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# NORM AS A PROMISE AND THE PROBLEM OF LEGITIMACY

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**Abstract**

The paper presents an investigation of legal norms, mainly involving matters of legitimacy and effectiveness of Law. It works with the following question: how legal norms can be understood under the Rule of Law? Different theories proposed a variety of models to understand legal norms. Frederick Schauer's contemporary legal positivism is an example. The present work intends to follow a different path, searching for other sources to understand legal norms. From the works of John Searle, it intends to see legal norms as promises. In order to reduce social conflicts to an optimum level, it is necessary to offer a promise of management, which comprises certain equality under the law (formal eradication of privileges). It is necessary to think about the production of legal texts (the constitution, for instance) by those who take over, by any means, the power to do so. Beyond mechanisms proposed in legal texts, tending to establish a formal equity (like those of individual rights, remedies and social rights), in a system of power managed by governments it is necessary to obtain legitimacy through the systematic persecution of promises made (by those who have the power) in those texts.

**Keywords:** Legitimacy, Effectiveness, Legality, Theory of Norms, Power.

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vol. 12, nº. 01, Rio de Janeiro, 2019. pp. 56-
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## INTRODUCTION

The problem of understanding the concept of legal norms is also a problem of application of law. The jurist generally applies legal norms according to his understanding of what is a legal norm. Positivist approaches to this problem were common on the last century, and continue influencing legal thought today. Those approaches generally divide politics and law, aiming for a juridical concept of legal norms. This kind of thought can be observed in two of the most influential positivist models for law: Kelsen´s (2005) and Hart´s (1994). The return to Hart proposed by Frederick Schauer (2015) follows those guidelines. The present paper aims a different approach for understanding legal norms, and consequently for their application.

This conjecture starts with John Searle (1981). His study on communication and pragmatics, mainly on the structure of contracts and promises, offers basis for a different approach for understanding legal norms. From this standpoint, this work has for hypothesis that legal norms can be seen as promises made to reduce social conflicts and obtain legitimacy, comprising certain equality under the law. Politics and law are not separated, so in some extent legitimacy depends upon law´s effectiveness. Effective legal promises, made in a given culture/civilization, are a key factor for both the legitimacy of the legal order and the government. In this way, this work intends to analyze the structure of a promise and if legal texts can be seen as promises.

In order to pursue this objective, in the first chapter a study on the structure of the promise will be made, mainly based on Searle´s work. The second chapter will investigate the possibility of seeing legal texts as promises, mainly studying the preconditions, production and some consequences (on the criminal field) of these kinds of legal promises.

It is necessary to highlight that this work does not intend to be the correct mirror of nature. It is only a model for understanding the complex reality. A model is only effective if it works in guiding subjects to action in a complex reality. It works like map – to go from one location to another. If the model does not work in doing so – leading someone from a place to another, it can be thrown way. In other words, there is no intention of saying that the present model is the truth – it has no ontological intentions, it aims only to provide a matter for discussion and debate, and maybe guide human actions in the complex reality of the world.

## THE STRUCTURE OF A PROMISE

Different from a contemporary positivist conception of norms proposed by Frederick Schauer, this paper, by other means, will revisit John Searle's (1981) work, noting that – beyond presenting the foundations of contracts in any system of law – it permits (although does not perform) a new theory of legal norms – which will be outlined in this paper.

vol. 12, nº. 01, Rio de Janeiro, 2019. pp. 56-
DOI: 10.12957/rqi.2019.33213

The concept of legal norm, as most relevant concepts to humankind, had several definitions throughout history. Among others, legal norms were understood as: values, patterns, schemes, guides, regulations, laws, precedents, costumes, codes, precepts, rules, principles, criterion, metrics etc.

This paper will try to see legal norms as a more tenuous concept, which tends to, in the current data driven society, to receive others senses and incorporate vague expressions such as good practices; the best conducts; on the limits of objective good faith; according to the legislation about the matter etc.

Beyond this first sense, this work will also consider the insertion of legal norms as a part of the social construction of the subject or individual. Through social representations (MOSCOVICI, 1978) legal norms are incorporated as a part of the subject. In this paper the subject is considered as a semantic-pragmatic atmosphere – which acts in accordance with the senses collected in his life, having an irremovable level of pollution – not questioned senses about the world. This concept of pollution has many similarities with the concept of ideology in its innumerable meanings (ECCLESHALL, 1994).

Having posed these two presumptions about legal norms, the paper will now investigate John Searle´s (1981) theory, mainly in what concerns acts of speech. From this point of view, to perform an act of speech consists of:

1) Express words that perform an expressive act;

2) Commit to these words a predication and a reference that constitutes the propositional act;

3) An illocutorionary act or explicit promise;

4) A perlocutionary act or act of comprehension from the message´s receiver.

The concept of promise highlighted by Searle (1981) is particularly useful for the concept of legal norm that will be developed. In this sense, it deserves a more profound analysis, which can be summed up in this way:

A subject S that emits an F sentence in the presence of a receiver R promises something sincerely and without defects to R if and only if the following conditions are accomplished:

a) There are normal conditions of emission and reception, that is, the subjects in communication know the language, comprehend what they are doing and there are not physical obstacles to communication;

b) Announcing F, S emits certain content and predicts a future act about him (S). A subject cannot emit a promise about past acts;

c) R prefers that S performs the mentioned act than otherwise, and S believes that R prefers that he keep his promise than otherwise;

d) It is neither obvious to S or to R that the realization of the promise made by S is in the natural ordinary course of events. The act ought to pursue a result. Therefore, the promise "One day I will die" does not deserve that name;

vol. 12, nº. 01, Rio de Janeiro, 2019. pp. 56-
DOI: 10.12957/rqi.2019.33213

e) S really wants to do what he promises;

f) S wants that the emission of F obliges him to fulfill the act that was promised;

g) S intends to inform R about the knowledge (K) of the statement that F ought to contain and that obliges him to the fulfillment of the act. S wants to transmit K acknowledging his own intentions and wants that those intentions be recognized by the knowledge that R has about the meaning of F (reflexive intention);

h) The semantic rules of the language spoken by S and R are such that F announces correctly and sincerely if and only if all the conditions above are accomplished.

From those rules, which can be perceived in every contract, Searle (1981) draws some that permits to use an illocutionary force indicator (the performative "I promise"):

1) Propositional content rule: "I promise" can only be used in a statement which predicts a future action performed by S.

2) Preparatory rule: A promise can only be fulfilled if R prefers that S performs the promised act instead of the contrary, and if S believes that R prefers that way. S ought not to perform an act that he did not have promised.

3) Sincerity rule: There is only a promise if S has the intention to perform what he promised.

4) Essential rule: the statement of a promise obliges to perform what has been promised, that is, all promises are obligations.

These rules are valid for all illocutionary acts. The adoption of an illocutionary goal to enlighten social linguistic uses promotes a reduction of the fundamental things done with speech. One says to others how occurrences develop and about the state of them; expresses feelings and dispositions, and provokes changes when certain statements are made. Often with the emission of a single statement more than one of these actions is provoked. And, as a foundation of all these possibilities is rooted trust. Communication always requires a vote of confidence to the interlocutor.

Searle (1981) considers the following guidelines essential to investigate a possible taxonomy of illocutionary acts:

a) A word-to-world fit: An affirmative statement, for example, seeks to fit words to a state of affairs (world); a promise seeks to perform a state of affairs that fulfills the promise's linguistic description.

b) The psychological state expressed: a consequence of the sincerity´s condition. By performing a certain linguistic act, the sender emits a mental or psychological attitude towards the statement´s content and classifies the illocutionary acts by them:

b.1) Representative: they are classified by their illocutionary goal that obliges the sender to express the truth about the proposition stated. In this classification are included: the observations, the assertive,

vol. 12, nº. 01, Rio de Janeiro, 2019. pp. 56-
DOI: 10.12957/rqi.2019.33213

explanations, classifications, descriptions, diagnostics etc.

b.2) Directive: the illocutionary goal of directives consists in provoking actions from a receiver. Their content is always a future action. For example: an invitation, a question, an advice, a request etc.

b.3) Promissory: they oblige the sender to perform a certain future action. Among others: a promise, an oath, a lament, an apology etc.

b.4) Declarative: they determine the correspondence between the propositional content and a state of affairs. For example: to marry, to bequeath, to fire etc. The sincerity rule is not applied here, because it is replaced for the reference to an extralinguistic normative system, for example: law, canonical rules, particular contracts etc.

The analytic approach, as can be perceived, lacks of many nuances that are worked by discourse analysis and constructionism (MOSCOVICI, 1978; JODELET, 2001). However, for the concern of the present approach, it is ought to be noted that Searle´s (1981) position is concerned with interactions between interlocutors in a coordination relationship, in which if there is any kind of domination, it is established by the statement of performative sentences that imply active responses from the interlocutor.

The present paper assumes that behavioral standards are established not only by relational habitualness (defining who is in charge in long term relations), but also by active factors (for example: preexisting norms, rooted social habits, economic conjuncture etc.), strategies (a set of actions aiming for a utility) (MULGAN, 2013), or situations (the action´s place) (MOSCOVICI, 1978; JODELET, 2001), which structure subordination relations, beyond those of coordination, in communicative situations.

Human activity consists in an historical phenomenon that emerges, changes and perfects itself according to the development of social relations (therefore rooted in communicative and metacommunicative processes). In this sense, human activity can be seen as subordinate to social relations and always in transformation.

The genetic approach to human activity permits to enlighten why the anthroposociogenesis process was essential for the animal in the state of nature, capable of successfully satisfying his material needs for survival, to come to a state of civilization and communication.

The explanation is given by the historical process of emergence of new needs. This process has roots on the formation of social relations, which required the creation and improvement of new activities and abilities – requiring new terms and new relations. It would be too simple to imagine that communicative processes could emerge, *sponte propria*, from the simple approximation of two beings in relation. There is a substrate of human activity that imposes itself and enables the possible communications between subjects, there is, two brains in water tanks would not be capable, without proper connections, to establish communication.

The recent decay of the subject and object categories, and even the notion about process, by the implicit acknowledgment that, although the human being still is the subject in action, there is no continuity in that subject and

vol. 12, nº. 01, Rio de Janeiro, 2019. pp. 56-
DOI: 10.12957/rqi.2019.33213

even its intentionality is not constant, understood as the set of acts of will (choices) directed towards utilities. This takes to a necessary reevaluation about the concept of formation of communicative processes.

Initially is necessary to perceive that History is not a linear record of actions, but mainly of conflicts and ruptures in the established order. A vast period of time without conflicts and decisions probably will have few historical records. But human activity seeks, sometimes although itself, to secure conservation, safety and the permanent development of society, which, in its way, aims to reproduce conditions that go beyond the agent´s own needs, for example: social relations; culture and the mode of production it is inserted, even for the use of processes and instruments (means of production) in conformity with this mode, as if these ruptures and conflict states were never there. The great fiction of the absolute spirit comes up, capable of conducing history according to its designs. This last great philosophical system, the Hegelian, by its rightists and leftists followers, will influence all philosophical landscape and will give prevalence to consensualist approaches.

Conflictivist versions insisted in the existence of a deep hiatus between workers and capitalists aspirations, and developed a whole philosophical system around it. They admitted that the subject constructs its *weltanschauung* from the practical-sensorial contact with reality, but also and principally thought its contacts with others human beings, that have objectives and values which go beyond the direct sensorial contact with "reality". The society constituted by concrete actions of human beings gives to them, at the same time, the contents of consciousness and, paradoxically, of its alienation.

Human beings in front of reality do not have the attitude of abstract, immaterial and cognizant subjects speculatively examining it. It ought to be recognized that while beings that objectively and practically act in search of their interests (utilities), in relation to nature or other human beings, in the midst of specific social relations of their time, they do need to communicate in a direct or indirect form the elements of their semantic-pragmatic atmosphere in relation, expressing the necessary consequences of the multiple interactions, that reveal themselves by the alteration of this atmosphere and its pollution, in each contact. In other words, human beings are always in relation, despite the concrete action to undertake – because their relations are given in a concrete state of affairs – establish a semantic pragmatic communicative process. In the words of Bacchylides (FEARN, 2007, p. 03):

> One man learns his skill from another,
> both in former times and today:
> For it is not the easiest thing
> to discover the gates of unuttered words.

The possible horizon for communication is limited by the intersection between different atmospheres in relation. The pragmatic function is limited by the same intersection. In that way, the educational aspects will be relevant to the application of a pragmatic theory as substrate of conceptions of Law and of societies in which those atmospheres are immersed. The law is specifically mentioned because the possible actions in the midst of a society, in circumstances of normal and according actions, will be held in the limits posed by the legal system, as a result of implicit promises that define the functioning of society and its processes.

vol. 12, nº. 01, Rio de Janeiro, 2019. pp. 56-
DOI: 10.12957/rqi.2019.33213

These processes are often unplanned, because their directions are defined from interdependencies between acts of will and plans of many human beings. A vectorial sum of many vectors (actors) can be used to model this system, having almost always different results from those isolated actions practiced by actors.

The direction of social processes stems in large scale from social configurations. These configurations have a large influence from organized groups (collective actors), which for Norbert Elias (1989, 1993) promote civilizing offensives (actions aiming to influence the social behavior and introduce changes), but do not depend only on them. Social planning seems like a possibility that comes from the course of an unplanned process. In this sense, planning is a characteristic from a stage of the unplanned development and continuously interweave with it.

Therefore, the project (be what it may – the consecution of a determined utility or the production of conditions for domain) comes from pre-existing conditions. However, this condition does not deny the possibility for creation of new projects, mainly when they lead to the creation of new objects in the civilization's field.

## LEGAL TEXT AS A PROMISE

A government´s constitutive act, which comes from civilizing offensives guided by projects of organized groups, imposes certain power structures that inevitably create social conflicts. In order to reduce these conflicts is necessary to offer a promise of administration in accordance that enables certain legal equality (formal eradication of privileges).

It is necessary to consider the production of the legal texts (the Constitution, for instance) by those who seize, by any means, the right to do it. Beyond mechanisms of concessions constructed by neoliberalism, which tends to establish a formal equality (like the modern mechanism of individual and social rights and liberties) posed in legal texts, which often constitutes the power system administrated by the government, groups responsible for the government must obtain legitimacy through a systematic persecution of promises made in legal texts (by those who detain the power to do it).

### Preconditions of the promise´s proposition

As already shown in previous works (PUGLIESI, 2015), a relevant way to think about the meanings of Culture and Civilization is to understand then, respectively, as the set of projects and the set of objects in a given society. Therefore, for example, the production of a text for a theatric piece will be the project (what is thrown ahead), which will become an object through this piece´s enactment. In the same way, when someone goes to a history museum, he or she sees objects, and not projects of a society – what is seen is a restricted vision about a civilization, and not about a culture. In this sense, culture and civilization are producers and products of the socio-historical process in each society:

vol. 12, nº. 01, Rio de Janeiro, 2019. pp. 56-
DOI: 10.12957/rqi.2019.33213

projects come before the production of objects, that once produced (rarely as have been projected) are basis to the formulation of new projects.

However, it is necessary to highlight that legal texts are not responsible for the institution of society – they reflect and seek to keep the functioning conditions of society, usually through the lenses of those who have the power. For example, the most (internally) peaceful period in ancient Rome was situated between the patrician tyranny and the insurgence of the Gracchi. At that time, the power functioned through the reunion of the three base forms: the consuls, functioning according to the monarchic regime; the senate, functioning aristocratically; and the tribunes, democratically elected. In the end of this period, during the Gracchi tribunes, the senate was accused of altering the norms to stay in power. This illegitimacy led to long and profound riots that caused the power´s centralization on the hand of the *optimates*.

Hence, not Dracon´s constitution, not even Solon´s constitution (CLOCHÉ, 1940) effectively constitute a society, as usual thinking, but they gather the rules of the effective socio-historical functioning, at the same time that they introduce the agenda of those who have the power, by their predictive and ideological effect, having the goal to reduce conflicts, which are inherent to the act of power. On one hand constitutions set the directions they intend to conduct society, and on the other promise rules and principles that they agree to keep to obtain social homeostasis, at the lower possible cost.

Among the most relevant promises are found those about the maintenance of the social *status quo* and the production of an equalitarian society (In Brazil, for example, the articles 1º, 3º, 4º and 5º of the Federal Constitution); the principles that institute a new social order and that set the limits of conduct for those who made the promise in relation to those who receive it.

In societies that some say are more primitive (FRAZER, 1922; MORGAN, 1868; FALLERS, 1974; ENGELS, 1964; WEBER, 1984), the progressive institution of dominion made necessary the introduction of compensations to unsettle coalitions and the production of hostile leaderships. In the field of culture, power seeks through government, in the field of civilization, to divide or discourage coalitions and dissociate them every time they are formed. That is done through concessions, authorizations and benefits that instead of socialize the power, favor its concentration. It is noted that private economy received from public powers the conditions to its growth, for example: the formation of skilled labor; the trust in social and economic order; the monopoly of violence and administration of justice; culture and, in particular, civilizing organization. Adding to that, nowadays in contemporary economies more than half of the resources put in circulation as investments come from governments. Furthermore, in any given contemporary economic system a minority still decides what the majority will do. (PUGLIESI, 2009)

Throughout history concessions made by those who have the power are common to maintain the state of affairs – it is enough to see, for example, the remission of debts made by the legislation attributed to Solon, which was in accordance with the interests of the *optimates*; the successive legal revisions made by the roman senate in order to

vol. 12, nº. 01, Rio de Janeiro, 2019. pp. 56-
DOI: 10.12957/rqi.2019.33213

maintain the power and to reduce the riots (DUCOS, 2007); the *Magna Charta Libertatum Concordiam inter regem Johannen at barones pro concessione libertatum ecclesiae et regni anglia* from 1215, which restricted the powers of the King John of England giving his disagreements with the catholic church and the English noblemen, conducing later to a constitutional state – among other possible examples.

In more complex societies procedures are the rule (LUHMANN, 1980), but beyond them there are also expectations that demand fulfillment. Therefore, even if all the procedures are rigorously performed; if the norm created by those procedures and by the men authorized to do it (by other procedures or fictions) is not consistent with the projects of the society (capable of manifestation) it will be seen illegitimate or even illegal. Beyond legal requisites for legitimacy (formal/material) of a norm: validity, justice and efficacy, a political legitimacy ought to be achieved, which supposes that all the norms will be accepted and fulfilled with minimum state´s coercion. There is, it is not enough formal legitimacy related to state´s procedures in conformity with what is established in legal documents. It is mainly necessary popular approval to the existing norms given its conformity with the society´s project (culture) and the government´s actions to its fulfillment/concretization (civilization). Therefore, legitimacy is bound to the conjunction of political factors that comes from the concentrated and persistent search to fulfill society´s projects in the limits of legality (that can be elasticized by judicial activism, new normative or administrative dispositions, among others). In this sense, Agamben:

> ( ... ) Because it draws back the attention to the distinction between two essential principles to our ethical-political tradition, of which societies seem to have lost any awareness: legitimacy and legality. If the crisis our society is passing is so deep and serious it is because the society does not question the legality of institutions, and also their legitimacy; it is not only the rules and modes of power´s exercise, as it is frequently repeated, but also the very principle that founds and legitimates the exercise of power. Public powers and institutions are today delegitimized not because they fell in illegality; the contrary is more truthful, there is, legitimacy is disseminated and generalized because the public powers have lost all their awareness about their legitimacy. This is the reason they will believe the crisis in society can be fought by judiciary actions (certainly needed) – a crisis that invests legitimacy cannot be solved only on the field of law. Law´s hypertrophy, which has the intention to legislate about all things, reveals, through an excess of formal legality, the loss of all substantial legitimacy. The modern attempt to make legality and legitimacy coincide, aiming to secure the public power´s legitimacy through positive law, is totally inefficient – as it results of the irrevocable process of decay in which democratic institutions have entered. The institutions of a society will only stay alive if both principles (that in our tradition have also received the names natural law and positive law, spiritual power and temporal power or, in Rome, auctoritas and potestas) stay present and act on them, never intending that they coincide. (AGAMBEN, 2015, p. 10-11)

The separation of legality and legitimacy, two fundamental concepts to theories of politics and law, guides to many relevant matters. Among them it is found the loss of meaning posed by Weber (1987, p. 130-131), taking into consideration that life´s method loses its moral basis, and rational actions towards an end get automated – leading to a loss of a "place in the world", understood as the origin of all violence to Hannah Arendt (GOMBI BORGES DOS SANTOS, 2011). Legitimacy, in this way, consists in the legality of decisions, that one of procedures (merely formal),

vol. 12, nº. 01, Rio de Janeiro, 2019. pp. 56-
DOI: 10.12957/rqi.2019.33213

with a weak subjective support.

From other standpoint, Habermas will say that this weakening in legitimacy is caused by the bureaucratization of private and public life, as well as its monetization (WHITE, 1995). The instrumentalization of the *Lebenswelt* (world of life) by effect of systemic demands, the unmaking of action complexes endowed with formal organization (state and economy) leads to a prevalence of cognitive-instrumental actions, breaking the necessary familiarity to the production of some legitimate sense to the acts in private and public spaces. The cultural tradition is impoverished and the processes of understanding fade.

It is thought, at the same time abandoning and adopting the positions of both thinkers, that the production of legal texts (projects about the functioning of society) will have as a counterpart its effective application to reach the interests of their recipients or their enforcers, through concrete norms that are a result of the comprehension (sense)/interpretation (meaning) of those actors (players) and, in particular, of third parties authorized to do so (operators), implying, at the same time, *auctoritas* and *potestas*. As writes Walzer:

> The need for self-justification has, no doubt, a number of reasons; we can give both cynical and sympathetic accounts of it. Why did the pharaohs of ancient Egypt, for example, or the kings of Babylonia and Assyria, in the earliest inscriptions, proclaim their commitment to seeing justice done, the poor sustained, widows and orphans protected. Was it because the thought that their power would be more secure if their subjects believed in commitment? Or because their own self-esteem depended of thinking themselves committed? Or because the rituals of commitment (and their inscriptions) were required by gods? Or because this was what the rulers of states always said about themselves? (But why they said it?) It doesn't matter. If the pharaoh promises that he will see justice done, then the way is open for some Egyptian scribe to take his courage in his hands and write out a catalogue of the injustices the pharaoh in fact condones. (WALZER, 1994, p. 42)

In fact, the announcing of rights and liberties (individual or social) in normative texts does not consist merely in promising (in latin *promittere* – put ahead), but in permitting the promise´s existence. Only a future action to be perpetrated by the one who promises (or the one who succeeds him in office or fuction) can be promised. In this sense, a norm consists in a promise that is made to be fulfilled given the demand of anyone who is interested, in particular of those who have the obligation to make demands, and act demanding its fulfillment (police, public offices, civil society organizations etc.). From this standpoint, it can be asserted: the *optimates*, by their representatives, discipline the life in civilization through projects of conduct that they admit as adequate for each aspect of this civilization, in any of its stages (RIBEIRO, 2005; ELIAS, 1989, 1993; PUGLIESI, 2015), once that the most synthetic definition of power consists in assuming that power gets the conducts that it wants.

## The production of legal texts as promises

Among the great variety of contractual theories, according to Arendt (2010), most are based on the stabilizing power of the promise. What they did not consider is the unpredictability of the consequences once this promise turns

vol. 12, nº. 01, Rio de Janeiro, 2019. pp. 56-
DOI: 10.12957/rqi.2019.33213

into action. Even so, the power to make promises occupied and still occupies the nucleus of political thought.

Since the institute of *pacta sunt servanda* (agreements must be kept), which still persists as a guideline to the inviolability of agreements and treaties in conditions *ceteris paribus* (things being equal), to the institute of *neminem laedere* (general duty of care), and finally to *cuique sum tribuere* (may all get their due) – equality before a promise is a key factor. In this sense, it can be said that the promise was an organizing principle in Roman society and, given the persistence of the Romano-Germanic system, also an organizing principle in many legal orders today.

Arendt (2010) believes that the consequences of the action triggered by the promise are unpredictable and of long term, but still the maintenance of that promise between individuals is a clause that insures the good functioning of society. On the other hand, when a promise becomes a norm it does not only dictate expected behaviors, it also generates the commitment (for those who create it) to demand it uniformly from all individuals addressed by the norm (equality under the law). However, and above all, to demand only what was promised and to give nothing except what was promised.

The citizen, according to Arendt (2010), is the one who acts and talks, in other words, actions and speech are what affect the present and future. In this circumstance, a promise anticipates a future action, giving homeostasis to the business of men, which have equality as a guarantee.

The word principle comes from *primus* and *capere*, meaning what should be taken first or what comes before. The principles of administrative law constrain the possible promises and give conditions to their fulfillment. Legal norms that impose fiscal responsibility and their consequences (which punish contrary behaviors) give substance to the relation government-administered.

The projects conceived in a given society are structured in the limits and conditions of possibility of this society – from promises of the legal order, building a shareable culture (PUGLIESI, 2015) and an adequate civilization for those projects. The concept of a project´s program depends upon the shared socio-historic process between the programmer and the designer. The word program comes from the Greek *programma*, which is derived from the verb *prografo* – meaning to write before. In ancient Greece the order of the day was constituted as a program, the agenda, which is gerundive of *agere* – to take ahead, to execute what must be done, to act. When the designer is exogenous, he will add the conditions of his own semantic-pragmatic atmosphere (acquired socio-historically), which composes his possibility to project the comprehension of the program that was presented to him.

It is important to clarify the meaning of semantic-pragmatic atmosphere, as done in previous works (PUGLIESI, 2009, 2015). The individual semantic-pragmatic atmosphere is composed by *doxa* (opinions), social representations and episteme (any kind of scientific knowledge, or what resembles to it), forming a subject. In the set of social representations the language is included. Therefore, any given subject is constructed by a socio-historic process, and all of them are responsible for building, from their own perspective, programs and projects for society.

In this sense, for example, when Rousseau (1982) talks about the reform in Polish government, he carries his

vol. 12, nº. 01, Rio de Janeiro, 2019. pp. 56-
DOI: 10.12957/rqi.2019.33213

own convictions that came from Genevan conditions, as he had previously done in the Social Contract (ROUSSEAU, 1985). The same can be observed with Montesquieu (1968) in his analysis of the ascension and fall of Rome, as any in any author that turns himself to the search of explanations about culture from civilization's information.

## Promises in crime and punishment

To commit a crime means, in this conjecture, to perform any action that prevents the fulfillment of the promise made through norms in society. What is punished in the case of disrespect of law is precisely the prevention to fulfill the promise.

The punishment´s strictness would depend (as depends on the evaluation of the one who creates the legal norm) on how much damaging the criminal action caused to the promise´s general maintenance. If the action causes more damage to the maintenance of the promise, the punishment is stricter.

The return to Hart proposed by Frederick Schauer (2015) is just a part of a positivist program – in fact the roots are more remote and are created in the fertile soil of modernity´s program.

The Marquise of Gualdrasco e Villareggi, Cesare Bonesana-Beccaria, already in 1764, worried about the law´s usage in benefit of the (rich) minorities, published a work that became famous under the title On crimes and punishments.

From his standpoint, a set of norms gave to some few the accumulation of income and benefits, leaving to the vast majority misery and authority's negligence. Good norms, on the other way, would serve to difficult the abuse done by the minority, promoting welfare thought equal distributive policies.

His vision incorporated relevant advancements, among them the understanding that a punishment has a preventive function, not only a retributive one; the punishment´s probability and not its harshness would provoke this deterrent effect. Also the punishment ought to be proportional to the committed crime. The criminal process and consequent punishment ought to occur in public, in a short-term from the criminal action, in order to not lose its effectiveness. The requisite of publicity aimed to protect the accused from any excess from the authorities.

The influence of Rousseau´s ideas is tangible, in particular to explain the origin of punishments. They would occur from the usurpation, by the criminal, of the liberty given by the others to consolidate the republic and secured the general welfare.

Excessive and hateful punishments contradict the social contract and, in consequence, are inadmissible. The trial, always conducted by a magistrate, ought to turn delinquency unacceptable. Delinquency consists in the disrespect of the conduct compatible with the legal norm – atypical conducts are not punishable. For this reason legal norms ought to have a general character, *erga omnes* (to all men). The punishment´s goal ought to restrict itself to the preservation of the law´s enforcement, in order to avoid greater harm, punishing the one who did not followed the

vol. 12, nº. 01, Rio de Janeiro, 2019. pp. 56-
DOI: 10.12957/rqi.2019.33213

norms, getting deviated from the social contract. Any punishment that exceeds this ought to be considered an abuse.

The judge, by this model, does not have the power to interpret laws in criminal matters, once he is not the legislator. Therefore clarity in legal texts is needed, because the obscure text is as harmful as the arbitrary interpretation. The divulgation of a legal text ought to be large, because the knowledge of punishments reduces the will to commit crimes.

Another limitation is imposed: arbitrary arrests and imprisonments cannot happen – legal norms ought to indicate judiciary requirements to authorize the arrest of a person accused of a crime. Liberty is an essential common good that ought to be protected.

Perfect proofs of a crime are the ones that do not depend upon other proofs, once that if one is proved false will not affect the others, and the set of evidence (even if just one is perfect) ought to lead to the necessity of the condemnation. If this is not the case, the accused ought to be maintained in liberty. If there are only imperfect proof that cannot avoid the possibility of innocence, the accused ought to also be maintained in liberty.

It can be observed with clarity the due process of law principle, by which proof can both make an accused be considered innocent or guilty by the end of a trial.

Another principle to be observed is equality under law, and for this Beccaria (1764) thought that a criminal trial ought to be made only by peers of the accused, that is, by a popular jury in a public trial.

Punishments ought to be moderated – cruel punishments induce new crimes, but they also ought to be effective, in particular with no delays between them and the crimes perpetrated. The capital punishment would only be acceptable in cases of great social disturbance.

The moral punishment studied by Beccaria (1764) consists in the decree of social death of an individual through infamy - the sacrifice of the accused´s honor in social benefit. Banishment differs from infamy, once that it physically removes the criminal from the territory and serves to punish, for example, the political idleness, known as the failure to the duty to labor for the society´s growth and development.

Beccaria (1764) thought that punishments ought not to be excessive, neither too soft – in law enforcement and application a balance ought to be searched, in order to give hopes to the convict of returning to social coexistence. This humanitarian version of punishments and his conception that the most efficient method to reduce criminality would rest on educative processes influenced criminal legislation in a great number of countries. In his mode of thinking, only civilized good guidance and ethics could influence natural impulses. The prevention of crimes due useful, clear and simple laws that conduce to general welfare and the maintenance of peace are more effective than the fear of punishment, which has to be immediate to be effective.

On the other hand, Marat wrote in his Plan de Législation criminelle:

> Ce qu'on appelle de ce nom (les lois) qu'est-ce autre chose que les ordres d'un maître superbe ? Leur empire n'est donc qu'une sourde tyrannie exercée par le petit nombre contre la multitude. [ ... ] Qu'importe, après tout, par qui les lois sont faites, pourvu qu'elles soient

vol. 12, nº. 01, Rio de Janeiro, 2019. pp. 56-
DOI: 10.12957/rqi.2019.33213

> justes; e qu'importe qui en est le ministre, pourvu qu'il les fasse observer. [ ... ] Périssent donc enfin ces lois arbitraires, faites pour le bonheur de quelques individus au préjudice du genre humain ; et périssent aussi ces distinctions odieuses, qui rendent certaines classes du peuple ennemies des autres, qui font que la multitude doit s'affliger du bonheur du petit nombre et que le petit doit redouter le bonheur de la multitude![3] (MARAT, 1974, p. 35)

These ideas are consistently completed in Marat´s work **Chaînes de l'esclavage**:

> C'est à la violence que les états doivent leur origine, presque toujours quelque heureux brigand en est le fondateur et presque partout les lois ne furent, dans leur principe, que des règlements de police, propres à maintenir à chacun la tranquille jouissance de ses rapines.[4] (MARAT, 1972, p. 58-59)

And, if the foundation of the State seems to him as an act of power, legal norms would also have the same foundation. This is what happened through the perspective of an attempt to clarify the formation of the national states thought lenses of power.

It is prefered, is this work, another position: if an act of power comes together with the foundation of the state, by other means this tension needs to resolve itself in a conflictive state of less impact, in order to reach the maximum of efficiency that can be reached. In this sense, legal norms ought to at least concede an identity of treatment: an isonomic condition. What is promised (to the one who is adressed by the norm) through making legal norms is that the own legal norm will be demanded from all, without exceptions, even from the legislator, the law enforcer and the judge.

The different schools of criminal politics today (DELMAS-MARTY, 2004), influenced by the three dominant political views (liberal, equalitarian and totalitarian), end up converging, even the structural-systemic approach, in a single point: it will be needed to reintegrate the convict (of any crime) to the social system. Considering that the criminal behavior will always depend on the definition of the one who have the power about the punishable conducts, it is verified that the limits of these possibilities are defined in the interior of the set of promises made by all other norms. There can only be a punishable offense if there is a previous norm that determines it (*nulla poena, nullum crimen – sine praevia lege poenali*), and a criminal norm can only be posed if the set of norms permits it. This general principle that establishes limitations to the application of punishments also implicitly brings those that come with the state´s apparatus, like constitutional review, that sometimes may lead to bad results - both international, with the reduction of the efficacy of state´s sovereignty, and national, with the imposition of criminal punishments according to precedents and without taking into consideration the particularities of the case.

However, the criminal punishment is deeply rooted in the action of the offender that impedes the state to fulfill his promises to others – this kind of equality under the law will be a touchstone of a possible tribunal justice,

[3] Translation: What is called that name (laws) other than the orders from a proud master? His empire is just deaf tyranny exercised by a minority against the multitude. ( ... ) What matters, in the end, by whom the laws are made, provided they are fair; and what matters whom applies them, provided that he makes them observed. ( ... ). Perish, then, finally, these arbitrary laws made for the happiness of some individuals in prejudice of the human gender and perish, also, these odious distinctions that make certain classes of people to become enemies from others, that make the multitude afflicted with the minority´s happiness, and that make the minority fear the multitude´s happiness.

[4] Translation: It is to violence that the states owe their origin; almost always a happy adventurer is its founder and almost everywhere laws were merely, in their origin, police rules made to guarantee for each one a peaceful fruition of their plundering.

vol. 12, nº. 01, Rio de Janeiro, 2019. pp. 56-
DOI: 10.12957/rqi.2019.33213

having in sight the legal order´s implicit promises.

## CONCLUSION

This paper had for objective the study of the concept of legal norms and its implications. It was stated that discussing the concept of legal norms is also discussing the way they are applied. Many positivist approaches over the last century tried also to deal with this problem. It was seen that they usually separate law and politics, aiming for a solely juridical concept of norms. It was also stated that the positivist model of Frederick Schauer follows those guidelines. The paper at hand presented a different approach for understanding legal norms, seeing then as promises made to reduce social conflicts and obtain legitimacy, in a given culture/civilization, comprising certain equality under the law, and trying to unite the fields of law and politics. In this sense, at some extent, legitimacy depends upon effectiveness.

The study of communication and pragmatics in John Searle (1981), mainly concerning the structure of contracts and promises, offered basis for the present conjecture. In his theory, to perform an act of speech consists not only in communicating messages, but in provoking actions, uniting an expressive act, a propositional act, an illocutionary act or explicit promise and a perlocutionary act or act of comprehension from the message´s receiver. The concept of promise developed by Searle is particularly important for this conjecture about norms. As seen, a promise ought to follow some conditions and has a central role on contracts. From those conditions, some rules can be drawn that permits the use of a illocutionary force indicator. The use of the illocutionary goal enlightens the social linguistic uses of speech and promotes a reduction of the fundamental things done with it. As a foundation of the possibilities of speech is rooted trust.

Based on this notion of promises and contracts, this work tried to consider a more tenuous concept of legal norms, tending in the current society to incorporate vague expressions (such as principles), also considering their insertion as a part of the social construction of the subject or individual, which always have an irremovable level of pollution. In this sense, human activity is a phenomenon rooted in communicative and metacommunicative processes, that emerges, changes and perfects itself according to the development of social relations. From this point of view the world is not a given, but a construct, continuously transforming itself according to the situation of the observer. Therefore, history is not a linear record of actions, but mainly of conflicts and ruptures in the established order.

The need for survival and safety leads agents to reproduce social conditions that go beyond their own needs in a given time and space – generally leading to the development of different cultures and civilizations, having roots in communicative and metacommunicative processes among individuals – a semantic-pragmatic processes, involving meanings and actions, being limited by the intersection between the atmospheres of the individuals in relation. The concepts of law and society are also limited by the situation in which the atmospheres are immersed. In contemporary occidental societies generally the limits of possible actions are posed by the legal system. This system can be seen as a

vol. 12, nº. 01, Rio de Janeiro, 2019. pp. 56-
DOI: 10.12957/rqi.2019.33213

result of implicit promises that define the functioning of society and its processes. Consequently, legal norms may be seen as promises (in the terms of this conjecture).

Following these guidelines, the investigation continued to verify the possibility of seeing legal texts as promises, mainly concerning preconditions, production and some consequences (on the criminal field) of these kind of legal promises.

It was seen that power structures are created by a government constitutive act, guided by projects (culture) and civilizing offensives. These structures inevitably create social conflicts. A promise of administration has to be made in order to reduce these conflicts, enabling some kind of legal equality. Generally these promises are made through the production of legal texts (the constitution, for example) by those who seize, by any means, the power to do it. From this point of view, legal texts are not responsible for the institution of society – they reflect and seek to keep the functioning conditions of society, usually through the lenses of those who have the power, and also introduce their agenda, mainly by the predictive and ideological effect of law. On one hand, constitutions set the directions they intend to conduct society, and on the other promise rules and principles that they agree to keep to obtain social homeostasis, at the lower possible cost. Concessions made by those who have the power are common to maintain the state of affairs. The systematic persecution of the promises made in legal texts enables a government to have legitimacy.

In this sense, beyond formal procedures are social expectations that demand fulfillment. Therefore, even if all the procedures are rigorously performed; if the norm created by those procedures and by the men authorized to do it (by other procedures or fictions) is not consistent with the projects of the society (capable of manifestation) it will be seen illegitimate or even illegal. Legitimacy in bound to the conjunction of political factors that comes from the concentrated and persistent search to fulfill society´s projects in the limits of legality. Through these lenses, legality and legitimacy, two fundamental concepts to theories of politics and law, are not separated. The production of legal texts (projects about the functioning of society) will have as a counterpart its effective application to reach the interests of their recipients or their enforcers, through concrete norms that are a result of the comprehension (sense)/interpretation (meaning) of those actors (players) and, in particular, of third parties authorized to do so (operators), implying, at the same time, *auctoritas* and *potestas*. Announcing rights and liberties (individual or social) in normative texts does not consist merely in promising, but in permitting the promise´s existence. Only a future action to be perpetrated by the one who promises (or the one who succeeds him in office or function) can be promised. In consequence, a norm consists in a promise that is made to be fulfilled given the demand of anyone who is interested, in particular of those who have the obligation to make demands and acts demanding its fulfillment

The maintenance of that promise between individuals is a clause that insures the good functioning of society. When a promise becomes a norm it does not only dictate expected behaviors, it also generates the commitment (for those who create it) to demand it uniformly from all individuals addressed by the norm (equality under the law). However, and above all, to demand only what was promised and to give nothing except what was promised.

vol. 12, nº. 01, Rio de Janeiro, 2019. pp. 56-
DOI: 10.12957/rqi.2019.33213

The projects conceived in a given society are structured in the limits and conditions of possibility of this society – from promises of the legal order, from building a shareable culture and an adequate civilization for those projects. The concept of a project´s program depends upon the shared socio-historic process between the programmer and the designer. As said, any given subject is constructed by a socio-historic process, and all of them are responsible for building, from their own perspective, programs and projects for society.

To commit a crime means, in this conjecture, to perform any action that prevents the fulfillment of the promise made through norms in society. What is punished in the case of disrespect of law is precisely the prevention to fulfill the promise. The punishment´s strictness would depend (as depends on the evaluation of the one who creates the legal norm) on how much damaging the criminal action was to the promise´s general maintenance. The return to Hart proposed by Frederick Schauer is just a part of a positivist program – in fact the roots are more remote and are created in the fertile soil of modernity´s program. It is prefered, is this work, another position: if an act of power comes together with the foundation of the state, by other means this tension needs to resolve itself in a conflictive state of less impact, in order to reach the maximum of efficiency that can be reached. In this sense, legal norms ought to at least concede an identity of treatment: an isonomic condition. What is promised (to the one who is adressed by the norm) through making legal norms is that the own legal norm will be demanded from all, without exceptions, even from the legislator, the law enforcer and the judge. The criminal punishment is deeply rooted in the action of the offender that impedes the state to fulfill his promises to others – this kind of equality under the law will be a touchstone to a possible tribunal justice, having in sight the legal order´s implicit promises.

It ought to be said that the present paper has no intention to be the correct mirror of nature. It is instigation to debate, to dissent and dialog. The positions shown here cannot be seen, and have no pretension to be, the natural truth. All theories are models of reality – work like a map. Reality is extremely complex; therefore a reduction is needed in order to understand it. A theory is a reduction of a complex reality, in order to understand it somehow. Just like a map, it permits to go to a destination. But a theory cannot be mistaken with reality, as a map cannot be mistaken with the city – if the map were the city, it would be the city, and not a map – and this counts for theories also.

Every theory, as every map, has the goal to situate a subject in a complex reality. Physics permits to understand the functioning of certain natural phenomena, as do chemistry; math enables to reach proved results; theory of law permits to situate a subject in a reality of social regulation.

In case a theory cannot reach its goal to guide subjects in a complex space – it must be thrown away, searching for a more adequate for that task. There is a problem in ontologizing theories, in other words, mistake them for reality, as this discard process becomes much more difficult.

vol. 12, nº. 01, Rio de Janeiro, 2019. pp. 56-
DOI: 10.12957/rqi.2019.33213

## NORMA COMO PROMESSA E O PROBLEMA DA LEGITIMIDADE

**Resumo**

O presente trabalho investiga a norma jurídica, principalmente no que envolve questões de legitimidade e efetividade do direito. Funda-se no seguinte questionamento: como a norma jurídica pode ser entendida dentro de um Estado de Direito? Diferentes teorias propuseram variados modelos de entendimento da norma jurídica, como contemporaneamente o positivismo jurídico de Frederick Schauer. O trabalho em questão pretende seguir caminho diverso daquele de Schauer, buscando diferentes fontes para o entendimento da norma jurídica. A partir dos trabalhos de John Searle, propõe-se observar a norma jurídica como promessa. Com a finalidade de reduzir a conflitividade social a níveis ótimos, faz-se preciso oferecer uma promessa de gestão conforme ofereça certa igualdade frente à lei (erradicação formal do privilégio). É preciso refletir sobre a produção do texto legal (a Constituição, por exemplo) pelos que se apoderam, a qualquer título, do poder de fazê-lo. Para além dos mecanismos construídos tendentes a estabelecer uma equidade formal (como aqueles dos direitos e garantias individuais e dos direitos sociais), posta no texto legal constituidor do sistema de poder gerido pelo governo em suas diferentes acepções – deve-se obter legitimidade mediante a persecução sistemática das promessas postas (pelos detentores do poder) nos textos legais.

**Palavras-chave**: legitimidade, Efetividade, Legalidade, Teoria da Norma, Poder.

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