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REFORMA CONSTITUCIONAL MULTINÍVEL E SEUS DILEMAS:
O CASO DA 3.^a REFORMA DA PREVIDÊNCIA NO BRASIL (2019)

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Abstract: The article explores the different political and legal dilemmas faced by transposition from federal to regional or local legislation, in federal states. In this context, it is argued that federal and supranational legislation are examples of the same phenomenon (multilevel legislation) but have sensitive and remarkable differences in terms of dynamics and political distribution costs. The case analyzed is the Brazilian 3rd Pension Reform, which is considered a representative of the problem as it is a constitutional reform that needs to be transposed to regional and local legislation but often fails to do so.

Keywords: Federal state, constitutional reform, multilevel legislation.

Resumo: O artigo explora os diferentes dilemas políticos e legais enfrentados pela transposição de legislação federal para legislação regional ou local em estados federais. Nesse contexto, argumenta-se que a legislação federal e supranacional são exemplos do mesmo fenômeno (legislação multinível), mas apresentam diferenças sensíveis e notáveis em termos de dinâmica e custos de repartição política. O caso analisado é a 3^a Reforma da Previdência no Brasil, considerada representativa do problema, pois é uma reforma constitucional que precisa ser transposta para legislação regional e local, mas frequentemente não o é.

Palavras-chave: Estado federal, reforma constitucional, legislação multinível.

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1. Introduction

In this article, I intend to analyze the dilemmas and difficulties faced in federal states in approving constitutional reforms that affect regional or local levels. Instead of supranational problems that traditionally refer to transposition issues, the internal/constitutional reform made by federal level is never approved by regional or local level so easily.

First, I will explain the differences between supranational and federal legislation, as examples of the multilevel legislation phenomenon. After this, I will explain why I chose the specific case of Brazilian 3rd Pension Reform, and why I consider this to be a paradigmatic case study to explore the peculiarities of federal multilevel legislation. I will then show the difficulties faced by Brazilian parliaments (specially at regional and local levels) in transposing federal legislation to its own legislative order. Finally, I will conclude the analysis postulating that, in federal states, there are many difficulties in internal transposition of legislation, which have to be considered when studying multilevel legislation, given that supranational legislation does not face the same dilemmas.

In context, in 2019 a Constitutional Amendment was enacted in a Latin American country. The proposal was to reform the pension system of that national state, with a focus on public servants rather than private employees. After three years of a polemic process that was the opposite of linear and peaceful, the pension reform was approved by federal parliament. A negative surprise, however, was experienced by those who were not involved in the formulation of the bill: federal parliamentarians decided to legislate only on the federal pension system, laying the modification of regional and local law “at their own discretion”. Although it could appear respectful on the other federate levels, it was read more as if federal parliament had abandoned regional and local parliamentarians, by not assuming the high political costs of approving an unpopular constitutional reform. *Au contraire*: federal representatives and senators chose not to be involved with regional and local impacts of the reform, adopting a “minimum political cost” approach. This was definitely not the strategy that was ruled in the two other precedent Constitutional Amendments about the same matter, and it left a bittersweet taste regarding federal government on market specialists who expected a pondered and “definitive” reform.

The country in case was Brazil, and the Constitutional Amendment was the 3rd Pension Reform. As I will explain further, this is a paradigmatic case study on some particular problems and dilemmas involved in multilevel legislation, specially and specifically when federative states (and not supranational legislation) are taken into account. I argue that there are some relevant differences between federal and regional, and even local relationships, in legislative terms, when compared with supranational and national interactions, and I think that the study of this paradigmatic case in a paradigmatic federative country can shed light on some themes that were often forgotten about in multilevel legislation.

2. The problem context: two species of multilevel legislation

Multilevel legislation is an issue that is frequently analyzed by a supranational perspective². However, we cannot forget that there is another form of application of this particular legislative technique: legislation in federal states.

First of all, I would like to make a brief theoretical digression. Multilevel legislation is a genre that covers (at least) two types: supranational legislation (and its problems about transposition of European legislation to domestic legislation, which we all are familiar with); and federal legislation, that is frequently (by obvious motivations) more studied in countries that adopt this type of state organization. This article focuses specially in the second field of multilevel legislation. In this context, I argue that there are some particular problems in multilevel legislation in federal states must be taken into account. There are more many dilemmas when the legislation in question intends to modify the Constitution itself, by the proceeding of constitutional amendment.

Indeed, although there are many similarities between supranational and national-federal legislation, the differences appear relevant when we focus on cases that could be paradigmatic to explain the particularities of multilevel legislation in a federal state. In this context, it is notable that in many ways the supranational legislation has much more enforcement in national legislation, when compared to national and regional (or national and local) relationships in a federal state. If analyzed in perspective, this problem of political balance and top-down “weak” enforcement in federal nation is remarkable as an undiscovered aspect of a multilevel legislation difficulty that marks the federal dynamic.

In effect, there are some additional problems about this kind of legislation when linked to (a) constitutional reform and (b) federal states. My point is that multilevel legislation has different dynamics when in relation with federal states, instead of supranational transposition (like European Union – EU, *v.g.*). Otherwise, multilevel constitutional reform also has particular problems and questions that are not precisely present when we discuss “ordinary” multilevel legislation³. At this point, I propose the analysis of 3rd Brazil’s Pension Reform (2019) as a paradigmatic case of the difficulties and peculiarities of multilevel constitutional reform in federal states, which will possibly allow to see and segregate some lessons for other constitutional experiences, specially when linked to federal dynamics.

3. Why Brazil: a stable and relevant Federal State

If one studies the federal states in the world, it will be clear that this form of state organization is not the most popular between countries. The major number of national states are unitarian, although we could never forget that some world powers adopt federal state form. This article is not the place to discuss federal vs unitarian advantages and disadvantages, or the causes for choosing federal or unitarian form as their choice of of constituent power.

2. Cf., e.g., Padoa-Schiopa (2012).

3. About policy-making in Federal states: Biela et al. (2013: 46).

But if we want to explain the differences between multilevel legislation in federal countries and in supranational context, we should analyze federal organization in general and how it reflects on legislation and legislative process, and I need to explain why I chose the Brazilian case study (apart the fact that I am Brazilian, which is scientifically irrelevant).

First, we should remember the goals that are pursued in a country that adopts federal government form⁴. Decentralization of power and of decision-making is linked with enforcement of democracy; recognizing regional and local autonomy is a tool for widening the horizons of popular participation and of distribution of political power⁵. In this context, there is no surprise in verifying that large countries tend to choose federal form instead of unitarian organization. Five in six large countries in territory extension adopts federative organization⁶. Brazil, with its huge territorial extension, is a paradigmatic example to study the dynamics of multilevel legislation in federations. Furthermore, both the stability of a federation that was adopted in 1889 and has been ongoing (without interruptions) and the federative peculiar structure, which recognizes three federative levels (União/Union - federal level; Estados/States - regional level; Municípios/County - local level⁷) highlights the paradigmatical character of the Brazilian case.

This is not all. Distribution of legislative function and competences between federal and regional (and also local) levels makes the Brazilian case remarkable. In effect, the Brazilian Constitution of 1988 adopts a very complex system of division of legislative powers between the various federative levels. There are competences that are exclusively attributed to the Union (art. 22) and to the Counties (art. 30), with the remaining given to the States (art. 25, § 1º)⁸. Parallel to this “American inspiration” system, there are competences inspired by the German model, in which they are shared by Union and States (art. 24), which includes the pension system. Hence legislative competence on pension law is shared by Union and States, with the particularity that, in this type of legislation, a Union may formulate only

4. There are many discussions about nomenclature of federal organizations. Many authors prefer to use “government form” to refer to a monarch and republican option, reserving “state form” to refer to federal or unitarian option. Others use “government form” to study the latter difference. In this article, I use “government form” or “state form” indifferently as a form to refer to the federal or unitarian option. About the discussion, cf. Kelsen (2020).

5. Cf. Hesse (1998: 181).

6. There are other factors that influence this decision, like historical issues and ethnical diversity, as shown by Germany, Belgium and other countries that adopt federative government form.

7. There is another federative figure that is considered “*sui generis*”: the Federal District (Distrito Federal), which has many State characteristics and others that approximate it to Counties. It is remarkable yet that the Counties in Brazilian federation do have political autonomy, being considered by the majority of authors as a federative entity. Cf. Meireles (2003).

8. Although the fair claim of States about more legislative power, given that in comparative analyses the Brazilian Federation is considered one of the most centralized in legislative terms. Cf. Ramos (2008: 170). There were a Proposal to widen the state legislative competences (PEC nº 47/2012), but it was never approved by Federal Senate.

general law, while the States hold the competence of specifying federal legislation.⁹

In this context, the relationship between federal and regional legislative powers is similar to that which occurs in supranational and national interactions, with the particularities described below. It makes the federal legislative division of powers in Brazil very particular and, at the same time, very representative as a paradigmatic case.

4. Why choose this case? The 3rd Brazilian Pension Reform as a paradigmatic form of multilevel legislation in Federal states

In this article I propose to focus on Brazil's 3rd Pension Reform Case. This deep constitutional change (approved by *Emenda Constitucional* – Constitutional Amendment – n.º 103, in 2019) could be the object of study as a paradigmatic case. The choice of this case is due to particular conditions that never appear in conjunction: a controversial bill, that incited discussion about political costs distribution between federal and regional lawmakers; a constitutional reform, that elevated the ordinary political cost of approving the modification; and a multilevel legislation, given that one of the multiple points of debate about the Constitutional Amendment itself was whether federal lawmakers should (or should not) elaborate the text with immediate effect on States.

Indeed, although Brazil has had prior Pension Reform amendments (in 1998, in the second mandate of liberal President Fernando Henrique Cardoso; and in 2003, in the first mandate of leftist President Luís Inácio Lula da Silva), this theme is always controversial in a country that has one of the most unequal economies of the world. In this context, the enormous pension deficit is not always sufficient ease the approval of a constitutional reform considered by many social sectors as unfair for most popular sectors, who frequently have no access to pension benefits nor pension system at all. The corollary of this grey scenario is that political costs of approving this bill are particularly high, and Federal Deputies and Senators do not want to assume these electoral difficulties without many doubts and/or political negotiation.

This is a particularity in multilevel national and federal legislation, which is not always involved in multilevel supranational legislation. As I will expand further, this particularity resulted in a partial and insufficient approbation of the constitutional amendment, with rules that are not immediately able to be applied on a regional sphere, frustrating the Federal Government (Union), the Regional Governments (States), and particularly the market, which expected a major reform that would stabilize the increase of the pension deficit with legal security. All these particularities make the 3rd Pension Reform a paradigmatic case that deserves to be looked at as parameter to study or predict the dynamics about multilevel legislation in federal states, specifically when it involves federal constitution reform.

9. In case of legislative omission by federal legislation, there is a rule that allows States to legislate extensively, although the supervenient federal law can derogates it (efficacy suspension, in technical terms) (article 24, § 3º, of Federal Constitution of 1988).

Another characteristic that makes Brazil so interesting in this regard is the strong “constitutionalization” that is experienced there. As many constitutions elaborated after de Second World War, the Constitution of 1988 has plenty of detailed norms and commands. There is a joke that if you cannot find some issue in Brazil Constitution, this issue does not exist at all. Many authors manifested concerns about this “catch-all” model of constitution. I have already alerted to “panconstitutionalizing” movement that has reached unknown levels in recent years, with Federal Parliament bringing to the Constitution matters that were traditionally dealt with in ordinary laws, making the Constitution more and more analytical¹⁰.

This movement shows that federal parliament and parliamentarians apparently do not have concerns about legislating deeply and widely on a constitutional level, given that the most recent constitutional amendments brought more and more texts and issues to the federal constitution. Thus, the refusal to legislate in order to reform regional and local pension systems was not explained by a passive virtue of federal parliamentarians, rather than by a refusal to assume the high political costs involved, which makes this case so relevant.

Finally, the authority of federal parliament to amend the Proposal in Brazilian is enormous. Basically, federal parliamentarians may suggest modifications to any aspect of the Proposal, if the amendment is backed by 1/3 of members of the chamber and approved by 3/5 of the same universe, as the main text demands. This means that not approving modifications to the main text was not particularly costly to Chamber and Senate: the refusal to legislate on regional and local spheres was not due to the political costs of the modification at all. In other words, there was a lack of political will on approving the extension of pension reform to States and Counties, not attributed to the instrument at all.

In partial conclusion of this topic, I argue that the 3rd Pension Reform case in Brazil is paradigmatic because: a) the fact of being a constitutional reform can emphasize more precisely the distribution of political costs of approval; b) the need for regional and local transposition allows to compare this dynamic with problems often faced by supranational legislation; c) the approval of a pension reform (as unpopular legislation) can evidence the particular difficulties of internal transposition, compared to multilevel supranational transposition.

5. Multilevel legislation in federal states: differences between federal and supranational types of multilevel legislation

One of the cited differences between supranational and federal multilevel legislation is the balance of the political costs of approving unpopular legislation. In effect, in supranational multilevel legislation, the cost of approving unpopular reforms is frequently more diffuse, assumed mostly by

10. To further contextualize the problem, the Brazilian Constitution has more than 250 articles, divided into subdivisions (“incisos”, “parágrafos” and “alíneas”) that do not always have a direct link with the principal disposition. In terms of number of words, the Constitution has experienced a relevant growing process: some chapters almost doubled in size between 1988 and 2022. Cf. Cavalcante Filho (2022).

supranational instances, which are usually elective, but not linked to ordinary politics (more policy, less politics).¹¹ In this context, the cost of approving transposition of supranational legislation, although it exists, tends to be lower, given that the transposition is assumed by international treaty. The cost, in other words, is shared between national and supranational parliamentarians, but not on a “fifty-fifty” basis, given that transposition does not cost the same as legislating *ex nihil*.

However, the political cost balance in federal multilevel legislation is different in many aspects. As either federal or regional lawmakers are elected by direct popular vote, vertical accountability is more intense.¹² (always in theory, obviously), and both participate more in the ordinary politics. In this context, federal parliament’s incentive to approve unpopular reforms that impact exclusively (or in major terms) the regional legal system tends to be smaller than in supranational parliaments; the “every man for himself” strategy may predominate. In other words, federal lawmakers tend to want to share the political costs of approving unpopular reforms, rather than totally (or predominantly) assumes its hard duties.

On the other hand, *constitutional* multilevel reform reserves some additional questions. The qualified quorum; the stringent rules to commence the proposal itself; and the major difficulty of obtaining approval of the reform proposals might be taken into account as particular aspects that make the federal-regional relationship more complex in political terms. Indeed, the Brazilian Federal Constitution is considered rigid, using the known Brice classification: to be admitted in discussion, Proposals of Constitutional Amendments (Propostas de Emenda à Constituição – PEC) may be signed by 1/3 of parliamentary federal body, or by the President of the Republic. Furthermore, approval itself may be obtained by 3/5 of both Chambers, two times in a row in each House.¹³

As we can see, the effort to approve constitutional reform as implementation of federal constitutional reform at state level, when necessary, can be relevant by creating some discouragement for regional deputies to shoulder this political cost – specially when this is tied with unpopular reforms.

6. Case Analysis: 3rd Brazilian Pension Reform

As previously stated, the 3rd Brazilian Pension Reform can be analyzed as a paradigmatic case that shows the particular issues about multilevel constitutional reform in federal states. It is one of the more discussed bills approved in Brazil in the last decade, and multilevel problems appear so clearly in debates about it, that it can be used as a model to study the specific problems of multilevel constitutionalism.

At the beginning, the Constitutional Amendment Proposal (Brazilian acronym: “PEC”) for the 3rd Pension Reform, proposed by the newly elected President Jair Bolsonaro, established the automatic incidence of new

11. This discussions is much more deeply taken in, e.g., Raunio (2007: 158).

12. Cf. Ocampo, Arteaga (2015).

13. Cf. Brazilian Constitution, art. 60.

pension rules in states and municipalities.¹⁴ This was the “natural and expected” way, given that the 1st and the 2nd Pension Reforms (1998 and 2003, respectively) had adopted this kind of solution. It is relevant that the Brazilian tradition was that federal pension rules were immediately applicable to the regional and local systems, despite the existence of segregated funds and budgets.

Notwithstanding, during the legislative procedures, the Lower Chamber (Câmara dos Deputados) inflicted several defeats to the Executive Power, excluding some principal aspects of the presidential proposal, such as the capitalization system (proposed to replace the distribution system traditionally adopted in Brazil). In same context, there were some political movements to replace the automatic incidence of reform in states and municipalities by an “opt-in” formula: by this artifice, federal lawmakers intended to share the political costs of approving a “unpopular reform” (like pension reforms usually are) with regional and local lawmakers. This was the option finally adopted in the Lower Chamber, to the despair of the Minister of Economy.

In the Federal Senate (which takes, in this kind of proposal, the revision chamber role), there are more concerns about state finances and the actuarial balance of state pension systems. It is significant that Deputies are elected by a proportional system, while Senators are elected by a majority system and often are former governors. By this conjunction of factors, the Senate adopted a “middle solution”: it approved the Chamber version, but with separate additions, through a tactic denominated “parallel PEC”.¹⁵ Instead of the commentator’s disbelief about the chance of these additions being approved by the Lower Chamber, it represented a political message that the Senate would not be compliant with the limitation of incidence formulated by the Deputies Chamber.

At last, the proposal enacted was immediately applicable only to private employees and federal public servants, with the incidence in the state and municipal system dependent on the approval of state and municipal amendments: the “opt-in” solution adopted by the Lower Chamber won. States and Counties (Municipalities) were obligated to create their Pension Reform, adopting or not, totally or partially, the federal rules; there are no further penalties to entities who do not make the reform, but there is a federal incentive to States and Municipalities systems that adopted restrictive benefits (a soft law strategy).

Today, after almost four years of the enactment of the federal Pension Reform, nine out of twenty-seven states still have not made their reforms, and only three states achieved the approval of a Reform which is more or equally economic as that of federal rules (Duque, Trippi, 2020). Neither was the “Parallel PEC” approved by the Deputies Chamber. This indicates that, as expected, the federal rules of the 3rd Pension Reform remain not widely applicable to States and Counties, despite of the efforts of the Senate and the

14. The Brazilian federal system considers municipalities as federal entities, the third level of Federation Republic, with autonomy and legislative power.

15. The potential positive impact of “Parallel PEC” to States and Municipalities was calculated as R\$ 350 bi in ten years (approx. U\$ 65 billion). Cf. Pellegrini (2019).

approval of some modifications in regional legislation to implement the mainlines of new federal rules in that level.

Obviously, adopting the “opt-in” strategy was not a decision driven by public interest in elaborating a better regulation of the pension system. It was a tool used by federal parliamentarians to share the cost of approving an unpopular reform with their state and counties colleagues. This kind of multilevel legislation is not common in supranational law, what suggests that it is a particularity of the federal legislation dynamic, as I claim in this article.

7. Conclusion: the “Brasília Effect” and its dilemmas

Since David Vogel popularized the study of California Effect, many more effects were discovered or identified with regards to multilevel legislation, or, more precisely, how a state law influences other states or levels of legislation. Indeed, Anu Bradford identified a Brussels Effect proposing that the increasing influence of European Directives in other regions or continents promotes a form of regulatory unilateralism. This was posited as way to explain, for example, the influence of General Data Protection Regulation (GDPR) in countries like the United States, United Kingdom, and Brazil (Bradford, 2012). In this context, the Brussels Effect is then close to the California Effect - which recognizes that some affluent countries' regulation is often adopted (not always 100% voluntarily) by other states or other countries.¹⁶ Both are phenomena of multilevel legislation by imitation or by inspiration.

There is a possibility that we are witnessing now a new effect, particular of federal states legislation, that I (jokingly) call the “Brasília Effect”. In federal nations, specially in constitutional reforms that entail relevant political costs to federal parliamentarians, there is a tendency to share this cost with subnational instances, avoiding detailed legislation at other federal levels not out of concerns about state autonomy, but only (or mainly) to avoid assuming those political costs. It is a bit ironic to nominate this tendency as the “Brasília Effect”, since the Brazilian Capital (Brasília) is commonly known as a “public servant” city which does not understand states and counties necessities: the Minister of Economy at the time claimed his lemma as “More Brazil, less Brasília” (“Mais Brasil, menos Brasília”). In this context, the concern about approving a constitutional amendment that brings freedom of choice to states and counties is indeed a bit ironic.

Independent of the existence of a “Brasília Effect”, it can be possible to state that there are two different dynamics of political cost distribution in multilevel legislation. In supranational multilevel legislation, as is the relation between UE-members, the implementation/transposition of supranational legislation often is an obligation, and supranational lawmakers have less political issues when approving unpopular directives, which will be mandatory for all UE states.

¹⁶ The more didatic explaining of the California Effect is given by Sebatiaan Princeny: “The California Effect takes place when a country (or a Coalition of countries) exports or imposes its own (stricter) standards upon one or more of its trading partners through the use of market access”. Princen (1999).

However, in federal states, the multilevel dynamics operates in a different basis. As federal lawmakers are elected by direct vote and are more susceptible to vertical accountability, there are frequently fewer incentives to approve unpopular reforms which are mandatory for other levels legislation: it is more “attractive” to adopt an “opt-in” model, which allows the political cost of unpopular decisions to be shared with regional or local lawmakers. When this reform needs to be approved at a constitutional level, with a major quorum requirement or other procedural difficulties, the “temptation” of federal lawmakers to “wash their hands” off this problem is a real danger. The 3rd Pension Reform in Brazil (2019) seems to be a paradigmatic case about these political dilemmas on multilevel legislation in federative states, which are substantially different those that the UE experiences.

References

- Biela J et al. Policy Making in Multilevel Systems. ECPR; 2013.
- Bradford A. The Brussels Effect. *In*: Northwestern University Law Review, vol. 107, n. 1; 2012.
- Cavalcante Filho JT. Os riscos da panconstitucionalização. Consultor Jurídico (ConJur); 2022.
- Duque D, Trippi P. Análise das Reformas da Previdência Estaduais. Centro de Liderança Pública; 2020.
- Hesse K. Elementos de Direito Constitucional da República Federal da Alemanha. Porto Alegre: Sergio Antonio Fabris; 1998.
- Kelsen H. Teoria do Direito e do Estado. São Paulo: WMFM; 2020.
- Meirelles HL. Direito Municipal Brasileiro. São Paulo: Malheiros; 2003.
- Ocampo JA, Arteaga NG. Accountable and effective development cooperation in a post-2015 era. United Nations; 2015.
- Padoa-Schiopa A. Towards a Globalization of Law? Developments in Europe to the medieval t the contemporary age. In: Fagnoli I, Rebenich S, orgs.. Das Vermächtnis der Römen. Berne University Press; 2012.
- Pellegrini J. A Situação das Previdências Estaduais. 2019. Senado Federal (Federal Senate). Instituição Fiscal Independente (Fiscal Independent Institution). https://www2.senado.leg.br/bdsf/bitstream/handle/id/557965/EE_09_Previdencia_Estadual.pdf
- Princen S. The California Effect in the EC's External Relations. Archive of European Integration; 1999.
- Ramos ES. Autonomia do Estado-membro no Federalismo Brasileiro. In: Caggiano MH, Ranieri N, orgs.. As Novas Fronteiras do Federalismo. São Paulo: Imprensa Oficial do Estado de São Paulo; 2008.
- Raunio T. National Parliaments and the Future of European Integration: Learning to Play the Multilevel Game. In: Debardeleben J, Hurrelmann A, orgs.. Democratic Dilemmas of Multilevel Governance. Palgrave; 2007.