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The Structuralist Study of Constitutional Law: a New Paradigm in Teaching Law

Keywords: constitutional law study, structural bases, separation of powers, balance of powers, guarantee of rights
Słowa kluczowe: studium prawa konstytucyjnego, podstawy strukturalne, podział władzy, równowaga władzy, gwarancja praw

Abstract

The aim of this paper is the structuralist study of constitutional law teaching: the organization of constitutional law based on the three foundations of neoconstitutionalism. The systemic vision of the legal system involves not only perceiving the Law as a whole but visualizing all this from a fundamental law that serves as an interpretive basis. It's conceived that constitutional law, in a broad sense, encompasses constitutional theory and constitutional law. It's subdivided into separation of powers, balance between powers, and guarantee of rights. All other themes, in this regard, would derive from these three bases. It involves the organization of powers, control of constitutionality, and fundamental rights. Thus, for example, the study of the organization of each of the powers, the control of constitutionality and fundamental rights, correspondingly. This format allows a holistic view of constitutional law and the constitutions.

Streszczenie

Strukturalne studium prawa konstytucyjnego: nowy paradygmat w nauczaniu prawa

Przedmiotem artykułu jest przedstawienie strukturalnego studium nauki prawa konstytucyjnego, opartego na założeniu o trzech fundamentach neokonstytucjonalizmu. Wizja systemu prawnego polega nie tylko na postrzeganiu prawa jako całości, ale także na przedstawieniu z perspektywy prawa fundamentalnego, które służy jako podstawa interpretacyjna. Przyjmuje się, że prawo konstytucyjne w szerokim znaczeniu obejmuje teorię konstytucyjną i prawo konstytucyjne. Dzieli się ono na trzy części: podział władzy, równowagę między władzami i gwarancję praw. Wszystkie pozostałe zagadnienia są podporządkowane tym trzem podstawom. Obejmuje to organizację władz, kontrolę konstytucyjności i prawa podstawowe. Taki format pozwala na holistyczne spojrzenie na prawo konstytucyjne i konstytucje.

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I. Introduction

The greatest difficulty in introducing constitutional studies is to remove the analytical view of Law from the student, separated by well-defined topics and with exclusive purposes. The systemic vision of the legal system involves not only perceiving the Law as a whole but visualizing all this from

a fundamental law that serves as an interpretive basis. The study of Constitutional Law is carried out based on the idea of the legal system itself, viewed in its entirety, without this meaning forgetting the specifics. Studying Constitutional Law as an integrated element of the national legal system is necessary for its real understanding and application. The old dichotomy between Public and Private Law is losing more and more space, falling into the perception that it is hardly possible today to treat private law without public nuances. The teaching methodology of Constitutional Law becomes necessarily encompassing, being extremely critical and reducing an attempt to, throughout the disciplinary study, teach only what theoretically would be *materially constitutional*.

We dare to say that many of the difficulties inherent in the understanding of constitutional law stem from the mistake of emptying the same of the daily and vivid nuances that illuminate the reproduction of law, through epistemological cuts that are badly used to rationalise the study of a particular institute to the maximum.

Furthermore, if we recognize that Constitutional Law can only be understood as a whole, then we are stuck in the problem of deepening in relation to certain topics, which, in fact, is always an obstacle and a risk for every constitutionalist. In this context, we come to propose the perspective that constitutional law needs to be understood from its foundations. All the themes of constitutional law derive directly from one of its foundations.

First, however, we propose the following distinction: the study of constitutional theory and the study of constitutional law itself.

In the first, themes such as constitutionalism, constitutional history, the classification of constitutions, the study of constitutions in relation to the state model, the constitutional norm, constitutional interpretation, the constituent Power, and the very understanding of constitutional study would be inserted from its three bases.

With this theoretical view, the student would be invited to study his own constitutional law from three bases: the separation of Powers, the balance between Powers and the guarantee of rights, foundations that illuminated the very construction of modern constitutionalism.

All other themes, in this regard, would derive from these three bases. Thus, for example, the study of the structuring of Powers would be connected

to their separation; the control of constitutionality and the brakes and counterweights system for balance between the Powers; the prediction of fundamental rights for the guarantee of rights.

In this project, we will explain the reasons why these three bases are considered essential for the study of constitutional law, as well as the themes included in them.

II. The foundations of constitutional study

Firstly, we present the bases of the Constitution, which will structure the study for you: a) the separation of powers; b) the balance between powers; and c) the guarantee of rights. This is, in our view, the tripod that supports modern constitutionalism and only through it will it be possible to evolve studies in a way that is both practical and theoretical.

The first base addresses the driving force of constitutionalism: *The Separation of Powers*. It concerns the fundamental principles and organization of the Brazilian State, the Executive Power, the Legislative Power, the Judiciary Power and the functions essential to Justice.

Moreover, assuming the fact that it is not enough for the powers to be separate, but to be equalized, the *Balance between Powers*, enters the second base. Studies must focus on the maintenance of the State, political issues, Public Administration, the inspection of powers and the control of constitutionality, the great star of contemporary constitutionalism.

Finally, the last base leads to the study of Constitutional Rights. In this way, some questions are clear: the general theory of fundamental rights, individual and collective rights and duties, social rights, nationality rights, political rights, and the role of the State in matters involving rights and duties and counter-benefits, such as the tax order, the economic-financial order, and the social order.

The separation of powers foresees an organized and coordinated state entity with activities described in the common legitimation plan, allowing this circle to participate in the preparation of the Constitution and in the formation of political will. It is necessary that the State Powers are aligned to achieve the constitutional objectives, without lasting prevalence of one over the oth-

ers and ensuring that all Powers comply with the Constitution, under penalty of invalidity of their acts. Regarding rights, the Constitution has the duty of protecting citizens against illegitimate interference, by the State or by other citizens, guaranteeing them minimum issues and giving certain guarantees so that these rights are realized or repaired, when violated.

Contemporary constitutionalism brings together the study, in time and space, of the creation and application of the Constitution to a specific group of people, so that in this State there are balanced powers and protection for its citizens.

III. The separation of powers

The idea of separation of powers is widely known from the illuminist understandings of Baron de La Brède and of Montesquieu, or by the latter. The theory of the separation of powers was not originally Montesquieu's, although he improved it and introduced it to modern constitutionalism, albeit with certain restrictions about the Judiciary.

The first to mention the outlines of a tripartition of powers was Aristotle. According to the philosopher, there are three essential powers, to be conveniently accommodated by the legislator: "The first of these three powers is the one who decides on the affairs of the State. The second involves all constituted magistrates or powers, that is, those that the State needs to act, its attributions and the way to satisfy them. The third covers jurisdictional positions"[1]. The first would be equivalent to the Legislative, which he calls Deliberative Power, although with nuances also of the Executive; the second, to the Executive; the third, to the Judiciary.

John Locke offers precedence to the Legislative Power: "*the first and fundamental positive law of all political societies is the establishment of the legislative power*", providing for the conservation of society[2]. Still: "The Legislative Power is the one that has the right to set guidelines on how the *strength of political society* will be used to preserve it and its members"[3].

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1 Aristóteles, *Política*, São Paulo 2006, p. 75.

2 J. Locke, *Dois Tratados sobre o Governo*, São Paulo 1998, pp. 502–503.

3 *Ibid*em, p. 514.

For administrative functions, Locke subdivides it into two powers, the executive and the federative, with the former being responsible for the enforcement of laws and the latter for managing security and public interest[4]. The Judiciary seems to be inserted in the Executive power, precisely in view of the execution of the laws, not constituting autonomous power. It is possible, however, to understand that the judicial function is attributed to the Legislative, who would be responsible for creating the laws and applying them.

It is undeniable, that, even before Aristotle, Plato outlined the need for the division of functions to guarantee justice in the city[5].

Montesquieu, from the analysis of the English experience (*Instrument of government*, Oliver Cromwell's English Constitution), states that there are three types of power: "the legislative power, the executive power of things that depend on people's law and the executive power of those that depend on civil law". According to Montesquieu, the first concerns regarding the creation, alteration, and repeal of laws. The second concerns the common governmental tasks, that is, the administration of the State, whilst the third concerns the prosecution of crimes and relations between individuals, which he calls "the power to judge"[6].

The gain of Montesquieu's theoretical reinterpretation is the need to distinguish between people who exercise the three types of powers, under penalty of threat to freedom. Thus, there is a need for precise delimitation between them, especially with the attribution of each one to different people[7].

A reading largely driven by the limitation to Power through the law, Montesquieu's doctrine honours sovereignty. That is why defending that the power to judge is, in some way, invisible and null, leaving it to the mere pronunciation of the words of the law, so large before the judiciary, which leads to the understanding that the legislative body must be the "supreme authority" to "moderate the law in favour of the law itself, ruling with less harshness than the law"[8].

Finally, it must be said that, for many, Power is one and indivisible, and what we have are distinctions of functions (executive, legislative and judicial),

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4 *Ibid*em, p. 516.

5 Platão, *A República*, Lisboa 1987, p. 185.

6 C.L.S. Montesquieu, *O espírito das leis*, São Paulo 2000, pp. 167–168.

7 *Ibidem*, p. 168.

8 *Ibid*em, p. 175.

although such differentiation does not cause problems of any kind in the study of the theme. Thus, it is common to refer to functions rather than powers.

Nonetheless, the following themes of constitutional law would derive, in our view, from the basis of constitutional law: federalism, fundamental principles, preamble, foundations of the Democratic Rule of Law, fundamental objectives, principles in international relations, sensitive principles, symbology and language of the homelands, federal structure, assets and powers of the entities, structuring of the Powers, characteristics of the exercise, legislative process and functions essential to Justice.

It should be noted that, they are all themes connected to the idea of separation and structuring of the Powers, which is why we link them to the first base.

IV. The balance between the powers

Since federalist writings, Hamilton, Madison and Jay had argued for the impossibility of absolute separation between powers, with the need for certain entanglements as a measure of "constitutional control" of Powers over one another. At the same time, it is desirable that such an influence should not be so widespread as to mean domination[9]. There is, therefore, a need for balance.

In federalism, it is common to refer to this balance of control as a system of checks and balances. It is important to note, however, that the concern with balance[10]. Hence Kant's views in the sense that the powers must be coordinated, to complement each other, to offer constitutional organization, and to depend on one another, so that one does not invade the competence of the others[11].

Montesquieu's writings were based on the as Oliver Cromwell's Instrument of government, which came into force in 1653, as well as the development of English constitutionalism. In 1701, the First Viscount of Bolingbroke, takes a seat in the English Parliament, as a member of the Tory Party. Bolingbroke is considered by some to be the true author of the system of balance between powers, highlighting the Constitution must provide the powers so

[9] A. Hamilton, J. Madison, J. Jay, *O Federalista*, Belo Horizonte 1984, p. 401.

[10] F. Ommati, *Dos freios e contrapesos entre os Poderes do Estado*, "Revista de Informação Legislativa" 1977, no. 55, p. 57.

[11] I. Kant, *Princípios Metafísicos del Derecho*, Whitefish 1873, p. 171.

that, in case one of them invades the powers of the others or disrespects the legal bases, the others can, uniting their forces, correct the excesses and put the invader power back in its place[12].

With the United States Constitution and federalist articles, the theory of the balance of powers gains practical outlines and is raised to a new level[13].

The system of checks and balances results, largely, from the inaccuracy of the limits between state powers[14], which sometimes requires that they act together for a certain purpose[15].

In particular, the system enhances the rule of law, especially when important decisions come to depend on a complex decision, as with the appointment of Judges to the Supreme Court, carried out by the President of the Republic, but pending the approval of the United States Congress.

Currently, Article 2 of the 1988 Brazilian Constitution is categorical in stating that the three Powers (the Executive, the Legislative and the Judiciary) are independent and harmonious with each other, making it clear that there is need to establish balance bonds with the others. As Alexandre de Moraes asserts, in addition to the allocation of state functions, the system must deal with the creation of "reciprocal control mechanisms"[16]. For Canotilho and Vital Moreira, the relationship between the powers must be based on the idea of constitutional loyalty (*Verfassungstreue*)[17].

In contemporary constitutionalism, the balance between powers has gained special significance, even as a way of rebalancing the scale in the face of the cyclical movements of preponderance of one or the other power. When the system becomes unbalanced, the limitation of the function that has exceeded its limits becomes a goal for new Constitutions or for constitutional reform. The Brazilian Constitution of 1988, for example, sought to re-establish the Executive Power within certain limits that were disrespected during the military regime, but, especially after Amendment 45, it ended up giving the Ju-

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[12] H.St.J. Bolingbroke, *Remarks on the history of England,* Basil 1794, pp. 78–79.

[13] F. Ommati, *op.cit.*, p. 59.

[14] T. Cooley, *Princípios generales de Derecho Constitucional en los Estados Unidos de America,* Buenos Aires 1898, p. 40.

[15] F. Ommati, *op.cit.*, p. 62.

[16] A. Moraes, *Direito Constitucional,* São Paulo 2018, p. 441.

[17] J.J.G. Canotilho, V. Moreira, *Os poderes do Presidente da República*, Coimbra 1991, p. 71.

diciary the possibility of exceeding itself, emphatically regarding public policies and legislation, as it was to occur in current American constitutionalism.

There is, however, a counterpoint. In North American constitutionalism, there are those who argue that the Courts play a crucial role in the system of checks and balances, and it is up to the Judiciary to impose the application of the laws without interference from the other Powers and the need for the Courts to review the laws based on the Constitution – control of constitutionality[18].

Do not, in any other way, shy away from criticism of the excessive intrusion of the Judiciary in political matters, developed mainly by John Hart Ely. Through his democracy-reinforcement theory, Ely argues that it is up to the judiciary to only unblock democratic channels, so that popular decisions prevail. The Judiciary should let democracy take its course naturally, intervening only when the system has flaws capable of generating mistrust[19].

Note that the balance between the Powers permeates the balanced performance of the Power. Ely's criticisms of the activist judiciary deal precisely with the invasion of that power over legislative and executive functions. On the other hand, for activists, it is precisely the purpose of their functions, especially the custody of the Constitution, by the Judiciary itself.

In one way or another, the system runs through history in the context of the balance effort. Based on these explanations, we included in the study of the balance between the Powers the following themes: state of constitutional exception, federal intervention, Armed Forces, public security, political parties, Public Administration, budgetary and financial inspection, Court of Auditors, and all control constitutionality.

These are themes that collaborate to maintain the balance between the Powers.

V. The guarantee of rights

The third aspect of constitutionalism is the establishment of a list of rights, members of the fundamental nucleus or not. It should be noted that the "guar-

[18] R. La Porta, F. López-De-Silanes, C. Pop-Eleches, A. Shleifer, *Judicial checks and balances*, "Journal of Political Economy" 2004, no. 21, t. 112, pp. 446–447.

[19] J.H. Ely, *Democracia e desconfiança: uma teoria do controle judicial de constitucionalidade*, São Paulo 2010, p. 137.

antee of rights" range goes beyond the idea of "fundamental rights and guarantees" to admit an understanding that the Constitution establishes a considerable menu of rights[20].

Thus, we would have, in the first place, those rights whose "violation or non-satisfaction means either death or serious suffering or touches the essential core of autonomy", relating to any dimensions that classify them[21]. And, secondly, those rights that, although not classified as much, are provided for in the constitutional text, such as, for example, the period of sixty days for decision in the Sports Justice (Art. 217 § 2 of the Brazilian Federal Constitution).

It is evident that, in a formal sense, it is not overlooked that fundamental rights will be all those so classified by the Constitution[22], even if their violation does not imply such harmful effects.

In one way or another, we are dealing here with all the rights established in the constitutional plan of a given State. If the law is part of the Constitution's routine, it is because it reveals some importance to its people and its insertion in the constitutional text had been considered essential.

The establishment of rights, conferred to citizens or to the public, within the constitutional bosom goes beyond the organization of the State and the Powers, as the North American Constitution of 1787 did, at first, to admit that it must also be taken as a materially constitutional design of a rights tree.

However, in 1776, even before the Constitution, the Americans proclaimed the Virginia Declaration of Rights, with an undeniably liberal content. After the 1787 Constitution, in the year 1789, the first ten constitutional amendments, known as the Bill of Rights, are promulgated. The Bill of Rights is dedicated to the protection of rights of the first dimension, inspired by both the Declaration of Virginia and the English Bill of Rights (1689).

The idea, however, already permeated the French revolutionary ages, supporting the 1789 Declaration of the Rights of Man and Citizens, pri-

[20] D.W. Hachem, *Tutela Administrativa Efetiva dos Direitos Fundamentais Sociais: por uma implementação espontânea, integral e igualitária*, doctoral dissertation in legal sciences, Federal University of Parana, Curitiba 2014, pp. 333.

[21] R. Alexy, *Direitos Fundamentais no Estado Constitucional Democrático: para a relação entre Direitos do Homem, Direitos Fundamentais, Democracia e Jurisdição Constitucional*, "Revista de Direito Administrativo" 1999, no. 217, p. 61.

[22] K. Hesse, *Elementos de Direito Constitucional da República Federal da Alemanha*, Porto Alegre 1998, p. 225.

or to the Constitution of 1791, which would later incorporate it. In its preamble, the Declaration proposes to establish "natural, inalienable and sacred human rights".

Therefore, the need to guarantee rights predates even French constitutionalism itself, as a necessary measure to overcome the Absolutist State.

Long before, it must be said, the Magna Carta, in 1215, shined upon the need for guarantees of citizens' rights regarding the State. The *Magna Carta Libertatum* sought to limit the absolute powers of the king, highlighting the rise of due legal process stands out, the central axis of guaranteeing rights.

England was the birthplace of several rights guaranteeing devices, such as the Petition of Rights (1628), the Habeas Corpus Act (1679), the Bill of Rights (1689) and the Act of Settlement (1701).

It is noted, that in the face of any organized government, the need arises to create guaranteeing barriers between the citizens and the State. The establishment of rights constitutes a proposal against abuse by the government in its state exercise, allowing the State to always have as a parameter the people, towards which it is born and towards which it is directed.

The guarantee of rights is a guarantee within itself. A guarantee for the peaceful continuity of the State, which will not exist whenever the rights are not constitutionally guaranteed or, despite being guaranteed, are ignored by the government. In these terms, one of the structures of constitutionalism is broken.

They are thematic, in our view, resulting from: general theory of fundamental rights, dimensions of fundamental rights, individual and collective rights and duties, social rights, nationality rights, political rights, tax order, financial order, economic order and social order.

In these areas, although not exclusively, there is a major prediction of rights. That is why we understand that these themes are related to the guarantee of rights.

VI. Conclusion

The purpose of this article is to present a new model for the study of constitutional law, which we call a "structuralist study".

The structuralist study assumes that all the themes of constitutional law are linked to the three bases of contemporary constitutionalism: separation of powers, balance between powers and guarantee of rights.

The separation of powers is one of the oldest assumptions of the State, prior to constitutionalism itself, while the need for state functions to be practiced at the same time, but separately.

They would be connected to the study of the separation of thematic powers such as the organization of the State, the fundamental principles, the characteristics of each Power and those that concern the federal entities.

More contemporaneously, the separation of powers gained a new vision, involved by the idea that it is not enough that the powers are separated, but it is necessary that, inserted in the independence of each one, the idea of balance between them must be present, so that none overlaps the others, enjoying an unbalanced portion of State power. Related topics are, among others, constitutionality control, inspection and the System of checks and balances.

Finally, the third base is highlighted in French and American constitutionalism, under the logic that the maximum law of a country should not only organise it, but also establish a list of guarantees to citizens. It is a premise that is part of the paradigmatic breakdown of the Absolutist State, with the need to protect the individual in the face of the State and that has come to develop under the aegis of new rights. On this basis, not only the so-called fundamental rights would be present, but all themes that would offer protection to the citizen in the face of the State.

We think, therefore, that all the themes of constitutional law must be connected to one of these three foundations. There is an inherent gain in learning constitutional law when the student realizes that the whole study has its reason in one of its foundations and, thus, understanding its characteristics and the form of social irradiation. The reasons of being of constitutional law, in this step, would always find an understanding in something essential to the very existence of the Constitutions. Thus, no topic could be considered disconnected and even go unnoticed.

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