



Caselow decisions on the unconstitutionality of direct elections to choose the directors of Brazilian public schools¹

Decisões jurisprudenciais sobre a inconstitucionalidade das eleições diretas para escolha dos diretores das escolas públicas brasileiras

Sentencia de decisiones sobre la inconstitucionalidad de las elecciones directas para elegir a los directores de las escuelas públicas brasileñas

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Abstract

The objective was to catalog and analyze the set of legal precedents arisen from the decisions coming from the Federal Supreme Court and the Superior Court of Justice regarding direct elections in public schools. Bibliographic and documentary study, from 1988-2017. It is pacified in the Federal Supreme Court and the Superior Court of Justice that both State Constitutions and their laws, decrees and resolutions carry with them incurable vices, which are incompatible with the provisions of the current Federal Constitution.

Keywords: Public schools. Choice of Directors. Unconstitutionality.

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Resumo

Objetivou-se catalogar e analisar o conjunto de Jurisprudências formadas a partir das decisões oriundas do Supremo Tribunal Federal e do Superior Tribunal de Justiça, tendo por objeto a temática relacionada ao instituto das eleições diretas nas escolas públicas. Estudo bibliográfico e documental, no período de 1988-2017. Encontra-se pacificado no STF e STJ que, tanto as Constituições Estaduais quanto suas leis, decretos e resoluções, carregam consigo vícios insanáveis, os quais são incompatíveis com as previsões abrigadas na atual Constituição Federal.

Palavras-chave: Escolas públicas. Escolha de Diretores. Inconstitucionalidade.

Resumen

El objetivo era catalogar y analizar el conjunto de jurisprudencias formadas a partir de las decisiones de la Corte Suprema Federal y la Corte Superior de Justicia, teniendo como objeto el tema relacionado con el instituto de elecciones directas en las escuelas públicas. Estudio bibliográfico y documental, en el período de 1988-2017. En el STF y el STJ se calma que tanto las Constituciones estatales como sus leyes, decretos y resoluciones llevan consigo vicios insanables, que son incompatibles con las predicciones contenidas en la Constitución Federal vigente.

Palabras clave: Escuelas públicas. Elección de directores. Inconstitucionalidad.

Introduction

A study by Paro (1996) demonstrated the historical character of the struggles triggered by social movements, in particular those linked to the education sector, of which the claiming agenda for democratic management and direct elections in schools were also highlighted. Despite all this trajectory that runs from the 1960s to the first half of the 1990s, few states and municipalities covered that matter in their legislation and, those successful in doing so, brought with them electoral processes irregularities that took place in national politics. This would have made it difficult to strengthen the participation of society in the elective processes in education institutions, since they remained stained by clientelistic practices, permeated with corporatist behaviors, and populist relations between the subjects involved with school life.

Regarding the relationship between democratic management and the quality of education, the research by Maia and Manfio (2010) was equally successful in diagnosing, through a bibliographic study, that between the years 1990-2005, in the different locations where the provision of the position of school director started to be decided through direct elections, the quality of teaching still remained at precarious levels.

A study by Brzezinski and Mata, (2009), addressed the phenomenon of elections to choose directors of state schools, concentrating the analysis on the reality of the State of Goiás, exposing the conflicts between the State Board of Education and the Education Workers Union. Equally relevant was the work of Santos and Prado (2013), in which they discussed the relationship between democratic management and the election of directors in municipalities in the State of Alagoas. In turn, Silva's research (2000) addressed the historical trajectory, impasses and perspectives related to the choice of school directors in the State of Minas Gerais; while Medeiros (2006), talked about the democratic management and choice of the school director; and Oliveira (2017), concentrated his analysis on direct elections for directors of schools in the Metropolitan Region of Belém, in the State of Pará.

On the other hand, the work of Freitas, Alexandre and Silva (2012) pointed out several difficulties to consolidate democracy in the institutional environments of Brazilian public schools, in spite of the fact that direct election processes were the adopted model for the choice of school directors.

Within the scope of Constitutional Law in Brazil, the number of researches whose authors are dedicated to the study of constitutionality control under different perspectives (MENDES, 1999, 2004; COSTA, CARVALHO, FARIAS, 2016; BRUST, 2009; GARCIA JÚNIOR, 2015; KUNZLER, 2017; MUZZI FILHO, MURTA, 2016; OLIVEIRA, 2016; LOPEZ, CHEHAB, 2016; LIMAS TOMIO, ROBL FILHO, KANAYAMA, 2017).

The constitutionality control has undergone historical evolution in Brazil, as highlighted by Costa, Carvalho, Farias (2016, p. 155). However, although the role of the Supreme Court in concentrated and diffuse control has gained relevance, the expansion of the Supreme Court's power has not reduced the workload, but has mitigated the activities regarding the adjudication of merits, mainly through restrictions on the number of judgments rendered. In addition, they emphasize that:

The process of enhancing the effects of concentrated control also occurred within the scope of the hermeneutical possibilities available to the Federal Supreme Court. It was accentuated by the consolidation of the institute of the "according interpretation", which occurred for the first time in Supreme Court syllabuses of 1987 (STF, Rp 1417) and was consolidated throughout the 1990s, when precedents references became constant, having even been legislatively recognized by Article 28 of

Law no. 9868/1999. That interpretative strategy gave the Federal Supreme Court the possibility of editing interpretative sentences of constitutionality that, as Leo Brust (2009) emphasizes, correct or extend the work of the legislator without altering the then predominant discourse of the negative legislator. Other important milestones of that process were the reform of the Judiciary carried out by Constitutional Amendment 45/2004, which instituted the binding precedents, and the legal precedents change that, in the judgment of Injunction 670/ES, in 2007, adopted greater activism regarding unconstitutionality by default (COSTA, CARVALHO, FARIAS, 2016, p.158).

Garcia Júnior (2015) carried out a historical and legal study regarding the evolution of jurisdictional control of constitutionality in the Brazilian system, examining the main characteristics assumed in the various constitutions of Brazil, with special attention to the current model arisen from the Federal Constitution of 1988.

The work of Kunzler (2017) focused on “the origin and theoretical references of schools on the interpretation of Constitutional Law, and the exercise of constitutionality control in tax matters in Brazil”, demonstrating the effects of the decisions handed down by the Federal Supreme Court, based on the application of the principles of legal certainty and exceptional social interest.

For Muzzy Filho (2016), the role of the Federal Supreme Court in the control of constitutionality went through historical crises and shows the Court's inability to judge those cases, no matter how many reforms aimed at improving the model have been made, resulting in no solution for the crises, therefore it is necessary to reduce the jurisdictional powers bestowed upon the Supreme Court.

According to research by Oliveira (2016), the exercise of the constitutionality control of laws in Brazil is permeated by disputes and interests related to the different roles of the Federal Supreme Court when examining and judging Direct Action of Unconstitutionality, acting as an authority which deliberates much more in a corporate way than in favor of implementing social and collective rights.

Lopes and Chehab's analysis (2016) showed that, in the Brazilian case, both the control of constitutionality and the control of conventionality are still viewed with fear because of the prevalent lack of knowledge on their benefits and the fear of using legal norms from international treaties, aiming at the non-application of internal rules.

The results of the study by Limas Tomio, Robl Filho, Kanayama (2017), indicated that, in view of a comparative history of the cases of Brazil, Spain, Italy, Mexico and Portugal, the abstract and concentrated controls of constitutionality impact on national and subnational conflicts, since the constitutional jurisdiction favors the maintenance or the increasing of powers of the central or national government.

Another relevant research was developed by Correa, Walmott Borges, Pinhão (2019), who pointed out that public hearings play an important role as spaces in democratic legitimation in the exercise of concentrated constitutionality control, bringing positive implications for the construction of a democratic society. In addition, Schmitt (2014), emphasized that the Accounting Courts in Brazil also play a relevant role in exercising constitutionality control.

It appears, therefore, that in constitutional matters, in addition to the Federal Supreme Court, and the powers attributed to judges and courts (Federal Constitution of 1988, art. 97, art. 102, III, *a* to *c*, art. 105, II, *a* and *b*), they are currently legitimized to the proposition of Direct Action of Unconstitutionality (ADI):

Article 102. The Supreme Federal Court is responsible, essentially, for safeguarding the Constitution, and it is within its competence:

I - to institute legal proceeding and trial, in the first instance, of:

a) direct actions of unconstitutionality of a federal or state law or normative act, and declaratory actions of constitutionality of a federal law or normative act;

(...)

Article 103. The following may file direct actions of unconstitutionality and declaratory actions of constitutionality:

I - the President of the Republic;

II - the directing board of the Federal Senate;

III - the directing board of the Chamber of Deputies;

IV - the Directing Board of a State Legislative Assembly or of the Federal District Legislative Chamber;

V - a State Governor or the Federal District Governor;

VI - the Attorney-General of the Republic;

VII - the Federal Council of the Brazilian Bar Association;

VIII - a political party represented in the National Congress;

IX - a confederation of labour unions or a professional association of a nationwide nature.

Paragraph 1. The Attorney-General of the Republic shall be previously heard in actions of unconstitutionality and in all suits under the power of the Supreme Federal Court.

Paragraph 2. When unconstitutionality is declared on account of lack of a measure to render a constitutional provision effective, the competent Power shall be notified for the adoption of the necessary actions and, in the case of an administrative body, to do so within thirty days.

Paragraph 3. When the Federal Supreme Court examines the unconstitutionality in abstract of a legal provision or normative act, it shall first summon the General Counsel for the Federal Government, who shall defend the impugned act or text.

Paragraph 4. (Revoked). (BRASIL, 1988).

The abstract control of the norms was turned into a goal of the new normative systematics brought by the Federal Constitution of 1988, since it would have increased the number of legitimates, including the participation of representative bodies of the society:

Such fact strengthens the impression that, with the introduction of abstract control of norms system, with wide legitimation and, in particular, the granting of the right of proposition to different authorities, the intention was to reinforce the abstract control of norms in the Brazilian legal system as a peculiar *correction instrument* of the general incident system (MENDES, 2004, p. 2).

In this context, a new paradigm of constitutionality control was instituted in the Brazilian legal system, from which the Federal Supreme Court was given custody of the Constitution:

The 1988 Constitution emphasized, therefore, no longer the *diffuse* or *incident* system, but the *concentrated* model, since, practically, all relevant constitutional controversies started to be submitted to the Supreme Federal Court, through a process of abstract control of legal norms. The wide legitimacy, the promptness and the speed of this procedural model, including the possibility of immediately suspending the effectiveness of the questioned normative act, upon request for provisional remedy, constitute an explanatory element of this tendency (MENDES, 2004, p. 2).

Mendes (1999), clarified that, regarding the abstract control of constitutionality, the adjudications produced in the scope of the Federal Supreme Court, generate binding precedents on the Judiciary and the Executive Branches.

Once a law has been produced, approved, sanctioned and published, its technical efficacy does not mean that it is free from vices, and it may give rise to the claim of its unconstitutionality in the face of a right. This will imply an appreciation of the lawsuit filed with the Federal Supreme Court.

Given this context, one wonders: would direct elections in schools be constitutional or would it be contaminated by vices, suffering, therefore, from unconstitutionality?

In the construction of this investigation, a bibliographic study was carried out and consultation of the existing legal precedents at the Superior Court of Justice <http://www.stj.jus.br/SCON/pesearch.jsp> and at the Federal Supreme Court <http://portal.stf.jus.br/jurisprudencia/>.

The Appellate Decisions and Caselaws analyzed showed that in different Brazilian states, the ways of filling the position of director is made by political appointment as a commissioned position, even though a selection process was performed through direct election, according to specific law, strengthening the discretionary power of the Chief Executive when hiring or discharging the contractor².

In accordance with the Constitution of the Federative Republic of Brazil, enacted in 1988, democratic management has become an essential principle for teaching, and the filling of positions must also result from a competitive civil-service examination

Art. 206. Education shall be provided on the basis of the following principles:

- I - equal conditions of access and permanence in school;
- II - freedom to learn, teach, research and express thought, art and knowledge;
- III - pluralism of pedagogic ideas and conceptions and coexistence of public and private teaching institutions;
- IV - free public education in official schools;
- V - appreciation of the value of school education professionals, guaranteeing, in accordance with the law, career schemes for public school teachers, with admittance exclusively by means of public

² A different situation occurs in the State of São Paulo, which currently promotes competitive civil-service examination for admission to the Teaching Board in the position of School Director, according to the rules expressed in Resolution SE 56, of 10/14/2016, which “Provides for profile and skills required of School Directors of the state education system, and on bibliographic references and legislation, which underlie and guide the organization of competitive civil-service examination, and selective, evaluative, and training processes, and provides related measures”.

entrance examinations consisting of tests and presentation of academic and professional credentials;

VI - democratic administration of public education, in the manner prescribed by law;

VII - guarantee of standards of quality;

VIII - nationwide professional minimum salary for public school teachers, under the terms of a federal law.

Sole paragraph. The law shall provide for the classes of workers to be considered basic education professionals, as well as for the deadline for the preparation or adaptation of their career schemes, within the sphere of the Federal Government, the States, the Federal District, and the Municipalities (BRASIL, 1988).

It was noticed that the control of constitutionality has strengthened the discretionary power of the heads of the Executive Branch in the different federal units of Brazil, since in those places where there was a specific law regulating direct elections in schools, all of them were considered unconstitutional because filling the position of director resulted from political nomination and not from a competitive civil-service examination.

Thus, in view of the decisions of the Federal Supreme Court on the merits, the Superior Court of Justice has been reiterating the deliberations of the Supreme Court, ratifying the binding effects of its judgments.

Direct election in schools in accordance with the caselaws of the superior court of justice

In the case of the Supreme Court of Justice, the search for Caselaws, using the keyword "choice of school principals", showed that there are currently 15 pronouncements available, including 01 Appellate Decision³ and 14 Decisions by the Trial Court⁴. However, during the reading of each of those documents, it was found that not all refer to the topic of this study, which implied a reduction in that amount, maintaining the Appellate Decision, but concentrating the analysis on 10 Decisions by the Trial Court.

It was noted that, since 1997, the Supreme Court of Justice (STJ) has ruled on several cases involving the choice of public-school principals through direct elections. There were situations in which the elected candidate was dismissed for having supported strikes, however, in several other cases, the removal from office was a discretionary act practiced by the Chief Executive, which started to demonstrate that directors could have their appointment revoked at any time, because it is not a liquidated and certain right. As an example, see some cases below.

As part of the Ordinary Appeal in Writ of Mandamus RMS 3699 (1993 / 0028516-5 - 08/04/2003), about 10 years after the demand arose, the STJ decided by law that the school principal should be dismissed due to lack of serious and the fact that the occupation of this position in committee may be subject to dismissal at any time.

ADMINISTRATIVE LAW. WRIT OF MANDAMUS. DIRECTORS OF PUBLIC SCHOOLS. EXEMPTION. COMMISSIONED POSITION. "AD NUTUM" EXONERATION. LEGALITY. PRECEDENTS OF THE STJ. - The act of the State Secretary of Education that discharged the Appelants from the commissioned

³ Refere-se a uma decisão final ou sentença proferida por instância superior que passa a ter seus efeitos sobre os demais casos semelhantes.

⁴ É aquela decisão proferida por um único magistrado, esteja ele vinculado a qualquer grau de jurisdição. Na primeira instância ela é tida como a regra a ser seguida, na segunda, torna-se a exceção.

positions they held, due to serious misconduct, is legal, since the position of trust has the essential premise of the possibility of "ad nutum" dismissal. Precedents of the STJ. – Appeal heard, but denied.

As said in the Report:

This is an ordinary appeal in a writ of mandamus filed by AMAURY BARBOSA and OTHERS, in forma pauperis, against the ruling handed down by the Rio de Janeiro State Court of Justice, which denied the original writ of mandamus. The prosecutors sought, through action for a writ of mandamus, to return the powers of Director and Deputy Directors of the Integrated Center for Public Education Dom Pedro D'Alcântara de Bragança - First Emperor of Brazil - CIEP, and, therefore, the revocation of the administrative act which, without due administrative process, culminated in their "ad nutum" discharge. Therefore, they claimed that they were unjustifiably dismissed by the State Secretary of Education of the State of Rio de Janeiro, for participating in a strike movement, without, however, an adversary procedure.

Becoming a school director, even though through an electoral process resulting from the application of a specific law, does not mean that the elected person has reached the impossibility of discharge from the post, as the act of appointment may be rendered ineffective.

The fact of being able to be dismissed at any time from the position of school director, demonstrates that there is no need to observe the adversary and fair hearing of the aggrieved party, since it is not necessary to institute administrative proceedings in order to effect the discharge of the then appointed person.

From Minas Gerais, the INTERLOCUTORY SPECIAL APPEAL No. 904.171 - MG (2016/0120742-0), was judged at the Superior Court of Justice on 05/17/2017, whose decision emphasized:

In the case file, I note that the plurality opinion objected dismissed the prosecution's thesis on the grounds that "the law that determines the occurrence of election for positions of direction and vice-direction of public schools violates the provisions of the Federal Constitution, because removes from the chief executive the constitutional prerogative of freely appointing civil servants in commissioned positions"(page 476).

Thus, the a quo court, in view of what has already been decided by the Federal Supreme Court in similar cases, decided to deny the complaint, since "the act of the Mayor of Sacramento to appoint civil servants to occupy management positions and vice -direction of municipal schools was not illegal" (page 470).

In this sense, I understand that the filing of a special appeal is not acceptable based on violation of a constitutional provision, as provided for in art. 105, III, "a", of the Federal Constitution, under penalty of affront to the jurisdiction reserved to the Federal Supreme Court.

It is noticed that the creation of a law within the scope of the Federated Units, aiming to regulate the institute of direct elections in schools, is typically unconstitutional, since it removes

the competence of the Executive Branch to appoint and dismiss the occupants in commissioned positions/functions, without any illegality in the official act that discharges the servant.

Another case comes from Paraná - SC, through APPEAL IN WRIT OF MANDAMUS Nº 15.320 - PR (2002 / 0108680-0), filed with the STJ and only judged on May 6, 2015, with the following decision content:

The heart of the controversy lies in the legality of the acts of dismissal of commissioned positions of directors of public schools of the State of Paraná, after the judgment by the STF of ADI 606-1, which declared unconstitutional the election of directors in the educational institutions maintained by the State Governments.

In effect, the judgment under appeal is in harmony with the jurisprudential orientation of this Superior Court, in the sense that the dismissal of a civil servant occupying commissioned positions does not require motivation, since it is a discretionary act.

It should be noted that, in the State of Paraná, the election to choose public school principals has already been judged to be unconstitutional, so the Executive Branch's actions to appoint and remove from office/position are not covered by any illegality, mainly because it is a discretionary power, that is, dependent on the Chief Executive's will to maintain/dismiss the servant.

In Espírito Santo, in the judgment of APPEAL IN WRIT OF MANDAMUS No. 26.017 - ES (2008/0000785-5), which took place on September 9, 2013, the STJ also decided:

Contrary to what the plaintiff states, the election to the position of School Director of the State Education System, since it is a commissioned position, does not give the elected individual the right to only be discharged at the end of their terms, or in the event of having committed functional infractions, duly determined through administrative proceeding.

Once the school directors are appointed, such fact does not guarantee that they will remain in office for the entire duration of their exercise (2, 3 or 4 years), since, as it is a commissioned position, the Executive Branch enjoys the prerogative to dismiss them at any time, without the need of administrative proceedings.

Judged by the Superior Court of Justice on February 2, 2007, APPEAL IN WRIT OF MANDAMUS No. 22,882 - RJ (2006/0218857-2), decided on the matter of election for director, held in the Municipality of Nova Iguaçu, in the State of Rio de Janeiro:

Depending on the case, the appellant complains against the act of the Mayor of the Municipality of Nova Iguaçu-RJ, consisting of the appointment of a candidate from Coalition 1 to the position of School Director, due to alleged nullities in the electoral process.

Regardless of the arguments presented by the applicant, the reasons at no time succeeded in shaking the grounds provided by the a quo appellate decision, which concluded that there was no liquidated and certain right to be protected.

The decisive vote of the decision stated: "The claim of the Applicant, in invoking municipal legislation to support the alleged liquidated and

certain right, collides with the constitutional rule of article 37, II, of the Federal Constitution.

As well signed in the ministerial legal opinion, based on scholar citation, the electoral process does not remove the power of dismissal and appointment of a position of trust by the Mayor.

Furthermore, in the specific case, the election was carried out and, based on its result, the Respondent Authority, in the exercise of its prerogatives, appointed of the winner.

Candidates who may have taken office after electoral election to choose directors, do not become the holder of a liquidated and certain right in relation to the Executive Branch, since their appointment is linked to a position of trust and, therefore, this can be undone at any time by the constituted authority.

The analysis of caselaws that occurred in the sphere of the Superior Court of Justice shows that the laws that originated and regulated direct elections in schools at state and municipal levels are recognized as unconstitutional, therefore, innocuous in the legal world.

Furthermore, taking office as director of public school, does not generate liquidated and certain right to the person favored by this official act, this because it is a commissioned position, for which the Executive Branch has the power to nominate and/or discharge the nominee, including dismissing absent of administrative proceedings.

Appellate decision in the scope of caselaw decisions in the Federal Supreme Court

Consulting the database of the Federal Supreme Court on the website <http://www.stf.jus.br/portal/jurisprudencia/>, through the search in the Free Search with the search term “election of school director”, there were 12 judgments in which there were decisions on the subject.

On 08/12/2009, the en banc court held the judgment of ADI 2997 / RJ - RIO DE JANEIRO DIRECT ACTION OF UNCONSTITUTIONALITY, in which it decided that:

HEADNOTE: UNCONSTITUTIONALITY. Direct action. Art. 308, item XII, of the Constitution of the State of Rio de Janeiro. Regulatory standards. Education. Public education institutions. Management positions. Choice of managers through direct elections, with the participation of the school community. Inadmissibility. Commissioned positions. Appointments within the exclusive competence of the Chief Executive. Offense to arts. 2, 37, II, 61, § 1, II, "c", and 84, II and XXV, of the Federal Constitution. Scope of democratic management provided for in art. 206, VI, of the FC. Action deemed valid. Precedents. Vote won. Any rule that provides for direct elections for the direction of educational institutions maintained by the government, with the participation of the school community, is unconstitutional.

In public educational establishments, due to their unconstitutionality, the choice of directors of school units through direct elections has become inadmissible, since the appointments or dismissal of officials from commissioned positions are exclusively the responsibility of the Chief Executive Officers.

In the case of ADI 2997 MC / RJ - RIO DE JANEIRO PROVISIONAL MEASURE IN DIRECT ACTION FOR THE DECLARATION OF UNCONSTITUTIONALITY, in the trial held on 10/29/2003, the en banc court ruled for the

unconstitutionality of the set of rules expressed in state Constitution and laws, that provide for the occurrence of direct elections in schools maintained by the government:

HEADNOTE: UNCONSTITUTIONALITY. Direct Action. State Constitution and state laws. Draft made by a deputy, regarding one of the laws. Education. Management of educational institutions maintained by the Government. Rules that provide for direct elections, with the participation of the school community. Apparent offense to arts. 2, 37, II, 61, § 1, II, "c", and 84, II and XXV, of the FC. Great risk of damage to public administration. Provisional measure granted. Precedents. In a direct action of unconstitutionality, a provisional measure should be granted to suspend the validity of Constitution norms and state laws that provide for direct elections, with the participation of the school community, for the management positions of educational institutions maintained by the Government.

In addition to constituting an offense to the Federal Constitution, the judicial branch must grant a provisional measure aiming at suspending the validity of nonconstitutional rules regarding the institute of direct elections in public schools, with wide participation of the school community.

In the State of Rio Grande do Sul, the en banc court ruled on March 3, 1999, ADI 578/RS - RIO GRANDE DO SUL

DIRECT ACTION FOR THE DECLARATION OF UNCONSTITUTIONALITY, which also recognized the unconstitutionality of state laws regulating direct elections for the choice of school principals:

HEADNOTE: DIRECT ACTION FOR THE DECLARATION OF UNCONSTITUTIONALITY OF THE STATE OF RIO GRANDE DO SUL, ARTICLE 213, § 1. STATE LAW No. 9,233/91 AND 9,263/91. ELECTION FOR PROVISION OF OFFICES OF DIRECTORS OF EDUCATION UNIT. UNCONSTITUTIONALITY. 1. It is the exclusive responsibility of the Head of the Executive Branch to fill positions of public schools directors as commissioned positions. 2. Constitution of the State of Rio Grande do Sul, Article 213, § 1, and State Laws No. 9,233 and 9,263, of 1991. Election to fill the positions of directors of a public education unit. Unconstitutionality. Request granted.

It should be noted that even in the case of laws that arose after the Constitution of the Federative Republic of Brazil of 1988 and before the Law of Directives and Bases of National Education - LDBEN, of 1996, the judgment of the direct action for the declaration of unconstitutionality (ADI) proved to be unconstitutional any and all laws created by the States in order to choose school principals through electoral processes that involve the school community.

In a legal situation regarding the State of Minas Gerais, on February 5, 1997, the Federal Supreme Court, en banc, held the judgment of ADI 640/MG - MINAS GERAIS DIRECT ACTION FOR THE DECLARATION OF UNCONSTITUTIONALITY, deciding on the unconstitutionality of filling positions of director of state schools, through direct elections:

HEADNOTE: DIRECT ACTION FOR THE DECLARATION OF UNCONSTITUTIONALITY. FILLING OF POSITIONS OF DIRECTOR OF STATE EDUCATIONAL UNITS THROUGH ELECTION: ART. 196, VIII, OF THE STATE CONSTITUTION, LAW No. 10,486, 7/24/91, AND DECREE No. 32,855, 8/27/91, ALL FROM THE STATE OF MINAS GERAIS. UNCONSTITUTIONALITY: ART. 37, II, IN FINE, OF THE FEDERAL CONSTITUTION. 1. It is up to the Executive Branch to make the appointments for the commissioned position of public-school director (FC, art. 37, II, in fine). 2. The legal rule that removes this prerogative from the Executive is unconstitutional, when determining an electoral process to fill these positions. 3. Request granted regarding the unconstitutionality of art. 196, VIII, of the State Constitution, Law nº 10.486 / 91 and Decree nº 32.855/ 91, all from the State of Minas Gerais.

This decision clarifies that both the State Constitutions, the state laws and their regulatory Decrees, are unconstitutional when they set norms involving the choice of school directors, since they threaten to remove the prerogative from the Executive Branch to determine the appointment or dismissal of a servant for the filling of that school position in public educational institutions.

With regard to the State of Santa Catarina, the Federal Supreme Court, en banc, ruled on February 3, 1997, ADI 573/SC - SANTA CATARINA the DIRECT ACTION FOR THE DECLARATION OF UNCONSTITUTIONALITY, declaring the unconstitutionality of the State Constitution and specific laws concerning the process of choosing the directors of state schools:

HEADNOTE: - Direct action for the declaration of unconstitutionality. 2. Law No. 8040, dated of 7/26/1990, of the State of Santa Catarina, which provides for the management functions of public schools, a way of choosing the directors, and providing for other measures. 3. Choice, through election among the school community, of directors. 4. Allegation of offense to arts. 61, § 1, II, letter "c", and 37, II, of the Federal Constitution, for the law was of parliamentary initiative and concerns the provision of commissioned positions. 5. Provisional granted. 6. Guidance by the Federal Supreme Court in the sense of not accepting, in the light of the constitutional precepts in force, the electivity of the directors of public schools. Since the directors of public establishments, who are part of the Executive Branch, hold commissioned positions, it would not be permissible to make these positions tenured, with offices that would ensure teachers, civil servants and students, without the manifestation of the Chief Executive, who would be bound to such choice to provide positions of trust, in order to manage administrative positions, members of the educational structure. 7. Precedents in ADINs No. 244-9-RJ, 387-9-RO, 578-2-RJ, 640-1-MG, 606-1-PR, 123-0-SC and 490-5. 8. Direct action for the declaration of unconstitutionality granted, declaring the unconstitutionality of Law No. 8040, of July 26, 1999, of the State of Santa Catarina.

The filling of the position of director in a commissioned position must not be provided for in a law of the state Legislative Branch because it goes against federal constitutional norm. In addition, the offices derived from elective processes in which professors, servants and students participate, cannot be validated, since it suppresses the prerogative attributed to the Chief Executive.

Coming from that same State of Santa Catarina, the Federal Supreme Court, en banc, ruled on February 3, 1997, ADI 123/SC - SANTA CATARINA. DIRECT ACTION FOR THE DECLARATION OF UNCONSTITUTIONALITY, whose decision proved to be unconstitutional the provision present in the contents of the State Constitution:

HEADNOTE: CONSTITUTIONAL. PUBLIC EDUCATION. DIRECTORS OF PUBLIC SCHOOLS: ELECTION: UNCONSTITUTIONAL. Constitution of the State of Santa Catarina, item VI of art. 162. I. - The provision of the Santa Catarina Constitution that establishes the elective system, by means of a direct and secret vote, is unconstitutional for the choice of school directors. Public positions are either filled by competitive civil-service examination, or, in the case of a commissioned position, by free appointment and dismissal of the Chief Executive, if the positions are in his orbit (FC, art. 37, II, art 84, XXV). II. – Request for the declaration of unconstitutionality granted.

Since the filling of public positions carried out by means of a competitive civil-service examination, or, in the case of a commissioned position, by means of an appointment made by the Chief Executive, it is unconstitutional any state Constitution or law that expressly regulates the process of choice of directors of public schools through the mechanism of direct and secret voting.

On November 22, 1991, the the Federal Supreme Court, en banc, had already analyzed the ADI 640 MC/MG - MINAS GERAIS PROVISIONAL MEASURE IN DIRECT ACTION FOR THE DECLARATION OF INCONSTITUTIONALITY, and decided to grant a provisional measure to suspend the effects of rules that provide for the choice of public school directors by elective process:

SCHOOLS - DIRECTORS - CHOICE PROCESS - DIRECT ACTION FOR THE DECLARATION OF CONCONSTITUTIONALITY - PROVISIONAL. The prerequisites for granting the provisional compete when the contested normative acts provide for the choice of public-school principals through a peculiar selection process and for the filling of positions. At first glance, the hypothesis involves positions to be filled at free discretion, being illegal, by legal norm, to suppress Executive Branch's power.

Any norm established in the form of a Decree, specific law or in the text of state constitutions, does not have the power to prevent or even suppress the power of the Chief Executive as an entity that gathers the powers to appoint and dismiss the civil servants for the positions of director of public schools.

The Federal Supreme Court, en banc, in a trial dated of September 14, 1988, that is, before the Constitution of the Federative Republic of Brazil, of October 5, 1988, came to power, decided in Representation Rp 1473 / SC - SANTA CATARINA REPRESENTATION, that the appointment of a public school principal was incompatible with a choice made through electoral processes involving teachers, parents and students:

REPRESENTATION FOR THE UNCONSTITUTIONALITY. Appointment to the commissioned position of public-school principal, through election by teachers, students and parents of students. Since the commissioned position is based on the trust of the nominating power, free nomination cannot be reconciled with the choice by election. The constitution limits the provision of public offices in the ways provided for in article 97, paragraphs 1 and 2, leaving no scope for an elective process to be created for commissioned positions. As public primary schools do not have the administrative and financial autonomy conferred on universities, there is no need to consider investing in their leadership positions by election. Representation granted for the declaration unconstitutionality of Law 6,709, of September 12, 1985, of the State of Santa Catarina⁵.

Commissioned positions are subject to the indication of the Executive Branch, therefore, even if the electoral process that determines the choice of public school principals by direct, secret and universal vote has been instituted and regulated by law or Decree, it does not find constitutional support, mainly because these institutions do not have administrative or financial autonomy.

It can be seen that the judgments made within the scope of the Federal Supreme Court brought important reflections on the institute of direct elections for the choice of public-school directors. It demonstrated that the Constitution must prevail in view of the state Constitutions, laws and decrees regulating the elective processes for filling the position of director.

On the other hand, it remains explicit that the Chief of the Executive Branch (be it state, municipal, or even in the Federal District) enjoys the power to appoint or dismiss the position of director of public school. For this reason, elective processes cannot suppress this constitutionally supported power, even if teachers, civil servants, students, parents or their legal representatives participate in them.

It is important to note that since September 1988, the Federal Supreme Court, en banc, has decided that the provision of electoral processes for choosing public school directors, whether in State Constitutions, laws, decrees or resolutions, is unconstitutional. Such rules may not undermine the competence of the Chief Executive to appoint or remove the servant from the position of these educational institutions.

Conclusions

If, on the one hand, the efforts of social struggles is advantageous in order to ensure the legality of the processes of choosing school unit directors, on the other, in the context of the years 1988 to the present day, the regulation of direct elections in schools was already covered with extemporaneous material and marked by the anachronism of this agenda of claims, considering that, in the month of September of 1988, when the Brazilian Constitution of 1967⁶ was still in force, the Supreme Court, for the first time, under art. 95, § 2, decided

⁵ Through that law, the Government of Santa Catarina "Provides for elections and establishes rules for the choice of directors of state public schools and takes other measures". Available at <http://www.leisestaduais.com.br/sc>. Accessed on May 05, 2018.

⁶ During the recess of the National Congress, which since December 13, 1968 was prevented from functioning, this Constitution underwent Constitutional Amendment N. 1, of October 17, 1969, thus the subject was then regulated in Section VIII On Public Servants, in art. 97, §§ 1 and 2.

on the unconstitutionality of the choice of principals through direct election with the participation of the school community, since the Head of the Executive Branch was free to appoint or dismiss at any time.

Despite the existence of this judgment in the orbit of the Supreme Court and the production of its effects in the Brazilian legal system, several States seemed to go against the grain and created legal norms (expressed in State Constitution, Law, Decree, Resolution) providing for electoral election to choose directors, granting legality through express law.

However, the same State that recognized and validated the electoral process, also became the author of several Direct Actions for the Declaration of Unconstitutionality with the Supreme Court, as well as Appeals against the STJ, alleging the inapplicability of the law because it is completely unconstitutional.

In view of the preponderance of political nomination as a mechanism to uphold the position of director of public schools, the results of electoral processes may be the subject of legal disputes, as well as disputes between unions and the State, or even between the candidate elected by the school community, but that has been passed over by the Chief Executive, at the time of making the nomination. In all these cases, the discretion of the state power prevails.

Thus, it is settled in the Federal Supreme Court and the Superior Court of Justice that, in the case of the electoral process for choosing public school directors, in the States, both the State Constitutions and their laws, decrees and resolutions, no matter how much they are covered by legality in relation to the adopted legislative process, all these regulations carry with them insatiable vices, which are incompatible with the provisions of the current Federal Constitution.

For this reason, the constitutionality control exercised by the Supreme Court in the case of direct elections for the choice of directors, highlights the need for the constitutional principles of valuing education professionals to be complied with, especially with a competitive civil-service examination to occupy this position, as well as preserving the principle of democratic management in the way the management of teaching units is implemented.

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