



The religious argument in homeschooling. An analysis of the decision of Extraordinary Appeal 888.815/RS of the Federal Supreme Court¹

O argumento religioso no ensino domiciliar. Uma análise da decisão do Recurso Extraordinário 888.815/RS do Supremo Tribunal Federal

El argumento religioso en la enseñanza en el hogar. Un análisis de la decisión del Recurso Extraordinario 888.815/RS del Supremo Tribunal Federal

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Abstract

This research proposes to consider the families' agenda in order to legalize in Brazil, the practice of homeschooling. Among the arguments used to justify the option for homeschooling is religious freedom. What is the relevance of this argument? Through case law analysis, specifically Extraordinary Appeal 888.815/RS, general repercussion theme 822, considered by the Supreme Federal Court, this argument appeared frequently in the votes and statements of the parties and specifically in the votes of ministers Luis Roberto Barroso, Alexandre de Moraes and Luiz Fux. In order to understand the bases of arguments and what developments arise from them, whether in favor or against the practice of homeschooling. The results raised here serve as a subsidy for research about the topic with a legal or educational bias.

Keywords: Homeschooling; Religious Freedom; Education.

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Resumo

A presente investigação propõe pensar a pauta das famílias a fim de legalizar, no Brasil, a prática do ensino domiciliar, chamado de homeschooling. Dentre os argumentos utilizados, para fundamentar a opção pelo exercício do ensino domiciliar está a liberdade religiosa. Qual a relevância desse argumento? Por meio de análise jurisprudencial, em específico Recurso Extraordinário 888.815/RS, repercussão geral tema 822, apreciado pelo Supremo Tribunal Federal, tal argumento apareceu com frequência nos votos e manifestações das partes e em específico nos votos dos ministros Luis Roberto Barroso, Alexandre de Moraes e Luiz Fux. A fim de compreender as bases de argumentos e quais desdobramentos decorrem dos mesmos, sejam a favor ou contra o exercício do ensino domiciliar. Os resultados aqui levantados servem de subsídio para pesquisas do tema com viés jurídico ou educacional.

Palavras-chave: *Homeschooling*; Liberdade Religiosa; Educação.

Resumen

La presente investigación propone pensar en la agenda de las familias para legalizar, en Brasil, la práctica de la educación familiar, llamada homeschooling. Entre los argumentos utilizados para apoyar la opción de la educación en el hogar se encuentra la libertad religiosa. ¿Cuál es la relevancia de este argumento? A través del análisis jurisprudencial, específicamente el Recurso Extraordinario 888.815/RS, tema de repercusión general 822, considerado por el Tribunal Supremo Federal, este argumento apareció frecuentemente en las votaciones y manifestaciones de los partidos y específicamente en los votos de los ministros Luis Roberto Barroso, Alexandre de Moraes y Luiz Fux. Para comprender las bases de los argumentos y qué desarrollo se deriva de ellos, ya sea a favor o en contra del ejercicio de la educación en el hogar. Los resultados aquí planteados sirven como subsidio parainvestigaciones sobre el tema con sesgo jurídico o educativo.

Palabras clave: Educación en el hogar; Libertad religiosa; Educación.

Introduction

Homeschooling is an emerging topic in Brazil, and its discussions go beyond the boundaries of educational policy, while the arguments that support this movement must be critically analyzed (COSTA 2016; DOURADO 2020; LIMA, 2021). Given the media rush to legalize homeschooling, knowing the reasons that support this thinking is essential to understand the educational challenges that will come.

Currently, there is no federal legislation that regulates homeschooling in Brazil, however, a bill is being processed in the National Congress in order to legalize this type of education (Bill No. 3179-B/2012 and appendices). One of the various popular and political demonstrations for the approval of such a regulation, before evaluating whether the legal criteria, whether constitutional or not, what would it be the main arguments put forward in favor of this type of education in Brazil? This answer can be drawn from a detailed analysis of the decision of Extraordinary Appeal No. 888,815/RS of the Federal Supreme Court (STF), which highlights the religious basis as one of the arguments in defense of the homeschooling modality.

Regarding the in-depth discussion of the admissibility of infraconstitutional legislation that establishes the homeschooling modality in compliance with Art. 208 §3º of the Federal Constitution, we suggest reading the works of Fabricio Veiga Costa (2016) and Lorie Dourado (2020). As well as the master's dissertation entitled "*Da casa para a escola, da escola para casa: uma análise jurídica da proposta do homeschooling à luz do princípio da solidariedade*", in which Ferri (2023) interprets the context through the principle of solidarity, with a historical review of education in Brazil and an overview of the theme in the Legislative, Executive and Judiciary branches.

This text is an extension of a dissertation research for a master's degree, and aims to analyze the homeschooling movement, observing the ideological core of the claim: the religious argument, understanding the relevance of the claim of religious freedom and, finally, leading and providing support for research on the conflict between the modalities of school education and homeschooling

In order to this end, arguments will be presented from the votes of Ministers (Min.) Luis Barroso, Alexandre de Moraes and Luiz Fux, given in an emblematic legal case in Brazil, judged by the Brazilian Constitutional Supreme Court, Extraordinary Appeal 888.815/RS, received with general repercussion status (topic 822), substantiated in the decision by the judgment, as well as dialoguing with research that studies the theme of religious freedom and education.

1. Overview of homeschooling and the STF decision

The families which support homeschooling understand that parents and guardians have the duty to educate, as well as the right to choose the type of education for their children, which is homeschooling (ANED, 2021). Homeschooling is approached differently in each country. In the United States of America, homeschooling is permitted in all states of the federation, but with different degrees of restrictions depending on the location (LIMA, 2021), originating from a judicial precept from the 1970s.

Although it is not a universally discussed practice, whether accepted or denied, homeschooling is recognized in countries such as the United States, the United Kingdom, France, Italy, Portugal, Ireland, Belgium and Finland (COSTA, 2016; STF, 2018). In contrast, countries such as Sweden, Greece, Germany and Spain prohibit homeschooling, highlighting that this is a minority position. In Brazil, the treatment of this modality follows the legal rule that there is no clear and certain right to homeschooling, as there is no federal law regulating the subject (STF, 2018).

There are still no official statistics in Brazil, but the National Association of Homeschooling - ANED, (2021) states that homeschooling is a consolidated and unstoppable phenomenon, having grown more than 2,000% in recent years. Jumping from around 360 families in 2011 to 7,500 educating families in 2018, with around 15,000 students, aged between four and seventeen. In 2023, the unofficial estimate is that the numbers will have grown to 35,000 families and 70,000 students, “verbal information” from representatives of ANED, noting that those who practice this modality do not expose themselves for fear of reprisals from the State (through the guardianship council, public prosecutor's office and legal proceedings) (LIMA, 2021). It emphasizes, however, that the practice is illegal, given that there is no legislation on the matter in Brazil.

In the interest of having the right to exclusively homeschooling effective, the request of a family that had its homeschooling practice administratively denied by the Department of Education of the Municipality of Canela – State of Rio Grande do Sul (RS) reached the Federal Supreme Court (STF) for analysis.

In short, the family alleged violation of arts. 5, VI; 205; 206, II, III, IV; 208; 210; 214; 226; 227 and 229, all of the Federal Constitution (CF), arguing that the meaning of the word “educate” cannot be restricted to formal instruction in a conventional educational institution, in school. Furthermore, it continued to argue that the legislation cannot ignore the various forms of education, including technological ones, nor even violate constitutional guarantees, highlighting that there is no provision in the Brazilian legal system that prohibits the practice of homeschooling, even arguing:

The petitioner has the financial means to study at home, by hiring teachers for the various subjects and intends to take tests regularly, but understands that she has the right not to attend school because she disagrees with the conventional and public education system. Therefore, they cannot be forced to attend school and live with students of different ages, in a multi-grade education method that is detrimental to their education and personal development (STF, 2018)

In the original proceedings of RE 888.815/RS, the initial petition stated that the party requesting the request does not agree with the conventional education system due to “pedagogical impositions” of regular education, such as the issue related to Charles Darwin's Theory of Evolution, emphasizing that, because he is a creationist (Christian), “he does not accept it as viable or credible that men evolved from a monkey, as the Evolutionary Theory insists” (STF, 2018). In the judgment of RE 888.815/RS, Justice Luís Roberto Barroso listed seven reasons why parents and guardians choose, in some circumstances, homeschooling:

(i) the desire to directly guide the normal and full development of their children; (ii) the provision of comprehensive and appropriate moral, scientific, philosophical and religious instruction; (iii) the protection of the physical and mental integrity of students, removing them from aggressive, disabling or limiting school environments; (iv) dissatisfaction with the real effectiveness of the school system offered by the public or private network; (v) the development of a personalized teaching plan adapted to the peculiarities of children and adolescents, especially those who require special care; (vi) the belief in the superiority of the homeschooling method in relation to the pedagogical models used by the regular school system; and (vii) the difficulty of accessing traditional educational institutions, due to financial or

geographical restrictions. In short, behind the motivations of parents is a genuine concern for the full and adequate educational development of their children, in order to prepare them for the challenges of life in society. (STF, 2018)

Of the reasons listed, what is the relevance of religious freedom as an argumentative force? Would it be merely a rhetorical reason (factual argument) or a legally valid reason (legal argument) capable of consolidating the teaching method? As for the reasons that give rise to the fight for the right to exclusively homeschooling, Fabricio Veiga Costa outlines it as follows:

In general terms, the defenders of homeschooling in Brazil are divided into three large groups: those who are motivated by religious and moral reasons; those who allege philosophical or pedagogical reasons; and those who defend homeschooling due to the problems that their children have experienced at school, such as school violence, and more particularly bullying. (COSTA, 2016, p. 118).

As highlighted, the religious motive is present in the factual argument, on the other hand, Lima (2021, p. 15) says that “one of the main obstacles to the approval of a law regulating the modality is the false belief that educating children at home is something of the “conservative religious right”. For Lima (2021), the religious motive is a factual argument, but not a legal argument with the strength to move the issue towards legality.

Furthermore, the justification presented in favor of homeschooling, aiming to refute institutional education, is clothed in a religious tone. In fact, the paradigm process, which gave rise to General Repercussion (theme 822), considered by the Brazilian Supreme Constitutional Court, strongly brings with it the religious background as a central argument, as seen in the words of the initial petition up to the votes in the decision analyzed below.

2. Homeschooling: the right to education and religious freedom

When we talk about the right to education, we immediately associate the right to access school with the right to school and the right to remain in school (ANDRADE, 2013). By constitutional law, education is a social, human and fundamental right expressed in Article 6 of the Federal Constitution. Education is also addressed with special attention, with specific provisions in Chapter III, Section I, of Articles 205 to 214, such as Article 205 on the social purpose of education, Article 206 on the principles of education, Article 208 on the duty of the State, Articles 209 and 210 on the structure of the educational system. In fact, the Universal Declaration of Human Rights (UDHR), in Article 26, states:

Art. 26 - 1. Everyone has the right to education. Education must be free, at least that corresponding to elementary education. Elementary education is compulsory. Technical and professional education must be widespread; access to higher education must be open to all on the basis of merit and on a full equal basis. 2. Education must be aimed at the full development of the human personality and the strengthening of human rights and fundamental freedoms, and must promote understanding, tolerance and friendship among all nations, racial or religious groups, and further the activities of the United Nations for the maintenance of peace. 3. Parents have the priority right to choose the type of education to be given to their children. (UNICEF)

A careful reading of the legislation shows that the priority right to choose the type of education is guaranteed, thus strictly linked to religious convictions and religious freedom. In this sense, “religious freedom consists of the right that man has to choose the religion he will profess and follow” (OLIVEIRA, 2015 p. 13), considering this concept, it is important to highlight that the Constitution of the Federative Republic of Brazil of 1988 thus provides in its text:

Art. 5 - freedom of conscience and belief is inviolable, ensuring the free exercise of religious worship and guaranteeing, in accordance with the law, the protection of places of worship and their liturgies;
 (ii) - the provision of religious assistance in civil and military institutions of collective internment is guaranteed, in accordance with the law;
 (iii) - no one shall be deprived of rights due to religious belief or philosophical or political conviction, unless they invoke them to exempt themselves from a legal obligation imposed on everyone and refuse to comply with an alternative service, established by law;
 (BRAZIL, 1988)

Oliveira (2015) highlights four meanings of the constitutional right to religious freedom, the first being freedom of conscience, of an individual nature, encompassing both the right to believe and the right not to believe. Second, freedom of belief has a social and institutional dimension, encompassing the right to choose or adhere to a belief or religion. Third, freedom of worship, resulting from the expression of belief, which can be expressed through rites, ceremonies or meetings in public or private. Finally, the fourth meaning is the freedom of religious organization, which arises from civil legislation in order to guarantee legal personality.

Having outlined religious freedom, it is worth noting how it was presented in the judgment of RE 888.815/RS, which occurred through the discussion among the emeritus judges Luis Barroso, Alexandre de Moraes and Luiz Fux, considering that the other ministers in their votes highlighted legal issues related to the case under discussion, given that the rapporteur opened the discussion by justifying the constitutionality of the modality, highlighting the religious basis as a central element, Min. Alexandre de Moraes opened a dissenting vote with arguments against the religious basis, as he states

MINIST ALEXANDRE DE MORAES - President, one last important consideration: firstly, in Brazil, the issue of homeschooling has no connection with the issue of religious freedom; the issue of religious freedom is connected with homeschooling in the United States, where 75% are Mormons. MINISTER LUÍS ROBERTO BARROSO (RAPPORTEUR) - I want to say that I have received many families who educate for religious reasons and I know Jewish families who homeschool for religious reasons. (STF, 2018)

It is worth noting that Minister Alexandre de Moraes makes considerations, denying the religious background as an argument of supporters of homeschooling in Brazil, attributing this condition only to homeschoolers in the United States. In an eminent response, Minister Luís Roberto Barroso supports the thesis that there is a religious element as a basis or motivation for the option of homeschooling in Brazil. He also states that “homeschooling is very often more associated with religious freedom than with the right to education” (STF, 2018). He argues that

“in the sense that homeschooling is a choice made based on religious grounds, because it is common for it to be, there is a fundamental right to religious freedom” (STF, 2018).

Furthermore, Minister Luís Roberto Barroso points to the case *Wisconsin v. Yoder*, of the US Supreme Court, which allowed Amish families do not to enroll their children in regular schools in the name of religious freedom. In turn, Minister Luiz Fux, participating in the dialogue, highlighted that

the great difference in the North American experience, however, is that the intention of homeschooling is based on a deeper community issue, with an identity bias. The Amish are a religious sect that, for more than three centuries, has been part of a self-sufficient community in American society and has as its essence the interrelation between its religious beliefs and its way of life. [...] (STF, 2018)

As highlighted by the Supreme Court ruling, “the evidence also showed that the respondents sincerely believed that attending high school was contrary to their religion and the Amish way of life, and that they would put their own salvation and that of their children at risk by complying with the law” (STF, 2018). The emblematic case of the United States, with its peculiarities, established by the Ministers, had its religious background as its main foundation. Understanding in Brazil that this would also be a present reason, directly implies the reading of the Constitution and the validity of the right raised. In other words, it goes from simply the freedom of families to provide education to their children (argument of fact), to the discussion of religious freedom, as one of the main arguments, in this case for the judiciary, but also in another case for the legislature to legislate (legal argument). Minister Luís Roberto Barroso continues to present the religious reason in defense of homeschooling, noting that the North American Court established that

The fundamental theory of freedom, on which all governments in this Union are based, excludes any general power of the State to standardize its children, forcing them to accept the unique teaching of public teachers. The child is not a mere creature of the State; those who nurture him/her and direct his/her destiny have the right, together with the high duty, to recognize him/her and prepare him/her for additional obligations (STF, 2018).

In contrast, Minister Luiz Fux states that

Homeschooling, understood as that which replaces schooling, aims to indoctrinate the student and/or to distance him/her from the social interaction established in the school environment. In both cases, it seeks to instill in the child the worldview of his/her parents without providing him/her with the opportunity for the critical counterpoint that would be constructed from other existing visions. No book or speech by parents will teach the child to respect difference better than social interaction with those who are different. Homeschooling, therefore, compromises the integral formation of the individual, especially as a member of a society that is known to be plural. [...] The peculiarity of parents being able to choose the educational institution is an interesting argument. **Even in the Brazilian context of social inequality, the argument applies to demonstrate that school education does not violate**

religious freedom. When parents can choose a private school system, they simply need to select the model that is most in line with their convictions. When they cannot or prefer the public system, the optional enrollment in religious subjects, offered in all faiths, will be guaranteed. (our emphasis) (STF 2018)

Min. Luiz Fux (STF, 2018), continues to affirm that the parents' will autonomy cannot override the right of the child to study at school, due to all the positive externalities that arise from this environment. Religious or philosophical freedom does not serve to substantiate the intent or disguise the abuse of family power. Therefore, parents can present their beliefs and point out flaws or inconsistencies in the curriculum, methodology and content taught at school and in the Brazilian education system, but they cannot deprive their children of having access to the knowledge provided there. Among researchers, there is no agreement about the position and relevance of religious foundations in the intention to exercise and legalize homeschooling. In this sense, Lima (2021, p. 16) also highlights that “in the 1980s, studies showed that homeschooling was the option of only 10,000 North American families, and that 93% of them were made up of only white evangelicals, the majority living in rural areas.” He also goes on to point out that “in the United States, it has become mathematically impossible to point to homeschooling as an exclusive agenda for Christians, whites and right-wingers” Lima (2021, p. 17).

On the other hand, regarding homeschooling in the United States (VIEIRA, 2012), Costa (2016, p. 36) found “a growth of over 100% between 1999 and 2010, which now represents 3.8% of the school population in the entire country.” No less importantly, he concluded that “the phenomenon is concentrated in Christian families in the rural South of America, with religion and moral values as its central motivation.” In the legal field, the religious argument is supported by the Constitution (Art. 5, Clauses VI, VII, and VIII). Even overriding the educational reasons or arguments, which would be subsidiary (quality of education, methodologies, violence in schools, political positions, financial conditions), Vieira (2011, p. 143) highlights that among the most diverse reasons that “greatly justify the withdrawal of children from the regular education system is the religious issue.” Kloh (2020), in a study that addresses the aforementioned STF decision, highlights

although religious motivation is not the main reason in Brazil for families to opt for Home Education, the core motivation is the same as that claimed by Brazilian families, as well as Valentina Dias' family, which is the freedom of parents to choose the best type of education for their children. (KLOH, 2020 p. 138)

In the interest of the debate, it is worth highlighting the decision to judge ADI 5,537 of August 24, 2020, handed down by Min. Luís Roberto Barroso, which dealt with the declaration of the unconstitutionality of Law 7,800, of May 5, 2016, of the State of Alagoas. The aforementioned rule established the *Escola Livre* program in the state educational system. In the ruling, it followed the reasoning that

The Additional Protocol of San Salvador itself, when recognizing the parents' right to choose the type of education that should be provided to their children, provided for in art. 12.4 of the American Convention on Human Rights, conditions this right to the option for an education that is in accordance with the other principles contemplated in the Protocol and that, consequently, is suitable for the full development of the human personality, for participation in a democratic society, for the

promotion of ideological pluralism and fundamental freedoms. It is quite clear that parents cannot seek to limit their children's informational universe or require the school not to spread any content with which they do not agree. This type of measure – expressed in art. 13, § 5 – means preventing young people from accessing entire domains of life, in clear violation of pluralism and their right to learn. Education is, precisely, the accumulation and processing of information, knowledge and ideas that come from different points of view, experienced at home, in contact with friends, with possible religious groups, with social movements and, equally, at school. (ADI 5.537 MC, rapporteur Min. Roberto Barroso, monocratic decision). (STF, 2020)

Following the debate on the relevance of the religious argument in RE 888.815/RS, Min. Luiz Fux recalls the case of the judgment of the Direct Action of Unconstitutionality - ADI 4439, which ruled on optional confessional education in public schools and established the syllabus

RELIGIOUS EDUCATION IN PUBLIC SCHOOLS. CONFESSIONAL CONTENT AND OPTIONAL ENROLLMENT. RESPECT FOR THE BINOMIAL OF SECULARITY OF THE STATE/RELIGIOUS FREEDOM. EQUAL ACCESS AND TREATMENT FOR ALL RELIGIOUS CONFESSIONS. COMPLIANCE WITH ARTICLE 210, §1º, OF THE CONSTITUTIONAL TEXT. CONSTITUTIONALITY OF ARTICLE 33, CAPUT AND §§ 1º AND 2º, OF THE LAW OF GUIDELINES AND BASES OF NATIONAL EDUCATION AND OF THE LEGAL STATUTE OF THE CATHOLIC CHURCH IN BRAZIL PROMULGATED BY DECREE 7.107/2010.

DIRECT ACTION DECLINED AS UNFOUNDED. 1. The relation between the State and religions, historically, legally and culturally, is one of the most important structural issues of the State. The interpretation of the Brazilian Magna Carta, which in keeping with our republican tradition of broad religious freedom, enshrined the inviolability of religious beliefs and cults, it must be carried out in its double meaning: (a) to protect the individual and the various religious confessions from any interventions or state commandments; (b) to ensure the secularity of the State, providing for total freedom of State action in relation to religious dogmas and principles. 2. The interdependence and complementarity of the notions of a Secular State and Freedom of Belief and Worship are basic premises for the interpretation of religious education with optional enrollment provided for in the Federal Constitution, since the matter reaches the very freedom of expression of thought in light of tolerance and diversity of opinions. 3. Freedom of expression constitutes one of the essential foundations of a democratic society and includes not only information considered harmless, indifferent or favorable, but also information that may cause disturbance, resistance, or unsettle people, since Democracy only exists based on the consecration of the pluralism of political, philosophical and religious ideas and thoughts, and the tolerance of opinions and the spirit of openness to dialogue. 4. The uniqueness of

the constitutional provision for religious education, with optional enrollment, observing the binomial Secularism of the State (CF, art. 19, I)/Consecration of Religious Freedom (CF, art. 5, VI), implies full regulation of compliance with the constitutional precept provided for in article 210, §1, authorizing the public network to offer, under equal conditions (CF, art. 5, caput), confessional education of the various beliefs. 5. The Federal Constitution guarantees students, who expressly and voluntarily enroll, the full exercise of their subjective right to religious education as a subject in the regular schedule of public elementary schools, taught in accordance with the principles of their religious confession and based on the dogmas of faith, indistinguishable from other branches of scientific knowledge, such as history, philosophy or science of religions. 6. The binomial Secularism of the State/Consecration of Religious Freedom is present insofar as the constitutional text (a) expressly guarantees the voluntary nature of enrollment in religious education, also enshrining the State's duty to absolutely respect agnostics and atheists; (b) implicitly prevents the Government from artificially creating its own religious education, with a specific state content for the discipline; as well as prohibiting the favoring or using hierarch way of biblical and religious interpretations of one or more groups to the detriment of others. 7. Direct action dismissed, declaring the constitutionality of articles 33, caput and §§ 1º and 2º, of Law 9.394/1996, and of art. 11, § 1, of the Agreement between the Government of the Federative Republic of Brazil and the Holy See, regarding the Legal Status of the Catholic Church in Brazil, and affirming the constitutionality of confessional religious education as an optional subject in the regular schedules of public elementary schools". (ADI 4439, Rapporteur Min. ROBERTO BARROSO, Rapporteur for the Judgment Min. ALEXANDRE DE MORAES, Full Court, decided on 09/27/2017, DJe 06/21/2018) (STF, 2017)

As seen, Minister Luis Roberto Barroso presented a clear position that the religious background is the main basis for homeschooling in Brazil, an idea refuted and not accepted by Minister Alexandre de Moraes, both in favor of homeschooling, however, they disagree as to the reason behind the teaching method in Brazilian homes, or the reason why parents want to see their right to teach at home effective and legalized, given that the loss of power of families over the content of the teaching provided is a touchstone of several judgments and agendas in the legislature, from curricula to the homeschooling method.

On another side, contrary to homeschooling in Brazil, Minister Luiz Fux presents arguments that, in addition to constitutionally rejecting homeschooling, also refute and attack the main argument of homeschool supporters, which is the religious basis.

3. (Im)possibility of the prevalence of the religious argument or the principle of religious freedom

In summary, it highlights an obstacle in the prevalence of the religious argument, because regarding secularism in public education in Brazil, especially regarding the aforementioned ADI 4439 judgment, Cury (2023) presents the context of religious education in the History of National Education, highlighting from colonization with the prevalence of such teaching until the sudden change to

this broad framework, typical of Modernity, religion was giving way to the State assuming the condition of authority and place of exercise of power and, under tensions and contradictions, it was moving to the field of civil liberties and privacy. The State, in the exercise of power, became secular, that is to say, it was slowly becoming neutral and equidistant from religious cults, respecting them in their freedom of expression, worship and conscience in the spaces proper to civil society. (CURY, 2023, p. 27)

Regarding the secularism, “the State has become secular, that is, it has become equidistant from religious cults without assuming one of them as the official religion. Modernity is increasingly distancing itself from the *cujus regio, ejus religio*” (CURY, 2004, p. 183). It is also difficult to point out the bias of the attacks on secularism, since

the fact that Christianity is the dominant religion in the country makes it difficult to maintain secularism in public spaces. This is because in recent decades, religious people (mainly evangelicals) have been organizing themselves politically and have started to use Christian morality as a criterion for approving and presenting bills. (FERREIRA, 2021, p. 67)

As seen, Minister Luiz Fux defended the unconstitutionality of homeschooling, including with regard to its religious background, explaining that not just any religious belief can exempt the fulfillment of an obligation imposed on everyone, especially since its free and mandatory provision is legitimized by the State. Furthermore, for the aforementioned justice, conscientious objection finds constitutional support when the provision imposed on everyone legally “clashes inexorably with the conviction freely formed by the individual, which defines his or her moral identity” (STF, 2018). Therefore, he accepts the factual argument, but does not admit the legal argument. In order to understand conscientious objection as a basis for religious freedom, in the description of the legal teachings of Gilmar Mendes, Inocêncio Coelho and Paulo Branco,

Conscientious objection therefore consists of the refusal to perform a prescribed behavior, due to convictions that are deeply rooted in the individual, such that, if the individual were to comply with the normative command, he would suffer serious moral torment. It should be noted that the attitude of insubordination does not arise from a whim or a petty interest. On the contrary, it can be invoked when submission to the norm is capable of generating unbearable psychological violence. The determined behavior contradicts something that the individual cannot renounce. (MENDES; COELHO; BRANCO, 2009, p. 313-314)

In effect, “the right to conscientious objection is, therefore, the ability that an individual has to refuse to perform any act that violates his or her conscience, that goes against his or her principles arising from religious belief or philosophical or political conviction” (BASTOS, 2013, p. 49). Thus, the reason why families have the financial means to promote home schooling by hiring, or not, private tutors, and are dissatisfied with the quality of regular education, dissatisfied with safety, does not legitimize their exclusive choice for homeschooling, not even under the argument of religious freedom, under the guise of conscientious objection. From this perspective, the religious argument cannot be the sole, or mainly, reason why they choose to replace school education, the

national education system, in factual and legal terms. Otherwise, Oliveira (2015), presenting legal-theological research, deals with the Adventist perspective on homeschooling and the argument of religious freedom, establishing that

According to this theological line, it is understood that the family has primacy in the educational formation of children, and that the State must offer an auxiliary complement, when necessary or required. Therefore, a family that commits to homeschooling should not have to ask the State for permission, but only notify it that this was the preferred method within the family. In the same way, the government could not force parents to adapt to a certain form of discipline. (OLIVEIRA, 2015 p. 75)

After presenting the theme, Oliveira (2015) highlights that “these many arguments can be used to strengthen any eventual judicial request for the right to basic home education in cases where parents reject the teachings provided in public schools for religious reasons.” Still from the perspective of conscientious objection, it highlights rights won by Adventists,

taking into account that Adventists have been successful in making participation in education provided on Saturdays more flexible, it is possible, by analogy, to expand this already settled understanding and appeal to the argument of religious freedom in defining the educational format of the family in its entirety (OLIVEIRA, 2015, p. 74)

As the argument of religious freedom takes the stage and suggests the exercise of homeschooling, Min. Luiz Fux (STF 2018) emphasizes that in this case, “the programmatic content and social interaction in the school environment do not violate the freedom of belief of the child, subject of rights, in its minimum and essential content.” Despite the programmatic and pedagogical content, they oppose the beliefs of the parents. However, the minister says, “there is no record of any religion that advocates school dropout, which shows that mandatory school enrollment does not suppress religious freedom” (STF, 2018).

Therefore, overcoming the religious argument, for the Minister, the excuse of conscience does not legitimize the failure of parents to comply with their legal duty to enroll and ensure their children’s school attendance for this or any other reason, except in the case of force majeure, in the case of illness. Furthermore, Minister Luiz Fux (STF, 2018) sheds light on the analysis to the extent that school education does not violate religious freedom, since parents have the option of enrolling their children in a public educational institution or, whenever they wish, opting for a private school system, simply by choosing the model that is most consistent with their religious convictions. Enrollment in religious subjects is optional and is offered in all faiths.

As previously explained, even religious education in public schools during regular school hours is optional. Now, the structure of the Brazilian educational system respectfully advocates for the preservation of religious freedom. There is no denying the presence of elements of the religious fundamentalist movement in Brazil, supporting the homeschooling movement, including representatives in the National Congress (SEDUFMS, 2022)

Religion is the driving force behind homeschooling in Brazil. Although families who take their children out of school and homeschool are a diverse group, ranging from alternative to ultraconservative, it was Christians who organized themselves and gained a voice. A large part

of the evangelical and Catholic benches in Congress are in favor of the practice. (ESTADO DE MINAS, 2019)

On this path to fundamentalism

The first to use it were American Protestants who, at the beginning of the 20th century, began to call themselves “fundamentalists” to distinguish themselves from the more “liberal” Protestants, who, in their view, completely distorted the Christian faith. They wanted to return to their roots and emphasize the “fundamentals” of the Christian tradition, which they identified as the literal interpretation of Scripture and acceptance of certain basic doctrines (ARMSTRONG, 2001, p. 10).

Also regarding fundamentalists, Armstrong writes that

They are combative forms of spirituality that emerged as a reaction to some crisis. They face enemies whose secularist policies and beliefs seem contrary to religion. Fundamentalists do not see this struggle as a conventional political battle, but rather as a cosmic war between the forces of good and evil. They fear annihilation and seek to fortify their beleaguered identity by rescuing certain doctrines and practices from the past. To avoid contamination, they often withdraw from society and create a counterculture; however, they are not utopian dreamers. They absorb the pragmatic rationalism of modernity and, under the guidance of their charismatic leaders, refine the “fundamentals” in order to develop an ideology that provides the faithful with a plan of action. They end up fighting and trying to turn sacred again an increasingly skeptical world. (ARMSTRONG, 2001, p. 11).

As initially highlighted in the presentation by Minister Luís Roberto Barroso, about the religious fundamentalist movement in the United States, in which homeschooling is practiced, the same background comes to Brazil, to argue in favor of the homeschooling modality, with the exclusion of the constitutional and systematized school model. In addition to being evidently present as an argument of fact, it is also a strong legal argument, Costa (2016, p. 40) notes that “in the understanding of Auberon Herbert (1978, p. 30), in the same way that the State does not have the legitimacy to direct which religion will be adopted by each citizen, it should also not have the right to establish the type of education to be given uniformly to all”.

A very broad discussion, this being just one reason or one argument among many alleged, but it can be a determining argument for the legal implementation of homeschooling, for this Dourado (2020, p. 31) explains that “an example that can be cited is related to religious education, since Brazil is a secular State, and the diversity of beliefs present in the national territory must also be taken into account”. From this perspective, it is pointed out that “moral and religious education is the parents’ responsibility, and there are no legal provisions regarding the transfer and mandatory nature of this right to schools”.

According to Andrade (2021, p. 319), “with regard to the phenomenon of homeschooling, the pulsating motivation of the social movement in its favor finds its roots in some kind of religious fundamentalism”. For Ribeiro (2021, p. 253), families who are

supporters of homeschooling defend “the rule of law as long as it does not alter the secular foundations of human society: private property, individual autonomy, freedom, inherited rights, customary and traditional rules, Christian values”. Any threat to these ideals is rejected as an attack on religious conservatism or fundamentalism.

The religious background must be addressed and cannot be disregarded, including through the fundamental human right of religious freedom, since religious and moral motivations are a constant among parents who support homeschooling. “The defense of home education in the face of attempts to establish compulsory schooling is found mostly among Christians.” (Vieira, 2012, p. 52-53)

Highlighting that there are homeschooling scholars who claim that it is technology and not religion that drives homeschooling, as reported by Lima (2021, p.19) “They are also discovering that the great motivator behind the growth of Homeschooling in the world is not a supposed religious desire to isolate children from society, but rather the facilities offered by new learning technologies”.

Furthermore, although in the United States the main supporters are concentrated in religious groups, in the studies by Vasconcelos (2021, p. 211) “in Brazil, there is no single motivation for families who support homeschooling that can characterize them as belonging to a group delimited by exclusively empirical, ideological or religious issues”.

In this vein, with respect to fundamentalism and religious freedom, for those who support homeschooling, both in terms of the basis for adopting the modality and the claim of constitutional, human and fundamental right, there is no way to dismiss the relevance, perhaps centrality.

Final considerations

From the researchers' perspective, there is no consensus on whether the religious argument is used for homeschooling, whether it is central or peripheral. However, it is undeniable that such an argument does appear in the justification of those interested in the modality, and it is also relevant for the discussion of bills and at the time of judicial review.

In light of the analysis of the ruling of RE 888.815/RS and the arguments present in the ministers' votes, it was noted that initially in the request that gave rise to the legal proceeding there is the presence of the religious basis. To the extent that the rapporteur, Min. Luís Roberto Barroso, opened an interpretation in favor of homeschooling, including highlighting the religious background as a touchstone, Min. Alexandre de Moraes disagreed with the fundamentality of the religious argument, even though he agrees with the homeschooling modality.

In this regard, the vote of Justice Luiz Fux, although it does not put an end to the discussion among the ministers, nevertheless shed light on a path to consider the arguments for adopting homeschooling, because even though the religious basis is in fact the argument commonly alleged for the exercise of homeschooling in Brazil, it would still not be legally, ideologically and educationally capable of legitimizing the homeschooling modality in an exclusive and autonomous way.

Considering what has been read about conscientious objection and the rights to religious freedom and their aspects, it is possible and relevant to use the factual and legal argument. For the consideration of the legislature in the creation of a homeschooling law or for the consideration of the judiciary in a constitutionality action, the religious basis is shown to be a mandatory issue to be addressed.

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