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The declaration of constitutionality of the new basic sanitation statute: the “rascal consequentialism” in the application of the sub-principles of cooperative federalism by the Supreme Federal Court

A declaração de constitucionalidade do novo estatuto do saneamento básico: o “consequencialismo malandro” na aplicação dos subprincípios do federalismo cooperativo pelo Supremo Tribunal Federal

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ABSTRACT: The work analyzes the federal clashes that took place within the ADI 6492, which dealt with the constitutional analysis of the new Basic Sanitation Statute. Thus, through Critical Discourse Analysis, the decisions of the ministers were examined, observing the existence of a relaxation of the constitutional sub-principles of federalism. The main objective was, therefore, to understand the changes promoted in the federative balance through the redistribution of competencies among the federated entities, based on the discussions held in the ADI, which focused on the process of sharing competencies. The results indicate that the Supreme Federal Court (Supremo Tribunal Federal – STF), regarding public sanitation policy, prioritized a pragmatic and consequentialist model, justifying the centralization of competencies in the Union as a strategy to universalize public policy and ensure fundamental rights, influenced by the urgency of the Covid-19 pandemic. Nevertheless, the decision generated federal tensions, compromising the principle of subsidiarity and the autonomy of subnational entities. It is concluded



that in this ADI, federalism was used to realize public policies, altering the originally intended balance of power established by the Brazilian 1988 Constitution. This approach, while aimed at efficiency and speed, raises questions about the long-term impacts on the federative structure and intergovernmental cooperation.

KEYWORDS: Cooperative federalism. ADI. Consequentialism. Discourse Analysis.

RESUMO: O trabalho analisa os embates federativos travados no âmbito da ADI 6492, a qual tratou da análise de constitucionalidade do novo Estatuto do Saneamento Básico. Assim, por meio da Análise do Discurso Crítica, examinou-se as decisões dos ministros, observando a existência de flexibilização dos subprincípios constitucionais do federalismo. O objetivo principal esteve, portanto, em compreender as alterações promovidas no equilíbrio federativo pela redistribuição de competências entre os entes federados, tendo por base as discussões travadas na ADI, que perpassaram sobre o processo de repartição de competências. Os resultados apontam que o STF, no que diz respeito a política pública de saneamento, priorizou um modelo pragmático e consequencialista, justificando a centralização de competências na União como estratégia para universalizar a política pública e assegurar direitos fundamentais, influenciado pela urgência da pandemia de Covid-19. Apesar disso, a decisão gerou tensões federativas, comprometendo o princípio da subsidiariedade e a autonomia dos entes subnacionais. Conclui-se que, nessa ADI, o federalismo foi instrumentalizado como meio para concretização de políticas públicas, alterando o equilíbrio de poder originalmente previsto pela Constituição de 1988. Essa postura, embora voltada para a eficiência e celeridade, levanta questões sobre os impactos a longo prazo na estrutura federativa e na cooperação intergovernamental.

PALAVRAS-CHAVE: Federalismo cooperativo. ADI. Consequencialismo. Análise do Discurso.

1. INTRODUCTION

This research examined, through the methodology of Critical Discourse Analysis, the ruling of ADI 6492, which declared the constitutionality of the new Basic Sanitation Statute, shedding light on the underlying federative conflicts of the decision. Thus, the overall objective of this research was to assess the decision-making stance adopted by the Supreme Federal Court (STF) regarding the realization of cooperative federalism, based on the analysis of the redistribution of competencies.

Despite the strictly outlined rules in the 1988 Constitution, which aim to institutionalize the functioning of the federation by establishing which competencies are applicable to each entity, federalism clearly exhibits characteristics of a socio-political phenomenon, deeply influenced by preconditions and political contexts of dispute and governability. Therefore, the concepts of federalism and federation are not universal, as they change over time and across countries, absorbing the unique characteristics of Society in each period.

In this way, the crucial point of the discussion was to analyze how the Supreme Federal Court (STF) dealt with the tensions between the Union and subnational entities through the lens of critical discourse analysis and the understandings of cooperative federalism. It looked at how managing these tensions contributed to crafting a new balance of powers and, consequently, the very organization of federalism, leading to decisions that were predominantly pragmatic and consequentialist, which culminated in the instrumentalization of the concepts of federalism.

Therefore, the research problem guiding the structure of the work is to understand what the decision-making profile of the STF was in the ADI (Direct Action of Unconstitutionality), considering the presence of strong federalist debates, highlighting whether the Court made changes in the process of redistributing powers among the federal entities.

Understanding how the Court resolved federal conflicts when provoked, clarifying the choices made, is a question that aims to grasp the decisions, options, and positions of the Supreme Court during one of the most challenging periods for maintaining institutional balance.

Understanding the federalist disputes that surrounded ADI 6492 is relevant for observing how public policies effectively materialized. When the responsibilities of each federal entity are clearly defined, the process of demanding the realization of social rights becomes more transparent and effective. Conversely, when the distribution of powers becomes confusing, the tendency is for the public policy itself to fail in achieving the expected results.

The work is divided into three sections. Initially, discussions are held on the characteristics of cooperative federalism and the framing provided by the 1988 Constitution. There is an analysis of the discourse in ADI 6492, elucidating, based on the Court's constructs, interpretative modifications in the sub-principles of cooperative federalism. Finally, it is noteworthy that these modifications highlight a consequentialist and pragmatic decision-making stance, which subverts the constitutional text by instrumentalizing the concept of cooperative federalism under the supposed justification of increasing the effectiveness of fundamental rights.

2. THE PARADIGM OF COOPERATIVE FEDERALISM

For federalism to work, as envisaged constitutionally, it is essential to maintain consensus and cooperation among subnational entities. The established consensuses uphold the notion of normalcy. Thus, as long as there is consensus, federalism, in its current form, is upheld. When consensuses begin to crumble, new forms of federalism are contemplated, allowing a country to continue practicing federalism, even if the characteristics from one cycle to another are vastly different from each other. From a practical and changeable aspect of the concept, one can infer that its characteristics are not uniform but vary based on the prevailing political organization. Therefore, it can be inferred that federalism can find support in values like democracy and freedom, but even the decision about which values federalism should rely on is political.

Hence, the framework established by the constitutional text creates a space for political configuration that can undergo changes throughout the cycles. This space of configuration consists of values defined based on interests and identities that are intended to be developed.

Thus, with the weakening of the Military Regime and the promulgation of the 1988 Constitution, federalism adopts new shapes.

After all, as Arendt Lijphart (1999) points out, all federal democracies have in common the existence of a written Constitution, which outlines the contours of the federal pact, aiming to promote cooperation among the federal entities and regulate competition. If the federal model established by the 1967 Constitution did not reflect the democratic and republican reality that was sought to be strengthened, it was necessary to rewrite the pact and the allocation of responsibilities among the federal entities.

That is why discussions about effective decentralization of States and Municipalities have returned to the public arena, especially considering the changes implemented by the 1988 Constitution, where the fiscal reform was accompanied by a division of common responsibilities among the distinct levels of Government.

In this sense, that federalism has strengthened in contemporary Brazil with the empowerment of subnational entities, which have re-emerged with greater strength after the end of the Military Dictatorship period. Thus, the process of “redemocratization” has had an undeniable influence, not just on the way the electoral process is organized but also on the structuring of federalism, which has contributed to governability and democratic consolidation in the country, as these phenomena are intrinsically related (Samuels and Abrúcio; 2000, pp. 43–62).

However, analyzing the 1988 Constitution, it is observed that it intended to be, simultaneously, centralized in favor of the Federal Government and, at the same time, to reduce state influences on local activities, granting greater autonomy to the Municipalities, especially with the creation of mandatory transfers of funds from States to Municipalities, solidifying fiscal federalism. The establishment of fiscal federalism, in turn, has not completely enabled the self-administration of peripheral entities, given the mismatch between the powers constitutionally granted to States and Municipalities and the revenues earmarked for financing these entities (Ribeiro, 2023, pp. 335–362).

We can infer, therefore, that the 1988 Constitution presents a mechanism for the distribution of competencies that favors the Union,

with a lack of symmetry among the federal entities. This scenario has persisted since the origins of federalism in the country. The 1988 Constitution rewrites some characteristics but does not eliminate the centralizing influences that exist in the origins of Brazilian federalism, enabling the construction of a competitive and predatory federalism, where States constantly seek investments from the Federal Government while simultaneously expanding their powers (Abrúcio and Costa, 1998).

Despite the strong centralizing trend, it is evident that decentralization reached public debate as a unified strategy to combat dictatorial processes. “Passou-se a supor que, por definição, formas descentralizadas de prestação de serviços públicos seriam mais democráticas e que, além disso, fortaleceriam e consolidariam a democracia”¹ (Arretche, 1996, pp. 44-66) by enabling higher levels of popular participation in deliberative debates. The crucial point of decentralization, therefore, was to make the government more stable against changes, as other equally suitable structures were established to curb the centralizing impulses of the federal government, while also facilitating the strengthening of citizens’ freedom of expression, who would have adequate spaces for action (Rossum, 1946).

Based on these parameters, it can be observed that right after the 1988 Constitution, subnational entities gained prominence, with automatic resource transfers from the Central Government, few conditions for using the funds and loan requests, an expansion of taxation powers by States and Municipalities, and a low delineation of responsibilities, so that various public service assignments remain linked to the Central Government (Willis, Garman and Haggard, 1999, pp. 7-56).

However, there are possible fluctuations in these behaviors, while maintaining the same framework, since the structure of decentralized

¹ Maia and Magalhães translation: “It came to be assumed that, by definition, decentralized forms of public service provision would be more democratic and, in addition, would strengthen and consolidate democracy”.

federalism is directly influenced by the political incentives offered by each level of government, by the structure of political parties, and by how the bargaining process among the levels of the federation develops, allowing different configurations to emerge.

Within this framework outlined by the constitutional text, which permits various and different forms of federalism to develop, it is assumed that different configurations of democracy may also appear. As previously discussed, a country that opts for decentralized federalism is not necessarily democratic, and vice versa. So, just because a decentralized practice has been adopted, it does not mean that the democratic functioning of the institutions is guaranteed. As Ferran Requejo (2010, pp. 275–298) explains, in a general sense, democracy is characterized by a specific notion of equity among citizens, a certain degree of political participation, and the presence of popular control over political decisions. Federalism, in turn, presents the notion of a pact established to regulate specific interests and functions of the community, classifying itself as a normative theory, based on deontological or consequentialist approaches, depending on the political connotations to be developed (Requejo, 2010, pp. 275–298).

Thus, as Michael Burgess (2006) warns, federalism was initially conceived to compose associations between different types of socioeconomic, ideological, and cultural configurations, until it was incorporated into the constitutional text, becoming an essential element of liberal democracy, grounded in value-based configurations, such as: justice, respect, tolerance, and reciprocity.

Brazil, as a country caught up in the third wave of (re)democratization, underwent a process of reevaluating federalism, in its centrifugal dimension, granting powers to subnational entities in an asymmetric manner, given the various levels of self-governance between states and municipalities. Given these characteristics, it can be said that federalism, by itself, is not a tool capable of stabilizing or guaranteeing democracy. However, it constitutes a practice that creates conditions for the flourishing of democracy, as it enables, through decentralization,

the participation of culturally and politically diverse groups. This is necessary for maintaining federalism, which requires preserving the pact so that individuals and communities coexist, thereby weakening the possibilities of an eventual tyranny of the majority and influencing decisions to be more consensus-driven than necessarily majority-driven (Kincaid, 2010, pp. 299–324).

Therefore, in the Brazilian context, it is possible to infer that the establishment of federalism in the 1988 Constitution represents an attempt to strengthen nationalism, aiming to reduce regional inequalities through the redistribution of resources and the improvement of fiscal federalism. However, this phenomenon has preserved the interests of elites, who began to control the structure of local and municipal governments, creating challenges in terms of unity in a socially and politically diverse country (Fenwick, 2018, pp. 165–192).

It is observed that the constitutional text aimed to implement cooperative federalism, as explicitly provided in Article 23, establishing various areas of common jurisdiction among the Union, States, and Municipalities. This conception of federalism influences not only, albeit indirectly, the democratic practice but also establishes the very structure of the Social State, in that “o Estado Social influi de maneira decisiva no desenvolvimento do federalismo atual, sendo o federalismo cooperativo considerado como o federalismo adequado ao Estado Social”² (Bercovici, 2004, p. 57).

Thus, for the decentralization process to achieve the expected results, it is essential that the institutional capacities for dialogue and cooperation are well developed. Decentralization, without a prior organizational process, can have the opposite effect, strengthening the centralization of powers in the Federal Government and, in substance, weakening democracy.

² Maia and Magalhães translation: “the Social State decisively influences the development of current federalism, with cooperative federalism seen as the suitable federalism for the Social State”.

On this point, it's important to highlight that until the 1990s, the understanding was that Brazilian federalism was structured with many "veto players," being an institution designed to limit the expectations of the majority and even the Federal Government, to the extent that the President alone couldn't push through significant reforms, requiring coalitions with other political representations and subnational entities (Guicheney, Junqueira and Araújo, 2018, pp. 69-92).

One of the main proponents of the idea that federalism, as conceived in the 1988 Constitution, would pose an obstacle to governance was Alfred Stepan. The reasons for this impasse were attributed, among other factors, to the need for consensus, the distribution of powers that were previously exclusive to the Union with the States and Municipalities, the quorums required for approving amendments, as well as the fragmented representations in the Chamber and the Senate. According to the author, based on comparative analysis from his research, "somente o Brasil tem condições potenciais para fazer obstrução à maioria democrática no plano federal comparáveis com o poder de bloqueio das majorias que se verifica nos Estados Unidos"³ (Stepan, 1999, p. 208), all due to the impact of the federalism structure adopted.

So, in Stepan's view (1999), the model of federalism adopted in Brazil distances political decisions from what the people would expect. It is an inefficient system for implementing the political reforms desired by the majority, tending, therefore, to maintain the status quo, especially considering that the political actors themselves are aware of the obstruction power they can invoke.

This view of Stepan regarding the organization of federalism remained more consistent in the doctrine of the nineties. Later, other discussions about the decentralization process driven by federalism

³ Maia and Magalhães translation: "only Brazil has the potential conditions to obstruct the democratic majority at the federal level that are comparable to the blocking power of majorities seen in the United States".

gained traction, so much so that federalism alone was not able to limit the changes envisioned by the Federal Government.

From this perspective, Marta Arretche (2013, pp. 39-57) explains that it is not necessary to achieve significant majorities, as Stepan pointed out, to implement reforms in the national constitutional system. However, despite the decentralization conducted with the Constitution of 1988 giving some prominence to subnational entities, the Federal Union still concentrates a lot of power. In fact, minorities continue to struggle to establish themselves as veto players.

Thus, for the federalism envisioned by the Constitution of 1988 to function properly, even with an excessive concentration of competencies in the Federal Union, it is necessary for the institutions to be reconfigured to promote cooperative techniques, in accordance with the constitutional text, since both in its positive dimension (which imposes action by federal entities), and in its negative dimension (which requires the parties to respect general interests), loyalty and respect for the constitutional text are essential for relationships to genuinely occur cooperatively (Rovira, 1996, pp. 51-68).

For this reason, it can be argued that cooperative federalism is structured in pursuit of achieving the great constitutional objectives, enhancing effectiveness, public efficiency, and consequently, intergovernmental relations. What one can notice, therefore, is that cooperative federalism represents a phase in the development of the notion of federalism, composed of the following central attributes: division of powers and functions among the different government entities; exclusion of rigid models of relationships among federal entities, as long as cooperation is encouraged; and the emphasis on the supremacy of cooperation in achieving political and constitutional goals (Mendoza, 2013, pp. 19-44).

Thus, to achieve these objectives, it is necessary to observe some fundamental principles, including: the principle of non-secession, equality, solidarity, coordination, subsidiarity, and the predominance of interest.

It is noted, therefore, that the analysis regarding the constitutionality of ADI 6492, which pertains to the new Basic Sanitation Statute, involves understanding whether the legislation, as proposed and approved, aligns with constitutional provisions, especially regarding the distribution of competencies.

From the discourse analysis on the votes expressed in ADI 6492, it is perceptible that there is a thin connection between the interpretations provided by the Ministers regarding the notions of cooperative federalism, as several sub-principles of cooperative federalism were relaxed for the Declaration of Constitutionality to become possible.

3. THE DECLARATION OF CONSTITUTIONALITY OF THE NEW BASIC SANITATION STATUTE: CRITICAL DISCOURSE ANALYSIS OF ADI 6492

In ADI 6492, the unconstitutionality of provisions of Law No. 14.026/2020 (popularly known as the “new Basic Sanitation Statute”), was addressed by the Democratic Labor Party (PDT). From the party’s perspective, the legislation would contain some unconstitutional articles that would taint the very execution of public sanitation services.

Therefore, the discussion of ADI 6492, although broader, focused primarily on the distribution of competencies among the federal entities. The main issue of ADI 6492 was to examine whether the centralization of basic sanitation services at the Federal level would be possible under the framework of cooperative federalism.

In this clash, Minister Edson Fachin stated that the centralization of some issues regarding basic sanitation at the federal level does not reflect a decrease in democratic indices, since the focus of federalism, with the distribution of responsibilities, is to ensure the realization of fundamental rights. Therefore, the federal government should be allowed to set general rules while leaving room for creative formulation by subnational entities. In the Minister’s words:

“não verifico plausibilidade na retirada de parcela tão grande do poder decisório de outros titulares do serviço, a ponto de somente lhes restar acatar as normativas federais, sem espaço suficiente para o desenvolvimento de regras criativas”⁴ from subnational entities (Brazil, 2021, p. 200).

The proposal for centralizing the power of standardization at the federal level is widely rejected by Minister Edson Fachin, who further clarifies other concerns when he points out in his ruling that: “na esteira de uma hermenêutica cooperativa, se a União não demonstra, de plano, que o tratamento da matéria pela via da centralização legislativa é aquela que melhor atende a concretização do direito fundamental em tela”⁵ (Brazil, 2021, p. 200), there are no justifications for reducing the participation possibility of other federated entities.

In this sense, if there is no evidence that the federal government would regulate the matter more efficiently, there are no reasons to restrict the normative power of the municipalities, under the risk of weakening the dialogue process among the federated entities.

Despite Minister Fachin’s concern to ensure the participation of subnational entities in the basic sanitation regulation process, preventing only the federal government from regulating the process, as was planned in the contested decision, his vote was in the minority. The proposal brought by Minister Barroso, which prevailed, stated that:

O exercício da função normativa da agência não deve esvaziar a competência regulatória dos entes titulares dos serviços, mas apenas orientá-la, quando se verificar, por critérios técnicos, que a uniformização regulatória é mais adequada do que

⁴ Maia and Magalhães translation: “I do not see any plausibility in removing such a large part of the decision-making power from other service holders, to the point where they are left only to comply with federal regulations, without enough space for developing creative rules”.

⁵ Maia and Magalhães translation: “in line with cooperative hermeneutics, if the federal government does not demonstrate, from the outset, that dealing with the issue through legislative centralization is the best way to achieve the fundamental right at hand”.

a descentralização. Aqui é preciso ter, Presidente e preza-dos Colegas, na justificativa da legitimidade dessa alteração, a compreensão de que o Brasil tem 5.600 municípios nos mais diferentes níveis de desenvolvimento, nos quais, por muitas razões, existem limitações cognitivas do que seja a coisa certa a fazer. Ter uma orientação de âmbito nacional é extremamente positivo e construtivo para orientar as decisões a serem tomadas pelos poderes concedentes locais (Brazil, 2021, p. 314)⁶

It is worth noting that the idea of “standardization” is the core of Minister Barroso’s vote. In this opportunity, most of the Court understood that the challenged regulations are constitutional, giving prominence to the Federal Union and reaffirming that there was no usurpation of deliberative competence from subnational entities, which still have the option to regulate sanitation programs using any of the constitutional archetypes, bearing only the consequence of not receiving federal transfers if they choose not to comply with the reference standards set by regulatory agencies. The goal of this decision was, therefore, to find ways to accelerate, through simplification, the population’s access to public policy.

The pragmatic criterion for distributing competencies also appears in a passage of Minister Luiz Fux’s vote, where he explains that:

A universalização do saneamento diz respeito a percepção de seu valor pela coletividade. O sucesso da atuação estatal na concretização desse mister não se limita à qualidade dos serviços prestados e à respectiva satisfação dos usuários. Indo além, o

⁶ Maia and Magalhães translation: “The exercise of the agency’s normative function should not undermine the regulatory authority of the entities that provide the services, but rather guide it when, based on technical criteria, it becomes clear that regulatory uniformity is more suitable than decentralization. Here it’s important to understand, President and esteemed Colleagues, in justifying the legitimacy of this change, that Brazil has 5,600 municipalities at various levels of development, where, for many reasons, there are cognitive limitations regarding what the right course of action is. Having national guidance is extremely positive and constructive for directing decisions made by local granting authorities”.

valor é mensurado pelo acesso e capilaridade desse conjunto de serviços, infraestrutura e instalações (Brazil, 2021, p 10)⁷.

Thus, what gives, in Minister Fux’s view, success to a public policy is its reach and not necessarily how that policy is evaluated by users, placing high importance on the process of centralizing public sanitation regulation by the Federal Union as a possible tool for achieving greater reach, despite the lack of evidence that regulatory centrality would contribute to higher efficiency rates.

Indeed, speaking of efficiency, the term appears more than two hundred times throughout the ruling, highlighting that uniformity and efficiency were the tone of the deliberative process, demonstrating how ADI 6492 was influenced by the health emergency caused by the Covid-19 pandemic. For decades, the issue of basic sanitation had been under discussion. Even in 2003, with the establishment of the Ministry of Cities, the debate on creating a new regulatory framework for basic sanitation came to light; the mentioned project was subject to more than 800 amendments, aiming to defend the interests of the States (Sousa and Costa, 2016, pp. 615–634). As there was no consensus among the Federal Government, States, and Municipalities on organizing the subject, some parallel projects emerged, resulting, only in 2007, in the approval of Law No. 11.445/07.

With the approval of this legislation, integrated management policies were established among the entities of the federation. Basic concepts were incorporated into the legal text, such as the right to water and sanitation, enabling the resumption of investments in the sector, which had been stalled in the nineties (Gonçalves and Silva, 2020, pp. 71–92).

⁷ Maia and Magalhães translation: “The universalization of sanitation is about how the community perceives its value. The success of state action in fulfilling this mission isn’t just limited to the quality of the services provided and the satisfaction of the users. Beyond that, the value is measured by the accessibility and reach of this set of services, infrastructure, and facilities”.

In 2018, the promotion of improvements in the country's infrastructure re-emerged as an agenda for the Federal Government, signaling the President's interest in increasing interaction with the private sector. Thus, it can be observed that with the onset of the pandemic and the urgency of enhancing the effectiveness of health equipment usage, this issue began to progress again, with concerns organized around four points: “universalização dos serviços de saneamento; o fortalecimento da regulação setorial; a regionalização da prestação dos serviços de saneamento básico e as formas de contratação das prestadoras de serviços”⁸ (Sion, 2020, p.128).

The new regulatory framework was approved, therefore, during the pandemic, after more than five years of debates in the Legislative Power, presenting as deliberations: the centralization and expansion of activities at the National Water Agency (ANA), thus reversing the global logic of re-nationalization processes, as the private sector was given a leading role (Gonçalves and Silva, 2020, pp. 71-92).

It is evident, therefore, that the simplification referred to in Minister Barroso's vote is associated with the intention of universalization and concentration of regulation, all of which is deeply influenced by the pandemic scenario. Thus, the Supreme Court, by majority, adopted a discourse of redistributing the constitutionally established powers, in an attempt to ensure the effectiveness of fundamental rights, seeking to achieve positive results in managing the existing health crisis.

In this way, ADI 6492 understood that fundamental rights would be better ensured if the deliberation on sanitation were concentrated at the Union level, for “uma atuação imediata, concentrada e eficiente do poder público”⁹ (Brazil, 2021, p. 200) to be provided.

⁸ Maia and Magalhães translation: “universalization of sanitation services; strengthening of sector regulation; regionalization of the provision of basic sanitation services; and the ways of contracting service providers”.

⁹ Maia and Magalhães translation: “immediate, focused, and efficient action by the public authority”.

The search, therefore, to realize fundamental rights, in the presented framework, varies in greater or lesser degrees of centralization of powers. It is observed that the emphasis adopted by the Court is that fundamental rights must be ensured, even at the expense of the design of a constitutionally crafted federation, which contributes to the development of a crisis regarding the adoption of cooperative federalism.

After all, when undertaking greater centralization of powers in the Federal Union, there is a reinforcement of the conflict among the federated entities. The process of judicializing the new Basic Sanitation Statute has indirectly led to a judicialization of federalism, as the core of the discussion has been to understand the distribution of powers among the federated entities, which provides a notable hermeneutic gain to the system, as the choices made by the Court reveal and clarify the contours that the country’s federative organization should assume from the perspective of the Judiciary (Canello, 2016).

It can thus be observed that in the examined decision all the conflicts were precisely about mapping which federated entity would hold the power to implement the public sanitation policy, with the Court recognizing that, due to the exceptional nature of the context, it was necessary for measures to combat contagion to be taken as swiftly as possible, even if this resulted in a centralization of powers in the Union, defining that centralization and uniformity in regulation would make the public policy more efficient.

4. THE “RASCAL CONSEQUENTIALISM” IN THE APPLICATION OF THE SUB-PRINCIPLES OF COOPERATIVE FEDERALISM.

The analysis highlights that some of the sub-principles of cooperative federalism were addressed in a pragmatic and consequentialist manner. The current construction starts with the analysis of the non-secession sub-principle. After all, considering that federalism can

take on multiple characteristics (dual, cooperative, symmetric, asymmetric, or competitive), these traits become prominent or fade away depending on how the federal pact is outlined in the constitutional text. Thus, given that federalism takes on characteristics imposed by the constitutional text itself, it is generally the process of allocation of powers that conditions federalism, and not the other way around. Therefore, the constitutionally established powers must be capable of promoting the realization of the federalism model that the constitutional text envisions (ENAP, 2017).

So, if the allocation of powers becomes unbalanced, whether towards greater centralization or greater decentralization, with overlapping functions among the entities, the federally planned balance falls apart, destroying the union, which should be the driving force behind ensuring fundamental rights are realized, directly altering the characteristics of federalism itself. Consequently, non-secession ceases to exist. Preserving the union and the cooperative action of the entities means ensuring that fundamental rights are safeguarded in the arrangement laid out by the original constituent, ensuring that the Union, States, and Municipalities complement each other in this activity.

From this, we can infer that in order for the principle of non-secession to be respected, it is not enough for fundamental rights to be realized; they must also be enforced by the entity that holds the competency, so that States, Municipalities, and the Union itself have their autonomy guaranteed, without extending their areas of action into matters that do not concern them. After all, as mentioned at the beginning of this topic, the realization of fundamental rights under the 1988 Constitution hinges on adherence to the rules of federalism, among them, the observance of the distribution of competencies.

The decision reviewed shows a lack of concern from the Supreme Court about the overlap of competencies among the federal entities. The priority is to ensure fundamental rights, even at the expense of the constitutionally designed federal structure. Thus, despite being

mentioned, the concern over a possible secession due to the disregard of the rules for the distribution of competencies was not significant in the STF’s deliberation, being reflected only in the minority votes of ADI 6492.

As a result, regarding the non-secession subprinciple, it is observed that the Supreme Court adopted an institutional discourse that downplays this risk, which only appears sporadically in minority votes. The risks related to the overlap of competencies and the weakening of the constitutionally provided distribution rules are not presented as significant concerns.

From the points made, it is clear that the non-secession subprinciple was not predominant in the deliberative process; rather, it has contributed to the instrumentalization of federalism, putting it at the service of ensuring fundamental rights, despite the neglect of constitutional arrangements, reinforcing the doctrinal discussion made at the beginning of the topic that institutional discourses do not need to align with the formally established structures to be taken as such.

Another principle manipulated by the Supreme Court in the examined decision concerns subsidiarity. As Thana Campos (2020, pp. 212–214) explains, the principle of subsidiarity is classified as a structural principle, defining how the distribution of competence and authority should occur in a multi-level system. Therefore, according to the prevailing doctrine, it is considered a principle with an operational dimension, guiding how federal entities should act based on constitutionally established competencies.

Despite the fact that subsidiarity may go through cycles of weakening, with increasing levels of centralization, it’s important to point out that the function of this principle is to lessen the existing asymmetry between the federated entities, allowing for greater autonomy and, at the same time, the collective and coordinated exercise of constitutional competencies (Bieliauskaitė, 2012, pp. 231–248).

Therefore, even though there is a strong link between the concepts of federalism and subsidiarity, it is crucial to highlight that the

introduced by this sub-principle primarily involve solving problems locally first, and only then, if assistance is needed, reaching out to higher instances. This way, policies tend to be implemented more swiftly. However, for this dimension to work, it is necessary for the diverse levels of the federation to communicate clearly with one another, avoiding gaps in service delivery (Campos, 2020, pp. 212–214).

In the case of ADI 6492, what we see is a subversion of the principle stemming from the centralization of public basic sanitation policy at the federal level, compromising the principle of subsidiarity by “violiar manifestamente a autonomia municipal e, ao desconsiderar o parâmetro de atuação federal”¹⁰ (Brazil, 2021, p. 338).

Thus, as with the constitutionality of the new Basic Sanitation Statute, the main discussion was about demonstrating that “a assunção de competência pelo ente maior deve fundar-se no princípio da subsidiariedade, ou seja, na demonstração de que é mais vantajosa a regulação de determinada matéria pela União ou pelo Estado”¹¹ (Brazil, 2021, p. 13). Therefore, to justify the centralization of public service at the federal level, the argumentative challenge faced by the Supreme Court was to show that a centralized service would be delivered more effectively.

In this way, argumentative construction strengthens the process of centralization rather than cooperation, enabling federalism to move away from a cooperative perspective. The positions discussed here show consequentialist concerns, as they initially seek the fairest response, only later developing legitimizing arguments. This approach provides what Luis Fernando Schuartz (2008, pp. 130–158) has conventionally called “rascal consequentialism”, characterized by the

¹⁰ Maia and Magalhães translation: “manifestly violating municipal autonomy and disregarding the federal action parameter”.

¹¹ Maia and Magalhães translation: “the assumption of competence by the higher entity must be based on the principle of subsidiarity, that is, on the demonstration that regulating a certain matter is more advantageous when done by the Union or the State”.

attempt to produce a customized and specific decision for a concrete problem, where the legal framework “cria, redesenha e eventualmente aperfeiçoa a dogmática jurídica para colocar a seus serviços, ainda que pontualmente e para o caso, um ordenamento jurídico recalitrante”¹² (Schuartz, 2008, p. 156), risking the incorporation of decision-making elements into the constitutional order that were influenced by the circumstances contributing to the decision’s formulation.

In this type of consequentialism, which is also pragmatic, established elements and terminologies from legal theory were used to minimize economic repercussions, emphasizing that the possibilities of legislation are influenced by the context (Magalhães, 2017).

In this sense, the decision analyzed in this work highlights the adoption of rascal consequentialism, which first concerns itself with the repercussions of the decision before seeking to justify its intricacies.

5. CONCLUSION

While it can be stated, based on the data collected, that the STF has modified fundamental characteristics of federalism, acting in a pragmatic and consequentialist manner, it is not possible to point out (since it falls outside the scope of this research) whether the new characteristics attributed to federalism will last indefinitely or whether they reflect a specific crisis situation. It was also not possible to analyze, as it is not the focus of this investigation, whether the changes made by the Court to constitutionally established institutions will compromise the Court’s functioning in the future.

What we see is that the new Basic Sanitation Statute, declared constitutional, flipped the logic of cooperative federalism on its head, producing decisions that are focused on efficiency and speed, justifying

¹² Maia and Magalhães translation: “created, redesigned, and eventually improved to serve its purposes, albeit only for this particular case, within a stubborn legal order”.

changes in the interpretation of federalism to allow for wider dissemination of public policies.

The work, therefore, aimed to diagnose what changes in the structure of federalism had been made, which were profoundly influenced by the external context, showing that the Court did not act independently, but rather in a consequential and pragmatic way.

Federalism was instrumentalized, interpreted to realize fundamental rights and public policies. Therefore, it is claimed that the Tribunal did not position itself legally, as it moved away from the concepts of division of powers traditionally established in the constitutional text, enabling the Federal Union to take the lead and completely sidelining the role of the Municipalities.

With the decision examined, the STF enabled power reconfigurations, inaugurating a curious situation: under the same constitutional paradigm that advocates for characteristics of cooperation in federalism, the Court consolidated disputes between the Union and the States. The central goal in the deliberations involving power accommodation was to allow public policies to be realized as quickly as possible, instrumentalizing the concept of federalism and no longer seeing it as an end in itself, which may lead to other problems regarding the relationship between institutions.

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