

# THE QUEST FOR DYNAMISM IN CONTEMPORARY LAW: MULTIPLE DIMENSIONS OF LEGAL CERTAINTY

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**Abstract:** The legal principles' evolution towards a post-positivist conception has led to the acknowledgement of their normative power. Although such movement has made legal systems better suited in reaching decisions adapted to contemporary societies, it has casted uncertainty upon allowing the vague use of abstract expressions, which the concrete meaning is difficult to understand. In this sense, it is necessary that the possible meanings of each legal principle be narrowed down and that a proper method be coined for weighting legal principles that eventually collide. The scope of this academic paper is to address legal certainty in its multiple dimensions, in the attempt to unveil its essential meanings.

**Keywords:** Postpositivism - Legal certainty - Weighting of legal principles

## 1. INTRODUCTION

The acknowledgment of the normative content of legal principles represented a remarkable progress<sup>1</sup>. For being little rigid, legal principles

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<sup>1</sup> "The appreciation of legal principles, its explicit or implicit incorporation by the constitutional texts, and its normative power as admitted by the legal systems are part of such environment of rapprochement between Law and ethics. [...] Following the track to the core of legal systems, legal principles had to conquer the status of legal provisions, overcoming the belief that they would have a purely axiological, ethical, dimension – deprived from legal effectiveness or direct and immediate applicability." BARROSO, Luís Roberto. *O Começo da História - A Nova Interpretação Constitucional e o Papel dos Princípios no Direito Brasileiro*. Revista da

are well fit to accommodate the contemporary dynamism, allowing the molding of reality to the law.

Indeed, it is through a legal system which prescriptions rely, not only on objective requirements (rules), but also on legal principles, that more balanced decisions can be reached.<sup>2</sup>

As per Alexy, legal principles are optimization commands<sup>3</sup>. They admit a progressive scale of compliance, in accordance to each case. In other words, legal principles allow that a legal provision be complied with at the largest extent possible within the constrictions of legal and factual circumstances.<sup>4</sup>

Different from antagonist rules which result on the effectiveness of one and on the full detriment of the other rule, Alexy sustains that the adherence to one legal principle does not lead to the preclusion of another colliding legal principle.<sup>5</sup>

In this sense, the elucidation of the meaning of each legal principle is the work of a new hermeneutic, which task remains challenging: the high degree of abstraction often leads to an overly indeterminate application, contributing to a pernicious use. Not rarely, interpreters who wish to achieve a preconceived solution make use of different principles without drawing a clear content, but only to legitimate a decision reached beforehand.<sup>6</sup>

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EMERJ, v. 6, n. 23, 2003. p. 32.

2 “As most authors sustain, legal systems are composed by legal provisions divided in two types: rules and legal principles. The latter, as traditionally understood, constitute the core provisions of legal systems, radiating its effects and serving as a beacon for the interpretation and integration of the entire society. Legal principles are much broader and more abstract than rules, and for that they have a more indeterminate application range. [...] they tend to depict more properly the legal and political values in a given society.” ALEXY, Robert. *Teoria dos Direitos Fundamentais*. Trad. A. DA SILVA, Virgilio. São Paulo: Malheiros. p. 50.

3 “Legal principles are provisions that enforce something to be realized to the greatest extent possible within the legal and factual possibilities. Legal principles are, therefore, optimization commands, which are characterized for being complied with to varying degrees and for the fact that the proper measure of their satisfaction relies not only on the factual possibilities, but also on the legal possibilities.” *Idem*. p. 86.

4 *Idem*. pp. 103 and 104.

5 DWORKIN, Ronald. *Levando os Direitos a Sério*. Trad. BOEIRA, N. São Paulo: Martins Fontes. p. 72.

6 About the difficulty on defining the content of certain legal principles: “Human’s dignity became, during the last decades, one of the large ethical consensus in the western world, as consubstantiated in countless international documents, constitutions, laws and case law. In an abstract plan, few ideas have matched it in seducing spirits and earning unanimous adhesion. Such fact, however, does not minimize – rather aggravates – the difficulties in its use as a relevant instrument for legal interpretation. Frequently, it operates as a mirror, in which each one projects its own image of dignity. Not by accident, all around the world, it has been invoked for both sides of disputes, in issues such as pregnancy interruption, euthanasia, assisted suicide,

When carelessly employed or deprived from a proper method, legal principles denature. They cease to function as a mean for achieving justice and become a source of so many evils, including the inability to subject judicial decisions to control and the spreading of legal uncertainty.

The very absence of a strict hierarchy - since any legal principle may give way to another, depending on the circumstances - serves at the implementation of justice, so that all legal principles are at hand and available to be made use of.

Consequently, it is not enough that legal principles have normative power. In fact, it is mandatory that the concrete dimension of each legal principle (i.e. its possible meanings) is identifiable and recognizable. Accordingly, interpreters must clarify what human dignity, freedom, legal certainty and other legal principles that may collide do mean and why one should have greater weight in relation to others in a case.

On that context, the Brazilian legal system has evolved. Now, it enforces that the interpreter must go beyond appointing legal principles as the basis of a ruling. For example, the Civil Procedure Code, enacted on 2015, requires not only the identification of the applicable legal principles but also its concrete meaning on each case and in accordance to an empirical density (weighting in relation to other principles that are applicable on that same case).<sup>7</sup> Hence the importance of weighting<sup>8</sup> as a method - or as a principle of legitimizing other principles. It is due to the weighting, that one can draw logical reasoning and assign different

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same-sex marriage, hate speech, holocaust denial, cloning, genetic engineer, post mortem artificial insemination, sex-change surgery, prostitution, drugs decriminalization, shoot-down of kidnapped planes, protection against auto-incrimination, death sentence, life sentence, use of lie detectors, hunger strikes, social rights enforceability. It is a long list". BARROSO, Luís Roberto. *A Dignidade da Pessoa Humana no Direito Constitucional Contemporâneo: Natureza Jurídica, Conteúdos Mínimos e Critérios de Aplicação*. Provisory version for public debate. Mimeographed, December 2010. p. 321.

7 "The modern constitutional interpretation involves choices of its interpreter, as well as the subjective integration of principles, open standards and undetermined concepts. A considerable part of scientific production nowadays have been dedicated, precisely, to prevent judicial discretion, by delimiting parameters for values and interests weighting and by the duty to provide sound demonstration of the rationality and the correctness of its options". BARROSO, Luís Roberto. *O Começo da História - A Nova Interpretação Constitucional e o Papel dos Princípios no Direito Brasileiro*. Revista da EMERJ, v. 6, No. 23, 2003. pp. 29 and 30.

8 Concerning the limits to the application of conflict of laws traditional methods to legal principles, Sarmiento asserts: "[...] it can be observed that the chronological, specialization and hierarchy criteria have limited use for overcoming tensions between constitutional principles. Such questions demand the use of a more dynamic and flexible method, which can handle infinite fact variables that the traditional method fail to encompass." SARMENTO. *Os Princípios Constitucionais e a Ponderação de Bens*. In Melo, Celso de Albuquerque e TORRES, Ricardo Lobo. *Teoria dos Direitos Fundamentais*. Rio de Janeiro: Renovar, 2 ed. p. 49.

levels of relevance to each colliding principle.<sup>9</sup>

The conception that the righteous man must be guided by a sense of proportion is not new at all. It goes back as much as the Greeks. In the essay *Nicomachean Ethics*, dedicated to his son fallen in battle, Aristotle proposed equity as the corrective measure of justice. Mindful of the inability of an abstract command to sufficiently solve all conflicts, Aristotle emphasized the importance that each case be resolved primarily by principles of justice.<sup>10</sup> However, such encumbrance would not be solely attributed to judges.

This constant and widespread fairness manifested by a personal disposition of selflessness towards the others and to demand less than what one would be reserved by the law is the cornerstone of a fair society. Fairness would be far more than a merely formal justice, it would function as a corrective measure in order to restore the balance destabilized by an unfair act. That is why - before perishing in a distorted sense of its original meaning - jurisprudence was used to designate a cautious sense of proportion by which all should be guided.<sup>11</sup>

Rawls, in the introductory chapter of his *Theory of Justice*, presents justice as fairness and takes up the Aristotelian concept of distributive justice, which is articulated between self- investiture of

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9 "Legal principles, on its turn, contain facts that demand a higher degree of abstraction, but do not specify the conduct to be followed. They are applied to a broad group, sometimes undetermined, of situations. In a democratic system, principles often reach a dialectical tension, pointing to different directions. For such reasons, its application rely on weighting: in view of the case, the interpreter will determine the weight that each principle has in the case, by means of reciprocal concessions, and preserving the most of each principle to the extent of factual possibilities. Its application, therefore, will not be all or nothing, but measured in accordance with the circumstances represented by other legal provisions or facts." BARROSO, Luís Roberto. *O Começo da História - A Nova Interpretação Constitucional e o Papel dos Princípios no Direito Brasileiro*. Revista da EMERJ, v. 6, n. 23, 2003. p. 34.

10 According to Aristotle, even if, sometimes, the formal and material justice coincide, remitting to the legal text as the best solution; not rarely, legal principles must be weighted and waive, somehow, the unjust rule, in a way that material justice can be reached. The need to apply equity would be triggered by the fact that laws provide a generic content, referring indistinctly to all, with no differentiation of potential nuances and fact variables. However, there are cases in which should the law be applied - law being understood as a normative command - injustice would be caused. It is to overcome the limitations of the abstract act, which is unable to exhaust the details of all possible situations and anticipate future situations, that equity must be used. The legal justice is impervious, while the reality is, by essence, mutant. For both situations, equity must be used, which means account for the legislator's intention, and not the law literally. It is the qualified justice that, proportional and coherent with the case, is defined as equity. Equity would then avers as the corrective measure when formal justice engines injustice by means of the generality of its normative precepts." ARISTÓTELES. *Ética A Nicômaco*. pp. 124 to 125.

11 REALE, Miguel. *Lições Preliminares de Direito*. 26. ed. São Paulo: Saraiva, 2002. p. 62.

rights and obligations by individuals at an original state of ignorance (veil of ignorance).

*One feature of justice as fairness is to think of the parties in the initial situation as rational and mutually disinterested. This does not mean that the parties are egoists, that is, individuals with only certain kinds of interests, say in wealth, prestige, and domination. But they are conceived as not taking an interest in one another's interests. [...] The initial situation must be characterized by stipulations that are widely accepted. [...] I have said that the original position is the appropriate initial status quo which insures that the fundamental agreements reached in it are fair. This fact yields the name 'justice as fairness'. It is clear, then, that I want to say that one conception of justice is more reasonable than another, or justifiable with respect to it, if rational persons in the initial situation would choose its principles over those of the other for the role of justice. Conceptions of justice are to be ranked by their acceptability to persons so circumstanced. [...] It seems reasonable to suppose that the parties in the original position are equal. [...] Obviously the purpose of these conditions is to represent equality between human beings as moral persons, as creatures having a conception of their good and capable of a sense of justice. The basis of equality is taken to be similarly in these two respects. [...] each man is presumed to have the ability to understand and to act upon whatever principles are adopted. Together with the veil of ignorance, these conditions define the principles of justice as those which rational persons concerned to advance their interests would consent to as equals when none are known to be advantaged or disadvantaged by social and natural contingencies.<sup>12</sup>*

In short, Rawls claims a strictly hypothetical agreement, according to which the people - at their corresponding original position - cannot foresee the situation that they would enjoy in future society.<sup>13</sup>

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12 RAWLS, John. *Uma Teoria da Justiça*. Trad. SIMÕES, Jussara e DE VITA, ALVARO. São Paulo: Martins Fontes, 3 ed, 2010. pp. 12 to 15.

13 TORRES, Ricardo Lobo. *Tratado de Direito Constitucional Financeiro e Tributário*, Vol. II

*Kelsen incisively criticizes the work of Aristotle, but not before making a direct parallel between the axiological conception of legal principles (values) and the moral application of the mesotes as an attempt to harmonize conflicting virtues. As appointed by Kelsen, the mesotes is proposed as the result of a quasi- mathematical operation, the objective mid-term.<sup>14</sup>*

*As the standards of a given moral system are often in conflict with each other; in order to act morally, it is necessary to restrict the sphere of validity of the rules. Being morally right would, thus, correspond to act in the middle between two vices. That means that the only possible righteous conduct is the one that – at the same time – abides to one conflicting rule, without, however, breaching the other. The real problem is to demonstrate how that is possible. For example, how one man's action can conform simultaneously to the standards of courage and to the standards of prudence. At this point the doctrine of mesotes offers no answer nor to any question relating to moral assessment.<sup>15</sup>*

Alexy's weighting, as a method, escapes that chimerical aim. Unlike the mesotes, the weighting does not seek to force a middle line between two mobile and inaccurate extremes. On the contrary, it represents the very recognition of the subjectivity of legal principles and its inherent fluidity that make so complex any attempt to attribute concrete relevance whenever there are more than one legal principle applicable.

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- Valores e Princípios Constitucionais Tributários. São Paulo: Renovar, 2005. p. 137.

14 "Aristotle intends to present his method of determining the moral good or virtue as an almost mathematical or geometric formula, as shown when he says that although it is possible to find out what is morally good or a virtue, it is not easy. For him, being good it is a tough task, because finding out the midpoint of anything is difficult. For example, not everyone is able to find the center of a circle, only those who know geometry. Determining what is the moral act or the good has, in principle, the same problem as to determine the midpoint of a straight line or center of a circle. [ ... ] The quantification of moral values; the tripartite scheme divided in much, medium and little; the essential presupposition of a mathematical or geometric method to determine the moral good are, however, a fallacy. In the field of morals and virtues, there are no measurable amounts as in the field of reality as an object of natural science". KELSEN, Hans. *O Que É Justiça?* 3. ed. São Paulo: Martins Fontes, 2010. pp. 117 to 121.

15 Idem. p. 121.

Sarmiento claims that the starting point of consideration is to check whether the case effectively falls under more than one legal principle's sphere of influence. If it is found that the case is actually tutored by multiple legal principles, the interpreter will go on to the next stage, the weighting itself, which is based on the verification of a cost-benefit ratio. Such proportion will be met through an analysis of suitability of the principles' concrete meaning directed towards the preservation of conflicting provisions, to the extent such preservation is possible.<sup>16</sup>

So as to reach the desired rationality, the method for the application of legal principles bolsters on a logical path that must be retraced and reproduced, running along the following considerations: (i) adequacy – the identification of the measures that enable a legal principle to achieve the legislator's goal on a particular case; (ii) necessity - the verification of the various legal principles suitable to the achievement of the envisioned purposes and the choosing of the least restrictive one; and (iii) proportionality - the balance between the result produced by granting more weight to one legal principle and the burden derived therefrom<sup>17</sup>.

In summary, a ruling achieved by the weighting method should be, at the same time, the least burdensome one, inasmuch as suitable for its intended purposes and capable of causing more benefits than disadvantages.<sup>18</sup>

As briefly presented, the analysis of a legal principle goes beyond the principle itself. It is only by the empirical assessment of the

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16 SARMENTO. Os Princípios Constitucionais e a Ponderação de Bens. In Melo, Celso de Albuquerque e TORRES, Ricardo Lobo. Teoria dos Direitos Fundamentais. Rio de Janeiro: Renovar, 2 ed. p. 57.

17 *Idem*. p. 58.

18 Similarly, Naranjo De La Cruz states that: "Adequacy consists in measuring whether the chosen means are suitable and necessary to obtain the envisaged result. Such measure is instrumental and not evaluative. It is worth to say, the adequacy is, actually, an examination of the formal suitability of the restrictive measure. Need or enforceability constitutes, according to Alexy, the so called 'postulado do meio mais benigno', comprehending an analysis of the means-end relation, under the evaluative prism. It imposes the adoption of a less burdensome position among the existing options, preferably an option that will not reduce the efficiency of the fundamental right and, when lacking such option, the one that will impose a softer reductive impact. Finally, proportionality *stricto sensu*, is a sub-principle that presupposes the conjunction of the two previous sub-principles, once the restrictive measure must, simultaneously, be suitable to the ends it seeks and be the less burdensome to achieve such ends in order to shape into the proportionality principle. From such sub-principle, it can also be extracted that the burden caused by the restrictive option shall be minor when compared to the benefit provided by its safeguard concerning other rights constitutionally protected. To that sense, the principle of proportionality *stricto sensu* requires that the sacrifice of one individual right is reasonable when related to the end sought." NARANJO DE LA CRUZ, Rafael. Los límites de los derechos fundamentales. Madri: Centro de Estudios Constitucionales, 2000. p. 36.



colliding principles, that one may truly reach a balanced and stabilizing solution to the conflict, therefore avoiding to promote an even greater imbalance than the one that it aims to correct. However, before seeking to resolve conflicts among legal principles, it is paramount to reduce their polysemy, systematizing them and delimiting the possible meanings that each legal principle may have.

## **2. THE PRINCIPLE OF LEGAL CERTAINTY**

Humberto Avila presents the multiple dimensions of legal certainty, such as: (i) a defining element of law; (ii) a fact; (iii) a value; and (iv) a legal principle. The author also points out that these different dimensions are not mutually exclusive, but cumulative.<sup>19</sup>

In the first sense, legal certainty would be an intrinsic element of the law, intended to suppress casuistry. On that regard, one could not even conceive a legal system deprived from minimum legal certainty: “[ ... ] legal certainty is a quality, without which there could be no legal system, neither good nor bad, nor of any kind”.<sup>20</sup> Legal certainty is, thus, a structural element of legal systems.

In fact, the deterrent capacity of the law to prohibit intolerable conducts would be little worth if there were no legal stability nor a projection that the legal framework would continue in time.<sup>21</sup> As a result, should a legal system change so rapidly and deeply – to the extent its agents become unable to anticipate if some action or omission would remain restrained on a near future - the law would turn into a disruptive element, rather than a social link.

Raz faces that dilemma in a didactic way. For him, the characterization of legal certainty as a defining element of legal systems may be compared to a knife. In his metaphor, Raz argues that a knife is defined as such (a type of sharp instrument), for its ability to cut. Consequently, to be sharp is inherent for the purpose of a good knife, inasmuch as to be minimally sharp is inherent to any knife at all.<sup>22</sup> Similarly, it is the essence of legal provisions to frame human behavior and to delimit conducts. As a result, a legal system will be better organized and more able to fulfill its purpose (namely, social stabilization), the more clear and stable its provisions are.

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<sup>19</sup> ÁVILA, Humberto. *Segurança Jurídica – Entre Permanência, Mudança e Realização no Direito Tributário*. São Paulo: Malheiros, 2011.

<sup>20</sup> *Idem*. p.107.

<sup>21</sup> Among others, Avila makes reference to Rawls, Bobbio, Coing and Sichés. ÁVILA, Humberto *Segurança Jurídica – Entre Permanência, Mudança e Realização no Direito Tributário*. São Paulo: Malheiros, 2011.

<sup>22</sup> RAZ, Joseph. *The Authority of Law: Essays on Law and Morality*. Oxford: Oxford University Press. 2nd Ed. pp. 225 and 226.



This structural perspective<sup>23</sup> inexorably leads to the second dimension of legal certainty, which corresponds to an objective reality. It means the possibility that one anticipates the legal consequences of their conduct and, before acting, evaluate it in light of the law.

The third dimension, legal certainty as a value, is very close to the previous ones, because it denotes a state of desirable things, which gives stability to the social fabric. In that sense, legal certainty, together with justice and social peace, inspires the legal system as a whole. Again, more than a value consubstantiated in express legal provisions, legal certainty can be seen as a concept inherent to the legal system.

In search of an ideal stability, Jerome Frank points a mythical quality, due to the childish desire of mankind to replace the lost paternal authority<sup>24</sup> by an institution that awakens a similar nurturing and assuring feeling.<sup>25</sup>

Avila also maintains that legal certainty may be considered as an aspiration to a paroxysm of legal stability or full predictability. For obvious reasons, this ideal should not function as an asphyxiating metaphor, otherwise the law would be incapable of evolving and shaping up to the ever-changing reality. In a different sense, this archetype of stability should be interpreted as a command of immutability for certain behaviors, which are utterly irreconcilable with a particular legal system. In other words, an insurmountable legislative ban regarding a number of subjects.<sup>26</sup>

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23 In English, authors tend to adopt more than one expression to refer to *segurança jurídica*. For a more precise comparison with similar concepts of the Brazilian legal system, the author has opted to use on this academic paper the expression legal certainty. There are, however, English and North-American authors that make use of the expression rule of law. In fact, the large frequency that rule of law is used as a substitute of legal certainty manifests a structuring conception that is hold dear to Anglo-Saxon scholars: “[...] in connection with protection of fundamental constitutional rights, the rule of law stands on behalf of the citizens against the State, to the extent that constitutional law can be invoked by citizens against laws and policies of the State”. ROSENFELD, Michael. *The Rule of Law, and the Legitimacy of Constitutional Democracy*. Cardozo Law School Jacob/ Burns Institute for Advanced Legal Studies, March 2001, Working Paper Series No. 36. p. 5.

24 That is evidently a psychoanalytic interpretation. Freud used to defend that institutions such as religion and the State itself would play the role of a substitute to the mythological father killed by mankind, in a substitutive relation that Jerome Frank extends to the law itself and, more specifically, to the rule of law. FREUD, Sigmund. Trad. DE SOUZA, Paulo César. *Totem e Tabu*. São Paulo: Ed Schwarcz, 2013.

25 “Why do men seek for an unachievable certainty in Law? Because, as we say, they have still not abandoned the childish desire of a father with authority, and unconsciously have tried to find in Law the substitute with those attributes of strictness, certainty, infallibility assigned to fathers during childhood.” ÁVILA, Humberto. *Segurança Jurídica – Entre Permanência, Mudança e Realização no Direito Tributário*. São Paulo: Malheiros, 2011. p. 116.

26 Idem. p. 117.

Thus, Ávila reconciles the thoughts of Jerome Frank and Bobbio<sup>27</sup>, the latter an advocate that legal certainty be interpreted as a mean to relative certainty, capable of undergoing changes, provided that such changes are soft and abide to legitimate expectations.

Following this axiological prism, one could say that legal certainty is a value in itself, so that - regardless of the normative content of a given legal system - the more it is predictable and stable, the less it would be abusive. Opposite to those who argue that legal certainty may induce inequities, once it crystalizes unfair provisions, Avila claims that legal certainty would always prevent greater injustices, which would be the offshoot of casuistry.<sup>28</sup> One could even say that, if there were two legal systems with identical arbitrary normative content, the one system endowed with greater stability would be intrinsically less abusive than the other.<sup>29</sup>

Raz also argues that the stabilizing function of legal certainty - although it may not be sufficient to ensure proper justice - asserts a minimum frame of integration to social relationships, avoiding erratic behaviors.<sup>30</sup> Legal certainty is, therefore, one of the most relevant elements that hold the social fabric together. Ultimately, a legal system deprived from minimum legal certainty would fail to allow its agents to consistently articulate themselves.<sup>31</sup>

Legal certainty also plays a role as instrumental value, allowing the exercise of other rights. Once more, legal certainty remits to its first dimension, as structural element and as a mean to the achievement of justice. Surely, without knowledge of the law, individuals would be incapable of planning and designing the future, having their margin of action decisively constricted.<sup>32</sup> Therefore, in addition to an end in itself,

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27 *Idem*. p. 117.

28 *Idem*. p. 176.

29 *Idem*. p. 119.

30 "A government subjected to the rule of law is prevented from changing the law retroactively or abruptly or secretly or whenever it suits its purposes. [...] The law can help to secure such fixed points of reference in two ways: (1) by stabilizing social relationships which but for the law may disintegrate or develop in erratic and unpredictable ways; (2) by a policy of self-restraint designed to make the law itself a stable and safe basis for individual planning." RAZ, Joseph. *The Authority of Law: Essays on Law and Morality*. Oxford: Oxford University Press. 2nd Ed. pp. 219 and 220.

31 "[...] in heterogeneous societies with various competing conceptions of the good, constitutional democracy and adherence to the rule of law may well be indispensable for purposes of achieving political cohesion with a minimum of oppression." ROSENFELD, Michael. *The Rule of Law, and the Legitimacy of Constitutional Democracy*. Cardozo Law School Jacob/ Burns Institute for Advanced Legal Studies, March 2001, Working Paper Series No. 36. p. 7.

32 Raz claims that legal certainty (or, as he prefers, rule of law) is just one of the virtues that a legal system must possess, and such virtue should not be confused with democracy, equality or human dignity. This statement, despite seeming trivial, is important because the expression

legal certainty is embodied as a tool for achieving other virtues, being construed as a scope-value.<sup>33</sup>

In short, the axiological dimension of legal certainty would encompass the following characteristics: (i) a guiding legal principle, once it constrains and/or directs the interpretation of other legal principles; and (ii) an instrumental legal principle, setting up the law as a shaping tool of reality.

Moving forward, it is relevant to break down the legal certainty under a positivist light, according to which it constitutes a normative prescription designed to regulate actions, framing human behavior as permitted, prohibited or mandatory. As a result, legal certainty aims to lead society towards a state of reliability, based on the calculability of behavior and its legal consequences. As such, legal certainty depends on a chain of elements: it requires conditions to make the law known and assurances that the legal provisions are stable, so as to allow individuals to effectively anticipate the legal consequences of their conducts.<sup>34</sup>

Richard Fallon Jr also addresses these forming elements and goes even further, by claiming that it is inherent to the legal certainty – or as he prefers, the rule of law – a legal supremacy, limiting not only individuals but also the empowered authorities.

*[...] leading modern accounts generally emphasize five elements that constitute the Rule of Law. To the extent these elements exist, the Rule of Law is realized.*

*(1) The first element is the capacity of legal rules, standards, or principles to guide people in the conduct of their affairs. People must be able to understand the law and comply with it.*

*(2) The second element of the Rule of Law is efficacy. The law should actually guide people, at least for*

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rule of law is interchangeably used in English to define effectiveness of the law (a circumstance in which there are effective laws to which the people abide) and not only legal certainty. Raz also claims that legal certainty should be understood as a negative value, comparable to health, which can be identified only as the absence of disease. Similarly, we should consider legal certainty by the absence of phenomena such as arbitrary and abrupt changes, disregard of vested rights, among other tangible manifestations (or symptoms, to stay true to the same metaphor). RAZ, Joseph. *The Authority of Law: Essays on Law and Morality*. Oxford: Oxford University Press. 2nd Ed. pp. 211 to 224.

33 ÁVILA, Humberto. *Segurança Jurídica – Entre Permanência, Mudança e Realização no Direito Tributário*. São Paulo: Malheiros, 2011. p. 178.

34 Idem. p. 125.

*the most part. In Joseph Raz's phrase people should be ruled by law and obey it.*

*(3) The third element is stability. The law should be reasonably stable, in order to facilitate planning and coordinated action over time.*

*(4) The fourth element of the Rule of Law is the supremacy of legal authority. The law should rule officials, including judges, as well as ordinary citizens.*

*(5) The final element involves instrumentalities of impartial justice. Courts should be available to enforce the law and should employ fair procedure.<sup>35</sup>*

Raz's view is similar. To him, legal certainty should be understood, cumulatively, as: (i) individuals being governed by the law and obeying it; and (ii) the law being able to guide people.

For these purposes: (a) legal provisions should be relatively stable, clear and public, since an ambiguous, vague, inaccurate or unknown law will not be able to lead human behavior; and (b) individuals must be granted wide access to courts, so that they may seek due protection, including as a remedy against unfair changes to the law.<sup>36</sup>

### **3. NARROWING THE POLYSEMY**

In order to assert the semantic scope<sup>37</sup> of legal certainty, it is

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35 FALLON JR, Richard. The Rule of Law as a Concept in Constitutional Discourse. Columbia Law Review. Vol. 97, No. 1, 1997. The Rule of Law as a Concept in Constitutional Discourse. pp. 8 and 9.

36 RAZ, Joseph. The Authority of Law: Essays on Law and Morality. Oxford: Oxford University Press. 2nd Ed. pp. 213 to 218.

37 For a historical approach over the concept of legal certainty, it is worth reading Ricardo Lobo Torres : "After Liberalism initial phase, which claimed to legitimize the state by limiting individual will [...], we are witnessing a long disbelief because of contradictions to that same values. Positivism whetted the identification between freedom and law, only briefly presented in the work of Kant, and ultimately transformed legitimacy into legality, by misconstruing legality and rule of formal law. The legal certainty derailed up to becoming security of individual rights, therefore losing its credibility at the rise of the welfare state [...]. With the dawn of positivism and the reaffirmation of liberalism after the Second World War, new ways to resume the study of legitimacy were sought. At first, the revival of natural law and the legitimation by a system composed of values. After the Kantian turn (virada kantiana), on the 70's, the social contract conception was recovered together with the reaffirmation of values such as freedom, justice and security, which are realized through the intermediation of legal principles. [...] In

necessary to analyze the meaning of each of its composing words.<sup>38</sup>

Certainty refers to the ability of the addressee to unveil the legal provision's precise content. On a public perspective, being public authorities the issuers of legal provisions, they are bound by the duty to determine unequivocally all elements that constitute the legal provision.<sup>39</sup>

As per an intertemporal perspective, such certainty is articulated from the interaction between two axles: the first axle is the immutability, which corresponds to the search for an ideal of intangibility of certain standards.<sup>40</sup> In this sense, it binds the future to the past, limiting the possibilities of change. The second axle goes towards promoting stability within changes. It aims at safeguarding subjective rights that have been vested to each individual and the existence of transitional rules. It does not function as immutability, but as a relative stability that proscribes abrupt changes.<sup>41</sup> The movement is thereby understood as an inseparable condition of stability. If there is no change, the legal structures harden, tending to rot and ultimately be broken out from an institutional model, leading to shifts outside the law.<sup>42</sup> The construction of a dynamic balance (stability within movement) is understandable by the

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Germany, immediately after the end of the Second World War, it took place the so called rebirth of natural law (*Naturrechtsrenaissance*), with the return to values. [ ... ] In the United States, a similar idea was developed. At the height of the welfare state, some jurists and even the Supreme Court came to defend the thesis that there are non-written values that, although not formally expressed by the Constitution, could be inferred or unveiled by the interpreter. [...] security, previously identified as safekeeping of individual rights, gained in the welfare state the meaning of social cohesion. [ ... ] The present-day order, from 1989 on, following the fall of the Berlin Wall, which symbolized the change of political and legal paradigms, is a democratic state (as Riscosou defined, a society's state; or, as preferred by Habermas, a security state), which is structured in accordance with the purpose of prevention (*Prävention*), celling against the risks posed by science and technique. This state is legitimized by the implementation of the ethical and legal values of security, which also postulates the intermediation of legal principles and reasonableness. On that sense, individual security connects and lives together with social security and international security." TORRES, Ricardo Lobo. *Legitimação dos Direitos Humanos*. Rio de Janeiro: Renovar, 2002. pp. 414 to 417 and pp. 439 to 440.

38 "Although agreement on these elements establishes the Rule of Law a shared concept, many of the operative terms are vague. Understanding the vagueness of particular shared assumptions helps clarify possible bases for disagreement. And disagreement is common". FALLON JR, Richard. *The Rule of Law as a Concept in Constitutional Discourse*. *Columbia Law Review*. Vol. 97, No. 1, 1997. pp. 5 and 6.

39 ÁVILA, Humberto. Incluir nome artigo do Ávila. p. 124 and 125.

40 Idem. p. 125.

41 Idem 139.

42 "Conformity to the rule of law is a good instrument for achieving certain goals, but conformity to the rule of law is not itself an ultimate goal. [...] if the pursuit of certain goals is entirely incompatible with the rule of law, then these goals should not be pursued by legal means". RAZ, Joseph. *The Authority of Law: Essays on Law and Morality*. Oxford: Oxford University Press. 2nd Ed. p. 229.

use of metaphors such as cycling, an activity that depends on continuity.<sup>43</sup>

As a projection into the future, legal certainty sets forth the need to anticipate the legal consequences of human conduct. Before acting, one must be able to reasonably foresee the law that will be enforceable and picture the legal outline that will frame an act committed in the past.<sup>44</sup>

However, how could one qualify that certainty? What sense may be drawn from its nature? The answers to these questions surely are not easy and rely on proper systematization.

(i) the certainty of the law

The certainty of the law refers to its clarity and determination. Just like other reasoned, understandable and rational constructions, the knowledge of the law should not be measured in relation to experts, but in relation to common people, after all they are the addressees of general legal provisions. A society where people deprived from legal training are unable to understand basic legal formulations is doomed to be erratic. That means that, except for specific provisions which the addressees are a limited group of individuals or economic segment, all individuals should be able to locate the applicable provisions and to understand its meaning without the assistance of a lawyer.

Taking into account (i) Brazilian federation system in which all federative entities may legislate (Central Government, states and municipalities); and (ii) the checks-and-balance regime, pursuant which all three Branches of Power exercise atypical attributions, resulting on the fact that even the Judiciary and the Executive Branches are empowered to enact rules equivalent to legal provisions, Brazilian legal system is indeed complex. Consequently, it is ever more important that such a myriad of legal provisions are organized in a logical manner, allowing individuals to access the law and decode the meaning envisioned by legislators.<sup>45</sup>

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43 ÁVILA, Humberto. *Segurança Jurídica – Entre Permanência, Mudança e Realização no Direito Tributário*. São Paulo: Malheiros, 2011. pp. 138 to 141.

44 “[...] it does not concern to the anticipation of events, but, rather, the ability to anticipate, in reasonable measure of depth and breadth, the legal consequences. One does not anticipate the future, but the normative sense of the present action or inaction in view of a future ruling. [ ... ] The requirement of knowledge relates to the people having access to the relevant legal provision and its content being sufficiently accurate; the requirement of reliability makes reference to the inviolability of subjective situations that are not subject to retroactive effects; and the requirement of calculability means to impose transitional rules or equity clauses to safeguard the reliability of administrative understanding in general and abstract level”. *Idem*. p. 141.

45 Mauro Cappelletti and Bryant Garth analyze the problem of access to justice. They focus on procedural instruments, which must be understandable to the general population, as well as quickly and affordable. Procedural rules, as a type of legal provision, must be clear and objective. For the effectiveness of rights and the erection of a fair society, access to justice

An important initiative is, for example, the Central Government's website<sup>46</sup>, which discloses the latest updated rules, its final wording and amendments thereto. However, many states and municipalities do not follow that praised example, turning simple researches into an insurmountable task. It is also difficult to locate administrative rules, since the vast majority of regulatory agencies, secretariats and administrative bodies that have overlapping competencies fail to properly organize their normative acts. Unfortunately, it is common to find websites of official agencies merely listing ordinance acts without cross references to supervening amendments or later revocation, therefore subjecting the people to the unreasonable burden of reading all acts enacted by that administrative agency in the attempt to identify the rule in force.

The meaning of legal certainty could, thus, be firstly interpreted as the knowledge of the law, i.e. to access the relevant provision and to understand its content.<sup>47</sup>

(ii) law with certainty

Since legal systems must be minimally flexible so as to accommodate changes in society, the process of amending legal provisions should be objective and guided by impersonal rules, thus leading to changes within a frame of stability<sup>48</sup>.

Regarding the Judiciary Branch, it is recommended that court precedents are duly regarded and the coining of a different understanding, apart from the consolidated one, relies on rigorous reasoning so as to demonstrate the inapplicability of the previous precedent on that case. Uniformity of precedents among different district courts is also important, in order to prevent forum shopping<sup>49</sup>. This concern is more justifiable on a civil law system, such as the Brazilian, in which the law is fundamentally written down in codes and it does not rely as much in court precedent as in common law systems.<sup>50</sup>

In relation to the Legislative Branch, law with certainty

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shall be made through the access to the law and access to legal remedies of protection and effectiveness. CAPPELLETTI, Mauro; GARTH Bryant. Trad. NORTHFLEET, Ellen Gracie. *Acesso à Justiça*. Porto Alegre: Sergio Antonio Fabris Editor, 1988.

46 <http://www4.planalto.gov.br/legislacao>

47 RAZ, Joseph. *The Authority of Law: Essays on Law and Morality*. Oxford: Oxford University Press. 2nd Ed. p. 213.

48 ÁVILA, Humberto. *Segurança Jurídica – Entre Permanência, Mudança e Realização no Direito Tributário*. São Paulo: Malheiros, 2011. pp. 128, 129 and 160.

49 *Idem*. 171.

50 In other words, common law systems tend to enact court decisions that are uniform and/or more coherent as a whole, for court precedents are such a major tool to create the law.



encompasses a negative obligation of self-constrain from issuing provisions that may cause drastic changes or are incompatible with the legal system in its entirety.<sup>51</sup>

That aspect of the law with certainty also affects the Executive Branch, imposing the duty to maintain a consistent enforcement of the law and to exercise its regulatory attributions within the legal framework.<sup>52</sup> Public authorities are also constricted, once they cannot modify acts that may impact negatively in vested rights.<sup>53</sup>

Ultimately, as an agent that induces expectations in a given society, the Government undertakes yet another burden, namely, to preserve its own unlawful acts and personal rights vested therefrom, should the people acted in good faith upon relying on a legitimate expectation that such Government's act was licit.

*Acts issued by competent authorities serve as guidelines for the people who, believing in the validity and correctness of these acts, follow the path indicated by such authorities. Genuine rule of law determines that authorities refrain from indulging in contradictory behavior and that the people's legit expectations are not betrayed. This immunizing task is fulfilled by the legal principle of protection of legitimate expectations. If an authority has led a person to trust their conduct, provided that such trustworthiness was justifiable, it is incumbent to that authority, prima facie, to act in order to safeguard that trust. [ ... ] The protection of legitimate expectations corresponds to the subjective perspective of legal certainty, dialoguing with the principle of objective good faith.*<sup>54</sup>

In summary, the protection of legitimate expectations binds (i) the Judiciary Branch, by preventing courts to rule differently over similar matters; (ii) the Legislative Branch, by enforcing clarity and consistency in enacting legal provisions; and (iii) the Executive Branch, by limiting its ability to review its own acts.<sup>55</sup>

Surely, to be worthy of protection, the expectation must be

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51 Idem. p. 158.

52 Idem. p. 159.

53 Constituição da República Federativa do Brasil / 1988, art. 5o, XXXVI.

54 CAMPOS, Carlos Alexandre de Azevedo. Proteção da Confiança Legítima na Jurisprudência do Supremo Tribunal Federal. Revista de Direito Administrativo Contemporâneo, 2014. pp. 12 and 13.

55 Idem. p. 14.

legitimate and justifiable. The mere inertia of the authority in reverting its illicit act does not suffice to crystallize such act over time, nor to vest one in any right. It is also necessary that other elements are in place, such as: (i) an objective situation (an act) by a competent authority, leading a person to legitimate expectation; (ii) that person's subjective state of mind (a state of consciousness) that consists in the confidence inspired by the authority's act; (iii) a conduct carried out by the person upon relying on such confidence; and (iv) a new objective situation of the relevant authority (another act), contradicting its first act and in breach of the person's legitimate expectation.<sup>56</sup>

#### 4. CONCLUSION

The scope of this academic paper was to outline the elements of a new hermeneutic, based on the recognition of the legal principles' normative power. On the one hand, this new hermeneutic expands the possibilities for justice and brakes away from a strictly positivist tradition<sup>57</sup>. On the other, it imposes the challenge of electing a method for the implementation of legal principles, in order to curb excessive polysemy – so typically associated with abstract concepts. In such regard, the method of weighting was briefly addressed, giving concreteness to legal principles.<sup>58</sup>

Then, a parallel was depicted between the thought of Alexy, to whom legal principles are defined as optimization commands to be performed at the greatest extent possible within the legal and factual conditions<sup>59</sup>; and the thought of Ávila, dedicated to present legal certainty in its multiple dimensions (as a rule, a legal principle, a value, a fact and an element inherent to the law)<sup>60</sup>.

In its essence of a structuring element, legal certainty was presented as an inseparable and inherent part of the law. It is no coincidence, therefore, that many Anglo-Saxon authors use the concept of legal certainty in strict correspondence to the concept of rule of law, which - in the English language – equals to what is deemed as the legal system itself.<sup>61</sup>

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56 Idem. p. 15.

57 TORRES, Ricardo Lobo. *Legitimação dos Direitos Humanos*”. Rio de Janeiro: Renovar, 2002. pp. 414 a 417.

58 ALEXY, Robert. *Teoria dos Direitos Fundamentais*. Trad. A. DA SILVA, Virgílio. São Paulo: Malheiros. p. 95.

59 Idem. p. 90.

60 ÁVILA, Humberto. *Segurança Jurídica – Entre Permanência, Mudança e Realização no Direito Tributário*. São Paulo: Malheiros, 2011. p. 178.

61 FALLON JR, Richard. *The Rule of Law as a Concept in Constitutional Discourse*. Columbia Law Review. Vol. 97, No. 1, 1997. *The Rule of Law as a Concept in Constitutional Discourse*. pp. 8 e 9.

The author has also portrayed how legal certainty projects an expectation of stability in the future and remits to the crystallization of the past, imposing a wide spectrum of obligations to social agents, including public authorities.<sup>62</sup>

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62 RAZ, Joseph. The Authority of Law: Essays on Law and Morality. Oxford: Oxford University Press. 2nd Ed. p. 229.

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