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PROPORTIONALITY AND THE OBJECTIVITY ON LEGAL DECISION-MAKING

GRAZ – 2021

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Dissertação apresentada ao Curso de Mestrado, do Programa de Pós-Graduação da Faculdade de Direito da Universidade de Brasília como requisito a obtenção do título de Mestre em Direito.

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ABSTRACT

The main task of the thesis is to respond to a common misconception about the theory of proportionality in the Brazilian context, that proportionality is an instrument that increases judicial discretion. In particular, Rafael Giorgio Dalla Barba's criticism that the theory of proportionality developed along the lines of Robert Alexy is not capable of overcoming the positivist paradigm of judicial discretion, since it would guarantee a discretionary margin of decision to the judge who applies the Law will be addressed here. The problem of discretion, on the model developed by the legal positivist from the beginning and middle of the last century, especially by Hans Kelsen and Herbert L. A. Hart, may be called the main problem of modern Legal Philosophy. The Theory of Proportionality, even as the most important innovation on this matter for analytical, empirical and normative reasons, is a target of many criticisms defending exactly the opposite, it is that Proportionality would increase judicial arbitrariness by validating the insertion of subjective decisions on the legal realm. The criticisms mentioned above are some of the most common in Brazilian context. How far or right they may be is what we shall check. More than that, general elements that any theory of legal decisioning must present for not be considered an arbitrary one will also be discussed to check how much Proportionality is able to fulfil them.

Keywords: Proportionality; Legal Argumentation; Arbitrariness; Determination; Adequacy; Hermeneutic Critique of Law.

RESUMO

O principal objetivo desta dissertação é responder a uma concepção equivocada muito comum sobre a teoria da proporcionalidade no contexto brasileiro, de que a proporcionalidade é um instrumento que aumenta a discricionariedade judicial. Em particular, a crítica de Rafael Giorgio Dalla Barba de que a teoria da proporcionalidade desenvolvida na linha de Robert Alexy não é capaz de superar o paradigma juspositivista da discricionariedade judicial, uma vez que garantiria uma certa margem de mobilidade interpretativa ao juiz que aplica o Direito será abordada aqui. O problema da discricionariedade, no modelo desenvolvido pelos positivistas jurídicos desde o início e meados do século passado, especialmente por Hans Kelsen e Herbert L. A. Hart, pode ser chamado de o principal problema da Filosofia do Direito moderna. A Teoria da Proporcionalidade, mesmo sendo a inovação mais importante nesta matéria por razões analíticas, empíricas e normativas, é alvo de muitas críticas as quais defendem exatamente o contrário, que a Proporcionalidade aumentaria a arbitrariedade judicial ao validar a inserção de decisões subjetivas no âmbito jurídico. As críticas mencionadas acima são algumas das mais comuns no contexto brasileiro. O quão longe ou corretas elas podem estar é o que devemos verificar. Mais do que isso, elementos gerais de uma teoria de decisão judicial que não se considere arbitrária também serão discutidos, para verificar o quanto a Proporcionalidade é capaz de cumpri-los.

Palavras-chave: Proporcionalidade; Argumentação jurídica; Arbitrariedade; Determinação; Adequação; Crítica Hermenêutica do Direito.

Contents

I. Introduction

The main task of the thesis is to respond to a common misconception about the theory of proportionality in the Brazilian context, that proportionality is an instrument that increases judicial discretion. In particular, Rafael Giorgio Dalla Barba's criticism that the theory of proportionality developed along the lines of Robert Alexy is not capable of overcoming the legal positivism paradigm of judicial discretion, since it would guarantee a discretionary margin of decision to the judge who applies the Law will be addressed here.

The problem of judicial discretion is fundamental to Legal Philosophy since the legal positivist theories in Law at the beginning/middle of the twentieth century, where the two prominent cases were Hans Kelsen's and Herbert Hart's theories.

In both theories, there is the standard premise that when, in a specific case, the positive legal material does not specify precisely what the judge must do to solve the legal problem, it is, multiple interpretations are possible from the positive legal material, the judge is free to use any criteria of her choice to decide[1].

That is because if one understands – as they do – that only what is positive can be considered legal, then just these materials can provide the legal parameters for judging. But norms are, in many cases, too general[2] – as Kelsen would say -, or have an open texture language[3] – as Hart would say – so one needs to use non-legal commandments freely chosen – since Law would not provide them – to take a decision.

This represents the problem of discretion, probably the main practical problem of the positivist theories. Once judges are free to choose criteria to resolve a case, their decisions cannot be rationally controlled. It embodies a significant problem of irrationality in legal decisions.

Many theories tried to answer how it is possible to overcome this problem of arbitrariness, to demand correctness on legal decisions. The most important one is the Theory

[1] Hart, on *Discretion* (2013), demonstrates, however, that discretion cannot be understood as mere choosing, since its exercise demands some kind of justification, but the criteria that will guide this justification is, nevertheless, still arbitrary, for instance, one may call attention for it drinks example, or the knife one. See P. 657, 659-60.

[2] KELSEN, Hans. *Pure Theory of Law*. 1967. P. 353-354.

[3] HART, Herbert L. A. *The Concept of Law*. 1994. P. 252.

of Proportionality, in the terms developed in particular by Robert Alexy[4]. Accordingly to proportionality a decision must not only be inside of the interpretation borders of the norm (Kelsen) or under the open texture of the language (Hart), but must be rationally justified, which means there is a claim of correctness[5] on the decision-making.

This is because Law must satisfy not only legal certainty and social effectiveness but also moral correctness; it means the demand for justice that Law must have to be considered legitimate.[6]

The proportionality test is also connected with a complex theory of legal argumentation, which is able to analyse and evaluate arguments in order to make it possible to decide rationally by providing not just internal correctness but also external one in judicial argumentation and decisions.

However, plenty of authors addresses critics against proportionality by saying that it is a tool that ensures a discretionary margin of judgement in judicial decision-making. The specific critics of this kind that will be discussed here are Rafael Giorgio Dalla Barba's, supported by Lênio Streck's theory of Hermeneutic Critique of Law, which asserts that proportionality is an instrument of arbitrariness.

He argues that since proportionality "will allow some margin for interpretative mobility to complete its project",[7] it is also not able to overcome the positivist discretion[8]. On his understanding, proportionality is not a good mechanism to apply fundamental rights once you can achieve a better and safer answer by Streck's method of interpretation[9]. Furthermore, on his and on Streck's point of view, proportionality would allow the negotiation/trading of rights on judicial decisions[10] as well as it legitimates these trades by a simply fulfilment of empty procedures[11].

The premise behind these arguments is that to make Law non-arbitrary a theory must be able to provide an uncontroversial correct answer to every and each case presented.

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[4] One argument for this assessment is the empirical one, in which is demonstrated the worldwide spread of the Proportionality test. See: KLATT, Matthias and MEISTER, Moritz. *The Constitutional Structure of Proportionality* (OUP 2012) P. 1-3. See also: SWEET, Alec Stone and MATHEWS, Jud. Proportionality Balancing and Global Constitutionalism. (2008) 47 Columbia Journal of Transnational Law, P. 160.

[5] ALEXY, Robert. *Legal Certainty and Correctness*. 2015. P. 441.

[6] ALEXY, Robert. *My Phiplosophy of Law: The Institutionalization of Reason*. 1999. P. 32.

[7] Free translation.

[8] DALLA BARBA, Rafael Giorgio. *Nas Fronteiras da Argumentacão: A Discricionariedade Judicial na Teoria Discursiva de Robert Alexy.* 2018. P. 138.

[9] *Idem. Ibidem.* P. 100-9.

[10] *Idem. Ibidem.* P. 117-28.

[11] *Idem. Ibidem.* P. 129-36.

That's the hidden idea I opposed here. For two main reasons: (I) it is based on a misinterpretation of Dworkin's one right answer thesis, that both Dalla Barba and Streck cite a lot, and (II) it puts the spotlight on the wrong place on the subject of possible objectivity and predictability of the Law.

The questions that will guide all the investigations here are (I) what should a theory provide in order to overcome the discretionary problem and to be considered non-arbitrary, and (II) if the proportionality test does fulfil these demands.

To answer these questions first of all (chapter II) will be exposed in more detail which and in what consists Dalla Barba´s – based on Streck´s Hermeneutic Critique of Law – criticisms over proportionality and Alexy´s legal argumentation theories. The next stage (chapter III) is to discuss the idea of uncontroversial correct answers on legal theory and legal judgement, which has Dworkin´s theory on its background. This enables the understanding of what kind and degree of objectivity one can expect from the Law and notice the key concept for the overcoming of decisionism, called the determination of the sense of adequacy. Then the last step (chapter IV) is to check how much proportionality is able to fulfil this request, providing the possibility of intersubjective control. In this topic, it will be explained how proportionality and legal argumentation work together in order to provide a rational procedure of decisioning.

This has two main important consequences. The first consequence is a theoretical one and concerns Alexy's intent on developing a theory suitable for overcoming the problems of legal positivism, especially the problem of judicial discretion; even as his theory is held up as an important touchstone of non-positivism, it is of utmost relevance to investigate whether such a theory would be able to represent a restriction on positivist decisionism. The second consequence is both normative and practical and concerned on the needing to identify if Law, as a rational argumentative enterprise, has, or not, discretionary gaps when it comes to its concrete application since this would represent a significant increase in the argumentative burden of judges, to justify the option for a legal decision, instead of the other possible ones, thus making it possible to identify more clearly such points of greater or lesser argumentative burden.

For the Brazilian context, the justification of the research is given by the possibility of expanding the understanding of the limitations of the decisions of the Federal Supreme Court, as well as to expose both to the judges and to the general public - scholars or not - which are the relevant elements that the Court must comply with in order to fulfill its decisional capacity,

as well as, in case of argumentative insufficiency, to make it more evident to society what should be criticized and based on which grounds.

For the Post-Graduate Program in Law at the University of Brasilia, the research fits the goal of broadening the understanding of the argumentative elements of a judicial decision involving fundamental rights, as well as assisting the discussion on rationality and Law of the research group Law, Rationality and Artificial Intelligence/CNPq, coordinated by Professor Dr. Fabiano Hartmann Peixoto.

II. The Criticisms of Hermeneutic Critique of Law

Probably the most important pragmatic problem in Legal Philosophy since the last century is the judicial discretion problem. This problem became especially clear after the two main theories on Legal Positivism, to wit, Hans Kelsen´s and H.L.A. Hart´s theories[12]. Besides its differences, both theories have a common conclusion: because of the generality or open texture of the language, many rules cannot provide a certain way for the judge to decide about a concrete case; therefore, since only the issued material constitutes Law, the judge is free to choose her criteria to determine the decision[13].

The problem contained therein is that, since judges are free to choose their criteria to decide when the issued material is not absolutely clear, the Law would be extremely uncertain. The result for that is the unpredictability of decisions and the impossibility of any control of them because of its inseparable subjectivism and arbitrariness.[14] The problem of discretion is the problem of arbitrariness. One would only possibly know one's right after the judicial decision.[15] Furthermore, this enables judges to satisfy or impose their own particular political preferences[16] what weakens the democratic governance and popular representations as well as political institutions.

Several theories have sought to provide a solution to the lack of predictability and control of decisions made by judges. The main one is the Proportionality Theory, widely spread and adopted by several courts worldwide.[17] Nevertheless, the reasons for proportionality´s importance are not just empirical but are also analytical[18] and normative[19].

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[12] The discretion on each one may be seen on KELSEN, Hans. *Pure Theory of Law*. 1967. P. 348-56, and HART, Herbert L. A. *The Concept of Law*. 1994. P. 126-32.
[13] *Idem. Ibidem.*
[14] For Hart this may be expressed by the idea of controversiality, see: *The Concept of Law*. 1994. P. 253.
[15] This refers to the problem of the rights *ex post facto*, see: Dworkin, Ronald. *Taking Rights Seriously*. 1977. P. 30.
[16] COOTER, Robert D., & GINSBURG, Tom. *Comparative judicial discretion: An empirical test of economic models*. 1996. P. 295-6.
[17] See footnote 4.
[18] ALEXY, Robert. *A Theory of Constitutional Rights*. 2010. P. 44-110.
[19] KLATT, Matthias. *Proportionality and Justification* in: Constitutionalism Justified: Rainer Forst in Discourse (E Herlin-Karnell and M Klatt, ed.; H Morales Zúñiga, assist. ed.) Publisher: Oxford University Press 2019. 159-96.

Besides this wide proliferation of proportionality by Courts and scholars, it does not cease to be the target of various harsh criticisms. What will be faced here is the criticism from Rafael Giorgio Dalla Barba – supported by Lênio Streck´s Hermeneutical Critique of Law´s theory[20] - and which is commonly found in the legal imaginary of a considerable amount of Law operators in Brazil - for a variety of factors[21] - that is, proportionality is an instrument that fosters judicial discretion.

Barba´s main argument is that since proportionality "will allow some margin for interpretative mobility to complete its project",[22] it is also not able to overcome the positivist discretion[23]. On his understanding, one would be able to get better results by Streck´s hermeneutic method to interpret the Law[24]. They say that with this method, one would be able to get the correct/adequate[25] answer for the case and, therefore, avoid this "margin for interpretative mobility". As we will check further, their comprehension of the correct or adequate answer could be understood in two possible manners, both with problematic results.

As both Barba and Streck reduce the legal positivism to a discretion theory[26]and understand that proportionality opens the decision for the individual preferences of the judge[27],

[20] It could be citated by his main works on this regard: STRECK, Lenio Luiz. *Verdade e Consenso: constituição, hermeneutica e teorias discursivas*. 4° ed. São Paulo: Saraiva. 2011, and STRECK, Lenio Luiz. *Lições de Crítica Hermeneutica do Direito*. 2° ed. Rev. e ampl. Porto Alegre: Livraria do Advogado. 2016.

[21] Largely due to the misuse of its premises by the Brazilian Supreme Court, as can be seen in the works of HARTMANN PEIXOTO, Fabiano. *A decisão judicial no Supremo Tribunal Federal do Brasil e a aplicação da teoria dos princípios de Robert Alexy: a ponderação como estratégia de argumentação jurídica.* (2015). Doctoral dissertation for obtaining the title of PhD in Law at the Law School of the University of Brasília. See also SANTOS DE MORAIS, Fausto. *Ponderação e arbitrariedade: a inadequada recepção de Alexy pelo STF*. Salvador, JusPODIVM, 2018.

[22] Free translation.

[23] DALLA BARBA, Rafael Giorgio. *Nas Fronteiras da Argumentacão: A Discricionariedade Judicial na Teoria Discursiva de Robert Alexy.* 2018. P. 138.

[24] *Idem. Ibidem.* P. 106-109.

[25] Specially Streck changes the choise of word time to time with the same meaning. STRECK, Lenio Luiz. *Verdade e Consenso: constituição, hermeneutica e teorias discursivas*. 2011. P. 403 and 617. Barba, on other hand, prefer to restrain the use only to the word "correct".

[26] STRECK, Lenio Luiz. *Lições de Crítica Hermeneutica do Direito*. 2016. P. 79, and DALLA BARBA, Rafael Giorgio. *Seria a Teoria Discursiva de Robert Alexy um Modelo Pós-Positivista?* 2016. P. 1006.

[27] STRECK, Lenio Luiz. *Lições de Crítica Hermeneutica do Direito*. 2016. P. 54-55.

they support the idea that proportionality is not able to overcome the problem of judicial discretion.

This main argument is based on other underlying arguments, which Dalla Barba divides into four. Those arguments will be exposed afterwards.

The reason for choosing this work as reference – Nas Fronteiras da Argumentação by Rafael Giorgio Dalla Barba – is that because it consists in a recent publication, that includes important criticisms – mentored by Streck – which, besides already exhausted, are still repeated a lot, but with a new breath after that publication.

1. The split between rules and principles

1.1 The Structural distinguishing

One of the main thesis of proportionality is the idea that between rules and principles there is a structural distinction. It means they are logically different.

The idea that there is a difference between rules and principles does not start with proportionality. In fact, even the legal positivists already accepted some differences between them. As well as Kelsen, Hart and Bobbio talked about norms with a greater degree of generality in opposition to those with a more closed interpretation.

So, legal positivism was not a mere system of rules – as Dworkin would say -, but with principles too, which for their greater degree of generality created a wide margin of discretion for the judge when applying the rule to a case[28].

But, especially with Dworkin, the difference between rules and principles gains an important contribution. For him rules and principles are not distinguished by their degree of generality or opened texture but by a logical-character[29]. It means that their structures are

[28] That´s why Travessoni Gomes defends that Dworkin's criticism of legal positivists for not accepting the existence of principles was wrong. It is precisely because they accepted principles as more general and open-ended norms that Dworkin's second criticism of positivism - the criticism of discretion - was correct. See TRAVESSONI GOMES, Alexandre. *Kant e o pós-positivismo no direito.* 2006. P. 49.

[29] DWORKIN, Ronald. *Taking Rights Seriously*. 1977. P. 24

different. While rules have just the dimension of validity they are applied in an all-or-nothing fashion, it means, or the rule is valid, then it must be applied, or it is not, and for that, must not be applied[30].

Principles, in its turn, do not are applied just to analyze their validity but their weight as well. It means that in one specific case the importance of a principle must be weighted to determine its application or not. And differently from rules, a non-application on a given case does not affect the principle´s validity, neither could it be announced as an exception.

Explaining it better: in a conflict of rules or one of them is considered invalid or as an exception for a specific case which must be included in the whole statement of the rule. For example, the rule that says that if the batter has three strikes on a baseball game he must be removed has an exception, that is, if the catcher slips the ball on the third strike. So, the whole statement of the rule must include this exception.

In the case of principles that´s not true. In a given case a principle yields to another by the criteria of its importance on that case. So not being applied does not mean neither that it loses its validity or is enounced as an exception "because we cannot hope to capture these counter-instances simply by a more extended statement of the principle" as we could on the counter-instances of rules and these "are not, even in theory, subject to enumeration […]"[31].

It is at this moment of weighting principles on each case to check which one is more important, so to be applied, that the test of proportionality comes into play. But its structure and criteria will become clearer in the first part of the last chapter. At this moment, what is important for us is this structural distinguishing between rules and principles.

1.2 The comprehension of Principles on the Hermeneutic Critique of Law

[30] *Idem. Ibidem*.
[31] *Idem. Ibidem.* P. 25

Dalla Barba relies on the Hermeneutic Critique of Law – a theory developed by Streck – to criticize the structural distinguishing of rules and principles.

Besides this theory has in Dworkin´s work one of its basis, it denies that rules and principles are structurally different. According to them, between these two kinds of norms there is a simple difference, but not a structural split.

Streck highlights that the "human/fundamental/social rights entrain - as the practical world - by means of the principles"[32], which is much close to what Dworkin also says about then. According to Dworkin, a principle "[…] is a requirement of justice or fairness or some other dimension of morality"[33].

Differently from him, however, Streck attributes a distinguishing by function between rules and principles. It is, while principles are responsible for making this connection between the Law and the practical world "[r]ules, on the other hand, represent a technique for the realization of these rights, i.e. means (conducts) to guarantee a desired 'state of affairs[34]."

Here we can see a clear difference from Dworkin to the Hermeneutic Critique of Law: while the former understand a structural difference between rules and principles, reflecting proper ways of application, the latest sees a mere weak-difference, which is functional.

The principles, for Streck, are not to be weighted but to guide the interpretation of the rules "under penalty of an 'alienated' interpretation" of them[35].

That is the same with Dalla Barba. For him, the principle is responsible for allowing the comprehension of the rule inside the background of the constitutional situation[36]. He admits that their concept of principles is an approximation of Dworkin´s since both the principles create

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[32] STRECK, Lenio Luiz. *Verdade e Consenso: constituição, hermeneutica e teorias discursivas*. 2011. P. 304. (Free translation).
[33] DWORKIN, Ronald. *Taking Rights Seriously*. 1977. P. 22.
[34] STRECK, Lenio Luiz. *Verdade e Consenso: constituição, hermeneutica e teorias discursivas*. 2011. P. 305. (Free translation).
[35] *Idem. Ibidem.*
[36] DALLA BARBA, Rafael Giorgio. *Nas Fronteiras da Argumentacão: A Discricionariedade Judicial na Teoria Discursiva de Robert Alexy.* 2018. P. 107.

a gravitational force to guide the legal argumentation on the hard cases in the direction of the right answer[37].

More than that, besides both Dworkin and Robert Alexy a structural distinction for principles[38], since the latter gives an express definition of principles as "norms which require that something be realized to the greatest extent possible given the legal and factual possibilities"[39], Dalla Barba understands that one cannot equate Alexy's and Dworkin's proposals since, in the latter, the principles maintain the open texture of the norms - therefore, their arbitrariness -, while in the latter, the principles would close and direct the interpretation of the rules, excluding arbitrariness[40].

That is because, for Alexy, since principles are optimization requirements[41] , they may – and will many times – conflict with each other forcing the judge to balance the conflicting interests to determine a result for the case[42], and here Streck sees a great problem.

According to the Hermeneutic Critique of Law, since we do not know previously which principles will be balanced and what weight will be assigned to each one[43], understanding principles as optimization requirements would make them discretionary[44].

On the other hand, Streck´s idea of principles as guiding norms that avoids having an 'alienated interpretation' of the rules since they would allow the comprehension of the 'correct answer' for the case.

The idea of a correct answer for each case also comes from Dworkin´s theory, but in this latter, it is explained as a 'right' answer. Briefly explaining Dworkin´s thesis: the right answer is the one given by the judge who effortfully considers the precedents, the legislative

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[37] Idem, ibidem. P. 108.
[38] ALEXY, Robert. *A Theory of Constitutional Rights*. 2010. P. 47
[39] *Idem. Ibidem.*
[40] DALLA BARBA, Rafael Giorgio. *Nas Fronteiras da Argumentacão: A Discricionariedade Judicial na Teoria Discursiva de Robert Alexy.* 2018. P. 108.
[41] ALEXY, Robert. *A Theory of Constitutional Rights*. 2010. P. 67.
[42] *Idem. Ibidem.* P. 50-51.
[43] STRECK, Lenio Luiz. *Lições de Crítica Hermeneutica do Direito*. 2016. P. 49.
[44] *Idem. Ibidem.* P. 53.

material, the peculiarities of the specific case in hand, and the principles present in that community in order to pronounce a decision that takes all of these factors into consideration and fits all of them[45].

Understanding it, Streck determines that the correct/adequate answer is the answer that discovers the principle "which (legitimately) establishes the rule of the case."[46] The author even says that this answer does not have to be the only, neither the best for the case, but just adequate[47][48]. This adequacy/correction would, therefore, come from the correct guidance of the interpretation of the rule applied by the correct principle.

This correct answer would be necessary to avoid any kind of 'margin for interpretative mobility' on Dalla Barba´s terms.

According to his theory, it is not necessary, therefore, to resort to balancing interests - as proposed by Alexy - since this procedure expands rather than restricts judicial discretion[49].

It is hard to understand how exactly this guidance works on Dalla Barba´s conceptions once he does not give examples of his ideas. But Streck gives a few ones, and we will look for one of them.

The example drawn by Streck comes from the sentence n° 105/88 of the Spanish Constitutional Court declaring the unconstitutionality without textual reduction of the art. 509 of the Spanish Criminal Code. This article punishes anyone in possession of lockpickers or any other instrument specially made to commit robbery. On this occasion, the Court understood that the mere possession of such instruments could not feature as a crime without proof of actual damage[50].

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[45] DWORKIN, Ronald. *A Matter of Principles*. 1985. P. 32

[46] STRECK, Lenio Luiz. *Verdade e Consenso: constituição, hermeneutica e teorias discursivas*. 2011. P. 562.

[47] STRECK, Lênio Luiz. *A efetividade dos direitos humanos e fundamentais em terrae brasilis (a necessidade de uma resposta adequada à constituição)*. 2016. P. 96.

[48] As we will see, this is not the only interpretation that should be made by the right answer thesis on the Hermeneutic Critique of Law.

[49] DALLA BARBA, Rafael Giorgio. *Nas Fronteiras da Argumentacão: A Discricionariedade Judicial na Teoria Discursiva de Robert Alexy.* 2018. P. 109.

[50] Tribunal Constitucional de España. Sentencia 105/1988, de 8 de junio.

That is because interpreting the rule of the art. 509 in another way would infringe the art. 24.2 of the Spanish Constitution about the presumption of innocence since one cannot presume a crime just for the possession of proper tools for that[51].

For Streck, this correct answer was possible to achieve since the interpreter was inserted on the 'legitimate tradition of law', which means to combine the rules with the practical world involved by the principles[52]. Thanks to this 'fusion of horizons', it is possible to avoid the 'alienated' interpretation of the rules and, for Dalla Barba, avoid the 'margin for interpretative mobility' of proportionality theory.

2. The Critique to Subsumption

As a result of his structural distinguishing between rules and principles, the proportionality theory says that rules are applied by the subsumption method[53]. The more basic form of a subsumption application is to deduce a conclusion from a minor premise taken under a major premise. In Law, usually, the major premise is a general legal statement, like the art. 5°, LVII of Brazilian Constitution "no one shall be considered guilty until his criminal conviction has become final and non-appealable" and the minor premise a statement of a concrete case, like "the criminal conviction of 'X' is still appealed". The legal decision, so on, will be the conclusion deduced by these two premises: "'X' shall not be considered guilty".

This manner of application comes from the rules structures as definitive commands, in other words, as rules are related only to the idea of validity, if they are valid, one must apply exactly what it demands, 'nothing more, and nothing less'[54], in an 'all-or-nothing fashion'[55].

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[51] STRECK, Lenio Luiz. *Verdade e Consenso: constituição, hermeneutica e teorias discursivas*. 2011. P. 309-311.
[52] *Idem. Ibidem.*P. 310-311.
[53] ALEXY, Robert. *On Balancing and Subsumption: A Structural Comparison*. 2003. P. 443.
[54] ALEXY, Robert. *On Structure of Legal Principles*. 2000. P. 295.
[55] DWORKIN, Ronald. *Taking Rights Seriously*. 1977. P. 24.

Dalla Barba, however, considers this explanation as a mistaken comprehension. For him, we cannot apply the Law by subsumption for a special reason, which is closely related to Gadamer´s hermeneutical approaches.

Dalla Barba´s justification is that one cannot operate first with conceptual abstractions and apply them forwardly to particular circumstances. "We just apply the rule to the case" because we have already comprehended it before one could structure it analytically[56]. The comprehension of the phenomenon comes much earlier than any possibility of premise structuring[57].

For this reason, Dalla Barba says that to apply the Law by a method of deducing conclusions from abstract concepts is to reduce it on mechanical procedures, and once the interpretation must be produced from the factual and historical context, a method based on the adequation between abstract and concrete premises (major/minor premises and conclusions)[58] turns into a mean to 'asphyxiate' the Law from its pragmatical dimension[59].

To justify these assumptions, the author resorts to Gadamer, for whom understanding is a behaviour that is never reproductive but always productive since it is always determined by the historical situation of the interpreter[60]. Thus, understanding has already manifested itself by contextuality before any analyticity can be done, therefore – in Dalla Barba´s conception -, the Law cannot be applied by subsumption[61].

The interpretation made of the law must consequently be carried out in such a way as to make it the best possible example of its genre. It must never be applied in an automatic manner

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[56] DALLA BARBA, Rafael Giorgio. *Nas Fronteiras da Argumentacão: A Discricionariedade Judicial na Teoria Discursiva de Robert Alexy.* 2018. P. 112.
[57] *Idem. Ibidem.* P. 115.
[58] *Idem. Ibidem.* P. 111.
[59] *Idem. Ibidem.* P. 113.
[60] Gadamer, Hans Georg. *Truth and method*. 2004. P. 296.
[61] [61] DALLA BARBA, Rafael Giorgio. *Nas Fronteiras da Argumentacão: A Discricionariedade Judicial na Teoria Discursiva de Robert Alexy.* 2018. P. 115. About this by Gadamer see: *Truth and method*. 2004. P. 320.

– as he understands it to work in proportionality theory – but in such a way to incorporate integrity and coherence[62] - as can be seen, he once again resorts to Dworkin's concepts[63].

Dalla Barba´s criticism, then, can be expressed by the following: Since subsumption operates on the basis of two premises, one of which consists of abstract statements, it reduces the complexity of the concrete case by removing from the interpretation the historical and contextual dimension in which the interpreter and the legal community are inserted, creating 'asphyxiated' decisions.

3. The Problem of Colliding Principles

To face Dalla Barba´s third criticism it must be settled that in proportionality theory, norms are or rules or principles[64]. As we have seen, rules are definitive commands, which means that they must be applied on their exact extension by the method of subsumption. Principles, in their turn, are optimization commands that deal with the dimension of weight/importance, which means that they cannot be simply subsumed once they get into collision many times[65]. They must be applied by proportionality.

That´s the reason Dworkin says that one cannot pronounce the whole statement of a principle – it is, including all its exceptions – because it is impossible to preview all the possible situations in which one principle needs to yield to the other[66].

The Hermeneutic Critique of Law criticizes both subsumption and proportionality.

We have faced its criticism on subsumption on the last topic. Now their raised arguments are against the proportionality test itself.

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[62] [62] DALLA BARBA, Rafael Giorgio. *Nas Fronteiras da Argumentacão: A Discricionariedade Judicial na Teoria Discursiva de Robert Alexy.* 2018. P. 116.
[63] For Dworkin´s arguments see: Law´s Empire. 1986. Chapter Six.
[64] ALEXY, Robert. *Proportionality, constitutional law, and sub-constitutional law: A reply to Aharon Barak.* 2018. P. 872
[65] ALEXY, Robert. *The Dual Nature of Law*. 2010. P. 174.
[66] DWORKIN, Ronald. *Taking Rights Seriously*. 1977. 25

On proportionality theory, one may have two principles demanding opposing behaviours on a concrete case. It means that one of them must take precedence over the other to solve the case. This precedence is, however, conditional on the peculiarities of the case, which means that under different circumstances the other principle can prevail[67].

Alexy translates this idea on the following logical sentence[68]:

(P1 **P** P2) C

It says: Principle P1 takes precedence (**P**) over principle P2 under the concrete circumstances C.

To determine which principle must prevail on a concrete case one must apply the proportionality test, which is divided into three sub-tests, namely suitability, necessity and balancing (or proportionality in *strictu sensu*)[69].

Whereas the Hermeneutic Critique of Law, in general, and Dalla Barba, specifically, make no attacks directly on suitability and necessity, concentrating their efforts against balancing, these will be the criticisms to be exposed now.

Further and clearer explanations on the whole structure and premises of proportionality will be made in the next chapters – especially chapter IV[70]. At this moment, just the essential to understand Dalla Barba´s criticism will be exhibited.

Principles as optimization commands mean that both colliding principles must always be promoted to the greatest extent possible. For this reason, when balancing them, one must check how much both principles are being satisfied or non-satisfied under the given circumstances[71].

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[67] ALEXY, Robert. *A Theory of Constitutional Right*. 2010. P. 50-52.
[68] Idem. Ibidem. P. 52.
[69] Both terms can be understood as synonyms. The term 'balancing' will be preferred from this point forward.
[70] To check a good and didactic work in Portuguese language explaining and applying the three sub-tests of proportionality see: AFONSO DA SILVA, Virgílio. O proporcional e o razoável, Revista dos Tribunais 798 (2002): 23-50.
[71] ALEXY, Robert. *A Theory of Constitutional Rights*. 2010. P. 401.

This statement can be expressed by what Alexy names 'The Law of Balancing' and can be said by the following sentence[72]:

"The greater the degree of non-satisfaction of, or in detriment to, one principle, the greater must be the importance of satisfying the other."

One can now notice that balancing consists of three more steps: the first is to check how much P1 demands to be satisfied, thereafter check how much P2 is constrained, then relate these two values to establish if the importance of satisfaction of P1 justifies the detriment of P2[73].

To make this process more rational, Alexy proposes a triadic scale to evaluate the degree of satisfaction/non-satisfaction of principles, being possible to characterize them as light, moderate or serious[74]. A moderate detriment of a principle must be justified by a serious necessity of satisfaction of the other principle, or at least as moderate as the first one.

As Virgílio Afonso da Silva would say: "In less technical terms, what is lost on one side must be compensated for by what is gained on the other"[75]

Dalla Barba issues that there are two problems regarding this proposal. The first one is the problem of discretion, and the second is the problem of trading rights.

Regarding the discretion issue, Dalla Barba draws attention to one more aspect of Alexy's theory of fundamental rights, which is the similarities between principles and values. According to Alexy, the very difference among principles and values is that the former are deontological norms, besides the latter are axiological ones[76].

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[72] *Idem. Ibidem.* P. 102.
[73] *Idem. Ibidem.* P. 401.
[74] ALEXY, Robert. *Formal principles: Some replies to critics*. 2014. P. 515.
[75] AFONSO DA SILVA. Virgílio. *A Constitucionalização do direito: os direitos fundamentais nas relações entre particulares*. 2005. P. 154.
[76] ALEXY, Robert. *A Theory of Constitutional Rights*. 2010. P. 92.

This observation leads Dalla Barba and Streck to comprehend Alexy´s theory as a mean to introduce value arguments on the discourse of fundamental rights, making them 'hostages to the interpreter's subjectivism'[77].

Coupled with the idea of optimization commands, the similarities of principles and values creates this understanding on the hermeneutic critique of Law authors that proportionality would threat principles in such a way to make the legal interpretation more open. In other words, for them, Alexy´s idea of principles opens the margin of interpretation of the judge.

To solve this problem, however, they propose a different function for legal principles, the idea of principles of guiding norms[78], in such a way that principles would not allow the interpreter´s subjectivism at the application of Law. In this manner, principles would close, instead of opening, the interpretation[79].

Remember here Streck´s example of the sentence 105/88 of the Spanish Constitutional Court. In that situation, Streck proposes that if principles had been taken as optimization commands, the judges would be much freer to decide however they want to since they would have to introduce moral and political arguments instead of legal ones.

With his theory, however, the judicial decision-making would be much more closed since principles would serve as guiding norms, driving the judge to the correct answer, restricting the possibility of various interpretations[80].

The principles, so on, insert the practical world on the Law and are characterized by its facticity and historicity, in such a way to close the possible interpretations and, because of that, removing the subjectivity of the interpreter[81].

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[77] DALLA BARBA, Rafael Giorgio. *Nas Fronteiras da Argumentacão: A Discricionariedade Judicial na Teoria Discursiva de Robert Alexy.* 2018. P. 124.
[78] As we have seen on II, 1, 1.2.
[79] [79] DALLA BARBA, Rafael Giorgio. *Nas Fronteiras da Argumentacão: A Discricionariedade Judicial na Teoria Discursiva de Robert Alexy.* 2018. P. 124.
[80] STRECK, Lenio Luiz. *Verdade e Consenso: constituição, hermeneutica e teorias discursivas*. 2011. P. 226.
[81] *Idem. Ibidem.* P. 229.

The answer given by principles is a problem of hermeneutics (comprehension) instead of procedural (reasoning) because the constitutional values are already embedded in it by historical contingencies that are institutionalized by Law and encase the judicial interpretation. It would leave no empty spaces for subjective grounds from the interpreters[82].

The problem of discretion turns into the second problem, the possibility of trading rights, which is strictly connected with Dworkin´s theory of rights as trumps.

The theory of rights as trumps will be clearer explained in the next chapter. But very briefly, the idea of rights as trumps comes from Dworkin's differentiation between principles and policies. While the former would be guaranteeing individual rights that do not depend on the State to exist and should be assured to every citizen, policies are common projects and pretensions of a certain people for its development and well-being[83].

Policies profess what is for the general good, while principles guarantee what cannot be denied to any citizen under pain of denying him his own humanity. Principles/rights are the citizen's trump against the majority[84].

This is why principles should not be overridden by policies. And it is precisely in this respect that Dalla Barba argues that proportionality denies rights as trumps.

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[82] The whole quotation might be valuable here: “Therefore, the answer given by the principles is a hermeneutic problem (understanding), and not an analytical-procedural one (reasoning). The presence of the principles in the resolution of the so-called "hard cases" - although it is inadequate to split easy cases from hard cases - has exactly the purpose of avoiding judicial discretion/arbitrariness. The answer does not come from an adjudicative discourse (from outside); it comes from a cooriginality. [...] See: it is exactly the historical contingencies that make morality become institutionalized in law (but without serving as an instrument to legitimize a search for "values" hidden underneath the legal texts). This institutionalization is based on factuality (or, if you prefer) on the a priori of factuality). In Hermeneutic terms, it is the (new) practical way of the sense of being of the law in the context of this attempt to rescue that which legal positivism had dismissed. In other words, this phenomenon occurs as a practical act - a "since already factually given" - which provides a change in the form of practical reason inside which it becomes possible to discuss social behaviors under the light of democratically produced legislation, which - it should be pointed out - takes on a prime position in the Democratic State of Law”. (Free translation). STRECK, Lenio Luiz. *Verdade e Consenso: constituição, hermeneutica e teorias discursivas*. 2011. P. 226-228.

[83] DWORKIN, Ronald. *Taking Rights Seriously*. 1977. 82-83.

[84] *Idem. Ibidem.* P. 11.

By understanding that proportionality principles open up the interpretation to subjective arguments from the interpreter, it allows policy arguments to be used to override arguments from principles, devaluing the value of rights[85].

This is what is meant by trading rights. According to this conception, when balancing a concrete case, a judge or a court could balance a right against a policy and, by giving more weight to the latter due to the subjective arguments used, superimpose policy over the right, subjectivity over objectivity, axiology or ideology over deontology[86].

In addition to the negotiation between rights and policies, Dalla Barba also argues that weighting allows the negotiation of rights with each other in a way that allows incorrect answers since, again, this balancing would be carried out by the interpreter's own evaluative choices and not those of the legal community to which he belongs[87].

Proportionality would thus serve to cover up the 'intimate arguments of each judge'[88]so as to weaken the normative-deontological structure of rights.

Rights would no longer be citizens' guarantees but would be at the disposal of each judge to apply the one he pleases the most, putting an end to trumps.

4. The Emptiness of the Procedure

The fourth and last argument from Dalla Barba against proportionality is about the procedural justification of decisions. This criticism is also divided into two parts, the latter as a result of the former and can be described as first, the emptiness of procedural decisions, which is connected with Heidegger´s phenomenology, and the second the idea of Law as integrity proposed by Dworkin.

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[85] DALLA BARBA, Rafael Giorgio. *Nas Fronteiras da Argumentacão: A Discricionariedade Judicial na Teoria Discursiva de Robert Alexy.* 2018. P. P. 128.
[86] *Idem. Ibidem.* P. 127.
[87] *Idem. Ibidem.*
[88] *Idem. Ibidem.*

Once more, a brief explanation of each theoretical assumption, necessary for the understanding of the criticism, will be made, and they will be deepened in their due moments.

The critic of the emptiness of a procedural decision comes from Alexy´s theory of legal argumentation. The legal argumentation is a special case thesis from the general practical discourse that has, in particular, its binding to statutes, precedent and doctrine[89].

As part of the general practical discourse, the correctness of legal arguments will be tested by a procedure of asking and giving reasons for every assertion anytime it is requested. This game of asking and giving reasons is based on twenty-eight rules and principles of rationality[90] , which basically intend to assure freedom and equality opportunities of participation to anyone affected by a measure that says what is obligatory, forbidden, and allowed[91].

Dalla Barba sustains that, as long Alexy´s proposals are merely formal-procedural criteria of decisioning, it ignores the historical elements that constitute the reality where the community is inserted[92]. Alexy himself recognizes that his legal argumentation theory does not always yield always one right answer but is a procedure that allows 'to make explicit the conditions of discursive rationality by means of a system' of rules[93].

At this point, Dalla Barba resorts to Heidegger to justify the importance to include these elements of contextuality to make possible correct answers.

As he sustains, Heidegger proposes a double structure of language according to which we do not understand things only by formal-logical (discursive) resources, but essentially also

[89] ALEXY Robert. *The Special Case Thesis and The Dual Nature of Law*. 2018. P. 255-257.
[90] ALEXY, Robert. *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification*. 2010. P. 188-206.
[91] ALEXY Robert. *The Special Case Thesis and The Dual Nature of Law*. 2018. P. 255-256.
[92] DALLA BARBA, Rafael Giorgio. *Nas Fronteiras da Argumentacão: A Discricionariedade Judicial na Teoria Discursiva de Robert Alexy.* 2018. P. 133.
[93] ALEXY Robert. *The Special Case Thesis and The Dual Nature of Law*. 2018. P. 255-256.

by hermeneutic resources which signify previous experiences of the world that are prior to the understanding of the linguistic element[94].

It is at this hermeneutic point that historical and contextual elements come into play to make the understanding of formal-logical statements possible.

Precisely because of this, Dalla Barba accuses Alexy of proposing a merely procedural model, removing the contextuality of the interpreter's decision[95]. This is another reason for the plurality of subjectively possible decisions since, according to Streck[96] and Dalla Barba[97], the mere compliance with formal elements would enable the most varied decisions based on subjective values, which, to make matters worse, would be legitimized by a rational procedure, whether such decisions are correct or not.

Instead of this mere procedural thesis, Dalla Barba defends that a substantial proposal must be held. These substantial elements would come exactly by the contextual and historical factors of which the interpreter is inserted. He runs, once again under Dworkin´s ideas, who – according to Dalla Barba – differently from Alexy proposes the substantial way-out that Dalla Barba is looking for[98].

Thus, the Dworkinian concept of integrity comes into play. For Dalla Barba, Law as Integrity means that the legal community should be conceived in a systematic way so that rights are guaranteed to the citizen in a coherent manner, following institutional history.

This leads Dalla Barba to understand that Law as Integrity would not allow the conflict of principles since they should coexist harmoniously[99]. The interpreter must then produce a

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[94] HEIDEGGER, Martin. *Being and Time*. 1996. P. 204-206. See also: DALLA BARBA, Rafael Giorgio. *Nas Fronteiras da Argumentacão: A Discricionariedade Judicial na Teoria Discursiva de Robert Alexy.* 2018. P. 130-1.
[95] DALLA BARBA, Rafael Giorgio. *Nas Fronteiras da Argumentacão: A Discricionariedade Judicial na Teoria Discursiva de Robert Alexy.* 2018. P.132.
[96] STRECK, Lenio Luiz. *Verdade e Consenso: constituição, hermeneutica e teorias discursivas*. 2011. P. 332.
[97] DALLA BARBA, Rafael Giorgio. *Nas Fronteiras da Argumentacão: A Discricionariedade Judicial na Teoria Discursiva de Robert Alexy.* 2018. P.130.
[98] *Idem. Ibidem.* 135.
[99] *Idem. Ibidem.*

decision that maintains this coherence between the principles, representing the best interpretation of the legal practice in the matter.

Here it is argued that principles could not conflict since this would go against the concept of Law as Integrity, of coherence of the system and of the common history of that legal community[100].

[100] *Idem. Ibidem.* P. 135-6.

III. Dworkin´s Theory and The Elements for a Non-Arbitrary Theory of Legal Decision

After the main criticism from the hermeneutic critique of Law addressed against proportionality are laid out, what this chapter aims is to first verify if, or how much, the recourse to Dworkin's theory made by Streck's theory, and endorsed by Dalla Barba, is coherently done. Since Dworkin is the main legal philosopher that apparently gives support to such intellectual enterprise, the comparison to the author himself is of utmost importance to verify the solidness of the pillars that sustain the hermeneutic critique of law and its arguments against proportionality.

It is not intended, however, to make a completely exhaustive explanation of Dworkin's theory due to its extent and complexity. What will be sought to do is to present his relevant concepts to the discussion to the exact extent they are necessary to disprove the understandings of the hermeneutic criticism of law concerning this matter.

The thesis defended in this regard is that Streck and Dalla Barba's theory is based on a misinterpretation of Dworkin, especially regarding the ideas of rights as trumps and Law as integrity, which leads to a problematic comprehension of the objectivity of a legal decision or, in Dworkinian terms: a right answer.

The second objective of this chapter is to seek to clarify what should be required of a theory of judicial decision in order for it to be considered non-arbitrary - thus overcoming the positivist decisionism of Kelsen and Hart - as well as how much objectivity can be expected in the legal decision-making. For this, it will not be restricted - despite being connected - to Dworkin's proposals, requiring recourse to other authors as well.

These questions will be answered by resorting to two concepts, namely: determination of the sense of adequacy of decisions and the possibility of intersubjective control.

1. Dworkin´s Theory against the Hermeneutic Critique of Law

If one picks up all of Ronald Dworkin's publications, it can be seen that his work comprises a variety of possible interpretations. The author himself reformulates relatively significant elements of his early writings until he reaches the last ones -which has its advantages, but also its disadvantages-, and not always these concepts are explicitly related to each other in such a way as to form an analytically clearer theoretical web.

This makes it rather difficult to propose an unequivocal reading of his theory. It is not because of this that one cannot coherently defend a single interpretation of Dworkin's work, but it does imply accepting that at least some variety of interpretations of some of his proposals can also be coherently sustained.

This is not to say, however, that the interpretation of such a theory is free, that is, it is not because one might not be able to demand an unequivocal interpretation of Dworkin that any interpretation of him is correct.

This is the case of the reading of Dworkin proposed by the hermeneutic critique of Law. What is proposed here is that the way in which it is incorporated by Streck and Dalla Barba does not correspond to any of the possible areas of interpretation of Dworkin, i.e. in many situations, only those Dworkinian passages that corroborate their thesis are used, by ignoring his work in a systematical way, which would lead to completely different conclusions.

Here is defended that the two Dworkinian concepts that are mainly misinterpreted by the hermeneutic critique of Law are those of rights as trumps and of Law as Integrity. The misunderstanding of these two elements leads to a misunderstanding of the objectivity that can be expected by legal decisions, in other words, of what can be understood as a possible idea of one right answer[101]. For that, the comprehensions of a correct answer and objectiveness will be understood as one.

[101] This last one, the one correct answer, may be recognized as the most controversial element on Dworkin´s work interpretations.

This triad – trumps, integrity and objectivity – would allow one specific master thesis to each of them, because of that, the two first elements will be exposed until the necessity to disprove the Dworkinian reading of the hermeneutic critique of law (topics 1.1 and 1.2), and the third until its connection with objectiveness is understood (topic 1.3).

After that, the question of what objectiveness could be expected in legal decision-making will be addressed (topic 2).

1.1 Rules, Principles, Rights and Trumps

Probably the most important question to understand Dworkin´s idea of rights as trumps is what purpose he develops this idea for. Dworkin is pursuing a specific goal when he develops this idea, and this goal is very important to be able to completely understand the concept of trumps.

However, before that, we will investigate what Dworkin proposes with the concept of trumps.

As shown above[102]., the hermeneutic critique of law criticizes proportionality based on the idea of trumps for two reasons. The first is that when rights are balanced, they could be subjected to negotiations by the judges that apply them so as to weaken their guarantee against "the kind of trade-off argument that normally justifies political action (policies)"[103]; this is Dalla Barba's criticism. On the other hand, proportionality is also criticized by resorting to trumps because applying principles as optimizing commands would open, instead of closing, the judge's interpretative possibilities, allowing her to introduce subjective arguments in the decisional act, which again removes from rights their character of protection against majorities, power or the state; this is Streck's criticism.

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[102] See Chapter II, 3.

[103] DWORKIN, Ronald. *Is democracy possible here?* 2006. P. 31.

In this topic, Dalla Barba's critique will be faced, while Streck's will be addressed in the next chapter[104]when legal argumentation is discussed in detail.

Thus, Dalla Barba's criticism is that the principles cannot yield in concrete circumstances, or they would cease to be trumped[105]. Thus, there would be no conflict between principles, nor between a principle and a policy, since in both cases, the principles serve to guide the interpretation of the rules, and either type of conflict would cause the enforcer to use his personal values, allowing principles to be trade-offs[106].

This trade-off is what weakens the trump character of the principles for Dalla Barba's criticism.

The author even resorts to a passage of Dworkin's second book, 'A Matter of Principles', to justify that he would be against the possibility of conflicts both between principles among themselves and principles and policies[107]. The passage deserves reproduction[108]:

> "In any event, however, this argument of policy, however strong or weak as an argument of policy, must yield to the defendant's genuine rights to a fair trial, even at some cost to the general welfare. It provides no more reason for overriding these rights than the policy argument in favor of convicting more guilty criminals provides for overriding the rights of those who might be innocent. *In both cases there is no question of competing rights, but only the question of whether the community will pay the cost, in public convenience or welfare, that respect for individual rights requires*."[109]

As mentioned in the previous paragraph, this excerpt is taken from Dorwkin's second book - A Matter of Principles. However, a reading that takes Dworkin minimally seriously would seek to answer what meaning should be attributed to this quoted paragraph in connection with the rest of the author's publications.

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[104] See chapter IV, 1.3.
[105] DALLA BARBA, Rafael Giorgio. *Nas Fronteiras da Argumentacão: A Discricionariedade Judicial na Teoria Discursiva de Robert Alexy.* 2018. P.128.
[106] *Idem. Ibidem.* P. 127.
[107] *Idem. Ibidem.*
[108] DWORKIN, Ronald. *A Matter of Principles*. 1985. P. 377.
[109] highlights by Dalla Barba.

The reason for this is that, although he says that in this case - the Farber case - " there is no question of competing rights", the author is not saying that rights do not "compete" in any case, but that there are no competing rights on this Farber case [110].

The reason for this is quite obvious since the case would be about a collision between a principle and a policy, not about rights/trumps against each other. Therefore, it is clear that "there is no question of competing rights" because no right is competing the right of due process of law, but a policy is[111]. And as already pointed out, Dworkin arguments from principle cannot yield to arguments from policy because of their special importance.

But it is necessary to go further. If one really wants to take Dworkin seriously, it is not possible to propose that the author did not recognize the existence of conflicts between principles by this mere passage, since he himself referred that when 'principles intersect' the judge must consider the relative weight of each of them, in his first book Taking Rights Seriously[112], and that a trump can get *trumped* by a higher trump enough justified, in his last one, Justice for Hedgehogs[113].

As can be seen, although conflict between principles is not a frequent subject in Dworkin's writings, he has considered them throughout his career, one might say 'from one end to the other'. And the reason why the author does not dwell so much on conflicts between rights is that, unlike Alexy, exploring these conflicts was not his main goal, but rather proving that beyond the positive legal material there should be rights that are independent of them - the argument against positivism -, and that such rights are not at the pleasure of a political majority or power groups - the argument against utilitarianism[114].

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[110] DWORKIN, Ronald. *A Matter of Principles*. 1985. P. 377.
[111] *Idem. Ibidem.* P. 374-5.
[112] DWORKIN, Ronald. *Taking Rights Seriously*. 1977. P. 26.
[113] P. 473. Besides this quotation in the mentioned text, the author goes on to reference another writing of his own, "Rights as Trumps," in Jeremy Waldron, ed., Theories of Rights (Oxford: Oxford University Press, 1985), showing that his conception of trumps and conflicts has not been significantly altered over the years.
[114] DWORKIN, Ronald. *Taking Rights Seriously*. 1977. VIII. See also YOWELL, Paul. (2007). *A Critical Examination of Dworkin's Theory of Rights* in: The American Journal of Jurisprudence, 52(1), 93–137.

This does not mean that two legitimate rights cannot conflict - as indeed they do, and Dworkin acknowledges.

This is best visible from the introduction to Taking Rights Seriously, where Dworkin makes clear his goal, a goal that will follow him throughout his theory, which is "to define and defend a liberal theory of law"[115].

A passage from the introduction may demonstrate it[116]:

> The various chapters define and defend a liberal theory of law. They are nevertheless sharply critical of another theory that is widely thought to be a liberal theory. [...]The rulling theory has two parts, [...] (t)the first is a theory about what law is;[...] (t)his is the theory of legal positivism.[...] The second is a theory about what the law ought to be, and how the familiar legal institutions ought to behave. This is the theory of utilitarianism.

Apart from this passage, it is enough to remind that Dworkin refers to trumps in various situations generally as guarantees against the will of political majorities. To the author, therefore, what characterizes trump is not the impossibility of yielding to another trump but of yielding to the majority will[117]. That is what Dworkin is pursuing with the concept of rights as trumps: face a utilitarian moral theory of Law. The argument of trumps is an argument against utilitarianism, not against balancing!

Otherwise, one could not explain how it is possible to resolve cases in which legitimate trumps require conflicting resolutions – as we will see, that is the case of Streck´s example of the Spanish Constitutional Court[118].

It can be seen, therefore, that Dworkin's theory, although hermeneutically based, does not oppose the idea of rights as trumps to conflicts of principles. On the contrary, the recognition of the possibility of collision of trumps that in a case requires conflicting resolutions and that it

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[115] DWORKIN, Ronald. *Taking Rights Seriously*. 1977. VII.
[116] *Idem. Ibidem.*
[117] DWORKIN, Ronald. *Is democracy possible here?* 2006. P. 31. *Taking Rights Seriously*. 1977. P. XI, 197-8. *A Matter of Principles*. 1985. P. 59, 66-8, 359.
[118] See Chapter II, 1.2.

is, therefore, necessary to choose the most important one is a constant - although not receiving much focus from the author - in Dworkin's theory since his beginning until his last writings.

Therefore, the collision between principles does not mean allowing trade-offs between these rights in such a way that the idea of rights as trumps is given up, neither in Dworkin's theory nor, as will be shown, in proportionality.

1.2 The Idea of Integrity

Remembering Dalla Barba's criticism of proportionality based on Dworkin's proposal of Law as Integrity, the author believes that when considering Law as Integrity, one could not accept any kind of collision between principles[119].

Thus, Dalla Barba proposes that, by having to treat all individuals with equal moral consideration, the State would incorporate the principles in a harmonious, coherent and conflict-free manner[120].

It is not clear, however, that the fact of having to treat individuals with equal consideration necessarily leads to an absence of a collision between the principles, since it is precisely because the State has to treat the rights and interests of each one with equal consideration that it brings these interests into conflict, that is, precisely because the right to freedom of expression of A must be taken into equal consideration with the right to privacy of B - both demanding, therefore, different results - that the State must resolve the conflict with integrity.

It is interesting to note that if Law based on integrity did not allow for conflicts between the different principles and interests that come into play when making a judicial decision, the work of the Dworkinian judge Hercules would be much simpler, both to find a correct answer

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[119] See Chapter II, 4.

[120] DALLA BARBA, Rafael Giorgio. *Nas Fronteiras da Argumentacão: A Discricionariedade Judicial na Teoria Discursiva de Robert Alexy.* 2018. P. 135.

and to justify it. It would be enough to pronounce that the decision taken is correct because it incorporates the internal limit of the principle used by the decision-making agent. Hercules, it would not be so herculean if principles acted in such a harmonious way.

Anyway, for Dalla Barba, the concept of Law as Integrity would not allow the existence of conflicts between principles. We have already seen that conflicts exist in Dworkin[121], even if we understand principles as trumps, but it is also necessary to understand whether the idea of integrity can require the absence of conflicts between principles.

Dworkin proposes that in order to understand Law as Integrity when formulating and deciding, the judicial agent should take all legal elements into consideration as broadly as possible. Thus, both the reading of the issued Law and practical considerations of morality should enter into the interpreter's assessment. The author says that reading the Law in its entirety requires presupposing that all these elements "were all created by a single author"[122].

This integration of the formal and practical elements of the Law should be consistent with a concept of justice and fairness[123].

Thus, integrity can be understood as the requirement to understand Law in a systematic manner and can be divided into two elements, namely: fit and coherence.

As Klatt points out, consistency/fit is a formal element that requires the absence of logical contradictions between all the elements of the Law, while coherence is an element of material correctness of the content of these elements[124].

While consistency demands that what is decided can logically fit from the materials already produced[125] - an absence of logical contradictions -, coherence demands that these

[121] See: III, 1.1.
[122] DWORKIN, Ronald. Law´s Empire. 1986. P. 225.
[123] *Idem. Ibidem.* P. 228-32.
[124] KLATT, Matthias. *The Rule of Dual-Natured Law*. 2016 P. 06.
[125] DWORKIN, Ronald. *Law´s Empire*. 1986. P. 230.

materials are materially correct with elements of justice and fairness[126]. Coherence, therefore, requires justification[127], and justification, in turn, requires rational bases of validity[128].

But the point is that neither consistency nor coherence together can lead to a conclusion that is unequivocal. The former eliminates some possibilities of interpretation because they are logically incompatible with the issued Law, but in many cases a range of logically possible interpretations will still be available; indeed, this is especially where consistency comes into play for Dworkin[129]. But also coherence, coupled with consistency, is limited because it is made up of distinct moral principles, such as justice, fairness and due process, for example, which will lead not only to disagreements between different judicial actors but also to doubts within the individual judge[130].

This is because Dworkin understands that such principles will compete for distinct outcomes in certain cases. Although they are not contradictory, in the sense that they exclude each other, they compete to determine which gives the best interpretation of the case, and for that, non-arbitrary legal elements should determine the precedence and weighting between them[131]; that´s a matter of justification. The determination of which one will prevail, and thus applied in the actual case, is a dynamic - not static - matter, not only because of changes in the historical or contextual elements the judge evaluates but also because of the rise of new arguments or reflections[132].

In other words, judgments may be altered by the insertion of new arguments into the judge's reflection, leading the principle that had previously been preferred to be now preceded, even under the same historical or contextual circumstances.

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[126] DWORKIN, Ronald. *Law´s Empire*. 1986. P. 232, 248-9.
[127] *Idem. Ibidem.* P. 239.
[128] HABERMAS, Jürgen. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. 1996. P. 226.
[129] DWORKIN, Ronald. *Law´s Empire*. 1986. P. P. 256.
[130] *Idem. Ibidem.*
[131] *Idem. Ibidem.* P. 269.
[132] *Idem. Ibidem.* P. 257-8.

Thus, the Law as Integrity response does not always lead to unequivocal answers, nor does it exclude the possibility of conflicts between rights and principles in the case – at least, it does not necessarily exclude conflicts between principles.

The fact that Dworkin understands that such conflicts can be resolved, or disappear, through a greater distance from the case, giving the judge a broader view of the problem, does not mean that the conflict is absent or non-existent, or even that it is not recognized. This is because, even if one defends that the legal duty is only one, the grounds of obligation (principles) that underlie this duty may conflict[133]. Even a rigorist practical philosophy such as Kant's recognizes the possibility of conflict[134], and it also seems to be the case with Dworkin.

It is worth noting what Travessoni Gomes points out in this regard "What some call a duty is, for Kant, the ground of obligation; consequently, what some call a conflict of duties is, for Kant, a conflict of the grounds of obligation."[135]. Thus, even the rigorist (or integrity) determination of duty, in the sense that the enunciation of law must be one and no more, does not exclude the existence of conflicts behind it.

The existence of conflicts does not, however, lead to the fact that any decision on this conflict is correct but rather determines that the conflict should be resolved through the justification of the concrete norm[136].

The manner of understanding the integrity of law as something unique, unequivocal, and not as an interpretative *ideal*[137] as Dworkin does[138], creates this misconception about how conflict problems are solved, leading them to be ignored or hidden.

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[133] TRAVESSONI GOMES, Alexandre. *Kant e o pós-positivismo no direito.* 2006. P. 59-60.
[134] KANT, Immanuel. *Metaphysics of Morals*. 1991. P. 50. See also, KALSCHEUER, Fiete. A Teoria Kantiana da Ponderação, A. T. G. Trivisonno (transl.) in: Revista de Estudos Constitucionais, Hermeneutica e Teoria do Direito, V. 13 N. 1 (2021): janeiro/abril.
[135] TRAVESSONI GOMES, Alexandre. *Kant e o pós-positivismo no direito.* 2006. P. 60. (Free translation).
[136] DWORKIN, Ronald. *Law´s Empire*. 1986. P. 245.
[137] For more about 'regulative ideal' see KANT, Immanuel. *Critique of Pure Reason*, W. S. Pluhar (transl.), Indianapolis, 1996. P. 518 and 619.
[138] DWORKIN, Ronald. *Law´s Empire*. 1986. P. 255.

1.3 Right Answers in Law

It is by understanding the integrity of law as a methodology that would extinguish conflicts of principles that a mistaken image is created about the right answer to a legal problem. Thus, the absence of conflicts would take Law to a level in which its decisions would be an expression of the harmonious coexistence of all the principles, the materials established and the historical context.

This conception creates a distorted vision of the objectivity of judicial decisions since there would be no margin of interpretative mobility, therefore unequivocal, uncontroversial.

The problem of a/one right answer is a problem about the objectivity of judicial decisions. As we can recall, for Hart and Kelsen, given the open texture of language and the abstractness of norms, Law would allow the judge to employ her subjectivity when the limits of what can be discovered from the promulgated legal material are reached[139]. Thus, as the Law would not provide resources for deciding beyond the formally institutionalized one, the interpreter would be free to decide the parameters that would guide his decision since the Law authorizes him to do so[140]. A theory that seeks to overcome legal positivism is a theory that overcomes subjectivism in judicial decisions by providing legal-decisional elements beyond those formally institutionalized.

The best argument against positivism would be, therefore, that for each legal case, only one answer can be given, once that there could not be a "certain margin for interpretative mobility". Unfortunately, a theory that proposes such a degree of objectivity for judicial decisions is either naïve or overly ambitious[141].

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[139] Herbert L. A. *The Concept of Law*. 1994. P. 137-40. HABERMAS, Jürgen. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. 1996. P. 202-3.
[140] KELSEN, Hans. *Pure Theory of Law*. 1967. P. 353-4.
[141] AFONSO DA SILVA, Virgílio. *Ponderação e objetividade na interpretação constitucional*. 2011. P. 367.

But the fact that one cannot propose that for any given judicial case there will always be a single right and univocal decision, since it is free from any "margin of interpretive mobility", does not mean that in a case there is no correct answer.

It means, to say that in some cases there is no *one* right answer does not mean to say that in such cases there is *none* right answers[142].

Dworkin himself understands that even if one takes Law as seriously as possible, this will not guarantee that the answer given will be right. Nonetheless, Understanding Law as Integrity and granting the Trump status to rights, in the conceptions seen above, assures citizens at least that their horizontal and vertical relationships will be a matter of justice and encourages them "to discuss as a community what justice requires these relationships to be"[143].

This raises the question of how objectivity in judicial decisions can be understood. Or, in another way, how much objectivity is possible in law?

The answer to such a question will be answered with a new triad.

This work assumes that the possible objectivity of judicial decisions depends on the union of three factors, the determination of the sense of adequacy, the possibility of intersubjective control and the predictability of decisions. These three elements are not completely independent one from another and, in most part of cases, work to support each other – besides, not always.

These three elements will be exposed in the next chapter with the support of two Brazilian authors, Alexandre Travessoni Gomes and Virgílio Afonso da Silva, and a German one, Matthias Klatt.

2. The Elements for a Non-Arbitrary Law

[142] HART, Herbert L. A. *The Concept of Law*. 1994. P. 252.
[143] DWORKIN, Ronald. A Matter of Principles. 1985. P. 32.

The problem of discretion in Law is the problem of arbitrary decisions – even if these two words have not the same concept -, it is to say, the problem that, when the generality of the norms leaves a range of decision-making possibilities open to the judge, she may take subjective moral criteria, political beliefs or personal choices to guide her decisions since the positively worded legal material does not clearly offer the answer.

The antonym of arbitrariness is not unambiguous, uncontroversial, neither 'immobility of interpretative margin', but yes, justified. Hence, a non-arbitrary Law is one in which judicial decision-making is guided by rational and legal elements, not restricted to positive law[144], so as to guide the judge to make a justified decision based on rational and legal criteria.

Justification through rational legal arguments, together with the exposure of them, is what leads to the possibility of intersubjective control of decisions and of the judiciary, creating predictability of decisions. The relation between these three elements does not happen only in this direction, but this explanation can provide a good overall vision of how they work together in a way to provide the demands of a possible objective decision-making.

The three elements discussed here do not necessarily lead to the adoption of proportionality, but they give us the tools to verify whether it can promote enough legal objectivity to be considered as a theory that overcomes decisionism and arbitrariness.

2.1 Determination of the Sense of Adequacy

The keywords in determining the sense of adequacy are "determination" and "adequacy". Adequacy means that the rules of law, abstract as they are, should be adequate/adapted to the peculiarities of the concrete case under analysis. This element was already present in the legal positivists of the last century.

[144] See KLATT, Matthias. *Taking Rights less Seriously. A Structural Analysis of Judicial Discretion*. 2007. P. 508-10. See also DWORKIN, Ronald. *Taking Rights Seriously*. 1977. P. 32-3.

What made their model of decision thus subjectivist was the lack of determination of this process of adequacy.

Determinism here means that such adequacy cannot be achieved without the aid of rational criteria to guide its course and that such criteria cannot be anything other than legal. This second is absent from the positivists. Although they recognized the need to adapt the legal norms to the concrete case, the legal positivists understood that, precisely because of their high degree of generality, these norms - especially the principles - would allow a variety of possible interpretations, and the judge could use relative moral principles to make her decision. Legal positivists, then, proposed an indeterminate sense of adequacy.

On the determination of the adequacy of the norms, Dalla Barba and Streck raise two claims, first is that historical and contextual elements of the hermeneutic reality of the interpreter are essential elements to guide their decision-making[145], second that the recourse to abstract elements - such as Habermas's rational criteria of practical validity - cannot promote such guidance[146].

As we shall see, the authors are wrong about the latter but right about the former; despite being right about the former, they are also wrong in saying that proportionality denies it.

As Travessoni Gomes points out[147], to overcome such discretion of legal positivists, it is necessary to determine the sense of adequacy of the norms. This means, precisely, to establish how to obtain better or worse answers in the adequacy of the norms, but without resorting to extra-legal criteria[148].

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[145] STRECK, Lenio Luiz. *Verdade e Consenso: constituição, hermeneutica e teorias discursivas*. 2011. P. 225-6. DALLA BARBA, Rafael Giorgio. *Nas Fronteiras da Argumentacão: A Discricionariedade Judicial na Teoria Discursiva de Robert Alexy.* 2018. P. 132-3.

[146] STRECK, Lenio Luiz. *Verdade e Consenso: constituição, hermeneutica e teorias discursivas*. 2011. P. 124. DALLA BARBA, Rafael Giorgio. *Nas Fronteiras da Argumentacão: A Discricionariedade Judicial na Teoria Discursiva de Robert Alexy.* 2018. P. 129-31.

[147] TRAVESSONI GOMES, Alexandre. *Kant e o pós-positivismo no direito.* 2006. P. 56-62.

[148] See also KLATT, Matthias. *Taking Rights less Seriously. A Structural Analysis of Judicial Discretion*. 2007. P. 510-1.

A theory that determines the sense of adequacy of norms needs to be a normative theory, not merely a descriptive one[149]. A normative theory is a theory that sets out what is permitted, forbidden or obliged to do. Such a theory is expressed by normative statements, which need to be justified by arguments, which should be evaluated as more or less correct according to criteria of practical rationality[150].

The task of determining the sense of adequacy is, therefore, an argumentative exercise. Whoever raises an argument must claim that it is justifiable, that is, true or correct[151]. Therefore, the determination of the sense of adequacy necessarily demands claims of correctness in both the ideal and real dimensions, so that factual and rational criteria of validity are necessary.

This is the reason why Streck is wrong to propose that elements of argumentative evaluation, even if abstract, cannot assist in the decision-making process. According to him, one cannot evaluate only texts, or abstract statements, because in them "the structuring element of understanding is already covered"[152], which would be given by hermeneutics. But this understanding also occurs argumentatively, as well as the decision that is taken from it, therefore, if one were to give up elements that assessed the rational validity of arguments, or also their quality. The decision-making process would be derived not from arguments but from statements about the state of mind; that is, a mere expression of "I understand it to be so"[153].

The very arguments from principles, which Streck repeatedly highlights, would completely lose their dimension of political morality if they could not be assessed and criticized on the basis of criteria of rationality that, ultimately, possess some degree of abstraction and correctness.

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[149] TRAVESSONI GOMES, Alexandre. *Kant e o pós-positivismo no direito.* 2006. P. 58.
[150] HABERMAS, Jürgen. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. 1996. P. 226.
[151] ALEXY, Robert. *A Discourse-Theoretical Conception of Practical Reason*. 1992. P. 240.
[152] STRECK, Lenio Luiz. *Verdade e Consenso: constituição, hermeneutica e teorias discursivas*. 2011. P. 311. Free translation.
[153] It could be said that giving up rational validity criteria to judge argumentation would bring Streck's theory closer to an intuitionist theory. For criticism about intuitionism see: ALEXY, Robert. *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification*. 2010. P. 37-8.

One of the challenges of a theory that seeks to determine the sense of adequacy of norms is thus to establish the need for these elements as well as how they relate to each other[154]. We may see how different theories connect and relate these elements, and despite having features in common, they have different formats and methods, for instance, in Kant[155], Dworkin[156], and Habermas[157].

2.2 Intersubjective Control

The possibility of an intersubjective control of judicial decisions is closely linked to the argumentative burden and the exposition of the presumptions that support the arguments pronounced. Intersubjective control is a necessary element for the possible objectivity of Law because, given Law as an argumentative practice, it is indispensable that such arguments may be susceptible to criticism, and for this, they need to be duly exposed.

For Virgílio Afonso da Silva the possibility of intersubjective control can be realized through two requirements/aspects, one methodological and the other theoretical[158].

The methodological aspect is directly related to the grounding of the evaluations and judgements made in the decision. This argumentative burden ensures that the authoritative decisions of judicial bodies are not mere preferences of the judges but express legitimate reasons that can be controlled and criticised by the population[159]in order to create a public dialogue of reasons.

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[154] One can see this establishment of this relation on Dworkin, for instance, *A Matter of Principles*. 1985. P. 34-5.
[155] KANT, Immanuel. *Metaphysics of Morals*, M. Gregor (transl.), Cambridge ; New York : Cambridge University Press, 1991.
[156] DWORKIN, Ronald. *Law´s Empire*. 1986.
[157] HABERMAS, Jürgen. *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*. 1996.
[158] AFONSO DA SILVA, Virgílio. *Ponderação e objetividade na interpretação constitucional*. 2011. P. 368-75.
[159] *Idem. Ibidem.* P. 368.

The methodological aspect aims to show argumentatively how the decisive steps for the decision have been carried out and are based[160].

The methodological aspect cannot, however, prevent disagreements regarding the evaluations made, but this is not decisive for its success and, therefore, its necessity. What is decisive in this aspect is that the disagreements - which will inevitably arise at various moments - are founded and liable to criticism by other stakeholders[161].

Virgilio gives us an enlightening example of the methodological aspect based on the Caroline von Hannover case, judged by the German Federal Constitutional Court[162] and later by the European Court of Human Rights[163]. Both cases dealt with the exposure of photos of Caroline in media vehicles without her consent, which made her feel that her privacy had been violated. The German Court made a ranking based on the characteristics of each photo in order to decide which ones would constitute a restriction to the fundamental rights in issue. Such gradings were accompanied by reasons that justified the degree of privacy of the photos, thus exposing and demonstrating the grounds and reasoning that guided its decision. Dissatisfied with the result, the author appeals to the European Court of Human Rights, which reaches a different result, judging that the German Court did not sufficiently protect Princess Caroline's right to privacy.

The different result was also accompanied by several reasons to support it. Therefore, it can be seen that the difference in result did not come from a simple divergence of preferences but of reasons, and thus the possibility of rational dialogues and intersubjective controls is created[164].

The second aspect for the possibility of intersubjective control, according to Virgilio, is the theoretical one. The theoretical aspect concerns the exposition of the theoretical premises

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[160] *Idem. Ibidem.* P. 372.
[161] *Idem. Ibidem.* P. 370.
[162] BVerfGE 101, 361.
[163] Caroline von Hannover v. Germany, no 59320/2000.
[164] AFONSO DA SILVA, Virgílio. *Ponderação e objetividade na interpretação constitucional*. 2011. P. 372.

that are present in the judgements. The theoretical aspect requires that the substantial assumptions on fundamental rights that underlie the application of the method used should be as explicit as possible[165].

"Thus, in the theoretical aspect, the main problem is not related to the analysis of the concrete case, but to the theoretical premises from which it is departed to solve it"[166]. According to him, every method will be filled with substantial premises about fundamental rights at the moment of applying and, in this way, for the arguments used by the Court to be satisfactorily understood, it is necessary that such premises are clear in the decision[167].

This is because more libertarian theoretical premises, for example, will to a large extent lead to different evaluations than more paternalistic theoretical premises, and if they are not properly clear to others, the quality of the reasoning and of intersubjective control is drastically reduced by obscuration in the method[168].

The author also points out that, as well as the evaluation made in the methodological aspect, the choice of a theoretical foundation will not be free of disagreements or some degree of subjectivity, but the theoretical aspect is less related to these issues and more to the exposition of such premises in order to make the argument clearer, understandable and able to receive criticism[169].

2.3 Predictability

The third element for the possible objectivity of the Law is related to what Virgilio calls the predictability of decisions, is exposed by him as the institutional aspect and is divided into two ambits: the respect for precedents and social control.

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[165] *Idem. Ibidem.*
[166] *Idem. Ibidem.*
[167] *Idem. Ibidem.*
[168] *Idem. Ibidem.* P. 374.
[169] *Idem. Ibidem.* P. 375.

The possibility of foreseeing decisions, at least at some level, is an indispensable factor for a reasonable degree of objectivity in Law. It is closely related to legal certainty and is present in many criticisms of proportionality, for example. Thus, establishing parameters for an objective Law necessarily involves demanding factors that corroborate with decision predictability.

As the first element that generates predictability, Virgílio highlights the respect for precedents. According to this demand, the longer the understanding of a court on a certain matter is, the greater the argumentative burden to change it will be, which significantly reduces the interpreter's subjective freedom to judge[170]. The power to modify already established and expected decisions on a given case is directly proportional to the need to argumentatively justify such a change - and as we have seen, rational justification requires that such arguments can be accepted by other individuals, which prevents something from being grounded on particular reasons/not suitable for debate.

The use of precedents in a decision where it is possible to use them is not even a matter of option but of necessity, as well as the argumentative burden to overcome it[171].

The ambit of respect for precedents is one of the elements that substantively fills the abstract normative statements of Law[172].

The second element highlighted by Virgilio in the institutional aspect is the social control, which is characterised by the monitoring, control, criticism, discussions and demands concerning judicial decisions, not by other judicial bodies, but by the general public, especially "the academic and legal community and the press"[173]. Since it is an external control, it is also closely related to the transparency and reasoning of the decisions[174].

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[170] *Idem. Ibidem.* P. 376.
[171] ALEXY, Robert. *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification*. 2010. P. 274-9
[172] AFONSO DA SILVA, Virgílio. *Ponderação e objetividade na interpretação constitucional*. 2011. P. 377-378.
[173] *Idem. Ibidem.* P. 377.
[174] *Idem. Ibidem.* P. 378.

The more a decision can and is actually controlled, the lower the risk of the main factor generating legal unpredictability, the ad hoc decisions[175].

With this, the three elements necessary for a theory to be able to propose a possible degree of objectivity in judicial decision-making become clear. These three elements, determination of the sense of adequacy, intersubjective control and predictability, are not exhaustive, and therefore do not exclude the possibility of other elements that generate objectivity being taken into consideration, but they seem to be the indispensable ones.

[175] *Idem. Ibidem.*

IV. Proportionality and Rationality

Not much has been said about proportionality up to this point. The objectives pursued so far were, first, to expose the criticism that Streck's hermeneutic critique of Law directs to proportionality, especially those presented by Dalla Barba; these have as a general point the understanding that proportionality is not able to overcome positivist decisionism since it would maintain the possibility of a "certain margin of interpretative mobility". Then, since the hermeneutic critique has in Dworkin its main juridical figure and source of arguments, it was sought in the theory of the referred author resources to verify how much Dworkin's theory can be opposed to the proportionality theory, reaching the conclusion that, although Dworkin's work enables some interpretative variety, even more, if seen in a systematic way, it cannot be opposed to proportionality in the patterns that the hermeneutic critique tries to do[176].

The reading that Streck and Dalla Barba offer on Dworkin is neither good nor consistent[177] with what the author proposes. In fact, most of Streck and Dalla Barba's criticisms of proportionality, through Dworkinian theory, are denied by Dworkin himself[178]. This happens because such criticisms are based on handpicked excerpts from Dworkin's writings, but which, if read together with the rest of his work, mean something quite different from the view exposed by the authors[179].

Their misreading of Dworkin is well exposed in their conceptions of three Dworkinian notions, namely the idea of rights as trumps and Law as integrity, which leads to a problematic conception of the right answer, which means, the possible objectivity in Law.

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[176] See Chapter III, 1.1, 1.2, 1.3.
[177] Consistency, here, also understood in a very Dworkinian sense (see chapter III, 1.2).
[178] See Chapter III, 1.1, 1.2 and 1.3.
[179] It needs to be clear that, again, it is much difficult to establish one single interpretation of Dworkin´s theory, but some interpretations he expressly deny cannot be part of these possible interpretations.

The overcoming of positivist decisionism in Law is intimately related to the answer about what objectivity is possible in legal decisioning, for this reason, a proposal was finally built, based not only on Dworkin but also on other authors, about which elements a theory of Law needs to incorporate in order to overcome the arbitrariness existing in the positivist proposals of the last century[180].

In this sense, it was found that the three key elements that a theory should possess to achieve this goal are the determination of the sense of adequacy, the possibility of intersubjective control and predictability. These elements are not exhaustive and do not guarantee full objectivity if it is understood as synonymous with an unequivocal answer, but they do establish the general elements that a theory should supply in order to guarantee the degree of possible objectivity in Law.

Streck and Dalla Barba criticize proportionality exactly for the element of objectivity, which suggests that either they understand that their method has almost absolute objectivity, or that proportionality cannot meet the criteria mentioned above. As will be shown, not only does proportionality meet the aforementioned criteria in a largely coherent way, but also that the hermeneutic critique of Law cannot avoid its use.

Thus, this last chapter will be divided into two sections, the first will expose the premises and the use of proportionality itself, while the second will deal with the theory of legal argumentation, developed by Robert Alexy, which - as will be demonstrated - is an indispensable presupposition to proportionality. Dalla Barba's first two criticisms will be answered in the first section in the development of the respective parts of the theory, and the third and fourth criticisms will be answered in the second section in the same way. Beyond it,

[180] See chapter III 2.1, 2.2, 2.3.

the meeting of proportionality and the three criteria for objectiveness in Law will also be highlighted during these passages.

From this, one may reach the conclusion which Dalla Barba's general criticism that proportionality is not able to overcome positivist decisionism could not be emptier.

1. The Meaning of Proportionality

1.1 Proportionality and The Theory of Principles

In order to correctly understand the meaning of the proportionality test, it is necessary to understand the theory of principles and make it clear that the existence of proportionality analytically requires the concept of principles as optimization commandments, and vice versa. If principles are considered as optimization commands, it is necessary to reach the proportionality test, as well, if one use proportionality, the principles are being used as optimization.

Thus, I shall start by explaining what this concept of principles consists of, as well as why optimality is indispensable if we want to take rights seriously.

The theory of principles starts from the premise that between principles and rules there is a logical distinction, as in Dworkin[181]. This means that both have different normative structures. Rules are understood as definite commands, and therefore, are applied in an all-or-nothing fashion since they possess only the dimension of validity[182]. Therefore, there is no way to comply with a rule partially, either it is complied with in its entirety, or it is not.

[181] See ALEXY, Robert. *Sobre o conceito de princípio jurídico*. 2015. P. 168-74.
[182] ALEXY, Robert. *On the Structure of Legal Principles*. 2000. P. 295.

This causes a specific way to solve a problem in which different rules determine conflicting obligations. When this occurs, such conflict is resolved only in the field of validity and can be solved from two possibilities. The first one concerns when one of the rules can be considered as an exception to the other, so the narrower rule is introduced as an exception to the more general rule[183].

Both Dworkin and Alexy give examples in this respect. The Dworkinian example refers to two rules in the baseball game. According to him, there is a rule in this sport that states that if the batter misses a beat three times, he is removed from the game. This is a rule read in isolation. However, according to another rule, if on the third batter's error the catcher drops the ball, the former is not out[184].

Dworkin then says that, since the more restrictive rule can be included as an exception to the first one, both can retain their validity, which would result in the duty to read both rules as one complete statement[185], one might say the following: "if the batter misses the ball three times he is out unless on the third error the catcher drops the ball".

Alexy also has an example of this hypothesis. He offers a mental experiment on the rules of a school, in which, among them, one - more comprehensive - rule states that children may not leave the school environment before time X. At the same time, another rule states that in case of fire, everyone must leave the school grounds. In this case, if there is a fire in the school before time X, both rules would require different measures[186]. However, the conflict can be resolved by including the second rule as an exception to the first, with a statement such as "no child shall leave the school grounds before time X except in the case of fire".

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[183] ALEXY, Robert. *A Theory of Constitutional Rights*. 2010. P. 49.
[184] DWORKIN, Ronald. *Taking Rights Seriously*. 1977. P. 24-5.
[185] *Idem. Ibidem.* P. 25.
[186] ALEXY, Robert. *A Theory of Constitutional Rights*. 2010. P. 49.

As can be seen, the inclusion of one of the rules as an exception to the other allows both to be read as a single statement, even if there are two or more exception clauses for the broad rule, as in the school example, other exceptions such as "if the child's parents pick her up early", or "if the child is not doing well and needs to go to the hospital" The exceptions would be an integral part of the rules, as Alexy says[187]. On the other hand, the principles cannot announce all of their exceptions[188].

But before dealing with principles, the second form of resolution in the conflict between rules should be highlighted. As rules have only the dimension of validity, if none can be conceived as an exception to the other, one of them should be expurgated from the legal system, i.e., it loses its validity and should no longer be applied. The way to determine which of the rules will be excluded from the Law in these hypotheses is from the classical criteria of validity such as '*lex posterior derogate legi priori*' or '*lex specialis derogate legi generali*'[189].

Unlike rules, principles act not only on the scope of validity, but also on weight. This means that they can be realized to different degrees according to the peculiarities of the case in which they are applied. According to this conception, the principles would not be a definite command as rules, but rather an optimization command that requires to be realized to the greatest extent possible given the factual and legal circumstances of the concrete case[190]. The factual circumstances are related to what can empirically be done, while the legal circumstances are related to the conflicting principles.

Therefore, distinct to rules, when two principles in a given case require different behaviours, neither of them is excluded from the Law, but only a relationship of conditioned precedence is created regarding that case[191].

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[187] ALEXY, Robert. *Sobre o conceito de princípio jurídico*. 2015. P.169.
[188] DWORKIN, Ronald. *Taking Rights Seriously*. 1977. P. 25-6.
[189] ALEXY, Robert. *A Theory of Constitutional Rights*. 2010. P. 49.
[190] *Idem. Idibem.* P. 47-8.
[191] *Idem. Ibidem.* 51-2.

In a conflict between principles, then, as they are optimization commands, some variables must be considered to verify if the optimization nature of the principles was respected.

Imagine a Measure M1 elaborated by a parliamentary organ, which seeks to promote principle P1, for instance, the promotion of public economic interest. This measure, however, restricts principle P2, which guarantees professional freedom. Taking principles as optimizing commandments, we must first verify whether M1 is suitable to promote P1, otherwise, we would be restricting P2 without any justifiable reason. This first test is called the suitability test[192]. In a positive case, that is, if it is verified that M1 is, in fact, able to promote the realization of P1, it is necessary to verify whether M1, among all the other measures equally able to promote the realization of P1, is also the one that least restricts P2, This is because if, among M1 and M2, both equally capable of promoting P1, and that M2 restricts P2 less, then P1 does not require the adoption of either M1 or M2 specifically, whereas P2 requires the adoption of M2. This second test is called the necessity test[193].

Adequacy and necessity refer to the factual aspect of proportionality.

There still remains, however, a last test of proportionality, referring to its legal aspect characterized by the colliding principle, namely, the balancing. According to this test, the proportionality of a measure M1 can only be justified if the degree of promotion of P1 is greater than, or at least equal to, the degree of restriction caused to P2. This is because, since both P1 and P2 are principles that should be realised to the greatest extent possible, a measure M1 that promotes the desired principle less than it restricts the other cannot be justified.

This demand is expressed by Alexy as the law of balancing from the following statement[194]:

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[192] *Idem. Ibidem.* P. 68-9.
[193] *Idem. Ibidem.* P. 67-8.
[194] ALEXY, Robert. *Constitutional Rights, Balancing, and Rationality*. 2003. P. 136.

"The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other"

These three subtests form the overall structure of the proportionality test and, as shown, are logically deduced - therefore required - from the optimality structure of principles.

It is also necessary to establish that each of these subtests must be followed from this order[195], and that it is not possible to analyze necessity before adequacy, for example, because an inadequate measure can be neither necessary nor unnecessary. The same happens with balancing, since an inadequate or unnecessary measure cannot be either proportional or disproportionate. Thus, the analysis of an element is conditioned to the overcoming of the previous element.

From the proportionality test, it can be seen how principles, unlike rules, are performed in different degrees, which is justified by its requirement of optimization. But a very relevant factor also derives from this: the preference of one principle over the other in a given case does not change the validity of either one of them in future cases. They are not expunged from the legal system because they are prevailed over in a certain case in favour of another, as happens with rules, but only establish a precedence relationship conditioned to the characteristics of that moment.

Alexy explains this relation of conditioned precedence in the following formula[196]:

(P1**P**P1) C

This formula expresses the idea that the principle P1 takes precedence **P** on principle P2 under the factual conditions C, which, on different factual conditions, may generate the opposite precedence relationship.

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[195] AFONSO DA SILVA, Virgílio. *O proporcional e o razoável*. 2002. P. 30.
[196] ALEXY, Robert. *A Theory of Constitutional Rights*. 2010. P. 51-2.

In Dworkinian terms, one could say that " we might say, the trump gets *trumped* not by an ordinary justification but by a *higher trump*."[197] where 'sufficiently justified' can be understood as 'given the reasons relative to the concrete aspects of the case in question'.

To better understand how proportionality works, one has to take a closer look at the Law of Balancing. In short, it says that the more one principle is restricted, the more the other principle should be promoted. From this, we can see that the Law of Balancing consists of an examination with three other steps: first, the degree of restriction of P1 is evaluated, then the degree of promotion of P2. Finally, the two values are related to see if what is gained justifies what is lost[198].

The rationality of balancing depends, therefore, on the ability to make rational judgments on the degree of interference and promotion of principles. According to Alexy, such variables may be fulfilled with light, moderate or serious degrees of interference[199]. Some examples may demonstrate the author's proposal.

Here we can mention one of the dozens of examples that Alexy provides in this respect, the Tobacco case[200], judged by the Federal Constitutional Court of Germany. On this occasion, the Court decided that the obligation to display warnings about the danger of smoking on tobacco packages would be a merely light restriction on the right of occupation, as opposed to, for example, a total ban on the sale of cigarettes, which would be a serious interference. Between these two extremes, other moderate options exist. On the other hand, if the health risk of smoking is serious, the protection of this right should also be considered serious. Thus, a serious risk to the right to health in the face of a merely light restriction on the right to

[197] DWORKIN, Ronald. *Justice for Hedgehogs*. 2011. P. 473. (No griffes on the original).
[198] ALEXY, Robert. *Constitutional Rights, Balancing, and Rationality*. 2003. P. 136.
[199] *Idem. Ibidem.*
[200] BVerfGE 95, 173.

occupation led the Court to decide - as could not be otherwise - to uphold the legal requirement of exposure to such risks[201].

One can also mention the Brokdorf case[202]. On this occasion, protests against the construction of the nuclear power plant in Brokdorf were organized, and, according to police surveys, a considerable number of the expected 50,000 participants were prepared to commit acts of violence and occupy and destroy the plant. The local administrative authorities then issued an act prohibiting the protests that were to take place there. There is a conflict between public safety and public property on one side and the freedom of assembly on the other.

A protest that causes a light restriction on public security and public property could not include acts of violence planned by any part of the demonstrators, while a serious restriction to those principles would occur, for example, if the organizers of the movement themselves or a significant and influential part of the population were willing to do so, or even if the destruction of the building was the only or main objective of the assembly. However, between these two situations, there is a range of hypotheses of only moderate risk. On the other hand, the total prohibition of assemblies, even for those who did not intend to carry out violent acts, constitutes a serious restriction on the freedom of assembly, since measures to contain violent acts could be considered a light restriction, or even policing, searches and actions prior to the assembly to control it would be considered moderate restrictions. Thus, we have a severe restriction of the freedom of assembly in opposition to a moderate promotion of the protection of public safety and public property. This was the understanding of the Federal Constitutional Court when reforming the previous decisions that maintained the prohibition.

As established before, it is possible that there are disagreements as to the value assigned to each variable. But what cannot be pointed out is a lack of rationality or possibility of

[201] ALEXY, Robert. *Constitutional Rights, Balancing, and Rationality*. 2003. P. 136-7.
[202] BVerfGE 69, 315

intersubjective control, given that the arguments on which the assigned values are based are duly justified by the Court[203]. If it is possible to make practical judgements about public rationality, then it is possible to make judgements about degrees of interference with principles and values.

It is important to emphasize that such judgments do not involve the measurement of rights, principles, values or standards, since they are incommensurable objects. This, however, does not prevent the possibility of comparing these values in a rational way by having very specific comparison values and criteria such as optimization commands and degrees of interference[204].

It is now necessary to face the following question: as it has been seen that comprehending principles as optimization commands necessarily leads to proportionality and vice versa, one could say that the example brought by Streck of the Spanish Constitutional Court judgment[205] would be a good argument to prove that proportionality is not used in such cases involving principles and, therefore, proportionality would not be necessary, which would enable a view on principles different from optimization, such as Streck's view, according to which principles would not be structurally different from rules, but only have a different function, to guide their reading in order to avoid "alienated interpretations"[206].

To prove the indispensable presence of proportionality would then prove the character of the principles as optimization commands.

Streck's argument seems convincing: in that case, the Spanish Court used the principle of presumption of innocence (P1) to guide the interpretation of the rule that forbade the traffic

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[203] AFONSO DA SILVA, Virgílio. *Ponderação e objetividade na interpretação constitucional*. 2011. P. 372. See also chapter III, 1.2 of the work.
[204] For more about it see AFONSO DA SILVA, Virgílio. *Comparing the incommensurable: constitutional principles, balancing and rational decision*, in: Oxford Journal of Legal Studies, 31 (2), pp. 273–301, 2011.
[205] See chapter II, 1.2.
[206] STRECK, Lenio Luiz. *Verdade e Consenso: constituição, hermeneutica e teorias discursivas*. 2011. P. (Free translation).

with lockpickers - among other instruments in residential areas. Streck says that the Court was right in its judgement since to carry instruments suitable for theft "is not a sufficient reason to fit the criminal type", since "mere conducts cannot be punished" - we may call this first reason R1.1 - and that "nor can one punish someone based on mere presumptions" - R1.2. The author, however, ignores that reasons such as the duty to protect property, because it generally comes as the product of work and this requires effort and time of life (R2.1) or that property represents much to its owners (R2.2), both reasons that would lead such rule to be 'guided' by another principle, the principle of protection of property (P2).

This second principle has also been recognized by the Court as demanding a different attitude from the one they have decided upon, but how is this possible to say that P1 should be used instead of P2? Only if we can consider that the reasons supporting P1 were more relevant than the reasons supporting P2, so that the promotion of the presumption of innocence was more important - we can say to a serious degree - than the protection of property in these specific conditions, since the latter was being protected only in a light degree.

As we can see, proportionality and optimization are an argument present in Streck's own example; an argument that is carefully hidden or ignored by the author.

We can see also that proportionality becomes present in every argument regarding the importance involving fundamental rights, since restricting or promoting them occurs in the field of justification - which necessarily raises a claim of correctness, as we shall see in the next section - and justification is given by arguments and the forms of argument are given through inferential discursive forms, among which is balancing[207]. One may say, 'balancing begins indispensably when one begins to argue in favour of the preference of one principle over another'.

[207] ALEXY, Robert. *Constitutional Rights, Balancing, and Rationality*. 2003. P. 139.

This is Law as Integrity, taking all the rights that are part of the case under consideration. This is considering rights as trumps, not ignoring the importance of justifying their removal in each case.

Taking rights seriously is, therefore, to take all rights that are part of the case under consideration (Integrity) and to fulfil the argumentative burden of setting aside one in the detriment of the other. Therefore, taking rights seriously is definitely connected to justification, which, in turn, is connected to proportionality[208] - this being a form of argument - and that "proportionality test is the central means to establish whether infringements with human rights are justified. It is the main instrument to assess whether the state's duty to 'justify its decisions to those who raise ... grievances' has been fulfilled"[209].

The arguments in favour of the protection of property would lead the Spanish court to a completely different decision, which would be in line with what Streck proposes since, for him, the adequate decision to the constitution does not need to be the only, neither the best one[210]. Thus, the determination of the sense of adequacy of the norms to the case would not be present, since the choice of which reasons would be preponderant would be completely arbitrary.

On the other hand, considering principles as optimization commands, which cannot be set aside or ignored without due justification and relating their respective degrees of interference in an argumentative manner does determine such sense of adequacy, since it directs the decision by means of legal arguments under the aegis of the claim of discursive correctness - which will be the second partial answer in the second section - in a way that enables the

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[208] For more about that see KLATT, Matthias. *Proportionality and Justification*, *in*: Herlin-Karnell E, Klatt M (eds), Morales Zúñiga H A (assistant ed.), Constitutionalism justified: Rainer Forst in discourse (Oxford University Press 2019) 159-196.

[209] KLATT, Matthias. *Proportionality and Justification*. P. 170.

[210] STRECK, Lênio Luiz. *A efetividade dos direitos humanos e fundamentais em terrae brasilis (a necessidade de uma resposta adequada à constituição)*. 2016. P. 96. In a free translation "In this sense, I understand that there is a fundamental right to obtain an adequate response to the Constitution, which is neither the only nor the best one."

intersubjective control from other individuals, as such arguments, being exposed, can be observed and criticized, in addition, creating judgement predictability once decisive arguments for such a case of gradation are protected in new judgments by the argumentative burden of overcoming precedent.

The first Dalla Barba´s criticism that one cannot split rules and principles is impossible once between them there is a mere difference of functions where the latters guide the interpretation of the formers, because he and Streck are unable to explain how to proceed when different principles demand different ‘guidance’ for a rule. So, determining each of them will guide the interpretation of a rule demand balancing, which demands to consider principles as optimization commands.

1.2 The Matter of Contextuality

Having overcome the criticism according to which principles and rules could not be structurally separated, from the reason that balancing is an indispensable issue in cases in which fundamental rights require different interpretations and consequences in the concrete case. This is demonstrated by the fact that disregarding the reasons that would lead, in Streck's example, to a decision in favour of the protection of property instead of the presumption of innocence without giving reasons for such a decision would remove the trump/right character of the former. When the reasons for why R1.1 and R1.2 are more relevant than R2.1 and R2.2 are given, one is balancing and, therefore, treating principles as optimization commands structurally different from rules.

At this point, we should talk a little more about rules and their differences - or lack of them - with principles.

As pointed out in the previous topic, rules, as definitive commands are applied in an all-or-nothing fashion. That is, a rule is either applied in its entirety, or it is not applied at all. This implies that the method of application of rules is the subsumption, as opposed to principles applied by proportionality[211].

Applying a rule based on subsumption implies that the final decision (conclusion) will be the result of a series of inferences from a series of premises. This decision follows, therefore, a deductive/logical reasoning[212].

Based on this observation, Dalla Barba criticizes the theory of principles by saying that the subsumption could not be considered a coherently legal method for the application of rules. This is because, according to him, as the subsumption would consist in a method in which a conclusion would be deduced from the inference of a major premise over a minor premise, where the major premise would be the rule and the minor the concrete facts, it would ignore all the complexity of the concrete case and would remove from the rule (major premise) all its historical contextuality by treating it only as an abstract statement[213].

It is not possible to affirm with certainty - he does not state any reason - what led Dalla Barba to imagine that in subsumption, there would only be a major premise, a minor premise and a conclusion. Perhaps because the most novice examples of this method do so, such as the best-known one, made by Mill[214]:

> "All men are mortal;
> Socrates is a man;
> Therefore, Socrates is mortal."

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[211] ALEXY, Robert. *On Balancing and Subsumption. A Structural Comparison*. 2003. P. 433.
[212] *Idem. Ibidem.* P. 433-5.
[213] DALLA BARBA, Rafael Giorgio. *Nas Fronteiras da Argumentacão: A Discricionariedade Judicial na Teoria Discursiva de Robert Alexy.* 2018. P. 110-1.
[214] *A System of Logic, Ratiocinative and Inductive, Being a Connected View of the Principles of Evidence, and the Methods of Scientific Investigation*. P. 190.

This argumentative form - because subsumption is also a form of argument[215] - would be applied in Law as something like this:

Everyone who commits murder must be imprisoned;
'X' committed murder;
Therefore, 'X' must be arrested.

Perhaps Dalla Barba defends this simplistic image of subsumption by his conception of the ancient legal formalists.

However, this is definitely not a coherent image of the subsumption method, and this starts by the fact that subsuming is not restricted to an inference from a major to a minor premise but can be performed from a series of inferences with several major and minor premises which support the complexity of the peculiarities of each case in order to propose a coherent concrete decision.

This leads us to Dalla Barba's second criticism of subsumption, according to which it is limited to applying abstract statements to concrete cases, ignoring the interpretative historicity of the context in which it is applied. His argument, resorting to Heidegger, is that we cannot interpret purely abstract statements, but always insert in a historical contextuality, so that, as the subsumption would propose this way of understanding the rules, as mere abstract statements to be subsumed to a case, it would reduce the application of the rules to mere mechanical exercises, suffocating the Law of its facticity[216].

[215] ALEXY, Robert. *On Balancing and Subsumption. A Structural Comparison*. 2003. P. 433.
[216] One might remember whats was said on chapter II, 2 of this work: "Dalla Barba´s criticism, then, can be expressed by the following: Since subsumption operates on the basis of two premises, one of which consists in abstract statements, it reduces the complexity of the concrete case by removing from the interpretation the historical and contextual dimension in which the interpreter and the legal community are inserted, creating 'asphyxiated' decisions."

The curious thing is that the answer to such criticism consists exactly in applying something that Dalla Barba and Streck emphasize countless times, the distinction between text and norm.

Virgílio Afonso da Silva offers an excellent form of response to such criticism. Under his arguments, the application to a case by means of both subsumption and balancing is performed on the basis of norms, not texts[217]. A text such as "Without prejudice to other guarantees assured the taxpayer, the Union, States, Federal District and Counties are prohibited from levying taxes on books, newspapers, periodicals and paper intended for the printing thereof"[218] expresses a rule, namely that it is prohibited to tax those materials. But such rule may be expressed by several other texts, which will become a norm – the same one - after their due interpretation in its various aspects[219].

Therefore, as both the subsumption and the proportionality are methods of norms application, not of simple texts, it is a mistake to propose that the first would consist in applying abstract concepts to concrete cases - which would be impossible - as this would mean that one would be applying texts, but texts are not applied, rather the norms resulting from the interpretation of those.

Alexy himself recognises that 'consideration of all circumstances' is an indispensable part of the interpretation of any norm, the difference would be found, after such interpretation, in the fact of whether the norm - the result of the interpretation of a text considering all circumstances - can be applied in degrees - and in this case, it is a principle -, or not - being a rule[220].

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[217] AFONSO DA SILVA. Virgílio. *Regras e Princípios: mitos e equívocos acerca de uma distinção*. 2003. P. 617.
[218] Free translation.
[219] *Idem. Ibidem*. P. 616.
[220] ALEXY, Robert. *On the Structure of Legal Principles*. 2000. P. 299-300.

To summarize the argument, it can be said that interpreting something considering all the circumstances - and therefore obviously the facticity and historicity of the interpreter's context - is a characteristic of any norm, whether it is a rule or principle, and as subsumption and proportionality are methods of applying norms, not texts, both take into account the facticity of the Law so that what will differentiate them is not how much one should be interpreted more than the other, but the form of application[221].

With this, it is clear that the theory of principles does not propose an 'automatic application' of the rules in order to create a barrier to political morality, so as it does not move Alexy away from Dworkin - at least in this regard - as Dalla Barba supposes.

2. Balancing v. Trading – The Matter of Legal Argumentation

At this point, having overcome the criticism about the impossibility of structural separation between principles and rules, since it does not answer how one would decide which principle would guide the interpretation of a rule when two different ones demand different results, leading to having to treat them as optimization commandments if one wants to take them seriously, and also showing that interpreting is a characteristic of every norm, whether it is a rule or a principle, and that this cannot be an argument against subsumption, since both it and proportionality are methods of interpreting norms, not mere texts, we reach the point of facing Dalla Barba's two last criticisms to proportionality, namely: that it would open the decision to the interpreter's subjectivity (third criticism) since it would consist in a mere empty procedure (fourth criticism).

[221] AFONSO DA SILVA. Virgílio. *Regras e Princípios: mitos e equívocos acerca de uma distinção*. 2003. P. 616-7.

Both criticisms will be treated together since they are related to the same issue: the possibility of making substantial rational judgments by means of a theory of argumentation applied to the Law.

It follows that in order to answer these criticisms of proportionality, it is first necessary to explain what the theory of legal argumentation developed by Robert Alexy consists of and how it is a complementary and indispensable element to proportionality.

The theory of legal argumentation is, therefore, what not only removes subjectivity from legal decisions but also gives content to proportionality. This is what we shall now do.

2.1 Proportionality and the rational discourse

As seen before, the rationality of proportionality necessarily depends on the possibility of proposing rational judgments on the degree of interference of the principles at stake and on the relationship between them. The above demonstrations show that this is possible, however, in a certain sense "intuitively", that is, the values exposed in the examples cited really seem to be rational, and they are. But for such a demonstration to carry a more convincing argumentative and justificatory weight, some more analytical explorations on the idea of rationality are necessary.

In order to answer how rational judgments are possible, one must first ask the question: what are rational judgments about?

Rational judgements are made by means of affirmative statements, which claim to be true or correct[222]. The statements of truth deal with theoretical reason and those of correctness with practical reason, so only correctness will be discussed here.

[222] ALEXY, Robert. *A Discourse-Theoretical Conception of Practical Reason*. 1992. P. 240.

He who makes an assertion must be able to maintain that there are reasons to support it. Whoever makes an assertion saying, at the same time, that there are no reasons to support it, is in fact, not making any assertion at all[223]; this is what Alexy calls a performative contradiction[224].

From this, we arrive at two initial conclusions, firstly that rational judgements are given by means of affirmative statements, which suppose that there are reasons that support them, and secondly, that rationality is communicative.

To say that rationality is communicative is due to the fact that the existence of reasons that support an affirmative statement only makes sense if such reasons can be demanded and questioned, which requires discourse partners. Practical rationality, therefore, is only fully possible discursively[225].

Another issue appears at this point, from the need to provide reasons for an assertion, it is also necessary to presuppose that the other participants in the discourse can also accept them as correct; therefore, practical reasoning is realized through argumentation (between the participants in the discourse), not negotiation or decision[226].

Argumentation, in turn, presupposes certain requirements in order, first, to guarantee its rationality and, second, its impartiality. These requirements are met by the rules of argumentation. The rules of the first group are monological - which shows that argumentation does not deal only with the production of consensus - and those of the second group are non-monological, which aim at impartiality in discourse[227].

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[223] *Idem. Ibidem.*
[224] ALEXY, Robert. *The Dual Nature of Law*. 2010. P. 169.
[225] ALEXY, Robert. *A Discourse-Theoretical Conception of Practical Reason*. 1992. P. 237-8.
[226] *Idem. Ibidem.* P. 235.
[227] ALEXY, Robert. *My Phiplosophy of Law: The Institutionalization of Reason*. 1999. P. 28-9.

The rules of the first group may be called rules of reason and express the requirements of non-contradiction, possibility of universalization, linguistic clarity, possibility of role exchange, among others[228]. The second group, on the other hand, are rules that guarantee the possibility of universal acceptance by the other participants in the discourse, whose main ones are: anyone able to speak may participate in the discourse, anyone may question any statement, anyone may introduce any statement into the discourse, anyone may express their views, wishes and needs, and no speaker may be deprived of the previous guarantees through internal or external coercion.

These are the general and most important outlines of discourse theory, which, for its complexity and extent, it would not be possible to explain fully within the space and purpose of this work. But these lines are already enough to answer Dalla Barba's criticism according to which the discursive procedure of proportionality would be empty and would allow the insertion of the interpreter's subjectivity in his decisions since his judgments need, from the rules belonging to the second group be acceptable to any and all participants in the discourse, therefore impartial[229], and second, such rules require that minimum rights of freedom and equality be guaranteed to all participants, so as to create a necessary connection between the process of justification of practical judgments and human rights[230].

However, discourse theory has its limitations, which Alexy highlights as the main ones "Rules of discourse enclose firstly no provision concerning the starting points of the procedure. Starting points are the normative convictions and interpretations of interests of the participants, just as they appear. Secondly, the rules of discourse do not lay down all steps in argumentation.

[228] ALEXY, Robert. The Dual Nature of Law. 2010. P. 172.
[229] ALEXY, Robert. *My Phiplosophy of Law: The Institutionalization of Reason*. 1999. P. 29.
[230] *Idem. Ibidem.*

Thirdly, some of the rules of discourse are of ideal character and can therefore only be approximately fulfilled."[231]

This last limitation clarifies a very important aspect of discourse theory, that it has an ideal dimension, therefore, merely approximative, which in turn makes the discourse to be realized by its real dimension bearing all the practical limitations such as limited speaking time, limited knowledge of the subject, restricted linguistic clarity, and others.

But such restrictions mean the following: if the discourse claims to be rational, it must avail itself of its ideal dimension at least as a regulative ideal.

Against the regulative ideal, the objection could be raised that, since it is something unachievable, it would be useless. Alexy responds to this objection by pointing out that the regulative ideal would be useless in case greater or lesser approximations to the ideal dimension of discourse were not possible. But such approximations are possible. For instance, discourses in which participation is limited for no good reason are more distant from the ideal discourse than a more inclusive one[232]. In the same way, statements that make use of arguments based on reasons derived from a particular religious strand are, by definition, irrational since they cannot be accepted by all those who do not share the same strand.

One may state the following: The more an argument can be accepted by the widest possible range of people, the more rational it is.

2.2 The Special Case Thesis

[231] *Idem. Ibidem.* P. 30.
[232] *Idem. Ibidem.*

We can call such a theory of general practical discourse since it deals normatively with everything that is obliged, forbidden or permitted through a discursive procedure. With the theory of general practical discourse, relevant consequences for Law arise.

According to Alexy, Law is a special case of general practical discourse since it also deals with what is obliged, forbidden or permitted in a discursive manner but is limited by statutes, regulations, precedents and doctrine[233]. This means that law also has a dual nature. The authoritative acts represent the real dimension of Law, while practical correctness refers to the ideal dimension[234]. The real dimension is demanded by the ideal dimension to give its efficacy and obligatorily, while the ideal dimension is demanded by the real dimension for its critical perspective, which means that without the ideal dimension, Law would be a mere instrument of power retention[235]. Because of that, if Law could be anything different than oppression and arbitrariness, the ideal dimension is a necessary element of it.

This combination of the two dimensions of Law creates a powerful way of controlling and directing judicial decisions. Because the discursive rational procedure, represented by the ideal dimension of Law, is only capable of determining certain indispensable requirements for its realization, such as human rights, being such requirements the so-called discursively necessary and, in turn, its denial, the discursively impossible, between these two extremes there is the so-called discursively possible[236], the result of antagonistic but equally rational arguments, which are connected in large measure by what Rawls calls "reasonable disagreements"[237].

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[233] ALEXY, Robert. *The Special Case Thesis and the Dual Nature of Law*. 2018. P. 257.
[234] *Idem. Ibidem.* P. 255.
[235] ALEXY, Robert. *The Dual Nature of Law*. 2010. P. 167.
[236] ALEXY, Robert. *A Discourse-Theoretical Conception of Practical Reason*. 1992. P. 245.
[237] RAWLS, John. *Political Liberalism*. 1993. P. 55.

This opens a space for structural discretion, in which decisions are made about what is discursively possible since there is no prohibition, and likewise for epistemic discretion, concerning the difficulties of fully knowing what is obligatory or prohibited[238].

Nevertheless, once the ideal dimension is connected to the real one, which goes through authoritative acts performed within the discursively possible, the legal argumentation gains more trails and supports for its rationality because, once such acts are issued, they must be respected under the argumentative onus to overcome them.

Such considerations respond to Dalla Barba's fourth criticism since discourse theory does not consist of a mere procedure to validate any sort of argument, allowing the subjectivism of judges to be considered rational. On the contrary, it is from discourse theory that one can limit such subjectivism to the greatest extent possible and not just that, but also control it.

The set of non-monological rules of rational discourse has precisely this purpose, that is, to prevent subjectivism from being imposed as rational arguments.

The real dimension of argumentation, furthermore, limits the subjectivity of decision-making since it restricts decisions to what was elaborated according to the processes of creation of positive law. Moreover, the real dimension is also responsible for incorporating what both Streck and Dalla Barba most demand from Law, the historical-hermeneutic elements in which the interpreter is inserted.

Against this last statement, it could be objected that such incorporation is not present in Alexyan theory. Against this, two arguments may be raised. The first concerns the Alexyan theory of the special case. Since, according to this theory, Law is a special case of the general practical discourse[239], which is formed by moral discourses (those which determine what should be universalizable), ethical-political discourses (those responsible for deciding what is good for

[238] ALEXY, Robert. *Formal principles: Some replies to critics*. 2014. P. 519.
[239] ALEXY, Robert. *The Dual Nature of Law*. 2010. P. 179.

a given community) and pragmatic discourses (those which establish the relationship between means and ends), it is clear that, just like general practical argumentation, Law should also take ethical-political discourses into consideration, not so that the judges can take partisan or ideological political decisions, for example, but so that the historical-contextual reality of the context in which the decision is inserted is also taken into account.

Another argument, more succinct, answers that if the Alexyan theory did not take such elements into account, the author himself would not have argued that the fact that freedom of expression is broader in the United States than in Germany does not make such rights to be neglected in one or the other, or in both, but that this is due to the characteristic graduation of such principles[240]. Such graduation is not the result of the subjectivity of the judges of the Constitutional Courts of these countries but of the degree resulting exactly from the historical-hermeneutic reality in which each of them find themselves. This variation, as long as it is within the discursively possible, is perfectly coherent and does not make such right lose its deontological character.

Finally, Dalla Barba's third criticism, according to which the balancing would enable the negotiation of rights, is also totally compromised. Such criticism would propose that in a collegiate decision, something like a simple "let us give up this right in detriment of this other one because it seems beneficial, or because the first one carries a noble goal that we consider valuable".

However, as demonstrated above, this is not what proportionality is about. It is not about mere preferences or noble intentions, but about evaluating the degree of interference in a conflict of fundamental rights through an argumentative process that should follow a rigorous process of rational justification responsible for determining the quality of arguments, rejecting

[240] ALEXY, Robert. *Entrevista a Manual Atienza* in: ALEXY, Robert. Teoria Discursiva do Direito, organizacão, tradução e estudo introdutório Alexandre Travessoni Gomes Trivisonno. 2. Ed. – Rio de Janeiro: Forense Universitária, 2015. P. 331.

many of them because they are discursively impossible, and removing the subjectivity of the applier as much as possible. Therefore, proportionality does not allow negotiations between rights, rather it is the most powerful argumentative form to make the resolution of conflicts the most rational and exposed one possible.

Such criticism by Dalla Barba becomes even more fragile once he resorts to a conflict involving a right and a policy to exemplify his thesis, stating that such a conflict could not be taken seriously regardless of the grounds that were given because it would remove the trump character of rights, along with their deontological character. But his arguments are totally incapable of answering how a conflict between two rights/trumps rather than one right and one policy would be resolved, and his argument is incapable of answering such a problem exactly because the tool for doing so is precisely proportionality.

Because proportionality consists in making assertions, its judgements are all bound to the requirements of a practical rational discourse, responsible for introducing the claim of correctness in Law, and creating a necessary connection between discourse, proportionality, principles and human rights. Therefore, not only is it a mistake to assert that proportionality is a method that accepts any kind of argument, but also that it is totally empty since, at least indirectly, it demands the existence of human rights and that they must be taken seriously, thus guaranteeing them a deontological character. The aggregation of all these elements is what makes Alexyan theory such a consistent, coherent and resilient system[241].

In fact, Alexy is not the only one to derive the necessity of human rights from the demands of the justification process. Rainer Forst, from his formal justification right, also states that "If basic legal rights are reciprocally and generally non-rejectionable and fully justifiable among free and equal persons who aim at establishing their status as legal, political and social

[241] For more about the system of Alexy´s theory see KLATT, Matthias. Robert Alexy's Philosophy of Law As System "Institutionalized Reason", edited by Matthias Klatt, 1–26. 2012. Oxford: Oxford University Press.

equals protected from domination (so understood), it follows that there is a particular moral foundation for these rights" and that further "In a negative sense, this is the moral right not to be subject to a normative order which denies you basic position as an equal and which, reflexively speaking, cannot be justified to you as a free and equal person; furthermore, positively speaking, it is the right to be an equal normative authority and an active agent of justification when it comes to the basic legal, political and social provisions in your society - including the basic rights that determine your status."[242]

[242] FORST, Rainer. *The Justification of Basic Rights: A Discourse-Theoretical Approach*. 2016. P. 8.

V. Conclusion

The cycle thus is closed. As seen from the beginning, the criticism of the so-called Hermeneutic Criticism of Law theory to Alexyan theory, developed by Streck, but here especially discussed from Dalla Barba's point of view, can be summarized, in the latter's expressions, as not being able to overcome the decisionism of legal positivism, especially in the way built by Kelsen and Hart, since it would allow "a certain margin of interpretative mobility". The arbitrariness of positivist theories that countless authors seek to overcome is due to the fact that in them, given that the rules possess a certain degree of generality and an open linguistic texture, the judge, at the moment of adapting them to a concrete case, would be entitled, by the authority consigned to him by the legal system, to make use of extra-legal criteria to decide, since the Law itself would not provide them. In this sense, one could not speak about a correct answer for such cases but only about answers that would be within the normative framework or linguistic limitations.

The best argument to solve such a problem would be, then, a theory capable of proposing a single answer for each legal case presented. This argument, however, is inexecutable. Whether due to epistemic limitations, reasonable interpretative and moral disagreements, or even the limitations that any real discourse possesses, to argue that for each given case one could not accept "a certain margin of interpretative mobility", i.e. that only one answer would be possible, is, at the very least, too pretentious or naïve. Dworkin's Hercules would be very happy if this were not so, for his work would be much less herculean; but to his and all our misfortune, things are somewhat more complex.

As we have seen, these claims by Streck and Dalla Barba can be expressed from these two perspectives - which neither of them makes clear whether both are correct or whether they are the same thing, but their arguments certainly lead to these two interpretative possibilities - either for each given case there would be a single correct answer to be pronounced by the judge, or the correct answer would be an answer appropriate to the constitution, which, in Streck's

words, does not need to be the only, nor the best one. In the first case, we could close all legislative bodies because the answers of Law would already be given, just waiting to be pronounced by the judge, and anything different from this, including legislative acts, would be unconstitutional. In the second case, despite presenting a different method from the legal positivists, the result would be exactly the same, given that if the legal answer does not need to be even the best, then judicial discretion would be extremely more present than in the Alexian theory.

Dalla Barba's general criticism on the interpretative mobility can be divided into four minor criticisms, namely: that one cannot structurally separate principles from rules, that the subsumption responsible for applying the rules would ignore the historical elements of the community in which the interpreter would find himself, that the weighting would allow negotiations between principles removing from them their deontological character of trumps, and that, since proportionality is a formula, it would be completely empty, allowing the full insertion of any subjectivity of the interpreter, which would be valid by the procedure.

As can be seen, such criticism, as well as Streck's theory, has in Dworkin its main source in legal philosophy. Besides Dworkin, Heidegger and Gadamer are two other major sources for their development.

What happens, however, is that such criticism of the Alexyan theory is largely the result of a misinterpretation of Dworkin, to say the least, especially the idea of rights as trumps, Law as Integrity and the right answer.

According to Streck and Dalla Barba, to take Law as Integrity would mean that all its elements should walk in a harmonious way in such a sense that it would not be possible for conflicts between principles to occur since this would remove the harmony of integrity and the trump character of the principles - by the rather restricted notion that trumps cannot collide since one cannot overcome the other. This notion of integrity and trumps also leads to a misinterpretation of the Dworkinian correct answer because, since Law would be arranged in

such a harmonic way, there would be no possibility of multiple answers for the same legal problem; otherwise, judicial arbitrariness would still be present.

It is a recognized fact that the Dworkinian theory allows for some variety of interpretations, also because the author changes some of his positions throughout his work, the degree of activism of constitutional courts is an example of this. But certain assumptions are perennial, or at most, practically the same. One of these assumptions is precisely the existence of conflicts between principles, denied by Streck and Dalla Barba, but reaffirmed by Dworkin from his first to his last work so that the possibility of two trumps colliding is nothing more than something indispensable in Dworkinian theory so that the resolution for such is given by the process of argumentation and justification.

This mistake by Streck and Dalla Barba may be due to the fact that Dworkin's goal was not so focused on discussing cases in which principles collide, therefore most of his examples involve only one principle being applied, or at most, one principle in conflict with one policy. But this is due to a fact that is also extremely relevant for anyone intending to understand Dworkin's thought, something present in the first pages of "Taking Rights Seriously", the fact that his main goal is to develop a liberal theory of law that would overcome both legal positivism and political utilitarianism. The main way to do this is precisely by proving the normativity of principles, fruits of political morality, that do not depend on the State to exist and that are individual protections against majoritarian claims.

But I repeat, and this should be completely clear, Dworkinian theory proposes and is to some extent dependent on the existence of conflicts between legal principles.

Elements of Dworkin's theory can be used to challenge the Alexian theory, but the way Streck and Dalla Barba do it is not one of them.

The normativity of principles allied to the possibility of conflicts between them - as often happens - requires that such norms cannot be treated merely as guides for a non-alienated interpretation of the rules, as Streck and Dalla Barba propose, but rather as optimization

commands, i.e. that they should be carried out to the greatest extent possible given the factual and legal possibilities. Which in turn analytically requires proportionality. Therefore, proving optimization is proving proportionality and vice versa.

Streck's own example demonstrates that proportionality is present in many cases involving fundamental rights since as soon as one begins to justify why one principle should be responsible for guiding the interpretation of a rule rather than another, one is applying proportionality. Streck may not recognize this fact, may ignore it or may try to hide it, but if one wants to take rights seriously, the reasons why one principle yields to another for application in a concrete case must be justified and exposed; that is, proportionality. There is no escaping from it.

The judge of the hermeneutic critical theory of law is not the Hercules judge of Dworkin, but an Alcides judge, which is Hercule´s name before receiving the mother's milk from Hera and gaining his Herculean capacities. Judge Alcides merely guides the interpretation of rules without taking into account all the principles at stake. Hercules, on the other hand, knows the fact that principles often collide, that in concrete cases, different principles demand different results, and that, to take them seriously, the justification of the precedence of one over the other must be intensely justified according to legal criteria of rationality - as can be clearly seen in the example that Streck himself uses. A judge Hercules is a judge that takes his responsibility to consider all relevant rights as important, and every single restriction on it must be justified. He does not close his eyes to some principles in certain circumstances.

Since principles are commands to be optimized, it is also determined that they have a structure, not merely a function, different from rules. The latter, as definitive commands, are applied by means of a series of inferences on a series of major and minor premises - as many as are sufficient to bring all the peculiarities of the case to the procedure - in order to reach a logically deducible conclusion. Such a method is subsumption, which is also attacked by Dalla Barba, who understands it as a simple system with two premises that ignores the historical

facticity in which the judge is inserted. The error here is twofold, first because subsumption can include as many premises as desired, and second because, as both subsumption and proportionality are methods of applying rules and not texts, both must incorporate the historical facticity of the legal community. This is because norms and texts are different and, when interpreting texts, such facticity is incorporated into the norm. No text is a rule or a principle in itself, they only become one or the other after the interpretation, and what will differentiate the character of the norm is whether it can be applied in degrees or not; being in the first case a principle and in the second case a rule. It is not because Alexy does not quote Gadamer or Heidegger on every corner of his writings that his method ignores the historical-hermeneutic facticity that is present in the act of interpreting.

Finally, we come to the question of how to carry out such methods of application in a non-arbitrary manner, therefore, non-discretionary in the legal positivist way. Thus, the characteristics that a theory of judicial decision needs to possess in order to overcome these problems are threefold: the determination of the sense of adequacy of the norms, the possibility of intersubjective control and the predictability of decisions. The first element establishes that the norms should be adapted to concrete cases by means of exclusively legal criteria, so as to guide the magistrate's application not by his subjectivism, but by the Law and its facticity. The second demands that the arguments he makes should be able to be challenged, controlled and publicly criticised in order to ensure that the argumentative burdens of each decision are met. And the last demands that the attachment to precedents should be as broad as possible, so as to ensure that future cases that reach the Courts have a reasonable degree of predictability, thus avoiding ad hoc decisions.

The theory of proportionality has all these elements, since it is also intrinsically linked to the theory of legal argumentation.

From the legal argumentation, Law is bound to all the requirements of a general practical discourse that claims to be rational, thus creating procedural requirements to give validity to

the judgments of importance made in the implementation of proportionality. The claim of correctness plays a fundamental role here since, according to it, the decisive arguments for the practice should be the best ones, which means that they should supply the rules of legal discourse in such a way as to guarantee its rationality and impartiality. This game of giving and demanding reasons requires that such reasons may be accepted by all and any participant in the discourse, one of the ways of attesting to the quality of an argument is by the degree of universal acceptability it possesses.

The demands of discourse are, however, only approximately realized since they are part of what may be called the ideal dimension of Law. But rather than being a problem, this is actually an advantage, since the discourse is always carried out in real, not ideal, situations, it is also marked by the authoritative elements of Law, which are: statutes, legislation, precedents and doctrine.

As legal systems continue to evolve, these real elements are increasingly enhanced in order to further expand the argumentative resources and limits in the discursive process.

Proportionality and legal argumentation thus create a powerful justification for the existence of human rights, because once proportionality is carried out through practical judgments, these demand to be rational, and therefore correct, which requires discursive practice in which not only monological rules of rationality are present, but also non-monological rules of impartiality responsible for removing as much subjectivity as possible from public discourse. These rules can be summarised as the guarantee of liberty and equality among all those capable of speaking to give and demand reasons, and the acceptance or rejection of these by each one must be absent of internal or external coercion. From these procedural rules, the justification for the existence of human rights is guaranteed, showing that proportionality is not completely empty, nor does it allow any argument, the negotiation of rights, or the insertion of subjectivism and arbitrariness in the decision. This does not mean,

however, that judges do not decide in an arbitrary manner by citing proportionality, but this is the fault of such a magistrate, not of the theory that is being used inappropriately.

Discourse, human rights, proportionality and principles thus create - together with representation and judicial review - what can be called discursive constitutionalism, or deliberative democracy. In this sense, one can compare the theory of principles, as Marcelo Neves did, with the Hydra of Greek mythology. But, unlike Neves, according to whom the theory of principles creates an immense expansion of the possible judicial decisions, here the comparison is not to try to weaken it, but to highlight it, for, as it is a great system widely consistent and coherent, the theory of principles, after each attack directed to it, comes out more toughened.

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