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The Principle of Legality and its Transformation in Brazil

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Abstract: This article investigates the scope of the principle of legality in Brazil, its basis, developments, and limits and the role of governing officials in light of this principle. In a summarized manner, we examine the several instruments for the control of legality found in the Brazilian Constitution of 1988. We also analyze the legal institutes of a state of siege, a state of defense, and provisional measures, seeking to identify the reach of such exceptions to legality in Brazil and how their inordinate use has had an adverse effect on Brazilian society.

Keywords: legal principle; principle of legality in brazil; rule of law; control; administrative function; exceptions to legality; provisional measures

1. Introduction

This study aims to identify the scope of the principle of legality in Brazil, the basis for its existence, its developments, and those instruments that may be considered as exceptions to the principle, as well as the reasons for it having been relegated to a "second" normative tier in Brazil.

Beginning with the concept of what constitutes a principle and moving on to the question of legality, from a historical and legal perspective, we will attempt to

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identify how those in power have used exceptional instruments to legislate on the most varied topics in the country.

We also examine the question of administrative function in light of the principle of legality, with the aim of verifying the limits of administrative action, including in the exercise of discretionary power.

2. The Concept of a Legal Principle

Before we go deeper into the question which we propose to address, we must highlight that a principle, in the words of Celso Antônio Bandeira de Mello (Bandeira & Celso, 2021, pp. 913-914), is the directional vector of an entire system of positive law, the structural mainstay of the legal framework, the sustaining pillar which brings harmony and coherence to the legal order of a society. Thus, principles are the general, abstract, and necessary legal norms to build, sustain, and inform the values that should govern in erecting the confines of the prescriptive norms of a given legal framework.

For this reason, when a principle is violated, it represents a much more serious blow to the system than when a legal norm, farther down in the hierarchy, is violated. This is because, in the former case, the violation strikes at the heart which pumps, irradiates, and spreads its value-imbued commands for the intellection of the meaning, content, and reach of the other legal norms, whereas in the latter case, the values being defended by the legal order are only affected in a peripheral manner (Bandeira & Celso, 2021, p. 914).

Along the trajectory that principles have taken to reach the center of the system, they have had to conquer the "status" of a legal norm, overcoming the belief that they possess a purely axiological and ethical stature, without any direct and immediate legal effects or applicability.

Current legal scholarship in Brazil has adopted the understanding that legal norms in general, and constitutional legal norms in particular, may be grouped into two large and distinct categories: principles and rules (Barroso & De Barcellos, 2003, p. 57).

Rules are objective prescriptions, descriptions of certain behaviors that apply to a limited number of situations. If the events foreseen in their hypothesis occur, the rule should be applied following the traditional formula of subordination. That is, the facts are inserted into the abstract provision and, as a result, produce a

conclusion (command), The application of a rule operates in the modality of *all or nothing*: it either regulates the subject matter in its entirety or there is a failure of compliance. In the event of a conflict between two rules, only one is valid and will prevail. Principles, on the other hand, have a greater degree of abstraction. They do not specify the conduct to be followed, and they apply to a wide range of situations, sometimes an indeterminate number. In a democratic system, principles frequently are in dialectical tension, pointing in different directions. When this occurs, they must be applied through a *balancing test*: considering the concrete case, the interpreter will estimate the importance that each principle should be given under the circumstances, employing reciprocal concessions[1], and preserving each principle to the maximum extent possible. Principles, therefore, are not applied on an *all or nothing* basis, but must be adjusted to fit the circumstances represented by other norms or situations of fact (Barroso & De Barcellos, 2003, pp. 57-58).

For this reason, a given legal framework may only be understood from a systematic perspective (coherent and harmonious), taking into consideration precisely the abovementioned vectors of interpretation (that is, the principles of said framework).

This does not mean, however, that all principles are in the identical hierarchical position in the Brazilian legal framework. There are subordinate relations between them. There are, in the end, supra-principles that take precedence over the others.

Indeed, some of the prescriptions listed in positive Brazilian law were raised to the status of so-called "fundamental clauses" ("cláusulas pétreas") by art. 60, par. 4, of the Federal Constitution. This means that the normative content of certain constitutional guarantees cannot be altered by the Congress through subsequent legislation. This is a testament to the preponderance and greater weight of such clauses with respect to others; thus, they constitute prescriptions that are not subject to change while the 1988 Constitution remains in effect.

It is precisely at this higher hierarchical threshold that the principle of legality may be found (where also may be found the folds of the mandate instituting a republican form of government, as provided for in the same Brazilian Constitution of 1988, thus itself constituting a fundamental guarantee, the two principles being "cláusulas pétreas").

[1] As has, by the way, been expressly recognized by the Brazilian Federal Supreme Court in its rulings in Federal Interventions nos. 590-2/CE and 164-1/SP

3. The Principle of Legality

3.1. Concept

Under the Brazilian legal system, the principle of legality means that the legal system is the foundation for all actions or omissions of both the government and the governed. Thus, the principle of legality indicates the vector to be followed by a state constituted under the rule of law is that set forth in the law – and only by the law.

All persons are subject to the law when the law prohibits a given conduct or the failure to act in a given manner – this being the condition of coexistence, the concept behind the civilizing process since time immemorial, and the heart of the principle of legality – as the general rule for all persons in society is their liberty to act (Moreira & de Figueiredo, 2005, p. 81).

It is also true that obedience to the law is not restricted to its literal precepts, but mainly to the spirit of the law, to its consecration as an instrument for aggregating the values and principles of a society at a certain time and place.

This is why Celso Antônio Bandeira de Mello has rightly stated that, under the Brazilian legal framework, the principles of intention, reasonability, proportionality, motivation, and state liability all descend from the principle of legality (Bandeira & Celso, 2021, p. 4).

Therefore, the law – and its application – must ensure compliance with the principles of proportionality (employing the proper dimension), reasonability[1] (adherence to proper criteria in terms of reasonableness), intention (submission to the intent and spirit of the law), motivation (the obligation to demonstrate that a given set of facts gives rise to the law, allowing for its application), and state liability (the rule that the state must also subject itself to the law, thus being liable for its actions).

J.J. Ferreiro Lapatz adds that the force of the law derives from the fact of it being the most genuine expression of the popular will. Therefore, according to that author, the principle of legality establishes that only the law may govern certain

[1] Eloquently, Carlos Maximilano has stated: "The law must be interpreted intelligently, not in such a way that the legal order becomes absurd, mandating inconvenient, inconsistent, or impossible conclusions," (Hermenêutica e Aplicação do Direito. Porto Alegre: Editora Livraria do Globo, 2ª Ed., 1933, p. 183).

subject matters, precisely those that ensure the organization of society on the basis of individual liberty[1].

3.2. Basis

The principle of legality came into existence through the rule of law which, in addition to governing private legal relations, also mandated that state actions be governed by the law, as the latter is the only valid regulatory instrument for all types of relations in Brazilian society, both between private parties and between such parties and the state.

If it is true that the law regulates human conduct through coercive means so as to make social life possible, it is no less true that the law acts in this manner to provide citizens with a minimum degree of security.

Long ago Rosseau said that men must surrender a portion of their liberty so that, in return, they might receive the necessary security to not suffer from unpredictable interventions, either on the part of the state or from another private party.

Indeed, the effects of this degree of security in the normative field (that is, legal certainty) has the capacity, in the words of Bandeira de Melo (Bandeira & Celso, 2021, p. 109) (i) to impede unforeseen modifications that destabilize the situation of those subject to administration and (ii) to reduce the traumatic effects which arise from new legal manifestations with respect to ongoing situations.

The aim of the principle of legal certainty is precisely to guard the citizenry from the sinister influence of sudden alterations, with no basis in law and emanating from those without the power to take such actions.

[1] Lapatza, J. J. Ferreiro. ("El Princípio de Legalidad y La Reserva de Ley". Revista de Direito Tributário. São Paulo: Editora Revista dos Tribunais, no 50, página 7). The full and original text reads as follows: "El rango de la Ley, la fuerza de la Ley, en nuestro ordenamiento, como en todos aquellos que tratan de organizar una democracia pluralista de acuerdo con el principio de la división de poderes, deriva, insistimos de que ella es la expresión más genuina y representativa de la voluntad popular. La Ley representa la voluntad de autoformación de una colectividad que no reconoce otros poderes que los que emanan del conjunto de los ciudadanos que forman parte de ella. Refleja las normas que la comunidad se da a si misma a través de sus representantes y debe contener, por tanto, el entramado básico del sistema jurídico, aquel en que se basa y encuentra apoyo el resto de la normativa que configura el ordenamiento. Pues sólo reservando a la ley tal entramado básico el sistema garantiza la primacía de la voluntad popular. El principio de legalidad, según el cual la Ley y sólo la Ley ha de regular ciertas maetrias [sic], precisamente aquellas que garantizan una organización social basada en la libertad individual, incorpora, esencialmente, la idea de que en una sociedad libre sólo la comunidad puede darse a sí misma, a través de sus representantes, normas sobre tales materias."

Thus, the principle of legality rightly seeks to address one of the major concerns of humanity, that is, legal certainty in societal relations.

3.3. Subjugation of the State to the Rule of Law and the Three-part Division of State Functions.

The rule of law originated in order to confront the instability and uncertainty brought about by the absolutist state[1], in which the monarch made and unmade the rules at will. In France the reigning motto was "*le roi ne peut mal faire*", equivalent to the English "the King can do no wrong", which translated into the total concentration of state power in the hands of a single individual[2].

The rule of law arose precisely to subject rulers and all their activities to the authority of the law, a circumstance which can be summed up in the Anglo-Saxon legal maxim: "the rule of law, not of men"[3].

The Portuguese jurist Afonso Rodrigues Queiró (Queiró, 1944, p. 41) masterfully summarized the difference between the Rule of Law and a Police State when he stated: "*We know that the principal and essential characteristic of the Rule of Law is precisely that the State behaves in relation to private parties in accordance with the Law, that is, 'observing legal norms', whatever their source; and that, on the contrary, in a Police State, the activity of the State, including that immediately related to private parties, is not subject or tied to any legal rule with which said parties may demand compliance (...)"*.

[1]For further clarifications on the transition from the absolutist state to the constitutional state, see Paulo Bonavides. Teoria do Estado. São Paulo: Malheiros Editores, 2004, pp. 37-65.

[2] Teseu, in a part of *The Suppliants* by Euripides (422 BC), characterizes tyranny as the worst of all political evils, stating: "Nothing is more hostile to a city than a despot; [430] where he is, there are first no laws common to all, but one man is tyrant, in whose keeping and in his alone the law resides, and in that case, equality is at an end. But when the laws are written down, rich and weak alike have equal justice".

[3] O Prof. J.J. Gomes Canotilho clarifies that the interpretation of the phrase the "Rule of Law" as varied over time, but has maintained four basic attributes: "first, following the Magna Carta of 1215, the obligation to observe regular due process of law in judging, when it is necessary to judge and punish citizens, depriving them of their liberty and property. Second, the Rule of Law means the preeminence of the laws and customs of the 'country' over the discretion of royal prerogative. Third, the Rule of Law establishes the subjugation of all the acts of the executive to the sovereignty of the parliament. Finally, the Rule of Law means equality of access to the courts on the part of citizens so that they may there defend their rights according to the principles of English Common Law against any entity (individuals or public institutions)". Direito Constitucional e Teoria da Constituição. Coimbra: Editora Livraria Almedina, 2003, pp. 93 and 94.

Certainly the idea of the rule of law is not new: already in 445 B.C., Herodotus, the "Father of History", transcribed the following speech of a famous Persian by the name of Otanes: "*In my opinion, the government should not be in the hands of a single man; that is neither agreeable nor good. (...) How is it possible to have balance in the government of a single man, if under such a government the ruler may do as he pleases and does not have to be accountable for his acts? (...) A government of the people, on the contrary, first entails the most beautiful of names: 'equality before the law"* (da Gama Kuri, 1985, pp. 176-177).

The ideas of equality before the law and the need to control those in power evolved over the centuries before being synthesized in the thought of Jean Jacques Rousseau and Montesquieu.

The rule of law as a political project was then consolidated in the ideas of Montesquieu for whom the preservation of the freedom of men against the abuses and tyrannies of those in power depended on breaking up the concentration of those powers imaginable, as all men who hold power tend to abuse it[1].

In this context, the importance of the principle of legality lies latent, as the superiority of the law, as preached by Rousseau, impedes favoritism and persecution, in addition to being the legitimate expression of the popular will.

Indeed, Geraldo Ataliba has already warned that an adequate understanding of the content, meaning, and scope of the principle of legality depends on the intellection of the separation of powers, which Brazilian constitutional texts traditionally enshrine – as the fundamental principle of our legal system. According to Ataliba, the separation of powers "…*completes a formula for the containment and discipline of the exercise of state power and appears as the functional expression*

[1] In the words of the philosopher (in the original text): "(...) c'est une expérience eternelle, que toute homme qui a du pouvoir est porté à en abuser; il va jusqu'à ce qu'il trouve des limites. Qui le diroit! la vertu même a besoin de limites. Pour qu'on ne puisse abuser du pouvoir il faut que, par la disposition des choses, le pouvoir arrête le pouvoir". E pouco adiante: "Lorsque dans la même persone ou dans le même corps de magistrature la puissance législative est réunie à la puissance exécutrice, il n'ya point de liberté, parce qu'on peut craindre que le même monarque ou le même sénat ne fasse des lois tyranniques por les exécuter tyranniquement. Il n'ya a point de liberté si la puissance de juger n'est pas séparée de la puissance legislative et de l'exécutrice. Si elle était jointe à la puissance législative, le pouvoir sur la vie et la liberté des citoyens seroit arbitraire; car le juge seroit législateur. Si elle était jointe à la puissance exécutrice, le juge pourroit avoir la force d'un opresseur" (L'Ésprit des Lois. Paris: Garnier Fréres, Libraires-Éditeurs, 1869, avec des notes de Voltaire, de Crevier, de Mably, de La Harpe, etc., Livro XI, cap. IV, p. 142).

of the republican principle, whose basic postulates are only effective under this formulation" (Ataliba, 1998, p. 123).

Thus, based on the political ideas of Montesquieu, the concentration of power is achieved through its division. This division has a clear objective: to control power, as only power can control power. This is how the idea of the separation of powers emerged, a system under which those who make the laws do not execute them, nor judge them; those who judge the laws, do not make them, nor execute them; and those who execute the laws do not make them, nor judge them.

It must be clarified, however, that the separation of state powers "*does not reflect a truth, an essence, something inexorable arising from the nature of things. It is purely and simply an political construction that is uncommonly notable and well-established as it has received the broadest juridical confirmation. It was formed from a clear ideological proposal of Baron Montesquieu, the illustrious thinker who gave explicit form to the idea of the separation of powers. That is: to impede the concentration of powers to preserve men's liberty against the abuses and tyranny of the rulers"* (Bandeira & Celso, 2021, p. 28).

Innumerable authors – both from Brazil and abroad – understand the functions of the state to not be of three kinds, but two, four, or more[1].

The late Prof. Oswaldo Aranha Bandeira de Mello (De Mello & Aranha, 1969, pp. 34-42), for example, provides us with a dichotomy classification between the functions of the state, as he understood that the actions of the legislative branch and the executive branch correspond to a single state function, that is, the administrative function.

In this context, it may be deduced that the abovementioned actions seek to achieve the public interest through direct means, through the action of the state as a party, either implementing general and abstract norms or executing concrete legal acts.

The other state function is jurisdictional, where the primordial interest is to safeguard the legal order that has been threatened or disturbed. Thus, both functions aim to achieve the common good, however the manner in which they achieve it is different. In exercising the jurisdictional function, the state acts as a

[1] Kelsen affirms that the state has two functions: to legislate and to execute, with the last being carried out both by the executive branch, as well as the judiciary (Teoria General del Derecho y del Estado. México: Imprensa Universitária, 1950, tradução de Eduardo García Maynez, pp. 268-269). Otto Mayer states that the state has four functions: in addition to the three already known, he adds the activity of governing which consists of the activity of directing and heading the state (Le Droit Administratif Allemand, v. I, V. Paris: Giard & E. Brière, Libr. Editeurs, 1903, pp. 1-14).

third-party, substituting the will of the parties directly involved to establish the rights of each, forcefully and definitively in each concrete case.

In this way, for Prof. Bandeira de Mello, the objective of the actions of the legislative and executive branches is identical, that is, both seek to achieve a degree of public utility. Therefore, the function is the same, though it may be expressed through different organs.

In any event, the separation of powers has been enshrined in our legal framework[1]. This separation is certainly not absolute, however, as there are interventions that one branch may make in the sphere of another to create a harmonious system of "checks and balances".

With the mastery of the subject which is unique to him, José Afonso da Silva (da Silva, 2004, p. 109) has clarified:

"(...) it should be noted that neither the division of functions between the branches nor their independence is absolute. There are interferences that seek to establish a system of checks and balances in an attempt to find the necessary equilibrium to realize the collective good and which is indispensable to avoid arbitrariness and abuse of one branch at the expense of another and especially at the expense of the governed".

From the above it can be seen that a state formed under the rule of law must be subsumed by a pre-existing normative regime, obeying its precepts until these are legitimately altered in accordance with the procedures enshrined in that same normative regime, or until said regime is overthrown by a revolution and another regime begins.

Finally, under the rule of law, state power is manifest through state entities, independent of but in harmony with each other, thereby impeding the concentration of power in a single person or group.

3.4. Origin

Caio Tácito (Tácito, 1997, pp. 142-151) relates an interesting historical narrative on the origin of the principle of legality which we will summarize here.

[1] See art. 2 of the Federal Constitution: "Art. 2 The Legislative, the Executive and the Judicial, independent and harmonious among themselves, are the powers of the Union".

The law, as an instrument of conduct between private persons, has its origins in the Roman legal system.

In the public law sphere[1], royal authority determined the behavior of collective society absolutely, as the will of the monarch possessed coercive force to impose itself on everyone, with no form of compensation in return (compensation which, as a rule, does occur in the private sphere).

In addition to the obligations imposed by the orders of the king, individual will was subject to the imposition of religious obligations, with the *lex divina*, as revealed by the ecclesiastical authorities, complementing the *lex regia*, as expressions of absolute power.

The cradle of individual rights was the Middle Ages, in the *forais* and communal charters granted to local communities. The principal example of these rights at the time was undoubtedly the Magna Carta of 1215, which sealed the accord between Landless John and the barons, consolidated in the Petition of Rights of 1628 and ratified in the Bill of Rights of 1689, and affirmed the control of Parliament over the monarch, making acquiescence the source of the effectiveness of the law.

Certainly it was the French Declaration of the Rights of Man and of the Citizen, of August 26, 1789, that consecrated the principles of the limitation and separation of powers, though the independence of the English colonies in North America had accelerated the recognition of rights in the Declaration of Virginia, of June 12, 1776, which, with the confirmation of the other states, took permanent form in the United States Constitution promulgated on September 17, 1787.

Liberalism, as it took shape in the 19th century, had its origins in the French Revolution. From there, fundamental rights and the principle of legality spread internationally as the cornerstones of the guarantee of liberty and property, sheltering the individual from the absolutism of the government action.

Article 2 of the French Declaration of the Rights of Man and of the Citizen states that the purpose of all political association is the conservation of the natural and indefeasible rights of man. Those rights are the right to liberty, prosperity, and security and the right to resist oppression.

[1] Though it may be controversial, in Brazil public law is the area of the law applicable to the actions of the state or whoever may sometime act in the pursuit of the public interest (that being, the interest of each individual as a component of the national society). In Brazil, the pursuit of eminently private interests (the interests of each individual considered in isolation) is through the application of another area of law: private law.

Liberty, under the terms of art. 4 of the French Declaration of 1789, consists of the subjective right of an individual to engage in any activities that do not harm his neighbor, and the law, the expression of the general will, applies to all individuals, either to protect or to punish. Thus, each man's exercise of his natural rights is only limited by the rights of the other members of society to enjoy those self-same rights. Those limits can only be established by law.

Moreover, the law is only the capacity to prohibit actions which are prejudicial to society, whereas law enforcement, which is necessary to maintain order, is instituted for the benefit of all and not to serve the private needs of those to whom such force is confided (articles 5 and 12 of the Declaration).

In addition, it should be noted that art. 16 of the French Declaration is categorical in affirming that a society in which guaranteed rights are not safeguarded nor power distributed does not have a constitutional document to speak of.

Finally, art. 17 ends the French Declaration of 1789 affirming that property is an inviolable and sacred right and, therefore, no one may be deprived of it, except when legally verified public necessity evidently so requires and on condition of just and prior compensation.

The principle of legality, thus defined as the basis of individual rights and, consequently, of the political right to popular representation in the constitution of the branches of government, acts as check on absolutism in state power and conditions the activities of the public administration.

3.4.1. Origin in Brazil

The first Brazilian constitution was the Imperial Constitution of 1824, which did not reflect true liberalism, something which would only fully occur with the advent of the Republic.

In addition to the three branches (judicial, executive, and legislative), the Imperial Constitution also established a moderating branch which, as Paulo Bonavides and Paes de Andrade (Bonavides & Paes de, 2002, p. 106) would have it, "*is literally the insertion of absolutism into the constitution, if this were even possible".*

The moderating branch was conceived by Benjamin Constant who, in his theory of *royal power*, sought to create a neutral and balancing branch that would be the key to the entire political organization (Silva, 2003, pp. 26-27).

The functions of the moderating branch would therefore be to maintain the other branches in equilibrium when they entered into disordered conflict with each other.

It is the case that, as much in theory as in practice, the moderating branch was in no way neutral[1]: it was above the other branches, interfering with everything and with everyone.

The liberals battled to extinguish the moderating branch, as it instituted the unique and exclusive power of the Emperor, "*an instrument for the centralization of power and of authoritarianism, especially given the absence of an authentic parliamentary life, of representative elections, and of a party system that could place a check on the exercise of that power, irresponsible [2] under the terms of the Constitution*" (Silva, 2003, p. 26).

Thus, the primacy of legality was seriously weakened by the existence of a moderating branch during the Brazilian Empire.

The Brazilian Constitution of 1891 was, from an ideological perspective, the consecration of liberalism in Brazil.

Only analyzing the constitutional text – and thereby removing it from its historical context – it is evident that it crowned the separation of powers in the manner proposed by Montesquieu, eradicating the much-criticized moderating power completely and forever.

Thus, at least on a theoretical level, submission to the principle of legality was achieved.

In practice, however, the First Republic was a den of political corruption carried out by oligarchies that took turns in power, manipulating elections and removing the authenticity of citizen participation from the guiding course of the nation.

In any event, it cannot be denied that the text of the constitution, taken by itself, introduced considerable innovations such as the separation of church and state, the extinction of honorific orders and all the privileges and prerogatives associated therewith, the abolition of the death penalty, and the creating of the right of *habeas*

[1] Article 98 of the Brazilian Imperial Constitution of 1824 established that: "The Moderating Branch is the key to the entire political organization, and it is exclusively delegated to the Emperor, as the Supreme Head of the Nation, and to his First Representative, so that they may incessantly guard the maintenance of Independence, balance, and harmony of the other Political Branches" (updated text).
[2] "Article 99. The Person of the Emperor is inviolable, and Sacred: He is not subject to liability of any kind." (emphasis added).

corpus, as well as incorporating many of the rights and guarantees present in the Imperial Constitution (Bonavides & Paes de, 2002, p. 259).

With regard to the Brazilian Constitution of 1934, it can be said that it adopted some of the precepts of the welfare state, following a post-First World War European tendency that would only reach fruition at the end of the Second World War.

In fact, for the first time in Brazilian history, the constitutional text contained provisions with respect to the economic and social order.

The separation of powers was maintained in its three-part configuration, but the executive branch was strengthened. It was given the legal power to declare a state of siege that, as we will see further on, is one of the exceptions to the principle of legality.

In the legal sphere, the writ of mandamus was a great conquest "*for the defense of clear and uncontestable rights, threatened or violated by manifestly unconstitutional or illegal acts of any authority"* (art. 33, CR 1934).

Many of the good innovations, though, were not correctly implemented as the political process did not precisely define the ideology that was to guide the supreme document of the nation[1].

On November 10, 1937, this doubtful and unstable situation brought about a coup d'état advanced by Getúliio Vargas, subsequently elected President of Brazil, who imposed a constitution of his own and closed the brief period under the Constitution of 1934.

The Brazilian Constitution of 1937, also known as the "Polish constitution" as it was inspired by elements of an authoritarian nature that were plaguing Europe at the time, sought to privilege a basic principle, that is, organization. This principle was used by Getúlio Vargas to benefit himself, limiting participation to such an

[1] Paulo Bonavides and Paes de Andrade add: "The Constitution is a patched quilt in which its legal brilliance and its historic lesson stand out. Antagonistic principles (antagonistically formulated, even) are placed side by side. They mark two clearly defined tendencies, two separate political projects. (...) The text of 1934 is marked by ambiguities. It is not possible to delineate a hegemonic political project for the nation using it as the starting point. This hegemony seemed at the time a life and death question. If it could not be resolved at the plenum, it had to be resolved with the help of off-stage maneuvering and historical falsehoods (such as the Cohen Plan, for example), not to say by the force of arms. The Constitution of 1937 is the definitive record of the defeat of the liberal tendency. To the regret of all Brazilians" (História Constitucional do Brasil. Brasília: OAB Editora, 4ª Ed., 2002, p. 326).

extreme that it became exclusive to the President, "*a euphemism for what should properly be called a dictator"* (Bonavides & Paes de, 2002, p. 338).

In this context, the executive branch was characterized as a centralizing and extremely violent power, which shredded the legislative branch, converting it into a mere consultative council.

Thus, the principle of legality was shattered, both through the total concentration of power – both in fact and in law[1] – in the hands of the President, as well as through the omission of the legislative branch in its failure to act. That this was the case is illustrated by the fact that the latter branch was not even convened during the period known as the "Estado Novo" (New State), when its functions were "transferred" to the hands of the technobureaucracy that exercised the legislative activity in practice.

It is thus apparent that the Brazilian Constitution of 1937 was not applied, with the exception of its authoritarian provisions which served the interests of those in power.

Proof of this is that the simplest of its provisions and the first that should have been put into practice – a plebiscite which would allow for a popular referendum – was not even cogitated (Bonavides & Paes de, 2002, p. 348).

In light of this, all the legitimacy that might have come from the necessary popular participation was lost, along with the three-branch structure for state functions, as the only branch which existed in fact was the executive.

The Brazilian Constitution of 1946 came as a response to the arbitrariness that reigned in the "Estado Novo": the liberalism in the text of the 1946 Constitution is a reason for all Brazilians to take pride in.

[1] Likewise note the authoritarian nature of the following articles of the Brazilian Constitution of 1937:
"Art 9 – The federal government shall intervene in the States, through the nomination by the President of the Republic of an intervenor, who shall assume the functions corresponding to the executive branch under the State Constitution, or those that are granted him by the President of the Republic in accordance with convenience and necessity in each case: c) to administer the State, when for any reason one of its branches is unable to function;
Art 13 During the periods of parliamentary recess or upon the dissolution of the Chamber of Deputies, the President of the Republic may issue decree-laws on all subjects within the legislative remit of the federal government (...) if the demands of the government so require.
Art 170 – During a state of emergency or a state of war, the Courts and Tribunals may not address the resulting acts.
Art 171 – During a state of war the Constitution will cease to be in effect in those sections indicated by the President of the Republic." (emphasis added)

Hence, the Brazilian Constitution of 1946 reestablished the federative ideal, granting precious autonomy to the states and cities. It even gave effectiveness to the branches of government, recovering the dignity and importance of the legislative and judicial branches. It granted total freedom of thought, except with respect to public spectacles and entertainment. It forbade that public liberties and guarantees were shredded by any authoritarian acts, granting the institution of a state of siege exclusively to Congress. Finally, it included on the list of individual rights and guarantees that the law could not exclude from judicial review any violation of individual rights, along with other important provisions.

The social side was also not forgotten by the authors of the constitution who instituted a weekly day of rest, recognized the right to strike, included the Labor Courts within the judiciary, and norms for the obligatory and direct participation of workers in the profits of the company, among others.

The Brazilian Constitution of 1946 therefore ensured the creation of the welfare state, predominantly liberal, but with an anti-individualistic ideology and principally concerned with the enactment of social justice.

What was it then that determined the defeat of this line of thinking, which lasted from 1946 to 1967, with substantial violations beginning in 1964?

The period that preceded the 1946 Brazilian Constitution was marked by the supremacy of the executive branch over the other branches. The figure of Getúlio Vargas, above all, was a lesson in paternalism which so marked his regime. Nor must it be forgotten that the Constituent Assembly which drafted the 1946 Constitution was elected by only 15% of the population, which did not allow it to safely claim the popularity that Vargas enjoyed, even if that popularity was most evident among the less advantaged classes (Bonavides & Paes de, 2002, p. 416).

It may be said, in short, that the 1946 Brazilian Constitution was not able to become part of the day-to-day life of the population, nor even demonstrate that it constituted an instrument for participation and change.

As a consequence and with the rise of populism, members of the military say an opportunity for the infamous “surgical intervention”, which – according to them – consisted in the introduction of some reforms and changes that would guarantee Brazilian democracy in perpetuity and the countries integration with the world economy. In short, the generals promised to bring Brazil into the 20th century before they would return democracy to the people.

During the period from April 1964 to December 1966, four so-called "Institutional Acts" (*Atos Institucionais* – AI) were issued and fifteen amendments to the Brazilian constitution were ratified, the principal focus of which was the centralization of power in and the strengthening of the executive branch. The Institutional Acts were, in fact, the equivalent of the Brazilian constitution during the period.

Institutional Act no. 1, among other things, suspended the constitutional and statutory guarantees of life-time appointments (vitaliciedade) and job security (estabilidade) in the public service, as well as allowing for the quashing of legislative terms of office at the federal, state, and municipal levels, with any appeal to the courts being prohibited.

Institutional Act no. 2 abolished political parties, empowering the President of the Republic with the right to issue supplemental acts, as well as decree-laws, on matters of national security (a very expansive term whose contours were whatever those in authority said they were). It also established the right to decree obligatory recesses for the Congress, state assemblies, and city councils, either under a state of siege or otherwise. In such cases, the executive branch was authorized to legislate in all areas provided for in the Constitution and relevant statues, by means of decree-laws.

Institutional Act no. 3 extended indirect elections from the federal sphere to the states, while Institutional Act no. 4 convened Congress to gather to discuss and vote on a new constitution.

The government sent the bill to Congress on December 12, 1966, and the new Constitution was promulgated on January 24, 1967.

At that time, some had hope that democracy would return: they imagined the end of the wretched institutional acts and the victory of the rule of law. However, Institutional Act no. 5 (AI-5) of December 13, 1968 arrived and eradicated any dreams of re-democratization.

AI-5 included the content of all of the previous institutional acts and, in addition, included the possibility of intervention in states and municipalities, as well as minutely describing the resulting consequences for those whose political rights had be nullified, suspending the use of *habeas corpus* and granting total power to the President of the Republic to declare a state of siege and to extend any such declaration.

According to Raul Machado Horta (Horta, 2003, p. 63), the institutional acts paralyzed the functioning of the Constitution, annihilated the principle of independence of and harmony between the branches, and subjected everything to the arbitrariness and uncontrollable will of the President of the Republic, transforming a presidential system of government into a presidential dictatorship.

It is evident, therefore, that the rule of law had failed and the principle of legality had been subjugated to the will of the sovereign, that is, the President.

The fact is that the "surgical intervention" lasted much longer than expected. "*Arbitrariness was definitively established and society was silenced, its leaders persecuted, tortured, assassinated. A third of the votes in the 1970 elections were blank or null. It seemed that the military solution to populist ambiguity had ended up burying the last hopes of our people. The democratic resistance, carrying the banner of a National Constituent Assembly, was the depository of the remaining rays of light in the midst of the authoritarian darkness*" (Bonavides & Paes de, 2002, p. 435).

The transition period from the military dictatorship installed in 1964 to the current constitutional stage was marked by black and painful memories.

The most visible response to the dictatorship occurred in 1971, in the State of Pernambuco, when the progressive faction of the Brazilian Democratic Movement (MDB) distributed the "Recife Letter", announcing the urgency of convoking a National Constituent Assembly for the belated re-democratization of the country.

However, it was only in 1984 that a national, integrated movement formed in favor of "Direct Elections Now" ("Diretas Já"), including the support of the Brazilian Bar Association (OAB), labor unions, and other civic organizations.

The elections held on January 15, 1985, were not direct. The President-elect, Tancredo Neves, was chosen by an Electoral College to be the 29th President of the Republic.

President-elect Tancredo, however, never took the oath of office: he died on April 21, 1985, and his vice-president, Senator José Sarney, was officially sworn in as President of the Republic on April 22 of that year, remaining in office until 1990, one year more than that provided for in the letter of understanding of the Democratic Alliance under which he was brought to power.

On November 15, 1986, the people went to the polls to elect the members of a Constituent Assembly made up of 487 deputies and 72 senators. The Constituent Assembly was then inaugurated on February 1, 1987.

After some discussion and voting, the seventh national constitution was promulgated on October 5, 1988: the 1988 Constitution of the Federated Republic of Brazil, which will be the object of our study in the next section.

4. The Principle of Legality in the Brazilian Constitution of 1988

In several of its articles, the 1988 Brazilian Constitution sought to elevate the principle of legality, in an attempt to once and for all (at least in theory) separate itself from the authoritarian bent that had existed in the previous constitution.

Upon opening the text of the 1988 Constitution, the reader soon comes across art. 1 which states that the Federated Republic of Brazil is constituted as a democratic state under the rule of law.

The concept of the rule of law has already been defined in the previous sections.

As to the term democratic state, José Afonso da Silva (da Silva, 2004, p. 121) has stated that such a state is founded on the principle of popular sovereignty, which mandates the effective and functional participation of the people in public affairs[1].

In addition to being a democratic state under the rule of law, Brazil is as social welfare state, by constitutional mandate, as laid out in the provisions of articles 1, III, 3, I, III and IV; 5, LV, LXIX, LXXIII, LXXIV, LXXVI; 6, 7, I, II, III, IV, VI, X, XI, XII; 23; 170, II, III,VII, and VIII (Zancaner, 1997, p. 621).

A welfare state or social welfare state is one in which there are positive obligations of the state to act on behalf of the citizenry, correcting the natural deviations of classic individualistic liberalism, so that true social justice might be achieved[2].

[1] The sole paragraph of art. 1 reads: "All power emanates from the people, who exercise it by means of elected representatives or directly, as provided by this Constitution." It is thus evident that our constitutional system priveleges popular participation.

[2] Incidentally, the understanding of the Argentinean jurist Augustin Gordillo is that "the basic difference between the classic concept of liberalism and the welfare state is that, while the former only concerns itself with placing barriers on the state, forgetting to also assign it positive obligations, the latter adds objectives and tasks where there were no such previous obligations, without removing the barriers. The basic identity between the rule of law and the welfare state, in turn, is that the latter takes from the former and maintains respect for individual rights and on that basis constructs its own

Having verified that Brazil is a democratic state subject to the rule of law, we will now analyze the configuration of the principle of legality in our highest law.

Among the guiding normative vectors of the Brazilian legal framework, legality is an express constitutional principle as may be seen from the text of art. 37, main clause, which reads: "*The direct or indirect public administration of any of the branches of the Federal Government, the states, the Federal District and the municipalities, shall obey the principles of legality, impersonality. morality, publicity, and efficiency (...)"*.

As the basis for the development of all administrative activities, this mandate grants the governed the subjective right to control the conduct of the administration. This is so much the case that, in another passage of the 1988 Brazilian constitution, art. 5, sections XXIV, line "a", LXVIII, LXIX, and LXX, provides constitutional instruments for the guarantee and restoration of legality. Those instruments are, respectively, the right of petition, *habeas corpus*, the individual writ of mandamus, and the collective writ of mandamus.

Thus, it is evident that legality is both a constitutional principle as well as the object of individual and collective safeguards through the right of petition, *habeas corpus*, and individual and collective writs of mandamus.

As a result, José dos Santos Carvalho Filho (Carvalho Filho, 2005, p. 12) notes the extreme importance of the effect of the principle of legality with respect to individual rights, as that principle is reflected as a consequence of the fact that the guarantee of those same rights depends on the former's existence, thereby authorizing individuals to hold the activities of the administration to the law.

It should also be note that legality is also protected in favor of the public interest when art. 74, par. 2, of the 1988 Brazilian Constitution asserts that "*Any citizen, political party. association or labor union has standing under the law to denounce irregularities or illegalities to the Federal Court of Accounts"*.

In addition, the principle of legality permeates the entire Brazilian constitutional framework. In addition to the provisions already mentioned, there are art. 70, main

principles. (...) The fact that the idea of the welfare state implies the achievement of certain objectives for the common good also does not demonstrate that it is opposed to the notion of the rule of law, as the latter also allows for limitations on individual rights in pursuit of the public interest." (Princípios Gerais de Direito Público. Tradução de Marco Aurélio Grecco. São Paulo: Editora Revista dos Tribunais, 1977, pp. 74-75.

heading; art. 71, sects. III, VIII, and IX; art. 74, sect. II and pars. 1 and 2; art. 103-B, par. 4, sect. II; and art. 130-A, par. 2, sect. II[1].

In this regard, it is worth noting the inclusion of two more means for the control of legality, introduced by two entities created by Constitutional Amendment no. 45, promulgated on December 8, 2004: the National Council of Justice and the National Council of the Public Ministry. Both bodies are tasked with monitoring compliance with art. 37 of the Federal Constitution and analyzing, at their own initiative (*ex officio*) or "upon request", the legality of the administrative acts of

[1] "Art. 70. Control of accounts, finances, budget, operations and property of the Federal Government and of the agencies of the direct and indirect administration, as to lawfulness, legitimacy, economic efficiency, application of subsidies and waiver of revenues, shall be exercised by the National Congress, by means of external control and of the internal control system of each Branch."
"Art. 71. External control, incumbent on the National Congress, shall be exercised with the aid of the Federal Court of Accounts, which shall: III examine, for the purpose of registration, the lawfulness of acts of admission of personnel, on any account, in the direct and indirect administration, including the foundations instituted and maintained by the Federal Government, with the exception of the appointments to commission offices, as well as the granting of civil and military retirement and pensions, except for subsequent improvements which do not alter the legal fundaments of the conceding act; VIII n case of illegal expenses or irregular accounts, apply to the responsible parties the sanctions provided by law, which shall establish, among other comminations, a fine proportional to the damages caused to the public treasury; IX determine a period of time for the agency or entity to take the necessary steps for the strict compliance with the law, if an illegality is established;"
"Art. 74. he Legislative, Executive and Judicial Powers shall maintain an integrated system of internal control for the purpose of: II verifying the lawfulness and evaluating the results, as to effectiveness and efficiency, of the budgetary, financial and property management in the agencies and entities of the federal administration, as well as the use of public funds by private legal entities;
Par. 1 The persons responsible for internal control shall, upon learning of any irregularity or illegality, inform the Federal Court of Accounts about it, subject to joint liability;
Par. 2 Any citizen, political party. association or labour union has standing under the law to denounce irregularities or illegalities to the Federal Court of Accounts."
"Art. 103-B. Par. 4. It is incumbent upon the [National] Council [of Justice] to control the administrative and financial operation of the Judicial branch and the proper discharge of official duties by judges, and it shall, in addition to other duties that the statute of the judicature may confer upon it: II – to ensure that Art. 37 is complied with, and examine, on its own initiative or upon request, the legality of administrative acts carried out by members or bodies of the judicial branch; being able to repeal or review them, or stipulate a deadline for the adoption of the necessary measures to achieve due enforcement of the law, without prejudice to the jurisdiction of the Federal Court of Accounts;" (Added by Constitutional Amendment no. 45 of 2004).
Art. 130-A. Par. 2 It is incumbent upon the National Council of the Public Ministry to control the administrative and financial operation of the Public Ministry and the proper discharge of official duties by its members, and it shall: II ensure that Art. 37 is complied with, and examine, on its own initiative or upon request, the legality of administrative acts carried out by members or bodies of the Federal Public Ministry and that of the states, and it may revoke or review them, or stipulate a deadline for the adoption of the necessary measures to achieve due execution of the law, without prejudice to the powers of Courts of Account;" (Added by Constitutional Amendment no. 45 of 2004).

members of the judiciary or the Public Ministry, respectively, when those persons act in the exercise of their administrative functions.

Indeed, as was explained above, the separation of functions is not static, but dynamic and harmonious, a fact which implies the possibility of the exercise of administrative, judicial, and normative functions being mixed between the three branches of government, in atypical situations.

Also significant is art. 5, II, of the 1988 Brazilian Constitution which provides that: "*no one shall be compelled to do or refrain from doing something except by reason of law*".

The above-mentioned provision synthesized the principle of legality, dividing its content into three principal focal points of interpretation, these being: (i) that citizens are only obliged to act or refrain from acting if there is a legal prescription to do so; (ii) that the non-existence of any law concerning a particular form of conduct means that such conduct is allowed for private parties; and (iii) that no authority may make use of any other normative instrument to compel the action of private parties save a law, as only the latter has the power to create such an obligation. A law, in turn, is a normative act typical of the activities of the legislative branch, one of the vertical branches of the state and the symbol of popular representation *par excellence*, one capable of instituting changes to the legal framework through the regular legislative process[1].

Geraldo Ataliba (Ataliba, 1998, p. 124) adds that "*in addition to this: under Brazilian constitutional law, a law is necessarily generic, equal, abstract, and not retroactive*".

José Afonso da Silva (da Silva, 2004, p. 121) further states that a law may not remain in the merely normative sphere, it cannot remain as only a legal arbiter, but must influence the social reality, directly implicating changes to the social situation.

[1] According to Oswaldo Aranha Bandeira de Mello. Princípios Gerais de Direito Administrativo. Vol. 1. Rio de Janeiro: Ed. Forense, p. 260.

4.1. The Administrative Function and the Primacy of Legality

In exercising the administrative function, the Brazilian state is governed by the principle of administrative legality[1], the basis of which is art. 37, main heading, of the 1988 Brazilian Constitution.

That article, as mentioned before, establishes that the exercise of administrative functions by the state (hereinafter referred to as the public administration) must be in accordance with legality, a legality that is different from that provided for in art. 5, II, of the 1988 Brazilian Constitution, as it subjects the state to the law by requiring that the state's actions be strictly guided by conformity with the precepts established therein.

That is to say: while private parties may do all that is not prohibited by law, the public administration is only allowed to act within precise legal limits.

With his golden pen, Hely Lopes Meirelles has observed:

"*In the public administration, there is no freedom nor will personal. While un private administration, it is valid to do all that the law does not prohibit, in the public administration it is only allowed to that which the law authorizes*" (Meirelles, 2002, p. 86).

Thus, the principle of legality possess two sides: the legality that permeates the actions of private parties and the legality that restricts administrative functions[2].

The Portuguese scholar Marcelo Caetano, in his classic work (Caetano, 1977, p. 95), has noted that the public administration, under a regime governed by legality, is subject to the law. Its activity, therefore, must be legal, that is, it must arise from the terms outlined in the law.

The teachings of the illustrious Prof. Alberto David Araujo and Prof. Vidal Serrano Nunes Junior continue along these lines (Araujo & Nunes Jr., 2003, p. 291):

"*The affirmation that the public administration must respect legality in its activities implies the notion that administrative activities are executed at a level immediately under the statutory level, in compliance with the provisions set forth in the law. In*

[1] Also know as the principle of restrictd legality or principle of restriction, according to Edmir Netto de Araújo. Curso de Direito Administrativo. São Paulo: Editora Saraiva, 2005, p. 51.

[2] In this regard, Santi Romano: "It is a fundamental principle of modern public law that this function must be exercised within the limits of the legal framework and in accordance with the scope outlined by the law, which is its principal source".(in Princípios de Direito Constitucional Geral. Tradução de Maria Helena Diniz. São Paulo: Editora Revista dos Tribunais, 1977, p. 255).

other words, the function of administrative acts is the execution of legal provisions. For this reason, it is impossible to use them to change the legal framework, but only to effectively realize the generic and abstract indications previously established through the exercise of the legislative function".

Following this train of thought, Lúcia Valle Figueiredo (Figueiredo, 2004, 66) instructs that one must understand a regime governed by strict legality as one that not only prohibits the practice of those acts forbidden by the law, but, above all, that only allows for the practice of those acts the law expressly permits.

Hence administrative activities may only be effected under the law; that is, the administrative function takes place *secundum legem*, never *ultra* or *contra legem*.

In this regard, Ruy Cirne Lima has already noted that "*the public administration consequently rests under existing legislation, which must pronounce and determine the legal rules"* (Cirne Lima, 1954, p. 22).

This is why administrative functions are defined (Bandeira De Mello, 2021, p. 32) as the function of the state, or of those who may perform them, in the exercise of public prerogatives and within a hierarchical structure, in the faithful application of the law, by means of commands supplemental to the law. Such commands are completely distinguishable from a legality perspective with respect to the judicial branch[1].

As Seabra Fagundes, always ingenious and apt, has summed it up: "*to govern is to apply the law by trade*" (Fagundes, 1979, pp. 4-5).

Therefore, if the activity of those who would manage the public trust (that is, to govern) is the activity of concretely applying the legal commandments, consequently, government is the mere servant of the law.

And, if it is a servant of the law, the orders it issues (that is, the public administration) may only serve to faithfully execute the former (i.e. the law).

At this point it is worth questioning how the obligation to strictly comply with the law combines with the existence of a certain margin of liberty that is granted to

[1] Sharing this understanding, Renato Alessi: "Ora, funzione amministrativa, sul piano giuridico, è la funzione di emanare statuizioni (o quanto meno atti preparatori od integrativi delle medesime) aventi valore complementare nel senso sopradetto, rispetto ad um precetto normativo astratto mancante di concreta ed immediata operatività, al fine appunto di permettere siffatta operatività concreta." (Principi di Diritto Amministrativo. Milão: Giuffrè Editore, 4° Ed., 1978, p. 10).

public administrators in the satisfaction of their duties, whenever such persons are granted discretionary powers (Bandeira de Mello, 2003).

First, it must be noted that this margin of liberty only exists when the law grants it to the public administrator. Without the existence of prior law to that effect, one may not speak of discretionary power, as the law is the sole legal instrument that may validly assign such power.

Moreover, in a particular case, it may be that the discretion granted by the law disappears, either because there is only one behavior that a public administrator may pursue that ensures the preservation of the public interest, or because the purpose of the law only allows for a single solution in that particular case.

Thus, in the understanding of Celso Antônio Bandeira de Mello (Bandeira de Mello, 2003, p. 48), discretion is the margin of liberty that remains for public administrators to choose, employing the criteria of reasonability: one, among at least two forms of possible conduct, in each concrete case. In exercising that discretion, they must comply with the obligation to adopt the most appropriate solution which meets the purpose of the law whenever it is impossible to objectively extract a single solution for the situation at hand and the play in the terms of the law or the liberty granted so allow[1].

It follows from the above that discretion is characterized by its residual nature; that is, only a detailed analysis of the concrete case will allow for the existence (or not) of any margin of liberty.

Before embarking on a study of the supplemental commands of the law (regulations), we must first examine the exceptions to the principle of legality.

[1] In this regard, Tomás Hutchinson: "Discrecionalidad no significa 'libertad de elección'. La Administración no elige libremente una opción determinada, ya que, como poder en todo momento dirigido por el derecho, deber orientarse según los parámetros establecidos en la ley y en su mandato de actualización, ponderándolos autónomamente en el marco de la habilitación actuada. Estos parámetros están constituidos, en primer lugar, por los objetivos o fines deducibles de la programación contenida en la ley y que, en ocasiones – sobre todo cuando se trata de normas de programación final -, se recogen expresamente en aquella en forma de directrices par el ejercicio del poder discrecional atribuido. A estos parámetros se unen los de la Constitución, en particular los derechos fundamentales y los principios de proporcionalidad y de igualdad." ("Principio de Legalidad. Discrecionalidad y Arbitrariedad". Revista Jurídica de Buenos Aires. Buenos Aires: Abeledo-Perrot LexisNexis, 1ª Ed., 2005, p. 317).

4.2. Exceptions to the Principle of Legality

Under the Brazilian constitutional system, the exceptions to the principle of legality are: provisional measures ("*medidas provisórias"*) and the existence of a state of defense or of a state of siege.

One speaks of exceptions to the principle of legality because, through the instruments listed above, the actions of a private party may be restricted by a normative instrument other than the law.

It should be recalled that art. 5, II, of the 1988 Brazilian Constitution establishes that no one may be obliged to do or refrain from doing anything except by virtue of the law.

Therefore, as this norm deals with the individual rights of citizens to not suffer intrusions, except by means of the law, only another norm of the same hierarchical level may provide for exceptions to the general rule that may affect the life of that individual.

This was exactly what occurred: the constitutional norm that guarantees that human conduct may only be regulated by law, and thereby create rights and obligations, was made subject to the exceptions listed in articles 62, 136, and 137 of the 1988 Brazilian Constitution.

We will now briefly examine each one of those provisions.

4.2.1. On a State of Defense

A state of defense is another case in which the principle of legality suffers transitory constriction.

A state of defense, provided for in art. 136 of the 1988 Brazilian Constitution, establishes that *"After hearing from the Council of the Republic and the National Defense Council, the President of the Republic may decree a state of defense in specific restricted locations to preserve or promptly re-establish public order or social peace threatened by grave and imminent institutional instability or affected by large scale natural calamities.*"

Moreover, the decree establishing a state of defense shall also set the time of its duration, specify the areas to be affected, and indicate the coercive measures to be in effect, within the terms and limits of the law[1].

The procedure, the duration, and the limits of the decree that institutes a state of defense are found in paragraphs 2 to 7 of art. 136 of the 1988 Brazilian Constitution.

4.2.2. On a State of Siege

In addition, there is a state of siege, which is also an instrument which acts as an exception to the principle of legality.

Contrary to a state of defense, the establishment of a state of siege depends on a congressional decree.

Indeed, "*After having heard from the Council of the Republic and the National Defense Council, the President of the Republic may request authorization from the National Congress to decree a state of siege in the event of: I. a serious disturbance with national effects or occurrence of events that show the ineffectiveness of a measure taken during the state of defense; II. declaration of state of war or response to foreign armed aggression"* (art. 137, 1988 Brazilian Constitution).

The decree instituting a state of siege shall indicate its duration, the necessary norms for its execution, and the constitutional guarantees to be suspended. After publication, the President of the Republic will designate who will execute the specific measures in the areas affected (art. 138, 1988 Brazilian Constitution).

The other norms relating to a state of siege may be found in title V, chapter I, and section II, of the Brazilian Constitution.

[1] The sections of art. 136, par. 1, of the 1988 Brazilian Constitution stipulate the coercive measures that may be put in effect, these being restrictions on the right to: a) assemble, even when exercised within an association's facilities; b) confidentiality in one's correspondence; and c) confidentiality in communications via telegraph and telephone; and the temporary occupation and use of public goods and services, in the event of a public calamity, with the federal government being liable for any resulting costs or damages.

4.2.3. On Provisional Measures

Provisional measures are normative acts with the force of law that the President of the Republic[1] may issue when they are relevant or urgent. These are then immediately submitted to Congress which is charged with debating whether they should be converted into statutes, within 120 days, at the risk of their being nullified *ab initio*. Provisional measures may also be rejected which likewise results in their loss of efficacy from the moment of issue.

In Brazil, the requirements of relevance and urgency have taken on the meaning that the Head of State has chosen to give them. With the consent of the judiciary, Brazilian presidents have governed the country through abusive, inept, and totally unconstitutional provisional measures, completely failing to meet the requirements of relevance and urgency[2].

By way of example, the current administration (Pres. Jair Bolsonaro, 2019-2022) has already issued more than 230 provisional measures since he took office on January 1, 2019[3]. This situation demonstrates the lack of regard the administration has for the legislative process, which then takes on a secondary role in Brazilian lawmaking.

It is certain that, following Constitutional Amendment no. 32 (2001), not all subject matters could be the object of a provisional measure[4]. Article 62, par. 1, stipulates that "*Provisional measures may not be issued on matters: Sect. 1 - with respect to: a. nationality, citizenship, political rights, political parties and electoral law; b. criminal law, criminal procedure and civil procedure; c. organization of the Judiciary and the Public Ministry, as well as the careers and guarantees of their members; d. multi-year plans, budgetary directives, budget and*

[1] We understand that the 1988 Brazilian Constitution to be definitive in denying the use of this instrument of exception to state governors and mayors, even when expressly provided for in the state constitution or the city charter ("*lei orgânica*"). We believe any such provisions to be unconstitutional.

[2] Celso Antônio Bandeira de Mello has not ignored this situation and has noted with his habitual proficency: "What is urgency? What should be considered as urgent? Though the word itself contains a degree of fluidity in its meaning, anyone would understand that a matter is only urgent if it must be dealt with immediately, one which cannot wait out the due course of time, at the risk of the desired benefit being thereby unobtainable or the loss one hopes to avoid exhausting the object in question or, at the very least, there are serious risks of disastrous effects in the event of delay." In another passage he has written: "(...) practically all provisional measures issued until now have been unconstitutional as they have ignored the requirements of 'relevant public interest and urgency'.(Curso de Direito Administrativo. São Paulo: Malheiros Editores, 35ª Ed., 2021, pp. 116-117).

[3] http://www4.planalto.gov.br/legislacao/portal-legis/legislacao-1/medidas-provisorias/2019-a-2022.

[4] These subject matters are considered part of the preserve of statutes.

additional and supplementary credits, except as provided for in art. 167, Par. 3; Sect. II. that deal with detention or sequestration of property, popular savings or any other financial assets; Sect. III. that are reserved for complementary law; IV. that have already been regulated in a bill approved by the National Congress which is awaiting the approval or veto of the President of the Republic."

The procedures governing provisional measures are given in paragraphs 3 to 12 of art. 62 of the 1988 Brazilian Constitution.

It behooves us to highlight, however, the differences between a provisional measure and a statue ("*lei*"). In this regard, we may look to the lessons of Celso Antônio Bandeira de Mello (Bandeira De Mello, 2021, 115-116) who highlights the following five differences:

(i) Provisional measures constitute an exception to the normal means of regulating certain subject matters, whereas statutes are the normal means for doing so.

(ii) Provisional measures, as their very name suggests, are provisional, that is, ephemeral. Statutes, on the other hand, are valid for an indeterminate duration and, even when they are temporary, the term of validity is stipulated in the statute itself, different from provisional measures which have a maximum validity of 120 days, as established in the 1988 Brazilian Constitution.

(iii) Provisional measures are precarious, subject to rejection by Congress at any time within the period which the latter body has to debate them. On the contrary, statutes are effective for as long as the body that passed them (the Congress) sees fit.

(iv) Provisional measures that are not converted into statutes lose their efficacy from the moment of their issue (*ex tunc*), while the effects of statutes which are revoked cease to be valid *ex nunc*.

(v) As a condition of their issuance, provisional measures depend on the existence of certain prerequisites (relevance and urgency), while statutes need not meet such requirements.

In light of the above, it is imperative that provisional measures be utilized within their constitutional limits and not as a surreptitious means of legislating and mandating the norms of social life.

5. Conclusions

Much has been debated about the future of the principle of legality in Brazil (and in the world). The arduous path that we have taken until the present time does not appear to have been properly paved, as Brazil still struggles with the difficulties of implementing a truly democratic regime, with those in the executive branch insisting on usurping a role that does not belong to them: that of the legislator.

Thus, democracy in Brazil has been crumbling through the use of authoritarian provisional measures that do not meet the requirements of relevance and urgency provided for under the 1988 Brazilian Constitution.

The path towards once again placing the country on the tracks of legality presupposes strong social and judicial controls, under which the abuses of those in power are inhibited and penalized, thereby – in a return to the past – following the precept of "the rule of law, not of men".

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