BRAZILIAN LANDMARK DECISIONS ON "RELIGIOUS, PHILOSOPHICAL AND IDEOLOGICAL RIGHTS IN EDUCATION": FROM LEADEN YEARS TO DEMOCRATIC RESET

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I.

UNIVERSITY AND ACADEMIC FREEDOM DURING THE BRAZILIAN DICTATORSHIP

1. Case title

STF - HC: 40910 PE, Relator: Hahnemann Guimarães, Data de Julgamento: 24/08/1964, Tribunal Pleno, Data de Publicação: DJ 19-11-1964 PP-04174 EMENT VOL-00603-03 PP-01311. HC.ACMS. ADJ2 40910.ACMS.

2. Parties

Appellant: Justo de Moraes, Joaquim Correia de Carvalho Jr., and Inezil Penna Marinho (representing Sérgio Cidade de Rezende).

3. Keywords

Academic Freedom; Freedom of Thought; Freedom of Speech; *Habeas Corpus*.

4. Region

Brazil, state of Pernambuco.

5. Background

5.1 Social context

The overthrow of democratically elected president João Goulart by a branch of the Brazilian Armed Forces at the outset of April of 1964 gave rise to what has since become a highly contentious period of military dictatorship in Brazil. Military governments would remain in power until the late 1980s. This period was characterized by systematic political persecution of specific segments of society. Left-wing intellectual circles concentrated in universities, and trade unions constituted a special target for repressive action. Many prominent figures were dismissed of their functions, sent into exile, arrested, and even tortured because of their ideas. These included renowned scholars such as the educator Paulo Freire; Paulo Florestan Fernandes and Fernando Henrique Cardoso, professors of the School of Philosophy of the University of São Paulo, one of whom would later become president during the period 1995-2003; and Anísio Teixeira, the dean and mentor of the audacious project of the University of Brasilia,– whose body would be found in 1971 at the bottom of an elevator shaft in a friend's apartment building under suspicious conditions.

5.2 Normative framework

Article 141, §5, and 168, VII of the Brazilian Constitution of 1946, regulating freedom of speech and thought and academic freedom.
Articles 11, a, §3, and 17 of the National Security Law (Law 1802 of 5th of January of 1953), defining crime against the State and the political and social order.

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Article 315 of the Code of Criminal Procedure, defining crime against the State and the political and social order.

6. Description

6.1 Facts

On 26th June, 1964, Sérgio Cidade de Rezende, Professor of Economics at the School of Economic Science of the Catholic University of Pernambuco, northeast of Brazil, distributed a manifesto to 26 students who were attending exams for the class he was conducting. The document criticized the political regime instituted by military forces in April of the same year. In one of the passages, it read: "You, students, part of a privileged minority that attends university, have the obligation to think about your position before society. You have the responsibility to decide the fate of society, and for that you must choose between savagery or humanity. You have the honoured opportunity to defend democracy and freedom". As a consequence of this document, the professor was submitted to interrogation on 7th July, 1964. On the same day, the prosecutor responsible for the case requested his preventive detention alluding to the manifesto and alleging that he was threatening the public order, inciting subversive behaviour and acting against the established regime.

6.2 Application

Decision of First Instance

Sérgio Cidade de Rezende was convicted by the Third Criminal Chamber of Recife (3ª Vara Criminal do Recife). He was accused of having committed crimes against the State and the political and social order, offenses defined by the National Security Law in the articles 11, a, §3, and 17 as well as in article 315 of the Code of Criminal Procedure. The detention of Sérgio Cidade de Rezende was effectuated on 9th July, 1964. He was released on 29th July by force of a *habeas corpus* of the Superior Military Court and arrested again in the very next day, when the defendants decided to appeal to the Brazilian Federal Supreme Court.

Decision of the Brazilian Federal Supreme Court

Appellant's observation

Even though the manifesto was a document clearly against the political regime, the defendants argued that it contained no evidence of encouragement to students to engage in violent practices, subvert the political or social order, or to collectively disobey the law or the public order. According to the appellants, without evidence of incitement to violence, the mere distribution of a manifesto could not constitute an offense as defined by the National Security Law and the Code of Criminal Procedure. Indeed, the constitutional guarantees of freedom of speech and thought and academic freedom, enshrined in articles 141, p. §5, and 168, VII of the Brazilian Constitution of 1946, should prevail. Therefore, as the custodian failed to provide an adequate legal justification for the imprisonment, the appellants asked for the Court to order the professor's release.

Reasoning of the Supreme Court

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The rapporteur of the case was Justice Hahnemann Guimarães. The Justice-Rapporteur dismissed the penal accusation because, according to him, the acts described in the file did not constitute a crime. The manifesto was not considered an act of incitation of violence to subvert the social or political order (Law 1.802 of 5th of January, Article 11, a, §3) or an act of incitation of collective disobedience to the obligation of complying with the law of public order (Law 1.802 of 5th of January, Article 17).

Justice Evandro Lins made use of some of the arguments developed by the Justice of the Supreme Court of the United States, William O. Douglas, in the book "The Right of the People," to justify his vote and reassure the supremacy of Freedom of Speech and Academic Freedom. Furthermore, he stressed how the report made by the police while Sérgio Cidade de Rezende was arrested revealed a misunderstanding by the police staff of the status of constitutional guarantees that, despite the coup d'etat, remained in full force. In his vote, Justice Evandro Lins characterized the criticism issued by the professor as "unfavourable to the regime but not criminal", clarifying that having an opposing opinion does not constitute an offense.

Justice Victor Nunes, in his vote, reinforced the defence of Academic Freedom, making references to the U.S. Supreme Court case of *Sweezy v. New Hampshire* (1957), in which Academic Freedom was considered a fundamental principle in the organization of North-American society.

Justice Pedro Chaves, in his turn, made a distinction between his legal decision and his juridical-political analysis of the case. Following the legal reasoning developed by the Justice Rapporteur and voting in favour of the concession of the habeas corpus, he, however, emphasized his disagreement with the political attitude of the appellant. According to Pedro Chaves, there was an abuse of freedom of thought, freedom of the press and academic freedom, and the abusers were mainly responsible for the critical political situation of Brazil.

Justice Gonçalves de Oliveira abstained to make a further digression about academic freedom or engage in an analysis of the political climate, defending a strict application of the norms in force: "We must fulfil our duty and judge according to the constitution and the laws in force". Following his colleagues, he defended the release of Sérgio Cidade de Rezende. One of the Justices concluded: "This is an opinion. Nobody can be punished in this Republic for having an opinion".

Final Ruling

The final decision reversed the decision of the court of first instance. According to the final ruling: "the complaint describes facts that *obviously* do not constitute a crime". Therefore, a habeas corpus in favour of the appellant was unanimously granted. According to the Court, "the appellant has probably exceeded his function as a professor […] but problems of consistency should be resolved in the sphere of the university itself".

6.3 Government's position

The decision was a partial success. Subsequent to the grant of the habeas corpus, the police department refused to release Sérgio Cidade de Rezende. Additionally, after his delayed release he was again arrested "to not affect investigations of the communist reorganization".

In general terms, the decision represents a landmark case which exemplified the resistance displayed by the Brazilian Federal Supreme Court, during the initial period of the military regime in Brazil, against abuses perpetrated by officials of the State against scholars. During this short period of faltering resistance, the habeas corpus was one of the most important weapons in the defence of constitutional guarantees.

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The response of the government to this initial resistance was a strengthening of the regime. The military command tried to legitimize and immunize its actions by reforming the normative framework of the State as well as the structure of the Federal Supreme Court itself. Accordingly, in 1965, the number of Justices of the Federal Supreme Court was expanded to 16. The five additional Justices, selected by the military government, would neutralize juridical disagreements with the regime's activities and guarantee legal support to the directives of the executive. In 1968, the enactment of the Institutional Act 5, a species of executive decree commonly used during this period, suspended the guarantee of habeas corpus when related to political crimes. In 1969, a constitutional amendment established restrictions to freedom of thought. These normative and institutional changes were followed by other reforms that would progressively narrow the space of action of the Judiciary.

7 Note

The case of Sérgio Cidade de Rezende depicts an extreme scenario, of explicit and systematic persecution of professors and students because of their ideas, as well as that of a vigorous defence of the Constitution by the Supreme Court. This is one of the first *habeas corpus* granted by the Brazilian Federal Supreme Court in favour of an individual being persecuted for his or her political ideas. It created a powerful legal precedent, representing an act of resistance and defence of constitutional values before an authoritarian regime. One could question why a relatively old case, selected from a dictatorial period (and therefore sensitive moment) of recent Latin American history, may be useful for understanding the Brazilian legal mindset regarding "religious, philosophical and ideological rights in education", the proposed subject of this comparative study. The decision is a landmark case concerning philosophical and ideological rights in education because of two reasons mainly. First, while cementing the defence of academic freedom as one of the prerogatives of the rule of law, this case demonstrates how challenging it can be to effectively safeguard such freedom in authoritarian circumstances. At the same time, it settles academic freedom as a superior principle to be defended regardless of how adverse are the conditions. Second, the case highlights how habeas corpus can be a fundamental tool to guarantee constitutional rights.

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