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Brazilian weighting: the rationality of the judicial decision in Robert Alexy as a challenge of the Democratic Constitutional State

Ponderação à brasileira: a racionalidade da decisão judicial em Robert Alexy como desafio do Estado Constitucional Democrático

Ponderación a brasileña: la racionalidad de la decisión judicial en Robert Alexy como desafío del Estado Constitucional Democrático

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ABSTRACT

The present article aims to analyze the processes of construction of discourses and juridical decisions from the Theory of Argumentation of Robert Alexy in a dialogue with the Discursive Constitutionalism in the Democratic State of Law. Based on the analytical method and on the technique of bibliographical research, the present work will make it possible to approach as a central issue the weighting of principles, which is used as the main methodology for justification of a judicial decision and not for its rational construction, as originally proposed by the theory. The main hypothesis raised is that the conception of principles as mandates of optimization allows the relativization of fundamental and social rights through a selective use of weighting technique. Due to this feature of indeterminacy, the theory of weighting has become a convenient way for the fundamental rights to not be binding in the Discursive Constitutionalism, a challenge in the Democratic State of Law. As a result, it is observed that the theory of weighting is used as a conception of discourse and juridical decision that reproduces and maintains social inequalities.

KEYWORDS: Law. Decision. Weighing. Principles. Robert Alexy.

RESUMO

O presente artigo objetiva analisar os processos de construção de discursos e decisões jurídicas a partir da Teoria da Argumentação de Robert Alexy em diálogo com o Constitucionalismo Discursivo no Estado Democrático de Direito. Ancorado no método analítico e técnica de pesquisa bibliográfica, o trabalho possibilitará abordar como questão central a ponderação de princípios, que é utilizada como principal metodologia para justificação de uma decisão judicial e não para a sua construção racional, como originalmente propõe a teoria. A principal hipótese levantada é que a concepção de princípios como mandados de otimização permite a relativização dos direitos fundamentais e sociais a partir do uso seletivo da técnica da ponderação. Devido a essa característica de indeterminação, a teoria da ponderação tornou-se conveniente para a não vinculação de direitos fundamentais no Constitucionalismo Discursivo, um desafio no Estado Democrático de Direito. Como resultado, observa-se que a teoria da ponderação é utilizada como concepção de discurso e decisão jurídica que reproduz e mantém desigualdades sociais.

PALAVRAS-CHAVE: Direito. Decisão. Ponderação. Princípios. Robert Alexy.

RESUMEN

El presente artículo tiene como objetivo analizar los procesos de construcción de discursos y decisiones jurídicas a partir de la Teoría de la Argumentación de Robert Alexy en diálogo con el Constitucionalismo Discursivo en el Estado Democrático de Derecho. Basado en el método analítico y la técnica de investigación bibliográfica, el trabajo posibilitará abordar como cuestión central la ponderación de principios, que es utilizada como principal metodología para justificación de una decisión judicial y no para su construcción racional, como originalmente propone la teoría. La principal hipótesis planteada es que la concepción de principios como mandamientos de optimización permite la relativización de los derechos fundamentales y sociales a partir del uso selectivo de la técnica de la ponderación. Debido a esta característica de indeterminación, la teoría de la ponderación se hizo conveniente para la no vinculación de derechos fundamentales en el Constitucionalismo Discursivo, un desafío en el Estado Democrático de Derecho. Como resultado, se observa que la teoría de la ponderación es utilizada como concepción de discurso y decisión jurídica que reproduce y mantiene desigualdades sociales.

PALABRAS-CLAVE: Derecho. Decisión. Ponderación. Principios. Robert Alexy.

INTRODUCTION

Legal positivism, conceived under the dogmas of the security and impartiality of the law, maintained its solid convictions as an ideological instrument indispensable to the political and historical project of domination that it served¹. The dimming, crisis and overcoming of positivism in the Law system, in a slow historical process, established throughout the 20th² century, constitutes a dialectical work, emerged from the inescapable contradiction exposed, in the name of legality, in the institution of humanitarian and libertarian constitutions, such as of Weimar, offered in the service of the barbarism established in history, during the first half of that century, and diverse economic and political fundamentalisms³.

¹ FOUCAULT, Michel. **Em defesa da sociedade**. Translation: Maria Ermantina Galvão. São Paulo: Martins Fontes, 2002, page 32.

² BARCELLOS, Ana Paula. **A eficácia jurídica dos princípios constitucionais: o princípio da dignidade da pessoa humana**. Rio de Janeiro: Renovar, 2002, p. 14.

³ AUER, Andreas. O princípio da Legalidade como Norma, como Ficção e como Ideologia. In HESPANHA, António Manuel Botelho (Org.). **Justiça e Litigiosidade: história e prospectiva**. Lisbon: Fundação Calouste Gulbenkian, 1993.



In Law, ideology and interests are organized around methodological parameters, instituted as paradigms that emerged from scientific revolutions⁴, driven by the inability of a particular paradigm to satisfactorily face the complexity offered by new social relations, the emergence of new subjects of law and by the ideological requirements arising from it. In this way, unable to face historical reality, positivist convictions about the text of the law have collapsed.

In the context of overcoming legal positivism, the Constitution has acquired new importance, appearing as an ideal of justice, and from this, all theoretical construction aims at the introduction of moral principles and ethical values in positive Law. In this post-positivist context, the reasoning of legal decisions based on rational criteria stands out in the study of Law, which allows the development of theories of legal argumentation⁵.

It seeks to justify judicial decisions as a criterion of rationality and demand against judicial subjectivism, which implies the need for objective and determined criteria to guide the decision. In this sense, we highlight the theoretical construction of Robert Alexy⁶ developed from a methodological procedure of argumentation.

It is a challenging proposal for the Democratic State of Law, which bets on its effectiveness in legitimizing its jurisdictional power, and a theory that has become hegemonic in Brazilian jurisdictional practice. However, the Brazilian jurisdictional reality presents decisions that, while justifying a rationale in pondering Robert Alexy's principles, use it in a wrong way, surrounded by subjectivism, in disagreement with the proposed theoretical procedural criteria.

In this way, this article deals with the theory of argumentation in Alexy, the

⁴ KUHN, Thomas. **A estrutura das revoluções científicas**. Translation: Beatriz Vianna Boeira and Nelson Boeira.

⁵ SIMIONI, Rafael Lazzarotto. **Curso de hermenêutica jurídica contemporânea: do positivismo clássico ao pós-positivismo jurídico**. Curitiba: Juruá, 2014, p. 236/237.

⁶ ALEXY, Robert. **Teoria da Argumentação Jurídica**. Translation Zilda Zilda Hutchinson Schild Silva. São Paulo: Landy Editora, 2001.



pondering of principles and the challenges faced from its application, which has allowed the relativization of fundamental and social rights and the non-binding of constitutional guarantees, the central problem of this study. The hypothesis raised is that relativization comes from Alexy's conception that principles are mandated for optimization, goals to be realized to the best extent possible⁷, and that, therefore, they suffer voluntary restrictions in the context of justification of the judicial decision.

To carry out the exposition of the theme, the research method used will be analytical, using the technique of research and bibliographic review. First, we will analyze the propositions established by Robert Alexy in his work Theory of Legal Argumentation⁸, Theory of Fundamental Rights⁹ in dialogue with the work Discursive Constitutionalism¹⁰; then the challenges of the Democratic State of Law will be addressed to control the rationality of the judicial decision that, after overcoming legal positivism, still presents questions of subjectivism and nonconformity with the methodological procedures of the theory.

This research reveals its scientific importance, since it deals with the relevant subject of the Law, that is, the healthiness of the justification of the judicial decision, crystallized as a constitutional guarantee, and which proves to be a challenge in the Democratic State of Law, since the theory of weighting is used, to solve several cases, in a mistaken way, as a conception of discourse and subjective and voluntary legal decision that reproduces, maintains and legitimizes social inequalities.

1 RATIONALITY OF THE JUDICIAL DECISION IN ROBERT ALEXY

⁷ ALEXY, Robert. **Teoria de los derechos fundamentales**. Tradução para o castelhano Ernesto Garzon Valdes. Madrid: Centro de Estudios Constitucionales, 1993. p. 88/83.

⁸ ALEXY, Robert. Teoria da Argumentação Jurídica. Tradução Zilda Zilda Hutchinson Schild Silva. São Paulo: Landy Editora, 2001.

⁹ ALEXY, Robert. **Teoria de Los Derechos Fundamentales**. Tradução para o castelhano Ernesto Garzon Valdes. Madrid: Centro de Estudios Constitucionales, 1993.

¹⁰ ALEXY, Robert. **Constitucionalismo Discursivo**. Tradução Luís Afonso Heck. Porto alegre: Livraria do Advogado Editora, 2007.



In the context of overcoming legal positivism, the Constitution acquired a new importance, appearing as an ideal of justice, constituting itself an instrument of social construction of modernity, capable not only of differentiating law and politics, but mainly of acting as a structural coupling between these two functional systems and delineate structural contours of the reproduction of political processes of search for power and of collectively binding decision making¹¹.

In that post-positivist context, theoretical constructs aim at introducing moral principles and ethical values into positive Law. In this sense, Robert Alexy's theory of argumentation¹² seeks to reconcile Hans Kelsen's normative positivism¹³ with the Natural Law that conceived of justice as a value superior to the positive law itself¹⁴.

Therefore, it seeks the rational justification of a corrective discourse that relates legal arguments and moral values from presuppositions and procedural strategy, without, however, compromising the operability of the Law. This is a challenging proposal for the Democratic State of Law, which bets on its effectiveness to legitimize its judicial power.

Other post-positivist theorists have also formulated methodological proposals and theories for the practical realization of Law from a rational justification such as Ronald Dworkin¹⁵, Jürgen Habermas¹⁶ and Castanheira Neves¹⁷. However,

¹¹ NEVES, Marcelo. **Transconstitucionalismo**. São Paulo. Editora WMF Martins Fontes, 2009. p. 56/57.

¹² ALEXY, Robert. **Teoria da Argumentação Jurídica**. Tradução Zilda Zilda Hutchinson Schild Silva. São Paulo: Landy Editora, 2001.

¹³ KELSEN, Hans. **Teoria pura do direito**. Tradução João Baptista Machado. 8. ed. São Paulo: Editora WMF Martins Fontes, 2009.

¹⁴ 14 SIMIONI, Rafael Lazzarotto. **Curso de hermenêutica jurídica contemporânea: do positivismo clássico ao pós-positivismo jurídico**. Curitiba: Juruá, 2014. p. 235.

¹⁵ DWORKIN, Ronald. **Levando os direitos a sério**. Tradução Nelson Boeira. São Paulo: Martins Fontes, 2002.

¹⁶ HABERMAS, Jürgen. **Direito e democracia: entre a facticidade e a validade**. Tradução Flávio Beno Siebeneichler. v. I. Rio de Janeiro: Tempo Brasileiro, 2003.



because of the delimitation of this study, this article addresses the discussion of the theory proposed by Alexy and the challenges faced from its application, which became hegemonic in Brazilian jurisdictional practice, especially in the Federal Supreme Court (STF)¹⁸.

This article does not intend to analyze Robert Alexy's theory in detail, especially since it is already known and which scholars and critics have analyzed masterfully, as well as due to the limitation and format of this work. However, the main features of his proposal will be listed for the necessary development of the theme.

Alexy uses as a starting point for the development of his theory a prior examination, which is necessary to support the possibility of introducing principles and ethical values in legal argumentation. Such an examination consists of answering the following questions: "(1) where and to what extent value judgments are required, (2) how these value judgments relate to the so-called 'specifically legal' arguments and legal dogmatics, and (3) whether such value judgments are rationally justified"¹⁹.

In this way, it can be emphasized as presuppositions²⁰ of Alexy's theory of argumentation that: first, not every legal decision requires a foundation in principles and values, and this must be used when necessary; that there is a complementary

¹⁷ CASTANHEIRA NEVES, Antônio. **Metodologia Jurídica**: problemas fundamentais. Coimbra: Coimbra Editora, 1993.

¹⁸ Em pesquisa de jurisprudência disponível no site do Supremo Tribunal Federal, a busca pelas expressões livres "Alexy" e "Ponderação de Princípios" encontra mais de 60 (sessenta) acórdãos como resultados, enquanto a busca por "Dworkin" apresenta 24 (vinte e quatro) resultados, "Habermas" 4 (quatro), e "Castanheira Neves" apenas 2 (dois). Disponível em <<http://stf.jus.br/portal/jurisprudencia/pesquisarJurisprudencia.asp>>. Acesso em: 11 fev. de 2018.

¹⁹ ALEXY, Robert. **Teoria da Argumentação Jurídica**. Tradução Zilda Zilda Hutchinson Schild Silva. São Paulo: Landy Editora, 2001. p. 21.

²⁰ SIMIONI, Rafael Lazzarotto. **Curso de hermenêutica jurídica contemporânea**: do positivismo clássico ao pós-positivismo jurídico. Curitiba: Juruá, 2014, p. 243/244.



relationship between legal judgments and moral judgments, which are related and not substituted; and that it is possible to promote rational reasoning through a valid procedure.

The explanation of the concept of rational legal argumentation in this examination consists in the presentation of a number of rules that the argument must follow and in a number of formats that the argument has to assume if the implicit requirement in it is to be made good. When a discussion is in accordance with these rules and formats, then the result offered by it can be called "correct." The rules and formats of legal discourse thus constitute a criterion for the correction of legal decisions.²¹

In addition, it is necessary, in order to enter the understanding of the problem to be approached in this work, the presentation of the definitions and concepts that Alexy proposes for rules and principles, since this defines the limitations of application of proportionality and weighting. So that, afterwards, we can address the challenges of the Democratic State that uses the theory of argumentation in Robert Alexy, to realize the rational justification of correction discourse.

1.1 Rules and principles

A complex principles system capable of providing effectiveness to the fundamental rights foreseen in the Constitution was inserted to the recognized positive normative set, comprised by undefined, axiological legal concepts, of moral contents and that resonate effects throughout the planning. To make use of this content in legal argumentation, Alexy distinguishes between rules and principles,

²¹ ALEXY, Robert. **Teoria da Argumentação Jurídica**. Tradução Zilda Zilda Hutchinson Schild Silva. São Paulo: Landy Editora, 2001. p. 273.



from several criteria²².

For the author, rules and principles are types of the legal standard genre, and both can be formulated with the help of basic deontic expressions of permission or prohibition. Principles are mandates of optimization, norms that order something to be carried out to the greatest extent possible, the fulfillment of which depends on the existing actual and legal possibilities. On the other hand, rules are determinations that do not accept graduations of compliance, they are either complied with or not, since they have determinations of low generality²³.

From this distinction, Alexy presents as a consequence of the application of the legal norms the conflicts of rules and collisions of principles, i.e., when the independent application of two standards of norms leads to a contradictory legal result because they differ in the way in which the result of the conflict is solved²⁴.

The conflict of rules is solved by the dimension of validity, such as insertion of exception clauses, invalidation of one of the rules, or by the adoption of specific rules hierarchy criteria such as *lex posterior derogat legi priori*²⁵, which refers to the beginning of validity of the laws, indicating that the most recent should prevail over the oldest²⁶.

However, collisions of principles cannot be resolved in this way, since principles are not hierarchized like the rules, nor can they be declared invalid; this collision must be solved in the dimension of the weight. When, in general terms, a principle allows something that another principle prohibits, one must yield to the

²² ALEXY, Robert. **Teoría de los derechos fundamentales**. Tradução para o castelhano Ernesto Garzon Valdes. Madrid: Centro de Estudios Constitucionales, 1993. pp. 81/82.

²³ ALEXY, Robert. **Teoría de los derechos fundamentales**. Tradução para o castelhano Ernesto Garzon Valdes. Madrid: Centro de Estudios Constitucionales, 1993, pp. 82/83.

²⁴ ALEXY, Robert. **Teoría de los derechos fundamentales**. Tradução para o castelhano Ernesto Garzon Valdes. Madrid: Centro de Estudios Constitucionales, 1993, p. 87.

²⁵ “Lei posterior derroga lei anterior.” Tradução livre.

²⁶ ALEXY, Robert. **Teoría de los derechos fundamentales**. Tradução para o castelhano Ernesto Garzon Valdes. Madrid: Centro de Estudios Constitucionales, 1993, p. 88.



strength of the other in the circumstances of the particular case without being invalidated. This does not prevent the same principles in collision from presenting different weights and offering other results in other circumstances.²⁷ It is therefore a question of weighting and proportionality of principles.

1.2 Weighting proportionality

To direct the theory of legal argumentation with rational reasoning, Alexy proposes an orientation based on proportionality, to be achieved in the most satisfactory way possible, since it refers to the justification of collisions of principles. Based on the distinction between rules and principles, the metaphor of weights and faced with the factual circumstances of collision cases, the principle of proportionality is recommended, a methodology developed to carry out the weighting of principles and their argumentation in a rational way.

In this way, the postulate of proportionality, which aims for an argument in a rational and objective way, is able to demonstrate which of the principles must prevail in the event of a collision, in an environment with real conditions for its realization, as already explained by the delimitations and concepts covered by the theory. The procedural character of the rules of proportionality is its division into three partial principles²⁸, namely: suitability/appropriateness, necessity, and proportionality in the strict sense²⁹.

The appropriateness refers to an empirical analysis of the case, which allows the evaluation of the feasible means possible to fulfill the objectives of the principles. Its analysis can determine if the chosen means to solve the case can reach the purpose proposed by the principle without harming the achievement of the others. It

²⁷ Ibidem., p. 89

²⁸ ALEXY, Robert. **Constitucionalismo Discursivo**. Tradução de Luiz Afonso Heck. Porto alegre: Livraria do Advogado Editora, 2007, p. 110.

²⁹ ALEXY, Robert. **Teoría de los derechos fundamentales**. Tradução para o castelhano Ernesto Garzon Valdes. Madrid: Centro de Estudios Constitucionales, 1993, p. 112.



is, therefore, an optimization in relation to the factual and legal possibilities.

Faced with the impossibility of optimizing the factual and legal possibilities of the case and the substitution of one means for another, rational argumentation should be directed towards the justification of the necessity. This refers to the attempt to balance the satisfaction of one principle with respect to the violation of another, that is, it requires the choice of the judge, which requires an argumentative justification, which is closely related to the weighting in the strict sense.

Finally, weighting in the strict sense refers to the rational justification that “the higher the degree of non-compliance or impairment of a principle, the greater must be the importance of compliance of the other”³⁰. That is, it demonstrates what the optimization that refers to legal possibilities means. In addition, it exposes the duty to comply with rational procedure.

The law of weighting shows that the weighting is broken down into three steps. In a first step the degree of non-compliance or impairment of a principle must be proven. To this must follow, in a second step, the proof of the importance of compliance with the principle to the contrary. In a third step it must finally be ascertained whether the importance of compliance with the principle to the contrary justifies the prejudice or non-compliance of the other.³¹

It is noted, therefore, that the steps indicated in the procedure of the weighting by Robert Alexy to proceed with an argument in the criterion of proportionality of principles requires the fulfillment of steps, which maintains the rationality and correctness of the discourse. First, one must identify which principles are in collision; after pointing out the degree of satisfaction of each of them before

³⁰ ALEXY, Robert. **Constitucionalismo Discursivo**. Tradução de Luiz Afonso Heck. Porto alegre: Livraria do Advogado Editora, 2007, p. 111.

³¹ ALEXY, Robert. **Constitucionalismo Discursivo**. Tradução de Luiz Afonso Heck. Porto alegre: Livraria do Advogado Editora, 2007, p. 111.



that of the factual circumstances; one must prove the importance of satisfaction and the reasons that justify the consideration of greater importance to one and not to another; and also, the indication of the consequences on proportionality and weights assessed for the principles³².

A legal decision that carried out the judgments of suitability/appropriateness, necessity and entered the weighting in the strict sense, fulfilled steps of a procedure capable of rationally proving the argumentation of the authenticity of the collision of principles. After all, such a procedure also presents itself as a pusher of subjectivism and voluntarism, in demanding that the losses of the consequences of applying the principles under consideration be justified and proven.

It is therefore observed that Robert Alexy's theory of argument does not guarantee a correct decision, however, it guarantees that a rational argument is developed, which constitutes a guarantee of the citizen in the Democratic State of Law. The weighting and proportionality of principles thus constitute mechanisms capable of indicating what should be reasoned, and the theory of argumentation, as must be justified, since "the instrument of justification that will perform the function of limiting power and consequently provide the control of the Judiciary Power, is the basis of the judicial decisions".³³

2 THE CHALLENGES OF THE DEMOCRATIC STATE OF LAW

In Brazil, the Constitution of the Republic represents the rupture of an authoritarian constitutional order, whose historical foundation stems from an act of

³² SIMIONI, Rafael Lazzarotto. **Curso de hermenêutica jurídica contemporânea: do positivismo clássico ao pós-positivismo jurídico**. Curitiba: Juruá, 2014, p. 289/296.

³³ MIRANDA, Felipe Arady. **A fundamentação das decisões judiciais como pressuposto do estado constitucional**. Brasília: Instituto Brasiliense de Direito Público – IDP, 2014, p. 53. Disponível em <<http://www.idp.edu.br/docman/ebooks/1066-a-fundamentacao-das-decisoes-judiciais-como-pressuposto-do-estado-constitucional-1/file>> Acesso em 15 de fevereiro de 2018.



force, restoring to the State the credibility and legitimacy deriving from the exercise of popular power, characterizing the Democratic Constitutional State of Law, such as constitutions promulgated after dictatorial periods, such as that of 1949 Germany, of 1976 Portugal, and of 1978 Spain, which had a profound influence in national doctrine.

The democratic sense of the new order posed in relation to the Law is reflected mainly through the judicial decision, which can create and organize diverse situations in the plural and multicultural world, to control behaviors, to grant power, to guarantee rights, and to present themselves as a rule against majority³⁴. In this way, the introduction of a principles system, permeated by indeterminate legal concepts, amplifies the interpretation and activity of the judge, and, for this reason, demands a greater argumentative density, which, if not observed, can generate a complex crisis of credibility, legitimacy, and rationality in judicial decisions, since it replaces the dogmas by the voluntarism and subjectivism in the application of the new legal methodology³⁵.

Thus, the interpretation of the judge must dialogue with society, and the basis of the judicial decision must be rational, moving away from subjectivism, since it is not an act of will, under penalty of discretion to transform judges into lawmakers³⁶, further guaranteeing to the jurisdictional ones the obligation of the motivation of the judicial decisions³⁷, with the purpose of hindering arbitration, since, “the legitimacy of the magistrate's action stems from the reasoning of the judicial decision, and the lack of true justification is an attack on democracy and

³⁴ BAHIA, Alexandre Gustavo Melo Franco. Fundamentos de Teoria da Constituição: a dinâmica constitucional no Estado Democrático de Direito, *In*: FIGUEIREDO, Eduardo Henrique Lopes (coord.). **Constitucionalismo e Democracia** – Rio de Janeiro: Elsevier, 2012.

³⁵ BERGEL, Jean-Louis. **Teoria geral do direito**. Tradução: Maria Ermantina Galvão. São Paulo: Martins Fontes, 2001, p. 122.

³⁶ CAPPELLETTI, Mauro. **Juízes Legisladores?** Tradução de Carlos Álvaro de Oliveira. Porto Alegre: Sergio Antônio Fabris Editor, 1999.

³⁷ NERY JÚNIOR, Nelson. **Princípios do processo na constituição federal**. 10ª ed. São Paulo: Revista dos Tribunais, 2010, p. 288-301.



values inserted in the Federal Constitution”³⁸.

2.1 Criticism of weighting and proportionality

Robert Alexy proposes legal argumentation based on rational procedure capable of articulating legal discourses, practical discourses, arguments of moral and ethical values and still solve the problem of the collision of fundamental precepts, presenting justification procedure based on weights of principles and weighting from the factual circumstances. It is a sophisticated and widespread theory, which makes it the object of studies and criticism, which is not the object of this study.

Kai Möller³⁹ presents an article with analysis of the criticisms and arguments against weighting and proportionality. He states that the weighting constitutes a doctrinal tool and that, therefore, it depends on circumstances of application, which is raised like hypothesis of this article. Möller directs his conclusion to the particular conceptions of proportionality and not against the idea of proportionality itself. The relativization of fundamental rights carried out by the theory of weighting in Brazilian jurisdictional practice stems from the conception that principles are mandated for optimization and that, therefore, they suffer voluntary restrictions in the context of the justification of the judicial decision.

Stavros Tsakyrakis⁴⁰ argues that proportionality, although in many countries raised to a basic constitutional principle of conflict resolution, has misconceptions of precision and objectivity, because it provides argumentation that allows the evasion of rights. He asserts that the theory is vulnerable to the arguments that allow an assault

³⁸ OLIVEIRA NETO, Olavo de. Princípio da fundamentação das decisões judiciais. In: OLIVEIRA NETO, Olavo de; LOPES, Maria Elizabeth de Castro (Orgs.). **O Princípios processuais civis na constituição**. Rio de Janeiro: Elsevier, 2008, p. 212.

³⁹ MÖLLER, Kai. Proportionality: Challenging the critics. In: **International Journal of Constitutional Law**, vol.10, 2012, p. 709–731. Disponível em: <<https://doi.org/10.1093/icon/mos024>>. Accessed on 15 Feb. 2018.

⁴⁰ TSAKYRAKIS, Stavros. Proportionality: An assault on human rights? In: **International Journal of Constitutional Law**, vol. 7, 2009, pp. 468–493. Disponível em: <<https://doi.org/10.1093/icon/mop011>> Acesso em: 15 fev. 2018.



on human rights, because in the context of proportionality subjectivity corrupts the very meaning of Law, transforming it into something quantifiable, that is, replacing the distinction between what is right and what is wrong, for what is appropriate and convenient.

On the other hand, Matthias Klatt and Moritz Eister⁴¹ presented an article analyzing Tsakyrakis arguments and asserting, in short, that proportionality is a structured approach capable of balancing fundamental rights with other rights and interests in the best possible way, incorporating standards of rationality to play a role as an element of a reasoned argument.

2.2 Brazilian weighting

The theory of argument in Alexy answers and reaffirms the rational character of the jurisdictional provision in the Democratic Constitutional State of Law, since it is a guarantee that the judicial decision is justified, and that the judge explains its motivations and fulfills the fundamental role of due legal and contradictory process, to control the legitimacy of State power, as a judge, and, thus, for democracy.

Although hegemonic in Brazil and meeting the criticisms regarding the peculiarities of its application, the theory is not presented and applied in Brazilian practice in exact compliance with the proposed theoretical procedures. As a problem to be analyzed by this article, it is observed that most of the demands submitted to the judiciary are decided based on proportionality and weighting.

Regardless of the origins of the conflict or the rules under discussion, much of the resisting pretensions are transferred to the weighting environment and all are dealt with from the concept of collision of principles. The hypothesis is that Alexy's conception of principles constitutes optimization warrants, objectives to be realized

⁴¹ KLATT, Matthias; EISTER, Moritz. Proportionality: a benefit to human rights? Remarks on the I COM controversy. *In: International Journal of Constitutional Law*, vol. 10, 2012, pp. 687/708. Disponível em: <<http://www.corteidh.or.cr/tablas/r30063.pdf>>. Acesso em: 15 fev. 2018.



to the best extent possible is favorable to the development of a subjective argumentation, which allows rights restrictions in the context of the justification of the judicial decision.

The determining factor of the collision resolution of principles in Alexy's theory of argumentation refers to the fulfillment of the steps of the procedure to construct the correct and rational decision. Which does not occur in the concrete cases, because as indicated by Tsakyrakis, to possess a singular opening for subjectivisms the theory supports argumentation that negates and relativizes rights.

In Brazil, the fundamental rights and guarantees, and even the social rights provided for in the Federal Constitution, are evaded by reasoning based on weighting and proportionality of principles in Alexy. The stages of rational reasoning are dispensed, or performed without compromise with integrity and correction, allowing the judiciary a methodological adequacy of the theory to the Brazilian way. The objective requirements of rule conflicts are not met, the distinctions between rules and principles are not considered; and even the very wording of the new Code of Civil Procedure presents the possibility of weighting rules⁴², not restricting it to principles.

To exemplify the central problem of this study, it should be noted that the STF adopts different positions regarding the weighting methodology and uses the theory of argumentation and proportionality in a way that differs from the proposed model in a selective way, depending on the subject to be judged, as shown by Simioni⁴³.

In the judgment of the Direct Action of Unconstitutionality that regulates the *vaquejada* as a sporting and cultural practice in the state of Ceará, the STF presented a judgment based on a weighting of principles, however presented a justification contrary to the fundamentals of the theory and methodology proposed by Alexy. The

⁴² “Art. 489. São elementos essenciais da sentença: (...) § 2o No caso de colisão entre normas, o juiz deve justificar o objeto e os critérios gerais da ponderação efetuada, enunciando as razões que autorizam a interferência na norma afastada e as premissas fáticas que fundamentam a conclusão.” BRASIL, Código de Processo Civil, Lei 13.105, de 16 de março de 2015.

⁴³ SIMIONI, Rafael Lazzarotto. **Ponderando a ponderação**: crítica à relativização de direitos fundamentais e à máxima da proporcionalidade em países desproporcionais, 2017, no prelo.



ruling points out that in the conflict between cultural manifestations and protection of the environment, the Court prevails in favor of excluding practices of inappropriate treatment of animals, even within cultural contexts⁴⁴.

In other words, an individualized analysis capable of complying with the steps of the procedure to adjust the criteria and assumptions of compliance with the principles of adequacy, necessity, and weighting of the principle in the face of the factual reality was not performed, since the STF already had a predetermination of the judgment from the jurisprudential understanding, that is, Brazilian weighting was performed.

The STF has already decided not to apply and avoid the weighting, choosing not to relativize the rights of those sentenced to the individualization of the sentence and to the legality of the criminal execution to which they were condemned⁴⁵. In this case, the judgment explains the selectivity of the Court for the application of the theory, demonstrating that some cases, although dealing with fundamental rights in principles, cannot be weighted. Emphasizing a characteristic of Brazilian weighting, that is, its use as an instrumental principle of solution to collisions, to be removed because it is inappropriate in certain cases and not others.

Finally, it should be noted that Alexy's theory is convenient for the exercise of the jurisdictional power of the State, which makes it hegemonic in Brazil. His

⁴⁴ “Diz que o Supremo usa a técnica da ponderação para resolver conflitos específicos entre manifestações culturais e proteção ao meio ambiente, predominando entendimento a favor de afastar práticas de tratamento inadequado a animais, mesmo dentro de contextos culturais e esportivos.” Ação Direta de inconstitucionalidade ADI 4983; Relator: Ministro Marco Aurélio; Data: 26/04/2017; Origem: Ceará. Disponível em: <[⁴⁵ “Disso concluo que não se pode ponderar o interesse da segurança pública com os direitos à individualização da pena e à legalidade, sem se desconsiderar que os presos também são pessoas, dotadas de imanente dignidade. Dessa forma, não será a ponderação de princípios que autorizará o Estado a deixar de cumprir a lei que confere direitos aos condenados durante a execução das penas. Na medida em que os regimes existem, resta ao Estado disponibilizar vagas em estabelecimentos penais adequados à execução da pena no regime adequado.” \(grifo nosso\). Recurso Extraordinário nº 641.320; Relator: Ministro Gilmar Mendes; Data: 11/05/2016; Origem: Rio Grande do Sul. Disponível em <<http://stf.jus.br/portal/processo/verProcessoDetalhe.asp?incidente=4076171>> Acesso em 15 de fevereiro de 2018.](http://www.stf.jus.br/portal/processo/verProcessoAndamento.asp?numero=4983&classe=ADI&origem=AP&recurso=0&tipoJulgamento=> Acesso em 15 de fevereiro de 2018.</p></div><div data-bbox=)



method allows subjective justification, without, however, establishing democratic control or responsibility, because of this subjectivism.

At the level of application, judicial activism on political issues and on the factual means necessary for the fulfillment of the political aims established by fundamental principles⁴⁶. The condition of satisfaction is a socially generalized theme due to the scarcity of economic resources, socially accepted, and justified by Alexy's own theory.

Weighting is not only a solution to the problems of collision of principles, but also to the problems of linkage and flexibility, precisely when it is necessary to find an intermediate path between compliance and withdrawal from the norm, citing as an example, the Brazilian constitution "that knows generous and socially generous fundamental rights"⁴⁷.

Notwithstanding a well-constructed theoretical conception, whose rationality resides in the obedience to the rules of discourse and forms of argumentation, it is noticed that the conception of principle as an optimization mandate allows the creation of Brazilian weighting.

3 RELATIVIZATION OF CONSTITUTIONAL AND INTERNATIONALLY RECOGNIZED RIGHTS

Notwithstanding the weighting of the principles of one of the main forms of constitutional interpretation in Brazil⁴⁸, the studies resulting from this reception are generic and simplistic, which relativize the theoretical presuppositions, denying the important and independent character regarding decision theory. Therefore, the distortion of a complex theory of decision and legal argumentation, its application

⁴⁶ SIMIONI, Rafael Lazzarotto. **Curso de hermenêutica jurídica contemporânea: do positivismo clássico ao pós-positivismo jurídico**. Curitiba: Juruá, 2014, p. 314.

⁴⁷ ALEXY, Robert. **Constitucionalismo Discursivo**. Tradução Luís Afonso Heck. Porto alegre: Livraria do Advogado Editora, 2007, p. 68/69.

⁴⁸ SIMIONI, Rafael Lazzaroto. Economia de colisões: ponderando a teoria da ponderação de Robert Alexy. In: **Revista do Curso de Direito da FSG Caxias do Sul**. ano 4, n. 7, jan./jun. 2010, p. 142.



incurring numerous misunderstandings and the formation of a common theoretical sense of the jurists⁴⁹ on such a complex subject.

The weighting of principles characterizes a mere theoretical fragment, whose reception and application refers to an argument that may even refer to the theoretical assumptions of Robert Alexy, but such technique is not effectively characterized. It is a simplification that goes from the imprecise use of terminology to the total inadequacy of procedures, applied as a mere subjective choice of the judge, a technique used as if it were a faculty of the judge to choose the best principle to be affected, as if the norm and the facts were at his disposal.

It occurs that the choice of the judge between one principle and another, sometimes withdraws completely the effectiveness of the rights deprived, such as fundamental rights of workers whose effectiveness is constitutional and internationally guaranteed. Recognition by the International Labor Organization (OIT) aims to promote opportunities for men and women to have access to decent and productive work, in conditions of freedom, equity, security and dignity, however, due to weighting in the grounds of the STF judgment of the direct action of unconstitutionality no. 4.066⁵⁰, to the worker's right to health, effectiveness was denied.

The court dealt with the constitutionality of a law that provides for extraction, industrialization, use and marketing of products containing asbestos, harmful to the health of workers. Notwithstanding the fact that the votes presented were based on weighting of principles, the results diverged (five votes to four), that is, through the theory, each minister justified their choice among the principles under discussion in

⁴⁹ WARAT, Luis Alberto. **Introdução geral ao direito I**. Interpretação da lei: temas para uma reformulação. Porto Alegre: Sergio Antonio Fabris, 1994, p. 15.

⁵⁰ BRASIL. Supremo Tribunal Federal. Ação direta de inconstitucionalidade nº 4.066. Distrito Federal. Relatora: Rosa Weber. **Pesquisa de Jurisprudência**, Acórdãos, 24 de agosto de 2017. Disponível em: <<http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=14452232>>. Acesso em: 25 nov. 2018.



the concrete case, on the one hand economic order, national development, and market activities on this product, and another, the principles on the right to the worker's health.

The example clearly demonstrates the possibility of discretion of the decision from the justification being weighted, which may reveal, but not determine that Robert Alexy's weighting of principles is articulated in Brazilian judicial decisions because it constitutes an instrument capable of granting credibility to the argumentative discourse and raise the importance of the justification that underlies the judicial decision. The weighting that was formulated to remove subjectivism and assign rationality to the decision is used without compromise with the technical criteria, and its theoretical assumptions are trivialized by the Brazilian common sense.

Another decision whose grounds were weighed was Extraordinary Appeal no. 654.432⁵¹ which dealt with the possibility of extending the prohibition of the right to strike, provided for in Article 142§3º, IV of the Constitution to civilian police. Throughout history the strike was used to demand rights and better working conditions, pickets were formed at the entrance doors of the factories and workplaces were occupied as an expression of revolt and violence, "on the one hand, bourgeois political organization, dominant, triumphant, with its constituted apparatuses (the State apparatus); and, on the other hand, the proletarian political organization dominated, contaminated, continually reduced to the Economic struggle, to which the political character is denied"⁵², occurring even a change in the legal recognition of the strike, which has come to be treated as a channel for dialogue of a collective labor relationship, which is characterized as the embryo of

⁵¹ BRASIL. Supremo Tribunal Federal. Recurso extraordinário com agravo nº 654.432. Goiás. Relator: Edson Fachin. **Pesquisa de Jurisprudência**, Acórdãos. 05 de abril de 2017. Disponível em: <<http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=14980135>>. Acesso em 25 nov. 2018.

⁵² EDELMAN, Bernard. **A legalização da classe operária**. Coord. Tradução Marcus Orione. 1ª. Ed.- São Paulo: Boitempo, 2016, p. 46.



Labor Law.

Using the weighting technique, without presenting a response to the technical methodological criteria such as adequacy, necessity and weighting in the strict sense, the judgment presents the result of a choice between the right of the security of public goods over the right to strike for police officers. The judgment presents arguments that have social consensus, such as public security to justify the restriction of rights.

In the Constitutional Democratic State of Law, the decision needs to obtain the adhesion of the society so that it obtains credibility and can be considered legitimate and representative of the juridical culture of the country and the values constitutionally received as fundamental, "therefore, the decisive criterion of validity of a normative order, and especially of the legal order, is the recognition, the consensus (theories of recognition and consensus theory)"⁵³. In this way, when the argumentative discourse is linked to a social reality of economy and scarcity, it becomes automatically accepted.

The extrajudicial factual motives constitute a fascinating legal argumentation strategy, since it allows an extensive set of justifications, and dangerous, since it allows an "economic competition of principles"⁵⁴, as if only the effectiveness of rights that meet the consensus should prevail. It is the resumption of discretion under the argument of reasonableness accepted by society in a context of vulgarization of scarcity and factual and legal possibilities.

The right of workers cannot be reduced to mere standardization since it is not only for the solution of conflicts in an employment relationship. Throughout history, its evolution has shown that the role of balancing the tension between the

⁵³ KAUFMANN, Arthur. **Filosofia do direito**. Tradução: António Ulisses Cortês. 5ª ed. Lisboa: Calouste Gulbenkian, 2014, p. 299.

⁵⁴ SIMIONI, Rafael Lazzarotto. Economia de colisões: ponderando a teoria da ponderação de Robert Alexy. In: *Revista do Curso de Direito da Faculdade da Serra Gaúcha*. Caxias do Sul: ano 4 n. 7 jan./jun. 2010 p. 135-150.



forces of capital and labor, it has developed mainly as an instrument of social justice, since it is essentially concerned with conducts that promote the construction of a more just and egalitarian society, possessing moral requirements that give meaning to the Law⁵⁵. Social justice is constituted as what is good and just for all, which is not limited only to philosophical studies, but is rooted in public life, in historical constructions eminently marked by a process of struggle and overcoming, and in what is effectively constituted as social, and is part of the world of life, practical life and the experience of man.

A judicial decision based on a weighting of principles, but which does not meet the techniques of theory and does not maintain a link with the historical and scientific production of the law with respect to its objectives, efficacy and legitimacy of fundamental rights, choosing a right at its discretion to the detriment of the other, limits its effectiveness to the act of State power to the detriment of the credibility of the jurisdiction and legitimacy of democratic institutions in the face of the pretensions and purposes emerging from the values arising from complex, conflicting and alternating social realities.

Accepting fundamental rights restrictions from extrajudicial factual motives, rules and optimization mandates is, in Brazilian constitutionalism, a fascinating legal argumentation strategy, since it allows for an extensive set of justifications, and dangerous, because it offers an "economic competition of principles"⁵⁶, as if fundamental rights should be met to the best of their ability in the face of resource scarcity.

CONCLUSION

⁵⁵ SOUTO MAIOR, Jorge Luiz. *O direito do trabalho como instrumento de justiça social*. São Paulo: LTr, 2000, p. 244.

⁵⁶ SIMIONI, Rafael Lazzarotto. Economia de colisões: ponderando a teoria da ponderação de Robert Alexy. In: *Revista do Curso de Direito da Faculdade da Serra Gaúcha*. Caxias do Sul: ano 4 n. 7 jan./jun. 2010, p. 135-150.



This study reaffirmed the need for rational substantiation for judicial decisions, as a guarantee of the Constitutional Democratic State. The most relevant points of Robert Alexy's theory of argument were analyzed, relating the propositions established in the works, Theory of Legal Argumentation, Theory of Fundamental Rights in dialogue with the work Discursive Constitutionalism.

It was verified that the reasoning of judicial decisions constitutes an instrument of limitation of the power and guarantee of control of the Judicial Power, in this way, the demonstration of its rationality and demand against judicial subjectivism, implies the necessity of objective and determined criteria to guide the decision.

The presentation of the theoretical construction by Robert Alexy, developed from a methodological procedure of argumentation, and the approximation of the theory of fundamental rights with the theory of argumentation, carried out in this work, enabled the demonstration of the search for rationality through a valid procedure, with assumptions and steps.

Alexy's proceduralism can relate legal discourses and introduce moral and ethical values, crystallized through principles, conceived as mandates of optimization, norms that order something to be carried out to the greatest extent possible, whose fulfillment depends on the real and legal possibilities that exist. For a concrete case solution that involves principles, the author proposes a weighting and proportionality methodology based on the maximum of weights.

It is concluded that Robert Alexy does not guarantee a correct decision, however, he guarantees that a rational argument be developed, which constitutes a guarantee of the citizen in the Democratic State of Right. For this reason, the theory is criticized by scholars, since it provides the possibility that constructed argumentation allows the avoidance of rights, since the context of proportionality presents a gap for subjectivity

Such criticism awakens to the object of this article, which is the Brazilian weighting. Although it is of hegemonic application in Brazil, the theory of



argumentation in Alexy is not presented and applied in the jurisdictional practice in exact compliance with the proposed theoretical procedures. In Brazil, the fundamental rights and guarantees, and even the social rights provided for in the Federal Constitution, are evaded by reasoning based on weighting and proportionality of principles in Alexy.

Federal Supreme Court judges were presented that demonstrate the different positions on argumentation theory, using the weighting and proportionality methodology in a contrary way to that of the proposed model, and, selectively, depending on the subject to be judged, creating what may be called Brazilian weighting. In addition, decisions were made which, based on the weighting technique, exposed the instability of national law, since they now bind, or at least make constitutional guarantees more flexible, either actualize or go without the efficacy of internationally guaranteed rights to workers, breaking with the legal security and effectiveness of rights.

It is possible to conclude that, in Brazil, Alexy's theory of argumentation justifies judicial activism on political issues and on the factual means necessary for the fulfillment of the political aims established by fundamental principles. Weighting does not only offer a solution to the problems of collision of principles, but also an alternative of linkage and flexibility, when the political and ideological choice of a given position is convenient, away from the Law theory, applied in a syncretic and discretionary way.

The conception of principles as mandates of optimization constitutes, in this historical reality, effective ideological apparatus intended to consolidate hegemonic ideological positions, at the moment, contrary to the realization of fundamental and social rights; imposing a challenge on the Theory of Law and the Democratic Constitutional State of Law and its ethical commitments to society.

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