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AN EPISTEMOLOGY FOR FEDERAL STATES IS POSSIBLE? A BRIEF SPECULATIVE ESSAY

É POSSÍVEL UMA EPISTEMOLOGIA PARA OS ESTADOS FEDERAIS? UM BREVE ENSAIO ESPECULATIVO

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Abstract: This article aims to present a theoretical speculation about the possibility of an epistemology of its own to understand the normative phenomenon in federal States. Therefore, as a methodology, the *Pure Theory of Law* is used to think about understanding the federal State through typically federative institutions. In this case, two cases of how this thought can be developed are presented: A Supreme Court as "guardian of the Federation" and the Senate as a house of representation of the people as "people of the States".

Keywords: Federalism; Federal States; Legal Epistemology.

Resumo: Este artigo tem como objetivo apresentar uma especulação teórica sobre a possibilidade de uma epistemologia própria para compreender o fenômeno normativo nos Estados federais. Portanto, como metodologia, utiliza-se a Teoria Pura do Direito para pensar a compreensão do Estado federal por meio de instituições tipicamente federativas. Neste caso, são apresentados dois casos de como esse pensamento pode ser desenvolvido: Um Supremo Tribunal Federal como "guardião da Federação" e o Senado como casa de representação do povo como "povo dos Estados".

Palavras-chave: Federalismo; Estados Federais; Epistemologia Jurídica.

Introduction

The purpose of this essay will be demonstrated as the shaping of political institutions in federal States can contribute to the jurisprudence, in special, for the legal epistemology. In case, the Law can be an object of scientific knowledge according to institutions' attributes. This study is essential for the comprehension of legal phenomena.

The jurisprudence must have enlightened its method and object for the correct interpretation. Each legal system is unique; its individuality is highly relevant for savvy each one. It is current of some comparatists sorts the legal systems in families, in reason its structures

or same its groundings.

Seems no assured, so even, attribute a general epistemology of knowledge all legal orders. It is sure a determined degree of resemblance among technical features of systems that allow certain generality. Is possible to perceive the presence of division of powers in several legal orders, even though not be correct understand them bypassing the political context in them are reared.

The adjective "federal" in a legal order is determined by its Constitution. Federal orders, by its turn, have common features that enable identify them as such. Though the institutional differences among them, it is achievable sort of them by unitary States. Among the objects of Jurisprudence, the legal system is what structures States, such as the federal States. The federations have common characteristics that allow their identification as such - and thus differentiate them from unitary states - despite institutional differences between them.

In this way, it is possible to establish a theory of scientific knowledge for understanding the normative phenomenon of federal States through the political formation of their institutions.

How to think of a specific jurisprudence for federal States?

For the understanding of law in the federal States, it is essential to be concerned with their theory of knowledge.

From the legal positivism paradigm begun in the 19th century and perfected in the 20th century, the Law is the object of a so-called science whose results of its observation is the description of the normative phenomenon. The Law is a dynamic normative order (Kelsen, 2013), as proposed by Hans Kelsen, of the plane of *Sollen*.

According to Kelsen, the legal order built under the same partial basic norm (*Grundnorm*) is a national legal order, which would correspond to a State (Kelsen, 2013). State and National Law in kelsenian thought are identical concepts: the only concept of state possible to be known by the jurisprudence to isolate the ideological sense is its identity with the order itself. A dualistic conception (the State separated from the Law) would be an undue embodiment of the State as a political entity that produces the legal order as a power on which the right would be based. Therefore, the State is prescribed in the legal norms. The Constitution of a State does not describe the political institutions of the State; it determines that institutions must be that way (Kelsen, 2013).

The jurisprudence consecrated in the positivist paradigm, despite its great importance for the elucidation on method and object, is strongly criticized in its bases by theories that somehow seek to understand the law under another method and, consequently, delimit the object differently, especially with the rapprochement of morality as a criterion for the legal identification.

A description of the Law of any State must consider constitutional determinations that bind the lower norms and established institutions that carry out state activities. In this sense, it is necessary to consider the Constitution as a starting point for understanding the Law by analytical dogmatic. There is, however, a certain group of States which can - under how their legal system is established and constantly "feedback" - differentiate themselves from others. In

this context, the States qualified by the Jurisprudence as "federal" is distinct from the so-called unitary States by the way their order and their institutions are constituted.

As exposed by Hesse (1998), the federal State is a legal concept. Since each federal State can be individualized for its historical reality, it would be impossible to imagine the concept of an individualized federal State. Still, one can think of features common to all of them. All contemporary federal States - and those that have already extinct - have in common a multiplicity of legal orders in the same national territory. At the very least, there are two different types of orders: the national, which represents the order the norms common to all states of the federation, and the state juridical orders, no matter how many states make up the federation.

This conception is in line with Kelsen's proposal to explain federal States according to their normativism: "The legal order of a federal State is composed of central norms valid for its entire territory and local norms valid only for portions of this territory, for the territories of the 'component (or member) States" (Kelsen, 1949)

According to the kelsenian view, for legal knowledge, to understand a state as federal, the legal scientist must observe the existence of a constitutional provision of legislative power for the entire national territory and a legislative power for each of its subdivisions. If so, subnational entities will be autonomous, a formal criterion enough to differentiate a federal State from a simple.

In this sense, there is a previous definition of the object whose delimitation is problematized: The positive Law of the federal State. Among several States in contemporary international society, a certain number of them are constitutionally organized under the federal form, making, from the legal positivist point of view of Law, a multiplicity of interconnected orders with a larger one that together forms a system because of a legal bond, towards the internal system (Losano, 2008).

This conclusion of Kelsen (2013) is expected by the method of knowledge that proposes normativism. If the law is a dynamic order because the validity of its norms comes from the act of the will of the issuing authority (in turn authorized by another norm), then the federal State could not be thought of otherwise than because of competencies that are formed by its Constitution. The "federal" feature is designed for the authority will issue its rules. If it is federal it is because there are a legislative power, an executive power, and a judiciary on more than one territorial level (Kelsen, 1949).

There are some ways of studying and addressing federal States and the presence of federalism in an order. By the legal approach, as proposed by Hesse (1998), what defines or not the federal State is its presence as a norm in a system that determines that the state should be organized in this way.

There are other ways of thinking about federalism in a state other than just by law. The second definition of federalism is, as demonstrated by Levi (1983): "as a social doctrine of global character, like liberalism or socialism, which is not reduced, therefore, to the institutional aspect, but involves an autonomous attitude towards values, society, the course of history and so on".

In turn, Livingston (1952) argues that the nature of federalism is not in the legal form, but in the disposition of society in a political organization. Thus, the definition of the "federal"

feature in a state does not depend on the legal provision but the sociological approach. Despite seeming contradiction, Livingston's thinking complements Kelsen's positivist epistemological thinking.

Federative institutions in the federal State

Reflection on the knowledge of the federal State needs to consider the specific institutions of federations. Among the elements that make up the meaning of the concept of the federal State, there are fundamental characteristics of the legal and political system. The intention is to think about how it is possible to know a federal State through the formation of its political institutions.

An important reminder is essential: federal States are historical realities. The federal State emerges with the practice of federalism as the fundamental principle of political organization. Historically, the first federal State considered, by form and practice, the United States of America, a federation created at the legal level with the promulgation of the Philadelphia Constitution of 1787.

Despite the pioneering spirit of the American model (which began to be studied in a different sense of federation from that of confederation in the nineteenth century only), other federal forms emerged as products of political tensions, either to maintain unity in territories prone to fragmentation. either to decentralize the exercise of political power.

The Federal States such as Germany (in the Second Reich, under the Weimar Constitution and after the fall of the National Socialist regime), Canada, Republican Brazil, and the Russian Federation are some of the ways that can be classified as federations because of have similar political institutions, although with quite different historical realities.

The Federal States have similar characteristics, which is normal in any classification criteria. One way to approach federal States is by their political institutions, that is, by their specific organs, which differentiate them from a unitary (albeit decentralized) State and a confederation.

In this sense, Sidgwick (1897) suggests a way to accomplish the identification of the federal State in comparison to the unitary State and the confederation: (i) the autonomy of states in the federation must be considerable; (ii) When federality is well evidenced, the member states of the Federation will find some expression in the structure of the federal government; (iii) If the federal feature of the policy is stable, the constitutional process of changing the constitutional division of powers between central and local powers shall be determined following the principles of federalism.

According to Sidgwick's approach, there is federality, for the presence in its normative system of organs formed for its operation. Firstly, the organic gradations in the legislative, executive, and judicial functions stand out. If the federal States have more than one independent unit, each as a partial law to be harmonious with the Federation, two considerations are needed

First, the primary functions of the institutions in the federal States are intended to legally solve tensions between the federated units and to represent the population of the federated units

for political decision-making, either law-making or state management.

Second, in the autonomous units, that is, the federated entities, have constitutional powers to exercise the state functions - legislative, executive, and judicial - within their scope, applying their law with federal law. In this way, federal institutions are manifestations of the legal system that can be criteria for the recognition of federality in any State.

The sense of institution, according to Hauriou (1928), reveals the durability and stability of a social organization. The institution, therefore, is formed from a guideline that is expressed in organs with separate competencies and is legitimated by consent, that is, an idea accepted by most members of a political society.

The institution has a legal meaning. Following Bergel (2006), it is possible to distinguish the notion of legal institutions between institutions-organism and institutions-mechanisms. Both notions of legal institutions make up a set of rules on the same object involving a purpose that is imposed on legal subjects. However, the institutions-bodies are those formed by a systematic set of rules which, in the sense of the function of the State to be realized, are manifested by the formation of the body. An institution is a general idea present in a public activity that is formed and realized through political wills; are manifested and regulated by a set of rules. In summary, "institutions can be formal, such as legal codes, or informal, such as social customs, mores, and traditions" (Marshfield, 2011).

Institution – as an organ – is the manifestation of the institution in the law of a state. According to Kelsen (1949), "whoever fulfills a function determined by the legal order is an organ. These functions, be they of a norm-creating or a norm-applying character, are all ultimately aimed at the execution of a legal sanction". Not too much, the institutions express themselves by the organs, which in turn need to receive constitutional or legal powers, their competence. They are the institution and competence, according to Miranda, the objective elements of the organ (Miranda, 2015).

Federal institutions in the federal State are, according to this reasoning, exercised by the organs prescribed by the norms of the legal order, especially the Constitution. Of course, to think in this sense, one must understand the presence of federalism (federative input) in federal State Law (federative output). Despite the sociological criticisms formulated by Livingston, federalism understands of federalism needs a paradigm according to which the federal State is generated by the Constitution. Thus, on the way defended by Hesse (1998), federalism is present in the constitutional law of a legal system, even though its constitution does not determine the federative organization as a form. Federalism is a principle present in federations (Burgess, 2006), for which the Constitution plays a fundamental role in stabilizing institutions.

The guardian of the Federation

The first of these institutions should be able to solve federative problems and giving the constitutional interpretation of the boundaries between federal competences and the competences of federated units. In every federal State, there must be predictions of conflict resolution of autonomy. Autonomy is a legal power, but with a great political burden; in federations means to say how powerful that unit is concerning the others.

Since the protection of the federal functioning is contained in the function of guarding the Constitution, the organ for the protection of the federative balance should be a federal court, instance of the judiciary, which will decide on the limit of state autonomy. This court, as Kelsen (2005) warns, should not be a court of the federal or federal States, but of the total Constitution of the federal State itself. This means that this body must be neutral in its decision-making to resolve conflicts that may arise.

Is it possible to know whether a State is federal by the existence of an institution, manifested in a court, whose purpose is to interpret the Constitution to define limits of jurisdiction?

The federal court, as the ideal body in federal States, is provided for in several federative legal orders. Its primary function of guaranteeing the federation is to decide on possible violations of the federative system (and hence the constitution) by a member state. Therefore, this body should exercise a judicial function, as it will apply the legislation in a specific case, in response to demand.

As Kelsen (2005) notes, in federal States the importance of constitutional jurisdiction is more in evidence. Only with a constitutional court, the purpose of a federal State would be realized. In this sense, it is possible to infer, in federal States, dependence on federal purposes with the constitutional court as an institution.

Kelsen's view is in line with his conception of what a federal State is in its normativism. The essence of a State thus considered is the division of functions (legislative, executive, and judicial) between central organs, with competence over the entire territory and local organs, with competence limited to the part of the territory corresponding to the national subdivision (such as States, Länder, Provinces, etc.). Thus, the federal State is a manifestation of decentralization, whose regulation is the essential content of the Constitution.

As a necessary institution for the federal State, this court has a fundamental role in the constant transformation of the state through the determinations of the Constitution; that is, in the constant activity of the State in making effective, at each norm, the constitutional project of the Constituent Power. This is a fact that fits directly with legal epistemology and the problem of law as an object.

Precisely to the federal States, the federal Constitution in contemporary times radiates political values as principles in the order, especially the federalist principle. This is not just a matter of applying for federal dispute settlement by the Court. Far beyond the court federal must continually work to protect the federative form. As guardian of the Constitution, the body in federal States is also the guardian of the federation, which means being the guardian of all Constitutions.

Representativity and double nature of the people in the federal State

The second of the federative institutions will be a parliament composed so that its members can exercise a double representation: the people of the States and the people of the Federation. The bicameralism of the Congress was the solution found by the US Federalists to solve this problem of representativeness. Thus, inspired by the two houses of Parliament of England, the Americans persuaded in a Congress consisting of an upper house with parliamentarians

representing the states and a lower house with representatives of the American people as a whole, respectively named by the Senate and House of Representatives.

In federal States, the dual composition of parliament is perceived as necessary for the federative balance (Dinan, 2004). The existence of the two chambers is inherent in the intertwined system formed by partial orders within the federation and is directly in line with the people, one of the elements of the State's situation. National bicameralism is present in almost all contemporary federations.

The dualism of houses in the federal parliament equalizes federation with states, as they are represented in national legislative decision-making, especially in the matter of constitutional amendment (Marshfield, 2016). The legislative in a federal State need to be studied by the jurisprudence not merely as the organs and procedures; it is essential to bear in mind the role of the legalizing authorities who, in addition to their constitutional legitimacy consolidated by the electoral process, have a duty to maintain the continuity of the normative system. Thereby, each one belonging to the people of the federal State is at the same time subjects of the federation and the federated entity where it practices legal acts. The same person, in this line of thought, is the same subject to federal law, produced by the organs of the three powers of the Union, and to state law, according to the territorial delimitation in which he finds himself.

Because of this double subjection, in a theory of knowledge of federal State law, the jurist must understand the dual political formation of a federal parliament. Parliament is causally related to the idea of people, which as an element of the federal State should, as an epistemological assumption, be studied as people of the federative unit and people of the federation.

The upper House commonly referred to as the Senate, is the house that represents the symmetrical or asymmetrical organization of the federal units concerning the federal power. This is usually made up of representatives of the states. These representatives are not themselves from the federative units from which they are elected; must, besides this factor, be understood as representatives of the people of that entity. Senators represent a portion of the people bounded legally and territorially by a partial legal order (Kelsen, 1949).

In the federative system, this representative projection of the citizen, as a people of the federal unit in the federal parliament, is indispensable for participation in decision-making in the general context. One might speculate that the constitutional prediction of a Senate as a political institution is one of the factors that allows the observer to recognize the federative principle in a federal State. This organ is the one in which the federative political tensions are more sensitive since their agents are speaking for the people of their states and have several members symbolizing the equality of autonomy or justified inequality.

If the parliamentary institution has a house to represent the various partial peoples in a federation, it must have another to represent the people of the federation. The proportional system of representatives in the lower house is pertinent to the idea of people of the federation, due to the scope of those who are represented. The members of these houses exercise sovereignty representing the people of the federal State, that is, the people as recipients of the federation's legal order. Since there is only one national order, there can be only one person under one sovereignty.

Like the federal Court, the national parliament divided into two houses is an expected

institution in a federal state that, in addition to its constitutional name, has in its system a strong presence of the federative principle. They are politically formed institutions that are contained in the federal state as the object of legal science.

Conclusions

The federal State, as a complex normative phenomenon, is the object of legal science. Just as law as an object of science needs its own theory of knowledge and, consequently, a research method, federal law has specificities that require special attention. Thus, it is necessary to seek an epistemology of law for the study of federal legal systems.

In this sense, the federal State as an object of knowledge of the science of law must be understood as not only as a normative framework comprising a multiplicity of orders under a general order, but also as the reaffirmation of materially federative principles. , revealed in the understanding of constitutionalism and the political formation of the institutions.

Therefore, the legal epistemology for the federal States has as an indispensable task, besides the observation and description of the normative phenomenon inherent to the complex system generated by the partial orders and the general, the study of the political origin of the federative institutions, must be inserted object of jurisprudence.

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