Brazilian Supreme Court, judicial self-restraint, and educational policy: the homeschooling case (RE 888815)

Supremo Tribunal Federal, autorrestrição judicial e política educacional: o caso do homeschooling (RE 888815)

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1. Introduction

In 2018, the duty to solve a constitutional dispute related to a relevant issue of educational public policy came to the Brazilian Supreme Court (STF): the hypothesis that parents of a child could (or not) choose to not enroll her in a school and to educate her in the family environment (the practice of *homeschooling*) against the interests of the public officers, which denied permission and required a link to the formal education system, whether by

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a public or private institution. The parents' lawyers argued - in their appeal to the Supreme Court - that the denial act was against the provisions of the Brazilian Federal Constitution (articles 5, VI; 205; 206, II, III, IV; 208; 210; 214; 226; 227 and 229) by simply restricting the meaning of the word "educate" to formal instruction in a conventional educational institution. They also added to their arguments that the denial by the municipal education department would violate educational freedom, pluralism of pedagogical concepts, and family autonomy.

Conversely, the education department of the municipality of Canela (RS), the Federal Union and the Attorney General's Office (*Procuradoria Geral da República - PGR*) claimed that: a) the Federal Constitution imposes mandatory formal basic education; b) students not enrolled in schools are deprived of basic elements of socialization and the pedagogical processes proper to the school environment, an appropriate place for the development of tolerance, solidarity, and ethics; c) in short, that schooling is the pedagogical standard adopted by the Constitution.

Several entities acted as amicus curiae (Federal Union, the National Association of Home Education - ANED, the Conservative Institute of Brasilia, and the States of Acre, Alagoas, Amazonas, Goiás, Espírito Santo, Maranhão, Mato Grosso, Mato Grosso do Sul, Minas Gerais, Paraíba, Pernambuco, Piauí, Rio de Janeiro, Rio Grande do Norte, Rio Grande do Sul, Rondônia, Santa Catarina, São Paulo, Sergipe and the Federal District) defending technical, political and legal positions and arguments, respectively, against or in favor, of the intention to declare (or not) the constitutionality of home education.

Since the year 2016, all other lawsuits in Brazilian territory that dealt with the matter related to home education were suspended, awaiting the decision to be rendered in the aforementioned precedent (RE 888815) to define the future of all other claims of the same nature.

From then on, the task of the Justices of the Brazilian Supreme Court in their role as arbitrators of a constitutional conflict was to decide which is the proper interpretation of the Brazilian Federal Constitution, in terms of educational policy, defining which position was under the constitutional order.

However, a peculiar characteristic of that judgment deserves to be highlighted: despite relevant information on educational public policies brought by both litigants and the vast technical-legal experience of the Justices, in the decision-making process carried out there, the judicial behavior characterized as judicial self-restraint stood out, in which elements external to

the constitutional technique (e.g., personal preferences, common sense, and infra-constitutional rules) underpin decisions in situations where there are decision-making costs in addressing the strictly constitutional issue.

In this context, it is relevant to understand how the Brazilian Supreme Court's Justices use the decision-making strategy of judicial self-restraint in public policy disputes.

Judicial self-restraint is a strategy whose fundamental premise sustain that, if possible, any Supreme Court should avoid ruling on constitutional issues, and resolve the cases before them on other (usually statutory) grounds to avoid the hard constitutional questions that would come with the other interpretation.

When asked to decide on the constitutionality of homeschooling plans (RE888815), the Brazilian Supreme Court Justices entered a debate involving various aspects of the educational public policy cycle, moving away from the strictly constitutional issue. This research qualitatively analyzed this case, notably through content analysis tools, to verify how the judicial self-restraint strategy was used in the judgment of a relevant educational public policy issue.

2. Brazilian education constitucional policy

No campo da teoria democrática, costuma-se afirmar que a noção genérica de democracia não é suficiente para evidenciar quais elementos estão presentes para que dada prática seja considerada democrática. Nesse sentido, faz-se necessária a utilização de um qualificador, de modo a complementar e especificar a qual modelo de democracia se faz referência.

The fundamental rights expressly provided by the Brazilian constitutional rule were standardized to enable the State to take positive actions to promote and guarantee the effectiveness of those indispensable rights. Historically, the community and State concern to guarantee the existential *minimum* to the human being started to influence the amendment of the national constitutional diplomas and the promulgation of international conventions to expressly safeguard social rights[1] .

The constitutionalization of social fundamental rights results from the need to guarantee individuals an existential-material foundation, humanly

1 ALCALÀ, 2011.

worthy, in the economic, social, and cultural plan[2]. While the economic rights have an institutional nature, constituting as a public policy to be pursued in the market to achieve certain social objectives, the actual social constitutional rights behave as a kind of personal protection, conducting personal subjective or community experiences, that demand positive public policies[3].

In Brazil, the constitutional right to education aims at the full development of the person, the preparation of the one for the exercise of citizenship, and the qualification of the individual for work. In this way, education is a fundamental right of a social character, insofar as it is necessary for the enjoyment of the intellects of the human personality so that the person can understand and exercise his citizenship. In other words, without education, the subjects will not have the necessary insight to be aware of their capacity and responsibility, whether as an individual or as part of society, which ends up affecting the person to the point of being sentenced to live on the fringes of life in society.

It is a universal right that must be guaranteed to all, in an equal way and without any discriminatory treatment, generating a duty/responsibility, in this case, the constitutional rule imposes on the State and the family the duty to provide it. According to Duarte[4], although education is a right for all, its implementation requires the prioritization of social groups that are in a situation of vulnerability, since the specific objective of social rights is to reduce the edges between social classes to alleviate socioeconomic inequalities.

One of the most notable features of the Brazilian Federal Constitution of 1988 is the literal constitutionalization of social rights, as well as some of the public policies essential for the realization of these rights. There are political pre-commitments in Brazilian constitutional rules related to public policies on a large spectrum of topics, including health, social security, and employment. In this sense, Couto and Arantes[5] found significant levels of public policies (covering 30.5% of the constitutional text) in all chapters of the Brazilian Federal Constitution, except for only those dealing with fundamental principles and guarantees.

2 CANOTILHO, 2003.

3 SILVA, 2005.

4 DUARTE, 2007.

5 2006.

Among these provisions, a relevant portion of text (articles 205 to 214; 226 to 229) is dedicated to establishing guidelines, general or detailed, for the formulation and implementation of public educational policies by public sector agents or by private institutions under state regulation, from basic education to Universities.

This institutional design was conceived by the original constituent to establish a lasting national education plan for the country's development project and ensure stability, certainty, and predictability to educational policies. Despite the relatively high rate of the amendment to the Brazilian Federal Constitution[6], there is remarkable stability in the content of its provisions that specifically deal with the fundamental right to education and the public policies linked to it.

As was emphasized by Duarte[7], "the satisfaction of the right [to education] is not limited to the realization of its merely individual aspect (guarantee of a place at school, for example)"; otherwise, "it is only effective through the planning and implementation of public policies", as established in the general parameters provided for in the Brazilian constitutional education system.

In this sense, in line with the constitutional norms on education, the respective public policies, as well as any practices derived from them, should be thought by the administrators and by the legislators (and possibly by the judicial bodies) in the light of the constitutionally stabilized educational values, e.g., accessibility, equality, inclusion, sociability, and permanence[8].

Hence, the intense constitutionalization of the national education plan, as well as the detailed institutional anticipation of the elements and characteristics of the respective public policies, allow any attempt to change the political trajectory or to implement new educational models to be always subject to potential challenge in the judicial arena.

3. Formal education vs. home education

Before going into the arguments in favor of the types of education on which the present work is concerned, it is important to point out the main criticism about the regular model of education, which is the support for

6 COUTO; ARANTES, 2006.

7 DUARTE, 2007.

8 RANIERI, 2017; CURY, 2007; CURY; FERREIRA, 2009.

home education advocates. The great controversy, in the Brazilian reality, is in the quality of school education: it cannot be denied that education (mainly public) is experiencing a real crisis, due to the quality of teaching, or due to the lack of decent conditions and, even, due to the insufficiency of structure in some schools.

Simultaneously, there is also a national controversy over political and ideological differences, because there is no denying that the existing dichotomy about the educational model is intrinsically linked to the political perspectives of each family. In general, defenders of political liberalism (associated in Brazil to conservatism in customs and the political rise of neo-Pentecostal Christian churches) are naturally more likely to defend the legality of home education, while their opponents, in opposite direction, believe that the State should intervene in many fields, including private relations, support the mandatory teaching in public or private institutions, ruled by state's agency regulation.

Defenders and practitioners of family education, popularly known as homeschoolers, usually do not speak out in public on this issue because they fear suffering social reprisals. They tend to defend that the reality of Brazilian education, about compulsory schooling, is a real violation of private autonomy, as well as of the ideological, political, social, economic, and even religious individuality of each family.

Homeschoolers says that family education has some favorable points, which should be considered for the legalization of this type of education. The first one is that the parents who defend this alternative education believe that home education has a higher quality and monitoring than "schooled" education. They also believe that home education is more compatible with religious issues and family ideals. To reinforce the defense thesis, homeschoolers present some criticisms with the teaching and methodology of the public school, as well as the behavior of students from this type of school, and also that the school is not able to receive, include and integrate students with disabilities.

They also argue that the school does not add any socialization superior to that which children would have access to at home, that the coexistence of children with their peers, but also with adults (from the family) brings great benefits regarding maturity and sociability. Finally, advocates of homeschooling argue that such a form of education has the benefit that children grow more independently, individually, learning their values and skills and

are not subject to the approval of attitudes by their peers[9].

The great watershed between regular education and home education is in terms of the effectiveness of socialization as an assumption of the best interest of children and adolescents. Socialization is an important process and social fact, through which experiences, communication, and knowledge are exchanged. It comes to be, therefore, a social fact that can be considered as an act of survival and, especially, coexistence, given the perception of empathy and cooperativeness that may be aroused among individuals after experiencing such a process. Socialization goes further than that, as it guarantees an environment conducive to the free development of the Children's personality, awakens the stimulus to cooperation between the community (between peers and other citizens) and promotes the discovery of social skills, necessary human development, the establishment of the person in society and, also, insertion in the labor market and family formation[10].

Supporters of school education maintain that the type of alternative education ends up being harmful to children due to the unambiguous restriction in the social sphere. They claim that homeschooling starts to compress the three spheres of child sociability - school, family, and peers - making it just a single sphere, which is the home itself, which makes real socialization extremely difficult for children. This social restriction imposed on children can also cause interpersonal conflicts, social isolation, and the development of aggressive behavior[11].

The role of the school as a curriculum standardizer must also be considered: through school education (or regular) that there is a standardization in the contents taught to children; such standardization comes to prepare them in a similar way so that they can have the same intellectual capacities and come to gain space in universities if they so wish. The State, as the regulator of public affairs, cannot refrain from regulating or directing the form of education, since, in the event of any discrepancy between the education "provided" by the State, through schools, and home education, those instructed by the latter will be in a vulnerable legal situation, as the State cannot be responsible for an education that it has not provided[12].

9 ANDRADE, 2017; ARRUDA; PAIVA, 2017; BARBOSA 2016.

10 BARBOSA, 2016.

11 ARRUDA; PAIVA, 2017; BARBOSA 2016.

12 ARRUDA; PAIVA, 2017; BARBOSA 2016.

In the environment produced by the Brazilian Federal Constitution institutional design, would there be space - at the present moment - for the peaceful and simultaneous coexistence between the two models of educational policy? For the democratic and institutional balance, would judicial protection be necessary and desirable for the original long-term educational development project? The Brazilian Supreme Court was provoked to answer such questions while the constitutionality of home education activities was submitted to its analysis.

4. Judicialization of public policies

The judicialization of politics corresponds to the Courts' performance expansion in the main political discussions of contemporary democratic states, to interfere in the role of others political spheres[13], from the institutional transformations by 20th century second half, when judiciary intensified review over other branches roles, while the Constitutions started to play a central role as political documents[14].

The legal and political literature has addressed interesting aspects of its interference in terms of the formulation and implementation of public policies, based on an increasingly broad list of judicial controversies over institutional behavior with non-compliance with constitutional precepts[15]. Thus, from the conception that public policies are governmental action programs, developed to achieve collective interest, notably in the promotion of fundamental rights of a social nature, the central role of the Judiciary is perceived, when issues make policies impossible or limit the capacity of policy implementation[16].

This role is not exclusive of the Brazilian judiciary, having also been observed in several countries through Latin America that has considerable deficits in terms of citizenship rights, in the face of a late process of democratization and consecration of fundamental social rights. Specifically, civil and social rights and liberties are effectively enshrined by constitutional design[17].

13 TATE; VALLINDER, 1995.

14 HIRSCHL, 2009; BARROSO, 2005.

15 SWEET, 2000; GINSBURG, 2003; BARBOZA; KOZICKI, 2012.

16 BARBOZA; KOZICKI, 2012.

17 CARVALHO, 2001.

Latin America's countries' institutional design favors judicial review, from historical deficits to contexts of executive and legislative absence in the formulation and implementation of social public policies: any social demand that does not involve enough interest or adds a high cost will certainly find it difficult to fulfill. Some courts, due to the inertia of politicians and the impossibility of denying a decision, are institutionally obliged to put an end to litigations that should be first resolved in the political arena[18].

Brazilian Constitutional designs (full of policy content) builds a scenario favorable to the judicialization of political issues and higher judicial interference in policy matters[19], "as the Judiciary [...] becomes more involved to control the constitutionality of laws and other normative acts […] frequently related to public policies"[20].

5. Public policies and judicial self-restraint: main aspects

Despite the possibility of Judiciary interference on the agenda of other Branches, effective responses to the establishment of the judicial apparatus do not always occur, given the institutional incentives existing in the Brazilian constitutional design. Several factors act as limitations to this performance when the magistrates perceive the institutional and political incentives to decide on one or another direction. Decision-making costs are decisive for Justices, taking into account the preferences of all agents involved in the legal-political context, as well as the potential consequences of the judicial decision itself[21].

There is a wide spectrum of formal mechanisms and legal arguments, which can be used by the Justices, both for the implementation of public social policies, and to be silent about them, redirecting the discussion to the typical political instances, seeking the reduction, case by case, of the decision-making costs involved. It's a selective modus operandi of the Constitutional Courts on what to decide, which is noticeable in the performance of the STF: it can occur from the use of formal instruments, such as the

18 CARVALHO, 2004; STEIN et al., 2006.
19 FERNANDEZ; GOMES NETO, 2018.
20 COUTO; ARANTES, 2006, p.43-44.
21 POSNER, 2010.

doctrine of political issues[22], the recognition of the internal corporate acts of the political Branches[23] or adjudication techniques that exempt the Court of the judgment of demand: the so-called "passive virtues"[24].

There are significant moments in which the Brazilian Judiciary acts in a self-restrained way, with several precedents of the Court in this sense[25]. Hence, costs play a decisive role in self-restraint stance, notably in the judicial self-restraint strategy, which fundamental premise is that any Court should avoid ruling on constitutional issues and resolve cases at its discretion by other reasons (infra-constitutional and/or non-legal) to avoid the difficult constitutional issues (costs) that would arise.

An example of this self-restrained performance is observed in the performance of the Court in the analysis of national educational policy and the constitutional aspects of home education plans (RE888815). However, in this particular scenario, it is necessary to understand the nuances of how these strategies were used by the Court's Justices.

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6. Qualitative analysis of the homeschooling case

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There is a context of intense political polarization in Brazil today, in which the rise of a conservative right is seen in opposition to long periods of leftist governments, those characterized by liberal guidelines, mainly regarding customs and education. In exercising its duty to judge the constitutionality

22 CHOPER, 1982.

23 LIMA; GOMES NETO, 2018.

24 BICKEL, 1962.

25 LIMA; GOMES NETO, 2018.

26 POSNER, 2010.

of home education practices, the Brazilian Supreme Court suffered pressure from both sides of the spectrum of political interests, whether the conservative right defending homeschooling as a means of protecting the family and values considered fundamental, or the left defending the continuity of liberal practices inherent to formal public education policies. Thereby, this research submitted the referred collective judicial decision to the *content analysis*, to understand the justifications of the opinions, in a dynamic that covers from the technical analysis of constitutionality, the preferences of the litigants on the matter, and the individual preferences of each judge.

According to Bardin[27], a categorization is a useful tool for content analysis as it "[...] operates the classification of elements that are part of a set, by differentiation and grouping (according to genres or categories) [...]", based on criteria defined and presented by the researcher. From the categorization, it is possible to develop a "[...] valid organized system of categories, capable of serving as a source of data able to produce inferences about the fact [...]" (or set of facts) related to the text whose content is intended to be analyzed, qualitatively or quantitatively[28].

As presented by Caregnato and Mutti[29], content analysis research has *content* as its object, in other words, the "[...] linguistic materiality through the empirical conditions of the text, establishing categories for its interpretation [...] ", as well as this "[...] hopes to understand the subject's thought through the content expressed in the text, in a transparent conception of language".

Content analysis tools are relevant qualitative investigation means for understanding decision-making mechanisms in the public policy research field. As an example, Darrell and Schwartz[30] used two methods of text enumeration, a quantity assessment, and a quality assessment, to find significant positive differences in the levels of environmental disclosures by law firms during two time-series, that support the idea that said variation occurs either as a result of the firm's interests or as a result of pressure from public policies.

27 BARDIN, 1977, p.117.

28 BARDIN, 1977.

29 CAREGNATO; MUTTI, 2006, p.683-684.

30 DARRELL; SCHWARTZ, 1997.

In a different path, Habel et al.[31] analyzing the news content that publicized public policies for vaccination against HPV identified that many fundamental details of those policies and the very functioning of the disease were omitted from the published texts, undermining the recipients' decisions as to their appearance to take vaccines during official campaigns. As another example, Norton[32], through policy content analysis, evaluated master plans and zone codes about land and urban issues in the state of Michigan, discovering moderate correspondence between plans and codes for urban landscape policies by urban jurisdictions and rural landscape policies by rural jurisdictions.

This research aimed to analyze as its empirical *corpus* the content of the long ruling that resolved the case about the litigation regarding the constitutionality of home education initiatives (RE 888815), which contains the written record of the opinions presented by each of the ten Justices when collegially deciding the conflict between public liberties and private freedoms related to the educational issue. It was an extensive document composed of 197 pages in which the official versions of the opinions of each Justice on the theme of educational practices at home were reproduced.

As mentioned earlier, it sought to qualitatively test the hypothesis that the judges (when judging the case related to home education) were more influenced by individual values and preferences than by questions of constitutional technique, configuring a situation of judicial self-restraint decision-making. In the hypothesis confirmation circumstance, it is usually expected to find references to non-legal sources and arguments, as well as less emphasis (or even absence of reference) concerning the alleged (un) constitutionality of home educational practices. In turn, in a denial scenario of the hypothesis faced in the research, it was expected to find in the text of the decision a greater emphasis on the compatibility (or not) relationship between the Brazilian constitutional education policy and the intended educational practices at home, with low or no references to non-legal issues, such as the judge's personal preferences.

A content analysis tool was used in this research: the categorization as a means of identifying and framing the position of each Justice in the composition of the collegiate decision.

31 HABEL et al., 2009.

32 NORTON, 2008.

In this sense, the opinions of each justice, reproduced in the written document, were submitted to a more in-depth investigation. After reading each opinion, the data obtained from the text were qualitatively transcribed into analytical categories, to build profiles from the behavior of each judge when forming his conviction about the best solution for the dispute (of a constitutional nature) over home education practices.

In the first sequence of analytical categories, this research sought to verify in the texts of the opinions of each Justice whether their preferences (in the issue of homeschooling) would be related to facing (or not) the constitutionality of home education practices, as well as to other legal arguments and/or non-legal arguments (both featuring judicial self-restraint). It should be noted that the expected behavior of the members of the Brazilian supreme court was that they would limit themselves only to saying whether the intended homeschooling activities are constitutional or not.

Table 1: Judicial preference x basis of opinion (RE 888815)

Brazilian Supreme Court's Justice (*)	Preference	Constitutionality analysis	Use of non-legal arguments	Use of infra-constitutional rules and/ or general standards
BARROSO	Favorable	Yes	Yes	Yes
MORAES	Against	Yes	Yes	Yes
FACHIN	Favorable	Yes	Yes	Yes
WEBER	Against (***)	No	Yes	No
FUX	Against	Yes	Yes	Yes
TOFFOLI	Against (***)	No	Yes	No
LEWANDOWSKI	Against	Yes	Yes	Yes
MENDES	Against	Yes	Yes	Yes
M MELLO	Against	Yes	Yes	Yes
ROCHA	Against (***)	No	Yes	Yes

Font: Authors' elaboration based on data collected from the text of the above-cited judicial decision.
(*) Justice Celso de Mello justifiably did not participate.
(***) Although it was officially registered that this Justice adhered to the winning opinion, he did not issue any value on constitutionality or unconstitutionality.

A singular argumentative mosaic produced a collegiate decision, composed from the sum of the opinions of the Justices, winners or losers, which moves away from the expected standard behavior of simply (and only)

declare the constitutionality or unconstitutionality of the intended norm or practice. It can be observed by reading the second sequence of analytical categories, through which the preferences of each Justice participating in the trial were compared with the content of their respective opinions, as officially stated in the written records of that decision.

Table 2: Opinions (RE 888815)

Brazilian Supreme Court's Justice (*)	**Preference**	**Selected excerpts from the text of Opinions (**)**
BARROSO	Favorable	"[...] the Brazilian State is too big, extremely inefficient, and often practices inadequate public policies and without any type of monitoring. [...] behind the motivations of parents who choose home education is a genuine concern for their children's full and adequate educational development. No father or mother makes this option, which is much more laborious, due to laziness, caprice, or disgust. [...] I think that the different interests at stake - that of parents, of being able to choose their children's educational method, are reconciled, and, therefore, validating the choice of home education, and the State, by their bodies, of verifying whether home education is effectively allowing the full development of that child or adolescent [...]".
MORAES	Against	"[...] In this way, both for formal training, which is pedagogical and academic, as well as for moral, spiritual and citizenship training, the Family has a duty in solidarity with that of the State, and is not an exclusive duty of the other, since the constitutional purpose was, exactly, to put them together to jointly overcome the great challenge of better education for the new generations, essential for the countries that want to see themselves developed. [...] This seems important to me, because, within the democratic and protective bias of children, adolescents and young people, this solidarity that the Constitution brought, the duty of education between family and State, has a dual purpose the integral defense of the rights of children and adolescents and their training in citizenship. [...] In this way, the species of radical unschooling, moderate unschooling, and pure homeschooling, in any of its variations, will be unconstitutional, as they deny the possibility of solidarity state participation, including in the establishment of a basic inspection nucleus and assessments. [...]".

FACHIN	Favorable	"[...] We are discussing, therefore, a possible failure in public education policy and, in this dimension, it would not be up to the Judiciary to replace the public agencies in the technical, democratic and financial choices made by the Executive. [...] If it is true that the right of parents can be legally limited to impose compulsory education, it should be noted, [...] that the primacy of responsibility for the education of children falls on parents. [...] In other words, parents have the right for their children to enjoy a pluralism of pedagogical conceptions that allow the child to develop personality, skills, and mental and physical capacity to its full potential. Thus, state public policy that does not meet the pluralism of viable pedagogical concepts is not supported by the Constitution. [...] ".
WEBER	Against (***)	"[...] And if this situation is understood in a different sense, making home education compatible with higher freedom of parents, the task would not be for the Judiciary. With all due respect, it would be for the National Congress. [...]".
FUX	Against	"[...] Now, in my view, with due respect [...], obviously this project does not pass through the Chamber of Deputies, because there is no political consensus on this. And it is up to Parliament to define that. We do not have the institutional capacity to define this. [...] So, here too, in my view, there is a place for discussing this topic in the light of the total lack of institutional capacity of the Judiciary to debate this topic. [...] Home education, understood as that which substitutes for school aims at indoctrinating the student and/or his / her distance from the social interaction in the school environment. [...] Home education, therefore, compromises the integral formation of the individual, especially as part of a society known to be plural. [...]".
TOFFOLI	Against (***)	"[...] I think there is no way for us to say, right away, that homeschooling is absolutely incompatible with the Constitution, asking the colleagues who voted for the unconstitutionality of homeschooling to bow. I think that education is everyone's duty and, being everyone's duty, it cannot be seen as an exclusive monopoly of the State, but an obligation of the State. [...] Faced with the difficulty of immediately seeing a right to homeschooling, I vote in the sense that Minister Alexandre de Moraes voted, to deny it, without declaring the unconstitutionality of this type of education. [...] ".

LEWANDOWSKI	Against	"[...] Citizens are not consumers of certain goods or services, who can use them according to their exclusive discretion. On the contrary, the concept of citizen as opposed to that of consumer, because the citizen is not given the right to choose what he likes in the Republic in which he lives, since, in addition to rights in the face of it, he has public duties towards him. [...] I think that the Supreme Federal Court cannot align itself with an individualistic, ultra-liberal stance, which reduces the State to a *mere gendarme*, as was discussed in the distant past, under the influence of the thought of French physiocrats, who fenced the motto *laissez-faire, laissez-passer, le monde va de lui même*. [...] ".
MENDES	Against	"[...] We have a Constitution that is attentive to the sensitivity of the theme and laws that formulate solid methodological bases, which have ample potential to enable quality education at any level. [...] The intention to delegitimize the methodology conducted in the context of formal education, proposing the adoption of a domestic methodology, sounds, at least, presumptuous. [...] Nothing prevents us, in this debate, from advancing towards a different model, with greater emphasis on one or another educational agent, but this cannot be done through a judicial decision, even in the context of a Supreme Court. [...]".
M MELLO	Against	[..] If it is possible, on the one hand, to argue that schooling is not the only possible pedagogical standard, considering the use, by the constituent, of open and inclusive concepts, it is no less correct, on the other, to claim that this was the model chosen by the ordinary legislator, in the exercise of the conformation power granted by the Major Law and in strict compliance with the constitutional framework. [...] In the elaboration of the precepts at stake, the legislator favored an approach shared by several experts in the art of educating, who maintain that the school institution has a relevant role that can never be supplanted, but only complemented, by the family entity. He joined the pedagogical current of thought according to which the guarantee of admission and permanence in school is included in the very fundamental right to education, considering the need to allow students to build citizenship in a plural environment and characterized by diversity. [...] ".

ROCHA	Against (***)	"[...] With nothing to say about the possibility, even less, about constitutionality, because I do not see, a priori, incompatibility of arriving at a model that adopts the system and that fits this institute of this education at home - and that it can be extremely fruitful, it can be the best school, it can often be teaching that does not exclude anyone - but that it does not serve, mainly, without any legal framework, such as the possibility of denying education, which is what most worries. [...] There are, in none of these devices, norms establishing any beacons for home education. None of them, nor implicitly, is derived from the parents' right to take charge of the intellectual education of their children without State aid. These provisions do not have the normative density for the Judiciary to allow the submission of people to home education without the existence of a law. [...] ".

Font: Authors' elaboration based on data collected from the text of the above-cited judicial decision.
(*) Justice Celso de Mello justifiably did not participate.
(**) Translated freely by the authors. The entire original content can be checked at the following link: https://bit.ly/2WGM7Mk
(***) Although it was officially registered that this Justice adhered to the winning opinion, he did not issue any value on constitutionality or unconstitutionality.

For several reasons and for a long time, the Brazilian Supreme Court (through its Justices) does not behave as a unitary and homogeneous institution, nor as stable and exactly delimited decision-making blocks: what is seen successively is an intense decision-making fragmentation, characterized by the predominance of individual decisions, which is reflected in the scope of collegiate decisions as to the allocation of individualized and decentralized decision-making powers[33].

The judicial decision-making equation in the Supreme Court has been of a complexity that transcends the mere binary relationship between those judges who are against or in favor (e.g., liberals or conservatives) of a certain claim against the Constitution: each of the eleven Justices (as well as their individual preferences and strategies) becomes a variable in its own, affecting the result in a particular way through various internal dynamics of the Court, e.g., from the formation of fragile majorities and/or insistent dissents to a large variation on the ability to convince its peers about adhering to their preferences.

33 FALCÃO, 2015; ARGUELHES; RIBEIRO, 2018.

Depending on the institutional incentives and decision-making costs of each case brought to trial, each of the Justices will individually decide whether to judge against or in favor of the litigant's interests (declaring the constitutional or unconstitutional a rule or a practice) or use judicial self-restraint techniques to avoid the decision on constitutionality and its respective costs[34]. In the circumstances of a collegiate decision within the scope of the Brazilian Supreme Court, the production of the final result goes through a complex decision-making process, within which it will seek to identify the similarities and differences of each opinion for the composition of the Court's decision on the subject, either unanimously or by a majority (divergence).

This research found in the text (content) of the case under analysis (RE 888815) the formation of three decision blocks: a) a *first block*, composed of the Justices who considered home teaching practices constitutional; b) a *second block* (majority), composed of the Justices who expressly considered homeschooling practices unconstitutional; and c) a *third block*, composed of those Justices who preferred not to rule on the constitutionality of home education, suggesting deciding the case in other terms, behavior that would fit into judicial self-restraint.

Table 3: Decision Blocks (RE 888815) (*)

First Block	Second Block	Third Block (***)
BARROSO; FACHIN	MORAES; FUX; LEWANDOWSKI; MENDES; M MELLO	WEBER; TOFFOLI; ROCHA

Font: Authors' elaboration based on data collected from the text of the above-cited judicial decision.
(*) Justice Celso de Mello justifiably did not participate.
(***) Although it was officially registered that this Justice adhered to the winning opinion, he did not issue any value on constitutionality or unconstitutionality.

The reason for the first argumentative block is the constitutionality of home education practices: 1.1. Justice Barroso maintained that the different interests at stake - that of *parents*, of being able to choose their children's educational method, are reconciled, and, therefore, validating the choice of

34 LIMA; GOMES NETO, 2018.

home education, and *the State*, by their bodies, of verifying whether home education is effectively allowing the full development of that child or adolescent, situation to be seen compatible with the constitutional order; and 1.2. Justice Fachin argued that that the primacy of responsibility for the education of children falls on parents, whose have the constitutional right for their children to enjoy a pluralism of pedagogical conceptions that allow the child to develop personality, skills and mental and physical capacity to its full potential, in a pluralism of viable pedagogical concepts supported by the Constitution.

In turn, the second argumentative block is structured on the incompatibility between constitutional rules and home teaching practices: 2.1. Justice Moraes argued that the solution to this controversy was not a question of competition between the State and the family, but, as required by litigants, the species of radical unschooling, moderate unschooling, and pure homeschooling, in any of its variations, would be unconstitutional, as they deny the possibility of solidarity state participation, including in the establishment of a basic inspection nucleus and assessments; 2.2. Justice Fux contented that no book or discourse of the parents would teach the child respect for difference better than social interaction with the different, because home education, therefore, compromises the integral formation of the individual, especially as part of a society known to be plural, being incompatible with educational constitutional rules; 2.3. Justice Lewandowski in an opinion full of arguments based on political theory, public policies, and poetry, considered homeschooling unconstitutional, pointing out that citizens were not consumers of certain goods or services, who could use them according to their exclusive discretion because, in addition to rights in the face of it, they had public duties towards then; 2.4. Justice Mendes claimed that there would be unconstitutionality in home education activities once Brazil has a Constitution that is attentive to the sensitivity of the theme and laws that formulate solid methodological bases, which have ample potential to enable quality education at any level; and 2.5. unconstitutionality was also alleged by Justice Marco Mello when he stated that the guarantee of admission and permanence in school is included in the very fundamental right to education, considering the need to allow students to build citizenship in a plural environment and characterized by diversity.

Finally, the third argumentative block, representative of the arguments in favor of judicial self-restraint, was constituted as follows: 3.1. Justice

Weber claimed that the task of saying whether homeschooling would be compatible with the fundamental freedoms provided by the Constitution should be the responsibility of the National Congress, not of the Supreme Court; 3.2. Justice Toffoli although considered that there was no way for then to say, at that moment, that homeschooling was absolutely incompatible with the Constitution, he joined the majority to deny it, without declaring the unconstitutionality of this type of education; and 3.3. lastly, Justice Rocha, at that time Chief Justice, argued that she had nothing to say about the possibility, even less, about constitutionality, of homeschooling practices, explaining that, from her point of view, there would be no subjective right (implicitly or explicitly) to carry out home education in the Brazilian constitutional order, nor would there be any prohibition on its subsequent legislative provision.

One detail identified in the research is noteworthy: in all three decision-making blocks (even those that dealt with constitutionality or unconstitutionality) the use of non-legal arguments and infra-constitutional norms and/or general principles was verified. Although they are a traditional characteristic of self-restraining judicial behavior, such arguments were widely used in the opinions that made up the first two blocks, as an argumentative reinforcement of each opinion's theses. And this detail may have been decisive in the construction of the collective result, based on the interaction between the three blocks of individual opinions.

At the end of her opinion (p.193-195 of the document), then Chief Justice Rocha offered his peers a suggestion of how a collective decision of the Court could be drawn, by a majority, based on the composition of individual opinions. On the one hand, based on the constitutional order, she maintained that the promotion of the right to education does not happen, therefore, exclusively at school, but also in the coexistence of children, adolescents and young people in family life and society, is this the sense of the constitutional provision that education is the duty of the State, the family, and society, which *would make the declaration of unconstitutionality of home education activities unfeasible*. On the other hand, she also argued that it would not be possible to extract from the constitutional rules, nor implicitly, the right of parents to take charge of the intellectual education of their children without State assistance, since the constitutional rules mentioned would not have the normative density for the Judiciary to make it possible for people to submit to home education without the existence of a

law, which, in their view, *would also harm the declaration of constitutionality.*

Given these two circumstances narrated by her, Chief Justice Rocha suggested to her peers the collegiate decision's thesis on the issue of homeschooling (which effects would affect all processes in Brazil dealing with that subject): *"There is no subjective public right of the student or his family to home education, which does not exist in Brazilian law"*. She also stressed that homeschooling (in any of its variations) is not a subjective public right of the student or his family, but its creation by federal law (edited by the National Congress) is not constitutionally prohibited, as well as she pointed out that the Federal Constitution does not prohibit home education, but prohibits any of its kinds that do not respect the duty of solidarity between the family and the State as the main nucleus of educational training.

In a polarized political and social environment, such as the Brazilian case, any declaration on constitutionality (in matters of public policies) implies high decision-making costs, with relevant social groups always involved, satisfied, or dissatisfied with the outcome of the judicial decision. If home education practices were declared unconstitutional, the Supreme Court would protect public educational policies and serve the interests of the Executive Branch, in its three spheres (Union, States, and municipalities), as well as of all those who defend inclusive and pluralist formal education, but it would displease several conservative groups and religious entities that do not identify with formal education and defend educational practices that are more aligned with their values. In the opposite scenario, the declaration of the constitutionality of homeschooling activities would please these conservative and religious groups but would harm the interests of public authorities and those who defend the exclusivity of formal education. Under the strict constitutional judicial review, any alternative chosen by the Court would bring external decision costs.

This clever and strategic proposal by Chief Justice Rocha not only attracted the adhesion of the other two Justices from the *third block* but also attracted the adhesion of the five Justices from the *second block*, who would be able to achieve their purpose of barring home education at that time (preserving educational public policy), without the costs of declaring the practices unconstitutional, ensuring the necessary majority to compose the collegiate decision.

Avoiding saying about constitutionality, the Court found a decision-making balance among its members, in which both decision-making

costs were reduced, by establishing that: 1. although it did not affirm the unconstitutionality of homeschooling, it benefited the defenders of formal education, by stating that, at that moment, there would be no subjective right to carry out home education activities; 2. at the same time, failing to rule on the unconstitutionality of home education, benefited the groups that defend it, by leaving open the future regulation of the matter, which can be carried out by the National Congress.

In this way, most of the Justices of the Brazilian Supreme Court silently adopted the strategy of self-restraint, presenting a solution to the dispute, without assuming the costs of considering the question of constitutionality, *in casu*, the constitutionality of *homeschooling* activities.

And this is not an isolated situation: the homeschooling case is just only a clear example of a series of institutional dynamics of the Brazilian Supreme Court, which, combining legal arguments and political strategies, redefines the scope of its jurisdiction, as well as its role in the relationship with other branches of government[35], by using judicial self-restraint strategies to avoid exercising constitutional judicial review (its primary function and the very reason for the Court itself).

7. Conclusions

> *[...] A pound of this merchant's flesh is yours. The court awards it, and the law authorizes it. [...] And you have to cut this flesh from his chest. The law allows it, and the court awards it. [...] But wait a moment. There's something else. This contract doesn't give you any blood at all. The words expressly specify 'a pound of flesh'. So, take your penalty of a pound of flesh, but if you shed one drop of Christian blood when you cut it, the state of Venice will confiscate your land and property under Venetian law. [...]* [36]

In William Shakespeare's story (tragedy and comedy), "*The Merchant of Venice*", a Jewish moneylender demanded that an antisemitic Christian (Antonio) offer "a pound of flesh" as collateral against a loan, took to help his friend (Bassiano) to court Portia. Antonio can't repay the loan, and without mercy, the jew (Shylock) demands (to the Dodge, the judicial

35 LIMA; GOMES NETO, 2018.

36 SHAKESPEARE, William, "*The Merchant of Venice*".

authority) a pound of Antonio's flesh. The heiress (Portia), then the wife of Bassanio, dressed like a lawyer at Court and saves Antonio from death, using the argument transcribed above. She did it so facing the need to resolve a difficult legal issue: if the judicial authority simply enforced the Venetian law, it should execute the debt through its contractual guarantee (in this case, part of the merchant's own body), ordering the extraction of a pound of human flesh and, consequently and indirectly, condemning to an imminent death; if decided to save the debtor's life, would prejudice the authority and legitimacy of Venetian law, as well as that of his government and judicial authorities.

In that example, extracted from classic British literature, there is a legal dispute, with a very high decision-making cost, so Porcia offered a solution (accepted by the judicial authority) that was beyond the expected decision about whether or not enforce the personal guarantee (extraction of a body part of the borrower) as the loan was taken and not paid. The debt was overdue and unpaid, the guarantee was due to its creditor, but Venetian law forbade Christian blood from being spilled due to private matters, concretely preventing any known means of extracting human flesh, without blood spilling. Therefore, an argument was made that drastically reduced decision-making costs, maintained respect for Venetian law and authorities, and saved the merchant from certain death. Something very similar happened in the resolution of the dispute about the constitutionality of home education.

The primary function of the Judiciary is to resolve disputes, pointing out which of the litigants would be right (or perhaps, in a situation of a split decision, indicate to what extent each would be partially right and wrong). In the judicial review exercised by the Brazilian Supreme Court, either in the abstract modality (through constitutionality control actions) or in the diffuse modality (through appeals), the aforementioned primary function takes shape in the declaration of constitutionality (or unconstitutionality) of a rule or a practice.

Any other results that deviate from this standard and bring content different from constitutionality analysis present elements that characterize the behavior described as judicial self-restraint, in which, for several reasons, the members of the Court strategically renounce the exercise of the review power that was delegated to them by the Parliament through constitutional rules.

On the other hand, in matters of public policies, understanding the collegiate decision-making process in the Brazilian Supreme Court is not an

easy task: there are peculiar decision dynamics, in which intuitively expected behaviors, such as homogeneous actions or clear decision-making blocks, eventually give way to the formation of individual preferences, whose final product reflects a difficult seam of interests, strategically carried out, weighing decision costs and pragmatically anticipating concrete consequences of the judicial decision on that topic.

The qualitative content analysis identified that, although the Brazilian Supreme Court produces decisions in a deeply fragmented manner, the ten Justices participating in the leading case judgment that dealt with the matter related to homeschooling ended up informally organizing themselves into three decision-making blocks (constitutionality, unconstitutionality, and self-restraint).

Among the opinions of those Justices who defended the unconstitutionality of homeschooling, arguments were also found that tacitly identified themselves with the purpose of judicial self-restraint, probably a product of the high decision cost to which they submitted themselves when choosing that aspect of judgment, as well as essential elements for greater propensity to accept alternative proposals for decision.

Seeking a less costly way, Chief Justice Rocha convinced her peers to adopt a clever and strategic way to resolve the dispute, reducing social and political decision-making costs to the maximum, through judicial self-restraint. The Brazilian Supreme Court found a way to decide the issue of homeschooling, strategically facing the expectations of the actors involved in the dispute, reducing its decision-making costs, but silently giving up the exercise of its primary institutional function, that is, the constitutional judicial review.

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ABSTRACT: How do Brazilian Supreme Court Justices use the decision-making strategy of judicial self-restraint? Judicial self-restraint is a strategy whose fundamental premise sustain that, if possible, any Supreme Court should avoid ruling on constitutional issues, and resolve the cases before them on other (usually statutory) grounds to avoid the hard constitutional questions that would come with the other interpretation. When asked to decide on the constitutionality of homeschooling plans (RE888815), the Brazilian Supreme Court Justices entered a debate involving various aspects of the educational public policy cycle, moving away from the strictly constitutional issue. This research qualitatively analyzed this case, notably through content analysis tools, to verify how the judicial self-restraint strategy was used in the judgment of a relevant educational public policy issue.
Keywords: Brazilian Supreme Court; educational policy; judicial review; judicial self-restraint; homeschooling.

RESUMO: Como os Ministros do Supremo Tribunal Federal (STF) usam a estratégia de tomada de decisão denominada *autorrestrição judicial*? A *autorrestrição judicial* é uma estratégia cuja premissa fundamental sustenta que, se possível, qualquer Tribunal deve evitar se pronunciar sobre questões constitucionais e resolver os casos à sua frente por outros motivos (geralmente infraconstitucionais) para evitar as difíceis questões constitucionais que surgiriam com a outra interpretação. Quando solicitados a decidir sobre a constitucionalidade dos planos de educação domiciliar (RE888815), os Ministros do STF entraram em um debate envolvendo vários aspectos do ciclo das políticas públicas educacionais, afastando-se da questão estritamente constitucional. Esta pesquisa analisou qualitativamente este caso, principalmente por meio de ferramentas de análise de conteúdo, para verificar como a estratégia de *autorrestrição judicial* foi usada no julgamento de uma questão relevante de política pública educacional.
Palavras-chave: Supremo Tribunal Federal; *autorrestrição judicial*; Educação domiciliar.

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