The evolution of "legality" applied to administrative and legislative acts: a tendency to abandon the logic of nullity in favor of the logic of annullability[1]

Fernando Menezes de Almeida

Full professor at the Faculty of Law of the University of São Paulo.

Table of contents: 1. Introduction; 2. The logic of nullity and the logic of annullability; 3. The comprehension of legality in the Brazilian constitutional tradition; 4. Vectors of legislative and jurisprudential evolution; 5. Conclusion; References.

Abstract: This article aims to highlight, throughout the validity of the 1988 Constitution, a tendency to detach the notions of validity of the legal norm and its conformity to the law, opening the way for the understanding of legality to be based on a logic of annullability, instead of a logic of nullity.

Keywords: 1988 Constitution; validity of the legal norm; legality; nullity; annullability.

1. Introduction

As Brazilian law is inserted into the tradition of Western constitutionalism (Troper, 1994, p. 203-205)[2], a fundamental premise, from which the understanding of the constitutional bases of its legal system derives, is the adoption of a rule of law model.

As Manoel Gonçalves Ferreira Filho states:

> No formula better expresses the spirit of the Rule of Law than that enshrined in Article 30 of the Massachusetts Declaration of Rights of 1780: 'government by laws, not by men'. (Ferreira Filho, 1987, p. 95)

In other words, to use Kelsenian language, it is a matter of replacing the subjective will of individuals with the objective will of society, a will contained in the laws, as an enabling parameter to define the meaning of the binding norms of individuals' conduct (Kelsen, 1996, p. 34-35).

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1 This text was prepared based on an invitation from Professor Manoel Gonçalves Ferreira Filho for a collective reflection on the "changes" that the 1988 Constitution had undergone in its application, regardless of any alterations to its text, over its more than 30 years of validity; the same text was presented, in an abridged version, in English, at a research seminar regularly organized at the University of Freiburg (Germany), under the coordination of Professor Matthias Jestaedt, on the Pure Theory of Law. Having received the honorable invitation to submit a paper for the inaugural issue of *Plenário – Revista Jurídica da Câmara dos Deputados*, I believed it would be pertinent, given the connection between the topic of legality and the activities of the Chamber of Deputies, to submit these ideas to a new publication, considering the possibility that it would reach a different readership.

2 Michel Troper points out three (non-exclusive) meanings of constitutionalism: a) lato sensu, it is the idea spread since the 18th century that every State must have a constitution as a way of preventing despotism; b) stricto sensu, it is the idea that not only is a constitution necessary, but that it must be based on certain principles, aimed at avoiding despotism, or, which is not exactly the same, at guaranteeing political freedom; such principles – and in this aspect the ideology of constitutionalism has variations – can be the following or some of them: the separation of powers, the distinction between constituent power and constituted powers, representative government, jurisdictional control of the constitutionality of laws; c) strictissimo sensu, it is the idea according to which the desired result (political freedom or the impossibility of despotism) can only be achieved if among the principles indicated here is jurisdictional control of the constitutionality of laws.

Legality, therefore, is understood as the technical-legal translation of the idea of the rule of law.

The Brazilian legal system clearly adopts this model. Firstly, by virtue of the inaugural norm of the 1988 Constitution, affirming the Federative Republic of Brazil as a "Democratic State of Law" (art. 1).

Secondly, the Constitution emphasizes the principle of legality, which is enshrined as a fundamental right applicable to all individuals – whether in its formal sense (law as a result of the body representing society: art. 5, II), or in its material sense (law as a norm that tends to be general and abstract, so as to equally affect all members of society: art. 5, caput and I) – and also as a principle applicable to public administration (art. 37, caput)[3].

Traditionally, due to doctrinal positions, enshrined in case law, legality was (or perhaps still is) understood in a majority way in Brazilian law in order to promote the inseparable connection of the notions of validity and compliance with the law.

However – this is what this brief essay aims to highlight – there has been, in these 37 years of application of the 1988 Constitution, a tendency to detach the notions of validity of the legal norm and its compliance with the law, opening the way for the understanding of legality to be given by a logic of annullability, instead of a logic of nullity.

2. The logic of nullity and the logic of annullability

As a starting point for the developments proposed in this essay, let us establish the idea that the phenomenon of the invalidity of a legal norm can basically be explained in two ways: by a logic of nullity or by a logic of annullability.

According to the logic of nullity, it is assumed that the invalidity of a norm arises, ipso facto[4], from its non-conformity with the standards established by law for the creation of norms – or, in other words, from its non-conformity with legality (legality in the broad sense, including constitutionality here).

By this first way of explaining law, it is assumed that a legal norm will not be valid as an immediate consequence of its way of being (the way it was produced), as if it were a natural phenomenon, without the intercession of human will.

In this case, it is assumed that the stance of the law enforcer, faced with a "null" norm, will be the same stance as that of an observer of nature who observes a fact given a priori (immutable and inevitable): the norm is not valid – it was no longer valid since its creation.

And the act of recognizing nullity would be a declaratory act of a legal situation that does not depend on the will of the person applying the law (of the legal body that is recognizing the nullity).

On the other hand, according to the logic of annullability, it is assumed that the invalidity of a rule arises from an act of will by the person applying the law, who also takes into account a judgment of non-compliance with the standards established by law for the creation of norms (non-compliance with legality), but which is not mechanically conditioned by this non-compliance.

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[3] In addition to other specific cases, which are developments of this more general categorization, such as legality in criminal or tax matters.

[4] I mean ipso facto: as if it were a causal phenomenon proper to the world of being (of physical nature), even before being a consequence foreseen by law (ipso jure). I will return to this point in the final part of topic 3 of this essay.

In this second way of explaining law, it is assumed that a legal norm will not be valid due to a volitional decision by the person applying the law.

In this case, it is assumed that the stance of the law enforcer, when faced with a rule whose validity is being questioned, will be the same as that of the law creator: through an act of will, the law enforcer will withdraw the validity of the rule – which, were it not for this decision, would remain valid.

And the act of annulment would thus be a constitutive act of a legal situation, based on the will of the person applying the law (the will of the body of the legal system authorized to do so).

The explanation given here about nullity and annullability adopts a perspective of general legal theory, seeking a scientific approach to a legal phenomenon on an abstract level, independently of an analysis of linguistic uses or conceptual conventions that certain positive law makes in relation to the words "nullity" and "annullability".

For instance, the Brazilian Civil Code addresses this issue, distinguishing between null and annullable acts (articles 166, 167, and 171) and assigning distinct legal consequences to each[5]. However, these differences in legal regime are accidental and not substantial differences, resulting, it should be repeated, from conventions of language and legal concepts used by the legislator. Of course, in a scientific reading of positive law, it is also necessary to recognize the existence and operability of these concepts. In any case, findings of this type do not prevent, at the level of general theory, a search for a broader and more abstract explanation – essential – for the situations described here as "nullity" and "annullability".

In other words, from the more abstract perspective of the general theory of law, nullity and annullability are distinguished – as theoretical models to explain the invalidity of the norm – by the understanding that the first is supposed to operate ipso facto, leaving it to the enforcer of the law to declare the consequent legal situation, which preexists in itself, and that the second is supposed to operate through the human will that created the norm, so that the enforcer of the law then constitutes (volitionally) a legal situation as a consequence of a judgment of invalidity.

Whether the first or second hypotheses – regardless of whether they are called "nullity" or "annullability" – can be practiced ex officio or not, produce retroactive effects or not, coexist with validation or not, among other operating rules, this is an accidental option of each positive legal system.

Returning to the consideration of the abstract categories of nullity and annullability, we can see the alignment of the logic of nullity with the philosophical premises of natural law, and the alignment of the logic of annullability with the philosophical premises of positivist law.

The logic of nullity implicitly views the legal phenomenon (normative creation) as a natural phenomenon, existing independently of human will, which reflects the essence of natural law thought.

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5 For example: "Art. 169. A void legal transaction is not susceptible to confirmation, nor does it convalesce with the passage of time"; or "Art. 168, sole paragraph: Nullities must be pronounced by the judge, when he is aware of the legal transaction or its effects and finds them proven, and he is not allowed to supply them, even at the request of the parties"; or even "Art. 172. A voidable transaction may be confirmed by the parties, except in the case of third-party rights".

In turn, the essence of the various lines of thought that can be called positivist (or realist) have in common the fact that they center the essence of the legal phenomenon (of the act of normative creation) on human will, which leads, in the case in question, to the reasoning of annullability.

Emblematic, in this sense, is the position of Hans Kelsen (1962, p. 159-160), considering that "a norm belonging to a legal order cannot be null but only voidable" and that "the annullability provided for by the legal order can have different degrees", of which one of the extremes would be what is traditionally called "nullity" (annullability with ex tunc effects). Thus, there is no nullity of a norm as a situation given prior to the (legal) decision, taken by a competent body, to withdraw its validity – a decision that has a constitutive nature.

In his words:

> It is therefore incorrect if the decision annulling the statute is designated 'declaration of nullity' (German: 'Nichtigkeitserklärung') and if the organ who annuls the statute declares that the statute was null 'from the beginning'. His decision has a constitutive, not a merely declarative, character. The meaning of an act by which a norm is annulled, like the meaning of an act by which a norm is created, is a norm. [...] When, for example, the legal order stipulates that a norm is to be considered as a priori null (and therefore does not require a nullifying act) if the norm was not created by the competent organ, or if it is created by individual who does not even have the quality of an organ, or if the norm has a content excluded by the constitution, then the legal order would have to prescribe who has to establish the existence of this conditions of nullity; and since this establishment has constitutive character (since the nullity of the norm in question is the result of this establishment and cannot legally be asserted before the establishment), this establishment means the retroactive nullification of a norm to be regarded as valid until then, even if the establishment is formulated as a 'declaration of nullity'. In this respect, the law is like King Midas: just as everything he touched turned to gold, so everything to which the law refers assumes legal character. Within the legal order, nullity is only the highest degree of annullability. (Kelsen, 1967)[6].

These ideas involve a relevant theoretical development, equally rich within the scope of the School of Pure Theory of Law, on the existence of a "margin of error" (Fehlerkalkül) inherent in law and an "alternative authorization" (Alternativermächtigung)[7] for a definitive decision, in the case of a final instance decision (Kelsen, 1962)[8].

These are theoretical elements that, among other applications, explain the coexistence of normative acts, equally valid, but containing manifestations of will with conflicting contents in terms of the human conduct governed by them (for example: a court ruling, whose content conflicts with the content of a norm present in the constitution, may remain definitively valid because it has become res judicata; or an administrative act, whose content conflicts with the content of a norm contained in a law, may remain definitively valid due to the passage of time, leading to the expiration of the legal

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6 The English excerpt from Kelsen's work was taken from the Pure theory of law, Clark, The Lawbook Exchange – translated from the second German edition by Max Knight and originally published: Berkeley, University of California Press, 1967.

7 On the topic, see Rodrigo Garcia Cadore, "Alternativermächtigung vs. Fehlerkalkül – Wie geht das Recht mit Fehlern um?" – whom I thank for the discussion on the topic and for other bibliographical references, including Christoph Kletzer, "Kelsen's development of the Fehlerkalkül-theory", and Philipp Reimer, "Die Unabhängigkeit von Rechtswirksamkeit und Rechtmäßigkeit – Ein Beitrag zur Lehre vom Fehlerkalkül".

8 According to Kelsen (1962, p. 146): "[...] the court of last instance has the power to create either an individual legal norm whose content is predetermined in a general norm created by legislation or customary means, or an individual legal norm whose content is not predetermined in this way but which will be determined by the court of last instance itself".

power of the administration to withdraw its validity, or leading to the prescription of legal actions in the same sense).

From a personal point of view, I express my sincere support for the thesis of annullability, as a theoretical model suitable for understanding the legal phenomenon.

I insist: I am not arguing that nullity does not exist as a provision of Brazilian positive law (as already exemplified here with the Civil Code). I am, rather, saying that even that which the law calls nullity, in essence, cannot deny the creative-volitional power of the body that applies the law.

Even if the situation of withdrawing the validity of a legal act is called nullity, its essence will be what is here called annullability – whether it is an annullability with retroactive effects, or not, or an annullability decided ex officio, or not.

Kelsen's arguments are complete. To test them, one only needs to empirically examine social reality. Every day, identical legal issues are brought before different legal practitioners – judges, for example – who may issue judgments in different directions, all of which are potentially final and binding. This simple reasoning shows that there is no legally "correct" solution a priori, that is, one that arises from the nature of things, independently of judicial decisions (which are being considered in the example).

Every act of application of law, precisely because it "applies" law, is based on a previously established norm, but, at the same time, it is itself essentially another legal norm, introducing legal effects in the situations to which it is applied; in this sense, every act of application of law is also an act of creation of law (Kelsen, 1962)[9].

The act of withdrawing the validity of another legal act only occurs through the volitional action of a law enforcement body – it is not a spontaneous movement of the forces of nature. Even if, psychologically, deep down, the individual who occupies the role of law enforcement behaves as if he were merely noting a predefined factual situation, this behavior, in truth, expresses his decision, his will, to do so.

In everyday legal situations, a person who wishes not to be subject to the incidence of a rule (legal, administrative, contractual, jurisdictional) because they believe it to be contrary to the law must mobilize a body that applies the law to decide on its invalidity.

The simple failure of the subject to comply with the rule, under the argument (formulated subjectively within him/her) that he/she understands it to be invalid, does not produce the legal effect of invalidity: potentially, this subject will suffer the corresponding sanction; if eventually, in fact, he/she does not suffer it, this does not mean that the rule that was not complied with was not valid, but only that, concretely, the law enforcement bodies were not mobilized to trigger the application of the sanction.

This intimate motivation of good faith of the subject who fails to comply with a rule because he (subjectively) understands it to be invalid does not have the power, in itself, to create a legal situation of true invalidity of such rule; in the same way that the attitude of the subject who deliberately fails to comply with a rule that he assumes to be valid does not.

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[9] According to Kelsen (1962, p. 87), "the application of law is simultaneously the production of law. [...] In fact, if we leave aside the limiting cases – the presupposition of the fundamental norm and the execution of the coercive act – between which the legal process develops, every legal act is simultaneously the application of a higher norm and the production, regulated by this norm, of a lower norm".

3. The comprehension of legality in the Brazilian constitutional tradition

As stated in the introduction to this text – and as is well known –, Brazil aligns itself with the tradition of Western constitutionalism, adopting a system of legality, both in its formal and material sense.

The synthesis of this idea, on a historical level, is expressed in an exemplary way in the text of the Declaration of the Rights of Man and of the Citizen of 1789:

> Art. 4. La liberté consist à pouvoir faire tout ce qui ne nuit pas à autrui: ainsi, l'exercice des droits naturels de chaque homme n'a de bornes que celles qui assurent aux autres Membres de la Société la jouissance de ces mêmes droits. These borne ne peuvent être déterminées que par la Loi.
>
> Art. 5. La Loi n'a le droit de défendre que les actions nuisibles à la Société. Tout ce qui n'est pas défendu par la Loi ne peut être empêché, et nul ne peut être contraint à faire ce qu'elle n'ordonne pas.
>
> Art. 6. La Loi est l'expression de la volonté générale. Tous les Citoyens ont droit de concourir personnellement, ou par leurs Représentants, à sa formation. Elle doit être la même pour tous, soit qu'elle protect, soit qu'elle punisse. Tous les Citoyens étant égaux à ses yeux sont également admissibles à toutes dignites, places et emplois publics, selon leur capacité, et sans autre distinction que celle de leurs vertus et de leurs talents.

Classical doctrine extracts from these rules the two fundamental meanings of legality, complementary and harmonious: formal legality and material legality.

In the formal sense, law is taken as a socially legitimized instrument to define the limits of the exercise of human freedom – the legal act produced by the body representing the will of individuals, in accordance with the procedure previously established in the basic norm of organization and definition of the competences of state powers (constitution, in the broad sense).

The formal sense, therefore, gives prestige to the political notion of freedom, assuming that any restriction on its exercise will result from a decision directly or indirectly related to the will of the individuals themselves (whose freedom is thus disciplined in its exercise).

This is the meaning that corresponds, in the current Brazilian Constitution, to the provisions of art. 5, II: "no one shall be obliged to do or refrain from doing anything except by virtue of law".

In the material sense, it is understood that the law must tend to be general and abstract, that is, the law must apply to any recipients, not previously identified, whose conduct coincides with the hypothesis of incidence of the law ("general"); and, furthermore, the law must formulate hypotheses of incidence aimed at future cases and not at concrete situations that have already occurred ("abstract").

The material sense, therefore, gives prestige to the political notion of equality, admitting that the law, being general and abstract, tends not to create privileges or to encourage persecution, treating all members of society equally (Duguit, 2007, p. 96)[10]– even if this equality involves the classic formula

[10] In the words of Léon Duguit (2007, p. 96): "On a compris que les détenteurs du pouvoir politique ne devaient pas pouvoir prendre arbitrairement telle ou telle décision individuelle, en vue de telle ou telle situation déterminée; qu'ils étaient liés par la règle générale formulée d'une manière abstraite sans considération ni d'espèce ni de personne, et ne pouvaient prendre de décision individuelle que conformément à la règle générale contenue dans la loi. Du moment où ce régime a été compris et appliqué, l'individu s'est senti fortement protegé contre la toute-puissance des gouvernants; car il est évident que cette règle générale et abstraite, qui limite leur action, présente beaucoup moins de danger d'arbitraire qu'une décision individuelle, qui peut toujours être provoquée par la haine, l'ambition ou la vengeance".

of treating the unequal unequally to the extent of their inequality. This is the sense that corresponds, in the current Brazilian Constitution, to the provisions of art. 5, caput: "All are equal before the law, without distinction of any nature [...]".

The statement that everyone is equal before the law is not a constitutional prohibition on laws (in a formal sense) that are individual and/or concrete.

The scope of material legality therefore implies that, if an individual and/or concrete law (in the formal sense) is produced, it must be based on a prior and superior provision[11], which is necessarily general and abstract. In other words, individual and/or concrete laws are not necessarily unconstitutional, but they may be considered unconstitutional (for violating the rule of equality of all before the law) if they are not based on a constitutional criterion of discrimination[12].

The system of legality (formal and material) of the Brazilian Constitution applies as a guarantee of the fundamental freedoms and rights of individuals (art. 5) and has the effect of conditioning all state action – notably executive action, exercising the administrative function – to operate within the limits of legality (art. 37).

In fact, legality is a principle of public administration, as expressly stated in the caput of art. 37 of the Constitution. This text only mentions the word "legality", without describing it in an analytical formula; however, it is understood as referring to both the formal and material sense of law – the latter reinforced by the provision of the principle of impersonality, in the same list of principles of public administration given by art. 37.

Legality applied to individuals, precisely because it deals with subjects endowed with subjective will (free will), has as a corollary that conduct not prohibited by law is considered free.

Legality applied to public administration, based on the fundamental premise of the Rule of Law – in the sense that the State does not have a subjective will, that is, that the will of the State is not the subjective will of the rulers, but rather the objective will of the law –, has the consequence that the Administration can only act within the limits of the law.

There is no need to consider a will (free will) of the Administration (or, more broadly, of the State) beyond the limits of the law, which could supposedly justify a conclusion analogous to that applicable to individuals, under the terms of the aforementioned art. 5, II. If we start from the premise of the Rule of Law, all "will" of the administration is limited to the (objective) will be contained in the law.

This understanding of legality, traditionally called "strict", applicable to the Administration, leads to the classic discussion of the scope of this link between the Administration and the law. In fact, the idea expressed by the doctrine in formulas such as "the Administration can only act within the limits of the law", or "the Administration can only do what the law determines", among others, is an idea that is necessarily imprecise.

What are these limits of the law? How does the law effectively determine the conduct of the Administration? By foreseeing in detail all the elements of this conduct? By foreseeing all the concrete circumstances of the cases of incidence of the law, in order to accurately describe the conduct to be adopted by the administrator?

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11 In the case of formal law, such superior provision must be in the Constitution itself.

12 See, for example, the cases of laws that create so-called affirmative actions.

These questions open space for any discussion about administrative discretion; and about the degrees of binding to the law, ranging from a notion of "conformity" (stricter identity) to a notion (more fluid) of "non-contrariety" between the administrative action and the legal provision – to use here the famous formulation of Charles Eisenmann (2014, p. 535 et seqs.).

Given the objective of this essay, it is not the case to delve into the discussion of legality from this perspective of binding and discretion.

On the other hand, from the same basic notion of legality applied to public administration, derived, in the traditional doctrine of administrative law, an understanding that the Administration cannot, in any way, carry out acts that do not comply with the commands of laws[13]; or even that any non-compliance implies, inexorably, the invalidity of the administrative act.

It is a reasoning that implicitly disregards the basis of all realist-positivist reasoning, aimed at a scientific and objective analysis of law: the distinction between being and ought-to-be (Kelsen, 1962, p. 203-212).

The traditional thesis of the nullity of an administrative act confuses, at least implicitly, the duty of the Administration to comply with the law with the (supposed) fact that the administration acts, by force of nature, necessarily in a manner bound by the law (Kelsen, 1996)[14]. As a corollary, instead of considering an administrative act that is contrary to the law as liable to have its validity withdrawn by another legal act that comes to verify this contradiction (thus nullifying the first), the traditional thesis assumes that an administrative act that is contrary to the law is an act without validity (null) ab initio e ipso fact.

In fact, this was the same view that the doctrine traditionally applied to the unconstitutionality of laws: the law's non-conformity with the Constitution inexorably leads to its invalidity.

As for unconstitutionality, see Manoel Gonçalves Ferreira Filho's analysis regarding the stance of traditional doctrine:

> The nature of the unconstitutional act – as traditionally taught by doctrine, both foreign (e.g., Marshall) and national (e.g., Rui) – is null and void. Thus, it is not binding and cannot be applied. Or, if applied, this application is null and void. Thus, the effect of the declaration of nullity is retroactive ex tunc, the acts carried out under his empire not being valid.
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> In Brazil, the jurisprudence of the Supreme Federal Court has repeatedly declared the unconstitutional act null and void, as classical doctrine requires. (Ferreira Filho, 2015, p. 63)

As for administrative acts, refer to the emblematic position of Hely Lopes Meirelles:

> A null act is one that is born with an irremediable defect due to the absence or substantial defect in its constituent elements, or in the formative procedure. Nullity can be explicit or virtual. It is

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13 This issue of compliance with legal commands opens the field for another discussion present in contemporary Brazilian doctrine, which is the defense of replacing a notion of connection to legality – as if legality meant adherence to the literalness of the law – with a notion of connection to law (here including the Constitution and all the values arising from it). This position is part of the same framework of constitutionalization of law, mentioned below.

14 It is the misleading confusion, denounced by Kelsen, between "causal necessity" and "normative necessity"La règle de fait peut avoir le caractère d'une loi causale, en vertu de laquelle, sous certaines conditions, quelque chose de determiné doit nécessairement avoir lieu. L'expression de 'falloir-être' exprime la nécessité causale. Si l'on admet que le devoir-être exprime aussi une necessite, il faut distinguer clairement la necessite causale de la nécessité normative. Mais, comme dans la langue usuelle, le terme 'norme' peut signifier, non seulement une règle normative, mais aussi une règle de fait, les deux sortes de nécessité ne sont pas parfois clairement distinguées entre eles, les mots de 'devoir-être' et de 'falloir-être' sont utilisés comme des synomymes, ce qui est extrêmement trompeur" (Kelsen, 1996, p. 11). [Searching for expressions in English, "devoir-être" is understood as "should be" and "falloir-être" as "must be".]

> explicit when the law expressly imposes it, indicating the defects that give rise to it; it is virtual when the invalidity results from the infringement of specific principles of public law, recognized by interpretation of the rules concerning the act. In any of these cases, however, the act is illegitimate or illegal and does not produce any valid effect between the parties, for the obvious reason that no rights can be acquired against the law. [...] Although some authors admit the act administrative voidable, subject to validation, we do not accept this category in administrative law, due to the impossibility of private interest prevailing over public interest, and the maintenance of illegal acts is not admissible, even if the parties so wish, because this is opposed to administrative legality. Hence the legal impossibility of validating the act considered annullable, which is nothing more than an originally null act. (Lopes Meirelles, 1989, p. 149-150)

Regarding administrative acts and their "nullity", the STF's jurisprudence had long since crystallized around Summary No. 473 (or, as it could be said more faithfully to the original terminology: Statement No. 473 of the STF Summary), approved on December 3, 1969:

> The Administration may annul its own acts when they are tainted with defects that make them illegal, because no rights arise from them; or revoke them, for reasons of convenience or opportunity, respecting acquired rights, and in all cases, subject to judicial review.

The judgments that are officially invoked as precedents for the formulation of Summary No. 473[15], as well as several others that apply it in subsequent years, start from the premise that illegal acts, for this very reason, do not generate rights and can (should) be annulled[16]– that is, have their invalidity recognized – at any time.

4. Vectors of legislative and jurisprudential evolution

However, even without express or conscious adherence to the logic of annullability from the perspective of general legal theory, a substantial part of Brazilian doctrine began to support, after the first years of application of the 1988 Constitution, the need for greater attention to legal certainty.

In general terms, the 1988 Constitution expanded the powers of the Judiciary and the Administration's oversight bodies. It did so either directly, by expanding the powers and oversight instruments, or indirectly, by resorting to formulations that are very principle-based, the application of which is more prone to interpretative creativity on the part of the Judiciary[17].

This expansion also occurs in the context of the amplification of the normative scope of the Constitution itself, which has an extremely extensive, detailed and inclusive text of topics that could normally be assumed to deserve infra-constitutional treatment. This is the phenomenon described as the constitutionalization of law (Guastini, 2002)[18].

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15 RMS 16935 (DJ 24/5/1968), MS 12512 (DJ 1/10/1964), MS 13942 (DJ 24/9/1964) and RE 27031 (DJ 4/8/1955).

16 Here the word "annulled" refers to "invalidated", not implying adherence to the thesis of annullability, as follows from the systematic understanding of the case law in question.

17 This point is not worth developing here, but the reference remains to the entire discussion on the politicization of justice and the judicialization of politics in the 1988 regime – the pioneering analysis of which was made by Manoel Gonçalves Ferreira Filho, in "Judiciary in the 1988 Constitution: judicialization of politics and politicization of justice" – and on judicial activism – the object of study by Elival da Silva Ramos, in Judicial activism : dogmatic parameters.

18 Many works deal with the subject, and it is worth mentioning, as a conceptual summary, the thought of Riccardo Guastini: "un ordinamento giuridico costituzionalizzato è caratterizzato da una costituzione estremamente pervasiva, invadente, debordante", leading to the following main consequences: (i) that legislation ceases to be considered a free activity in its purposes, and becomes a discretionary activity (regarding the choice of means) conditioned on achieving purposes pre-established by the Constitution; (ii) that judges have the power and duty to apply not only the laws, but also the Constitution: whether a direct application of the Constitution, considered as a binding norm, or an application of the laws in an interpretation that always adapts them to the Constitution; (iii) that private relations are also conditioned by the Constitution; (iv) that even the doctrine sees itself guided by the Constitution, seeking in it the

This movement towards constitutionalizing the law and expanding the role of the Judiciary (if not even its activism) has as a consequence, in terms of the application of the law, the compromise of legal certainty.

The way in which the exercise of the jurisdictional function is structured in Brazil, with a diffuse system of constitutionality control, where any judge, at any instance, can rule on the unconstitutionality of laws or administrative acts, however without the temperaments of a system of valuing precedents (as in the case of common law countries) law), and even in a context in which the Constitution itself provides arguments for, with a large margin of interpretative maneuver, questioning the constitutionality (questioning the legality, in a broader sense) of any norm, it is an evident factor of insecurity regarding the predictability and permanence of rules established in laws, administrative acts and contracts or individual legal acts in general.

It is true that, in this situation, the Judiciary itself or other control bodies have adopted mechanisms to contain and mitigate these effects – for example: new mechanisms for the main and abstract control of the constitutionality of laws, with jurisdiction concentrated in the Supreme Federal Court; summaries and other formulas to bind other jurisdictional bodies to the decisions of the STF; recourse to terms of conduct adjustment or similar.

However, another line of action, also aimed at seeking greater legal certainty, came from the initiative of legislation, supported by a new school of doctrinal thought and subsequently endorsed by case law.

This legislative tendency, if analyzed from a scientific, general theory perspective, can be identified with what has been called in this essay a logic of annullability.

I will cite three very significant examples, within the scope of the legislated law. First, with regard to administrative acts, the general law of federal administrative procedure, Law No. 9.784/1999[19], at the same time repeated the terms of the aforementioned Summary No. 473 of the STF (only changing the verb "may" to "must" – a meaning that, in any case, was already given to the summarized case law), but introduced elements that, at the time, were important innovations: the time limit for the Administration to exercise its power to annul certain illegal acts and the possibility of validating illegal acts.

> Art. 53. The Administration must annul its own acts, when they are tainted with legal defects, and may revoke them for reasons of convenience or opportunity, respecting acquired rights.
>
> Art. 54. The Administration's right to annul administrative acts that result in favorable effects for the recipients lapses after five years, counting from the date on which they were carried out, unless bad faith is proven.
>
> § 1 In the case of continuous patrimonial effects, the limitation period will be counted from the receipt of the first payment.
>
> § 2 The exercise of the right to annul any measure of administrative authority that involves challenging the validity of the act is considered.
>
> Art. 55. In a decision that shows that they do not cause harm to the public interest or loss to third parties, acts that present remediable defects may be validated by the Administration itself.

axiological foundation of the laws and tending to expose the normative content as a mere development of constitutional principles (Guastini, 2002, p. 148-155).

19 Accompanied or even preceded by similar laws from other spheres of the federation – as is the case of Law No. 10,177/1998, of the State of São Paulo.

In both of these hypotheses introduced as novelties by Law No. 9,784/1999 (arts. 54 and 55), the result is a situation in which an administrative act, which does not comply with a legal parameter according to which it should have been produced, may remain valid, either because it cannot be invalidated (remaining as it was originally practiced), or because it has been validated (thus preserving its original effects) (Barbin, 2019).

Secondly, regarding the unconstitutionality of the laws themselves, Law No. 9,868/1999 and Law No. 9,882/1999, dealing respectively with direct actions of unconstitutionality and the allegation of non-compliance with a fundamental precept, established the possibility for the STF to recognize the non-conformity of a law or normative act with the Constitution, while still maintaining the (past) effects of the unconstitutional norm – or even maintaining the validity of the norm to continue producing (new) effects until a certain future time frame:

> Art. 27. When declaring the unconstitutionality of a law or normative act, and taking into account reasons of legal certainty or exceptional social interest, the Supreme Federal Court may, by a majority of two-thirds of its members, restrict the effects of that declaration or decide that it will only be effective from the moment it becomes final or from another time that may be determined. (Law No. 9,868/1999)
>
> Art. 11. When declaring the unconstitutionality of a law or normative act, in the process of alleging non-compliance with a fundamental precept, and taking into account reasons of legal certainty or exceptional social interest, the Supreme Federal Court may, by a majority of two-thirds of its members, restrict the effects of that declaration or decide that it will only be effective from its final judgment or from another time that may be determined. (Law No. 9,882/1999)

And a third, more recent example, is given by the articles introduced by Law No. 13,655/2018 in the Law of Introduction to the Rules of Brazilian Law (LINDB), of which the following stand out, on the point in question:

> Art. 20. In the administrative, controlling and judicial spheres, decisions will not be made based on abstract legal values without considering the practical consequences of the decision.
>
> Sole paragraph. The motivation shall demonstrate the need for and adequacy of the measure imposed or the invalidation of an act, contract, adjustment, process or administrative rule, including in view of possible alternatives.
>
> Art. 21. The decision that, in the administrative, controlling or judicial spheres, decrees the invalidation of an act, contract, adjustment, process or administrative rule must expressly indicate its legal and administrative consequences.
>
> Sole paragraph. The decision referred to in the caput of this article must, when applicable, indicate the conditions for regularization to occur in a proportional and equitable manner and without prejudice to general interests, and cannot impose on the affected parties burdens or losses that, due to the peculiarities of the case, are abnormal or excessive.

Article 20 allows that, even in the event of a non-conformity with the norm that is the basis for the validity of an act, the invalidity of this non-conforming act is not necessarily recognized. And Article 21 allows the body responsible for invalidating a norm or a legal act (which is still a norm) to determine the specific effects of the invalidation, that is, modulating such effects.

All these laws, cited as examples, expressly invoke the idea of legal certainty as the basis for the legislative policy option adopted.

As for Law No. 9,868/1999 and Law No. 9,882/1999, the articles transcribed here already mention legal certainty. And as for Law No. 9,784/1999 and the LINDB, legal certainty is mentioned in other provisions:

> Art. 2º The public administration shall comply with, among others, the principles of legality, purpose, motivation, reasonableness, proportionality, morality, full defense, adversarial system, legal certainty, public interest and efficiency. (Law No. 9,784/1999)
>
> Art. 30. Public authorities must act to increase legal certainty in the application of standards, including through regulations, administrative summaries and responses to consultations. (LINDB)

The jurisprudence of the STF, regarding the issue of the invalidation of administrative acts, in the first decade of the 21st century, even for cases not covered by the validity of Law No. 9.784/1999 – cases involving facts practiced before the validity of the Law, but which only came to the consideration of the STF at a later date – progressively established the understanding that the principle of legal certainty, implicit in the constitutional clause of the Rule of Law, would already be sufficient to prevent the invalidation of administrative acts practiced a certain time ago.

There are several examples in which the Court invoked the principle of legal certainty, admitting that Law No. 9,784/1999 could not be applied retroactively to the case, to adopt the five-year term of its art. 54 as a parameter for invalidating administrative acts[20].

Subsequently, with the arrival at the STF of cases that had already been judged in lower courts based on Law No. 9,784/1999, the jurisprudence was consolidated in the sense of admitting the persistence of the validity of administrative acts that may be inconsistent with the law on which they are based [21].

In the same sense, after Laws No. 9,868/1999 and No. 9,882/1999, the STF began to apply the modulation of effects of unconstitutionality[22], sometimes even maintaining the law recognized as unconstitutional as valid, to continue producing effects until a future term[23].

Analyzing, therefore, the position of the STF, it can be seen that, more due to a concern with the practical consequences of legal uncertainty, than due to a conscious adherence to a theoretical perspective for understanding the legal phenomenon, Brazilian law evolved towards a reading of legality (in the broad sense, including constitutionality) through the logic of annullability, disconnecting "conformity of the legal norm with the law" (including the constitution) and "validity of the legal norm".

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20 Cite, among many other examples, MS 24,268 (judged on 2/5/2004), MS 22,357 (judged on 5/27/2004), RE 348,364 AgR-AgR-AgR-AgR (judged on 12/14/2004), RE 329,001 AgR (judged on 8/23/2005), MS 24,927 (judged on 9/28/2005), MS 26,353 (judged on 9/6/2007), MS 24,448 (judged on 9/27/2007), MS 26,405 (judged on 12/17/2007), MS 25,963 (judged on 10/23/2008).

21 There would be no need to cite examples, as there are so many situations. A simple search on the STF website for rulings that refer to the application of art. 54 of Law 9.874/1999 points to more than 280 results.

22 Likewise, there are countless cases in which the STF applies art. 27 of Law 9.868/1999. This article itself, in fact, is the subject of two direct unconstitutionality actions, filed in 2000 and which, up to the time of writing this essay (consulted on the STF website on April 30, 2021), have not been judged: ADI 2.154 and ADI 2.258. However, the application of the aforementioned article of the law throughout this period is strongly indicative of the likely failure of these ADIs.

23 For example, the case of RE 197,917 (judged on 6/6/2002), in which the STF, interpreting the constitutional rule on proportionality between population and number of councilors, reduced the number of seats in a certain City Council, but fixed effects "future to the incidental declaration of unconstitutionality" of the municipal law in question, which would only produce effects in the following elections; or the cases of ADI 3,316 (judged on 9/5/2007), ADI 2,240 (judged on 9/5/2007), ADI 3,489 (judged on 9/5/2007) and ADI 3,689 (judged on 10/5/2007), in which the constitutionality of state laws creating municipalities was discussed, in disagreement with the rules introduced by Constitutional Amendment no. 15/1996, in which the STF maintained the validity of unconstitutional laws for a period of 24 months.

5. Conclusion

The proposal of the work in which this article is inserted, according to its organizers, is to analyze provisions of the 1988 Constitution that, in the more than 30 years of its validity, have gained new interpretative meaning, validated in jurisprudence, without there having been an express change to its normative text.

The examples used in this essay refer, of course, to infra-constitutional legislative changes. However, the way in which such changes occurred indicates that the legislative changes themselves (strictly speaking, legislative innovations) followed a trend of evolution already observed in the jurisprudence of the STF and verified in part of the doctrinal thought.

In any case, the consolidation of these innovations took place in a context of changing the interpretation of the scope of the constitutional principle of legality, applied to the administration (the state), without there being any change to the constitutional text in this regard.

The same textual provision of legality persists in the Constitution, but the interpretation that the STF began to give it allowed the acceptance, as constitutional, of the aforementioned legal provisions, worked on as examples in this essay.

In accepting the consequences of legal certainty on legality, the STF did not actually carry out a "weighing" of these two principles. In fact, it considered that the guarantee of legal certainty is implicit in the notion of legality (legality in a broad sense: as stated at the beginning of this essay, the technical-legal translation of the Rule of Law)[24].

In other words, the STF expanded the interpretation of the principle of legality, to envision within it the need to guarantee legal certainty – allowing for the separation between "non-compliance with the law" and "invalidity"; and therefore abandoning the traditional reading of legality (here including constitutionality).

It is true that the STF did not abandon the traditional terminology, referring very frequently to the categories of nullity and annullability[25]– not because of the position of general theory, but mainly because of the distinction that was previously said to be accidental, aiming at the consequences attributed to these words by Brazilian positive law.

In this sense, see the understanding of Manoel Gonçalves Ferreira Filho, analyzing the "nature of the unconstitutional act":

> It should be noted, however, that Brazilian law is moving closer to Kelsen's thesis. In fact, the aforementioned Laws No. 9,868/1999 and No. 9,882/1999, without completely denying the thesis of the nullity of the unconstitutional act[26], allow for an attenuation of the effects of the recognition of unconstitutionality. (Ferreira Filho, 2015, p. 64)

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[24] As examples of cases in which the STF expressly affirms the principle of legal certainty as implicit in the rule of law, we can mention, among many others: MS 22,357 (judged on 05/27/2004), RE 348,364 AgR-AgR-AgR-AgR (judged on 12/14/2004), MS 24,448, (judged on 09/27/2007), RE 587,604 AgR, (judged on 12/16/2008), MS 25,403 (judged on 09/15/2010), RE 601914 AgR (judged on 03/06/2012), MS 22,315 (judged on 04/17/2012), RE 646,313 AgR (judged on 11/18/2014), ADI 954 ED (judged on 6/20/2018).

[25] Once again, there would be countless examples to cite. Just to illustrate what is being said, the following sentence, contained in the judgment of RE 1162788 (judged on 9/25/2018), should be highlighted: " Art. 54 of Law No. 9,784/1999, applicable to the present case, is based on the importance of legal certainty in the field of public law, stipulating a 5-year statute of limitations for the review of defective administrative acts (whether void or voidable)".

[26] As a significant example of the STF's persistent reverence for the idea of nullity (although substantially giving it a scope that general theory would call annullability), the following excerpt from the summary of a decision is cited: "The

In any case, having understood the theoretical distinction initially pointed out in this essay, it can be concluded that the interpretation of the principle of legality applicable to public administration (explicit in the caput of art. 37) – as well as, in a broader sense, of the principle of legality to encompass the constitutionality of laws themselves – changed throughout the validity of the 1988 Constitution to substantially embrace the logic of annullability.

On a personal level, I believe this to be an important and correct development. The logic of annulability implies greater respect for institutional (objective) positions, with an appreciation of the competence of the bodies of society invested with the power to decide on the application of the law, thus removing emphasis from the (subjective) positions of the individuals who exercise the functions of these bodies: it is essentially the same distinction between the positivist position of defense of the objectivity of the law (essence of the rule of law) and the naturalist positions vulnerable to the subjective values of individuals who exercise state functions and who intend to understand the law based on dogmatically revealed truths (and subjectively apprehended by themselves), regardless of the volitional (objective) choices of society.

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temporal modulation of decisions in judicial review of constitutionality derives directly from the 1988 Charter as it embodies an instrument aimed at the optimized accommodation between the principle of nullity of unconstitutional laws and other relevant constitutional values, notably legal certainty and the protection of legitimate trust, in addition to also finding support in the infraconstitutional plane (Law No. 9,868/1999, art. 27)" (ADI 4,425 QO, j. 3/25/2015).

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