FROM THE LINKAGE TO RULES TO THE LINKAGE TO THE LAW:

the juridicity as paradigm

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ABSTRACT

This study has as scope the discussion about the rupture of the legality paradigm, overpassed by the juridicity one. Thus, we analyse the reasons upon wich the legality was founded, and also the reasons why it became surpassed. Still, seeks the understanding of the concept of juridicity, by drawing its possible practical consequences.

KEY-WORDS: Juridicity. Legality. Legal system. Hermeneutics.

DA VINCULAÇÃO À LEI À VINCULAÇÃO AO DIREITO:

a juridicidade como paradigm

RESUMO

O presente trabalho tem por escopo a discussão sobre a ruptura do paradigma da legalidade, superado pelo da juridicidade. Assim, analisam-se os fundamentos sobre os quais fundou-se a legalidade, bem como as razões pelas quais restou superada. Ainda, busca-se a conceituação da compreensão da juridicidade, traçando-se seus possíveis desdobramentos práticos.

PALAVRAS-CHAVE: Juridicidade. Legalidade. Sistema jurídico. Hermenêutica.

1 INTRODUCTION

This paper aims to propose a discussion about the understanding and development of the principle of legality, typical from Civil Law tradition, which culminates in the notion of juridicity. This process shows a change at the juridical-normative State's linkage: If this principle was once strictly linked to the law (rules or set of rules), nowadays such link extends to the whole Law system, systematically understood, extending, therefore, the complexity of such linkage.

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Thus, it seeks throughout this text to expose the legal-dogmatic elements that sustains the principle of juridicity, evaluating the relevance of its existence and the need of its proper comprehension. This path is essential as the current notion of legal system does not operate in same frequency of the notion of strict legality.

In this sense, the work is divided into two blocks: the legality paradigm and the juridicity paradigm; each block is divided into other two, in order to facilitate the text flow, exposing the main elements of the principles in debate.

The perspective of this research is to analyze the phenomenon of juridicity from the relationship between Public Administration and Law, although it doesn't deny the possibility of expanding the notion of juridicity to other Law areas.

In summary, the argumentation that permeates the text is synthesized by Pontes de Miranda, for whom "the Law, not the rules as text, is what is feared to be offended."

2 THE PARADIGM OF LEGALITY

For historical reasons, the current legal thought at Civil Law communities links the actions of the Public Administration (and the Judiciary) to the rules, in an inextricable way. Thus, legal operators have limited margin of maneuver and a jeopardized ability to analyze the sources of law, whereas they have the rules, in the strict sense, as the only legitimate source of Law.

In sequence, it will be analyzed, under historical perspective, the reasons why the understanding that the rules must be the source and the limit of State's action was formed and solidified, without space for others normative elements, submitting the State to the letter of the rules, inexorably.

2.1 THE STATE'S SUBMISSION TO THE RULES

The high prestige developed by the rule (in the strict sense) or its primacy, has its origins in the eighteenth century, with the bourgeois revolutions in Europe, which gave rise to the emergence of a new organizational structure model of the State. The ideological embryo, however, had emerged much earlier, with the proclamation of the famous Magna Carta, signed by John of England in 1215, which somewhat limited the power of the State regarding tax liability.

In this way, the Liberal State (also called bourgeois), emerged as a result of the need to put an end at the excessive abuse and concentration of power existent at the Absolutist period, and advocated by respected authors such as Montesquieu, Rousseau, Locke, Kant, Hegel, Adam Smith, Madison, Bentham, Benjamin Constant, Tocqueville and Stuart Mill, had as great merit the creation of capable mechanisms to reduce and regulate, legally, the use of power arising from the State's activity, as well as ensuring the political and individual freedom (In this sense, MIRANDA, 2011, p. 36).

Thus, in order to create guarantees to safeguard the citizens, the Modern States evolved into the Liberal State, either through the British standard, i.e., through a politic-institutional evolution, either by the French model, i.e., through the revolutionary rupture – based upon principles – of the order structured (SOUZA JUNIOR, 2002, p. 24).

In this sense, the Liberal State had few, but well defined functions, consisting, basically, in reasonable administration of justice, police power and protection against external enemies, becoming, thus, the essential elements that would form the defense of the immediate interests of the citizens: freedom, property and security (SOUZA JUNIOR, 2002, p. 36).

Democratically, through legislative means, the rules would assume great importance, as it would be assimilated as guarantor for maintaining the achieved and established order, confusing itself with justice. How exposes Souza Junior, "at Liberal State, rule is the expression of justice: it is a positive translation of natural rules, prior and superior to the State" (SOUZA JUNIOR, 2002, p. 48). Consequently, would only be allowed for the State to operate in the compass of the rules, with any legitimate alternative to such political-legal-institutional prescription.

Thus, according with the elements shown, the lesson of Ferreira Filho is worthy of record:

> In the liberal worldview, it is reserved to the rules a dual role. If the Declarations are mainly directed to the constituent, if the Constitutions organize and restrict the powers of State, the rules, on the one hand, delimit the freedom of individuals, while, on the other hand, establish their own agenda of activities of state superior organs. (Ferreira Filho, 2007, p. 19)

In this way, the rule assumes a dual role and it can be understood as a *limit*, as well as the *base* of State's activity, providing one negative linkage and other positive to the State in relation to it, respectively. In this sense, is the teaching of Canotilho:

> The administration is bounded to the rules not only in a *negative sense* (the administration can do no only what the rule expressly authorizes, but everything that the law does not forbid), but in a *positive sense*, because the administration can only act based on the rule and there is no free space at the rule in order that the administration can act as a free legal power. (CANOTILHO, 2003, p. 833)

Given the level of importance recognized by the rules, the principle of legality naturally arise, mentioned at Montesquieu's The Spirit of Laws, for whom "in a society with laws, liberty can consist only in the power of doing what we ought to will, and in not being constrained to do what we ought not to will." The author continues:" freedom is the right to do whatever the laws permit "(Montesquieu, 2004, p. 167).

The principle of legality, "the result of the submission of the State to the rules" (BANDEIRA DE MELLO, 2005, p. 91), according to liberal ideals, as seen, " the liberty is recognized as the rule and the restriction, as the exception" (FERREIRA FILHO, 2007, p. 23), assuming, therefore, an extremely important role in constitutionalism, firming up at the political-legal contexts until the present day.

The lesson of Pimenta Bueno follows the thought above:

> Freedom is not the exception, but the imperative, the absolute principle, the positive law; the prohibition, the restriction, they are the exceptions, and for that reason they need be proved, find themselves expressly mentioned by the rules, and not by a doubtful way, but by a formal, positive one; everything else is sophism. (BUENO, 1987, p. 382)

For the Portuguese publicist Paul Otero, the legality is based - following Montesquieu's thought - on three core ideas: (i) the law is understood as rational expression originated by general will, (ii) the power would find in the law the criteria for their decisions and (iii) the law would assume a guarantor role of freedoms. (OTERO, 2011, p 51).

Still according as the Portuguese publicist:

> The law would translate, according to the liberal postulates, a product of reason, a revelation of an absolute truth given by the most credible representatives of society, being able to regulate all subjects on which a minimal State would feel the need to intervene, assuming for the citizens the nature of guarantee's instrument towards power and having, in terms of a positivist-legalistic conception, the status of the first and most important source of Law. (OTERO, 2011, p. 153)

José Afonso da Silva, in his turn, comment the principle of legality inscribed in the 1988's Brazilian Constitution, understood by him as a "submission and respect for the law":

> The principle of legality is an essential note of the Constitutional State. It is also, therefore, a fundamental principle of the Democratic Constitutional State, since it is the essence of its concept to subordinate itself to the Constitution and be based on democratic legality. (...) All the activity depends to "the law", understood as the an expression of the general will, which only emerges in a system of separation of powers, being a act formally created by the organs of popular representation, according to legislative procedure established in the Constitution. It's by this sense that it needs to be understood the assertion that the State, the Public Authority or administrators cannot demand any action, impose any abstention, nor prohibit anything to the administered, except under the law. (SILVA, 2009, p. 82)

Thus, as the natural evolution of societies and legal models, legality became present to ensure the preservation of rights and to better coordinate State action, constituting, therefore, in an important Law's historic achievement. Sylvia Maria Zanella Di Pietro affirms, without exaggeration, that the principle of legality "is one of the main guarantees of respect for individual rights" (DI PIETRO, 2007, p. 58).

In a, perhaps, hyperbolic way, Bandeira de Mello explains the principle of legality in the patriotic system:

> The principle of legality is the principle of complete submission of the Administration to the rules. The Administration must merely obey

> them, keep them, and put them into practice. Hence, the activity of all agents, since the ones that occupy the summit, ie, the President, until the most modest of servers, can only be the activity of docile, reverential, obsequious doers of the general rules established by the Legislative, because that is their position in the Brazilian Law. (BANDEIRA DE MELO, 2005, p. 92)

For no other reason, the 1988's Federal Constitution inscribed the principle of legality in the title dedicated to fundamental rights and safeguards, standardized in section II of art. 5th that "no one shall be compelled to do or not do something except under the rule."

However, despite all the significant contributions of the different notions of legality brought by the Liberal State, which played an important role for the development of the activity models of Western States, the legality becoming an essential element to the notion of Constitutional State, it can be questioned the methodological appropriateness for using strictly legal criteria – and, therefore, formal - to measure the compliance of certain legal or factual element with Law, inasmuch as that the notion of legal system underpinned by legal science today differs from the legal comprehension of yore .

2.2 EPISTEMOLOGICAL (IN) SUFFICIENCY OF THE PRINCIPLE OF LEGALITY

Several changes occur over the centuries about the understanding of legal phenomenology. Thus, it is imperative to explain the contemporary conception of the concept of legal system, because it is from this premise that it will be studied the (in)sufficiency of legality while parameter of verifiability of eventual accordance to Law of any object pretend to be examined, regardless if it is rule or fact. In other words, it seeks to "reflect on the veracity of certain classical dogmas concerning the legality's administration that is mechanically transmitted to the jurists from generation to generation" (OTERO, 2011, p. 19).

In this way, it is important to assimilate that "the legal system is an open and topical network, axiologically hierarchized of rules, principles and values" (ARONNE, 2001, p. 55) that cannot operate through formalist methodologies; it cannot be forget it that the pursuit for the "rationality of 'clear and distinct truths'", typical from the demonstrative sciences, is

"a ridiculous demonstration of epistemological anachronism" (SILVA, 2006, p. 69), because as already pointed Canaris, "the inherent difficulties of the legal thought does not overpass the means of formal logic" (Canaris, 2008, p. 70), which is closely related to legality. The Law, it is worth remembering, cannot be operated through syllogisms.

In order to proceed the analysis of the characteristic elements of the legal system, it is necessary to appreciate of the work of Canaris.

The professor Canaris defends the need for insertion of principles in the normative network, in order to give it a "unifying role" (Canaris, 2008, p. 81), since it could not be composed only of rules (in the strict sense). Thus, he points out that "the principles are not worth without exception and can collide or contradict; they do not claim exclusivity, they display their own sense only in a combination of mutual complementation and restriction (...)" (CANARIS, 2008, p. 88).

The advantages of such understanding are shown by the author himself, when he make his points about the eternal dichotomy between *justice* and *legal security*:

> The mobile system represents a particularly happy compromise between the various postulates of the idea of Law - and legal security is always guaranteed to a greater extent than in front a mere equity clause - and balances the 'polarity' of them in a considered and 'intermediated' solution; it deviates not only from the rigidness of strict rules, but also from the absence of contours of a pure equity clause. (CANARIS, 2008, p. 145)

So, Canaris proposes a systematic understanding of Law, through which you can stop seeking the *ratio legis*, to seek the *ratio juris* (Canaris, 2008, p. 159): the difference between the two objects is abysmal, and represents an ideological rupture via the insertion of teleological element in legal reasoning, settling the idea that the science of Law is hermeneutic (CANARIS, 2008, p. 266) and does not dissociate from axiological issues.

Similarly, the work of Juarez Freitas proposes the seizure of the legal system, "unfinished and endless" (Freitas, 2004, p. 47), as a hierarchical network of principles, rules and values, demonstrating the anachronism of the subsumed arguments against the inclusion of the axiological dimension in the Law:

> Indeed, any mechanical subsumption criterion would be revealed as unproductive as the automatic linkage of legal rules (principles or rules) dogma, because a strict approach - located in a syllogistic-formal plan or based at the authority who has laid down the normative commands – bump at the necessary considerations about the minimal **legitimacy** and the nuclear **evaluative correction** of the legal system. (FREITAS, 2004, p. 26) (emphasis added)

Still, the author argues aligned with the teachings of Canaris, that "Positive Law is open, that is, the idea of a supposed set of autosufficient rules does not have the slightest plausibility, neither in theory, nor empirically" (FREITAS, 2004, p. 32). So, he affirms that "the validity of the legal system (...) is based, ultimately, on values, and it seems undeniable the concurrence of multiple axiological elements in all jurisprudential constructions, justifying the multiplicity as a sign of democratic pluralism"(FREITAS, 2004, p. 38). He states further that "the system is not built through strict and definitive contours, especially because the dogma of completeness doesn't resist the observation that the contradictions and gaps follow the rules, in the guise of irremovable shadows" (FREITAS, 2004 p. 39).

For Juarez Freitas, the legal system is, therefore:

> (...) An axiological network, topically hierarchized of fundamental **principles**, of strict standards (or **rules**) and of legal **values** whose function is, while avoiding or overcoming antinomies in a broad sense, to fulfill the justifying goals of the Democratic State, as they are embodied, explicitly or implicitly, in the Constitution. (FREITAS, 2004, p. 54) (emphasis added)

It is observed that Ricardo Aronne has reached a similar conclusion, for which the system is "predictable in its chaotic dynamics" (ARONNE, 2010, p. 69):

> The legal system is a mobile, entropic and open network, axiologically hierarchized of **rules, principles and values**, positivized in the legal system in a implicitly or explicitly way, teleologically oriented in topical implementation. The system is sensitive to initial conditions that are proposed, is not linear, responding differently and

> not proportionally to 'inputs' or different interactions. Due to its opening, there is also the complexity of architectures and influences that, necessarily and properly, the system exposes itself. (ARONNE, 2010, p. 204) (emphasis added)

Canotilho's lesson doesn't differ from the elements already exposed: for the Portuguese constitutionalist, the legal system is an "open legal system of rules and principles":

> (1) is a legal system because it is a dynamic system of rules, (2) is an open system because it has a dialogical structure (Caliess), translated at the availability and 'learning ability' of constitutional rules to capture the changing reality and be open to changing conceptions of 'truth' and 'justice', (3) is a normative system, because the structuring of expectations concerning values, programs, functions and people is made through standards, (4) is a system of rules and principles, because the standards of the system reveal themselves as principles, or as rules.

In this way, it has to be perceived the contemporary sense of legal system, leaving aside the claims of yore, through which was pursued a closed system, complete and composed only by rules, without connection with the real world, nor committed with the ideals of ethics and justice. The Law is much more than the law, and this has been demonstrated by Chaïm Perelman, who said that:

> The events that followed in Germany after 1933, showed that it is impossible to identify the Law with the law, because there are principles that, even not expressly object of legislation, it's imposed over all whose the Law is an expression not only of the Legislative, but of the values that the Legislative intend to promote, among which figure in the foreground, the justice. (PERELMAN, 2004, p. 95)

The statement above is justified because according the paradigm of legality, what is in accordance to the rules is correct, necessarily. The lesson of Ferreira Filho says that "legality unlinks itself from justice" (FERREIRA FILHO, 2007, p. 51), because, as seen by the paradigm of legality, there is no room for merits consideration of the State acts, but only for the formal syllogisms, by which merely investigates the existence of a possible subsumption between the act and the legal text.

Evidently, this link established by the Liberal State (therefore also by the legality) between the fulfillment of the rule and the legal suitability doesn't have any logical relation, but, mere presumption of legitimacy, under penalty to convalidate the unfortunate affirmation of H. Kelsen that, "through the Law's science point of view, the Law edited by the Nazi Government was right" (*in* FERREIRA FILHO, 2007, p. 45).

It seems clear the idea that Law is above the law – reason why the Kelsen's fallacy cannot be tolerated - and also the reason which sets up the failure of the principle of legality to report the legal complexity of today's world, in which Law exists as a system of multiple sources and values, and not as a mere set of rules in the strict sense; the legality, as a principle of strict subservience to the rules, is inconsistent with the notion of system.

The lesson of Paul Otero is below transcribed, by its relevance:

> The ideas of supremacy of parliament and deification of the law, either as an expression of the general will or as an guaranty instrument of equality of all citizens, allow to consolidate during the nineteenth century a positivist conception that, setting the law as the main source of Law and making codification the flag for scientificity and modernity of legal systems, all lead back the Law to the State: the administrative legality is, in this precise context, the expression of "statefication" of the entire legal system.
>
> It happens, however, that this scenario typically eighteenth of "statefication" of the sources of Law is now substantially altered by the state decentering of legality: the monistic conception of Law is replaced by a conception of legal pluralism. (...)
>
> The administrative legality becomes integrated into a context of polycentric system of sources of Law. (OTERO, 2011, p. 148)

2 THE PARADIGM OF JURIDICITY

> *As long as people avoid levity or caprice, and observe a decent constancy of judgment over time, in addition to remain open to revising their views by well-founded arguments, they are not unreasonable just because they adopt a different view of my or yours.*
> Neil MacCormick

Faced with the inexorable need to understand the Law as a system composed of a broad set of rules from multiple diplomas - and values - sometimes chaotically arranged, always searching a *telos*, ie, a *ratio*, it urges the study and understanding of the juridicity dogmatic proposal, understood as the overcoming of strict legality, consistent with the idea that "the principle of legality cannot be understood in a timid way" (FIGUEIREDO, 2003, p. 42), but in a "systematic context." (FIGUEIREDO, 2003, p. 45)

In this sense, it will be undertake the dogmatic analysis of the juridicity's contents and its possible practical ramifications.

3.1 JURIDICITY: FUNDAMENTS AND CONCEPTUAL ATTEMPTED

The juridicity can be understood as the adequacy of the principle of legality to the current complex and systematic structure of Law, no longer identified with only a fraction of the legal-normative structure, ie, the rules. As exposed by Lúcia Valle Figueiredo, the administrator necessarily "must be also submitted to Law" (FIGUEIREDO, 2003, p. 42), which is obviously a much more complex and extensive notion than the simple (if not simplistic) notion of legality. In the words of Binenbojm, "the Administration linkage is not restricted by the formal rule, but by the legality's pack (the legal system as a systemic whole)." (BINENBOJM, 2008, p. 141.)

It isn't defending the destruction of the principle of legality, but rather the construction of a new understanding from which it will be possible to satisfy the demand for respect to the rules (principle of legal certainty corollary, which is essential to a Constitutional State) and also in respect to the system - complexly structured and not restricted to the simple normativity of the rules - because, in the lesson of Juarez Freitas,

"the legal substance, under the evaluative nature, transcends the mere and sparsely positivist substance" (FREITAS, 2009, p. 71), especially in so-called *hard cases*.

Accordingly, the synthesis of Raymond Parente about the juridicity is worth recording:

> According with the phenomena of principalization and constitutionalization of Law, it is no longer conveying to explain the relationship of Public Administration with the legal system using the idea of positive linkage to the rules. The Administration's linkage to the legal system is not restricted only to formal law and to the legal conveyed rule, but it is restricted to the entire systemic legal system that manifests through normative sense's unity. (ALBUQUERQUE JÚNIOR, 2010, p. 199)

Indeed, when the principle of legality overlaps the other principles and values of the legal system it becomes clear the existent mismatch for extreme valuation of legality, however, it cannot be tolerate that flexibilization, or even the deliberation of the normative content of the principle of legality, in comparison with other normative elements, allows decisions based on subjectivist and non-legal criteria. As analyzes Juarez Freitas:

> If the belief that the interpreter has to discover the intention of the legislator or the law is inadmissible, without fair or proportional appreciation, it is also true that we should not break the legal rules, opening unjustifiable exceptions. (FREITAS, 2009, p. 71)

In the same sense, the lesson of Manuel Atienza:

> The legal reasoning is neither 'a simple syllogistic deduction', nor 'the mere search for an equitable solution'. It is the 'search for a synthesis that takes into account, mutually, the value of the solution and its compliance with Law. Or, put it in another way, the combination of the values of equity and legal certainty, the search for a solution that is

> 'not only according to the rules but also equitable, reasonable and acceptable'. (ATIENZA, 2006, p. 77) (emphasis added)

Hence, the principle of juridicity is, in this way, established, as a overcoming in some basic tenets of the notion of strict legality, among this tenets, it stands out, beyond the systemic understanding of Law, already discussed in topic 1.2, the ideas of (a) imperfection of the rules, (b) constitutionalization of Law, (c) normative principalization rules, and (d) suprapositive normativity. In sequence, it will be analyzed each phenomenon.

A) The imperfection of the rules

The rules are expressed through language, which make them imperfect; it couldn't it be otherwise, since the language is inaccurate and flawed instrument.

As Humberto Avila says, "every norm, because conveyed through language, is at some extent indeterminate" (AVILA, 2009, p. 85), to Herbert Hart, in the same way, "all rules have a shadown of uncertainty" as an "open texture" (HART, 2007, p. 16). Clarice Beatriz da Costa Söhngen, referring to Saussure's work, asserts that "language is a flawed reality, in which the errors continue to appear." (SÖHNGEN, 2006).

It remains evident, therefore, that the linguistic intrinsic nature of rules gives them an intangible dimension due to the language's essence: the claim to see the rule as indisputable and non-interpretable becomes completely misplaced; the complexity of language makes it necessary - and sometimes stormy - the hermeneutic task.

It cannot intend to couple up the operator of the rules to the letter of the law inexorably, as the failure of language could lead to a material error during the application of the dispositive, nullifying the correctness of such normative element during its application.

Furthermore, in addition to linguistic issues, the rules are produced to regulate normal cases, ie, the standard cases and is not unreasonable to deny applying the rule when it grossly not conform with the system, even if the fact is subsumed to the legal text. According Castanheira Neves:

> (...) Because the rules are prescribed due to the prediction of the more frequent, common or typical cases that they propose to regulate (...) it does not exclude the possibility to decide specifically about its applicability in other terms than those immediately imposed by the

> significant and conceptual (or interpretable in the abstract) meaning of norms, already applying them to situations and cases formally covered by it. Situations and cases non-common or atypical concerning the determinants hypothesis of rules, and whose concrete atypicality justify those deviations. (NEVES, 1993, p. 171).

B) Constitutionalization of Law

The term "constitutionalization of Law" relates to the "impregnation" of the constitutional normative at the legal system, particularly in adapting the infraconstitutional normativity to the demands and postulates of the Constitution, especially regarding the axiological elements existent in the Constitution.

According to Binenbojm, "the new constitutional principiology (...) occupies a central position at the formation of a democratic administrative law, committed with the fulfillment of human rights." (BINENBOJM, 2008, p. 142)

Thus, the validity of the rules (in a broad sense) remains tied to existing constitutional accordance, because the Constitution - being able to irradiate its normative force to the entire legal system, particularly through its principles (BARROSO, 2010, p. 158) - imposes a certain uniformity of interpretation, which should be consistent with the Constitution.

As noted by Otero, "the constitutional rules arise as an immediate guiding criterion of interpretation, integration and application of all infraconstitutional acts" (OTERO, 2011, p. 741), demonstrating, beyond relevance, the need of constitutional normativity for State's action.

In this sense, in an essay about this subject, Luis Roberto Barroso discusses the direct relationship between the constitutionalization of Law and the phenomenon of juridicity:

> It overcomes, here, the restricted idea of positive linkage of the administrator to the rules, in conventional reading of the principle of legality, in which its performance was guided by what the Legislative authorizes or determines. The administrator can and should act guided directly by the Constitution and independently, in many cases, from any manifestation of the ordinary legislator. **The principle of legality transmutes itself in principle of constitutionality or, perhaps more**

> **properly, on the principle of juridicity**, understanding its subordination to the Constitution and to the rules, in that order. (BARROSO, 2007, p. 30) (emphases added).

C) Normative principalization

Cretella Jr. teaches that principle is "every proposition, assumption of a system, which guarantees its validity, legitimizing it." For the author, the principles can be understood as "the first premise of the system." (CRETELLA JUNIOR, 2000, p. 06). Still on the characteristics of the principles, Humberto Avila says:

> As the principles constitute immediately finalistic rules and mediately rules of conduct, the justification of the interpreted decision will be made, evaluating effects of the action made as a necessary way to promote a state of things put by the rules as an ideal to be achieved. (AVILA, 2009, p. 75)

It is important to note that the principles, unlike rules (GRAU, 2006, p. 49), have non-antinomic coexistence, even when in reverse. Aronne explains that:

> Unlike the rules, existing in the validity's plan, because its concreteness, reduces interpreter's discretion, the principles coexist in evaluative plan. They are dialogical. Their reasons are complementary, even in antagonism.
>
> The rules have an antinomic convivial, dialectical, moving away in cases of antinomy to be applied or not, topically. The principles do not. They have a conflictual coexistence, and hierarchize themselves axiologically to preserve the material unity of the system. They dialogue. Mutually relativize themselves in topical incidence, on teleological chaining of the highlighted values. (ARONNE, 2010, p. 72)

Thus, through this considerations, it realizes the importance of a full and systematic comprehension of Law, from which the normative principiology allows searching the legal

certainty and justice material simultaneously, minimizing at most the use of subjectivism because the principles, as rules, link the operator.

In other words, as argues Paul Otero, the principiological framework of the system (called by him as "'principlist' normativity") acts as "unifying element" (OTERO, 2011, p. 166) to the system. Furthermore, the oxygenating function performed by the principles in the system appears to be relevant; in Aronne's words, "the principles are the window to system's maintenance, updating it by an axiological breath consistent with today's contemporary system and with the addressed societal needs."(ARONNE, 2001, p. 267).

In brief, as Otero explains:

> A tendentiously closed system of legality is replaced by a predominantly open system: the administrative legality, similarly to what happens with the constitutional system, it is predominantly principlist (...). (OTERO, 2011, p. 167).

D) Suprapositive normativity

The positivist conception of Law, since the atrocities committed by totalitarian regimes in the last century, cannot be accepted, under the risk to legally endorse such aberrations, which, ironically, had institutional support from the Law itself. As Barroso says, "the legal positivism, after the second half of the twentieth century, no longer fits into the Law." (BARROSO, 2010, p. 327).

Aware of this condition, in the chapter entitled "The myth of the omnipotence of written Law", Otero explores the existence of a suprapositive axiological order, understood as the "general legal consciousness." (OTERO, 2011, p. 411). Thus, the Portuguese jurist argues:

> The positive written Law – assuming a constitutional or merely infraconstitutional dimension – can never forget or ignore a **suprapositive axiological order**, being independent of any positive acclaim, it works as the ultimate criterion of **validity** and **foundation** of the entire legal order that doesn't show itself axiologically neutral in terms of justice. (OTERO, 2011, p. 411) (Emphasis added)

Emphasized by Otero, submission to "general legal consciousness" is due not only for infraconstitutional norms, but also by the Constitution itself.

So, considering that "man emerges as author and recipient of Law, it lays in his dignity the ultimate foundation of an axiologically fair legal system" (OTERO, 2011, p. 415). Otero lists some structural postulates of a "general legal consciousness": (a) the duty to protect human life, (b) interdiction of using human beings as means, (c) the full development of personality, recognizing its inherent rights, (d) interdiction of arbitrariness and unfounded discrimination, (e) the right to refuse to commit an injustice.

Thus, it can be observed that because the "general legal consciousness" an inexorably materiality related to human dignity as a fundamental rights, cannot be dictated by the majority on duty, otherwise, the political majorities would be legitimized to oppress minorities, hindering them fundamental rights. The configuration of the "general legal consciousness" is independent of the "general will."

As it appears, the notion of a suprapositive normativity protecting a basic and fundamental core of rights, inherent to the human condition, presents itself as a parameter to configures the juridicity, while (i) limiting the insults to fundamental principles and (ii) guarantor of such rights, regardless if it is written.

In summary, the analysis of the exposed elements suggest that "the plurality of legitimized normative sources requires a broader concept [of legality], namely, that of juridicity." (MOREIRA NETO, 2005, p. 104).

3.2 THE JURIDICITY AND ITS POSSIBLE PRACTICAL OUTCOMES

The juridicity definition proposed traces some possible developments that outcome from the designed definition. It will be explained possible consequences of the juridicity's phenomenon. It will be shown some examples, because it would not be possible even aspire to exhaust the matter, which is inexhaustible. Further, the present topic intends to gather exemplifying elements unfolds from juridicity, and not thorough analysis of each.

(A) Juridification of factual elements

From the notion of juridicity, there is the possibility of juridification of facts not formalized, i.e., assigning legal valuation to facts that, a priori, could not be legally

recognized. In other words, juridicity can give legal relevance to mere factual existence of certain situations, something unimaginable under the legalistic prism.

In this sense, Otero exemplifies juridification of facts by three possible situations: (i) the administrative habit, (ii) the procedures, practices and administrative uses and (iii) the administrative precedent (OTERO, 2011, p. 1084).

These facts, made by the Administration itself, have the power to "subvert" the legality and the dichotomy between validity and invalidity, (OTERO, 2011, p. 783) because, although those acts aren't formal according to the perspective of strict legality (they would be illegal and invalid by the paradigm of legality), they are worthy of consideration by the mere existence, which is able to give them legal validity, despite the formal illegality.

It should be noted, though, that the recognition of such acts or administrative precedents have legal force to regulate or even bind the Administration itself, and may not claim illegality of it own conduct, unless in cases with enough arguments – of public interest - to disregard such situation, through a systematic analysis. This understanding is based, as exposes Otero (OTERO, 2011, p. 786), at the *venire contra factum proprium* prohibition, as well as legal certainty.

(B) Temporal consolidation of defected legal situations

It is well known that defected legal acts may suffer further consequences able to make them without any legal value: the normative system allows certain vices to become annullable imperfect acts, when disregarding certain formalities, the act would be in disagreement with the legal structure, configuring the illegality.

However, other factors must be analyzed, in comparison to the strict legality of the act. The existence of principles such as legal certainty and *bona fide* can lead to a different conclusion.

In this sense, Otero (OTERO, 2011, p. 1026) argues that time could consolidate the defected legal situation, convalidating it. This is because it must be considered if the annulment of the act, by its inconsistency with the law (in the broad sense), would not be generating an even greater offense to the system than its maintenance, even if that act is ingrained with defections: recognizing the defect could jeopardize legal certainty and existent *bona fide*. Thus, a comparison between the values protected by the legal system is imperative, because, by one side there is the need to obey the current rules, and by other

side, there's the protection of the legal certainty and *bona fide*, reason why such conflicts can only be resolved topically, never in the abstract.

Aware that such convalidation of defected acts by the time produces great discomfort, the portuguese publicist (OTERO, 2011, p. 1027) makes a unanswerable comparison, since the administrative defected act could produce effects, no jurist doubts that the defected *res judicata* sentence, even by unconstitutional vice, produce effects, operating a sort of vice's convalidation also by *res judicata*. It is possible to extent such possibility of court to the administrative decision.

Otero pushes further his argument, sustaining that even nonexistent acts can have legal effects:

> Also the inexistent acts can build situations that (...) through time and according to safety, certainty, stability and reliability reasons, justify the attribution of legal effects for them. (OTERO, 2011, p. 1027).

(C) Nullification of legal situation that insults fundamental right

If on one hand it is assumed the convalidation of an act that is inconsistent with certain legal statement to safeguard the high prestige principles of the system, on the other hand, it does not admit the existence of legal acts that may be able to cause injury to fundamental rights.

The same reasoning that leads to the maintenance in the system of a formally illegal act, due to certainty, *bona fide*, etc.., also leads to the conclusion that any act, even respecting infraconstitutional formal standards, should be nullified if jeopardize some fundamental right: it is the recognition of the role played by fundamental rights, which can never suffer any kind of disregardness.

Otero explains the issue:

> The administrative violation of essential content of a fundamental right always results in the nullity of the respective legal act, expressing a direct and immediate special linkage of the Administration to the fundamental rights. (OTERO, 2011, p. 741)

It is mandatory the constant reverence to fundamental rights, because "the principle of justice and the ‘idea of Law’ due from the respect for human dignity, [act] as final foundations of evaluative adequacy and unity of Law." (OTERO, 2011, p. 333).

(D) Inapplicability of unfair rules

The comprehension of the broader sense of juridicity, beyond legalistic and syllogistic thought, allows to consider the (in)applicability of rules manifestly unjust, although there’s possibility of formal subsumption.

In other words, the purpose of recognizing the possibility of non- applicability of a rule is to avoid occurrence of injustices during the application of rule. In some situations, although the norm seems to be "subsumed", there are facts (exceptions) that make the norm improper to it.

As asserted by Gerson da Costa Godinho:

> The identification of Law with the rules created two serious problems. One, related to the absence of an unreachable rationality at the legal system, the other, due to him, related to the obvious and undisputed injustice by the automatic application of some legal rules. (COSTA, 2008, p. 59)

In some circumstances, the mere subsumption is not able to assess the adequacy of the legal rule to the present case. As explained by Castanheira Neves, the rule to be applied must have been made with the intention of being used in a case like the one through consideration. For the Portuguese jurist philosopher, the "rule can only be definitively applicable, or it will be only defined as total applicable, when checked 'experimentally' (ie, through methodological discourse of valued questioning) their intentional-normative suitability to the present case." (Neves, 1993, p. 167). Still according to Castanheira Neves:

> (...) Because the rules are prescribed in the prediction of the regular, common hypothesis or typical cases that propose to be constant (...), it does not exclude the possibility of deciding its concrete applicability in other terms than those immediately imposed by the significant and conceptual meaning (or interpretable in the abstract) of the norms,

> already applying them to situations and cases formally covered by it. (Neves, 1993, p. 171)

Thus, once verified that the application of the rule will result obvious injustice, it is imperative to the operator to protect the evaluative content of the system, not applying the specific rule: as maintained by Juarez Freitas, it isn't an opposition to the Law, but to the unfair rule. (FREITAS, 1989, p. 14).

(E) Protection of the legitimized expectation

The idea of protecting the confidence only seems possible from the paradigm of juridicity: the confidence's protection rightfully deposited in the Administration presumes a compromise of strict legality and the so called supremacy of the public interest, reinterpreting those principles topically according to the system.

Thus, exposes Maffini that the guaranty of the confidence's protection intent to "preserve the administrative conduct or its effects, even when resulting from contrary actions to the law and, even more, when they were validly perpetrated." (MAFFINI, 2005, p. 233). This means that the person who trusted in the an act originated by the Government could see the referred act producing effects even if it is defected; likewise, being in the act formally perfect, it cannot be undone without a minimal reasonableness, since the reliance placed by the citizen is worthy of legal protection - as well as State prerogatives - while a corollary of the principle of legal certainty as regards the maintenance of legal *status*.

According to the elements already mentioned, it seems proper the interpretation whereby the protection of the trust must be raised to the constitutional level, because, as explained by Maffini (MAFFINI, 2005, p. 237), to protect the confidence is a direct deduction of the principle of legal certainty, which, in turn, is one of the elements that configures the Constitutional State, demonstrating therefore the relevance of the confidence's protection by the system.

Thus, it shows the need to overcome the paradigm of legality, since, as seen, the operability of various legal elements can only be seen from the extensive analysis of the system, which configures and legitimates the principle of juridicity.

4 CONCLUSIONS

The objective was to demonstrate that the emergence of the idea of legality, associated with a particular historical context, corresponding to the Liberal State, brought a number of notions of positive content to Law, improving the understanding upon State, whose power, limited and legitimated, came to be exercised in a non-absolute way.

However, the scientific improve of Law, attached with the need to interpret systematically its content, have made the theory embodied in the principle of legality insufficient. Once the legal phenomenon was comprehended as systemic entity, the syllogistic methods of application and interpretation of the rules once adopted have been removed it.

The juridicity, understood as the idea of respect and concern to the entire regulatory system, that is built by rules, principles and values, axiologically hierarchized and teleologically applicable, overcame the notion of strict legality, because the strict legality does not fit the contemporary social and legal complexity.

Thus, new legal possibilities emerge in normative scenario, consenting the flexibility / adaptation of legal institutions according to elements that have been recognized with autonomous and own normative force, with special emphasis to the constitutional principles. It is not the loss of formal rationality, but the assumption of a new rationality, committed to the possible materiality of Law.

In summary, the proper apprehension of the phenomenon of juridicity represents the overcoming of the strict legality, because of contemporary systematicity attributed to the normative framework and to the effective appreciation of the constitutional principiology.

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