

Chapter V

The Juridical Rule

Chapter V – The Juridical Rule

Program topics covered in this chapter:

5. The creation of juridical rules

5.1. What are and who makes the rules. How juridical rules are made (legislative process).

5.2. The general theory of the sources of Law. Concept and hierarchy of sources. The general principles of Law and legal conscience of the community. The law and its contemporary crisis. Customs and practices. Equity. Jurisprudence. Doctrine.

5.3. The creation of juridical rules in the legal state. The hierarchy of state legal rules (Constitution, statutory law, Government regulations). Relations between rules. Review of constitutionality and legality. The statewide organization. The organs of sovereignty (separation, interdependence, skills). The constitutional process. The legislative process. The process of making Government regulations.

Chapter V – The Juridical Rule

5.4. The creation of juridical rules in the European Union (EU) legal system. The hierarchy of EU legal rules (Treaty, secondary legislation). Relations between rules. Surveillance of "constitutionality" and legality. The organization of the European Union. The EU institutions (especially their competences). The EU "constitutional" process. The EU legislative process.

5.5. The creation of juridical rules of the Autonomous Regions, local authorities, sub-state public organs, private organizations with public functions, other private organizations and other civil society organizations.

Chapter V – The Juridical Rule

1. Concept of Juridical Rule

- ✓ It is a rule of social conduct that contains a general and abstract command, established under the threat of a particular sanction.
- ✓ Examples of juridical rules: CRP, laws, decrees-laws, regulations of local municipalities, *ad-hoc* rules (created by whom applies Law).

2. Features of the Juridical Rule

- ✓ Generality – juridical rules do not address to any particular individual, nor to individual relations, but to the community, to the society;

Chapter V – The Juridical Rule

- ✓ Abstraction – juridical rules do not apply to a specific case, but to any number of subsumed situations to the predicted category, setting broad categories , in which many facts or situations do fit.
- ✓ Hypothetical (“*Hipoteticidade*”) - the legal effects that rules establish only occur if the situations or facts occur; if they do not occur, the legal rule will not apply.
- ✓ State condition (“*Estadualidade*”) - current legal rules represent a direct or indirect expression of the sovereign will of the State, through its construction by sovereign organs.

Chapter V – The Juridical Rule

- ✓ Bilateral – juridical rules are bilateral, i.e., they confer rights and imposes duties. However, they do not always establish a legal relationship: suffice to say that criminal rules impose duties, primarily to the defense of values that transcend a mere legal relationship (such rules are not, properly, bilateral).
- ✓ Imperative - legal rules are not limited to state, to observe facts or situations; they give orders, impose duties to do this or that. However, this imperative condition is absent from retroactive rules, merely qualifying, of automatic effects and on rules over rules.

Chapter V – The Juridical Rule

- ✓ Coercivity - if legal rules are of State Law, their non observance means that it becomes legitimate to make use of force. It should be noted, nevertheless, that coercivity is not always present in juridical rules: it is unnecessary in penalties that operate automatically; it is not possible in rules which govern the powers of the supreme organs of the State; and there is no coercivity in rules lacking sanction.

3. Structure of the Juridical Rule

Chapter V – The Juridical Rule

- ✓ The juridical rule has a triple structure, as it is constituted of three parts: prediction, *estatuição* and sanction. Prediction and *estatuição* are common to all legal rules, while sanction exists only in coercive rules.
- Prediction (or antecedent, or ruling hypothesis, or *factispecie*) - is the definition of the situation of life that, once verified, will determine the application of the *estatuição* .
- *Estatuição* - is the statement of the legal consequence applied by the rule, whenever the prediction occurs.
- Sanction - part of the rule where the consequence imposed by the juridical rule is established, by the violation of that rule (imprisonment, fines, penalties, compensation, ...).

Chapter V – The Juridical Rule

➤ Examples:

- Art.13, no. 1, of the CRP - Prediction ("All citizens"); *estatuição* ("have the same social dignity and are equal before the law");
- Art.1368, of the CC - Prediction ("Trees or shrubs born on the dividing line of buildings belonging to different owners"); *estatuição* ("are presumed to be common; any one of the consorts have the option of booting it, but the other is entitled to half the value of the trees or shrubs, or half the firewood or wood they produce, as it most suits him").

Chapter V – The Juridical Rule

- Art.483, no.1, of the CC - Prediction ("Whoever, with intent or recklessly, unlawfully violates the rights of others, or any statutory provision designed to protect the interests of others"); *estatuição* ("is obliged"); Sanction ("to compensate the injured party for damages resulting from violation").
- Art.11, no. 1, of the Highway Code – Prediction ("Any vehicle or animal which travels on public road"); *estatuição* ("must have a driver, with the exceptions provided in this Code").
- Art.131, of the Penal Code - Prediction ("Whoever kills another person"); *estatuição* ("is punished"); Sanction ("with imprisonment from 8 to 16 years").

Chapter V – The Juridical Rule

4. Content of the Juridical Rule

a) Rules with rigid content and flexible content

- Rigid content rules – rules which Prediction or *estatuição* are strictly defined (e.g.: art.13, no.1, of the CRP - "All citizens have the same social dignity and are equal before the law").
- Flexible content rules - rules which Prediction or *estatuição* give the organ that implements Law the freedom of choice, such as prison sentences in which the judge can choose between minimum and maximum limits (e.g.: art.131 of the Penal Code - "Whoever kills another person shall be punished with imprisonment from 8 to 16 years ").

Chapter V – The Juridical Rule

b) Naturalistic content rules and legal content rules

- Naturalistic content rules - rules that use natural concepts: day, night, kill, drink, walk, stop, ... (e.g.: art.131 of the Penal Code - "Whoever kills another person shall be punished with imprisonment from 8 to 16 years").
- Legal content rules – rules which use legal concepts, i.e., which meaning is given by other legal rules or general principles of Law: citizen, foreigner, majority age, stateless, ... (e.g.: art.15, no.1, of the CRP - "Foreigners and stateless persons residing in Portugal enjoy the rights and are subject to the duties of Portuguese citizens").

Chapter V – The Juridical Rule

c) Juridical Rules with determined content and undetermined content

- Rules with determined content - rules that use strict and precise concepts, whose application is easy, clear and automatic (e.g.: art.25, no.1, of the Highway Code - "Notwithstanding the set speed limits, the driver must be especially moderate speed: a) When approaching passages marked in lane; b) When approaching schools, hospitals, kindergartens and similar establishments, when properly flagged; c) In towns or roads bordered by buildings; d) When approaching agglomerations of people or animals).

Chapter V – The Juridical Rule

- Rules with undetermined content – rules that use imprecise or vague concepts, whose application to concrete cases requires a further determination or accuracy by the judge (e.g.: art.25, no.1, of the Highway Code - "Notwithstanding the set speed limits, the driver must especially moderate speed: e) in steep descents; f) At curves, intersections, junctions, roundabouts, speed bumps and other places of reduced visibility; h) In track sections in poor condition, wet, muddy or which offer poor grip conditions).

Chapter V – The Juridical Rule

5. Types of Juridical Rules

5.1. Regarding Content

- ✓ Precept rules (“*normas preceptivas*”) - legal rules which impose the practice of a specific behavior (arts.406, 473, 483, of the Civil Code, art.13 of the Highway Code, art.14 of the CIRS, art.1, no.1, of the CIRC).
- ✓ Prohibitive rules - legal rules that prohibit the practice of a specific behavior (arts.131, 217, 256, of the Penal Code; arts.405, 877, 1347, 1376, no.1, 1601, §a and §c, 2188 and 2189, of the Civil Code).
- ✓ Permissive rules - legal rules which allow or authorize a specific behavior (arts.1305, 1356, 1773, no.3, 1781, §d, and 2281, of the Civil Code).

Chapter V – The Juridical Rule

- ✓ Program rules - legal rules that define goals in the form of obligation of result, which performance can not be immediate and depends, in addition to the adoption of implementation rules, on the favorable combination of factors of economic, social and political order (arts.65, no.1 and 66, of the CRP).

5.2. Regarding Function

- ✓ Injunctive rules - prohibitive or precept rules define an imperative legal consequence, so its application does not depend on the willingness of recipients (art.840, of the CC).

Chapter V – The Juridical Rule

- ✓ Dispositional rules - rules that entrust their recipients the decision on their application and may be:
 - Interpretive rules - built to clarify previous rules or to clarify and define the meaning of terms or expressions used in juridical instruments (arts.13, no.1, 279, 1402, 2226 and 2262, of the CC).
 - Subsidiary or Integrative rules – rules that intervene to fill gaps left open by the parties in a given legal act, or to clarify a comprehensive regulation when any statement of the parties is lacking (arts.348, no.1, 772, no.1, 942, no.2, 878, 885 and 1717, of the CC).

Chapter V – The Juridical Rule

5.3. Regarding the Material Scope

- ✓ General rules - constitute the standard regime of the type of relations which governs (arts.219, 309, 342 and 781, of the CC).
- ✓ Special rules - rules which consecrate a regime, which, not lying in opposition to the general regime, has certain particularities regarding the latter (arts.7, no.3, and 934, of the CC).
- ✓ Exceptional rules - rules that govern the private sector of relations, as opposed to that which generally prevails for most of the relationships of the same type (arts.11, 310, 316, 317, 344, 875 – facing art.219 of the CC -, and art.947, no.1, of the CC).

Chapter V – The Juridical Rule

5.4. Regarding the Internal Application Scope

- ✓ Universal rules – they are applied across all the territory of the State (CRP, CC, CP, laws, Decrees-laws).
- ✓ Regional rules – they are applied in an autonomous region (regional legislative decrees and Azores regional regulation decrees of the Azores and Madeira).
- ✓ Local Rules – they are applied only within the territory a of local municipality (local government regulations; postures).

Chapter V – The Juridical Rule

5.5. Regarding Structure

- ✓ Autonomous rules - express a complete sense, i.e., they have an independent content from other legal rules. Complete rules contain in themselves, generally, all the elements of the juridical rule, including sanctions (arts.130, 483, 807, 1367 and 1690, of the CC).
- ✓ Non autonomous rules - those that do not contain all the elements of the juridical rule; they are incomplete in its prediction or *estatuição* (arts.408, 1287 and 1672, of the CC). These can be of several types:
 - Interpretive rules - when the lawmaker creates a juridical rule to clarify an earlier one (art.13, no.1, of the CC).

Chapter V – The Juridical Rule

- Legal definitions – combined with other rules, impose no obligations to anyone, nor establish sanctions (arts.202, 212, 868, 874, 940, 980 and 1022, of the CC); they are limited to defining concepts with legal meaning.
- Restrictive rules (“normas limitativas”) - rules that limit or reduce the scope of other rules (art.1061 of the CC).

Remissive rules (“*Normas remissivas*”) – rules referring to other rules. It is usual to use the figure of remission by the lawmaker (arts.939, 985, no.4, 1134, 1151, 1158, 1186, 1293, §b, 1407, no.1, 1440, 1485, 1773, no.3, 1781 and 1953, of the CC).

Chapter V – The Juridical Rule

- Conflict rules - rules that regulate the relations of private nature between two or more people of different nationalities, when rules derived from various jurisdictions apply to both, simultaneously, with different regulatory responses (art.25 and following, of the CC).
- Juridical fictions (“ficção jurídica”) - the lawmaker determines that a specific fact or situation is, or is deemed, as if it were equal to the fact or the situation referred in another law. Therefore, fictionally assimilating the fact X (to discipline) to the fact Y (already disciplined), the new juridical rule will allow another legal rule (which disciplines Y) to apply, also, to the fact X (arts.212, no.2, 275, no.2, and 805, no.2, §c, of the CC).

Chapter V – The Juridical Rule

- Legal presumptions (“presunções jurídicas”) - to keep away the difficulties that, sometimes, the proof of a fact or a situation which needs regulation raises, the legislator says that, once proved the existence of a specific fact, the other fact is also considered proven. On the basis of presumptions lies the relation between the two facts, which, experience says, when one occurs, usually the other also occurs. Therefore, being X verified and proved, Y is also proved; being Y presumed, the juridical rule (which establishes the presumption) refers, implicitly, to the juridical rule which disciplines it (arts.243, no.3, 344, 349, 350, 351, no.1, 441, 442, no.2, 1260, no.2, 1294, 1295, 1296, 1298, 1299, 1826, 1828, 1829, 1832, 1838 and 1874, of the CC).

Chapter V – The Juridical Rule

6. Types of Sanctions

6.1. Reconstructive Sanctions (“Sanções Reconstitutivas”) - restore the situation that would exist if the juridical rule had not been violated. The sanction may assume the following reconstructive aspects:

- Reconstitution *in natura* - resets the situation prior to the violation of the rule, without resorting to a non-existent good at the moment. It is the sanction privileged by Law (arts.562, 566, no.1, and 1341, of the CC);
- Specific execution (“*Execução específica*”) – it applies the Law of Obligations (“Direito das Obrigações”) and translates the execution of the performance imposed by the offended rule (arts.827, 828 and 830, of the CC);

Chapter V – The Juridical Rule

- Specific compensation (“*Indemnização específica*”) – it restores the situation with a good that, not being the one that was damaged, allows it to play the same role (e.g.: the case of someone who is forced to restore a good equivalent to the one that was damaged).

6.2. Countervailing or Reimburse Sanctions (“Sanções Compensatórias ou Ressarcitórias”) - establish a situation which, although different, is considered equivalent to the situation that existed before the breach of the juridical rule. This situation is obtained through compensation for caused damage, that the offender is required to undertake. Compensation may cover damages (“danos emergentes”) and also loss of profits (“lucros cessantes”), i.e. the frustration of a gain (arts.496 and 564, of the CC).

Chapter V – The Juridical Rule

6.3. Punitive Sanctions (“Sanções Punitivas”) - apply a sanction to the offender, as punishment for the violation of a legal rule. Particular severe punishments are in place whenever the fundamental values of the legal system are disrespected. These sanctions, involving deprivation of property (life, liberty, property) and disapproval of the conduct of the offender, may be:

- **Criminal:** the most serious ones, because they correspond to violations that the law considers as criminal. Their privileged field is, therefore, the Criminal Law. However, it should be noted that, in many cases, the act involving criminal liability also produces civil liability;

Chapter V – The Juridical Rule

- Civil - established by Civil Law, regarding unworthy conduct (arts.1612, no.2, 1649, and 2034, of the CC);
- Disciplinary - apply to the offense of duties of specific professions, in the exercise of their work activity (e.g.: reprimand, suspension and dismissal - art.328, no.1, of the Labour Code);
- Administrative offenses - are generally issued from the Public Administration and punish, with fines, certain behaviors capable of damaging fundamental interests.

Chapter V – The Juridical Rule

6.4. Preventive sanctions (“Sanções Preventivas”) - aimed at keeping away future violations, whose fear is justified by a particular unlawful practice. E.g.: a parole that may apply to those who, sentenced to prison, have served half their sentence, in a minimum of six months, had good prison behavior and showed ability to readjust to social life (art.61, no.2, 3 and 4, of the Penal Code); internment of unimputable people (art.91 of the Penal Code); inhibition of the exercise of guardianship of who has committed crimes (arts.1933 and 1948 of the CC); the maturity of future benefits when the debtor fails one of them (art.781 of the CC).

Chapter V – The Juridical Rule

6.5. Mandatory Sanctions (“Sanções Compulsórias”) – they seek that, albeit belatedly, the offender adopts a proper conduct and, thus, the violation does not extend; these sanctions cease once the disrespected juridical rule is observed (e.g.: imprisonment incurred by those who do not fulfill their obligation to provide food maintenance, although in conditions of doing so (arts.2003 to 2020, of the CC, and art.250 of the Penal Code); the obligation to pay an interest of 5% from the date on which the judgment of the condemnation of the cash payment has become final (art.829, no.4, of the CC); the right to hold that, when a debt is related to an object, allows the creditor to its retention until the full satisfaction of his claim (arts.754 and 755, of the CC).

Chapter V – The Juridical Rule

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