The fine line between Constitutionality and Legality: A question of difference between legal principles in Brazilian Constitutional Law

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Abstract. Legal principles are what Bonavides understands as the alpha and omega of Constitutional Law. From the theoretical analysis in the conceptualization discourse of the legal principle, the question of the difference between Constitutionality and Legality is problematized, through a paradigm of Constitutionalization of law. Therefore, it is vital for this work to establish a clear methodological-theoretical approach in the search for limits in the dominant constitutional thought regarding what determines a constitutional norm and a principle of Law. Thus, the question arises what is the difference between the legal principle of Legality and the notion of Constitutionality.

Keywords. General Principles of Law, Constitutional Law, Legality, Constitutionality, Theory of Principles, Constitutionalization of Law.

1. Introduction

1.1. Research field

It is commonplace that the term principle always leads us to the idea of the initial phase or foundation of a knowledge system [1]. However, this term is enriched in the vast ocean of Brazilian Constitutional Law, adding to it the meaning that it is not only the basis, but also the space of categorical synthesis of the universe of contemporary Constitutions [2].

Recognizing the Neoconstitutionalist achievements and transformations, transversal to different legal systems [3], it is essential to understand the constitutionalization of legal principles in the service of the irradiation of Fundamental Rights in the Democratic State of Law [2,3].

Thus, it is no longer possible to understand the direction of today's constitutionalism without undertaking a Science of principles.

1.2. What is already known

Bonavides points out the need to explore, within the scope of the analysis of the concept of Principles of Constitutional Law, the ideas of its nature and characteristics [4].

Barroso characterizes the principles based on their material and instrumental differences [3,4]. He argues that, from a functional-dogmatic point of view, interpreters of the Magna Carta must balance themselves on the fine line between revealing the law and doing politics [3,4].

Celso Antônio Bandeira differentiates them into master principles and sub-principles that make up the so-called "legal-administrative regime" [4]. He bases his widespread notion on the argumentative problem arising from the inviolability between different administrative constitutional principles [4].

José Afonso da Silva, the first to deal with the legal and social effectiveness of principles in Brazilian Law, inserts distinctions of effectiveness between constitutional norms [4].

1.3. What is not known

In all legal-constitutional discourse, the issue of the difference between principles

permeates as a driving force of theoretical evolution in the recent history of Brazilian Constitutional Law. However, the distinction between certain fundamental ideas and the legal principles themselves remains an unexplored activity, as occurs in the case of Constitutionality and Legality.

1.4. Research proposal

By not conceiving Constitutional Law as a creation guided by discretion [5] and its totalization [6], the need for this research arises. The objectivity of constitutional Law [2], directly associated with the representation of Legal Security through the principle of Legality [7], is in danger with the so-called relativization of legal principles caused by the phenomenon of the "vulgarization of Fundamental Rights" [8].

Through the context of moralizing the actions of the Judiciary [5,8], the binomial of Legality and Constitutionality permeates the common legal discourse of Brazilian constitutionalism, in such a way that it is necessary to investigate.

Therefore,is the central question of this work: "What is the difference between the principle of Legality and Constitutionality in Brazilian Constitutional Law?"

The methodological approach of choice was the bibliographic review, with special emphasis on the lesson in the Manual of scientific methodology "Como elaborar projetos de pesquisa" from the prof. Antônio Carlos Gil [9].

2. Methodology

2.1. Choice of topic

Any study begins with thematic choice. Despite its primitive nature, it cannot be overlooked given its vital importance for the success of research [9].

It is important to consider methodological tangibility and broad scientific interest [9], so that the complexity of the object is not incompatible with the scope of work and available research tools [9].

2.2. Methodological Choice

Bibliographic research, in short, is marked by the systematic search for information in scientific texts that relate to the solution of the central problem [9].

It is the available work methodology that best met the demands of this project. By denying the intention of exhausting subjects as extensive as Constitutionality and Legality, the possibility of more ambitious future studies is recognized in this work.

2.3. Preliminary Bibliographic Survey

Before formulating a research problem, a preliminary bibliographical survey takes place, a multifactorial and exploratory stage [9]. Its development aims to familiarize you with the thematic area. So, it's the process of first asking yourself, "What is the universe of this work?" [10].

The preliminary bibliographical survey is important for formulating the research problem, however, it is insufficient in itself [9]. Critical reflection on the matter is vital for the clear and effective formulation of the general research problem, a task constantly claimed during this stage [9,10].

2.4. Provisional research plan

After delimiting the thematic universe of the research problem, a research plan is organized. It is a logical structure in which a general problem is divided into specific, interconnected objectives [9]. It is important to highlight that it is not definitive, given the insufficient knowledge of the topic at this stage [9]. In it, an initial project is as complete as the preliminary bibliographic survey allows [9].

2.5. Definitive bibliographical survey

From the provisional work plan, the identification of the appropriate sources for a satisfactory solution to the central problem begins [9]. Unlike the preliminary search stage, this is definitive and not just exploratory, a factor to be explained in the following stage.

The internet and its search engines constitute a new paradigm in science. Its effects on access to information become inevitable in bibliographic research [9]. Therefore, its strategic use is essential for the greater effectiveness of available digital tools [9].

Software aimed at managing bibliographic references is useful for inserting and manipulating bibliography. Throughout the process of designing and investigating the topic, the strong and constructive help of the Mendeley system stands out, whose functionalities of grouping texts by tag and its free accessibility were differentiators in the production of this article.

2.6. Systematic reading

Reading the research material should be focused on specific objectives related to the research problem [9]. Four layers of reading were considered, depending on the progression in the study: exploratory, selective, analytical and interpretative [9].

Exploratory reading verifies the adequacy of the work to the central objective of the research. Then, selective reading extracts information that meets specific interconnected objectives [9]. Then, in analytical-interpretive reading, the content is properly analyzed, generating knowledge from related information [9]. It should be noted that, although a certain degree of systematization of reading is desirable, this cannot be harmed by irreparable rigidity [9].

2.7. Records and notes

One of the biggest problems highlighted in reading is retention [9]. That is why registration tools are so important in bibliographic research [9].

The literature on methodology in bibliographical research recommends taking notes in specific sentences, which encourage the understanding of other people's thoughts and make them essential [9].

However, in this article, it was recognized that there is no best type of record, but different retention tools depending on different reading depths.

The records were divided into citation notes and notes, considering the importance of differentiating similar strategies guided by different purposes [9].

Furthermore, such separation allows the clear identification of non-copyright records from those that are. Thus, differentiating citation notes from annotation notes also seeks to mitigate the predatory practice of scientific plagiarism [9,10].

Concomitantly with selective reading, citation notes are extracted from the material in the form of excerpts that link the extracted ideas. Generally, given the first contact with the selected material, these notes are made literally without prejudice to the real meaning linked to the recorded material [9,10].

As for the note records, they are those produced from an authorial and analytical interpretation of the citation notes, assuming, in the form of their own words, the researcher's understanding of that reference section [9,10].

It is important to highlight the reiteration of this process throughout the collection, selection and construction of the textual structure of the article [9].

2.8. Logical Construction of Work

Between the note-taking and writing stages lies the logical construction of the work, which represents the organization of the ideas and concepts then developed [9,10,11]. It is a fundamental although laborious process, as it consists of the effort to assemble the unity of thought of the work, providing greater cohesion and coherence to the basic structure of the text [9,10,11].

2.9. Article Writing

Finally, there is the writing and editing stage of the article. Of the Methodology, it is the one with the greatest creative freedom, however, structural, stylistic and graphic aspects need to be affirmed [11]. It is fundamental for scientific writing to carry out successive steps called by Ashby [11] as textual design.

It is a process of five successive stages: Identification of academic need, general conceptualization, repeated editing, adaptation of language style, and, finally, visualization of the final product [11].

In the first stage, the hierarchy of importance of the knowledge produced is essential [11]. Being a stage of thinking about the text argumentatively, the aim is always to communicate an idea to someone [11]. To this end, it is necessary at this stage to know who the work is aimed at [11].

The fact is that different readers have different intentions and prior knowledge regarding the text [11]. Thus, by elucidating the target audience, the level of technicality of the text is decided [11]. It is then understood whether it is a popular article, a research proposal or a thesis, for example [11].

The second stage in the textual design process is conceptualization, vital for the full transition from the other stages of bibliographic research to writing [11]. Its main characteristic is the movement to instigate the author's freedom of thought, moving him away from details initially useless for drafting the text [11].

Graphic resources are not spared, such as concept maps and drawings to segment the idea of the work into different blocks [11]. The use of different colors and shapes is welcome to establish relationships and comments to what is established throughout this stage [11].

It is in the repeated editing that the text begins to flesh out [11]. It is important, mainly for the principles of cohesion and coherence, to build the final product on solid foundations, paying attention to graphic punctuations and effective syntactic and stylistic constructions [11].

3. Results

3.1. Constitutionality

One of the most important findings in this research arose from the following reflection: “What is Constitutionality? Can it be understood as a legal principle?”

Cármen Lúcia's understanding of Constitutionality was recognized, as it seemed to reconcile that of other renowned constitutionalists, such as Barroso and Bonavides [4].

According to the jurist, Constitutionality is the primary logical parameter of all Law [4], assuming what appears to be the logos of any Legal-Constitutional experience.

Therefore, it is understood that, more than one of the dimensions inherent to Legal Principles [4], Constitutionality, in abstract, is the identity of the Constitution and, consequently, the assumption that validates the logical primacy of the Principles of Law [4] .

3.2. Legality

In article 5, item II of the Constitution of the Federative Republic of Brazil, it is stated that no one will be obliged to do or not do anything except by virtue of law [12]. That is the broad meaning of legality, but it is also very confused with it´s stricter sense disposed in article 5, item XXXIX of the Constitutional text, which is that there is no crime without a law that defines it, nor is there a penalty without a law that imposes it [7,12,13].

According to Alexandre de Moraes, legality is, historically, the founding principle of the Rule of Law [12]. The positive origin of this general principle of Law goes back to the Magna Carta of 1215 [7], which Pinto Ferreira attributes the title of “chrysalis and imperfect model of subsequent Constitutions” [14].

Nucci [7] states that it is a principle that, from the political point of view, is an individual guarantee that combats arbitrariness, which Dworkin criticizes in his concept of Law´s Empire [5].

Two considerable results are produced when assuming, respectively, the political and normative meanings of legality [7]: the emergence of the concept of citizenship based on this principle and its criminal constitutional materiality.

3.3. The problem of difference

An immediate concern in the production of research results was verifying the feasibility of satisfactorily distinguishing legal principles through the chosen theoretical-methodological approach.

It was noticed that most of the relevant previous work on the Theory of Principles centralizes the methodological need to differentiate principles from rules or delimit their action in the legal system [2,3,4].

It was understood, however, that in the current State of the Art little attention was devoted to the effective theoretical distinction between certain principles, a fact observable in the lack of scientific consensus regarding a single classification of this normative type [2,4].

It is therefore understandable that there is a certain lack in constitutionalist discussions regarding the ontology of the principle, that is, the essence and reason of being of Legal Principles. Fact that identifies an epistemological problem in Law, not merely identifiable in the positive law.

4. Discussions

4.1. Theoretical framework

Ruy Samuel Espíndola's work is the exercise in a principled understanding of Brazilian constitutional law that is more appropriate to the multiple discourses that permeate this legal universe [2,4]. His work thus constitutes the theoretical framework on which this work was developed.

His analysis of constitutional legal principles when evaluating the powers and absences in the speech of different thinkers [4] dialogues with the premise of the difficulties of legal-argumentative language in representing principles.

The theoretical importance of authors such as Luís Roberto Barroso, Cármen Lúcia da Rocha, Alexandre de Moraes and Guilherme Nucci is also highlighted, without whom the development of the final product would not be possible.

4.2. Weaknesses of the approach

According to Virgílio, the central problem of fundamental principles in the midst of a paradigm of Constitutionalization of Law is not the correct definition of principles, but rather the theoretical discernment that defines their “fundamentality” [6].

The author claims that the search for a total definition of fundamental principles makes the mistake of not focusing on the concept of “Constitution as a framework”, an alternative between the two theoretical extremes of “constitution as law and total constitution” [6].

He thus points out that a search for a Total definition of principles, which include in the

author's understanding the Fundamental Rights themselves [6], is the root cause of the pitfall of judicialization and the politicization of the Constitution, in reference to the German constitutionalist Isensee [6].

4.3. Central hypothesis of the study

The main hypothesis of this study refers to the nature and characteristics of Constitutional Principles [2], in light of what Ruy Samuel called the "taxonomy of principles" [2].

According to Carmen Lúcia's formula, it is assumed that it is necessary to consider 12 aspects that reveal the real nature of the principles, which are: generality, primarity, axiological dimension, objectivity, transcendence, actuality, multiformity, binding, adherence and informativeness [4].

It is important to highlight the currentness and depth of this author's theoretical production [4], the basis for formulating the central hypothesis of this research. However, Espíndola points out the confusing distinction between principles and rules and the lack of typification regarding the applicability of principles as absences in his speech [4].

4.4. Reaffirmation and verification of Results

The identification of the *logos* of current legal experience is an interesting result of this research as it reveals the material and instrumental permeability of Constitutionality in the implementation of Constitutional Law.

This result lives up to the widespread systematization of constitutionality in Barroso's speech, which makes the corrective mechanism of Constitutional Control [14] vital for his understanding.

Thus, it was not possible to state without contradiction that this is a material legal or hermeneutic principle guiding constitutional dogmatics [3, 4, 14]. However, it is certainly clear that it is an uncompromising predicate of all legitimized Law [4] by the political-legal situation in a State of Constitutional Law.

Furthermore, the criminal constitutional materiality of Legality is the result of what Nucci highlights as the generic normative character of this principle [7] which, counter intuitively, constitutes the characteristic of objectivity, as Cármen Lúcia´s theory proposes [2,4].

Constitutional principles are necessarily determinable and operative [3,4] in the characteristic of objectivity [2]. This is because the interpretative revelation [3,4] of Law does not imply its subjective creation through the free option of meanings by "owners of constitutional truth" [4].

Regarding the legal-criminal nature of Legality, it is necessary to fully understand the legal-criminal assets that this principle acts to defend [15]. Legality acts as a restriction on the sources of norms and, mostly, as a guarantee of the citizen's personal freedom [15], foundation of the state of people being in possession of their inherent civil and political rights [16].

4.5. Prospective

It is recommended for subsequent studies to analyze Constitutionality faithful to the completeness of Cármen Lúcia's criteria, restricted in this article to primacy, objectivity and generality which, despite the technical limitation, I believe have produced promising results.

Efforts to systematize and apply the lessons of authors such as Carmen Lúcia and Bonavides as a theoretical framework in various areas of Brazilian Law are welcome, enabling tests of the validity and dogmatic applicability of these complementary Theories of Principles.

5. Conclusion

It is in the development of legal-constitutional discourse that the question of the difference between Legality and Constitutionality unfolds, in order to reveal the principled nature of these permanent notions in the current paradigm of constitutionalization of Law.

Constitutionality is understood as a primary logical-normative parameter necessary for the operation of constitutional principles. That's what it seems to be the *logos* of every valid legal-normative experience in a legitimate Constitutional State of Law.

Legality is the general constitutional principle that enables peaceful social coexistence under the rule of law in the punitive power of the State in the defense of Legal Security.

However, it was not possible to safely demonstrate the principled nature of the idea of constitutionality due to its material and instrumental permeability when implementing the structuring of the Rule of Law and its maintenance through corrective control of the constitutional norm.

The present study does not intend to exhaust such extensive material present in countless discussions of Brazilian Public Law, but to raise the limits of the current State of the Art, presenting the fine line between Constitutionality and Legality.

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