The Notion of Law According to Michael Oakeshott and the Idealism in Brazilian Law

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1. THE NOTION OF LAW IN OAKESHOTT

In his book *On History and other essays*, there is a chapter entitled "The Rule of Law", regarding the implications of the Law as the ruler, supporter and conductor of a distinct and unique type of political arrangement observed in Western Europe since the Modern Era. Through rigorous analysis of the constituent and structuring elements of this specific associative mode, and anchored in the registers of human experience extracted from past events and artifacts that participated in the historical formation of social bond under the aegis of norms defined by agreements between existent groups in the Europe, Oakeshott explains and develops, within his perspective on Political Philosophy, an ideal notion of Law.

The essay evokes, initially, an explanation of Michael Oakeshott's view of models of human congregation, dividing them into two ideal and fundamentally non-reductive types. The first consists of a transactional association: when through plans and targets established and acknowledged by the participants in the association, the intent is the satisfaction of substantive interests. In the words of the author himself, there is:

> a relationship in terms of substantive needs and satisfactions that occupy time and look towards a future, in which the means employed may include instrumental rules, arrangements, and practices, but which is not subject to any considerations other than the power to achieve a purpose (Oakeshott 2003, p. 198).[1]

As an example, one may cite trade of goods or provision of services, which can take place through direct exchange between people or through cooperation of efforts with a view to the previously indicated end. In other words, there will only be "Purpose, Plans, Politics, and Power" (Ibid.).

The second type, despite the similarities in organization (there are active individuals and intelligently designed procedures), differs substantially from the other case because it lacks any desire to obtain a concrete substantive interest, either current or future. As the author establishes in this excerpt:

> The expression 'the rule of law' refers to human associations. It is meant to signify human beings associated through the recognition of certain conditions of association, namely 'laws': human beings gathered by an exclusive and specific mode of relationship (p. 191).

In another part of the essay, the explanation is reaffirmed:

> The expression 'the rule of law' accounts for a relationship whose unique and exclusive conditions are rules of a certain kind, namely laws. But these laws are not like the 'laws' of chemistry, psychology, or economics, which aim to predict what will likely happen or explain what has already happened; they are human inventions intended to declare the conditions of a human relationship (p. 193).

And also:

> The expression 'the rule of law,' in its precise sense, signifies a mode of moral association that is realized exclusively through the acknowledgment of the authority of known and non-instrumental rules (that is, laws), which impose upon all those who fall within their jurisdiction the obligation to submit themselves to adverbial conditions in the performance of voluntary actions (p. 213).

In this case, people follow a proposal that characterizes itself by the construction of common and mandatory objective rules capable of conditioning and validating behaviors, practices chosen by individuals or institutions. The ultimate purpose is not to create foundational elements to achieve the substantive goals that were elected, but rather to promote agreements that seek to delimit free movements and attitudes that would be acceptable, as long as the rules are respected, under the possibility of punishments to be imposed by adjudicative bodies. The interests of citizens belong to the private sphere, as each individual pursues his or her own desires. Any interventions would be restricted to guarantee that those agreed rules are respected, as violations would put the constructed association at risk. It will be this associative pattern subordinate to the legal dictates made public that will conduct the reflection proposed here. It remains to be seen, then, what the nature of the Law would be in this regard.

The definition of Law is presented by Oakeshott as "indeterminate prescriptions of generic adverbial obligations" (p. 222). The Law will be the prescription of "adverbial conditions" not concerning concrete cases, but constituting authoritative requirements for necessary compliance, with the possibility of having punishments because of the potential inadequacies. These conditions are understood in the pursuit of "substantive satisfactions" freely chosen by the agents affected by the authority of the jurisdiction. The Law will be, then, decomposed by Professor Oakeshott into two constituent elements, each dealing with a specific aspect of the Norm: *Lex* and *Jus*.

The concept of *Lex* addresses the behavioral prescription that conditions the individual that integrates society. This procedure transforms habitual practices and behaviors developed over the years, in an intelligent and voluntary manner, though not as the result of rational deliberation, into binding norms by the agents who have freely associated themselves in a context governed by contingency. These prescriptions become general rules that validate the means to consume the interests and needs elected by the individuals.

According to Oakeshott, the notion of *Lex* encompasses certain constituent aspects that imply in it the ideal character (typical, characteristic), namely, "non-instrumentality, indifference to persons and interests, the exclusion of *privilege* and marginality, and so on" (p. 241, italics in the original text).

The "non-instrumentality" relates to the content of the norm not constituting in itself something that should be a way to obtain some substantive good. Rather, the obligation just establishes the limits for the individual to choose the ways or measures that suit them in the pursuit of their interests. Therefore, the rule will not be a practical guide for purpose satisfaction.

The so-called "indifference" registered by Oakeshott relates to the general and broad character of the norm, whose scope encompasses everyone who belongs to the society during the period in which the norms remain in force. Even if it comes to the conclusion to merely regulate less common acts, the rule

approved by the Legislative does not provide a foundation for individual cases. Based on the analogy with a form of game, the norms apply to any matches or events of that type.

By "marginality" in the concept of *Lex*, Oakeshott treats the peripheral character of the norm. The reason is easy to understand: the book of rules or legal anchorage will never assume the protagonism in public sphere, which is built by free and intelligent action from the citizens. The rules would also exercise, while people are in that region, the role of foundations and surroundings that hold the power to remind those concerned that all their lives will be marked by the obligation to respect primary commitments that originated in the consolidations of that arrangement.

Another constituent basilar element in *Lex* formation is the notion of formal equality that underlies all legislative discussion. No one will receive powers or privileges to the detriment of another person, given that the balance of forces in society requires individuals to comprehend that the rules ignore prominent figures within that association. The prestige or certain relevance of arbitrators will stem from the typical functional exercise: preserving order, ensuring compliance with the law and setting legal procedures in force. Only in this hypothesis is it necessary to have a concession of power to some individuals and institutions.

Furthermore, the concept is inserted in the discussion of *Lex* identifying its real and effective source. The competence for that enterprise belongs to the legislative instance created, or acknowledged, by the associates. Because this organism will benefit from two powers: to promote the modifications in the set of rules (either through creation or through repeal) to control habits and behaviors of individuals; and conferring authentication on the dictates (a term used by Oakeshott for validity), because only rules submitted to the scrutiny of the Legislative Branch will have recognized coercive force and will form the instrumental basis in which adjudicative body may resort in situations of possible non-compliance with the "rules of the game".

The matter is complex and requires careful analysis because the formation of the law encompasses the so-called *Jus* criteria, namely the moral discussion that permeates the origin of the rules of positive law, interfering in the ultimate architecture of the normative set. People conceive rules of behavior taking into consideration values, precepts and traditions of diverse natures, for example religions, myths, philosophies, as long as they are familiar or close to them. To establish a parameter for action means giving it public legitimacy in society. Oakeshott addresses the issue as follows:

> the *jus* or *injus* of a law is composed of considerations by means of which a law may be recognized not only as something that has been appropriately approved, but as proper or improper to be - or to have been - approved; beliefs and opinions invoked when considering the propriety of the conditions prescribed by a particular law (p. 218).

The generic guidelines will be well defended when identified with the Notion of Justice present in the common morality of that specific group. For justice, and moral discourse that follows, Oakeshott works with the judgment of public approval of the rule, that is, this previous judgement seeks to imply the consent or confirmation of the agents to the Norm produced in ways of being incorporated to the "book of rules".

It's not enough for the Legislative to simply exercise its competence and bring to light random orders to that society in which sees itself included. It's imperative that the legislators are able to translate objectively and obey strictly the common morality that exists in the common and regular discourse observed in the community. The means to contemplate the concrete manifestation of this morality, and even to identify it, are the habits, customs, and rites incorporated into various social spheres, which give life to the moral imagination that will ensure legitimacy to the adverbial prescription that has become public law.

In another part of the chapter, Oakeshott writes:

> What this mode of association requires for determining the *jus* of a law is not a set of abstract criteria, but a form of appropriately argumentative discourse by which the matter is deliberated upon; that is, a form of moral discourse not concerned with the rightness and wrongness of human conduct generally, but intensely focused upon the kind of conditional obligations a law may impose, which is undiverted by consequential and prudential considerations and set apart from spurious claims of conscientious objection, of exceptional treatment for minorities and, so far as possible, of current moral idiocies (pp. 221-222).

Oakeshott's proposal clarifies that the legal regency system, if it is the predominant form of the great association, derives from another binding framework, but stems from the specific historical experience translated and verbalized into various rituals and procedures that embody common beliefs and values. The moral framework is informal by nature, with public norms being a step that succeeds a long period of agreements, deliberations regarding various purposes, such as commercial transactions. However, those norms were indirect manners of bringing to concrete reality what was considered "correct" or "right" by citizens.

To follow up with the proposal of this present reflection, however, it remains to bring to the discussion Oakeshott's notion of rationalism created in his own philosophical proposition, before we proceed with juridical discussion.

2. JURIDICAL IDEALISM AS AN EXPRESSION OF THE POLITICS OF FAITH

According to Oakeshott in his books *Rationalism in politics and other essays* (1991) and the posthumous *The Politics of Faith and the Politics of Skepticism* (2018), modern rationalism manifests itself in political arena through the belief in reason as an essential tool or "infallible guide" (1991, p. 8) for dealing with the formation and the internal dynamics of social arrangements, logically. There would be a principle or set of abstract and rational deliberations capable of guiding political actions towards the perfect, unequivocal formulation of human association. Rationalism represents the willingness to believe in and seek the consubstantiation of an idea of perfection of the political arrangements, according to the theory elaborated by intellectuals and researchers, such as philosophers themselves, for example.

This perspective was developed by free thinkers throughout the centuries and is not restricted to a determined historical period. On the other hand, Oakeshott clarifies it:

> Among these ideas there are several which carry an indelibly modernist appearance, and if these are the roots of the politics of faith it would be unwise to push their emergence back to the beginning of modern history. Nevertheless, these beliefs have had a much longer history than is commonly supposed, and although I have stated them, for the most part, in the confident and adult language of the eighteenth century, they came to bloom much earlier. (2018, p. 59).

The social vices and ills identified in the contingent reality by different individuals from modern era would be overcome (or surmounted) through useful and effective political and juridical instruments to reorder forms of popular and governmental/state participation. It would occur in view of the ideal society project which, if implemented, would guarantee freedom from failures and conflicts of any kind, or at least a significant reduction in them, with supposedly significant gains to the well-being of society. It was theorized by Oakeshott as "politics of faith", as observed in the following paragraph:

> In the politics of faith, the activity of governing is at the service of the perfection of humanity. There exists a doctrine of cosmic optimism that attributes an inevitable perfection to the universe,

> not through observation, but through the inference of the perfection of its creator. There is also a doctrine according to which human perfection emerges as a divine, assured gift, though unmerited. However, the idea of human perfection, characteristic of the politics of faith, far from deriving from either of these doctrines, in fact contradicts both. In the politics of faith, human perfection is pursued precisely because it is not already present; moreover, it is believed that we should not, and indeed cannot, depend on divine providence for the salvation of humanity. Human perfection must be achieved through human effort, and in this case, trust in the ephemerality of imperfection stems from faith in the power of man and not in divine providence. Perhaps we are encouraged to believe that our efforts count with approval and even support from perfection itself, and that we will inevitably reach it through our own unrelenting effort" (2018, pp. 57-58).

Based on the above, would it be possible to identify an idealistic notion of law based on the rationalist conception of law as evidence of a policy of faith in the juridical universe?

3. THE 1988 CONSTITUTION OF THE REPUBLIC AND THE IDEALISTIC FACE OF BRAZILIAN LAW

The main norm of the Brazilian state is the "*magna carta*" promulgated by the Constituent Assembly in 1988. This document structured the national legal framework, established the key aspects of the sociopolitical order that prevailed following the end of the military regime, and decreed the separation of powers and the obligations of the Branches of Government—Executive, Judiciary, and Legislative.

According to the third article of the Constitution:

> The fundamental objectives of the Brazilian Republic are: I—To construct a free, just and solidary society; II—To assure national development; III—To eradicate poverty and marginalization and to reduce regional and social inequalities; IV—To promote the well-being of all, without prejudices of origin, race, sex, color, age or any other form of discrimination.

In the highlighted sections we can identify, among the purposes of the original constitutional power, that the Brazilian state shall apply its entire juridical-bureaucratic organization in the pursuit of the goals that were constitutionalized. This behavior adopted by the framers of the new political pact submits the entire Brazilian society to the interests that this representative Assembly designated as priorities. Brazilian political arrangements may have other intentions in the activities they assign to themselves and to which they are dedicated, but they are obliged, by force of the current legislation, to consider the social project defined in article three of the Constitution as something at least minimally similar to their own particular plans.

This way, the methods used by official bureaucracy intrude into the architecture of associations to impose diverse goals upon them to be achieved, because society well-being idealized by the State would be so important that the national citizens would need to strive in consummation.

In light of Oakeshott's theoretical explanation, the presence of abstract idealism in the Constitution of the Republic configures, arguably, evidence of conjugation of what is named by him as "politics of faith" with the mutation in the basic meaning of the law. Instead of political and juridical action being anchored in historical experience, seeking to preserve the link between contemporary intentions and old movements and restricting juridical apparatus to what is common in the complex network of relations and moral language that shape social tissue, the State decided, with the consent of main political groups, but to the detriment of the plurality inherent in society, to list ideas that will guide Brazilian destiny.

Nowhere in the Political Charter, and much less in the vast, and contradictory, national legislation is there indicative data or general guidelines regarding what would be the definition of an "egalitarian and just society". What objective reality in the factual world does this plan refer to? What would be the

basis of the project in society, with the exception of notions shared by groups connected to ideologies? Would it be viable to sacrifice the broader interpersonal arrangement that forms the country, with a view to substituting it with something whose plausibility was never verified outside the universe of theoretical speculations? And in light of the totalitarian experience of the 20th century and its serious consequences would repeating this idealistic adventure not cause the social body to collapse again?

Political idealism can also be observed in the Constitution of the Republic, according to article 193: "the social order is based on the primacy of work and has as its objective social welfare and justice". Thanks to the content of this norm, located in Title VIII of the Political Charter, social order will be regulated by principles without legal definition (open-ended norms), therefore, who, then, will be entrusted with the task of defining the essence of the key concept contained in the article? It will be up, simultaneously, to judges that oversee normative arrangements and determine sanctions to proven offenders who will be tasked to "usurp" a prerogative traditionally belonging to the Legislative Branch, giving meaning to binding norms through sentences or appellate decisions made by judges who were not elected or appointed to represent interests, but rather must act impartially?

Beyond the social order and the potential conflicts that could arise in the exercise of political power, another issue that exemplifies the difficulties inherent to idealism lies in what is set forth in article 205: "education, a right for all and a duty of the State and the family, shall be promoted and encouraged with the collaboration of society, aiming at the full development of the person, their preparation for the exercise of citizenship, and their qualification for work". What would be the paradigm of "full human development" that grounds the constitutional text? Once endowed with obligatoriness and coerciveness, would any citizen or institutionalized group that devotes itself to a divergent or alternative view of the ethical perspective concerning the proper purpose of human existence constitute a threat to, or violate, national political unity?

Although lawful and factual, social plurality encounters a legal framework whose semantic limits, by their very nature, will never allow it to be as flexible as the social body. Moreover, the predictability necessary for the validity of norms would conflict with constant innovations or mutations.

4. FINAL CONSIDERATIONS

The role of the Law, from an Oakeshottian perspective, would be to regulate human behavior in order to guarantee juridical and social security for citizens when they seek to assert their interests in dealings with other people or institutions. By assuming a secondary role, Law remains in the shadows of factual reality, allowing human beings to assume the protagonism that is proper to them, through public actions that introduce innovations into the social order encompassed by a contingent universe.

The positive rules express a perennial moral conversation, consolidated over time in a society, bringing with them the peculiarities of the values and ideas that shape and singularize the human association situated in a specific region of the world. Legislative production also translates, for the juridical universe, the common morality that permeates the social fabric, and shall serve as a legitimate guide for regulating the conduct of citizens. This act, necessary for the validation of behaviors, would guarantee the pacification of society amid ordinary divergences and the imbalance arising from the discrepancies identified within the group.

On the other hand, the purported stability obtained through the model of human association governed by laws will gradually be undone as rules and obligations without factual grounding, or with only negligible presence in the language of organic morality, are introduced into the normative framework. We would then have at least two concurrent and divergent systems acting as public authorities: the legal and public system, combining the representative legislative center and the public judicial core; and the idealist system, which would not be held hostage to the laws in force, yet has the power to influence the functional exercise of the other Branches of Government and subject them to its political interests and abstract precepts. Thus, another nature or type of law would remain operative in society: a supralegal, coercive rule,

supported by a morality not shared collectively and capable of dominating society in the name of merely theorized interests. The broader and more vigorous system would lack, obviously, public legitimacy, since its authoritative power was not subjected to analysis and appraisal by the representative body responsible for the alteration of the status of norms observed by individuals.

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NOTES

1 The quotations in this article have been translated from the Brazilian Portuguese versions of Michael Oakeshott's work.