



CAUSES AND CONSEQUENCES OF CREATING AUTONOMOUS ENTITIES

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Abstract

The structure of the Brazilian state has a growing creation of autonomous entities, which includes Public Prosecutors, Public Defenders' Offices, Courts of Auditors, as well as the possibility of autonomy of other bodies, such as the Central Bank, the Federal Police and the Federal Attorney General. This theoretical essay elaborates propositions in order to shed light on the following questions: Why do constituent legislators create autonomous entities, independent of the structure of any of the three State branches, unrelated to legislative or popular control? What would be the consequences of creating such entities? The answers, in the form of propositions, include the insecurity of political actors about future situations, the performance of the public policies, as well as the rising costs of changing policies and institutions.

Key words: Delegation; Autonomous Entities; Governance

Introduction

The Brazilian constitutional order establishes since the beginning a Public Prosecutor Office with administrative and functional autonomy, capacity to formulate the budget proposal itself, to initiate bills on the organization and functioning of the agency, and on the creation and termination of their posts. This autonomy was extended to the state public defenders' offices, through Constitutional Amendment n°. 45, of 2004, to the Federal District Public Defender's Office through constitutional amendments no. 69, of 2012, and to the Federal Public Defender's Office through Constitutional Amendment n° 74, of 2013.

In addition to these bodies that orbit the Judiciary, there are currently some proposals for amendment to the constitution underway in the Brazilian Chamber of Deputies with the objective of converting public bodies linked to the Executive Branch into autonomous entities without hierarchical subordination to any of the three Republic branches. We highlight the Proposed Amendment to the Constitution (PEC) 82/2007, which aims at granting autonomy and prerogatives to members of the Public Attorneys' Offices at the federal, state and municipal levels; PEC 412/2009, which seeks to provide the Federal Police with functional, administrative and budget autonomy; and PEC 186/2007, which deals with the autonomy of tax administration bodies of the Union, States, Federal District and Municipalities.

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It is not uncommon to have independent agencies in the structure of the state. When observing the database of the Comparative Constitutions Project¹, public accounts control entities stand out in the form of account courts or councils, or even auditors-general. There are also central banks, economic councils and public service commissions. This model of organization of the public entities involves a governance solution for the management of these entities' policies. This is a delegation in which the authority of representative bodies is transferred to institutions that are not run by elected politicians. This situation raises the following questions: for what reasons do the constitution-making legislators create autonomous entities, independent of the structure of any of the three branches, and outside of legislative or popular control? What would be the consequences of the creation of such entities?

This theoretical essay elaborates propositions as possible answers to these questions. These propositions are the result of a theoretical discussion with several authors of a literature that covers structures of democratic governance, involving constitutionalism and the delegation of powers to autonomous entities. This essay goes forward in the knowledge building, as it provides an institutional way of explaining the causes of delegation, which are explained mostly based on the expectations of political actors, and shed light on the consequences of delegation. Moreover, it offers an idea of the operationalization of these propositions in future hypotheses of empirical research.

In addition to this introduction, the text contains three other sections. The next section deals with the causes of the creation of autonomous entities. The two propositions on the causes are presented in the following section, divided into the subsections "Heterogeneity of Actors", which brings the first proposition, and "Performance", where the second is presented. In the following section, the propositions deal with the consequences of the creation of autonomous entities, and are also presented in two subsections "Public Policies Modification" and "Costs Expansion ". The last section of the text brings a conclusion and research agenda.

1. Causes of the creation of autonomous entities

Autonomous entities may be conceptualized as independent state institutions to which authority on certain themes has been delegated, and whose leaders are not directly elected by the people. The delegation is formalized through an act of public law, in which the elected representatives transfer the authority to the autonomous entities. There is a principal-agent relationship involved in this delegation. The principals, in this case, are the elected representatives who create the autonomous agencies and delegate power and authority to them. The agents, in turn, are those who exercise the delegated powers, that is, the bureaucracy linked to autonomous entities (SWEET, THATCHER, 2002).

¹ See the database of the Comparative Constitutions Project, accessible at: <http://comparativeconstitutionsproject.org/>. Access on September 20, 2019.

The causes commonly cited in the literature to motivate the delegation encompass the expectations about the results of the delegation. It is believed that autonomous entities would act to increase the credibility of the State's commitment to public policies (BACH, 2014). These autonomous entities would have a more reliable performance, because they have less possibilities of political interference (THATCHER, 2002). It is also expected that the employees would develop and place technical knowledge for the formulation and implementation of the most appropriate public policies, thus reducing information asymmetry (SWEET, THATCHER, 2002). Another reason would be to increase efficiency in responding to specific problems, which is based on the belief that experts on delegated policy issues would act more effectively than elected politicians (VAN THIEL, YESILKAGIT, 2011; ECKERT, 2017). Finally, another motive would be to avoiding to be blamed for unpopular policies (OVERMAN, 2017; ECKERT, 2017). In this case, the elected representatives would expect the autonomous agencies to take the blame for unpopular public policies, or for possible errors in the management of public policies (SWEET; THATCHER, 2002).

It is noticed that the literature has explained the causes of the delegation based on the expected results. This study, however, perceives the causes of delegation embedded in the institutional context of the political system, not only in the expectation of the elected representatives as to the results of that delegation. Regarding the expected outcomes, the hypotheses published in the literature can be summarized in only one: better performance of public policies, be it in terms of efficiency, efficacy or effectiveness.

1.1 Heterogeneity of actors

In order to deal with the institutional context of the political system, it is important to highlight the contrast between consensual and majoritarian democracies. To this end, Lijphart (1999) established a model with two dimensions, one federative-unitary and one executive-partisan. On the one hand, from the point of view of the federative-unitary dimension, a consensual system would be characterized by federative decentralization; bicameralism; constitutional rigidity; greater judicial review power; and independence of the central bank. From the executive-partisan dimension, the characteristics and a consensual system would be: balanced relation between the Executive and Legislative powers; proportionality in electoral representation; pluralism of interest groups; largest number of parties represented in parliament and with control over legislative seats(LIJPHART, 1999).

On the other hand, a majoritarian system, from the perspective of the federative-unitary dimension, would be related to unitary states; unicameral; with less rigid constitutions; less power for judicial review; and with central banks linked to the government. With regard to the executive-partisan dimension, a majoritarian political system would tend to present dominance of the Executive over the Legislative; majority electoral representation; corporatist interest

groups; bipartisanship; and a smaller group of parties with legislative seats (LIJPHART, 1999). Consensual political systems have a greater number of veto points and veto players, which tends to slow down the decision-making process, in addition to making it more costly (KNIGHT, 2001). Veto players are political actors capable of exercising veto power over certain issues. Veto points, in turn, are the institutional mechanisms used by these actors to veto certain issues. The Judiciary, for example, may constitute a veto point if it is independent and has the power to judge the constitutionality of the enacted legislation (COX, MCCUBBINS, 2001). In this case, the veto players are the entities capable of provoking the Judiciary on the issues to be vetoed. Political systems with great heterogeneity of actors tend to generate uncertainties about which groups will have decisive control in the future. That is, it is feasible to think that with a greater number of interest groups capable of influencing decision-making, there will be no hegemonic groups for long periods of time. Considering this uncertainty, it is possible to believe that the dominant groups in the present are averse to risk, choosing to design consensual institutions (counter majoritarian) to assert their interests, which includes stricter rules to amend the constitution, more detailed constitutional provisions, delegation of greater power to the constitutional court and the possibility of a greater number of actors provoking that court (KNIGHT, 2001).

Consequently, consensual political systems may be originated from contexts in which there is a great heterogeneity of political actors. In this sense, power-sharing institutions tend to be more resilient than power-concentrating institutions. Once created, pluralistic institutions do not face the same pressures for change as do the majoritarian institutions, because they encourage over time the emergence of a greater number of actors with interest in their maintenance (NEGRETTO, 2012). Therefore, it is possible to infer that widely consensual political systems with great heterogeneity of actors are part of a vicious cycle in which a constituent conjuncture with several interest groups capable of influencing decision making creates a consensual political system that, in turn, stimulates the emergence of a wide range of actors capable of vetoing decisions, which feeds back the initial circumstance. An example of this has been the expansion of the number of political parties throughout the democratic period in Brazil, as well as the expansion of actors capable of questioning the constitutionality of laws before the Federal Supreme Court (RODRIGUES, 2019).

Thus, here is the first proposition about the reasons for creating autonomous entities:

Proposition 1: Constitution-making processes permeated by heterogeneity of actors influence the creation of new veto players and veto points.

Political uncertainty was posed by Elgie (2006) as a possible cause for delegations. However, the author understands that uncertainty is inherent in democracy, and does not relate this factor to the type of political system. In fact, there will always be uncertainty about the future. However, the arguments put forward here are that there is greater uncertainty in

consensual political systems because of the heterogeneity of actors and the number of veto points. It is also worth noting that uncertainty is not the independent variable of the relation proposed in Proposition 1, but the mechanism that would explain the correlation between the heterogeneity of actors and the creation of new actors and points of veto via delegation.

1.2 Performance

With the greater number of actors and interests involved in decision making in consensual political systems, it is necessary to consider the transaction cost involved in coordinating these actors in order to reach consensus. These costs increase exponentially as the relevant actors involved expand (HOOGHE; MARKS, 2003). Therefore, there is greater difficulty in formulating and modifying public policies in consensual systems. Choices for certain institutional designs, besides taking into account the benefits that certain constitutional rules can provide, would also consider common interests in the efficient performance of these institutions (Cox & McCubbins, 2001; Negretto, 2013)

The creation of autonomous agencies in states with consensual political systems could follow two different but complementary logics. On the one hand, it would follow a cooperative logic, with the common interest that the constitutionally established policies be effective. On the other hand, there would be a logic of power, considering the political benefits to certain groups with the creation of autonomous institutions (NEGRETTO, 2013). From a cooperative point of view, autonomous entities would result in more effective public policies. From the perspective of power, some political actors would gain more from autonomy, with emphasis on particular interests or certain groups.

As reinforcement to the cooperative logic, it is necessary to highlight the deterioration of the legitimacy of the State for the realization of public policies since the end of the last century. State actors are often seen as slow and bureaucratic. Theories of governance and new public management consolidate the idea that public administration has isolated itself from the rest of society and from economic pressures, resulting in a negligent and ineffective public administration (PETERS; PIERRE, 1998). In this perspective of discrediting democratic institutions, it is possible to believe that functions that could not be delegated to the private sector would tend to be better performed by autonomous agencies, insulated from political disputes and less controlled. In addition, complex public policies would tend to be better executed by specialized bureaucracies and endowed with the necessary resources for their execution (VAN THIEL; YESILKAGIT, 2011; ECKERT, 2017).

It is possible to think that people would want to build insulated institutions with a higher level of technical capacity. Following this logic, a good level of insulation could ensure that institutions over time display the results that the people want (FEREJOHN, 2002). That is, the choice for the creation of insulated autonomous agencies would be defined based on the

expected results.

In addition, autonomous institutions can function as mechanisms of state governance. The Public Prosecutor's Office, for example, is responsible for triggering the Judiciary when public policies are not effectively enforced. The Public Defender's Office plays a similar role, but focuses on vulnerable citizens. The courts of accounts, in turn, are responsible for the control of public accounts at the various federative levels. Such institutions are necessary so that the delegation of the execution of laws does not become an abdication of the responsibility of the elected representatives.

Therefore, there is the separation of power among diverse actors with different purposes. By delegating power to actors with opposing ambitions, it is intended to encourage these actors to regulate one another, preventing them from taking advantage of the power delegated to them (COX; MCCUBBINS, 2001). In this sense, the creation of autonomous agencies would be related to a higher level of state governance and, consequently, a better performance of public policies, which leads to the following proposition:

Proposition 2: The creation of autonomous entities would seek to ensure the best performance of public policies constitutionally determined.

This hypothesis is related to the expectation of the elected representatives regarding the results of the public policies after the delegation to autonomous entities. That is, the delegation would occur due to an expectation of better performance, which may not necessarily represent an effective improvement in the performance of delegated public policies. The substitution of political criteria for the selection of leaderships by criteria based on merit occurs to a large extent when dealing with autonomous entities. It can lead to less responsiveness to political desires, hampering the correspondence between electoral results and public policies. With less consonance between policy goals and policy management, the performance will consequently be less, given that the criteria for evaluation change from the modification of political preference. Moreover, the process of administrative reform tended to remove controls over bureaucracies, which has been intensifying with the establishment of autonomous entities. This type of change weakens accountability systems, which can lead to loss of performance (PETERS; PIERRE, 2004).

2. Consequences of the creation of autonomous entities

2.1 Public Policies Modification

A political system with multiple veto points and veto players can lead to two different situations. On the one hand, fragmentation of the political system combining independent monitoring and enforcement mechanisms may be able to limit corruption. On the other hand,

many veto points can make the political system susceptible to the enrichment of actors with veto power at the expense of public resources (ROSE-ACKERMAN, 1999).

In the first point, the creation of autonomous entities can function as a mechanism of state governance, preventing deviations. Entities created with counter majority ambitions function as an independent checkpoint. Examples of this can be the Accounts Courts, the Public Prosecutors' Offices or even the Constitutional Court. According to Cox and McCubbins (2001), not only the separation of powers is sought, but the establishment of rules that guarantee important agencies are not controlled by a single interest.

Regarding the second point, the creation of autonomous agencies increases the number of actors with veto power in the decision-making process, leading to higher transaction costs in order to reach the necessary consensus for the formulation or modification of policies. This causes greater difficulty in changing public policies, but greater commitment to the policies already adopted (COX; MCCUBBINS, 2001). In fact, multiple sources of authority confer greater advantage on the status quo, since it implies that no group possesses absolute power. Unless there is agreement among veto players, nothing can be done (ROSE-ACKERMAN, 1999).

Although this rationale is intuitive, Negretto (2012) suggests that the constitutions of countries with fragmented party systems (where there are many political parties with representation in parliament), when rigid, have higher substitution rates, and when flexible, have higher amendment rates (NEGRETTO, 2012). This indicates a greater competition for the rules of the game in consensual political systems, which would tend to act contrary to the previous reasoning. That is, instead of preserving the status quo, consensual systems would lead to more frequent changes in the rules of the game.

There are, in this case, two possible opposing results. On the one hand, there would be more actors interested in maintaining the rules of the game in the policies that benefit them. On the other hand, the greater number of actors would tend to widen political competition, pressing for the constant mutation of the policies according to the group that dominates the decision making at certain moments. However, it is necessary to state that what would define such results is not only the quantity of actors but their heterogeneity. That is, political actors with conflicting interests would induce change. Political actors with similar interests would generate stability. However, the veto players are created with the resolution of separating power and purpose (COX; MCCUBBINS, 2001). That is, these actors would already be born with counter majoritarian purposes, which leads to the following proposition:

Proposition 3: A greater number of autonomous agencies leads to higher rates of constitutional amendment and public policies modification.

A caveat needs to be done. Constitutional amendments should not cover every single provision. It is in the interests of political actors to maintain the foundations of the system that

created them and allows them to survive. As Arantes and Couto (2012) put it, the process of constitutional amendment tends to be more intense in constitutions that have large amounts of public policies, as is the Brazilian case. In such cases, the government is encouraged to modify the Constitution to simply be able to implement its political agenda, which increases the costs of formulating public policies (ARANTES; COUTO, 2012).

2.2 Costs Expansion

The expansion of the number of autonomous entities also generates a situation in which, with a greater number of actors capable of asserting their interests, public policies tend to serve private interests or the interests of specific groups (ROSE-ACKERMAN, 1999; COX; MCCUBBINS, 2001). This would occur as a consequence of political bargaining among actors with veto power, since each of these actors is able to demand parallel payments (COX; MCCUBBINS, 2001), even in the form of amendments to public policies, or resources aimed at its electorate.

Added to this, it should be stressed that the most appropriate degree of autonomy does not allow bureaucrats to isolate themselves from society to the point of making decisions that are not in accordance with social demands. Contexts of great autonomy, in which the bureaucracy escapes political control, tend to generate low levels of performance (FUKUYAMA, 2013). That is, despite the feeling that the creation of autonomous agencies would produce better results, the imbalance between autonomy and control could lead to a worse performance.

It is worth emphasizing that representativeness carries significant values for a democratic society. A representative public service tends to be more open and accessible to ordinary citizens, which leads to greater equality of opportunity (MOSHER, 1968). In the way they have been created in Brazil, autonomous agencies are insulated from society and unrelated to democratic control. In this case, decision-makers are distant from the people and their direct representatives, that is, they are not elected or openly appointed by elected representatives, but are chosen on the basis of established criteria that strongly restrict the decision of the appointing authority².

The direct and active monitoring of autonomous agencies by the Legislative, besides being costly, does not generate electoral benefits. Thus, legislators opt for a more distant supervision, waiting for signs that these autonomous agencies are performing inappropriately the delegated policies. This allows politicians to pay attention to the issues that matter most to their constituents and to claim credit for problems solved (LUPIA; MCCUBBINS, 2000). In short, the control system of the Legislature over autonomous agencies requires the attention of

² An example of this can be seen in Brazilian Federal Complementary Law 80/1994, which organizes the Public Defender's Office. The head of the institution is appointed by the Chief of Executive branch among the defenders listed in a triple list formed by the vote of the other members of the career of public defender.

legislators only when there is a substantive problem (WEINGAST, 1984).

Considering that individuals tend to be opportunistic and self-interested, the bureaucracy linked to autonomous entities, far from democratic control, would tend to use the power delegated for its own benefit, which would induce physiological behavior and consequently higher maintenance costs. Managers of autonomous agencies would tend to have public policies working at a sub optimal level of efficiency, so that they can maximize their interests and minimize the risk of sanctions (TOMIC, 2018), enforcing their own agendas for institutional affirmation (ARANTES; MOREIRA, 2019). Hence, the following proposition:

Proposition 4: Autonomous entities entail higher costs for the State.

This would tend to be even more relevant in cases where the creation of autonomous entities involves a very wide delegation of power, so that elected representatives lose control over bureaucrats. In such cases, the delegation becomes abdication (LUPIA; MCCUBBINS, 2000). This inability to control allows agents to make decisions that maximize their interests, involving not only pecuniary benefits, but also benefits arising from non-pecuniary aspects, for example, luxury on the physical premises of the workplace and the agents' low level of discipline (JENSEN; MECKLING, 2008).

Conclusion

The purpose of this theoretical essay was to elaborate propositions about the reasons that lead the legislators to create autonomous entities isolated from the legislative or popular control, and the consequences of the creation of these entities. The four propositions presented do not bring an exhaustive list of possible answers to the initial questions, but they are an attempt to shed light on the current phenomenon of the creation of autonomous entities.

The answers, in the form of propositions, are based on the assumption that consensual political systems are permeated by a large number of political actors with diverse interests. With regard to the reasons why legislators create autonomous entities, it is argued that the heterogeneity of political actors involved in the constituent processes generates uncertainty as to the hegemonic political groups in the future, which encourages the creation of consensual institutions. These institutions also encourage the creation of new political actors, in a vicious cycle, increasing the number of autonomous entities. Thus, the proposition is initially based on the premise that the main cause of the creation of autonomous entities is precisely in the institutions that define the functioning of the political system: 1) Constitution-making processes permeated by heterogeneity of actors influence the creation of new veto players and veto points. As a consequence of the heterogeneity of actors and interests, there is the greater slowness in the decision-making process and the greater costs involved in forming consensus for such decisions. In addition, the deterioration of the legitimacy of the State and the need for more effective public policies make it possible to infer that the creation of autonomous entities would

seek to guarantee the best performance of the constitutionally determined public policies, Proposition 2.

Propositions 3 and 4 are related to the consequences of the creation of autonomous entities. The argument considers that the greater heterogeneity of political actors involved in decision-making leads to a greater level of conflict and higher transaction costs to achieve consensus. Thus, the propositions placed are: 3) A greater number of autonomous entities leads to higher rates of constitutional amendment and public policies modification; and 4) Autonomous entities entail higher costs for the State.

Empirical studies would be needed to test such propositions. To do so, the database of the Comparative Constitutions Project can be of great value, since it has a large amount of variables about numerous constitutions in force or already superseded. Specifically with regard to autonomous entities, this base has precious information about the existence of entities with constitutionally determined autonomy.

Some propositions could be addressed through quantitative studies. The first proposition, for example, could be confirmed by a study that correlates the number of political parties in Congress with the number of autonomous agencies. The third proposition could be tested by correlating the number of autonomous agencies with the constitutional amendment rate. In the fourth proposition, it would be interesting to correlate the data on the number of autonomous agencies and the government expenditures of each country. The second proposition, in turn, could be tested by means of qualitative analyzes of the motivations elicited by the parliamentarians in the proposals for constitutional amendment or in the sections in which these proposals were deliberated.

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Article submitted on: 2019-07-09

Resubmitted on: 2019-19-09

Accepted on: 2020-14-01.