

REFLEXIVE FREEDOM AS A COMPARATIVE LAW ANALYSIS PARAMETER IN THE CONSTITUTIONAL COURT DECISIONS OF BRAZIL AND SPAIN ON HOMESCHOOLING¹

POSIÇÕES SOBRE O DIREITO FUNDAMENTAL À
LIBERDADE DOS TRIBUNAIS CONSTITUCIONAIS
DO BRASIL E DA ESPANHA NAS DECISÕES SOBRE O
HOMESCHOOLING: UMA ANÁLISE DE DIREITO COMPARADO

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ABSTRACT

This work sought to carry out, from the functionalist method that seeks to find relationships in the analyzed phenomena according to their social manifestation and their function in it, a comparison between the decisions of the Brazilian and Spanish constitutional courts regarding the manifestations of the Fundamental Right to Freedom. In this sense, partial differences were found between the two judicial decisions, since both declared the practice of homeschooling unconstitutional, but there were differences regarding the flexibility of a possible practice of this educational modality in the future, with the Brazilian decision allowing the practice through a law that regulates home education, which was not in the Spanish decision. Thus, there was a restriction on the collective will and freedom in favor of the common interest, which is precisely the one brought in the present work in the development of the theoretical framework (Axel Honneth), which highlights a crisis in democratic constitutionalism and reinforces the need for reflection on the theme.

Keywords: comparative law; fundamental right to freedom; homeschooling; brazilian and spanish constitutional court; judicial decision.

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RESUMO

Esse trabalho buscou realizar, a partir do método funcionalista que procura encontrar relações nos fenômenos analisados de acordo com a sua manifestação social e a sua função nessa, uma comparação entre as decisões do tribunal constitucional brasileiro e espanhol com relação às manifestações do Direito Fundamental à Liberdade. Nesse sentido, encontrou-se diferenças parciais entre as duas decisões judiciais, já que ambas declararam inconstitucional a prática do homeschooling, porém houve diferenças com relação à flexibilidade de uma possível prática dessa modalidade educacional futuramente, tendo a decisão brasileira permitido a prática por meio de lei que regule a educação domiciliar, o que não houve na decisão espanhola. Assim, houve uma restrição à vontade coletiva e a liberdade em prol do interesse comum que é justamente àquela trazida no presente trabalho no desenvolvimento do marco teórico (Axel Honneth), o que evidencia uma crise no constitucionalismo democrático e reforça a necessidade de reflexão sobre a temática.

Palavras-chave: direito comparado; direito fundamental à liberdade; homeschooling; tribunal constitucional brasileiro e espanhol; decisão judicial

1. INTRODUCTION

The general objective of this research is to investigate the paradigmatic decisions of Brazil and Spain on homeschooling and to point out their main similarities and differences. The specific objectives are: To analyze the current situation in Brazil regarding the practice of homeschooling (1); Analyze the current situation in Spain regarding the practice of homeschooling (2); Analyze the decisions of the constitutional courts in Brazil and Spain on homeschooling (3); Gather data on the issue of the right to freedom in Axel Honneth (4); Produce inferences based on the analysis of the fundamental right to freedom according to the similarities and differences in the results of paradigmatic decisions on homeschooling between Brazil and Spain, having as scope the concept of freedom in Axel Honneth (5).

The hypotheses of the present work are allocated according to the research objective, in this sense, three possible hypotheses are configured: Brazil on homeschooling (1); There are no similarities in decision-making grounds regarding the fundamental right to freedom concerning the decision of the constitutional courts of Spain and Brazil on homeschooling (2); There are partial similarities in decision-making grounds regarding the fundamental right to freedom about the decision of the constitutional courts of Spain and Brazil on homeschooling (3).

For the development of the research, it is necessary to elaborate a problem question linked to the objectives and hypotheses. Thus, the problem question for the development of this research is: is the decision-making basis regarding the fundamental right to freedom of the paradigmatic decisions on homeschooling of the constitutional courts of Brazil and Spain similar?

The theoretical framework to be used to address the problem-question of this research will be Axel Honneth's concept of the right to freedom.

The methodology to be used in this research will be the comparative functionalist law. So:

[...] as vantagens que o direito comparado oferece podem, sucintamente, ser colocadas em três planos. O direito comparado é útil nas investigações históricas ou filosóficas referentes ao direito; é útil para conhecer melhor e

aperfeiçoar o nosso direito nacional; é, finalmente, útil para compreender os povos estrangeiros e estabelecer um melhor regime para as relações da vida internacional. (David, 1986, p. 3)⁴

The justification for the importance of the theme communicates with the features of Comparative Law, according to David (1986, p. 3). In this sense, a philosophical investigation of the fundamental right to freedom will be carried out in the decisions that will be analyzed in Brazil and Spain. In this sense, it will be possible to improve national law according to the understanding of a philosophical theme to be analyzed, establishing a greater principled connection following international parameters.

Furthermore, it is worth mentioning that no scientific production was found in Google Scholar on the comparison of constitutional court decisions regarding homeschooling and not even regarding the fundamental right to freedom involving decisions in Brazil and Spain.

This further justifies the present research, since it is necessary to visualize legal issues compared between these two countries to stimulate mutual cultural understanding between them. In addition, for the analysis of the case, it is important to say that the decision-making practice of the Brazilian Federal Supreme Court frequently uses the resource of comparative law to support its decisions, in addition to what is frequently used by constitutional judges from other countries (Cardoso, 2010, p. 478).

The communication between different Constitutions of different countries or even decision-making aspects of the constitutional courts can be an important tool to make the best decision for the specific case (Canotilho, 2003, p. 1214).

For the construction of the methodology raised here, the functionalist method of Comparative Law will be used (Zweigert *et al.*, 1998, p. 34). This method can be conceptualized as the intention of finding similar or different legal responses to similar social conflicts, even if they occur in different places around the globe (Dutra, 2016, p. 198). As homeschooling presents similar problems of conflicts between the public and the private around the world, there is the possibility that there is a functional equivalence between the decisions on home education of the Brazilian and Spanish constitutional courts regarding the fundamental right to freedom, which will be investigated throughout this article.

In this sense, the objects of the scientific content analysis proposed in this work will be: the decision of the Brazilian Supreme Court on homeschooling called Extraordinary Appeal nº 888.815 compared with the decision of the Spanish constitutional court said sentence 133/2010, of 2 de diciembre (BOE núm. 4, of January 5, 2011), both intended to attribute constitutional decisions on homeschooling (Brasil, 2018; Espanha, 2010)

2. HOMESCHOOLING IN BRAZIL

The practice of homeschooling in Brazil is deregulated by the Brazilian State. The Brazilian constitutional court declared the unconstitutionality of the practice of homeschooling in 2018

4 Our translation: [...] the advantages that comparative law offers can, succinctly, be placed in three planes. Comparative law is useful in historical or philosophical investigations concerning law; it is useful to know better and improve our national law; It is finally useful for understanding foreign peoples and establishing a better regime for international life relations.

without a law that regulates it. So far, no laws have been approved that regulate this type of educational choice. Even so, according to the Brazilian Association of Home Education (ANED) (2021), there are 35,000 Brazilian families and 70,000 students aged 4 to 17 practicing this educational modality. ANED (2021) also demonstrates that there is an average growth rate in the practice of home education of 55% per year in Brazil.

The fact is that, even though the Brazilian constitutional court has understood that the practice of homeschooling is per constitutional principles, this type of education cannot be practiced without the law that regulates it (Santos, 2019, p. 19). Thus, the 35 thousand families that practice homeschooling currently practice it illegally.

In the scientific field, Brazilian productions on homeschooling are much more in the area of legal studies than education. This has a great impact in countries where homeschooling has not been regulated, as is the case in Brazil, which highlights the emerging scenario of this type of education in the country (Evangelista, 2017, p. 63). Also, it is worth mentioning that the use of bibliographic references in Brazilian academic works is very similar, which shows that there is not a vast production on the subject in the country (Silva, 2019, p. 33).

Furthermore, one of the principles that govern the Brazilian Democratic State of Law is the principle of freedom. However, the freedom of choice of the educational type to be applied by parents to their children has not yet been recognized in Brazil (Kloh, 2014, p. 16).

It is essential to highlight an important empirical research conducted regarding the Brazilian judiciary's decision on homeschooling, as found in Barbosa (2023) master's thesis. This research involved a meticulous content analysis of the ruling issued in the landmark decision on homeschooling. The study demonstrated that, despite the conflicts of principles present in the judicial process, the STF's decision on homeschooling failed to adequately weigh the right asserted by the petitioner. Consequently, the decision did not thoroughly examine the fundamental right to freedom of teaching and learning in relation to the fundamental right to education, revealing a significant issue in the handling of this matter.

It is also necessary to mention what different authors in the legal field say about homeschooling in Brazil. Gandra (2019) argues that the Brazilian Constitution guarantees parents the right to freedom of teaching, allowing them to choose how their children are educated, viewing homeschooling as an expression of this fundamental right, which is closely tied to the families' philosophical, religious, and moral convictions. He emphasizes that parents have the right to decide on their children's education and are responsible for ensuring that it is conducted adequately. Homeschooling, he asserts, can be a legitimate choice if it is done within legal parameters and aims to provide quality education.

Although he acknowledges the State's role in education, Gandra (2019) contends that this does not exclude the parents' right to educate their children at home, suggesting that the State should respect this choice, provided that minimum educational requirements are met. He points out that for homeschooling to be fully recognized, specific regulations are necessary to establish clear criteria, ensuring that children receive an education equivalent to that offered in traditional schools. This regulation should safeguard both the parents' freedom and the children's right to education.

Gandra (2019) ultimately argues that homeschooling is not unconstitutional and, when properly regulated, can coexist with the State's educational obligations, affirming that the Con-

stitution does not prohibit home education and that parents should have the right to choose this modality, especially when seeking education aligned with their values and convictions.

It is also valid to present a position opposed to homeschooling within the normative structure of Brazil. Streck (2010) addresses the topic of homeschooling within a broader discussion on constitutional interpretation and the role of the Judiciary. Streck (2010) criticizes homeschooling by arguing that the Brazilian Federal Constitution prioritizes formal education, ensuring children's right to an education that is both inclusive and socializing. He contends that homeschooling may undermine these objectives by isolating children from a collective learning environment, which is essential for their holistic development and the formation of citizens in a democratic society.

In this sense, it is concluded that Brazil is still an emerging country, both politically and scientifically, concerning discussions on homeschooling. There is still a great conflict between public and private interests, which is evidenced by the conflict between parents' freedom of choice regarding the application of educational types other than schooling, between the principle of the best interest of children and adolescents, emphasizing the possibility of the parents' choice not being the best choice for their children and between the democratic constitutional project of a nation for the formation of citizens aware of their collective roles in society. Thus, dialogues on the subject are necessary so that it is possible to broaden the understanding of the subject in Brazil.

3. HOMESCHOOLING IN SPAIN

In Spain, as well as in Brazil, there is no legislative provision on homeschooling. However, this did not prevent practitioners of this modality from emerging, which led to a discussion by the constitutional court on the subject in 2010 (Estarellas, 2011, p. 59-65).

In 2015, a survey was carried out that identified 2000 to 4000 families that practiced homeschooling in Spain (Such, 2015). However, this estimate does not have accurate records of homeschooling practitioners, given the difficulty in identifying families due to the illegality of the practice in the country (Maestre, 2016, p. 29).

For this reason, it is necessary to guide the following issues addressed in the Spanish scientific field:

la libertad de enseñanza operaría como fundamento de la regulación legal del homeschooling, mientras que el derecho a la educación del menor, entendiendo como tal el que se ha descrito en el epígrafe anterior, operaría a la vez como objetivo y como límite a esa manifestación de la libertad de enseñanza y del derecho de los padres a decidir el tipo de educación de sus hijos que es la educación en casa (Estarellas, 2011, p. 83).⁵

5 Our translation: the freedom of teaching would operate as the foundation of the legal regulation of homeschooling, whereas the right to the education of minors, understanding as such what has been described in the previous epigraph, would operate at the same time as an objective and as a limit to this manifestation of the freedom of teaching and the right of the parents to decide the type of education of their children that is home education (Estarellas, 2011, p. 83).

In this sense, the spaces for different interpretations, different from those developed by the Spanish Constitutional Court in 2010, are remarkable. Following this direction, there is a growing investigation into homeschooling, mainly about educational innovation, and sometimes there may be hybridization with the conventional school (Sotés-Elizalde; Urpí-Guercia; Molinos, 2012, p. 69).

Thus, points out Sanchez (2012, p. 200):

El Tribunal Constitucional circunscribe la libertad de enseñanza y el pluralismo educativo a la elección por los padres de un puesto escolar dentro del sistema educativo, público o privado, y no contempla otras posibles manifestaciones del pluralismo, como es la educación en casa.⁶

As it could be identified, the Spanish Constitutional Court did not authorize the practice of homeschooling in the country, not having contemplated manifestations of pluralism except within the school system, whether public or private.

Pérez Maestre (2016, p. 28) states that the situation of homeschooling in Spanish legislation is confusing, as there is no explanation as to whether or not it is legal. For this reason, discussion on the subject by the Spanish legislative power is necessary, opening possibilities for expansion on the subject (Carballo *et al.*, 2021, p. 11).

It is important to point out that most of the research found on homeschooling in the scientific field of Spanish production addresses legal issues, affirming the phenomena described in the previous subtitle in the sense that, in countries with emerging homeschooling regulation, there are usually many productions on the legal theme in the sense of finding points of discussion seeking the attempt of positivation or not of the regulation of the modality.

Even so, the truth is that Spain, like Brazil, still does not have in-depth manifestations on the issue of homeschooling. In this way, debates on the issue remain open, with a gap concerning practitioners of the home education modality in Spain, which leaves them illegal.

4. RIGHT TO FREEDOM IN AXEL HONNETH

As a theoretical framework for the analysis of the right to freedom, the author Axel Honneth proves to be a plausible choice since he systematically works on the Right to Freedom. In this sense, for Honneth (2017, p. 141-144), in exercising the right to freedom, the individual can choose a position privately, with the State bound to protect this choice. It is, therefore, a right duty, since while the individual has the right to manifest his action, the State must protect this right. In this sense, for a right to exist, the factual reality must allow its manifestation. Therefore, the manifestation of the right to freedom in Axel Honneth must be based on a collective idea of freedom (always aiming at the common good), which would limit personal freedoms to a certain extent.

6 Our translation: The Constitutional Court circumscribes the freedom of teaching and educational pluralism to the election by the parents of a school post within the educational system, public or private, and does not contemplate other possible manifestations of pluralism, such as home education.

Therefore, the right to freedom must be manifested because of obligations of reciprocal actions in a complementary way between the entities of the society. Thus, the appropriate condition could be reached for society to manifest its fundamental rights to freedom legitimately (Honneth, 2017. p. 232).

The State's duty must be to enable the exercise of freedoms, taking into account the collective interests, which is called reflexive freedom. Thus, the State would have a fundamental role, through the manifestation of its reflexive freedom, in the legitimation of freedom as a right, since this is a condition for the practical implementation of this fundamental right (Honneth, 2017, p. 80-84).

Thus, according to Honneth (2017), personal freedoms cannot override social freedoms, and there must be an intimate and systemic communication between the two manifestations of freedom, and there must be an *ethos* based on solidarity and eudaimonia.

The theory of recognition is a necessary parameter for reading the right to freedom since the individual's self-recognition takes place according to his interactions with the community. Still, the struggle for recognition takes place not only with individuals but also with social groups. The struggle for their freedoms and rights in institutions and also in culture reflects the struggle for recognition of these groups. Thus, recognition will allow the possibility of institutional transformations that guarantee the right to freedom to be, to express, and to modify phenomena with practical actions (Honneth, 2009, p. 156).

The analysis of the conceptual similarities regarding the fundamental right to freedom in the decisions on the practice of homeschooling by the Brazilian and Spanish constitutional courts will be done with a view to the context and the philosophical reflections made by Axel Honneth and brought, not with exhaustive pretensions, but to allow the objective of the present work to be developed.

5. ANALYSIS OF THE FUNDAMENTAL RIGHT TO FREEDOM IN PARADIGMATIC DECISIONS ON HOMESCHOOLING IN BRAZILIAN AND SPANISH CONSTITUTIONAL COURTS

As the approach method, Peirce (1931-1958) semiotic phenomenology was used. Peirce's phenomenological theory, centered on the concepts of Firstness, Secondness, and Thirdness, provides a robust theoretical framework for understanding how humans perceive and interpret phenomena. Firstness refers to the direct and immediate experience, unmediated by anything else, capturing the raw essence of phenomena. Secondness deals with the experience of resistance and opposition, where phenomena are perceived as realities that interact directly with us. Finally, Thirdness encompasses the mediated interpretation of phenomena, where the human mind organizes and symbolizes lived experiences, applying patterns and generalizations. This tripartite approach is valuable for investigating phenomena in scientific studies because it allows for an analysis that spans from immediate sensory perception to the construction of more complex meanings.

The choice of Peirce (1931-1958) phenomenology as a methodological approach is justified by its ability to provide a complete and detailed analysis of phenomena, considering both their immediate sensory qualities and their symbolic and interpretative implications. The application of this methodology in scientific studies enables a more holistic understanding of phenomena, covering everything from initial perception to the construction of complex meanings. This approach is particularly useful in research areas where both the concrete and abstract aspects of phenomena need to be considered, such as in studies of human behavior, communication, or psychology. By utilizing Peirce (1931-1958) theory, researchers can ensure that all dimensions of phenomena are explored, resulting in a more robust and comprehensive analysis.

In practice, the implementation of a methodology based on Peirce (1931-1958) semiotics involves combining different methods of data collection and analysis aligned with the three modes of perception. Initially, methods such as direct observation and qualitative analysis will be used to capture the Firstness of phenomena. Next, Secondness will be explored through experiments or case studies, where the direct interactions between subjects and phenomena are observed and recorded. Finally, Thirdness will be addressed through content analysis or theoretical modeling, where the collected data will be interpreted and integrated into a broader theoretical framework. This integrated approach allows for phenomena to be examined exhaustively, ensuring that all their dimensions are considered in the analysis.

The approach method was applied by utilizing the procedural method and this method adopted for this study was content analysis. Krippendorff (2018) is a central figure in the development of content analysis methodology, a research technique widely used across various disciplines such as communication, sociology, political science, and law. According to Krippendorff (2018), content analysis aims to interpret and infer meanings from textual data, whether written, verbal, or visual. This process involves several critical steps that ensure the depth and accuracy of the analysis.

The first step involves defining the research problem. Krippendorff (2018) emphasizes the importance of formulating a clear and specific research question that guides the entire analytical process. Clarity in the research problem allows for focused analysis efforts and precise definition of the study's objectives. In this context, the research question for the present article is: what are the consequences of judicial decisions by courts in Brazil and Spain concerning reflective freedom?

Next, it is necessary to define the units of analysis. Krippendorff (2018) suggests that these units can range from words and phrases to themes or other segments of text. The choice of units of analysis is crucial because they are the central elements to be coded and subsequently analyzed. The chosen unit of analysis was the right to freedom as reflected in landmark constitutional decisions on homeschooling in Brazil and Spain. A semantic analysis of this unit of analysis was conducted to enable coding, the description of which can be found in Barbosa e Rosa (2023).

After coding, the phase of inference and interpretation is fundamental. According to Krippendorff (2018), content analysis should go beyond mere quantitative descriptions, such as word counts, to infer deeper meanings, identify underlying patterns, and explore the implications of the analyzed content. These inferences should be grounded in appropriate theories and context. Thus, the inferences from the analyses are presented to demonstrate, finally, the

conclusion reached in this article. But before that, it is essential to discuss the application of content analysis in legal research.

Barbosa e Rosa (2023) offers an in-depth reflection on the use of content analysis as a method for empirical research in the legal field. Barbosa e Rosa (2023) discusses the epistemological foundations of content analysis, highlighting its importance in investigating complex legal phenomena. They argue that content analysis allows for a more detailed understanding of legal texts, judicial decisions, and other legal documents, helping to identify patterns, themes, and discursive structures that are not immediately evident.

The article also explores the different stages of the content analysis process, including data coding, information categorization, and result interpretation. Barbosa e Rosa (2023) emphasizes the need for a rigorous and systematic approach to ensure the validity and reliability of the obtained results.

Furthermore, Barbosa e Rosa (2023) applies these theoretical considerations to specific empirical studies in the field of law, demonstrating how content analysis can be used to investigate complex legal issues, such as judicial interpretation and the application of legal norms.

With the methodologies outlined in this article, we now move on to the inferences. Regarding the decision on the constitutionality of the practice of homeschooling, the Brazilian State, represented by the Federal Supreme Court, decided in 2018, in Extraordinary Appeal (RE) nº 888.815 the following points:

- First, it concluded that education is a fundamental right that qualifies the community as a whole, developing its citizenship based on enlightenment, politicization, and development. In addition, it dignifies the individual because it makes him the holder of a fundamental subjective right and fulfills the principle of human dignity.
- It also concluded that it is a priority duty of the family to ensure the education of children, adolescents, and young people. To this end, the Brazilian Constitution established the duty of the family and the State to be solidary so that there is adequate educational training for children, adolescents, and young people. This would respect the educational purpose for Brazil to reach better educational parameters.
- The Brazilian Constitution does not prohibit the practice of homeschooling, however, any of its hypotheses that do not respect the duty of solidarity between the State and the family will be unconstitutional.
- The practice of homeschooling is not a subjective public right of the family or the student. This means that, from the creation of a federal law, the legislative power, as long as it respects the solidarity between the State and the family and other constitutional principles related to the right to education, will be able to enact a law that regulates the practice of homeschooling.
- In this sense, the Brazilian constitutional court declared unconstitutional the practice of homeschooling without a law that regulates it according to the parameters provided for in the constitution.

Before moving on to the analysis itself, it is also exposed what the Spanish State decided, through the Spanish Constitutional Court, in judgment nº 133 of 2010, on the subject of the possibility of practicing homeschooling:

- The practice of homeschooling must meet requirements that are not met in practice, namely: following the purpose of human development, ensuring that the contents provided by the State are taught since it is the public power, based on constitutional principles, who approves and supervises the educational system.
- The Spanish infra-constitutional legislation, as well as the Spanish Constitution, say that basic education is mandatory, free, and must complete 10 years of schooling, ranging from 6 to 16 years, according to art. 27.4 of the Spanish Constitution.
- Article 27 of the Spanish Constitution, which provides for constitutional freedoms, does not mention the freedom of parents to choose a type of education outside the modality offered by the Spanish State. Thus, they argue that this freedom is not located in the freedom of teaching, since parents have the right to complement official teaching outside of school hours. In the same sense, the freedom to choose to homeschool is not allocated to everyone's right to education, since the reasons alleged by the appellants were pedagogical and not religious or moral, as provided for in art. 27.3 of the Spanish Constitution.
- It argues that the Spanish legislative power created an infra-constitutional law, exercising political pluralism, which defines an educational system designed with mandatory schooling and that, art. 27 of the Spanish Constitution, prioritizes school education as a way of forming citizens since the objective of the Spanish educational system is to allow the free development of the individual personality about a democratic society that values fundamental freedoms.
- There is no prohibition by the Spanish Constitution regarding the choice by the legislator to create a law that configures school and compulsory education. Still, they say that the function of the Constitutional Court should not be confused with that of a legislator who enacts a law.
- They decided, therefore, that the practice of homeschooling is unconstitutional.

The decision of the Brazilian constitutional court demonstrated the concern that the right to freedom for the practice of homeschooling was manifested not only based on individual freedom, but also social freedom. This means that individual or small group manifestations cannot override collective interests, which are also represented by the legislator's freedom of choice. In this sense, the Brazilian State would have used its reflective freedom to the point of not recognizing, through its institutions, until now, the legality of the practice of homeschooling.

Thus, given the common good, the right to freedom, worked by the decision of the Brazilian constitutional court on home education, clearly defended the position that collective freedom is a limitation of individual freedom. Precisely for this reason, it decided that the practice of homeschooling is not unconstitutional, as long as the community, through the legislature, understands that it is necessary to regulate this modality following constitutional parameters.

Regarding the decision of the Spanish constitutional court, taking into account the reflective freedom of the State, there was a partial similarity with the decision of the Brazilian constitutional court. This is because the Spanish State did not recognize, through its institutions, the legality of the practice of homeschooling through laws, principles, and norms. In this sense, collective freedom stands out over individual and/or group freedoms since the legislative power exercises the function of representative of collectivity.

In the second point of analysis, it is pointed to a lack of reasoning based on empirical evidence on the part of the Spanish constitutional court. This one stated that the parameters of citizenship would not be sufficiently developed in homeschooling with a view to the constitutional principles of the Spanish nation, but at no time did it bring data that evidence this statement in its decision. Collective freedom should serve to limit individual freedom, but in its decision, the Spanish constitutional court did not limit individual freedom with its statement but suppressed it in an unfounded way. In this sense, there is no motivation for the suppression of individual freedom in this argument.

In the third point of the analysis of the right to freedom, the Spanish constitutional court decided to declare the practice of homeschooling unconstitutional. However, the only argument that justified his declaration intending to express the fundamental right to freedom is the reflective freedom of the State in creating laws. However, if the Spanish legislator decides to create a law that regulates homeschooling, there would also be an expression of reflective freedom, since there is no prohibition in the Spanish Constitution to create a law with this theme, an argument even used by the Spanish constitutional court to support the unique possibility of compulsory school education.

Thus, to express the right to freedom, having as a reference the limitation of individual freedom for the common good, it is concluded that the decision of the Brazilian and Spanish constitutional courts in their decisions on homeschooling is partially similar. They are similar concerning the reflective freedom of the respective States when, based on their institutions, they regulate compulsory school education, choosing not to regulate the practice of homeschooling. On the other hand, they are not similar since the Brazilian State decided, with the exercise of the judiciary power, for an expanded reflective freedom since, if there is a law that regulates homeschooling, the practice of this will be constitutional. On the contrary, the Spanish State only declared the practice of homeschooling unconstitutional. Such a perspective is limiting because of the right to freedom, since the legislature if it decides to create a law that regulates homeschooling, will be using its power to represent the people to establish norms that prioritize collective interests and not just mere individual freedoms, which affirms the collectivist perspective of the right to freedom. Thus, the position of the Spanish judiciary is reductionist precisely because the Spanish Constitution does not prohibit the creation of a law that regulates homeschooling, nor does it limit educational practice only to school education.

6. CONCLUSION

In the sense of the research developed here, one can observe the need to expand the dialogues on the practice of home education in Brazil and also in Spain, since these countries still have emerging perspectives on the practice of this educational modality. In this sense, a deeper understanding that gives legitimacy to political and social decisions is essential, which is why a discussion on the subject is necessary, mainly in a scientific way.

In addition, it was concluded that the decision according to the parameter of the fundamental right to freedom was partially similar in Brazil to Spain when evaluating the judgments of the constitutional courts on homeschooling in these respective countries. This is because

the Brazilian judiciary gave a greater extension regarding the possibility of practicing home-schooling, provided that there is participation between the State and the family and that it is regulated by law. The Spanish judiciary, on the other hand, limited freedom in order not to even allow future reflective freedom if a law is approved that regulates homeschooling, which restricts the collective will and freedom in favor of the common interest, which is precise that brought in the present work. in the development of the theoretical framework, which highlights a crisis in democratic constitutionalism and reinforces the need for reflection on the subject.

REFERENCES

- ANED. *ED no Brasil*. ANED, 2021. Disponível em: <https://www.aned.org.br/index.php/conheca-educacao-domiciliar/ed-no-brasil>. Acesso em: 15 ago. 2022.
- BARBOSA, Hugo Paiva. *Homeschooling e direito à liberdade: uma análise da posição do Judiciário brasileiro*. São Paulo: Dialética, 2023.
- BARBOSA, Hugo; ROSA, Waleska. Análise de conteúdo: Considerações epistemológicas e aplicações nas pesquisas empíricas em Direito. *Metodologias e Aprendizado*, v. 6, p. 543-560, 2023.
- BRASIL. Assembleia Legislativa. *Projeto de Lei PL 3179/2012*. Acrescenta parágrafo ao art. 23 da Lei nº 9.394, de 1996, de diretrizes e bases da educação nacional, para dispor sobre a possibilidade de oferta domiciliar da educação básica. Brasília, DF: Câmara dos Deputados, 2012. Disponível em: https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=963755&filename=PL+3179/2012. Acesso em: 26 Ago. 2021.
- BRASIL. Supremo Tribunal Federal. *Recurso Extraordinário nº 888.815-RS*. Recorrente: V D Representada por M P D. Recorrido: Município de Canela. Relator: Min. Roberto Barroso. Brasília, 12 de setembro de 2018.
- CARBALLO, Noelia Mendoza et al. *Homeschooling, ¿la realidad del siglo XXI?*. 2021. Disponível em: <https://riull.ull.es/xmlui/handle/915/24955>. Acesso em: 8 jul. 2022.
- CANOTILHO, José Joaquim Gomes. *Direito Constitucional e Teoria da Constituição*. 7. ed., 2. reimpressão. Coimbra: Almedina, 2003.
- CARDOSO, Gustavo Vitorino. O direito comparado na jurisdição constitucional. *Revista Direito GV*, v. 6, p. 469-492, 2010. Disponível em: <https://www.scielo.br/j/rdgv/a/mrBH6vqQdksL7LMtxHwSF6C/abstract/?lang=pt>. Acesso em: 31 Ago. 2022.
- DAVID, René. *Os grandes sistemas do direito contemporâneo*. São Paulo: Martins Fontes, 1989.
- DUTRA, Deo Campos. Método (s) em direito comparado. *Revista da Faculdade de Direito UFPR*, v. 61, n. 3, p. 189-212, 2016. Disponível em: <https://revistas.ufpr.br/direito/article/view/46620>. Acesso em: 15 jul. 2022.
- ESPANHA. Tribunal Constitucional. *Sentencia 133/2010*, de 2 de diciembre. Disponível em: <http://www.tribunalconstitucional.es/es/jurisprudencia/Paginas/Sentencia.aspx?cod=10041>. Acesso em: 3 ago. 2022.
- ESTARELLAS, Mª Valero. *Derechos educativos y homeschooling en España: situación actual y perspectivas de futuro*. 2011. Disponível em: https://eprints.ucm.es/id/eprint/15784/1/TFM_M_Jose_Valero.pdf. Acesso em: 1 jul. 2022
- EVANGELISTA, Natália Sartori. *Educação Domiciliar e Desescolarização: mapeamento da literatura (2000-2016)*. 2017. 92 f. Trabalho de Conclusão de Curso (Bacharelado em Pedagogia) - Faculdade de Educação, Universidade Estadual de Campinas, Campinas, 2017. Disponível em: https://www.aned.org.br/images/TrabalhosAcademicos/Evangelista_NataliaSartori_TCC.pdf. Acesso em: 5 ago. 2022.
- HONNETH, Axel. *Luta por reconhecimento: a gramática moral dos conflitos sociais*. Tradução Luiz Repa. 2. ed. São Paulo: Editora 34, 2009.

HONNETH, Axel. *O direito da liberdade*. Martins Editora, 2017.

KLOH, Fabiana Ferreira Pimentel. *Homeschooling no Brasil: a legislação, os projetos de lei e as decisões judiciais*. 2014. 233 f. Dissertação (Mestrado em Educação) - Faculdade de Educação, Universidade Católica de Petrópolis, Petrópolis, 2014. Disponível em: https://sucupira.capes.gov.br/sucupira/public/consultas/coleta/trabalhoConclusao/viewTrabalhoConclusao.jsf?popup=true&id_trabalho=1571856. Acesso em: 25 maio 2022.

KRIPPENDORFF, Klaus. *Content analysis: An introduction to its methodology*. Sage publications, 2018.

MAESTRE, María Elena Pérez. *Homeschooling, una opción educativa para las familias españolas*. 2016. Disponível em: <https://idus.us.es/bitstream/handle/11441/80374/Homeschooling%2c%20una%20opci%3b%20educativa%20para%20las%20familias%20espa%3b%20ol.pdf?sequence=1&isAllowed=y>. Acesso em: 7 jul. 2022.

MARTINS, Ives Gandra da Silva. Homeschooling: direito fundamental dos pais ou dever do Estado? In: MARTINS, Ives Gandra da Silva. *O Estado de Direito e o Direito do Estado: outros escritos*. São Paulo: Lex Editora, 2019.

PEIRCE, Charles Sanders. *Collected Papers of Charles Sanders Peirce*. vol. 2, 3, 4. Cambridge: Harvard University Press, 1931-1958.

SANCHEZ, Miguel Ángel Asensio. La educación en casa o "homeschooling" en la doctrina del tribunal constitucional. FORO. *Revista de Ciencias Jurídicas y Sociales*, Nueva Época, v. 15, n. 2, p. 185-212, 2012. Disponível em: http://dx.doi.org/10.5209/rev_FORO.2012.v15.n2.41491. Disponível em: Acesso em: 7 jul. 2022.

SANTOS, Aline Lyra. **Educação domiciliar ou "lugar de criança é na escola"**: Uma análise sobre a proposta de homeschooling no Brasil, v. 255, 2019.

SOTÉS-ELIZALDE, María Ángeles; URPÍ-GUERCIA, Carmen; MOLINOS, María del Coro. Diversidad, participación y calidad educativas: necesidades y posibilidades del Homeschooling. *Estudios sobre Educación*, p. 55-72, 2012. Disponível em: <https://dadun.unav.edu/handle/10171/22634>. Acesso em: 13 jul. 2022.

STRECK, Lenio Luiz. *O que é isto - Decido conforme minha consciência?* 3. ed. Porto Alegre: Livraria do Advogado, 2010.

SUCH, M. (7 de octubre 2015). *¿Por qué quiero educar a mi hijo en casa?* Las razones de los homeschoolers [entrada de blog]. Blog Lenovo. Disponível em: <http://www.bloglenovo.es/por-que-quiero-educar-a-mi-hijo-en-casa-las-razones-del-homeschooling/>. Acesso em: 13 jul. 2022.

ZWEIGERT, Konrad et al. *Introduction to comparative law*. Oxford: Clarendon press, 1998.

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