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The judicialization of education: pedagogical and judicial aspects of homeschooling

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Abstract

This article aims to study homeschooling in light of the right to education and the Extraordinary Appeal (2018) ruling, which deals with its constitutionality, and to analyze whether it is a legitimate alternative to schooling. The rationale involves a theoretical examination of education as a fundamental right and the concepts of the judicialization of education and judicial activism; an understanding of homeschooling from legal and pedagogical perspectives; and a study of the methods used to substantiate judicial decisions. The methodological procedure included bibliographical and documentary research. As a result, it was found that, in general, homeschooling has lower educational effectiveness than schooling, however, it can become a legitimate form of regular formation if a public policy is created that generates actions between the government and the family to ensure that students receive a comprehensive education, with socialization, citizenship formation, and pluralistic coexistence.

Keywords: Education. Constitution. Judicialization. Homeschooling.

A judicialização da educação: aspectos pedagógicos e judiciais do ensino domiciliar

Resumo

Este artigo tem como objetivo estudar o ensino domiciliar à luz do direito à educação e do acórdão emitido no Recurso Extraordinário (2018), que trata da sua constitucionalidade, e analisar se ele é uma alternativa legítima à escolarização. A fundamentação passa pelo exame teórico da educação enquanto direito

fundamental e dos conceitos de judicialização da educação e ativismo judicial; pela compreensão do ensino domiciliar pelos aspectos jurídico e pedagógico; e pelo estudo dos métodos de fundamentação das decisões judiciais. O procedimento metodológico contou com pesquisa bibliográfica e documental. Como resultado, verificou-se que, em geral, o ensino domiciliar tem eficácia educacional inferior à escolarização, entretanto, pode vir a ser uma forma legítima de formação regular se for criada uma política pública que gere envolvimento de ações entre o poder público e a família, para garantir ao educando a educação integral, com socialização, formação para a cidadania e convívio plural.

Palavras-chave: Educação. Constituição. Judicialização. Ensino domiciliar.

La judicialización de la educación: aspectos pedagógicos y judiciales de la educación en el hogar

Resumen

Este artículo tiene como objetivo estudiar la educación en casa a la luz del derecho a la educación y de la sentencia dictada en el Recurso Extraordinario (2018), que trata de su constitucionalidad, y analizar si es una alternativa legítima a la escolarización. El fundamento pasa por el examen teórico de la educación como derecho fundamental y de los conceptos de judicialización de la educación y activismo judicial; por la comprensión de la educación en el hogar desde los aspectos jurídicos y pedagógicos; y por el estudio de los métodos de fundamentación de las decisiones judiciales. El procedimiento metodológico incluyó la investigación bibliográfica y documental. Como resultado, se verificó que, en general, la educación en el hogar tiene una eficacia educativa inferior a la escolarización, sin embargo, puede llegar a ser una forma legítima de formación regular si se crea una política pública que genere la participación de acciones entre el gobierno y la familia, para garantizar al educando una educación integral, con socialización, formación para la ciudadanía y la convivencia plural.

Palabras-clave: Educación. Constitución. Judicialización. Enseñanza en el hogar.

Introduction

The investigative process was based on bibliographic and documentary research, with emphasis on the studies of Silva (2007), Alexy (1999; 2005), Cury (2002; 2007), Duarte (2004), Ramos (2010), Cellard (2008), Grau (2009) and Habermas (2012). The legal relevance of homeschooling took the issue to the Federal Supreme Court, through the institute of "general repercussion," a mechanism by which the Court definitively decides on constitutional issues of high legal, economic, political, or social relevance, with an impact that goes beyond the interests of the parties involved.

This article is organized into three axes: initially, education is presented as a right and, subsequently, as a fundamental right. Next, we discuss the judicialization of education and the methodological procedures adopted for the documentary analysis of Theme 822 of general repercussion, which culminates in the assessment of the judgment of Extraordinary Appeal No. 888815/RS (2018), in which the Federal Supreme Court ruled on the constitutionality of homeschooling.

Education as a right

Education has unquestionable relevance for humanity, which is why the law seeks to protect it, ensuring access to formation considered essential to the constitution of the human being as an individual and social person. Not all educational aspects are legally protected, but only those that the State, in each historical context, decides to guarantee, in order to allow the individual to exist and assert himself as a citizen.

Education has been consolidated as a human right, integrating modern legal systems (Marshall, 1967) and gaining normative relevance, despite challenges to its universalization. Since the liberal revolutions (XV and XIX centuries), education was considered essential to citizenship (Locke, 2012), with the State assuming a regulatory role, because "[...] the status of citizen supposes intelligent and common-sense people" (Cury, 2007, p. 832).

With the advent of the Welfare State, education gains outlines of subjective public right (Marshall, 1967), allowing the citizen to demand from the

State the provision of formation defined as essential to self-determination. The notion of education as a collective right (Medeiros, 2004) and its universalization is also consolidated, recognizing the public interest in everyone's access to education (Silva, 2007).

Education as a fundamental right

The conception of education as a right has evolved historically until reaching, in the current Brazilian Constitution, the legal status of a fundamental right. At the international level, this recognition is in article 26 of the Universal Declaration of Human Rights (UN, 1948).

According to Caggiano (2009), education is a fundamental right because it is a prerogative linked to the dignity of the human person. As such, it constitutes the structural basis of the social body and is essential to the dignified existence of the human being. The Federal Constitution of 1988 (Brasil, 1988) not only recognizes this character, but also delimits the field of State action, determining the provision of formative education, its form of provision and the guidelines that should guide it.

Being a right of predominantly social nature, its realization takes place through public policies, whose legislative and executive powers are distributed among the Union, states, Federal District, and municipalities. The Constitution also defines the forms of financing and organization of these policies, according to its articles 21, 24, 211 to 214 (Brasil, 1988).

The judicialization of education and judicial activism

As a subjective public right – whose holder is the citizen – education imposes obligations on the State and the family, relying on fundamental guarantees that protect it against state omissions. In practice, this right can be demanded in court, including immediate compliance by the responsible authorities. As Cury points out:

> Any child, adolescent, young person, or elderly person who has not entered elementary school can demand it, and the judge must

> grant it directly and immediately, obliging the constituted authorities to comply with it without further delay. Failure to comply, by those entitled to do so, implies the responsibility of the competent authority (Cury, 2002, p. 22).

Among the guarantees of education as a subjective public right, the procedural and institutional instruments that allow citizens to seek their judicial effectiveness in case of violation stand out. The 1988 Constitution, by enshrining the principles of the Social and Democratic State of Law, promoted a profound transformation in the legal system. As Duarte (2004) explains:

> The provision of meta-individual conflicts of interest through lawsuits – such as the public civil action, the injunction, the collective writ of mandamus and the popular action – made this category take on new dimensions (Duarte, 2004, p. 116).

Briefly, subjective public rights allow citizens to activate the Judiciary to compel the State to offer a certain provision or public educational policy, configuring the judicialization of education. In this sense, to judicialize is to submit to the Judiciary a legal controversy with a violated right, seeking a decision that repairs the injury to the legal good (Ramos, 2010).

However, constitutional principles such as the separation of powers and the reservation of the possible – provided for in articles 2, 60, § 4, III, and 192 of the Federal Constitution of 1988 (Brasil, 1988) – are also part of the list of fundamental rights. Such foundations structure the Republic and reserve to the legislative and executive powers the responsibility for the creation and execution of public policies, limiting, as a rule, the direct action of the Judiciary in this sphere.

With the advancement of the Social Rule of Law, the Judiciary began to perform functions that distance it from the classic model of separation of powers. According to Garcia:

> […] ensures the restriction of executive and legislative functions to law, including safeguarding the supremacy of the Constitution in some systems; its institutional function of assessing injuries or threats of injury to people's rights is enhanced, adopting the measures relevant to the case; and ensures

> the protection of fundamental rights, which go beyond the essentially abstentionist aspect, characteristic of individual freedoms, and achieve economic, social and cultural rights, which presuppose a positive action by the State (Garcia, 2008, p. 64-65).

Another relevant issue in the debate on the judicialization of education, linked to the separation of powers, is the "reservation of the possible", since public educational policies involve costs to be borne by the State. The responsibility for the collection and allocation of resources rests, as a rule, with the Legislative and Executive Powers, which, as elected representatives and holders of budgetary management, can evaluate the financial availability of each sector – including education.

In this scenario, Wang (2008) notes an asymmetry in the application of the principle of reservation of the possible by the Federal Supreme Court, as demonstrated in his analysis of court decisions:

> Very interesting to note as a reservation of the possible, scarcity of resources and costs of rights – issues usually linked to the debate about the justiciability of social rights – are treated in such a simplified way by the Federal Supreme Court, or even ignored, when it judges cases involving the right to education and health in diffuse control of constitutionality, but receive enormous importance in cases of federal intervention for non-payment of court orders (Wang, 2008, p. 565).

On the other hand, in the face of the power vacuum left by the legislative and executive powers – which are omitted in the realization of educational rights – the judiciary, historically, has occupied this space and, sometimes, acts beyond its institutional functions of applying the law to the specific case. Such practice is identified as judicial activism (Ramos, 2010).

In the face of the omission of the legislative and executive powers in the realization of educational rights, the judiciary has occupied this space and, in some situations, extrapolated its typical function of applying the law to the specific case – a phenomenon known as judicial activism (Ramos, 2010). Doctrinal critiques of activism are intense. Judicial activism is the exercise of the jurisdictional function beyond the limits of the legal system, resolving subjective and

normative disputes to the detriment of the legislative function, configuring incursion of other powers, without characterizing direct legislation (Ramos, 2010).

In summary, we present the debate on homeschooling from the perspective of the fundamental right to education, guaranteed by the Federal Constitution.

The judicialization occurs at the initiative of those who defend the right to offer basic education at home, without formal schooling, requesting the recognition of this modality as regular education. They maintain that the Constitution guarantees freedom of conscience, religious and pedagogical, and, in the absence of an express prohibition on homeschooling, they understand that it is legitimate to educate their children in the family environment.

Pedagogical aspects of homeschooling

Maria Celi Chaves Vasconcelos and Carlota Boto (2020), in an academic article called "Homeschooling as an alternative to be questioned: problem and proposals" elaborate a fruitful analysis of homeschooling under educational and pedagogical aspects.

The authors conclude that the socialization, the transmission of knowledge and the construction of citizenship provided by the school is adequate for the formation of the human being and is irreplaceable. For them, these functions can be compromised by homeschooling due to the difficulty of pedagogical monitoring and the absence of the plural coexistence typical of school daily life, generating tolerance and respect for diversity. Thus, its implementation would require complex inspection mechanisms, without which the integral formation of the student would be compromised.

Methods for conducting document analysis

The documentary analysis is based on the text "L'analyse documentaire," by André Cellard (2008), part of the work "La recherche qualitative: enjeux épistémologiques et méthodologiques" organized by Jean Poupart. For the specific approach to judicial decisions, the methodology proposed by Freitas Filho and Lima in *Decision Analysis Methodology* (*2010*) is adopted.

The analysis begins with the extraction of the relevant information, according to pre-established criteria for the selection of the units of analysis, and continues with the interpretation of these units, following methodologically justified parameters.

Decision analysis is a method that allows systematically organizing and interpreting judicial pronouncements within a previously defined context. According to Freitas Filho and Lima (2010).

1) Organize information related to decisions rendered in a given context; 2) verify decision-making coherence in the previously determined context; and 3) produce an explanation of the meaning of decisions from an interpretation of the decision-making process, the form of decisions and the arguments produced (Freitas Filho; Lima, 2010, p. 7).

> The summaries of arguments presented by the parties to the extraordinary appeal will be considered as units of analysis according to the criterion that: "[...] the choice of documentary clues presented in the range that is offered to the researcher must be made in the light of the initial questioning" (Cellard, 2008, p. 303).

The theoretical approaches of Grau (2009), Alexy (2005), Habermas (2012), Conte (2016) and Adeodato (2014) will be adopted, according to their respective works on argumentation, interpretation, and legal basis.

The choice of the "argument" as an analysis criterion is justified by the fact that every judicial decision requires reasoning, as determined by the Federal Constitution (art. 93, IX) and the Code of Civil Procedure (art. 489), in accordance with republican and democratic principles (Brasil, 1988; 2015; Conte, 2016).

Detailed justification is also required in cases of collision between norms, and it is up to the judge to explain the weighting criteria and the factual assumptions adopted (Brasil, 2015).

As an essential element of any judicial decision, the reasoning requires more than the citation of rules or principles: it requires the demonstration of the connection between the object analyzed and the legal system. This interrelation is carried out through arguments, whose logical sequence configures the argumentation (Grau, 2009).

In addition to the study on the right to education, argumentative validity criteria will be applied to verify whether the rights invoked – and other ideological, factual, personal, scientific, or notorious arguments – give meaning to the grounds present in the judgment.

Argumentation develops through discourse, even if monological, in which the arguer articulates the meanings of arguments to build a cohesive and persuasive conclusion. As Rodriguez (2005) observes:

> Argumentation is processed through discourse, that is, by words that are chained together, forming a cohesive and meaningful whole, which produces a rational effect on the listener. The more cohesive and coherent the discourse, the greater/will be its ability to adhere to the listener's mind, as he will absorb it easily, revealing smaller gaps (Rodriguez, 2005, p. 13).

In this documentary analysis, one of the classifications proposed by Habermas (2012) will be adopted, as it best suits the structure of the judgment and the nature of the judicial decisions. The main arguments are those extracted, expressly or implicitly, from the constitutional rule and then from the infra-constitutional legislation.

It should be noted that such norms are not mere positive texts, but express the sovereign will of the people in a republican democracy, according to art. 1, sole paragraph of the Federal Constitution: "All power emanates from the people, who exercise it through elected representatives or directly, under the terms of this Constitution" (Brasil, 1988).

Although the judiciary is not elected, it plays an essential role in applying the popular will to concrete cases, being more democratic when aligned with legitimate political decisions (Habermas, 2012). Legal rules allow multiple interpretations, allowing hermeneutical flexibility in unprecedented cases, outdated rules, normative conflicts or, as in homeschooling, absence of express rules. Figueroa (2012) points out that legal argumentation must consider practical reason, intertwining norms with moral reasons. For him, the judge, by articulating the moral and institutional dimension of the Law, becomes a protagonist in decisions involving constitutional principles such as dignity, democracy, freedom, or justice (Figueroa, 2012).

Although it is possible to make the application of legal rules more flexible, two aspects must be observed: (1) this flexibility must be treated as an exception, and the rule must be fidelity to the popular will; (2) democratic argumentation is part of the rule, except in case of absolute normative omission.

Even when someone relativize the legal formalism, the justification must originate from the norm itself or dialogue with its foundations. This does not imply austere formalism, but rather commitment to democratic-republican principles and collective justice.

The debate on homeschooling reveals a possible conflict between fundamental rights – such as the right to education and the freedom of belief of those responsible. There is no hierarchy between these rights at the constitutional level; it is up to the interpreter, in this case, to consider them based on the principles of proportionality and reasonableness, seeking the maximum possible effectiveness. As Steinmetz (2001) points out, the solution of collisions between fundamental rights requires more than general hermeneutical rules:

> Collision solution is required. In addition to the use of the specific principles or postulates of constitutional interpretation, it requires, above all, the application of the principle of proportionality and the fundamental legal argumentation (Steinmetz, 2001, p. 69).

It is not intended to exclude from the judicial grounds the use of scientific studies, philosophical, logical arguments, or personal experiences. However, for this foundation to be compatible with the democratic-republican ideal, it must be linked to an argument originated from a legal norm, understood as an expression of the popular will.

Therefore, the classification of Habermas (2012) is adopted, in which the main arguments derive from norms and demonstrate, in a legal-rational way, whether the factual situation fits – or not – in its scope.

Accessory arguments are those that, legal or not, reinforce the main ones; the introductory ones contextualize the reader; the irrelevant ones lack a relationship with the issue debated (Habermas, 2012). Fallacies, in turn, are arguments that claim a legal-rational link with the specific case, but this connection is non-existent (Adeodato, 2014).

A hypothetical example illustrates this distinction: "Homeschooling is not authorized because the Constitution determines that education is mandatory." Without contextualization, this statement is fallacious, since the obligation of education does not necessarily require that it occur only in schools; when teaching at home, parents would be precisely fulfilling this requirement.

Consider the following example: "The Constitution determines that the public authority must control the attendance of students in schools; therefore, even if there were control in homeschooling, the use of the word 'school' would indicate an implied prohibition." This is a valid main argument against homeschooling, as it starts from the constitutional rule and establishes a connection with educational practice.

On the other hand, the following counterargument can be presented: "The rule is in the article that deals with the duties of the State, not the family; therefore, it would not apply to the teaching given by legal guardians."

In this context, two legally valid arguments are identified – one against and one in favor of homeschooling – both with a normative basis and rational reasoning, which highlights the complexity of the weighting between fundamental rights.

With the exposition of the main arguments, it becomes feasible to use supplementary arguments to reinforce the central theses. An example contrary to homeschooling would be: "The Constitution requires compulsory education and, as the home is inviolable, State supervision is unfeasible, which corroborates the thesis of implied prohibition."

On the other hand, a favorable accessory argument would be: "As the Constitution requires compulsory education and there are high rates of school dropout, homeschooling can be a legitimate means of fulfilling this obligation."

This demonstrates that the rule on compulsory education can be used, in a valid way, both to support the prohibition and to justify the feasibility of homeschooling, according to the framework adopted.

The 822 theme of general repercussion: homeschooling

Theme 822 of General Repercussion (official nomenclature used to identify and organize matters judged under the general repercussion system) discusses whether individuals between 4 and 17 years old, represented by parents or guardians, can receive homeschooling with official recognition as regular education, without the need for daily school attendance.

In this case, the plaintiff – a minor represented by the parents – claims the right to formal education in the family environment. The votes for and against homeschooling evoke fundamental educational rights directly related to the object of this research.

Although education is situated among social rights (second generation), it is also characterized as an individual fundamental right (first generation), guaranteeing everyone the subjective right to education. In this sense, it is a public freedom, including the possibility of choice regarding the form of education.

The author bases her claim precisely on this individual aspect of the right to education, requesting the recognition of homeschooling as a legitimate alternative to the traditional school modality.

On the other hand, opponents of homeschooling maintain that education, as a social right, is a shared duty between family and State, and the public authority cannot omit it under penalty of institutional responsibility.

They also affirm that the formation of the citizen is of collective interest, requiring exposure to the diversity of knowledge, methods, ideologies and living with different realities. For these authors, school socialization is a public good and a common value.

This view is aligned with the theory of education as a collective – or third generation – right also present in the grounds of the analyzed judgment. The arguments detailed in the following topic are more in-depth, but the syntheses presented so far demonstrate that the document addresses education from the perspectives of first, second and third generation fundamental rights, confirming its high compatibility with the object of the research.

The judgment goes beyond classificatory approaches, including mentions of the historical evolution of the right to education, its constitutional configuration, the nature of subjective law and the limits of judicial action in relation

to legislative powers – aspects directly linked to the debate on judicial activism. Therefore, the document reveals a strong thematic and theoretical connection with the contents developed in this research, consolidating itself as a central source for the proposed critical analysis.

The judgment that judged the extraordinary appeal No. 888815/RS/2018

This item presents the documentary analysis of the judgment of Extraordinary Appeal No. 888815/RS, judged in 2018 by the Federal Supreme Court, which dealt with the constitutionality of homeschooling (Brasil, 2018).

Here, along with the text, the units of analysis (Cellard, 2008) are being collected, which are the main arguments against and in favor of homeschooling.

The debate between advocates of compulsory schooling and supporters of homeschooling is relatively objective: the former claim that only formal schooling ensures formation compatible with modern states, promotes socialization, prevents child labor and violence, and encourages coexistence and respect for diversity.

In turn, advocates of homeschooling maintain that such objectives can be equally achieved through education provided in the family environment.

Defenses of homeschooling are largely based on the ideals of liberalism – a doctrine that values individual freedom and seeks to limit State interference. For this current, imposing a unique model of education violates the autonomy of the citizen. As Harold Laski (1973) points out:

> Almost from the first moment of its history, it aimed to limit the scope of political authority, confine government business to the frameworks of constitutional principles and, therefore, systematically tried to discover a system of fundamental rights that the State was not allowed to violate (Laski, 1973, p. 11).

Arguments in favor of homeschooling include dissatisfaction with public school, freedom to transmit religious values, the supposed academic superiority of homeschooling, and the strengthening of family ties (Lyman, 2008).

Next, we will briefly present the arguments of the plaintiff of the lawsuit that gave rise to the extraordinary appeal – in favor of homeschooling – and the main arguments against this educational modality.

The plaintiff's allegations are summarized in Minister Cármen Lúcia's vote report, which summarizes the main points of the complaint as follows:

> She maintains that "the compulsory education provided for in art. 208 of the Constitution, is addressed only to the State".
>
> She argues that "the Constitution does not intend to create a totalitarian and paternalistic State that can validly replace parents in choosing the best education to be given to their children" (arts. 1, caput - Democratic State of Law, and V - political pluralism; 3, I; 206, II and III).
>
> She states that it is up "to the public authority to supervise the conditions under which private education is provided, but never to prohibit a type of education without any reason for doing so – the school is not the only place where children can have contact with diversity."
>
> She notes that it is "necessary, in the present case, to apply the principle of reasonableness because it is 'a valuable instrument for the protection of fundamental rights and the public interest, [...] because it functions as the measure with which a rule must be interpreted in the specific case for the best realization of the constitutional purpose embedded in it or resulting from the system'".
>
> She concludes that "the provisions of Law No. 8,069, of July 13, 1990, and Law No. 9,394, of December 20, 1996, which require school enrollment must be interpreted in this way: Parents are obliged to give education to their children, but are free to choose the best means to do so, considering the child's interest and their pedagogical, moral, philosophical, and religious convictions. In this context, they can only be obliged to enroll their children in the regular education network if, otherwise, they cannot provide for their children's education" (Brasil, 2018, p. 87).
>
> The main arguments of the plaintiff in defense of homeschooling are anchored in the following constitutional provisions: freedom of conscience (art. 5, VI), freedom of education (art. 206, II) and pedagogical conceptions (art. 206, III) (Brasil, 1988).

Based on these grounds, it is argued that the family would have the legitimacy to opt for education outside of school, since the Constitution guarantees

autonomy to the family nucleus in the educational field – a valid interpretation, although not excluding other currents.

The Constitution attributes to the family the co-responsibility for the education of children, which reinforces the argument in favor of homeschooling. However, this does not imply express constitutional authorization, requiring a broader analysis of the normative set. The plaintiff maintains that "the compulsory education provided for in art. 208 of the Constitution, is addressed only to the State".

Although the family has educational responsibility, art. 208 of the Constitution refers to the duties of the State. The plaintiff argues that §3, which provides for the census of students, the call and zeal for school attendance with parents, does not prohibit homeschooling, but imposes on the State the duty to monitor attendance only in the education offered by public or private institutions under its supervision.

The plaintiff acknowledges that art. 55 of the Statute of the Child and Adolescent (Brasil, 1990) and art. 6 of the Law of Guidelines and Bases of National Education (Brasil, 1996) require school enrollment in regular education. However, it argues that its purpose is to avoid educational exclusion, and not to force teaching to take place exclusively in school institutions.

Thus, she defends the compatibility of homeschooling with the legal system, since there is no express constitutional prohibition. Finally, she argues that only the parents who cannot or do not wish to facilitate homeschooling would be required to enroll their children in a school, requesting, at this point, an interpretation in accordance with the Constitution.

Minister Cármen Lúcia's vote report also summarizes the contrary manifestation of the Municipality of Canela (RS), in the following terms:

> On the other hand, the Municipality of Canela argues that "homeschooling cannot be seen as a substitute for school teaching, but rather as a complement, an ethical and joint participation of parents in the education of their children". She states that "the Federal Constitution, in its article 208, paragraph 1, considers access to compulsory education as a subjective public right", and that "paragraph 2, of the same law, states that its non-offering by the public authority implies the responsibility of the competent authority" (Brasil, 2018, p. 185).

The first defendant in the original action – the Municipality of Canela – argues, against homeschooling, that the Constitution imposes a sanction on the public authority for not providing compulsory basic education. Thus, since the right to education is a subjective public right, the legal system would prohibit State omission. This understanding is based on the normative logic of legal sciences, according to which "[...] the subjective right or the legal relationship is protected by the State, through a special protection, represented, in general, by the legal system and, particularly, by the sanction" (Montoro, 2005, p. 538).

There is a constitutional interpretation contrary to homeschooling, but other readings of §2 of art. 208 (Brasil, 1988), not addressed in the judgment, deserve consideration. The verb "offer" suggests that the State duty is to make education available, without imposing its enjoyment, so that, if teaching is carried out at home, there would be, in theory, no violation of the norm.

Both interpretations – the one that requires institutional schooling and the one that admits its realization at home – can be considered legally valid, provided that they are substantiated. As it involves primary public interest, the Attorney General's Office manifested itself as an interested third party, positioning itself against the plaintiff's thesis and understanding the recognition of homeschooling as a regular modality as unconstitutional. In summary, it was positioned in the following terms:

> (i) the art. 208, I, of the Constitution, by imposing basic education from four (4) to seventeen (17) years of age, it prohibits parents and guardians from removing their children from schools; (ii) the infra-constitutional legislation determines that parents enroll their children in the regular education network; (iii) students not enrolled in schools are deprived of basic elements of socialization and the pedagogical processes of the school environment, an appropriate place for the development of tolerance, solidarity and ethics; (iv) schooling is the pedagogical standard adopted by the Constitution; and (v) the authorization of the practice of homeschooling in Brazil depends exclusively on a law to be approved by the National Congress (Brasil, 2018, p. 8).

In item (i), the statement that the obligation of basic education would prevent parents from opting for homeschooling is vague and devoid of logical-normative chain. In the words of Adeodato, (2014) it is a type of fallacy, since in homeschooling the obligation of education would be met by the family.

Item (ii), on the other hand, represents a main argument (Habermas, 2012) valid against homeschooling, but with an infraconstitutional basis, which gives it a lower hierarchy compared to the constitutional provisions invoked in favor of the practice.

In item (iii), it is not possible to assess, from the content of the judgment, whether the allegation is supported by technical studies contained in the records or whether it is a mere personal opinion of the attorney general of the Republic. Thus, in the view of Habermas (2012), it is an irrelevant argument.

Issues of this nature must be resolved on the basis of the primacy of norms drawn up by legitimate authority – that is, the Constitution and democratically approved laws. Although subject to different interpretations, they are the primary parameter of legal validity. An empirical-social argument, such as that of item (iii), can only reinforce a normative foundation, never replace it.

Item (iv), which states that schooling is the constitutional pedagogical standard, is a vague assertion. Its generality makes it impossible to consider it a legitimate and safe interpretation of the constitutional text.

Art. 206 of the Constitution (Brasil, 1988) mentions "official establishments" only in item IV, providing for free public education, but does not impose compulsory schooling for all basic education, public or private, according to valid interpretation. To claim that the Constitution adopted schooling as a universal standard would require interpretively suppressing the term "public" from the text, which is not sustainable.

The other items of art. 206 do not impose schooling as an exclusive model. On the contrary, items II and III, considered in isolation, admit the freedom of legal guardians in choosing the pedagogical model, including outside the school environment. Thus, among the constitutional principles of education, there is no rule that imposes schooling as a mandatory standard.

However, art. 208 of the Constitution (Brasil, 1988), which deals with the duties of the State, makes two references to the institutionalization of

teaching: in item IV, when providing for "early childhood education, in daycare and preschool"; and in § 3, when entrusting the public authority with ensuring school attendance.

Although the family is also co-responsible for the education of children, art. 208 regulates the duties of the State. Thus, it is understood that the obligation of schooling falls on the State entity when it offers basic education, and it is not reasonable to extend it, in a generalized way, to the family that decides to directly assume this function.

There is no hermeneutic effort that justifies including the word "family" in the caput of art. 208 of the Federal Constitution (Brasil, 1988), where it does not appear. Another mention of the term "schools" appears in art. 210, § 1, which provides: "Religious education, with optional school enrollment, will respect the regular schedules of public elementary schools" (Brasil, 1988). Literal reading reveals that, when offered in public schools, religious education will be optional and taught at regular times – without indicating schooling as a constitutional standard.

It is concluded, therefore, that there is no express constitutional provision that imposes schooling as a mandatory pedagogical model. Although schooling predominates in Brazilian social practice, this empirical reality cannot be automatically attributed to the constitutional text, which admits multiple interpretations and does not explicitly enshrine the exclusivity of schooling.

As for item (v) of the manifestation of the Attorney General's Office – which states that the authorization of homeschooling depends on a law of the National Congress –, it is a legally viable conclusive argument. This was even the majority conclusion of the Federal Supreme Court in the analyzed judgment.

After the votes of the ministers, the Federal Supreme Court established the following thesis in the judgment of Extraordinary Appeal No. 888815/RS (Brasil, 2018): there is no subjective public right to homeschooling, which does not exist in Brazilian law. The Federal Supreme Court recognized the possibility of its regulation, provided that by formal law approved by the National Congress.

The syllabus highlights that education is a fundamental right linked to the dignity of the human person and citizenship, owned by children and adolescents. It reaffirms the solidarity duty of the family and the State in guaranteeing

basic education, as a nucleus that forms citizenship and the integral protection of childhood.

Homeschooling is not absolutely prohibited, but it is considered unconstitutional when it disrespects this collective duty. Radical unschooling, moderate unschooling, or pure homeschooling practices are rejected. Only the "utilitarian" modality may be admitted, provided that it meets constitutional requirements, such as public supervision, basic curriculum, regular evaluations, and promotion of the socialization of the student.

In item 1 of the statement, the Federal Supreme Court highlights two central dimensions of the fundamental right to education: its relationship with the dignity of the human person (individual aspect) and its function in the formation for the exercise of citizenship (collective aspect). It also reaffirms the obligation of basic education for children and adolescents aged 4 to 17 years.

In item 2, the Court recognizes the solidarity duty of the family, society, and the State in the realization of basic education, understanding this co-responsibility as an element of the integral protection of childhood and youth, linked to the absolute priority and citizen formation provided for in the Constitution.

In item 3, the Federal Supreme Court recognizes that the Constitution does not absolutely prohibit homeschooling, but declares unconstitutional the modalities that disregard the duty of solidarity between family and State. Only the "utilitarian" model would be admissible, provided that it is linked to public educational policy and subject to State supervision. Modalities such as pure homeschooling or unschooling, with full autonomy of the family over content and evaluation, are prohibited.

In item 4, the Federal Supreme Court states that homeschooling is not, today, a subjective public right. However, it admits its regulation by federal law, provided that it is guaranteed: compliance with the obligation from 4 to 17 years old; cooperation between family and State; a basic nucleus of disciplines; and State inspection. The law must also meet the constitutional objectives of education, such as combating school dropout and promoting student socialization.

The summary of the judgment is methodologically appropriate according to the parameters of the item "Methods for conducting document analysis." The main arguments were constitutional, weighing on one side the individual freedoms – first generation fundamental rights – against the social and collective

aspects – second and third generations – of the right to education, linking it to human dignity and citizenship. Secondary legal-pedagogical arguments, such as the prevention of school dropout and the guarantee of socialization, complement the rationale.

Thus, there is a logical-legal connection between constitutional norms and the theme, in addition to the Federal Supreme Court's concern to avoid judicial activism: it conditioned the implementation of homeschooling to legislative and executive action, in accordance with the separation of powers.

Despite this, it was identified in the text of the judgment some votes that presented inapplicable arguments, but that do not invalidate the result described above.

By way of example, minister Barroso declared that "out of philosophical conviction, I am more in favor of people's autonomy and emancipation than of paternalism and heteronomous State interventions" (BRASIL, 2018, p. 12). Minister Lewandowski, on the other hand, has the personal opinion that "the Federal Supreme Court cannot align itself with an individualistic, ultra-liberal position, which reduces the State to a mere *gendarme*" (Brasil, 2018, p. 133). In both cases, the motivations went beyond the normative field, approaching personal convictions. The correct thing, according to the methodological analysis presented, would be for ministers to extract, in a reasoned way, the burden of liberalism or State interventionism that the Constitution brought as a political philosophy.

In addition, minister Toffoli based much of his vote on family experiences of literacy at home, an argument of a subjective and unproven nature.

Final consideration

Pedagogically, the opinion of Maria Celi Chaves Vasconcelos and Carlota Boto (2020) is followed. In this sense, it is thought that, in general, schooling is a more efficient educational method, thus, the practice of homeschooling, if adopted, would require the elaboration of a method of involving actions between the public authority and the family, to guarantee to the student socialization, formation for citizenship, plural coexistence to generate tolerance and respect for diversities, in short, integral education.

However, the very study of this article leads to the understanding that the fact that it concludes for the greater efficiency of schooling should not lead to the conclusion that it should be *mandatory for all*. To this end, the decision of the affected community, expressed in the Constitution and infra-constitutional norms, must be analyzed.

Thus, from the legal aspect, it is concluded that there is no explicit prohibition on homeschooling in the Federal Constitution, nor express authorization for its practice. The controversy analyzed evidently involves a *conflict between fundamental rights*, requiring the interpreter to make a weighing judgment.

In general, the judicial decision issued by the Federal Supreme Court in Extraordinary Appeal number 888815/RS/2018 met the argumentative precepts (Freitas Filho; Lima, 2010) brought in this article as methods for conducting document analysis (Cellard, 2008).

The central arguments were constitutional and the exercise of weighting between them was exercised in a validated and argumentative way, with a logical-legal connection between constitutional norms and judged theme. Secondary arguments of a legal-pedagogical nature, such as the prevention of school dropout and the guarantee of socialization, complement the foundation. There was a clear concern of the Federal Supreme Court to avoid judicial activism.

Despite this, it was identified in the text of the judgment some votes that presented inapplicable arguments: two ministers were based on personal philosophical-political convictions and another on family educational experience. That is, arguments that should be irrelevant (Habermas, 2012), try to be taken as main.

The intended logical-rational concatenation has been achieved in this article. According to the theorists studied, education is a fundamental right (Caggiano, 2009) that is indispensable and necessary for human development (Cury, 2002), which leads several citizens to judicialize (Duarte, 2004) the issue when the government does not offer them this right (Garcia, 2008). In this judicialization, sometimes the judiciary invades the functions of the legislative and executive, promoting judicial activism (Ramos, 2010).

It was also seen that, pedagogically, schooling is a more effective method than homeschooling to provide regular education (Vasconcelos, Boto,

2020). It was also found that decisions must be based (Cellard, 2008) and that there are methods with a high load of objectivity (Freitas Filho; Lima, 2010) to argue and support decisions according to Habermas (2012), Conte (2016) and Adeodato (2014).

Applying all this theoretical framework to Extraordinary Appeal No. 888815/RS (2018), it was concluded that, by its syllabus, the judiciary applied the argumentative framework studied here satisfactorily and that, in general, homeschooling has lower educational effectiveness than schooling, however, it may become a legitimate form of regular formation if there is a method of involving actions between the public authority and the family, to guarantee to the student integral education, with socialization, formation for citizenship and plural coexistence.

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