v. 2, n. 9, 2022

Scientific Journal of Applied Social and Clinical Science

CIVIL LIABILITY OF THE STATE FOR BREACH OF THE RIGHT TO EDUCATION

Vívian Aguiar Gomes Lopes

Abstract: This monograph will present the profile of Brazilian educational law in order to question the status quo of the current scenario, in the context of Brazilian social, political and legal reality. The current legislation on constitutional guarantees regarding the right to education and the State's Civil Liability for violating the Right to Education will be analyzed. We will list the main instruments for the protection of such guarantees, which are responsible for the population's access to education. It will seek to understand the relevance of the theme in the construction of a more balanced society, as a result of the effective exercise of citizenship. We will also examine some theories about the civil liability of the State. These assess the extent of the State's culpability in relation to fundamental rights and guarantees. If, on the one hand, the action of the State is limited by the budget it has, on the other hand, it is necessary to guarantee the exercise of some rights considered to be priority and indispensable.
Keywords: Brazilian Educational Law, Educational Legislation, State Civil Liability, mechanisms to protect constitutional guarantees.

INTRODUCTION

Due to the essential character of education in the formation and development of the individual and to its fundamental role for the exercise of citizenship, so that the Right to education and citizenship are no longer just a speech and can be carried out in practical life, it is perceived the scientific relevance of the topic to be addressed in this work.

It is understood the need for a historical contextualization to find the origin of our current reality, considering that the public power since the emergence of the Republic did not prioritize public policies, nor did it build a homogeneous and effective educational legal order.

The choice of theme is justified, mainly, because this subject has been little discussed in the Brazilian social, political and legal context since the birth of the Republic, when there was an awakening to the question of popular education. Therefore, this gives an innovative brand to your analysis.

Furthermore, the fundamental character of the right to education is inherent to its condition as an essential element for the full development of the human personality and the materialization of citizenship itself.

The judicial mechanisms that are at the service of educational law will be observed, which must be provoked through procedural instruments.

In order to do so, the qualitative, deductive, historical and dialectical method will be used in order to investigate the origins of the Brazilian educational legal system, its current context and its practical applicability.

Initially, the origins of the expression educational law will be exposed, as well as its precursors in Brazil. From there, a brief exposition of the object and objectives of Educational Law and its extension.

Next, the distinction between educational law (much broader) and educational legislation, which is presented as a set of laws, decrees, etc. There is also mention of some constitutional and infra-constitutional provisions related to the right to education and educational legislation.

The extension of the Right to Education and the Civil Liability of the State as a result of its violation will be presented. Among the relevant themes that concern this subject, we have the existential minimum as opposed to the reserve of the possible, as well as the Subjective Responsibility of the State and the Objective Responsibility of the State. This chapter also includes a passage through the main collective actions aimed at the practical applicability of these constitutional guarantees.

At the end, Educational Law is analyzed in relation to the public budget, observing the counterpoint between the theory of the cost of rights and the principle of the effectiveness of Public Administration.

BRAZILIAN EDUCATIONAL LAW

EMERGENCE OF THE INSTITUTE OF EDUCATIONAL LAW IN BRAZIL

According to Joaquim (2009, apud DI DIO, 1981, p.1), the first time the term Educational Law was used in Brazil dates from 1970 when Renato Alberto Teodoro Di Dio held a Specialization Course on Comparative Law at the Faculty of Law at the University of São Paulo (USP). The work was presented under the title of Educational Law in Brazil and the United States.

Years later, Joaquim (2009) describes that in 1977, with the objective of delimiting autonomy and a systematization of Educational Law, the 1st Seminar on Educational Law was held at the State University of Campinas (UNICAMP). This was the first attempt at a technical-scientific systematization of Educational Law in the history of Brazilian Law.

Among the educators and jurists present were Esther de Figueiredo Ferraz, Lourival Vilanova, Guido Ivan de Carvalho, Álvaro Álvares da Silva Campos, José Alves de Oliveira. They were assigned to synthesize the presentations and debates. At the end, they presented thirteen conclusions and recommendations (JOAQUIM, 2009, p. 106,107).

> 1. Give wide dissemination to the results of the 1st Seminar on Educational Law.
>
> 2. Sensitize the Public Powers and, in particular, the bodies and entities directly responsible for education to the importance of the systematization of education legislation.
>
> 3. Recommend to the MEC the sponsorship of special resources on Educational Law for personnel who directly work in the sector of enforcement of education legislation.
>
> 4. Recommend to the MEC that resources and conditions be provided for carrying out studies aimed at explanations for the scientific realization of Educational Law.
>
> 5. Need to consolidate educational legislation.
>
> 6. Need to catalog the pronouncements of the Federal Council of Education contained in the magazine "Documenta".
>
> 7. Support the creation in Universities and isolated establishments of higher education, of bodies destined to the study of Educational Law.
>
> 8. Encourage the promotion of Seminars and lecture cycles, in Universities and isolated higher education establishments, on educational legislation.
>
> 9. Encourage the inclusion of the subject "Educational Law", as an option, in regular undergraduate courses, which do not have it as a mandatory feature.
>
> 10. Gradually assign to Law graduates the responsibility for teaching "Educational Law".
>
> 11. Recommend to Universities that they promote the study of "Educational Law" at the postgraduate level.
>
> 12. Suggest, as a measure of relevant effect, in the national education system, the restructuring of the Boards of Education, so that they act on a permanent basis and with observance of the adversarial principle, whenever applicable.
>
> 13. Creation of the National Order of the Magisterium.

Given the growing complexity of the Welfare State, the creation of new branches of Law, including Educational Law, is justified. Among other factors (JOAQUIM, 2009), the

complexity of society, the increase in demand for education and conflicts in educational relations, led to the emergence of specific legislation in the area of education and, consequently, the need for specialization and systematization of the Educational Law.

OBJECTS AND OBJECTIVES OF EDUCATIONAL LAW

Renato Alberto Teodoro Di Dio (1981, p. 24) teaches that "Educational Law is the set of norms, principles, laws and regulations that deal with the relationships of students, teachers, administrators, specialists and technicians, while involved, mediately or immediately in the teaching-learning process".

Educational Law is related to two central issues, namely, the existence of norms, whose content is given by social relations in the kind of educational relationship, in the other, the systematized construction of knowledge, which have such norms as their object (VILANOVA, 1982).

Nelson Joaquim (2009) advocates that this branch of law has a hybrid and interdisciplinary nature, with rules of public and private law. In the author's conception, this right is mixed, as it protects both public and private interests.

> A set of rules, principles, judicial institutes, procedures and regulations that guide and discipline the relationships between students and/or guardians, teachers, educational administrators, school directors, educational managers, educational establishments and the public power, while directly or indirectly involved in the teaching-learning process, as well as investigating the interfaces with other branches of legal science and knowledge (JOAQUIM, 2009, p. 115,116).

For Renato Di Dio (1981, p. 156) the juris-pedagogical institutes must be called this way, as they participate simultaneously in the legal and educational nature, incorporating each other in an original reality. These are the procedures used in educational practice, such as enrollment, transfer, evaluation, etc.

We can also consider as legal-pedagogical institutes, those contemplated by the Law of Directives and Bases of Education, such as, On Education; Composition of School Levels; Of Special Education, etc.

Also, in line with Nelson Joaquim (2009, p. 117), it can be seen that "the judiciary institutes are in the process of being built, but they are present in the different educational legislation and in the pedagogical practice".

According to Nelson Joaquim (2009, p. 118), to meet the demands arising from legislative changes and understanding of the subject, Educational Law emerges with the scope of

> a) Overcoming the legislative phase of education, that is, overcoming the legalistic conception of Education, to understand Educational Law as a branch of interdisciplinary and practical legal science;
>
> b) Facilitate the understanding, interpretation and application of educational legislation;
>
> c) Provide legal and education professionals with a global knowledge of Educational Law, which includes legislation, doctrine, jurisprudence and educational principles;
>
> d) To encourage research and debate on the relationship between Educational Law and other branches of legal science and knowledge;
>
> e) Operate in two directions: on the one hand, preventively guide; on the other hand, it presents a compositional or judicial solution;
>
> f) From the practical point of view of the action of Law, it is identified with the administrative instruments - school administration (extrajudicial) and judicial instruments for the solution of conflicts in educational relations.

When faced with a conflict of interest in the field of Educational Law, it appears at first as an element of conciliation, which aims to prevent possible conflicts that may arise in the academic sphere. In a second moment, having exhausted all the possibilities of composing or harmonizing the conflicts in the administrative or conciliatory headquarters, it is up to the actors of the legal relationship to resort to Justice for the judicial solution.

EDUCATIONAL LAW AND EDUCATIONAL LEGISLATION

The term legislation means something that was said, that was written in the form of a law and that is being presented, or that is being made known to the people, including to be read and inscribed in our social life (CURY, 2000, p.15).

> The Teaching (or Educational) Legislation, as a discipline, is a set of laws, decrees, resolutions, normative opinions, ordinances, regulations, etc. The Teaching Legislation discipline is traditionally integrated into the Pedagogy curriculum, as an integral part of Educational Law and of a more pedagogical nature. On the contrary, Educational Law has a more juridical character than a mere set of laws (BOAVENTURA, 1997, p. 59 apud JOAQUIM, 2009, p. 120).

It is worth remembering that over the five centuries of Brazilian history, it is noted that Brazilian educational legislation was elaborated, but there was no single text, which encompassed all the norms that were in force and were applied in educational relations (Nelson Joaquim, 2009).

> Educational (or teaching) Legislation must not be confused with Educational Law, because while the former is limited to the study and/or systematization of the set of rules on education, the latter has a much broader field and can be understood as a set of techniques, rules and systematized legal instruments, which aim to discipline human behavior related to education, as defined by Álvares Melo Filho (MOTTA, 1997, p. 51 apud JOAQUIM, 2009, p. 120).

Boaventura (2004, pp.1/12) warns that the subject Education Legislation reaches, at most, the objective of describing the legal structure of education, its component bodies, the succession of laws and the placement of guidelines and bases. The problem of its location, in his opinion, remains in the Faculty of Education or in the Faculty of Law, it will depend on the university organization, which must stimulate exchange and the interdisciplinary character desired to enrich the field of educational law.

JUDGMENTS ON THE RIGHT TO EDUCATION

In the Brazilian legal system, the right to education is recognized in the set of social rights, being recognized as a right of all and a duty of the state.

Therefore, if the rights are recognized by the legal system of a country, it is essential that there is the possibility of making the Public Power fulfill its duties if it is silent or acts irregularly. The statement about the judicialization of education is projected as a strategy for the implementation of the right to basic education.

According to Cury and Ferreira:

> The judicialization process occurs when aspects related to the right to education become the object of analysis and judgment by the judiciary. This phenomenon occurs when the right to education is violated as a result of changes in the legislative landscape, reorganization of judicial and school institutions, active positioning of the community in the search for the consolidation of social rights. (CURY, 2010. p. 81).

A research on educational decisions carried out in the State of São Paulo on the educational decisions of the court in that State, between

the period from 1991 to 2008, evidenced the use of the Judiciary, for the implementation or questioning of public policies involving education. However, the survey of judicial decisions denotes more expressively the use of the Judiciary in some areas. The judicial appeal for acquiring a place in basic education and for offering services that prevent the student from staying in school were the most present conflicts in the group studied (SILVEIRA, 2011).

By way of example, in the annex, there are two menus related to the right to education. In the same way, there is also attached a table that exposes educational decisions of the court of justice of the State of São Paulo.

EXTENT OF THE RIGHT TO EDUCATION AND CIVIL RESPONSIBILITY OF THE STATE

EXISTENTIAL MINIMUM

According to Ana Paula de Barcellos:

> The existential minimum corresponds to the set of material situations indispensable to a dignified human existence; existence considered there not only as a physical experience - the survival and maintenance of the body - but also spiritual and intellectual, fundamental aspects in a State that is intended, on the one hand, democratic, demanding the participation of individuals in public deliberations, and, on the other hand, the other, liberal, leaving each one in charge of his own development. (2002, p.197 - 198).

This includes the rights to health, education, assistance to the destitute (food, clothing and shelter) and access to justice (NOVELINO, 2013). The existential minimum is the paradigm that must guide the establishment of priority goals for the state budget (BARCELLOS, 2002).

> According to the wording of the ADPF decision (MC) 45/DF, rel. min. Celso de Mello: "It will not be lawful, however, for the Public Power, in such a case, through improper manipulation of its financial and/or political-administrative activity - to create an artificial obstacle that reveals the illegitimate, arbitrary and objectionable purpose of defrauding, frustrating and to make the establishment and preservation of minimum conditions of existence in favor of people and citizens unfeasible. (NOVELINO, 2013, p. 623).

The concept of existential minimum cited by Marcelo Novelino (2013) is the result of the combination of the institute of human dignity, material freedom and the Social State. The existential minimum consists of a reduced and more delimited set of social rights formed by basic goods and utilities essential to a dignified human life.

For Ana Paula de Barcellos (2002), in the formulation and execution of public policies, the existential minimum must guide the establishment of goals that must be a priority when formulating the budget.

However, defining this minimum is not an easy task. Fundamental rights are not absolute. The judge must proceed with the analysis of the principles, values and objectives set out in the Constitution, in order to better decide the issue (REISSINGER, 2015).

In this sense, collective actions are important mechanisms for the protection of social rights as they allow a potential universalization of the request, reducing the exclusion of disadvantaged citizens who do not have access to justice (NOVELINO, 2013).

RESERVATION OF THE POSSIBLE

It is observed that even the provisional rights in their subjective dimension, which can be legally demanded, have limits, and it is up to the judge, in the event of omission by the Public Administration, to verify if the provision demanded by the citizen is reasonable, within the criteria of existential

minimum and reserve what is possible, in relation to what can be expected from the State to meet it (REISSINGER, 2015). As Marcelo Novelino said, The reservation of the possible, in turn, is characterized as a factual and legal limitation that can be opposable, albeit in a relative way, to the realization of fundamental rights, especially those of a provisional nature. (2013, p. 621).

Ana Paula de Barcellos describes the reserve of the possible as follows:

> The expression reserve of the possible seeks to identify the economic phenomenon of the limitation of available resources in the face of the almost always infinite needs to be supplied by them. [...] in addition to the legal discussions about what can be legally demanded from the State – and ultimately from society, since it is society that supports it –, it is important to remember that there is a limit to the material possibilities for these rights. (BARCELLOS, 2002, p. 236).

These are the assumptions for the reserve of the possible: The State can only provide the citizen with what is reasonable, whether from a financial point of view, due to legitimacy or necessity (SILVA, 2012).

The reserve of the possible (before acting as an insurmountable barrier to the realization of fundamental rights) must be in force as a mandate for the optimization of fundamental rights, imposing on the State the fundamental duty of promoting the optimal conditions for the realization of the state provision in question, as far as possible, preserving, in addition, the levels of achievement already achieved, which in turn points to the need to recognize a prohibition of retrogression, even more in what is being preserved the existential minimum (SARLET; FILCHTINER, 2008).

SUBJECTIVE RESPONSIBILITY OF THE STATE

Subjective responsibility for Celso Bandeira de Mello (2012, p.1019), is the obligation to indemnify someone incumbent on a fact contrary to the law - culpable or intentional - consisting of causing harm to others or failing to prevent them. when obliged to.

Celso de Mello (2012) describes the French law perspective of blame for the lack of service. Here, the absence of the service due to its defective operation, including delay, gives rise to the responsibility of the State for the damages resulting therefrom in the grievance of the administered.

In view of the principle of publicity of public administration acts, it is not necessary to identify an individual fault to trigger the State's responsibility. This notion is replaced by the faute de service (lack of service), enshrined among the French. Service fault or lack of service occurs when it does not work, works poorly or works late. This is the triple modality by which it is presented and it translates into a link between the traditional responsibility of Civil Law and objective responsibility (MELLO, 2012).

It is worth remembering that in no way, the subjective responsibility of the State is confused with the modality of objective responsibility, since the subjective responsibility is based on guilt (or willful misconduct). It must be clarified, according to Mello (2012), that there is strict liability when the simple causal relationship between a fact and the effect it produces is enough to characterize it.

> There is subjective liability when, in order to characterize it, it is necessary that the conduct generating damage reveals a deliberation in the practice of the prohibited behavior or undesired failure to comply with the standards of effort, attention or normal skills (guilt), legally required, in such a way that the right of a or otherwise, it is transgressed. Therefore, it is always the State's responsibility for illicit behavior, when

> the State must act, and according to certain standards, does not act or acts insufficiently to stop the harmful act (MELLO, 2012, p. 1021).

OBJECTIVE STATE LIABILITY

According to Celso de Mello (2013), strict liability is the obligation to indemnify someone due to a lawful or unlawful procedure that produced an injury in the legally protected sphere of another person. To be characterized, the mere causal relationship between the behavior and the damage is sufficient.

The objective responsibility of the State is provided for in article 37, paragraph 6 of the Constitution of the Federative Republic of Brazil of 1988, namely:

> Art. 37. The direct and indirect public administration of any of the Powers of the Union, the States, the Federal District and the Municipalities shall obey the principles of legality, impersonality, morality, publicity and efficiency, as well as the following: (Wording given by the Constitutional Amendment No. 19, of 1998)
>
> § 6 Legal entities governed by public law and those governed by private law that provide public services shall be liable for damages that their agents, in this capacity, cause to third parties, ensuring the right of recourse against the person responsible in cases of intent or fault.

COLLECTIVE ACTIONS

The 1988 Constitution universalized the collective protection of trans-individual rights, dealing in various devices with instruments suitable for the protection of homogeneous diffuse, collective and individual interests (GUIMARÃES, 2014).

Among the Collective Actions, the following stand out:

> a) Direct actions of constitutionality or unconstitutionality – ADC or ADIN (CFRB (BRAZILIAN FEDERAL CONSTITUTION)/88, art. 102, I, a);
>
> b) The allegation of non-compliance with a fundamental precept – ADPF (CFRB (BRAZILIAN FEDERAL CONSTITUTION)/88, art 102, paragraph 1);
>
> c) The collective writ of mandamus (CFRB (BRAZILIAN FEDERAL CONSTITUTION)/88, art 5, LXX);
>
> d) The writ of injunction (CFRB (BRAZILIAN FEDERAL CONSTITUTION)/88, art. 5, LXXI);
>
> e) Popular action (CFRB (BRAZILIAN FEDERAL CONSTITUTION)/88, art.5, LXXIII);
>
> f) Public civil action (CFRB (BRAZILIAN FEDERAL CONSTITUTION)/88, art.129, III);
>
> g) Direct intervention action (CFRB (BRAZILIAN FEDERAL CONSTITUTION)/88, art.36, III).

Unfortunately, in most cases, individual attempts to defend social rights are vulnerable in the face of the precarious structure of the State to guarantee rights individually considered.

Thus, among the constitutional instruments for the protection of individual and collective guarantees, collective actions are fundamental elements for the protection of supra-individual interests, especially after the insertion of item IV in article 1 of Law No. 7347/85 (Law of Action Civil Public), for allowing an indefinite number of people to benefit from a single action.

> The possibility of guardianship by the legally legitimated, of the constitutionally guaranteed rights, without the citizen having to face the difficulties inherent in accessing Justice and the Judiciary, constitutes an enormous advance and a powerful

> instrument for the materialization of social rights, especially to education. qualified and integrative (GUIMARÃES, 2014, p. 2).

Currently, in our civil liability system, there is a tendency to relax the causal nexus and also to end guilt, absorbed by strict liability (SCHREIBER, 2005).

Even in the broad field reserved for subjective responsibility, there were significant changes throughout the 20th century. The psychological notion of guilt was definitively abandoned, in favor of another, which designates guilt as non-compliance with an abstract model of conduct (SCHREIBER, 2005).

Anderson Schreiber (2005) also points to a second trend in Brazilian civil liability, namely the collectivization of civil liability actions. The aforementioned author cites popular action as an example, an instrument capable of ensuring the protection of supra-individual interests.

Public civil action, enhanced by provisions of the Consumer Defense Code, specifically aimed at collective protection of consumers' interests, even when such interests are essentially individual - known as homogeneous collective interests.

Still from the perspective of Anderson Schreiber (2005), the doctrine finds that collective actions not only make it possible to overcome the difficulty of individual access to justice, but ensure full understanding of the demand and a coherent (single) decision for all victims. It is worth remembering that in Brazil, although supra-individual actions have been disciplined for a long time, their effective use is recent.

The Judiciary, although it does not create new public policies that guarantee education, is capable of giving effect to existing social and economic policies, since they are not being fulfilled.

EDUCATIONAL LAW X PUBLIC BUDGET

COST OF RIGHTS THEORY

The theory of the cost of rights (SILVA, 2012) demonstrates that there are no negative rights and that their state budget resources are finite, thus there may be situations in which fundamental rights will not be realized. Its appearance was due to the reserve of the possible.

First, it has to be said that professors at Princeton and Chicago Universities, Stephen Holmes and Cass Sustein, respectively, developed the theory of the cost of rights. They even diagnosed that the rights of defense or negative actions demand the expenditure of public resources, otherwise citizens would not be able to enjoy private property or any other individual right in the way they do (FONTES; FONTES, 2015).

Defense rights or rights to negative actions need, as much as performance rights, social interaction as well as social cooperation and government funding. To this end, they adopted as their main target the distinction made between negative and positive rights (FONTES; FONTES, 2015).

The biggest question is precisely how to choose the best action, among those that demand costs? For example, what to choose? Increase the police apparatus or invest in the area of public health? Both choices will incur costs. It is precisely in defining these priorities that the existential minimum must always be considered. (HOLMES; SUNSTEIN, 1999).

According to Galdino, there is a great inequality between the norms that deal with fundamental rights in Brazil and the practice of verified distribution is brutally unfair, as it does not correspond to such predictions. Also according to the aforementioned author, the central object of study must be human or fundamental rights, in their understanding as subjective rights.

If we start from the thought that it is necessary to determine ways to define the norms that make up the legal system, we can say that fundamental rights are confused with the essential norm of recognition of other legal norms.

This way, a legal norm undergoes an examination of compatibility with the norms of fundamental rights. In this segment, as norms, fundamental rights would serve as a standard for the interpretation of other legal norms.

In Galdino's words:

> In terms of fundamental rights, considered as norms, the relevant legal effects derive directly from the very norms that consecrated them, with both active and passive unavailability in relation to legal situations that are understood to be constituted from the interpretation of norms. In this most relevant sense, it is stated here that fundamental rights are norms that constitute the legal title for the exercise of the corresponding fundamental subjective right, in line with principle, without the need for intermediation by legal acts or transactions, without prejudice, when it is the (exceptional) case of the indispensable legislative conformation, which is not to be confused with a legal transaction. (2005, p. 10).

According to Galdino (2005), Law would be a good channel for the relationship between ethics and economics. In his view, there would be three factors that compete for the Law to achieve this objective. First, Law is a model of examination guided by values, therefore, and dedicated to ethical reflections. Secondly, legal examinations are largely oriented towards rejecting insufficiency, through various techniques of (re)distribution of wealth and allocation of rights and resources. Finally, well-crafted legal concepts admit to be included in the considerations of economic analyses.

Galdino lectures:

> Before being an enemy or a mere ideological device for denial of rights, understanding the scarcity of resources - along with the correct understanding of the cost of rights - through cost-benefit analysis, means a means of converting the right into a powerful instrument of social transformation, also representing even a justification for the Law itself.(2005, p. 251).

The aforementioned author continues, saying that the worst solution that Law could imagine would be to try to absolutely assert its own rationality or its own premises and solutions over the others (such as affirming that Law must prevail over the economy), or even that some rationality must definitively prevail over the others, especially as the facts challenge these rationalities and their dominant paradigms.

Galdino instructed:

> It is important to know that administrative activity, especially managerial activity, is prospective and involves the most varied risks (financial, social, etc.) because the unplanned (or unintended) consequences and externalities, both positive and negative, are absolutely normal. In ongoing relationships, as seen above, changes in conditions and necessary adaptations are the rule, which means that legal regulation must be flexible. Notably in the case of political agents who make the most important strategic decisions of the public administration, including through the legislative form - usually prospective and increasingly based on economic rationality -, there is the possibility of unsatisfactory results. The eventual occurrence of failure cannot, in itself, be considered as an act of improbity, under penalty of making the exercise of these very relevant functions unfeasible. (2005, p. 255).

Finally, the aforementioned author teaches that Law can be the way to combine morally justified and economically efficient solutions. The efficiency model, in the light of ethics, is determined as a means of creating and

portraying reflective, responsible, morally justified and coherent public choices of citizens, thus expanding the qualities of the democratic process. That said, it defends a pragmatic theory of law and rights, which promotes an adequate cost-benefit analysis of legal measures, as far as possible before deciding them.

Still, the author presents an interesting reflection, saying that taking rights seriously and also and among other things - pragmatically including in the list of tragic choices that are made every day by people, the costs of rights, because, as I said, rights do not grow on trees (2005).

PRINCIPLE OF PUBLIC ADMINISTRATION EFFICIENCY

> The principle of efficiency has, in fact, two aspects: it can be considered in relation to the public agent's way of acting, from which the best possible performance of his attributions is expected, in order to achieve the best results; and in relation to the way of organizing, structuring, disciplining the Public Administration, also with the same objective of achieving the best results in the provision of public service (DI PIETRO, 2005, p.84).

The principle of efficiency requires that administrative activity be carried out with promptness, perfection and functional performance. It is the most modern principle of the administrative function, which is no longer content to be performed only legally, demanding positive results for the public service and satisfying the needs of the community and its members (MEIRELLES, 1999).

It also conceptualizes (MEIRELLES, 1999) that other changes promoted by Constitutional Amendment nº 19/98 are a result of the adoption of the principle of efficiency. This amendment provides for principles and rules of Public Administration, civil servants and political agents, control of public expenditures and finances and funding of activities under the responsibility of the Federal District.

The principle of efficiency came to be called a principle expressed from the constitutional amendment nº 19 of 1998 which included the caput of art. of the Magna Carta. The purpose of this principle is to provide society with the means to demand that the Public Administration ensure the highest quality of its acts. Thus, in the face of dissatisfaction, the individual may demand that the deficiency in the service provided be repaired.

In the words of the illustrious professor José dos Santos Carvalho Filho, the core of the principle is the search for productivity and economy and, what is more important, the requirement to reduce the waste of public money, which requires the execution of public services with promptness, perfection and functional performance. (2013)

According to Martins, the principle of efficiency was inserted in the Constitution with the aim of transforming the bureaucratic administration model into managerial administration, based on neoliberalism, a current of thought that defends the Minimum State, one in which its performance is restricted to essential areas. of social life.

Maria Sylvia di Pietro presents the argument used in the Master Plan for State Reform, to explain the objectives that it was intended to achieve

> To regain control of the State means improving not only the organization and personnel of the State, but also the finances and its entire institutional-legal system, in order to allow it to have a harmonious and positive relationship with civil society. The reform of the State will allow its strategic core to make more correct and effective decisions, and its service - both the exclusive and the competitive ones that will only be indirectly subordinated as they become public, non-state organizations - to operate

very efficiently. (di Pietro, Maria Sylvia. 1995, p. 73).

CONCLUSION

Given the importance of education in the formation of any person, the statement exposed in this work becomes vital for the construction of a more balanced society.

When analyzing the Brazilian social, political and legal reality, we can see the usual lack historically experienced in this area, due, among other reasons, to the insufficiency of public initiatives with the aim of establishing a substantial improvement in the quality and effectiveness of education in Brazil, but also the lack of efficiency on the part of the Public Power in implementing the existing laws and their guarantees.

This is reflected in the inexistence of a homogeneous and effective educational legal system, which overcomes the lack of a system that facilitates the resolution of conflicts involving questions that have a legal-pedagogical nature, that is, that deal with the right to education and its involvement in everyday life and relationships in student environments.

However, there are procedural instruments capable of supplying, albeit limitedly, claims of different species in the field of educational law. Of particular note are the so-called constitutional and collective actions, which aim to protect homogeneous diffuse, collective and individual interests.

Among the collective actions, the direct actions of constitutionality or unconstitutionality (ADC or ADIN), the allegation of breach of fundamental precept (ADPF), the collective writ of mandamus, the writ of injunction, the popular action, the public civil action and the direct interventional action, are indispensable instruments for the effectiveness of the constitutional guarantee of the right to education, as well as for the protection of supra-individual interests that encompass this theme.

The civil liability of the state for the violation of the right to education can be classified as subjective, when the harmful act practiced occurs as a result of a negligent or intentional act, or objective when it arises from a simple causal relationship between the fact and the effect it produces.

In addition, it can be classified as strict liability due to the complex state machine, in front of which the citizen is in a state of hypo-sufficient, thus making the relationship legally unequal.

The definition of the legal nature of the civil liability of the state is a subject that is still very controversial, mainly because it differs from the civil liability model applicable to any other legal entity, as it presents many distinctions.

Among the theories about the civil liability of the state, this work focused especially on the reserve of the possible, which served as the basis for the theory of the cost of rights. Such theories consider that the State is responsible to the extent that its budget is capable of meeting social demands.

However, if, on the one hand, the State is obliged to perform its obligations and is limited due to available resources, on the other hand, it must prioritize the needs demanded so that it always considers the existential minimum.

Therefore, this set of rights appears as the paradigm that must guide the definition of priority goals for the State budget. It contains, among the fundamental rights that compose it, the right to education, and hence the consequent responsibility of the State for its violation.

It is understood that the right to education is included in the concept of existential minimum according to its imperative

character in the constitution of a developed society, the exercise of citizenship and the political participation of the collectivity in this process.

In this sense, the Principle of State efficiency meets the existential minimum, so that it requires the State to implement constitutional rights and guarantees efficiently, in a way that achieves positive results for the public service and satisfactory to meet the needs of the population. and its members.

However, according to what was exposed in this work, the interest and individual initiative in this movement of consolidation of guarantees and fundamental rights are essential.

Since the State, in turn, has limited resources, which combined with other factors such as insufficient public policies that favor the realization of these rights and guarantees, corruption, among others, corroborate so that there is a proactive attitude on the part of interested parties. Nevertheless, the State remains responsible for the effectiveness of such rights.

Observing the Theory of the Cost of Rights, we realize that both the rights that require a benefit and those that do not depend on it, on the contrary, are effective with the abstention of the State, both demand public resources. Faced with this scenario, the question that arises lies in the choice of priority rights among which they constitute the so-called existential minimum.

We also understand that Law, as an instrument capable of promoting social equality, would be an appropriate means for the relationship between ethics and economics. This way, the Law would be the path capable of conjecturing morally justified and economically efficient solutions.

Once the Principle of Effectiveness of Public Administration emerges, there is the objective of giving society ways to demand that the Public Administration take care with greater dexterity of the fulfillment of its functions.

Consequently, the core of the aforementioned principle is the search for productivity and economy, in addition to the imposition of reducing waste of public money, which requires the execution of public services with promptness, perfection and functional performance.

Thus, it was demonstrated that the civil liability of the State for the violation of the Right to Education is conditioned by some factors that determine the stage in which the State's role as a provider of public services will be played.

Among the elements that form the guidelines that condition the action of the State, the order of priorities that will be established by the legislature when formulating the plans involving Education stands out.

However, despite having standards and plans that are sufficiently well designed and that meet, in principle, social demands, there is an enormous difference between the normative provisions that deal with the right to education in Brazil and the practice of applicability and distribution of investments by of State.

However, despite the great disparities between the real and the ideal, with regard to the realization of the right to education, the Brazilian citizen has, in the institutes that make up the so-called collective actions, instruments capable of effecting such a constitutional guarantee.

REFERENCES

BARCELLOS, Ana Paula de. *A eficácia jurídica dos princípios constitucionais: o princípio da dignidade da pessoa humana*. Rio de Janeiro: Renovar, 2002.

BOAVENTURA, Edivaldo Machado. *Aspectos juspedagógicos da educação*. *Anais do II Seminário Nacional de Direito Educacional – Educação brasileira no século XXI:* Perspectivas e transformações, 17 e 18 de setembro de 2004, São Paulo: Centro de Extensão Universitária.

CURY, Carlos Roberto Jamil. *Legislação Educacional Brasileira*. Rio de Janeiro: DP & A, 2000.

DI DIO, Renato Alberto Teodoro. *Contribuição à sistematização do Direito Educacional.* Tese de livre docência. São Paulo. Faculdade de Educação – USP,1981.

DI PIETRO, Maria Sylvia Zanella. *Direito Administrativo*. 11. ed. São Paulo. Editora Atlas, 1999.

FLACH, Simone de Fátima.*Direito à Educação e Obrigatoriedade Escolar no Brasil: Entre a Previsão Legal e Realidade.* Artigo. Disponível em: <.*www.histedbr.fe.unicamp.br/revista/edicoes/43/art20_43.pdf*>Acesso em: 22 out. 2015.

FONTES, Grazielly dos Anjos; FONTES, Karolina dos Anjos. *O Principio da Eficiência Administrativa e a Teoria dos Custos dos Direitos Fundamentais: A Atuação Estatal diante da limitação de recursos financeiros*. Disponível em: < www.publicadireito.com.br/conpedi/manaus/arquivos/anais/.../2725.pdf> Acesso em: 17 out. 2015.

GALDINO, Flávio. *Introdução à teoria dos custos dos direitos – direitos não nascem em árvores*. Rio de Janeiro: Renovar, 2005

GUIMARÃES, Alexandre José. *A educação como Direito Fundamental: efetivação por meio da ação coletiva na Constituição de 1988*. Artigo. Site Jus Navigandi. Disponível em:<http://jus.com.br/artigos/31829/a-educacao-como-direitofundamental-efetivacao-por-meio-da-acao-coletiva-na-constituicao-de-1988/2 >. Acessado em: 20 jun. 2015.

HOLMES, Stephen; SUNSTEIN, Cass. *The cost of rights: why liberty depends on taxes*. New York: W.W. Norton & Company, 1999.

JOAQUIM, Nelson. *Direito Educacional Brasileiro: História, Teoria e Prática*. 1. ed. Rio de Janeiro: Livre expressão, 2009.

FILHO, José dos Santos Carvalho. 2013. *Manual de Direito Administrativo.* 26. ed.

MARTINS, Cristiane Fortes Nunes. *O Princípio da Eficiência na Administração Pública*. Disponível em < http://www.faete.edu.br/revista/artigocristiane.pdf> 28 ago. 2015.

MEIRELLES, Hely Lopes. *Direito Administrativo*.11. ed. São Paulo. Malheiros, 1999.

MELLO, Celso Antônio Bandeira de. *Curso de Direito Administrativo.* 29. ed. São Paulo: Malheiros, 2012.

MOTTA, Elias Oliveira. *Direito Educacional e educação no Século XXI.* Brasília: Unesco, 1997.

NOVELINO, Marcelo. *Manual de Direito Constitucional.* 8. ed. São Paulo: Método, 2013.

REISSINGER, Simone. *Reflexões sobre a efetividade dos Direitos Fundamentais Sociais*. Disponível em: <www.publicadireito.com.br/conpedi/manaus/.../simone_reissinger.pdf>. Acesso em: 12/05/2015.

SARLET, Ingo Wolfgang; FIGUEIREDO, Mariana Filchtiner. *Reserva do Possível, Mínimo existencial e Direito à saúde.* 2008. Revista de Doutrina TRF4. Disponível em:<http://www.revistadoutrina.trf4.jus.br/index.htm?http://www.revistadoutrina.trf4.jus.br/artigos/edicao024/ingo_mariana.html> acesso em: 08 nov. 2015.

SILVA, Liliane Coelho da. *Reserva do possível, orçamento e direitos fundamentais.* 2012. Disponível em: <http://jus.com.br/artigos/21850/reserva-do-possivel-orcamento-e-direitos-fundamentais >. Acesso em: 18 out. 2015.

SCHREIBER, Anderson. *Novas Tendências da Responsabilidade Civil Brasileira.* 2005. Disponível em: <www.andersonschreiber.com.br/novas_tendencias_da_responsabilidadecivilbrasielira>. Acesso e*m: 17 out. 2015.*

VILANOVA, Lourival. *O direito educacional como possível ramo da ciência jurídica.* Mensagem. Revista do Conselho de Educação do Ceará. Fortaleza: 1982-83.

ANNEX A

STJ - ORDINARY APPEAL IN WORD OF WAITING: RMS 38415 SP 2012/0129655-9

CONSTITUTIONAL. ADMINISTRATIVE. ARTICLE 153 OF THE STATUTE OF CHILDREN AND ADOLESCENTS. RIGHT TO EDUCATION. Administrative action of the Court of Childhood and Youth. Possibility. Ordinary appeal not provided.
(STJ - RMS: 38415 SP 2012/0129655-9, Rapporteur: Minister ARI PARGENDLER, Judgment Date: 11/27/2012, T1 - FIRST PANEL, Publication Date: DJe 12/03/2012)

ANNEX B

STF - AG.REG. IN EXTRAORDINARY APPEAL WITH INTERLOCUTORY: ARE 850154 RS INTERLOCUTORY APPEAL IN THE EXTRAORDINARY APPEAL WITH INTERLOCUTORY. ADMINISTRATIVE. RIGHT TO EDUCATION. WITH SPECIAL NEEDS. HIRING A MONITOR TO ASSIST IN SCHOOL ACTIVITIES. INABILITY TO ANALYZE INFRACONSTITUTIONAL LEGISLATION AND REVIEW EVIDENCE. SUMMARY N. 279 OF THE SUPREME FEDERAL COURT. REGIMENTARY APPEAL WHICH IS DENIED.

(STF - ARE: 850154 RS, Rapporteur: Min. CÁRMEN LÚCIA, Judgment Date: 02/24/2015, Second Panel, Publication Date: ELECTRONIC JUDGMENT DJe-042 DISCLOSED 03-04-2015 PUBLIC 03-05-2015)

ANNEX C

Quadro 1 - Organização das decisões por categorias e temas

Categorias	Temas
Acesso à educação básica **284 decisões**	Acesso à educação infantil
	Acesso ao ensino fundamental
	Acesso ao ensino médio
	Acesso à Educação de Jovens e Adultos (EJA)
	Acesso à educação profissional
	Acesso à educação especial
Permanência **36 decisões**	Violação às normas escolares
	Cancelamento de matrícula em curso de língua estrangeira
	Evasão escolar
Responsabilidade estatal **35 decisões**	Transporte
	Ações de reparação de danos
	Condições de funcionamento das escolas
Poder de regulação estatal **67 decisões**	Mensalidade escolar
	Autorização/credenciamento
Decisões administrativas e políticas **36 decisões**	Competência para legislar
	Reorganização das escolas estaduais
	Municipalização
	Fechamento de creche no período de férias
Gestão dos recursos públicos **14 decisões**	Aplicação mínima de recursos
	Fundo de Manutenção e Desenvolvimento do Ensino Fundamental e de Valorização do Magistério (FUNDEF)
	Contratos
	Repasse de recursos públicos às instituições privadas
Deveres dos pais **11 decisões**	Responsabilidade dos pais e responsáveis

Fonte: Decisões do Tribunal de Justiça de São Paulo (a partir de documentos contidos em São Paulo, 2002 e *Jurisprudência do Tribunal de Justiça de São Paulo*).
Elaboração da autora.