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The Spree of Principles and the Abuses of the Balancing Doctrine in Brazil

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THE SPREE OF PRINCIPLES AND THE ABUSES OF THE BALANCING DOCTRINE IN BRAZIL

Ronaldo Porto Macedo, Jr.*

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“[S]ciences are small power.” – *Thomas Hobbes*¹

The science of law is a small power too, but it matters.

I. THE CONTEXT OF THE ELLWANGER CASE IN THE BRAZILIAN SUPREME COURT: A SYMPTOM OF THE ABUSES OF THE BALANCING OF THE PRINCIPLES DOCTRINE

The Ellwanger case (tried in 2003) originated in a complaint lodged with the Brazilian Supreme Court (*Supremo Tribunal Federal*—STF), requesting the concession of a writ of *habeas corpus* in favor of writer and editor Siegfried Ellwanger. Ellwanger, who had been previously convicted by the

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¹ Thomas Hobbes, *Of Man, Being the First Part of Leviathan, Chapter X: Of Power, Worth, Dignity, Honour, and Worthiness*, in 34 THE HARVARD CLASSICS pt. 5 (Charles W. Eliot ed., 1914).

Brazilian Superior Court of Justice (Superior Tribunal de Justiça—STJ) of a crime of racism, for publishing, selling, and distributing anti-Semitic material.² According to the Brazilian Federal Constitution of 1988 (“Constitution”), in Article 5, section XLII, “the practice of racism is a non-bailable crime, with no limitation, subject to the penalty of confinement, under the terms of the law”³ The Plaintiff’s allegation rested on the premise that Jews cannot be categorized as a racial group and, therefore, the anti-Semitic discrimination he was convicted of did not imply the racial connotation required to prevent the prescription as provided by the abovementioned Article 5, section XLII.⁴

Nevertheless, the plenary session of the Brazilian Supreme Court, based on the premise that there are no *biological* subdivisions between the human species,⁵ declared that the divide of human beings into races results from a merely *sociopolitical* process that motivates racism and creates segregationist discrimination and prejudice.⁶

The Court argued that discrimination against Jews—a central theme in national-socialist thinking that affirms that Jews and Aryans form distinct races—is irreconcilable with the ethical and moral standards defined in the Constitution and defended by the democratic rule of law.⁷ Consequently, the crime of racism is identified by these stigmas, which constitute an attack on the principles upon which human society is built and organized. It deserves to highlight human respectability, dignity, and peaceful coexistence in the social environment.

Despite commonly being treated as the paradigmatic case on freedom of expression in Brazil, the Ellwanger case bears in its reasoning an absence of clear standards and a tension between different conceptualizations of what

² See S.T.F., Rio Grande do Sul Habeas Corpus 82.424-2, Relator: Min. Moreira Alves, 17.09.2003, Diário da Justiça [D.J.], 19.03.2003, 524 (Braz.).

³ CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 5 (Braz.).

⁴ S.T.F., Rio Grande do Sul Habeas Corpus 82.424-2, Relator: Min. Moreira Alves, 17.09.2003, D.J., 19.03.2003, 524, 699 (Braz.) (“In the present HABEAS, the PETITIONER argues that the offense committed by the PATIENT does not have racial connotations. He asserts that Jews are not a race. They are a people.”) (translated by this author).

⁵ *Id.* at 524 (“Human race. Subdivision. Non-existence. With the definition and mapping of the human genome, there are scientifically no distinctions among men, whether by skin pigmentation, eye shape, height, hair, or any other physical characteristics, since all qualify as the human species. There are no biological differences among human beings. In essence, they are all equal.”) (translated by this author).

⁶ *Id.* (“Race and racism. The division of human beings into races results from a purely social-political process. From this assumption arises racism, which in turn generates discrimination and segregationist prejudice.”) (translated by this author).

⁷ *Id.* (“[It is the] [b]asis of the core belief of National Socialism that Jews and Aryans form distinct races. The former would be an inferior, harmful, and infected race, characteristics sufficient to justify segregation and extermination: irreconcilable with the ethical and moral standards defined in the Political Charter of Brazil and the Contemporary world, upon which the democratic state stands and harmonizes.”) (translated by this author).

freedom of expression means and how to balance conflicting legal principles. In their divergent votes, Justices Marco Aurélio Mello⁸ and Gilmar Mendes Ferreira⁹ invoked Robert Alexy's doctrine of balancing to arrive at opposing opinions. After summarizing the proportionality test, the two justices ignored several justificatory reasoning steps, jumping straight to a conclusion. In addition, anyone who reads the Marijuana March case (tried in 2011) will notice the tension between the predominant justification adopted and the justification and method used in the Ellwanger case.¹⁰ This tension is particularly evident when justices discuss the limits of the practice of crime advocacy.¹¹

In the Ellwanger case, the pre-existence of a federal law considering racism as a crime was one of the grounds for the decision.¹² The predominant interpretation considered the denial of the Holocaust as equivalent to the practice of racism.¹³ However, in the Marijuana March case¹⁴, the interpretation of the argument of crime advocacy was much more flexible and open. Many other cases also showed an ultimate *ad hoc* use of the rhetoric of balancing principles.¹⁵

⁸ *E.g., id.* at 885 (“[A]s Robert Alexy states, they have one thing in common: all collisions can only be overcome if some kind of restriction or sacrifice is imposed on one or both sides.”) (translated by this author).

⁹ *E.g., id.* at 658 (“The maxim of proportionality, in the expression of Robert Alexy (Theorie der Grundrechte, Frankfurt am Main, 1986), also coincides with the so-called essential core of fundamental rights conceived in a relative manner—as defended by Alexy himself. In this sense, the principle or maxim of proportionality determines the ultimate limit of the possibility of legitimate restriction of a certain fundamental right.”) (translated by this author).

¹⁰ On June 15, 2011, the Federal Supreme Court unanimously decided in favor of the legitimacy of such manifestations through the judgment of the Claim of Non-compliance with a Fundamental Precept. *See generally* S.T.F., Arguição de Descumprimento de Preceito Fundamental 187 Distrito Federal, Relator: Min. Celso de Mello, 15.06.2011, Revista Trimestral de Jurisprudência [R.T.J.] (Braz.). The Court held that the so-called Marijuana March did not constitute advocacy for drug-related crimes such as drug trafficking and that its prohibition would threaten freedom of expression. *Id.*

¹¹ *See, e.g.,* S.T.F., Rio Grande do Sul Habeas Corpus 82.424-2, Relator: Min. Moreira Alves, 17.09.2003, D.J., 19.03.2003, 524, 584, 888–90, 928–30 (Braz.).

¹² *Id.* at 524 (“‘Writing, editing, disseminating,’ and trading books ‘advocating for prejudiced and discriminatory ideas’ against the Jewish community (Law 7716/89, article 20, as amended by Law 8081/90) constitutes a crime of racism subject to the clauses of non-bailable and non-prescription (Federal Constitution, article 5, XLII).”) (translated by this author).

¹³ S.T.F., Rio Grande do Sul Habeas Corpus 82.424-2, Relator: Min. Moreira Alves, 17.09.2003, D.J., 19.03.2003, 525 (Braz.). (“Discrimination which, in this case, is evident as deliberate and specifically targeted towards Jews, constituting an illegal act of racism with the serious consequences that accompany it.”) (translated by this author).

¹⁴ S.T.F., Arguição de Descumprimento de Preceito Fundamental 187 Distrito Federal, Relator: Min. Celso de Mello, 15.06.2011, R.T.J. (Braz.).

¹⁵ *See* S.T.F., Distrito Federal Arguição de Descumprimento de Preceito Fundamental 130, Relator: Min. Carlos Britto, 30.04.2009, Diário da Justiça Eletrônico [D.J.e.], 06.11.2009, 235, 274, (Braz.); S.T.F, Distrito Federal Arguição de Descumprimento de Preceito Fundamental 187, Relator: Min. Celso de Mello, 15.06.2011, R.T.J. 126, 132, 147–48 (Braz.).

The case exemplifies several changes that Brazilian law goes through, mainly through protecting freedom of expression and using interpretative techniques based on balancing. It is also an example of the phenomenon designated in this Article as a *spree of principles*. This risk surrounds Brazilian jurisprudence and doctrine, particularly concerning freedom of expression.

There are many different perspectives through which one can analyze the paradigmatic Ellwanger case, as is true of any critical case. One possible analyzing perspective is the *micro-structural perspective*, which focuses on its “*petite histoire*”—specific circumstances, contingencies, and actors, among others. This contextual story can also explore the movements of each of the protagonists or each of the votes of the trial stage, or even their implications for the Brazilian Federal Supreme Court’s jurisprudence on balancing and freedom of expression. Another possibility is the *macro-structural perspective*, the non-contingent or specific variables and constraints of the trial that can help us understand the larger context in which it is inserted. This last perspective is the one adopted in this Article. For this reason, it takes the Ellwanger case as a paradigm of a growing trend in the Brazilian judiciary.

This Article intends to highlight, albeit schematically, the historical, institutional, and intellectual constraints at stake during the trial stage. In a very particular way, however, it shows the nature of the legal epistemological conditioning that underlies this process, notably the incorporation of balancing as the predominant interpretation for problems related to conflicts between fundamental rights. In addition, it shows *how* incorporating this balancing technique in Brazil is committed to the philosophical assumptions that define it. At the same time, this is problematic and dangerous, especially in addressing issues related to freedom of expression.

II. THE SPREE OF PRINCIPLES AND THE ABUSES OF THE BALANCING DOCTRINE

The enshrinement of rights in the Constitution, the expansion of the language of legal principles in the Constitution and infra-constitutional norms, and the progressive judicialization of conflicts over rights have profoundly impacted the interpretation of the law in countries such as Brazil. One of its most visible effects is the disproportionate expansion of the rhetoric of principle balancing in judicial interpretation. This phenomenon, characterized in this Article as a “*spree of principles*,” is also associated with the adoption in Brazil of a hardly ever used technical version of balancing as a test of proportionality, which was strongly inspired by the ideas of Robert Alexy on the German constitutional jurisprudence and International Human

Rights Courts case law.¹⁶ This interpretation method's impact on freedom of expression has been extensive and often problematic.

The title of this Article is a provocation. The provocation must be apparent to those already familiar with the legal world. Why spree? What is a spree? Young people (and older people) certainly know what a spree is, but it is helpful to explore the concept. "Spree" is usually defined as a moment of fun or celebration, characterized by euphoric and noisy behavior, often with dancing, singing and drinking, and the gathering of several people.¹⁷ In short, the central idea here is of a relatively disordered practice, sometimes festive and irresponsible, sometimes mischievous or irrational (drunk) and unruly.

What is a principle? Once again, it is essential to give some thought to the concept. After all, the concept of principle is one of the most controversial in contemporary law theory. The word "principle" holds many different meanings. Etymologically, in Latin, *principium*,¹⁸ or in Greek, *arché*,¹⁹ means beginning, outset, first cause, or even foundation. In the field of law, however, the term has gained an autonomous meaning, designating a normative type or pattern that is distinct from legal rule or norm in its *strict sense*.²⁰ Roughly speaking, there were usually two criteria used to establish this difference.

For some, the difference between rules and principles resides in the greater generality of the latter with the former. Thus, for example, a principle such as freedom to come and go would be broader and more general than a rule prohibiting driving after 11:00 P.M. on a particular street in a city. For others, however, the difference would not be of the degree of generality but, instead, of a logical or structural difference. The disagreements are complex

¹⁶ See generally Robert Alexy, *On the Structure of Legal Principles*, 13 *RATIO JURIS* 294 (2000).

¹⁷ *Spree*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/spree> (last visited Apr. 5, 2024).

¹⁸ *Principle*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/principle#dictionary-entry-1> (last visited Apr. 5, 2024). For reference, see the etymology section of Merriam-Webster Online Dictionary of the term.

¹⁹ See Richard McKirahan, *Archē*, *ROUTLEDGE ENCYC. PHIL.*, <https://www.rep.routledge.com/articles/thematic/arche/v-1> (last visited Apr. 4, 2024).

²⁰ In Brazil especially, a new literature proliferating under the label of *neo-constitutionalism* sees in Ronald Dworkin one of its main theoretical references, in particular regarding the principle-rule distinction. See RONALD DWOKRIN, *TAKING RIGHTS SERIOUSLY* 198–205 (1977). For a critical analysis of this process of extending the use of principles in legal interpretation, see RONALDO PORTO MACEDO JR., *DIREITO E INTERPRETAÇÃO: RACIONALIDADES E INSTITUIÇÕES* [LAW AND INTERPRETATION: RATIONALITIES AND INSTITUTIONS] (Catarina Helena Cortada Barbie ed., 2011) (Braz.). An analysis of the same phenomenon in Spanish law can be found in Carlos Bernal Pulido, *Los derechos fundamentales y la teoría de los principios: ¿Es la teoría de los principios la base para una teoría adecuada de los derechos fundamentales de la constitución española? [Fundamental Rights and the Theory of Principles: Is the Theory of Principles the Basis for an Appropriate Theory of the Fundamental Rights of the Spanish Constitution?]*, 30 *DOXA. CUADERNOS DE FILOSOFÍA DEL DERECHO* 273, 273 (2007) (Braz.).

since the authors usually have differing views about the criteria to determine these differences.²¹

It is also important to note that doctrine and jurisprudence do not always use “principle” and “rule,” observing such distinctions. For this reason, the Article provisionally adopts a standard definition found in public law and constitutional law doctrine or dogmatics. Accordingly, “[i]n the legal sciences, the principles have the great responsibility of organizing the system and acting as a link of all legal knowledge to achieve elected results; therefore, for this reason, they are also legal norms, although of previous nature and hierarchically superior to ‘common norms’ (or ‘non-principal norms’).”²²

To sum up, a spree of principles designates a phenomenon by which operators of law, in general, seek to produce a legal rhetorical effect in favor of a particular objective through the unruly, irrational, irresponsible, and, at the same time, astute invocation of the language of principles.

The objective of such invocation may be, in theory, of any nature. It can embody both progressive intentions of transformation or acceleration of change in society through the “realization of the principle of substantive justice,” as well as ideological goals usually associated with other latitudes of the ideological spectrum that guarantee tradition or the status quo, usually through the invocation of principles of public order, national security, and efficiency, among others. It all depends, of course, on the context of use. In other words, the invocation of principles, exposed through a language of greater generality and semantic indeterminacy, maybe at the service of multiple objectives, becomes contestable and eventually dissociated from those that one expected to be linked to the legislation that regulates a given matter.

However, if principles are problematic as a source of uncertainty and potential abuse, why have they become so important in contemporary Brazilian law? It is essential to ask why we are living in such a time of “explosion of the invocation of principles” and whether it would be possible to avoid them. We might then consider whether it would be desirable to avoid

²¹ See generally Bernhard Schlink, *Proportionality (1)*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW 718–37 (Michael Rosenfeld & András Sajos eds., 2012); Alec Stone Sweet & Jud Mathews, *Proportionality Balancing and Global Constitutionalism*, 47 COLUM. J. TRANSNAT’L L. 72 (2008); HUMBERTO ÁVILA, VERBETE PRINCÍPIO [ENTRY PRINCIPLE] (2006); HUMBERTO ÁVILA, TEORIA DOS PRINCÍPIOS: DA DEFINIÇÃO À APLICAÇÃO DOS PRINCÍPIOS JURÍDICOS [THEORY OF PRINCIPLES: FROM DEFINITION TO APPLICATION OF LEGAL PRINCIPLES] (2008). See VICENTE DE PAULO BARRETO, DICIONÁRIO DE FILOSOFIA DO DIREITO [PHILOSOPHY OF LAW DICTIONARY] 657–61 (2006).

²² Paulo Henrique dos Santos Lucon, *Garantia do tratamento partidário das partes*, in GARANTIAS CONSTITUCIONAIS DO PROCESSO CIVIL [*Guarantee of Partisan Treatment of Parties*], in CONSTITUTIONAL GUARANTEES OF CIVIL PROCEDURE] 92 (José Rogério Cruz e Tucci ed., 1999).

principles or whether there would be better alternatives to deal with them than those predominating in courts and academia.

The intention here is not to inaugurate a new primary historical subject. However, it is crucial to understand why using an appeal to principles is rooted in contemporary legal experience. In that case, it will be tempting to very quickly and naively propose their mere elimination or emptying of their role. Many jurists propose that we leave principles aside.²³ These authors recommend that we disregard them and thus diminish their importance. However, they are naively mistaken since their influence is deeply rooted in contemporary legal practice.²⁴

Some crucial moments regarding modern law transformations help us understand why principles have significantly played a role in legal practice. The first can be designated as the process of the complexification of society and increasing the material rationality of the law. The second one is the constitutional enshrinement of rights and democratization of Latin American countries. The third moment relates to the increasing importance of international treaties and conventions, especially human rights, and the movements for unification and harmonization between different jurisdictions. The fourth moment relates to the growth of social rights and their incorporation in the constitutions and infra-constitutional norms of various countries, a fact that has significantly impacted the way of conceptualizing the content and meaning of a primary or fundamental right. The fifth factor consists of the rise of a powerful form of legal reasoning that has gained space in recent decades based on balancing. Despite its multiple forms, this idea establishes significant elective affinities with some strong philosophical assumptions in the current day. In particular, it establishes the assumption of the pluralism of values, the acceptance that law is inevitably marked by indeterminacy and by a form of philosophical conventionalism that recommends that a conventional semantic criterion be adopted to give meaning to legal concepts that enshrine legal principles. This process has been labeled “the age of balancing.”²⁵ A closer look at these factors will help to understand the risk of the emergence of the “spree of principles” in Brazilian law and, possibly, other Latin American jurisdictions.

²³ See Carlos Ari Sundfeld, *Princípio é Preguiça?*, in DIREITO E INTERPRETAÇÃO—RACIONALIDADES E INSTITUIÇÕES [*Is Principle Lazy?*, in LAW AND INTERPRETATION—RATIONALITIES AND INSTITUTIONS], 287–305 (Ronaldo Porto Macedo Jr. & Catarina Helena Cortada Barbieri eds., 2011).

²⁴ See JUAREZ DE OLIVEIRA, COMENTÁRIOS AO CÓDIGO DE PROTEÇÃO DO [COMMENTS PUBLISHED IN THE CONSUMER PROTECTION CODE] 12 (1991).

²⁵ See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L.J. 943, 972, 1005 (1987).

A. *The Process of Complexity and of Increasing the Material Rationality of the Law*

The process of complexification and increase of the material rationality of law has its classical description in the works of the German sociologist Max Weber. In his view, the transformations of modern law, as well as the transition from the Liberal State to the Welfare and Regulatory State, entailed a kind of materialization of formal bourgeois law.²⁶ This phenomenon has led to an increasingly complex society, with new social demands (new social actors, trade unions, pressure groups, women, children, the elderly, the sick, and immigrants, among others) to produce intense pressures in favor of a state that is more regulating, intervening, and capable of carrying out compensatory and redistributive policies.

The resulting new Welfare State's structure consists of a Regulatory State that introduces material (or substantive) justice instruments to accomplish this task. To a large extent, the new material rationality of law is set by introducing general principles of material justice, which are gradually posited in the new Constitutions during the twentieth century. This introduction occurs through the positivation—understood as the enshrinement in explicit legal norms and often in codes—of protective legal principles of fundamental rights such as equality, freedom, dignity, material good faith, fairness, and vulnerability, among others.²⁷ This phenomenon significantly alters the predominance of the formal rationality of law that had been hegemonic in the liberal order of the nineteenth century. This critical change is no longer about protecting a universal and abstract legal subject or free will in the abstract sense. Instead, it is about the birth of new rights of groups (elderly, consumers, the vulnerable, workers, the disabled, and children, among others) and their wills as concretely established and protected by counterbalancing mechanisms to the abuse of power.

This process has generated essential tension in the form of the legitimization of contemporary law. Heretofore, legal rationality was anchored, at least in part, on formal qualities of law (especially in the positivation of law). However, with the introduction of material justice points of view in law, contemporary law has experienced an increase in material (or substantive) rationality (and a consequent moralization of law). This process is done mainly by expanding the role of the general principles of law.²⁸

²⁶ See MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 641–900 (Guenther Roth & Claus Wittich eds., 1978).

²⁷ NORBERTO BOBBIO, *THE AGE OF RIGHTS* 6 (Polity Press 1996) (1990).

²⁸ See generally JÜRGEN HABERMAS, *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* 194–237 (William Rehg trans., 1996).

For authors such as Herbert Hart, the inevitable “open texture [of the language] of the law,” which generates an unavoidable indeterminacy about its normative meaning, is not a sign of its pathology. Instead, it is a sign of its virtue, plasticity, and flexibility to adapt to a modern society of high complexity and constant change. Principles would be normative standards forged with a more open, semantic texture precisely to perform this function, unnecessary in archaic and pre-modern societies but central in contemporary societies.²⁹

B. Processes of Enshrinement of Rights in the Constitution and Democratization of Latin American Countries

Parallel to the structural process of the materialization of law in complex societies, most Western-capitalist countries, particularly in Latin America, have experienced critical democratization and enshrinement of rights in the constitution since the 1980s. Brazil is a paradigmatic example of these changes.

The end of the cycle of Latin American dictatorships culminated in the establishment of a constituent process in which democratic demands were combined with the action of lobby groups that sought the inclusion of programmatic norms in the constitutional text.³⁰ Several political pressures led to an increase in the importance of the judiciary power in implementing social rights—broadening the space for judicial activism—primarily through the growth of demands for rights through the courts. The field of the right to health is one of the most emblematic of these changes.³¹ Democratic constitutions have also strengthened other actors, such as the Attorney Generals’ and Solicitor Generals’ offices and non-governmental organizations’ representation of collective interests, contributing to the judicialization of politics and justice.³²

The Brazilian Constitution is rich in expressions and statements of principles that regard fundamental rights but that, in reality, spread to practically all fields of law, such as private law, tax law, labor law,

²⁹ H.L.A. HART, *THE CONCEPT OF LAW* 124 (2d ed. 1994).

³⁰ OSCAR VILHENA VIEIRA, *A BATALHA DOS PODERES: DA TRANSIÇÃO DEMOCRÁTICA AO MAL-ESTAR CONSTITUCIONAL* [THE BATTLE OF POWERS: FROM DEMOCRATIC TRANSITION TO CONSTITUTIONAL MALAISE] 23–30 (2019).

³¹ See generally Octavio Luiz Motta Ferraz, *The Right to Health in the Courts of Brazil: Worsening Health Inequities?*, 11 *HEALTH & HUM. RTS. J.* 33, 33–45 (2009); Daniel W. L. Wang, *Courts and Health Care Rationing: The Case of the Brazilian Federal Supreme Court*, 8 *HEALTH ECON., POL’Y & L.* 75, 75–93 (2012).

³² Ronaldo Porto Macedo Júnior, *Evolução institucional do Ministério Público brasileiro*, in *MINISTÉRIO PÚBLICO: INSTITUIÇÃO E PROCESSO* [*Institutional Evolution of the Brazilian Public Ministry, in PUBLIC MINISTRY: INSTITUTION AND PROCESS*] 36–65 (Atlas, 1997).

administrative law, and procedural law, among others.³³ The enactment of new legislation that reinforced the invocation of principles of material justice also accompanied this enshrinement of principles in the Constitution. Examples of such phenomena are the legislation on consumer protection,³⁴ the environment,³⁵ children and adolescents,³⁶ the protection of the disabled³⁷ and the protection of elderly people.³⁸ We live in the “Age of Rights,” as Norberto Bobbio refers.³⁹

A new doctrinal ideological orientation, *neo-constitutionalism*, has also reinforced the new language of law marked by invocation of principles.⁴⁰ The Constitution is now seen as the *forum of principles* and is enunciated as such by some influential contemporary theorists such as Ronald Dworkin.⁴¹

C. *The Increasing Importance of International Treaties and Conventions, Especially Those on Human Rights and the Movements for Unification and Harmonization Between Different Jurisdictions*

Expanding international treaties and conventions, particularly those concerning human and social rights, is paramount.⁴² This expansion is necessary because, to a large extent, the new Latin American constitutions, and particularly the Brazilian Constitution of 1988, present provisions that faithfully reproduce enunciations in international human rights treaties.⁴³

³³ See C.F. art. 5 (Braz.).

³⁴ CÓDIGO DE PROTEÇÃO E DEFESA DO CONSUMIDOR [C.D.C.] [CONSUMER PROTECTION AND DEFENSE CODE] law no. 8078/1990 (Braz.).

³⁵ CÓDIGO FLORESTAL [C.FLOR.] [FOREST CODE] law no. 12.651/2012 (Braz.).

³⁶ ESTATUTO DA CRIANÇA E DO ADOLESCENTE [E.C.A.] [CHILD AND ADOLESCENT STATUTE] law no. 8069/1990 (Braz.).

³⁷ ESTATUTO DA PESSOA COM DEFICIÊNCIA [STATUTE OF PERSONS WITH DISABILITIES] law no. 13.146/2015 (Braz.).

³⁸ ESTATUTO DO IDOSO [E.IDS.] [STATUTE FOR THE ELDERLY] law no. 10.741/2003 (Braz.).

³⁹ BOBBIO, *supra* note 27.

⁴⁰ Luis Roberto Barroso, *Neoconstitucionalismo e constitucionalização do Direito (O triunfo tardio do direito constitucional no Brasil)* [Neoconstitutionalism and Constitutionalization of Law (The Late Triumph of Constitutional Law in Brazil)], 240 REVISTA DE DIREITO ADMINISTRATIVO [RDA] 1, 1–42 (2005) (Braz.).

⁴¹ Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. Rev. 469, 469–518 (1981).

⁴² GEORGE RODRIGO BANDEIRA GALINDO, TRATADOS INTERNACIONAIS DE DIREITOS HUMANOS E CONSTITUIÇÃO BRASILEIRA [INTERNATIONAL HUMAN RIGHTS TREATIES AND BRAZILIAN CONSTITUTION] 9 (2002).

⁴³ FLÁVIA PIOVESAN, TEMAS DE DIREITOS HUMANOS 44–56 (5th ed. 2012). It is worth mentioning, by way of example, the provisions of Article 5, item 111, of the 1988 Constitution, which, by providing that “no one shall be subjected to torture or cruel, inhuman or degrading treatment,” is a literal reproduction of Article V of the Universal Declaration of 1948, Article 7 of the International Covenant on

Furthermore, the Universal Declaration of 1948 and other treaties, such as the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights of 1966, and the San José Pact of Costa Rica (which came into force on July 18, 1978), had already inaugurated the explicit assertion of fundamental rights as general principles that protected them. These documents became more comprehensive from adopting the techniques to control the conventionality of laws in light of these international documents.

It is also essential to understand that these treaties and conventions have deepened due to international, economical, and cultural integration and the formation of new political and economic blocs, such as the European Union, Mercosur, and NAFTA. The documents that instituted such integration processes often resorted to negotiations on the medium and stable meaning of the general rules created. The preference for neutral, abstract, and conventional meanings for legal concepts was due to the search for consensus pressured for a constitution of a more generic language and one that could increase the chances for political consensus required for their approval.

D. The Ascension of Social Rights and Its Incorporation in the Constitutions and Infra-Constitutional Norms of Various Countries

The materialization of law has meant expanding the constitutional protection (through the enunciation of principles) of social rights. In contrast to the classic fundamental rights (at times referred to as first-generation human rights), social rights established social objectives of inclusion and implementation of social policies. Therefore, by directly linking themselves to public policies that would allow their implementation (e.g., right to health, right to housing, right to education, right to the environment), social rights attributed a dimension of management of public resources to their protection.

For this reason, its implementation began to generate new points of tension regarding the limits set by the classical theory of separation of powers. These tensions seemed unavoidable because the form of guarantee of each demand for a social right proposed before the judiciary involved

Civil and Political Rights, and Article 5(2) of the American Convention. Conversely, the principle of presumed innocence, previously provided for in the 1988 Constitution in Article 5, LVII, is also the result of inspiration from international human rights law, in terms of Article XI of the Universal Declaration, Article 14 (3) of the International Covenant on Civil and Political Rights, and Article 8 (2) of the American Convention.

expenditures, budget, and consequently, a reformatting of the classic way of regulating public policies.⁴⁴

This change feeds the judicialization of politics and the demand for public policies and affects the conception of *a right*. This change in the meaning of a right is generated because the classic view of individual fundamental rights considered them to have a lexical priority over other positive rights. Such individual rights and guarantees should be understood as trumps before imposing demands or laws implementing public policies.⁴⁵ One of the formulas used to deal with the demand for social rights, raising its rhetorical and legal status, was the affirmation of its condition as a fundamental right on an equal footing with other individual rights and guarantees; this process has provoked more than a certain trivialization of human rights.⁴⁶ Nevertheless, the endorsement of a conception of a fundamental right has overshadowed the grammatical distinction between rights (in a strong sense or as trumps) and public policies.⁴⁷ After all, the rhetorical way of affirming the strength of a social right implies its characterization as a basic fundamental right (even if of “another generation”). This fact partially explains why the dominant theory in Brazil about balancing assimilates policies and rights in the formula of “optimization commands” (a term coined by Robert Alexy).⁴⁸

E. The Rise of the Idea of Balancing in Legal Reasoning

Despite its multiple forms, balancing establishes significant elective affinities with some strong philosophical assumptions today. In particular, the assumption of the pluralism of values, the acceptance that law is inevitably marked by indetermination and by a form of philosophical conventionalism that recommends the adoption of a conventional semantic criterion to give meaning to legal concepts that enshrine legal principles.

Ronald Dworkin has intensely criticized this point. In his article, *Is There a Right to Pornography?*, he states:

We should consider two [] different strategies that [can] be thought of to justify a permissive attitude. The first [strategy] argues that even if the publication and consumption of

⁴⁴ On the concept of Social Law, see FRANÇOIS EWALD, *L'ÉTAT PROVIDENCE [THE WELFARE STATE]* (Bernard Grasset ed., 1986). For the English edition, see *THE BIRTH OF SOLIDARITY: THE HISTORY OF THE FRENCH WELFARE STATE* (Melinda Cooper ed., Timothy Scott Johnson trans., 2020).

⁴⁵ DWORKIN, *supra* note 20, at 198–205.

⁴⁶ Tércio Sampaio Ferraz, Jr., *A trivialização dos direitos humanos [The trivialization of Human Rights]*, 28 *NOVOS ESTUDOS CEBRAP* 99, 99 (1990).

⁴⁷ See DWORKIN, *supra* note 20, at 81–89.

⁴⁸ See Alexy, *supra* note 16.

pornography is bad for the community as a whole, just considered in itself, the consequences of trying to censor or otherwise suppress pornography would be, in the long-run, even worse. I shall call this the “goal-based” strategy. The second argues that even if pornography makes the community worse off, even in the very long-run, it is nevertheless wrong to censor or restrict it because this violates the individual moral or political rights of citizens who resent the censorship. I shall call this the “rights-based” strategy.⁴⁹

The second strategy is based on a famous Dworkinian argument that fundamental moral rights should be considered trumps. These two strategies point to the following argument about balancing as a necessary and unique method of interpretation to be applied in conflicts involving a clash of principles (as often happens in freedom of expression cases). It is important to stress that none of these rationalities captures the complexity of freedom of expression issues, nor does the Supreme Court’s theory of freedom of expression. Therefore, deciding which rationality is applicable and which basis best suits the specific cases generally requires more than mere balancing on the part of the judges. It is necessary, more or less consciously, to organize the grammar of freedom of expression according to some philosophical premises (and underlying theory of justice) not only as a preliminary step before balancing, but sometimes to precisely avoid certain types of balancing (notably the one that is here called a proportionality test, as theorized by authors such as Robert Alexy).⁵⁰

The combination of all these variables, particularly in the last twenty and thirty years, has produced a massive expansion in the use and employment of the language of principles in contemporary democracies such as Brazil. A new principle-oriented rhetoric has gained prominence, sometimes assuming teratological contours, which can be characterized as a spree, but which functionally responded to internal demands of law that reflected external pressures (political, economic, social, and religious, etc.). For this reason, it is simplistic to imagine that the language of principles could be avoided. Their functionality is rooted in contemporary legal practice.⁵¹ They are here to stay.

⁴⁹ RONALD DWORKIN, A MATTER OF PRINCIPLE 336 (1985).

⁵⁰ See Aharon Barak, *Proportionality (2)*, in THE OXFORD HANDBOOK OF COMPARATIVE CONSTITUTIONAL LAW, *supra* note 21, at 738–55; RICARDO CAMPOS, CRÍTICA DA PONDERAÇÃO: MÉTODO CONSTITUCIONAL ENTRE A DOGMÁTICA JURÍDICA E A TEORIA SOCIAL—ENSAIOS TRADUZIDOS [CRITICISM OF WEIGHTING: CONSTITUTIONAL METHOD BETWEEN LEGAL DOGMATICS AND SOCIAL THEORY—TRANSLATED ESSAYS] 2 (2016) (Braz.).

⁵¹ See Aleinikoff, *supra* note 25, at 972, 1005.

However, the law is not a crude game of power. The practice of law obeys a certain logic or grammar. Understanding it and knowing how to practice it is a challenging task. Knowing its grammar allows us to interpret and practice the law correctly and in a justified way. To follow the rules of the legal game correctly (in this case, formed by positive rules in its strict sense and moral and political principles) means to know the grammar of the various forms of legal reasoning that implies knowing that just as the application of the law is not confined to the classic exercise of *subsumption*, that is, from the association of the rule to the case, neither is *balancing* reduced to proportionality tests as proposed by Alexy's prescription.

Aristotle used to say that the being is said in many ways.⁵² Balancing is also said and practiced in different forms (contrary to what some of the apologists of reflection postulate). One of these forms, undoubtedly, is the one that the protocol of the proportionality rule describes. This protocol is commonly invoked, for instance, when one observes a clash between two desirable social objectives (or commandments of optimization):⁵³ two policies. Another of them, which for linguistic misfortune has been called by the same name of balancing, involves a different type of interpretative activity. It requires a reconstructive interpretive activity, which resembles the previously mentioned *reflective equilibrium* method.⁵⁴

This method does not postulate or accept a conventional meaning for values. The existence of some degree of sharing in the use of the meanings of values is only a starting point for the exercise of a reconstructive interpretation that seeks to present the conception of a value concept that best fits the practices in which it has its value appeal. In addition, the best *conceptualization* of a *concept* (i.e., the best way to construct it theoretically) will depend on its ability to remain coherent with a broader web of values with which it interrelates.⁵⁵ However, this approach to values rejects

⁵² See *Book Zeta*, in ARISTOTLE METAPHYSICS 1028 (David Bostock trans., Oxford Univ. Press 1994).

⁵³ Ralf Poscher makes a similar criticism in the sense that Alexy elaborates a theory of optimization commandments that does not exhaust the explanation of the functioning of the grammar of principles. See Ralf Poscher, *Resuscitation of a Phantom? On Robert Alexy's Latest Attempt to Save His Concept of Principle*, 33 *RATIO JURIS* 134, 136–37 (2020); see generally MATTHIAS KLATT & MORITZ MEISTER, *THE CONSTITUTIONAL STRUCTURE OF PROPORTIONALITY* (2012).

⁵⁴ See Norman Daniels, *Reflective Equilibrium*, *STAN. ENCYC. PHIL.* (Oct. 14, 2016), <https://plato.stanford.edu/archives/fall2018/entries/reflective-equilibrium/>; JOHN RAWLS, *A THEORY OF JUSTICE* 18–19, 40–41 (1971).

⁵⁵ I developed the argument in RONALDO PORTO MACEDO, *DO XADREZ À CORTESIA: DWORKIN E A TEORIA DO DIREITO CONTEMPORÂNEA [FROM CHESS TO COURTESY: DWORKIN AND THE THEORY OF CONTEMPORARY LAW]* (2013) (Braz.). The idea was originally formulated by W. B. Gallie, *Essentially Contested Concepts*, 56 *PROC. ARISTOTELIAN SOC'Y* 167, 189–92 (1956), and later explored by John Rawls and Ronald Dworkin.

understanding politico-moral values, such as dignity, freedom, equality, and many other values, according to their conventional meanings.

This approach also questions the current assumption that the apparent pluralism of values implies an inevitable collision of values that leads to a single solution by *proportionality-balancing*. Therefore, it rebuts both the assumption that balancing-proportionality is the only form of balancing and that it is the best form (and the correct one) when one has to balance moral-political values, such as justice, freedom and equality, which require an integrating reconstructive interpretation.

This type of *reflective equilibrium-balancing* does not assume, as a standard position, the inexorable clash of principles, but will face the challenging task of reconciling principles and values coherently integrated. The method of reasoning, in this case, will be more similar to the reflective equilibrium of Rawls than to the mathematical calculation of the Pareto optimum. The argument is interpretive and philosophical and not empirical. Nevertheless, it is clear that in a world where legal practice, especially judicial activity, becomes mechanical and massive, the opportunities for such an exercise may only be complete in some contexts in which it will be required.

III. CONCLUSION

Despite the provocative title, this Article is not advocating a discourse “against principles.” While there is a problem with the spree of principles (the Ellwanger case, for example), it would be pretty simplistic to present it as plainly preaching against principles. Principles have distinct grammar from rules in the strict sense, not because they are more general and abstract, but because they function differently, according to a different grammar.

Political-moral principles are distinct from policies and other social objectives. It is necessary to analyze the contexts of the use of legal language in order to distinguish between principles and policies (often referred to as “Principles”). The analysis of the context requires the employment of a conceptual analysis of language. Political-moral principles and concepts, increasingly used and abused in judicial reasoning, such as freedom, equality, justice, dignity, good faith, etc., may have their meaning determined either *conventionally*, i.e., by agreement or consensus among practitioners of legal language, or in a *reconstructive-interpretative* manner. To grasp the meaning of concepts within the latter perspective requires a philosophical-political reflective effort. In other words, the nature of these concepts is not determined exclusively by the convention fixed among the users of a language. Nevertheless, it requires a reflection characteristic of Political

Philosophy or Theory of Justice—hence the relevance of the renewed agenda updated and revalued by John Rawls mentioned earlier.

Balancing is said in many ways; on one hand, *balancing-proportionality* maintains not only its applicability and functionality (and undeniable practicality) for countless contexts of use, on the other hand, its ambition of universality as the only method of legal reasoning and balancing of principles is highly contestable.⁵⁶ The assumptions (which serve as functional premises) about the pluralism of values and the inevitability of the tragic clash of principles equally are always questionable, possibly mistaken, and account for losses.

The language of principles is politically and ideologically powerful. Its power is one of the causes of its success and its dangers. The creative jurist is the one who can carry out his activity without ending the joy, the charm, the “interesting” nature of the interpretation of principles and of the activity of reflection and balancing, and has the ability to re-establish the *threads of rationality* that can provide the criteria of correction for the interpretation of legal practice.

This type of reasoning includes the interpretation of principles without spree and the restrained use of proportionality without abuse and naïve ambitions of universality. Therein lies the advantage and fragility of *proportionality balancing*. It enables *dogmatic reduction*. It is palatable, appealing, and quickly sold since it translates the language of law manuals into common sense legal doctrine. This particular condition guarantees its popularity. However, the cost of mechanical reduction to balancing dogmatics (especially proportionality balancing) is the risk of expanding the spree, followed by the effects it causes.

What is the cost of the spree of principles? The cost is a series of risks to protecting fundamental rights, particularly the freedom of expression. To paraphrase Thomas Hobbes again, science, or philosophy, is a small power. It does not serve to eliminate the spree of principle. Nevertheless, it has a relevant role to play in tackling it. Understanding the genealogy and the causes of the methodology employed in the Ellwanger case is crucial to understanding its risks to the freedom of expression and legal interpretation

⁵⁶ Some of the most insightful critiques were made by: Aleinikoff, *supra* note 25, at 943; Moshe Cohen-Eliya & Iddo Porat, *American Balancing and German Proportionality: The Historical Origins*, 8 INT'L J. CONST. L. 263, 265–69 (2010); Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3128–55, 3193–94 (2015); Guglielmo Verdirame, *Rescuing Human Rights from Proportionality*, in PHILOSOPHICAL FOUNDATIONS OF HUMAN RIGHTS 341–60 (Rowan Cruft et al. eds., 2015); RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 1–43 (1996); Stavros Tsakyrakis, *Proportionality: An Assault on Human Rights?*, 7 INT'L J. CONST. L. 468, 468–93 (2009); MATTIAS KUMM, *LAW, RIGHTS AND DISCOURSE: THE LEGAL PHILOSOPHY OF ROBERT ALEXY* (George Pavlakos ed., 2007).

of fundamental rights in Brazil, and possibly many other Latin American countries.