THE USE OF THE PRINCIPLES BY THE SUPREME FEDERAL COURT: AN ANALYSIS OF THE EXTRAORDINARY APPEAL N. 635.648/CE

A UTILIZAÇÃO DOS PRINCÍPIOS PELO SUPREMO TRIBUNAL FEDERAL: UMA ANÁLISE DO RECURSO EXTRAORDINÁRIO N. 635.648/CE

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ABSTRACT

This article has the problem of analyzing the use of the principles by the Federal Supreme Court in the judgment of extraordinary appeal n.635.684/CE. The first chapter sets out to analyze the concepts of principles and rules. The following chapter outlines the object of analysis of the aforementioned extraordinary appeal. Finally, analyze the bases and parameters for using the principles by the STF. The methodology is documentary/bibliographic.

Keywords: Principles; Rules; Federal Court of Justice.

RESUMO

O presente artigo tem como problema analisar a utilização dos princípios pelo Supremo Tribunal Federal no julgamento do recurso extraordinário n.635.684/CE. O primeiro capítulo se propõe a analisar os conceitos de princípios e regras. O capítulo seguinte, a delinear o objeto de análise do referido recurso extraordinário. Por fim, analisar as bases e parâmetros de utilização dos princípios pelo STF. A metodologia é documental/bibliográfica.

Palavras-chave: Princípios; Regras; Supremo Tribunal Federal.

Keywords: Principles; Rules; Supreme Federal Court.

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1. INTRODUCTION

The present article proposes to analyze the use of the principles by the Brazilian Supreme Federal Court at the judgment of the extraordinary appeal number 635.648/EC. The choice of this appeal is unrelated to the analysis of the concrete case or with the reasons that generated the judicialization of the case, but intents to observe the constant invocation of the principles during the judgment. However, some elements of the case will be raised for better elucidation of the presented problem.

In the first chapter an analysis of the definitions and distinctions between principles and rules is done. Thereunto, notes are made about the normative force of the principles. The bibliographic methodology uses the literature of authors that dialogue with the subject, such as Marcelo Neves, Humberto Ávila, Lênio Streck and José Joaquim Gomes Canotilho.

In the second chapter there's an outline of Extraordinary Appeal number 635.684/EC. The case chosen for analysis arrived at the Federal Supreme Court under discussion of the (un) constitutionality of the predictions of item III, article 9, of law 8.745/93, which deals with the hiring of personnel by the Public Administration for a specified period due to temporary need. The methodology, in addition to bibliographical, uses the document, the judgment in question to guide the analysis of the current and the following chapter.

In the third and last chapter, a survey is made of the excerpts or passages of the ministers votes in which the principles are invoked. The aim is to note how the Supreme Court, in this specific case, uses the principles, as well as contextualizes them in the specific case.

2. AN ANALYSIS ABOUT THE PRINCIPLES: DEFINITIONS AND DISTINCTIONS

The definitions about the principles are many. Therefore, a survey is essential in order to find and adopt a delimitation between the main definitions of the principles. Furthermore, the distinction between principles, norms and rules is necessary.

At first, it is necessary to define the norm. Kelsen (2008), defines a norm as an interpretive act that gives legal meaning to a given act or text. Humberto Ávila (2016, p. 50) states that norms are not texts or a set of them, but meanings constructed from the systematic interpretation of normative texts.

This implies that the interpreter's activity does not mean a mere descriptive work of the meaning of a text, as "their activity consists in constituting these meanings. For this reason, it is also not plausible to accept the idea that the application of Law involves an activity of subsuming between ready concepts even before the application process" (ÁVILA, 2018, p. 52).

Interpreting is extracting the meaning of words (OLIVEIRA, 2015, p. 18), which is not limited to a construction process, but a reconstruction process, "since language is never something pre-given, but something that is materialized in use" (ÁVILA, 2018, p. 52). It can be concluded, at first, that the qualification of norm or principle will depend on a previous interpretation process,

being impossible, in the words of Kelsen (2008, p. 396), to think that "a legal norm only allows, and in all the cases, only one interpretation: the correct interpretation".

As for the principles, Canotilho and Moreira (1991, p. 49) understand that principles are condensation cores in which constitutional goods and values converge that radiate such values to the systems of norms and serve as a foundation for the application of the other norms.

José Afonso da Silva (2014, p. 93) states that the word "principle" is a mistake, however, he adds that, in the constitutional sense, as well as what is written in Title I of the Federal Constitution of 1988, principle expresses the notion of "commandment nuclear system". He follows Canotilho, inserting the principles in this position of expression of the constitutional order, and which, from its positivization, are transformed into principle-norms (CANOTILHO; MOREIRA, 1991, p. 49).

Humberto Ávila defines principles as "immediately finalistic norms, primarily prospective and with the intention of complementarity and partiality" (ÁVILA, 2016, p. 2016), which do not determinate initially a behavior, but indicate a state of things that would align certain behaviors to the achieve of this purpose.

2.1 BETWEEN PRINCIPLES AND RULES

According to Virgílio Afonso da Silva (2011, p. 45), the main distinguishing feature between rules and principles, according to the theory of principles, is the structure of the rights that these rules guarantee. In the case of rules, definitive rights are guaranteed (or duties are imposed), while in the case of principles, *prima facie* rights are guaranteed (or duties are imposed).

For the author, taking into account all the exceptions foreseen for in the law and verifying their impertinence, when a standard has the rule structure, the right is definitive and must be carried out in its entirety, while the principles, as they are commandments optimization (ALEXY, 2008), do not require maximum achievement, and can be fulfilled in different degrees, depending on the factual and legal conditions.

Making a distinction in terms of structure, especially when the concepts are split under a formal-enunciative differentiation (STRECK, 2017), where the textual utterance and what it expresses (*a priori*) are analyzed, is to go against what has been previously understood, that principles and rules are norms and, as such, only arise from a process of interpreting a normative text, and not before.

Otherwise, to understand the distinction in these terms would be to attribute to the rules, in semantic terms, an adjective of "closed" statement, and to the principles an open texture, giving greater scope to the interpreter, which, for Lênio Streck (2017, p. 599) makes "the semantic problem of the rule – ambiguity and vagueness – is also transferred to the principles", which would be wrong, as it would make the principles "responsible for a problem, of which they are the solution". In these terms, Streck then argues that

> [...] the principle recovers the practical world, the lived world, the forms of life (Wittgenstein). The principle 'everydays' the rule. 'Returns', therefore, the thickness to the ontic of the rule. It is 'pure' signification and de-abstratalization. [...] it is the rule that opens the interpretation, precisely because of its universalizing

> perspective (it intends to cover all cases and, in fact, it does not cover any, without the densificatory coverage provided by the practical world of principled singularity) (STRECK, 2017, p. 600).

Streck adds that while there may be a "spelling of principle," the quality of principle goes beyond simple bookkeeping. For example, the Equality Principle is not called that just because it is described in the *caput* of article 5 this way, "but it itself transcends the constitutional text to take shape in the practical world" (STRECK, 2017, p. 618).

Humberto Ávila, in that regard, denies a purely structural distinction of principles and rules, and admits the synchronic existence of these normative species in the same device.

> Analyze the constitutional provision according to which everyone should be treated equally. It is plausible to apply it as a rule, as a principle and as a postulate. As a *rule*, because it prohibits the creation or increase of taxes that are not equal for all taxpayers. As a *principle*, because it establishes as due the realization of the equality value. And as a postulate, because it establishes a legal duty of comparison to be followed in the interpretation and application (ÁVILA, 2016, p. 92)

Among other criteria, Ávila points out that rules and principles differ in terms of how they contribute to the decision. While the rules "are preliminarily decisive and comprehensive", and that generate a specific solution to the conflict, the principles "consist in primarily complementary and preliminary partial norms" (ÁVILA, 2018, p.100), since they do not have the intention of providing a specific solution, but just cooperate, with other reasons, for the decision-making.

> The rules are immediately descriptive norms, primarily retrospective and with a pretension of decidability [...] the principles are immediately finalistic norms, primarily prospective and with a pretension of complementarity and partiality, for whose application an evaluation of the correlation between the state of things to be promoted and the effects resulting from the conduct deemed necessary for its promotion (ÁVILA, 2016, p. 102).

Presenting similar reasoning, Marcelo Neves adduces a concept that guides the application of the law. It states that "principles are mediate reasons for decisions on legal issues" (NEVES, 2014, p. 84), so that between the principle and the concrete issue there will always be a rule, whether through legislative activity or jurisprudential construction. Apparently, Neves introduces a middle ground between the two concepts presented, claiming a difference with "functional-structural meaning".

Therefore, from the relevant doctrinal opinions collated and recognizing the indeterminate normative nature of the principles, it is possible to understand that in these, unlike the rules, subsumption does not apply, not being norms of immediate application to concrete cases. These norms are immediately final, prospective and intended to be complementary. And it is not understood that a distinction between principles and rules can be delimited under purely structural or purely functional criteria:

> In short, the practical effect of the qualitative distinction is to regularize the principles and principalize the rules, demonstrating that the structural and functional characteristics supposedly observed only in the principles can also be found in the rules and vice versa (VALE, 2006, p. 122).

It is understood that, the norm created based on interpretation, and generated a principle, this, although the supreme importance for the systematization of the legal system, has to go

through a careful examination of the correlation between the state of affairs to be promoted and the behaviors that have as an effect the fulfilling or not of the required purpose (ÁVILA, 2018). The principles need solid normative predictions, under the penalty of becoming an object of manipulation and rhetorical use (LOPES, 2015).

2.2 THE NORMATIVE FORCE AND THE METHOD OF ANALYSIS OF THE PRINCIPLES

In the specific cases, interpreted in light of the principles, these, when passing a certain degree of indefiniteness need to be placated, as a way to achieve the objectives of the rule of law and legal certainty (FROTA, 2017, p. 83).

In this sense, Streck states that the "era of constitutional principles" comes not only from the arise of new texts or constitutional orders, but also from the value opening of the system, from a political decision that "facilitates the creation of all kinds of principles [from where] as many principles could be withdrawn as much as necessary to solve difficult cases" (STRECK, 2017, p. 555), what he called *pampprincipiologism*: the indiscriminate use of legal principles. Streck exemplifies this with the indiscriminate naming of the Principle of Morality.

> Dogmatics of the most diverse nuances have used this principle as a channel to introduce corrective morality into Law. It is the door to a colonizing discourse of the autonomy of Law, ending up becoming an alibi for adjudicating discourses to enter Law (STRECK, 2017, p. 619).

Hermeneutics has as its main task to preserve the normative force of the Constitution (STRECK, 2017, p. 600), and the lack of limits in the interpretive process would culminate into *judicial activism* (STRECK, 2017, p. 67).

As a result of this evaluative and interpretative opening, and, above all, of its teleological characteristic, it is understood, therefore, that the constitutional principles are "capable of democratically opening the system for the future" (GUIMARÃES, 2007, p. 84), and, in view of the final function of the principles, the application of this normative specie consists in an expansion of the "argumentative field, making the system open to a bigger amount of arguments" (GUIMARÃES, 2007, p. 112), which directly influence the decision-making process, given that, according to Humberto Ávila (2018, p. 155), the principles give foundation to certain ends, "without, however, foreseeing the *means* for its realization".

Whatever the nature of the goal or state of affairs prescribed in principle, consistency is always a requirement. Meaning that, it is necessary to give equal treatments to similar situations. "This is a requirement that can be associated with the idea of justice. Not an external, natural, transcendent justice, but an internal justice to the system itself" (GUIMARÃES, 2007, p. 103).

A proposal for analyzing the principles is observed in Humberto Ávila (2018), which will be used as a guide for the objectives of this research. In view of the principle consideration as norms "which require the delimitation of an ideal state of affairs to be sought through the necessary behaviors for this achievement" (ÁVILA, 2018, p. 116-117), it is possible to synthesize and accommodate a path that goes through a specification or detailing of the ends to the maximum, as well as the clarification of the conditions that compound the ideal state of affairs from the similar cases mentioned in the process as elements that support the decision.

The specification goes through a systematic analysis of the constitutional norms themselves in order to turn a "vague end into a specific end" (ÁVILA, 2018, p. 117). Therefore, a reading of the Constitution with the intention of delimitating ends is required.

> For example, instead of joining the Administration to the promotion of public health, without delimiting what this means in each context, it is necessary to demonstrate that public health means, in the context under analysis and according to certain provisions of the Federal Constitution, the duty to make the 'x' vaccine available to curb the advance of the 'y' epidemic. (ÁVILA, 2018, p. 117)

In concrete terms, this first moment goes through a systematic reading of the Constitution, identifying precepts related to the observed principle, *polishing* the vagueness of terms from this analysis, and "relate the provisions according to the fundamental principles" (ÁVILA, 2018, p. 117)

In a second moment, making the study a little more pragmatic, it seeks, based on concrete cases, to clarify the ideal state of affairs to be achieved, and, consequently, a better definition of the necessary behaviors to achieve its realization. Ávila (2018) emphasizes those cases considered exemplary, due to the ability to generalize to other cases, for example,

> rather than merely stating that the Administration must guide its activity according to the standards of morality, it is necessary to indicate that, in certain cases, the duty of morality was specified as the duty to fulfill expectations created through the fulfillment of promises made before or as duty to achieve legal goals through the adoption of serious and fundamental behaviors (ÁVILA, 2018, p. 117).

The reading of specific cases, already decided by the court, and the verification of which behaviors were considered necessary (or unnecessary) to the realization of the principle's purpose, helps making the proper interpretation of this normative species. According to Ávila (2018, p. 118), it is "needed to replace the vague purpose with necessary conducts for its realization". Therefore, this verification will be used in the analysis of the object of this article, judgment of Extraordinary Appeal n. 635,648, without, however, going into the merits of the decision (which in some moments may be unavoidable).

3. OUTLINES ABOUT EXTRAORDINARY RESOURCE N. 635.648/CE

The case chosen for this analysis was Extraordinary Appeal No. 635.648/CE. Such appeal reached the Federal Supreme Court under discussion of the (un)constitutionality of a certain legal provision. The text under analysis is the provisions of item III, of article 9, of Law 8.745/93 (which deals with the hiring of personnel by the Public Administration for a specified period of temporary need), as written

> Article 9. Personnel hired under the terms of this Law may not: [...] III – be hired again, based on this Law, **before 24 (twenty-four) months have elapsed from the termination of their previous contract**, except in the cases of items I and IX of art. 2 of this Law, upon prior authorization, as determined by art. 5 of this Law. (Wording given by Law No. 11.784, of 2008). (BRAZIL, 1993)

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The appeal was filed against a decision handed down by the Federal Regional Court of the 5th region, the decision declared unconstitutionality of this provision to maintain a rehiring of a temporary teacher, and which has the following content:

> ADMINISTRATIVE. PUBLIC SELECTION FOR SUBSTITUTE TEACHER. CANDIDATE WHO HAD PREVIOUSLY SIGNED A CONTRACT. PROVISION OF ART. 9 OF LAW No. 8.745/93. UNCONSTITUTIONALITY. PRECEDENTS. **The constitutional principle of isonomy is affronted by** the prohibition established by law for hiring a substitute teacher who has already been hired within a period of twenty-four months, prior to the holding of the selective competition. Precedent of the egregious Plenary of the Court, in the Allegation of Unconstitutionality in AMS nº 72575/CE. Sentence upheld. Appeal and Official Remittance rejected (BRASIL, 2017, p. 3).

The appellant alleged a constitutional violation in the judgment, more precisely of the article 37, items I, II, IX, of the Federal Constitution, which elects the public examination as a means of access to public positions and jobs and which defers to the law cases of temporary hiring, which, supposedly, would substantiate such a device. He added that "the exercise of the position of professor, even temporarily, is undoubtedly capable of integrating the petitioner to the community of the institution in question, generating an advantage in his favor at the expense of other competitors" (BRASIL, 2017, p. 4).

Therefore, it is understood that both positions claim, for different purposes, a breach of the principle of equality. For the appellant, the rehiring would hurt isonomy by mischaracterizing the temporary nature of the hiring (and a supposed advantage because of the integration of the candidate to the institution), and the judgment, following the settled understanding of the TRF-5, see AMS 72575/CE, understands that preventing the hiring of a candidate, approved in a selective, objective and isonomic process, would be, rather, a violation of "the principle of equality, accessibility to public positions, efficiency and impersonality" (APELREEX 24169-AL, TRF-5, 4th Class).

> ADMINISTRATIVE. SELECTION FOR TEMPORARY CONTRACTING OF SUBSTITUTE TEACHER. PARTICIPATION OF A TEACHER ALREADY CONTRACTED. PROIBITION. LAW 8.745/93. […] 2. If a violation of art. 37, IX of the Federal Constitution exists, this violation is in the perpetuation of the temporary hiring by the Public Administration, of anyone, instead of holding a public examination to fill an effective position, **not in the participation of the petitioner in the selection process, which, in principle, is objective and isonomic;** (Full, rel. Federal Judge Paulo Roberto de Oliveira Lima, Claim of Unconstitutionality in AMS 72575-CE, judged on 10/23/02, DJ of 06/03/03).

The Union, manifesting itself as *amicus curiae*, defended the constitutionality of the provision as a constitutional instrument that prevents the perpetuation of public servers contracts, since it "would mischaracterize the temporary nature inherent to this kind of recruitment in the public service". He also stated that the exclusion of the "beneficiaries" corroborates the fairness of the selection process.

The Federal Public Prosecutor's Office also expressed its approval:

> […] 2. Art. 9, III, of Law No. 8.745/93, with the wording given by Law No. 9.849/99, aims precisely to prevent public administrators, in obvious misuse of purpose and circumventing the **principle of public tender**, indefinitely extend temporary contracts, making them permanent ones by oblique way (BRASIL, 2017, p. 5).

The argumentative construction of the antagonistic positions makes it clear that the discussion is being taken to the principiological field. The source of principles and their argumentative handling to substantiate different positions denotes the delicacy of the topic and casts serious doubts on the uniformity of an argumentation based on principles, at least in the way these arguments are presented.

The drawn scenario correlates with what Streck (2017, p. 600) called the "myth of closing the rule". Thus, by the arguments of the parties here presented, it is induced that in these statements, the parameter that the rule "is closed" was adopted and, according to Alexy (2008) and Dworkin (2002), it determines behaviors in the "all-or-nothing" manner, and that the principles can be open to argumentation even in a contradictory way. But, in fact, according to the concepts raised so far, the principles densify what is in the rule in a vague and ambiguous way (STRECK, 2017), pointing out a purpose in a prospective way (ÁVILA, 2018).

Therefore, it will be sought to analyze the outlines of this judgment of the Federal Supreme Court in the principled field. Is there, in fact, an ideal state of affairs behind each principle (ÁVILA, 2018), or is the normative application of the principles compromised by their argumentative use having two distinct purposes? Was there a rhetorical and creative use of the principles, as did the Public Ministry when citing, for example, the "Principle of Public Tender" in its arguments? This is what will be verified in the next chapter.

4. THE ISSUE OF THE PRINCIPLES APPLIED TO THE EXTRAORDINARY APPEAL N. 645.648/CE

The extraordinary appeal, whose judgment was the main piece for the analysis of the major ideas and arguments of the case, was granted under the following menu:

> ADMINISTRATIVE. EXTRAORDINARY APPEAL WITH GENERAL REPERCUSSION. REQUIREMENTS FOR HIRING A SUBSTITUTE TEACHER IN THE CONTEXT OF FEDERAL HIGHER EDUCATION INSTITUTIONS. LEGAL PROVISION THAT DOES NOT AUTHORIZE A NEW CONTRACT WITHOUT COMPLIANCE WITH THE INTERSTICE OF 24 (TWENTY-FOUR) MONTHS. CONSTITUTIONALITY. APPEAL PROVIDED. 1. Although the rules of public tender do not fully apply to hiring for temporary reasons, the simplified selection must observe the principles of impersonality and morality, inscribed in art. 37, caput, of the CRFB. Precedents. 2. The legal provision that does not authorize the new hiring of substitute professors without observing the minimum interstice materializes the administrative morality. 3. It is up to the Judicial power to assume a position deferring to the option expressed by the legislator when the right invoked is proportional to the common public interest. 4. The legal provision prohibiting, for a fixed period, the new hiring of a candidate previously admitted in a simplified selection process to meet the temporary need of exceptional public interest, under penalty of becoming "ordinary whatever it is, by its nature, extraordinary and transitory" (ROCHA, Cármen Lúcia Antunes. Constitutional principles of public servants. São Paulo: Saraiva, 1999, p. 244) 5. Extraordinary appeal granted. (BRAZIL, 2017).

Initially, the rapporteur, Minister Edson Facchin, condensed his vote under the argumentative construction of weighting. He claimed that the principles of impersonality and morality are imperative even in selections that do not require a public contest, and that both principles "have a normative weight equivalent to the principle of equality".

It is noticed that the first mention of principles in the judgment is focused on the structural conception of principles that materialize the axiological hermeneutic theory of Alexy (2008), who sees the principles as a *prima facie* norm, applied "as optimization commands" and require the weighting that, in its turn, is instrumentalized by the proportionality method (LOPES, 2015).

It was possible to conclude, at a previous moment, that this way of treating the principles is the same as considering them semantically open norms. Added to this is the fact that, according to the theory designed by Alexy, which underlies the weighting, that "constitutional principles are equivalent to values in the application task, since they admit the possibility of collision" (LOPES, 2015, p. 43). The problem of considering principles when considered as equivalent to values (sometimes contradictory values) lies in a possible value fixation that might not be shared by everyone in a society.

> The Axiological hermeneutic theory is criticized for its inability to accept the pluralism of contemporary society and to deal with such an inescapable fact, since it presupposes a previous hierarchical scale of principles. The proportional weighting would only be possible through the determination of a fixed hierarchical order of values (LOPES, 2015, p. 47).

It is possible to verify that by taking this path of directing the argumentation towards a structural conception of principles, considered with a *prima facie* open texture, already criticized by Streck (2017), the discourse seems to lean towards a ponderation of legal assets that, according to Lopes (2015, p. 59), "generates the weakening of the Law, which becomes malleable according to what the judges consider most interesting for the community".

After this introductory conflict, the reporting minister understood that the case referred, therefore, to "the application of the constitutional rules of public tender to the hypotheses of simplified contracts". From this, he made notes about the institute of public selection as an "administrative procedure that aims to choose, on merit, the best prepared candidate, under equal conditions", concluding based on the convergence in the doctrine on the understanding that equality, morality and impersonality are "postulates of the public tender". And he concludes his reasoning by stating that, although the constitutional permissive of hiring for a fixed period is foreseen to meet temporary needs without public examination, these same principles should still be applied to this type of selection and hiring.

Once the appeal dealt with the restriction of article 9, III, of law 8.745/93, the case has as main subject which is knowing whether such restriction is compatible with the constitutional commands of article 37 and the adjacent principles. Following the path proposed above, for the correct resolution of the conflict, the text begins to observe the specification of the state of affairs and the analysis of similar cases made by the ministers.

The reporting minister, in order to verify the pertinence of Article 37 of the Constitution, proceeded to make considerations about the normative elements "determined deadline" and "temporary need". Citing court precedents such as ADI 890 and 3.721, and RE 658,026, he concluded that it is not the activity itself, but the need that can be temporary and adequate to

serve as an object of selection without competition. of functions is continuous, but the one that determines the special form of designating someone to perform them without a public examination and upon hiring is temporary" (BRASIL, 2017).

From the reading of the precedents mentioned by the rapporteur, it is possible to extract a common understanding, which helps in specifying the state of affairs required by the invoked principle-norms. In these cases, in a context of repeated unruly and merely indicative rehirings, the understanding is unequivocal that "allowing the indeterminate perpetuation" violates the equality and morality.

On the other hand, the reporting minister points out several times that "the public tender implements the principles of article 37, *caput*, of the Federal Constitution", and citing Bandeira de Melo (2015) and Lucas Rocha Furtado (2013), he compiled that the public tender "gives everyone equal opportunities to compete for positions or jobs in the direct and indirect Administration" and that

> By preventing the use of public office for appointment based on **criteria of political or relatives recommendations,** the constitutional rule of public examination also gives effectiveness to administrative morality. (BRASIL, 2017, emphasis added)

It is concluded, a *contrario sensu*, according to the reasons mentioned by the minister the principle of morality is breached by the factual element (behavior) of the designation by mere political or parental recommendation to temporary positions (art. 37, IX, CF), and that competition, occasioned by the public tender, is a necessary behavior to achieve the state of affairs required by the principle of equality. And, as stated above, in these terms, these same principles must be adopted in a simplified selection process based on article 37, IX, CF/88.

The criticism naturally raised is that, if the principles of morality and equality, in this specific case, require aligned behaviors (ÁVILA, 2018) and instrumentalized by the public tender, which, in turn, in abstract terms, is consistent with a selection process held under these same principles, the quarantine of twenty-four (24) months provided for in the contested statement should not be interpreted in light of these principles, prohibiting mere "political indications".

Thus, is it possible to state that indefinite hirings that at the same time allows the free participation of candidates (regardless of a previous contract with the Public Administration) in selective processes marked by objectivity and that, analogous to the public tender are able to provide competitiveness and equality? Since the rule does not define all-or-nothing behaviors (ÁVILA, 2018) and the principles should densify the ambiguity and vagueness of the rule (STRECK, 2017), the application of the principles of equality, impersonality and morality, in this case, should not modulate and dailyize (STRECK, 2017) the effects of the rule extracted from article 9, III, of law 8.745/93?

In this sense, André Rufino do Vale says that the solution to situations like these requires that

> in the sense of harmonizing its deontic contents [of the rule], which can be accomplished through the accommodation of its scopes of validity, that is, giving them a partially distinct personal, material, spatial and temporal scope, which allows apply one on certain occasions and the other on the others. Thus, both in the case of conflict of rules and collision of principles, preference should be given to solutions of a conciliatory nature that allow the permanence of all rules in the legal system (VALE, 2006, p. 117-118).

The issue was partially faced by the rapporteur when he stated:

> It could be added, in this sense, that the impossibility of extension would not prevent a new selection from competing those who have already been hired. This situation brings, however, an undeniable risk: the civil servant admitted under a temporary regime may, even through a new selection, be kept in a temporary position, becoming, as stated by Minister Carmén Lúcia, "ordinary what is by its nature, extraordinary and transitory" (BRASIL, 2017).

The argument of the reporting minister isn't deep enough and fails to make it clear whether what hurts the state of affairs required by the principle of administrative morality is the fact of hiring the same person more than once, even through an objective selection process; or whether it is the existence of successive selections for temporary functions; and ends up not facing this criticism. This imprecision about the purpose and state of affairs required by the principles cited in the judgment compromises an adequate normative application of the principles.

At the end of his vote, the reporting justice returns to using weighting, concluding that the quarantine provided for in the contested provision "is necessary and adequate to preserve the impersonality of the public tender". And concluded by granting the appeal. With this reaffirmation of "proportionality" and weighting as the method used by the Minister Rapporteur, it is possible to affirm that

> instead of what the proportionality formula suggests, constitutional principles are not necessarily or naturally values that should be considered based on means/ends or cost/benefits. Identifying them with values literally and logically means admitting that they can be used for both 'good' and 'evil', depending on what the observer distinguishes as 'good' and 'bad'. (GUIMARÃES, 2007, p. 190).

Therefore, this indirect identification, deduced by the method of weighing, between principles and values is "prejudicial to the very consistency of legal decisions, as the requirement of equality in the treatment of cases becomes dependent on particular moral evaluations" (GUIMARÃES, 2007, p. 190). And in an argument based on principles, as André Rufino do Vale well reminds us,

> Both rules and principles can provide *prima facie* reasons, collide in a dimension of validity or weight, be applied by subsumption or weighting. Finally, the structure of the rules will only stimulate, but will not determine, the way of interpretation and application (VALE, 2006, p. 137).

All other votes followed, without further additions and debates, the conclusions presented by the reporting minister. However, the positions of minister Ricardo Lewandowsky, minister Carmén Lúcia and minister Alexandre de Moraes deserve some consideration.

Minister Ricardo Lewandowsky limited himself to pointing out that "there are numerous cases of temporary contracts that are renewed *ad aeternum*, in open mockery of the constitutional principle of public tender." According to the concepts we have analyzed so far, in no interpretation would we've been able to attribute to the norm that requires the Public Tender (Art. 37, II, CF) a qualification of principle (as an ideal state of affairs), but only consider it a rule that materializes another constitutional principles. The constitutional requirement of public examination entails a behavior that is in line with the constitutional principles contained in Article 37, *caput*, but does not, constitutes a principle itself. As pointed out in the opening chapter, the principiological nature of an interpreted standard serves as a foundation for certain purposes without necessarily describing means or forms of materialization, something incompatible,

therefore, with the clairvoyant provisions that pragmatically require exams, or exams and titles, to the admission to public service (ÁVILA, 2016).

This attempt illustrates the discursive intention of labeling any legal institute as a principle, which is contained in the argumentative phenomenon nicknamed by Lênio Streck, (2017, p. 526) of *pamprincipiologism*.

> Without any taxonomic possibility regarding the matter, these (assertorical) statements fulfill the function of para-rules. With them, any answer can be correct. In fact, there will always be a statement of this nature applicable to the 'concrete case', which ends up being 'constructed' from a zero degree of meaning. Its multiplication is due to the erroneous understanding of the thesis that the principles provide an interpretive opening, that is, it can be said that the Dworkian thesis about the difference between principles and rules was misunderstood (STRECK, 2017, p. 575).

Minister Lewandowsky's succinct and short vote does not require lengthy considerations, although only as an atechnic, the use of the word "principle" was misplaced in his vote, in addition to, once again, bring imprecision to the judgment. The rhetorical use of the word "principle" can function as a utilitarian way out of apparent safety, but this has extremely opposite consequences (OLIVEIRA NETO, p. 486).

In its turn, Minister Carmém Lúcia, in addition to citing several precedents (ADI 3.721, ADI 3.430, ADI 890, RE 658.026, ADI 3.662) that focused on the temporariness and emergency of such contracts (but which do not specify what the court could come to understand as a violation of the aforementioned principles), concluded that

> In essence, the prohibition of rehiring a substitute teacher, previously selected to respond an emergency situation, before 24 months have elapsed from the termination of the previous contract (art. 9, item III, of Law 8.745/1993), **proves to be reasonable and proportional**. Initiative that, at the same time, **aims to give concrete effect to the principle of public tender,** ensuring the transitory nature of precarious contracts that came before. In this pursuit, there is no affront to the principle of isonomy, but in its **instrumentalization in the way of the public tender**.

In addition to once again having an aesthetic refuge from the "principle of public examination", the construction of the conclusion brings the inconsistency about knowing what mischaracterizes, for the ministers, the temporary nature of the function, if it is due to the same person who occupies it, or the repeated occurrence of temporary hiring. The argument is built in the sense that the prohibition placed in article 9, III, "ensures the transience". The same conclusion is seen in the vote of Minister Alexandre de Moraes.

The aforementioned minister begins his vote with considerations on the temporary and exceptional nature required for admissions under article 37, IX, of the Constitution, and also cites several precedents (ADI 3.721, RE 527.109, RE 658;026. ADI 3.116) that support his position.

> These precedents show the concern of the Court with the selection of criteria that ensure the transitory and exceptional nature of temporary contracts based on the permissive provisions of art. 37, IX, of the Federal Constitution, admitted that any leniency of the legislator in indicating these criteria favors the circumvention of the rule of access to public positions through competition, in disrepute to the principles of impersonality and morality of the Public Administration (BRASIL, 2017).

The minister, therefore, concludes that the limitation provided for in Article 9, III, of Law 8.745/93 is constitutionally based, since it promotes the "temporary and exceptional profile that the Constitution attributes to temporary employment", proving legitimate "the exclusion of those already contracted for the purpose of providing new temporary contracts", considering that such exclusion evidences the temporary nature of the contract (art. 37, IX, CF), with no violation of isonomy "if the differentiation criterion maintains a logical correlation with a purpose intended by the Constitution".

It is possible to identify two issues in the statements made by Minister Alexandre de Moraes. One, he does not elaborate on the "logical correlation" between the criteria of article 9, III, of Law 8.745/93 and the purpose of the principle of equality, which, on the other hand, was more or less specified by the reporting minister. Two, returns to what was questioned about the notes made on the rapporteur's vote: what is out of line with the principle of morality and impersonality is (1) the rehiring of the same person, hired in the first moment, before the elapses the stipulated period (24 months), or is it (2) the reiteration of multiple selections for hiring due to temporary need?

José dos Santos Carvalho Filho teaches that, if we are dealing with topic 1 (rehiring the same person), in order not to violate any principle, we must understand that "such prohibition must be interpreted restrictively, so that it does not apply to the hypothesis of hiring by another institution, within that period, when the interested party undergoes a new selective procedure" (CARVALHO FILHO, 2017, p. 405). This position supports the fact that, when submitted to objective and isonomic selection, there is no direct violation of any constitutional principle.

The questioning is valid because, in the votes of the ministers, there is an argumentative expense in the reasons for deciding, delimiting issues such as temporariness, exceptionality and necessity, and the restrictive use that should be given to contracts of this nature. And in this context, the application of the principle of equality is considered and withdrawn when Administrative morality and impersonality are marred by the abuse caused by selections of this nature. In this terms, considering principles as norms that can be set aside, it is worth mentioning Humberto Ávila.

> The redefinition of principles as norms that prescribe ends, serve as a normative foundation for the normative materialization process, as argued here, is important because it excludes, from the definition of principles, the possibility of restriction and consequent removal. The inclusion of the possibility of restriction and removal in the definition of principles, on the one hand, brings the principles of councils and values closer together and, on the other hand, removes the element of bonding from them (ÁVILA, 2018, p. 155).

Once again, the use of weighting can be seen. And, understanding what Ávila (2018) adduces about the removal of the "binding element", this interpretive technique has become delicate for two reasons: 1) Article 9, III of Law 8.745/93, does not prevent repeated temporary contracts with other people not falling under its terms; and 2) If there are objective elements of comparison in the simplified selection process prior to hiring, equality is imponderable, as Humberto Ávila teaches, citing the so-called structuring principles, which must always be observed, such as, for example, the principle of due legal process.

> And also the principle of equality, which requires the relationship between two subjects, **based on a measure of comparison**, to achieve a certain purpose. It presupposes the relationship between these elements, but its observance is also not gradual, nor can its relational requirements be removed for contrary reasons (ÁVILA, 2018, p. 153, without emphasis in the original)

Minister Alexandre de Moraes seeks to face this question.

> **It is true that the impossibility of rehiring the same professionals does not ensure compliance with art. 37, IX, of the Federal Constitution**, because the filling of these jobs through temporary contracts, even with people not previously hired by the Administration, also frustrates the ideal of temporality and transience of this type of hiring (BRASIL, 2017).

It is noticeable that the minister confirms that the impossibility of rehiring the same persons already hired does not guarantee compliance with article 37, IX, of the CF, which, in a way, makes the supposed weighting between administrative morality and equality, in this case, does not indicate the preponderance of one principle over the other. However, it concludes that,

> Even so, the discontinuity of the temporary bond caused by the prohibition of art. 9, III, of Law 8.745/93 prevents the installation of opposite interests to effective provision of public positions in Administration through the public tender process and removes the public administrator from the comfortable situation of reusing the same workforce already recruited through a simplified selection process.

The minister concludes his vote, then, elucidating that the contested prohibition constitutes a reasonable restriction to isonomy, favoring administrative morality, but without offering further depth analysis on the technique he used, nor specifying the state of affairs required by the principles he refereed to.

5. FINAL CONSIDERATIONS

Corroborating the raised teachings, the principles must be guided as finalistic norms, prospective and with the intention of complementarity, and that prescribe a state of affairs, requiring the alignment of certain behaviors to achieve this purpose, even without describing precisely which actions.

It was possible to verify that the Federal Supreme Court, judging the Extraordinary Appeal 635.648/CE, frequently used the principles of morality, equality and impersonality with a certain lack of correlation to the specific case, as it was possible to observe in the position of the Minister Rapporteur, citing such principles, but without facing the main question: Would the selection process itself materialize such principles? From another perspective, wouldn't demanding the candidate a quarantine violate such principles, especially equality?

As for the precedents mentioned, as a basis for the arguments used (ADI 890, ADI 3.116, ADI 3.237, ADI 3.721, RE 658.026, RE 527.109, among others), in the pretense of serving as a guide along the delimitation of the normativity of the analyzed principles, if they didn't served as a rationale for each minister's final decision, they outlined an ideal state of affairs, required

by the principles of morality and impersonality, different from what was used as a parameter to verify adequate behavior.

If questioned the relevance of the prohibition of article 9, III, of Law n. 8.745, to the objective selection processes, and if the principle of morality would be fulfilled by verifying the reasons, for example, of ADI n. 890, of prohibiting successive contracts through "civil adjustment of service leases" and "exceptional" admissions, the analysis of the specific case concluded that the morality, in this case cited, had no relation with the object of the process.

Based on the considerations made, it is possible to conclude that although the ministers have specified the normativity of the principles of morality and equality, from the imperative of the public tender, as a process of meritorious analysis and equal conditions, they didn't clarify whether the individual prohibition of participating in simplified competitions or the existence of successive temporary contracts was under discussion. It was not taken into account that the selection in question was not a mere political indication, but an isonomic and objective selection, as explained in the decision of the Regional Federal Court, in charge of the appeal.

The decision, therefore, lead to an arbitrary act, a freedom of action by the judge, as a tool that can origin judicial creativity and it is used as a technique that hides the paradox of the undecidability of difficult cases. To avoid this criticism, they have sought the principles, which legitimize the creation of law through jurisprudence, avoiding criticism of the use of discritionarity.

The principles, despite being used in many ways yet constitute a new element that hides the paradox of difficult cases, and works as the limits and standards that deny this discritionarity (at least in a strong sense) and legitimize the decision not because they are from nature or religion, but principles extracted from the juridic order itself, that is, legal principles.

REFERENCES

ALEXY, Robert. **Teoria dos Direitos Fundamentais**. 2. ed. Tradução de Virgilio Afonso da Silva. São Paulo Malheiros Editores, 2008.

ÁVILA, Humberto. **Teoria dos Princípios**. Da definição à aplicação dos princípios jurídicos. 15. ed., revista, atualizada e ampliada. São Paulo: Malheiros Editores, 2016.

BARROSO, Luís Roberto. Neoconstitucionalismo e constitucionalização do direito: o triunfo tardio do direito constitucional no Brasil. **Revista da Escola Nacional da Magistratura**, Brasília, ano I, n. 02, p. 26-72, out. 2006.

BOBBIO, Norberto. **O positivismo jurídico**. São Paulo: Ícone, 1995.

BRASIL. Presidência da República. **Lei 8.745/1993**. Disponível em http://www.planalto.gov.br/ccivil_03/leis/l8745cons.htm. Acesso em 19 maio 2019.

BRASIL. **Constituição Federal de 1988**. 1988. Disponível em http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm. Acesso em 19 maio 2019.

BRASIL. Supremo Tribunal Federal. **RE 635.648/CE**. Relator: Ministro Edson Facchin. Julgado em 14.06.2017. Disponível em: http://portal.stf.jus.br/processos/detalhe.asp?incidente=4034064. Acesso em 19 maio 2019.

BRASIL. Tribunal Regional Federal da 5ª Região. **AMS 72575-CE**. Relator: Des. Paulo Roberto de Oliveira Lima. Julgado em 23.10.2002. Disponível em: http://www.trf5.jus.br/data/2015/06/PJE/08016089620154050000_20150630_46671_40500002618443.pdf. Acesso em 19 maio 2019.

CANOTILHO, J. J. Gomes; MOREIRA, Vital. **Fundamentos da constituição**. Coimbra: Ed. Coimbra, 1991.

CARVALHO FILHO, José dos Santos. Manual de Direito Administrativo – 31 ed. rev., atual. e ampl – São Paulo: Atlas, 2017.

DIAS JUNIOR, José Armando Ponte. Princípios, Regras e Proporcionalidade: Análise e síntese das críticas às teorias de Ronald Dworkin e de Robert Alexy. **Revista do Curso de Mestrado em Direito da UFC**, Fortaleza, v. 27, n. 2, p.177-199, jul. 2007. Semestral.

DWORKIN, Ronald. **Levando os direitos a sério**. São Paulo: Martins Fontes; 2002.

FROTA, Bárbara Gabriele Santos. **Direitos Fundamentais e argumentação:** Da fundamentação em casos difíceis do Supremo Tribunal Federal. 2017. 123 f. Dissertação (Mestrado) - Curso de Mestrado em Direito, Universidade Federal do Rio Grande do Norte, Natal, 2017.

FURTADO, Lucas Rocha. **Curso de Direito Administrativo.** 4ª Edição. Belo Horizonte: Editora Fórum, 2013.

GUIMARÃES, Guilherme Francisco Alfredo Cintra. **O uso criativo dos paradoxos do direito na aplicação de princípios constitucionais:** Abertura, autoritarismo e pragmatismo na jurisdição constitucional brasileira. 2007. 200 f. Dissertação (Mestrado) – Curso de Mestrado em Direito, Universidade de Brasília, Brasília, 2007.

LOPES, Karina Nathércia Sousa. **Princípio da Proporcionalidade:** questionamentos sobre sua consistência e riscos do uso retórico do STF. 2015. 124 f. Dissertação (Mestrado) - Curso de Mestrado em Direito, Universidade de Brasília, Brasília, 2015.

LUHMANN, Niklas. **A Restituição do Décimo Segundo Camelo**: Do Sentido de uma Análise Sociológica do Direito. *In*: ARNAUD, André-Jean; JUNIOR, Dalmir Lopes (Org.). Niklas Luhmann: Do Sistema Social à Sociologia Jurídica. Rio de Janeiro: Ed. Lumen Juris, 2004.

KELSEN, Hans. **Teoria Pura do Direito**. São Paulo, Martins Fontes, 2008.

MELLO, Celso Antonio Bandeira de. **Curso de Direito Administrativo**. 25. ed. São Paulo: Malheiros Editores, 2013.

NEVES, Marcelo. **Entre Hidra e Hércules**: princípios e regras constitucionais. 2. ed. São Paulo: Martins Fontes, 2014.

OLIVEIRA, Ana Carolina Borges de. **Os Princípios Jurídicos e o Pós-positivismo no Direito Brasileiro.** 2015. 127 f. Dissertação (Mestrado) - Curso de Mestrado em Direito, Centro Universitário de Brasília - Uniceub, Brasília, 2015.

OLIVEIRA NETO, Valmir Chaves de. O pan-principiologismo no direito administrativo brasileiro: o caso da legalidade. **Revista do Cepej**, Bahia, v. 1, n. 16, p. 483-503, 2015.

SILVA, Virgílio Afonso da. **Direitos Fundamentais. Conteúdo essencial, restrições e eficácia.** 2. ed. 2. Tiragem. São Paulo: Malheiros Editores, 2011.

SILVA, José Afonso da. **Curso de direito constitucional positivo**. 37. ed. São Paulo: Malheiros, 2014.

STRECK, Lenio Luiz. **Verdade e Consenso:** Constituição, Hermenêutica e Teorias Discursivas. 6. ed. São Paulo: Saraiva, 2017.

VALE, André Rufino do. **A estrutura das normas de direitos fundamentais:** Repensando a distinção entre regras, princípios e valores. 286f. Dissertação. Curso de Mestrado em Direito. UnB. Brasília, 2006.

WEBBER, Suelen da Silva. O panprincipiologismo como propulsor da arbitrariedade judicial e impossibilitador da concretização de direitos fundamentais. **Revista de Direitos Fundamentais e Democracia**, Curitiba, v. 13, n. 13, p.305-324, jun. 2013.

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