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THE CONSTITUTIONAL PRINCIPLE OF PLURALISM IN THE LEGAL REGULATION OF SOCIAL RELATIONS

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Abstract

Aim. Designate the relationship of the constitutional principle of pluralism with other principles of constitutional law, in particular with the principle of solidarity and the principle of constitutional identity. Reveal the characteristic features of the complex content of the constitutional principle of pluralism and show its significance in the modern world.

Methodology. When writing the article, general scientific and special research methods were used.

Results. Principles of constitutional law as a value in the system of legal regulation of social relations presuppose the idea that the Constitution is not just a set of norms that regulate state power, but also that regulate society. The constitutional principle of pluralism guides the legal regulation of social relations. This orientation is not just a procedure, nor is it limited to the idea of negative freedom. The strengthening of the modern state took place under the guise of nationality and national identity. This national identity is no longer legitimated in tradition and in the creation of a homogeneous society. Social pluralism is a feature of our time. The State guarantees the Constitution and the Constitution recognizes pluralism. The principle of pluralism in the legal regulation of social relations requires the development of public policies that promote inclusion and harmonious coexistence between the different groups that make up society, that is, the promotion of solidarity between different people. The challenge is immense, as it is necessary to overcome prejudice, discrimination and violence that are rooted in society. Conservatives understand that this mission is impossible and it is better to preserve the existing social order. Progressives believe in the utopia of transformation. There is no universal formula. Each State and each society must seek the possible solution in the context of its social, political, economic and cultural formation.

Research implications. The results of the study contribute to the theory of constitutional law, creating prerequisites for the development of the theory of the principles of constitutional law.

Keywords: constitutional pluralism; social relations; legal regulation; human rights; cooperative constitutional state; social inclusion

КОНСТИТУЦИОННЫЙ ПРИНЦИП ПЛЮРАЛИЗМА В ПРАВОВОМ РЕГУЛИРОВАНИИ ОБЩЕСТВЕННЫХ ОТНОШЕНИЙ

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Аннотация

Цель. Обозначить взаимосвязь конституционного принципа плюрализма с иными принципами конституционного права, в частности с принципом солидарности и принципом конституционной идентичности. Выявить характерные особенности комплексного содержания конституционного принципа плюрализма и показать его значимость в современном мире.

Процедура и методы. При написании статьи применены общенаучные и специальные методы исследования.

Результаты. Обосновано, что принципы конституционного права как ценности в системе правового регулирования общественных отношений предполагают идею о том, что Конституция – это свод норм, не просто регулирующих государственную власть, но и регулирующих общество. Конституционный принцип плюрализма определяет правовое регулирование общественных отношений. Эта ориентация – не просто процедура и не ограничивается идеей негативной свободы. Укрепление современного государства происходило под прикрытием национальности и национальной принадлежности. Эта национальная идентичность больше не узаконивается традициями и созданием однородного общества. Социальный плюрализм – это черта нашего времени. Государство гарантирует Конституцию, и Конституция признает плюрализм. Принцип плюрализма в правовом регулировании общественных отношений требует разработки государственной политики, способствующей включению и гармоничному сосуществованию между различными группами, составляющими общество, т. е. поощрению солидарности между разными людьми. Задача огромна, поскольку необходимо преодолеть предрассудки, дискриминацию и насилие, укоренившиеся в обществе. Консерваторы понимают, что эта миссия невыполнима и лучше сохранить существующий общественный порядок. Прогрессисты верят в утопию трансформации. Универсальной формулы не существует. Каждое государство и каждое общество должны искать возможное решение в контексте своей социальной, политической, экономической и культурной формации.

Теоретическая и/или практическая значимость. Результаты исследования вносят вклад в теорию конституционного права, создавая предпосылки для развития теории принципов конституционного права.

Ключевые слова: конституционный плюрализм, социальные отношения, правовое регулирование, права человека, кооперативное конституционное государство, социальная интеграция

Introduction

Principles of constitutional law as a value in the system of legal regulation of social relations presuppose the idea that the Constitution is not just a set of norms that regulate state power, but also that regulate society.

Modern state has a monopoly on the legitimate use of violence. Globalization has not yet replaced the state with another type of organization and there are no signs that this could happen anytime soon. Seemingly unshakable values and scientific constructs are being rethought today [16, c. 20–28]. The monopoly on the legitimate use of violence by the State must observe the existence of the pluralism that permeates social relations. The strengthening of the modern state took place

under the guise of nationality and national identity. This national identity is no longer legitimated in tradition and in the creation of a homogeneous society. Social pluralism is a feature of our time. The State guarantees the Constitution and the Constitution recognizes pluralism.

This paper seeks to emphasize how the constitutional principle of pluralism guides the legal regulation of social relations. This orientation is not just a procedure, nor is it limited to the idea of negative freedom. The principle of pluralism in the legal regulation of social relations requires the development of public policies that promote inclusion and harmonious coexistence between the different groups that make up society.

The Constitutional Principle of Pluralism in the Legal Regulation of Social Relations

The system of legal regulation of social relations is based on constitutional principles, in what is conventionally called “the constitutionalization of civil law”.

The constitutionalization of civil law means the interpretation of civil law institutes in accordance with the Constitution. According to Tepedino, the direct application of constitutional norms in legal relations under private law shifted the fundamental principles of private law from the Civil Code to the Constitution. Private autonomy is no longer a value in itself, as it will only be observed when it is in harmony with constitutional values (personality rights, dignity of the human person, etc.) [19, p. 35–36]. In this case, we are still talking about private law, but a private law interpreted in accordance with the Constitution [4, p. 89].

This phenomenon relativized the classic distinction between public law and private law, which defined public law as the part of law in which the public interest predominates, that is, the interest of the State. Public law, in this context, would be the law that organizes the State and protects order and social peace [7, p. 190–191].

The State is an obligatory part of public law, being in a position of superiority in exercising the power of *imperium*. According to this classification, public law would comprise constitutional law, administrative law, tax law, procedural law and criminal law [7, p. 192]. Constitutional law, in particular, would have as its main function to organize the State, giving it shape, structure and establishing the bases for the exercise of its power. Here we speak clearly about the State Constitution.

In turn, private law was defined as the branch of law in which the private interest predominates, in which the parties are on an equal footing. The State, in this sense, when acting in the field of private law, presents itself on equal terms with private persons [7, p. 191].

The constitutionalization of civil law brings a new understanding of constitutional law. The historic moment of this transformation was the

end of World War II and the emergence of the concept of “human rights”. Human rights is a different concept from “rights of man” (*Droits de l'Homme* in French), or even “fundamental rights” (*Grundrechte* in German). It intends to establish a universal parameter for the validity of the law, extended to the international level, for the different peoples of the world.

From a terminological point of view, while the concept of “fundamental rights” is a concept of constitutional law, and means the rights contained in the national Constitution, the concept of “human rights” is a concept of international law and means the rights contained in international conventions of human rights [12, p. 42].

The historical evolution of fundamental rights can be understood in four generations. The first generation is the generation of civil and political rights, which emerged in the 19th century and is linked to the rights of freedom (right to come and go, freedom of expression, confidentiality of correspondence, etc.) and political rights (universal [male] suffrage) [1, c. 516].

In the second generation are the social, economic and cultural rights, which emerged after the First World War, from which the State expanded its functions, seeking the well-being of the people, with the implementation of a universal education system, the right to health, housing, work, etc. [1, p. 518]

The third generation comes after World War II. While in the first and second generations, there was an understanding of rights within the territorial limits of each State, the third generation, influenced by the concept of “human rights”, started to understand law at the international level as well. The fundamental human rights of the third generation are the rights to development, peace, the environment, communication and the common heritage of humanity [1, p. 522].

Finally, after the end of the cold war, the rights to democracy, information and pluralism emerge as the fourth generation [1, p. 524]. From a geopolitical point of view, the fourth generation of fundamental human rights is linked to the hegemonic presence of the United States in the world, a fact that has been chang-

ing in recent years with the emergence of a multilateral world [15, p. 85–100; 18].

The concept of “human rights” has profoundly transformed constitutional law. This transformation can be seen in several aspects. It is possible to say that constitutional law is no longer the subject that merely organizes state power. The Brazilian Constitution of 1988, for example, in addition to organizing state power, deals with the rules of the family, the rights of indigenous peoples, the protection of the environment, culture, sport, in short, other matters that transcend the organization of the State. It is possible to speak here of a Constitution of the political community in a broad sense, which goes beyond the State organization [13; 14].

The State, of course, plays a political role in guaranteeing and enforcing the Constitution. However, this State is no longer the “National Constitutional State”, closed in on itself [2, p. 67–78; 3, p. 25–28; 6, p. 52–73]. The State of constitutionalism of human rights is much more a “Cooperative Constitutional State”, which both cooperates internationally for the effectiveness of human rights, as it recognizes and promotes these rights at the domestic level [9, p. 407; 14, p. 59].

In this aspect, the constitutional principle of pluralism has special relevance in the legal regulation of social relations. The constitutionalization of civil law promoted by the concept of human rights places the national Constitution as the source of validity of the legal order.

Article 1, no. 5, of the Brazilian Constitution provides that the Federative Republic of Brazil is founded on political pluralism. This principle is also present in the Constitutions of Portugal (art. 2), Spain (art. 1) and France (art. 4), as well as in many of the constitutions of Latin American countries, which seek to recognize and protect diversity and pluralism of Latin American societies.

Pluralism is an inseparable concept from constitutionalism. According to Sarlet, “political pluralism... is intrinsically related to the democratic principle... Political pluralism (which is also economic and cultural) allows and ensures the free (but respectful and regulated) coexistence and interaction between

convictions, ideals, individual life projects shared by groups more or less representative of segments of society” [17, p. 275–276]. Human societies are not monistic, univocal, but pluralistic and heterogeneous. If, on the one hand, political unity is fundamental for citizenship, for legal equality and many other things of civilized societies, on the other, respect for diversity and pluralism is indispensable.

Popular sovereignty is still a principle that takes place at the level of national states. If it is possible today to speak of globalization, the sovereign will of the people is manifested within the limits of the nation-state. In this way, the Constitution represents national unity, which has its symbols of national identity (flag, anthem, coat of arms, heroes, national days, culture, music). National anthem, national days and national flag are for Häberle the three cultural identity elements of the Constitutional State. The open Constitutional State needs basic cultural elements that give it identity, both internally, as a form of integration of the people and communion of a sense of belonging, and externally, as a form of recognition. Globalization and supranational integration matter in the historical and cultural affirmation of the National State [8; 9; 10; 11].

These symbols, which mean a lot to the country’s political history and its social cohesion, are not guaranteed by tradition, but by a republican system that attributes to these symbols the values of solidarity, respect and the right of everyone to belong to the political community [20, p. 3–7]. The common good of this republican system is not linked to a common ethnic origin, but is built in the public space based on the political recognition of all citizens [5].

Recognizing and respecting human rights means politically recognizing what is different. The political recognition of the different must permeate the interpretation of all fundamental rights, whether freedom rights or social rights. Pluralism is a principle inherent in fundamental rights, a principle that gives them unity and meaning.

The constitutionalization of civil law removed civil law from the liberal understanding of law as negative freedom. The classic distinction between public and private law, in

which private law constituted an autonomous sphere of law, originating from natural law, is now permeated by constitutional principles of public order. Civil law must pay attention to constitutional principles, in particular, to fundamental rights norms.

The constitutionalization of civil law gives a new meaning to the principle of pluralism in the sphere of legal regulation of social relations. The State's political commitment to human rights makes the principle of pluralism a legitimate form of legal regulation of social relations.

Constitutional pluralism legitimizes both conservative and progressive worldviews. These differences, present both in the forms of organization of political parties, as well as in social organizations, must be based on the assumption that "inclusion" is a key concept to live under a democratic constitutional regime.

Respect for the Constitution is achieved through a commitment to pluralism. Pluralism contemplates tradition, understood as a legitimate way of seeing the world and living life. Traditional ways of life must coexist with other progressive ways of life. The hegemonic pretension of traditionalism is opposed to constitutionalism.

In this aspect, constitutional pluralism emphasizes the existence of a plural society, which groups individuals into different social organizations, who have very different views of the world. The State must guarantee this pluralism, it must develop public policies that promote inclusion and harmonious coexistence between different groups. In public spaces of coexistence with difference, inclusion must be promoted and discrimination must not be tolerated.

In this way, it is very important the role of the constitutional principle of pluralism in the legal regulation of social relations. Pluralism is the key concept of constitutionalism in the 21st century, as it allows for a redefinition of the concept of Constitutional State, both in terms of its role in the international and domestic spheres. At the international level, the Constitutional State, understood as the Cooperative Constitutional State, works with other States and organizations with the objective of making human rights effective.

Internally, the Cooperative Constitutional State guarantees pluralism through public policies of inclusion and harmonious coexistence with differences.

Conclusion

The principle of pluralism in the legal regulation of social relations must promote solidarity between different people. Human rights show how different people are. In the spectrum of "person" there is a child, a teenager, an elderly person, a man, a woman, a heterosexual, a homosexual, a person with a disability, an indigenous person, a black person, a foreigner, a stateless person, that is, there is a plurality. This plurality has different demands, as the social conditions of each of these people are different.

The State guarantees the normative force of the Constitution. In this sense, the State should neither abstain, that is, understand that these issues are in the private sphere, nor understand that its role is limited to guaranteeing procedures for the political participation of these different groups. The State must promote public policies that promote the social, economic, political and cultural inclusion of this diversity, with the objective of building a more tolerant society. The challenge here is immense, because in this task, which is not exclusive to the State, but to society as a whole, it is necessary to overcome prejudice, discrimination and violence that are rooted in society. Conservatives understand that this mission is impossible and it is better to preserve the existing social order. Progressives believe in the utopia of transformation. There is no universal formula. Each State and each society must seek the possible solution in the context of its social, political, economic and cultural formation.

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