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

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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.

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