



## **Human rights, education and sustainable development**

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#### ABSTRACT

The right to education plays a central role in the development of contemporary societies, we cannot speak of sustainable development apart from the civilizing standards promoted by education. Thus, considering the importance of the theme, this work will focus on the effectiveness of this right in the Brazilian legal system, which will be done through a case study related to the judgment issued in the records of Extraordinary Appeal 1.008.166/SC. Specifically, it will seek to address the issue within the logic of human rights, the 2030 Agenda and the legal provisions established in the Brazilian legal order. The methodology used, therefore, will be the case study, with contributions in the bibliographical research. The relevance of the theme lies in the need to promote the realization of the fundamental right to education, especially basic education. The results obtained with the research revealed the importance and essentiality of this right, which does not have a merely programmatic content and affirms itself as a norm of full effectiveness and direct and immediate applicability. Finally, this work contributes to the understanding of the fundamental right to education from the theoretical and practical point of view.

**KEYWORDS:** Human rights. Development. Education.

#### 1 INTRODUCTION

The current constitutional order, established by the Federal Constitution of 1988, represented the resumption of democracy as the Brazilian State's ideology. This transformation was important to overcome the previous dictatorial regime, bringing the social constitutionalism, also known as neo constitutionalism, in Brazil's legal scenario. More than a paper, the citizen's charter implied a rereading of the pre-existing normative system, realized based on fundamental rights.

The re-democratization process intensified the attention directed towards the concretization of fundamental rights. Among them stands out, in the field of the constitutional text, the right to education, that was contemplated with dignity and special highlight.

It's important emphasize that concerns related to the implementation of fundamental rights in the internal scenario are influenced directly by debates in the international constitutionalism scope. Brazil is signatory of several documents and treaties that address social, cultural, and economic rights. In this context, is highlighted, for this article's purposes, the 2030's Agenda, a *soft law* standard that showcases significant correlation with the discussions held in the Brazilian context regarding collective demands, geared to the implementation of the educational rights.

The Brazilian reality, though, is challenging. Successive economic and political crisis have affected the executive and legislative powers capacity of meeting social requirements, especially in the concretization of social rights.

In the presented context, the judicial power takes on the responsibility of deliberating about the crucial issues related to the educational right's implementation. Among various uttered decisions, it's highlighted the Extraordinary Resource (RE) 1.008.166/SC, that refers the 548's theme of general repercussion, that settled the State's constitutional duty of guaranteeing access to kindergarten and pre-school to children up to 5 (five) years, based on

the comprehension that basic education in all its stages (pre-school, elementary school and high school) constitutes a fundamental right of direct and immediate application.

Seeing the importance and relevance of the question debated in the referred decision, the present article will analyze the 2030's Agenda and United Nations' dialog and the fundamental rights' effectuation.

## **2 OBJECTIVES**

The present proposal's general objective is studying the Extraordinary Resource 1.008.166/SC, upon analysis of the legal foundations that were used as support for the decision. In particular, dedicate to the human rights and fundamental rights concepts, with special attention to its essential elements and the interconnection with the constitutional order both internal and external. The investigation of 2030's Agenda and its impacts on national dialogs about the realization of fundamental rights proceeds. Lastly, examining the educational right's normalization in the Brazilian legislation and its effective fulfillment.

## **3 METODOLOGY**

The present seminary aims to develop a case study, with special focus in the educational fundamental right effectuation. To the understanding of the topic, with the systematization adequate execution, ordination, and interpretation of the collected information, initially it will be applied the bibliographical research technique, also known as secondary source research. This section of the article will allow the identification of informational sources trough literary revision, encompassing books and periodic publications. In the subsequent stages, the analysis of the ruling emitted during the Extraordinary Resources (RE) 1.008.166/SC's judgment.

This is about the research of an applied nature, that seek actively producing knowledge geared towards the practical reality, striving outlining the adopted parameters and foundations to the analyzed juridical decision's utterance. The scientific method applied is the inductive, insofar as the judicial decision analysis already specified to the comprehension of the juridical fundaments contained therein will be realized.

## **4 RESULTS**

### **4.1 Human Rights and Constitutionalism**

The legal discussions of the XXI' century give the human rights centrality, adopted the avant-garde position in the edification of a global society focused on the human development in its multiple's capabilities. It is important to elucidate that the term “human rights” denotes a concept shaped throughout history and intertwined with the society's development.

Initially, it's important to highlight that, due to the amplitude and the divergences related to the human rights conceptualization, it becomes necessary fixate, since the beginning the sense of meaning that will be adopted in this context. Thus, with the support in the conceptualization proposed by Sarlet (2012, p.18), it's possible establish distinctions between the expressions human rights and fundamental rights.

To the author, while the first are attributes recognized by documents of international laws, the last are the ones that were recognized and positivized in certain State's constitutional laws. To Bonifacio (2008, p.93) whether in internal judicial order, whether in the international judicial order, the fundamental rights project themselves identically and such understanding could not be different, once that fundamental rights also are human rights that were positivized, i.e., represent an internal juridical projection of the human rights.

To Jürgen Habermas (2002, p. 213) the human rights, in its modern sense, reassemble the declarations formulated with base in the political philosophy of rational rights, especially in John Locke's and Jean-Jacques Rousseau's, namely, the *Virginia Bill of Rights*, the 1776's United States of America Declaration of Independency and the 1789's *Déclaration des Droits de l'Homme et du Citoyen*. It's no surprise that the human rights only assume a tangible feature in the first constitutions, more precisely, as fundamental rights guaranteed in the national juridical orders.

The human rights have its roots in the scenario of development marked by liberal revolutions. These, imbued in the illuminist philosophy and in the crescent constitutionalist movement, opposed to the absolutism that then prevailed.

Daniel Sarmento (2010, p. 38) defends that the liberal doctrine of human's rights articulated in two different systems to the protection of the human liberty. To the private relationships, the Civic Code performed a central role, regulating relations between privates in compliance with general rules understood as, supposedly, immutable, once that founded in postulates of the jus naturalist's rationalism. The second system of rights protection was the applicable to the relationships between the State and the individual.

In this stage of the constitutionalism development, the fundamental rights concentrated in the safeguard of the individual, establishing clear boundaries to the States actions in relation to the citizens (SARMENTO, 2010, p. 38). In this context, the supremacy of the relationships between public and private consolidates, favoring the individual above the group and the State.

The liberal constitutionalism conception, in this way, it's marked by the individualism values, government absenteeism, private propriety valorization and protection of the individual. The concept o dignity present in the illuminist discourse reflects exactly these values. Despite the apparent abstraction and universality of the speech, the liberal ideals aligned to the bourgeois man, occidental, white, christian, and heterosexual (SARMENTO, 2016, p. 323). In other words, reflected the interests of the political group that was rising to power, supplanting the old statements of the cleric and the bourgeoisie that previously held the dominion.

As the historical process advanced and transformations occurred in the transition of the XIX century to the XX, especially with the progress of the industrial revolution and the movements of a socialist nature fights, the later liberal state was revealed insufficient to attend the social demands. Progressively, became more unequal and prone to the income concentration, culminating in the instauration of the Liberal State Crisis in the first half of the XX century. To Paulo Bonavides (2010, p. 231), all the constitutional system composed by the juridical science of the XIX century, of liberal orientation and underlined by its apparent strength, entered a crisis, and collapsed. The former dual picture between State and Society erected by liberalism collapsed and was replaced by the absorption of the Society by the State, i.e., by the politicization of all Society. The peak of this crisis comes documented by the Weimar’s Constitution (BONAVIDES, 2010, p. 231).

To Daniel Sarmiento (2010, p. 42), the liberal state’s crisis forecasted the necessity of adopting a new posture before the imposed reality, with important criticism to the classic liberalism, starting from Marxist authors and the Church’s social doctrine. Emerged from this context the Social State, no longer restricted to the mere guarantee of non-intervention in the people’s individual private sphere. The focus becomes the search for social well-being, in a vision directed to material equality of the citizens, ineffective the mere assurance of formal equality spread by liberalism.

According to Barroso (2015, p. 417), the new constitutional right’s historical mark, by him named neo constitutionalism, in the continental Europe, occurred during the post-war’s constitutionalism, notably in Germany and Italy. In the Brazilian context, this mark was established by the 1988’s Constitution and by the re-democratization, in which it performed a crucial role. The philosophical fundament of the new constitutional right is identified in the post-positivism (BARROSO, 2015, p. 418).

In the XXI century, the contemporaneous constitutionalism emerged under a logic aimed to the preservation and progress guarantee of the Democratic Rule of Law, with renewed concerns regarding the concretization of fundamental right, both in the internal and external spheres. According to Daniel Sarmiento (2010, p. 81-82), if the liberal constitutionalism represented basically a doctrine of statal power containment, the neo constitutionalism, is far more ambitious in its project, once that intends to spread the humanitarian ideals present in the constitutional texts to all the positive legislation.

Before this scenario of social transformations in constant evolution, appears the pressing challenge of concretize the fundamental educational right, especially in the basic level. This is due to, not only its acknowledgment in the international sphere, but also to its regimentation in the Brazilian legislation. To face this challenge, it becomes imperative that the Brazilian State act effectively, going beyond of mere right’s comprehension constitutionally guaranteed as formal commitments assumed by the legislator.

#### **4.2 The 2030’s Agenda**

Whilst an integral member of the United Nations (UN), Brazil has been performing an important role in the articulation of the international order. Among the relevant commitments assumed, it's worth highlighting here the denominated 2030's Agenda. Though what would be the nature of relevance of an “agenda” to the Brazilian internal legislative order?

Firstly, it's relevant enlighten that the agenda's commitments are norms of *soft law* that, although don't achieve the status of judicial order of binding nature, constitutes moral obligation to the States, acting on to distinct purposes. The first is establishing goals to orientate future political actions in the international relations. The second is recommending to the States an adaptation of its internal laws according to the international rules established by the *soft law* (MAZZOULI, 2020, p. 1426).

For the purposes of this seminary, is relevant emphasize that at the turn of the XX century to the XXI, the United Nations General Assembly (UN) acknowledged in the Resolution A/55/L.2, referring to the *United Nations Millennium Declaration*, adopted in 2000's September 8, the existence of Millennium Development Goals (MGDs). The objective's consecution and improvement should be undertaken jointly by the international community and by the States, established in 2015 as a way of achieving these goals.

With the expiration of the deadline to the accomplishment of the millennium development goals, the General Assembly of the United Nations (UN) proposed a new set of goals through de Resolution 70/1, titled “Transforming Our World: the 2030's Agenda to Sustainable Development”. It was defined a comprehensive range of 169 goals organized in 17 objectives of Sustainable Development (SDGs) (United Nations, 2015) (ACCIOLY; SILVA; CASELLA, 2019, p. 258). This new set of objectives delineated an updated vision to the development, oriented by a sustainable perspective.

Specifically, the universal access to kindergarten and pre-school, are encompassed in the 4.2 goal, *in verbis* “Until 2030, guarantee that all the boys and girls have access to a quality development in the early childhood, care and pre-scholar education, in such way that they will be ready to the primary education”. In general, the right to education can still be contemplated in Objective 1 (Eradicate the poverty in all its forms, in all places); Objective 4 (Ensure inclusive, equal and quality education, and promote opportunities throughout life to everyone); Objective 5 (Achieve gender equality and empower all women and girls); Objective 10 (Reduce inequality within and between countries) and in the Objective 16 (Promote pacific and inclusive societies to the sustainable development, provide access to justice for all and build efficient, responsible and inclusive institutions in all levels).

### **4.3 The educational rights in the Brazilian judicial order**

Although it isn't this article's intention address the complex and divergent evaluations about globalization, is relevant observe that this phenomenon has been identified an intricate division of the work in a global scale, what is accompanied by a vertiginous



restructuring of companies, as well as national economies, and the increase of reciprocal economic dependence.

The recent economic global integration is represented and managed by the International Monetary Fund (IMF) new influential centers, World Trade Organization (WTO), Organization for Economic Cooperation and Development (OECD) and Mundial Bank. With the support of these institutions, the Occident implements its economic models in the societies of the so called Third World (MÜLLER, 2021, p. 101).

In the current development state of the liberal-capitalist order, education emerges as a necessary requirement and the most effective way to the development of a society. In the Brazilian Constitutional Order, the education, conceived as right of all and duty of the State, earns constitutional status<sup>1</sup> renewed with the enactment of the 1988's Federal Constitution and expressly foreseen in general form in the art. 6º of the alluded norm.

The constituent power conferred special importance to the matter, dedicating the whole Section I, Chapter III, of Title VIII (of the Social Order) to the educational thematic. Beyond these dispositions, the constitutional text brings throughout its content various others, the following can be mentioned, art.23, V, of the Magna Carta, that specifies as being of common competence of the Union, the States, the Federal District, and the Municipalities provide, among others, the means of accessing education.

Nonetheless, the thematic amplitude, interests in this article the detailed treatment of the basic education right (pre-school, elementary school, and high school), notably of the assistance of children in kindergartens and pre-scholar environments.

Are revealed of utmost importance, regarding the matter under consideration, the enshrined positions in the Constitution's art. 208, which delineates the means to the State's performance of duty to the education. In this context, the incision I of this dispositive establishes the basic education's obligation and gratuity for individuals of 4 (four) to 17 (seventeen) years, guaranteeing to everyone the rights to free of charge offer if it's not possible the access in the appropriate age. For its part, the incision IV stipulates the State's responsibility of ensuring the access to infantile education, covering kindergarten and pre-school to children up to 5 (five) years.

The constitutional text disposes specifically in the art. 211, § 2º, that the Municipalities will be the responsible entities for acting, with priorities, in the elementary education and the infantile education. In this sense, the 1988's Federal Constitution's art. 30, IV, still disposes that it's of those entities' competence the maintenance of the early childhood and elementary education programs, upon cooperation technical and financial of the Union and the State.

The Statute of Children and Adolescents (SCA – Law nº 8.069/1990) also deals with the educational rights. In more specific terms, the art. 53 of the legislation ensures the right to

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<sup>1</sup> Although education was also addressed in the Federal Constitution of 1967, especially in its Article 168, it was only with the promulgation of the Federal Constitution of 1988, amidst the process of democratization in Brazil, that this right began to be approached in a more comprehensive manner.

education for children and adolescents, seeking the whole development of those individuals, the practice of citizenship, and work preparation. The same dispositive ensures in its first incision the “equality of conditions to the scholar access and permanence”. Lastly, it’s important to mention that the incision V explicitly deals with the access to public and free of charge schools, demanding the real viability of the child’s entrance in the educational institution. This access must be particularly easier through the offering of establishments near their residency, with guarantee of vacancies to siblings that are in the same learning stage or cycle in the basic education in the referenced institution.

In disposition that flows the same way, the art. 54, incisions I, II and IV, of the SCA treats the assurance of access to the elementary school, obligatory and free of charge for children and adolescents, including those that didn’t have access to it in the proper age (incision I), in accordance with the established by the 1988’s Federal Constitution. Moreover, foresees the progressive extension of the obligation and gratuity of the high school (incision II) and fixates, in the incision IV, the attendance in kindergartens and pre-schools to children of 0 (zero) to 5 (five) years.

There are no doubts about the importance of education, especially in the actual panorama in which the contemporaneous society find itself, permeated by the technical-scientific-informational environment. The utilization of new disruptive technologies, above all the 5G, the artificial intelligence, and the recent informational technologies, have unleashed profound transformations in various aspects of the human life, from the reconfiguration of the labor market to the new ways of interaction in the social medias.

Within this framework, the right to education is an essential condition to the economic progress and the emancipation of a society. This education must not be limited to a privileged social group, but be accessible to everyone, seeking the construction of a genuinely free, fair, and solidary society.

#### **4.4 Of the judgement of the Extraordinary Resource 1.008.166/SC**

The case under analysis refers to the Extraordinary Resource 1.008.166/SC. The litigation was originated by the Security Mandate impelled by the Santa Catarina’s Public Ministry, facing the Santa Catarina’s State Court, with the objective of register impuberate minor in a kindergarten integrated in the public network in the Criciúma/SC’s Municipality.

The Court of First Instance conceded the safety and determined that the referred municipality provided the inclusion of the minor in an infantile education establishment located near their residence.

Unsatisfied, the Criciúma’s Municipality interposed an appeal facing the Santa Catarina/SC’s Court of Justice sustaining, in summary, that the decision of the Court of First Instance violated its own principles of legality and separation of powers. Moreover, argued that the promotion of infantile education it’s of programmatic nature, in these terms, its execution should be effective inside the budgetary limits to which the public power is



submitted. When considering the appeal, the High Court of Santa Catarina denied provision to the interposed appealing resource.

The Municipality of Criciúma handled the interposition of new resource, this time Extraordinary Resource, defending the general repercussion of the the me, raising, in summary, the following arguments: 1. The judicial determination to immediate inclusion of a child in an infantile educational establishment violates the dispositions contained in the 1988’s Federal Constitution, once that obligates the municipal entity to act disaccording to the principle of strict legality; 2. The maintenance of the recurred decision represents economic burden to the Municipality that would be used as precedent to other judicial orders, putting at risk other essential activities of municipal competence and collective interest; 3. The judiciary cannot interfere in the monetary decisions of the public gestor in favor of the service of individual interests of some of the beneficiaries of the infantile educational system and in disfavor of priority investments of general and impersonal character; 4. The right to infantile educational right is conditioned to the social and economic politics, in these terms, any intervention of the State must be effective in the measure of its structural possibilities, as well as the financial.

In the reasons to the extreme appeal, the Municipality sustained that the 1988’s Federal Constitution only guarantees obligation of the elementary school. Moreover, stated that the ruling impugned directly violated the arts. 2º e 37 of the Citizen’s Chart.

Though the original court denied the follow-up of the extraordinary resource, by the understanding that the resource an obstacle in the Abstracts 282 and 283 of the STF, in May 24<sup>th</sup> of 2021, the Supreme Federal Court (STF) gave allowance and interlocutory appeal lodged by the aforementioned Municipality and determined the reauthorization of the extraordinary resource, with posterior knowledge of the general repercussion.

The resource was judged by the STF’s Plenary, it fell to the Rapporteur Minister Luiz Fux, that denied provision to the extraordinary resource interposed by the Municipality of Criciúma and confirmed the ruling prolated by the Third Chamber of Public Law of the Court of Justice of the State of Santa Catarina, to settle the duty of the referred municipal entity of effectuating the child’s matriculation in an infantile educational establishment near their residence. In the opportunity, the minister proposed the general repercussion thesis fixation (theme 548) delineated as: “The Public Administration by judicial decision must matriculate children of zero to five years in public kindergartens or pre-schools as long as there is evidence of prior administrative request not complied within a reasonable period of time and of financial incapability of the petitioner of bearing the corresponding costs” (BRASIL, 2022, p. 31).

The Minister Luís Edson Fachin, also denied the provision to the extraordinary resource, proposed the following thesis: “it’s subjective right and simultaneously duty of the State the attendance in pre-schools and kindergartens to children from zero to five years” (BRASIL, 2022, p. 152).

The Ministers Nunes Marques, Alexandre de Moraes; Dias Toffoli; Luís Roberto Barroso; Cármen Lúcia; Ricardo Lewandowski; Gilmar Mendes and Rosa Weber also denied the provision to the extraordinary resource.

The Minister André Mendonça opened divergency in his vote, seeing that recognized the extraordinary resource to, according to the Court a qui for re-examination of what was done. In the opportunity, also formulated the following thesis proposal (BRASIL, 2022, P. 52):

It's the States duty, constitutionally obligated, ensuring the universal access to infantile education, in kindergarten and pre-school, the children up to 5 (five) years. This obligation must be fulfilled: a) immediately, to all the 04 year old kids; b) gradually, according with the National Educational Plan — PNE, guaranteeing the offering of vacations equal to, at least, 50% of the demand until 2024, to children up to 03 years; Stated the non-application of the minimal budgetary percentual, as well as the non-compliance of any other legal or constitutional obligation related to the public educational politic by the entity. The obligation of universalization of attendance to infantile education becomes immediate.

By the end, the Supreme Federal Court, when appreciating the Theme 548, by majority, denied provision to the extraordinary resource, in the terms of the Reporting Minister's vote, won in part, the Minister André Mendonça. The STF's Plenary deliberated the fixation of the thesis in the following terms:

1. The basic education in all its phases — infantile education, elementary education, and high school — constitutes fundamental rights of all the children and youth, ensured by constitutional laws of total efficacy and direct and immediate applicability. 2. The infantile education comprehends kindergarten (from zero to 3 years) and the pre-school (from 4 to 5 years). Its offer by the Public Power may be individually required, like in the examined case in this process. 3. The Public Power holds the judicial duty of integrally effectuating to the constitutional norms about the access to basic education.

Important observations can be obtained through the items of the fixated thesis. Relatively to item 1, the Supreme Court considered that the basic education, in all its instances (infantile, elementary, and high school), are fundamental rights of all children and young people.

The second item relates directly to the right's demandability facing the State. It's possible to observe that the STF beyond fixating the range and contends of the concept of infantile education (kindergarten to children from zero to 3 years and pre-school to kids from 4 to 5 years), settled the citizen's faculty of demanding these rights individually. This does not exclude, obviously, the possibility of proposing collective demands, in the terms of the legislation in vigor.

The last item implies the rejection of the thesis that the right to basic education it's a mere programmatic norm. To Mendes and Branco (2018, p. 106) these norms impose a duty to the public powers, i.e., give them an activity or prescribe a future action<sup>2</sup>. To the referred Minister, an example of programmatic norm in the Brazilian constitutional text would be the art. 3º, I, that imposes as fundamental objective of the Republic “build a free, fair, and solidary society”. Thus, being a total efficacy norm, the right to basic education is norm of direct and immediate applicability.

Lastly, it's necessary punctuate the importance assumed by the compromise originated by the 2030's Agenda in the STF' scope. In the exposed judgement, the Reporting Minister (BRASIL, 2022, p. 14) as well as the Ministers Luís Edson Fachin (BRASIL, 2022, P. 134) and Ricardo Lewandowski (BRASIL, 2020, p. 188) realized the express remission of the pledged commitments in the referred agenda. With effect, it's impossible discuss the sustainable development without considering educational politics, once that these are intimately intertwined to the access to education in its wider meanings. This link becomes much more evident while abording the basic education, a crucial step in the process of a citizen's formation.

## 5 CONCLUSION

To achieve the truly free, fair, and solidary society, so wished by Brazil in the XXI century and solemnly proclaimed in its constitutional text (art. 3º, I, of the 1988's FC), will only concretize in a reality in which the fundamental rights are effectively realized. The constitutional text does not resume into a simple piece of paper, it consecrates rights and values that must be effectuated.

The effectuation of the educational right, notably of the basic education in all its phases (kindergarten, elementary, and high school), it's demand of the utmost priority to the future development of the Brazilian society, not only economically, but also emancipatory and allied to the protection and defense of the environment and the human rights.

In this scope it's possible to affirm that only with the Brazilian State's acting the full access and subsequent universalization of the basic education, in respect to it's public and free of charge offer, can be ensured. The State, supported by the subjective public right, must not only ensure the right to education, but also, primordially, provide the necessary means to

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2 In a more detailed definition, the Portuguese jurist Jorge Miranda (p. 244-245) considers that “programmatic norms have deferred application, rather than immediate application or execution; more than rule commands, they articulate value commands; they provide elasticity to the constitutional framework; their primary - though not exclusive - addressee is the legislator, whose discretion determines the timing and means by which they acquire full effectiveness; they do not allow citizens or any citizens to invoke them (immediately after the Constitution takes effect), requesting the courts to enforce them solely by themselves, which leads some to assert that the rights contained in them, especially social rights, have more the nature of expectations than true subjective rights; they often appear accompanied by indeterminate or partially indeterminate concepts”.

guaranteeing this right, including the offer of vacancies in kindergarten and schools, as established in the legislation.

In conclusion, we can adduct that the decision adopted in the judgement of the Extraordinary Resource 1.008.166/SC reveals itself coherent with the advance of the fulfillment of the fundamental rights in the educational area. It cannot be left without punctuating that the decision, in its nature, will orient the decision making process of other magistrates and public agents, serving as an important beacon to the implementation of the right to basic education and contributing to the materialization of the Sustainable Development Goals (SDGs) established by the 2030's Agenda.

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