

An Evaluation of Law No. 13,415/17 Based on Legistics and the PNE Goals

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ABSTRACT – An Evaluation of Law No. 13,415/17 Based on Legistics and the PNE Goals¹. The legislative policy of basic education in recent years is far from tackling the current deep crisis of the Brazilian educational system. We must rethink legislative practices in order to improve its quality, implementing changes in public education. In this context, this research aims to analyze the procedure of the curricular reform of upper secondary education established by Law No. 13,415/2017, based on the quality parameters of Legistics and Legisprudence, as well as to evaluate the content of the law taking as a starting point the goals for basic education of the National Education Plan (PNE) 2014/2024. Finally, it concludes that the steps of the circuit of legislative action were not observed and, on merit, the reform does little to contribute to the implementation of the PNE goals.

Keywords: Basic Education Legislative Policy. Curricular Reform of Upper Secondary Education. Law No. 13,415/2017. Legistics. National Education Plan.

RESUMO – Uma Avaliação da Lei nº 13.415/17 a partir da Legística e das Metas do PNE. A política legislativa de educação básica nos últimos anos está longe de enfrentar a profunda crise pela qual passa o sistema educacional brasileiro. É preciso repensá-la para se alcançar melhorias na sua qualidade, com mudanças no ensino público. Nesse contexto, essa pesquisa analisa o procedimento da reforma curricular do ensino médio trazida pela Lei nº 13.415/2017, a partir dos parâmetros de qualidade da lei da Legística e Legisprudência, bem como avalia o conteúdo da lei tomando como partida as metas em educação básica do Plano Nacional de Educação (PNE) 2014/2024. Ao final, conclui que não foram observadas as etapas do circuito de ação legislativa e, no mérito, a reforma em pouco contribui para a implementação das metas do PNE.

Palavras-chave: Política Legislativa de Educação Básica. Reforma Curricular do Ensino Médio. Lei nº 13.415/2017. Legística. Plano Nacional de Educação.

Introduction

Traditional legal science has focused more on the interpretation and application of law; in turn, the production of norms and the impacts they generate on society play a secondary role in legal studies (Mader, 1991). This issue has been dominated by Political Science (Oliveira, 2009), and there is a considerable shortage of legal literature on the control of the legislative process by the Executive Branch, as well as on its impacts on Brazilian democracy (Soares, 2007), and more specifically, on the quality of basic education legislation².

Likewise, the diagnoses about the quality of basic education are produced predominantly as a result of researches focused on Education and Pedagogy (Oliveira, 2009). Thus, the approach proposed in this article, which seeks to assess the quality of this legislation based on Legisprudence and Legistics, combined with knowledge related to Constitutional Law, Political Science and Educational, may contribute to a better understanding of this scenario and to the improvement of public policies on the subject.

In this context, this article aims to analyze the legislative procedure and the content of the reform of the curricular structure of upper secondary education and of the policy to foster the implementation of full-time schools, both established by Law 13,415/17, which modified the National Education Law (LDB).

First, the substance of the change implemented by Law No. 13,415/17 will be analyzed taking as a starting point the fulfillment of the basic educational goals set by the National Education Plan (PNE) 2014-2024, which will be an indicator of the reform's quality. Next, the rationality parameters of the law and the principles of Legisprudence, as well as the methods of the Material Legistics and the technique of Formal Legistics, will be used as indicators of the conformity of the reform's procedure with the good legislative practices.

Changes Introduced by Law No. 13,415/2017 in LDB and its Effects on the Fulfilment of PNE's Basic Educational Goals (2014/2024)

Law No. 13,415/17, derived from Provisional Measure (MP) No. 746/2016, altered LDB provisions, especially regarding the curriculum of upper secondary education. It altered the Consolidation of Labor Laws (CLT), Law 11,494/2007, which regulates the National Fund for the Maintenance and the Development of Basic Education (Fundeb) and the Decree-Law 236/67. It also repealed Law No. 11,161/05, which provided for the teaching of the Spanish language and, lastly, instituted the policy of fostering the implementation of full-time secondary schools. Thus, it is divided, in summary, into two main guidelines: the loosening of upper secondary education's curriculum and the implementation of full-time schools.

When comparing the previous wording of the LDB with the original wording of MP 746/16 and with the final wording of Law 13,415/17, it is possible to note the main changes implemented, which will be discussed below, as well as the evaluation of potential impacts, taking as a parameter the basic educational goals established by PNE 2014/2024.

Minimum Annual Course Load of Upper Secondary Education

As provided in art. 24, § 1 of the LDB, with the wording given by Law 13,415 (Brasil, 2017), the annual course load of upper secondary education should be progressively increased from 800 to 1,400 hours. Within a maximum period of 5 years, as of March 2, 2017, education systems must offer at least 1,000 hours.

The expansion of the course load is related to PNE's goal n. 6 (Brasil, Law 13,005/2014), which aims to increase the provision of full-time education. However, the achievement of this goal is not restricted to the extension of the school day; to that end, strategies foreseen in the PNE should be implemented, which include, for example, investments in school infrastructure (strategies 6.2, 6.3 and 6.8) and pedagogical supervision and multidisciplinary activities, including recreational, cultural and sport activities (6.1, 6.4 and 6.9).

As Law 13,415/17 did not allocate new resources to implement these intrinsic changes to the compliance with goal 6, it is possible to evaluate that the increase in the course load, by itself, will not generate the expected effects of tackling the serious quality problem of Brazilian upper secondary education (Brasil, 2016c, p.192).

As pointed out by Duarte and Melo (2013), the implementation of higher quality education involves multiple structural and historical variables related to the organization of work in schools and teaching conditions. The increase in course load without investment in these other aspects will not contribute to the quality of education or to the expansion of full-time education. True, considering the current conditions of schools and of teachers' work, increasing the course load may even have negative effects due to the lack of human, physical and financial resources.

Foreign Language

The teaching of the English language, from the sixth year of elementary school, became compulsory, preventing the school community from choosing which foreign language would be offered (Brasil, 2017, article 26, § 5). The teaching of other languages may, however, be part of the curriculum on an optional basis, preferably Spanish (Brasil, 2017, art. 35-A, § 4).

This change is contrary to the spirit of curricular flexibility of Law 13,415/17 and of LDB, since the school community will no longer be able to choose the foreign language to be taught, according to the interests of the students and the ability of schools. This requirement may also

aggravate the deficit scenario of the public educational system, especially due to the lack of teacher training in the area in certain localities. Despite the importance of the English language on the international stage, this legislative option greatly devalues the study of the Spanish language and the Latin American cultural context. In this sense, Sedycias points out:

[...] the position of the Spanish language in the world today is of such importance that those who decide to ignore it cannot do so without running the risk of losing many commercial, economic, cultural, academic or personal opportunities (Sedycias, 2005, 36).

The position of the Spanish language is even more central in Brazil, which is bordered by South American countries whose official language is Spanish (Leal, Pereira, 2017). Thus, the mandatory provision of English teaching goes against the Brazilian reality, particularly the reality of the Brazilian states bordering other South American countries.

As for PNE (Brasil, 2014), the change is in line with the guidelines for the promotion of culture in the school (which includes foreign culture) and for the promotion of humanistic and citizen education, such as strategies related to goals 3 and 6.

Mandatory Components of Upper Secondary Education Curriculum

At the outset, MP No. 746 (Brasil, 2016a, art. 1) expressly repealed the obligation of providing physical and art education as curricular components of upper secondary education, requiring them only for preschool and basic education. However, in view of the enormous negative repercussion of this change among specialists and in society, Law 13,415/17, in its final wording, revoked these changes, so that physical education and art are once again compulsory curricular components of basic education (Brasil, 2017, article 26, § 2 and 3). This was, therefore, a victory of those affected by this legislative process that showed, albeit exceptionally, an opening of the government to listen to their demands.

With the conversion of the MP into a Bill of Conversion (*Projeto de Lei de Conversão* - PLV), mandatory study and practice of physical education, art, sociology and philosophy was established, to be introduced by the National Curricular Common Base (BNCC) - (Brasil, 2017, article 35-A, § 2). Thus, the new legislation maintained the repeal of item IV, art. 36 (according to the wording of Law No. 11,684/2008) that required the compulsory teaching of philosophy and sociology in upper secondary education. Instead, the new draft contained expressions (*study and practice*) intentionally more vague and unclear than the terms *teaching* and *offer*, used for the mandatory curricular components.

Thus, ceases to exist the legal obligation to offer these subjects and in its place there is the mandatory studies and practices included in the BNCC, which was signed by the Ministry of Education (MEC) on December 14, 2018. Without setting legal requirements, it provides for the maintenance of these contents in the educational systems' curricu-

lum (Janine, 2017). This indicates that, in practice, there may be a relaxation in the provision of this humanistic content, potentially harming the students' physical and intellectual development and the building of their reflexive and critical capacity.

The PNE does not establish specific curricular requirements (except for content on Afro-Brazilian and indigenous history and cultures in strategy 7.25), but it provides for teaching based on the ethical and moral values of society and that promotes human rights, diversity and sustainability (Brasil, 2014, article 2, V, VII and X).

BNCC Upper Secondary Education Course Load

Up to 1,800 hours will be reserved for the common and compulsory content of BNCC over the three years of upper secondary education, which amounts to 60% of the total; the remaining hours comprise the diversified and flexible part of the curriculum and will be occupied according to the student's area of interest and the school's offering (Brasil, 2017, article 35-A, § 1 and § 5).

Initially, MP No. 746/16 provided for up to 1,200 hours for the BNCC; however, due to various criticisms that this course load was not enough to cover all common core content, in the PLV process it was increased to 1,800 hours. Nevertheless, it is important to note that the law states that the course load for the common content may not exceed 1,800 hours of the total; it does not establish a minimum number of hours to be allocated to BNCC, only the ceiling. As a result, the legal wording makes it possible for the education systems to allocate the hours they deem necessary to BNCC, if the maximum of 1,800 hours has been met. Thus, uncertainty remains as whether the time allocated will be sufficient for the study of the essential and basic notions of the various areas of knowledge, in order to ensure an integral and complete education (Brasil, 2016c, 271).

There are also questions about a possible premature, excessive specialization in upper secondary education, as 40% of the course load will be focused on elective courses (Leal, Pereira, 2017). Students should complete secondary education having obtained global and integrated skills related to the social and political reality in which they live, including scientific and natural aspects, and basic linguistic and mathematical skills for their practical and professional life.

Organization in Different Learning Pathways

Five learning pathways for upper secondary education were established: a) languages and their technologies; b) mathematics and its technologies; c) nature sciences and their technologies; d) applied human and social sciences; (e) technical and vocational training. The offer of different curricular arrangements will depend on their relevance to the local context and the possibilities of the education systems (Brasil, 2017, article 36, caput). It is possible for education systems to create an

integrated learning pathway (Brasil, 2017, article 36, § 3) and for secondary education seniors to take an additional pathway, if there are places (Brasil, 2017, article 36, § 5).

The first point that deserves to be highlighted is that the choice of any learning pathway by the student depends on whether schools are capable of offering them (Castilho, 2017, p.9). This can be especially problematic given the reality of Brazilian public schools lacking financial resources, structure and teaching staff, especially in smaller municipalities. For the proposed change to generate the expected effect, there must be investment, support and articulation between federative entities, in order to enable the offer of these pathways in schools, for example with the provision of school transport, which was not foreseen in the law.

Also, as long as there is no appreciation of the teaching profession, it is not possible to think of quality teaching; organizing secondary education in teaching pathways will not ensure a quality education if there are no professionals with adequate training and remuneration (Duarte and Melo, 2013). However, the law does nothing to address these obstacles to the teaching career.

It should also be noted that the supposed curriculum loosening is not as flexible as it seems: it is not possible for students to mix different teaching pathways; they should opt for and remain attached to a specific pathway, having no choice of combining contents of the 5 existing pathways (Brasil, 2016b, 147).

Despite the contingencies that need to be addressed, the world's secondary education trend today is deepening the study of the various areas of knowledge (Brasil, 2016c, p.200). The previous Brazilian curricular model of 13 compulsory disciplines that did not converse among themselves was unattractive to students and contributed to raising school dropout rates.

In this sense, PNE (Brasil, 2014) establishes a common national curricular base for basic education, as well as a diversification and loosening of the curriculum (strategies 2.1, 2.2, 3.1, 3.2, 3.3, 7.1), in order to promote interdisciplinary pedagogical practices that relate theory to practice. Thus, the curricular loosening introduced by Law 13,415 (Brasil, 2017) is positive and goes in the direction pointed out by the PNE, in consonance especially with strategy 3.1 (Martins, 2017, p.61).

Nevertheless, the problem will persist if education organized in learning pathways continues to take place in a unidisciplinary and non-dialogical way; this model does not guarantee that teaching will be transdisciplinary or linked to practice. Curriculums are often still aimed at preparing the student for the National Secondary Education Examination (Enem) or at ensuring performance improvement in educational evaluation systems, such as the Basic Education Development Index (Ideb). The law does not address this scenario; on the contrary, it aims to increase student performance rates, with emphasis on the Portuguese language and mathematics, in which student performance has been poor.

Technical and Vocational Training

Law 13,415 (Brasil, 2017) establishes that technical and vocational training is one of the five learning pathways of secondary education (Brasil, 2017, art. 36, caput). In offering them, education systems may include practical work experiences and partnerships with the private sector (Brasil, 2017, article 36, § 6).

It is possible to question the dichotomization in vocational training and learning pathways for languages, mathematics, natural sciences and humanities is critical, which reinforces the mistaken idea of separating theory and practice and of strengthening a dualistic concept of education - propaedeutic and professional (Vieira and Souza Junior, 2016). It would be more appropriate for professional education to be thought of in an articulated way, integrated with the respective areas of knowledge and not as an isolated learning pathway (Brasil, 2016c, 236).

In order to implement these initiatives aimed at including practical experience in the curriculum, it is necessary to create mechanisms for ensuring secondary education students access to vocational training (Brasil, 2016c, 197), so that integrated education activities are developed in combination with work, science and technology, together with society (Viera, Souza Júnior, 2016), which was not done by Law 13,415/17.

Moreover, another problem is that there is still insufficient offer of education systems and courses geared to vocational training to meet current demand (Vieira and Souza Júnior, 2016, p.163). It is necessary, therefore, public investments for the expansion of the number of schools offering vocational education; only then will it be possible to implement effectively an adequate and accessible vocational training system.

PNE (Brasil, 2014) provides for the expansion of vocational training and of enrollments in the area (strategies 3.7 and 8.4 and goals 10 and 11). The changes brought by Law 13,415 (Brasil, 2017) point in this direction, but without introducing specific instruments and public investments to materialize the provision of vocational training, which may end up rendering them innocuous.

Distance Education

Law 13,415 (Brasil, 2017) allows educational systems to sign agreements with distance education institutions of known expertise (Brasil, 2017, article 36, § 11).

Distance education (EaD) is provided for in PNE (Brasil, 2014) in items related to vocational training (strategies 10.3 and 11.3), higher education (strategy 12.20) and master's and doctoral degrees (strategy 14.4). The goal is to expand the offer and facilitate access to such programs, ensuring quality standards, which has been the main challenge. On the other hand, Law 13,415 (Brasil, 2017) allows EaD in upper secondary education, using a very vague expression to ensure the quality

of the education offered by the partner institution, that is, it must have a *renowned recognition* (“*notório reconhecimento*”). It also establishes in the items of § 11 of art. 36 a series of means of attesting this renowned recognition, which include experience, provision of courses, studies conducted; however, they do not ensure a sufficiently precise and specific parameter for this evaluation.

It is also important that the provision of education in this modality does not become a subterfuge for the government to refrain from guaranteeing the right to education or a tool to improve statistics without ensuring quality. More than raising the number of places and enrollments in basic education, “[...] the equalization of educational opportunities and a minimum standard of quality of education are the purposes set in the Constitution to establish the duty of collaboration between the entities of the Federation, in the light of art. 211, §§ 1 and 4” (Pinto, 2016, p.12). Therefore, the universalization of education provision must go hand in hand with the improvement of its quality.

Finally, it should be pointed out that EaD is not adequate for all educational situations, since not all satisfactory teaching and learning is possible outside the context of the classroom (Paiva, 2017), especially in basic education.

Decree 9,057 (Brasil, 2017c) introduced new regulations for art. 80 of the LDB, which provides for distance education programs. Regarding Law 13,415/2017, the decree establishes in art. 8, item II, the competence of education systems to authorize the provision of courses and the participation of distance education institutions in upper secondary education.

Basic Education Professionals

Two new categories of basic education professionals were established by Law 13,415 (Brasil, 2017), namely: a) professionals with renowned knowledge recognized by educational systems, to provide, exclusively in technical and vocational training, content of areas related to their training or professional experience, attested by specific degree or teaching practice in educational units of the public or private network; b) professionals with higher education degrees and pedagogical training (Brasil, 2017, art 61, IV and V).

As for the first category, reference is made to the expression *renowned knowledge* (“*notório saber*”), an indeterminate juridical concept, which refers to the experience and professional practice of the teacher. Several specialists in the field spoke of the inadequacy of the term *professional* (Brasil, 2016c, 192), as it further disqualifies the already precarious profession of teacher. One of the biggest problems of Brazilian education today is still the training and qualification of teachers, the poor remuneration and, therefore, the low attractiveness of the career (Duarte and Melo, 2013). Admitting professionals with renowned knowledge does not contribute to alleviate this problem, since it dis-

penses with training and degrees, admitting professionals who have only teaching practice.

Another criticism was the devaluation of vocational training, by admitting professionals with no teaching degree to work in the area. Historically in Brazil, technical and vocational training have been considered as second class and directed to the lower classes, as opposed to higher and academic education (Vieira, Souza Júnior, 2016, pp. 154-155). By expanding the range of professionals who can work in this area, this idea is reinforced and the requirement to teach is reduced to having experience in it, when it requires much more than this, like having knowledge of pedagogy and professional didactics (Brasil, 2016c, pp. 233-234), in accordance with PNE strategy 15.6.

The requirement of a professional with renowned knowledge to minister in vocational and technical education violates the goal 15 of the National Education Plan, which provides that all basic education teachers should have specific higher education pedagogical training (“*licenciatura*”), obtained in the area of knowledge that they teach.

Although the PNE (Brasil, 2014) states that experience should be valued in teacher training for vocational education, it expressly establishes that this should be done through the offer of courses aimed at didactic-pedagogical complementation and certification of experienced professionals (strategy 15.13). In this way, teaching experience is not considered, by PNE, a sufficient requirement for classroom teaching, but a complementary one. In contrast, Law 13,415 (Brasil, 2017) only admits professionals with teaching experience.

Finally, the second category is in line with art. 14 of Resolution 2 of the National Education Council (CNE) - (Brasil, 2015), which provides for pedagogical training courses for unlicensed teachers with undergraduate degrees, but only on an emergency and provisional basis, a proviso not found in Law 13,415/2017 (Britto, 2017, p 235).

Implementation

The education systems should establish a schedule for implementing the changes introduced by Law 13,415 (Brasil, 2017) in the first school year following the date of official publication of the BNCC and start implementation from the second school year subsequent to its approval (article 12). The approval of the BNCC of preschool and basic education took place on December 20, 2017, and its publication in the Official Gazette (DOU) the following day. In turn, the BNCC of upper secondary education was only approved on December 14, 2018. Therefore, during the 2019 academic year, schools should establish the implementation schedule to be executed in 2020.

There are strong reasons to worry about the difficulties and impossibility of implementing the measures introduced by the law in Brazilian schools, especially regarding the offer of learning pathways. The scenario of Brazilian upper secondary education is not uniform; there

are different realities and peculiarities in the different regions of the country³ that can jeopardize the effectiveness of these changes.

The lack of basic physical infrastructure and teachers in schools, an obstacle for which the law does not provide solutions, may mean that its text will become a dead letter. In order for the law to be effectively implemented, it is necessary to increase investments in education and that the various teaching problems are faced, especially those related to the teaching career, which directly affect the quality of teaching (Duarte; Melo, 2013).

Policy to Promote the Implementation of Full-Time Upper Secondary Education

With regard to the policy to promote full-time education, it involves the disbursement of MEC funds to the States and the Federal District (DF) over a period of 10 years per school, counting from the date of implementation of full-time upper secondary education in the respective system of education (Brasil, 2017, article 13, sole paragraph).

First, we must understand that the concept of integrated education is not confused with that of full-time education. The first one refers to the integrated teaching of different disciplines, in a transdisciplinary way, providing an integral and comprehensive education to students; the second is related to the increase in school hours and the adaptation of the school space to receive the students for this extended period (Queiroz, 2015, 64).

As full-time education students have been performing better at school, government policies have sought to implement new full-time schools as a path to quality education. Nevertheless, this improvement is due to not only the increase in the course load, but also to its combination with the articulation of knowledge in integrating projects and with the offer of complementary cultural and sport activities (Queiroz, 2015). In other words, these educational systems have sought to offer an integrated education, besides extending the school day.

Thus it is clear that extending the time spent in the school, by itself, does not guarantee a quality education. To ensure this, it is necessary to renovate the physical infrastructure and change schools' pedagogical projects to make them effectively integrative and enable schools to become a space for training and humanization (Brasil, 2016c, 234). In this sense, without improving the highly deteriorated structure of Brazilian schools, it is innocuous to seek only to increase the course load.

Another point is the low reach and modest impact of the policy. According to MEC data, 516 schools received funds in 2017, and in 2018, this number is expected to reach 967 vocational schools. Full-time education is currently attended by a small percentage of upper secondary students, especially by those with better socio-economic conditions, who do not need to reconcile study and work. Concerns have arisen over the perverse effect of this policy of increasing existing inequalities (Bra-

sil, 2016c, 234). Thus, it is necessary to invest first in the construction of an integrated education in upper secondary education as a whole, which reaches a much larger student spectrum than the mere implementation of some full-time schools.

Furthermore, the issue of financing full-time schools and especially the continuity of disbursements is relevant. The law does not provide for the actual amount intended to finance the policy or how MEC's financial support will be monitored; according to Arts. 14, § 2 and 16, this must be defined by an act of the Minister of Education⁴ (Brasil, 2017). There is also a history of discontinuation of social policies and programs by federal administrations, without achieving the goals initially targeted. Therefore, when thinking about a new education program, it is necessary to ensure the sustainability of this support and the continuity of the policy after the end of the 10-year term for federal financing.

As highlighted in sub-section 2.1, PNE goal 6 (Brasil, 2014) establishes that full-time education should be offered in at least 50% of public schools, serving at least 25% of basic education students. Law 13,415 (Brasil, 2017) seeks to increase the number of full-time schools and provides for the transfer of funds, but again does not provide for the structural changes required for full-time activities, such as: physical infrastructure of schools, training of teachers, articulation with educational spaces, production of teaching material, provision of transdisciplinary activities (strategies 6.1 to 6.9).

Financing

To comply with the first measure of Law 13,415/17 (curricular loosening), no new source of funds to finance the proposal was created. This means that public education systems will need to conform to legal requirements, such as organizing learning pathways and expanding the course load, without necessarily receiving new funds. This is worrying because of the new expenses that will arise for implementing these adaptations, for example, the adjustment of the pedagogical project, the training of teachers, the production of adapted didactic material, the adjustment of the infrastructure to the extended school day.

Specifically, the financing of technical and vocational training, established in item V of art. 36 of the LDB by the new Law, will come from the Fundeb (Brasil, 2007, article 10, XVIII). This means that this new expense may impair preschool education if municipalities receive less resources for this purpose (Oliveira, 2009). The National Union of Municipal Education Administrators of Minas Gerais (Undime) showed exactly this concern in public hearings over the division of the already precarious resources of education, especially for municipalities (Brasil, 2016c, p.12). It is also important to note that the term of validity of Fundeb will end in 2020 and therefore this funding issue should have been addressed separately from Fundeb or deferred to the discussion on the new fund to be implemented after 2020.

Lastly, for the policy to foster full-time schools, as already pointed out, the law provides for a transfer of supplementary financial support, but without determining the amount to be disbursed⁵.

In view of the above, Law 13,415 (Brasil, 2017) does not contribute to the achievement of PNE's goal 20, since it does not ensure the expansion of public investment in education. On the contrary, in view of the Constitutional Amendment (EC) No. 95 (Brasil, 2016d), which freezes public spending for the next 20 years, there are predictions that there will be cuts in the financing of public education.

Upper Secondary Night School

MP No. 746 (Brasil, 2016a) did not make any reservations to increasing the course load of upper secondary night schools. Law 13,415 (Brasil, 2017) established that education systems will regulate the provision of youth and adult education and of regular night education according to students' conditions (Brasil, 2017, article 24, § 2). This addition draws attention to the need to take into account the age and the socio-cultural and financial particularities of those who study at night and usually combine study with work. Increasing the course load for this student profile could aggravate the problem of school dropout, discouraging completion of high school. However, the law does not establish how this increase would be implemented, nor does it introduce any new legal obligation, since art. 4, VI of the LDB already required the provision of this differentiated modality (Martins, 2017, 62).

Other Considerations

In addition to the changes mentioned above, the main criticism of the upper secondary education reform is the fact that it was enacted as a provisional measure. The most diverse social actors related to education questioned, in particular, this legislative approach, since it allows for little public participation (Brasil, 2016c, p.232). Although it has been possible to change some aspects of its content through a bill of conversion, it is a proposal that had already been fully formulated by the Executive and whose pace of legislative processing prevents further discussion.

This decision-making process is hardly in line with the PNE goal 19, which provides for the democratic management of education, with effective public consultation with the school community. Particularly noteworthy is the strategy 19.6 that determines the incentive to participation and consultation of education professionals, students and their families in the formulation of pedagogical projects and school curriculums.

The lack of participation and consultation of those affected about this policy, especially students, teachers and administrators of education, and their exclusion from its elaboration process will also impact the implementation and effectiveness of the changes introduced.

Another major problem pointed out in the debates about MP No. 746 (Brasil, 2016a) was the approval of the law without establishing the BNCC, which was only approved by the MEC for upper secondary education in December 2018, almost two years after the promulgation of Law 13,415 (Brasil, 2017). This fact is surprising, first because of the urgency required for enacting a MP and the consequent fast processing and haste in the approval of the law, which, however, would not become effective without the Curricular Base of upper secondary education, approved almost two years later; and second, because of the postponement of the Upper Secondary Education Base, homologated one year after the BNCC of preschool and elementary education, fragmenting the BNCC of basic education without a relevant reason.

In practice, since the law deals only with the more general guidelines to be further elaborated in the National Base, approving the law without a Base meant giving a blank check to the Executive. With the approval of BNCC, the law can finally be implemented, even if its effectiveness is in question, given the chaotic reality of Brazilian education systems.

In view of the above, it is clear that curricular changes will be innocuous if they are not accompanied by improvements in the structure of the educational system, especially by investing in the area, in order to enable the establishment of a qualified teaching staff (and career enhancement), the renovation of physical infrastructure and the reform of pedagogical projects. School dropout, which has been identified as the problem that demanded curricular reform, is a much more complex issue and involves a series of factors that go beyond the rigidity of the upper secondary school curriculum, such as violence, the need for early and precarious entry into the labor market and teenage pregnancy (Unicef, 2017). Finally, it is undeniable that students enter upper secondary education with serious educational shortcomings, notably due to a poor elementary education. Thus, it is necessary to face the root of the educational problem by investing in the various levels of basic education: preschool, elementary education and secondary education.

Presentation and Application of Principles of Legisprudence and of Legistics Methodology to the Reform Established by Law 13,415/17

In a situation of intensification and centrality of legislative activity of the Executive branch, it is essential to rethink how the elaboration of normative acts is managed (Soares, 2012). In this context, the lessons of Legisprudence and Legistics can contribute to the quality and simplification of norms, in this case, regarding basic education.

To analyze upper secondary education based on this approach, it is necessary to clarify some concepts that are not commonly used in the legal and educational fields. First, Legisprudence⁶ is the branch of law theory that reflects on legislation, touching on issues such as the legitimacy of laws and the justification and rationalization of the legis-

lative process. Thus, it combines contents of Law Theory with Political Science, in that it seeks to focus on the activity of the legislator as a legal agent and not just as a political agent.

According to Wintgens (2012), the subject is an autonomous and morally responsible agent (*subject qua subject*), capable of social interaction and of acting, in principle, without state intervention. In this sense, Legisprudence takes freedom not only as the starting point, but also as the guiding motive of every course of political action.

Nonetheless, the author argues that there must often be external limitations (such as norms) on the freedom of the individual, provided they are rationally justified, otherwise they will be considered illegitimate. Thus, for a law to be legitimate and evaluated as qualitatively good there must be a proper rationale behind it, precisely because it constitutes a limitation on freedom (Wintgens, 2012). This is one of the aspects used to evaluate the quality of the reform introduced by Law 13,415 (Brasil, 2017), from the perspective of Legisprudence: were sufficient reasons and rationale considered in the decision-making process?

To answer this one must understand what constitutes a rational justification; thus, A. Daniel Oliver-Lalana (2013) points out five levels of legislative rationality:

i. Linguistic rationality: focuses on the clarity, precision, comprehensibility and grammatical correctness of the law, that is, the success in transmitting the normative message to the recipients. This analysis will be done later in Formal Legistics, pointing out the linguistic problems in Law 13,415 (Brasil, 2017).

ii. Systematic-normative rationality: it is related to the observance of the due legislative process and to coherence and logical consistency, internal and external, ensuring that the new norm is not self-contradictory and is compatible with the pre-existing normative order. Regarding this aspect, Law 13,415 (Brasil, 2017) is incompatible with some of the goals of the PNE (Brasil, 2014); there is a normative clash mainly between the elaboration of the law and goal 19 and between the new wordings of art. 61, IV of the LDB and the goal 15 of the PNE;

iii. Social rationality: it involves the expectations of compliance by the recipients, of its application and implementation and of the mobilization of the state apparatus for its enforcement. The lack of participation and influence of those affected in the elaboration of Law 13,415 (Brasil, 2017) diminishes expectations of compliance with the norm, due to the low level of social legitimacy and confidence of these actors in decision-making processes that were conducted without their involvement. The state apparatus mobilized to achieve the goals of the norm has also been reduced, given the persistent precariousness of financial investments;

iv. Instrumental rationality: adequacy between the objectives and means used; sufficiency and necessity of the norm, its social and economic impacts (cost-benefit, efficiency); and the ability of norms to meet their objectives. Law 13,415 (Brasil, 2017) seeks to address com-

plex secondary education problems such as school dropout, poor quality of education and poor performance in national evaluations. The means used, essentially, the curriculum loosening and the promotion of full-time education, are, however, insufficient to solve them, as has been said previously. One can still question the necessity of the norm, since the dictates of the LDB were enough for ensuring the intended curricular changes. Finally, the *upper secondary education reform* does not bring the structural changes required to generate deep educational impacts; in the case of the sector's development policy, it reaches a very small share of Brazilian public schools;

v. Axiological rationality: fairness and correctness of the values behind the norm. In the justification accompanying MP No. 746 (Brasil, 2016a), it is clear that the purpose of the federal government is not to combat the shortcomings of secondary education, but to improve the performance in national evaluations, such as Ideb, Enem and Prova Brasil, even if this does not mean an actual improvement in teaching quality. Hence, the great focus on increasing the course load of Portuguese language and mathematics and the disparagement of more philosophical and political content.

Thus, at first, it cannot be said that Law 13,415 (Brasil, 2017) was satisfactorily and rationally justified, which makes its implementation illegitimate and potentially unfair.

In a more practical and methodological perspective than Legispudence, Legistics seeks to reflect on the elaboration and impact of the law, proposing a series of practices and measures to be taken in order to institutionally consolidate good practices of legislation and the quality of the legislative product. It is divided into Formal Legistics and Material Legistics; the former addresses formal aspects of writing, language, semantics, structuring and systematization of legislative acts, being, therefore, a legislative technique that seeks to increase the accessibility and intelligibility of legislative commands; the latter, addresses issues related to the content of the law, in order to make it more effective (Mader, 2007).

Thus, the Material Legistics focuses on developing a procedure or method for the elaboration, application and evaluation of the laws, in order to improve effectiveness and normative quality. In this sense, Delley (2004, p.101) elaborates a normative cycle to be followed in a non-linear, interactive and successive way, whose steps are:

i) Definition of the problem: it is a process of autonomous comprehension of the reality to be potentially regulated. For this purpose, it is necessary to constantly relativize and problematize the legislative impulse, avoiding a partial or incomplete view of the problematic situation being addressed, according to the specific interests of those who demanded a normative solution. It is also important to provide channels of participation for citizens and experts to bring their views on the issue for the legislator to assess the whole scenario of the problem (Delley, 2004).

According to the above parameters, the government proposal (MP No. 746/2016) did not duly define the problem situation demanding legislative intervention. The Explanatory Statement (*Exposição de Motivos* - EM) that accompanied the MP (EM No. 00084/2016) did not present an integral overview of the causes and conditions in which the current deficiencies of secondary education developed (Brasil, 2017). Likewise, there was no adequate mapping of those directly or indirectly affected; the analysis of the minutes of the public hearings carried out shows that participation was merely formal (Brasil, 2016b, 2016c).

One of the techniques proposed by Legistics for a comprehensive representation of the problem is the causal modeling, which allows to decompose it into its various elements and to visualize the relations between them.

Thus, the causal modeling graph is constructed based on the central elements of the problem, in this case the poor quality of public secondary education and school dropout rates. These variables are then decomposed into the various factors (from the most concrete to the most abstract) that favor them (positive sign [+])⁷ or mitigate them (negative sign [-] in the graph) - (Delley, 2004).

Because of the complexity and multidimensionality of the problems of Brazilian upper secondary education, this technique will be used to facilitate the visualization of the dynamics and causal relationships between these factors to enable a comprehensive visualization of the problem addressed by Law 13,415 (Brasil, 2017).

The graph shows that the main problems of Brazilian education are related to the low quality of teaching, mainly due to the lack of infrastructure in schools and the precariousness of the teaching profession. However, the reform does not contribute to solving any of these deeper issues; it must be borne in mind that the causes of the problem, not its symptoms, should be the focus of legislative intervention (Meneguim, 2017: 88).

Specifically regarding the lack of resources for education in states and municipalities, the reform did not comply with the principle of subsidiarity, which is recommended by the Mandelkern report on improving legislative quality. According to this principle, it is preferable that the decision be taken at the local level, as close as possible to the citizen. To do this, it must be verified whether the state or municipality has sufficient resources to achieve the objectives of a proposal before its implementation. Otherwise, its effectiveness is compromised (Mandelkern Group, 2000, p. 27). As there is an acute shortage of resources at the local level and the reform does not address this, and even imposes changes that will generate new expenditures to local governments, this principle was not observed.

ii) Determination of the aims and objectives: in order to alter a situation considered unsatisfactory, it is essential to visualize clearly the situation to be achieved; therefore, the definition of the legislation's objectives and aims, from the most general to the most concrete (Dellay, 2004), should be made. This definition should not be generic and abstract; the more specific it is, the easier it will be to choose the appropriate means to achieve the objectives pursued. Ideally, some indicator should be used to verify the success of the norm in the accomplishment of its ends.

It is possible to envision the tension between the reality and the goal to be pursued in relation to basic education; thus, it is possible to determine where there should be legislative intervention in order to change this picture. The objectives declared to justify the reform of upper secondary education are too general and the instruments presented are also inadequate, insufficient to reach them. In essence, in EM No. 00084/2016 accompanying MP 746/16, the stated purposes of this regulation are to reduce school dropout and improve school performance and teaching quality (Brasil, 2017). However, the instruments established by the law, that is, curricular loosening and extension of the school day, are incapable of reaching these goals.

iii) Establishment of alternative scenarios: all options must be considered to make the most appropriate decision; also, legislative intervention may not be the most appropriate means to achieve the objectives pursued. Again, the proposal of MP No. 746 (Brasil, 2016a) did not consider alternatives, stating only that there was another bill presented by the Executive branch dealing with the issue.

It must be borne in mind that a legislative initiative is not always the best option. In this sense, approving a general law in Congress, especially regarding education, may not be the most adequate solution

to address certain Brazilian teaching shortcomings, given the particularities of schools in each region of the country. Thus, it may be much more appropriate to enact regulations by local councils of education, whose composition should include those affected, such as teachers, administrators and students (Brasil, 2016c, p. 194). This idea is in line with the principle of subsidiarity of the Mandelkern Report mentioned above, which recommends that decision-making should occur at the local level.

A law may be unnecessary or even an obstacle to the implementation of a public policy. In this sense, Law 13,415 (Brasil, 2017) specifies, for example, the areas to be taught in upper secondary education, which the LDB did not. However, the organization in teaching areas have been practiced in schools since 1998 based on Opinion 15/98 (Brasil, 1998b), although there was no legal provision until now (Brasil, 1998). Therefore, to organize the teaching in areas, a law was not necessary, and this current provision only legally formalizes an already consolidated practice.

(iv) Choice of solutions: starting from a well-formulated problem and well-defined objectives, appropriate solutions are chosen in accordance with the principles of subsidiarity (least constraining means), adequacy (between means and objectives), synergy (optimization of chosen means) and celerity (rapid resolution of problems) - (Delley, 2004).

The panoramic view of structural deficiencies in upper secondary education in Chart 1 reveals which dimensions should be addressed to improve education quality. There is no obvious or easy-to-execute solution to such multifaceted problems, but the one envisaged in Law 13.415 (Brasil, 2017) touches only the surface of these issues.

(v) Prospective assessment: it aims to anticipate the possible effects and impacts of the law on the affected and on the regulated and related sectors, before its entry into force (Delley, 2004). These data allow deciding whether to enact the law.

vi) Application: law implementation.

Law 13,415 (Brasil, 2017) depends directly on the elaboration of the BNCC of secondary education to be implemented. As this Base was approved in December 2018, the expectation is that education systems will prepare a timetable for the implementation of the Law during the 2019 school year and will begin to effectively implement it starting in 2020.

vii) Retrospective evaluation: it analyzes the actual and diffuse effects of the law, after its entry into force, to determine if the objectives were achieved. According to Wintgens (2012), the *ex post* evaluation involves the analysis of the degree of efficacy, effectiveness and efficiency of the law. The criterion of effectiveness evaluates the causal relationship between norm and behavior change, that is, whether the law is followed or well applied; efficacy refers to the success or failure of legislation, i.e. whether the law achieves the objectives for which it was designed; and efficiency assesses the cost-benefit between the law

and its effects. These criteria are then used to decide whether to revise, maintain or revoke the law.

There was no attempt to foresee the impacts of the upper secondary education reform either before or after the publication of Law 13,415/17. True enough, in Brazil there is still no culture of legislative evaluation or regulatory planning. Although Decree No. 4,176 (Brasil, 2002) establishes in its Annex I an instrument for impact assessment, this practice was little internalized and has not been fulfilled in the elaboration of normative acts (Soares, 2012). By doing so, laws come into force without mapping their potential and actual effects, resulting in a chaotic and unpredictable regulatory landscape.

Finally, some considerations based on Formal Legistics regarding Law 13,415/17 are in order. In Brazil, the Formal Legistics were implemented through the Complementary Law (LC) No. 95/98 (Brasil, 1998a) and Decree No. 4,176/2002 (in force at the time MP 746.16 was enacted), recently revoked and replaced by Decree No. 9,191/2017 (Brasil, 2017d)⁸.

Contrary to art. 11, I, c of LC 95/98, Law 13,415/17 uses the indirect order of discourse in various provisions of its provisions, particularly when shifting complements to the middle of the sentence, between the subject and the verb. This occurred, for example, in the new wording of §§ 5 and 7 of art. 26 and of §§ 5 and 7 of art. 36 of the LDB (Brasil, 2017). However, this recommendation of the LC is aimed at ensuring textual clarity; it should be considered that not every case of indirect order use compromises this goal.

Some passages of Law 13,415/17 adopt vague and indeterminate expressions, impairing the accuracy and clarity of the legal text. One example is the use of the expression *notório saber* (renowned knowledge) in the item IV included in the art. 61 of the LDB, as well as *studies and practices* regarding the teaching of physical education, art, sociology and philosophy (Brasil, 2017, article 35-A, § 2). Another example is the use of the expression *renowned recognition* (*notório reconhecimento*) to refer to institutions providing distance education (Brasil, 2017, article 36, § 11). Also lacking precision, and possibly affecting the effectiveness of the legal provision, is the expression *de forma progressiva* (*progressively*) in relation to the extension of the course load to 1,400 hours (Brasil, 2017, article 24, I, § 1), without setting a deadline to reach that final goal.

The final wording of the said law also uses long and obscure sentences, making it difficult to understand its normative provisions, such as in art. 35-A, § 4, art. 36, §§ 7 and 8, art. 61, IV and art. 62, caput of LDB (Brasil, 1996); and art. 14, § 4 of Law 13,415 (Brasil, 2017). Conversely, LC 95/98 provides for the use of short and concise sentences (Brasil, 1998, art. 11, I, b).

Law 13,415/17 also errs in unnecessarily repeating provisions already present in other legislation, such as the LDB. LDB's art. 26, for example, already mentions the National Curricular Base and the diversification and flexibility of the curriculum, the latter in its art. 28, item I.

Therefore, Law 13,415/17 was not the first Brazilian statute to establish a flexible organization of curriculums in a common and a diversified part. The legal basis for implementing these curricular changes already existed, the main problem was not the absence of a legal norm authorizing them, but the lack of effectiveness of these devices, which were not practiced in schools.

The inclusion of § 2 in art. 24 of the LDB is also unnecessary from the normative point of view. Items VI and VII of art. 4 of the LDB already established that it is imperative to offer night education for young people and adults, adapted to suit the condition and needs of these students. The proviso included by Law 13,415/17 was due to the extension of the school day, which may not apply in full to these teaching modalities. However, a simple reference to art. 4 would be enough, avoiding the repetition of legal provisions.

Finally, it should be emphasized that it was unnecessary to establish the full-time education policy through a primary normative act (provisional measure); an Executive decree would be sufficient for its implementation. True, according to good legislative technique, it would have been more appropriate to establish it by decree in a more comprehensive and detailed way, so that the (secondary) act would be enough for its implementation. It is in this regard that LC 95/98 establishes that, as a rule, the same subject should not be regulated by more than one law (Brasil, 1998, art. 7, IV). Likewise, the implementation of policies is more transparent and the access to legislation easier when they are regulated by a single norm.

However, as it was done, the policy still depended on a new legal act to determine budget availability (art. 14, § 2) and the criteria for monitoring the financial support by the MEC (Brasil, 2017, art. 16). When MP No. 746 (Brasil, 2016a) was in force, this act was the Ordinance No. 1,145; with the enactment of Law 13,415 17, it was revoked and replaced by Ordinance No. 727 (Brasil, 2017a).

Best legislative practices would also dictate that the policy be established in a secondary act dissociated from the modifications made in the ordinary legislation by the MP. This is because Law 13,415/17 was drafted with two aims in mind: the creation of a policy and the curriculum loosening, which goes against art. 7, I of LC 95/98 (Brasil, 1998), according to which each law should have only one purpose. Although the two goals indeed have a certain thematic affinity, they are not intrinsically associated; for the sake of transparency and clarity, it would be better to enact two independent norms.

In view of all of the above, the analysis detected flaws in the drafting of Law 13,415/17, ranging from the legislative initiative to its impact on education. True, the lack of observance of good legislative practices is the rule in the Brazilian legal system. For this reason, the techniques and strategies mentioned above can contribute to the adoption of a policy aimed at improving the quality of normative production, thus ensuring the enforcement of fundamental rights, among which the right to education.

Conclusion

It is well known that the Brazilian educational model has been showing signs of exhaustion for decades. The country is far from having reached an acceptable standard of public basic education, despite constitutional commands on the matter. This means that there is a complex and current social problem demanding government action. Legislative intervention is necessary for the proper implementation of the educational objectives of the Federal Constitution.

However, this does not mean that the educational project established by Law 13,415/17 is the best alternative. The need for regulatory change does mean not assessing the quality of the proposed change; moreover, it can generate more damages than the maintenance of the legislative status quo. It is necessary to present rational arguments justifying the legislative choice made, showing that it is better than other options and even than the existing legislation. The analysis of the explanatory statement and of the documents annexed to the proposal at the time of its legislative processing has shown that none of these issues was expressly weighed.

The assessment of the merit of Law 13,415/17 concluded that the quality of the reform was low, taking into account the basic educational goals of the PNE and the lessons of Legistics and Legisprudence.

The upper secondary education reform does little to implement effectively that goals, as in the case of goals 3, 6, 10 and 11, insofar as it does not address the true causes of the crisis of secondary education. The changes established do not address the lack of physical and human resources of schools. In addition, the reform disregards goal 15, on the qualification and valorization of the teaching career, in relativizing the concept of education professional.

It also presents problems related to linguistic, systematic-normative, social, instrumental and axiological rationalities. It distances itself from the dictates of the Legisprudence and does not observe the steps of the circuit of legislative practice proposed by Delley. This is because the problem that demanded legislative intervention was defined in an incomplete, indeterminate and vague manner. As a result, the lack of compatibility between the normative solutions and the stated objectives was inevitable. It also has deficiencies pointed out by Formal Legistics, by disregarding the recommendations of good legislative technique.

Thus, a scenario of absence of an effective policy of legislative-regulatory planning in basic education is perpetuated.

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Notes

- 1 This essay is one of the products of the author's master's research entitled *The role of the federal executive in the law-making process on basic education reform*. The dissertation received an Honorable Mention by the Academy Award 2018, from the International Center for Advanced Law Studies (CAED-Jus).
- 2 This shortage of specific legal literature in the area can be attested by conducting a bibliographic research in the main Brazilian databases.
- 3 This is what the Brazilian Education Opportunities Index (IOEB) shows, a unique index ranking Brazilian municipalities, states and the Federal District by basic education quality. The comparison of the discrepancies between the performances of education systems in the various regions of the country shows that there is not only one educational reality (Public Leadership Center, 2018).
- 4 On June 13, 2017, Ordinance No. 727/2017 of the MEC was published, providing the parameters and criteria of the policy of promotion of full-time education. In art. 28, it is established that the resources for its implementation will come from the FNDE according to the Annual Budgetary Law - LOA (Brazil, Ministry of Education, 2017a). Resolution No. 16 of December 7, 2017 provided further details on funding procedures for the policy. According to art. 6, the amount is R\$ 2,000 per enrollment per year (Brazil, 2017b).
- 5 According to information published in the press by the MEC, investments in the promotion policy will reach R\$ 1.5 billion by 2020. On January 17, 2018, the government announced the disbursement of R\$ 406 million to expand the number of schools served (from 516 to 967 schools). According to the MEC, in the course of 2018 resources will exceed R\$ 700 million (Brasil, 2018).
- 6 The term derives from the words legislation and jurisprudence (which means Theory or Philosophy of Law). It is, therefore, a Theory of Legislation, thus designated by authors like Wintgens (2012) and Luzius Mader (1991).
- 7 The option was to highlight the factors that intensify the problem. The inverse interpretation of these factors makes it possible to conclude in what dimensions there should be legislative intervention capable of mitigating them.
- 8 The option was to analyze only the fulfillment of the dictates of LC 95/98 by Law No. 13,415/2017, with the final wording approved by the National Congress. The reasons for this are that the provisions of Decree No. 4,176/2002 largely repeats the content of the LC; it only applies to Executive acts (such as MP 746/16); and it no longer makes sense to analyze the previous and revoked wording of this MP.

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