

Freedom of learning and teaching

The importance of denominational schools in the realization of the right of choice of parents in the education of their children

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Abstract

This work addresses the theme of freedom to learn and teach and the importance of confessional schools to guarantee the exercise of the right of parents in the moral and religious education of their children. Based on Article 12.4 of the American Convention on Human Rights, this paper highlights national and international legislation on this topic, which was the subject of a trial by the Brazilian Supreme Court in 2017. On that occasion, the Brazilian Federal Supreme Court ruled that religious teaching in public schools must be confessional.

Keywords Brazil, confessional schools, religious education, parental rights.

1. Introduction

Education is widely acknowledged as a fundamental right. Both the Universal Declaration of Human Rights and Brazilian legislation recognize that every person is entitled to instruction, culture and information as means to reach their full personal development and contribute to their social context.

Furthermore, international doctrine has generally affirmed the right of choice amongst various types of education – for example, secular or confessional, public or private. This is what the Universal Declaration of Human Rights (UDHR) states, when it states that “Parents have the right of priority in choosing the type of edu-

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cation that will be given to their children” (Art. 26.3). This choice is usually in the hands of the students themselves, or their parents or guardians in the case of underage children.

In stating that education is “everyone’s right and the State’s duty”, the Brazilian Federal Constitution points to the primacy of the public, secular education system and stipulates that education is mandatory, but it also allows for the existence of private schools as laid down in the Law of Directives and Foundations of Education (LDB in Portuguese). Nevertheless, the Brazilian Ministry of Education has worked on developing a National Curricular Common Basis, which seeks to stipulate the instructional content covered by every school in the country.

The danger in this model is the possibility of an improper restriction of the plurality of ideas and pedagogical conceptions, impairing private schools’ possibilities and preventing cultural progress. In this scenario, appreciating the role played by private schools, especially confessional ones, in the maintenance of a pluralistic educational environment is an important safeguard of parents’ and students’ rights to choose quality education that is in accord with their personal values and beliefs.

2. The right to education in the federal Constitution and in the international treaties signed by Brazil

The right to education was established in the Brazilian Federal Constitution of 1988 (CF/88) as a social right (Article 6). This means that it is a subjective public right which is entirely claimable before the State, and one that can be translated into material and moral damages when the public sector fails to provide it.

Minister Gilmar Mendes stated in his work *Curso de Direito Constitucional* (Course of Constitutional Rights):

The character of subjective right given by the constituent to these judicial situations paints itself as unequivocal, bearing no doubt as to the possibility of trial in the occurrence of incomplete or deficient correspondence to the referred rights. (Mendes 2016:676)

CF/88 also refers to this theme in Articles 205 and 206 on education, culture and sport. Article 205 states that education is a right to all and a duty of the State and the family; moreover, in Article 206, the principles that guide teaching are listed, among which the following stand out: (a) equality in the conditions governing access to and ability to stay in school; (b) freedom to teach, learn, research and divulge thought, art and knowledge; (c) plurality of ideas and pedagogical conceptions, and coexistence of public and private schooling institutions; and (d) a guarantee of a quality standard.

The constitutional text assigns primacy in the educational function to the State, as reflected in the preferential order in which the State is mentioned (before the family) in Article 205. However, in view of the low quality of education offered by many public schools, most parents who have the requisite financial resources opt to enroll their children in private schools that respect the family's ethical, moral and religious values. In some situations, the parents prefer homeschooling, a method not yet regulated in Brazil.

So whose duty or right is it to educate children: that of the State or the family?

It is possible to find within the law a complementarity between the educational functions of the family, society and school, as each of these institutions contribute to the formation of young people. However, especially while still underage, individuals are subject to a family's authority, suggesting that the family should be able to choose the type of education they want their children to receive.

As Paulo Pulido Adragão affirmed:

The freedom of teaching appears as a right that goes far beyond some of its partial or "technical" aspects ... it is essentially attributed to the person and the family as a way to shape their own personalities and their children's through education, as naturally inseparable from family and personal relations as the right to procreate: raising your children is to birth and educate them. (1995:3)

In Adragão's view, education belongs to the family, even if the family delegates the actual teaching itself to a school system.

The Universal Declaration of Human Rights states that every human being has a right to instruction, and that it shall be oriented towards the full development of human personality and the strengthening of respect for human rights and fundamental liberties. It also states that "parents have a priority of right in the choice of the type of instruction ministered to their children" (Article 26.3).

The American Convention of Human Rights (also called *Pact of San José of Costa Rica*) declares, in Article 12.4, that the parents retain the right for their children to receive religious and moral education that is conforming to their own convictions. The same right is established by the Pact of Civil and Political Rights, in Article 18.4, as well as by the International Covenant on Economic, Social and Cultural Rights, in its Article 13.3, which holds as follows:

The States Parties to the present Covenant undertake to have *respect for the liberty of parents* and, when applicable, legal guardians *to choose for their children schools, other than those established by the public authorities*, which conform to such minimum educational standards as may be laid down or approved by the

State and to ensure the religious and moral education of their children in conformity with their own convictions. (emphasis added)

Truly, “every time international society refers to the right to free and generalized education, it does so safeguarding the respect to the parents’ decisions ... who opt for a different educational system.” (2004:182).

In sub-constitutional Brazilian law, many legal statutes support the right to free choice in education, and to a quality education that is consonant with a family’s values. The LDB states (in Article 2) that education is both a family duty and a State duty, being inspired by the principles of liberty and the ideals of human solidarity, having as a goal the full development of the student and his or her preparation for the practice of citizenship and qualification for work.

Moreover, Article 3 of the LDB, ratifying the provisions of Article 206 of CF/88, addresses equality in access to education, opportunity to stay in school, the liberty to teach, learn, research and divulge culture, thought, art and knowledge, the plurality of ideas and pedagogical conceptions, and the guarantee of a quality standard.

The LDB also grants legal permission for confessional schools to exist in Brazil. Article 19, § 1º, states:

§ 1 The educational institutions referred to in items II and III of the caput of this article may qualify as confessionals, given specific confessional guidance and ideology.

Items II and III referred to define what private and community schools are in the following terms:

II - private, understood as those maintained and administered by individuals or legal entities under private law.

III - community, according to the law.

In summary, the right to education is guaranteed by the Federal Constitution of 1988, by international treaties of which Brazil is a party, and by sub-constitutional Brazilian laws. These provisions suggest that education belongs to the family, who typically delegates the actual delivery of instructional content to schools. Therefore, the state must offer schooling that respects families’ values, especially their moral and religious values, which contribute to the formation process of human beings.

That being said, we cannot consider it appropriate to provide education by means of a large, impersonal school that does not consider a student’s particularities, family background or beliefs and values. The dignity of a human person urges that a student must not be treated as simply a number in the school envi-

ronment, but as a unique individual with distinctive characteristics, and that each student must be respected with regard to the ways in which he or she differs from others.

3. From the right to education to freedom of choice: the dangers of implementing state-owned unified education

Brazil is a secular republic, but its citizens are not. Some are Catholic Christians, some are Evangelical, some are Spiritists and some follow African religions such as Candomblé. Agnostics believe only that there is some superior being, and atheists acknowledge no deity at all. Therefore, the State is secular so as to respect religious pluralism.

The tendency, however, to go beyond being secular towards implementing a secularist or even anti-religious State is not anything new; France being a notable example of this when it prohibits the use of hijab in schools and universities demonstrating the growth of what has been called by Guylain Chevrier³ “radical secularism”.

According to Jónatas Machado, the very discussion as to what is the best model to support social conviviality is itself something derived from Judeo-Christian principles that prize human dignity, free will and democracy. As the illustrious professor teaches:

The defense of the primacy of the Constitutional State is only possible from a theistic vision of the world and of life that corresponds, essentially, to the Judeo-Christian matrix. The defense of fundamental human rights before autocratic and democratic public powers is only possible through the recognition of its transcendent origins. A naturalistic, atheistic worldview founded in millions of years of amoral physical processes of predatory cruelty, pain, suffering and death cannot identify the values that must guide life on the bosom of a political community, or rationally justify its normative primacy and universality. (Machado 2013:123)

There have been many discussions of the legitimacy of the National Curricular Common Basis (BNCC), which seeks to ensure that students in all regions of Brazil will be taught the same basic knowledge, as a way to ensure that fundamental education is comparable for all Brazilian students. This system comes from a long-established yearning to diminish regional inequality, fighting what some call “elite schooling” or schools that favor social disparities in the country.

However, within this reasonably noble motivation, a tendency to implant unified, homogeneous and state-operated education has been growing in Brazil. This tendency is not only recent but has appeared at earlier points in Brazil’s history. In 1932, the

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“Manifest of the Pioneers of New Education,” a document written by 26 educators led by Fernando de Azevedo and Anísio Teixeira, advocated for unified schooling, defending the position that education should be an essentially state-regulated function. The following excerpt from the Manifest provides a good example of the mindset of these educators:

Education, which is one of the functions that the family has been disposing of in advantage of the political society, has torn the pictures of family conviviality and of specific groups (private institutions), to incorporate itself definitively as one of the primal and essential functions of the State. . . . Secularity, which puts the school environment above beliefs and religious disputes, an outsider to all sectarian dogmatism, subtracts the student, respecting the integrity of his forming personality, of the disturbing pressure the school exerts when utilized as an instrument of propaganda of cults and doctrines. (Teixeira and Azevedo, 2014:51, 53-54)

As a way to respect pluralism of ideas and of pedagogical conceptions, as well as the parents’ right to choose the type of education their children will receive, Brazilian law must evolve from the simple right to education to the right of choice in education, as a logical consequence of the judicial guidelines adopted in Brazil. This right is incompatible with a unified model of mandatory, state-operated, secular education, as some are seeking to establish.

Jurisprudence has not yet evolved to the point of clearly recognizing parents’ right of choice in their children’s education. In fact, the tendency of the Brazilian judicial system has been to guarantee only access to education, a fundamental right that is still denied to many families, as is shown by the precedent case transcribed below. This case was resolved in the city of São Paulo in 2010:

Security warrant. Finding vacancy in nursery. Considerations on the right to education and to the obligation of the City to provide openings in primary schools. Articles 208, IV, 211, 2nd Paragraph and 227 of the Federal Constitution and 54 of the Teenager and Children’s Statute (ECA). The City’s immediate obligation, corresponding to a certain and liquid right of the child, judicially claimable. Jurisprudence on this Distinguished Court of Law of São Paulo (TJ/SP). Not harming the equality principle, as *the only recognized right is that of the minor’s enrollment in a primary school and not that of the parents’ choice*. Settled decision. Appeal not granted. (Brazil –TJSP, 2010) (emphasis added)

In a ruling that went in a completely opposite direction, the U.S. Supreme Court, in its 1925 decision in *Pierce v. Society of Sisters*, declared that “the State did not own any general power to establish a uniform type of education for the youth, forcing it to receive instruction only in public schools” and that “children are no mere

creatures of the State; those who provide for and guide them have the right, along with the high duty, to educate and prepare them for the fulfilment of their duties.”

Freedom of learning and the pluralism of ideas and pedagogical conceptions, which are addressed within Article 206 of CF/88 as noted above, are impaired when the students have no educational alternatives; that is, the monopoly of education by the state does not generate authentic democracy and limits parents’ freedom of choice.

In contrast, to respect the pluralism of ideas, it is necessary for multiple pedagogical options must exist, so that parents and students can choose the one among them that is most aligned with their own values and beliefs.

In fact, the idea of implementing a unified and state-operated educational system points back to authoritarian government practices, such as Italian fascism and German Nazism. As Paulo Adragão stated, “Like fascism, Nazism also advocated for a strict ideological functionality of the educational system, at the State’s service. Therefore, it is not surprising that its domination in Germany led to the establishment of a complete monopoly of schooling by the State” (1995:54).

It is the legitimate responsibility of the State to review and monitor the implementation of these multiple pedagogical systems, requiring minimum quality criteria when prescribing the contents necessary for instruction. It will not be legitimate, however, to eliminate pluralism of ideas by unifying thoughts in disrespect to the rights of parents and students.

4. Religious freedom, parents’ rights to determine their children’s education, and confessional schools

Throughout human history, religion and education have always been deeply connected. In fact, Martin Luther declared that next to every church there should be a school. Jónatas Machado had an interesting comment on this topic:

The Constitutional State’s material and cultural assumptions, designed to structure a free and democratic constitutional order, are, far from being self-evident truths, inseparable from the history of religious, philosophical and political ideas in Europe, or from the multi-traditional course of sedimentation the fundamental elements of which can be found in Christianity, the Renaissance, the Reformation, the Enlightenment and Liberalism some of their fundamental structuring elements. (Machado 2013:132)

Freedom of teaching and learning is closely related to other fundamental rights enumerated in Federal Constitution of 1988, such as religious freedom, freedom of speech, respect for families’ values and cultural progress.

Brazil’s regulatory system guarantees private individuals or legal entities the right to create schools that differ from those established by the State. In this context,

the importance of private schools, both confessional and non-confessional ones, is essential for the realization of parents' right of choice. To be effective, the liberty granted to private schools must encompass freedom to select their teaching staff, students, administration and teaching methods.

Contrary to the interpretation that some may propose of Article 205 of CF/88, the existence of private schools should not serve purely as a supplement to the insufficiency of the public system's reach, but as a way to ensure a plurality of educational options.

For freedom in education to be guaranteed, beyond simply the possibility of creating private schools, these schools must have latitude as to how they structure and administer their educational programme, as long as minimum legally established standards are respected. Some appropriate standards that the State may require are (a) the school's sanitary conditions, (b) the hiring of appropriately trained teachers and (c) the teaching of content that ensures the formation of good citizens.

Furthermore, public and private systems should have equal opportunities across their educational programmes, especially with regard to teacher selection, student examinations and graduation requirements.

There has been considerable controversy regarding the possibility of private schools, especially religious schools, receiving government subsidies. Facilitating access to private institutions by reducing the cost of enrolment helps to ensure equality of opportunity for students of any socio-economic status. Programs such as the Fund for Student Financing (FIES) in Brazil have already been granting this increased access at the university level.

On this theme, Professor Machado offers some considerations about the question of state funding of private religious schools:

From this financing may come a greater range of educational options for the parents, and a wider competition between teaching institutions in a way that will favor improved quality and a greater social and ideological pluralism. Beyond that, the financing would justify itself through the fact that private religious schools would serve the public interest by providing education to individuals, as a way to compensate for the positive externalities produced by these schools. In the opposite direction, dangers include greater social and economic stratification and a diminished intensity of transmission of civil and democratic values such as pluralism and political, religious and racial tolerance. (Machado 1996:377)

Funding for private religious schools is conceivable with appropriate legal provisions – for example, forbidding the reduction of investments in public education or discrimination against confessional schools of minority religions.

We know that many parents, as a way to ensure that their children's education in school is fully consistent with the one they are receiving at home, have been opting for private confessional schooling, enrolling their children in schools that adopted their professed creeds in their statutes.

Brazil does not have a Statute that specifically addresses the regulation of confessional education, the federal government office that oversees education has, on many occasions, imposed rules that disrespect the parents' right to a confessional schooling option.

Confessional schools hold historical and cultural importance in Brazil. Available data indicates that the country has at least 2,400 confessional schools, representing about 7 percent of all private schools. According to Cida Mattar, executive director of AECEP (Association of Christian Schools for Principles), in an interview with the *Revista Educação* (Education Magazine) website, many parents choose religious schools for their children because they "believe the confessional school will supply the need for a religious formation, whether or not it is in resonance with the family's religion." Those parents' choice must be legally protected. The State must provide the means to make this option effective and widely available, guaranteeing that organizations that propose to materialize these parents' choices are protected from unjust interference.

If confessional schools have no legal assurance that they will be treated in the same way as other teaching institutions, there will be indirect injury to the parents' rights, and subsequently to the children's rights to be educated under the principles which their families hold.

5. Freedom of learning and teaching in Brazilian courts

Freedom of learning and teaching has been a hotly debated topic in both private and public settings in Brazil. National courts are frequently called upon to rule on cases that involve education, and not a few of these cases have involved matters related to confessional schools.

The theme reappeared recently when, in 2017, a case that intended to declare the unconstitutionality of the religious teaching model to be applied in public schools was heard in the Federal Supreme Court (*Ação Direta de inconstitucionalidade* (ADI) 4493). The lawsuit was filed by the Attorney General's Office, which required interpretation of the Federal Constitution, the LDB, other federal laws and a 2010 agreement between Brazil and the Roman Catholic Church (Decreto Nº 7.107), through their ecclesiastical jurisdiction, called the Holy See, to decide whether confessional religious teachings, as they were being done in public school, were unconstitutional. According to the Attorney General's Office, religious education in public schools would fulfill the obligation of state secularism only if the content

adopted was restricted to the “doctrines, practices, history and social dimensions of different religions, including non-religious positions, without decision-making position of the educator”, within the application of a non-denominational model.

After four sessions of heated debate, the Plenary of the Supreme Federal Court ruled against ADI by a margin of 6 to 5. Therefore, it concluded that confessional religious teaching in public schools was constitutional.

The judge, Luís Roberto Barroso, was in the minority who favoured the ADI. To him “that religious education in public schools can only be of a non-religious nature confessional, with the prohibition of admission of teachers as representatives of religious confessions” (ADI 4493:25).

Judges Marco Aurélio and Celso de Mello agreed with Barroso, contending that the secular State is not authorized to interfere on the religious choices of people who may not have confessional preferences. Aurelio claimed that the secular State would not be incentivizing skepticism nor annihilating of religion, but that it should limit itself to enabling the healthy coexistence of the various confessions. Celso de Mello said that the law clearly forbids the public school from acting as an ideological apparatus or promoting a given confession. Celso de Mello argued that the State’s duty was to safeguard neutrality in religion, and that its only objectives were to guarantee the exercise of religious freedom and stop fundamentalist groups from taking state power.

Judge Alexandre de Moraes disagreed, stating that if one treats religious phenomena only sociologically, as an historical and cultural fact, based on the justification of respecting the State’s secularity, what actually happens is the violation of freedom of belief. He wrote:

Therefore, starting from a point of respect to the secular State, an interpretation of the singularity of the constitutional envisioning of religious teaching and in respect to religious freedom, the definition of the nucleus of your own concept based on the “dogmas of the faith”, unmistakable for other fields of scientific knowledge, such as history, philosophy, religious sciences ... (ADI 4493:4)

De Moraes continued to affirm that the dogmas of the faith are the nucleus of the concept of religious teaching. Therefore, the State would violate freedom of belief by replacing the dogmas of the faith, which are diverse in every different belief, with something neutral. Neutrality does not exist in religious teaching. What should exist is respect for differences in religious teaching.

De Moraes considered that confessional teaching is a subjective right of the student and of the parents or guardians who wish to enroll their child in a school course consistent with their own confession. He stated that the State should respect the autonomy and self-sufficiency of religious organizations as they offer subjects

according to the student's religious confession, consistent with the student's or their parent's choice:

We can agree or disagree with one or more religious conceptions, but there is no denying that the request in the present action intends to limit the legitimate subjective constitutional right of a student who already has a religion, or of their parent or legal guardian, to enrol in religious schooling of their own confession. This would be a significant limitation of the free manifestation of citizens' will, and a consequent restriction of religious freedom, given that (a) the Federal Constitution, in its original text, determines the implementation of religious schooling; (b) 92 percent of the Brazilian population (IBGE census, 2010) has a given religious belief; (c) enrolment is optional, so as to protect not only the remaining 8 percent, but also that part of the 92 percent who may not be interested in such enrolment. (ADI 4493:3)

Supreme Federal Court President, judge *Cármem Lúcia*, in her decisive vote, also rejected the action. In her vote, she said, "The secularism of the Brazilian State did not prevent the recognition that religious freedom imposes duties upon the State, one of which is the offer of religious studies as an optional choice." (ADI 4493:2) She stressed that even if all agreed on the condition of the secular State of Brazil, one cannot ignore religious intolerance, such as the fundamental importance of freedom of belief, expression, and ideas.

The decision covered only public schools and did not impose any requirements on private educational institutions. The majority considered that the request of the Attorney General's Office violated their interpretation of the Constitution. According to this decision, the Constitution should be interpreted to allow and regulate the freedom of worship – without subsidies – because it was the intention of the drafters, reflecting the will of the people, to guarantee and enable religious education as an indispensable element of the formation of human persons and of citizen, in ways that go beyond simply recognizing religion as a cultural and sociological phenomenon.

The presumption that such religious teaching happens exclusively through the exposition of "practices, doctrines, history, etc. of religions", as stated by the Attorney General in his claim, overlooks the fact that setting aside the transcendent elements of the creed would result in denying religion itself, since it is precisely this transcendent nature of religion that characterizes its value. Therefore, the deviation by the Attorney General's Office from the will of the original writers of the constitutional text is evident, and it runs counter to the right to learn and teach as guaranteed by the accepted norms of the country.

6. Conclusion

This paper has considered what international agreements and Brazilian law say regarding the right to religious freedom in education. It has noted that international

legal ordinances guarantee this right as a logical consequence to the principle of dignity of a human person.

The importance given to the primacy of the family in the education of children is emphasized, with the description of a case in which this prerogative was questioned in order to limit the subjective right of students and parents to enroll in the religious teaching of their confession in Brazil.

A judgement involving the right to religious freedom in education was analysed. The majority of judges indicated that state secularity cannot be utilized as a basis for imposing regulations that violate individuals' religious convictions.

The existence of an educational system that embraces all Brazilian citizens, along with their cultural, regional, religious and social identities, is necessary. In a country so wide and diverse, it is improper to talk about the possibility of requiring all students to receive a uniform education, even though the education system needs to be cohesive.

Tolerance is the main principle that should guide legislation in the realm of education, given that the right to education is an inalienable right. The type of education everyone wishes to receive is, above all, a quality formation that contemplates the ethical values inculcated by the family and develops citizens committed to the common good.

An educational model in a regime of State monopoly cannot be allowed; rather, a variety of models must be encouraged, including confessional ones, that guarantee parents continuity with the values they are transmitting to their children at home. The confessional school as an instrument of education, being the ideology-based organization that it is, should receive from the State the protection that ensures its functionality in the form for which it was created; otherwise, its existence is made impossible.

The suppression of the right to religious freedom points to the presence of covert discrimination against this guarantee, although the Brazilian Constitution gave it the same level as other fundamental rights, such as privacy and freedom of expression.

It is necessary, for the full exercise of religious freedom, to ensure State neutrality in the evaluation of rights, taking into consideration that the right discussed is fundamental for humanity, the true origin of fundamental rights.

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