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CLASSIFICATION OF ARGUMENTS REGARDING THE CONSTITUTIONALIZATION OF THE SCIENTIFIC POLICE IN BRAZIL

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Abstract: This article mentions the discussion regarding the autonomy of the Scientific Police in Brazil, mainly in the context of Constitutional Amendment Proposal 76/2019. The necessity for autonomy was evidenced by historical and current cases, such as the death of Vladimir Herzog. Through a detailed survey, arguments for and against the constitutionalization of the Scientific Police were presented. Among the favorable issues, the search for modernization, efficiency, standardization and the guarantee of exemption and impartiality in the production of technical evidence stands out. The opposing arguments emphasize possible harm to the integration of the police, intensification of internal conflicts, managerial challenges and financial burdens. The article was concluded by highlighting the relevance of the autonomy of the Scientific Police for strengthening criminal expertise and modernizing criminal prosecution in the country, in line with the principles of the Democratic Rule of Law, that was established by the Federal Constitution of 1988.

Keywords: Criminal Forensics; Autonomy; Constitutionalization; Impartiality; Test Production.

INTRODUCTION

The autonomy of the Scientific Police is a very recurrent theme in discussions regarding the institutionalization and professionalization of activities related to official criminal expertise in Brazil, coming to the fore, mainly in cases of repercussion, such as in the death of Vladimir Herzog (MEDEIROS, 2020), and several discussions have advanced so that cases like this do not happen again (QUEIROZ, 2020). Thus, the greatest debate regarding the modernization and better functioning of the scientific police in the various legal systems in the world has focused on the issue of autonomy (GUJARATHI, 2020; NATIONAL

RESEARCH COUNCIL USA, 2009).

In this context, for a long time now, there has been a campaign by companies and professionals involved in criminalistics to include the Scientific Police in article 144 of the Federal Constitution (for example, Constitutional Amendment Proposal 76/2019), (BRAZIL, 2019). However, we understand that there is a lack of clarity in the delimitation of arguments, which creates redundancy and reduces the rationality of the debate, resulting in rhetorical fallacies.

In this work, we surveyed the main arguments for and against this proposal in the context of the discussion regarding P.E.C. (Proposed Amendment to the Constitution) 76/2019; we suggested a classification within a theoretical scheme; and, finally, based on this, we discussed the compatibility of the statements with the constitution, the Code of Criminal Procedure, as well as with expert activity and the need to modernize and improve Public Security in the country.

METHODOLOGY

The analysis of this work is purely qualitative. To raise the arguments related to the constitutionalization of the Scientific Police, we performed a survey based on the P.E.C. (Proposed Amendment to the Constitution) 76/2019 (BRAZIL, 2019) and at the public hearing of the C.C.J. (Constitution and Justice Commission), on March 17, 2022 (TV SENADO, 2022). Among the audience participants, there were a significant number of associations that are against or in favor of the proposal, therefore, we considered it a relevant survey.

However, we considered the remark that the document is nothing more than a piece of legislation, very summarized, inserted within a political context. Thus, we looked for additional materials to support the survey, analyzing the related work to the topic of

Scientific Police autonomy in Brazil, such as a recent manifestation document from several associations, that was led by the Brazilian Association of Criminalistics (LIMA, 2020). The arguments were separated into groups based on thematic similarity.

RESULTS AND DISCUSSION

ARGUMENTS THAT ARE FAVORABLE TO CONSTITUTIONALIZATION

From the survey, we divided the arguments in favor of constitutionalization, as it follows below:

1A) Administrative-operational (specialization, efficiency and modernization):

- The inclusion has the goal to modernize the public security system, taking into consideration, the management of the Scientific Police and the working conditions of the official criminal expert;

- Standardizes the structure of the Scientific Police, as the organization and functioning models differ between federated entities, including the nomenclature (16 different names in Brazil);

- Autonomy to manage the institution's own resources can improve the departments' operating conditions, seeing that, there is a precarious situation and lack of investment in the Scientific Police, as resources are shared with other areas of the civil police;

- With more resources, a better service could be provided, that is, there would be a higher quality of material evidence in the country;

- With constitutionalization, there would be the integration of all expertise, regardless of conflicts, therefore, it integrates more than it divides;

- Expertise activity does not only occur in the pre-procedural phase (experts are not

restricted to police investigations);

- Requesters are not just police chiefs, there is service to the Public Prosecutor's Office, Military, Fire Department, Military Justice.

2A) Legal security (compatibility with what is already set out in law and social practice):

- There is a large gap in standards: there is no constitutional provision or federal law that regulates the existence of the Institutes of Criminalistics and Legal Medicine, their basic organizations and their positions within or outside the structure of the judicial police of the States and the Federal District;

- Lack of standardization of expert departments, including nomenclature;

- In eight states, the Scientific Police do not have any independence in relation to the Civil Police; in 19, they already have their own departments, and in nine of these, they do not have police status.

3A) There is a conflict between the methods of the inquisitive phase of the criminal investigation presided over by the delegate (pre-procedural) and the principles that were applied to the production of technical evidence (pre-procedural and procedural ones):

- The expert examination has a scientific nature and must be impartial and impartial, thus, it is recommended that the conductor of police investigations be removed from official expertise institutions, so that "all interference in the reports produced is neutralized" (National Plan of Public Security, 2002);

- The maintenance of the Scientific Police within the framework of the Civil Police is based on a punitive logic of the Penal Code/1944, supporting the conviction, since according to current practice, the evidence is guided by the department that substantiates

the accusation, therefore, it is closer to the complainant than to the defense, which violates the guarantee principles of the Federal Constitution/88. Therefore, there is a necessity for a “unified organic structure of expertise to serve, in a direct, equidistant and, above all, impartial way, all entities that require expert examinations”;

- The role of the Scientific Police is not restricted to producing evidence against the accused (convicting), as the civil police seeks in its investigation, but, instead, seeks to bring the truth of the facts through material evidence, even if it contradicts the rest of the investigation;

- Guiding principles of the Civil Police (discipline and hierarchy) are divergent from the needs of quality expert work (application of the scientific method in the search for truth in a crime scene or related material);

- The independence of the Scientific Police avoids suspicion of experts;

4A) Social demand and institutions linked to Justice:

- Supported by several institutions: United Nations, Amnesty International, Decree 7,037 (National Human Rights Plan), the Human Rights Commissions of the National Congress and State Legislative Assemblies, the National Secretariat for Human Rights and Non-Governmental Organizations defending Human Rights; National Public Security Plans (2002 and 2009); 1st National Public Security Conference; Recommendation Number 6 of the National Public Security Council (2012);

- The recommendations emphasize the need for an independent scientific department, with its own material and human resources, as well as the impartial and qualified production of material evidence, respecting the principle of broad defense and contradictory Human Rights.

3.2. ARGUMENTS AGAINST CONSTITUTIONALIZATION

On the other hand, the opposing arguments can be divided into:

1B) Damage to police integration

- Splitting of two activities that are inherent to the same main activity: investigative activity;

- Investigation and criminal prosecution are integrated in a single way, therefore, any division that may exist between the entities involved in the investigation only brings more difficulties: disputes over competence;

- Fragmentation of the investigative and judicial police;

- Impairment of integration, in relation to information sharing, speed of information, as well as hindering the integrated and harmonious action necessary for investigation activity;

- It would make banking and tax analysis, the investigation of money laundering throughout Brazil, as well as investigative work derived from telephone and telematic data unfeasible, as they work integrated with constant exchange between delegates, investigating agents and criminal experts.

2B) Intensification of conflicts;

- Autonomy of the delegate would contradict the autonomy of the expert/expertise;

- The independence of the Scientific Police would further intensify internal conflicts with papilloscopist experts;

- There are difficulties in integration and conciliation between papilloscopist experts, criminal experts and forensic doctors; a separate institution will not bring a solution to the problem;

- Promotion of tension between institutions and the emergence of unwanted vanities;

- P.E.C. (Proposed Amendment to the

Constitution) proposal could intensify conflicts, bringing more contradictions, worsening what already exists.

3B) Difficult managerial operationalization;

- Overlapping responsibilities requires yet another new regulation;
- Adapting each federated entity to this new item in the constitution would create enormous difficulties;
- Constitutionalization creates difficulties within the scope of the federative pact;
- It makes management even more difficult in the states and the Union.

4B) Financial burdens for the State;

- There is no palpable justification for the service provision to have an increase in spending in a portfolio that is already complicated to manage;
- Separated administrative structure would require more public spending, with increased costs for infrastructure and management, with new inspectors, new building facilities, communication centers, new vehicles, weapons;
- Difficulty in dividing budgetary resources.

5B) Worsening of service

- Constitutionalization would weaken the Scientific Police itself;
- More spending, in a context of limited resources;
- There would be a lack of minimum resources to operate regularly.

5B) Dysfunctional corporatism;

- The proposal has the following character: corporate, associative, aiming at a power structure;
- Criminal investigation is not exclusive to one position or another;
- It would be better to defend the

valorization and strengthening of the judicial police, and also of criminal activity, as an integral and inherent part of the judicial police institutions;

- Such legislative movements are contrary to the trend that should occur: unification, including discussions about a single career;
- It would not comply with the dictates of autonomy;
- Problems in the Brazilian police structure: each position may request the creation of its own police force;
- Criminal Police had another justification: in most states, they were in another department (penitentiary administration), which is not the case with experts);
- There is no public interest in modifying the model.

6B) Formal (legal) and practical redundancy;

- If it is already in infra-constitutional legislation, article 2 of Law 12,030/2009, for example, provides for functional and scientific technical autonomy of expert activities, why to constitutionalize it?
- Legally speaking, the departments are already autonomous, considering constitutional dictates and the provisions of laws that regulate criminal prosecution;
- Autonomy already exists and happens in a very harmonized way;
- Expertises are already autonomous in the States;
- Expertise departments are already led by the departments 's own professionals;
- It is working very well, for example, the Federal Police does excellent work, with 74% of investigations resolved, without any separation from the Scientific Police and respecting the autonomy of the experts.

8B) Criminalistics is not independent

- Expert activity, criminalistics activity,

does not subsist on its own. There is absolutely related, inherent part of the (activity of) criminal investigation. Expert does not have the capacity to act, he needs to be required by the judicial police to carry out his work;

- Not every investigation needs expertise;

COMMENTS REGARDING THE ARGUMENTS

Considering that the various mobilizations related to the P.E.C. (Proposed Amendment to the Constitution) are ongoing at this very moment and this work is part of this context. Therefore, our survey is limited, preliminary, and is still under development, but it can serve as a tool for analyzing the progress of ongoing discussions, considering that the fight for constitutionalization is quite old and its arguments are already quite consolidated.

We considered that the classification covers a considerable part of the arguments related to the topic and can support the movement around the proposition, seeing that, it allows easy visualization of how each argument may be related. In this sense, we discussed a set of observations that can strengthen or weaken the propositions, and we indicated how the proposal for the constitutionalization of the Scientific Police is supported.

Taking into consideration the arguments that were listed, it was noted that the first justifications in favor of constitutionalization are directed to issues relevant to improvements in management and administration (topic 1A), which would bring improvements to the functioning of the institution, with more resources, more specialization, standardization and improvement in serving different requesting entities, as well as a possible reduction of conflicts within the institution (the opposite of what critics argue). Thus, constitutionalization could guarantee that the expertise itself is responsible for managing its human and financial resources.

The justification is plausible and can be enriched by empirical studies of police departments that have become independent, such as firefighters and the criminal police.

In relation to legal security (2A), the legal gap and the lack of standardization in the states are emphasized, as well as the vulnerable situations of experts who go to the scene without police power in states with criminal expertise separate from the civil police. Although, there is validity in this type of argument, it is necessary to go deeper and detail the ways in which legal security is affected by constitutionalization and how such security would bring better services to society.

The conflicts between the methods of the inquisitorial phase of criminal prosecution and the production of technical evidence derived from the expert examination carried out by the criminal expert (3A) suggest that constitutionalization proposes the strengthening of the Democratic Rule of Law, as it makes the criminal expert more exempt, as it would not be within the department that conducts the production of evidence for the prosecution, therefore, it would be equidistant to the parties, and consequently, the expert evidence would be more impartial. Related to this increase in the scope of justice that guarantees fundamental rights, in accordance with our Constitution, which has the goal to guarantee it, several international and national departments reinforce the necessity for a strengthened Scientific Police independent of the accusing or investigating department (4A).

The set of arguments is significant, but there is little emphasis on propositions related to the scientific practice of criminal expertise department, that is, assertions that indicate how specialization, derived from independence, would affect the improvement of scientific production by criminal experts. We evaluated that this kind of expert work

needs to be addressed more prominently. This fact may be another indication of the institution's lack of specialization (1A).

On the other hand, there was a great variety of arguments against constitutionalization, some of a financial nature, others of a practical nature, in relation to the functioning of the civil police, mainly in relation to inquiries presided over by police chiefs.

In the public hearing we observed, the damage to the integration of the police (1B) was mentioned by all opponents of P.E.C. (Proposed Amendment to the Constitution) 76/2019. Defenders argued that constitutionalization would not affect integration, nor would there be problems related to competence, as it would formalize the autonomy of the scientific police, with improved management and administration of resources, maintaining the same competences provided for by the CPP (Criminal Procedure Code).

Critics highlighted that another supposed negative impact of constitutionalization on the functioning of the civil police would be to increase conflict between positions (2B), as well as between the institutions themselves. The delegates highlighted the conflicts between papilloscopist experts, criminal experts and coroners. Proponents of the proposal point out precisely the opposite: the department's greater autonomy would unify and bring fewer conflicts.

To oppose constitutionalization, difficulties were also brought to the State, in relation to the implementation of the proposal: they talk about managerial difficulties (3B) and financial costs (4B). Typically, this argument was associated with the idea that constitutionalization does not bring any pertinent benefit to society. Such practical questions are quite relevant, and must be considered in relation to other practical arguments brought by defenders. However, it

must be emphasized that if it is discovered that, in fact, the organization most compatible with the principles of the constitution to guarantee the dignity of the human person, the right to adversarial proceedings and broad defense would be with the expansion of the autonomy and independence of the department experts, this objective must not be stopped for purely practical reasons. According to our guarantor Federal Constitution, the difficulty in guaranteeing a right is not a justification for the State to abstain, mainly when it comes to Fundamental Rights.

The arguments regarding the supposed worsening of the service (5B) are connected to the previous one, indicating a low resource limit, but the argument seems fallacious, because even if the resources were not increased and were simply divided as they are nowadays, they should be transferred, if we consider that the resources would not be sufficient for the Scientific Police to guarantee its proper functioning independently, nor is it currently the case (nothing would change at all).

The accusation that the constitutionalization agenda is limited to pure corporatism of the Scientific Police (6B) avoids the merits of the issue and appears rhetorical. Even if such an accusation were sustained, the corporatism inherent to a given career would not invalidate a legitimate claim.

Furthermore, if the arguments were purely corporatist, it would be difficult for there to be so many defenses, coming from different sources, which would be understood as purely rhetorical. Such criticism needs to be considered in relation to the merit of the proposal: how much of the current legislation meets what is desired with constitutionalization?

Apparently, according to the arguments that were listed here, there are still gaps, so that the infraconstitutional legislation has

not been sufficient: it is impossible to create any other department with a public security character other than those already contained in article 144, such as a scientific police disconnected from the civil police, as stated by the S.T.F. (Federal Court of Justice) plenary in a discussion regarding the A.D.I. (Direct Unconstitutionality Action) number: 2575.

Finally, the criticism that Criminalistics is not independent (8B) suggests that the activity is restricted purely to the scope of criminal investigation and ignores its role in the process itself. In fact, it is noted that the criticisms listed touch on or avoid issues related to the process, therefore, there is a great deal of disagreement, ignorance or invisibility regarding the participation of expert evidence (and the criminal expert) during the procedural phase. Furthermore, it contradicts all legal definitions, including the Constitution itself, seeing that, technical evidence must be independent in its production and its value as evidence is discussed until the end of the process, under the protection of broad defense and adversarial proceedings. Such disdain reiterates technical-scientific expertise as a “pertinent activity” of the police investigation instead of recognizing it as autonomous in its own right, that is, as the production of “autonomous” and “impartial” reports.

Most of the arguments can be analyzed empirically by comparing the functioning between the most independent scientific police and those most linked to the civil police. Therefore, many parameters related to management, effectiveness, efficiency, integration, costs, conflicts, among others, can be chosen. In this sense, the improvements and worsening after the separation of the scientific police could be listed to clarify the discussion.

Considering the public hearing, all favorable arguments came from criminal experts representing their class associations,

while opposing arguments came from representatives of delegate institutions or the civil police as a whole. The organization of papilloscopist experts (National Federation of Official Identification Experts), in turn, they suggested rejecting the P.E.C. (Proposed Amendment to the Constitution), seeing that, it would not consider papilloscopist experts as official experts. After stating this, the corporatist component of the discussion is blatant. The need for a deeper legal analysis of the arguments for greater legal justification in relation to the opposing and pro positions seems evident. Thus, it would be beneficial to deepen the arguments in order to connect them not only to our practical reality, but also to our legal system, so that discussions are more rational and less influenced by corporate provisions.

CONCLUSION

In view of the Federal Constitution/88, with the consolidation of the Democratic State of Law, the independence of the Scientific Police sounds like an advance, considering the principle of contradictory and broad defense, as the production of technical evidence by the expert department would be equidistant to both parties, without closer proximity to the accusation, thus, closer to exemption and tending towards impartiality. This is the best-known and perhaps the most powerful argument for decoupling the scientific police from the civil police. (3A), (MEDEIROS, 2020).

We reiterated, therefore, that the inclusion of the Scientific Police in article 144 would be an advance in the autonomy of the institution, convenient and opportune for strengthening criminal expertise, and it could bring a better effectiveness and efficiency to police activity in public security in the country, together with other issues regarding the modernization of criminal prosecution in Brazil (MEDEIROS,

2020).

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