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ROBERT ALEXY'S BALANCING: WHY NOT?

PONDERAÇÃO DE ROBERT ALEXY: POR QUE NÃO?

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Abstract: Robert Alexy presents his peculiar theory of principles, especially the instrument of balancing, as a mechanism to combat judicial arbitrariness. This article investigates the powers granted to the judge by Alexy's balancing operation: power to assign weight to the "importance" of legal goods and rights in balancing; power to discover 'principles' to be balanced; power to assign meaning to the normative text in order to form the input of balancing; power to identify the presence in the concrete case of a constitutional right, in order to use balancing even in cases in which the legislator has established a 'rule'. The conclusion is that Alexy's balancing is not a legitimate possibility in a Rule of Law, because it makes no claim to control the extensive powers granted to judges.
Keywords: constitutional rights; principles (*Prinzipien*); maxim of proportionality (*Verhältnismäßkeitsgrundsatz*); determination of meaning (*Festsetzung*); formal principles; judicial arbitrariness.

Resumo: Robert Alexy apresenta sua peculiar teoria dos princípios, especialmente o instrumento da ponderação, como um mecanismo para combater a arbitrariedade judicial. Este artigo investiga os poderes conferidos ao juiz pela operação de ponderação de Alexy: poder de atribuir peso à "importância" dos bens jurídicos e direitos na ponderação; poder de descobrir 'princípios' a serem ponderados; poder de atribuir significado ao texto normativo para formar o dado de entrada da ponderação; poder de identificar a presença no caso concreto de um direito constitucional, de modo a utilizar a ponderação mesmo nos casos em que o legislador tenha estabelecido uma 'regra'. A conclusão é que a ponderação de Alexy não é uma possibilidade legítima em um Estado de Direito, pois não tem a pretensão de controlar os amplos poderes concedidos aos juízes.
Palavras-chave: direitos fundamentais; princípios (*Prinzipien*); máxima da proporcionalidade (*Verhältnismäßkeitsgrundsatz*); determinação do significado (*Festsetzung*); princípios formais; arbitrariedade judicial.

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Introduction

The ideas I present here have been defended by me for some time, in texts and lectures on sparse topics, especially when I was dealing with the abuse of rights, particularly of fundamental rights (constitutional rights).[2] The central point here is that it does not make sense under the Rule of Law to defend Robert Alexy's balancing model — since *it necessarily leads to arbitrariness*.

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[2] I refer the reader to my books *Abuse of Rights: From abus de droit to allgemeine Verbot unzulässiger Rechtsausübung* and *Abuse of Fundamental Rights: From the Private Law Doctrines to a Constitutional Theory*. In the second book, I argue that Robert Alexy's theory is not opposed to a doctrine of abuse of fundamental rights (Peixoto, 2023a, pp. 122 et seq.) — on the contrary, Alexy himself admits it when he deals with the *Glaubensabwerbung* [Religious Cooptation] decision, explicitly judged by the BVerfG as a case of "abuse of the fundamental right [*Mißbrauch des Grundrechts*]" (*Glaubensabwerbung*, 1960), as an example

Alexy has the self-perception of being a combatant against this very judicial arbitrariness. This intention is clear, above all, in his *Theorie der juristischen Argumentation* [Theory of Legal Argumentation]: the problem that guides his research is that "in a large number of cases" (Alexy's words), "the legal decision that puts an end to a legal dispute and can be expressed in a singular normative statement does not logically follow from the formulations of the legal norms"[3] (Alexy, 2001, p. 17). The aim there would be to immerse legal science in an argumentation about practical rationality — a rationality beyond that one (supposedly) deducible from normative texts —, obliging the judge to also justify his decisions that do not logically follow from the normative texts (Alexy believes that, in some cases, of *sens clair*, it is possible to establish this logical connection). Nevertheless, there is a great distance between Alexy's intentions and the broadly considered practical results of his theory (especially those resulting from his *Theorie der Grundrechte* [Theory of Constitutional Rights] and from the immense amount of works associated with the latter).

In this article, I do not claim that the theory I am dealing with is generating judicial arbitrariness *because it is being misapplied* (which, symptomatically, has become a frequent claim among authors who follow Alexy).[4] In my view, Alexy's theory *necessarily leads to a high level of arbitrariness*,[5] unless it is reformulated to the point of being totally mischaracterized.

This is for reasons that I have outlined in four sections. Firstly, because Alexy subverts the *Verhältnismäßigkeitsgrundsatz* (maxim of proportionality), in order to legitimize his (re)creation of an open balancing of the "importances" of legal goods and rights, giving judges a power that would be unimaginable in a typical means-ends balancing in the context of the *Verhälnismäßkeit*. Secondly, because, after the criticism he received about his initial concept of 'principles', he ended up having to reformulate it, resulting in a vicious circle that connects 'principles' to balancing and vice-versa, making it uncontrollable for judges to decide what is a 'principle' (in Alexy's peculiar definition), and therefore subject to a one-level balancing, and what is a 'rule' (idem), and therefore subject to a two-level balancing (the first-order balancing implied in any application of 'principles', and the second-order balancing between the constitutional right and the legislator's discretion to establish 'rules' for its exercise). Thirdly, because Alexy's proposed model gives judges the power to determinate (*festsetzen*), from the normative text, the meaning of the 'principles' that will serve as the input to the balancing operation. Fourthly, because this model authorizes the judge to balance

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of a legitimate insertion of a conditional permission in the *Tatbestand* (Alexy, 2015, pp. 273-274 [footnote 65]), which has the same practical consequence.

[3] *"Das einen Rechtsstreit entscheidende, in einem singulären normativen Satz ausdrückbare juristische Urteil folgt in einer Vielzahl von Fällen nicht logisch aus den Formulierungen der als geltend vorauszusetzenden Rechtsnormen zusammen mit als wahr oder bewiesen anzuerkennenden empirischen Sätzen"*.

[4] Robert Alexy's defenders, despite this, never clarify how it *should be* applied. Attributing the arbitrariness of judges who adhere to Alexy's theory to a failure on applying his ideas, see: Morais, 2018.

[5] I resist the temptation to describe the powers granted to judges by the model proposed strictly by Robert Alexy (this analysis cannot cover all the work of other authors who claim to be followers of Alexy's theory) as absolute because legal science can still resist this extension of powers imposing at least a "constraint of justification [*Rechtfertigungszwang*]" on judges. About this constraint, exercised by criticism: Müller *et al*., 1997, p. 123–124.

(of course, to override) the legislator's own decisions, making everything "balanceable", even when there is a 'rule' on the case.

For these reasons, I maintain here that the model proposed by Alexy is indefensible. The path for a jurist who wants to effectively control judicial decisions (and this must be the path of any jurist who takes Rule of Law seriously) is certainly not in Alexy's balancing, but in a Dogmatics that sees itself as imposing limits on the actions of judges — what I believe should be done through the dogmatic formulation of groups of cases (*Fallgruppen*).

1 **The Subversion of the *Verhältnismäßkeit* Maxim and the Uncontrollable Power of Judges to Assign Weight to the "Importances" of Legal Goods and Rights**

This section is dedicated to contextualizing Robert Alexy's balancing at the most general level of what is understood by 'balancing' (a tradition in which, for didactic reasons, I include both the US balancing and the German *Abwägung*). Among the various models of balancing, I focus on the one inserted in the *Verhälnismäßkeit* maxim (more precisely, in its last phase, *Verhältnismäßigkeit im engeren Sinne* [proportionality in the strict sense]) as a test between the means and the ends of an intervention of State on rights. The aim is to show that Alexy has subverted the *Verhälnismäßkeit* maxim to create a model of open balancing of the "importances" of the legal goods and rights concretely considered in a judicial decision (or, in Alexy's words: in a "collision" of 'principles'). In this open balancing model, the judge has extensive control over assigning "weights" to the importance of the legal goods and rights considered by him.

1.1 **Balancing/Abwägung Models**

When a person talks about 'balancing', she may be talking about one of at least two kinds of judicial activity with similar but somewhat distinct meanings: on the one hand, there is the balancing developed in the US common law tradition (whether *ad hoc* balancing or definitional balancing) (Cohen-Eliya & Porat, 2010, pp. 266–275; Laurentiis, 2017, pp. 61 et seq); on the other, the *Abwägung* of the German civil law tradition.[6]

On the US balancing side, one can cite as an example the definitional balancing promoted by the US Supreme Court in New York Times Co. v. Sullivan:[7] here, the freedom of the press and

[6] A very detailed history of the common and specifically legal uses of the German word "*Abwägung*" (balancing), from the verbs "*abwägen*" (figurative balancing) and "*abwiegen*" (concrete balancing), can be found in: Christensen & Fischer-Lescano, 2007, pp. 149–173.

[7] That is what is on the US Supreme Court's website: "During the Civil Rights movement of the mid-20th century, the New York Times published a full-page ad for contributing donations to defend Martin Luther King, Jr. on perjury charges. The ad contained several minor factual inaccuracies, such as the number of times that King had been arrested and actions taken by the Montgomery, Alabama police. The city Public Safety commissioner, L.B. Sullivan, felt that the criticism of his subordinates reflected on him, even though he was not mentioned in the ad" (Justia, n.d.).

the public officials right to honor were openly balanced, to reach the conclusion that freedom of the press, as a preferred freedom, was more important (the importance was measured in relation to its effects caused on democracy) than the protection of the honor of public officials.[8] Because of this, the Supreme Court established that restrictions on freedom of expression would only be allowed in the very exceptional case of actual malice being proved.

On the German *Abwägung* side, there is not *necessarily* this open balancing of "importances". It can exist, though: in the Lüth judgment of the German Constitutional Court (*Bundesverfassungsgericht* [BVerfG]), for example, there was an open balancing between the importance of freedom of expression in democratic societies and the importance of the artistic freedom.[9] The solution of the BVerfG was very similar to that of the US Supreme Court: freedom of expression "on an issue of central interest to public opinion", because of its importance for maintaining the free democratic order, must enjoy a presumption of legitimacy (*Lüth*, 1958).[10] That is why Joachim Rückert (2017, p. 583), when commenting the Lüth case, speaks of a "*freierer Abwägung* [freer balancing]".

When Rückert (2011, p. 916) himself talks about the "legal career of the balancing" in Germany, he is only dealing with this free, open balancing (which he divides into two well-demarcated lines: that of Ernst Stampe, of the judge as a "social engineer", very well represented by the Lüth decision, and that of Philipp Heck, in which the judge freely and openly balances only within the inevitable surplus of subsumption). Any of them can be inserted in the "*offene Abwägung* [open balancing]" model.

Nevertheless, still in the German tradition of *Abwägung*, there is a balancing in the context of *Verhälnismäßkeit*, in which there is no open confrontation between the "importances" of legal goods and rights, but between the means and the ends of the State intervention on rights (it is important to note that *Verhältnismäßigkeitsgrundsatz* arose precisely as a way of controlling State power, later densified into a thought of intervention and limits).[11] The adage attributed by Fritz

[8] The US Supreme Court even explicitly relies on an opinion of the Supreme Court of Kansas, in Coleman v. MacLennan: "The *importance to the state and to society* of such discussions is so vast, and the advantages derived are so great, that they more than counterbalance the inconvenience of private persons whose conduct may be involved, and *occasional injury to the reputations of individuals must yield to the public welfare*, although at times such injury may be great. *The public benefit from publicity is so great, and the chance of injury to private character so small, that such discussion must be privileged*" (emphasis added) (*NYT v. Sullivan*, 1964).

[9] According to the BVerfG website: "Veit Harlan was a film producer during the Nazi regime. One of his major works was the notoriously anti-Semitic film Jud Süss. After the Second World War, he was charged with, but then acquitted of aiding and abetting the persecution of Jewish persons. In 1950 he directed a new film, Immortal Lover. Prior to the film's premiere, the applicant, then a Senator in Hamburg and Head of the Hamburg Press Office, gave a speech in a private capacity to an audience of film distributors and directors. He called for a boycott of the new film because he was convinced that it would harm Germany's film industry, given Harlan's history. Subsequently, the Hamburg Regional Court ordered him to refrain from such calls for boycotts on pain of a fine or imprisonment. In his constitutional complaint, the applicant claimed that this judgment violated his fundamental right to freedom of expression" (CODICES, n.d.).

[10] "*[…] einen Beitrag zum geistigen Meinungskampf in einer die Öffentlichkeit wesentlich berührenden Frage durch einen dazu Legitimierten*".

[11] It "arose" with the current meaning, because, as Dieter Medicus (1992, pp. 36–37) points out, with the meaning that legal consequences must be appropriate to the facts and valued in relation to the objective pursued, it dates back to antiquity.

Fleiner to Georg Jellinek should obviously be mentioned straight away: "The police should not shoot sparrows with cannons [*Die Polizei soll nicht mit Kanonen auf Spatzen schießen*]".

In order to get a little bit away from *Verhälnismäßkeit* in the context of constitutional rights (in which it is so frequently used that it ends up causing a lack of interest in a more profound dogmatic reflection), one can cite as an example the Art. 51(5)(b) of the Additional Protocol I to the Geneva Conventions (United Nations, 1977):

> Among others, the following types of attacks are to be considered as indiscriminate: [...] an attack which may be expected to cause *incidental loss of civilian life*, injury to civilians, damage to civilian objects, or a combination thereof, *which would be excessive in relation to the concrete and direct military advantage anticipated*" (emphasis added) (*Protocol Additional to the Geneva Conventions*, 1949).

Are military objectives, as legal collective goods, more important than the civilians' human right to life? It seems obvious that they are not. Even so, military attacks that cause civilian deaths as collateral effects are permissible, as long as there is a rational relation[12] between the expected objectives and the loss of lives. No balancing of "importances" here. Quite differently: there is a clear assessment of the relation between a means ("an attack") and an end ("concrete and direct military advantage anticipated"), from the perspective of those collaterally affected ("civilian life", "civilians" and "civilian objects"). There is no confrontation here between the "importance" of achieving the military goals and the "importance" of preserving civilian lives — just as there is no confrontation between the "importance" of the State objectives of shooting down sparrows and the "importance" of preserving the sparrows' lives: the problem debated in *Verhälnismäßkeit* concerns the effects caused by the cannon, not the importance of the sparrow's lives. Is that enough to protect civilians (and sparrows)? Of course not, but it is the maximum that *Verhälnismäßkeitsgrundsatz* can offer, without being completely denatured.

That is why, already in the field of constitutional law, Bernhard Schlink (1976, pp. 203–204), although generally rejecting the balancing legitimacy itself, speaks of a "balancing model built according to a means-end scheme" — a scheme that is well-established at least since Peter Lerche and his concept of *Übermaßberbot* (prohibition of excess), with the idea of 'excess' itself denoting a relation between the elements 'means' and 'end' (Martins, 2003, 19–22).

German Dogmatics generally follows this understanding: Horst Dreier (2013 [Rn. 885]) defines the last test of the *Verhältnismäßigkeitsgrundsatz* as one requiring "an adequate means-end relation [*adäquate Zweck-Mittel-Relation*]"; Lothar Michael and Martin Morlok (2016, p. 492 [Rn. 623]) deals with it as "a balancing between means and ends [*uma ponderação entre meios e fins*]"; for Walter Leisner (1997, p. 196–197), it is the instrument for determining the proportional "means-ends relation [*Zweck-Mittel-Relation*]"; and for Florian Windisch (2014, p. 50), it is seen as the element "for

[12] Note that 'rational' derives from the Latin '*ratio*', which refers precisely to proportion (Castanheira Neves, 1993, p. 34).

determining whether and how concrete interests (postulates) can be realized, in the instrumental sense of means-ends, in the light of certain goods or values".[13]

As Stefan Huster (1993, pp. 129–139) summarizes it:

> the means-ends terminology has become established; it is found in all explanations of the principle of *Verhälnismäßkeit* and the limits of constitutional rights. It understands the problem in such a way that *the measure restricting the constitutional right is the means to a certain end* [emphasis added]. [...] The examination of *Verhälnismäßkeit* in the strict sense is no longer concerned with the causal relation between means and ends, but whether the *relation of advantages and disadvantages brought about by the means is appropriate or inappropriate*[14] (emphasis added).

Again, no consideration of "importances" here: *Verhälnismäßkeit* is only about advantages of ends and disadvantages (collateral effects) of means. So, in a very simplified way, it is only necessary to know, in the context of the *Verhälnismäßkeitsgrundsatz*: *i*. what advantages are expected to be obtained by achieving a legitimate State end (let us imagine that, in the case of the shooting at the sparrows, it is to keep the airplane landing area clear); *ii*. what are the collateral disadvantages that the chosen means entails for a right (intensity of State intervention in the sparrows' rights[15]). Are the advantages (safe landing guarantee) resulting from the chosen means (cannon), in a rational relation (in the context of *Verhälnismäßkeit*, it has never been said that the advantages need to be greater, nor do they need to be at an optimum point)[16] with the expected collateral disadvantages (obviously, sparrows' *cruel* deaths)[17]?

1.2 **Robert Alexy's Subversion of Proportionality**

Robert Alexy (2021) proposes a "weight formula", in which the numerator is supposed to include the intensity of the intervention in the constitutional right affected, and the denominator, the *importance* of satisfying the constitutional right (or legal good) that serves for justifying the

[13] *"[…] bei der ‚Abwägung' darum geht zu bestimmen, ob und wie weil konkrete (postulierte) Interessen im Sinne instrumenteller Zweck-Mittel im Lichte bestimmter Güter oder Werte realisiert werden dürfen".*

[14] *"In einem gewissen Umfang durchgesetzt hat sich die Zweck-Mittel-Terminologie; sie findet sich durchgängig in den Ausführungen zum Verhältnismäßigkeitsprinzip und zu den Grenzen der Grundrechte. Sie faßt das Problem so, daß die grundrechtsbeschränkende Maßnahme das Mittel ist, um einen bestimmten Zweck zu verfolgen. […] Bei der Prüfung der Verhältnismäßigkeit im engeren Sinne geht es nicht mehr um die kausale Beziehung zwischen Mittel und Zweck, sondern darum, ob das Verhältnis von Vor- und Nachteilen, die das Mittel mit sich bringt, angemessen bzw. nicht unangemessen ist".*

[15] I will not go here into the question of the natural beings' rights and of nature as a whole's rights. I simply ask the reader to admit that the imaginary sparrows have rights.

[16] Specifically with regard to Alexy's theory, Ralf Poscher (2009, p. 442) observes that: "the maxim of proportionality need not necessarily be understood as an optimization requirement. As already noted, the principle of proportionality can be understood not only as an optimization criterion, but also as a guarantee of a minimal position [Schlink] or as a prohibition of gross disproportionality [Pieroth and Schlink; Poscher]".

[17] I emphasize the term 'cruel' because, if the maxim of *Verhälnismäßkeit* had to consider the *importance* of the lives of sparrows, Fleiner's adage would be only "The police should not shoot sparrows". The addition of "with cannons" only makes sense because what is relevant is not the lives of the sparrows themselves (for *Verhälnismäßkeitsgrundsatz*, not for this author), but the *way* in which they are killed.

behavior itself: "The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the *importance of satisfying the other*" (emphasis added).

He continues:

> The Law of Balancing shows that balancing can be broken down into three stages. The first stage involves establishing the degree of non-satisfaction of, or detriment to, the first principle. This is followed by a second stage, in which the importance of satisfying the competing principle is established. Finally, at the third stage it is established whether or not the importance of satisfying the latter principle justifies the detriment to, or non-satisfaction of, the former principle (Alexy, 2021).

For Alexy, the police can only shoot sparrows (no matter how: the only thing that matters is whether or not the sparrows should be killed) if the importance of keeping the landing area clear justifies the degree to which the sparrows' lives are not satisfied. So, yes, police can shoot sparrows (and probably can even shoot people, in extreme cases in which the importance of keeping the landing area clear justifies it), and can do it with cannons. Alexy's theory is not concerned with the rational relation involving the chosen means and its collateral effects.

Therefore, Alexy's model is clearly a model of open balancing, certainly not a model of balancing in the context of *Verhälnismäßkeit*: where is the consideration of the means (the cannon)? Where is the consideration of the expected advantages[18] of the State end (safe landing)? Where is the consideration of the expected disadvantages for the right collaterally affected (sparrows' *cruel* deaths)?

Ahron Barak — cited by Alexy (2014, p. 512 [footnote 7]) as one of the great promoters, outside Germany, of *his* 'principle of proportionality' — explicitly states that:

> *Proportionality stricto sensu does not examine the relationship between the goal of the law and the means adopted for its achievement* [emphasis added]; rather, it examines the relationship between the goal of the law and human rights focusing on the relationship between the benefit gained by the law's realization in comparison to its limit on the rights (Barak, 2010, p. 7).

An example of this Alexy's model of balancing is in his interpretation of the *Lebach I* case, judged by the BVerfG:[19] this would have been a case in which the "affectation on the protection of

[18] 'Advantage' is certainly not the same as 'importance', except from an extremely utilitarian point of view.

[19] German TV channel ZDF was planning to broadcast a show about a convict being released from prison after serving two-thirds of his sentence. State took the view that it had to prohibit, on the legal basis of § 23 of the *Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie*, only the display of the photo and of the name of a former criminal; State thus refrained from prohibiting the disclosure of all other information. The BVerfG held that this (partial) abstention on the part of State (on the grounds of non-compliance with the State duty of protection) in prohibiting the broadcast of the report "cannot be justified by the fundamentally overriding interest in current information about the crime [*Dieser schwere Eingriff in den Persönlichkeitsbereich des Beschwerdeführers ist nicht durch das grundsätzlich vorrangige Interesse an der aktuellen Berichterstattung über die Straftat zu rechtfertigen*]" (Lebach I, 1973).

personality" and the "importance of the realization of the principle of freedom of broadcasting" would have been balanced (Alexy, 2015, p. 150).[20]

It is interesting to note how, in the *Lebach I* case itself, the BVerfG understands the *Verhälnismäßkeitsgrundsatz*: "The central constitutional significance of the right of personality requires […] strict observance of the maxim of *Verhältnismäßigkeit*: […] the *disadvantages incurred by the perpetrator must be proportional to the seriousness of the offense* or to its significance for the public"[21] (Lebach I, 1973). Once again: there is no consideration here of the "importance" of satisfying the freedom of the press in order to justify the intervention in the Lebach's (the perpetrator) personality right — the BVerfG undoubtedly considers the freedom of the press important (who does not, in a democratic society?), but the benchmark for the judgment of proportional rationality is explicitly the "seriousness of the offense", not the "importance" of the freedom of the press. There is nothing to determine an open comparison, either abstract or concrete, between the importance of the fundamental right to freedom of the press and the importance of the fundamental right to honor and image.

Properly speaking, there would be a balancing in the context of *Verhältnismäßigkeitsgrundsatz* (means-ends balancing) only if it were confronted the intensity of intervention caused as collateral effect (restriction on the freedom of the press) caused by the means that State is said to have adopted (a ban on broadcasting the TV show) in the light of the recognized end (protection of the fundamental right to image and honor).[22] What happened in the *Lebach I* case is something noticeably different, which Stefan Huster (1993, p. 142 et seq.) describes as the dogmatic extension of the *Verhältnismäßigkeit* maxim to encompass not only a means-ends balancing (the 'classical' test), but also "correspondence tests", in which "real" ends are left aside in favour of others benchmarks.[23]

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[20] *"Daß die zu beurteilende Ausstrahlung eine sehr intensive Beeinträchtigung des Persönlichkeitsschutzes darstellt, wird u.a. mit der Reichweite von Fernsehausstrahlungen, den Wirkungen der Sendeform des Dokumentarspiels, dem hohen Glaubwürdigkeitsgrad, den Fernsehsendungen beim Publikum haben, den sich hieraus und aus weiteren Eigenschaften der Sendung ergebenden Gefahren für die Resozialisierung und der Zusätzlichkeit der Beeinträchtigung, die ein einige Zeit nach der aktuellen Berichterstattung ausgestrahltes Dokumentarspiel bedeutet, begründet. Was die Wichtigkeit der Erfüllung des Prinzips der Rundfunkfreiheit anbelangt, so werden zunächst zahlreiche Gründe für die Wichtigkeit einer aktuellen Berichterstattung über schwere Straftaten angeführt. Vor diesem Hintergrund wird dann die zu beurteilende wiederholte Berichterstattung als nicht wichtig genug, um die Intensität der Beeinträchtigung zu rechtfertigen, qualifiziert"*.

[21] *"Die zentrale verfassungsrechtliche Bedeutung des Persönlichkeitsrechts verlangt […] die strikte Beachtung des Grundsatzes der Verhältnismäßigkeit: Der Einbruch in die persönliche Sphäre darf nicht weiter gehen, als eine angemessene Befriedigung des Informationsinteresses dies erfordert, und die für den Täter entstehenden Nachteile müssen im rechten Verhältnis zur Schwere der Tat oder ihrer sonstigen Bedeutung für die Öffentlichkeit stehen"*.

[22] In the 'new formula' of the BVerfG, there are three kinds of *Verhältnismäßigkeit*: prohibition of excess, prohibition of insufficiency, and prohibition of unjustified inequality (Oliveira, 2013, p. 119 et seq.). This would be a clear case of prohibition of insufficiency (*Untermaßverbot*).

[23] An example of the "correspondence test" is the following: the German *Bundesarbeitsgericht* (BAG, 1980), in a decision of June 10, 1980, considered that "the permissible scope of defensive lockouts is determined by the maxim of *Verhältnismäßigkeit* (prohibition of excess). [...] The decisive factor is the scope of the offensive strike [*Der zulässige Umfang von Abwehraussperrungen richtet sich nach dem Grundsatz der Verhältnismäßigkeit (Übermaßverbot). [...] Maßgebend ist der Umfang des Angriffsstreiks*]". The *Verhältnismäßigkeit* of the lockout here is not measured by its purpose (considering it a means to achieve it), but by the scope of the strike to which it intends to respond.

Balancing in the context of *Verhältnismäßigkeit* has its critics — the main one perhaps being Bernhard Schlink (1976, pp. 214 et seq.), according to whom, except in symmetrical conflicts (in which citizens can resolve their conflicts on equal terms, cases in which Courts can apply a *Verhältnismäßigkeit* test in the means-ends scheme only with the aim of bringing all sides within the limits of what is "essentially harmful in the pursuit"), only the legislator can decide whether the means-end relation is in an acceptable *ratio*. But it would be unfair to direct Schlink's criticisms against Alexy's balancing — as Alexy (2015, p. 85 [footnote 48]) himself seems to be inappropriately receiving them —, because the latter deals with something completely different. And much more dangerous.

It is very curious that, faced with such an obvious discrepancy in relation to the balancing in the context of *Verhälnismäßkeitsgrundsatz* (means-ends balancing), Alexy (2003, p. 436) goes to such lengths to insert *his* balancing (henceforth: 'Alexy's balancing') into *Verhälnismäßkeitsgrundsatz* — to the point of explicitly stating that: "Proportionality judgments [...] presuppose balancing" (*his* balancing). Why does Alexy not openly adhere to the model of open balancing inaugurated by Ernst Stampe, and which reached its apex in the Lüth case (Rückert, 2011, p. 920) — a judgment explicitly considered by Alexy (2015, p. 134) as a great example of the kind of balancing he defends? One possible explanation is the clear movement away from this open balancing model, both in the literature (it can be cited here the *Ausgestaltungsdogmatik* [elaboration Dogmatics] (Volkmann, 2005, p. 265), with names such as Ernst-Wolfgang Böckenförde, Friedrich Müller, Bernhard Schlink, Ralf Poscher, Uwe Volkmann, Jochen von Bernstorff and Joachim Rückert), and in the BVerfG itself (for example, when Alexy published his *Theorie der Grundrechte* in 1985, the BVerfG had already handed down the *Böll* and *Sprayer von Zürich* decisions, both renouncing an open balancing along the lines of the Lüth case).[24] Alexy possibly does not want to be so clearly associated with a model that was already considered unsustainable at the time (which, of course, does not mean that he cannot be consistently associated with it).

What are the practical consequences of all this? Firstly, by giving the judge the power to confront the "importances" of legal goods and rights, Alexy's proposed model subtly subverts the idea that rights serve, to some extent, precisely as trumps against interventions based on collective goods (only rights must have *Schwellengewicht* [threshold weight] against restrictions, not public policies): now, under the misleading heading of the well-reputed *Verhälnismäßkeitsgrundsatz*, the judge can use the "importance" of a collective good to legitimatize interventions in rights — so

[24] In the *Sprayer von Zürich* (1984) [Sprayer from Zurich] decision, the BVerfG decided that the freedom of art protects only against State intervention in the choice of the object of art, not providing protection for graffitiing public and private buildings (see: Böckenförde, 2003, pp. 174 et seq.). In the *Böll* (1980) case, the Court ruled that the freedom of opinion does not protect incorrect quotations — even if only in cases where the inveracity of the factual assertion is evidently established at the time it is expressed (Vesting, 1997, p. 341). For more on this trend of the BVerfG overcoming the jurisprudence of the Lüth case, see: Kahl, 2006, p. 600; Murswiek, 2006, p. 479; Volkmann, 2005, p. 266; Hoffmann-Riem, 2004, pp. 216 et seq.; Bernstorff, 2011, p. 165–166. Three more recent decisions along these lines, which have had a lot of repercussions, are Glykol (2002), Osho (2002), and Wunsiedel (2009).

public policies are now also protected against restrictions *caused by* rights (Huster, 1993, p. 124–125). Secondly, Alexy extends the judge's power to assign weight to these "importances" in a totally uncontrollable way (there is no way, in the strict terms of Alexy's theory, to argue that the weight of a certain "importance" is 2^x, and not 2^y or 2^z) (Schlink, 1976, p. 127 et seq.; Windisch, 2014, p. 38; Novais, 2021, pp. 79–85).

2 The Lack of Criteria for Identifying 'Principles' and the Uncontrollable Power of Judges to Discover Them

In this topic, I deal with the conceptual circularity between Robert Alexy's 'principles' and the claimed necessity, in a concrete case, of an Alexy's balancing.

Alexy presents a semantic concept of *Prinzipien* (principles): he maintains that they are an ontologically species of the genus 'norm'. However, there has been a significant change in his theory: in the beginning, Alexy maintained that 'principles' would be optimization commands (the 'principles' would apply in degrees), while the 'rules' would apply in an all-or-nothing way (either the 'rule' applies or it does not); confronted by Aulis Aarnio and Jan-Reinard Sieckmann, Alexy ended up having to recognize that, if this were the case, the 'principles' would be 'rules', because either optimization would occur in the concrete case (then the commandment of the 'principle' would have been fulfilled) or optimization would not occur in the concrete case (then the commandment of the 'principle' would not have been fulfilled). As a result, at least since 2000, Alexy (2000, p. 300) maintains that 'principles' are commands *subject to optimization* ("commands to be optimized").

This change in his theory is problematic in itself, because 'principles' and 'rules' can no longer be ontologically distinguished on the basis of their function ('command to optimize' or 'command to apply all-or-nothing'), but are supposedly distinguished by whether or not they are subject to an external optimization command. A large number of objects, however, are also optimizable (as Ralf Poscher points out, tire pressure, for example), and not for this reason should 'rules' and these objects (as 'tire pressure') to be distinguished, for legal purposes. What is more, if there is such a thing as a "command to optimize", this command is directly applicable on the life's good (health and life, for example), not on a completely idly intermediate stratum that divides what should and should not be optimized (Poscher, 2009, p. 437). If something commands that health should be optimized, it should be optimized because it was so commanded by the 'thing' that commands; thus, a 'principle of something' (in Alexy's sense) is just an idle observation that this 'something' is the object of an optimization command (in whatever abstract "meta-level" this command exists) (Alexy, 2000, p. 300).

Anyway, there is a reason why Alexy insists on this already failed distinction between 'principles' and 'rules': the optimization (and this is a constant in the timeline of Alexy's theory) can only take place through an Alexy's balancing — this is "law" for Alexy. So today, for him,

roughly speaking (it will still be necessary to deal with formal principles and its second-order balancing), 'principles' are commands subject to first-order balancing, while 'rules', by exclusion, are commands that are not 'principles' (so 'rules' would not, in theory, be subject to first-order balancing, but to subsumption). Notice the difference: in the early days of his theory, 'principles' and 'rules' commanded; now, they are subject to a command of subsumption, of balancing, or of comparison — but, according to Alexy (2010, p. 18) and without further explanation, "comparison is necessarily connected with balancing". Although the distinction between 'principles' and 'rules' is no longer justifiable in the slightest, Alexy needs to maintain it in order to legitimize the core of his proposed model: the balancing operation.

Without an ontological distinction based on functions (the definition of 'principles' and 'rules', when existed, was only functional), what remains is a clear logical circularity: it is a 'principle' because it is balanced; it is balanced because it is a 'principle'.[25] Breaking this circularity requires either a concept of 'principle' that does not refer to Alexy's balancing, or a concept of Alexy's balancing that does not refer to 'principles': a closed set of sentences "A is what is subject to B" and that "B is what subjects A" is complete nonsense — the solution is the sentence "A/B is what has the characteristics *x*, *y*, *z*", as was the case in his first theory, with the assertion that 'principles' were optimization commands (a statement that presented a characteristic, and did not refer to balancing).

Knowing that the axis of Alexy's proposed model is the Alexy's balancing (and because it has not yet been proven that the intermediate stratum between the optimization command and the object of optimization, where 'rules' and 'principles' supposedly dwell, does exist), one imagines that the break in the logical circularity must occur on the side of Alexy's balancing,[26] but this is not relevant to the consequence that will be stated below: therefore, for Alexy's proposed model to make any sense, it is necessary to define what characteristics must be present in the specific case in order for it to be balanced (or, breaking the circularity at another point, it is necessary to define what the characteristics of a so-called 'principle' are): something like "balancing must occur whenever... [no 'principles' must be inserted in sentence]" (or "a principle derives from a normative text [Alexy's theory is semantic] with the following characteristics... [no Alexy's balancing must be inserted in sentence]").

The truth is that Alexy's proposed model is not even consistent on this point: for Alexy, even the freedom to murder must be inserted in balancing (in the context of the general freedom of action), and this is not "grotesque": "why should legal constructions, if they only lead to the most correct results in the most rational way possible, not be allowed to detach themselves to some

[25] See, e.g., the remark of Martins Borowski (2003, p. 108): "If a norm can be subject to balancing in the specific case, then it necessarily involves a principle [*Si una norma puede ser objeto de la ponderación en el caso concreto, entonces necesariamente se trata de un principio*]".

[26] Lucas de Laurentiis (2017, pp. 144–146) points out that the application by subsumption or balancing is the only 'visible' face of the circle (once this face has been identified, classification as a 'rule' or 'principle' is merely a logical consequence).

extent from initially existing intuitive ideas and follow their own laws?"[27] (Alexy, 2015, p. 198). One of these 'laws' (*rectius*: axioms) is: "even clear cases of non-protection under fundamental rights [such as the murder] are the results of tests of balancing of interests"[28] (Alexy, 2015, p. 290). Alexy (2007, p. 343–344), however, elsewhere deals with what I call 'fiascos':

> An important class of cases to be resolved by proportionality analysis [*rectius*: by Alexy's balancing] are cases of a collision between two rights. [...] In antiperfectionism some reasons are excluded in all cases from taking part in a balancing procedure […]. This, too, can however be grasped by means of the weight formula. As already mentioned, in case of excluded reasons *this can be done by attributing to them the value of zero*. In case of categorical constraints this can be achieved by giving them an infinite value. *Participating in balancing* with an infinite value is, just like participating *with the value of zero, not really participating in balancing at all* [emphasis added]. […] The fact that balancing has limits of this kind is not to say, however, that proportionality [*rectius*: by Alexy's balancing] does not remain at the centre of rights analysis.

So Alexy's 'principles', the alleged but unproven link between the optimization command and the legal good or right to be optimized, are what is subject to balancing (or comparison through balancing), except in cases in which the 'principle' is a fiasco (in which case it will be a 'principle' even without being "really" balanced or compared).

Alexy, anyway, does not propose criteria either for identifying when to balance, or for identifying a 'principle', or for identifying a fiasco. Thus, if the judge states that he has a case under judgment in which he must balance (or that a 'principle' is involved in the judgment, not a 'rule'), how can one rationally argue that the case requires subsumption (or that the 'norm' involved in the judgment is a 'rule', or that the 'principle' is a non-balanceable fiasco so it should not be part of balancing)?

Alexy's loophole gives uncontrollable powers to the judge: once it is determined that it is a case of balancing (or that there is a 'principle' involved with no weight 'zero' of importance), it is a case of balancing, and that is that. In words of Paolo Comanducci (2012, p. 27): "Clearly, the acme of discretion is realized in the configuration of the principle".[29] How can these judge's "discretion" be controlled? Alexy does not even give us a clue.

In a partial summation of what has been said so far: there is no way to rationally control the judge's determination that a given case is a case of balancing; if the judge decides that it is a case of balancing, he or she can, in a rationally uncontrollable way, assign weights to the "importances" of the legal goods and rights that he or she believe (or simply state that) are involved in the case under judgment.

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[27] *"Warum aber sollen juristische Konstruktionen, wenn sie nur auf möglichst rationale Weise zu möglichst richtigen Ergebnissen führen, sich nicht ein Stück weit von zunächst bestehenden intuitiven Vorstellungen lösen und ihren eigenen Gesetzen folgen dürfen?"*.

[28] *"auch klare Fälle grundrechtlichen Nicht-Schutzes das Ergebnis einer Abwägung sind und daß die Abwägungs*möglichkeit *für alle Fälle offenzuhalten ist und keinen Fall durch Evidenzen welcher Art auch immer ersetzt werden auf"*.

[29] *"Chiaramente l'acme della discrezionalità si realizza nella configurazione del principio"*.

3 The Lack of Criteria for *Festsetzung* and the Uncontrollable Power of Judges to Determinate the Meaning of the 'Principles' Discovered by Themselves

Robert Alexy builds his theory of fundamental rights on what he understands to be the decision-making practice of the BVerfG: his stated aim is to propose a rationalization of this supposed practice. The importance of this descriptive part of his theory is undeniable: a critical legal science only makes sense if it first has a deep understanding of what jurists actually do, and how they do it (and why they do not do it differently), as Martin Kriele (1967, pp. 43–44) points out. However, the part of Alexy's theory of most interest outside Germany — of global interest, it can be said — is not the descriptive, but the prescriptive one: Alexy not only describes a praxis that he believes is in force, but also proposes the adoption of a new praxis.

One of the central points of what Alexy sees as the praxis of the BVerfG is the *Festsetzung*; it is stated right in the introduction to his *Theorie der Grundrechte*: "In its more than thirty years of decision-making practice, it [the BVerfG] has repeatedly made new *Festsetzungen* within the broad scope of what is possible under the constitutional text"[30] (Alexy, 2015, p. 17). In his proposed model, globally considered, Alexy (2015, pp. 17–18, 57–58) explicitly maintains the importance of the *Festsetzung* gleaned from this supposed practice of the BVerfG: in his proposal, genetic, historical, comparative and systematic arguments are used to "justify such *Festsetzungen*"[31] (Alexy, 2001, p. 1009). The qualification, in a theory *of interpretation*, of such an extensive list of canons *of interpretation* as elements justifying *Festsetzungen* positions this concept as one of the most important concepts — despite being paradoxically little explored — in the prescriptive dimension of Alexy's theory of fundamental rights: Alexy observed it in the decision-making of the BVerfG, and incorporated it into his proposal.

In my view, this is the loophole for judicial arbitrariness that Alexy was least concerned with closing. On the contrary, Alexy's *Festsetzung* is a very thinly veiled admission of a virtually absolute power of judges (to be fair, in Alexy's case, *perhaps* only of an absolute power of the BVerfG).

Alexy has a broad conception of *Tatbestand*. In the "classical" definition of Karl Engisch (2018), the *Tatbestand* is that to which legal consequences (*Rechtsfolgen*) attach[32] (i.e., if something, in a concrete case, is foreseen in the norm's *Tatbestand*, the consequence will be an exemption, a prohibition or a command).[33] For Alexy, in the *Tatbestand* must be included everything that falls

[30] *"In seiner nunmehr über dreißigjährigen Entscheidungspraxis hat es im weiten Raum des nach dem Verfassungstext Möglichen immer neue Festsetzungen getroffen"*.

[31] *"Die nun zu diskutierenden Argumentformen dienen unter anderem der Rechtfertigung solcher Festsetzungen"*.

[32] *"‚Tatbestand', an den ‚Rechtsfolgen' durch den ‚Rechtssatz' (die ‚Rechtsnorm') geknüpft sind"*.

[33] These are the "basic deontic modalities [*deontischen Grundmodalitäten*]", according to Robert Alexy (2015, pp. 182 et seq.).

into the "semantic field" of the normative text — this means, for him, resolving cases of ambiguity, vagueness and value openness of the normative text in such a way as to include in the *Tatbestand* everything that is subject to at least doubt (the cut-off line of 'doubt' is left open) (Alexy, 1995, pp. 24–25) —, except those candidates for inclusion (again: candidacy refers to everything that can be extracted from the normative text) that are considered excluded "by means of decision, argumentation and/or praxis"[34] (Alexy, 2015, p. 297). What is of most interest here is exclusion by decision, operated by means of *Festsetzung* (determination of the meaning).

Alexy (2001, p. 289 [footnote 60]) explains that he takes the concept of *Festsetzung* (as well as of *Feststellung*) from Eike von Savigny, a German philosopher descended from Friedrich von Savigny. E. Savigny has done a lot of work in the field of Linguistics. One of his contributions is on the forced introduction (*Einführung*) of words into the lexicon. As well as words that arise "naturally" (almost all of them), E. Savigny (1981, pp. 47 et seq.) points out the possibility of new words being inserted by *Feststellung* (delimitation of the meaning) — which can occur verbally, in closed systems ('there are three fundamental colors: red is the color that is neither yellow nor blue'), or ostensibly (I point to blood, a cherry and a ladybug and say 'the color of these things should be called red'). A *Festsetzung* (determination of the meaning) can also be considered: this occurs when someone *arbitrarily* introduces a word and determines its meaning.

E. Savigny (1981, p. 50) himself points out that these are not very exciting observations: if the *Feststellung* has a place, albeit restricted, in the language-games of sciences, the *Festsetzung* is a hypothesis that is almost impossible to realize. After all, as E. Savigny sarcastically asks, who could introduce a word like *Junggeselle* [bachelor] into the German lexicon? "A papal bull"?[35] Alexy answers this question objectively: the BVerfG.

Not only does Alexy make this 'leap', but he attaches extraordinary importance to this conclusion: the "semantic openness" of the text of the German Basic Law would be resolved by *Festsetzung* of the BVerfG. And that is that:

> it is worth looking at Article 5(3), sentence 1, of the Basic Law, of which the following part is of interest: (2) "... science, research and teaching are free". [...] This norm is, of course, very vague. Its vagueness is twofold. It is both semantically and structurally open. Semantically, this norm is open due to the indeterminacy of the terms "science", "research" and "teaching". *The BVerfG articulates this indeterminacy by Festsetzung of semantic rules* [emphasis added] when it says that scientific activity is everything "which, in terms of content and form, is to be regarded as a serious attempt to ascertain truth", or when it says that scientific activity does not exist when "knowledge(s) gained through observation

[34] *"durch Entscheidung, Argumentation und/oder Praxis"*.

[35] *"Kein vernünftiger Mensch wird [...] wollen, ‚Junggeselle' sei in der Geschichte der deutschen Sprache jemals (durch Beschluß eines Things? durch eine Bulle?) als gleichbedeutend mit ‚unverheirateter Mann' festgesetzt worden, und ‚Junggeselle' hätte seine Bedeutung kraft einer Definition, nach der die deutschen Muttersprachler sich (gehorsam!) richteten"*.

> are taken up by a political party in its will and made the determinants of its political action"[36] (Alexy, 2015, pp. 57–58).

The result of this *Festsetzung* is the input of Alexy's balancing: a behavior of obtaining knowledge "adopted by the program of a political party [...] which uses it as the determining reasons for its political action" is not balanced, since it is not constitutionally protected under the term "science".[37]

Alexy seems to extend this power of *Festsetzung* (determination of meaning) to all judges: when dealing with the formulation of the *Tatbestand* of the murder crime in the German Penal Code, he gives as an example the determination of the meaning of "killing treacherously":

> (1) (x) (Tx → ORx) What is a *T* [*Tatbestand*], it is defined in § 211, phrase 2, by means of nine characteristics (M^1_1 - M^1_9) [M^1_5 would be killing "treacherously"] [...] § 211, phrase 2, can be reduced to the following form: (2) (x) (M^1_1 x v M^1_9 x ←→ Tx). From (1) and (2) it follows: (3) (x) (M^1_1 x v M^1_9 x ←→ ORx). (3) says that if one of the properties happens, the legal consequence ORx is produced. M^1_5 means "...killed a man treacherously". From (3) it now follows: (4) (x) (M^1_5 x ←→ ORx). *According to the definition used by Courts* [emphasis added], one kills treacherously if he "consciously takes advantage of the good faith and defenseless character of his victim in order to kill him" (M^2_5). Therefore: (5) (x) (M^2_5 ←→ M^1_5 x)[38] (Alexy, 2001, pp. 276–277).

He is not talking here about a specific *Festsetzung of the BVerfG*, but about a general *Festsetzung of the Courts*.

There is no problem in admitting that judges determine, to a certain extent, the meaning of normative texts. This is a presupposition of both doctrines of the further development of Law (*Rechtsfortbildung*) and of the creation of Law (*Rechtserzeugung*). The gap that Alexy opens (and makes no effort to close) is that of control over this determination of meaning, i.e., Alexy does not seem to be concerned about *how* this determination takes place.

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[36] *"Zur Beantwortung dieser Frage sei ein Blick auf Art. 5 Abs. 3 Satz 1 GG geworfen, von dem folgender Teil interessieren soll: (2) ‚… Wissenschaft, Forschung und Lehre sind frei'. […] Diese Norm is freilich sehr unbestimmter Art. Ihre Unbestimmtheit ist doppelter Natur. Sie ist sowohl semantisch als auch strukturell offen. Semantisch offen ist jene Norm aufgrund der Unbestimmtheit der Ausdrücke ‚Wissenschaft', ‚Forschung' und ‚Lehre'. Dieser Unbestimmtheit kann durch die Festsetzung semantischen Regeln formuliert das Bundesverfassungsgericht, wenn es sagt, daß wissenschaftliche Tätigkeit alles ist, ‚was nach Inhalt und Form als ernsthafter Versuch zur Ermittlung von Wahrheit anzusehen ist', oder wenn es sagt, daß eine wissenschaftliche Tätigkeit dann nicht vorliegt wenn ‚betrachtend gewonnene(n) Erkenntnisse von einer politischen Partei in ihren Willen aufgenommen und zu Bestimmungsgründen ihres politischen Handelns gemacht werden'".*

[37] On an even broader level, the very meaning of the term 'free' of the Art. 5(3) of the German Basic Law has to be introduced by *Festsetzung*. As Grégoire Webber (2014, p. 134) points out (about freedom of expression, but in reasoning that can be generalized), Alexy's conception includes in the *Tatbestand* not only everything that can be considered 'science', but also everything that can be considered '*freedom* of science'. Since what is being balanced is not 'science', but 'freedom of science', the terms 'free' and 'science' must already be determined (*setzten fest*) in the input of Alexy's balancing.

[38] *"(1) (x) (Tx → ORx) […] Was ein T ist, wird in § 211 Abs. 2 durch neun Merkmale (M^1_1 - M^1_9) definiert. §211 Abs. 2 kann auf folgende Form gebracht werden: (2) (x) (M^1_1x v M^1_9x ←→ Tx). Aus (1) und (2) folgt:(3) (x) (M^1_1x v M^1_9x ←→ ORx). (3) besagt, daß dann, wenn mindestens eines der Merkmale vorliegt, die Rechtsfolge ORx eintritt. M^1_5 bedeutet ‚… hat heimtückisch einen Menschen getötet'. Aus (3) folgt nun: (4) (x) (M^1_5x ←→ ORx). Nach der von den Gerichten benutzten Definition tötet heimtückisch, wer ‚die Arglosigkeit und Wehrlosigkeit seines Opfers zur Tötung bewußt ausnutzt' (M^2_5). Es gilt also (5) (x) (M^2_5 ←→ M^1_5x)".*

For Alexy, *Festsetzung* would be necessary in order to have formed the superior premise of subsumption (and this statement also applies to the input of balancing: there needs to be a *Tatbestand* to be balanced, because texts *per se* cannot be). Thus, only with the *Festsetzung* would it be possible to begin the process of applying Law: 'rules' cannot be subsumed and 'principles' cannot be balanced without someone (in this case, the judges) first having determined the meaning of the normative texts from which they are (according to Alexy) extracted. Friedrich Müller (1969, p. 24), in this context, is wrong to say that this kind of balancing pits "words against words":[39] what is being balanced is not the text "Arts and sciences, research and teaching shall be free", from Art. 5(3) of the German Basic Law, but, e.g., the term "sciences" *as the subject of the Festsetzung by the BVerfG* (perhaps "by Courts", in general) — as Alexy puts it without leaving any room for doubt.

Curiously, Alexy tries to justify himself in Josef Esser's theory, more specifically, in a phrase (very correct, by the way) in which the latter establishes the need to break, at some point, the hermeneutic back and forth between major and minor propositions of subsumption: for Alexy (2001, p. 281 [footnote 44]), "Esser critically notes that not much has been gained with this formula [Karl Engisch's]. In order for the back and forth not to become an 'endless road', *criteria are necessary that 'allow the settling on a certain subsumption'*" (emphasis added).[40] The *Festsetzung* certainly directs the path towards subsumption by clearly establishing its major proposition (so instead of a vague 'treacherously', one now has the element of the *Tatbestand* 'taking conscious advantage of the good faith and defenseless character', which is much easier to subsume).

However, Alexy does not cite the complement to the excerpt he refers to in order to substantiate his position: according to Esser (1970, p. 76), "A rationality, which has always been seen in this wandering back and forth [Engisch], can only be demonstrated once the *underlying rationality has been proven*" (emphasis added).[41] Thus, for Esser, any activity resembling a *Festsetzung* must be rationally *proved*: the judge, of course, is guided to a large extent by his pre-comprehensions — in the sense of the Philosophical Hermeneutics of Martin Heidegger and Hans-Georg Gadamer, which Esser (1969, p. 758) adopts in part —,[42] so this process of formulation of the *Tatbestand* need to be made explicit: Esser (1972, p. 126) proposes that the making explicit of pre-comprehensions takes place through a procedure of permanent dogmatic development of groups of cases (*Fallgruppen*).

Of the many rules of argumentation provided by Alexy in his *Theorie der juristischen Argumentation* [Theory of Legal Argumentation], it is quite symptomatic that only one deals, albeit in a very restricted way, with the *Festsetzung*, the J.2.3: "Whenever there is doubt as to whether *a* is

[39] *"Andernfalls steht Güterabwägung in der zusätzlichen Gefahr, ohne dogmatische Klärung im wesentlichen nur Wörter mit pauschal erfaßten Sachbereichen und allgemeinen Wertungsvalenzen gegen Wörter auszuspielen"*.

[40] *"Esser stellt kritisch fest, daß mit dieser Formel noch nicht viel gewonnen ist. Damit aus dem Hin- und Herwandern keine ‚Wanderung ohne Ende' werde, seien Kriterien erforderlich, ‚die das Einpendeln auf eine bestimmte Subsumtion erlauben'"*.

[41] *"Eine solche Wanderung ohne Ende wird erst dann vermeidbar, wenn man im Vorwegnehmen eines Wertungshintergrundes die Kriterien anzugeben vermag, die das Einpendeln auf eine bestimmte Subsumtion erlauben. Eine Rationalität, die in diesem Hin- und Herwandern, stets gesehen wurde, läßt sich erst aufweisen, wenn die Rationalität eines Hintergrundes nachgewiesen ist"*.

[42] On this only partial reception: Lamego, 1990, p. 90.

T or M_1, *a rule must be presented* that decides the question"[43] (emphasis added) (Alexy, 2001, p. 279). In the good example given by Claus-Wilhelm Canaris (1999, pp. 53–55): how does one control the correctness of a criterion for defining the legitimate exercise of freedom of expression such as that established by the BVerfG in the judgment of the *Lüth* (1958) case ("a contribution to the intellectual clash of opinions, on an issue of central interest to public opinion, made by a person legitimized to do so")[44]? No one, except the judge him/herself, can control this *Festsetzung*: in a specific critique of Alexy's model (the "central author" of the theory of principles), Horst Dreier (2013 [Rn. 79]) states that: "The emphasis [of Alexy's theory] is on obtaining confirmation, not on critical orientation. In practice, therefore, it ends up exhausting itself in the positive affirmation of the BVerfG".[45]

The alternative to this Methodics would be to adopt a concept of principle along the opposite lines to Alexy's — as pointed out by Ralf Poscher (2009, p. 445–446) —, led by Esser himself (as well as by Canaris). This, however, would completely denature Alexy's proposal: judges would assign meaning, but would no longer be free to do so. The implication of this would be that the judge could no longer openly balance legal goods and rights (the proposed Alexy way of dealing with fundamental rights), but now must respect a tradition loaded Dogmatics.

To be fair, Alexy (2010, pp. 16–17) even tries to establish a minimum control over the *Festsetzung* of judges, when he proposes the "relevant feature rule", according to which all the features of the result of the balancing must be stated, so that they can (supposedly) be compared in future balancing operations. Nevertheless, these features are always infinitely variable (García Amado, 2009, p. 40) — locally, temporally, modally, personally, etc. (e.g., a 37-year-old man's gestural expression in the living room of a green painted condo at dawn, etc.). As pointed out by Martin Kriele (1967, p. 391): "Out of the infinite abundance of events in the stream of life, a 'case' stands out only because of the assumption that certain facts are 'legally relevant'. […] details of who, where, when and how […] matter".[46]As Alexy does not propose a method for cutting out, from the infinite number of features, those that were decisive in the previous balancing, judges always remain free to evade these results (e.g., claiming that it is a relevant difference for the case that a man is 38 years old, not 37, or that is a woman, not a man). Therefore, Alexy fails, since his specific proposal is as rationally uncontrollable in application as his proposed model in general is. So much so that Alexy apparently abandons the "relevant feature rule", no longer devoting relevant attention to it.

[43] *"Immer dann, wenn zweifelhaft ist, ob* a *ein* T *oder ein* M_1 *ist, ist eine Regel anzugeben, die diese Frage entscheidet"*.

[44] *"einen Beitrag zum geistigen Meinungskampf in einer die Öffentlichkeit wesentlich berührenden Frage durch einen dazu Legitimierten"*.

[45] *"In nachzeichnender Bestätigung, nicht in kritischer Anleitung liegt der Schwerpunkt. Praktisch erschöpft sie sich somit letztlich in bundesverfassungsgerichtspositivistischer Affirmation "*.

[46] *"Aus der unendlichen Fülle der Ereignisse im Strom des Lebens hobt sich ein ‚Fall' überhaupt nur durch die Annahme heraus, daß gewisse Tatsachen als ‚juristisch relevant' seien. Tausend Einzelheiten des wer, wo, wann und wie kann man weglassen, nur auf gewisse Umstände kommt es an. Auf welche es ankommt, richtet sich nach der Normhypothese. Ohne Normhypothese also kann man einen ‚Fall' überhaupt nicht erzählen"*.

Until the necessary reformulation (*rectius*: the necessary surpassing) of Alexy's proposed model takes place, we shall deal with judges who determine that a given case is a case of balancing; that assign weights to the "importances" of the legal goods and rights that they believe (or announce) to be involved in the case that they believe (or announce) to be a case of balancing; that determine the meaning of the 'principles' (i.e., the meaning of the *Tatbestand* that is used as an input in balancing operation) that legally enshrine the legal goods and rights that they believe (or announce) to be involved in the case that they believe (or announce) to be a case of balancing.

4 The Lack of Criteria for Identifying Constitutional Rights and the Uncontrollable Power of Judges to Override the Legislator's Decisions

That is not all, though. Imagine that, through some self-control on the part of the judge (external control mechanisms are not provided, as seen), he or she recognize that what is at stake is not a 'principle', but a 'rule' (a "thing" *a priori not* subject to a command of optimization, therefore). The logical consequence would then be *not* to balance anything?

No. In Robert Alexy's proposed model, even when the judge identifies the involvement of a 'rule' in the concrete case, there must be balancing. This is because the "formal principle" of respect to the decisions made by parliament according to the majority rule may require the judge to make not one, but two balancing operations.

In this aspect of his theory, Alexy seems to vacillate: at first, he proposed that formal principles would reinforce the weight of "importance" that the judge should give to the legal good or right that the legislator (a bold legislator who tries to invade the free will of judges!) intended to protect (Borowski, 2019, pp. 23 et seq.). Alexy then altered his conception to establish that formal principles enter into a "second-order balancing", on *if* and *how* to carry out the inevitable and typical Alexy's balancing (first-order balancing):

> The decisive point of second-order balancing is that constitutional rights […] collide with the formal principle of the democratically legitimated legislature. If this collision could be solved by establishing an absolute precedence for the substantive constitutional rights principle as against the formal principle of democratically legitimated legislature, in wide areas of law the consequences would be inacceptable. [...] This would be a disproportional interference with the formal principle of the democratically legitimated legislature. This *disproportionality is established by means of a second-order balancing. This is a balancing of a substantive principle with a formal principle*. […] it takes place not inside the weight formula, but on a meta-level, where it is concerned with the question of *which variables with which kind of scales have to be inserted into the weight formula* [therefore, in the first-order balancing] [emphasis added] (Alexy, 2014, p. 521).

In this second-order balancing, Alexy (2014, p. 515) works with the "stages" 'reliable/certain', 'plausible' and 'not evidently false', for the premises adopted by the legislator. It is easy

to see that these three "stages" cover the entire field of reliability (at least from "certain" to "not evidently false"):[47]for Alexy, whenever there is a constitutional right involved, it will be necessary to assess, in a kind of Alexy's balancing (second-order balancing), the "epistemic discretion" (even if it is to qualify all the legislator's premises as "certain").

His example is the Cannabis judgement, in which the BVerfG upheld the State ban on the drug use, based on a conclusion that the legislator's premise was, according to Alexy (2014, p. 523), "plausible": "Scientifically based knowledge, which necessarily points to the correctness of one [use of criminal law] or the other [liberalizing cannabis products] strategies, is not available"[48] (*Cannabis*, 1994). The first thing to note is that, even if the legislator's premise was considered by the BVerfG to be 'certain', according to Alexy's theory, there should be at least a second-order balancing (as uncontrollable, and for the same reasons, as first-order balancing). This short-circuit stems from Alexy's misunderstanding of the BVerfG decision: it was not an issue of placing the reliability of the premises in the numerator and denominator of the former's "weight formula" — as Alexy (2014, p. 521) maintains —, but, according to the Court itself, of a control only of extremes, i.e., of a consideration that,

> under special circumstances, cases appear conceivable in which established criminological findings require consideration in the context of the review of statutes to the extent that they are capable of forcing the legislature to deal with an issue that is to be statutory regulated by virtue of the Constitution in a certain way or to exclude the regulation adopted as a possible solution[49] (*Cannabis*, 1994).

It can even be admitted that, in some cases, the legislator is obliged to act (the well-known issue of *Untermaßverbot* [prohibition of insufficiency]), but this is not a finding arising from an equation involving the reliability of the empirical premises of the constitutional right and of the intervention of the legislator. Anyway, Alexy (2014, p. 521) inserts the "epistemic discretion"[50]

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[47] The "evidently false" premise is obviously excluded from the outset as a legitimizer of the State intervention.

[48] *"Wissenschaftlich fundierte Erkenntnisse, die zwingend für die Richtigkeit des einen oder anderen Weges sprächen, liegen nicht vor"*.

[49] *"Zwar erscheinen unter besonderen Voraussetzungen Fälle denkbar, in denen gesicherte kriminologische Erkenntnisse im Rahmen der Normenkontrolle insoweit Beachtung erfordern, als sie geeignet sind, den Gesetzgeber zu einer bestimmten Behandlung einer von Verfassungs wegen gesetzlich zu regelnden Frage zu zwingen oder doch die getroffene Regelung als mögliche Lösung auszuschließen (vgl. BVerfGE 50, 205 [212 f.])"*. In the judgment referred to, the BVerfG explicitly states that: "The legislator is not constitutionally obliged to remove the regulation of the theft of low-value items from criminal law and, for example, to transfer it to the law on administrative offenses. Nor does the constitution require that, in view of the relatively low degree of wrongfulness […], the former or a corresponding classification of criminal offenses into felonies, misdemeanors and misdemeanors be restored, i.e. that 'theft by mouth' be reclassified as a lesser offense — for example as a misdemeanor — and thus its reclassification as a misdemeanor be reversed [*Der Gesetzgeber ist von Verfassungs wegen nicht verpflichtet, die Regelung des Diebstahls geringwertiger Sachen aus dem Strafrecht herauszunehmen und etwa in das Ordnungswidrigkeitenrecht zu verlagern. Ebensowenig nötigt die Verfassung dazu, angesichts des verhältnismäßig geringen Unrechtsgehalts der von § 370 Abs. 1 Nr. 5 StGB a.F. erfaßten Delikte die frühere oder eine ihr entsprechende Einteilung der Straftaten in Verbrechen, Vergehen und Übertretungen wiederherzustellen, den „Mundraub" also wieder als mindere Deliktsart - etwa als Übertretung - zu qualifizieren und damit seine Aufstufung zum Vergehen rückgängig zu machen (vgl. BVerfGE 46,188 [193])*]" (*Strafbarkeit von Bagatelldelikten*, 1979).

[50] The part concerning the "epistemic discretion" that is of interest here is that of "*empirical* epistemic discretion" — since the issue of "*normative* epistemic assumptions" only arises as a *result* of balancing (in cases of "structural deadlock in balancing [*impasse estrutural no sopesamento*]", i.e., in a concrete case, "constitutional rights admit only a rudimentary scaling, in such

(created by him) in the "weight formula" (idem): "If [...] the constitutional rights principle for which this classification is favorable has precedence over the formal principle [...] the substantive result on the side of the constitutional right is not at all influenced by any formal or procedural considerations as required by formal principles". In other words: here, the legislative 'rule' can be excluded, and the judge can (must!) enter into the regular first-order open balancing.

And if the formal principle has, in the second-order balancing, precedence over the material principle? "The precedence of the formal principle in cases of merely plausible or even not evidently false empirical assumptions only means that these assumptions are not excluded from balancing" (Alexy, 2014, p. 522).

To sum up: *i.* if the formal principle, grounded in 'certain' premises, has precedence over the constitutional right, there will be at least a "second-order balancing" (which is a kind of Alexy's balancing), and maybe (Alexy is not clear here) not a first-order balancing; *ii*. if the formal principle has precedence over the constitutional right grounded only in 'plausible' or 'not evidently false' premises, or if the constitutional right has precedence over the formal principle, there will be two Alexy's balancing operations (second-order balancing and first-order balancing). In other words: whether the formal principle "wins" or the formal principle "loses", there will be the second-order balancing and, probably (again: Alexy is not clear), first-order balancing.

So, in terms of defining whether or not *a* balancing operation (conducted by judges) should take place, it is irrelevant whether there is a legislative 'rule' or there is not: if the judge identifies a constitutional right "in collision", this authorizes the judge him/herself to balance, regardless of whether there is a legislative 'rule' or not.

This brings back the problems of the identification of the 'principles' and of the uncontrollable *Festsetzung*: what are the criteria that define whether or not the judge is concretely faced with a "constitutional right" (and therefore obliged to carry out balancing, even in the face of the existence of a legislative 'rule')? This is not a simple question, even less obvious, since almost all legislative 'rules' can be traced back, to a greater or lesser extent, to constitutional law (e.g., every single issue about property rights can be seen as a constitutional issue, ultimately). In the words of Matthias Jestaedt (2012, pp. 167–168):

> From this perspective even private law is an example *par excellence* of law emerging from competing fundamental rights. In the Civil Code (BGB), to put the matter simply, the state delimits the fundamental rights sphere of citizens *vis-à-vis* each other. The medium of this delimitation is above all else the balancing of fundamental rights claims. The statutory outcomes of balancing exercises that the legislature has laid down in the BGB can consequently be understood without more ado as "derivative fundamental rights norms". They ought then to have

a way as to create a deadlock in the balancing [*os direitos fundamentais admitem um escalonamento apenas rudimentar, de forma a criar um impasse no sopesamento*]") (Alexy, 2011, pp. 621–622). In this article, I am not concerned with the *results* of Alexy's balancing, but with the authorizations for its occurrence and *how* to carry it out — so what happens after the balancing (such as the conclusion that there is, in a certain case, "normative epistemic discretion") is not my concern.

> constitutional status. And thus the King Midas dilemma is complete: everything that comes into contact with the balancing model turns to gold, that is, assuming a sufficiently extensive interpretation of fundamental rights to constitutional law.

This is a question that often arises in the application of general clauses, such as § 242 of the German Civil Code (objective good faith).[51]Nevertheless, Alexy does not say anything about how to identify a proper 'constitutional right' (and, consequently, how to discard all the non-constitutional Dogmatics): Alexy remains in the "abstract realm of principles [*abstrakte Reich der Prinzipien*]" (Vogel & Christensen, 2014, p. 99), characteristic of his theory of principles.

If Alexy does not establish the criteria, two things happen: firstly, the judges themselves will define whether or not to respect the commands contained in (*rectius*: commands on) the 'rules' (if they do not want to obey a 'rule', all they have to do is arbitrarily raise the issue to the constitutional level, by identifying a 'constitutional right' incident in the case); secondly, no one can rationally argue that the decision in the "second-order balancing" was wrong (because the judge's attribution of "reliabilities" is arbitrary, and Alexy does not propose any means to control it).

In addition to the chaotic scenario presented so far (a judge who defines when to balance, who defines what weight to give to the "importances" of what he or she are balancing, who defines the meaning of the normative texts that serve as input for balancing), there is now the possibility that the judge do not even respect the hypotheses in which the legislator has peremptorily closed the door to an Alexy's balancing, clearly establishing a 'rule' (even if one considers that the Rule of Law has opened these doors one day).

Conclusion: why not Defend the Robert Alexy's Balancing?

At this point of the work, the question I started with ("why not?") no longer has even the shadow of an invite, of encouraging the adoption of an Alexy's balancing: all that has been presented here were the reasons for *not* accepting it.

Why, then, is Alexy's balancing still defended? It is undeniable that, in its extensive schematization, Robert Alexy's proposed model seduces, presenting itself as a mathematical model — who can question ancient Mathematics? However, Law is not an exact science, and any attempt

[51] A good example of the right way to proceed (by dogmatic formulation of groups of cases) can be found in Dieter Medicus, when he argues that the judicial discourse of abuse of rights (based on § 242 of the BGB, therefore 'permeated' with fundamental rights), in cases of application of "private law rules with good dogmatic incorporation", should be rejected (*"Dagegen mag die volle Ausnutzung einer überlangen Frist im Einzelfall vom Richter nach § 242 BGB als rechtsmißbräuchlich zu beanstanden sein. Doch ist auch insoweit die Einzelfallgerechtigkeit gegen die von der generellen Fristbestimmung ja gerade beabsichtigte Rechtssicherheit abzuwägen: Außer bei Evidenz wird man einen Mißbrauch verneinen müssen. Insgesamt wird danach die Verfassungswidrigkeit privatrechtlicher Normen mit guter dogmatischer Einbettung nur ganz ausnahmsweise zu bejahen sein"*) (Medicus, 1992, p. 61).

to mathematically tame its gradual further development/creation is doomed to failure (just as Alexy's attempt to explain it fails).

Furthermore, one can never accuse Alexy of not having a high scientific spirit: he is always willing to engage in dialog on the criticisms he receives, always offering answers (whether these answers are satisfactory or not, as I do not think they are, is an issue that does not discredit him). This attitude keeps, moreover, his theory and, specially, his proposed model in constant reformulation, requiring constant renewal of criticism: until new criticisms are made, Alexy's ideas remain convincing because they appear to be a consistent block, cohesively defending itself against its critics.

If one wants to tame the further development/creation of Law, one must strive to control not only the justification of the result ("my judgement can be accepted as correct because…", as in the J.2.3 rule of argumentation proposed by Alexy), but the justification of the judge's own pre-comprehension that underlies this judgment ("I came to this decision because…"). This presupposes an approach totally different from Alexy's — as is the case with that proposed by authors engaged in an elaboration Dogmatics, such as Josef Esser, Claus-Wilhelm Canaris, Joachim Rückert, and, despite his insufficient Methodics,[52] Friedrich Müller.

Alexy's proposed model, with its extensive powers granted to judges, is unsuited to the Rule of Law and must be vigorously opposed. This is why Alexy's balancing is *not* a legitimate option.

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[52] I maintain that, although theoretically correct — including explicitly placing the formulation of groups of cases in a central position in the rationalization of pre-comprehensions (Müller, 1966, p. 52) —, Müller does not propose a Methodics that makes it possible to control the legitimacy of pre-comprehensions. Müller lacks the explicit recognition that the very 'possible meaning' of the normative text can only be understood by comparing cases: although Müller refers several times to groups of cases, their importance is greatly reduced when it comes to understanding pre-comprehension, given the need to link them to the normative text, in his *Strukturierende Rechtslehre* [Structuring Doctrine of Law] (Peixoto, 2023b, pp. 322–323).

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