Juridicity and Legality: Rule of law *versus Rechtsstaat* or Rule of law *et Rechtsstaat*?

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ABSTRACT
This text aims to explore the moments of divergence and convergence between the constructions that led to the emergence of the rule of law and the *Rechtsstaat*. The conceptual evolution of the two terms leads to a reinforcement of their material dimensions, notably through the affirmation of the subordination of public powers (not only) to legality (but also) to juridicity (*Rechtsstaatlichkeit*). This evolution finds one of its fundamental precipitations in the principle of proportionality – whether as a result of its jurisprudential origin, or due to its dissemination within a global judicial review.

KEYWORDS
Rule of law; Rechtsstaat; Rechtsstaatlichkeit; juridicity; legality; normative principles; proportionality

1. Introduction

Historically there is no consensus on the meaning of *Rechtsstaat*, the rule of law or even *Etat de droit* (Böckenförde, 2000, 18; Heuschling, 2002, 5-17). One of the reasons for this consists in a plurality of meanings (which plurality is at the same time both synchronic and diachronic) and, therefore, with a tendency towards the vagueness associated with these concepts (Sunnquist, 2022, 81). Regardless of its spatial or temporal location, the concept is based upon the limitation of power (thus rejecting any sense of absolute power), its fragmentation (*hoc sensu*) and legal bounds, a guarantee of freedoms and the need to protect citizens against the arbitrary will (*potestas*) of the State, or at any rate the recognition of the political representation of individual citizens in Parliament. These various perspectives, therefore, have in common the fact that the principle as considered here is assumed to be an "essential form" (Stolleis, 2014b, 7) and, in particular, a "formula with a

political program" (*Formel mit politischen Programm*) (Stolleis 1990, 368). As such, it presupposes the existence of a political collectivity organized into a Sovereign state, the subordination (*hoc sensu*, limitation) of sovereign political power to (by) law/legislation[1], a certain kind of organization of the legal system (Chevallier, 2017, 13) and the consequences that such a relationship between State and law implies for the status of its citizens, especially with regard to the protection of their rights and, inherently, the strengthening of its position vis-à-vis public authorities (Costa, 2007, 74).

Taking as a reference point the recognition of a material dimension to the rule of law and the *Rechtsstat*, the distance between the two models begins by ... not existing! In different dimensions and with different purposes, both aim to give substantial meaning to the organization of the State around public values – which was not necessarily true in the French reading of the German model, which arose in the wake of legal thinking that was shaped by positivism. As we will see, the formal evolution of the German system would end up separating the meaning of the rule of law from the *Rechtstaat*. But it was also within German constitutionalism that, from the mid-20th century onwards, the idea of subordination of public powers to law (juridicity and not only legality) was born – forming the *Rechtsstaatlichekeit*, within which the principle of proportionality would emerge, in the context of a praetorian construction, as a remarkable example of the (re)birth of the importance of law over legality.

2. The rule of law: from England to the United States

The English rule of law is closely linked to the Common Law system itself. As such, English law highlighted the importance not of the notion of the law imposed by political power, but rather of a system that had been formed by the sedimentation of experience (even jurisdictional experimentation) over the centuries and shaped by the activity of generations of jurists and, above all, judges, who have always been autonomous from the will of the sovereign (or a prince or any other entity). Underlying the Common law was also the protection of liberties; put simply, instead of this protection

[1] Which the codifying movement, initiated in the second half of the 18th century by the Prussian Civil Code of 1751 or the Austrian Penal Code of 1787, would solidify, thanks to its generalizing nature and its vocation of certainty and security (Hayek, 2011, 297-298).

being granted exclusively to an assembly which, through a legislative act (an expression of *voluntas*), assumed the task of protecting these liberties (and even conforming to them), the guarantee of freedoms resulted from a constitution that emerged through various contributions (and not always necessarily through the intervention of an Act of Parliament).

Being a case law system, it is based on the prudential concretizing and normative-constitutive mediation of the judge, within the horizon of (judicial) decision of juridically relevant controversies. In the English version, the rule of law put the emphasis on the guarantees (in defence mechanisms, especially jurisdictional ones – the available remedies) that individuals had at their disposal to protect their liberties. Constitutionalism informed by the rule of law is not satisfied by a mere declaration of rights (which, per se, can guarantee nothing); it also demands (and above all so) the existence of remedies designed to protect them.

Since 1885, the theory of the rule of law has found its fundamental expression in Dicey (1927, 179), and it was established as one of the pillars of the English Constitution (along with the sovereignty of Parliament). It is the dichotomy between these two pillars (rule of law and parliamentary supremacy[2]) that will allow us to understand the specific role of the rule of law, endowed with a material or substantial content, which constitutes the result of an acquis built over centuries. On the one hand here, we have the principle *nullum crimen sine lege*, which embodies the epitome of reaction against an arbitrary and oppressive power of coercion (Dicey, 1927, 183-184); and on the other hand, there is the principle of equality before the law, implying the subordination of all citizens to the law of the kingdom and the jurisdiction of its courts of law. Added to this is the recognition that the fundamental principles of the English constitution (including rights and freedoms) derive from judicial decisions, which, over time, have been "discovering" (Dicey, 1927, 189-190) individual rights in actual cases before the courts, whose *rationes decidendi* became generalized, allowing us to state that the English Constitution itself is based on decisions (possibly, but not necessarily, confirmed, a posteriori, by Acts of Parliament – as occurred, *e.g.*, with the Habeas Corpus Act)[3].

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[2] Dicey (1927, 402-404, 406-408) stresses that the supremacy of Parliament not only favours the rule of law but is also its presupposition.

[3] One of the aphorisms of English constitutionalism determines that "*the constitution has not been made but has grown*" (Dicey, 1927, 191) – a dictum not to be taken literally, but as a form of expression that stresses that the English constitution "[has] not been created at a stroke" (Dicey, 1927, 192).

However, English constitutionalism coexists with the centrality of parliamentary activity – which will not be surprising when, also referring to Dicey (1927, 68), we note that the doctrine of the supremacy of Parliament (*hoc sensu*, the body consisting of the King, the House of Lords and the House of Commons) represents a keystone of the English Constitution. In this sense, as Parliament is the body responsible not only for creating but also repealing laws, it cannot be limited by any law, and it is in the light of any Acts of Parliament that judges will resolve specific cases (Dicey, 1927, 69-71). Nevertheless, the idea of parliamentary supremacy did *not* imply the concept that Parliament would have unlimited power (being, from the outset, prevented from adopting tyrannical measures) (Allison, 2024, 423-425); on the contrary, Acts of Parliament were subject to prudential judicial mediation. And that last substantial dimension of the rule of law assumes major relevance as far as English constitutionalism is concerned. If Dicey (1927, 193-194) himself admitted that freedoms could be protected either through their declarations of rights, or through their discovery in jurisprudence, he emphasized that the English solution was not so dependent on circumstances (which would dictate the existence of this or that right) and stressed the importance of (judicial) remedies under which such freedoms were effectively protected.

The subordination of public power to law has a different perspective in the North American system, under the motto inaugurated by the Massachusetts Constitution of 1780, in the sense of building a government of laws, not of men (cf. article XXX – Part I). This point is clearly revealed in Paine's (almost pamphleteering) statement, according to which "in America, the law is King", "for as in absolute governments, the King is the law, so in free countries, the law ought to be King, and there ought to be no other" (Paine, 2000, 28), or, most particularly, in Wilson's[4] interrogation about the danger of the existence of a "legislative despotism" – which, after all, it would end up leading to an attitude of reverent "worship of the Constitution" or of "canonizing the Constitution" (Holst, 1889, 64-79), which in turn would not have been unrelated to the period of prosperity (including economic prosperity) that followed its adoption (Corwin, 1928, 150-151).

[4] Reflecting on the need to limit the legislative branch, James Wilson (Farrand, 1911, 254) states that only the imposition of limits on the executive branch can assure the stability and the freedoms, as despotism can arise in different forms, among which, as "legislative despotism". Therefore, he advocated the creation of a bicameral Parliament.

The decisive contribution of the United States to the understanding of the rule of law lies in the affirmation of the parametricity of constitutional norms (in line with the reaction against parliamentary supremacy) and, in particular, the creation of a judicial environment designed to ensure this hierarchical superiority and, through it, the submission of public powers (especially the legislature) to the law. This was a mechanism that, in line with the Anglo-Saxon roots that predicate it, would represent a construction of jurisprudence and assume the value of binding precedent. We refer, of course, to the judicial review of legislation, established by the decision in *Marbury v. Madison* (1803).

The meaning and value given to the Constitution are in line with the historical-legal experience that determined the independence of the United States itself, directed at the reaction against the "insolent despotism" (Iredell, 1858, 146) of the English Parliament, whose tyranny was associated with abusive actions.

In legal-philosophical-political terms, the specific US notion of constitutional supremacy resulted both from the understanding that the Constitution incorporated, if not theoretical truths (Holst, 1889, 69), at least the fundamental axiological dimensions of the State (which were, as such, immutable), which (human) laws should obey, and, later, from the circumstance of their emanation being rooted in the popular will (as its initial words would evoke: *We, the People*) (Corwin, 1928, 152), their adoption of representative constituent procedures.

In association with this dimension, the specificity of the US rule of law is in its recognition of the power of the judiciary (indeed its duty) to ascertain the constitutionality of the acts of the constituted powers (in particular, the legislature). Underlying that institution is the ineliminable connection between the rule of law and the system of checks and balances presupposed by the US Constitution. In perfect coherence with the concern that it is a reaction against parliamentary omnipotence, the legislative branch was conceived as a creation of the Constitution, meaning that an act that contradicts the latter is void. In turn, as the courts were bound to act in accordance with the laws of the State, which included constitutional norms (norms that only differed from the rest due to their nature as fundamental law), they could not obey laws that were null, because this would imply disobeying the superior law that bound them and which, ultimately, would result in an action that would go beyond the scope of their power.

3. The origins of the *Rechtsstaat*: from a (Kantian) material point of view to a formal perspective

The German perspective has in its genesis Kant's vision of the State and the constitution. Contrary to the idea, widespread during the *Polizeistaat*, that the sovereign (*hoc sensu*) should be guided towards satisfying the *salus publica*, Kantian philosophy argues that the function of the State consists of guaranteeing freedom and autonomy, values that must also evidently limit sovereign action. According to Kant, the global civil constitution, or the constitution as an expression of cosmopolitan law (*Weltbürgerrecht*, *ius cosmopoliticum)* is one of the elements of approximation of perpetual peace (and, as such, a project of a legal-philosophical nature), guided as it is by the value of hospitality and considering men as citizens of a universal State of humanity (Kant, 2003). However, the principles emerging from this civil constitution were not limited to the expression of the will of the people or the general will, but rather constituted principles of reason. In this context (and despite the accentuation of the clearly formal character that this perspective would assume throughout the 19th century), Kant inaugurates the dogmatic tendency that, later, Placidus (1798, 73) would qualify as characteristic of the "authors of the theory of the rule of law" (*Rechts-Staats-Lehrer*). At issue was the need to highlight the contrast between a perspective tending towards the submission (typical of *Polizeistaat*) of rights to the interests of the sovereign (whose supporters Placidus (1798, 70) called "Staatsglückseeligkeitslehrer" or "politischen Eudämonisten") and a theorization in which the State would find itself subordinate to the law, being responsible, in a Kantian way, to ensure its performance in harmony with principles (or principles of reason).

During the 19th century, we saw a re-thematization of the problem. Initially, such a re-thematization was developed under the impulse of the Historical School and the conception tending to the legal personalization of the State, which was itself the personification of the specific national consciousness (*Volksgeist*), the *ethos* shared by an actual national historical community. At this moment, the concept was primarily connected with the abstraction in which the State is embodied – the solution followed by German doctrine immediately after the Congress of Vienna to, simultaneously, sustain the conciliation between the monarchical principle and popular sovereignty, allowing the concept of both the monarch and the

Parliament (as a polarizer of the representation of the people) as organs of the legal entity that the State constituted (Stolleis 2014a, 59-60).

The *Rechtsstaat* theory from the first half of the 1800s already bore an essential idea: a rational conception of the State, accompanied by the need to establish limits to its action (in particular, the actions of the State-Administration), ensuring the protection of freedoms. Von Mohl was responsible for disseminating[5], in German law, the significant *Rechtsstaat* – a concept already presented in an essay dated 1829 (Mohl, 1829), but, three years later, elevated to the title of one of his most emblematic works: *Die Polizei-Wissenschaft nach den Grundsätzen des Rechtsstaates*, whose first edition dates back to 1832.

If the *Rechtsstaat* began by being outlined as a *type* of State, rationally shaped and a guarantor of the conditions for the realization of individual freedoms, its subsequent dogmatic evolution (driven by positivism and, above all, by the Pandectists and the *Begriffsjurisprudenz*) removed this material dimension from it, to give it an essentially formal meaning. Through theoretical-constructivist thinking *Rechtsstaat* was transformed into an abstract category (a concept). This is what happened, *par excellence*, in the model proposed by Stahl (clearly an expression of a conservative liberalism (Stolleis, 2014b, 8)), already influenced by the abstraction that the nascent (and reigning) conceptualism would impose. Therefore, Stahl emphasized that, regardless of the purposes borne by the State (satisfaction of administrative purposes or protection of individual rights, or even both – a point that, for the construction of this specific concept, is not relevant), the *Rechtsstaat* (which is opposed to the patriarchal, patrimonial State and the *Polizeistaat*, or even to Rousseau's or Robespierre's *Volksstaat*) only intends to translate the State's *form* of action, the way or character (*Art und Charakter*) in which the purposes and content of the State are realized (Stahl, 1856, 137-138). Now, in the author's very words, such ends were achieved "in the manner of law" (*in der Weise des Rechtes*) (Stahl, 1856, 136). The law would constitute a *form*, now *un*concerned with a *material* content (such as the guarantee of freedoms). In Stahl's own synthesis, the nature of the *Rechtsstaat* simply expresses the impossibility of violating the legal order but does not attempt to define the content of that order (which comes from higher moral or political principles) (Stahl, 1847, 62).

[5] The paternity of the expression remains controversial: *v.* Hayek, 2011, 299-300.

4. The French reading of the *Rechtsstaat*: the *Etat de droit* and the *Etat légal*

The emergence, in France, of the concept of *Etat de droit* would correspond, *mutatis mutandis* (making use of the specific contributions and roots of French law), to the translation of the German *Rechtsstaat*, a concept that, when associated with an idea of voluntary self-limitation of a powerful State, raised reluctance in French doctrine, which saw it as a form of legitimization of the German State (Redor, 1992, 11). Hence, only the autonomy of the word from its meaning (Heuschling, 2002, 324) (and the perception that the former has a much later establishment compared to the latter) allows us to understand the meaning of the *Etat de droit* from the French perspective.

The introduction of the expression *Etat de droit* into the French doctrinal panorama appeared during the 19th century (in the context of a certain general fascination with Germanic thought that followed defeat in the Franco-Prussian war), but it truly flourished only at the beginning of the 20th century, with Duguit and Hauriou. In the first edition of his *Manuel de Droit Constitutionnel*, Duguit alluded, even using the German word *Rechtsstaat* (Duguit, 1907, 48-51, 472-477; Duguit, 1901), to the State bound by law (*Etat lié par le droit*); stemming from the concept of the State as a legal entity, it not only enjoyed rights, but was also subject to duties (which included the pursuit of legal purposes, and in particular, the realization of social solidarity). As Duguit admitted that the legislature was founded by a previous and superior written law (a reference to the revolutionary experience), the emphasis would be on subordination to a "regime of legality" (Duguit, 1907, 358-359). Hauriou also, expressly adhering to the German doctrine, identified the *état de droit* (*sic*) with the State subject to the regime of law (*regime du droit*, in a formulation very close, although not admittedly so, to the French version of the *rule of law*), leading him, immediately afterwards, to the "summary idea that the *état de droit* or the regime of law are the same thing as the regime of legality", the latter defined as "a balance of all forms of right established in favour of the law" (*loi*, not *droit*) or "under the hegemony of the law" (*loi* again) (Hauriou, 1916, 19, 27). Thus, political power is a legally limited power, insofar as it is subordinate to the rules of positive law that it itself emanates.

Although we may find some diversity of concepts in this matter, it would be up to Carré de Malberg (1962, 488-494) to design a very impressive distinction between the *Etat légal* and the *Etat de droit*, identifying the latter with *Rechtsstaat* and conceiving it (in opposition to the *Polizeistaat*) as subject (and limited), in its relations with citizens (now defended against the discretion of public powers), to a regime of law, insofar as its action is disciplined by a set of rules that establish the rights of citizens and that define the means of public action. For this reason, one of the fundamental characteristics of this *Etat de droit* leads not only to the limitation of the Public Administration, by preventing it from acting *contra legem*, but also to the subordination of administrative entities to the law (*loi*), binding them to act *secundum legem* (when they are given by the legislature a power to act).

The *Etat légal* expressed a specific political understanding of the relationship between the State branches, in particular, between the legislative and executive branches, with the purpose of subordinating the second to the first, giving supremacy power to the legislature (Malberg, 1962, 492, 496) and returning its administrative functions exclusively to the execution of the law (*loi*), understood as its source of legitimation. To this extent, the *Etat légal* aimed to establish a hierarchy between functions (a singularity that separated it from the German monarchies (Malberg, 1962, 491), without requiring, on the other hand, supervision of all acts of public power (including legislative acts) (Malberg, 1962, 493). The *Etat légal*, more than representing a mechanism designed to offer a set of guarantees to citizens, compatible with different forms of government, would – itself – constitute a *form* of government (Malberg, 1962, 491).

In short, in the French construction too, the evolution of the idea of subordination of the State to the law would end up leading to the defence of the supremacy of the acts of the legislature in the face of the administration, whose activity was led to the strict execution of the latter, under the principle of administrative legality on a material-substantive level, with the law defining the framework and limits of Public Administration action (Chevallier, 2017, 14) and the principle of parliamentary supremacy (on an organizational level) (Berthélemy, 1904, 213-214). If the judge and the executive were "dominated" by subordination to the legislation (as the only legal referent), the legislature would remain unchecked, with no mechanism for constitutional oversight yet to be envisaged.

5. *Intermezzo:* constitutionality and legality – the corollary of a certain view on *Rechtsstaat* and rule of law

A formal conception of *Rechtsstaat*, the worship of the Constitution in the US rule of law, a particular perspective on the Parliament's supremacy and the positivist conception of law underlying the binomial *Etat de droit/Etat légal* led to the emergence of two core principles: constitutionality and legality.

The binomial Constitution and legislation would thenceforth represent the axis around which the relationship between powers and sources evolved. The combination between constitutionality and legality pointed towards the recognition of popular sovereignty – and, as such, the supremacy of the general will, expressed in representative assemblies, whether at the foundational moment (as in a constituent assembly) or in the day-to-day functioning of institutions (the Parliament). In fact, the perception of the constitution as a superior norm of the legal system did not obliterate (but ended up paving the way for) the consequences of a legalism that would greatly mark nineteenth-century and early twentieth-century legal systems, in line with the evolutionary meaning given to the principle of separation of powers and the importance (actually, the essentiality) recognized, within it, by the legislature. Legislation now assumed a position as the essential element to provide movement and will to the political body organized as the State. And while, from the French or English perspective, this understanding did not result in the recognition of a specific substantive content for legislative provisions, the German construction established a material concept of legislative act and the principle of parliamentary reservation. However, the dogmatic elaboration underlying parliamentary reservation, instead of putting an end to the political understandings of the *Polizeistaat*, ended up merely replacing the seat of recognition of divine attributes, previously polarized in the King and now embodied by the Nation and legislation, as an expression of its will (the general will) (Soares, 1955, 63-64).

Taken to its ultimate consequences, the simultaneous affirmation, in this period, of constitutionality and legality reveals, at different times, a tension. On the one hand, the recognition of the (formal) constitution as a superior norm of the legal system involves, *volente, nolente*, the possibility of a confrontation between the former and the law, leading to the conclusion that there is a conflict between both of them. On the other hand, and considering that legislative acts effectively corresponded to an expression of the general will or the emanation of a body endowed with sovereign authority

or supremacy (over others), legality accentuated its rational superiority, consolidated by formality (*scilicet*, due to the independence of the content contained in them and the respective axiological basis of validity), and, to that extent, it detracted from their possible compatibility with the material requirements arising from the constitutional text.

6. From legality to juridicity as *the* referent for the action of public authorities... both in rule of law and *Rechtsstaat*

The last half of the 20th century[6] saw, in a consummate way, a review of the liberal centrality given to legality and the solidification of juridicity as a material or substantive principle that represents the core connection between public powers and the law. Despite previous advances[7] (abruptly interrupted by the interregnum resulting from the crisis of the Weimar Republic and the emergence of National Socialism), the *Rechtsstaatlichkeit* – or the subordination to juridicity – gives us a new scope to the understanding of this connection, to the point where it can be said that we now face a structure of own rationality, primarily oriented around the guaranteeing function of the law and the protection of fundamental rights, without losing sight of the ineliminable dimension of the separation of powers, as a rationalized form of organizing public powers.

Above all, the reference to juridicity allows for the recognition of parameters of binding public powers that are different from the legislation and the Constitution. Given the pluridimensionality of the legal system – true "networked juridicity" (Loureiro, 2006, 667) – the very attempt to clarify the normative standards to which public authorities are bound constitutes a task that is understandably more difficult than it would be if we let ourselves still be guided by a model like the normative pyramid.

We are interested, at this moment, in alluding to the less dense layer of the juridical system – that of normative principles – which, despite being

[6] As far as the *Rechsstaat* is concerned, this statement is true of the developments that took place in West Germany following the *Grundgesetz*, but it was no longer the case in the DDR (Stolleis, 2014b, 19).

[7] In the early 1930s, Jellinek had already introduced the juridical (and not strictly legal) binding of Public Administration as a dimension of the constitutional State and expressly emphasized that the State could not act against the law (*der Staat soll nicht Unrecht tun*) (Jellinek, 1931, 96, 88, respectively).

(mostly) treasured in constitutions, are possible expressions or concretizations of a meta-constitutional axiology and, therefore, of a metapositive axiology. And this is not a surprising statement considering the path we have taken: in fact, neither the affirmation of the *Rechtsstaatlichkeit* nor the consolidation of the rule of law (or even the transposition of its meaning to supranational orders – such as EU Law) intertwine in the defence of principles as foundations of the legal system.

Even when enshrined in positive texts or discovered by case law, the moment of validity of a legal system is identified by its normative principles, by its axiological-normative and constitutive foundations of law, foundations which, due to the openness that predicates them, intone a regulative intention but do not offer an immediate criterion for solving a problem (Neves, 1995, 175; Bronze, 2019, 627-632). The accentuation of the idea of subordination of public authorities to principles, whatever the form taken by the action in question, allows us to emphasize that the constitutional, legal and/or European normative positivation of principles does not preclude or replace the imperative of subordination of public powers to *all* law.

The relevance of principles in public action goes further, assuming special relevance in the context of interpreting norms. In fact, the determination of the normativity of the norm always calls for consideration of the entire legal (juridical) system and, consequently, also of its foundations. Therefore, the normative principles with which it is praised embody the last factor in determining the practical-normative intentionality of the norm, allowing such principles to perform a "calibrating function" (Bronze, 2020, 346). We may refer, in this regard, to the canon of "interpretation of norms in accordance with principles" (Neves, 1993, 188-189; Bronze, 2020, 348-351). Noting the founding dimension of normative principles, this canon postulates the determination of the normativity of the norm (any norm, even a constitutional one) considering its axiological foundations, implying the preference of the meaning of the norm that best harmonizes with the principle(s) underlying it and eliminating potential conflicts between *ius* and *lex* (*lato sensu*).

7. Proportionality as an example

Among normative principles, the subordination of public powers to the imperative of proportionality assumes fundamental importance today.

Regardless of the densification given to the principle of proportionality, the latter corresponds to an axiological requirement of the idea of rule of law and *Rechtsstaat*, binding, as such, all legal-public action (without distinction of the branch in question). Its refractions are not limited, moreover, to national Constitutional Law and Administrative Law, but extend to Comparative Public Law, as far as International Law (Vranes, 2009) or EU Law, as well as more recent legal-dogmatic branches, such as Investment Law (Vadi, 2018).

Understanding the judgments inherent in the principle of proportionality demonstrates a clear overcoming of a model that has moved from legality to juridicity, based on the redensifying role of jurisprudence – allowing us, therefore, to combine the original meaning of the rule of law with the acquisition of a material sense on the part of the *Rechtsstaat*. As is well-known, in its current configuration the principle of proportionality dates back to the jurisprudence of the *Bundesverfassungsgericht*, which culminated in the famous *Apothekenurteil* of 1958[8]. Analogous relevance (especially from the perspective of balancing) has the *Lüth* Judgment (also from 1958)[9], which, stemming from the conceptualization of the *Grundgesetz* as an expression of a *Wertordnung*, came to consider that the civil system must be interpreted in light of the Constitution (and constitutionally enshrined rights) to impose on judges of civil/common courts a methodical balancing of rights and interests (Schlink, 1976, 49-79).

The content of the principle of proportionality continues to reveal disagreements and reinvent itself, as a result of the various theoretical-dogmatic incursions and the emerging influences of jurisprudential practice (*rectius*, of jurisprudential practices) which, in the context of a global judicial dialogue, reciprocally interpenetrate. Furthermore, its understanding depends on its intersection with a set of other normative dimensions, such as occurs, *par excellence*, with the principle of the separation of powers or with the scope of fundamental rights (Barak, 2012a, 739).

In general, the principle of proportionality relates means and ends, aiming to answer the problem of knowing whether, after assessing the legitimacy of the latter, their achievement can be reached through the measures selected, which must be suitable and enforceable, and provide more benefits than they cause

[8] BVerfG, 11. 6. 1958 – 1 BvR 596/56: Niederlassungsfreiheit für Apotheker, *Neue Juristische Wochenschrift* (1958), 28, 1035.

[9] *BVerGE* (1958), 7, 198.

harm. In other words, the adequacy or aptitude (*Geeigneheit*) test supposes an *ex ante* judgment of causal prognosis (essentially – but not only – of an empirical nature), in order to evaluate whether the measure proves to be a suitable mechanism for the satisfaction of the given purpose. The reference to the aspect of necessity (or indispensability) emphasizes that, when compared with other equally appropriate means, the measure must constitute the least harmful or least intrusive instrument. Proportionality in the strict sense constitutes the proper moment for a cost-benefit analysis (the *Abwägung* of German law (Hirschberg, 1981, 77-87), the *bilan coût-avantages* discovered by French jurisprudence (Philippe, 1990, 179-181) or the cost-benefit analysis presupposed by US case law (Stone & et. al, 2023, 251-258)) and points towards the rationality and the reasonableness (*ragionevolezza*, *Zumutbarkeit*) of the proposed measure, taking into account the consequences it produces. From a positive perspective, cost-benefit balance aims to weigh up the advantages (to achieve the end) against the disadvantages implied by a measure, with the consequence that the greater the sacrifices caused by it, the greater importance the benefits must assume for the satisfaction of its purpose (Alexy, 2010, 102). From a negative perspective, the principle calls for a rule according to which, in situations of uncertainty, the decision-maker must choose the alternative whose worst consequence is greater than the worst consequences of the others (Rawls, 1999, 133). Or, ultimately, considering an alternative perspective, the principle supposes a balance between the importance of the social benefit achieved by reaching the purpose underlying the measure (satisfaction of the public interest or guarantee of another fundamental right) and the social importance that would exist if it were not to restrict the fundamental right; which is a judgment that seeks to evaluate the status of these benefits before and after such a restriction, by comparing their marginal effects (Barak, 2012a, 745; Barak, 2012b, 350-362).

The reference to these judgments supposes a further step and requires a reflection on the functions pursued by the principle of proportionality, conceived (yet again) as a predicative dimension of the rule of law *and* of the *Rechtsstaat*. Within this context, it becomes possible to attribute a double (methodological) role (or "methological aspect" (Barak, 2012b, 3-4, 7-8, 72-75) to the principle under analysis: on the one hand, we have its perspective as a *canon of interpretation*, contributing to the implementation of both constitutional norms (especially those relating to fundamental rights) and infra-constitutional norms; and on the other hand, there is its

configuration as a *limit* to public action, characterizing it as a *parameter of validity* and *standard of control* of the latter (to be called upon, above all, when it comes to the restriction of fundamental rights).

As an interpretative canon, the idea of proportionality determines that the meaning given to a constitutional norm is adequate and reasonable in view of the foundations that underlie it, and that its mobilization for the resolution of cases contributes to the realization of these same foundations. This means, therefore, that the principle of proportionality ends up tracing the (external) limits of the scope of the protection of constitutional norms (Kumm, 2007, 132). In this sense, the principle approaches (and complements) interpretation in accordance with principles and comes close to the scope that, in general, should be given to consequential thinking (*Sinepëik*) with regard to the problem of the relevance of the result of a decision (Fikenstcher, 1980, 57; Fikenstcher, 2004, 130-145). Proportionality aims to ensure practical-normative consonance between the meaning of the (constitutional) norm and its predicative axiology – an aspect that assumes greater importance in norms endowed with normative openness and the constitutional density of norms relating to fundamental rights.

But the principle of proportionality is also the basis for the canon of interpretation in accordance with the Constitution, thus having an impact on the development of the interpretative task of infra-constitutional norms. This canon is based not only on the principle of the unity of the legal system, but also on specifically hermeneutical principles, such as the principle of the unity of *interpretation* of the legal system – supposing the search for and choice of a meaning that does not prove to be incompatible with the Constitution. These are also associated with principles that are relevant, in particular, to the theory of unconstitutionality, such as the principle the preservation of norms (or, more generally, of all public acts) – which, when combined with proportionality, requires that unconstitutionality is an *ultima ratio* consequence (of normative conflicts), affecting only those acts whose failed constitutionality proves impossible to save.

Although it cannot be completely separated from the previous dimension[10], the privileged field of actions in proportionality concerns,

[10] The Charter of Fundamental Rights of the European Union demonstrates this interconnection between both dimensions of the principle of proportionality, insofar as it frames the restrictions (subject to the principle of proportionality in a precept (article 52) dedicated to the scope, but also to the meaning of the rights.

nonetheless, the assessment of the validity of acts of public authorities, and in particular, of measures that restrict rights with the purpose of safeguarding other fundamental (constitutional) goods or interests. And it is within this dimension that questions arise related to the identification of the judgment(s) of proportionality. On one hand, we must be aware of the fact that the invocation of the principle is not independent of the function (whether negative or positive, defensive or protective (Grimm, 2005, 137-155)) of the norms that enshrine those rights (Barak, 2012a, 742; Barak, 2012b, 27-32). On the other hand, we must not lose sight of the fact that such judgments in question assume a legal/juridical (and not political) nature, that they are based on a practical-normative rationality (and not on a strategic rationality), that they are praised in *ratio* (and not in *voluntas*), and that they are imposed by force of argument and not by the force of power, and so by *auctoritas* and not by *potestas*.

8. Concluding remarks

Despite having distinct roots, the rule of law and the *Rechtsstaat (Rechtsstaatlichkeit*) today converge in a material perspective[11]. Such a perspective requires, at the very least, the subordination of public powers to juridicity, and includes the recognition of principles as a layer of the legal system as one of its fundamental elements. And the importance assumed by the principle of proportionality – especially as a parameter of validity and standard of control of the activity of public authorities – represents an important expression of this phenomenon.

The difficulties inherent in the invocation of the principle of proportionality (by judges) led to its densification through a set of sub-principles (as already stated above). Such densification aimed to specify the meaning

[11] See, *e.g.*, article 2(a) of Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council, of 16 December 2020, on a general regime of conditionality for the protection of the Union budget. The expression rule of law (from the English version) appears translated, respectively, in the German and French versions, as *Rechtsstaatlichkeit* and *Etat de droit*. In either case, its material content is reduced to a value (more precisely, a European value), that "includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law".

of the means-end relationship demanded by compliance with the axiology underlying the principle under analysis here. While, in this context, proportionality is traditionally associated with the so-called "triple test" (which presupposes the logically successive assessment of suitability, necessity and cost-benefit balance), the normative qualification attributed to each of them remains controversial. Furthermore, jurisprudential experience in this matter has demonstrated not only the intentional differences inherent in the multidimensionality of the principle of proportionality, but also a certain evolutionary tendency, which tends to connect it, at certain times (even if not always in the most practical-normatively successful way), with other principles, such as is the case with reasonableness, but also with the protection of trust and equality – presupposing a confrontation between judgments of a different nature and content.

Difficulties increase due to the fact that the "tests" of proportionality not only presuppose the carrying out of very complex normative reasoning and considerations (which slip easily from the area of the law into the domain of political opportunity), but also prove to be changeable within the scope of resolving the various problems that the actual practice of the law has recently been facing. In particular, if we consider that the construction of proportionality involving several judgments presents an essentially praetorian matrix, it will not be surprising that we face today the need to re-thematize this principle, in an increasingly broader scenario of global judicial review. In fact, the specific dynamic nature of the principle has allowed it to receive new influences through the sharing of jurisprudential experiences and as a result of the assumption, by international (or supranational) courts, of functions parallel to those of the constitutional judges.

However, one of the main assumptions of the principle of proportionality – inclusion within the rule of law *and* the *Rechtsstaat* – is now being challenged. The construction and subsequent expansion of the principle of proportionality represented one of the expressions of the comparative constitutional law movement and the so-called "constitutional borrowing", which ended up obtaining very wide dissemination due to the public value it carries. The problems arise because, currently, the models that are attracting new (and not-so-new) States are those that have more authoritarian characteristics (although under the guise of democratic-constitutional semantics), calling into question the essential dimensions of constitutionalism (Dixon & Landau, 2019, 489-496). This rapprochement therefore occurs despite

the mobilization of the democratic European constitutional design and its related conceptual map – determining that, in practice, these new autocracies use this *instrumentarium* (and also the principle of proportionality) to legitimize and justify the appropriate nature of their actions, precisely inverting the axiological dimensions inherent to those principles. Once again, the rule of law and the (material) *Rechtsstaat* are in danger.

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