Agreement due to the special status of the Holy See in International Law. The methodology of study consists in describing the historical background of the relationship between State and Church in Brazil as a preamble for surveying cases which have dealt with the 2008 Agreement and the corresponding decisions at the Brazilian Superior Courts.

During the colonial (1500-1822) and imperial (1822-1889) periods, Brazil had Catholicism as its official state religion, with the monarch as the head of the Church in the country under the "Padroado" (patronage) arrangement with the Holy See. The arrangement was built on several concordats, by which the Pope delegated to the kings of Portugal, and after 1826, to the Emperor of Brazil, the administration of local churches and the appointment of bishops. The system remained intact until the advent of the republic in 1889, when the "Padroado" was abolished in the country by Federal Decree 119-A of January 7, 1890, that also enacted the separation of Church and State and guaranteed freedom of religion to all individuals and cults, recognizing the legal personality of all churches and religious faiths and their ownership of the assets and buildings already in their possession.

In 1919, the Brazilian representation to the Holy See was elevated to the level of embassy, expressing the country's recognition of the Vatican City as an independent state ten years before the Lateran Treaty.

Throughout its history, Brazil remained a predominantly catholic country, although diplomatically distant from the Holy See. The situation began to change in

1980, with the first visit of Pope John Paul II, who was warmly greeted in all cities he visited. Since them, all Brazilian presidents visited the Vatican, and all Popes visited Brazil. Such diplomatic approximation between both states led to the signature of two agreements: the 1989 agreement on religious assistance to the Armed Forces and the 2008 agreement on the juridical status of the Catholic Church and its Ecclesiastical Institutions in Brazil (the "Agreement"), being the latter the subject of our comments.

The Agreement was approved by the Brazilian Congress by Legislative Decree 698 on October 7, 2009 and entered into force in the international sphere on December 10, 2009. On February 11, 2010, by Presidential Decree 7.107, it entered into force in the domestic sphere.

The Agreement consists of a preamble and twenty articles covering a wide array of matters including the recognition of the juridical personality of the institutions foreseen in the canonical ordering and their fiscal regime; Catholic instruction in addition to that of other religious groups in public schools; collaboration between the states in the cultural area; religious assistance for citizens in health care centers or in jail; the insertion of places dedicated to worship in urban ordering; the recognition of ecclesiastical academic titles and the recognition of civil effects of marriage and ecclesiastical decisions in matrimonial matters.

Among the several topics treated by the Agreement, two were later brought to the Brazilian Judiciary in lawsuits that sustained the incompatibility of the Agreement with the laicity of the Brazilian state enshrined in its 1988 Constitution: the possibility of confirmation, by Brazilian Courts, of ecclesiastical declarations of nullity issued by marriage tribunals under the Code of Cannon Law, and the possibility of confessional classes in public schools. Both possibilities were eventually upheld by Brazilian Superior Courts in landmark rulings on the status of the Holy See in the Brazilian practice of international law.

2 THE CASE OF FORMAL ECCLESIASTICAL DECLARATION OF NULLITY OF MARRIAGE (STJ, SEC 11.962)[2]

The advent of the republic on November 15, 1889 led to several measures to separate the Church and the State. One of the first was the introduction of the civil marriage, which was established by Decree 181, of January 24, 1890. According to the decree, the validity of the marriage depended upon its celebration before designated state officials, and its annulment or declaration of nullity, by a court order. The same rules were reproduced in the Civil Codes of 1916 and 2002.

In 1942, Decree-Law 4.657, known as the Introductory Law to the Norms of Brazilian Law, regulated several issues of private international law, including

[2] BRAZIL, Superior Tribunal of Justice. Case *SEC 11.962*. Decided on Nov. 4, 2015. Copy of the decision available (in Portuguese) at: <http://www.stj.jus.br/sites/STJ>.

recognition of foreign judgments[3]. Article 15 defines in verbis: *A sentence rendered abroad shall be executed in Brazil provided it has the following requisites: a) Having been rendered by a competent court; b) The parties having been cited and having taken part in the action or having allowed judgement to go by default; c) Being in final form and being invested with the necessary formalities for execution at the place where it was rendered; d) Being translated by an authorized interpreter; e) Having been homologated by the Federal Supreme Court* (since 1988, the Superior Tribunal of Justice).

In 2015, the Superior Tribunal of Justice ruled on a landmark case recognizing the validity of the ecclesiastical annulment of a marriage of two Brazilian nationals, celebrated in Brazil, declared by the Supreme Tribunal of the Apostolic Signatura (case SEC 11.962).

In the case, P.R.C, the husband, succeeded in obtaining the annulment of his marriage with F.P.C., the wife, by the Diocesan Tribunal of the city of Sorocaba (Brazil), which was confirmed by the Ecclesiastical Appeal Tribunal in São Paulo (Brazil) and by the Supreme Tribunal of the Apostolic Signatura (Vatican). Lately, he applied for the recognition of the ecclesiastical ruling pursuant to article 15 of the Introductory Law.

The wife challenged the demand sustaining that article 12 of the Legislative Decree 698/2009 (which approved the Agreement) and article 12 of the Presidential Decree 7.107/2010 (which introduced the Agreement in the domestic legal sphere) were unconstitutional because, due to the laicity of the Brazilian state, they could not equate an ecclesiastical decision, supposedly of administrative nature, to a court ruling, of jurisdictional nature. Both articles have the same wording, as follows: *Art 12: The marriage celebrated in accordance with the Canon law, which also meet the requirements established by Brazilian law to contract marriage, produces the civil effects, provided they are recorded in the proper registry, taking effect from the date of its celebration. § 1º. The homologation of the ecclesiastical sentences in matrimonial matter, confirmed by the superior control body of the Holy See, will be carried out in accordance with the Brazilian legislation on the homologation of foreign judgments.*

The rapporteur of the case at the Superior Tribunal of Justice sustained in his opinion that the arguments brought by the defendant were not valid because the ecclesiastical sentences issued in Brazil were confirmed by the superior control body (Supreme Tribunal of the Apostolic Signatura) of the Holy See, the latter possessing legal personality under international public law, therefore being considered as foreign sentences for the purpose of homologation. Concerning the argument of laicity of the state, the rapporteur argued that the Brazilian State is neither confessional nor atheist and that the laicity of the state did not mean enmity with the faith, adding that the non-confessional state is not prohibited to enter into agreements were there are convergence between its civil laws and the canon laws. As final remarks, he quoted that the execution of the Agreement on the juridical status of the Catholic Church and its Ecclesiastical Institutions in Brazil has support in article 19, para. 1st, of the Constitution, that authorizes the cooperation of the state and religious faiths aiming the public interest, to conclude, regarding the procedure, that the Code of Canon Law ensures the right to defense and to full equality before

[3] For further information on the Introductory Law, see TIBURCIO, C., "Private International Law in Brazil: a brief overview", *Panorama of Brazilian Law*, Vol 1, No 1, (2013), pages 11-37.

the court. The rapporteur' opinion was adopted by the unanimous vote of the Court members on November 4, 2015.

3 THE CASE OF CONFESSIONAL CLASSES IN PUBLIC SCHOOLS (STF, ADI 4.439)[4]

Article 210, para. 1st, of the Brazilian Constitution enacted in 1988 defines that "the teaching of religion is optional and shall be offered during the regular school hours of public elementary schools". This constitutional command was regulated by the Brazilian Education Law (Law 9.394/1996, hereinafter, the "LDB"), which establishes in article 33 that *religious education is a subject of optional enrollment in public elementary schools, offered without public funding according to the preferences expressed by the students or their parents/guardians, either in confessional character, according to the religious option of the student or his/her parents/guardians, ministered by religious teachers or counselors prepared and accredited by their respective churches or religious entities; or in interconfessional character, resulting from an agreement between the various religious entities, which are responsible for the preparation of the respective program*.

When the Agreement was executed, it included a similar provision in article 11 stating that *the Federal Republic of Brazil, respecting the right of religious freedom, cultural diversity and the confessional plurality of the country, respects the importance of religious education in view of the integral formation of the person. §1º. Religious education, Catholic and of other religious faiths, with optional enrollment, is a discipline of the normal hours of public elementary schools, guaranteed respect for the cultural diversity of religion in Brazil, in accordance with the Constitution and other laws in force, without any discrimination*.

The LDB provisions remained unchallenged at courts until 2010, when the Office of the Attorney General (the "Procuradoria Geral da República" or PGR) brought suit in the Federal Supreme Court against its article 33 and against article 11, para. 1st, of the Agreement to obtain a court decision ruling that religious teaching in public schools should be limited to non-confessional character, and that public schools should not admit teachers representing religious faiths.

The case brought much attention in the country and several laic and religious entities joined the case with amici curiae. A public hearing was also convened by the Supreme Court that registered the presence of 31 entities, laic or representing Catholics, Protestants, Jews, Muslims and religions of African origin, with most of the statements supporting the claim.

The case divided the Court.

The rapporteur, Justice Roberto Barroso, relying on Brazilian and foreign legal teaching, and also on the European Court of Human Rights decisions in the

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[4] BRAZIL, Federal Supreme Court. Case *ADI 4439*. Decided on September 27, 2017. Copy of the decision and of the whole case file available (in Portuguese) at <http://portal.stf.jus.br/>.

Folgero and others v. Norway[5] and *Zengin v. Turkey*[6] cases, sustained that the principle of state neutrality in religious matters prohibited both the State to establish preferences for certain religions and religions to interfere in state affairs. Therefore, he sustained, the neutrality of laicity possessed three simultaneous dimensions: neutrality as no preference, as no embarrassment and as no interference. Because of these three dimensions, he added, whenever the State allows the initiation of students or the deepening of their knowledge in certain religions during their activities in a public school, even with no cost to the State, the neutrality is broken, especially in a country with a wide array of religions, where is physically, materially and operationally impossible to open and maintain classes for all faiths. In such context, only prevailing religions, such as the Roman Catholicism and other Christian denominations, would be able to train and afford teachers, therefore threatening the freedom of religion of students professing other minority faiths. His opinion, however, did not prevail because the dissenting opinion of Justice Alexandre de Moraes, obtained the support of most of the Court in a tight decision of 6 x 5 concluded on September 27, 2017.

According to the prevailing opinion, a state is not truly guaranteeing freedom of religion if it fails to respect the creed, dogmas, liturgies and cults of any given religion. Such respect would not exist if the state, for the sake of a proclaimed pseudo-neutrality, mutilated or simplified dogmas of different religions to fit in the syllabus of non-confessional religion classes; that would represent preventive government censorship to the free manifestation of religious concepts in the classroom. Moreover, the teaching of philosophy, history of religions or even science of religions, he added, would not be capable to hit the core of the concept of religious teaching because it relies on faith dogmas, which are uncapable to be explained by rational arguments or by the study of historical events. No religious teaching is neutral; all of them rely on faith and if catholic students want to attend catholic teaching classes, they do so because of a matter of faith, and it must be ensured.

The dissenting opinion mentioned decisions of the Supreme Courts of other countries such as Germany (BVerfG, 1 BvR 387/65[7]), United States (USSC, *West Virginia Board of Education v. Barnett,* 319, US 624 1943[8]) and Portugal (Tribunal Constitucional, Acórdão 423/87[9]) to sustain the compatibility between confessional teaching and the combination of State laicity/Freedom of religion, and, hence, the

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5 EUROPEAN UNION, European Court of Human Rights. Case Folgero and others v. Norway (application 15472/02). Decided on June 29, 2007. Copy of the decision available (in English) at <http://hudoc.echr.coe.int/eng?i=001-81356>.

6 EUROPEAN UNION, European Court of Human Rights. Case Hasan and Eylem Zengin v. Turkey (application 1448/04). Decided on January 9, 2008. Copy of the decision available (in English) at <http://hudoc.echr.coe.int/eng?i=001-82580>.

7 GERMANY, Federal Constitutional Court. Case *1 BvR 387/65*. Decided on October 19, 1971. Copy of the decision available (in German) at <https://openjur.de/u/175380.html>.

8 UNITED STATES, Supreme Court. Case *West Virginia State Board of Education v. Barnette (No. 591)*. Decided on June 14, 1943. Copy of the decision available (in English) at <https://www.law.cornell.edu/supremecourt/text/319/624>.

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constitutionality of the catholic teaching in Brazilian public schools under the 2008 Agreement between the Holy See and Brazil on the juridical status of the Catholic Church and its Ecclesiastical Institutions in Brazil.

4 FINAL REMARKS

The two Brazilian court decisions recognized the enforceability of the provisions of the Agreement executed between the Holy See and Brazil on the Juridical Statute of the Church in Brazil. One may say that they were influenced by the longstanding presence of the Catholicism in the country, which ranks first among the catholic nations[10]. This may be true but it is also undisputed that Brazilian scholarship has long recognized the international legal status of the Vatican City[11] and the Brazilian diplomatic practice expressed that understanding negotiating and signing the two mentioned agreements, that were approved by the Congress and entered into force in Brazil under the same procedure applied to treaties with other countries.

Most of the countries execute treaties dealing with trade of goods and services and protection of investments. In a certain way, the Vatican did the same, protecting its most important asset in the world: the faith in the Church. The Brazilian superior courts protected that investment.

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[10] According to the Pontifical Yearbook 2017 and the *Annuarium Statisticum Ecclesiae* 2015, compiled and edited by the Central Office of Church Statistics, the data for 2015 shows that Brazil, of the ten countries in the world with the greatest consistency of baptized Catholics, ranks in first place (with 172,200,000 or 26.4% of all Catholics of the entire American continent). See <https://press.vatican.va/content/salastampa/en/bollettino/pubblico/2017/04/06/170406e.html>.

[11] See, for example, GOUVEIA, J.B, *Manual de Direito Internacional Público*, Rio de Janeiro, Renovar, 2005 and MAZZUOLI, V, *Curso de Direito Internacional Público*, São Paulo, Revista dos Tribunais, 2008.

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