Right to Education

Constitucional Aspects

coordination

Nina Beatriz Stocco Ranieri

editor

Sabine Righetti

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Introduction

Nina Beatriz Stocco Ranieri

Brazil's first Unesco Right to Education Chair was established in the Law School of Universidade de São Paulo in 2006, with the mission of examining and researching the right to education from the point of view of the Brazilian legal system and international law.

The right to education is defined as an inseparable part of the mission of Unesco, the United Nations Organization's institution for education, science and culture. The right expresses its founders belief in, and advocacy of, the need to create equal and genuine educational opportunity for all. The Chair also has the aim of materializing the ideal of equal educational opportunity, as noted by the World Education Forum in Dakar in 2000.

The right to education, of course, plays a key role in the ambit of human rights, being crucial to the development and exercise of other rights. By enabling access to other rights, it therefore proves to be a fundamental instrument through which economically and socially marginalized adults and children may emancipate themselves from poverty and obtain the resources required to act as full members of society.

Unesco started its Chair Program in 1991 with the aim of strengthening higher education in developing countries and using the appropriate means of enhancing cooperation between universities. Agreements have

been signed to set up chairs in more than twenty countries, and they cover a wide range of academic disciplines – from the natural sciences to environmental and ecological issues, population, science and technology, the social sciences and humanities, the sciences of education, culture and communication, as well as peace, democracy and human rights.

In my capacity as professor of the Department of Public Law at the Law School, Universidade de São Paulo (USP), I was able to make the initial arrangements to set up this Chair, for which I became coordinator, with the support of the head of the Law School, Professor João Grandino Rodas. As one of the Chair's first steps in late 2006, an international seminar held on the initiative of the state government examined the perspectives for public higher education and the challenges involved in the state of São Paulo, with the participation of Dr. Kishore Singh as Unesco head of Basic Education and Right to Education. At that time, USP's Law School was affiliated with Unesco's University Education Twinning and Networking Scheme (Unitwin).

The program aims to foster education through exchanging and sharing of knowledge in a spirit of solidarity. Therefore the program sees North-South and South-South cooperation as a strategy for advancing its member institutions, most of whom are universities and research institutes working in partnership with a number of leading non-governmental organizations, foundations and public – and private-sector institutions. Unitwin enables those involved in higher education to join forces with Unesco in setting the goals for a global agenda.

On starting its activities in 2008, the Chair offered a course on Aspects of the Constitutional Right to Education – I, in the ambit of the schools master's in Human Rights, with fifteen students regularly enrolled and five audit students.

The present book – The Right to Education I – beautifully produced by Edusp (USP's publishing unit) is the fruit of research conducted by these students.

This broad field of study covers the problematic of fundamental rights and the right to education in particular, as well as the consequences of Brazil's federative structure for education and the distribution of competences between authorities at federal, states and municipal levels

under the 1988 Constitution. It further raises current issues pertaining to indigenous education, religious education and affirmative action; and tracks recent jurisprudence of Brazil's Federal Supreme Court and the role of public prosecutors, in an attempt to find indicators for assessing the implementation and efficacy of the right to education. All the articles raise theoretical and practical aspects of the right to education while seeking to disseminate its substantive content.

The book consists of five parts. The first is introductory, focusing theoretical rather than practical analysis, while the others examine more specific aspects.

Part I deals with constitutional aspects of the right to education in four chapters exploring opportunities for promotion and protection of the right, namely: "Education. Fundamental Right "; "States and the Right to Education in the 1988 Constitution: Comments on the Federal Supreme Court Jurisprudence"; "The Judicial Power and the Right to Education"; "Religious Education in Brazilian Public Schools: from the Right to Freedom of Belief and Worship to the Right to Positive State Provision".

Monica S. Herman Caggiano, in "Education. Fundamental Right" notes that the historical trajectory of Human Rights doctrine shows that Man – or any rate the most conscious of men – has or have shown a clear concern for education. This is proclaimed in the Declaration of 1789, with the idea of the urgent need to assure access to education and the means toward the intellectual and political emancipation of human beings as members of the social community.

By posing the historical affirmation of the right to education, this chapter raises the question of the judiciary's role in fostering and protecting the right, which is viewed from different perspectives in two chapters. One of them is my own article on "States and the Right to Education in the 1988 Constitution: Comments on Federal Supreme Court Jurisprudence", which points to the progress made to date in securing the right to education based on the court's jurisprudence after the 1988 Federal Constitution. There has been a very substantial increase in numbers of individual and collective actions brought before the court, not only compared to previous Brazilian Constitutions but also

in relation to actions claiming other social rights. Brazil's society, public prosecutors and judiciary would appear to have become much more aware of the importance of the right to education in building a free, fair and compassionate society. In this respect, I would emphasize that both aspects of the right to education – individual and collective, and their instrumentation – foster the spread of democracy, human rights and environmental protection as crucial values in the contemporary world.

Eduardo Pannunzio's "The Judiciary and the Right to Education" examines ways of assuring the right to education in legal systems locally and internationally, taking up the question of the right to education being raised before judicial or quasi-judicial bodies, and reviews Brazil's Supreme Court jurisprudence in the twenty years since the 1988 Federal Constitution, and that of the main organs of the Global and Inter-American System for Protection of Human Rights.

This part ends with the theme of religious education and freedom of worship. Solomon Barros Ximenes looks at the trajectory of religious education in Brazilian legislation in "Religious Education in Brazilian Public Schools: from Right to Freedom of Belief and Worship to the Right to Positive State Provision". An essential point in this analysis is the clash between secular education and religious instruction on the issue of the State's duties in this field.

Part II analyzes the obligations of education systems and the role of public prosecutors in education with two chapters: "Higher Education Institutions and State Authorities: Autonomy and Control "; and "Role of the Public Prosecutors in the Protection of the Right to Basic Education".

"Higher Education Institutions and State Authorities: Autonomy and Control" by Eduardo Martines Jr., focuses on the difficulties of legal analysis of broad educational themes. He notes that education has now entered the legal domain, and lawyers and legal professionals are requiring to adopt an interdisciplinary approach, both influencing others and being affected in turn. Education as a right has been discussed among lawyers as top priority in order to combat poverty, economic and social underdevelopment, and even crime. The conclusion is that any attempt to solve the serious problems we face involves prioritizing education.

In "Role of Public Prosecutors in the Protection of the Right to Basic Education", Adriana A. Dragone Silveira provides a detailed examination of the work of public prosecutors in protecting the right to basic education. She points to the importance of dialogue and practical benefits from their joint work with civil society organizations. However, the article also notes some of this institution's limitations, such as the issue of enforceability of demands relating to quality of education.

Concerns over quality in education is the theme of Part III – The Right to Quality Education.

"The Right to Quality Education from the Neoconstitutionalist Perspective" by Erik Arnesen Saddi, offers an interpretation of the requirement for quality education in light of neoconstitutionalist theory. From the perspective of a "constitutional state under law", there are further opportunities of giving legally enforceable content to the term "right to quality education", so that is no longer merely an intangible or subjective ideal or goal. The article also lists some of the perplexities in the expression of this right in everyday practice.

In "Quality Standards in Education", Marcelo Furtado Gasque argues that while everybody will agree on the need for quality in education at all levels, there are different and even conflicting ways of defining quality. He points to certain framing notions that enable the concept to be materialized in law, based on guidelines provided by the Constitution, in particular Article 206, VII, which poses a guaranteed standard of quality as one of the guiding principle for education in Brazil.

Three contributors focus on private education in Part IV – Reflections on Private Education, in chapters on "The Legal Nature of Private Educational Services: Controversial Aspects"; "The Expansion of Higher Education in Brazil: the Private Option"; " Education Provided by Private Enterprise and its Legal Limits".

"The Legal Nature of Private Educational Services: Controversial Aspects" by Luiz Gustavo Bambini de Assis focuses on the legal nature of educational services provided by private institutions and the related issues for legal theory and jurisprudence. It highlights the Federal Supreme Court's discussions of the concept of public service in Brazilian and international legal theory and explores the concept of subjective

public right. The chapter on "The Expansion of Higher Education in Brazil: the Private Option" by Fernanda Montenegro de Menezes, looks at the means most frequently used by the government to ensure the right to education, more specifically, higher education through programs implemented in private institutions. It also analyzes the historical process of the emergence and expansion of private higher education in Brazil.

Luiz Filho Tropardi also examines the expansion of private education and focuses on the legal limits of educational activity. Pointing to the steep rise in the number of private educational establishments and increasing state intervention in this business, he raises the possibility of a conflict between the public interest involved in providing educational services and private interests running a business. In light of this issue, the author asks how such interests may be harmonized and if it is possible to establish peaceful coexistence between the private and state provisions.

Part V concludes by going back to the issue of education and inclusion, with articles on indigenous education and affirmative action.

Sabine Riguetti's "Indigenous Education and the Role of the State" looks at recent discussions in the field in Brazil, in particular the legal and institutional aspects, the National Indian Foundation (Funai) set up in 1967, the 1973 "Statute of the Indian", and the inclusion of the issue of indigenous education in the 1988 Brazilian Constitution and the National Education Law (LDB) of 1996.

In "Affirmative Action and Quotas in Brazil: A Reflection on the Recent Debate", Camila Magalhães, Fernanda Montenegro de Menezes and Sabine Righetti examine affirmative action policies and quotas for blacks and Indians, focusing specifically on quotas for candidates from public schools in access to higher education. The article also looks at local and international progress in discussion of quotas in higher education, addresses the legal aspects of the subject and analyzes experiences of inclusion policies.

Given the diversity and breadth of the problems discussed in "The Right to Education I", it is recommended reading for all involved in examining the right to education and human rights in general at undergraduate or postgraduate level, or for educators and jurists drawn to by

the importance of the right to education. In a country where there is no tradition of individual and collective defense of this right, reflection on the subject and dissemination of doctrine and jurisprudence in this field are extremely welcome and timely.

February 2009

I

OS ASPECTOS CONSTITUCIONAIS DO DIREITO À EDUCAÇÃO

Education. Fundamental Right

Monica Herman S. Caggiano

Introduction

More than two hundred years after the first declarations of rights[1], scant progress has been made in factual terms, paradoxically despite

1. Here referring to the American declarations of clearly religious inspiration, imbued with the philosophy of natural justice and the English liberal tradition: a) The Virginia Declaration of Rights, by the constituent assembly of the state of Virginia, promulgated with the Constitution on 12 June 1776; b) The Declaration of Independence of the United States, arose from a proposal made by General Lee on behalf of Virginia, approved by the 2nd Continental Congress, with its final version called the *Declaration of Independence*" was passed in the session of 4 July 1776; c) The United States Constitution of 1787, a document produced by the Philadelphia Constitutional Convention, which started work on May 25th, 1787, presenting a quorum of seven states in order to debate and vote the revised Articles of Confederation. On September 17 of the same year, delegates from twelve states voted the new constitution, and it was signed by thirty-nine of the forty-two present. The new constitutional document came in effect on June 21, 1788, when it was ratified by the ninth state (New Hampshire); d) The Ten Amendments of Ratification of the United States Constitution (Bill of Rights of 1790) derived from a study drafted by James Madison and submitted to Congress (House of Representatives), under the name "Bill of Rights", in which phase twelve (12) amendments were voted and sent to the states for ratification. Virginia ratified the document on December 15, 1791, but only ten amendments were included in the American constitution, with the first amendment taken as guaranteeing "fundamental rights" such as freedom of expression, freedom of opinion, religious freedom *(the free exercise clause)* and the "establishment clause"

countless international documents showing the modern world's rapt attention to the cause of protecting fundamental rights of man and citizen[2]. The media are ready to denounce the many weaknesses: racial discrimination, discrimination against women, religious discrimination – and education for the few, or for an elite.

This poor record may in part be attributed to the accelerated evolution of the world itself, with globalization leading to new behaviors and new demands. From this point of view, it is opportune to note that even in the most evolved societies, such as developed Europe, education is once again a cause for concern due to the phenomenon of immigration impacting these countries with incoming contingents of students from a wide range of cultures, languages, and educational backgrounds, prompting authorities to devise new measures to cater for and train this differentiated clientele. This is the case of Germany and Italy, who are seeking new formulas to deal with the emerging phenomena and raise the quality of education[3].

Hence the renewed interest in debating this very special topic, which requires adequate framing in the current context of a world affected by

redirecting the law to its secular purposes. In France too, this was the case of the Declaration of the Rights of Man and of the Citizen (1789).Although not a pioneering effort historically, in using this formal document to proclaim an orderly ranking of the rights of man, this document appears to have had most repercussion worldwide, and clearly exerted a powerful influence on a whole body of doctrine around the subject of human rights- thus being most outstanding for its initiative.

2. The Versailles Treaty (28.06.1919, ILO); the Soviet Constitution of 1936; The Universal Declaration of the Rights of Man (1948); American Declaration of the Rights and Duties of Man, Bogota (1948); Statute of the Council of Europe (1949); Convention against Discrimination in Education (Unesco, 14.12.1960); International Convention on the Elimination of all Forms of Racial Discrimination (1965); International Covenant on Civil and Political Rights (1966) International Convention on Economic, Social and Cultural Rights (1966); American Convention on the Rights of Man (*Pacto de São José da Costa Rica*) (1969); Helsinki Final Act (1975); Recommendation on Education for International Comprehension, Cooperation and Peace and Education Relating to Human Rights and the Fundamental Freedoms, by the United Nations (1974); Convention on the Elimination of All Forms of Discrimination against Women (1979); Convention on Children's Rights (1989); Universal Declaration on the Human Genome and Human Rights (1997).

3. In this respect, see *The Economist* of 18 October, 2008, pp. 61-62.

globalization, giving rise to the resurgence of certain attitudes and demanding a new approach to this long-standing problem. In Brecher and Costello's global village (1998) of social groups and forces continuously competing with each other, the current task facing society is to build a more adequate system pre-ordained to concretely protect human rights, including the right to education, and primarily fostering education for fundamental human rights.

This initiative is both timely and worthwhile in taking up this issue and placing it in the context of an opus devoted to the study of law and its duty of fostering education. In order to attain the *status civitatus* defined by the legal order, the extension of education is a necessary condition – or rather sine qua non, as is its proper treatment by the legal system and public policy.

Education as a Fundamental Right

The historical trajectory of human rights doctrine is a precise indicator of Man's – or at least the more conscious of men's – manifest concern for education. Since the French Declaration of 1789, there has been growing awareness of the pressing need to ensure access to education and the means of intellectual and political emancipation of the human being as a member of the social community. The preamble clearly marks hostility in relation to ignorance, since the very first lines of this document read: "[...] that ignorance, forgetfulness and contempt for the rights of man are the sole causes of public misfortunes and the corruption of governments"[4].

The Jacobin Declaration of 1793, also French, advances to expressly cover the subject of education in Article 22, which starts by identifying it as "[...] a necessity for everybody"[5]. Again on French terrain, the 1848 Constitution tackles the matter in two different articles. The first (Ar-

4. In *Textos Básicos sobre Derechos Humanos*, Madrid, Universidad Complutense, 1973, p. 87.

5. See note 36.

ticle 9) declares freedom of education and the second (Article13)[6] free primary and occupational education as the means of assuring the right to work.

In the current context, it seems there is no longer any objection to including the right to education as one of the fundamental human rights, with the backing of a legal – constitutional framework to assure a system of guarantees. This is a fundamental right because education is a prerogative proper to the human condition, given the requirement of dignity, and because it is recognized and accepted by international instruments and constitutions guaranteeing this right.

The *right to education*, thus placed in the niche *of fundamental rights*, imbued with its own particular qualities. Moreover, the latter recognize the fundamental rights as elements of the *essence of a constitution*[7] and as Robert Alexy notes, show: *a.* the nature of "moral rights", since they rely on "universality" in their structure, assuming the stance of rights of all against all; *b.* the status of "preferential rights", since they provide the grounds for precisely the right of men to their protection by positive law; *c.* the "fundamental nature of the interest or need protected" which requires and leads to the "need for their being respected, protected or fostered by the law" (translation)[8].

Furthermore, in today's world, the right to education is seen in its two facets (first and second dimension or generation), framed as a social and individual reality. Thus developed and strengthened by the characters of collective nature extracted from the two previous generations of

6. Article 9: "Education is free. Freedom of education is exercised in conditions of capacity and morality determined by law and under the vigilance of the State. This vigilance extends to all educational and teaching establishments without exception".

Article 13: "Society favors and fosters the development of labor through free primary education, occupational education..." – in *Textos Básicos sobre Derechos Humanos*, *op. cit.* sup., p. 103.

7. The French Declaration of the Rights of Man and of the Citizen (26.08.1789) proclaimed in Article 16: "No society in which the guarantee of rights is not assured.... has a constitution".

8. "Direitos Fundamentais no Estado Constitucional Democrático", in *Revista da Faculdade de Direito da UFRGS*, v. 16, 199, p. 203.

rights[9], the right to education is envisaged as having multifaceted contents involving not only the right to education as a process of individual development, but also the right to an educational policy, in other words, a body of interventions legally organized and executed in terms of a process of educating society and offering members of the social community the means of attaining their aims.

In this respect, the guidelines of the Declaration of 10 December 1948, which conceives the right to education in its classical individualistic connotation, also adds a social purpose:

> Article 26. 2 – Education shall be directed to the full development of the human personality and to the strengthening of respect for Human Rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace[10].

Also noteworthy is the provision in item 3 of the same article 26 therein, which *attributes a wholly special social significance to education* by granting parents responsibility for the education of their offspring. Along with the school as a social institution, therefore, the family emerges as a factor contributing to the educational process, and is posed as the operative means of guaranteeing the right to education.

On 14 December 1960, as the first international instrument with such a profile, Unesco approved the convention on the fight against discrimination in the educational context, based on the prevalence of the

9. The second generation of social right and economic rights – emerged without abandoning the imposition safeguarding the prerogatives inherent to the human being (first generation) proclaimed in the American declarations and the French document of 1789. This new dimension includes rights favoring the individual, as a member of society, with certain positive services provided by the State. These social and economic right were present in the Jacobin Declaration of 1793 and the declaration included in the French constitution of 1848, but were really unequivocally in the Mexican constitution of 1917 and gained resonance with their inclusion in Germany's Weimar Constitution of 1919, which devotes a whole chapter to social life and another to economic life, thus offering a new constitutional model.

10. In *Direitos Humanos. Instrumentos Internacionais. Documentos Diversos*, Brasília, Ed. Senado Federal, 1996, p. 134.

idea inscribed in the constituent acts and above mentioned Declaration of 10 December 1948, which among other tasks, prioritizes the goal of *fostering the right to education for everybody*.

A major milestone on this evolutionary road was a document produced by the 1974 General Conference of the United Nations Organization, the Recommendation on education for international comprehension, cooperation and peace and education relating to human rights and the fundamental freedoms, which defines the issues thus: "1. For the purposes of this recommendation: a) the word 'education' implies the entire process of social life by means of which individuals and social groups learn to develop consciously within, and for the benefit of, the national and international communities, the whole of their personal capacities, attitudes, aptitudes and knowledge" (Barba, 1997, p. 139).

In fact, the idea of the obligatory presence and realization of the right to education in politically organized societies increasingly involves the evolution of society itself, preordained to facilitate a sense of respect for human dignity. Hence the many documents using this instrument as their guarantee. Among them, we may note the International Pact on Economic, Social and Cultural Rights of 1966, the Convention on Children's Rights passed 8 March 1989, by the UN Human Rights Commission, and the World Declaration on Education for Everybody, adopted at the Thailand World Conference on 9 March 1990, which called for a renewal of the commitment to education.

Despite the extensive range of documents on the adoption and application of guiding principles for education, and its status as a fundamental right, its proper implementation shows acute weaknesses, even though it recognized by national and international legal systems.

In 1990, the World Declaration on Education For Everybody itself noted the following issues:

> 1. More than 100 million children, at least 60 million of whom are girls, do not have access to primary education.
>
> 2. More than 960 million adults are illiterate.
>
> 3. More than 1/3 of the world's adults do not have access to knowledge....
>
> 4. More than 100 million children and countless adults are unable to conclude the stage of basic education [...] (Barba, 1997, p. 222 – translation).

More recently, members of Amnesty International, one of the most combative NGOs fighting to materialize the rights proclaimed in the 1948 Declaration, held a meeting in Dakar, the capital of Senegal, to debate the current need to step up the fight for social, economic and cultural rights. After successful campaigns against arbitrary arrest and torture, and its defense of civil and political rights, this organization aims to assure more publicity and visibility for the way governments deal with third-generation rights, since they have been somewhat neglected and in the absence of proper oversight, have eventually seen their practical effectiveness diminished[11].

Children being enslaved, as denounced in Nigeria, children being killed in Kabul, or organizations detected illegally trading in human organs are just a few of the revealing events that – in addition to continuing to require means of ensuring the validity of first-generation obligatory rights – show the need for measures to strengthen educational programs and diminish the harm caused by the absence of public policies to ensure that this right prevails[12] [13]. Including the right to education for human rights. Through education, the aim is to inhibit ignorance, the "cause of public misfortunes and corruption", as the 18th-century French revolutionaries proclaimed.

The situation in Brazil is not very encouraging in terms of the level of education. Progress has been made in combating illiteracy, but a survey conducted by the electoral courts during the most recent municipal elections found that of a total 130,469,549 voters, 8,097,513 were illiterate, 20,367,757 could read and write, while 44,456,754 had not concluded elementary education, against only 10,129,580 who had done so[14].

These data are corroborated by surveys published by the newspaper *Folha de S. Paulo*, such as the sad fact that one in five young people have

11. For the Dakar Conference, see *The Economist*, 18 August 2001, p. 18.

12. In *O Estado de São Paulo* of 21 July 2001, p. A 17.

13. In *El País*of 9 December 2001, International section, p. 5.

14. Source: Brazil's Supreme Electoral Court (TSE), profile of the 2008 electorate, 15 July 2008.

not concluded elementary education[15]. Only 3.49 % of electors hold a higher education diploma, with the states of Rio de Janeiro, São Paulo, Rio Grande do Sul and Santa Catarina containing the largest numbers that have had access to higher education. Among the states of the North and Northeast of Brazil, Maranhão and Piauí lead in terms of percentage of voters with university degrees. Attendance and learning issues lead to significant educational exclusion. Brazil's educational system was ranked 53rd by the International Student Evaluation Program (Pisa) in Math and 52nd in science and 48th in reading by the Organization for Economic Cooperation and Development (OECD)[16].

Education Under the Impact of Recommendations from International Documents

Based on classical assumptions that recognize *educational level as an essential factor in the development of the individual and the social collectivity*, thus pointing to the pressing need for intervention on a national and international scale in order to *strengthen the quality of education and guarantee universal access*, these documents call for concrete measures in relation to both structure and learning processes. Aims involve facilitating universalization and fostering equity in education, amid a process of globalization in full swing, while steering the young generations toward socioeconomic and cultural progress, tolerance and the inevitable requirements of international cooperation.

Among the recommendations given special emphasis in the abovementioned World Declaration on Education for Everybody, particular attention is drawn *to the need to foster proper conditions while strengthening cooperation and association.*

Indeed, as Rawls notes in *A Theory of Justice*, society must be seen as *a cooperative undertaking* for mutual advantage that is typically marked by both conflicting and identical interests. The illustrious Harvard phi-

15. *Folha Online*, 21 January 2008.
16. *Idem, ibidem.*

losopher stresses the relevance of collective involvement through all sectors comprising society to pursue its aims and objectives (Rawls, 1997, p. 580 – our emphasis).

Hence the natural and obvious recommendation emanating from the above mentioned World Declaration on Education for Everybody, which *seeks the intervention of society to support education, and evinces precisely the currently predominant participative spirit, implying the admission that the primary responsibility for providing education cannot be attributed to the State alone.* The document reiterates the need for "cooperation and association among all subsectors" (Rawls, 1997, p. 229 – my emphasis).

It calls for joint action of government agencies and non-governmental organizations (NGOs), the private sector, local communities, religious groups and families.

The European Union's Charter of Fundamental Rights, arising from the Nice Treaty of December 2000[17], pursues this theme in articles 14 (right to education), 21 (non-discrimination) and 24 (children's rights), which refer to the primacy of children's interests and the pressing need for the authorities and society to fulfill this duty.

The field of education, therefore, heavily influenced by the impact of this participative spirit, began to demand concrete actions of a collective nature in order to ensure better conditions for learning. All forces in society are called upon to join this effort. In this new attire, special attention is attributed to the roles of educators and families. Their education and training is a key factor that cannot be ignored, leading society to collectively re-examine its means of ensuring a level of education to meet the needs of the 21st century, and particularly UN recommendations posing the challenges of these new times.

17. The European Union's Charter of Fundamental Rights was drafted in the expectation that it would be included in a treaty and constitution, which was thwarted after adverse referendums in Holland and France in 2005. Therefore, the Charter of Fundamental Rights is still being studied and re-drafted but has not been implemented. See *Code de Droit International dês Droits de l'Homme*, Brussels, Bruylant, 2005. See also *Carta dos Direitos Fundamentais da União Europeia* (Riquito *et al*, 2001).

In fact under the new model, education and research are removed from the sphere of the state exclusively and made to reference "a broader vision and renewed commitment", involving the whole of society and in particular the family, which in turn must shoulder its share of responsibility for educating the cohorts that are going to make the history of the 21st century. Only in terms of education inspired by an entire collectivity, guided by the principle of participation, and developed on a community basis may the stated objectives of preserving human rights and dignity be achieved.

Brazil

The current constitution was given the epithet of the "citizens' constitution" on the occasion of an address by the chairperson as the work of the constituent congress was coming to its end[18]. Its innovative Title II contains an extensive range of rights and guarantees. However, changing the traditional position on this subject, the members of the constituent body sought "to confer precedence" in the words of Raul Machado Horta (Horta, 1995, p. 240), without however seeking to determine a hierarchical separation of constitutional norms. Presumably, the intention was for these provisions to be "imbued with value-laden content whenever confronted with acts of a legislator, an administrator, or a judge" (Horta, 1995, p. 240).

Following Brazilian tradition, however, the current constitution dealt with the subject by adopting a modern tone and broadening the range of previous charters to *include second- and third-generation rights*, focusing on collective and social rights and offering extremely contemporary nuances to the system of assurances thus engendered.

Indeed the drafting of the 1988 constitution reflected the influences of political groups and factions representing a wide range of sectors in

18. On 27 July 1987, defending the draft constitution against harsh attacks in relation to its possible efficacy, Representative Ulysses Guimarães, chair of the constituent body, proclaimed on nationwide TV that it was a "citizens' constitution, because it will make millions of Brazilians citizens again".

society. The situation arising from these spiraling interventions paints a precise portrait of the spirit avid for guarantees of liberties that prevailed at that point in history. Although, properly following the vocation of our constitutional law in vesting the subject of "fundamental rights and guarantees" with the superior "status" of the constitution, the current model does have its peculiarities, starting with the figures of law introduced and the odd topography – since this section was placed in Title II, at the very beginning of the text, as noted above.

Treatment of the subject of education is found throughout the constitutional texture, with the following precepts succinctly and systematically dealing with educational issues:

Article 5, IV; and XIV;
Article 6, (social rights) – Chapter II of Title II;
Article 7 XXV – assistance for dependents and children until the age of 5;
Article 23, V – common competence ⇒ fostering education;
Article 24, IX and XV – concurrent competence. General and specific norms;
Article 30, VI (common competence involving obligation of municipalities);
Article 205 (Section I, Chapter III, Title VIII – The Social Order);
Article 206 ⇒ principles governing education;
Article 207 ⇒ universities – academic autonomy;
Article 208 ⇒ education as a duty of the State;
Article 209 ⇒ Conditions for providing private education;
Article 210 ⇒ Common basic education and respect for cultural and artistic, national and regional values; Teaching of religion and use of Portuguese language (§1);
Article 211 ⇒ Organization of the federal education system;
Article 212 ⇒ 18% the Union (national level) and 25% states and municipalities;
Article ⇒ allocation of public funds.

Reflecting the context of a high level of permeability in relation to ideas and mechanisms eager to include the ideas of cooperation and association as inseparable from the educational sector, the 1988 constitution's Title VIII – "The Social Order", Article 205, specifies those responsible for implementing this right: "Article 205 – Education, as the right of all and duty of the State and the family, shall be promoted and fostered with the cooperation of society, with a view to the full deve-

lopment of the person, preparation for the exercise of citizenship and qualification for work".

Again, in the following provision, the constitution sets forth the principled basis guiding the development of education, thus:

> Article 206 –..... – equal conditions of access and permanence in school;
> II – freedom to learn, teach, research and express thought, art and knowledge;
> III – pluralism of pedagogic ideas and conceptions and coexistence of public and private teaching institutions;
> IV – IV – free public education in official schools;
> V – recognition of the value of teaching professionals, guaranteeing, in accordance with the law, career plans for public school teachers, and admission exclusively by public entrance examinations consisting of tests and the submission of academic or professional credentials;
> VI – democratic administration of public education, in the manner prescribed by law;
> VII – guaranteed standards of quality.

Thus the article affords unequivocal priority to recommendations taken from international documents, with concern for strengthening conditions making for efficacy of the isonomic canon, and an intensive demand for policies to support guaranteed access to basic education for adults and children.

Finally, the outlook of the constituent body clearly comes through in its *favoring the right to education even further* by broadening the reach of the constitution with elements derived from contemporary declarations, and seeking to actually concretize the prerogative of education as one inherent to human beings, while amounting to a requirement for the very development of humanity.

Concern for the constitutional treatment of education in Brazil – as a federal state whose constitution ensures autonomy for its federated entities, has also been reflected in the constitutional texts produced by the states and municipalities. In this respect, the *Constitution of the State of São Paulo* deals with this subject in Chapter III, Section I, of Title VII (Articles237 to 258). Particularly relevant is Article 249, which requires eight (8) years of compulsory education from the age of six (6). Again, Article 255 sets aside and allocates thirty percent (30%) of tax revenues for education and does not disregard the need for control since it re-

quires quarterly publication of revenues collected and sums transferred (Article 256).

The municipality of São Paulo did not disregard the essential nature of this right and while reinforcing the latter, clearly stipulates local responsibility for implementing education, stating that the Municipal Power has the duty of ensuring elementary and pre-school education (Article 7, VI Organic Law of the Municipality of São Paulo). This municipal document provides further details in Articles 200-211 (Title VI, Chapter I), where, symmetrically to the provision made by the state government, it stipulates allocating thirty-one percent (31%) of tax revenues to fulfill its duty of implementing the right to education.

The members of the constituent body sought to ensure constitutional stature for this right; based on models taken from current international deliberations, they dealt with the subject by strengthening the right to education and pointing to the need for cooperation and association between social forces and groups in order to concretize the process of learning and the transmission of knowledge. However, despite their efforts, glaring defects remain and intensive efforts are required to reach an ideal point in educational space. Take the resolution adopted by the Brazilian government as part of the discussions at the International Conference against Racism held by the UN in Durban, South Africa, in September 2000, which set aside university places for "blacks" or Afro-Brazilians.

5. Affirmative action – the quota model

Quotas for black students, a precise indicator of the influence of mobilization by social groups advocating development of the educational sector, is an issue that has been extensively debated over the last forty years. Affirmative action programs seek to implement policies for social inclusion through education.

Prof. Fernanda Dias Menezes de Almeida has described so-called affirmative actions as "procedures aimed at concretizing the right to equality" (Almeida, 2004). She further adds that these programs "designate the body of public or individual policies aiming to right imba-

lances disfavoring minority groups, and preventing their ascent socially, culturally, politically, economically etc." Having researched the subject at length, Paulo Lucena de Menezes notes: "Affirmative action in the present day is a broad term for a body of strategies, initiatives or policies aiming to the favor social groups or segments situated in the worst conditions for competing" (translation) (Menezes, 2001, p. 27).

Although affirmative action programs may be envisaged for the inclusion of the least favored sectors in the active and productive population of society, such as policies for admitting blacks in the labor market, or the physically disadvantaged, or women in politics, in short policies for training and prioritizing [certain groups] in an attempt to offset an imbalance that inferior conditions introduced into the social scenario, the fact is that *affirmative policies practiced in education have gained more notoriety* by pursuing the inclusion of Afro-descendants in universities in particular, authorizing the elevation of this contingent of disfavored persons in terms of qualifications through access to higher education.

Here it is of interest to examine the trajectory of these programs that trace their origins to the innovative policies of the Kennedy government, the first to use the expression affirmative action on setting up the Equal Employment Opportunity Commission (EEOC). This project introduced measures seeking to broaden isonomy in terms of employment opportunities. In the course of its historical evolution, however, the aim pursued shifted to concentrate on access to universities, as Table 1 shows.

In the Brazilian scenario, particularly under the aegis of the constitution enacted on October 5, 1988, the technique of affirmative action immediately won over disciples and spread through measures tending to broaden the range of opportunities for access to higher education, particularly for Afro-descendants and the low-income population. In this respect, highlights at federal level are Law 10.558/02 introducing the University Diversity Program, Law 10.678/03 calling for a new Special Secretariat for Policies Fostering Social Equality, Decree 4228/02, launching the National Affirmative Action Program in the ambit of the federal public administration, and more recently Temporary Measure 213, of 10 September 2004, introducing the University for All Program

Tabela 1. Políticas de ação afirmativa nos governos norte-americanos

PERÍODO	1935	6 de março de 1961 governo Kennedy	governo Lyndon Johnson (1963-1969)		governo Richard Nixon (1969-1974)	governo Jimmy Carter (1977-1981)	governo Ronald Reagan (1981-1989)	governo Bush (1989-1993)	governo Bill Clinton (1993-2001)	governo Georg W. Bush (2001-2009)
	Legislação trabalhista (The 1935 National Labor Relaction Act) Evitou-se discriminação a operários e sindicalistas, garantindo-se seus cargos.	Ordem Executiva 10925 do presidente J. F. Kennedy. Foi o primeiro a usar a expressão "Ação Afirmativa". Criou a Equal Employment Opportunity Commission (EEOC) Proibida a discriminação feita por instituições governamentais com base em cor, religião e nacionalidade para a contratação de funcionários. Mais: estimulou-se a contratação de minorias.	Criados mecanismo e estratégias de combate e de superação das desigualdades raciais e de gênero.		Nixon era conservador e inimigo das ações afirmativas. O interesse de Nixon era apenas angariar eleitorado negro a votar no Partido Republicano. Plano Philadelphia: estímulo à contratação de minorias (racial e gênero) por companhias e entidades educacionais.	Caso Regents of the University of California *v.* Bakke A Faculdade de Medicina da Universidade da Califórnia reservou dezesseis das cem vagas para estudantes pertencentes às minorias. A Suprema Corte decidiu, que os direitos do vestibulando branco, Alan Bakke ficaram violados com o plano de Ação Afirmativa desta Universidade.	Reagan possuía tendência anti-ações afirmativas. Fora eleito com o auxílio da classe média branca (avessa aos avanços da política de ações afirmativas).	Bush não era muito afeito aos progressos dos direitos civis. A Suprema corte voltou a decidir casos que chocaram a comunidade de direitos humanos. A Civil Rights Acto foi vetada por Bush, em outubro de 1990. No anos seguinte, foi promulgada, ajudando as vítimas de discriminação.	Clinton contava com o apoio da comunidade negra. Estabeleceu em governo mais intervencionalista, com ações impactantes na diminuição da desigualdade entre os grupos raciais.	Atualmente, a Suprema Corte dos Estados Unidos tem decidido contrariamente às políticas públicas que adotem critérios de favorecimento das minorias.
			1964	1965						
			"Civil Rights Act" Artigo VII. Visa a garantia do princípio da igualdade na contratação e promoção de seus empregados, pertencentes às minorias.	Lindon Johnson era efusivo defensor das Ações Afirmativas. Discursou em 1965 para os alunos de Harvard University.						

(local acronym Prouni) as an major instrument of inclusion policy. The latter has been examined by the Federal Supreme Court after three actions were brought claiming it was unconstitutional (actions referred to as ADIs 3330, 3314 and 3379.

At state level, Amazonas, Mato Grosso do Sul, Minas Gerais, and Rio de Janeiro have their own legislation governing affirmative action based on using the quota technique for university admissions. In Alagoas, the use of quotas (Universidade Federal) is regulated by Resolution 09/2004 – Cepe of 10 May 2004. In Brasília (Federal District), the subject is covered by a Universidade de Brasília social inclusion program (voted by the Council for Education, Research and Extension (local acronym Cepe), on 6 June 2003.In the state of São Paulo, the subject is governed by two decrees: State Decree 48.328/03 – setting up the Affirmative Action Program of the State of São Paulo, and State Decree 49.602/05 – under which Afro- descendants and candidates from public schools are awarded additional points in the scoring system for admission to the state's technical schools (locally ETEs) and technology faculties (locally Fatecs). The Municipality of Piracicaba stands out for having its own legislation in the form of Municipal Law 5.202/02. Lastly, we may note the original and very special technique devised in the state of São Paulo, where the admissions system for Universidade Estadual de Campinas (Unicamp) was remodeled on the lines of the good results obtained by the state's technology faculties (Fatecs). This system awards extra points to Afro-descendants, candidates from public schools, indigenous peoples and the "least favored", on condition that they reach the cut-off score. However, they do not use the method of setting aside a certain number of places, or quotas.

It has to be agreed that the need to meet the changing demands of the 21st century calls for persevering efforts from the State and poses the pressing need for civil society and all its elements to be involved in this task. What is required is joint effort, with constant cooperative and association to reach the high standards of the principles proclaimed in the declarations, in short the social community must mobilize to provide education at levels that meet international expectations.

References

Alexy, Robert. 2008. *Teoria dos Direitos Fundamentais.* Translated by Virgílio Afonso da Silva. São Paulo, Ed. Malheiros.

Almeida, Fernanda Dias Menezes .2004. *Discriminação e Ações Afirmativas.* Read at the 13th National Conference on Constitutional Law in São Paulo held by the Brazilian Constitutional Association, Instituto Pimenta Bueno, 19 ago.

Barba, José Bonifácio. 1997. *Educación para los derechos humanos.* Mexico, Fondo de Cultura Económica.

Brecher, Jeremy in Costello, Tim. 1998. *Global Village or Global Pillage.* Cambridge, Massachusetts, South End Press 2nd ed.

Burdeau, George. 1972. *Les Libertés Publiques.* Librairie Générale de Droit et de Jurisprudence, Paris, 4th ed.

Caggiano, Monica Herman S. 1982. "Proteção Jurídica dos Interesses Difusos". *EDP – Estudos de Direito Público*, Revista da Associação dos Advogados da Prefeitura do Município de São Paulo, n. 2, São Paulo.

_____. 1995. *Oposição na Política*, São Paulo, Angelotti.

_____. 2002. "Direitos Humanos e Aprendizado Cooperativo". *Um Olhar sobre Ética e Cidadania*, Coleção Reflexão Acadêmica, São Paulo, Ed. Mackenzie.

Code de Droit International dês Droits de l'Homme. 2005. Brussels, Bruylant.

Duverger, Maurice. 1996. *Constitutions et Documents Politiques*, Paris, PUF.

_____. 1971. *Institutions Politiques et Droit Constitutionnel*, Paris, PUF.

Ferrara, Alessandro. 1992. *Comunitarismo e Liberalismo*, Rome, Editori Riuniti.

Ferreira Filho, Manoel Gonçalves. 1999. *Direitos Humanos Fundamentais*, São Paulo, Saraiva 3rd ed.

Horta, Raul Machado. 1995. *Estudos de Direito Constitucional*, Belo Horizonte, Ed. Del Rey.

Jímenes, Maria Encarna García. 1998. *El Convenio Europeo de Derechos Humanos em el umbral del siglo XXI*, Valencia – Tirant lo Blanch, Universitat de Valencia.

Menezes, Paulo Lucena. 2001. *A Ação Afirmativa (Affirmative Action) no Direito Norte-Americano*, São Paulo, Ed. Revista dos Tribunais.

Montiel, Fernando Diaz. 2000. *Léxico de La Política.* Mexico, Fondo de Cultura Económica.

Moraes, Alexandre de. 2000. *Direitos Humanos Fundamentais.* 3. ed. São Paulo, Editora Atlas.

Nicolet, Claude. 1976. *Le métier de citoyen dans la Rome Républicaine*, Gallimard.

Oliveira, Almir de. 2000. *Curso de Direitos Humanos*, Rio de Janeiro, Ed. Forense.

Pinheiro, Carla. 2001. *Direito Internacional e Direitos Fundamentais*, São Paulo, Editora Atlas.

Rawls, John. 1997. *Uma Teoria da Justiça.* São Paulo, Martins Fontes, translated by Almiro Pisetta and Lenita M. R. Esteves.

Rials, Stéhane. 1988. *La declaration des droits de I'homme et du citoyen.* Paris, Collection Pluriel, Hachette.

Riquito, Ana Luisa; Ventura, Catarina Sampaio; Andrade, J. C. Vieira de; Canotilho, J. J. Gomes; Gorjão-Henriques, Miguel; Ramos, R. M. Moura & Moreira, Vital. 2001. *Carta dos Direitos Fundamentais da União Européia.* Coimbra, Portugal, Coimbra Editora.

Silva, José Afonso da. *Curso de Direito Constitucional Positivo.* São Paulo, Malheiros Editores.

States and the Right to Education in the 1988 Constitution: Comments on Federal Supreme Court Jurisprudence

Nina Beatriz Stocco Ranieri

Introduction

An examination of the right to education in relation to Brazil's legal system shows that remarkable progress has been made in protecting and promoting this right since the 1988 Constitution, not only in comparison with previous Brazilian constitutions, but also in relation to assurances of other social rights.

In terms of aggregating the public interest at national level, its provisions have had substantial legal and political consequences, and at least two main aspects may be identified in this respect. One relates to the federative covenant, which led to an effective and efficient form of cooperation in education; the other to the affirmation of the democratic dimension of the right to education. Both aspects are interrelated in as far as the State's duty is performed through integrated and coordinated actions of all federated entities in a cooperative federalism that that greatly favors extension of the right to education on different levels in both public and private spheres.

Indeed, a key change among the many that have taken place in Brazil since the enactment of the 1988 Constitution has been the considerable progress made in terms of the educational level of the population

in general and young people in particular. Elementary education is now almost universal[1]. The United Nations Educational, Scientific and Cultural Organization (Unesco) recently issued a report[2] on the initial years of elementary education in Brazil, which showed that only 10% of pupils are at private schools, and half of all pupils are enrolled in schools where most or all pupils' parents did not conclude primary school.

This is undoubtedly due to the public effort made to address recurring issues facing education in Brazil, such as universalization, funding, guaranteed access to education and permanence at school, and educational quality. The role of the public power over the last twenty years has been particularly relevant in light of Brazil's long history of backwardness in education, particularly public education, compared with other Latin American countries such as Argentina or Uruguay, where elementary education was universalized in the early 20th century (Fausto and Devoto, 2004, Marcilio, 2005, and others).

States and municipalities play a significant role in this process, and it may well be that the discrimination of educational competences introduced by the Federal Constitution has been effective by attributing educational responsibilities to federal entities on ascending levels of generality, together with the fact that they must spend fixed proportions of their tax revenues on education. This model benefits from the federative organization of education systems in Brazil, with its inherent principle of legislative and executive decentralization.

From a legal standpoint, there are many aspects to be analyzed in relation to the federative organization of education systems and its effects on the expansion of the means of accessing education and permanence in schools. One of the most complex aspects is the concurrent legislative powers of the member-states and the subtle distinction between general and supplementary educational norms, since there is virtually no distinction between national and regional interest in this field. The issue becomes thornier still on analyzing the involvement of member-states

1. Cf INEP/*Ministério da Educação Censo Escolar* – 2006 (Ministry of Education School Census), which reports approximately 56 million basic-education enrollments.

2. Cf. www unesco org br

in the economic domain, and in circumstances in which economic or consumer law overrides educational rights.

This article affords an overview of the problems inherent in the legislative activities of the states in education, as seen in the recent jurisprudence of the Federal Supreme Court (locally SFT) in situations involving abstract control of constitutionality. The aim, from the federal point of view, is to identify legal difficulties posed by implementing the normative program for education taken up by the 1988 Federal Constitution.

The relevance of this subject for a "democratic state under law" derives from the fact that education is both an individual and a collective right, as well as a qualification of an instrumental character. These two interrelated dimensions facilitate the extension of democracy, human rights and environmental protection as crucial values for the world today.

Anisio Teixeira notes that the democratic way of life is "[...] based on the assumption that nobody is so devoid of intelligence that they have no contribution to make to the institutions and society they belong to [...]" (Teixeira, 1968). He adds that this belief amounts to a political-social hypothesis: confirming it requires society to offer all individuals access to the means of developing their abilities in order to facilitate their utmost participation in the acts and institutions in which they spend their lives, and such involvement is an essential aspect of their dignity as human beings (Teixeira, 1968, p. 14).

The 1988 Federal Constitution and the Right to Education

On defining the duty of the State in relation to education (Article 205) and its commitment to national development while building a fair and caring society (Article 3), Brazil's constitution singles out education as a right of all citizens and a "legal good" due to its key role in the development of the individual and the exercise of other civil, political, economic, social and cultural rights.

Access to compulsory education free of charge is described as a subjective right (Article 208, § 1), and must therefore be universal. Secondary education too must be gradually universalized under the aegis of equity (Article 206), and other principles guiding educational activity.

To ensure exercise of this right in terms of the duty of the State, the Constitution sets forth precise responsibilities and competences for the federal, state and municipal education systems (Article 211), with their corresponding proportions of tax revenues to be spent on maintaining and developing education (articles 22, XXIV, 24, VIII, 30, VI, 208 and 212).

Under this model, based on emphasizing common generic competence, there is an indication of the levels of activity to be prioritized, although not exclusively, by each sphere of government except the federal authority, thus requiring and foregrounding the need for their respective systems to be organized under a collaborative regime, all the more so in relation to compulsory education. Therefore, elementary and preschool education are primarily incumbencies of the municipalities, while elementary and secondary education are for the states and the Federal District. The federal authority must act on a supplementary basis to ensure equality of educational opportunity and a minimum standard of quality by providing technical and financial assistance to the states, Federal District and municipalities at all levels of education (Article 211, § 1).

The competence of the federal authority ("the Union") as coordinator of national policy for education is reinforced by infraconstitutional legislation such as Article 8 of the 1996 Education Law (Law 9394 of 20.12.1996, aka LDB), which articulates the different levels of the education systems (basic and higher). This provision complements the generic norm in Article 211, paragraphs 2 and 3, which means that all political spheres shall act under federal coordination in preschool and elementary, middle and higher education and obey the following rule: municipalities prioritize preschool and elementary education, while states and the Federal District concentrate on elementary and secondary education. Not providing compulsory education or doing so irregularly involves a failure of duty of the competent authority (Article 208, § 3).

The Federal Constitution did not designate any particular level of education as priority for the activities of the federal authority, thus reinforcing its redistributive and supplementary action at all levels. In light of the broad scope of this attribution (all levels of education), the federal authority clearly has the attribution of providing higher education

should the other spheres of government fail to do so. Since the latter must prioritize basic education, federal competence in relation to higher education is residual.

The federal authority has the following attributions: intervening in states and the Federal District in the event of educational spending being less than the proportion of state tax revenue stipulated by Article 34, VII, "e"; organizing its educational system and that of the territories (Article 211, § 1); financing federal public education institutions, and authorizing and evaluating educational establishments in its system (Article 206, VII), including private ones (Article 209, II).

The states, the Federal District and the municipalities are left with the federative duties of implementing national and state education plans in light of the duty of the State to provide education (Article 205 of the 1988 Constitution), and pursuant to Articles 10 and 11 of the 1996 Education Law (LDB). They must spend at least 25% of tax revenues on organizing, maintaining and developing their education systems, (pursuant to Article 212), and must authorize and evaluate educational institutions in their ambits.

In terms of legislative competences, only the federal authority may legislate on the guidelines for, and basis of, national education (Federal Constitution, Article 22, XXIV), draw up the national plan for education (Article 214), and have concurrent competence with the states and the Federal District to legislate on education in general (Federal Constitution, Article 24, IX). In this scenario, the competence of states and municipalities is rather limited to residually enacting supplementary norms for their respective education systems.

In order to fulfill these duties, funds for the maintenance and development of education were assured through constitutionally mandated allocations of tax revenue pursuant to Article 212: the federal authority must allocate no less than 18% (eighteen percent), and states and municipalities no less than 25% (twenty-five per cent), including revenue from transfers.

In terms of funding compulsory education, in addition to Article 167, IV, which allows mandatory allocations of tax revenue to maintain and develop education, there is an efficient system of distributing pu-

blic funds based on numbers of enrollments in basic education school systems at state, municipal and Federal District levels. Distribution was initially ensured by the Elementary Education Development Fund (Fundef) under Constitutional Amendment n. 14 of 12.09.1996, which was subsequently broadened to include preschool and secondary education by what is now the Basic Education Development Fund (Fundeb) pursuant to Article 60 of the Transitional Constitutional Provisions Act, with the wording of Constitutional Amendment n. 53 of 19.12.2006.

The Federal Constitution also allows public funds to be allocated to community, religious or philanthropic schools for their support or development, on meeting conditions set forth in Article 213. This provision must obviously be taken together with Article 205, which states the duty of the State in relation to education, and notes the cooperation required of society. The point is underlined in Article 209, which allows the private sector to provide education pursuant to the general norms of education, with the public power authorizing such schools and evaluating their quality.

In relation to the right to education, now assured indirectly by the above mentioned constitutional provisions as a whole, a point of note is its recognition as an individual right, with the description of elementary education as a subjective public right in articles 205 and 208 § 1 respectively. Individuals, groups or occupational categories, associations, trade or professional bodies, trade unions or particular state entities such as the public attorney, may demand assurances or protection of individual, collective or public interest through procedures stipulated in the Federal Constitution itself, such as public civil action, writ of mandamus, writ of injunction, or "direct action of unconstitutionality by omission"[3].

I would also point out that the subjective right to education is extended to indeterminate groups of people, such as the future generations. Based on Article 6, this is clearly seen in the content of Article 210 (on the minimum contents of elementary education required to ensure common basic schooling and respect for national and regional cultural

3 In this respect, see Ranieri (1994).

and artistic values), and its § 2 (which, as an exception to the general rule of the use of the Portuguese language in elementary education, assures indigenous communities the right to use their mother tongues).

Moreover, the right to education benefits from constitutional guarantees associated with fundamental rights and guarantees as expressed in paragraph 1, of Article 5 and § IV, item IV of Article 60, and also international human rights norms assured by Article 5, § 2.

The above-mentioned constitutional provisions clearly pose important advances in terms of fostering, protecting and exercising the right to education, thus extending opportunities for individuals to take part in positing the values of the society to which they belong, as indicated above.

The Federal Supreme Court's recent jurisprudence in educational matters has followed this evolution, and the Court has undeniably expanded its activity in relation to implementing public educational policies, in particular to pre-school and elementary education as municipal competencies[4].

In relation to concurrent competencies of member-states however, its position has been wavering rather than consolidated, and we may well assume that the small number of complaints brought to the attention of the Court and the difficulties inherent to realization social rights are contributing factors. Overall, however, guarantees of means of access to education and permanence at school have been extended despite the narrow margin left to state legislative action by the Federal Constitution, and despite ambiguities, advances and setbacks.

This is the point I shall proceed to demonstrate, noting that the judgments listed below have been selected on the basis of the particu-

4. Cf. AI 455802 (rapporteur Justice Marco Aurélio, Federal Gazette (DOU) 05.03.2004), AI 411518 (rapporteur Justice Marco Aurélio, Federal Gazette (DOU) 03.03.2004), AI 475571-8 (rapporteur Justice Marco Aurélio, Federal Gazette (DOU) 31.03.2004), RE 401880 (rapporteur Justice Eros Grau, Federal Gazette (DOU) 28.09.2004), RE 402024 (rapporteur Justice Carlos Velloso, Federal Gazette (DOU) 27.10.2004), RE 410715 (rapporteur Justice Celso de Mello, Federal Gazette (DOU) 08.11.2005), RE 438493 (rapporteur Justice Joaquim Barbosa, Federal Gazette (DOU) 12.12.2005), RE 293412 (rapporteur Justice Eros Grau, Federal Gazette (DOU) 29.05.2006).

larities of the cases examined and the quality of debate in STF plenums, so there is no pretension of exhaustively covering all decisions related to this subject.

The Federal Supreme Court and Concurrent Competencies in Educational Matters

The case of monthly tuition fees. Guarantee of means of access to education and permanence in school, and private enterprise

ADI n. 007-7[5] Plaintiff: National Confederation of Educational Establishments (local acronym Confenem). Defendants: Governor of the State of Pernambuco and the Legislative Assembly of the State of Pernambuco. The plenary session of the Court by majority vote accepted the merits of the action, following the vote of rapporteur Justice Eros Grau[6].

The Confenen sought a ruling of unconstitutionality against the State of Pernambuco's Law 10 989/93 requiring monthly tuition fees to be paid by the last day of the month in which educational services had been provided.

The Governor stated that in the absence of federal law on payment of tuition fees, the State of Pernambucano was making full use of its legislative powers. The State Legislative Assembly noted that the law being challenged proposed only to avoid giving schools the privilege of being paid for their services before providing them.

The Court took the view that the constitutional issue concerned did not involve educational legislation, but contract law as an exclusive competence of the federal authority. It also ruled against the relevance of consumer relations to the situation examined, which would involve

5. ADIN – abbreviation referring to "Direct Action of Unconstitutionality".

6. Brazil, Federal Supreme Court, Summary: Direct Action of Unconstitutionality. Law 10.989/93 of the State of Pernambuco. Education: Non-Exclusive Public Service. Monthly Tuition Fees, Determination of Due Date, Contractual Law Issue, Defective Enactment, Rapporteur Justice Eros Grau, Federal Gazette (DOU) 24.02.2006.

the State's concurrent competence pursuant to Article 24, V of the Federal Constitution. The key argument for the court's majority on this vote (justices Nelson Jobim, Pertence Sepúlveda, Carlos Velloso, Marco Aurélio, Ellen Gracie, Cesar Peluso and Eros Grau) was that it would not be feasible to allow differential treatment of payment dates under the mantle of state particularities, despite possible abuses of economic power (an issue that had come before the Court in the early 1990s, in relation to federal law).

Noteworthy points in the debates were the distinctions made by Justice Eros Grau between "citizen" and "economic agent" in relation to contractual relationships with private education institutions:

> [...] the contractual relationship involved here is not one between a service provider and consumer only, but between the former and a user of a public service, or a citizen. Hence there is not purely and simply a consumer relationship, which would involve Article 24, clause V of the Constitution of Brazil. Consumer relations are accessible only to those able to go to the market carrying money sufficient to purchase goods and services, quite unlike the situation of a citizen who is a user of a public service (p. 15).

Moreover:

> [...] I must not reduce a citizen to an economic agent who enters into a relationship with producers of goods or services acting in the market, and having paid the cost or price of these goods or services, is then entitled to legal protection. No! The legal protection that users of public services are entitled to from the legal system exists prior to their going into the marketplace. They obtain it in as far as they participate in the State as citizens (p. 19).

Justice Carlos Britto disagreed and noted, "[...] the citizen, consumer and user of public services is cumulatively entitled to the State's protection. One does not exclude the other. The law protects citizens, consumers and users cumulatively". Furthermore he proposed that the State take market-related decisions and protect consumers, especially consumers of educational activity, which is a social right (p. 20 *et seq.*). This view was also taken by justices Celso de Mello and Joaquim Barbosa, who recognized the possibility of State intervention in the ambit of

contractual relations between proprietors of educational establishments and parents of pupils in order to protect and safeguard the right to education (p. 30 *et seq.*).

In this case, while not extending protection of the right to education, the contrast between the two opposing lines of thinking helps foster much needed discussion of market relations in education, regulatory approaches to abuse of economic power, and consumer relationships.

For one current of opinion, the key aspect is the prevalence of contractual relations of a general character within the competency of the federal authority, since the productive system is based on contracts and would be affected by legal uncertainty if it were to be subjected to differing standards in each state. However, the rapporteur's vote and subsequent statements show that classifying education as a "public service not exclusively provided by the State" is precisely a means of taking the issue beyond the purely contractual issues of private enterprise, so that the public nature of education undeniably predominates. This position, which Justice Eros Grau has consistently argued, is not considered sufficient here as grounds for the constitutionality of state legislation, as it was in other cases.

For the other current of opinion, issues relating to monthly tuition fees directly involve the right to education and hence citizenship too; as noted above, this does not exclude protecting consumers. Regulation in this respect would favor protection for pupils, particularly needy ones.

There is no doubting that the latter position, although in a minority, poses a simpler path toward greater assurance of access to education. The public nature of education stems from its democratic character and favors the expansion of opportunities for the exercise of citizenship, irrespective of its being conceptualized as a public service. Furthermore, private education is conditioned by state supervision and evaluation, and subject to general norms pursuant to Article 209 of the Constitution.

The same debate had been developed previously but led to a different outcome in the judgment of ADIN 1 266-5, as I shall now show.

The case of school supplies. Guaranteed access to education and permanence at school, and private enterprise

ADIN 1.266-5/BA. Plaintiff: National Confederation of Educational Establishments (Confenen): Governor of the State of Bahia and the Legislature of the State of Bahia. The majority of the Court's plenum voted with rapporteur Justice Eros Grau to dismiss the action[7].

On the grounds of the Federal Constitution's Article 103 (IX), Confenen asked the court to declare the unconstitutionality of the State of Bahia's Law 6586/94, which regulates use of school supplies and textbooks by private basic education establishments.

The purpose of the law was to ensure students and their parents have access to education and permanence in schools, specifically in relation to material to be used during class time, such as notification of quantity, barring indication of preference for brand or model of any item, possibility of delivery of material in a single lot or in portions etc.

In this respect, the rapporteur stated: "[...] educational services, whether provided by the State or privately, are public services but not but not exclusively so, so they may be provided by the private sector irrespective of concession, permission or authorization. However, education is certainly a public service. The member-state has competence to legislate on the matter under Article 24, IX of the Constitution" (ADIN 1 266-5, p. 102). On the other hand, Justice Joaquim Barbosa argued that although education was not by its nature a public service as argued by the rapporteur, there remained the concurrent competence of the Sate to legislate on education, given its nature as a fundamental right (p. 107).

In this case, the Court affirmed the concurrent competence of member States in favor of greater protection for fundamental rights, even when interfering in private relations. In similar situations, it subsequently ruled in the same sense in the judgments proffered in ADIN

7. Brazil, Federal Supreme Court, Summary: Direct Action of Unconstitutionality. Law 6 584/94 of the State of Bahia. Adoption of School Suplies and Text Books by Private Educational Establihsments. Public Service. Formal Defect. Non-Existence. Rapporteur Justice Eros Grau, Federal Gazette (Federal Gazette (DOU) 23.09.2005.

682-7 concerning the State of Paraná's Law 9 346/90, the Gazette of the Judiciary (DJ) 11.05.2007, and ADIN 3 669-6 relating to District Law 3 694 of 08.11.2005 in Gazette of the Judiciary (DJ) 29.06.2007, and other decisions.

An important point to note is the Court's view in this case was not taken as precedent for the judgment of the abovementioned ADIN 1 007-7/PE. In the latter case, it decided that Article 209 of the Federal Constitution (relating to the right to freedom of educational activity for private enterprise) was not contradicted by the State of Bahia, excepting the vote of Justice Marco Aurélio (p. 104).

The oddest aspect of this was that the rapporteur's argument on the legal nature of education as a non-exclusive public service, although not accepted by the other justices, was taken as the grounds for their vote to bar undue interference of state law in the private domain.

In both this case and the earlier one, debate on this particular point – education as a public non-exclusive service – led to a number of different inconclusive positions being taken, since it was not the specific purpose of the issue brought before the court.

Justice Carlos Britto, for example, found that "public health and education are ambivalently state and private activities, or mixed public and private, since two types of provider are possible, thus excluding both from the field of public services, if only because Article 175 of the Constitution clearly states that a public service is one undertaken by the State (pp. 105-106). However Justice Sepúlveda concluded that in constitutional terms, "private education is not a public service; it is a private activity, but since the right to education is involved, it is subject to government regulations" (p. 107). Justice Joaquim Barbosa argued: "the fundamental nature of this right leads to the legitimating of the State's regulation of this service" (p. 108). Justice Gilmar Mendes, however, believed that it was not necessary to make education into a public service, or to reach a middle term, "because there is a common understanding that it is liable to regulation by the State" (p. 108).

It would appear that this debate will be reproduced in similar situations. The problem posed in the definition concerns the tortuous balance between a "state under the rule of law" and "social or welfare state".

While "democratic state under law" is a formally legal concept, "social or welfare state" is not. The limitations of the former are technical in nature, and concern the preservation of the state/society dichotomy, hence the circumscription of the phenomenon of the power to its constitutional context. Under a "social or welfare state" on the contrary, the State is assumed to be politically active and interventionist, and there is almost no cognizance of such a dichotomy. On this basis, certain interventions may well go beyond the limits of control exerted by a "democratic state under law", thus altering the general character of the norms for the sake of legitimating social aspirations, and relativizing the restraining functions of these norms under the traditional constitutional model[8].

A similar situation is seen in the case commented below.

The case of half-price student admission to sporting, cultural, leisure or entertainment events. Guaranteed access to education and intervention in the economic domain

ADIN 1.950-3/SP. Plaintiff: National Confederation of Commerce (CNC). Defendant: Governor of the State of São Paulo and the Legislative Assembly of the State of São Paulo . The majority of the Court's plenum voted with rapporteur Justice Eros Grau to dismiss the action[9].

In the case of ADIN 1.950-3 concerning Law 7.844/92 of the State of São Paulo (03.11.2005), there was also discussion of State intervention in the economic order, given its duty of guaranteeing access to education and culture (Articles 23, V, 205, 208, 215 and 217), and the outcome favored extension of the right to education.

8. Cf. Nina Ranieri, *Educação Superior, Direito e Estado*, São Paulo, Edusp/Fapesp, 2000, p. 269.

9. Brazil, Federal Supreme Court, Summary: Direct Action of Unconstitutionality. Law 7 844/92 of the State of São Paulo. Half-price Admission for Students Regularly Enrolled in Educational Establishments Admission to Venues for Entertainment, Sports, Culture and Leisure. Concurrent Competence Between the Federal Authority, Member-States and the Federal District to Legislate on Economic Law. Constitutionality, Free Enterrpise and the Economic Order. Market. State Intervention in the Economy, Rapporteur Justice Eros Grau, Federal Gazette (DOU) 02.06.2006.

The law in question enables students regularly enrolled at schools providing basic education in the state of São Paulo to pay half-price admission to sporting, cultural or leisure events. The National Confederation of Commerce (CNC) brought the case ("direct action") alleging that the above law contradicted articles 170 and 174 of the Federal Constitution due to the member-state's undue intervention in the economic domain.

Opposing the reasoning that had determined the unconstitutionality of the above mentioned law of the State of Pernambuco (ADIN 1007), the Court recognized that the right to education prevailed over that of private enterprise, and declared the constitutionality of the concurrent competence of the state under Article 24, I. The majority voted with rapporteur Justice Eros Grau.

Stating that it was not a matter of civil law – unlike the case of the law of the state of Pernambuco – Justice Eros Grau favored preserving the collective interest, and argued as follows:

> In this case, while the Constitution assures the rights of private enterprise, it also requires a member-state to take every measure to enable effective exercise of the right to education, culture and sport (in the Constitution's articles 23, item V, 205, 208, 215 and 217, § 3). Now the balance between these principles and rules must be preserved in the interest of the collectivity as the primary public interest. No major difficulties are posed by overcoming opposition between the company's aim of making profits and accumulating wealth and the right of access to culture, sport and leisure as a means of complementing students' schooling (p. 63).

A key feature of the debate was the contrast between the positions of justices Marco Aurélio and Caesar Peluso in relation to undue intervention by the State in setting prices for these services. A noteworthy argument in reply to the comments of Justice Peluso was presented by the rapporteur, who asserted that half-price student admission is part of Brazilian culture and should therefore be maintained, an argument also accepted by justices Carlos Britto and Sepulveda Pertence (pp. 73-74).

The case of graduate programs in the field of health. Concurrent competence and federative organization of education systems

ADIN 3.098/SP. Plaintiff: Governor of the State of São Paulo. Defendant: the Legislature of the State of São Paulo. The Court's plenum unanimously dismissed the action[10].

In this case, unlike previous ones, the case before the STF involved conciliation between a "constitutional state under law" and a "social or welfare state" that was not so equivocal. The blatant unconstitutionality here facilitated the Court's position being based exclusively on educational norms.

The State of São Paulo's Law 10860 (31.08.2001) set forth requirements for creating, authorizing, evaluating and recognizing graduate programs and their functioning in the field of health care, to be provided by public and private higher education institutions; the law determined that applications to start such courses submitted by universities and other higher education institutions would be forwarded to the State Education Council after being submitted to prior assessment by the State Health Council.

The plaintiff argued on the grounds of the Federal Constitution's Article 22, XXIV, and 24, IX, paragraphs 1 and 2, citing violation of the federal authority's competence, hence of Article 209 of the Federal Constitution too. This interpretation was supported by the rapporteur Justice Carlos Velloso, who confirmed that state law had exceeded its supplementary concurrent competence, since the 1996 Education Law (LDB) was already in existence when it was enacted and it was not related to local specificities. It also involved institutions outside São Paulo's statewide education system that spilled over into the sphere of competence of the federal authority. In these terms, it was clear that Law 10860 (31.08.2001), of the State of São Paulo did not cover matters of concurrent or supplementary competence, or full competence, due to the existence of a lacuna[11].

10. Brazil, Supreme Federal Court. Summary: Constitutional. Education. Law of Guidelines and Bases of Education. Law 9.394 of 1996. Concurrent Legislative Competence: Cf. Article 24. Non-Cumulative or Supplementary State Competence and Cumulative Concurrent State Competence, rapporteur Justice Carlos Velloso, Federal Gazette (DOU) 10.03.2006.

11. A similar situation was also examined by the Federal Supreme Court in the case of

A key feature of the rapporteur's statement on voting was its clear analysis of the Federal Constitution's Article 24 relating to cases in which federal law sets aside states' right to supplementary measures, and state law fills the lacuna left by federal legislation, exercising full legislative competence to attend to state particularities. In this case, the 1996 Education Law (Law 9 394, or LDB, 20.12.1996) ruled against the possibility of state law on these matters.

In this respect, Justice Nelson Jobim noted "a kind of reserved segment of the market in Sao Paulo in relation to authorization for these courses entering the system [which] would create an odd situation: federal universities would be subject to authorization from the Health Council of the state of São Paulo" (p. 117).

A key point in the debate was the position taken by Justice Carlos Britto, which was restrictive in relation to the ambit of concurrent competence of the states concerning the role of private enterprise in education, pursuant the Constitution's Article 209, I. He believed the requirement to comply with general norms of national education would exclude states from legislative competence to ensure compliance of private activities in terms of education (p. 116).

This was an isolated position, which if consolidated would create difficulties for member states setting norms for their education systems (which in basic education, included private educational institutions, cf. Article 17 of the 1996 Education Law), as guaranteed by Article 10, V of the 1996 Education Law, and performing their duties arising from the Federal Constitution's Article 23, V.

The case of issuing a certificate of completion of secondary schooling irrespective of the number of classes attended by students in the third year of secondary education; Principle of equality and guarantee of access to higher education

the direct action number 1 399-8 (São Paulo) pleading the unconstitutionality of State Law 9164/95 requiring specific training for the exercise of the teaching profession. Rapporteur Justice Mauricio Correa, 03.03.2004, Federal Gazette of the Judiciary (DJU) 11.06.2004.

ADIN 2.667-4/DF. Plaintiff: National Confederation of Educational Establishments (Confenen): Defendant: the Legislative Assembly of the Federal District. The Court's plenum unanimously voted with rapporteur Justice Celso de Mello to rule in favor of the action[12].

The Federal District's Law 2912 (February 22, 2002) determined that schools must issue a certificate of completion of secondary education to third-grade secondary-school students irrespective of the number of classes they attended, if they could show they had passed an admission exam for enrollment at a higher education center. The law also stated that diplomas must be issued in good time, so that students could enroll for the degree course for which they were qualified.

The law was vetoed by the Governor on the grounds of the Federal Constitution's Article 22, XXIV. The National Confederation of Educational Establishments (Confenen), irrespective of prior request for information forwarded to the Legislative Assembly, brought a direct action pleading unconstitutionality and sought a court order with the aim of challenging said law. The order was granted with retroactive effect by the court's plenum unanimously voting with rapporteur Justice Celso de Mello.

Rapporteur Justice Celso de Mello made the court order on the grounds that the Federal District's regulatory intervention was unnecessary given the existence of national legislation on the subject and the absence of local particularities that might justify the need for the Federal District to cater for them.

12. Brazil, Federal Supreme Court, Summary: Direct Action for Unconstitutionality – Federal District Law on the Issue of Course Completion Certificates and Authorizes the Issue of School Transcripts to Pupils in the Third Grase of Secondary Education Proding Proof of Passing Examinations for Admission to a Higher Education Course – District Law Usurps Legislative Competence Granted to the Federal Authority by the Constitution of the Republic – Points on Lacune that may be Filled – Norm Lacking the Necessary Coefficient of Reasonableness – Offensive to the Principle of Proportionality – Legislative Activity Exercised with Misuse of Power – Legal Plausibility of Request – Acceptance of Court Order with Retroactive Effect. Usurpation of Legislative Competence, when Practiced by any State Entity, Described as Act of Constitutional Infringement, rapporteur Justice Celso de Mello, Federal Gazette (DOU) 12 03 2004.

His vote emphasized the contradiction with Law 9 394/96 on requirement for pupils to cover certain minimum contents in 800 hours of class time over 200 days of actual school attendance (as previously emphasized by the National Education Council), and the consequent discriminatory treatment of certain Brazilian citizens, against the principle of isonomy.

Moreover, he noted that the Federal District's legislature had failed to meet minimum standards of reasonableness based on the principle of proportionality, which the jurisprudence of the Court described as a parameter for gauging the material constitutionality of states' acts. "There cannot be no denying that legal norms [...] must be in accordance with the chapter which recognizes in its material dimension the principle of 'substantive due process of law' (Article 5 , LIV), [...]."

The norm in the Constitution's Article 5 LIV, he reaffirmed, was a decisive hurdle and a factor delegitimizing legislative acts having unreasonable or arbitrary content, as in this case.

In the case of education, he noted, there was no doubting the national scope of the 1996 Education Law (Law 9 394/96) and the impossibility of supplementary state law. The Court stated that it was vehemently against the "misuse of legislative power " committed by the Federal District's legislature and emphasized the notion that the legislative prerogative granted the State is an essentially limited legal attribution.

Conclusion

In the five cases commented, I have noted that the cases brought to the STF seeking abstract normative control raised more discussion on matters of economic law, civil law, and consumer rights issues related to educational problems than analysis of this specific content itself *vis a vis* concurrent state competence.

It is true that are tenuous and dubious boundaries between the 1966 Education Law, general educational norms, and any normative supplementation member-states may enact – particularly when there is no blatant unconstitutionality involved. Nevertheless, the Court has not always viewed the purpose of state law as a factor allowing for in-

terpretation favoring the right to education, although this position is apparently not the rule.

This was the case, for example in terms of greater restriction on the exercise of concurrent state competence in the case referred to as Direct Action of Unconstitutionality n. 1 007-7, judged 31.08.05, which examined the constitutionality of the State of Pernambuco's Law 10 989 (07.12.1993) in light of issues the Court saw as pertaining to civil law.

However, the Court ruled against a direct action pleading unconstitutionality of the State of Bahia's Law 6 586/94 (ADIN n. 1 266-5, 06.04.05), and stated that the educational aspect prevailed over other aspects of economic law, a position subsequently reaffirmed in Direct Action for Unconstitutionality n. 1 950-3 brought against the State of São Paulo's Law 7844/92 (03.11.2005).

I also note that in situations where state legislative action is clearly unconstitutional and in violation of the Federal Constitution's Article 24, IX, § 2 and 3 (as shown by Direct Action of Unconstitutionality n. 3 098-1 in relation to the State of São Paulo's Law 10 860 of 31.08.2001), the educational has been more easily focused. From this angle, a paradigmatic judgment was proffered in the case of Direct Action for Unconstitutionality 2667-4 brought against the Federal District's Law 2912 (February 22, 2002).

In all these cases, however, despite ambiguity, advances and retreats, STF jurisprudence has led to significant advances in protecting the right to education and defining the scope and limits of state action, in particular through its discussion of the possibility of State intervention in the economic domain to materialize the educational program set forth by the Constitution.

Making a "democratic state under law" compatible with a "social state" or "welfare state" is not easy. On the one hand, it involves ensuring shared values are accepted by the groups involved, which is an eminently political issue. On the other, there must a strictly constitutional framework guiding the activity of the State, which is an exclusively legal problem.

I have shown elsewhere that the great difficulty in ensuring this compatibility is preventing the so-called social functions of the State

becoming dominant functions, which would also be instigated by sheer formalism. This is the challenge that arises when formulating and implementing educational policy in Brazil, although not uniquely or exclusively for education. The 1988 Federal Constitution requires the State to assume responsibility for social transformation, and a precondition for this function is articulating and qualifying public and individual interests in line with the principle of the "social state".

There is no doubt that the record of the Supreme Court provide a privileged overview of this situation, as I have sought to show.

References

Inep/Ministério da Educação. 2006. Censo Escolar [Ministry of Education. School Census].

Fausto, Boris & Devoto Fernando. 2004. *Brasil e Argentina – Um Ensaio de Historia Comparada (1850-2002)*. São Paulo, Editora 34, pp. 50 *et seq.*

ldb. Lei de Diretrizes e Bases da Educação (Law 9.394, 20.12.1996)

Marcílio, Maria Luíza. 2005. *História da Educação em São Paulo e no Brasil.* São Paulo, Imprensa Oficial.

Ranieri, Nina. 1994. *Direito ao Desenvolvimento e Direito à Educação – Relações de Realização e Tutela.* Cadernos de Direito Constitucional e Ciência Política, v. 2, n. 6, pp. 124-134.

_____. 2000. *Educação Superior, Direito e Estado.* São Paulo, Edusp/Fapesp, p. 269.

Teixeira, Anísio. 1968. *A Educação é um Direito.* São Paulo, Cia. Editora Nacional, p. 13.

Unesco www.unesco.org.br. Accessed 10.06.2008.

Judicial Power and the Right to Education

Eduardo Pannunzio

Introduction

In a democracy based on tripartite separation of the functions of the State, the judiciary has a key role in ensuring that human rights are respected in endangered situations and consummated violations remedied.

The purpose of this study is to analyze existing mechanisms for the performance of judicial functions, as well as those of a "quasi-judicial" character (given their similar purpose) in relation to a specific human right: the right to education.

The study thus begins by investigating the "justiciability" of the right to education, since, as is the case for other economic, social and cultural rights, the belief that realization of this right always depends on the State's positive performance prompts allegations that the judiciary does not have the legitimacy or competence to take decisions direct or indirectly affecting the formulation of public policies or the State's allocations of budget funds.

Having laid the grounds for the protagonism of the judiciary in this field, I proceed to present an overview of the principal judicial and quasi-judicial mechanisms available for enforcing the right to education domestically and internationally.

The third part of the study appraises the record of the bodies responsible for the functioning of these mechanisms. In the domestic sphere, this is done by examining the Supreme Federal Court (STF) jurisprudence from the promulgation of the 1988 Federal Constitution through to the present day. On the international level, I shall analyze decisions made by bodies associated with the United Nations Organization (UNO) and the Organization of American States (OAS).

Finally, this study ends by reviewing certain conclusions reached on the basis of the points made in the preceding sections.

Justiciability of the Right to Education

More than 50 years ago, the Universal Declaration of Human Rights officially recognized education as a *human right*[1]. This conception was confirmed and further developed in several other international instruments published in the following decades, in particular the International Covenant on Economic, Social and Cultural Rights (ICESCR) of the United Nations Organization (UNO)[2], signed in 1966 and incorporated to Brazil's legal system in 1992 by the publication of Decree 591.

The same process took place on the legal level internally. The Federal Constitution not only covered rights arising from treaties ratified by Brazil[3], which of course includes the right to education as stated in the ICESCR and other documents, but also elevated education to the category of a fundamental right included in the list of[4] social rights in Title II, which is devoted precisley to "Fundamental Rights and Guarantees".

This classification has a number of consequences, particularly in relation to holders of this right enjoying access to the judiciary, as we shall see below.

1. Cf. Universal declaration of the Human Rights, approved by the Organization General Assembly Resolution of the United Nations (ONU) n the 217 The (III), of 10.12.1948, Article 26.

2. Cf. International pact of Economic, Social and Cultural Rights, promulgated by the Decree n the 591/92, Article 13.

3. Cf. Federal Constitution, article. 5, § 2.

4. *Idem*, Article 6.

The aggregate value of the human rights approach ??

Recognition of education as a human right is not merely rhetorical. On the contrary, it implies subjection to a specific conceptual and normative framework, with important ramifications. For the purposes of this study, we may mention two of them.

Firstly, by treating a certain utility or service as a human right, it can no longer be seen as a charitable concession (Office of the United Nations High Commissioner for Human Rights, 2008c) or a *xxxx* commodity to be distributed under the rules of the market (Leary, 2003, pp. 481-493, esp. 482), but as a particularly strong entitlement (Osmani, Nowak and Hunt, 2008) enjoyed by individuals as a question of law??.*xxxx*

As noted by Dworkin (1977, p. 90), a proposition describing a right constitutes a principled argument. A right calls for its application under a requirement of equity, justice or any other dimension of morality, irrespective of any circumstance favoring or prejudicing the attainment of some collective purposes of an economic, political or social character (Dworkin, 1977, p. 22 and 91). This is surely the case of human rights, based on what this philosopher calls "one of the most fundamental of all moral principles": the principle of shared humanity, that every human life has a distinct and equal inherent value (Dworkin, 2003).

This does not mean, obviously, that rights are absolute, in the sense that they must invariably triumph; after all, this would conflict with Dworkin's notion of principles, which unlike rules are not applicable on an all-or-nothing basis (Dworkin, 1977, p. 24). However, particularly when we are dealing with rights in relation to the State, the "weight" of these entitlements *vis-à-vis* other political objectives is especially strong. Dworkin himself is able to venture only three cases in which a right of this nature might be subject to some limitation: when it is shown that the values protected by the right are not actually endangered; when it may prejudice the exercise of another equally important right; Or, finally, when its concretization may incur a high and totally exceptional cost for the community (Dworkin, 1977, p. 200).

In short: When human rights are at stake, it is assumed that they prevail over considerations of another order. This statement itself

amounts to a principle without which there is no means of comprehending – much less, justifying – the political practice of a community that has decided to seriously incorporate the ideal of human rights.

A second ramification to be emphasized in the present study is that classifying education as a human right means it is subject to *principles* common to "human rights law" (Robinson, 2008).

This approach should assure a major role for the principle of non-discrimination in education-related decisions, such as emphasizing the need to foster equality between individuals and therefore ensuring special attention for more vulnerable social groups (Robinson, 2008).

Participation, as another human rights principle of great importance for education (Robinson, 2008), determines that educational policies should be devised, executed and monitored with the active and effective involvement of those who will be affected by them, and by civil society in general.

Even more significantly, a human rights approach to education poses the principle of *accountability* (Robinson, 2008). If educational policies are related to rights, their substantive and procedural aspects are not subject to the discretionary will of governments. On the contrary, they are bound by parameters that must be followed as legal obligations and which, therefore, may be claimed by individuals as legal entitlements.

It is In this sense that we usually speak of the "justiciability" of human rights, in other words, the possibility of their being invoked before the judiciary (or other bodies having similar functions) and applied by judges (Sheinin, 2001, pp. 29-54, esp. 29), for the benefit of their holders.

Therefore by asserting education as a human right implies we are recognizing that whenever this entitlement is endangered or violated, holders may appeal to the judiciary for a decision capable of ensuring the right prevails.

Resistance?? to the justicability of social rights

In the field of civil and political human rights (such the right to physical integrity, freedom of movement or religious freedom), the idea that they are fully subject to scrutiny by the judiciary appears to have been settled. Nevertheless, for economic, social and cultural human ri-

ghts such as the right to education, justiciability is not always accepted without some resistance.

This distinct treatment arises from a widespread belief that civil and political rights may act as obstacles to state action, thus preserving a private sphere for individuals and that in this context enacting laws would be sufficient to protect them, whereas economic, social and cultural rights would additionally require positive governmental intervention to create conditions required for their realization (Arambulo, 1999, p. 60). From this premise there follows the conclusion that courts would not have legitimacy or competence to judge cases related to this latter class of rights, since they involve making public policy decisions or allocating funds (Hunt, 1996, pp. 24-26), the latter being activities that must be left almost exclusively to the discretionary power of governments.

But this is a weak argument in light of the *typology of duties of the State* initially developed by Henry Shue. According to his "tripartite typology of duties", the recognition of a "basic right" gives rise to duties for the State on three different levels: *a.* a *duty to avoid* depriving the holder of a right of the conditions required to exercise it; *b.* a *duty to protect* individuals from having their right violated by others; and *c.* a *duty to help* those unable to enjoy the right by themselves (Shue, 1996, p. 52 *et seq.*).

Despite Shue's concept of "basic rights" as rights whose realization is "essential for the realization of all other rights" (Shue, 1996, p. 19) not necessarily corresponding to that of human rights, the theory seems to be perfectly approriate for application to the latter.Asbjørn Eide, for example, successfully developed these ideas to show that the State's duties in relation to economic, social and cultural rights include obligations on three different levels: *a. respecting* individual resources, allowing people who can to meet their needs for themselves; *b. protecting* individuals from interference by "aggressive subjects" in the exercise of their freedom of action; and *c. helping and satisfying* those who do not have enough resources to meet their needs (Eide, 2001, pp. 9-28, esp. 23-24).

The typology holds true for both civil and political rights (which may be related to Shue's concepts of "security" and "liberty" rights) and

economic, social and cultural rights (which fit in his "subsistence rights" proposal). The right to personal security[5], for example, confers on the State an obligation *a.* to avoid violating the personal security of any individual; *b.* to protect individuals against violations by others; and *c.* to help those whose personal security has been violated or are exposed to violation.

Obligation "a" may be illustrated with ?? the determination for the State to take measures to ensure that its agents do not interfere in the personal security of individuals, other than in cases of doing so lawfully. The structuring and functioning of an efficient public safety system to protect individual safety may arise from obligation "b". Finally, the State would also have the duty to hold a serious investigation when anyone has their right violated and to assure the victim some form of compensation, in light of obligation "c".

The same focus may be applied to economic, social and cultural rights. The right to education requires, for example, that the State *a.* should respect parents' freedom to choose their children's schools; *b.* protect individuals against actions by others that may endanger their right to education, such as schools' abusive hikes of monthly tuition fees; and *c.* provide a free public education system, or scholarships for private institutions, for those unable to afford their own education.

Clearly, therefore, both categories of right require the State's positive performance in order to be fully realized, particularly at the secondary and tertiary levels of duties. It would be oversimplifying to hold that civil and political rights may be satisfied merely by legislation, or that economic, social and cultural rights *always* require governments to play an active role. As shown above, the State may sometimes abstain from practicing a certain act (in the example given, avoiding barriers to parents' freedom to choose their childrens's schools) to pay deference to this class of rights, especially when the primary level of duties is being focused.

5. See International Covenant of Civil and Political Rights, promulgated by Decree 592/92, Article 9.

Whenever attempting to compare the State's obligations in relation to these two classes of right, it is crucial to ensure that the same level of duties is being analyzed. Concentrating on the primary level when examining civil and political rights, but the tertiary level when economic, social and cultural rights are at stake amounts to preferring one class of rights in detriment of another, under a flimsy pretext.

However, that is what those who refuse to admit justiciability of social economic and cultural rights seem to be doing. Ultimately, problems of the legitimacy and competence of courts to rule on the State's obligations in relation to the secondary and tertiary levels are not exclusive to this class of rights, and also apply to civil and political rights. If both classes have their correlatives duties analyzed at the same level, the difficulties of justiciability will be common to both.

For illustrative purposes, note what takes place in relation to the right to personal safety??. If the State fails in its duty of protecting and thus individuals start to be affected by violent acts in their everyday life, how can the courts solve this problem without considering public policy issues? If prisoners are serving their sentences in overcrowded penitentiaries because the State stopped building new ones, and in this context are subject to cruel, inhuman or degrading treatment, how may this obvious violation of article 7 of the International Covenant on Civil and Political Rights be remedied without considering public policy issues?

This dilemma, however, is far from being unsolvable. The fact that the Judiciary has to appraise the compatibility of public policies and legal parameters does not mean that it will have to formulate decisions in this field and thus replace elected governments in their the role. As Paul Hunt points out, on the basis of Mureinik's lesson, "[...] The courts' function is not to quash an illegal decision and substiute it with their own view. [...] they would be *reviewing* political choices rather than making them" (Hunt, 1996, p. 67).

It is a question of a judgment similar in kind to the decisions of Brazil's STF (supreme court) which examines the constitutionality of a law. By ruling that a certain normative enactment is unconstitutional, the court withdraws its effectiveness, but does not enact a new law its place, since this incumbency is primarily attributed to the National

Congress. The same applies to the field of public policies: a ruling of unconstitutionality will not lead to the judiciary's prevailing over the Executive, but it will ensure that choices made in the ambit of this Power are compatible with the primacy of human rights.

In short: even if issues of public policy or allocation of funds are raised, economic, social and cultural rights – including the right to education, obviously – should be fully subject to adjudication. This is an inevitable consequence of Brazil's recognizing the right to education as a human right.

Judicial and Quasi-judicial Machinery for Protecting the Right to Education

Having set out the premises for the justiciability of the right to education, let us now see what judicial or quais-judicial machinery[6] may be accessed by right holders both domestically and internationally.

Note that the following analysis does not aim to present an exhaustive list but rather just sketch an overview of the main channels of access for claiming the right to education.

Domestic machinery

Most of the machinery available under Brazilian law is not exclusive to the right to education, and is usually applicable to subjective public rights in general. The sole exception is perhaps the judicial action stipulated in Article 5, § 3 of the General Law of Education, or LDB, (Law 9.394/96), which states: "Any of the parties mentioned in the *main body* of this article [citizen, group of citizens, community association, union organization, trade or professional association or another legally constituted entity, and the Public Prosecutor] has legitimacy to bring an action to the Judiciary in the case of § 2 of Article 208 of the Federal

6. "Quasi-judicial" mechanisms means those that may have the competence of deciding on application of the right to education, but lack the powers to enforce their decision on their own account, and so depend on the cooperation of another body or the State itself.

Constitution[7], and the corresponding judicial action shall be summary proceeding free of charge."

Thus, the right to education may be protected by the following *judicial machinery*:

a. *Writ of mandamus:* stipulated in the Federal Constitution and regulated by Law n. 1.533/51, a writ of mandamus may be individual or collective and its aim is to protect an "undisputed" right (in other words, not requiring judical inquiry), not supported by habeas corpus, whenever anybody is affected by a violation or has reasonably gounds to fear they will be so affected[8] [9] [10].
b. *Writ of injunction*: also foreseen in the Constitution, the writ of injunction applies to cases in which the absence of a regulatory norm undermines the exercise of constitutional rights and liberties, such as the right to education, and the judiciary's role is to point to regulations applicable until such time as a norm be enacted[11] [12].

7. Federal Constitution, article. 208: "The State's duty in relation to education shall be realized by means of the guarantee of: – free and compulsory elementary education, also ensuring provision free of charge for all those who did not have access to it at the proper age; II – gradual universalization of free secondary education; III – specialized educational services for disadvantaged persons, preferably in the regular school system; IV – day-care and pre-school education for children aged up to 5 (five) years of age; V – access to the highest levels of education, research and artistic creation, depending on the ability of each individual; VI – offer of regular night school programs suited to the conditions of pupils; VII – assistance for pupils in elementary education through supplementary programs for learning material, transportation, meals/ snacks and health care. § 1 it – Access to free compulsory education is a subjective public right. § 2 Any failure to provide compulsory education by the public power, or its doing so irregularly involves responsibility of the competent authority. § 3 The public power is charged with maintaining a current census of pupils in elementary education and overseeing their proper school attendance together with their parents or guardians.

8. *dem*, Article 5, LXX.

9. See Federal Constitution, Article 5, LXIX.

10. Cf. Law 1.533/51, Article 1. If the right holder is a child or adolescent, the Children and Adolescents Statute (Law 8.069/90) expressly stipulates the possibility of applying for an injunction. See Law 8.069/90, Article 212, § 2.

11. Cf. Federal Constitution, article 5, LXXI.

12. There is at least one case in the STF of a court order related to the right to education. This is MI 727, brought by a postgraduate student who claimed that the absence of federal

c. Popular action ?? : also based on the constitution, the aim of a popular action is to anull an act harmful to public property or that of an entity in which the State is a participant, or to administrative morality, the environment or historical and cultural[13] heritage, and such an action may be brought by any citizen. These actions are regulated by Law n. 4.717/65;

d. Public civil action ?? : although the Federal Constitution places this action among the attributions of the Public Prosecutor as a means of upholding diffuse and collective interests, Law n. 7.347/85 broadened the range of those legitimated to bring such actions by extending it to associations that have been in existence for more than one year[14] [15].

e. Direct action of unconstitutionality ??: of the original competence of the Supreme Court, a direct action of unconstitutionality is regulated by Law n. 9.868/99 and its purpose is to declare a federal or state normative act or law incompatible with the provisions of the Constitution, including those concerning the right to education[16]. However, few entities are legitimated to use them[17], and they are beyond the direct reach of citizens and most civil-society entities.

f. Claim of ?? noncompliance with fundamental precept: this claim (locally ADPF) is to prevent or remedy harm to a "fundamental precept"[18] resulting from an act of the public power, when there

legislation guaranteeing students the right to half-price fares on interstate buses prejudiced his access to education. The Court did not uphold the order, alleging that the constitution did not impose on the State the duty of legislating on benefits granted students in relation to interstate transportation. See STF, MI 727, reporting judge Eros Grau, decision by individual judge 4.10.2005, available at http://www.stf.gov.br, accessed 21.6.2008.

13. Cf. Federal Constitution, article 5, LXXIII.

14. Cf. Law 7.347/85, Article 5, V.

15. *Idem*, Article 129, III.

16. Cf. Federal Constitution, article. 102, I, "a".

17. *Idem*, Article 103.

18. Neither the Federal Constitution nor Law 9.882/99 define "fundamental precept", but as Judge Gilmar Mendes remarked during the judgement of ADPF 33, "nobody may deny that individual rights and guarantees", [among them the right to education] are fun-

is no other effective means of remedying such a violation[19]. It also is of original competence of the Supreme Court and those legitimated to bring such an action are the same as in the case of a direct action of unconstitutionality[20] [21]. These actions are regulated by Law n. 9.882/99.

g. *Judicial action of the General Law of Education (LDB)*: in addition to the constitutional actions listed above, it is important to emphasize that, as already mentioned, the General Law of Education (LDB) provides for judicial action, in the form of summary proceedings at no cost, in the case of the public power failing to provide compulsory education or providing the latter on an irregular basis. Despite the broad reach of this machinery, which may be accessed by any citizen, among others so legitimated?? in this respect, it has apparently been used rarely in Brazil.

In addition to the judicial actions noted above, also worth mention is the existence of *quasi-judicial mechanisms* ?? available under Brazilian legislation. Among the latter, the following stand out.

h. In the general ambit, the *right of petitioning ?? the pubic powers* pursuant to Article 5 XXXIV, "a " of the Federal Constitution as an instrument for "the defense of rights or against illegality or abuse of power", irrespective of payment of fees??;

i. In the specific ambit of education, the *National Education Council* (and similar bodies in the ambit of the state and municipal education systems), have normative, deliberative and advisory attributions for the Minister of Education, in order to ensure the participation of society in the improvement of education in Brazil[22].

j. In the specific ambit of the right to education for children and adolescents, *guardianship councils ??* have the incumbencce of

damental precepts of the constitutional order. See STF, ADPF 33, reporting judge Gilmar Mendes, judgement 7.12.2005, available at http://www.stf.gov.br, accessed 21.6.2008.

19. Cf. Law 9.882/99, Article 4, § 1.

20. Cf. Federal Constitution, article. 102, § 1.

21. Cf. Law 9.882/99, Article 2, I.

22. Cf. Law 4.024/61, Article 7, with the wording provided by Law n. 9.131/95.

requiring public services in the field of education, and making representations to the judicial authority in the event of noncompliance with their deliberations[23].

International Machinery

In light of the fact of the right to education being recognized in international instruments to which Brazil is party, if the local judiciary should fail to provide effective response to any violations, there are grounds for an appeal to international mechanisms??.

These mechanisms may be part of the *Global System for Protection of Human Rights*, associated with the UNO; or the *InterAmerican System for Protection of Human Rights*, associated with the OAS.

Global System Mechanisms (UNO)

In the ambit of the UN, there are at least three important mechanisms whose functions cover protection of the right to education and related aspects:

a. Committee of Economic, Social and Cultural Rights (CDESC??): set up under Economic and Social Council Resolution 1985/17, is a body comprising independent experts monitoring implementation of the International Covenant on Economic, Social and Cultural Rights, including articles 13 and 14 on the right to education. Unlike the Human Rights Committee (charged with overseeing the International Covenant on Civil and Political Rights), the CESCR does not have competence to accept claims from individuals, although there has long been discussion on signing an Additional Protocol to the International Covenant on Economic, Social and Cultural Rights to overcome this limitation (Office of the United Nations High Commissioner for Human Rights, 2008b). Nevertheless, the Committee receives information from non-governmental organizations that may be useful

23 Cf. Law 8.069/90, Article 136, III.

when appraising the reports States must submit periodically (Office of the United Nations High Commissioner for Human Rights, 2008d).

b. *Rapporteur* for the Right to Education: "special rapporteur" is the title given to individuals who act on behalf of the UN with a mandate conferred by its Human Rights Comission to investigate and monitor human rights issues and suggest solutions. Since 1998, a Special Rapporteur for the Right to Education has been visiting countries and submitting reports on specific themes to the Human Rights Council – which is of special interest for the purposes of this study – and communicating with States on alleged violations of the right to education, including those originating from individual complaints (Office of the United Nations High Commissioner for Human Rights, 2008d).

c. *Ceart – Expert Committee on Application of the Recommendation on Status of Teachers:* Ceart is the result of a joint initiative by the International Labor Organization (ILO) and the United Nations Organization for Education, Science and Culture (Unesco) and its mission is to oversee implementation of the Recommendation on Teachers' Status adopted in 1966 and supplemented in 1997 by the Recommendation on Status of Higher Education Teaching Personnel. The Committee may receive allegations from national and international teachers associations concerning violations of the Recommendation (International Labour Organization, 2008a).

Machinery of the InterAmerican System (OAS)

In the domain of the OAS, a useful point to emphasize is that the 1969 American Human Rights Convention does not include a broad range of economic, social and cultural rights, but is limited to determining the commitment of State-parties to "take measures in both the internal ambit and through international cooperation, especially economic and technical cooperation, in order to gradually attain full effectiveness of rights arising from economic and social norms and those relating to *education*, science and culture, as stated in the Organization of Ameri-

can States Charter revised by the Buenos Aires Protocol, in as far as resources are available , through legislative means or for other appropriate means"[24] (our emphasis).

This apparent lacuna was filled in 1988, however, by adopting the Additional Protocol on Economic, Social and Cultural Rights ("San Salvador Protocol")[25], which devotes an extensive article (13) to the right to education. Moreover: the protocol expressly states that the right to education may be pursued under the individual complaints system stipulated in the American Convention, whose parties include the *InterAmerican Human Rights Commission* based in Washington, USA, and the *InterAmerican Human Rights Court* headquarter in San José, Costa Rica[26].

Therefore any person, group of persons or non-governmental organization may submit complaints[27] of violations of the right to education to the InterAmerican Commission, as determined in the Additional Protocol. This then initiates a process that may lead to a report in which the body in general announces its decision and recommendations[28]; or, conversely, to a case being submitted to the InterAmerican Court, in the event of the State involved having recognized the[29] latter's jurisdiction, which Brazil has done since 1992, through Decree 4.463. In this latter situation, the court may rule that the victim be assured realization of the right violated, including compensation for any damages thus caused[30].

24. Cf. American Human Rights Convention, promulgated by Decree 678/92, Article 26.

25. See Additional Protocol to the American Human Rights Convention on Economic, Social and Cultural Rights, promulgated by Decree 3.321/99.

26. *Idem*, Article 19, (6).

27. Cf. American Human Rights Convention, promulgated by Decree 678/92, Article 44.

28. *Idem*, Article 51, (3).

29. Note that under Article 61 (1), of the American Convention, only member states and the Commission have the right to submit cases to the Court, and this prerogative is not extended directly to a citizen, a group of citizens or non-governmental organization.

30. Cf. American Human Rights Convention, promulgated by Decree 678/92, Article 63, (1).

Jurisprudencial ?? Application of the Right to Education

Having duly asserted the justiciability of the right to education and posed an overview of the domestic and international mechanisms for realizing this entitlement, it remains to be see how the bodies charged with its implementation have been acting in practice.

In the internal domain??, the decision was to focus on one of these bodies: the Federal Supreme Court (STF), which acts as Brazil's Constitutional Court. The choice of focus was in part due to the narrow limits of this study and partly to the effect that the decisions of the STF, as the highest body of the judiciary, are binding all courts and judges in Brazil.

In the international sphere, the aim was to note the pronouncements made by UN and OAS bodies mentioned in the previous section that specifically pertain to the right to education in Brazil, while not taking into account decisions that treat this entitlement generically or in a manner associated with different situations facing other nations.

STF jurisprudence after the 1988 Constitution

In order to identify the Supreme Court's jurisprudence on the right to education, a full survey was conducted of the decisons available at the STF's internet[31] portal based on the search engines available there. Bearing in mind the natural limitations of this method, the results shown below, while not an exhaustive survey of the Supreme Court's rulings, are certainly representative of its positions.

Note that only final judgements were selected for this survey, thus excluding decisions made by individual Federal Supreme Court judges. Likewise, the timeframe for the survey included only decisions proffered after the promulgation of the Federal Constitution (5 October 1988).

On the basis of these parameters, the 33 decisions shown in Table 1 were selected:

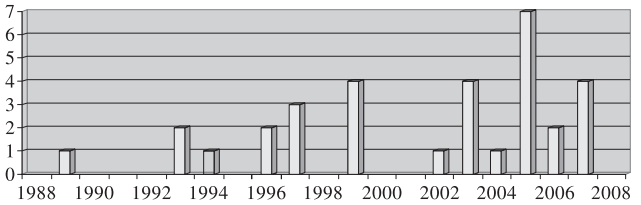
31. http://www.stf.gov.br.

Table 1. Selected decisions.

	Case	Type	Year
1	51	Direct action of unconstitutionality	1989
2	319	Point of order in direct action of unconstitutionality	1993
3	155.772	Interlocutory review in appeal?	1993
4	1.042	Direct action of unconstitutionality	1994
5	1.511	Writ in direct action of unconstitutionality??	1996
6	22.111	Ordinary appeal in injunction??	1996
7	123	Direct action of unconstitutionality	1997
8	490	Direct action of unconstitutionality	1997
9	640	Direct action of unconstitutionality	1997
10	163.231	Extraordinary appeal	1997
11	578	Direct action of unconstitutionality	1999
12	606	Direct action of unconstitutionality	1999
13	1.749	Direct action of unconstitutionality	1999
14	241.757	Direct action of unconstitutionality	1999
15	2.667	Writ in direct action of unconstitutionality??	2002
16	2.316	Internal interlocutory appeal	2003
17	2.643	Direct action of unconstitutionality	2003
18	2.806	Direct action of unconstitutionality	2003
19	2.997	Writ in direct action of unconstitutionality??	2003
20	3.324	Direct action of unconstitutionality	2004
21	1.007	Direct action of unconstitutionality	2005
22	1.950	Direct action of unconstitutionality	2005
23	3.098	Direct action of unconstitutionality	2005
24	362.074	Interlocutory appeal in extraordinary appeal	2005
25	410.715	Interlocutory appeal in extraordinary appeal	2005
26	436.210	Interlocutory appeal in extraordinary appeal	2005
27	436.996	Interlocutory appeal in extraordinary appeal	2005
28	3.512	Direct action of unconstitutionality	2006
29	465.066	Interlocutory appeal in extraordinary appeal	2006
30	820	Direct action of unconstitutionality	2007
31	845	Direct action of unconstitutionality	2007
32	3.669	Direct action of unconstitutionality	2007
33	384.201	Interlocutory appeal in extraordinary appeal	2007

Of the total number of judgements, 14 (42%) were proffered in the 1990s and 19 (58%) after 2000; no less than 13 (39%) of the judgements were made between 2005 and 2008 alone. These data suggest that STF jurisprudence on the right to education is not only relatively *incipient*, but also *recent* in light of the large volume of cases tried annually by the Court.

Gráfico 1. Compor título do gráfico em inglês



The floowing breakdown shows the types of cases in which judgements were proffered:

Table 2. Type of case in which judgement proffered

Type	Quantity	Percentage
Direct action of unconstitutionality	19	58%
Interlocutory appeal in extraordinary appeal	6	18%
Writ in direct action of unconstitutionality??	3	9%
Internal interlocutory appeal	1	3%
Interlocutory review in appeal?	1	3%
Point of order in direct action of unconstitutionality	1	3%
Extraordinary appeal	1	3%
Ordinary appeal in injunction??	1	3%

Noe that the great majority of judgements (19) were proffered in the ambit of direct actions of unconstitutionality. Taking in to account also judgements made when trying writs of prevention and points of order in direct actions of unconstitutionality, this number jumps to 23 (70%), showing that the STF's decisions on the right to education are fundamentally being proffered as part of the exercise of concentrated control of the constitutionality of laws and normative acts, and decisions taken as a court reviewing lower instances are residual .

Finally, the following breakdown shows the key issues argued in each of these judgements:

Table 3. Key issues discussed in judgement

Issue	Decisions	Cases
Direct election of principals or heads of public educational institutions	7 (21%)	51, 123, 490, 578, 606, 640 and 2.997
Monthly fees charged by private schools	6 (18%)	319, 1.007, 1.042, 3.512, 155.772 and 163.231
Right to day care and pre-school facilities for children below the age of 6 years	5 (15%)	410.715, 436.996, 463.210, 465.066, 384.201
Division of competences	5 (15%)	1.749, 2.316, 2.667, 3.098 and 3.669
Transfer of students from private to public university	2 (6%)	3.324 and 362.074
Adaptation of school calendar to holidays of the different religions	1 (3%)	2.806
University autonomy ??	1 (3%)	1.511
The State's duty of ensuring access to culture arising from the right to education	1 (3%)	1.950
Students' right to half-price fares on collective transport	1 (3%)	845
Exemption from fee charged to sit entry examination	1 (3%)	2.643
Legitimacy of the State's regulatory role	1 (3%)	22.111
Providing compulsory education for disadvantaged persons	1 (3%)	241.757
Mandatory earmarking of funds for education	1 (3%)	820

Note that the issue most frequently submitted to the STF relates to direct election of heads or principals of public educational institutions as stipulated in the laws of the different states. The Court has rejected these types of stipulations arguing that designating positions at public schools is the exclusive competence of the Executive Power.

In relation to monthly fees charged by private schools, the second most frequent issue, the STF declared that setting criteria for increasing monthly fees was constitutional, based on three judgements (Cases 319, 3.512 and 155.772), on condition that this be done by the Union??, rather than the states (cf. cases 1.007 and 1.042). Furthermore, it confirmed the competence of the Public Prosecutor to reject abusive or illegal monthly fees through public civil actiond (cf. Case 163.231).

In relation to day-care and pre-school facilities, this is a subject in which the Court has most profoundly analyzed the meaning and reach of the right to education, particularly in the decisions proffered in cases 410.715 and 436.996 (in which it stated "Pre-school education, being classified as a fundamental right for all children is not exposed in the process of its concretization to the merely discretionary appraisals of the Public Administration, nor is it subordinated to reasons of pure governmental pragmatism", for which reason "Although the prerogative of formulating and executing public policies lies primarily with the Legislative and Executive Powers, the judiciary may determine, although on exceptional grounds, especially in the case of public policies defined in the Constitution itself, that they be implemented by omissive agencies or bodies of the states, whose omission – through not complying with political-legal responsibilities incumbent on them on a mandatory basis – may undermine the effectiveness and integrity of social and cultural rights imbued with constitutional standing."). The judiciary's competence to protect the right to education against the executive's omission was also asserted in cases 384.201, 463.210 and 465.066.

Since the Union??, the states and the Federal District all have competence to legislate on education, in the case of the Union to compose "general norms" and the others to enact supplementary legislation", and since the boundary between these two domains is not always easy to identify, it is no surprise to find that the issue of the division of competences between federated units has also occupied the Court in five decisions (cases 1.749, 2.316, 2.667, 3.098 and 3.669)[32] [33].

32. *Idem*, Article 24, §§ 1 and 2.

33. Cf. Federal Constitution, article. 24, IX.

The fifth most frequent issue in STF jurisprudence concerns students transferring from private to public universities. The Court had occasion to declaring unconstitutional any interpretation of the General Law of Education allowing such a transfer, under the argument that it iscrucial to ensure the "congenerous character" of the institutions involved (cf. cases 3.324 and 362.074).

Finally, there was at least one decision each for the following subjects: *adaptation of school calendar to holidays of the different religions*, which is beyond the competence of the states (Case 2.806); *University autonomy*, under which, according to the STF, there is no presumption of unconstitutionality arising from the law introducing the examination known as "provão" as a means of evaluating universities (Case 1.511); The State's duty of ensuring access to culture , for which reason a constitutional law ensures half-price admission for students enrolled in education establishments (Case 1.950)*;* Right to half-price fares on collective transport for students, whose constitutionality was also recognized by the Court (Case 845); exemption from fee charged to sit entry examination, which may be implemented by the states (Case 2.643); *legitimacy of the State's regulatory role*, since although education may be freely provided by private enterprise, certain conditions must be fulfilled (Case 22.111); *providing compulsory education for disadvantaged people*, failing to do so incurs liability of the competent authority (Case 241.757); and *earmarked funds for education*, the STF having declared it unconstitutional to spend part of the funding allocated to education on "maintenance and conservation of a state's public schools", in light of the prohibition in Article 167, IV of the Constitution (Case 820).

Jurisprudence of international bodies in relation to Brazil

There are as yet few manifestations related to the human right to education in local jurisprudence – at least in relation to the STF – but there is even less international case law in relation to Brazil.

Particularly in the ambit of the CESCR, this finding does not come as a surprise. After all, as emphasized above, the body still does not have the competence of receiving individual claims of violation of economic, social or cultural rights. For this reason, the main opportunity manifest

on the subject is when it analyze member-states' periodic reports (country reports).

In the case of Brazil, there has been only one such report so far. This was in 2003, when the Committee analyzed Brazil's initial report on implementation of the International Covenant on Economic, Social and Cultural Rights. In its concluding observations, in the part specifically related to the right to education, the CESCR emphasized positive approval of Constitutional Amendment 14 – which set up the Fund for Maintenance and Development of Elementary Education and Appreciation ?? of Teachers (locally Fundef), and thus reorganized the elementary education system and earmarked more funds for education – and the designation of an independent special rapporteur for the right to education (United Nations Economic and Social Council, 2003, par. 11-12). However, it expressed concern over the inexistence, in practice, of effective mechanisms (judicial or extrajudicial) to ensure the prevalence of economic, social and cultural rights, and over the high level of illiteracy then reported to the body of 13.3% of the population in 1999 (United Nations Economic and Social Council, 2003, par. 18 and 39). Brazil was therefore asked to take measures to combat illiteracy and include them in its next report to the Committee, together with the results obtained (United Nations Economic and Social Council, 2003, par. 63)[34].

On the other hand, in relation to the work of the UN's special rapporteur for the right to education, there was no mention of measures directed specifically for Brazil. It is true that measures taken in relation to any individual claims that may arise are kept confidential until their inclusion in the annual report submitted by the expert to the UN Human Rights Council (Office of the United Nations High Commissioner for Human Rights, 2008d); therefore it may be that the rapporteur took measures in relation to the Brazilian government that have not yet been publicized; however, in the cases that have been made public, there are none relating to Brazil.

34 Brazil submitted its second periodical report in 2007, therefore the CESC R should soon be publishing its new report and recommendations for this country.

Nevetheless, there have been mentions of Brazil in at least two Special Rapporteur statements. The first was in the report submitted to the now extinct UN Human Rights Commission in 2004, which emphasized that Brazil, together with certain other countries, had made great progress in realization of the right to education for girls (United Nations Economic and Social Council, 2004, pair. 37). The second refers to responses to a questionnaire devised by the UN High Commission for Human Rights in 2007, in which when asked about good practices for combatting racism, racial discrimination, xenophobia and other forms of intolerance, the Rapporteur mentioned the case opened by the amendment to the General Law of Education (LDB) by Law 10.639/03, which included the history of African and Afro-Brazilian culture in the school curriculum, subsequently extended to embrace the history and culture of indigenous peoples (Office of the United Nations High Commissioner for Human Rights, 2008a).

The Special Rapporteur for the Right to Education has not officially visited Brazil, unlike several other UN rapporteurs such as those for Torture and for Summary or Arbitrary Extrajudicial Executions. However, it is noteworthy that when Professor Karatina Tomasevki was Special Rapporteur for the Right to Education, she came to Brazil in 2003 to take part in activities including the World Education Forum (Brazilian Association of Non-Governmental Organizations, 2008); but no official record of this visit could be found in the ambit of the UN.

In the Global Protection System for Human Rights, in relation to third mechanisms noted in the preceding section – Ceart –, it should be explained that the reports made available by the body have no record of allegations involving the Brazilian State being processed (International Labour Organization, 2008b).

In the InterAmerican System for Protection of Human Rights, the situation is not unlike the global level. This is because not a single Brazilian case was found in the Commission or in the InterAmerican Court of Human Rights, which deals specifically or more profoundly with the right to education. The most that could be identified were five Commission decisions in which the thematic was touched on tangentially.

The first and earliest was in 1985, in the case of the Yanomami Indians (Resolution 7.615), in which the petitioners alleged, among other offenses, violation of the right to education as recognized by the American Declaration of the Rights and Duties of Man. In its decision, the Commission recommended that Brazil run educational programs "[...] to be implemented in consultation with the affected indigenous population and with the assistance of qualified scientific, medical and anthropological advisors".

The second was in 2002, when the Commission declared the admissibility of the case "Adolescents in Custody of the Febem" (Report 39/02), based on violations of several human rights, among them the right to education stipulated in Article 13 of the San Salvador Protocol. Although considering *prima facie* that the facts submitted may indeed characterize this illicit act, the Commission has yet to pronounce on the merits of the case.

In addition, in 2006 the Commission saw a friendly settlement recahed for the case of "Emasculated ?? Boys of Maranhão" (Report 43/06) in which the Brazilian State promised to take a number of measures to improve schooling for children and adolescents in the metropolitan region of São Luís, as well as the use of school premises for sports and cultural activities. In the same year, the case of "Members of the Indigenous Community of Ananas and others" was declared admissible by the Commission (Report 80/06), also based on a possible violation of the right to education.

Along with these four decisions, adopted in the examination of litigation claims, the Commission took up the subject in its 1997 Report on the Human Rights Situation in Brazil. This led to its noting the "grave" situation of education in Brazil, with more than 3 million children not attending school in 1992, and the distortion in favor of the wealthier classes in the government's social spending (InterAmerican Human Rights Commission, 1997, chapter II). Futhermore, it warned of specific violations committed in relation to the more vulnerable groups, such as children and adolescents, indigenous peoples, women and other groups that were victims of racial discrimination (InterAmerican Human Rights Commission, 1997, chapters V, VI, VIII and IX).

This quick sketch of international jurisprudence leads us to conclude that issues related to the right to education in Brazil have not occupied a prominent place in the work of the bodies responsible for monitoring the human rights situation there. The causes behind this reality cannot be examined within the restricted scope of this study, but it may be due to low justiciability ?? in issues related to the right to education, or more probably to the still incipient level of awareness of the opportunities provided by international mechanisms for protecting human rights.

Conclusion

The present study sought to show that the right to education, like other human rights (civil, political, economic, social or cultural), is perfectly susceptible to adjudication by the judiciary. Ultimately, contrary to usual opinion, it does not always pose the need for positive action to be taken by the State, and even when this is the case, the courts do have the means of ensuring protection of the right without invading the terrain proper to the Executive or Legislative powers.

The study also sought to show that Brazilian citizens and other individuals resident in the country have access to a series of judicial or quasi-judicial mechanisms in cases of threat or violation of the right to education, on both domestic and international levels.

Finally, this study aimed to examine the ways in which bodies with competence to serve as guardian of the right to education have been dealing with the subject. In this respect, it has shown that STF jurisprudence since the 1988 Federal Constitution is still relatively incipient and recent, comprising chiefly decisions proffered in the ambit of cases of control of constitutionality of laws and normative acts (direct actions of unconstitutionality). In addition, I have pointed to issues related to the right to education that have thus far predominated in discussions of the Court, which in general has adopted an interpretation favoring realization of the right in the cases submitted. From another angle, it was shown that international monitoring bodies have not yet taken up the issue of the right to education in Brazil specifically or in a more in-depth manner.

One may therefore conclude that the judiciary has a very important role in to play in fostering and protecting the right to education, particularly in cases in which the Executive or the Legislative show omission in fulfilling their duties; and Brazil has machinery enabling the exercise of this attribution, although not in a fully satisfactory manner. STF jurisprudence, although at an initial stage, provides grounds for this assertion. In addition , there is a pleiad ?? of international mechanisms that may be activated when courts fail to fulfill their role, although this recourse apparently has yet to be fully exploited.

In any event, it is important to note that all these instances – and, especially, the Judiciary function at the behest of the actors legitimated to instigate them. The enlargement and qualification of their role, therefore, involves not only growing abilities of courts or their members, but also more awareness on the part of these actors – including citizens and non-governmental organizations – as to the opportunities provided by the available judicial and quasi-judicial mechanisms .

References

Associação Brasileira de Organizações Não-Governamentais. 2008. *UN reporter for Education, speech in São Paulo* [online]. Available at http://www2.abong.org.br/final/informes_pag.php?cdm=13024, accessed 30.10.2008.

Arambulo, Kitty. 1999. *Strengthening the Supervision of the International Covenant on Economic, Social and Cultural Rights: Theoretical and Procedural Aspects*. Antwerp/Hart, Intersentia.

Comissão Interamericana de Direitos Humanos. 1997. *Relatório sobre a Situação dos Direitos Humanos no Brasil* [on line]. Available at http://www.cidh.org/countryrep/brazil-port/indice.htm, accessed 30.10.2008.

Dworkin, Ronald. 1977. *Taking Rights Seriously*. Cambridge, Harvard University Press.

_____. 2003. "Terror & The Attack on Civil Liberties". *The New York Review of Books,* vol. 50, n. 17, nov. 6.

Eide, Asbjørn. 2001. "Economic, Social and Cultural Rights as Human Rights", in Eide, Asbjørn; Krause, Catarina & Rosas, Allan, *Economic, Social and Cultural Rights: A Textbook*. 2. ed. The Hague, Kluwer Law International.

Hunt, Paul. 1996. *Reclaiming Social Rights: International and Comparative Perspectives*. Aldershot, Ashgate Publishing Limited.

International Labour Organization. 2008a. *About Ceart – What it is* [on line]. Available at http://www.ilo.org/public/english/dialogue/sector/techmeet/ceart/about.htm, accessed 21.6.2008.

_____. 2008b. *Ceart Reports* [online]. Available at http://www.ilo.org/public/english/dialogue/sector/techmeet/ceart/docs.htm, accessed 21.6.2008.

Leary, Virgina A. 2003. "Implications of a Right to Health", in Mahoney, K. E. & Mahoney, P. *Human Rights in the Twenty-first Century*. S. l., Kluwer Academic Publishers, pp. 481-493.

Office of the United Nations High Commissioner for Human Rights. 2008a. *Contributions submitted by the Special Rapporteur on the right to education to the questionnaire prepared by the Office of the United Nations High Commissioner for Human Rights, pursuant to decision PC.1/10 of the Preparatory Committee of the Durban Review*. UN DOC A/CONF.211/PC.2/8.

_____. 2008b. *Fact sheet no. 16 (Rev. 1), The Committee on Economic, Social and Cultural Rights* [on line]. Available at http://www.ohchr.org/Documents/Publications/FactSheet16rev.1en.pdf, accessed 21.6.2008.

_____. 2008c. *Human Rights in Development* [on line]. Available at http://www.unhchr.ch/ development/approaches-07.html, accessed 17.6.2008.

_____. 2008d. *Special Rapporteur on the Right to Education* [online]. Available at http://www2.ohchr.org/english/issues/education/rapporteur/index.htm, accessed 21.6.2008.

Osmani, Siddiq; Nowak, Manfred & Hunt, Paul. 2008. *Human Rights and Poverty Reduction Strategies – A Discussion Paper* [online]. Available at http:// www.fao.org/righttofood/kc/downloads/vl/docs/AH177.doc, accessed 17.6.2008.

Robinson, Mary. 2008. *Bridging the Gap Between Human Rights and Development: from Normative Principles to Operational Relevance* [online]. Available at http:// www.unhchr.ch/huricane/huricane.nsf/view01/2DA59CD3FFC033DCC1256B1A0033F7C3?opendocument, accessed 17.6.2008.

Sheinin, Martin. 2001. "Economic and Social Rights as Legal Rights", in Eide, Asbjørn; Krause, Catarina & Rosas, Allan, *Economic, Social and Cultural Rights: A Textbook*. 2nd ed., The Hague, Kluwer Law International, pp. 29-54.

Shue, Henry. 1996. *Basic Rights – Subsistence, Affluence and US Foreign Policy*. 2nd ed., Princeton, Princeton University Press.

United Nations Economic and Social Council. 2003. *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Brazil. 23/05/2003*. UN DOC E/C.12/1/Add.87.

_____. 2004. *Economic, Social and Cultural Rights – The Right to Education – Report Submitted by the Special Rapporteur on the Right to Education, Mr. Vernor Muñoz Villalobos*. UN DOC E/CN.4/2005/50.

Religious Education in Brazil's Public Schools: From the Right to Freedom of Belief and Worship to the Right to Positive State Provision

Salomão Barros Ximenes

Introduction

This article analyzes the constitution's provisions in relation to religious education in public schools as well as "infraconstitutional" regulations, and notes the main issues arising thereof. In the case of religious education, responses to many questions not answered at the federal level may be found in state and local education systems, since under the current wording of the 1996 Education Law (Law n. 9 394/1996, or LDB) the latter have full jurisdiction to decide on the content of religious education and how it is provided. I would emphasize that this is the only example of curriculum content for which guidelines are not determined by the federal authorities; which means they are not exercising the legislative attributions of the Constitution's Article 22, subparagraph XXIV[1]. This situation has led to very different regulations at state and municipal

1. 1988 Federal Constitution, Article 22, XXIV: The federal authority has the exclusive attribution of legislating on: [...] XXIV: – guidelines and basis of national education".

levels, a good example of which is the contrasting concepts of the state governments of Rio de Janeiro and São Paulo in this respect[2].

The legal world is part of the social and political world, therefore many of the underlying reasons for options made by legislators and courts should not be sought in the codes and the Constitution alone. With this in mind, I begin with a brief review of provisions for religious education in Brazil's constitutional documents, which will show that this issue has always been associated with ideas as to how the State itself should be configured. At present, the aforementioned delegation of attributions to state and local education systems, while multiplying instances for deciding the contents and manner of implementation, in this particular issue means that compiling minimum content for a common basic curriculum is not feasible. The issue also relates to thousands of school systems in which there has historically been conflict over State secularization; rather than the formal declaration of separation between State and Church, this is expressed in everyday discussions of values in public life. On this issue, the recent Supreme Federal Court (STF) decision on ADI n. 3510[3] proposed by the Federal Attorney General against Law n. 11 105/2005 concerning stem cell research, in which the National Conference of Bishops of Brazil (CNBB) acted as amicus curiae, was certainly a victory over the Catholic Church for the secular position.

It is precisely the subjects of sexuality and reproduction (issues that must be covered by schools) that pose the main public disputes between secular and religious sectors. Major concerns for citizens, such as abortion and same-sex marriages (more precisely "civil-law unions") are irreconcilable with religious dogmas, which is why scholars such as Flávia Piovesan argue for a secular state as an "essential guarantee for the exercise of human rights" (2006, p. 20), which she shows to be con-

2. For more in-depth discussion of the state school systems' differing and sometimes contradictory religious-education regulations, see: Luiz Antônio Cunha, *Autonomização do Campo Educacional: Efeitos do e no Ensino Religioso*, available at http://www.luizantonio.cunha.nom.br/.

3. Federal Supreme Court (STF), ADI n. 3510.

sistent with exercise of the fundamental right to freedom of belief and worship:

> Fusing State and religion implies officially adopting undisputable dogma, and by imposing a single set of morals, this rules out any project for an open, pluralistic and democratic society. The legal system in a democratic state under law must not become the exclusive voice of the morals of any one religion. Religious groups have the right to compose their identities around their principles and values, since they are part of a democratic society. However, they do not have the right to hegemonize the culture of a constitutionally secular state (Piovesan, 2005, p. 20).

However, on examining the current context, Piovesan identifies contradictory trends: "while the contemporary State strives to separate itself from religion, the latter is attempting to make inroads in the domain of the State" (Piovesan, 2005, p. 20). As I shall note in concluding this article, religious education in the 1988 Constitution and particularly its regulation in Law n. 9 475 of 22 July 1997, which amended the original wording of the 1996 Education Law (LDB), undoubtedly shows this effort to make inroads in the domain of the public sphere at state level, including the effort to have public funds allocated for religious education.

Having made these points, I might well conclude this study by asserting the complete incompatibility between the secular nature of the Brazilian State and compulsory provision of religious education in states' public schools. However, although this could very reasonably be argued, it would not add to our knowledge of the problem: from the legal point of view, as well as a question of liberty related to the fundamental right to profess and disseminate religious belief and worship, religious education today in Brazil amounts to a subjective public right and has reached an accelerated stage of expansion and implementation in schools.

Therefore, the problems actually posed relate to ensuring that current legislation and public policies are compatible with the above-mentioned constitutional provisions. In other words, we may ask if religious education may be provided in a manner that is compatible with the secular character of the state while respecting diversity of curriculum content, political views and religious beliefs in public schools. This article

can hardly hope to cover such a wide range of issues, but I do hope to contribute to understanding of the challenges posed by revisiting the origin of these institutions in Brazil's constitutional history and interpreting them in the current legal context.

The Right to Education and Religious Education in Brazil's Constitutional Law

In her study of the effects of state secularism and religious freedom in Brazilian constitutional jurisdiction, Letícia Martel notes, "that throughout the history of the Republic, the relationship between education and state secularism has constantly been controversial... one of the major issues disputed was, and is, providing religious education in public elementary schools, subject to voluntary enrollment, as stipulated in successive constitutions, including the current one" (Martel, 2007, p. 23).

The 1824 Constitution of the Empire of Brazil followed the tradition of the colonial period by leaving no room for doubt as to the religious character of the State: "Article 5. The Apostolic Roman Catholic religion shall continue to be the religion of the Empire. All other religions may hold private or home services, or may worship in buildings designated as such, not in the form of temples externally". There was no specific provision for religious education, nor could its absence be noted, since the right to education at the time, as Marcos Augusto Maliska has shown, was "strongly characterized by the Catholic Church's involvement in the education of the people" (2001, p. 22). In other words, the omission was not due to any lack of importance attached to the subject, but to the undisputed fact that education was synonymous with religious education.

In relation to the 1824 constitution of the Empire of Brazil, Maliska also notes that the legal system tended to incorporate ideas from the French Revolution, such as positive civil and political rights for citizens. This influence was combined with a conservative monarchist regime and eventually led to "certain extremes that are essentially irreconcilable, such as freedom and slavery, or having a single national religion while providing assurances for other religions" (2001, p. 22).

Despite these early hints of liberalism, it was not until the advent of the republic that the debate on the secular nature of the State gained ground in Brazil, with its consequent effects in the sphere of education. Indeed, the 1891 constitution of the Republic of the United States of Brazil reads: "Article 72 [...] Paragraph 6 – Education in public establishments shall be secular". So religious education in public schools was suppressed for the first four decades of the Republic. "Moral and civic education" was introduced in its place.

Commenting on the issue of religious education, Aristides Milton's interpretation of the period is still useful:

> […] it is the duty of parents as heads of families, and at the same time the duty of the clergy of each confession, to provide religious education for those under their care, or to honestly attempt to do so, since the civil and ecclesiastical spheres are distinct and delimited. Just as teaching science is incumbent on instructors, so teaching religion belongs to priests, who as a rule will find precious and honest assistance in the home. [...] Science is based on experiment, while religious is based on revelation and miracles. Therefore it is not fair to fuse them, so logically there must be so-called secular schooling, which our Constitution adopted, as opposed to religious or denominational schooling (Milton, 1898, pp. 382-383).

However, the secularization of public education could not prevent Catholic sectors bringing pressure to bear as soon as the republican constitution was enacted. From 1891 to 1931, there was a major confrontation between secular and Catholic opinion, in which the latter prevailed. This subject has been examined by Carlos Roberto Jamil Cury, who discusses the historical recurrence of this clash over religious education and emphasizes the historically unique nature of the 1891 Constitution:

> However, after the prohibition of religious education in schools in 1891, the Catholic Church strove to reinstate this subject at state and national level at different times, especially at times of constitutional change [...] and was successful on the occasion of the educational reform of Minister Francisco Campos in the 1930s, when a decree reinstated religious teaching in schools.
>
> Indeed, religious education with voluntary enrollment for classes has been part of all Brazil's federal constitutions since 1934. But an important point to note is since the 1931 decree on religious education, enrollment has always been charac-

terized as voluntary but provision has been obligatory – although under the New State (*Estado Novo*) organic laws in force through 1946, provision too was optional (Cury, 2004, pp. 14-15).

An important to remember is that public education was expanding in Brazil (as it is today), particularly in the richer states of the federation. From a situation in which it was practically non-existent, public education moved to the center of debate nationally, driven by different ideological and political positions of social actors opposed to the policy of the Old Republic – factory workers, urban intellectuals, modernist artists, insurgent military officers etc. Luiz Antônio Cunha notes the active position of Catholic hegemony in that scenario, and places it alongside the *status quo*:

> Catholic militants under the leadership of Cardinal Sebastião Leme and a true powerhouse of ideological production and distribution were able to prevail in the political field as an effective solution to ensure an order threatened initially by the workers movement of the 1910s, and then by the military uprisings of the 1920s (Cunha, 2007, p 287).

This led to the first institutional advances in the field of religious education and the attenuation of state secularism. It was in the state of Minas Gerais, the traditional beneficiary of the regime, that the Catholic Church forged ahead in terms of transgression against the constitutional rules: "In 1928, President Antônio Carlos de Andrada from the state of Minas Gerais issued a decree authorizing weekly catechism lessons as part of the regular timetable in schools maintained by the state government" (Cunha, 2007, p. 288). The road was opened for religious education to return to Brazil's schools.

Finally, Decree n. 19.941 issued on 30 April 1931 allowed religious education in public primary schools (in Rio de Janeiro), and secondary and "normal" [teacher training] schools, providing it was not compulsory, but "facultative" (Cunha, 2007, p. 288).

The next step would be compulsory provision with voluntary enrollment or attendance. The 1934 Constitution definitively moved away from secular education, and provision for religious education was made

in terms repeated through to the present day: Article 153: attending religious education classes is *facultative* and they are taught in accordance with the principles of the pupils' *religious confession* as stated by parents or guardians, and it was a *regular timetable subject in public primary, secondary, occupational and normal [teacher training] schools* (my emphasis).

Note that the 1934 Constitution, under the influence of German constitutional traditions, raised the right to education to the "category of subjective public law" for the first time in Brazil (Maliska, 2001, p. 26), and erected the structure of the constitutional right to education as it is now known: a declaration of rights, attributions for federal entities, funds earmarked for education, regulatory role of the National Education Council, provision for a National Education Plan and, as mentioned above, compulsory provision of religious education in public schools, along with facultative attendance.

However, with the advent of the New State (*Estado Novo*) and the new constitution of the United States of Brazil in 1937, religious education became optional and restricted to primary schools: Article 113: Religious education *may* be seen as regular course content in *primary schools* But it may not be compulsory for masters or teachers, nor may pupils be required to attend on a compulsory basis (my emphasis). Apparently reviving the subject known as "moral and civic education" from the First Republic to take the place of compulsory religious education, the new 1937 Constitution stated the obligation to provide civic education along with physical education and manual crafts in all public primary, secondary and 'normal' [teacher training] schools" (Cunha, 2007, p. 290).

Under the sign of Fascist ideology, its main objective was to foster the patriotic spirit and historical development of the Brazilian people, and strengthen national unity. The aim was to disseminate a new religion, replacing god as a hindrance "the cult of the regime and the person of the dictator" (Herkenhoff, 1987, p. 41).

The subjective right to public education was eliminated and the 1937 constitution places education in the chapter dealing with the family, "prioritizing the private school as a means of materializing the citizen's

right to education, which is not mentioned as a duty of the State, which is allotted a subsidiary role in this task, thus revealing a pro-privatization concept" (Oliveira, 1995, p. 78). At this point, it is important to note that there seems to be pendulum motion between the strengthening of religious education in public schools on one side and the strengthening of private education on the other, in other words, the more important the public school's role in education, the more the State comes under pressure to ensure religious education is provided. This hypothesis was confirmed in subsequent constitutions.

On Brazil's redemocratization, the 1946 constituent body went back to the basis of the 1934 Constitution in terms of the right to education and compulsory provision of religious education, although it remained silent as to which stage of education it should be taught in. "Article 168 [...] V – Religious education is a regular timetable subject for official schools, with optional enrollment, to be taught in accordance with the pupils' religious confession as stated by the pupil, if capable, or by a legal representative or guardian".

The Law of National Educational Directives and Bases (Law n. 4 024) was ratified by President João Goulart on December 20, 1961, within the period of validity of the 1946 Constitution. Article 97 regulates religious education by literally transcribing the above-mentioned Article 168 of the 1946 Constitution, with an amendment that upset the Catholic Church: religious education was to be provided "at no cost to the public powers". This meant the State would not be paying public schools to hire teaching staff for religious education, which would be left to voluntary teaching by the faithful or payment provided by religious entities. The 1961 Education Law stated:

> Article 97: Religious education is part of the regular timetable for official schools, enrollment being optional, and shall be taught *at no cost to the public powers*, in accordance with the pupils' religious confession as stated by the latter if they are capable, or a legal representative or guardian.
>
> § 1 Arrangements for religious education classes shall not depend on having a minimum number of students.
>
> § 2 Religious education teachers will be registered *with the corresponding religious authority* (my emphasis).

Commenting on the paragraphs of this, which was Brazil's first general law of education (or LDB), Luiz Antônio Cunha explains its intended purpose:

> [...] religious education would not depend on the number of students interested, thus eliminating the inertial interpretation arising from the 1931 Decree, which stipulated a minimum for its feasibility. The other paragraph said that religious education teachers would be registered with the authorities of their corresponding faiths, in other words the public power abstained from doing so to the benefit of the Catholic Church in particular, and of others ready to dispute religious hegemony in public schools (Cunha, 2007, p. 294).

As explained below, this might appear to be a way of reconciling the provision of religious education and the secular character of the State within the current constitutional institutionality (similar to 1946). However, the fact of the Constitution's stipulating compulsory education in public schools and the Education Law's barring any cost for the State is a problem that is difficult to deal with from a legal point of view. In my opinion, by exempting the State from incurring the cost of religious education, the 1961 regulatory approach weakened its role as part of the public and subjective right to education, with its content weakened from the point of view of being compulsory. Ultimately, in practice the State cannot be not forced to provide a certain public service if express statutory provision prevents it spending its funds on such a service.

In this context, in which religious education in public schools would be provided by actors other than the State, it made sense not to be concerned with the minimum number of pupils (a factor directly related to the cost of education) or teachers directly associated with religious organizations.

However, there was significant change with the 1971 amendment to the Education Law (Law n. 5.692), in the context of Institutional Act n. 5 of December 13, 1968, which made religious education compulsory for both primary and secondary schools:

> Article 7. Moral and Civic Education, Physical Education, Art Education and Health Programs must be included in the full curriculum of primary and seconda-

ry schools, pursuant the provisions of Decree-Law n. 369 of 12 September 1969 in relation to the former.

Sole Paragraph. Religious education with voluntary enrollment shall be a regular timetable subject for official establishments of primary and secondary education

The prohibition of any onus for public funds is eliminated, and religious education regains normative force in relation to the State.

Another important factor is that the subjects Moral and Civic Education and Religious Education were materially inter-related, not only in geographical terms, during the recent dictatorial period. Antônio Luiz Cunha points to the strong Catholic influence in Moral and Civic Education, and its aim of "a solid fusion of reactionary thinking from conservative Catholicism with national security doctrine as conceived by Brazil's top military academy, the Higher School of War"[4]. This took on an official air in the report of the Federal Education Council (Opinion n. 94/71) drafted by member Archbishop Luciano José Cabral Duarte, which proclaimed religion as the basis of the morality to be taught. Anticipating possible criticism, the report stated that it was "natural religion", which emanated from a critical rationale.

In relation to this fusing of State and Catholic Church, which many times in the history of Brazil played the role of legitimating regimes that were illegal from a social and legal point of view, Letícia Martel refers to the classic work of Kenneth Serbin, a specialist in Brazilian studies, who again emphasizes the role of religious education and access to public funds:

4. Cunha gives a detailed description of the ultimate aims of Moral and Civic Education: "a. defense of the democratic principle through preservation of the religious spirit, human dignity and love of freedom with responsibility, under the inspiration of God; b. the preservation, strengthening and projection of the nation's spiritual and ethical values, c. the strengthening of national unity and a sense of human solidarity, d. honoring the homeland, its symbols, traditions, institutions, and major figures from its history, e. character improvement, based on morals, devotion to family and community; f. understanding rights and duties of Brazilians and knowledge of the country's sociopolitical and economic organization, g. preparing citizens for the exercise of civic activities, based on morals, patriotism and constructive action for the common good; h. obeying the law, dutifully working and being part of the community" (Cunha, 2007, pp. 295-297).

Analyzing relations between the State and the Catholic Church in Brazil in the period 1930-1964, Serbin pointed to their intensive symbiosis. The church supplied the moral apparatus required to support governments in exchange for public funds that ensured its hegemony in three key fields: *a.* education (Catholic schools, seminaries and universities), *b.* social assistance, including health care (the Santa Casa hospitals), *c.* culture. In addition, tax exemptions and immunities were granted based on requirements that were not objective, but allowed broad interpretation. In the educational field, Serbin noted that these benefits were related to training in morality and therefore favored Catholic pupils. In the initial stages of the military regime, the morality pact continued and was not affected until the "opening" or transition process began (Martel, 2007, pp. 22-23).

Religious education, writes Luiz Antônio Cunha, was used to harness political developments for "hegemonic purposes, through action in education" (2007, p. 300). Moreover, moral and civic education "represented attempts by politicians to harness religion for similarly hegemonic purposes, through the same means of public schools" (Cunha, 2007, p. 300) This mutual material support was used to make religious education part of the teaching material for Moral and Civic Education, objectively expressing synergy between the two subjects, and the Catholic Church was the religious entity that contributed most.

Prior to the amendment of the Education Law (LDB) and Institutional Act n. 5, the 1967 constitution had virtually repeated the 1946 wording, but with less emphasis on the condition of teaching matching the religious confession of pupils and their parents. "Art 168 [...] IV – Optional religious education will be a regular timetable subject for primary and secondary schools". This wording was maintained after Constitutional Amendment n. 1 in 1969.

The 1988 Constituent Assembly "seemed to revive an alliance of liberals, socialists and evangelical religions in defense of secularism" (Cunha, 2006, p. 4), that could supplant the confessional point of view, however, the current Constitution continues the hegemonic tradition of ensuring religious education in public schools – this issued is raised below.

The 1988 Federal Constitution and the Education Law (LDB, Law n. 9.394/1996): – The Right to Religious Education and Freedom to Profess Belief and Worship and the Negative Dimension of State Duty

The 1988 Constitution's provisions for the organization of the State were based on the idea of secularism, and federated entities "are forbidden to establish religious cults or churches, subsidize them, hinder their functioning or have relations of dependency or alliance with them or their representatives, with the exception of cooperation for the public interest, as lawfully determined" (Article 19, I). So while the 1988 Constitution positively introduced separation between church and state, it also left open the possibility of their cooperation, to be regulated by law. However, I do not think this particular authorization legitimizes confessional actions by the State, even if they were restricted to specific situations. Additionally, as part of this cooperation, the State may not act for the benefit of a specific religious denomination without violating the prohibition imposed in the same article against: "[...] creating distinctions between Brazilians, or differences or preferences between them" (Article 19, III), which obviously covers distinctions between nationals holding different beliefs, or atheists or agnostics.

In analyzing this constitutional provision, José Afonso da Silva states that there three possible systems for State-Church relations: *1.* fusion – both fused in the same institutionality, as in Islamic states, *2.* conjoining, in which there is a legal relationship concerning the organization and functioning of both, as in the case of Brazil's imperial regime, and *3.* separation, when there is no organizational or operational determination between them, ensuring their religious freedom, which was the case of the secular state after the 1891 Brazilian Constitution, However, jurist da Silva notes that over time "[...] there were minor adjustments to church-state relations, which moved from strict separation to a system that allowed certain contacts" (Smith, 2001, pp. 229-230). This flexible separation is facilitated by the Constitution's authorization (Art 19, I) of collaboration in the public interest. Silva admits the difficulty of determining the legal limits of this collaboration, but he feels there

is no doubt that "[...] it cannot occur in the religious. In addition, state collaboration must be general in order to avoid discriminating between various religions" (Silva, 2001, p. 230).

Constitutional provision relating to religious education in public schools must be interpreted in this context:

> Article 210. Minimum curricula shall be determined for elementary schooling in order to ensure common basic education and respect for national and regional cultural and artistic values.
>
> § 1 – *Optional* religious education shall be provided as part of the *regular school timetable* for public *elementary schools* (my emphasis).

The 1988 Constitution restores the normative elements of religious education established in Brazil's constitutional law by the 1934 Constitution – providing classes as part of the regular school timetable with optional enrollment or attendance, with two differences: it is restricted to elementary school (this is not the place to discuss the propriety of this measure in educational terms) and it excludes any reference to the character of religious education.

Returning to the conclusion posed by Jose Afonso da Silva, this last aspect enables us to conclude that in order to prevent contact between State and Church in the religious sphere, the Constitution signals that the confessional mode of teaching religion – i.e. education tied to a particular religious denomination – should be abolished in schools.

However, this kind of education is quite common today, inverting the sense of da Silva's interpretation: anticipating that religious education would be cast as real catechization in certain cases, the constituent assembly saw optional enrollment as a way of ensuring compatibility with the fundamental freedoms of religious belief, worship and organization. This seems to be the current interpretation in Brazil's legal circles.

Article 213 of the Constitution is explicitly more flexible on State-church relations, since it authorizes the allocation of public funds for private, community, philanthropic and confessional or faith-based schools. Thus, in addition to paying for religious education in public schools, the State is authorized to directly pay for staff training for schools that are openly confessional or faith based. In this case, there is no way to

avoid favoring certain religious denominations, because of course not all religions have the same institutional structure and hierarchy as the Catholic Church, which is a requirement for access to state resources.

After 1988, although there was some "weakening of the secular position, after the defeat suffered in the Constituent Assembly" (Cunha, 2006, p. 4), there followed a clash between secular and religious camps, from which "Congress introduced restrictions on religious education in public schools years later, through the Education Law (LDB, Law 9.394/96), of which the constitutional provisions were incorporated, with the restriction of providing it 'at no cost to the public treasury" (Cunha, 2006, p. 4).

There was a return to the tradition of the 1961 Education Law (LDB), including the stipulation of the confessional character of religious education, which in an unprecedented manner aggravated the second option – inter-faith teaching. This provision – faith-based teaching at no cost – seems to me to be an attempt to combine different positions in one and the same article, something that has often happened as part of Brazil's tradition of cordiality. Take the original wording of the 1996 Education Law (LDB):

> Article 33 Religious education with *voluntary enrollment*, as part of the *regular timetable* for public *elementary* schools, provided at *no cost to the public treasury*, in accordance with *preferences expressed* by pupils or their parents, its character being:
>
> I – *confessional*, in accordance with the religious option of pupils or their guardians, provided by *religious teachers or advisors* trained and *accredited by the corresponding churches or religious organizations*; or
>
> II – *inter-faith*, as the result of an agreement between various religious entities, which assume responsibility for compiling the corresponding program a (emphasis added).

However, as a development rarely seen in Brazil's legislative history, the provisions were soon changed, and once again in our history state funding for religious education in public schools was prohibited. In an article mentioned above, Luiz Antônio Cunha notes the social and political context in which the new wording of Article 33 (above) was approved:

A bill proposed by the Minister of Education, three months after the Education Law was promulgated, amended the article on religious education in public schools. In Congress, this project was combined with two other parliamentary initiatives. The projects were generated in the center-right of the political spectrum, but the reporting secretary for the substitutive project that was voted was a Catholic priest and a member of a center-left party, Padre Roque (PT-PR) (Cunha, 2006, p. 5).

Professor Roseli Fishmann of the School of Education, Universidade de São Paulo, at that time was a member of the team that prepared the Ministry of Education's National Curricular Parameters for Basic Education, tells us:

It was said at the time that the Minister of Education, pressed by the demands of having to give a response when the Pope visited Brazil, in view of their affinity and personal trust asked Nelson Marchezan (who died shortly afterwards) a provision that would amend that particular article of the Education Law (LDB), and point to solutions for all the problems noted.

However, the most picturesque was the ease with which Congress passed Nelson Marchezan's bill to a rapporteur who would not be objective (Padre Roque), of the historically dominant religious faith, and finally approved the amendment to the Education Law (LDB), a supplementary law to the Federal Constitution, after an agreement between congressional leaders on the eve of the July recess and school holidays (Fishmann, 2006, pp. 6-7).

Both reports speak of the political situation and emphasize the role of the Catholic Church in relation to Congress. I also interviewed Carlos Roberto Jamil Cury on the subject, and he emphasized the role of the National Education Council (CNE):

In a normative opinion on the subject prepared while the initial wording of Article 33 was still in force, the National Education Council (CNE) issued a report (referred to as CNE 05/97) on the issue of the cost of providing religious education for the public powers stating that "there would be a violation of Article 19 of the Federal Constitution which prohibits subsidies for churches or religious cults". The report also stated that: [...] by religious education is meant the opportunity public schools provide for pupils who may optionally begin to study a particular religion or develop within it. Consequently, only churches, individually or jointly, may accredit representatives to provide this education in response to demand from pupils at a particular school (p. 2) This wording did not please several religious authorities, in particular Catholics, whose initial objective was to press the president of the Repu-

blic to use his right to veto the bill. The president himself then promised to amend Article 33 of the bill, which resulted in Law n. 9 475/97 (Cury, 2004, pp. 7-8).

Therefore in Cury's view, based on the CNE's interpretation of the original wording of Article 33 of the LDB, there had previously been a rationale based on the secular character of State determined by the Constitution's Article 19, I, which was that the State allowed public schools to let various religious denominations provide religious education by acting on a collective (inter-faith) or individual (faith) basis, and as an optional subject for pupils. Religious organizations wishing to do so would thus make use of the opportunity available to them in schools, and arrange for religious education teachers from among their faithful and priests. If the religious confessions did not provide such education, it would not be incumbent on the State to do so.

Since the Federal Constitution authorized regulations in terms of the original wording of the LDB, it does not in principle include religious education among the State's positive obligations posed by the right to education. Therefore, until the LDB was amended in 1997, citizens could not require the State to provide religious education as a subjective public right, if it was not organized at a particular school, since this task directly corresponds to the private religious sector, which would act in public schools based on the margin of freedom granted by the State. The latter, on the other hand, would merely have to avoid hindering religious education in schools and protect it against possible threats from third parties.

LDB Amended by Law 9.475/1997: Religious Education as a Positive Aspect of the State's Duties

However, as was the case in the episode of changes made to religious education regulations in the 1971 Education Law (LDB), this interpretation had to be rewritten on the publication of Law n. 9 475 of 22 July 1997, when pressure from religious authorities and groups led to the amending of Article 33 of the LDB, which came into effect with the following wording:

Article 33 *Optional* religious education is part of the *basic education of citizens* and a *regular timetable subject* for basic education at public schools, ensuring *respect for religious and cultural diversity in Brazil*, and *forbidding any form of proselytism.*

§ 1 *School systems* shall regulate procedures for defining the content of religious education and set standards for teacher qualification and admission.

§ 2 School systems shall hear the views of a civil entity comprising different religious denominations in order to define the content of religious education (my emphasis).

The new wording removes the term "at no cost to the public treasury", thus tacitly affirming public financing. It also stipulates that religious education is "an integral part of basic education for citizens", and as such would be a legally enforceable right, so the State would have to guarantee it regardless of the position of religious organizations. Indeed, the first judgments responding to public civil action ruled that the State must provide religious education in public schools:

Summary: Civil Appeal. Public Civil Action. Religious education not provided at state schools in the municipality of Paraíba do Sul Sufficiency of grounds for appeal. Religious Education. National stipulation in the Federal Constitution and the Law of Education (LDB), as option. Compulsory subject in this State, as per provisions of State Law n. 3.459/2000, Article 1. Resolution that has no power to modify the text of the law. Obligation to provide the subject. Attorney fees. Public prosecutor. Confusion Agency maintained by the State, as is the Public Defender. Application, due to similarity, of this Court's Precedent n. 80. Partial granting of the appeal, only excluding ruling to pay attorneys' fees[5].

May be extended to preschool education as expressly determined by a law of the State of Rio de Janeiro (Law n. 3 459/2000) – a position I would describe as inappropriate:

Summary: Public Civil Action. Religious Education Establishment of State Education. Compulsory Nature Coverage of Measure Civil Appeal. Public Civil Action. Religious Education. Public schools system of the State of Rio de Janeiro. Law n. 3459/00 on Confessional Religious Education in the Public School System of the

5. Court of Justice of Rio de Janeiro (TJRJ) – Tenth Civil Bench, Case n. 2006.001.08880 – Civil Appeal, Judge Gilberto D. Moreira – judgment proffered September 5, 2006.

State of Rio de Janeiro determines that optional religious education shall be part of basic education for citizens, as a compulsory regular timetable subject for Basic Education at public schools. Item I of Article 21 of the Education Law (LDB) defines basic education as preschool, elementary and secondary education. The subject of religious education shall also be provided for preschoolers and classes for youth and adults at state schools in the municipality of Três Rios e Comendador Levy Gasparian. Inappropriate ruling against the State of Rio de Janeiro for attorneys fees in favor of the public prosecutor, which is an agency of the State itself. Affected by TJRJ Precedent 80. Appeal partially upheld[6].

Therefore, not through a provision of the Constitution, but rather arising from Law n. 9 475/1997, we may say that religious education, although optional, is now part of the list of the State's positive obligations in terms of education, including its enforceability in the event of omission by the State.

Concluding points

Having perused the trajectory of religious education in federal legislation, we may perceive the magnitude of the reform introduced by Law n. 9 475/1997 on states' approach to the issue of religious education in public schools: from a right seen as specifically associated with freedom of belief and worship, to be exercised in public schools too, at no cost to the State, which is asked only to take a negative attitude of non-intervention and offer protection against threats to its exercise, we have moved on to a right to positive service provided by the State, which must provide a school system with objective conditions administratively and financially to provide religious education, irrespective of religious organizations so requiring.

Therefore, religious education is being advocated as part of the right to education, not unlike English language classes or mathematics. The only difference, in this case, is in the sphere of pupils being free not to attend and no longer in states' approach to providing it.

6. Court of Justice of Rio de Janeiro (TJRJ) – Fifteenth Civil Panel, Case n. 2005. 001.45451 – Civil Appeal, Judge José Pimentel Marques – judgment proffered May 17, 2006.

In our view, this is not the best solution for the issue since religious education should rather be seen as a right, but one exercised in the private sphere, to be proposed, organized and paid for by the interested religious organizations. In this respect, we should move toward constitutional reform.

Currently, the change in the states' position on religious education and its inclusion, with financing too, as part role of states' duties, confronts educators, public administrators and legal operators with unprecedented complexity that is difficult to solve, involving aspects ranging from school management and organization to the exercise of rights covering beliefs and academic freedom. Issues such as training required for religious education teachers and how they are to be hired, their association with religious organizations, curricular organization, means of appraisal or testing, attendance and classroom time to be provided etc., have become part of the discussion on implementation in Brazil.

However, the greater complexity arising from the manner in which religious education is implemented in public schools in Brazil is due to the total delegation of powers to local education systems in regulating "procedures for deciding contents" and setting "rules for teacher qualification and admission" (Law n. 9 475/1997, Article 33, § 1), which leads to great unevenness in terms of interpretation and level of implementation. A point that must be borne in mind is that when we talk of delegation to local education systems we are referring to potentially more than five thousand units comprising states, municipalities and the Federal District[7]. However, these are issues to be raised on another occasion.

References

Cunha, Luiz Antônio. 2007. "Sintonia Oscilante: Religião, Moral e Civismo no Brasil – 1931/1997". *Caderno de Pesquisa.* São Paulo, v. 37, n. 131, p. 287, maio/ago.

7. The Education Law (LDB, Law n. 9 394/1996, Article 11) affords municipalities the faculty of creating their own education systems, being part of the state government's system, or being part of a single basic education system with the latter.

_____. 2006. "Autonomização do Campo Educacional: Efeitos do e no Ensino Religioso". Available at http://www.luizantonio.cunha.nom.br/.

Cury, Carlos Roberto Jamil. 2004. "Ensino Religioso e Escola Pública: O Retorno de uma Polêmica Recorrente". *Revista Brasileira de Educação*, n. 27, pp. 183-191, sep./oct. /nov./dec.

Fishmann, Roseli. 2006. "Ainda o Ensino Religioso em Escolas Públicas: Subsídios para a Elaboração de Memória sobre o Tema". Available at www.educacao.ufrj.br/revista/indice/numero2/artigos/rfischmann.pdf.

Herkenhoff, João Batista. 1987. *Constituinte e Educação*. Petrópolis, Vozes.

Maliska, Marcos Augusto. 2001. *O Direito à Educação e a Constituição*. Porto Alegre, SAF.

Martel, Letícia de Campos Velho. 2007. "'Laico, mas nem Tanto': Cinco Tópicos sobre Liberdade Religiosa e Laicidade Estatal na Jurisdição Constitucional Brasileira". *Rev. Jur. Presidência da República*, Brasília, v. 9, n. 86, pp. 11-57, aug./sep.

Milton, Aristides A. 1898. *A Constituição do Brazil – Notícia Histórica, Texto e Commentario*. 2. ed. Rio de Janeiro, Imprensa Nacional.

Oliveira, Romualdo Portela de. 1995. *Educação e Cidadania: O Direito à Educação na Constituição de 1988 da República Federativa do Brasil*. Doctoral dissertation, Universidade de São Paulo.

Piovesan, Flávia. 2006. *Direitos Humanos e Justiça Internacional*. São Paulo, Saraiva.

Silva, José Afonso da. 2001. *Curso de Direito Constitucional Positivo*. 19. ed. São Paulo, Malheiros.

Supremo Tribunal Federal. ADI n. 3.510-DF. Relator: Min. Carlos Ayres Brito. Available at: www.stf.gov.br.

TJRJ – Tribunal de Justiça do Rio de Janeiro. Décima Quinta Câmara Cível, Proc. n. 2005.001.45451 – Apelação Cível, Des. José Pimentel Marques – Judged 17.05.2006. Available at: www.tj.rj.gov.br.

_____. Décima Câmara Cível, Proc. n. 2006.001.08880 – Apelação Cível, Des. Gilberto D. Moreira – Judged 05.09.2006. Available at: www.tj.rj.gov.br.

II

OS SISTEMAS DE ENSINO E O MINISTÉRIO PÚBLICO

Higher Education Institutions and State Authorities: Autonomy and Control

Eduardo Martines Júnior

Introduction

Experience shows that education has extended well beyond its own domain and reached that of the Law, requiring jurists and active professionals to take an interdisciplinary approach, to influence several other fields of knowledge and in turn be influenced by them. Education has been discussed among jurists and posed as an absolute priority in order to combat poverty, economic and social underdevelopment, and even crime, directly affecting some aspects while affecting others indirectly, but always evincing the fact that any attempt to resolve the severe problems confronting our society must involve prioritizing education.

Although benefits are visible in many countries that have really prioritized education, I do not believe all responsibility for Brazil's progress (or lack of it) may be attributed to education; nevertheless education does hold out the concrete hope of tomorrow's world being better than today's. While there are no magical solutions, future generations may be much more knowledgeable and aware of their rights and duties if we make a clear and firm decision to support education. In the words used by Delors (2001), a modern vision of the concept of education is

based on four pillars: learning to know, learning to do, learning to live together and learning to be.

Note that these four pillars of education are not restricted to schools. On the contrary, they embody all forms of education "from cradle to grave". Delors (2001) warns:

> At a time in which formal educational systems tend to prioritize access to knowledge to the detriment of other forms of learning, it is important to conceive education as a whole. In the future, this perspective ought to inspire and guide educational reforms on the level of drafting programs and when deciding new pedagogical policies. (*Translation, as are all other quotations below.*)

Finally, I agree with Delors (2001, p. 103) that it is no longer possible for a young person to acquire a stock of knowledge, however extensive it may be, that will last them for the rest of their lives, since a world evolving at fantastic speeds requires constant updating. Delors adds:

> [...] the mission posed for education and the multiple forms it may take means that it covers everything – from cradle to grave – leading people to dynamic knowledge of the world, of other people and themselves, flexibly combining the four fundamental "learnings" described in the previous chapter. It is this educational continuum broadened to the dimensions of society that the Commission designates in this report as "lifelong education". This type of education is the key to the gateway into the 21st century and goes well beyond mere adaptation required by the world of work: it is a pre-condition for humanity's more comprehensive mastery of our rhythms and our times. (Delors, 2001, p. 104.)

The current concept of education is clearly much broader than the former one based on mere transmission of knowledge. Note that the educational process, although based on utilization of previous experience, is not restricted to what is taught and learned in classrooms. It goes far beyond that to incorporate relevant social values for each different society, some renovating existing values and others enhancing them.

Adorno referred to *creating true consciousness*. Democracy, he says, must function in accordance with this concept and thus requires emancipated persons, since only the latter may imagine an effective democracy as a society. Moreover, he notes:

> Education would be impotent and ideological if it ignored the goal of adaptation and did not prepare men to find their way in the world. However, it would be equally questionable if it were no more than this, producing nothing beyond well-adjusted people meeting the requirements of precisely the worst aspects of the status quo. In these terms, built into the origin of this concept of education for consciousness and rationality, there is ambiguity. Perhaps it cannot be overcome in the existing situation, but we certainly cannot avoid it. (Adorno, 2003, p. 143.)

Education must cover a broad spectrum, developing all facets of the human being, really preparing for social life, family, work and for the exercise of citizenship in particular. In this respect, other important issues are the environment, education for inclusion, and consumer education as part of the context of modern life, as a necessity, with individual awareness of the constant pursuit of economic and social development while protecting the environment, without failing to see people as holding the same rights if they are different in some way, etc. To teach these ideas today is to ensure success for future generations, since humanity must develop while respecting values we cherish.

The 1988 Constitution devotes a great deal of space to education, with Article 205 stating the duty of the State and the family in this respect, to be fostered and encouraged with the collaboration of society. Education alone will enable Brazilians to exercise citizenship and eliminate the many harsh inequalities persisting in our society. But what is the meaning of the word "State"? Is the Constitution referring to the legislative and executive powers alone? My aim is to broaden the sense of the word to include the public attorney as a differentiated entity of the state to which important functions were ascribed, in particular defense of the legal system, the democratic regime, inaccessible social and individual interests, and overseeing effective fulfillment by the public powers of the rights assured by the constitution, holding civil investigations and bringing civil public actions for the protection of diffuse collective rights. In the course of their duties, public attorneys may bring actions against the State itself.

The important and difficult task of educating requires the intervention of many governmental actors and agencies. The family and society are also called upon to assume their roles. From the State's point of view,

education is distributed in systems, as stipulated by the Constitution and detailed in the 1996 Education Law (LDB), and in the constitutions of the states, their laws and norms. For some time, public attorneys have been intervening in educational matters with an emphasis on specific points, but the tendency is toward a wider field of action.

Joining forces is positive, I believe, but it calls for a focus on points whose relevance justifies joint work from all the state entities involved. I shall now proceed to deal with Brazil's education systems and the role of public attorneys.

Education in the Constitution and the 1996 Education Law (LDB)

The subject of education arises in several different parts of the 1988 Constitution. In Article 6, education gains the status of social right and thus a fundamental right of human beings. Article 205 *et seq.* furnish more details, posing dignified education as a right of everybody and a duty of the State and the family, fostered and encouraged with the collaboration of society, aiming to ensure the development of individuals, thus preparing them for the exercise of citizenship, and providing skills for employment.

After stating the basic principles of education, the constitution organizes education systems under the federative principle adopted by Brazil. Article 221 charges the Union [the Federative Republic of Brazil] with the duty of organizing the federal education system and that of its territories, as well as the redistributive and supplementary task of ensuring equal educational opportunities and certain minimum standards. The states and the Federal District were assured the right of organizing their own *educational systems*, and priority was afforded to elementary and secondary education. Finally, the municipalities too may organize their education systems, prioritizing elementary, day-care and preschool education.

Further regulation was provided by Law 9394/96, literally the Law of Guidelines and Bases of National Education (usually referred to locally by the acronym LDB), which was a general education law based on

competences stipulated in item XXIV of Article 22 of the Constitution, under which the Union [the Federative Republic of Brazil] alone may legislate in relation to "the guidelines and bases of national education". Its Article 9 and other subsequent articles determine the competences of each system, with the Union deciding competences and guidelines for day-care and preschool, elementary and secondary education, as well as general rules for undergraduate and postgraduate courses (items IV and VII of Article 9). It also stipulates the existence of a National Education Council (§ 1 of Article 9), whose structure and functions are listed in Law 4.024 of 20 December 1961, with the wording from Law 9.131 of 24 November 1995, as seen below. The same law clearly states that the duty of the *national education system* is to set curriculum guidelines for both basic (preschool, primary and secondary) and higher education. Under the 1996 Education Law (LDB), states and municipalities were given competencies that include issuing supplementary norms for their own educational systems. Finally, education establishments may draw up and practice their educational proposals, as long as they follow common norms and those of their education system (Article 12 of the LDB. Clearly, the proposals cannot be detached from curriculum guidelines and standards enacted in the state and municipal systems to which they are related.

In short, the Union may issue general rules and curriculum guidelines; states and municipalities may enact supplementary norms for their education systems; educational establishments have the task of drafting and executing their pedagogical proposals.

The State's Educational Agencies

The National Educational Council

In light of the importance of education, I shall now attempt to show how actors on the educational scenario behave in practice.

As noted above, the *national system* determined by the 1996 Education Law (LDB) includes the National Education Council (CNE), which together with the Ministry of Education issues national curriculum guidelines for all levels of education. The council votes a report from

one of its members containing the grounds for its position and a *draft resolution* for approval by the Minister of Education. If the report and resolution are ratified, the norm binding on all those involved is finally implemented. This is usual practice in educational systems, and note that the 1996 Education Law (LDB) states that pluralism of ideas and educational conceptions is a principle when providing education (item III of Article 3) limited only by curriculums and guidelines on minimum contents set in the guidelines (item IV of Article 9). In relation to higher education, the Union issues general rules for the courses (item VIII of Article 9), and decides on curriculum guidelines for degree courses (item "c" of Paragraph 2, Article 9, of Law 4.024/61, with the wording from Law 9.131/95).

The State Education Council

In relation to state systems, Article 237 of the Constitution of the State of São Paulo generally repeats the Federal Constitution's principles. It requires a state system of education (Article 238 and 239), governs the manner in which it is organized and charges municipalities with priority responsibility for elementary education. It recognizes the State Education Council (locally CEE) (Article 242) as a body whose task is to set standards and take decisions on the state education system, and exercise advisory functions. These provisions are in accordance with the Federal Constitution and Law 9.394/96, particularly Article 17 governing state education systems.

Finally, in relation to the State Education Council, the state's constitution was regulated by Law 10.403, of 6 July 1971, associating the council with the state's education department. At state level, reports and proposals may lead to a type of draft resolution (*deliberação)*, a proceeding peculiar to this body, for subsequent ratification by the Minister of Education. The State Education Council is therefore a deliberative, normative and consultative body of the state education system, and has incumbencies conferred by the Federal Constitution, the Constitution of the State of São Paulo, the 1996 Education Law (LDB), and state regulatory law.

Public Attorneys and Education

The 1988 Federal Constitution significantly strengthened the office of the public attorney. Its Article 127 described the institution as "permanent and essential to the judicial function". However, rather than intervening in the field of jurisdiction, the Constitution stipulates incumbencies for the office of the public attorney that are clearly extraprocessual, such as defense of the legal system, the democratic system and social and unalienable individual interests. After stating the grounds for intervention, Article 129 provides an open-ended list of institutional functions only as concrete examples of the legal situations and instruments in which the public attorney's office may be involved. Neither the Federal Constitution nor the State Constitution, Law 8.625 of 12 February 1993 (Organic Law of the Office of the Public Attorney), Complementary Law 75, of 20 May 1993 (Law of the Public Attorney of the Union), or Complementary Law 734 of 26 November 1993 (Organic Law of the Office of the Public Attorney of the State of São Paulo) came close to restricting public attorney duties to jurisdictional ones. On the contrary, defending rights guaranteed by the federal and state constitutions is an institutional function of the office. Article 103, item VII of Law 734/93 gives public attorneys the incumbency of serving any member of the community and *taking appropriate measures* (Article 121, item II of LC 734/93). Law 75/93 is much broader and recognizes several cases of intervention by public attorneys outside the sphere of the judiciary (Article 5), with utilization of the instruments listed in articles 6, 7 and 8. In any event, the public attorney's office not only may act in relation to educational issues, but should do so, whether administratively or judicially[1].

In relation to education in general, I have already noted that it provides a measure of the social, cultural and economic development of a

1. This view was argued in my doctoral thesis for the postgraduate program in Law at Pontifícia Universidade Católica de São Paulo, and the Constitutional Law sub-program in particular, under the title: *Education, Citizenship and the Public Attorney*, advisor prof. Maria Garcia (2006).

nation[2]. If quality education is provided, it will surely be easier to achieve full development. For society as a whole, education provides feasible ways of offering opportunities for growth and sustainable development with social inclusion, conserving the environment, and affirming citizenship as a whole. Brazil needs investments in many economic sectors to generate employment and income, and leave poverty behind. However, we must not pursue developed-country status at the cost of ignoring the values recognized by the Constitution. On this basis, we shall ensure a better future for Brazil and the today's generation will prepare those of the future to climb to higher rungs on the ladder of economic and social development. According to Durkheim (1978):

> Education is the action exerted by the adult generations on those who are not yet ripe for social life; It has for its object to arouse and develop in the child, a certain number of physical, intellectual and moral states which the political society as a whole and the special milieu for which the child is particularly destined demand from him. (Durkheim, 1978, p. 41.)

Preparing future generations to be aware of the need to protect and preserve the values definitively embodied in a society's culture is a difficult task that requires endless honing, especially given the continuing and growing range of adversities. It is up to us to change the outcome of the game:

> This means it was already impossible to exist without assuming the right and duty of choosing, deciding, fighting, being political. All of which brings us again to the imperious nature of educational practice of an eminently ethical nature. All of which takes us back to the radical nature of hope. I know things may even get worse, but I also know that it is possible to intervene to improve things. (Freire, 1996, p. 52.)

Therefore, if the public attorney has the incumbency of defending the right to education as a whole, the institution must oversee its effective implementation in order to fulfill the provisions of the Federal Constitution.

2. *Op. cit., passim.*

Conclusions

Education is highlighted in the constitution and deserves special attention from the State, the family and society. In this respect, the Constitution and other applicable norms dealing with educational systems and their governing bodies, whether legislative or executive, embody a complex structure that does not follow fixed patterns.

The existence of the division of powers in obedience to the federative principle has been complemented by the existence of educational councils at national and state level, as bodies responsible for general norms binding on all those involved in educational matters. The National Council of Education, working with the Ministry, issues resolutions and reports. In the regional context, state councils of education provide norms for decision-making systems in conjunction with state education departments, and compile reports and opinions. Municipal educational councils may be added to municipal education departments, so the so-called *educational system* becomes quite complex.

The profile of the public attorney's office was raised by the 1988 Constitution. It evolved from being an organ of a merely judicial nature to a broader role as advocate for society's constitutional rights. As defender of people's rights, it naturally can and should demand the right to education as the basis for society's development. The public attorney must act in this sense to influence and demand concretization of the fundamental right to education.

References

Adorno, Theodor Wiesengrund. 2003. *Educação e Emancipação*. 3. ed. Translated by Wolfgang Leo Maar, Rio de Janeiro, Paz e Terra.

Delors, Jacques (org.). 2001. *Educação*: *Um Tesouro a Descobrir* (Report to Unesco from the International Commission on Education for the 21st Century). 5. ed. Translated by José Carlos Eufrázio, São Paulo, Cortez; Brasília: MEC/Unesco.

Durkheim, Émile. 1978. *Educação e Sociologia: Com um Estudo da Obra de Durkheim, Paul Fauconnet*. 11. ed. Translated by Lourenço Filho, São Paulo, Melhoramentos; Rio de Janeiro, Fundação Nacional de Material Escolar.

Freire, Paulo. 1996. *Pedagogia da Autonomia: Saberes Necessários à Prática Educativa.* São Paulo, Paz e Terra.

Martines Júnior, Eduardo. 2006. *Educação, Cidadania e Ministério Público: O Artigo 205 da Constituição e sua Abrangência.* Thesis for doctorate in Constitutional Law – Pontifícia Universidade Católica de São Paulo, São Paulo.

The Role of the Public Attorney and Protection of the Right to Basic Education

Adriana A. Dragone Silveira

Introduction

Brazil's legislation has declared the right to education since the Empire period, and free primary education was fully assured from the legal point of view by the 1934 Federal Constitution (Oliveira, 2007a). However, the promulgation of this right by the 1988 Federal Constitution (CF/88), along with further supplementary legislation such as the 1990 Children and Adolescents Statute (Law 8069, or ECA), or the Education Law (Law 9394 of 1996, or the LDB), has not sufficed to ensure that all Brazilian citizens can access schools, or be assured of progression at school, or educational quality.

Educational access statistics show elementary schooling (the only compulsory stage of basic education in Brazil) has not become universal despite expansion in the 1990s raising net enrollment to 97%. The most recent IBGE census data (2000) show that only 9.4% of children aged under 3 had access to day care; pre-school facilities reached 61.4% of children aged 4 to 6 years. For secondary education, net enrollment in 200 was 33.3%, which is a rather low percentage of young people (Inep/MEC, 2004). In 2004, 10.5% of the population aged over 15 were illiterate.

In the context of extending rights, the 1988 Constitution also enhanced the legal mechanisms for protecting them: public civil actions, writs of injunction, and collective writs of mandamus. A key role in the protection of social rights is attributed to the office of the public attorney (Duarte, 2003). In Brazil's new legal framework, this institution was conceived as "permanent, essential to the jurisdictional function of the State, with the incumbency of legal defense of the democratic system and the inalienable social and individual interests" (1988 Federal Constitution, Article 127).

The role of the public attorney was strengthened by the 1990 Children and Adolescents Statute, which sets forth the rights of minors, including their educational rights, and stipulates the institution's functions in protecting these rights.

The work of the public attorney as defined by the Children and Adolescents Statute (Article 201) may be developed in different ways, judicial or administrative. Chief among them are holding a civil inquiry (*inquérito civil*) or bringing a public civil action (*ação civil pública*) in defense of individual, diffuse or collective interests[1] relating to children and adolescents; and inspecting entities and assistance programs for children and adolescents. Its duties include taking administrative or judicial measures in cases of irregularities; initiating administrative proceedings or investigations; setting up inquiries and ordering police investigations to investigate illicit acts or violations of norms for the protection of children and young people; ensuring effective respect of legal rights and safeguards assured children and adolescents and taking the appropriate judicial and extrajudicial measures; overseeing the pro-

1. Diffuse and collective rights are defined in accordance with their divisibility, coverage and origin, Diffuse rights are "shared by a indeterminate group of persons prejudiced, the object of these interests is indivisible, the group is united by a shared de facto situation (e.g. an action to obtain civil remedy for damage to the environment, to the detriment of the residents of a region; a public civil action to stop misleading advertising on radio or television); '*collective* rights' those shared by a particular group of persons prejudiced; the object of interest is indivisible, the group is conjoined by a *shared basic legal relationship*, which must be resolved uniformly for the whole group (e.g. a class action seeking to annul unfair terms in an adhesion contract)" (Mazzilli, 2004, p. 76, my emphasis).

cess for electing members of local or regional bodies set up under the children and adolescents statute (*conselhos tutelares*); overseeing the registering of donations; monitoring the work of entities and programs protecting minors and their socio-educational services; and intervening when infractions are committed by adolescents.

This article looks at two municipalities in the interior of the state of São Paulo and the role of their public attorneys in protecting the right to basic education. The aims are to examine the different types of legal and judicial measures developed by the public attorneys for Children and Young People, and to characterize the consequences of their work in terms of guaranteeing the right to basic education.

The study looked at the work of the public attorneys for Children and Adolescents in Rio Claro and Ribeirão Preto, two municipalities in the interior of São Paulo state, both rated third-level cities in terms of development of the careers of public attorneys. The research covered actions developed by the attorneys in the 1997-2004 period, when new educational funding measures prioritized basic education and affected the provision of other stages of education and related services (these measures refer to Constitutional Amendment n. 14 of 1996, and the Fund for Maintenance and Development of Basic Education, or Fundef).

Two methods were used to collect data: one was documentary analysis of extrajudicial procedures, court cases and other documents compiled by the public attorneys' offices with the aim of protecting the right to basic education; the other was interviewing public attorneys working with the Children and Adolescents sections in the municipalities selected.

The decision to examine the work of these public attorneys for Children and Young People reflected the fact that in the state of São Paulo, members of the public attorney's office working in this field have the duty of acting to ensure full protection of children's and adolescents' rights, including educational rights, and that pupils in basic education are part of the age group covered by the statute.

From Recognizing the Right to Basic Education in Brazilian Legislation to Providing the Means of Protecting this Right

The right to education included in the list of human rights in the 1948 Universal Declaration of Human Rights comprises the social as well as the individual dimension. Education is crucial for full personal development and for access to other goods and services available in society as well as being necessary for economic, political and social development.

In Brazil, education is recognized as a fundamental right and officially declared by the State in constitutional norms. As an inalienable right of the citizen, it imposes on the State a duty to provide it free of charge, so that it is accessible for all citizens.

The 1988 Federal Constitution declares the right to education among the social rights as a whole (Article 6), as a right of all citizens, and a duty of the State and the family, in order to ensure "full development of individuals, their preparation for the exercise of citizenship and their qualification for employment" (Article 205). Duarte (2003) states that of all the social rights, it is the right to education that has been strengthened most by legal protection under the Brazilian constitutional system.

Article 208 of the 1988 Federal Constitution[2] spells out the duties of the State in terms of providing education and ensuring its effectiveness (Motta, 1997): compulsory elementary education free of charge, secondary education free of charge, specialized education for pupils with special needs, preferably as part of the regular school system; care day centers and pre-school units for children aged under five, supplementary school material programs, transportation, meals and health care.

The 1990 Children and Adolescents Statute includes some aspects of the right to education complementary to the 1988 Federal Constitution, such as enabling families to question the criteria used by schools to evaluate academic performance, and free access to a public school

2. Article 208 of the 1988 Federal Constitution was amended by two constitutional amendments, EC n. 14/1996 and EC n. 53/2006.

near the home. This declaration favors the possibility of demanding free school transport to anable pupils to attend schools not located near their homes (Oliveira, 1995).

One of the innovative aspects of the 1988 Constitution is that it explicitly declares compulsory education to be a subjective public right. Therefore the public power's failure to provide compulsory education, or its doing so irregularly, involves liability for the competent authority (Article 208, § 1 and 2). This declaration underlines the importance of the right to education, since a public subjective right is in itself a legal means of checking or controlling the action of the State, and enabling citizens vested with their rights to judicially demand that the State fulfill its obligations (Duarte, 2004).

In relation to this subjective public right, the 1996 Education Law (LDB) adds to the parties that may bring an action against the public power in this respect: any citizen, group of citizens, community association, trade union organization, trade or porfessional assocaition, or other legally constituted entity, and the public attorney's office. The same 1996 Education Law also specifies that a competent authority neglecting to provide compulsory education, i.e. elementary schooling, may be charged with failure of duty (*crime de responsabilidade*).

Assuring the right to education goes beyond guaranteeing equal conditions of free access to school: education must also be of a certain level of quality. The constitution merely determined that education must be of quality as a principle (Article 206), but did not clearly and objectively define what "quality" means in this context. However, the 1996 Education Law (LDB) did set minimum standards for educational quality as follows: "[...] the minimum variety and amount, per pupil, of inputs required to develop the teaching-learning process" (Article 4, item IX).

The incorporation of the constitutional principle of educational quality in the 1988 Constitution was not sufficient to establish a form of protection in relation to the Judicial Power. Legally enforceable quality indicators would have to be compiled (Oliveira and Araújo, 2005).

The policy of democratizing education implemented in recent years has posed the priority of broadening access to basic education, and new challenges have arisen as a consequence of these reforms: meeting

growing demand in other stages of basic and higher education, and in particular the need to end exclusion from access to learning, and ensure educational quality (Oliveira, 2007b). One issue clearly posed by these challenges is that investment in education is insufficient to meet the needs posed by higher enrollment numbers, which have been rising since the 1970s (Pinto, 2000), thus pointing to the main obstacle facing education policies, which is the shortage of funding for social programs.

The 1988 Constitution was drafted at a time when the military regime was ending, democracy was being reestablished, and civil society was very much involved in deciding Brazil's social and political future. Major advances in terms of the right to education were declared. The constitution was seen as an attempt to build a "social welfare state" in Brazil by recognizing extensive social rights. However, like other social policies, the right to education was undermined by spending cuts aimed at ensuring monetary stability, curbing inflation and balancing the budget – which meant that more efficient and less expensive education systems had to be built.

This changed concept of the State – to include the provision of these services and maintenance of social policies – relates to Bobbio's (2004) noting that the problem was not to show the grounds for the rights of man, but to provide conditions for materializing them, particularly social rights. The key issue is how to guarantee these rights that are recognized in declarations but then constantly violated.

The right to education, as guaranteed in legislation, may have its protection favored by the public attorney's office, which under the Constitution and the Children and Adolsecents statute (CF/88 and ECA/90) extends its past role relating to criminal offenses and seeks to ensure that legal rights and guarantees are fulfilled, thus adding another ally to the cause of education by bringing actions in court, acting extrajudicially, and demanding that public agencies materialize the right to education for all Brazilian citizens, not just access to schools and progression, but the right to quality education too.

Judicial demands in this respect may be pursued through procedural means such as writs of mandamus, injunctions and public civil actions.

In terms of extrajudicial measures, the public attorney may have violators sign a Promise to Adjust Behavior (under the Children and Adolescents Statute's Article 211) stating the date and conditions for rights to be materialized.

To initiate administrative procedures, public attorneys may issue notifications and collect depositions or explanations, and may demand information, examinations, technical reports and documents from local, state and federal authorities, or from bodies of the direct or indirect administration. They may also conduct inspections of individual or private institutions and require them to submit information and documents.

Characterization of the offices of the public attorney for Children and Young People in Rio Claro and Ribeirão Preto

To illustrate the potential and limits of the work of the public attorney in protecting the right to basic education, I shall analyze the work of the public attorneys for children and young people in two cities in the state of São Paulo. There follows a brief characterization of the two cities and the characteristics of the two public attorneys offices, which have the same ranking in terms of careeer promotion, but very different their physical structures and staffing. I would also emphasize that the aim of the study was not comparitive in that each attorney conducts his or her work independently, and their roles are related to the different social contexts in their municipalities.

Rio Claro

The municipality of Rio Claro is located in the east of the state of São Paulo, 157 km from the state capital. In 2005, its population was an estimated 185,131, making it a medium-scale municipality in the context of the state.

In 2004, seven public attorneys were active in the Rio Claro district, four with two criminal courts and the other three with civil courts. Work related to Children and Young People issues was done by two of them who were officially designated as the fifth and seventh public attorneys.

The public attorneys' offices were in the same building as the Judiciary. They did not have their own section but were located in different parts of the court building. There was little space and some public attorneys did not have a comfortable office, which made it difficult for them to attend to larger numbers of people.

The fifth public attorney entered the service in 1988 and moved to Rio Claro in 1992. Among the specialized departments, he served with Children and Young People, Housing and Urban Development and Occupational Accidents. On the arrival of the seventh public attorney in Rio Claro in late 1999, the duties of the Children and Young People's department were divided. The fifth public attorney started acting only in cases involving minor offenders, while the newly arrived attorney took other cases. In addition to Children and Young People, the seventh public attorney had duties in the Citizenship and Criminal departments. Each public attorney is assisted by an officer and a trainee. Both attorneys pointed to the need to staff their offices with professionals to ensure better progress on cases.

Priorities for action were defined at monthly meetings. The priorities set by the fifth public attorney in recent years have been building a correctional unit for minors, namely a unit of the State Foundation for the Welfare of Children (Febem), and ensuring access to school for children. The seventh public attorney prioritized checks on children in irregular situations, and begging on the streets, and together they sought to learn more about the problem of children dropping out of school or not achieving progression.

Ribeirão Preto

Ribeirão Preto is one of the larger municipalities in the state of São Paulo with an estimated population of 543,885 in 2005. It is located 313 km to the northeast of the state capital.

Unlike Rio Claro, the public attorney's office in Ribeirão Preto had more extensive and specific infrastructure in terms of facilities and staffing. Without pursuing comparisons, this meant that it had more opportunities to protect the right to basic education.

The attorneys had their own building, organized in two departments, Criminal and Civil, with eight of them lodged in the latter. Children and Young People had one member working on infractions only, while another six public attorneys shared cases involving custody, care or guardianship, and adoption.

The public attorney for Children and Young People, charged with the duties posed above, had joined the service in 1984 and worked in Ribeirão Preto since 1994. In all the districts where he had served, he had always worked with Children and Young People, but had become more specialized in this field in recent years, while also working with the environment and disputes involving deeds to land or property.

In the Children and Young People's department of the public attorney, the focus was on diffuse collective rights, which meant monitoring public policies and fulfillment of fundamental rights, as well as socio-educational measures for internees in one of the Febem correctional units. There was a support staff comprising two officers from the states' public attorney service, a technical assistant and several trainees.

Ribeirão Preto's state public attorneys held annual public hearings with the participation of civil society to decide their local activities and priorities. Education was in first place among the suggestions made at the 2004 public hearing for local priorities, along with appropriate judicial and extrajudicial measures to meet demand for pre-school units; the right of children and adolescents to study at the school nearest their home, with special emphasis on decentralizing secondary schools; the right to education for young people at the Febem correctional unit; democratic management of education by setting up properly functioning school boards or councils; steps to provide environmental education in public schools, and a seminar on democratic management in education.

Another highlight in Ribeirão Preto was the experience of the "community public attorney" outreach effort in 2003, conducted by the public attorneys for Children and Young People and Housing and Urban Development. The attorneys, the service's officers and a state attorney visited a needy district of the city to attend to needs of the local community.

Measures Adopted by Public Attorneys to Protect the Right to Education

During the period covered by the research, public attorneys for Children and Young People in Rio Claro were involved in eight actions, seven of them judicial and one extrajudicial, as well as less formal administrative measures such as official letters or phone calls to have places provided at schools near pupils' homes and measures in relation to school dropout rates.

The judicial proceedings were one "public civil action" and six writs of mandamus, all demanding access to education The first required the municipality to provide places in elementary education supplementing the state's school system, emphasizing the attributions shared between municipal and state governments for the purpose of meeting demand for this stage of basic education, against the background of a discussion of elementary school municipalization. Six writs of mandamus required places in school near the pupil's homes. The extrajudicial proceedings demanded access to day care centers and pre-school units near home for children who had not obtained places in the municipal school system.

Relating to actions brought by the state attorneys for Children and Young People in Rio Claro for realization of the right to education, note that all posed demands for access to education. However, the fifth attorney stated that although there were no complaints, he perceived lack of quality education in schools through contacts with minors who had committed offenses; they could only "draw" their names even though they were in sixth grade, say. The public attorney admitted it was difficult to take steps to ensure quality education, but noted the possibility of the institution making a collective effort together with teachers and parents.

Due to excessive caseloads and activities, including hearings, cases, attending the public and working in several different fields, Rio Claro's public attorneys said it was sometimes difficult to participate in events, undertake visits and conduct public hearings.

In terms of an analysis of the public attorneys office ensuring the right to education, Rio Claro's fifth public attorney believed the institu-

tion had fulfilled its role, saying "it fulfilled the function of modifying the social reality, at least a place is guaranteed, and now I have to work on the issue of quality. "The seventh public attorney said it was important for people to be aware of the limits of the attorney's office, particularly for collective rights, since it cannot play a role in all cases, and it was important to publicize "what it is able to do and how its functions may be exercised".

The Rio Claro public attorneys' efforts to guarantee the right to education illustrate the structural characteristics of the institution in the municipality and the role of the public attorney in a wide range of different fields with difficulty for more specialized intervention in situations affecting children and young people, especially when ensuring diffuse collective interests.

In Ribeirão Preto, the work of the public attorney for Children and Young People to guarantee the right to education involved different demands totaling 53 documents requesting access to and permanence at pre-school, elementary secondary education at schools near home, critiques of the quality of education, incentives for democratic management of public education, and various other matters, such as control of absence or dropping out of school, and funding for education.

Thirty-two judicial and extrajudicial proceedings brought by the public attorney for Children and Young People concerning the right to education may be seen as requesting the right to access and permanence or progression in basic education schools. These actions involved requests for places in schools near home, additional places, enrollment in day care or pre-school centers, and others objecting to measures taken by schools to prevent a pupil's permanence at school, such as expelling pupils, charging fees and uniforms.

In addition to extrajudicial proceedings and public civil actions judicially demanding the right to access education and ensure permanence at school, other actions involved objections to the way in which education was provided. In all, there were 16 cases raising issues associated with educational quality, such as the conditions of school facilities, insufficient teachers and staff for the proper functioning of schools, and curriculum or teaching issues.

The adoption of judicial and extrajudicial measures to ensure the constitutional principle of democratic management of education was included in the local action programs and broader plans of the State of São Paulo's Public Attorney for Children and Young People. The latter stated that it would be possible to improve the quality of public schools and meet the needs of the population through democratic management and effective participation of all sectors concerned. To foster the principle of democratic management, the public attorney was encouraging pupils to elect legally regulated pupils' bodies (*grêmios*) and taking measures to ensure proper functioning of school councils, in particular by creating regional bodies for the latter.

In the analysis of the work of the public attorney for Children and Young People of Ribeirão Preto, extrajudicial initiatives stand out as a main feature since of all documents reviewed, whereas only 9% of cases were taken to court. In the public attorney's opinion, litigation should be "exceptional" and only used when no solution is possible extrajudicially.

The structure of the public attorney for Children and Young People in Ribeirão Preto poses a differential feature in its activities involving educational demands. The role of the technical assistant is essential and has contributed greatly, according to the attorney, who noted that education was a priority for the State of São Paulo's plan of action, but for this to materialize, public attorneys for Children and Young People needed technical training and material support to do their job properly, and they had to be "mobilized to embrace this priority". The attorney also emphasized the need for a different approach to demanding the intervention of the public attorney, and said that the internal affairs department should verify compliance with time frames and ensure that attorneys are carrying out the institution's strategy.

This involvement of the Ribeirão Preto public attorney's office with the community, together with educational conditions in the municipality, as seen in the characterization of its basic education services, was the driving force for a range of significant actions ensuring protection of the right to basic education.

Points on the Role of the Public Attorney and Protection of Educational Rights

The role of public attorney's in protecting the right to education in the municipalities analyzed involved a limited number of requests for access to basic education These actions were quickly resolved in light of the express declaration of this stage of basic education as a subjective public right (1988 Federal Constitution, Art 208).

Guaranteeing the right to education involves not only providing places, but also pupils being enrolled at schools near their homes, as stipulated by the Children and Adolescents Statute (Art 53, item V) to facilitate their regular attendance and progression at school. This issue arose in both of the localities analyzed. In Rio Claro, the right was assured by writs of mandamus. In Ribeirão Preto, the public attorney acted extrajudicially through dialogue with schools, the municipal education department and the regional office of the state's department, a process that was not always favorable to the needs of children and adolescents. The difficulty in materializing this right shows that classrooms are overcrowded due to the lack of planning and school buildings, partly aggravated in this municipality by a program for reorganizing the state's public school system, which led to the division of basic education services in different schools. Constant demands for places near pupils' homes prompted Ribeirão Preto's public attorney to pose building and / or extending facilities, especially in remote regions with high levels of demand.

Also in relation to access to basic education, the demand for day care and pre-school units was pursued by attorneys in both cities, highlighting the need for more places. For the first time in Brazil, the 1988 Federal Constitution declared education to be a duty of the state, and this took place in the context of important theoretical discussions on the role of early childhood or pre-school education and civil society, particularly working women's movements, organizing to demand services for children below the age of compulsory schooling (Corrêa, 2007). However, this process occurred at a time when funding for basic education was prioritized by EC-14/96 and the creation of Fundef, or the elementary education fund (Pinto, 2000).

Demands posed for the extension of pre-school education, in Ribeirão Preto through the courts, and in Rio Claro through the involvement of the public attorneys in the action brought by some citizens, were symptomatic of a situation in which providing pre-school education is not compulsory but a programmatic norm in as far this is possible for the municipal government, depending on its capabilities. In 2005, a similar case demanding the right to enroll a child at a day care center reached the Supreme Court (STF) as an extraordinary appeal brought by the public attorney of São Paulo after the Court of Justice of São Paulo found that providing pre-school education was a discretionary act of government. As rapporteur judge for the appeal, Celso de Mello stated that pre-school education "qualifies as a fundamental right of every child, and the process of its materialization may not be exposed to merely discretionary appraisals of the public administration, nor is it subordinated to purely pragmatic reasons of government" (STF, Extraordinary Appeal n. 410715/SP). This decision supported realization of the right to pre-school education for all families requiring it.

The right to pre-school education was being materialized, although more gradually than one would wish, in Ribeirão Preto particularly, through extrajudicial action by the public attorney putting pressure on the municipal authorities, individually demanding access to day care and pre-school services that were not available, and listing children whose parents or guardians required places. However, large numbers of individual requests occupy more of the time of public attorneys, which may affect their roles in other areas and the effort to have municipalities implement public policies for larger numbers of children.

Among the arguments rejecting the right to pre-school education, some cases led to discussion of prioritizing basic education in the municipality's services for the care of children under six years of age. Sena (2004) states that by defining responsibilities shared among entities of the public administration, the 1988 Constitution determines that municipalities prioritize both elementary schools and pre-school education rather than ranking their priorities in terms of providing these services.

Again, in terms of access to basic education, the right to secondary education was demanded in Ribeirão Preto, but much less so than

pre-school services. These cases focused on extending secondary school services to certain localities, highlighting the need to build more schools since because many students obtain places at schools far from their homes, which posed difficulties for regular attendance.

In terms of the right to quality in education and the public attorney's role in protecting it, the study shows the difficulty of enforcement. In relation to the conditions in schools and buildings, the public attorney's work was more effective, however complaints were not resolved promptly when they concerned shortages of teachers and staff in schools, particularly in the state's educational system, and organization of the curriculum and teaching. Ribeirão Preto's public attorney took the more extrajudicial approach of discussing solutions to these problems with different sectors, mainly through the regional body for school councils, and believed in improving public schools through democratic management.

The strategy of taking a more extrajudicial approach to quality of education, as Oliveira (2007a) notes, evinces the challenge for research to "identify the level of quality to which everyone is entitled, so that they can demand it in the courts, as is the case in relation to places" (p. 39).

On examining the work of these two public attorney offices, one may conclude that aspects such as more constant dialogue with the community and other characteristics are more related to the individual profiles of the attorneys involved. In this respect, the constitutional principles governing the institution must be taken into account.

The office of public attorney is based on the three principles of unity, indivisibility and independence (1988 Federal Constitution, Article 127 § 1). Therefore, as Paula (2000) states, it is an institution "[...] whose functions are unique and exercised by agents who act in the name of the public attorney, enjoying full freedom in relation to legal conviction and broad autonomy of action in the cases involved" (2000, p. 194).

Kerch (2002) writes that the structure of the public attorney's office differs from other state agencies. Due to their independent status (*estrutura monocrática*), the Attorney General cannot order individual public attorneys to do their work in one way or another, or replace a member of the office in the middle of a case (pp. 95-96). Such a guarantee may pose problems for the role of the public attorney, but it also offers some

assurance for society, since a public attorney not may be replaced under pressures from within the institution or externally. However, according to Kerch (2002), Martinez Jr. (2006) and Silva (2001), this guarantee means that the institution as a whole is unable to pursue policies.

In addition to minimizing dependence on individual profiles of attorneys, more active participation of civil society is to be emphasized as a possible means of strengthening the role of the public attorney. By posing the community's real needs through actions and holding public hearings, the public attorney's office may be able to bring more pressure to bear on public bodies.

Demands raised by civil society make the public attorney's efforts more effective and its interventions more frequent. This involves members of bodies such as the councils set up under the Children and Adolescents Statute, councils for the rights of children and adolescents, education councils, the Fundeb social monitoring and control bodies, and representatives of communities and / or residents associations. However, there is a need for more awareness of the functions of the institution and its powers since the public attorney is often asked to solve problems that ought to be addressed to the office of the public defender.

The analysis of the work of the two public attorney offices also emphasizes different situations in terms of physical infrastructure and support staff as factors that may prompt more extensive and active interventions by members of the public attorney's office in order to ensure protection of social rights, including the right to education. In Rio Claro, public attorneys were involved in more different fields of work than in Ribeirão Preto, and the former lacked specialized staff, such as Ribeirão Preto's technical assistant, which would facilitate a more specialized approach and help develop different fields of work.

As an institution independent of the other powers of the State in the exercise of its functions, as specified by the Constitution and infraconstitutional laws, the public attorney's office may act as yet another ally of civil society in the pursuit of education for all Brazilian citizens, by requiring the State to fulfill its obligations. However, as Souza Júnior (2006) points out, the institution is affected by historical, material and

cultural limitations. As Castilho (2006) states, the institution must see education as one of its priorities; it must set up specialized public attorney offices, provide operational support centers, and encourage its members to take part in councils, committees or forums working for the proper materialization of educational rights.

As Martinez Jr. (2006) has shown, the work of the public attorney's office must be more broadly based to demand fulfillment of the fundamental right to education by the public power, the family and society; it must not be limited to demanding places *a posteriori* but should actively participate in formulating public policies for education and monitor their implementation.

Based on a case study of two public attorney offices, this article has sought to show the potential and limits of this service in terms of materializing the right to education. As Brazil's educational statistics show, legislation declaring a right is not sufficient, since society must have the structure required to materialize the right. In this context, the office of the public attorney, among other institutions, may help defend society against the State's violations of rights that have been recognized in legislation.

References

Bobbio, N. 2004. *A Era dos Direitos*. Rio de Janeiro, Elsevier.

Brasil. *Constituição*. 1988. *Constituição da República Federativa do Brasil*. Brasília, Senado Federal.

_____. *Law 8.069*, of July 13, 1990 relates to the Children and Adolesecents Statute and other measures. Available at http://www.planalto.gov.br. Accessed Sept. 6, 2007.

_____. *Law 9.394* (*LDB*) of December 20 1996, sets forth "guidelines for national education". Available at: http://www.presidencia.gov.br/ccivil_03/Leis/L9394.htm. Accessed July 20, 2008.

Castilho, E. W. V. de. 2006. *Direito à Educação e Ministério Público*. Available at: http://www.acaoeducativa.org.br/downloads/EST1.pdf. Accessed 5 jan. 2008.

Corrêa, B. C. 2007. "A Educação Infantil". In: Oliveira, R. P. de & Adrião, T. (orgs.). *Organização do Ensino no Brasil*: *Níveis e Modalidades na Constituição Federal e na LDB*. 2. ed. São Paulo, Xamã.

Duarte, Clarice Seixas. 2003. *O Direito Público Subjetivo ao Ensino Fundamental na Constituição Federal Brasileira de 1988*. Doctoral dissertation, Faculdade de Direito, Universidade de São Paulo, São Paulo.

_____. 2004. "Direito Público Subjetivo e Políticas Educacionais". *São Paulo em Perspectiva*. São Paulo, n. 18 (2), pp. 113-118.

Instituto Nacional de Estudos e Pesquisas Educacionais Anísio Teixeira/ Ministério da Educação (Inep/MEC). 2004. *Os Desafios do Plano Nacional de Educação*. Brasília: Inep/MEC.

Kerche, F. 2002. *O Ministério Público no Brasil*: *Autonomia, Organização e Atribuições*. Doctoral dissertation, Faculdade de Filosofia, Letras e Ciências Humanas, Universidade de São Paulo.

Martines Júnior, E. 2006. *Educação, Cidadania e Ministério Público: O Artigo 205 da Constituição e sua Abrangência*. Doctoral dissertation, Pontifícia Universidade Católica de São Paulo, São Paulo.

Mazzilli, H. N. 2004. *Ministério Público*. São Paulo, Damásio de Jesus.

Motta, E. de. 1997. O *Direito Educacional e Educação no Século XXI*. Brasília, Unesco.

Oliveira, R. P. de. 1995. *Educação e Cidadania*: *O Direito à Educação na Constituição de 1988 da República Federativa do Brasil*. Doctoral dissertation, Education, Faculdade de Educação, Universidade de São Paulo, São Paulo.

_____. 2007a. "O Direito à Educação". In: Oliveira, R. P. de & Adrião, T. (orgs.). *Gestão, Financiamento e Direito à Educação*: *Análise da LDB e da Constituição Federal*. 3. ed. São Paulo, Xamã.

_____. 2007b. "Da Universalização do Ensino Fundamental ao Desafio da Qualidade: Uma Análise Histórica". *Educação e Sociedade*, vol. 28, n. 100, pp. 661-690, Oct.

_____. & Araujo, G. C. de. 2005. "Qualidade do Ensino: Uma Nova Dimensão da Luta pelo Direito à Educação". *Revista Brasileira de Educação*, n. 28, pp. 5-23, jan./feb./mar.

Paula, P. A. G. de. 2000. "O Ministério Público". In: Konzen, A. A. (coord.). *Pela Justiça na Educação*. Brasília, MEC, Fundescola.

Pinto, J. M. de R. 2000. *Os Recursos para a Educação no Brasil no Contexto das Finanças Públicas*. Brasília, Editora Plano.

Sena, P. de. 2004. "O Município e a Responsabilidade pela Educação Infantil na Constituição, na LDB e no PNE". *Estudos*. Brasília, Câmara dos Deputados, July. Available at: http://www.camara.gov.br/internet/diretoria/conleg/Estudos/210643.pdf. Accessed April 21, 2005.

Silva, C. A. 2001. *Justiça em Jogo*: *Novas Facetas da Atuação dos Promotores de Justiça*. São Paulo, Editora da Universidade de São Paulo.

III

O DIREITO À QUALIDADE NA EDUCAÇÃO

The Right to Quality Education from the Neoconstitutionalist Perspective

Erik Saddi Arnesen

Introduction

My intention here is to provide an overview of the right to quality education in the light of neoconstitutionalist theory, necessarily a broadly based sketch since dealing adequately with the theoretical framework of neoconstitutionalism would in itself require much more developed reflections than those briefly noted below. Similarly, more than a few pages would be required to flesh out the expression *right to quality education* with legal content and redress.

I shall therefore begin by outlining this new legal model, to then apply its rationale in analyzing the right to quality education. Finally, I shall review some of the more perplexing aspects that have arisen in practice related to the combination of the two.

Developing New Legal Premises

For illustrative purposes, by analyzing the jurisprudence of the Federal Supreme Court I shall seek to ground the premises to be used here, in other words to show that Brazil's legal system and its practice evince premises sufficient to pose the constitutional right to quality education

as a subjective right, and as one that is fully enforceable legally and directly accessible to individual right holders. In this respect, the following rulings have been selected (Table 1).

Table 1. Federal Supreme Court rulings related to the right to education

Type	Ref.	Judge Rapporteur	Plaintiff	Defendant	Date	Publication
Interlocutory -Extraordinary Appeal	241.757-2	Maurício Corrêa	Association of Persons with Impaired Hearing of the State of Maranhão	Municipality of São Luís (MA)	29.06.1999	20.04.2001
Initial ruling Interlocutory Appeal	455.802	Marco Aurélio	Public Prosecutor of the State of São Paulo	Municipality of Santo André (SP)	07.02.2004	05.03.2004
Initial ruling Interlocutory Appeal	411.518	Marco Aurélio	Public Prosecutor of the State of São Paulo	Municipality of Santo André (SP)	03.03.2004	26.03.2004
Initial ruling Interlocutory Appeal	475.571-8	Marco Aurélio	Public Prosecutor of the State of São Paulo	Municipality of Santo André (SP)	03.03.2004	31.03.2004
Initial ruling Interlocutory Appeal	474.444	Marco Aurélio	Thiago Inácio Calado represented by Enedina Da Silva	Municipality of Santo André (SP)	05.03.2004	31.03.2004
Initial ruling Extraordinary Appeal	401.673	Marco Aurélio	Public Prosecutor of the State of São Paulo	Municipality of Santo André (SP)	26.03.2004	19.04.2004
Initial ruling Extraordinary Appeal	401.880	Eros Grau	Public Prosecutor of the State of São Paulo	Municipality of São Paulo (SP)	27.08.2004	28.09.2004
Initial ruling Extraordinary Appeal	431.773	Marco Aurélio	Public Prosecutor of the State of São Paulo	Municipality of Santo André (SP)	15.09.2004	22.10.2004
Initial ruling Extraordinary Appeal	402.024	Carlos Velloso	Public Prosecutor of the State of São Paulo'	Municipality of Santo André (SP)	05.10.2004	27.10.2004
Initial ruling Interlocutory Appeal	509.347	Sepúlveda Pertence	Public Prosecutor of the State of São Paulo	Municipality of São Bernardo do Campo (SP)	16.12.2004	09.02.2005

(cont.)

Type	Ref.	Judge Rapporteur	Plaintiff	Defendant	Date	Publication
Extraordinary Appeal	410.715	Celso de Mello	Public Prosecutor of the State of São Paulo	Municipality of Santo André (SP)	27.10.2005	08.11.2005
Interlocutory - Extraordinary Appeal	410.715-5	Celso de Mello	Public Prosecutor of the State of São Paulo	Municipality of Santo André (SP)	22.11.2005 Unanimous vote	03.02.2006
Initial ruling Extraordinary Appeal	436.996	Celso de Mello	Public Prosecutor of the State of São Paulo	Municipality of Santo André (SP)	26.10.2005	07.11.2005
Initial ruling Extraordinary Appeal	438.493	Joaquim Barbosa	Public Prosecutor of the State of São Paulo	Municipality of Santo André (SP)	20.11.2005	12.12.2005
Initial ruling Appeal	463.210	Carlos Velloso	Public Prosecutor of the State of São Paulo	Municipality of Santo André (SP)	07.11.2005	17.11.2005
Interlocutory - Extraordinary Appeal	463.210-1	Carlos Velloso	Public Prosecutor of the State of São Paulo	Municipality of Santo André (SP)	06.12.2005 Unanimous vote	03.02.2006
Initial ruling Extraordinary Appeal	467.255	Celso de Mello	Public Prosecutor of the State of São Paulo	Municipality of São Paulo (SP)	22.02.2006	14.03.2006
Initial ruling Extraordinary Appeal	472.707	Celso de Mello	Public Prosecutor of the State of São Paulo	Municipality of São Paulo (SP)	14.03.2006	04.04.2006
Initial ruling Extraordinary Appeal	293.412	Eros Grau	Public Prosecutor of the State of São Paulo	State de São Paulo and Municipality of Presidente Venceslau	15.04.2006	29.05.2006
Interlocutory - Extraordinary Appeal	384201	Marco Aurélio	Public Prosecutor of the State of São Paulo	Municipality of Santo André (SP)	26.04.2007	03.08.2007
Initial ruling Interlocutory Appeal	564035	Carmen Lúcia	Public Prosecutor of the State of São Paulo	Municipality of São Paulo (SP)	30.04.2007	15.05.2007

Source: Compiled for this article.

I would emphasize that this selection of these rulings is merely illustrative and that the aim is simply to note conclusions concerning the nature of legal norms related to the right to education, and to other norms involving educational rights.

To further demonstrate this approach, I shall begin with the first of the rulings selected, which was the judgment in Appeal n. 241.757-2, initially rejected by Judge Mauricio Corrêa, who then acted as rapporteur for the subsequent interlocutory appeal. Judges Néri da Silveira and Nelson Jobim Votes also voted to reject the appeal whereas Judge Marco Aurélio cast a minority vote.

At that time, the prevailing interpretation was that it was not incumbent on the judiciary to directly intervene in order to realize the right to education for disadvantaged persons. The words of Judge Néri da Silveira express the position of the others:

> There is no doubting that the Constitution's provisions [relating to the right to education] have extraordinary and far-reaching social significance. The constitutional congress inserted them and significant progress was made on this level. However, my view is that a writ of mandamus is not actually the proper means to ensure that these rights posed by the constitution text are enjoyed. *I do not see these norms as directly self-applicable. I believe they are predominantly programmatic in their content and would depend on integration procedures.* (My emphasis, STF, Appeal 241757, Rapporteur Judge Maurício Corrêa, DJ 24.04.2001.)

However Judge Marco Aurélio's minority vote was striking in its forcefulness and in fact it reflected what now appears to be the Federal Supreme Court's current position. He mentioned the Federal Constitution's Article 208, subparagraph III, which states that the State has a duty to provide "specialized educational assistance for disadvantaged persons", and noted: "When the constitution was enacted, this precept became directly self-applicable and therefore has sufficient force to compel the public power to provide places in the public school system for these disadvantaged persons". (STF, Appeal 241757, Rapporteur Judge Maurício Corrêa, DJ 24.04.2001.)

On education-related rights posed by the Constitution, he added: "I think the constitutional norms are self-applicable. None of them remits

to regulatory or supplementary legislation, except in relation to defining community, faith-based or philanthropic schools, which we now have clarified". (STF, Appeal 241757, Rapporteur Judge Maurício Corrêa, DJ 24.04.2001.)

A point of interest here, again with the aim of setting out the premises underpinning the Supreme Federal Court's current conception of the fundamental right to education, is to note the changed reasoning posed by Judge Eros Grau. In the case of Appeal 401.880, judgment of which was proffered on September 27, 2004, the Public Prosecutor of the State of São Paulo, acting as plaintiff, required the Municipality of São Paulo to provide more places in the elementary education sector of the municipal public school system. Initially, the judge ruled against direct applicability of constitutional norms related to the social right to education, in particular Article 211, paragraph 2, in respect of which he stated: "The precept in the Constitution's Article 211, § 2 – "The municipalities will act primarily in elementary and preschool education" – is a programmatic requirement to be materialized through laws implementing public policies". (STF, Appeal 401880, Rapporteur Judge Eros Grau, DJ 28.09.2004.)

Later, on 15 April 2006, in his initial appreciation of Appeal 293.412, the judge made a substantial alteration to his position. Again, the plaintiff was the Public Prosecutor of the State of São Paulo, while the defendants were the State of São Paulo and the Municipality of Presidente Venceslau. On this occasion, the case went beyond ensuring places, since and the Public Prosecutor sought a judicial guarantee that the State and the Municipality would provide free school transportation for pupils residing in the municipality as a means of materializing the right to education. The court ruled in favor of the Public Prosecutor and in contrast to his position in 2004, Judge Eros Grau stated: "Education is a fundamental and inalienable right of the individual. The State has the duty of providing the means of making exercise of this right feasible. Administrative omission prevents the Public Power from fully carrying out the duty imposed on it by the Brazilian Constitution itself". (STF, RE 293412, Rapporteur Judge Eros Grau, DJ 29.05.2006.)

This, he said, was the Supreme Court's position, and he cited Judge Celso de Mello:

> [...] pre-school education, as a fundamental right of all children, is not to be exposed to the merely discretionary appraisals of the Public Administration in the process of its concretization, nor subordinated to reasons of pure governmental pragmatism. [...] Municipalities [...] must not be omissive in terms of their constitutional and legally binding mandate under Article 208, IV, of the Fundamental Law of the Republic of Brazil, which is a factor restricting the political-administrative discretion of municipal entities [...]. Although the prerogative of formulating and executing public policies resides primarily with the Legislative and Executive Powers, the Judiciary may determine, although on exceptional bases, especially in the case of public policies defined by the Constitution itself, that these policies be implemented by state organs whose omission – involving non-fulfillment of the political-legal responsibilities of a mandatory character incumbent on them – may undermine the efficacy and integrity of social rights imbued with constitutional status. (STF, RE 293412, Rapporteur Judge Eros Grau, DJ 29.05.2006.)

A key point here is to inquire as to the essence of the different interpretations of judges Maurico Corrêa, Nelson Jobim and Néri da Silveira in Appeal 241.757-2 and Judge Marco Aurélio's submission with his minority vote, in addition to the apparent realignment in Judge Eros Grau's position between 2004 and 2006, and what this may represent in terms of legal doctrine.

In general terms, there have been two major traditions in the history of constitutional law (Sanchís, 2003). America's constitution states the rules of the game and poses a minimum criterion for separating the social and political competences for producing rules. Kelsen takes this view when he defines his "material constitution" as "positive norm or norms through which production of general legal norms is regulated" (Kelsen, 1984). Thus understood, a constitution has the function of merely assuring individuals their autonomy as private subjects or as political agents (Sanchís, 2003, p. 125), who thus have ample security and enjoy the freedom to determine the course of their individual and collective lives in a democratic and equalitarian manner. Constitutional content sets limits and provides procedures for legislators, but does not prescribe substantive determinations, or does so as little as possible.

This succinct model gives rise to constitutional guarantees for individuals and groups in relation to the power of the State, and to the idea of the supremacy of the constitution itself, since its norms organize the power of legislating, limiting and dividing competences between the bodies that produce rules (among them the ordinary legislator), and logically must be legally superior to the latter. The Judiciary in particular is vested of great relevance in this model since by effectively fulfilling its role it ensures the constitutional norms and individual guarantees are enforced.

The other tradition in constitutional doctrine, with dense substantive content giving society very detailed axiological guidance, has historically been associated with periods of social and political change (Sanchís, 2003, p. 125). European constitutionalism emerged from the transformative ideals of the French revolution and over the centuries, it has advanced far beyond setting limits to state power to "constitutionalize" social demands such as education, health, workers' rights, the environment etc., so that now almost all aspects of an individual's life are legally addressed by detailed constitutional provisions.

However, between this ambitious program and society is the figure of the legislator responsible for interpreting the abstract general will of society and translating it in institutional terms. Being thus inaccessible, constitutional norms are weakened against the unyielding legalism of democratic majorities incapable of making them conditional. Constitutions based on this model lack instruments capable of guaranteeing the force of their contents because the constituent power seeks to perpetuate itself in the leadership of society through the sovereign people. However, the authority of the people is diluted on being expressed through legislators, and thus weakened when confronted with government interests.

However, in Brazil today, and for a number of decades in Western European legal systems, a new structure has been posed for a model constitution, which is increasingly referred to as neoconstitutionalism. The new aspect of the latter may be its combining elements from these two above-mentioned constitutional traditions: one being the logical concept of constitutional supremacy and the jurisdictional guarantees to assure it of a synthetic model constitution seen as the minimum to

be agreed on; the other posing strong material (substantive) normative content related to the concept of the constitution as an articulated system regulating a wide range of aspects of social and political life. The core of the latter being "a transformative constitution setting extensive conditions for majority decisions, but in which the fundamental or deciding role corresponds to the judges rather than the legislators" (Sanchís, 2003, p. 126) [our translation]. Judicial instruments of guarantee are available for the realization of an extensive and substantive range of constitutional rights, which alter these positions. Note "judges" means not just those sitting in constitutional courts but also those of lower instances and jurisdiction applying to all citizens, who are assured direct application of constitutional norms. On the contrary, the very existence of a constitutional court is the legacy of a tradition of the constitution as the rules by which the powerful must abide.

Since they are now guaranteed legally, substantive constitutions have become normative rather than programmatic. Thus, there is no longer filtering of their effects through legislators. Be they individual rights or workplace conditions, constitutional provisions as obligations are directly accessible and enforceable by individuals independently, in their private relations or against the State.

Due to these elements, neoconstitutionalism is seen as posing a new "state under law" model that is perhaps more comprehensive since the legislator's power too is subject to the constitution. Legal theory refers to this new type of state as a "constitutional state under law".

Although Brazil's 1988 constitution may be seen as expression of neoconstitutionalism, its focus includes extensive substantial content; hence it sets conditions for most decisions in a crucial way that is fully assured judicially. This means that constitutional norms are not directed toward legislators. Their efficacy does not depend on any intermediary will. Rights and obligations are guaranteed by the judicial power, established and directly applicable. There are clearly implications of this concept for the right to education and related norms. Related to this is the importance of recognizing the immediate deontic force of norms such as Article 205 of the Federal Constitution.

This effort must involve considerations as to the effective position in terms of fundamental rights, and perhaps specifically those related to education in Brazil, such as applying regulatory criteria of the highest hierarchical standing that have the most legal force and importance, and are most indeterminate (Alexy, 2003, p. 32 *et seq.*).

In relation to the "highest hierarchical standing" criterion, this is met by the simple presence of fundamental rights in Brazil's 1988 Constitution. Similarly, their greater force is guaranteed since they set conditions for the acts of the State's powers, and there are jurisdictional instruments capable of guaranteeing this relation. There is some room for doubt in terms of certain norms of the fundamental rights in Brazil's legal system, in relation to the most important criteria of the aim of indetermination and its highest degree. However, this does not seem to be the case of the right to education, or the right to quality in education.

Also arguable is the extent to which Brazil's legal or social order is constitutionalized. Guastini (2003) presents the following seven conditions for classifying a given system as constitutionalized (Guastini, 2003, p. 50 *et seq.*).

a. Constitutional rigidity: involving a written constitution guaranteed against infra-constitutional legislation by the force of its higher hierarchical standing, and having an inalterable axiological minimum basis.
b. Jurisdictional guarantee of the constitution: the possibility of controlling the constitutionality of infra-constitutional norms through the judicial power.
c. Binding force of the constitution: acceptance by the legal culture of the normative rather than merely programmatic character of constitutional provisions.
d. Over-interpreting the constitution: extensive interpretation of the constitution assumed particularly by members of the judiciary, leaving little freedom of action for legislators.
e. Direct application of constitutional norms: individuals enjoying access to constitutional rights.

f. Interpretation in accordance with laws: judicial practice in the sense of constantly interpreting laws in the axiological direction indicated by the contents of the constitution.
g. The constitution's influence on political relations.

An important point to clarify is that such a classification is not absolute and may be divided into degrees of constitutionalization. Only the first two are indispensable conditions. However, both are clearly seen as present in Brazil. The others are in general emerging in Brazilian legal practice with increasing frequency.

This much may be deduced from the rulings selected, especially when compared to those of the past, as exemplified by the majority votes in Appeal 241.757-2.

This type of analysis does not envisage norms for fundamental rights on the lines of the Weimar Republic's constitutionalist tradition. The aim is comprehension of a right to education whose realization does not conceive related provisions as programmatic declarations. On the contrary, it should be understood that constitutional norms relating to education are prone to immediate judicial control and guarantee, and there can be no arguing that their realization will depend on their being politically convenient.

The above Federal Supreme Court rulings enable us to envisage the requirement of diffusion in legal culture, particularly in jurisprudence, being the voice of its highest body and based on a binding conception of the constitution attributing immediately enforceable rights.

In this respect, note Judge Cármen Lúcia's ruling in Interlocutory Appeal 564.035/SP:

> [...] Education is part of the existential minimum and its fulfillment is a strict obligation of the Public Power, from which none of the entities exercising state functions may be exempted. The existential minimum sets forth the fundamental rights without which human dignity is endangered. There can be no admitting this principle as a legal myth or delusion of civilization, but rather an ineluctable constitutional datum that elevates the worth of humanity that all human beings have as their birthright, and which demands respect from all. (STF, Appeal 564035, Rapporteur Judge Carmen Lúcia, DJ. 15.05.2007.)

On the same lines is the forceful ruling of Judge Marco Aurélio in Appeal 431773/SP:

> […] education… a duty of the State to ensure day care and pre-school for children through six years of age. The State - the federative republic, states as such (i.e. federated units) and municipalities - must be equipped for unrestricted observance of the constitutional precepts, and may not tergivisersate with pretexts related to shortage of funds. The huge tax burden in Brazil contradicts this endless beating about the bush. (STF, RE 431773, Rapporteur Judge Marco Aurélio, DJ 22.10.2004.)

Not only the Supreme Court evinces this trend. We may mention two of the High Court's rulings on the subject of education.

On ruling for the constitutional right to day care, Judge Luiz Fux noted:

> [...] it seems inconceivable that rights recognized in minor norms such as circulars, ministerial orders, provisional measures, and ordinary laws should have efficacy while constitutionally recognized rights based on the highest ethical and moral values of the nation are relegated to the background. The State promises the right to day care and has the duty to provide it since, in the words of Konrad Hesse, the political and constitutional will was to put an end to the intellectual pauperism that prevailed in Brazil. (STJ, Appeal 575.280/SP, rapporteur Judge Luiz Fux, First Panel, DJ 25.10.2004.)

In another judgment, also related to children's education, the same Judge Luiz Fux was even more forceful: "[The] Constitution is not ornamental and may not be reduced to a museum of principles, nor is it merely a set of ideals; it requires real efficacy of its norms". (STJ, Appeal 771.616/RJ, Judge Luiz Fux, First Panel, DJ 01.08.2006.)

In light of the above selected extracts, we may envisage the possibility of an effective substantive and guaranteed constitutional model. There is the worthy concept of fundamental rights in general as unconditionally assured for all, regardless of political conjuncture, even against the wishes of the majority. This would entail the possibility of a violation by the public power being seen as non-fulfillment of constitutional promises set forth in, say, Article 205 of the Constitution, and as a violation subject to control by the Judiciary.

The Federal Constitution articles 6 (social right to education), 205, 208, 211, and others education related articles have normative contents and thus pose deontico (prescriptive) content. Although apparently obvious, this affirmation provides great assurance in legal grounds. Once admitting that they are normative statements of fundamental rights, even if their implementation is as yet very restricted, the fundamental education related-rights may be seen as more than just good ideas for the future, or as the rhetorical fruit of a post-authoritarian period. They may be conceived not as expectations, but as real requirements to provide services and meet unfulfilled needs.

Again, the reference to the will of the majority is not unique. One recalls the democratic objection commonly made against neoconstitutionalism. However, it is understood that the model of a substantive and guarantor constitutional state under the rule of law also introduces a substantial dimension for democracy, making fundamental rights necessarily inherent to the latter (Ferrajoli, 1999, p. 23 *et seq.*).

Therefore, beyond formal or political democracy, we may speak of material or substantive democracy. While the former relates to the way in which the State's decisions are made in accordance with formal rules, the latter refers to that which may be decided, or ought to be decided, by the majority, in light of fundamental rights, otherwise invalidating the decision or absence of decision. Political democracy thus acquires substantive relations that may be negative in the case of rights or liberties, or positive in the case of social rights. "No majority, not even unanimously, may legitimately decide to violate a right to freedom or decide not to provide for a social right" (Ferrajoli, 1999, p. 24).

An important point here is that the neoconstitutionalist model does not describe a mere philosophy of justice with features derived from natural law. On the contrary, it identifies a specific institutional model whose dynamic requires its own interpretative structure. Clearly, it also depends on specific social practices. We have pointed to certain characteristics of the constitutional state under law as related to certain social stances regarding the Constitution. However, it does not appear that such praxis alone could shape the neoconstitutionalist model without

the aid of institutional instruments such as jurisdictional guarantees for making constitutionally stipulated rights effective.

The transformation from the "legalist state under law" to the new model is believed to have derived from social causes. It poses a change of stance in relation to the neutral character of general and abstract law expressed by legislators. In particular, it was the attrition caused by the periods before and after the two world wars that led to constitutionalization of the right to education based on a social perception that the liberal view of law as separate from a nation's general and abstract will may be a dangerous farce.

The danger was exemplified in the 1930s and 40s through Europe's totalitarian experiences, whose optimistic vision of the role of power and authority benefiting a nation enabled states to adopt discriminatory and degrading institutional solutions against stateless persons and minorities, a lesson that History has unfortunately taught us all. This process, however, brought out the inadequacy of the legalistic conception of law or rights bereft of any attribution of moral content, support for which in the legal system derived exclusively from its not negating the formal rules for its production.

A crisis of ordinary legislation derived from a perception of the law as acts permeated by many different interests, some of them harmful, and this combined with the two world wars eventually led to people doubting the ability of law "to adequately provide orderly social and political life" and came to pose the definitive obsolescence of the "legislative state under law" as a model of social order, and the need to reformulate and restore the efficacy of law as a check on power.

In the period following the Second World War, all sections of society were calling for the attribution of strong axiological-social content to the system, to declare rights and guarantee protection for individuals and their development. This "new political ethos that resulted from going beyond the liberal conception of the separation of society and State was then translated into an ever-expanding effort to institutionalize what was characterized as a social state, thus shaping a new type of relation between State, citizens and society, on the lines of a normative

order able to direct the economic and social order itself on the basis of fostering human dignity".

As Barroso noted, constitutionalization took this form in Europe. In Brazil, a "constitutional state under law" was predominantly shaped during the redemocratization period and the 1988 Constitution, possibly due to the socially shared will for fairness to prevail. In the jurist's words, we saw the emergence here of a "constitutional sentiment" over this period of almost twenty years; although timid, it was sufficient to be celebrated, since Brazilians were moving away from their historical indifference to constitutions.

The Content of the Right to Quality Education

All this theoretical effort, however, is meaningless if those charged with applying a constitutional right (i.e. judges, from the point of view posed here) are incapable of defining the content of the prescriptive right to quality education.

The right to education is public and subjective, meaning that it involves a relationship in which a certain subject has a legally protected interest. This legal protection is then organized by means of the contrary existence of a duty. Kelsen describes the right of the creditor as protected by the legal obligation of the debtor (Kelsen, 1984, p. 194). We must therefore clarify the duty (obligation) involved in the relationship established by the right to education. The Brazilian Constitution's articles 205 and 206 clearly state this content. The former individualizes the subjects bearing this duty as the State and the family. It also stipulates minimum guidelines as to the content of this right, although in the most abstract manner: "development of individuals, preparing them for the exercise of citizenship, and for employment". However, it really is a determination rather than legal rhetoric. Article 206 then lists the principles on which education in Brazil must be based, and one of the highlights is subparagraph VII, which guarantees a standard of quality.

Clearly the legally protected interest is not merely ensuring that the whole social cohort of school age is physically present in education establishments. Having achieved universal access to the educational system

is not to be demeaned, but it is only an initial part of the duty of the State (and to some extent of the family) in realizing the right to education. In this respect, Oliveira attributes "significant importance to universalization of access to elementary education, since this leads to contradictions shifting from one place to another, proceeding to concentrate on expansion of subsequent stages and the quality of basic education, particularly elementary education" (Oliveira, 2007, p. 666).

In his preface, Oliveira notes that elementary education has been all but universalized in the last three decades, and secondary education is now on the same road, so in as far as the immediately previous problem was solved the social contradictions in the demand for education have gradually moved higher in the educational process.

The first aim would have been extending the school system in physical terms, equating demand and the number of places available at the levels accessed. Having solved this matter, the next step would be the need to reduce truancy or absences by creating conditions for pupils to ensure progression and conclude elementary education.

Related to the need to control absence is the demand for less repetition of failed grades, thus regularizing progression through school and homogenizing enrollment ratios across the different levels of elementary education. Countless solutions were found in the attempt to solve the problem of progression through the educational system, such as introducing automatic-promotion cycles and accelerated learning programs. (Oliveira, 2005, p. 10.)

The inefficacy of the right to education has migrated to different stages of the educational process. It is no longer present at the time of initial access, or in barriers to being promoted to subsequent levels (as was formerly the case with secondary school admission examinations). There has been a gradual reduction of inefficacy in terms of the progression of pupils within the system, in as far as the latter is regularized.

Thus there must be no hesitation in stating that the inefficacy of the right to education at present is mainly seen in aspects related to the guarantee of quality. This situation is not peculiar to Brazil. Spencer-Brown wrote that "the question of quantity in education is so pressing that it would be comprehensible, although not sensible, for us to forget

quality altogether" (Spencer-Brown, 1957, p. 361). It is important to go back to the theoretical basis of neoconstitutionalism to note that it was not merely a social demand arising from the perception of a new contradiction, but a directly accessible right constitutional that may be legally guaranteed through the Judiciary. There must be a definition of the duty involved in this public obligation – in terms of the legal culture at least.

Many elements could be proffered for a legal rather than educational definition of quality education, such as physical structure, curriculum, teaching material, learning resources, staff qualifications etc. However, seeing these elements as provisions of the State directly intervening in the system, as De Groof pointed out, one must bear in mind the need for balance "between freedom and thus the responsibility of those directing schools, universities and another institutions of higher education on one side, and government's leading role on the other" (De Groof, 1998, p. 2).

De Groof belives that quality as a student entitlement involves State intervention. The State's duty in relation to this aspect of the right to education is put to the proof (and realized) in terms of the quality of its intervention in the educational process. In this respect, he notes, the quality of state intervention is best appraised in terms of the efforts it undertakes to foster quality in teaching institutions. The above notion – the duty of the State regarding quality is to be appraised from the point of view of its obligation of guaranteeing reliable educational process free from defects – is extremely useful for the jurisdictional realization of this aspect of the right to education.

From the legal point of view at least, the efficacy of quality must not be viewed from the same logical structure used to solve quantitative contradictions. Judges cannot be imputed the task of cold-blooded analysis of numerical indices, for they would risk being captured by their inherent distortions that cannot be perceived without adequate technical training.

Metrics such as the number of schools built, the elimination of barriers to access, the adoption of cycles, or automatic promotion, are all capable of having great impact on the levels of efficiency of the educa-

tional system. Nevertheless, these metrics relate to other aspects of the right to education – not quality.

Oliveira (2007, p. 10) mentions a new quality indicator that has been introduced in Brazil, which measures quality by the students' cognitive capacity by using standardized tests on a wide scale. However, even these tests are often imperfect since they do not eliminate social differences from metrics, and their scores fail to see outcomes in relation to points of departure. A student starting at a high intellectual level due to favorable family and socioeconomic conditions, may show much less progress than one starting from a lower level due to unfavorable conditions, but may nevertheless score higher than the latter.

There is also the risk of channeling education toward merely scoring well on tests, in an effort to improve indicators.

Therefore, it would appear that the paradigm of pure productivity is of little use as a parameter for those charged with ensuring fulfillment of the right to quality education. Taking the product thereof as instrument for control gains takes on airs of imperfection. The role of judges would be more effective related to control of the learning process. Obviously, they would not have the incumbency of evaluating teaching strategies. However, jurisprudential practice in this field, as seen in reiterated decisions, may define a minimum to be required of the State in its management of education, based on the comprehension of human dignity itself. There could be minimum standards for physical structure and sanitary conditions, a minimum number of teaching days, maximum teacher absences, and a certain minimum amount of educational resources for students.

The neoconstitutionalist perspective requires judges to take this approach. The Constitution being a set of directly binding norms, they must provide for their realization by applying the recognized legal categories.

For the neoconstitutionalists, as noted above, judges play a key role. Leaving the (enforceable) legal definition of quality to the Executive or the Legislative would be to reintroduce an element interposed between society and constitution. There is awareness of the extremely wide-ranging debate in psychology and education as to what quality education

comprises. However, the judiciary is not a technical body when acting outside the courts. In this respect, "quality education" defined for the purposes of public policies may be distinguished from "quality education" as defined for purposes of legal protection.

An important point to clarify is that judges cannot be expected to act as psychologists or educationalists. Their particular task in a constitutional state under law is to determine a legal definition of this right. Hence we may speak of a minimum of responsibility for the State in its management of the educational process, since this idea remits to the principle of human dignity, which judges may more easily assimilate and work with using the criteria of reasonability. As part of this effort, the law must seek support from other sciences and analyze social demands. Again, jurisprudential reiteration is mentioned as the source of this legal conceptualization of quality education since this is the element that attributes rationality and assurance to the system (jurisprudential analysis enables individuals to learn the content of their right; that which may be expected from a judicial decision).

Conclusion

Finally, one peculiarity of the Brazilian educational system in relation to the issue of quality merits comment, however basic, as a suggestion for future research. This is the interface between quality education and the use made of it by private enterprise.

Based on the opportunity afforded by the norm in the Federal Constitution's Article 209, education in Brazil has moved onto the satanic mill wheel that Polanyi (2000) described, in a way that would be very hard to reverse. In the information society, as the market creates ever more dependent relations with knowledge, as was the case of labor, land and capital in the past, education too is becoming a "fictitious commodity".

Describing education as fictitious due to its resemblance to a commodity is extremely apposite and I believe this notion must be constantly part of the thinking of students of the subject. Contemporary society seems to offer no path of retreat from the organizing of education as a

market, with its concrete supply and demand, and economic agents, in the context of its exploration by private enterprise. In this situation, the concept of commodity is essential.

However, we must not lose sight of the fact that educational activity in its essence does not exist for sale and commerce. At bottom, the purpose of education is spreading knowledge in order to foster the intellectual growth of all individuals and thus ensure the collective development of society as a whole. Although organized on lines similar to a market, this is the content that must prevail in educational business, rather than merely making a profit (which is not to be condemned *a priori*).

These points have important implications for quality of education. By guaranteeing quality when allowing private enterprise to provide education, Article 209 of the Constitution has the Public Power retain control of the criteria for authorizing schools and evaluating quality, and sees education as ultimately the State's responsibility. It remains a public and subjective right that is directly accessible and enforceable by the individual through judicial means.

As Ranieri notes (2005, pp. 58-70), the problem is that regulations pertaining to authorizing and controlling private schools are often vague and uncertain, and the mechanism has not favored proper quality control: "on the contrary, criticism is posed concerning the legality and legitimacy of the control exercised. This not only weakens it but also gives rise to a high degree of uncertainty relating to legal and administrative standards involved in the legal system. The procedure prompts defensive tactics from the organizations affected and tends to relativize the right in its abstract generality".

We may conclude by noting that the neoconstitutionalist perspective can contribute greatly to discussion of the right to education and especially the right to quality education. Both in terms of realization of the right to quality education, and when it comes to guaranteeing this right in privately run schools, the Federal Constitution attributes individuals the power of independently and directly accessing this right through the Judiciary, and doing so not in terms of the efficacy of a program, or a set of social or economic ideas, but of the norm that confers a subjective and public right in all its dimensions.

In relation to the difficulty of attributing content to the right to quality education, it would appear that from this neoconstitutionalist perspective with its key role for the judiciary, the best course is realizing human dignity. Only in this way will such rights be more than a reaching a certain score, or passing an exam, which are notions that can easily be glossed over – but the right to education.

References

Alexy, Robert. 2003. "Derechos Fundamentales y Estado Constitucional Democrático", in Carbonell, Miguel (org.), *Neoconstitucionalismo(os)*. Madrid, Trotta.

Baldwin, Peter. 1990. *The Politics of Social Solidarity*, Cambridge, Cambridge University Press.

Barroso, Luís Roberto. 2005. "Neoconstitucionalismo e Constitucionalização do Direito: O Triunfo Tardio do Direito Constitucional no Brasil", available at www.georgemlima.xpg.com.br/barroso.pdf.

Brown, Spencer. 1957. "Quality in Education", in *Jounal of Educational Sociology*, v. 30, n. 8, p. 361.

De Groof, Jan. 1998. "About Quality Rights in Education", in *European Journal for Education Law and Policy*, v. 2, Netherlands.

Duarte, Écio Oto Ramos. 2006. *Neoconstitucionalismo e Positivismo Jurídico: Uma Introdução ao Neoconstitucionalismo e às Formas Atuais do Positivismo Jurídico*, São Paulo, Landy.

Ferrajoli, Luigi. 1999. "Derechos y Garantias". *La Ley del Más Débil*, Madrid, Trotta.

Guastini, Riccardo. 2003. "La 'Constitucionalizacion' del Ordenamiento Jurídico", in Carbonell, Miguel (org.). *Neoconstitucionalismo(os)*, Madrid, Trotta.

Kelsen, Hans. 1984. *Teoria Pura do Direito*, Coimbra, Armênio Amado.

Oliveira, Romualdo Portela de. 2005. "Qualidade do Ensino: Uma Nova Dimensão da Luta pelo Direito à Educação", in *Revista Brasileira de Educação*, n. 28, Rio de Janeiro.

_____. 2007. "Da Universalização do Ensino Fundamental ao Desafio da Qualidade", in *Educação & Sociedade*, v. 28, n. 100, 2007.

Polanyi, Karl. 2000. "A Grande Transformação". *As Origens da Nossa Época*, Rio de Janeiro, Elsevier.

Pozzolo, Susanna. 2006. *Neoconstitucionalismo e Positivismo Jurídico*. São Paulo, Landy.

Ranieri, Nina Beatriz Stocco. 2005. "Direitos Humanos e Comércio Internacional. A Tutela do Direito à Educação nas Negociações Internacionais", in Yarshell, Flávio Luiz & Moraes, Maurício Zanoide de (org.), *Estudos em Homenagem à Professora Ada Pellegrini Grinover*, São Paulo, DPJ.

_____. 2000. *Educação Superior, Direito e Estado: Na Lei de Diretrizes e Bases (Lei n. 9.394/96)*, São Paulo, Edusp.

Sanchís, Luis Pietro. 2007. "Constitucionalismo e Garantismo", in *Revista de Direito do Estado*, n. 7, Rio de Janeiro.

_____. 2003. "Neoconstitucionalismo y Ponderación Judicial", in Carbonell, Miguel (org.), *Neoconstitucionalismo(os)*, Madrid, Trotta.

Currently working for a master's degree in Law of the State at the Law School, Universidade de São Paulo. Contact: erikarnesen@usp.br / eriksarnesen@yahoo.com.br

For the opposite position, see Pozzollo (2006, p. 78).

Quoting Luigi Ferrajoli, Luis Pietro Sanchís explains that "[all] totalitariansms pose an optimistic vision of power; 'on the contrary, the precept of assurance always poses a pessimistic conception of power, whoever is holding power, since the absence of limits and guarantees constantly exposes it to the risk of degenerating into despotism'", in Sanchís, Luis Pietro, *Constitucionalismo e Garantismo* in *Revista de Direito do Estado*, n. 7, Rio de Janeiro, 2007.

Duarte, Écio Oto Ramos. 2006. *Neoconstitucionalismo e Positivismo Jurídico: Uma Introdução ao Neoconstitucionalismo e às Formas Atuais do Positivismo Jurídico*, São Paulo, Landy, p. 19.

Barroso, Luís Roberto. "Neoconstitucionalismo e Constitucionalização do Direito: O Triunfo Tardio do Direito Constitucional no Brasil", available at www.georgemlima.xpg.com.br/barroso.pdf, p. 4.

In this respect, see Polanyi's explanation (2000, p. 94) of the nature of labor, land and capital as fictitious commodities.

Quality Standards in Education

Marcelo Gasque Furtado

Introduction

Discussion of educational quality has gained visibility in public forums and become a major concern not only for specialists in the field, but those from other disciplines such as Economics and Administration.

Law is also gradually becoming involved in this key educational issue, although perhaps not yet to the extent the subject deserves, in terms of the volume of academic work in this field.

In any event, the issue of educational quality includes elements that appear to interest everybody, and it has notable appeal in the community. The media in general, and newspapers and magazines in particular, carry features, editorials and special inserts covering the subject. Educational testing scores, for example, always make headlines due to their impact with the public.

We are living in a historical period in which elementary education is practically universal in Brazil – with few exceptions – so from the issue of access and numbers of places in the educational system, the focus has shifted to new concerns related to the right to education. According to Oliveira (1996, p. 61), "the question of quality, or the thematic of quality, has replaced the more traditional thematic of equality and equal oppor-

tunities, and in this perspective grounds a new focus for educational policy making"[1] (translated, as are other quotes below).

Shortage of places in schools is still a serious problem in Brazil, particularly day-care facilities, but it seems that the right to education is increasingly broadening to cover concerns that go beyond mere enrollment to include the standard of quality that goes with these places.

Although all sectors of society agree with the need for quality education, a more precise notion of what is meant by the term seems to be lost in the cacophony of conflicting voices, each with their own individual concept of quality in education.

There is no real unanimity as to the meaning of quality education. As noted above, it attracts attention and interest in many fields of knowledge, since it appears to pose an ideal requiring a complex process of concretization and supplementary efforts. My aim here is to contribute to the discussion from a legal-constitutional angle based on the Federal Constitution, which poses guaranteed standard of quality as a principle governing how education is to be provided in Brazil (Article 206, VII).

Prior to this, however, I shall pose the problem of educational quality in conceptual terms and briefly outline the historical context in which it has arisen.

Educational Quality: Conceptual Problems

The notion of educational quality is one of those concepts that immediately prompt unanimous agreement when first raised. But after mere acceptance of the general idea, major disagreements arise as people proceed to more in-depth analysis of its contents.

Sometimes "quality" appears to involve no more than a certain vague consensus exalting the education provided by private schools, par-

1. Article 21 of Law 9394/96 (LDB) divides schooling into basic education (comprising pre-school, elementary and secondary stages) and higher education. Pre-school education is provided by day-cares for children up to the age of three and pre-schools for children aged four to five. Elementary education lasts nine years, and is compulsory for children aged six or more. Secondary education is the final stage of basic education, lasting three years.

ticularly in the sphere of basic education, with a concomitant "stigmatization" of public education as lacking in quality. In other instances, "quality" seems to be narrowly related to the idea of testing, as if the latter were in itself synonymous with quality. Yet again, quality education may be synonomous with training for pupils within a certain concepti that is either more instrumental (passing admission examinations, for example) or more humanistic. Indeed, there are countless other possible ways of understanding the notion. Differing views of educational quality are brought out by Carvalho[2]:

> Like other "objects" of social discourse that show a high level of political visibility and involve mass-media impact, the concept of "educational quality" in its current usage poses a series of dangers for intellectuals and researchers. One of them is to treat it as a fixed and unchanging entity whose essential presence may be detected – or magnitude measured- unequivocally and ahistorically rather than a polysemic term capable of referring to a whole range of differing interpretations and categorizations of a range of shared social experiences and practices (2007, p. 307).
>
> Leaving aside historical variations and taking just a few social actors, it is unlikely that the São Paulo employers' association (locally Fiesp), say, would agree with the main trade union organization (CUT) on what is to be expected of quality education, likewise the State would hardly agree with families, or teachers with public policy makers. [...].
>
> For some of those involved, quality education must lead to pupils acquiring different "competences" enabling them to become diligent workers; for others it would produce protest leaders, successful entrepreneurs, literate people, or conscious consumers. Clearly some of these expectations may be compatible, but others are alternative or conflicting, since prioritizing one aspect may complicate another, or undermine its feasibility. A school whose principal pursuit is passing admission examinations may well see this aim as the key criterion for quality, and thus emphasize homogeneous classes and competitive pupils, which means fewer opportunities for sharing differences or cultivating the spirit of solidarity.
>
> On the other hand, for some schools of thought, the very idea that "quality" education should develop "competences" or "capacities" may compromise the educational ideal, since competence and capacity, in their common usage do not necessarily involve any ethical commitment other than efficacy (2004, pp. 328-329).

2. On this issue, see the elucidative article *A Estigmatização da Escola Pública* (Azanha, 1995).

Furthermore, the expression "educational quality" in common usage may refer to what would be expected of the educational process from the standpoint of a given concept of education; or it may refer to *additional* excellence, involving not merely what is expected but continuous improvement too.

An important point here is that "quality" is associated with the meaning of excellence applicable to business corporations acting in a relentlessly competitive market by pursuing productivity gains, maximizing earnings and cutting losses. This corporate sense of "quality", in which the notion of efficiency is implicit, has now migrated to other sectors of society, including education.

Both private and public schools have taken up the vocabulary typical of business, consumer relationships and corporate environments to use words such as "satisfaction", "efficiency", "results", "quality" etc.

A pertinent question here is to ask to what extent notions drawn from the relationships in or around a privately owned business corporation may be transferred to the context of an educational institutions, in which one would hardly wish for results with minimally varying characteristics on the same lines as mass production in industry, since education deals with individually unique human beings.

Many education researchers therefore feel uncomfortable with the unanimity of a certain social discourse that attributes quality to the type of education that pursues utilitarian results such as passing competitive entry examinations.

Is successf in such examinations in itself a measure of educational quality? Is it the quality criterion for education in the public school system too?

> Although entrance examinations may be an aspect of social reality that schools must not ignore, this does not mean they must be the main – not rarely exclusive – aim pursued by public schools. Even if the São Paulo public school system, for example, were to target high pass rates in the more competitive college entrance examinations, it would be doomed to failure, since the supply of higher education places at these universities falls far short of the number of students concluding secondary education (Silva, 2008, p. 76).

On this basis, the author of the above excerpt (in his doctoral thesis) discusses the meaning of quality for public schools as not merely instrumental and utilitarian, but related to the public interests education should be serving.

This difficulty in determining a more precise idea of quality in education grounds our concern for an approach to the concept of quality based on the Federal Constitution itself.

The Rise of the "Educational Quality" Issue

Contemporary concerns for quality in education coincide with events in the international economy and political scenario in the 1980s, particularly the role of globalization, internationalization of the economy and competitiveness between nation states involving a discourse in which education provides the competitive edge that is a key component for developing peripheral countries.

Furthermore, the fall of the Berlin Wall led to a certain unanimity around neoliberal policies, with reforms to boost the efficiency of the State and its services through administrative approaches typical of private corporations, in which the notion of "quality" had gained currency.

Another key point here is that technological advances in recent decades have affected the employability of the working masses, thus requiring increasingly specialized education attuned to this new panorama.

In the recent history of education in Brazil, Oliveira and Araújo note (2005) three different approaches in the changing focus on the concept of quality: universalization of access to education, progression of pupils within school systems, and evaluation through testing.

In the latter part of the 20th century, educational quality was initially discussed in terms of the process of achieving universal access to eight years of free and compulsory education instead of the previous aim of four years at a primary school.

The stage of the schooling process we now call "elementary education" led to a watershed after the four first years of primary school, since access to the subsequent stage of education (referred to as the "gymnasium cycle" of secondary education in Brazil) depended on passing an

"entrance exam" with similar characteristics to the current examinations for admission to public universities: extreme difficulty, success limited to economically more privileged classes, and exclusion of most pupils.

However, this state of affairs began to change as Brazilian society evolved – with rapid industrialization, a mass exodus from rural zones, internal migration, and urbanization – leading to pressure exerted by layers of the population formerly excluded from long-term schooling. The need to extend compulsory education to eight years for everybody, with a more flexible examination, became a political demand in this period, culminating in Law 5692/71 making the "gymnasium" stage a natural sequence after primary school, as in Article 18: "Primary education shall last for eight school years [...]"[3].

In the course of this process, there was a reaction from a section of the press that opposed what was pejoratively labeled "massification" of education. Public school system teachers themselves showed little appetite for change since it implied altering their customary pedagogical practices and working with pupils from low-income groups unfamiliar with the language, values and symbols previously cultivated in schools as institutions of the elite.

From this period comes a sense of nostalgia – echoing until the present day – for the quality of public schools of the supposedly "good times", with the percieved need to restore the high standards upheld by public education in the past. The problem is that schools in the past were responding to the needs of the past. The quality attributed to those schools cannot be reproduced today since it would lead to a situation in which the majority of the population would be excluded.

From the point of view of the privileged segments of the collectivity, the quality of public education may well have deteriorated: privileged groups can no longer find public schools boasting the same standards of education they provided in the recent past. The situation was inverted from the standpoint of the subordinate clas-

3. Under the amended Article 32 of the 1996 Education Law (locally LDB) and the Federal Constitution Amendment n. 53/2006, compulsory elementary education now starts at the age of six and lasts nine years. But since one year of the pre-school period has been reclassified as elementary education, this has not actually added an extra year's schooling.

ses, however, since the opportunity to enroll their children in school enabled this section of the population to use services previously inaccessible to them. For those who had previously had no access to schooling, even this low-quality education was a step forward. This does not mean, obviously, that the shortcomings of public schools are acceptable. But evaluations of the quality of public schools must not ignore the qualitative transformations that have been introduced in education in the course of its being extended to the working classes (Beisiegel, 2005, p. 151).

During the period in which quality meant broader access, providing more places was the priority. Note that the problem of access has not been entirely solved, but once it had been minimized (in the 1990s), the focus of the concern for quality then shifted to pupil progression in the elementary education system.

According to Oliveira and Araújo (2005, p. 10) "quality of schooling was measured by comparing inflows and outflows of pupils in the education system. If outflow was very small in relation to inflow, schools or the system as a whole would be of low quality [...]".

The issue of progression, or through-flows, therefore reflects concerns involving pupils attending school and evolving and being educated for the duration as planned, rather than "dropping out" before concluding the process.

Thus the focus for quality shifted to methods for correcting deviations from the flow of pupils through the system, such as repeating years or periods of absence, which led to the "continuous progression" regime being introduced.

Assuming that the severity of the progression/flow problem has been reduced (although not entirely solved, just as access to places has not been entirely solved), and assuming that most pupils stay at school and progress through to the end of the compulsory stage, the focus of concern for quality has more recently turned toward results obtained after the schooling process, in terms of cognitive evaluation based on large-scale standardized testing[4].

4. Some of these testsare the Basic Education Evaluation System (locally Saeb); the National Secondary Education Exam (locally Enem); and the National Pupil Performance Exam (locally Enade, used in higher education).

> There is no disputing the fact that educational practices must obtain results. Moreover, after a schooling process comprising the stages of basic education, for example, it would be strange if we did not expect certain outcomes, many of them obvious ones, such as literacy or numeracy. But other types of results expected from a schooling process may not be objectively or clearly measurable by standardized testing. For example, there is the idea that a "result" to be presented by schools is training or educating citizens [...] (Silva, 2008, p. 24).

The problem noted in the above excerpt reflects the major concern educators have in relation to testing: the uncritical belief that cognitive evaluations can show us everything that is important in an educational process.

Without taking this distorted view, it is important to emphasize that evaluation provides mere indicators. The results have to be submitted to a hermeneutic process capable of actually contributing to public policy making in education.

Education Quality in the 1988 Constitution and the Law of Education (LDB)

According to the 1988 Federal Constitution: "Article 206 Education shall be provided on the basis of the following principles: [...] VII – Guaranteed standard of quality".

The constitutional status afforded the subject of educational quality is found only in the 1988 charter, and has no precedent in Brazilian constitutional history. As noted above, this concern for quality in every sector of contemporary life, including education, emerged as part of far-reaching historical developments in the late 20th century in particular that had planet-wide social, economic and political repercussions.

But the Constitution does not include a definition of education quality capable of arbitrating between the above-mentioned differing interpretations. Note that a guaranteed "standard of quality" is posed as a constitutional principle.

While not attempting to discuss the conceptions and complexity theoretically involved in the notion of "principle" in the ambit of Constitutional Law, let us admit the view outlined: "[…] principles as

immediately purposeful norms. They determine an end-purpose to be attained [...] Stating an end implies posing a starting point and finding the means of progressing. Means may be defined as conditions (objects, situations) that lead to gradually reaching the content of the end". (Ávila, 2008, p. 79.)

Therefore, the principle set forth in Article 206, VII poses the end-purpose of obtaining quality education, and raises the pertinent question of which conditions would help materialize this end.

A look at the distinguished interpretations of the Constitution provided by reputed scholars in their commentaries on the 1988 Constitution, in article-by-article format or as annotations, shows how these jurists have understood the task of concretizing quality in their commentaries on Article 206, VII.

Ferreira Filho (1999, p. 244) includes a straightforward annotation that casts some doubt on the requirement of quality, or its enforceability: "the pursuit of quality in education is certainly a laudable principle. But the guarantee of quality is a promise that cannot always be carried out".

Silva (2006, p. 789) attempts to objectively identify what the idea of a standard of quality would comprise:

> The standard of quality in education depends on intrinsic and extrinsic factors. The former relate to the organization of schools, which must be equipped with proper instruments for providing all types of qualifications, from preparing children for successive stages of education through to their occupational training – this involves training good educational professionals for each stage, but also requires government to constantly oversee material conditions in schools, such as their use of modern learning methods based on information technology. The latter means providing adequate economic conditions for families so that their children are able to learn properly, since the standard of quality in education is gauged solely by students' school performance, and this does not depend on good quality teachers alone, but also and particularly on pupils' predisposition to learn – which in most cases depends on proper nutrition and having appropriate learning materials.

Bastos (2000) also describes the conditions in which quality would be observed:

> Subparagraph VII of Article 206 of the Constitution assures a guaranteed standard of quality in education. This may be obtained in several ways, including

the hiring and retaining of qualified teachers, good facilities for educational institutions, modern laboratories, computers, libraries and good quality teaching and learning materials being made accessible for everybody. (Bastos, 2000, p. 535.)

Commenting Article 205, Ferreira (1995, pp. 86-87) contributes a long article of an excellence rarely seen in the legal context, and also analyzes the item on teacher training in Article 206, VII

> […] a guaranteed standard of quality is important for the success of education and training for citizenship. To maintain this standard of quality, teachers must be qualified to teach classes and must be enabled to attend courses to ensure specialization and further development.
>
> The standard of quality should be the best possible, hence the need for reasonable remuneration for teachers, learning materials accessible to students, and laboratories, all forming a complex indispensable for the maintenance of educational standards, and relevant to the democratic process of ennobling human personality.

Bulos (2000, p. 1197) notes that "the aforementioned quality is not only internal quality perfected through school evaluation examinations, such as tests, research studies, monographs etc., but also external, in which education will be gauged by the standards and needs of society.

On the basis of these pointers, one may conclude that for the jurists who have provided commentaries on Article 206, VII, the standard of quality in education is to be attained by a complex series of means involving material conditions for teaching, for both educational institutions (sufficient number, school buildings in good conditions, the physical facilities available, effective cleaning and maintenance, regular supply of water, electricity etc.) and pupils (supply of school material, meals or snacks, transportation etc.); human resources related to education (proper training, constant updating, appropriate remuneration etc.); pedagogical conditions (adequate curriculums, methodologies suited to pupil profiles etc.) cognitive results of learning processes appraised by testing etc.

In general, these commentaries tend toward a view of quality related to the needs of a public education system.

Indeed, when the subject of education quality is raised, one usually thinks of problems such as overcrowded classrooms, teacher shortages, teacher training issues, unhealthy conditions, security issues or the threat of crime etc. – all closely related to perceptions of quality in the public system.

Nevertheless, Article 206, VII applies equally to both public and private education.

In addition to its appearing in one of the principles governing the means of providing education in Brazil, the idea of quality is also mentioned in the constitution's articles 209, II; 211, § 1; 214, III and in the Temporary Constitutional Provisions Act (locally ADCT), in Article 60, VI and § 1; reformulated by Constitutional Amendment 53/06. Except for Article 209, II, all these other mentions refer specifically to public education:

Article 209. Education is open to private enterprise, on the following conditions: [...]

II – authorization and *evaluation of quality* by the Public Power (my emphasis).

[...]

Article 211, § 1 The Union shall organize the federal educational system and that of the Territories, shall finance the federal public educational institutions and shall have, in educational matters, a redistributive and supplementary function, so as to guarantee the equalization of the educational opportunities and a *minimum standard of quality of education* through technical and financial assistance to the states, the Federal District and the municipalities (my emphasis).

[...]

Article 214. The law shall establish a multi-year national educational plan, with a view to the coordination and development of teaching at its various levels, and to the integration of government actions leading to: [...]

III – improved quality of education; (my emphasis)

Article 60 (Temporary Constitutional Provisions Act, locally ADCT)) For 14 (fourteen) years as of promulgation of this Constitutional Amendment, the states, Federal District and municipalities will allocate part of the funds referred to in the main body of Article 212 of the Federal Constitution to the maintenance and development of basic education and decent remuneration of education workers, pursuant to the following provisions [...]

VI – up to 10% (ten percent) of the supplementary amount from the Union stipulated in item V of the main body of this article may be distributed to the Funds

through programs aimed at *improving the quality of education*, in the form of the law referred to in item III of the main body of this article; (my emphasis) [...]

§ 1 The Union, the states, the Federal District and the municipalities shall, when financing basic education, ensure improved education quality in order to guarantee the minimum standard defined nationally.

Other mentions include the notions of quality evaluation, improved quality and minimum standard of quality.

The idea of government "evaluation" of the conditions under which private entities provide education derives from the public interest involved in educational activity.

The idea of "improvement", rather than being directly related to a concept of public education constantly getting better, seems to arise from the implicit assertion that everything in this field is generally of very bad quality, so there is a need to guarantee at least some improvement in the current precarious conditions.

Attention is drawn to the mentions of "minimum standard" in Article 211, § 1 and in the Temporary Constitutional Provisions, Article 60 § 1.

The principle in Article 206, VII is stated as only "standard", without the qualifying adjective "minimum". In common use of the word "standard", there is the idea of normative specifications emanating from a standard setting a model to be followed. When referring to "minimum standard of quality", as in Article 211 § 1, the idea of "model" obviously remains, but the adjective "minimum" calls for a less demanding standardization than that required for excellence, one that is closer to a level of essentiality that, if followed, will not involve serious prejudices. But what would this minimum standard for public education be?

Article 4, IX of the 1996 Education Law (LDB) stipulates thus:

Article 4 The State's duty in terms of education in public schools shall be performed by guaranteeing:

[...]

IX – minimum standards of education quality, defined as the minimum variety and quantity per student of materials indispensable to develop the teaching-learning process.

On reading this article, doubt as to what "minimum standard" of quality means is shifted to determine the "minimum variety and quantity of materials per student"[5].

On the basis of the 1996 Education Law (LDB), Liberati (2004, p. 257), although not concerned with defining minimum quantities of materials per student, seeks to identify the material content of the right to education. As one of the facets of this content, he points to quality. In his own words, in order to "highlight the material nature of the right to quality education", certain indicators are taken from schools practices:

> […] school management (1996 Education Law, Article 3, VIII); use of time (1996 Education Law, Article 24, I) organization of space in schools (articles 4, IX, 25,74 and 75), recognition of educational professionals (Article 67, II), dynamic composition of school curriculum (articles 9, IV, 26, 27 and 28), teaching-learning guidelines, forms of evaluation (Article 24, V), parent participation in schools (Article 14, II), recognition from the community and support from the authorities.
>
> [...] each one of these education quality indicators (there may be others!) is considered a material right for education of children and adolescents and may be protected by judicial and extrajudicial actions of all types (The Children and Adolescents Statute [locally ECA], Article 209), with the utilization of all legal instruments for enforceability stipulated in the legislation (ECA, Article 212).

Liberati thus sees infra-constitutional legislation itself as providing guidelines for determining quality to be legally claimed, when applicable.

5. Pending judgment in the Supreme Federal Court is the an action alleging non-fulfillment of a fundamental precept (locally known as ADPF n. 71) brought by the National Confederation of Education Workers in 2005, on the occasion of the issuance of decrees by the Executive introducing a method of calculation the minimum amount per student differing from the amount determined under the rules of the Elementary Education Development Fund (locally Fundef). One of the claims the action makes is that the Executive must determine a *minimum standard of quality* as an essential part of calculating the minimum amount per student. Although the claim concerning the failure to follow Fundef rules was prejudiced when the latter was replaced by a new body called Fundeb, for Basic Education, there remains the problem of finding what the *minimum standard of quality* would be.

Conclusion

Although the expression "education quality" may prompt conflicting interpretations of its real content, the Federal Constitution and the 1996 Education Law (LDB) pose the means of determining and concretizing this concept.

While recognizing that there may be some degree of uncertainty in relation to the meaning "standard of quality" in the context of the Federal Constitution, further light is shed on the meaning of the principle by looking at concrete behavior required to attain the end subsumed in the principle of guaranteed standard of quality.

Discussions of the subject of "quality education" often note the ambiguity of the idea and criticize a certain unanimity that sees passing entry examinations or high cognitive test scores as synonymous with quality. On examining the problem of quality education in legal terms, there is a certain set of elements whose absence implies *deficient* quality and voiding the right to education, e.g. clean school premises, ongoing teacher training, pupil support (school materials, transportation, meals or snacks) etc.

From this point of view, quality is an intrinsic aspect of the universal right to education.

Therefore the right to education in itself poses broader concerns in as far as it is no longer a question of merely guaranteeing places in a school system, but also guaranteeing the quality of the education provided.

References

Ávila, Humberto. 2008. *Teoria dos Princípios: Da Definição à Aplicação dos Princípios Jurídicos*. 8. ed., revised and extended, São Paulo, Malheiros.

Azanha, José Mario Pires Azanha. 1995. *Educação: Temas Polêmicos*. São Paulo, Martins Fontes.

_____. 2006. *A Formação do Professor e Outros Escritos*. São Paulo, Editora Senac.

Azevedo, José Clóvis. 2007. "Educação Pública: O Desafio da Qualidade". In: *Revista Estudos Avançados*, vol. 21, n. 60, may/aug., pp.7-26.

Barroso, Luís Roberto. 2003. *Constituição da República Federativa do Brasil Anotada.* 4. ed. São Paulo, Saraiva.

Bastos, Celso Ribeiro & Martins, Ives Gandra da Silva. 2000. *Comentários à Constituição do Brasil.* 2. ed., vol. 8, articles 193-232, São Paulo, Saraiva.

Beisiegel, Celso de Rui. 2005. *A Qualidade de Ensino na Escola Pública.* Brasília, Liber Livro Editora.

Boaventura, Edivaldo M A. 1992. *A Educação na Constituição de 1988.* RIL, Brasília, Senate, Year 29, n. 116, p. 275 oct./dec.

_____. 1995. *A Constituição e a Educação Brasileira.* RIL, Brasília, Year 32, 127, p. 29, july/sept.

Brandão, Carlos da Fonseca. 2007. *LDB Passo a Passo: Lei de Diretrizes e Bases da Educação Nacional* (Lei n. 9394/96), comentada e interpretada, artigo por artigo. 3. ed. current. São Paulo, Editora Avercamp.

Bulos, Uadi Lammêgo. 2000. *Constituição Federal Anotada.* São Paulo, Saraiva.

Carvalho, José Sérgio Fonseca de. 2007. "A Qualidade de Ensino Vinculada à Democratização do Acesso à Escola". In: *Revista Estudos Avançados*, vol. 21, n. 60, may/ aug., pp. 307-310.

_____. 2004. "Democratização do Ensino Revisitado". In: *Educação e Pesquisa*, v. 30, n. 2, may/aug., pp. 327-334.

Costa, Messias. 2002. *A Educação nas Constituições Brasileiras: Dados e Direções.* Rio de Janeiro, DP&A editora.

Ferreira Filho, Manoel Gonçalves. 1999. *Comentários à Constituição Brasileira de 1988.* São Paulo, Saraiva, vol. 2, article 104-250.

Ferreira, Pinto. 1995. *Comentários à Constituição Brasileira.* São Paulo, Saraiva.

Liberati, Wilson Donizeti (org.). 2004. *Direito à Educação: Uma Questão de Justiça.* São Paulo, Malheiros.

Machado, Nilson José *et. al.* 2001. *Pensando e Fazendo Educação de Qualidade.* São Paulo, Moderna.

Marchesi, Álvaro & Martín, Elena. 2003. *Qualidade do Ensino em Tempos de Mudança.* Translated by Fátima Murad. Porto Alegre, Artmed.

Oliveira, Romualdo Portela de. 1996. "A Questão da Qualidade na Educação". In: *Revista Brasileira de Administração da Educação.* Associação Nacional de Administração da Educação. Brasília, v. 12, n. 1, jan./jun., pp. 61-71.

_____. & Araújo, Gilda Cardoso. 2005. "Qualidade do Ensino: Uma Nova Dimensão da Luta pelo Direito à Educação". In: *Revista Brasileira de Educação.* Rio de Janeiro, n. 28, jan./feb./mar./apr., pp. 5-24.

Ranieri, Nina Beatriz Stocco. 1994. "Direito ao Desenvolvimento e Direito à Educação – Relações de Realização e Tutela". In: *Cadernos de Direito Constitucional e Ciência Política.* São Paulo, RT, n. 6, pp. 124-134.

Silva, José Afonso da. 2006. *Comentário Contextual à Constituição*. 2. ed. São Paulo, Malheiros.

Silva, Vandré Gomes da. 2008. *Por um Sentido Público da Qualidade na Educação*. Doctoral thesis submitted to the School of Education, Universidade de São Paulo, São Paulo.

IV

REFLEXÕES SOBRE O ENSINO PRIVADO

The Legal Nature of Private Educational Services: Controversial Aspects

Luiz Gustavo Bambini de Assis

Introduction

Since the Constitution classifies education as a fundamental right, or more precisely a social right, and characterizes it as essentially a type of public service provided by the state, the question is whether this public-service attribute still applies to education provided by private institutions.

The discussion arises because doctrine and jurisprudence disagree significantly as to whether this type of education involves a public service or a consumer relationship in which pupils pay for quality of service.

For the sake of clarity, I shall divide the issue into three, firstly examining the conflict between "education as public service" or as mere "consumer relationship". To this end, I shall examine recent Supreme Court jurisprudence in order to pose the issue in more detail.

I shall then proceed to the concept of public service specifically, to discuss its origins, characterization, and position in the Brazilian legal system in particular, using both Brazilian and foreign doctrine to better explicate the concept.

Finally, I shall discuss the concept of subjective public right and how it relates to providing educational services, as an important point

in my attempt to specify a connection between the concept of public service under subjective public law and its applications in the field of private education.

Having posed premises based on doctrine and jurisprudence, I shall proceed to draw conclusions.

Conflict Between the Concept of Private Education as Public Service or as Mere Consumer Relationship

For some time, Brazil's Supreme Court has been examining the best way of conceptualizing private education, and its interpretation was summarized by Justice Eros Grau acting as rapporteur in the case referred to as Direct Action for Unconstitutionality 1.266/BA:

> Summary: Direct Action for Unconstitutionality Law 6.584/94 of the State of Bahia. Adoption of School Material and Textbooks by Private Educational Establishments. Public Service. Formal Defect. None. 1. Whether provided by the State or by private individuals, educational services are public rather than private, but may be provided by the private sector irrespective of licensing, permission or authorization. 2. As public services, private educational entities providing them must strictly obey the general norms for education in Brazil and those made by the member-state exercising its supplementary legislative competence (§ 2, Article 24 of the Brazilian Constitution). 3. Plea to declare unconstitutionality dismissed (my emphasis).

While describing the nature of the service provided as eminently public, Justice Eros Grau admits that private educational institutions are authorized to provide a service that is public but not exclusively public, and which may therefore be delegated to a private individual through a mere administrative action authorizing the latter.

Note that authorization, in the words of Celso Antonio Bandeira de Mello (2008, p. 430) is a "unilateral action through which the Administration, at its discretion allows the exercise of a material activity that is, as a rule, of a precarious character", in other words, an activity that has no major formal aspects or need of contract or law to exist.

Justice Marco Aurélio's minority submsssion noted the difference between specifically public education and that provided by private ins-

titutions, saying there was no question of not distinguishing between these two types of services, one provided by the State and the other by private individuals.

There was an even more profound difference between the views of Justice Carlos Brito and the rapporteur. The former noted the following:

> I am stating for the record that I do not see education as a type of public service. Concerning the eminent rapporteur-judge's opinion, my understanding is that the Constitution's Article 175 clearly states that *public service is that which is held in the competence of the public power, or is under exclusive control of the public power* (emphasis added).

To which Justice Eros Grau responded: "Precisely because it is a public service, the Constitution then states that it is free in the sense that it is not exclusive, despite being a public service. This is the interpretation that has been adopted of late".

On submitting his vote, Justice Sepúlveda Pertence sated that private education was not a public service but a private activity subject to state regulations since it was related to a fundamental right. This position was eventually adopted by Justice Joaquim Barbosa too[1].

The same argument appears in the judgment of ADI 1.007/PE, for which Justice Eros Grau also acted as rapporteur. Intervening during the submission of Justice Carlos Brito's vote, Justice Joaquim Barbosa insisted that the service provided by private institutions is not an object of consumption, but rather one that involves a fundamental right and in the last analysis must be understood as state provision.

At bottom, the disagreement was the following: some judges believe that although there is a consumer relation in the case in question, this too must be overseen by the state, which must act to protect consumers[2];

1. The submissions and votes were taken from a specific Federal Supreme Court program known as "Consulta 2000", which contains all discussion and voting submissions in a pdf file.

2. Conclusion taken from Judge Eros Grau's explanation in ADI 1.007, more specifically pp. 18-21.

others say there can be no consumer relation between a student and a private institution, since what is involved is a public service, hence economic activity ultimately overseen by the State.

The cases quoted above, more specifically the two "actions for concentrated control of constitutionality", alert us to this disagreement over the nature of the service in question. In an attempt to contribute to the discussion, I shall proceed to examine the concepts involved.

The Concept of Public Service

I shall now examine the concept of public service. The different ways of performing state activities, either in the strict sense if provided by the state itself, or in the broader sense if provided by private enterprise[3], evince the existence of this relation between State and society that has been much studied since 17th century "social contract" theories.

My point may find corroboration in the words of Prof. Cristiane Derani (2002, p. 61): "The State finds its legitimacy in the services it provides for the collectivity. The public power cannot be legitimated by its origin, but only through services it provides under the rules of law".

Therefore, the existence of the state cannot be separated from its primary purpose, which is to attend to the interests of society.

3. The distinction between the concepts "economic activity in the strict sense" and "economic activity in the broad sense" is posed by Eros Grau (2003:91) in his work *A Ordem Econômica na Constituição de 1988*. 8th ed. São Paulo, Malheiros. The concept of "economic activity in the broad sense" is seen as a genre of which species are the concepts public service and economic activity in the strict sense. The state may perform monopoly activities that may be characterized a priori as private activities, or rather activities to be provided by private enterprise. The above mentioned professor of Economic Law characterizes this activity as *state intervention*, the "action of the state outside of the public sphere, in other words, in the private sphere (proprietary area of the private sector)", characterizing the term *intervention* as "intervention in the sphere of others". However, the state also performs activities that are inherent to its essence, and the basis of the reason for its existence. Provision of public services is an example of this type of *legitimate state activity* (in the words of Professor Eros Grau), not characterized as intervention, because it is precisely an inherent function, an essential task of the public entity. It is in providing public services that the interaction between state and society is most tangible. It is through these public services that the state is able to ensure execution of its planned public policies for promoting rights.

Hely Lopes Meirelles (2001, p. 116) characterizes the concept of public administration in its material sense as the set of functions required for the public service in general, and notes that in its operational acceptance, the Administration would be the entire state machinery preordained to provide services meeting collective needs. Hence it is clear that one of the main aims of the public administration is to meet the needs of society.

The concept of public service emerged in France with León Duguit (1923, p. 54) and what was known as the School of Public Service, which saw public service as the both the basis for governmental power, and its premise. In his well known *Traité de Droit Constitutionnel,* Duguit even subordinates administrative law, its principles and bases to the notion of public service[4].

Describing the state as a cooperative effort of public services organized and controlled by members of government, he demonstrates the need for the state's disposition to provide the service in question.

André de Laubadère (1988:19) directly relates the notion of public service to that of general interest, which may be translated to the notion of public interest[5]. Therefore, the concept of public service is seen as the existence of administrative law itself, as the basis for the formation of the contemporary state, which is enhanced by the pursuit of guarantees for individual and collective liberties.

It appears that the concept of public service was enhanced only with the ascent of the liberal state, followed by the 19th century social re-

4. Duguit writes, "In the cradle of the Nation, within the bounds of the territory occupied by this nation the rulers must employ their forces to organize and control the functioning of the public services. Therefore, the public services are an element of the State" (translation).

5. The author states: "The essential element of the definition of public service is the notion of general interest. Public service has the purpose of satisfying the public interest. The State exercises an activity in the public service instead of passing it to private enterprise on the understanding that the public interest involved in the matter is incompatible with the interests of private enterprise. It is thus the satisfaction of a general interest that justifies and mobilizes public service. This idea defines public service and distinguishes it from the private interests of the Administration" (translation).

volutions, and the presence of the welfare state in the 20th century arising from the attempt to guarantee individual and social rights.

Leon Duguit (1923, p. 54) continued to advocate limitations of state action, which was to have as its fulcrum the full guarantee of individual liberties. If the state were to act in such a way as to afford privileges to an individual or a minority, it would be acting against the public interest[6].

Duguit therefore sees the providing of public services as a condition for the proper performance of state action, the aim of which is precisely, in his own words, social development and interdependence, the latter being of such a nature that it only can be accomplished on the basis of the intervention of governmental power[7].

This subordination of state action to the provision of public service gains linearity ?? when the State's actions are limited and may not be arbitrary or contrary to the protection of collective or individual interests.

This is the notion of the state's responsibility for its acts emerging with the liberal revolutions of the 17th and 18th centuries, and based on the idea of defending individual freedom and property, which finally takes on shape and acquires consistency with the 19th century social revolutions.

Thus arises the grounds for the idea that the state may be held to account for the actions of its political or public agents. This notion derives from modern theories and meets with more support from the well known decisions of the French Council of State, which posed the notion of the state's responsibility to society in the landmark "Rothschild Decision" of 1855[8].

6. In the same above-mentioned work, the French author mentions: "Les gouvernants [...] ne peuvent em aucune façon faire une chose qui, pour une classe, une minorité ou même um Seul individu, serait um entrave quelconque a la satisfaction des besoins communs a tous les hommes". [Political agents may not act on behalf of a class or a minority to the detriment of protecting interests common to all men. This assertion corroborates the thesis that public service is directly related to the notion of public interest].

7. *Idem*, p. 55.

8. The ruling proffered by the French Council of State was based on the reasoning that it is incumbent on the Administration, under the rule of law, to regulate the conditions of the public service it is to ensure. The Administration must assure good relations between public agents executing the service provided and the population benefiting from it. The ruling in

It is only after the 19th century industrial revolution, with the emergence of social movements and the rights we refer to as "second generation" or collective social rights, that we find the state oriented to citizen rights, aware of its duties and obligations, and thus of its responsibility.

Constitutions formulated in this period began to assure individual and collective rights and guarantees, along with duties of the Public Power as an instrument for intervening in society and generating social welfare policies guaranteeing the rights of man.

In the words of Professor José Cretella Jr. (2002, p. 231):

> French law corrects the principle of irresponsibility of the Public Power, and admits the possibility of its agents being held to account through civil jurisdictions for actions related to their functions, but Article 75 of the Year VIII Constitution, which survives after the latter, subordinates exercising the action of responsibility to authorization conceded by the Council of State.

On the basis of sentences issued by the Court of Conflicts in 1873, Professor Edimir Netto de Araújo (1975, p. 4) writes that the latter's legitimacy was recognized for cases in which the State was held to account.

This corroborates the thesis of the strengthening of Administrative Law as an autonomous branch of legal doctrine. Moreover the consolidation of the concept of the state's responsibility for its acts also strengthens the concept of public service, since it involves activity that is inherently the State's, the purpose of which is precisely to foster the assurance of individual and social rights.

Leon Duguit (1923, p. 63) again poses the concrete nature of this relation between state responsibility for, and provision of, public service, arguing that if the latter is not executed for the community's benefit, the state is responsible for reverting this situation[9].

this case was incisive in the sense that this relation between State and society should not be considered and analyzed in the ambit of civil law, as is the case in individual versus individual relations. The responsibility of the State, in the event of blame or negligence, or an error committed by an agent of the Administration, may legitimately be treated under different rules

9. On stating in the same above-mentioned work that public services are established and must function in accordance with the interest of all. If their irregular functioning should cause harm to the individual, the loss must be supported by goods allocated to the provision

Obviously this is so, due to the direct relation that arose between the enhanced concept of the state's responsibility and its providing public service. For a long time the notion of a strict relation between the two required the state to protect certain monopoly activities to guarantee the promotion of individual and social rights, in order to avoid being accused of disrespecting these principles.

However, as the State developed alongside its relations with the social context, the activity of providing public service was gradually reformulated and shared between the State and private enterprise. Within the Public Administration itself, the concept of private activity was often used to distinguish public service from other functions exercised by the State itself.

The above-mentioned French authors analyzed this aspect very perspicaciously in classical works of administrative law. Laubadère (1988, p. 20) emphatically asserts the possibility of the state providing public services for financial gain, and states that public industrial or commercial services are part of a special category that allows them to be concerned with possible financial gains.

This idea developed further in 20th century Brazil too, which built up a public industrial structure that was to provide services of great importance to the country, from the point of view of communion between performance and exploitation of economic activity.

Duguit (1923, p. 57) noted that the characteristic of being a public service does not imply its being monopolized by government or its agents, and the service may be provided by a private individual, and he mentions education and social assistance as examples.

It is relatively easy, Guguit says, to enumerate the several activities used as support for public services, and not in vain notes that one of its characteristic does not imply there should be a monopoly for the benefit of governments or their agents, and certain activities may be freely exercised by private individuals. Furthermore, he disagrees with much of

of a given service or by the goods allocated to the public service, thus characterizing responsibility of the State.

French doctrine that rules out the exercise of public services by private enterprise.

Classical administrative law doctrine, however pays close attention to the direct relation between the development of society and the complexity involved in the provision of certain services. Leon Duguit (1923, p. 57) also draws attention to this subject:

> All we may claim is that as civilization develops, the number of activities susceptible to being used as support for public services increases, and the number of public services seems to grow in this proportion. It is clearly the case [...] that as civilization progresses, government intervention is likely to be more frequent, since materializing the interests of civilization is an incumbency of government.

On this basis, we have social development being related to the idea of more extensive state intervention as the latter provides public services. This was the case of classical doctrine, which posed an essential point for analysis: to what extent should the state intervene, and to what extent would a service being to a private entity invalidate the concept of public service?

In light of the above, we may note that the involvement of private individuals in activities classed as "of the public interest" is not a peculiarity of recent doctrine. The tradition of the French School of Public Service works with the hypothesis of private enterprise participating in the provision of public services without invalidating their characterization as such.

Education as Subjective Public Right

Thus the nature of the right to education remains to be seen. Whether or not it is characterized as a subjective public right does not pose any difference in the State's approach to fostering or realizing this right.

The right to education, described by doctrine as a second generation right, or one of the second dimension, is the outcome of social conquests and the fruit of struggles waged by many men and peoples over many centuries.

The end of the absolutist period in the early Modern Age, saw liberal revolutions in France and America asserting the first rights in their declarations, and they were considered first-generation rights (to Life, Freedom and Property). But the evolution of society and law did not stagnate at this point.

Social movements that sprang up in Europe after the Industrial Revolution posed a new road for the constitutionalization of rights. Initially they asserted individual rights that provided guarantees for the individual against a despotic state. Subsequently they sought rights that not only ensured physical integrity for individuals and their property, but also the integrity of their social and cultural values, to become true members of society and citizens of the world.

It is used to be said, without exaggeration, that first- generation rights, as Norberto Bobbio noted (2000, pp. 320-370), may be considered negative, since they would require omission of the state in relation to individual rights that had been conquered. On this reading, it would be incumbent on the State to respect these rights, not by confronting anyone but merely not doing anything to make them prevail, since they are natural rights inherent to humans.

Whereas second generation rights may be seen as positive, since they require specific action by the State for their affirmation. It is the public entity itself, through its providing public service, in other words through its performance and no longer through its omission, that will give grounds for this new set of rights.

Thereafter, history followed its course and asserted these rights of fraternity or even third-generation rights, particularly after the world wars, when humanity sought to build a fairer, more humane and fraternal society, an ideal that materialized in the founding of the United Nations Organization in 1945 and the Universal Declaration of Human Rights in 1948 (cf. Comparato, 2006, p. 320).

Thus we see that the promotion of second-generation rights, involving equality or social rights, requires constant State intervention and depends on public services being actually provided in order to be consolidated.

Prof. Gilberto Bercovici (2001, p. 132) notes:

The primary goal of the social state, therefore, becomes the pursuit of equality, with the guarantee of liberty. The State is no longer restricted to promoting formal or legal equality. The equality sought is material equality, no longer before the law, but through the law. What the State seeks to guarantee is equality of opportunity, which implies liberty, justifying state intervention.

Therefore, Brazil's 1988 Citizen Constitution could not but affirm social rights. This is precisely the reason for its constitutionalizing the right to education as a right of each citizen and a duty of the state, as stated in Article 205.

This point was eventually recognized by the Supreme Court most recently in the judgment of Extraordinary Appeal 538.924/GO, when rapporteur Justice Ricardo Lewandowski stated: "The promotion of second-generation rights of equality or social rights requires constant performance of the State and depends on effective provision of public services for its consolidation".

In the words of José Afonso da Silva (2007, p. 785):

The 1988 Constitution elevates education to the level of the fundamental rights of man, on conceiving it as a social right (Article 6) and a right for all (Article 205), informed by the principle of universality, that must be common to everybody.

[...]

In other words: everybody has a right to education, and the State has the duty of providing it, as does the family. This means, firstly, *that the state has to be equipped to provide everybody with educational services, and must offer education in accordance with the principles and objectives determined by the Constitution.* These constitutional norms – to repeat – also have *the legal significance of elevating education to the category of essential public service*, which the Public Power must provide for everybody" (my emphasis).

On undertaking a systematic interpretation of the Brazilian Constitution, Professor da Silva noted:

The fulfillment in practice of the aims of education, pursuant to Article 205 – full personal development, preparation for the exercise of citizenship and qualification for work –, requires the Public Power to organize public education systems, to fulfill its constitutional duty in relation to education, *by means of state initiatives to guarantee at least the services stipulated in Article 208* (my emphasis).

In this respect, it behoves us to analyze the concept of subjective public right and its direct relation with the right to education.

We have said that this second-generation right tends to require the state to take action, rather than omission as in the case of the rights of liberty. But does this action involve just an individual wishing to have a right asured, or a collectivity? Since we are speaking of social rights, there can be no question of the rights of one person, but rather the right of a collectivity.

In this respect, as Clarice Seixas Duarte (2003, p. 74) rightly points out: "When the theory of subjective public rights was elaborated, the underlying idea as the possibility of individuals having rights against the State, more specifically against the Public Administration. Today we must ask whether holders of subjective rights, on the active side, may be just subjects taken separately or a collectivity".

Therefore the theory of subjective right emerges precisely to assure individuals that the State is not there to act against the rights of liberty. It remains to be seen whether this right will perish or not when we study second-generation rights.

Seixas Duarte believes that there is no question of a subjective right unless there is a norm that stipulates it, or unless there an objective right that may then be asserted or otherwise.

Therefore, on quoting Jhering and his importance for the evolution of legal methodology, the author draws attention to the fact that, for us to know whether or not we are dealing with a subjective public right, "one must ask whether the law that benefits the individual in question was made for his individual interest or in the public interest alone" (cf. Duarte, 2003, p. 118). In this respect, it is the purpose, or teleological sense of the law that must be sought.

Practical methods of interpretation have taught us so. Therefore "the norms must be applied fundamentally looking to their spirit and purpose" (cf. Barroso, 2006, p. 138).

The aim of asserting social rights is to reach a collectivity, not just individuals.

In a democracy, therefore, the State must make every effort to have these rights prevail.

In addition to the benefits arising from the democratic regime as legitimate popular representation, note that it poses the possibility of more effectively reflecting the will of the population on political guidelines and is capable of ushering in more positive innovations.

I refer specifically to the fact that the more democracy evolved in a country, the more the democratic regime is able to instigate programs and public policies to be under the aegis of the state rather than governments.

Education is afforded special treatment by the constitution in relation to the allocation of public funds, since Article 212 deals specifically with the amount due from each entity of the federation in the field of education.

There is a budgetary imperative of avoiding the mandatory appropriation (or earmarking) of public funds; nevertheless, in the words of José Afonso da Silva (2007, p. 799): "In this case (Article 212), earmarking arises as an exception to the principle of not predetermining spending. [...] However, the norm itself has extensive meaning in that a minimum is set aside rather than a fixed amount".

The constituent assembly sought to elevate the right to education to a high level in relation to other services to be provided by the State. Therefore no public policies devised to promote this social right may be divorced from this context.

To better understand this reasoning, we must specify the notion of the concept of public policy. Professor Cristiane Derani (2002, p. 239) speaks of "acts arising from the balance of forces in society. There are several ways in which they may be materialized. [...] Policies are called public when these actions are led by state agents for the purpose of changing existing social relations".

Muller and Surel (1998, p. 16) write of a "program of government action for a sector of society or a geographical space", which has to endure not only in space, but also in time in order to achieve success.

Here we have the meaning of the right to education in the Constitution enacted twenty years ago. A right to be offered by the State, which through public policies, should provide education for those directly interested.

Furthermore, it was the constitution itself that in Article 208, § 1, asserted access to compulsory and free education as a subjective right. Now if access to education is a subjective right, and providing education is posed as an obligation, how can we not see the right to education in private institutions as subjective, if they exist only to provide a service that the State is unable to provide for all members of the collectivity?

In other words, if access to compulsory and free education is a subjective right, and a social rather than individual right, how can we not characterize education, irrespective of the way in which this service is provided, as a subjective public right?

Moreover, the Supreme Federal Court itself seems to have settled the matter. This is what we may conclude from an analysis of Extraordinary Appeal 472.207/SP, Rapporteur Justice Celso de Mello: "The right to education must have efficacy Being deemed a subjective public right of individuals, it consists of the individual's faculty of demanding that the State provide certain services".

On the same lines, RE 467.255/SP and RE 410.715/SP, for both of which Justice Celso de Mello acted as rapporteur, again, in the ruling proffered in Interlocutory Appeal 476.367/SP, the then judge Sepúlveda Pertence also conceived the right to education as being subjective:

> The judge gave an adequate solution to the case, the sentence not having the prerogative of causing the judiciary to interfere in the sphere of the public administration, but only that of guaranteeing realization of the constitutional duty to have the subjective public right respected. By not obeying these legal precepts the authority violated an uncontestable hildren's right

Therefore we see that the matter has been the object of attention of our Supreme Court and the tendency is toward recognition of the right to education as being public and subjective.

So despite being provided by private enterprise, educational service, in its essence, is not deprived of the characteristics of public service.

Conclusion

After the fuss over the legal nature of education as a service provided by private enterprise, we are required to specify whether or not it is a typical public service or some other nomenclature.

In Brazilian law, this issue leads to a clash of ideas among students of administrative law and economic law.

For students of administrative law in general, what defines whether a service is public or is not is the status of those who provide it, whereas for theorists of economic law, what prevails is the nature of the service provided.

The classical theory of public service works with the hypothesis of private enterprise being involved in this kind of activity, without thus de-characterizing its nature. In other words, irrespective of the status of those who provide the service, what matters is its specific nature.

We also see that education may be considered a subjective public right and thus be elevated to the level of a fundamental right. On this basis, its realization by the Administration becomes an imperative.

In light of everything posed here, we lean toward characterizing the provision of education as public service, even when realized by private enterprise.

Irrespective of the State's delegating this function by means of the precarious instrument of administrative authorization, there is direct control over the activity provided by private individuals, which is justifiable only by the grandeur and importance of the fundamental right being protected.

Therefore, the public interest involved poses the right to education as public and objective. Moreover, the right to education will have always be of the nature of public service, and must thus be understood; otherwise this service would become economically negotiable, which would certainly do incommensurable harm to Brazilian society.

References

Aguillar, Fernando Herren. 1999. *Controle Social dos Serviços Públicos*. São Paulo, Max Limonad.

Amaral Junior, Alberto do & Moisés, Claudia Perrone (orgs.). 1999. *O Cinquentenário da Declaração Universal dos Direitos Humanos*. São Paulo, Edusp.

Anetche, Marta T. S. 1995. "Emergência e Desenvolvimento do *Welfare State*: Teorias Explicativas". *Boletim Informativo e Bibliográfico de Ciências Sociais*, n. 39, pp. 3-40, jan./jun.

Araujo, Edmir Neto. 1975. *O Tribunal de Conflitos e a Responsabilidade Pública*. São Paulo. Curso de Pós Graduação da Faculdade de Direito da USP.

Aristóteles. 1995. *A Política*. São Paulo, Edipro.

Baer, Werner. 2002. *A Economia Brasileira*. 2. ed. São Paulo, Nobel.

Bandeira de Mello, Celso Antonio. 1997. *Prestação de Serviço Público e Administração Indireta*. 2. ed. São Paulo, RT.

_____. 1998. *Curso de Direito Administrativo*. 10. ed. São Paulo, Malheiros.

Barroso, Luís Roberto. 2006. *Interpretação e Aplicação da Constituição*. 6. ed. São Paulo, Saraiva.

Bauby, Pierre. 1998. *Reconstruire l'action publique: services publics ai service de qui?* Paris, Syros.

Bercovici, Gilberto. 2001. *Desequilíbrios Regionais: Uma Análise Jurídico-institucional*. Doctoral thesis, São Paulo, Faculdade de Direito da Universidade de São Paulo.

_____. 2005. *Constituição Econômica e Desenvolvimento: Uma Leitura a partir da Constituição de 1988*. São Paulo, Malheiros.

Bobbio, Norberto. 2000. *Estado, Governo e Sociedade: Para uma Teoria Geral da Política*. 8. ed. São Paulo, Ed. Paz e Terra.

_____. 2000. *Teoria Geral da Política: A Filosofia Política e as Lições dos Clássicos*. 7. ed. Rio de Janeiro, Ed. Campos.

Bonavides, Paulo. 2002. *Curso de Direito Constitucional*. 12. ed. São Paulo, Malheiros.

Comparato, Fábio Konder. 2006. *A Afirmação Histórica dos Direitos Humanos*. 4. ed. São Paulo, Saraiva.

Cretella Jr., José. 2002. *Tratado de Direito Administrativo*. Rio de Janeiro, Ed. Forense.

Derani, Cristiane. 2002. *Privatização e Serviços Públicos*. São Paulo, Ed. Max Limonad.

Duarte, Clarisse Seixas. 2003. *O Direito Público Subjetivo ao Ensino Fundamental na Constituição Federal Brasileira de 1988*. Doctoral thesis, São Paulo, Faculdade de Direito da Universidade de São Paulo.

Duguit, Leon. 1923. *Traité de Droit Constitutionnel*. 2. ed. Paris, E. De Boccard.

Grau, Eros Roberto. 2001. *Constituição e Serviço Público: Estudos em Homenagem a Paulo Bonavides.* São Paulo, Malheiros.

_____. 2003. *A Ordem Econômica na Constituição de 1988.* 8. ed. São Paulo, Malheiros.

Laubadère, André. 1988. *Manuel de droit administratif.* 13. ed. Paris, Librairie Générale de Droit et de Jurisprudence.

Lewandowski, Enrique Ricardo. 1988. "Serviços Públicos Ampliam Direitos na Constituinte". In *Revista da Faculdade de Direito da Universidade de São Paulo*, São Paulo, v. 1, n. 1, p. 3.

Meirelles, Hely Lopes. 2001. *Direito Administrativo Brasileiro.* 26. ed. São Paulo, Malheiros.

Mello, Celso Antonio Bandeira de. 2008. *Curso de Direito Administrativo.* 21. ed. São Paulo, Malheiros.

Muller, Pierre & Surel, Yves. 1998. *L'analyse dês politiques publiques.* Paris, Montchrestien.

[ngo] Ação Educativa. www.acaoeducativa.org.br/portal/index

Presidência da República. www.planalto.gov.br/casacivil/legislacao

Rivero, Jean. 1981. *Direito Administrativo.* Coimbra, Almedina.

Santos, Boaventura de Souza. 1999. *Pela Mão de Alice: O Social e o Político na Pós-modernidade.* 6. ed. São Paulo, Cortez Editora.

Senado Federal. www.senado.gov.br

Silva, José Afonso da. 2007. *Comentário Contextual à Constituição.* 3. ed. São Paulo, Malheiros.

Supremo Tribunal Federal. www.stf.gov.br

Tácito, Cáio. 2002. *Temas de Direito Público.* São Paulo, Ed. Renovar.

The Expansion of Higher Education in Brazil: The Private Option

Fernanda Montenegro de Menezes

Introduction

The historical trajectory of human rights clearly shows society's constant concern for education. Since the French Declaration of 1789, people have felt the imperative need to ensure access to education and the means of intellectual and political emancipation for all members of the community.

The right to education is now unarguably recognized as a fundamental right and part of our everyday social and individual reality. Upholding this right involves not only education as a process of individual development, but also as the right to an education policy that offers members of the community a means of attaining their goals in life (Caggiano, 2002).

However, education has not always been seen in this light. In Brazil, the constitutional right to education was only recognized when the 1934 Constitution was enacted, and formulating educational policy together with a systematic plan for executing policy was proclaimed an imperative duty of the National Education Council (Article 152 of the 1934 Constitution).

The national character of educational activity as the shared duty of federated entities (states) was consolidated when the Federal Authority was given the exclusive attribution of setting guidelines for the nation's education and sharing its costs and responsibilities (Article 150 of the 1934 Constitution)

> Article 150 – The Federal Authority shall:
>
> a. Draw up a *national education plan for all levels and branches, common and specialized, and coordinate and supervise its implementation throughout Brazil,* b. *determine the conditions for official recognition of secondary schools and supplement the latter and higher education institutions, and inspect them as required,* c. *organize and maintain appropriate educational systems throughout Brazil,* d. *maintain and supplement secondary, higher and university education in the Federal District,* e. *take supplementary measures, when necessary, due to lack of initiative or funds, and encourage educational work throughout the country, through studies, surveys, accounts and subsidies.*
>
> Article 151 – The states and the Federal District *shall organize and maintain* educational systems in their respective territories following the guidelines set by the Federal Authority (my emphasis).

In this respect, the 1934 Constitution was a milestone in its making the right to education a fundamental legal norm in Brazil, since it enabled the State to assume important attributions, in particular requiring a national education plan.

Over several decades, therefore, the development and recognition of educational level as an essential factor for the development of individuals and the community led to the right to education being inserted in the niche of fundamental rights, thus becoming an essential element of any constitution.

More recently, again in the case of Brazil, the 1988 Constitution posed an extensive list of rights and guarantees, including the elevation of the right to education to the category of a fundamental right. The important range of educational norms thus affirmed may be found in different sections throughout the Brazilian constitution.

In this context, legal theory and jurisprudence are unwavering in their treatment of the right to education, as noted in the decision of Judge Ricardo Lewandowski in the case of Extraordinary Appeal 500 171-7 – Goiás:

The present constitution *affirmed the right to education*, and removed it from the limbo of the State's generic obligations in relation to its citizens. In the words of José Afonso da Silva it elevated *education to the level of a fundamental right of man* by conceiving it as a social right (Article 6) and a right to be enjoyed by all (Article 205), which being informed by the principle of universality, must be common to all.

Education, indeed, deserved special attention in the constitution, and Article 205 states that it is not only a right for all, but also a *duty of the State* and the family, to be fostered and encouraged with the cooperation of society. The article states that education shall pursue the full development of individuals, prepare them for the exercise of citizenship, and enable then to attain qualifications for work.

The right to education is undoubtedly a fundamental right, and its implementation and realization is to be pursued through public policies and government programs.

However, I shall limit the scope of this study to focus the means most frequently used by the government to ensure realization of the right to education, more specifically higher education, through programs implemented in private institutions, and to examine the historical process of the emergence and expansion of private higher education in Brazil. This will be the aim of the next section

Private Higher Education – The Scenario in Brazil

Brazil's higher education was provided almost exclusively by the State for many decades. The notion of private enterprise being involved in education did not have easy acceptance. The absence of legal provisions for private sector educational activity in the Brazilian constitutions of 1824 (the Empire) and 1891 (the Republic) reinforced the idea of the predominance of the State in higher education during a long period that left its mark on the history of Brazil. From colony to republic, higher education was eminently public and exclusively controlled by the central power (Ranieri, 2000).

The 1934 Constitution broke new ground in its recognizing private education establishments. Its Article 150 provided for "the recognition of private educational establishments only when their teachers are assured stabile employment, as long as they serve well, and a dignified remuneration". The 1937 and 1946 constitutions, although not posing

these conditions, did proclaim the freedom of private enterprise to provide education.

The first law to deal with guidelines and bases for education in Brazil was Law 4.024 of 20 December 1961, which only made mention of the possibility of running separate private educational institutions. The freedom of private enterprise asserted in the 1961 education law (LDB) assured private universities a position of equality in relation to public universities.

The 1967 Federal Constitution and Constitutional Amendment n. 1/69 expressly guaranteed private enterprise its freedom in education, with provision for technical and financial support form the public powers, including through scholarship grants.

In this context, opening space for the private sector has increasingly become a feature over the last four decades.

In the 1960s, when Brazil was rapidly industrializing, the developmental process took off and people began to demand quality education to meet the needs of the newly promising and competitive market. In this context, the State called on private schools to provide higher education. It was precisely during this period, at the height of the military regime, that higher education in Brazil began to expand with many new private higher education institutions, which benefitted from a gradual process of more flexible regulations (Barros, 2005).

From the early 1970s through the late 1990s, piecemeal short-term policies produced an effective expansion of the educational system (Ranieri, 2000), due to both public financing, and authorization to provide new courses and open private institutions being facilitated by the increasing demand for higher education.

The current scenario is different however. Concurrently with the rising costs of public higher education for the State – which is unable to meet unrelenting demand for more places – there has been staggering growth of the role of private institutions in higher education.

In Brazil and the rest of Latin America, recent changes in higher education have tended to increasing numbers of places in private education – and the scrapping of public education, some observers would

add. In the view of certain students of the subject, Latin America's educational reforms, starting with the eclipse of military dictatorships in several countries in the 1980s, culminated in the introduction of the economic, political and social conditions that were crucial for neoliberal reforms based on fiscal adjustment, privatization and deregulated markets (Yarzábal, 2001).

One characteristic of these reforms was a disproportionate increase in the number of private higher education institutions in Latin America, particularly Brazil, Colombia, Chile, El Salvador and the Dominican Republic (Righetti and Shober, 2004), all countries in which large numbers of unemployed persons were seeking qualifications and inclusion in the competitive labor market.

Notwithstanding criticism of these neoliberal polices it favored, the State, as we have seen in practice, has been unable to supply places in higher education at the pace society has demanded in recent decades, in light of the soaring demand for quality higher education.

Brazilian society has been clamoring for more places at universities. Particularly with the economy growing and more sophisticated technology involved in manufacturing, skilled labor has become the rule rather than the exception it was in the past. This is the context in which University Reform is being posed, and consequently the University for All Program (Prouni), as the State's option for democratizing education through private institutions.

Policy to Increase Places Available at Private Institutions: The University for All Program (Law 11.096 of December 20, 2005, or Prouni)

The University for All Program (Prouni), introduced by Provisional Measure 213/04 and subsequently converted to Law 11096 of December 20, 2005, provides full and partial scholarships (50% [fifty percent] or 25% [twenty-five percent]) for students taking degree programs or specific sequential training courses at private institutions of higher education, which may be for-profit or non-profit.

The program covers two types of benefits: full scholarships granted to Brazilian citizens not holding a higher education degree, whose monthly *per capita* income is not more than one and a half times the minimum wage. Others for 50% (fifty percent) or 25% (twenty-five percent) are granted to Brazilians not holding higher education qualifications, whose monthly per capita income does not exceed three times the minimum wage, under criteria set by the Ministry of Education (Law 11096, Article 1, § 1 and 2, December 20, 2005).

Under Law 11096 of December 20, 2005, Article 2, scholarships shall be available to: 1. students who have concluded all their secondary education in the public school system or at private institutions on full scholarship; 2. students with a lawfully recognized disability and 3. public school system teachers taking education degrees or higher-level teaching courses, or training as basic education teachers, irrespective of income levels referred to in paragraphs 1 and 2 of Article 1 of the Law.

In exchange for scholarships, private educational institutions adhering to the program enjoy a number of tax benefits for the duration of their adhesion to the program in the form of exemption from four taxes, namely Corporate Income Tax, Social Contribution on Net Income, Social Contribution for Financing Social Security, and Contribution to the Social Integration Program.

Although the proposal has been approved and implemented, it is now to be subjected to the scrutiny of Brazil's highest constitutional court. By mid-2009, the Federal Supreme Court is due to rule on the legality of the quota system introduced by the Prouni. On April 2, 2008, Judge Carlos Ayres Brito voted for the constitutional propriety of the program, which was disputed by the National Confederation of Schools (Confenem), the Democrat Party (DEM) and the National Federation of Social Security Fiscal Inspectors (Fenafisp), who filed actions referred to as direct actions of constitutionality (ADINs 3330, 3314 and 3379). Judge Joaquim Barbosa stayed the proceedings for further examination of the issue.

In addition to the absence of the constitutional requirements of relevance and urgency required to issue Provisional Measure 213/04,

which introduced the Prouni scholarship program, actions claiming that it is unconstitutional (referred to as ADINs) allege that the Executive does not have the competence of "offering" tax breaks to charitable or philanthropic entities in return for their adhering to the program, since the latter enjoy tax immunity under the Federal Constitution. These arguments were rejected outright by Judge Ayres Britto on submitting his vote, and by the opinion of then-Attorney General Cláudio Fonteles proffered in the judgment of ADIN 3330.

Another argument raised by the actions contesting the program's constitutional status is that Law 11 096/05, Article 2 violates the Federal Constitution's Article 5, main body and items I and LIV (the constitutional principle of equality and non-discrimination) by granting full scholarships to students from the public school system and introducing a race-based criterion for filling these places. Judge Ayres Britto again ruled against the plaintiffs:

> The noun "equality", meaning quality of equal things (and therefore quality of similar and undifferentiated things placed on the same plane, or situated on the same level of importance) is *a value that is properly realized by combating factors causing inequality*. There is no way of concretizing the constitutional value of equality other than decisively combating the real factors of inequality. The depreciation of inequality precedes and justifies the imposition of the value of equality.
>
> Indeed, it is by efficaciously combating situations of inequality that the value of equality is concretized as a rule (as a positive value in some cases, negative value or depreciation in others). This is because at the point of departure for methodical inquiry into what are known as human affairs, i.e. as far as we may use the investigative lens of political scientists, historians and sociologists to examine the institutionalized relations of mankind, what we find is a life way now identified by the stain of (cultural, political, economic and social) inequalities. Inequality as an empirical gateway to scientific research then poses the challenge of its elimination through legal norms.

Moreover:

> In this line of thought, I note that "disequalizing" to favor pupils from public-system schools or those on full scholarships from private schools *did not violate the Constitution since this is a case of dis-crimination in the sense of compensating for a prior factual situation of inferiority*. This is so, of course, in light of the primacy of

the judgment that the desired equality between parties will almost always obtained by *administering* the clash between inequalities (one a matter of fact, the other legal, the latter to counterbalance the weight of the former) (my emphasis).

The issue is controversial. According to students of the subject, the Prouni from the outset violated the constitutional principle ensuring all Brazilians and resident foreigners the right to education. "Selecting" recipients for the Program (see Article 2 of Law 11096/2005) would, then, directly violate the constitutional principle of guaranteeing education for all. In this case, notes Prof. Nina Ranieri, "the Prouni would not only have to cater for teachers in basic education, but also those teaching preschoolers" (Abmes, 2004).

Finally, in attacking the argument posed in the actions alleging unconstitutionality (ADINs) on the lines that Article 7 of Law 11096/05 would disobey the principle of university autonomy guaranteed by Article 207 of the Federal Constitution, Judge Ayres Britto clearly stated as follows:

> The Prouni is emphatically an affirmative action program, which is operationalized by granting scholarships to low-income students with very little property or wealth. But [it is] a program designed to operate through an act of adhesion or entirely voluntary participation.
>
> [it would this be] Inconsistent, with any idea of binding enforcement. It is precisely a program for spontaneous adhesion or applicability due to the effect of this principle of university autonomy, which, let us recall, is a principle of constitutional status (Article 207 of the Constitution).

In light of all the arguments against the constitutionality of the University for All Program (Prouni), it remains to be seen how the other Supreme Court judges interpret the above-mentioned issues.

On the political front, Nina Ranieri writes, "the public power is withdrawing from directly funding education and disengaging from evaluation itself" (Abmes, 2004). She also notes that the program was not extended to cover public higher education institutions, which do not enjoy this exemption, thus showing its lack of commitment to public higher education.

In this context, the program would favor private higher education and keep the education system on the same privatized lines of the 1990s. As noted by Valente and Helene (2004): "Prouni gives more tax exemptions to private higher education institutions which, with few exceptions, are not held to account for their use of them, provide illegal remuneration for their owners, do not show transparency when granting scholarships, and embellish their balance sheets (Valente and Helene, 2004)".

The measure has widespread impact and favors privatization while costing little in budgetary terms.

The issue is more political than legal as such. Although the Prouni program advances in terms of access to places in private education, a false notion of democratization of education is posed: it does not function at all levels of education, does not ensure proper school attendance and progression for pupils, and does not assess the quality of the education provided.

The introduction of the Prouni clearly shows the current trend of the Brazilian State in relation to education: supporting more places in private higher institutions in order to alleviate the deficiency of public education and the State's inability to provide more places at the pace contemporary society is demanding.

The Proliferation of Private Education and the State's Key Role as Supervisor

Since the late 1990s, also reflecting the phenomenon of increasing numbers of places in private education, the Education ministry (MEC) has been more flexible in authorizing new private education institutions all over Brazil. According to its Higher Education Census conducted from 1998 through 2002, an average of 4.5 new courses per day were authorized during the Cardoso government (1995-2002) – which saw the fastest growth of private higher education in Brazil in the recent period – (Barros, 2005) The peak, however, was reached in 2002 when 2,244 new degree programs were authorized.

Indeed, the Cardoso government changed the bias of policy for authorizing new courses in higher education; the procedure was quicker

and easier; meanwhile monitoring for existing courses was conducted more vigorously and strictly. In practice, this meant the development of the State acting as regulator of higher education services, whereas it had formerly acted as direct provider of post-secondary education.

Moreover, according to a survey conducted by the Higher Education Department of the MEC??, 1,769 new degree courses were authorized in the first government of Luiz Inácio Lula da Silva – 1,245 in 2003 and 515 from January to May 31, 2004, thus averaging 3.4 new courses per day.

According to Barros (2005), the sole reason for the staggering growth of private courses is the target of "providing higher education for at least 30% of the 18 -24 age-group, by the end of the decade" set by the National Education Plan under Law 10172 of 9 January 2001 (Barros, 2005).

To offset the lack or insufficiency of investment in public universities, the State therefore started to subsidize places in private higher education institutions as means of providing more places and democratizing quality education.

The question is whether this is the best way of democratizing education.

Of course, there are many positive aspects of this policy. Not only are more new places being provided very quickly, but also, in a new development in the Brazilian educational environment, students are benefiting from competition between different private institutions, which now have to invest in quality to ensure their survival in the marketplace. Indeed, the growing numbers of places has led to a situation not previously seen in Brazil: a reasonable range of choices for applicants or candidates for higher courses. A young person or even an adult needing higher education now has more options and choices due to the recent "competition" in the industry.

Competition, now being established in Brazil because of the State's policy of encouraging the proliferation of places in the private education system, was based mainly on the experience of the United States, where for many decades the quality of education was much more driven by competition for students between educational institutions than by State regulation.

However, in light of the particularities of the situation in Brazil, a certain vulnerability of the public university and the difficulty in setting parameters or benchmarks for this recent turn in higher education policy, in Brazil there can be no discussion of leaving regulation of education to the "invisible hand of the market". The organizations of the State in Brazil cannot fail to act strongly in supervising private institutions, since abandoning or neglecting this activity could lead to a "black-out" for the system. Imagine low -quality institutions competing leaving students free to choose between bad and worse in a negative spiral that may cause delays and hinder economic development at the height of the "age of information".

While the State has shown its chronic deficiencies in terms of expanding the public higher education system, it also seems to have met with problems in its pursuit of this crucial "regulatory function". Constantly and concomitantly overseeing all the private institutions requires teams, training, structure, austerity and a considerable stock of criteria, parameters and experiences that State agencies have not yet managed to assemble.

In this environment, supervision of private institutions appears to be enormously defective, which allows students to consent to deviations, irregularities and serious faults committed by their university, often "flying under the radar" of State inspection. In the legal environment, the chief example of this gap between quantity and quality in higher education is seen in the bar examinations conducted by Brazil's equivalent of the Bar Association (Ordem dos Advogados do Brasil). Certain law schools are graduating hordes of untrained young people incapable of exercising the legal profession.

Clearly the consequences of the flood of new courses in recent decades casts doubt over the Brazilian State's educational planning. The evidence shows that the latter, due to its material and financial limitations, is not in fact able to efficiently fill the supervisory role for this vital public activity.

New Perspectives for the Growth of Education in Brazil

By deciding to encourage the expansion of higher education through privately owned schools, the Brazilian State, appears to have failed to develop efficient structures for monitoring the quality of education. However, it remains to be seen whether this deficiency is chronic or circumstantial, temporary or enduring. Having seen the State's inability to provide more places in the public system at the right pace and quantity for contemporary society, the future recognition of the State's inability to monitor and oversee the quality of education in the private system may lead to an insurmountable crisis of identity in the nation's educational policy, with consequences that will be all but irremediable.

In 2008, the state of São Paulo's policies in particular encouraged massive enrollments in public higher education. These initiatives, however, are very recent and will still depend on intensive government effort to approach real "democratization of education".

It is to be hoped that public and private universities may provide sufficient numbers of places In the near future. Building educational environments that are increasingly accessible and qualified is a necessary and challenging proposal for the future.

References

Abmes. Associação Brasileira de Mantenedoras de Ensino Superior. 2004. Abmes discute o programa universidade para todos. *Abmes Notícias*, n. 83, April-May-June 2004. Available at http://www.abmes.org.br/Publicacoes/Jornal/83/pag04.htm. Accessed November 2008.

Barros, Marco Antonio de. 2005. "Ensino do Direito: Dos Primórdios à Expansão pelo Setor Privado". *Revista dos Tribunais*. São Paulo, vol. 94, n. 832, pp. 83-99, feb.

Brasil. Constituição. 1988. *Constituição da República Federativa do Brasil*: texto constitucional promulgado em 5 de outubro de 1988, com as alterações adotadas pelas Emendas Constitucionais n. 1/92 a 46/2006 e pelas Emendas Constitucionais de Revisão n. 1 a 6/94. Brasília, Senado Federal, Subsecretaria de Edições Técnicas.

Brasil. Ministério da Educação e Cultura (MEC). Governo Federal. *Lei de Diretrizes e Bases da Educação (Lei 9.394/96)*.

Caggiano, Monica Herman Salem. 2002. "Direitos Humanos e Aprendizado Cooperativo". *Um Olhar sobre Ética e Cidadania*. São Paulo, Editora Mackenzie.

Carvalho, Cristina Helena Almeida de. 2006. "O Prouni no Governo Lula e o Jogo Político em torno do Acesso ao Ensino Superior". *Educação e Sociedade*. Campinas, v. 27, n. 96, Available at: http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0101-73302006000300016-&lng=pt&nrm=iso. Accessed: 27 June 2008.

Castro, Marcelo L. Ottoni de. 1994. "A Educação de Massa e o Princípio do Ensino Compulsório: Origens, Expansão Mundial e a Realidade Brasileira". *Revista de Informação Legislativa*. Brasília, v. 31, n. 122, pp. 183-196, april/june.

Catani, Afrânio Mendes; Hey, Ana Paula & Gilioli, Renato de Sousa Porto. 2006. "Prouni: Democratização do Acesso às Instituições de Ensino Superior?". *Educ. rev.*, Curitiba, n. 28, Available at: http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0104-40602006000200009-&lng=pt&nrm=iso. Accessed : 27 June 2008.

Constantino, Luciana. 2004. "Governo Lula Autoriza 3,4 Cursos por Dia". Report in the Cotidiano section of the newspaper *Folha de S. Paulo*, published 12 June 2004.

Leite, Celso Barroso. 2004. "O Prouni e o Dever do Congresso". *Revista de Previdência Social*. São Paulo, v. 28, n. 286, pp. 806-807, sept.

Ranieri, Nina Beatriz Stocco. 2000. *Educação Superior, Direito e Estado*. São Paulo, Editora Universidade de São Paulo, Fapesp.

Ranzani, Kátia Maria. 2000. "O Plano Nacional de Educação e a Expansão das Universidades". *Revista Jurídica da Universidade de Franca*. Franca, v. 3, n. 5, pp. 153-156, nov.

Riguetti, Sabine & Shober, Juliana. 2004. "Crescimento de Instituições Privadas de Ensino Superior é Fenômeno Mundial". *Revista Comciência*. Campinas, Ed. Reforma Universitária, n. 58, sept. Available at: http://www.comciencia.br/reportagens/2004/09/07.shtml Accessed november 2008.

Valente, Ivan & Helene, Otaviano. 2004. "O Prouni e os muitos Enganos". Published 11 December 2004 in the newspaper *Folha de S. Paulo*. Available to subscribers at: http://www1.folha.uol.com.br/fsp/opiniao/fz1112200410.htm. Accessed November 2008.

Yarzábal, Luiz. 2001. "Impactos Del neoliberalismo sobre La educación superior en America Latina". *Revista da Rede de Avaliação Institucional da Educação Superior*. Year 6, vol. 6, n. 1, march.

Attorney, bachelor's degree in Law from Universidade Presbiteriana Mackenzie (2006), currently working for a master's on the Mackenzie Postgraduate Program in Economic and Political Law. Special student of "Constitutional Aspects of the Right to Education I" on the postgraduate program at the School of Law, Universidade de São Paulo (first semester of 2008).

"Article 152 – The National Education Council, organized as prescribed by law, is principally ?? charged with drafting the national education plan to be approved by the Legislative Power and suggesting to Government measures required for the best solution of educational problems and appropriate distribution of special funds "

Constitutional recognition of the right to education did not gain ground until the 1932 Constitution, which is why there was no legal provision for private education in the 1824 and 1891 constitutions. However, this does not mean there were no private higher education institutions at the time.

"Article 3 The right to education is ensured:

I – by the obligation of the public power and the freedom of private enterprise to provide education at all levels, under the law currently in force;

Article 5 – Public schools and lawfully authorized private establishments are assured adequate representation on state education councils, and recognition of studies pursued in them for all purposes.

Article 20, §2 of the 1967 Constitution; Article 19, §2 of Constitutional Amendment n. 1, October 17, 1969

Brazil's current 1988 Federal Constitution expressly states that education is open to private enterprise o two conditions: they must comply with the general norms of the national education system, and their quality must be appraised by the Public Power. Article 7, III of the current LDB (Law No. 39420 of December 20,1996) adds a third condition: private institutions must have self-financing capability.

In this respect, see Righetti and Shober (2004).

Article 1 of Law 11096 of January 13, 2005 introduced the University for All Program (Prouni).

The Federal Supreme Court's website notes that the legal status of the program may be subject to the Court's scrutiny before the end of 2008.

In relation to the first argument, the opinion issued by Attorney General Cláudio Fonteles, based on the introductory rationale of the Prouni, argued that 37.5% of places in private colleges (about half a million) were not taken. In this respect, it would be imperative for such measures to be taken immediately, in the form of a Provisional Measure (presidential decree pending legislative ratification) to increase the number of scholarships for low-income students.

Decree n. 53 536 of 9 October 2008 set up a virtual university for the state of São Paulo (Universidade Virtual do Estado de São Paulo, or Univesp) in order to expand public higher education in the state of São Paulo, using information technology and other tools to increase the number of places offered in public education and raise its quality.

Education Provided by Private Enterprise and its Legal Limits

Luiz Tropardi Filho

Introduction

What is education? Among several possible meanings, for the purposes of this article I shall take the definition in the Constitution's Article 205: a process of formation of the individual seeking their full personal development, preparing them to exercise citizenship, and enabling them to acquire skills for work.

Brazil's legal system allows private enterprise to provide education in order to supplement the role of the State. Beatriz Ranieri Nina notes, "the educational task must consider public and private spheres as complementary rather than the dichotomous and exclusive relationship of a police-state" (Ranieri, 2000).

State provision of education differs in relation to the characteristics of this activity when run by individuals. The former is a purely public service governed by constitutional precepts, the latter a private service governed by contractual relations between an educational institution and its students, thus by contractual principles.

The current Federal Constitution altered this model and submitted and private educational institutions to state control.

The reason for this change was firstly its expressly stipulating formal education as a duty of the State, thus imposing on the latter the obligation to govern and oversee the provision of educational services (articles 205 and 206 of the Federal Constitution).

Again, with a number of microsystems being normatized (Children and Adolescents Statute, Consumer Protection Code, Copyright Law, and others), it must be recognized that the legal relations of private law are now being dealt with on a social basis in an attempt to balance legal protection of free will and collective interest.

Educational law, in this context, has undergone profound change, especially with the enactment of Law n. 9 634/1996, or the Law of National Education Guidelines and Bases (Portuguese acronym LDB), although a number of issues in doctrine and jurisprudence are still controversial, among them educational institutions' liability for the services provided, especially in relation to determining their adequacy and propriety.

Note also that the Education Law (LDB) poses principles and organizational norms, and thus requires supplementary regulation in different norms (laws, orders and resolutions). These constitutional and/or infraconstitutional norms limit private-enterprise activities in education.

The Evolution of Private Higher Education in Brazil

As Beatriz Ranieri Nina has shown, higher education in the colonial period was an exclusive attribution of royal power, and was used to build an ideology of national unity capable of justifying the continuation of social, economic and political models (Ranieri, 2000) Reflecting this situation, and the reforms introduced by Pombal[1] in Portugal, the Empire

1. In relation to Pombal's reforms, Laerte Ramos de Carvalho shows they involved "not just transfer of power [from the religious orders to the monarchy], but the very purposes and aims of education, enabling a new pedagogy soundly grounded in the logic of modern philosophy to replace scholastic pedagogy, of which the Jesuits' schools in Portugal were highly significant expressions" (Carvalho, 1978). Hence education was to pose the broader aim of maintaining the cohesion of civil society.

of Brazil's 1824 constitution contained no legal provision for private individuals to provide education.

The proclamation of the Republic altered this scenario, although the 1891 Constitution says nothing of educational activity being provided by private individuals. In the same period, a Higher Instruction Council was created and regulations governing legal education institutions approved (decrees 1.232-F and 1.232-G). Legislation then allowed private establishments known as "free schools" under concessions granted by the public power.

On January 1, 1901, Decree n. 3 390 approved a code for official secondary and higher education institutions. In the words of Frauches and Fagundes (2005), "the decree provided for the existence of higher or secondary education institutions funded by states, the Federal District or by 'any association or individual' to whom the government might 'grant the privileges of similar federal establishments' " (Frauches and Fagundes, 2005, p. 309).

The Higher Instruction Council was replaced by the Higher Education Council[2] in 1911, which in turn was replaced by the National Teaching Council[3] in 1925.

In 1931, further change came through Decree 19851 of April 11, 931, which set up the National Education Council to replace the National Teaching Council. It also allowed educational activity to be run by private individuals by stating that universities may be founded and supported by the federative republic or by states (federal and state universities) or in the form of foundations or associations, by private individuals ("free universities"). An important point to emphasize is that the norm forbids educational activity for profit, since it determines that the only types of organization that may support and run schools are foundations or associations.

For the first time, the 1934 Constitution mentions the activity of private individuals in education in its Article 150 (f): Attributions of

2. The Higher Education Council was created by Decree No. 8659 of April 5, 1911

3. The National Education Council was created by Decree No. 16782-A of January 13, 1925.

the Union [...] recognition of private educational establishments only when their professors have tenure, for as long as they serve properly, and appropriate remuneration. In Article 154, the constitutional legislature specifies tax immunity for private establishments of good standing providing free, primary or occupational education.

The 1937 Constitution's Article 128 states that art, science and education are freely open to individual enterprise or associations, public collectives or private individuals. The 1946 Constitution maintained the legal provision for private individuals' activity in education in its Article 167, and definitively subordinates this activity to the norms regulating education[4].

The first general law of education was the "Law of Guidelines and Bases of National Education", or Law n. 4 024, promulgated on December 20, 1961. As Frauches and Fagundes (2005) have pointed out, "freedom of education was the most significant hallmark of the first general law of education, ensuring equality between public and 'legally authorized' private educational establishments. The expressions 'free university' or 'free school' were no longer used to designate private higher education institutions" (Frauches and Fagundes, 2005, p. 311).

The 1961 education law had a Federal Education Council replace the National Education Council. In 1968, it was amended by Law n. 5 548/68 and Decree-Law No 464/69, particularly in relation to higher education (the 1968 University Reform).

The education law as amended in 1968 opened the first period of expansion for higher education institutions in Brazil. On this subject, Luiz Antônio Cunha wrote, "private institutions were given unprecedented direct and indirect incentives, and combined with the mostly private-sector representatives on the Federal Education Council, this prompted a spurt of growth" (Cunha, 2004). Private institutions subsequently multiplied in number and scale.

4. 946 Federal Constitution – "Article 167 The several branches of education shall be provided by the public powers and *open to private enterprise in compliance under the laws regulating it*" (my emphasis).

Educational activity is now mainly regulated by the 1988 Constitution and the currently applicable education law enacted in 1996 (LDB). Article 205 of the Federal Constitution states that education is a right of all citizens and a duty of the State and the family, to be fostered and encouraged with the cooperation of society, aiming for full personal development, preparing people for the exercise of citizenship and enabling them to acquire skills for work. Article 2 of the LDB is similar to the latter[5].

Although the Constitution's Article 209 allowed private enterprise to provide educational activity, it stated two conditions for this: *a.* compliance with the general norms of national education, *b.* authorization and evaluation of quality by the Public Power.

Authorization for private enterprise to provide education was also covered by Article 7 of the LDB[6], on condition of meeting the requirements of Article 209 items I and II on self-financing capability of educational institutions.

In this sense, the 1988 Federal Constitution and the LDB certainly provide for the coexistence of public and private schools, with the latter authorized by the State, In addition, the currently applicable norms allow for a third type of educational institution, namely for-profit private educational institutions.

Therefore, the normatization of education in Brazil appears to contradictory: is the provision of education by private individuals in accordance with the principle of free enterprise stated in Article 209 of the Constitution, or is it subject to state intervention, as in the subparagraphs of the same article? I shall proceed to examine this issue.

5. Article 2. Education as a duty of the family and the State, based on the principles of freedom and the ideals of human solidarity, aims for the full development of pupils, their preparation for the exercise of citizenship and enabling them to acquire skills for work.

6. Article 7. Education is open to private enterprise, on the following conditions: I – compliance with the general norms of the nation's education and the corresponding education system; II – its authorization to function and assessment of its quality by the Public Power; III – self-financing capability, saving the exceptions noted in Article 213 of the Federal Constitution.

The Principle of Private Autonomy and Educational Activity

As mentioned above, Article 209 of the Federal Constitution states that education is open to private enterprise. In the words of José Afonso da Silva, "free enterprise involves freedom of industry and trade, or freedom for business and contractual relations" (Silva, 1992). This principle relates to the liberal ideal of legal autonomy for individuals to freely act and develop the activity of their choice without state intervention.

Free enterprise is associated with the principle of free competition, and Celso Ribeiro Bastos points out that "free competition is one of the foundations of the liberal structure of the economy and has much to do with free enterprise. So there can only be free competition where there is free enterprise [...] free competition is something added to free enterprise, comprising a situation in which various productive agent are prepared to compete with their rivals" (Bastos, 2002, p. 807).

José Afonso da Silva defines the principle of free competition in the following terms:

> […] free competition is posed in Article 170, IV as one of the principles of the economic order. It is a manifestation of free enterprise; to guarantee it, the Constitution states that the law shall punish abuse of economic power that seeks to dominate markets, eliminate competition and arbitrarily augment profits. The two provisions are complementary and have the same objective. They seek to foster the market system and especially protect free competition from the overwhelming trend of capitalist concentration. The Constitution recognizes the existence of economic power, thus it is not condemned by the constitutional regime. Not rarely, this economic power is exercised in an anti-social manner. The State must therefore curb this abuse (Silva, 1992, p. 674).

In relation to education in Brazil, the principles of free enterprise and free competition are not fully exercised since the legal framework poses certain limitations, such as the social function of business[7].

7. In relation to the social function of business, Eros Grau notes that "the principle of the social function of property becomes substantive when applied specifically to ownership of the means of production, or the legal regulation of ownership of such property, implemented under the commitment of their use. Property on which the effects of the principle are most

In this context, the principles of free enterprise and free competition have their application narrowed and subject to public economic policies aimed at ensuring "dignified living conditions for all, in accordance with the tenets of social justice" (Silva, 1992, p. 692). This is the case in relation to providing educational services on a business basis: given the social repercussions and public interest involved, the principle of free enterprise stipulated by the 1988 Federal Constitution's Article 209 (and the inherent principle of free competition) are subject to restriction by the precepts of social justice. Note that this restriction is stipulated in the Federal Constitution's Article 170, sole paragraph, "all citizens are assured the free exercise of any economic activity, irrespective of authorization by public agencies, *except in cases stipulated by law*" (my emphasis). The exception is applicable in this case since the Federal Constitution's Article 209 states that educational activity is subject to State accreditation and supervision, and must comply with the general norms governing education.

On this issue, Gabriela Giannella Samelli quotes Vicente Rao arguing thus: "liberalism does not exclude the legitimacy of State intervention when it acts in private relationships through positive legal rules as and when necessary"[8].

In order to best illustrate the social relevance of the provision of educational services, I shall proceed to examine their legal nature in the next item.

Legal Nature of Educational Services Provided by Private Individuals

Educational services provided by the State are unarguably of a public nature. The issue to be analyzed is whether the provision of such services by private individuals alters their legal nature.

intensive is precisely dynamic ownership of the means of production. In fact, on referring to the social function of the means of production and their dynamism, we are referring to the *social function of business*" (Grau, 1981).

8. From the master's degree dissertation "A Prestação de Serviços Educacionais" [Provision of educational services] argued at USP in 2002, advisor Prof. Álvaro Villaça de Azevedo.

Di Pietro (2007) shows that there are two possible concepts of public services: broad and narrow. According to the broad concept, public services cover all functions of the State. Jurists adopting the broad concept include Cretella Jr. (1980)[9] and Hely Lopes Meirelles[10]. The narrow concept characterizes public service as an activity exercised by the State, thus excluding legislative and judicial functions. This concept is adopted by Celso Antônio Bandeira de Mello[11] and Di Pietro himself (2007)[12].

In all cases, public services must *1*. be directed to the collective interest, *2*. be provided by the state, and *3*. be provided through procedures determined by public law. It behooves us to analyze the second item, which is that public service should be provided by the State.

Analyzing the provision of educational services, Carlos Roberto Jamil Cury supports the idea of concessions to provide public service, but with reservations. He believes that only private non-profit institutions would be able to act on behalf of the State through concessions. Private establishments seeking profit (financial benefit from such services) would be acting on their own behalf and thus be subject exclusively to the precepts of private law: "the Constitution redefines the situation: private education (Article 209), for profit (as opposed to the wording of Article 213), is typically capitalist in its content. In opposition to this, the other modalities indicated (articles 213 and 150, VI, c) do not have

9. José Junior Cretella defines public service as "any activity that the State directly or indirectly exercises to meet public needs using typical public-law procedures" (Cretella Jr., 1980).

10. Hely Lopes Meirelles defines public service as "all those provided by the Administration or its delegates under norms and controls of the State in order to meet the community's essential or secondary needs, or simply for the convenience of the State" (Meirelles, 2003, p. 319).

11. Celso Antônio Bandeira de Mello writes, "public service is any activity offering a utility or commodity directly by administrators, provided by the State or another in its place, under a regime of public law – thus recognizing prerogatives of supremacy and special restrictions – instituted by the State in favor of interests defined as proper or pertinent in the normative system" (Mello, 1975).

12. According to Di Pietro (2007, p. 90), public service is "all material activity the law attributes to the State for it to exercise directly or through its delegates, aiming to concretely satisfy collective needs, under a fully or partly public legal regime".

a typically capitalist presence in a market economy" (Cury, 1992). His argument that non-profit private institutions act through concessions is based on the fact that they are authorized to receive public funds.

On the subject, Ranieri (2003) notes "[...] although private activity is freely allowed, subject to the principles informing economic activity, the fact is that from a practical point of view this is a concession, as Marques de Pombal noted: education at that time was defined as *jus regio*, thus private enterprise (in this case, religious bodies only) was allowed to exercise this activity exceptionally".

I do not share this view[13]. I believe services provided by private establishments – both for-profit and non-profit – are essentially private, but involve the collective socio-economic interest. Therefore they are private services, but also of public interest. These private services of public interest relate to the concept of "economic constitution" posed by Gilberto Bercovici (1988), i.e. economic affairs being covered by the constitution, which defines the parameters for formulating the State's economic policy.

The public interest in educational services arises from the Constitution itself, since the constitutional norm raised education to the category of a fundamental social right (Article 205, with Article 6 of the 1988 Federal Constitution), more precisely a second-generation right, since it may be seen as part of the duty of the State, to be provided in accordance with the applicable constitutional principles.

As private service of public interest, educational activity must be submitted to State control. In the words of Samuel Pontes do Nascimento, Antonio Roberto W de Carvalho and Giovani Clark,

13. Corroborating my interpretation that public service may not be delegated to private individuals, the following decision proffered by the Higher Court of Justice declared that federal courts had no jurisdiction to judge matters relating to private higher education. "Conflict of Jurisdiction. Writ of Manadamus. Higher Education. Administrative Act of Director of Private College. State Courts State courts have power to judge case for writ of mandamus against administrative act of director of private college" (STJ, DC 19279, Case 199700100782 – RS, Legal Gazette (DJ) September 12, 1997, p. 64585).

[…] economic exploitation of higher education, although governed by the principle of free enterprise, is not exempt from the actions of the public power, which, through norms and executive agencies, controls these services in order to ensure decent standards for all citizens, foster consumer rights and free competition, pursuant the dictates of social justice (1988 Constitution, Article 170, *main body*, IV and V)[14].

Restrictions Affecting Private Enterprise in Education

In light of the above, private education takes place in the private sphere, but is subject to social interest, and given the legal relevance of education, the right to free enterprise for private enterprise is relativized by the social function of business and social justice precepts. Therefore, the first and foremost limitation affecting private enterprise in education is precisely the fact that education is a fundamental social right of general interest.

Another example of this limitation is the submission of private institutions to authorization and assessment of quality by the public power (Article 209 of the Federal Constitution). A private individual or business, although under the supervision of the public power since it is authorized by the State, acts alongside the latter but not on its behalf. However, a private institution must first be accredited by the Ministry of Education, and the courses it provides must be duly authorized.

There is undeniably the need to submit a course and its pedagogical project for prior authorization by the Ministry of Education in order to ensure the quality of services provided. However, in our view, compulsory accreditation of a private education institution by the Ministry clearly characterizes undue State intervention in free enterprise.

In this respect, note that the Brazilian system distinguishes a school or college from the entity that funds or supports it. The former is the educational institution as such, and is responsible for all academic and educational aspects; the latter funds the institution and provides administrative management.

14. Samuel Pontes do Nascimento; Antonio Roberto W. de Carvalho e Giovani Clark, *O Ensino Privado Superior pela Ótica das Relações de Consumo.* Available at www.scielo.com.br.

Although the Ministry does not intervene in the founding and functioning of the entity supporting the school, it does set conditions for opening a school as such, and one cannot exist without the other. So there is a clear and explicit violation of Article 5, XVIII, of the Federal Constitution: "associations and cooperatives in accordance with the law may be founded irrespective of authorization, and the State may not interfere in their functioning".

When its courses have been accredited and authorized, a private education institution still conducts its educational activities on a relatively insecure basis since it is subject to quality assessments[15].

The Ministry assesses quality through the National Higher Education Evaluation System (Sinaes), set up under Law 10 861/2004 and the regulations of ministerial order MEC 2.051/2004, covering three aspects: institutional, courses, and self-evaluation. If an institution's test results are deemed unsatisfactory, it is required to sign a memorandum of commitment[16], setting targets or goals and final dates for resolving any nonconformities detected. Penalties are applicable if the terms of the memorandum or protocol are not fulfilled[17], which culminates in closure of courses and de- accreditation of the education institution.

15. Note that all private educational institutions are subordinated to the federal education system and therefore subject to the Ministry's assessment system. A key point is that the same evaluation system is used for all institutions in Brazil, irrespective of the particularities of each region or the unique features of each educational institution. In other words, the Ministry applies the same quality standards to universities committed to research and extension courses, as to non-university institutions whose sole purpose is teaching undergraduate courses.

16. Under Law 10 861/2004, the following items shall be included in the memorandum (or protocol): 1. an objective diagnosis of the conditions at the institution, 2. procedures, processes and measures to be taken by the higher education institution in order to resolve any issues detected, and 3. a statement of targets and deadlines for taking such measures, expressly defined, and a characterization of the respective responsibilities of its officers or directors, 4. the higher education institution must set up a committee to follow up implementation of the memorandum of commitment.

17. Penalties stipulated under Law 10 861/2004: 1. temporary suspension of the selection process for undergraduate programs, 2. withdrawal of the higher education institution's authorization to function or recognition of its courses, 3. warning, suspension or loss of man-

Finally, an important point is that the National Education Council is not involved in the evaluation process. Instead, there is the National Higher Education Evaluation Commission (Conai), a collegiate body composed of five members of government, a representative of teaching staff, a student and a technical or administrative member, along with five citizens of reputed academic learning designated by the Ministry[18].

Another aspect to be considered is university autonomy. Under Article 207 of the Federal Constitution, universities enjoy autonomy to direct their academic and administrative affairs, and to manage their finances and assets. Note that this prerogative applies only to public or private universities, thus excluding non-university institutions (colleges or schools, university centers and higher institutes).

However, note that only public universities have full autonomy as stipulated by the constitutional norm, and certain restrictions apply to private universities.

In this respect, note the following point made by Nina Stocco Ranieri: "university autonomy, which covers three aspects – educational-academic, administrative and financial management – refers to the educational institution as such rather than the supporting or funding entity" (Ranieri, 2003, pp. 29-47). However, the educational institution as such, by definition, has no administrative or financial management capacity, since these are attributions of the supporting entity.

Therefore certain measures that limit the performance of the supporting or funding entity, such as the need to comply with Law n. 9 870/99 in terms of parameters used for setting annual fees, or Order n. 40/2007, which forbids charging for issuing diplomas, do not involve violation of the constitutional precept in question.

However, submission of private universities to evaluation by the Ministry, or the need to obtain accreditation for a new campus outside

date of the officer or director responsible for not implementing measures in the case of public higher education institutions.

18. One of the criticisms raised is that Conaes has no representatives of private educational institutions in the Commission, thus raising questions as to its impartial approach to its tasks.

the field of activity of the university, or to obtain authorization for new courses, are all aspects that violate university autonomy as guaranteed by the constitution.

It is therefore essential that the private universities be assured full university autonomy in order to exercise their activities freely in relation to teaching, research and dissemination of ideas without interference of the public power or the market.

Finally, the issue of universities being self-financing requires examination. The Education Law (LDB) stipulates the participation of private enterprise in educational activity and its Article 7 added a third condition to those posed by the Federal Constitution's Article 209[19].

In this context, the LDB went further than the constitutional norm by stating that private-enterprise activities in education are subject to proof of self-financing capability.

It is therefore clear that if university financing originates from public policies, there is a political public and social investment, in which case educational services must not be treated as economic goods of a private nature.

Conversely, educational institutions able to show their self-financing capability would be fully subject to the norms of private law, and there would be no grounds for state intervention.

There is no justification for the LDB's forcing private education institutions to prove their self-financing capability. Furthermore, the right to freely exercise economic activity irrespective of proving self-financing capability is part of the set of principles on which Brazil's economic order is based!

Similarly, Decree n. 3 860/2001 requires an educational institution's supporting or funding entity to prove its good standing in relation to payment of taxes as a precondition to apply for authorization, recogni-

19. Exceptions to the requirement of self-financing capability are the institutions covered by Article 213 of the Federal Constitution: community, religious or philanthropic schools, as defined by the law, which receive public funds on demonstrating their non-profit status and assure that their assets are allocated to another community, philanthropic or religious school, or to the public power.

tion or renewed recognition of a course. The lawmakers' intention – to ensure a supporting or funding entity could provide the funds required to ensure continuity of service – is absolutely inappropriate, since the quality of a course bears no relation to the regular payment of taxes by the university's supporting or funding entity[20].

The State's Intervention in the Economic Domain: Law 9.870/99

The publication of Law n. 9 879/99 on the total amount of school tuition fees and other provisions legitimated State intervention in the economic domain. Indeed, the abovementioned legal norm sets criteria to be verified by education institutions when adjusting annual and semi-annual charges. In addition, private institutions must abide by certain limits.

Now it is a basic rule in any economic order that prices are set by the market in accordance with economic principles, including supply and demand, and competition.

20. The requirement posed by Article 20 of Decree n. 3 860/2001 has recently been the grounds for a court order sought by the official organization of entities supporting higher education institutions in the state of São Paulo (Semesp), in case No 2006.61.00 09158-6, tried by the 4th Federal Court of São Paulo. Part of the decision is transcribed here: "... the need to prove good standing in terms of payment of taxes, social security payroll contributions, and FGTS (severance fund) payments as a requirement for lodging and processing an application for recognition or renewal of recognition of a university course, which was introduced by decree, is therefore found to be unfair and illegal since it exceeds the limits of its regulatory powers, imposition of requirements not stipulated by law, *particularly when used as a means of coercion to ensure payment of taxes, as in this case*" (my emphasis).

The same view was taken for the decision proffered in case n. 2005 34 00 010501-8, an action brought by Sociedade Educacional Tuiuti Ltda tried by the 4th Federal Court of the Federal District, as seen in the excerpt transcribed below: "Indeed, the appellant is quite right in emphasizing that there is no law (in the strictly material sense of the word) supporting the requirement [...] Illustration of the issue were the Federal Supreme Court's precedents 70, 323 and 547, which *mutatis mutandis* is in essence applicable to the situation in question :

– Precedent 70: Interdiction of establishment unacceptable as a means of coercion to ensure tax collection.

– Precedent 323: Seizure of assets as a means of coercion to ensure taxes are paid is not admissible.

– Precedent 547: In relation to an indebted taxpayer, it is not lawful for authority to prohibit purchase of seals, clear goods through customs or exercise professional activities.

In other words, each private education institution must be free to set their prices depending on demand, the costs of the activity, the purchasing power of their students and their competitors' practices.

However, this prerogative was withdrawn from private education institutions by the State, which intervenes in the economy, imposing parameters for charges made by such institutions. These parameters, unfortunately, are out of touch with costs, which are increasingly higher given the constant improvements that private education institutions were forced to adopt in an increasingly professional and competitive a market.

In addition to the above, there is another distortion in the legal norm in question. Although Article 5 of said law authorizes educational institutions to refuse to renew the enrollments of pupils in default, there is nothing that authorizes the pupil being terminated during the semester. Therefore, the student has only to pay the first installment of the annual or semi-annual charge to have the right to attend school throughout the term.

Educational institutions are required by law to fulfill their obligation in full, even without receiving consideration owed by the student, which ultimately characterizes unjust enrichment of the student, which as practice has moreover long been rejected in our legal order.

Growth of Private-Sector Activity in the Education Segment

As mentioned above, current Brazilian law now allows the coexistence of public and private institutions.

In practice, what is occurring is a significant increase in participation of the individual in providing that service, encouraged by several aspects, among which we highlight the expansion of the tunica media, eager for obtaining a higher grade, then the symbol of economic and social prestige, the existence of various legal devices, such as the provision of tax incentives for private institutions, and especially for the scrap of public institutions, as well as the lack of incentives, in the creation of new educational establishments.

Until 1996, all entities supporting or funding private educational institutions were set up as non-profits. This scenario changed with the

current LDB, which broke new ground by allowing for-profit private education institutions. This led to a process of increasing professionalization for these companies (or, in official terms, "organizations supporting educational institutions"), and some of them proceeded to launch IPOs.

The new situation is not negative, although there are some nonconformities. Educational ventures maintained by private enterprise, in addition to their important social function, are quicker to respond to the aspirations of society. They are more agile at implementing projects and changing programs in mid-course and show extraordinary ability to adapt to new paradigms, values and beliefs in a society in constant mutation. The magazine *Veja* carried a feature by the journalist Camila Pereira ("Education goes to the stock exchange", Year 41, n. 26,) on the many benefits arising from the process of capitalization and professionalization of educational institutions, such as lower tuition fees, improved infrastructure and quality of education. Professionalization and inclusion of these establishments in the market leads directly to the need to improve services, and invest in infrastructure and human resources while providing quality education in order to survive in a growing and competitive market.

In this scenario, the State must be watchful and active, ready to perform the interventionist duties stipulated by law without hindering growth in the educational segment. There is no need for regulatory mechanisms in educational activity further restricting the activities of private establishments. The Federal Constitution's provisions should be obeyed, within their limits, in order to ensure quality services.

Conclusion

Under Article 209 of the Federal Constitution, private enterprise is free to exploit educational activity, as long as the following conditions are met: a. compliance with the general norms of national education, b. authorization and evaluation of quality by the public power. Article 170, IV of the Federal Constitution states that the economic order based on the value of human labor and free enterprise must be guided by several principles, among which the principle of free competition.

The two articles, although contradictory in principle, should be taken as a whole. Due to the social interest and relevance of education as a fundamental social right, private enterprise is not exercised in its plenitude, being limited by the dictates of social justice in observance of the social function of business.

Any limitations on the role of private enterprise in education that are based on the above concepts are fair and desirable. However, there is now a proliferation of instrumentation norms lacking justification or consistency that contradict the approach adopted by the Federal Constitution. These limitations must be removed to ensure the full and effective development of private institutions, which should coexist with public institutions as posed by the Education Law (LDB).

References

Aguilar, José Márcio. 1997. *Reformas de Ensino*. Belo Horizonte, Lâncer.

Bastos, Celso Ribeiro. 2002. *Curso de Direito Constitucional.* São Paulo, Celso Bastos Editor.

Bercovici, Gilberto. 2005. *Constituição Econômica e Desenvolvimento, uma Leitura a partir da Constituição de 1988.* São Paulo, Malheiros.

Campelo, Sérgio Amaral. 2000. "O Ensino do Direito – Reflexões". *Revista do Direito*. Pelotas, 1 (1), jan.-dec., pp. 95-108.

Carvalho, Laerte Ramos de. 1978. *As Reformas Pombalinas da Instrução Pública*. São Paulo, Saraiva; Editora da Universidade de São Paulo, 1978.

Cretella Jr., José. 1980. *Administração Indireta Brasileira.* Rio de Janeiro, Forense.

Cunha, Luiz Antônio. 2004. *Desenvolvimento Desigual e Combinado no Ensino Superior – Estado e Mercado*. Ed. Social, Campinas, vol. 25, n. 88, pp. 795-817, oct. Available at http://www.cedes.unicamp.br

_____. 2007. *O Desenvolvimento Meandroso da Educação Brasileira entre o Estado e o Mercado.* Educação Social, Campinas, vol. 28, n. 100, pp. 809-829, oct. Available at http://www.cedes.unicamp.br.

Cury, Carlos Roberto Jamil. 1992. *A Educação Escolar como Concessão*. Brasília, Aberto, year 10, n. 50/51, apr./sep.

Di Pietro, Maria Sylvia Zanella. 2007. *Direito Administrativo.* 20. ed. São Paulo, Atlas.

Frauches, Celso da Costa & Fagundes, Gustavo M. 2005. *LDB Anotada e Comentada e Reflexões sobre a Educação Superior.* Brasília, Ilape.

Gomes, Alfredo Macedo. 2003. *Estado, Mercado e Educação Superior no Brasil: Um Modelo Atual (?)*. Campinas, Educação Social, vol. 24, n. 84, pp. 839-872, sep. Available at http://www.cedes.unicamp.br Accessed November 2008.

Gonçalves, Carlos Roberto. 2002. *Principais Inovações no Código Civil de 2002*. São Paulo, Saraiva.

Grau, Eros Roberto. 1981. *Elementos de Direito Econômico*. São Paulo, RT.

Marques, Cláudia Lima. 2000. *Contratos no Código de Defesa do Consumidor*, 3. ed., São Paulo, RT.

Meirelles, Hely Lopes. 2003. *Direito Administrativo Brasileiro*. São Paulo, Malheiros.

Mello, Celso Antônio Bandeira. 1975. *Prestação de Serviços Públicos e Administração Indireta*. São Paulo, Revista dos Tribunais.

Nascimento, Samuel Pontes do; Carvalho, Antonio Roberto W. de & Clark, Giovani (undated). 2008. *O Ensino Privado Superior pela Ótica das Relações de Consumo*. Available in the annals of the Council for Legal Research and Postgraduation (Conselho Nacional de Pesquisa e Pós-Graduação em Direito, or Conpedi) at: http://www.conpedi.org/manaus/arquivos/anais/bh/antonio_roberto_de_carvalho.pdf Accessed november.

Nunes, Edson. 2007. "Desafio Estratégico da Política Pública: O Ensino Superior Brasileiro". *Rev. Adm. Pública* [online], v. 41. Available at: http://www.scielo.com.br. Accessed November 2008.

Ranieri, Nina Beatriz Stocco. 2003. "O Poder e o Limite do Estado na Atividade Educacional". *Estudos 31*, Abmes, july, pp. 29-47.

_____. 2000. *Educação Superior, Direito e Estado*. São Paulo, Editora da Universidade de São Paulo, Fapesp.

Samelli, Gabriela Giannella. 2002. *A Prestação de Serviços Educacionais*. São Paulo. Master's dissertation submitted to the Law School, Universidade de São Paulo, advisor Álvaro Villaça de Azevedo.

Silva, José Afonso da. 1992. *Curso de Direito Constitucional Positivo*. 9. ed., São Paulo, Malheiros.

Silva Jr., João dos Reis & Sguissardi, Valdemar. 2005. "A Nova Lei de Educação Superior: Fortalecimento do Setor Público e Regulação do Privado/Mercantil ou Continuidade da Privatização e Mercantilização do Público?" *Revista Brasileira de Educação*, may/jun./jul./aug., pp. 5-27.

Solon, Rosilene Maria. 2004. *Direito à Educação*. Rio de Janeiro, Letra Legal.

Tedesco, Juan Carlos. 1991. "Alguns Aspectos da Privatização Educativa na América Latina". *Estudos Avançados 12*(5). Available at http://www.scielo.com.br.

Tessler, Marga Inge Barth. 2004. "A Responsabilidade da Instituição e sua Direção na Prestação do Ensino". *Revista CEJ*, n. 26, sept.

V

EDUCAÇÃO E INCLUSÃO

Indigenous Education and the Role of the State*

Sabine Righetti

Introduction

The world press recently highlighted images of an isolated indigenous group discovered in the state of Acre near Brazil's border with Peru. Images collected by a team from Brazil's Indian Foundation (Funai) in April-May this year alerted Brazilians and non-Brazilians to the fact that Brazil, despite many difficulties and limitations, is one of the few countries in the world (if not the only one) still conserving isolated groups of indigenous peoples. Having had no contact with all the changes that have taken place in Brazil since its "discovery", they maintain the cultural traditions of their ancestors and survive by hunting, fishing, and gathering food, with some incipient agriculture (such as that of the Indians photographed, who cultivate a large area of land near their huts).

Brazil now has approximately 460,000 Indians, integrated or in the process of integrating, spread over 225 indigenous communities (villages), thus comprising approximately 0.25% of the population of Brazil,

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according to Funai data. In addition, there are some 100,000 to 190,000 Indians living outside indigenous areas, or in urban areas, and there are some 55 isolated groups of Indians for whom no objective information is available[1].

At no other time in its history has Brazil come under so much pressure from civil society through the press and non-governmental organizations (NGOs), locally and worldwide, to pay special attention to the question of the indigenous peoples and their preservation. This trend goes back to the 1970s and the first mobilizations supporting the struggle to defend indigenous identity, including the need to formulate public policies for health, education and welfare in these communities (Righetti, 2005).

There is a simple reason for this social pressure: preserving the remains of indigenous culture in this country depends on measures ensuring environmental sustainability in Indian reservations (their natural habitats) and surrounding areas, thus perpetuating their customs, languages and traditions.

These measures and policies must be aimed at both indigenous communities and other Brazilians. An example would be initiatives to raise awareness and inform people of the preservation of indigenous cultures.

In academia, discussions on the sustainability of Brazil's indigenous culture permeate the fields of sociology and anthropology in particular. However, measures supporting the indigenous cause are guaranteed by legal instruments setting up institutions or foundations, or by government orders or legislation. In this respect, in view of the aims of this study, an essential aspect of the discussion posed here is to review recent institutional instruments involving the indigenous peoples.

1. Funai does not have a precise notion of the scale of the regions inhabited by isolated Indians, and the number of isolated groups is estimated from studies of what are referred to as "contact fronts" that have been acting in the states of Amazonas, Pará, Acre, Mato Grosso, Rondônia and Missouri since 1987.

Legal and Institutional Instruments Involving Brazilian Indians

One of the most significant measures in Brazil's legal framework protecting indigenous communities was taken during the dictatorial period, when the National Indian Foundation (*Fundação Nacional do Índio*, or Funai) was created by Law 5371 of December 5, 1967.

With the advent of the Funai, previous agencies were automatically abolished, namely the Indian Protection Service (local acronym SPI), the National Council for Protection of Indians (CNPI) and the Xingu National Park (PNX). Functions related to the cause of the indigenous peoples were thus concentrated in the Funai as an institution with its own resources and status under private law.

In legal terms, Funai was founded for the purpose of determining the guidelines for indigenous policy, and compliance with them, based on four principles in particular, namely

1. ensuring respect for Indians as individuals, along with their tribal institutions and communities,
2. permanent possession of the land they inhabit and exclusive use of natural resources and all units thereof,
3. preserving cultural and biological equilibrium for Indians in their contact with Brazilian society and
4. shielding their spontaneous acculturation, so that their socioeconomic development process not be subject to brusque changes.

In the decade following the founding of Funai, during the dictatorial period, the *Statute of the Indian or Law n. 6001 of 19 December 1973* was enacted to regulate the legal status of Brazilian Indians or forest peoples and the indigenous communities, with the aim of preserving their culture and gradually and harmoniously integrating them with the national communion.

Under Law 6001, legal protection in Brazil was extended to Brazilian Indians and indigenous communities on the same terms as other Brazilians, excepting in relation to indigenous uses, customs and traditions, as well as other recognized specific conditions.

Article 4 of Law 6001 contains norms and definitions dividing Brazilian Indians into three groups[2]:

I – Isolated- living in groups not yet contacted, or if there are a few vague reports through occasional contact with elements of the national communion;

II – In the process of integration – in intermittent or constant contact with outside groups, retaining more or less conditions of their native lifestyle, but accepting some practices and lifestyles common to other sectors of the national communion, to which they turn for their own sustenance;

III – Integrated- incorporated to the national communion and recognized for full exercise of civil rights, while retaining usages, customs and traditions characteristic of their culture.

The group of Indians incorporated to the national community enjoys full exercise of civil rights although retaining usages, customs and traditions characteristic of their culture.

As defined in paragraph 8 of Article 7, which deals with protection or assistance:

Article 7 – Indians and indigenous communities not yet integrated into the national communion are subject to the regime of protection as stated in this law

§ 8 Acts involving non-integrated Indians and any person outside the indigenous community shall be null and void if there was no assistance from the competent protective authority.

This means that indigenous peoples are assured the application of special legislation: in the event of an Indian being found guilty of a criminal offense, the penalty must be mitigated pursuant to Article 56, which deals with the principles of criminal law.

Article 56 – In the case of an Indian found guilty of a criminal offense, the penalty shall be reduced and the judge will also take into account the extent of integration when applying it.

2. The 1973 Statute of the Indian does not clearly specify the methodology used to classify them as isolated, integrated or partially integrated. According to Funai, even defining who Brazilian Indians are is controversial: A group of people may be deemed indigenous or not if they see themselves as indigenous, or if they are thus seen by the surrounding population. Despite this criterion being the one most frequently used, objections to it have been raised, since there are often political interests that lead to the adoption of this definition, as there have been for the last 500 years (see the Funai website: http://www.funai.gov.br).

Sole Paragraph Imprisonment or detention shall be served, if possible, in a special regime of semi-liberty, at the premises of the federal agency assisting Indians that is nearest the abode of the person sentenced.

One approach to the indigenous question assumed the indigenous peoples would physically disappear in the future and saw them as a transient ethnic and social category doomed to extinction. However, this integrationist stance that sought to assimilate them to the national community was dropped when the *1988 Brazilian Constitution* recognized their right to continue to live as Indians.

From this innovative point of view, the indigenous question is addressed through its treatment of fundamental principles, rights and guarantees, stating the attributions of congress, regional federal courts and federal judges as functions essential to justice, the general principles of economic activity, culture and more specifically, those of Brazilian Indians themselves.

The 1988 Constitution's articles 231 and 232 emphasized the protective role of the State[3] in relation to indigenous peoples, as posed by the 1973 Statute of the Indian:

Article 231 The social organization of the indigenous peoples is recognized, as are their customs, languages, beliefs and traditions, and rights arising from the lands they have traditionally occupied, and the Union shall demarcate these lands, protect them and ensure all their goods or assets are respected.

Article 232 The Indians, their communities and organizations are legitimate parties to seek the protection of the courts for their rights and interests, with the public prosecutor intervening throughout the case.

The 1988 Constitution does not mention the typology of the 1973 Statute of the Indian, which classifies Indians as isolated, partially integrated or integrated, and this has led to discussion in the field of civil law. As part of the debate, some authors have advocated the Constitution's

3. The role of the State as protector or guardian of Brazilian Indians has been discussed by writers such as Souza Filho (1993), who asks to what extent the guardianship or wardship (which the state exercises over orphans as its wards) may be characterized as a form of discrimination or oppression in the case of Indians.

principle of equality (Article 5 states that all Brazilians are equal before the law without distinction of any kind) and other authors have argued that Indians are not imputable under the Statute of the Indian[4].

Another debate involving Brazilian Indians, which goes beyond the field of civil law to reach a broader discussion of human rights focuses on the theme of universal human rights in Brazil, as posed by authors such as Piovesan (1999). "Universalization of human rights" means applying the principles of the Universal Declaration of Human Rights proclaimed by the UN General Assembly on 10 December 1948, for all human beings regardless of gender, age, social group, ethnicity or nationality.

In this context, there is discussion over the extent to which specific practices of certain cultures, such as indigenous culture, should be punished if they violate principles of the Universal Declaration of Human Rights of 1948, to which Brazil is a signatory[5]. If they are to be punished, should punishment be applied on a different basis? Should universalization of human rights override specific features of certain cultures, such as those of indigenous peoples? Is Brazil's justice system – created and designed in a society totally distinct from that of the indigenous peoples – appropriate to examine acts performed in this society? Would this practice in itself not be a form of authoritarianism and oppression?

Having posed this reflection and briefly summarized legal treatment of indigenous issues in Brazil and its repercussions, we may now explore the key focus of this study: Brazilian Indians' right to education and the role of the State in this respect.

4. One example is the argument that Indians, except isolated groups, must respond as ordinary citizens in criminal cases, seen in a bill brought before the Senate – PLS 00216/2008 of 29 May 2008, by Senator Lobão Filho (PMDB-MA), now being processed, which amends Article 56 of Law n. 6 001 of December 19, 1973, to determine imputability criteria for Brazilian Indians.

5. This scenario includes bill PL 1057/2007 from Representative Henrique Afonso (PT/AC), currently in its reporting stage, which deals with "combatting harmful traditional practices and protecting fundamental rights of indigenous children, as well as those belonging to other societies referred to as nontraditional". The project is known as the "Muwaji Law" in honor of a Suruwaha mother who broke with her tribe's traditions in order to save the life of her daughter, who was to be killed because she was born with physical defects.

For the purposes of this study, the right to education is seen as second-generation fundamental right 6 of a social and welfare character.

Indigenous Education

As Cunha (2005) notes, schooling or education affected indigenous communities soon after the Portuguese landed in Brazil in the 16th century: initially catechizing by Jesuit missionaries, more recently forced assimilation through educational programs of the former Indian Protection Service.

Over the last two decades, after mobilizations by the Brazilian Indians themselves, and movements related to their cause, indigenous education policy has started to change, particularly after the 1988 Federal Constitution and subsequent legislation[7].

The Constitution's Article 210 reaffirms the imposition of Portuguese language in elementary education – initially introduced in the 18th century by the Marquis of Pombal – but also enables indigenous communities to use their mother tongues in their schools too, and their own learning processes:

> Art 210 A certain minimum content shall be determined for basic education to ensure common schooling and respect for cultural, artistic, national and regional values.
>
> Paragraph 2 – Regular elementary school shall be taught in Portuguese, and indigenous communities shall be assured the right to use their mother tongues and learning processes.

According to Funai data, at least 180 languages[8] are spoken by members of indigenous societies in Brazil, who belong to more than

6. First-generation rights are civil and political rights based on the principle of *liberty*, while second-generation rights of an economic, social or cultural character include the right to leisure, work, health and others, corresponding to the principle of *equality*. Third-generation rights correspond to *fraternity*, the right to development, peace and a healthy environment. Together, they form the triad of liberty, equality and fraternity.

7. A point to note, however, is the persistence of efforts catechizing indigenous peoples in Brazil, as shown by Amoroso (1998).

8. Funai has stated that around 1,300 different indigenous languages were spoken in

30 different linguistic families[9] which, Funai says, are still in a process of constant modification and reformulation, irrespective of contact with societies of European and African origin.

After the 1988 Constitution, there have been more instruments relating to indigenous education. Decree n. 26 of February 4, 1991, in use of the attribution conferred by the 1988 Constitution's Article 84, item IV, and the Statute of the Indian, stated:

> Article 1 The Ministry of Education (MEC) has the attribution of coordinating activities relating to indigenous education for all levels and types of education, in consultation with Funai.
>
> Article 2 The measures stipulated in Article 1 shall be developed by the education departments of the states and municipalities in consonance with the national education secretariats of the Ministry of Education.

The transfer of responsibility and coordination of educational initiatives on indigenous land from the indigenous peoples agency (Funai) to the MEC, in conjunction with the state secretariats of education, through a presidential decree (n. 26/1991), leads to the possibility, yet to be materialized, of indigenous schools being incorporated into Brazil's education systems, the aim being to end the continual shifting of responsibilities for meeting the educational needs of indigenous peoples between the agency and religious missions.

Some years later, the federal government enacted the 1996 Education Law (*Lei de Diretrizes e Bases, or LDB*), aka Law 9394 of 20 December 1996; among its general provisions, two articles relate to education for Brazilian Indians:

> Article 78 The national education system, with the collaboration of federal agencies for promoting Brazilian Indian culture and providing assistance, shall de-

Brazil 500 years ago. The disappearance of so many languages is a great loss to humanity, since each of them expressed a whole cultural universe, an extensive range of knowledge, and a unique way of looking at life and the world.

9. The fact of different indigenous societies speaking languages belonging to the same family does not mean their members will understand each other. An example of this is Portuguese and French, both Romance or Neolatin languages.

velop integrated teaching and research programs to provide bilingual intercultural education for the indigenous peoples, with the following objectives:

I – to enable the Indians, their communities and peoples, to recover their historical memories, reaffirm their ethnic identities, and appreciate their languages and arts;

II – ensure the Indians, their communities and peoples have access to information, and the technical and scientific knowledge of Brazilian society and other non-Indian indigenous societies.

Article 79 The federal authority shall arrange technical and financial support for education systems providing intercultural education for indigenous communities by developing integrated teaching and research programs.

§ 1 The programs will be planned after hearings involving indigenous communities.

§ 2 The programs referred to in this article, included in the National Education Plans, will have the following objectives:

I – strengthening the socio-cultural practices and mother tongue of each indigenous community;

II – maintaining programs for training specialized personnel to provide education in indigenous communities;

III – developing specific curricula and programs, including cultural content corresponding to their respective communities;

IV – systematically developing and publishing specifically differentiated educational materials.

On the basis of the 1996 Education Law (LDB), Indians themselves started to demand differentiated education in their communities (Cunha, 2005). The issue was addressed by the *National Education Plan (PNE), Law n. 10 172 of January 9, 2001*. The National Plan's section on Diagnosis of Indigenous Education in Brazil stated that the transfer of responsibility for the education of indigenous peoples from the Funai to the Ministry of Education pursuant to the abovementioned Decree n. 26/1991, was a mere transfer of powers and responsibilities and did not include a process of creating partnerships between government agencies and civil society organizations or entities:

The transfer of responsibility for indigenous education from Funai to the Ministry of Education [...] meant change in terms of execution with state governments taking over indigenous schools previously run by the Funai as official indigenous agency (or through agreements it signed with state or municipal education depart-

ments). Indigenous schools were transferred to state governments, or municipalized in some cases, but there were no new mechanisms able to guarantee a certain uniformity of measures taken to uphold the specificity of these schools. (Indigenous Education – Diagnosis / National Education Plan of 2001).

The analysis posed in the 2001 education plan (PNE) did not clearly distribute responsibilities between the federal level, states and municipalities, and so did not facilitate the implementation of a national policy ensuring the specificity of the bilingual and intercultural education model in indigenous communities. Furthermore. "There is also a need to legally regulate indigenous schools, drawing on successful ongoing experiments and redirecting others to develop regulations, timetables, curricula, teaching materials, educational programs and content tailored to the particular ethnocultural and linguistic features of each indigenous people".

Building indigenous schools is an issue recurrently addressed in bills now being discussed by the House of Representatives, such as PL 468/2007 from federal representative Geraldo Resende (PPS/MS), which suggests building an indigenous school in Dourados (MS) or PL 281/2007 from federal representative Vander Loubet (EN/MS), which suggests doing so in the municipality of Porto Murtinho (MS).

The regularization of indigenous schools proposed by the 2001 education plan has been a controversial aspect of discussions on these issues for some time. Scholars such as Cavalcanti (1999) have questioned the role of education for indigenous peoples, since the precise cultural significance of their demand for schools is unclear.

This aspect was taken up by Cavalcanti (1999), who focused on the question of the right to education as a second-generation fundamental right, and an obligation of the State. The question is whether the State should guarantee indigenous peoples the same education as other Brazilians (along with certain specifically indigenous subjects) in light of the fact that the former's history and tradition have not involved this form of education.

Whilst not pretending to answer this question, to which there is probably as yet no adequate response or reflection, I would note a new

development reported by Cunha (2005). Parents at some schools teaching only indigenous languages have recently asked for Portuguese to be taught too; this demand is now seen as a means of fighting for the rights of Indians in a struggle waged by the indigenous people themselves, and by related movements.

This phenomenon points to a clear change in the role of the State in relation to Indian welfare or assistance, involving a paradigm shift[10] toward a movement advocating their rights with support from by civil society but organized by the Indians themselves.

Recently, Indians have been more actively involved in forums organized by the Ministry of Education in partnership with Funai, in public hearings and other meetings (Cunha, 2005). Given this phenomenon, perhaps Indians themselves may concentrate the power of decision over what type of education they will have (if have any) and decide whether teaching should be in their native language or bilingual (including Portuguese). Alternatively, this phenomenon in itself may mean that Indians are gradually integrating into "conventional" society, which contradicts the aim of preserving indigenous culture.

Within the discussion on indigenous education, a new debate has emerged on teacher training. Only two universities in Brazil offer education degrees specifically for indigenous students. The first was the state of Mato Grosso's Unemat, which enrolled its first group of Indians comprising students from 11 different states in 2001 and went on to graduate new indigenous teachers for social sciences, languages, literature and arts, science and mathematics in 2006.

In 2003, Roraima's federal university (UFRR) introduced an intercultural education diploma. As of 2007, Indian students may also take conventional undergraduate admission examinations. Applicants must submit an indigenous administrative record issued by Funai, a referral

10. The concept of "paradigm" (or "current model") refers to the analysis of Thomas Kuhn (1987) applied to scientific research. In this case, Kuhn's theory would show that the current paradigm in which the State has a welfare-based role in relation to the Indians has been broken and replaced by a movement in which the Indians themselves and related movements are now claiming their rights and guiding public decision taking.

letter from their indigenous community, and a document in which they promise to work for their people and their region after concluding the course.

The state of Amazonas federal university (Ufam) is preparing a degree course called *Educational Policy and Community Development* for indigenous students to be taught locally in indigenous languages. The proposal is supported by the Minisrty of Education and is likely to involve partnership with the Rio Negro Indigenous Organizations Federation (Foirn) and the Linguístic Policy Development Institute (Ipol).

There is very lively discussion, which is far from producing a consensus on providing indigenous education, its practices, methodology and legal instruments; meanwhile the debate on teacher training for this type of education is merely beginning.

The Right of Other Brazilians to Education on Indigenous Culture

As mentioned above, another important aspect related to the discussion of indigenous education is educating other Brazilians to foster and preserve indigenous culture. This activity depends on public policies and measures to disseminate indigenous culture with the aim of encouraging their preservation.

In addition to specific educational initiatives, such as holding indigenous culture exhibitions and events, the integration of indigenous issues in schools and school curriculums has been crucial. The integration debate has made progress but less forcefully with discussions on Afro-Brazilian themes being part of school curriculums, as envisaged by Law 10639/2003.

Taking this subject into schools, of course, means going beyond the activities now being held, which are restricted to events such as the Day of the Indian (April 19). Such activities may often create a myth around Indians that has little to do with the real concept of indigenous culture (Freire, 2002). The issue has to be properly incorporated to the curriculum.

There has recently been major progress from the legal point of view: the history of indigenous peoples in Brazil must be included in

school curriculums under Law n. 11 465/08, ratified by President Luiz Inácio Lula da Silva, published in the Federal Official Gazette on March 11, 2008. This law amends an article of the LDB and replaces Law n. 10 639/2003, which already stipulated the inclusion of Afro-Brazilian themes in curriculums.

All elementary and secondary schools, both public and private, must now teach the history and culture of indigenous peoples. Under the new law, all courses, especially history, geography and literature, must incorporate the African and indigenous contributions to Brazilian culture.

If this initiative is actually carried through, it may help change perceptions of Indians and lead to for future generations advancing in educational policy and other issues relating to the indigenous cause.

Concluding remarks

This article has sought to instigate reflection on recent discussions of indigenous education in Brazil by contextualizing the legal and institutional instruments involved, such as the creation of the National Foundation for Indians in 1967, or the Statute of the Indian in 1973.

I have highlights the changed approach to the indigenous cause introduced by Brazil's 1988 Constitution, prior to which the prevailing idea was that Indians would eventually be doomed to physically disappear, so government would take an integrationist approach to assimilate them to the national community. After the 1988 Constitution, Brazil recognized indigenous culture and gave Indians the right to be Indians, and to preserve their culture and customs.

In terms of indigenous education specifically, I have addressed the inclusion of this issue in the 1988 Constitution and subsequent legislation, such as the 1996 Education Law (LDB), and the 2001 Educational Plan (PNE).

The discussion posed here is based on the idea of education as a fundamental second-generation right and the State's duty in this respect. However, I have posed a series of reflections and questions about the role of the State in indigenous education specifically (if this role really exists) and gone on to ask whether "conventional" education should

in fact be provided for the Indians, even while taking into account their specifications and traditional language during the educational process.

The article also raises the issue of teacher training for indigenous education and recent efforts made by indigenous organizations themselves to have their schools teach in Portuguese, since knowing this language may help them advocate their rights. I have described this development of the Indians taking control of the future of their cause as a "change of paradigm", since it confronts the issue of the State's protective role in relation to them.

Finally, the article addresses the issue of indigenous education for so-called conventional Brazilians, which means integrating indigenous themes in the school curriculum in order to disseminate their culture and history.

The study does not pretend to be exhaustive but to make a contribution to debate on the subject. In relation to the legal framework for indigenous education, Brazil has to avoid slip-ups such as Decree n. 26/91, which transferred responsibility for indigenous education from the Funai to the MEC without arranging partnerships between government agencies and civil society organizations or entities.

Discussions of this type are essential in various fields of knowledge, especially when domestic and international pressure has been brought to bear on Brazil to preserve indigenous culture, as noted above. Indigenous people are now down to only 0.25% of the total population, and more than 1,100 indigenous languages have disappeared since Brazil was "discovered", according to Funai statistics. Discussion of the indigenous question is now not only fundamental but urgently needed.

References

Amoroso, Marta Rosa. 1998. "Mudança de Hábito: Catequese e Educação para Índios nos Aldeamentos Capuchinhos". *Rev. bras. Ci. Soc.*, jun., vol. 13, n. 37.

Brasil. Constituição. 1988. *Constituição da República Federativa do Brasil*: texto constitucional promulgado em 5 de outubro de 1988, com as alterações adotadas pelas Emendas Constitucionais n. 1/92 a 46/2006 e pelas Emendas Constitucionais de Revisão n. 1 a 6/94 – Brasília, Senado Federal, Subsecretaria de Edições Técnicas, 2005.

Caggiano, Monica Herman S. 2004. "Os Direitos Fundamentais e sua Universalização". In: *Revista Brasileiro de Direito Constitucional, A Contemporaneidade dos Direitos Fundamentais*, July/December, n. 4, p. 760.

Cavalcanti, Ricardo Antônio da S. 1999. *Presente de Branco, Presente de Grego? Escola e Escrita em Comunidades Indígenas do Brasil Central*. Master's degree dissertation. Rio de Janeiro, Museu Nacional.

Cunha, Rodrigo. 2005. "Escola Indígena: Fortalecimento das Identidades e dos Direitos dos Índios". *Revista ComCiência*, Issue 64 on Direitos Indígenas (indigenous rights), april. Available at: http://www.comciencia.br/reportagens/2005/04/06.shtml

Decree issued by President of Brazil, n. 26, February 4, 1991.

Freire, José R. Bessa. 2002. "A Imagem do Índio e o Mito da Escola". In: Marfan, Marilda A. (org.). *Congresso Brasileiro de Qualidade na Educação – Formação de Professores: Educação Escolar Indígena*. Brasília, MEC, pp. 93-99.

Funai. Fundação Nacional do Índio. http//www.funai.gov.br

Kunh, T. 1987. *A Estrutura das Revoluções Científicas*. 2. ed. São Paulo, Ed. Perspectiva.

Law 5371, December 5, 1967 (Fundação Nacional do Índio – Funai).

Law 6001, December 19, 1973 (Estatuto do Índio – Statute of the Indian).

Law 9394, December 20, 1996 (Lei de Diretrizes e Bases – LDB).

Law 10172, January 2001 (Plano Nacional de Educação – PNE).

Piovesan, Flávia. 1999. *Princípio da Complementariedade e Soberania.* Texto baseado nas notas taquigráficas de conferência proferida no Seminário Internacional "O Tribunal Penal Internacional e a Constituição Brasileira", promovido pelo Centro de Estudos Judiciários do Conselho da Justiça Federal, em 30 de setembro de 1999. Available at: http://www.cjf.jus.br/revista/numero11/PainelVI-2.htm

Righetti, Sabine. 2005. "Riquezas em Terras Indígenas Geram Conflitos". *Revista ComCiência*, edição n. 64 sobre Direitos Indígenas, publicada em abril de 2005. Available at: http://www.comciencia.br/reportagens/2005/04/04.shtml

Silva, Aracy L. & Grupioni, Luís D. (orgs.). 1995. *A Temática Indígena na Escola. Novos Subsídios para Professores de 1º e 2º* Graus. Brasília. Mec/Mari/Unesco.

Souza Filho, Carlos Frederico Marés de. 1993. "Tutela aos Índios: Proteção ou Opressão?" In Santilli, Juliana (org.). *Os Direitos Indígenas e a Constituição*. Porto Alegre, Fabris Editor.

Universal Declaration of Human Rights (1948).

About the Authors

Adriana A. Dragone Silveira

Graduated in education from Universidade Estadual Paulista (Unesp); holds a master's from the School of Education at USP (Feusp), specializing in "State, Society and Education"; currently pursuing a doctorate at USP. Member of the Public Policy and Educational Research Center (Cepppe/Feusp). Contact: adrianadragone@yahoo.com.br

Eduardo Martines Júnior

Public attorney in Sao Paulo. Professor of Constitutional Law at PUC/SP, Escola Superior do Ministério Público, and FADI/Sorocaba. Bachelor degrees in Economics and Legal Sciences. Master's and doctorate in Law from PUC/SP. Member of the State of São Paulo Education Council. Chair of the State Council for Social Monitoring and Control of the Fund for Maintenance and Development of Basic Education and Recognition of Education Professionals (local acronym CEACS-Fundeb). Contact: eduardomartines@globo.com

Eduardo Pannunzio

Attorney, L. L.M. in international human rights law from the University of Essex (United Kingdom) and master's in the field of Public Law at the Law School, Universidade de São Paulo, advisor Professor Nina Beatriz Stocco Ranieri. e-mail: epazio@gmail.com.

Luiz Gustavo Bambini de Assis

Law degree and master's from USP. Working for doctorate in Public Law at USP. Federal Supreme Court judge's clerk. Formerly special assistant to the deputy-head of Legal Affairs of of the President's Civil Office. Parliamentary secretary to the government's Leader in the Federal Senate. Formerly on the student committee at Centro Acadêmico XI de Agosto law school, researcher with the Afro-Brazilian Interdisciplinary Research Center at Universidade de São Paulo (Neimb/USP), CNPQ research scholarship holder, and legal adviser to the municipal government of São Paulo. Contacts: gustavo.bambini@gmail.com

Luiz Tropardi Filho

Luiz Tropardi holds a law degree from Universidade de São Paulo (USP), and a specialist diploma in Educational Law from Centro de Extensão Universitária (CEU). Currently working for a master's in Civil Law at USP. Contact tropardi@usp.br

Marcelo Gasque Furtado

Graduated in Law from Universidade de São Paulo (USP), currently taking a master's in Human Rights at USP, and professor with the National Commercial Training Service (Senac-SP). Contacts: marcelo.furtado@usp.br

Monica Herman S. Caggiano

Associate professor of the Public Law Department, Universidade de São Paulo (USP). Master, doctor and *livre-docente* professor of Constitutional Law at the Law School, USP. Chair of the Postgraduate Commission of the Law School, USP. Professor of Constitutional Law and coordinator of the Management Law Specialization Course, Universidade Presbiteriana Mackenzie. Special advisor to the Governor of the State de São Paulo (2006). Attorney General of the Municipality of São Paulo (1995-1996). Secretary for Legal Affairs of the Municipality of São Paulo (1966). Attorney of the Municipality of São Paulo (1972-1996).

Nina Beatriz Stocco Ranieri

Professor, Public Law Department at the Law School, Universidade de São Paulo; Coordinator of the Unesco Chair of Right to Education at the Law School, Universidade de São Paulo; member of the State of São Paulo Education Council; currently Adjunct Secretary for Higher Education of the State of São Paulo. Contact: nranieri@usp.br

Sabine Righetti

Submitted for the course on "Constitutional aspects of the right to education", as part of the Human Rights doctoral program at the Law School, Universidade de São Paulo (USP). Theme: Indigenous peoples and the right to education. Submitted June 2008.

Salomão Barros Ximenes

Attorney, master's in Brazilian Education from Universidade Federal do Ceará (UFC) [Federal University of Ceará], advisor to Ação Educativa Assessoria, Pesquisa e Informação (Educational Advisory Action, Research and Information].

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Capa	Igor Daurício
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