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# IDEOLOGICAL ORGANIZATIONS: A COMPARATIVE STUDY BETWEEN FRANCE AND BRAZIL

# ORGANIZAÇÕES DE TENDÊNCIA: UM ESTUDO COMPARADO ENTRE A FRANÇA E O BRASIL



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## SUMMARY

The research aims to analyze how Ideological Organizations are juridically treated in France and in Brazil though a comparative study. As it will be show, Ideological Organizations are those entities created to defend an ideology, such as churches, political parties, labor unions, religion organizations, etc. In those organizations, different from what normally occurs in labor relationship, the employer can compel his employees to have conducts inside and outside the workplace that are similar with the ideology that the Organization defends. It is an exemption from what normally occurs in French and Brazilian labor relations. In French this legal institute is well applied by Courts, promoting stability, despite the fact that is not expressly regulated by the law. In Brazil, in the other hand, there is no legal certainty because


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the institute is not recognized by the labor law and, as a result of that, Courts significantly diverge while judging labor claims involving Ideological Organizations. The research is performed trough a deductive method.

**Key-Words:** Ideological Organization; Comparative Law; Labor Law; Globalization; Jurisdictional Power.

**RESUMO**

A pesquisa objetiva analisar como as Organizações de Tendência são juridicamente tratadas na França e no Brasil, através de um estudo comparado. Como será demonstrado, Organizações de Tendência são entidades criadas com o objetivo de defender uma ideologia, a exemplo das igrejas, partidos políticos, entidades sindicais, organizações religiosas, etc. Nessas organizações, diferentemente do que normalmente ocorre nas relações de trabalho, o empregador poderá impor aos seus empregados que tenham condutas dentro e fora do ambiente de trabalho que se assemelham com a ideologia pregada pela organização. Trata-se de uma exceção ao que normalmente ocorre nas relações de trabalho francesas e brasileiras. Na França o instituto é bem aplicado pelas Cortes, promovendo estabilidade jurídica em que pese não ser expressamente regulado pela lei. No Brasil, de modo diverso, não há segurança jurídica porque o instituto não é reconhecido pela lei trabalhista e, consequentemente, as Cortes divergem significativamente quando julgam reclamatórias trabalhistas envolvendo organizações de tendência. A pesquisa pautar-se-á no método dedutivo.

**Palavras-Chave**: Organização de Tendência; Direito Comparado; Direito do Trabalho; Globalização; Poder Judiciário.

## INTRODUCTION

The paper aims to analyse how Ideological Organizations are treated in two different legal systems: French and Brazilian, comparing the countries by highlighting the differences and similarities regarding the understanding and applicability of the institute through a comparative study and a deductive method of research. The ultimo goal is to demonstrate how the France scenario may help the Brazilian one to have a better understanding regarding Ideological Organizations.

In order to achieve the objective of the research, the paper has been separated in three parts: (i) the first chapter intends to demonstrate how a comparative study should be ruled, from a culturalist comparatist point of view, and intends to explain why to do a comparative study when analysing Ideological Organizations; (ii) the second chapter analyses how Ideological Organizations are treated in France by studying the law, the doctrine, the jurisprudence, and also taking into consideration other factors that contribute to the French understanding of the legal figure; (iii) the third chapter aims to make the same approach, but from a Brazilian point of view.

The study shows that there are specific factors in each country, besides the legal treatment of the matter, that explains why they use and apply the concept of Ideological Organization differently. After comparing both countries, it is possible to find more similarities than differences regarding the treatment of the so-called Ideological Organizations, because both of them don't have express provision in their legal system. Based on this, the French experience is able to provoke a critical analysis of the Brazilian law, whereas in the Brazil there is still big divergence regarding the matter.

## 1. COMPARATIVE LAW

### 1.1 WHAT IS A COMPARATIVE LAW?

A comparative study aims to discover a right that exists in a chosen foreign legal system, comparing how that specific right is legally treated in the country of the researcher (DIMOULIS, 2016, p. 77). It is somewhat like traveling, because the "traveler and the comparatist are invited to break away from daily routines, to meet the unexpected and, perhaps, to get to know the unknown" (FRANKENBER, 1985, p. 441). The objective with the comparison is to discover different legal systems and understand how they are related with the particularities of the place that they are inserted (ZWEIGERT; KOTZ, 1998, p. 2). Also, it offers "a better chance for distance and for exposing in law deficiencies, contradictions, ideological components and competing visions" (FRANKENBER, 1985, p. 448).

The comparatist engaged in this adventure must know that his position is not a critical one, neither of a one that is entitled to conclude that a determinate right in country *A* is better than in country *B*. His job must be strictly observer while analyzing the foreign, pointing the similitudes and differences of the countries that are being studied (DIMOULIS, 2016, p. 78). Only after that, the comparatist will be allowed to express his point of view. It means that the comparatist must try to liberate himself from his own doctrinal while studying the other law, in order to really achieve a scientific comparison (CARDUCCI, 2014, p. 21). In other words, and according to Pierre Legrand, the comparatist must respect the differences regarding the other law, accepting them as they are, to have a faithful analysis while comparing it with his own law (LEGRAND, 2018, p. 33).

Alain Badiou disagrees with this point of view, defending that differences are not interesting and comparatists should not waste their time studying differences. For him, what matters is the sameness because the truth is the same for all and the task of comparatists is to identify the truth (BADIOU, 1993, p. 27).

As mentioned, Pierre Legrand firmly disagrees with this point, because, for him, there is no "the truth", what exists is effectively someone's truth, but there is no truth existing somewhere. It is all a matter of interpretation, and each of those interpretations will be

different according to the interpreter. It is important to have in mind that a law, as a component of a legal system, is not something autonomous that can be compared with another system just taking into consideration superficial factors (LEGRAND, 2014, p. 17). The law, as known, has local characteristics that constitutes a unique model to a determinate place where it rules; doing a parallel with Jorge Luis Borges, "the moon on Bengal is not the same as the moon of Yemen, but it deigns to be described with the same words" (BORGES, 1998, p. 3). This means that the comparatist researcher must have a vision of the law as something made of different components: cultural, politics, sociologic, history, anthropology, psychologist, economic, linguistic, etc. (LEGRAND, 2014, p. 22). All of these items have a special rule in the law that the researcher intends to analyze.

To simple mention how a foreign right works in a determinate country is not to do a comparative analysis. In order to have a scientific study of this discipline, it is crucial to understand the "other" law with all its peculiarities, and, also, to have a corresponding or similar legal status in national law (MARRARA, 2013, p. 154). That is because you cannot do a comparative study of a determinate right with a country that doesn`t have that right or something similar. The comparatist needs to know that the law is singular in each country, that it is regulated in that way because it is inserted in a place and in a time; the law is not something beyond space or out of time and this must be taken into consideration while the comparison study takes place (LEGRAND, 2006, p. 523).

If the researcher follows a scientific and methodological method to do the comparative study, it can offer the opportunity to the researcher to have a better understanding of his own law, and, also, propose changes in his legal system that can make his own law better, based in a good foreign experience that came to his knowledge through the comparative study (DIMOULIS, 2016, p. 80). In other words, foreign law matters in two ways: (1) it may help you to have a better opinion about your own legal system because, as you study the foreign, you may find original solutions; you may find that some rights will be

beneficial and you could import that idea to your own country; and, (2) if you cannot use foreign law to improve your system, the knowledge of foreign law remains relevant because allows you to analyze that you have other options; your national law is not "the" way of doing things is only "a" way of doing things (LEGRAND, s.d.).

It can show, for example, to a Brazilian lawyer that it is possible to create a law without a Code, such as it happens in the United States, demonstrating to the researcher that there are other systems, totally different, that work in a determinate space and time. Because of that, it is possible to mention that comparing the law can be empowering and libertating because the comparatist is open to a radical re-evaluation of the domestic legal consciousness (FRANKENBER, 1985, p. 441).

Nevertheless, it must be emphasized the importance to respect the different models and to reject the idea that the comparatist must try to achieve the truth while he does the comparison. It is wrong to think that the researcher needs to find the truth, which would be what is "the same for all" (BADIOU, 1993, p. 27), because the whole process of comparison is a process of interpretation and each comparatist will have his own interpretation. In other words, there is no truth; what exists is someone's interpretation, based on the person's history (FRANKENBER, 1985, p. 442) of learning, as it will be shown below.

## 1.2 HOW TO DO A COMPARATIVE STUDY?

There are two big groups of comparatist: (a) positivists one and (b) culturalists. For the firsts (a), the comparatist is someone who is interested in the law inforce and in the interpretations and, because of that, the sources are limited to statutes, traditional decisions, law textbooks, and law review articles. It is understood by this group that comparative law "deals with several legal orders at the same time" (ZWEIGERT; KOTZ, 1998, p. 6), and that it offers the opportunity to find the best solution for a legal problem. Those type of comparatists

are concern with the law and are committed with two important ideas: objectivity and truth, as genuine positivists (GORDLEY, 2007).

For the seconds (b) – the focus of this paper – the comparatist does everything listed above, but that`s only the starting point because the researcher goes further, asking questions like "*why?*" to get the meaningful of the right that is being analyzed and, while he deconstruct that right, he sees there is history, politic, sociology, etc.

For the purposes of this paper, the analyses will be made taking into consideration the second type of comparatist, the culturalist one, where Pierre Legrand stands, and, with this in mind, to do a comparative study the big question a researcher needs to answer is "why?"; why does a state have a determinate right, why does that country rules like this, and so on and so forth and, to answer those questions, the comparatist will have to reach what is not visible, what is there between the lines of a law, which means he will need to go as deeper as possible. Considering those premises, positivism can allow the researcher only to identify the law in force, but it cannot do more than that. When it comes to the comparative as a culturalist, mere identification of what law do or says is not enough because a more complex form of understanding is needed, through the interpretation of the texts (LEGRAND, 2011, p. 603).

In order to demonstrate how culturalism comparatists defend their view, it is important to have some background information, as follows. First, this interpretation of the foreign must be done by the comparatist without taking into consideration his own conceptions of law, he must try to leave, as hard as possible, all his national beliefs in order to understand the other (LEGRAND, 2018, p. 35). Evidently that a certain degree of ethnocentrism is inevitable, because the researcher cannot completely dissociate himself from his beliefs; he was raised in a world that understand law and justice in a way and, because of this, the foreign will inevitably be analyzed by him as something derived, something that came after his own model (LEGRAND, 2018, p. 34).

Second, Pierre Legrand draws attention to the fact that no comparative study is objective, because each researcher will have her own legal baggage and this will guide her through her own analyses of the foreign law (LEGRAND, 2018, p. 36). To exemplify this argument, the author gives the following example: imagine two Brazilian jurists that decided to write about a specific right involving the British law. The first researcher studied for six weeks in Oxford, where she had the opportunity to access thousands of books; the second researcher stayed in Brazil while doing her analyses and, because of that, had very few books to study; besides that, the first had lived in England for two years before that and the second only lived in Brazil; the first decided to write in detail an important decision involving the specific right, the second decided only to mention that decision in a footnote.

The point is that, inevitably, each jurist will present a different research of the same right that they engaged in the analyses, because they are different, with different experiences, and this is something that they cannot change. Therefore, it is not possible to have objectivity while comparing laws; each research will have an autobiographical dimension (LEGRAND, 2018, p. 39) and, the best of these two interpretations will be the one that has a better interpretive performance, with more persuasive arguments.

Third, from the moment the comparatist decided to do a comparative study with two legal systems, she must accept that there will be differences. Then, raises the question: what to do with those differences? Should it be hidden or shown? (LEGRAND, 2018, p. 50). To answer those questions, Pierre Legrand (2018, p. 56) paraphrases Jacques Derrida (1998, p. 217), who defends that we need to respect the other, with all its differences. This respect for the differences can be show by the comparatist when he tries to comprehend the foreign law as it is and listen what it wants to say (LEGRAND, 2018, p. 60).

Forth, comparatists must not limit their analyses only in legal texts and judicial decisions, because those things give only a superficial view of the law as a hole. They must go further, look deeper, trying to understand why that decision or that right is like that; they

don't fall from the sky, everything has a reason, everything can be questioned "why?" (LEGRAND, 2018, p. 65). For a culturalist, the law must be analyzed by a positive and a cultural point of view (LEGRAND, 2018, p. 66). The comparatist engaged in this type of research will search for what jurisprudence and text law say but should go deeper, more exactly, should try to find what they reveal that is beyond the surface (LEGRAND, 2018, p. 72).

For Pierre Legrand, legal texts have political, social, economics, history and other traces, which should be discovered by comparatist in order to fully understand the legal treatment of a determinate right. To achieve those traces and make a comparative study based on a culturalist point of view, the comparatist should opt for an interdisciplinary perspective because the main idea defended is that the text is not only the words written on the paper; it is much more than that (LEGRAND, 2018, p. 75).

It is never too much to re-mention the fact that when the comparatist intervenes in the law of the other, he must remember that it is crucial to recognize the foreign and to respect it. It does not mean that the comparatist should agree with the foreign, but he needs to know and understand why that country do things in that way, and this must be done in a respectful way (LEGRAND, 2018, p. 82). In other terms, it is necessary to hear what the foreign is saying in order to give it a meaning and not judge the foreign based on your own right (LEGRAND, 2018, p. 84).

The role of comparatists is to give a meaning to a foreign right that is different from the one the comparatist knows. Inevitably, you will analyze that foreign right based on your own law; you will create an opinion through the only law you know. It means that, while you are doing the comparative study, you are saying to the reader something like that: let me explain you how does the foreign law is, why does it is like that; let me show it to you according to my own experiences and perspectives; let me show you the historical, religious, philosophical traces; and so on and so forth with it (LEGRAND, 2018, p. 85).

Pierre Legrand`s point, with that in mind, is that you cannot judge a foreign law basing only in your own right. You must try to understand it according to the context it is inserted. Nevertheless, your research will be personal, because it will be an extension of your own opinions, your own choices while doing the comparatist study. Because of that, it is possible to affirm that comparatist will never be able to substitute a jurist of the foreign country, because it is impossible to a comparatist to detached herself from all her own experiences, and it is exactly in this point that remains the beauty of a comparatist study: the comparatist can keep an open mind while studying the foreign, because she wasn`t raised in that model; on the other hand, a national jurist can`t have this open mind because she is bind in that model (LEGRAND, 2018, p. 90). As a consequence of that, comparatist could think outside the box and eventually demonstrate to foreign jurists that their model can be improved, promoting a reflection on the national law.

As seen, the comparatist will never be able to reach what a national jurist can reach but she must try to be fair and justice with the foreign, what Pierre Legrand calls charitable interpretation (LEGRAND, 2018, p. 82), and try to explain how they think, representing them fairly. In short, a comparatist will never be able to reach the truth because it is only his interpretation of the foreign law and, so, he will always fail. But, culturalists will fail better than a positivist because they will make their researcher more sophisticated bringing in historical, sociological, political information (LEGRAND, 2018, p. 96).

Those ideas are summarized by Thiago Marrara, who says that there are at least six steps to do a comparative study, which are: (a) the choice of the comparative objectives; (b) the presentation of the legal characteristics and functions of each object in its own legal system; (c) the contextualization of each object in a juridical and extra juridical perspectives; (d) the comparison; (e) the analyses of differences and similitudes and; (f) the conclusion, eventually proposing an improvement in the national legal system (MARRARA, 2013, p. 155). In conclusion, to have a scientific comparative study from a culturalist point of view, it is

necessary to go beyond the words that are written in the legal texts, which is exactly what is going to be done on the next two chapters of this paper.

## 2. IDEOLOGICAL ORGANIZATIONS IN FRANCE

### 2.1 CONCEPT, JURIDICAL AND EXTRA JURIDICAL PERSPECTIVES

The discussion regarding Ideological Organizations arises from the following questioning: is it possible for an employer to dictate to his employees a way of thinking and acting according to the ideology of his company or organization? (LHEUREUX, 2000, p. 74) Or, can an employer demands an employee to live his life in accordance with the ideology of the organization, in order to protect the image and the moral of that organization?

In France, regularly, all employees have the liberty to command their private lives in a way that suits them the best, although some attitudes may be morally reproved or criminally typified, because the conduct practiced by them outside the workplace is immune to the directive and punitive power of the employer. As a result of that, employers cannot make value judgments or apply sanctions to their employees based on conducts practiced outside the workplace, under penalty of violating the employee`s right to privacy and intimacy.

This protection of the private life emerged in the early modern period, when French high-status families tried to protect their privacy, while fought off efforts to require public registration of the mortgages on their real property, which would expose their finances (WHITMAN, 2004, p. 1171). After that, another incident in French history contributed to the development of the right of privacy, known as the case of the Duchess of Berry (WHITMAN, 2004, p. 1174), who was a royal and a mother of the pretender to the throne. While she was being held prisoner for fomenting a rebellion, it was publicly revealed that she was pregnant,

even though she was a widow for some years. The pregnancy came to the knowledge of the people and the intimate life of the Duchess was exposed to insult commentaries of the community. This episode caused a massive discussion regarding the need of protection of the private life.

These historical facts contributed to the actual French notion of private life, which understands that public revelation that intends to destroy the honor or that pretends to reveal personal matter must be banned (WHITMAN, 2004, p. 1179), including in labor relations. This system of protection of private life and individual freedoms is a landmark in French Labor Law and recognizes that there is a sphere of autonomy between the employee and the employer, so that the employee`s life after work does not affect his employment relationship inside the workplace (WAQUET, 1992, p. 146).

It is also understood by French law that discrimination under any grounds, including religious or philosophical matters, are prohibited by the Penal Code and Labor Code, demonstrating that French law is very protective when treating the liberties of people. This is what article 3, of the May 10, 2007 Law, previse, prohibiting the making of any discrimination grounded on age, sexuality, fortune, religious convictions, philosophical convictions, political convictions, etc. (FRANCE, 2007). Article 7 of the same law establishes that any conduct that has the objective to discriminate someone is prohibited, unless that distinction is objectively justified by a legitimate purpose and only if it will make possible the achievement of that purpose, having to be strictly appropriate and necessary.

Nevertheless, there are special situations where those general rules do not apply, such as it occurs with the Ideological Organization, called by French jurists as *Entreprise de Tendance*. This is an exception from what the anti-discriminatory law provides in France, authorizing a distinct treatment grounded on religious or philosophical matters, in despite French law does not expressly regulate the matter by citing the *Entreprise de Tendance*. This exception is presented in article 13, of the May 10, 2007 Law, that says that in professional

activities exercised in public or private organizations which have in their fundaments religious or philosophical convictions, a distinction grounded in religious or philosophical ideas does not constitute a discriminatory act because the nature of the activities practiced inside the organization and its context constitutes an essential, legitimate and justified professional requirement to exercise the job (FRANCE, 2007).

There are reasons why the French law understanding is in that way. One of those reasons is the fact that since 1905 French Law recognizes the separation between churches and the State, what is known as secularism, defending that Churches should not interfere on State matters and vice versa. This principle assures liberty of conscience and cult for Churches, ensuring to private organizations the free exercise of religious freedom (COULIBALY, 2014, s.p.). In other words, it means that for France, religious organizations have freedom to organize itself and dictate the rules that it will be applied, and the State could not interfere in this field.

This probably has traces in John Locke`s theory, that could have inspired Rousseau, regarding the freedom of religious organizations. According to John Locke no church is obliged by its duty of tolerance to preserve in its place a person who, even after being warned, remains obstinate to transgress the laws established by that organization. If the transgression is treated with impunity, the organization will dissolve, because there will be no bond that binds society together (LOCKE, 1983, p. 7). As a result of those facts, others that haven't been mentioned, and the de-Christianized movement that took place in the occident, enforcing the neutrality notion of the State, French workplace is miles away regarding religious concerns. This laicity vision reflects a conception of the political body that aims to emancipate its members from particularist fetters (D'IRIBARNE, 2010, p. 97).

Besides this neutrality notion, it is convenient to mention that French state refuses any kind of official recognition of minorities, be it racial, confessional, cultural, and so on (FAVELL, 2001, p. 71), because for the country there should be no partial society within the

state (LEGRAND, s.d., p. 2). This is so strong in France that "the denial of one's cultural identity has become a *sine qua non* condition of accession to French citizenship" (LEGRAND, s.d, p. 9).

Based on what has been said, the analysis of the object of study begins. Conceptually Ideological Organizations are, considering the French understanding, entities that have a social purpose that is intrinsically related to an ideology, a morality, a religion or a philosophy, such as associations, foundations, political parties, labor unions, churches and religious groups (WAQUET, 1992, p. 145)[2]. Those organizations are not for profit and should have in their statutory purpose the promotion and defense of religious, political or philosophical convictions (PAGNERRE, 2017). In such entities, in addition to the normal obligations that are imposed to all employees, regardless the nature of the service provided by the company, namely the duties of loyalty and good faith (MINISTÈRE DU TRAVAIL, 2017, s.p.), in French Ideological Organizations the employers may require from some employees conducts that resemble the customs and ideologies preached by the organization during the exercise of the professional activity and, also, in their private life (WAQUET, 1992, p. 146).

Thus, an individual who agrees to engage in an employment relationship in an Ideological Organization tacitly accepts that he will have to comply with a much more demanding duty of loyalty compared to an ordinary employment relationship (FRANCE, 1984). Going further, the employee`s own progress while working for an Ideological Organization will depend on how she will deal with the ideological issues that are embedded in the work environment (LHEUREUX, 2000, p. 76).

However, in order to employers restrict the exercise of the right to privacy and intimacy of their employees in a legitimate and legally way, it is required the presence of two elements: (a) verify whether offenses committed by the employee inside or outside the

[2] Free translation: Elles constituent néanmoins une réalité, dont il convient de tenir compte pour le régime de la liberté des salariés. En effet, elles sont caractérisées par un objet social qui se rattache à une idéologie, une morale, une religion ou à une philosophie: associations, fondations, partis politiques, syndicats, églises ou groupement religieux. (WAQUET, 1992, p. 145).

workplace may, in any way, negatively reflect the proper functioning of the company, (b) and, compare whether the nature of the employee's activity within that organization and the offense committed are consistent (LHEUREUX, 2000, p. 23). If the answers to those questions are positive, then the employment contract can be terminated with cause based on the existent of incompatibilities between the religious convictions of the organization and those of the employee, when justified in the case of the existence of a disorder caused within the enterprise (ARNOULT-BRILL; SIMON, 2013, s.p.).

In the European Union the concept of Ideological Organizations is well defined and it application occurs without difficulties by the State-Members, due to the existence of two Directives that provide guidance when situations involving that kind of entities occurs. The first Directive, 94/45/CE from September Consul of 1994 (EUROPEAN UNION, 1994), authorizes companies with an ideological orientation to adopt special rules in their favor regarding information and manifestation of opinions. Six years later, the second Directive is promulgated, 2000/78/CE from November Consul of 2000 (EUROPEAN UNION, 2000), which prohibit discriminatory conducts inside the workplace, but authorizes employers to treat their employees in a different way when it is essential and determinant to the activity and as long as the objectivity of the differential treatment is legitimate and proportional. In this exemption are included: churches and public or private organizations whose ethic is grounded on religious matters or any strong conviction.

Both Directives are responsible to uniform the treatment of the so-called Ideological Organizations in the whole Europe, assuring more juridical stability when facing cases related to those matters and engaging the State-Members, promoting a harmonization of the decision-make process. As mentioned, French Law does not expressly recognize Ideological Organization, but the Courts apply the institute to justify their decision, grounded on the law mentioned above and the two European Directives, which have a binding effect to the State-

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Members, not having the need to each country legislate regarding the matter, which is exactly what occurred in France.

## 2.2 JURISPRUDENCE – FRENCH COURTS

The French Judicial Power has been facing labor claims involving Ideological Organizations since 1986, when the *Cour de Cassation* judged the first case (FRANCE, 1986). Today, the applicability of the institute occurs naturally, mostly because of the two Directives listed above.

French Jurisprudence, since its first judgment involving labor claims and Ideological Organization, has been taking into consideration to decide the matter the objective of the organization, the conduct practiced by the employee and the nature of his functions while working for the organization (FRANCE, 2014). Also, depending on the position held by the employee, it is understood by French Courts that the employer can restrict the freedoms of the employee in a higher level, compelling them to live according to the principles of the organization and terminating the labor contract when employees practice conducts that go against the finality and principles of the entity (FRANCE, 2014). In order to show the current understanding of the matter, it was selected two labor claims: (a) the first, dated from 1991 and, (b) the second, dated from 2014.

(a) The first labor claim was filed by a former employee, a sacristy assistant, who`s contract was terminated with cause by his employer, a Catholic Church (FRANCE, 1991). The former employee alleged that his termination was discriminatory, grounded on the fact that he was homosexual; he affirmed that the conduct of the employer was illegal according to the French Labor Code which prohibit the termination of the contract due to religious matters, demanding moral damages. In defense, the employer alleged that, considering the post that the employee exercised inside the workplace, a sacristy assistant, and the finality of the

organization to defend the catholic religion, the conduct of the employee was going against the religious principles of the employer.

The *Cour de Cassation* understood that the employee could not exercise correctly his functions considering that his conducts in his private life were against the principles of the Catholic Church, which always condemned personal relations between persons of the same sex. Also, it was used as a fundament of the decision the fact that, even though the homosexually didn`t come to knowledge of the community, his conduct created a mess inside the organization and could put at risk the credibility of the message the Church had been created to propagate.

(b) The second labor claim was filed by a former employee, a nursery, who had her contract terminated with cause, against her former employer, a private nursery, known as *Baby Loup* (FRANCE, 2014). Briefly, in 1997 the claimant was employed to work as a nursery assistant at the Baby Loup association. In 2003 she received maternity leave and, when returning to the workplace, she had her contract terminated with cause because she was wearing an Islamic veil which was against the internal association rules.

According to the former employee, Baby Loup was not an Ideological Organization and, because of that, could not restrict freedom of religious of their employees. For the claimant, the association Baby Loup carries a mission of general interest, setting objectives in its statues such as the development of actions directed towards the early childhood in underprivileged environment and to work for the social and professional integration of women, without distinction of political and confessional opinion.

For the claimant, differently from an ideological organization, where the ideology supposes a militant adherence to a philosophical or religious ethics and aims to defend or promote those ethics, Baby Loup was not an organization like that.

The claimed, in defense, alleged that the nursery could require a neutrality from their employees, without making any distinction regarding political or religious opinions, in order

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to have a neutral workplace. In this way, the conduct of the employee to wear an Islamic veil was against the internal rules of the association and, so, it should be applied the same understanding as if it were an Ideological Organization.

The *Court de Cassation* understood that Baby Loup was a Conviction Organization – not an Ideological Organization – and, as such, could demand from its employee's neutrality in order to meet the provisions of its statue adopted since its creation in 1990, according to which employees must carry out their work and maintain political and confessional neutrality in order to have the acceptance of the society. Reasoned that the special regime foreseen by Ideological Organizations applies only to the professional activities of churches and other public or private organizations whose ethics are based on religion or philosophical believes. In those organizations where the nature of the activities and the context they are inserted are crucial, the belief is an essential, legitimate and justified reason with respect to the ethics of the organization. As a consequence of that, restrictions on fundamental freedoms of employees must be justified by the nature of the task to be performed in order to satisfy an essential and decisive professional requirement, proportional according to the objective pursued, such as what occurs in Ideological Organization.

Nevertheless, it was understood, in Baby Loup case, that the principles of freedom of conscience and religion can not be an obstacle to the observance of the principles of secularity and neutrality that apply in the exercise of all the developed activities in the association. In this way, the termination of the contract was necessary and there was a reason for the association to prohibit that kind of religious manifestation: the need for respect and protect the awakening consciousness of children, even if this requirement does not result from the law, but from the internal statute.

Summarizing, the understanding of Ideological Organization in France is consolidated, and there is no uncertainty when labor claims involving this kind of organization is filed, even though there is no legal prevision in the text law.

REVISTA DIREITOS SOCIAIS E POLÍTICAS PÚBLICAS (UNIFAFIBE)

## 3. IDEOLOGICAL ORGANIZATIONS IN BRAZIL

### 3.1 CONCEPT, JURIDICAL AND EXTRA JURIDICAL PERSPECTIVES

As seen, the understanding of "Ideological Organizations" in France authorizes the employer to engender in the private lives of her employees and enforce them to live a life, inside and outside of the workspace, according to the ideologies of the organization.

In Brazil, the applicability of the concept of "Ideological Organizations" is very controversy because Brazilian law does not recognize it as a legal figure and when labor claims are issued involving this type of organization the Judicial Power faces a situation that the legislation gives no answer. Because of this gap in the national law, the comparative study is interesting in order to eventually provoke a critical analysis based on the foreign law that, in this case, is the French law. It is important to remember that the French law does not expressly mention the prevision of the Ideological Organizations, such as it occurs in Brazil, but it's application by French judges occurs naturally.

Broadly speaking, in Brazil employees occupy a strengthened position while inserted in a labor relation, because the Federal Constitution of 1988 attempted to equalize a relationship (employee and employer) that was historically – and still is – unequal. In the country, jurists and Courts generally agree that employees are in a situation of vulnerability when comparing with the employer (SARMENTO, 2006, p. 142), because they sell their labor force in order to subsist and to sustain their family. This is a characteristic of the Brazilian reality regarding the treatment of the employee, due to the historic slavery happened in relationship of this nature, besides other aspects. Because of this, it is believed that the employer could, eventually, go beyond the limits of his directive power and violate rights of their employees that could not be violated (LEWICKI, 2003, p. 190). Based on these

situations, the Federal Constitution and the Labor Code have many articles that aims to guarantee that employees won`t have their rights violated by their employer.

As an example of that, it can be cited the article 5 of the Federal Constitution, that ensures to all Brazilians the exercise of freedom of religious, freedom of thought and right of privacy. These rights presuppose a protective sphere of the state with the purpose of preventing violation of them, even with individuals included in a labor relationship, and means that the private life of the employee, their beliefs, their ideas, their ideologies, etc. are, generally, immune from the employers power to direct the company they are inserted (NETO, 2001, p. 109).

Also, the Mercosur Social-Labor Declaration establishes that every employee has guaranteed the right to equal rights, treatment and opportunities, without distinction or exclusion based on race, creed, political opinion, ideology, etc. (MERCORUR, 2015).

Besides the legal perspective, from a political point of view there are important facts that contribute to understand why the legislation is so protective to the employee, starting with the state model adopted by the original constituent. Emerged in the early twentieth century, the model of the Social and Democratic State of Law adopted by the Brazilian constituent legislator presupposes the maximized realization of Social Fundamental Rights, as a result of an awareness of the need for the State to take positive and intervening actions regarding social demands, to promote material equality and social justice (HACHEM, 2015, p. 620).

This model of state has as its fundamental task to overcome social and regional inequalities and to institute a democratic regime that realizes social justice, the conclusion of which is extracted from the reading of articles 1 and 3 of the Constitution, which state, respectively, that the social values of work and the dignity of the human person are the foundations of the Republic, and its objectives are the construction of a free, fair and united

society, guaranteeing national development, eradicating poverty, reducing social inequalities and promoting the good of all (SILVA, 1988, p. 24).

Differently from what happens in France, the protection of minorities is one of the objectives of the Brazilian state, which is surrounded by different cultures, people and religions. Consequently, it is not possible to speak of a Democratic State in Brazil without first having an economic and social system that values the work and the worker herself. In this sense, the right to work becomes a right related to the right to freedom, which is an indispensable foundation for the right to life itself (FERRARI, 2011, p. 761).

It is also the Brazilian understanding that the private life of the employee must be invisible to the employer`s eyes (SAMPAIO, 1989, p. 141), because the right to privacy, such as it happens in France, is very strong. On the other hand, the employer, who rises his capital to generate jobs and foster wealth, also enjoys constitutional protection, which derives from the principles of private property, associative freedom and directive power, this last established by the labor code.

It is observed that, at a constitutional level, the employee and the employer in the Brazilian law have rights that must be protected and that are hierarchically equivalent, reason why they can collide in concrete cases, giving rise to Brazilian legal conflicts, and, to mention an example of that: Ideological Organizations.

The Brazilian labor claim authorizes the judges, when facing a case that has no normative correspondent in the national law, to use the foreign law in order to resolve the claim (BRZIL, 1943). However, it is very rare to see a judge acting like that, especially regarding the cases that involve Ideological Organizations, and there are many reasons why.

As mentioned, there is a higher level of awareness regarding the protection of employees because it is understood that they are in a situation of vulnerability for occupying the weakness part of the labor contract. As a result, legal issues that have the aim to restrict or limit the exercise of rights of employees is not much debated in the legal environment.

Consequently, Brazilian jurists do not mention often the existence of the Ideological Organizations in their books or papers, having, today, only written few pages about it. An example of this are the legal works of Arion Sayão Romita (2009, p. 310), Alexandre Montanha de Castro Setubal (2011, p. 210), Gabriela Curi Ramos Gaspar (s.d, s.p.), Alexandre Agra Belmonte (2012, s.p.) and Rafael Carmezim Nassif (2014), who all defend that in a hard case involving Ideological Organizations, it will be necessary to weight the legal assets in collision to find the best solution to the case. They agree that, at least regarding the exercise of indispensable tasks for the organization activity and, as long as that organization has an ideological element, the conducts of the employee must be in line with the its ideology. Finally, they defend that in a case involving Ideological Organization, the judge in charge will need to verify if the conduct of the employee questioned by the employer could put at risk the credibility of the employer ideological institution (BELMONTE, 2012, s.p.).

This scenario can change soon because it was recently approved and came into force the labor law reform, which made labor relations more flexible and stopped considering the employee as always vulnerable. An example of this is the new possibility of terminating the labor contract with cause when employee loses the qualification or the requirement established in law for the exercise of the profession, as a result of a willful misconduct of the employee (BRAZIL, 1943). Nevertheless, this new issue has not yet been examined by any Brazilian Labor Court, which is why the discussions regarding this new prevision are only theorical.

## 3.2 JURISPRUDENCE - BRAZILIAN COURTS

The Brazilian Judicial Power has been gradually facing labor claims involving Ideological Organizations, and, as the national law does not have a legal answer to those cases, what is happening is the making of controversy decisions, promoting instability. Two

decisions were selected to demonstrated that, currently, there is no legal certainty regarding Ideological Organizations: (a) the first case evoked the foreign law to support the decision and, (b) the second case rejected the foreign law to support the decision.

(a) The first case refers to a labor claim filed by an employee, a financial manager who was dismissed with cause, against his employer, a religious organization (BRAZIL, Ordinary Appeal n. 00735-2014-002-10-00-5). Briefly, the claimant alleged that his dismissal was discriminatory on religious grounds and, because of that, he entitled to be indemnified.

The claimed, in defense, alleged that the dismissal took place because, as an employee of a religious organization with conservative standards, the claimant needed to observe and comply with the ideologies and principles of the organization, in his private and public life. As the employee was being accused to harass the volunteers who were subordinate to him and, considering that he was married and was also a ecclesiastical leader in the organization, the maintenance of the employment relationship with him was impossible considering that his conducts went against what the organization defends.

The labor claim was dismissed according to the following arguments: it was understood that the former employee's practice of harassing several women in the work environment which has a heavy load of Christian ideological principles put at risk the image of the employers' organization itself before the society. Because of that, the termination of the contract with cause was justified. Also, it was understood that the former employee, as a manager, needed to conform his particular ideology with the social objectives defended by the employer, since the fulfillment of the tasks, in this case, meant the very expression of the ideas of the organization.

With that in mind and, in order to preserve the existence and credibility of the organization, the judge understood that it was accepted that the directing power of the employer engenders in the claimant private life, since his conduct could put at risk the achievement of the social purpose of the organization as a whole. Finally, it was put into

consideration the fact that, being the claimed a Church, that preaches values such as morality, good manners, chastity and, above all, fidelity and, yet, considering the personal condition of the claimant of a married man and an ecclesiastical leader, he could not maintain with volunteers any relationship that was not professional.

This is one of the very few cases where the Brazilian Judicial Power evoked the foreign law (Ideological Organizations) to support a decision that the Brazilian legal system does not have an express prevision.

(b) The second labor claim goes straight to the opposite position, as shown: the claimant, a religious education coordinator, had his labor contract terminated with cause by his employer, a religious organization (BRAZIL, Jugement n. 0001691-12.2013.5.09.0004). Briefly, the claimant alleged that his termination was discriminatory, based on religious grounds, because he stopped paying the tithing to the church (employer). Consequently, he lost his "letter of recommendation," which is a document issued by the church that was required to access the Temple.

In defense, the employer attested that the former employee, as a religious coordinator, had the duty to maintain a standard of conduct in accordance with the ethical and moral values of the church and, considering that the claimant lost the letter of recommendation because he was not living the church's teachings regarding family life, that could put the very image of the church at risk as an ideological organization. The labor claim was deemed appropriate, having the Court considered that none religious organization could require, as a condition to maintain the employment relationship, the payment of tithes.

This labor claim was selected to demonstrate how usually this kind of discussion is resolved by the Brazilian Judicial Power. The judges almost always decided not to import foreign law (Ideological Company) in order to support such a decision, even when there is no corresponding internal regulation.

As seen, the understanding of Ideological Organization in Brazil is miles way from being considerate consolidated, probably because of the culture protection of the employee, who is seen by the state as most vulnerable part of the employment relation.

## 4. CONCLUSION

The objective of the study was to demonstrate how France and Brazil understand and apply the concept of Ideological Organizations when facing labor claims involving them, taking into consideration not only legal aspects, but also the whole context where laws are inserted, with an interdisciplinary point of view.

As seen, both countries don`t have in their national law a specific prevision addressed to treat this kind of organization but this fact didn`t prevent France from applying the institute in a mature way, very different from what happens in Brazil.

In France, the legal institute is well applied by Courts, as a result of a long process of maturation of the doctrine and jurisprudence that gained strength with two European Directives that were published. Besides that, the context of the country encouraged French jurists to study deeply the matter, considering the cultural and historical facts that were mentioned.

It was seen that, despite French law doesn`t mention the existence of Ideological Organization, it authorizes the employer to treat its employees differently when it is founded on a religious or philosophical basis and as long as it is determinative for the exercise of the profession.

In Brazil, the applicability of the concept is very controversy because, besides the fact that the law does not recognizes it as a legal figure, the labor law is very protective regarding employees. Consequently, there are very few studies on the subject and Courts regularly do not recognize the institute.

This Brazilian reality of a strength protection can change soon, with the new labor law reform which now authorizes the termination of the contract when the employee lose her habilitation to do the job, approaching to the French understanding – excepting all their peculiarities.

In this scenario, French reality can be used to promote a critical analysis of the Brazilian law, eventually proposing an improvement of the national law (or the understanding) considering the French success even without a law regulating the Ideological Organizations.

It is possible to conclude that, besides the fact that France and Brazil have many differences, especially historical and cultural, there are similitudes that enable the comparasion between the two realities and give a chance to suppose and critically think if the Brazilian understand could change and improve regarding the treatment of Ideological Organization, getting close to the France understand.

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