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SUMÁRIO

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BALANCING, PROPORTIONALITY AND THE "ONE RIGHT ANSWER" IN THE ARGUMENTATIVE PRACTICE OF THE BRAZILIAN SUPREME COURT - SEVERAL PATHS TO NORMATIVE CORRECTION? THE CASE OF HATE SPEECH[1]

PONDERAÇÃO, PROPORCIONALIDADE E A "ÚNICA RESPOSTA CORRETA" NA PRÁTICA ARGUMENTATIVA DO SUPREMO TRIBUNAL FEDERAL - VÁRIOS CAMINHOS PARA A CORREÇÃO NORMATIVA? O CASO DO DISCURSO DE ÓDIO

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ABSTRACT

The axiological theory of fundamental rights reached in the last decades great academic and institutional repercussion in Latin America, including Brazil. It is commonly called a 'post-positivist' theory but, by rejecting Dworkin's thesis of 'the one right answer' it maintains elements that, as we argue, are typical of legal positivism. We herein discuss if, in light of a deontological theory of rights a correct decision would be possible, even if based on axiological terms of value-weighting. The rationale for a decision expressed in terms of conflicts of rights reduces the indispensability of fundamental rights. We argue,

1 A first draft of this paper was presented and discussed at the [redacted] World Congress. We thank, specially, to professors Adrienne Stone, András Jakab, and Dieter Grimm for their thoughtful contributions on that occasion.

however, that this does not, of itself, prevent the decision taken from being correct. We use as an example the decision in which the Brazilian Supreme Court discussed whether the constitutional provision that no statute of limitations applies to the crime of racism could be extended to the publication of anti-Semitic hate speeches. Referring to the ideas of balancing and proportionality the court concluded that, under Brazilian law, anti-Semitic hate speech constitutes the crime of racism. We maintain that such a decision proves to be the only correct one under Brazilian Law in the deontological sense. Despite the argumentative damage brought to the internal debate of the courts on the role of fundamental rights, such decisions can nevertheless be able to discern, in the concrete cases, the legitimate from the abusive claims, so as to enable the Law to consistently confront the tendency to abusive and merely instrumental use of the Law itself.

Keywords: Balancing; One-right-answer; Fundamental Rights; Constitutional Interpretation.

RESUMO

A teoria axiológica dos direitos fundamentais alcançou nas últimas décadas grande repercussão acadêmica e institucional na América Latina, inclusive no Brasil. É uma teoria comumente chamada de "pós-positivista", mas, ao rejeitar a tese de Dworkin da "única resposta correta", ela mantém elementos que, como argumentamos, são típicos do positivismo jurídico. Discutimos aqui se, à luz de uma teoria deontológica dos direitos, seria possível uma decisão correta, ainda que baseada em termos axiológicos de ponderação de valores. A fundamentação de uma decisão expressa em termos de conflitos de direitos reduz a imprescindibilidade dos direitos fundamentais. Argumentamos, no entanto, que isso não impede, por si só, que a decisão tomada seja correta. Utilizamos como exemplo a decisão em que o Supremo Tribunal Federal discutiu se a previsão constitucional de que a prescrição não se aplica ao crime de racismo poderia ser estendida à publicação de discursos de ódio antissemitas. Referindo-se às ideias de ponderação e proporcionalidade, o tribunal concluiu que, no direito brasileiro, o discurso de ódio antissemita constitui crime de racismo. Sustentamos que tal decisão se mostra a única correta no ordenamento jurídico no sentido deontológico. Apesar do dano argumentativo trazido ao debate interno dos tribunais sobre o papel dos direitos fundamentais, tais decisões podem, no entanto, ser capazes de discernir, nos casos concretos, as pretensões legítimas das abusivas, de modo a permitir que o Direito enfrente consistentemente a tendência ao uso abusivo e meramente instrumental do próprio Direito.

Palavras-chave: Ponderação; Única resposta correta; Direitos Fundamentais; Interpretação constitucional.

1. Post-positivism as rhetoric: Alexy and the continuity of the central elements of normative and philosophical positivism in the apparent rupture with legal positivism - A return to rules

The axiological theory of fundamental rights, especially as elaborated by the

German theorist Robert Alexy, reached in the last decades great academic and institutional repercussion in Latin America, including Brazil[2]. Drawing on Ronald Dworkin's distinction between rules and principles[3], Alexy promotes a reading of this distinction as a dichotomy inherent to legal norms' structure[4], keeping rules as norms precedent to principles in the task of judicial application:

> The theory of principles does not say that the catalog of fundamental rights contains no rules; that is, that it does not contain precise definitions. It affirms not only that fundamental rights, as a means of defining precise and definitive definitions, have a structure of rules, but also emphasizes that *the level of rules precedes prima facie at the level of principles. Its decisive point is that behind and alongside rules there are principles*[5].

The notions of legal gap and discretion, typical of the positivist conception of norms, are also maintained by Alexy's theory of norms, which rejects the thesis of the 'one right answer'. For the author, only an implausible 'strong' theory of principles, capable of a priori determining all relations between norms in all possible situations of application, could support the thesis of the only correct answer:

> The strongest variant [of a theory of principles] would be a theory which contained beyond all principles, all abstract and concrete priority relations between them, and therefore univocally determined the decision in each case. If a theory of principles of the strongest form were possible, Dworkin's thesis of the only correct answer would certainly be correct[6].

Here it becomes clear that Alexy does not fully grasp Dworkin's idea of the 'one right answer.' It ultimately does not depend on a real consensus on its correctness, but on a hermeneutical attitude towards the concrete case, the legal principles of the whole

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2 For a defence of the balancing approach in U.S. Constitutional Law, see GREENE, Jamal. Foreword: Rights as trumps? Harvard Law Review, v. 132, n. 1, pp. 28-132, 2018.

3 ALEXY, Robert. **Teoria de los derechos fundamentales**. Madrid: Centro de Estudios Constitucionales, 1993. p. 87 et seq., free translation.

4 ALEXY, Robert. **On the Structure of Legal Principles.** Ratio Juris, v. 13, n. 3, p. 294-304, 2000.

5 Robert Alexy, at a conference in Rio de Janeiro in 1998, transcribed by MENDES, Gilmar. F. Direitos fundamentais e controle de constitucionalidade: estudos de direito constitucional. São Paulo: Saraiva, 2004. p. 26, our emphasis, free translation.

6 ALEXY, Robert. **Sistema jurídico, principios jurídicos y razón práctica.** Doxa, n. 5, 1988, p. 145, free translation.

legal order and the institutional history. Dworkin has sought to make this clear at least since *Taking Rights Seriously* in 1977:

> … it is no part of this theory that any mechanical procedure exists for demonstrating what the rights of parties are in hard cases. On the contrary, the argument supposes that reasonable lawyers and judges will often disagree about legal rights, just as citizens and statesmen disagree about political rights. This chapter describes the questions that judges and lawyers must put to themselves, but it does not guarantee that they will all give these questions the same answer[7].

As it can be seen, contrary to Alexy's contention, Dworkin's theory does not raise the claim of forging a "rational" methodological procedure capable of assuring the correction of legal decisions[8]. Therefore, Alexy's assertion that Dworkin's one right answer thesis is derived from a "methodological rationalism"[9] remains implausible. On the contrary, the affirmation of the possibility of a cognitive activity resides precisely in the learning process due to the difficulty of the tasks of application, especially experientially. Unlike with Alexy, with Dworkin we are certainly on a terrain of rationality aware of its own limits. Posture, not method, is the determining factor.

The very task of *applying* the principles is then, in the end, rejected by Alexy, considering it as something similar to the legislation, a balancing activity of competing values, amenable to methodological treatment. Rights, understood as interests, must thus be sacrificed according to their degree of relevance, and principles provide multiple possibilities of correct decisions available to the applicator's discretion.

Robert Alexy claims to rely on Dworkin, however, to return to a conception of heuristic methodological formulas, reducing principles to policies, that is to say, norms of gradual application, retaking the rules as standards capable of regulating their own application process, since they would be applied in an all or nothing fashion, as if the distinction between principles and rules in Dworkin was simply morphological. The fundamental rights that, in Dworkin's theory, condition the legitimacy of public policies, in Alexy's theory lose this precise dimension.

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7 DWORKIN, Ronald. **Taking Rights Seriously.** Cambridge, Mass.: Harvard University Press, 1977. p. 81

8 See ALEXY, Robert. **Discourse Theory and Fundamental Rights.** In: MENÉNDEZ, Agustin J.; ERIKSEN, Erik O. Arguing Fundamental Rights. Dordrecht: Springer, 2006. p. 15-30.

9 ALEXY, Robert. **Teoria de los derechos fundamentales.** Madrid: Centro de Estudios Constitucionales, 1993. p. 528.

2. Internal and external limits and the 'value conflict'

Using the theory of Robert Alexy, Gilmar Mendes[10] exposes competing conceptions regarding the relation between **individual rights and restrictions**. For the external theory, rights can be, in principle, unlimited, and a right's conformity with the rest of the legal order would be by means of restrictions external to the right itself. According to the *internal theory,* individual rights and restrictions would not be autonomous categories, but the very content of rights would imply limits inherent to their concept, not external constraints. In the author's view:

> If it is considered that individual rights enshrine definitive positions (Rules: Regel), then the application of the internal theory is inevitable. On the contrary, if it is understood that they define only prima facie positions (prima facie Positionen: principles), then the external theory must be considered correct[11].

Also based on Alexy, Mendes points out problems in a theory of interpretation that, in his view, reduces the role of the legislator to declaring what is already expressed in fundamental rights, merely confirming the balancing judgment of the framers of the Constitution. In fact, for the author, real limitations to individual rights are made by the legislator - they would then be deemed external constraints.

Here we mark the difference between the so-called internal and external theories of limitations on rights. That's because, from the internal perspective, the difference between limitation and (re)definition of meaning lacks explanatory power, as long as the integrity of the law is respected, a parameter that marks the difference between legitimate constitutional interpretation and abuse of law.

Moreover, at least in the context of fundamental rights, the tension between abstraction and concreteness inherent to the principles of universal content renders the activities of creation and interpretation internally complementary, since the densification of these principles by the legislative route - and, keeping in mind the specificities of the application discourses,[12] also in judicial reasoning - involves both confirmation of the fundamental guarantees and innovation in the complex framework of the legal system.

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10 MENDES, Gilmar. F. **Direitos fundamentais e controle de constitucionalidade: estudos de direito constitucional.** São Paulo: Saraiva, 2004. p. 25.

11 MENDES, Gilmar F. **Direitos fundamentais e controle de constitucionalidade: estudos de direito constitucional.** São Paulo: Saraiva, 2004. p. 26, free translation.

12 As defined by GÜNTHER, Klaus. **The sense of Appropriateness: Application Discourses in Morality and Law.** Albany: State University of New York Press, 1993.

In a proper principiological conception of constitutional order, the distinction between enumerated and non-enumerated rights is problematic because the semantic opening inherent to the plural complexity of modern constitutionalism does not allow us to draw a definite interpretative framework of the content of fundamental rights as *numerus clausus.*

In Dworkin's terms, it is the integrity of law, in the hermeneutic exercise that addresses both the past and the future, that will mark the difference between densification and non-compliance with fundamental principles. This happens remarkably through the ability and the sensitivity of the interpreter, in the process of normative densification and concretisation, before a concrete situation of application, to impose norms that appear adequate to govern such situation in order to give full effect to the Law in its entirety - in other words, so as to reinforce the belief in the effectiveness of the community of principles.

Even in a context of a philosophy of language, in which assumptions are based on discursive terms and no longer on a hypothetical structure of human consciousness, it is the Kantian criterion of normative legitimacy, the categorical imperative requiring universality as a condition of validity of the norm, that continues to be the basic criterion in discourses of legislative elaboration or normative justification, only now translated in discursive terms: norms are legitimate if they can be accepted by all those they potentially affect as equal participants of a discursive procedure[13]. However, even if a rule is approved under that criterion, this does not mean that it should be applied to all cases, as one of the parties involved could claim. On the contrary, as we shall see, the constitutionality (legitimacy) of a norm does not, of itself, mean that abusive claims cannot be raised in relation to its application to concrete cases. That is why, although the abusive and instrumental use of law is always possible, we are now able to demand, in practice, that such claims no longer be justified under the law. This reinforces the internal position of the citizen whose rights are assumed as a condition of possibility of the community of principles based on the equal respect and consideration due to all its members.

The central problem of the so-called external theory is to conceive the rights as initially unlimited, lacking legislative or judicial external acts to lend them limits, in a constitutive way. Even if the text is silent on this matter, any right, including the classic individual rights, can only be adequately understood as part of a complex order.

All our accumulated historical experience, the learning process harshly lived since the dawn of Modernity, no longer allows us to reinforce the naive belief, for example, that "first generation" rights, originally affirmed within the framework of the liberal constitutional paradigm as guaranteed selfishness prior to social life, can still be validly

13 HABERMAS, Jürgen. **Consciência moral e agir comunicativo.** Trad. Guido A. de Almeida. Rio de Janeiro: Tempo Brasileiro, 2003.

understood as mere limits to action, focused on the pure external perspective of the observer.

This same generational experience allows us, in our shared background of understanding, to see the possibility that abusive pretensions to generic and abstract rights prefigured in legal texts tend to be raised in concrete cases, in everyday life. From the perspective of an external observer who only wants to obtain advantages at any cost, this happens precisely in the attempt to cover up actions that, even if at first glance could pass as the simple exercise of a right, would in fact already be condemnable and not admissible by Law itself when considered in its entirety, in its integrity.

To incite, for example, the elimination or even discrimination of people simply because they carry certain supposedly racial characteristics is not an exercise of the right to freedom of expression, it is an act of prejudice that is a crime in the Brazilian legal system, , and furthermore, one not subject to any statute of limitations, as we shall discuss.

We presently know well that the editing of general norms, in Modernity, does not eliminate the problem of the indetermination of the Law, as longed for in the previous constitutional paradigms and lively denied in them, but, on the contrary, inaugurates it. The problem of modern law, now clearly visible thanks to accumulated experience, is precisely the consistent confrontation between the challenge of adequately applying general and abstract norms to real life situations which are always individualized and concrete, and the situation of application, always unique and unrepeatable by definition.

Modern law, as a set of general and abstract norms, makes society more complex, not less. Such complexity involves a facet that can no longer be confused with the legitimate exercise of rights: that of the abusive pretensions that the mere edition in the text of law tends to encourage. The legal norm can and does tend to be perceived also from the perspective of a mere observer always interested in taking advantage. Through this we can highlight a central aspect of fundamental rights as founding constitutional principles of a community of people who recognise themselves as reciprocally deserving of equal respect and consideration in all situations of concrete life in which they take part. This is what, at least in a contemporary reconstructive reading, Konrad Hesse called the 'radiating force of principles'[14].

It is precisely the visibility of this force that radiates the principles that enable us to deal consistently with abusive pretenses as such, no longer confusing them with the regular exercise of rights. Not only is it insufficient to regard rights as mere limits. What becomes clear now is the Dworkian requirement that they should always be taken seriously, that is, that they always be considered as a requirement for the possibility of

14 HESSE, Konrad. **Die normative Kraft der Verfassung: Freiburger Antrittsvorlesung**. Mohr, 1959.

freedom. This moral content of law can only be effective when assumed from the internal perspective of the participant, the citizen. Even though the moral content of law does not turn it into pure morality, since it continues to operate as law (aimed at regulating people's external behaviour, not their internal beliefs and motivations), it must be taken seriously in the application discourse because it allows us to treat abusive pretensions in a consistent way.

In addition to this, the tension between public and private pervades all rights, whether individual, collective, or diffuse. It constitutes the background to the historical stage of our understanding of rights, which becomes indispensable when assigning meaning to any right, even a classical one such as property. Regardless of what is literally expressed in the Constitution, every individual right must fulfill a social function that internally integrates its own meaning so that it can be plausible.

This principiological and systemic reading demanded by the so-called internal theory exerts explanatory power even for Mendes. While advocating the external conception of restrictions, he sometimes performs interpretations that take into account the requirements of a hermeneutics attentive to the immanent sense of principles in a democratic constitutional paradigm, not just to the textual provisions. This can be clearly seen in his reading of section LXVI of art. 5th of the Brazilian Constitution[15]:

> With regard to provisional freedom, the constituent also apparently opted for granting the legislature ample discretionary power, authorizing it to define the cases in which the institute would apply. It is almost certain that the literal expression here is bad advice and that any model of protection of liberty established by the Constitution recommends an inverted reading, according to which provisional liberty, with or without bail, shall be admitted, except in exceptional cases, especially defined by the legislator[16].

Now, what is the external character of the limitation to the restriction of provisional freedom, if not the very (internal) meaning of that guarantee in the democratic constitutional context, as a densification of the principles of freedom and equality? Of course we do not refer to this internal character as ontological, transcendent, metasocial or metalinguistic, since the dynamic nature of any semantics, especially regarding legal norms, became apparent after the linguistic-pragmatic turn made by Philosophy in the mid-twentieth century, whose effects spread through all fields of knowledge. This

15 'No one shall be taken to prison or held therein, when the law admits release on own recognizance, subject or not to bail'.

16 MENDES, Gilmar F. **Direitos fundamentais e controle de constitucionalidade: estudos de direito constitucional.** São Paulo: Saraiva, 2004. p. 34-35, free translation.

assignment of meaning to norms is always a dispute about their contents, since, as with any text, legal ones also require the constructive contribution of interpreters[17].

As for fundamental rights without express legal reserve (i.e., which do not explicitly provide for the possibility of restriction by legislation), Mendes states that:

> In these rights too, the danger of conflicts due to abuses perpetrated by potential holders of fundamental rights can be seen. However, since the legislator was at first prevented from "limiting" such rights in order to curb abuses, "collisions of rights" or "between values" could be prevented by the exceptional appeal "to the unity of the Constitution and its order of values "According to the interpretation of the German Constitutional Court".

If, on the other hand, we adhere to the notion that no constitutional right is 'unlimited', in view of the Constitution itself, the interpretative task must take internal limits into account. This does not entail any reduction in the 'scope of protection' of a right, but simply in the discursive control that affirms as legally inadmissible the abusive pretensions that will surely be raised in relation to it. Law, understood in its integrity, cannot turn against law itself. For this reason, the collision figure does not plausibly portray the immanent tension in the legal system. In addition, it should be stressed that abuses of claims to rights will always be presented as legitimate claims and based on legislative regulation itself. In the context of a rationality that is known to be limited, therefore, there is no rational plausibility in the belief that one can eliminate abusive claims simply by editing more general and abstract norms. It is only in the field of application discourses that these claims may be qualified as legitimate or abusive, including those based on literal legal predictions, by scrutinizing the specificities of that particular case.

Once again, the distinction between discourses of justification and discourses of application is central so that we can adequately understand the very meaning (and "limits") of any right. General and abstract norms are not in themselves capable of preventing the so-called fraudem legis, as Francesco Ferrara already realised:

> The mechanism of fraud consists in the formal observance of the rule of law and in the substantial violation of its spirit: tantum sententiam offendit et verba reservat. The fraudster, by the combination of indirect means, seeks to achieve the same result or at least a result equivalent to that which was prohibited; However, since the law must be understood not according to its literal content, but to its spiritual content, because the disposition wants to achieve an end and not the form in which it can be manifested, it is already seen that, rationally interpreted, the

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> prohibition should also deny effectiveness to those other means that otherwise tend to achieve that effect[18].

We now know, therefore, that general and abstract laws do not eliminate the problem of the indetermination of law; in fact, contrary to what the Enlightenment philosophes believed with their excessive reliance on reason, they inaugurate the problem of modern law, which is precisely the application of general and abstract norms to situations always particularised, determined and concrete. It is necessary to emancipate ourselves from the naive belief that a good law would redeem us from the task of applying it adequately to the uniqueness and unrepeatability of life situations, always individualised. The formula of general and abstract law was, without any shadow of a doubt, an undeniable evolutionary achievement, and the belief in the power of this formula was determinant for the configuration of modern legal systems. The modern reduction of Law to a set of general and abstract norms, however, if it was able to subvert the old regime and its orders of privilege, and to be central to the establishment of this new society without absolute and immutable fundamentals, couldn't reduce the social complexity. On the contrary, it has increased and sophisticated it.

Constitutionalist movements and the very idea of a Constitution in the modern sense presuppose the dilution of unity and organicity typical of traditional societies, that is, the invention of the individual and also of civil society, of religious, political and social pluralism, the social tension that is constitutive of the relationship between self and other[19]. In fact, only a complex society (which is plural and known to be divided by the diversity of interests, ways of life and structures of personality) requires a Constitution. As Michel Rosenfeld states it, in a homogeneous society the Constitution would be unnecessary[20].

3. Moral pluralism and incompatibility between principles

Isaiah Berlin, one of the leading liberal thinkers of the twentieth century, defends a conception of principles (as 'moral values') in which there is a permanent and irreconcilable incompatibility between them, which would force society to necessarily

18 FERRARA, Francesco**. Interpretação e aplicação das leis.** Coimbra: Arménio Amado, 1963. p. 151, free translation. The original Italian text was originally published in the 1920's.

19 See ROSENFELD, Michel. **The Identity of The constitutional Subject: Selfhood, Citizenship, Culture and Community.** Routledge, NY, 2010.

20 ROSENFELD, Michel. **Comprehensive pluralism is neither an overlapping consensus nor a modus vivend**i: a reply to Professors Arato, Avineri, and Michelman. Cardozo Law Review v, 21, 1971-1997, 2000.

deal with the sacrifice of principles[21]. In opposition to Berlin, Dworkin[22] seeks to defend the kind of "perfect whole" condemned by him as a symptom of a 'dangerous moral and political immaturity'. Berlin speaks of a 'natural tendency' of most thinkers to believe that whatever they consider to be good must be connected or compatible.

For Dworkin, in contrast, the idea of a conflict of values has served in political discourse and common sense as a justification for maintaining social inequalities, since any egalitarian measure (for example, of redistribution or reallocation of resources through taxes) would imply, according to this vision, in an 'invasion' in the sphere of freedom. In addition, 'pluralism of values' can have a legitimizing effect on practices of disrespect for human rights at the international level, on the grounds that each society chooses the values it seeks to prioritise, and that any interference in this would be an act of imperialism.

But the arguments of Isaiah Berlin, Dworkin acknowledges, are more complex and persuasive than the anthropological commons so widespread in 'postmodernism', that repeat the cliché that each society is organised around different values, usually with the addition of the skeptical argument about the implausibility of asserting values as 'objective.' For Berlin there are values that can be considered as 'objective', but such 'true values' conflict in an insoluble way, not only between divergent perceptions or subjective opinions about the meaning of values, but intrinsically between the values themselves:

> Everything is what it is: liberty is liberty, not equality or fairness or justice or culture, or human happiness or a quiet conscience. If the liberty of myself or my class or nation depends on the misery of a number of other human beings, the system which promotes this is unjust and immoral. But if I curtail or lose my freedom in order to lessen the shame of such inequality, and do not thereby materially increase the individual liberty of others, an absolute loss of liberty occurs. This may be compensated for by a gain in justice or in happiness or in peace, but the loss remains, and it is a confusion of values to say that although my 'liberal', individual freedom may go by the board, some other kind of freedom — 'social' or 'economic' — is increased. Yet it remains true that the freedom of some must at times be curtailed to secure the freedom of others. Upon what principle should this be done? If freedom is a sacred, untouchable value, there can be no such principle. One or other of these conflicting rules or principles must, at any rate in practice, yield: not always for reasons which can be clearly stated, let alone generalized into rules or universal maxims. Still, a practical compromise has to be found[23].

21 BERLIN, Isaiah. **Liberty: Incorporating four Essays on Liberty.** Oxford: Oxford University Press, 2002. p. 175.

22 DWORKIN, Ronald. **Moral Pluralism.** In: DWORKIN, Ronald. Justice in Robes. Cambridge, Mass.: Belknap Press, 2006.

23 BERLIN, Isaiah. **Liberty: Incorporating four Essays on Liberty.** Oxford: Oxford University Press, 2002. p. 172-173.

According to Berlin, therefore, conflicts are not merely contingent, they are a consequence of the structure or concept of values, so that the ideal of harmony is not only unattainable, it is incoherent, since to assert a value would necessarily imply commitment or abandonment of another. And if we are dealing with essential values such as equality and liberty, any political decision would imply not only disappointing some expectations for the benefit of others but also violating people's rights; it being inevitable, in Berlin's view, that a political community will fail, irretrievably, in their responsibilities, one way or another. As Dworkin correctly describes, his argument is not that of uncertainty, that is, that we often do not know the right decision to make, but that we often know that no decision is right[24].

4. Legal conflicts, normative texts and abusive claims to rights

A Lei 9883/1999 Vera Karam de Chueiri, using as an example two principles expressly housed in the Brazilian Constitution[25], also shares the notion of incompatibility between contrary principles, which would necessarily lead to the dispute beyond the legal arena and to the impossibility of reaching a legally correct decision:

> The rightness of Hercules' right answer can also be problematic by the fact that the required coherence or integrity of the system of law is not often achieved by means of the interpretive model thought by Dworkin. It is possible that in face of principles that are not coherent among themselves, for instance, between the principle of private property and the principle of property's social function, Hercules could fail in constructing a coherent answer jeopardizing the idea of legal certainty and the claim to a legitimate application of law (in the terms put by Dworkin), as far as he would have to look for an answer outside the legal system, in the struggles that take place in the political arena[26].

Like Berlin, and based on Chantal Mouffe's agonistic theory[27], Chueiri seems to

24 DWORKIN, Ronald. **Moral Pluralism.** In: DWORKIN, Ronald. Justice in Robes. Cambridge, Mass.: Belknap Press, 2006. p. 110.

25 Art. 5th (…) XXII – the right of property is guaranteed; XXIII – property shall observe its social function.

26 CHUEIRI, Vera K. **Before the law: Philosophy and Literature** (the Experience of that Which one cannot Experience). Graduate Faculty of Political and Social Science, New York, New School University, Ph.D.: f. 216, 2004.

27 MOUFFE, Chantal. **Deliberative Democracy or Agonistic Pluralism?.** Social Research, v. 66, n. 3, p. 745-758, 1999: 'An approach that reveals the impossibility of establishing a consensus without exclusion is of fundamental importance for democratic politics. By warning us against the illusion that a fully achieved democracy could ever be instantiated, it forces us to keep the democratic contestation alive. An 'agonistic'

disregard the qualitative difference between conflicts of political values and the tension between norms proper to legal and moral principles. Of course, if we consider the interests at stake in such disputes as the example presented by the author - between landlords and landless workers - we can hardly find any compatibility between them, since they clearly antagonise each other. This is one of the main differences between law and morality: law cannot require adopting the internal and cooperative perspective of norms, always allowing attitudes to be pragmatically guided by interests, although it maintains as a requirement of legitimacy the possibility of obedience for the simple respect to rules, but as no more than a possibility. Once again, the problem of considering legal norms as equivalent to interests or values is clear. Similar is the reading of Gilmar Mendes, referring to the jurisprudence of the German constitutional court on the relationship between rights and interests in the case of such conflicts:

> As stressed by the *Bundesverfassungsgericht,* the power conferred on the legislature to regulate property rights obliges it to 'make the area of freedom of the individual within the scope of the property order compatible with the interests of the community'. This need to balance between the individual interest and the interest of the community is, however, common to all fundamental rights and is not a specificity of property rights[28].

It is proper to the deontological normative sphere, especially in the case of law, the requirement to deal with contrary norms in permanent tension without implying contradiction. On the contrary, as Habermas argues[29], inspired by Dworkin, the opposites here are equiprimordial and complementary, reciprocally constitutive of the respective senses. This is not a purely semantic question: values and norms entail diverse interpretative tasks, requiring different treatment from social institutions. Conflicts of values and interests require mediations and institutional solutions that must necessarily consider political arguments, through pragmatic and ethical-political discourses proper to the institutional space for the elaboration of general norms, that is, discourses of justification.

The exegesis to be done of the principles of private property and social function of property, as discourses of application proper to judicial activity, does not equate to a

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democratic approach acknowledges the real nature of its frontiers and recognizes the forms of exclusion that they embody, instead of trying to disguise them under the veil of rationality or morality'

28 MENDES, Gilmar F. **Direitos fundamentais e controle de constitucionalidade: estudos de direito constitucional.** São Paulo: Saraiva, 2004. p. 20, free translation.

29 See specially Chapter V of HABERMAS, Jürgen. **Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy.** Translated by William Rehg. MIT Press, 1996.

preference judgment on conflicting interests, but to the search of the meaning that, given the specificities of the case and the complexity of the legislation involved, can provide a coherent response to the Constitution and the legal order as a whole. In this case, it can be seen that since the exhaustion of the liberal constitutional paradigm, private rights, such as property rights, can no longer imply the tutelage of previous egotistic pretensions contrary to social life, since the individual, collective and diffuse rights of all other members of the community impose conditions for their legitimate exercise.

Thus, precisely because principles are open standards, norms that do not seek to regulate their application situation, they can only be properly construed if we take them into the integrity of the Law. In other words, we must always focus on a certain principle keeping in view, at the very least, the opposite principle, so that we can see the relation of productive tension or equiprimordiality that they hold between each other, in order to reciprocally, decisively and constitutively qualify the meanings of one another.

That's why, on the one hand, the individual right to property cannot be validly and legitimately understood in a way that impairs its social function - hence the constitutional provisions, in Brazil, for progressive taxation of unproductive properties[30], for example - and, on the other hand, the right of the collectivity to assign socially relevant functions to the appropriable goods cannot simply disregard private property - the meaning, for example, of the constitutional requirement of compensation in the event of expropriation[31]. Here the difference between arguments of principle and arguments of policy is fundamental for understanding the role and limits of government activity in the face of citizens' rights. In Dworkin's words:

> Most legitimate acts of any government involve trade-offs of different people's interests; these acts benefit some citizens and disadvantage others in order to improve the community's well-being as a whole. (...) But certain interests of particular people are so important that it would be wrong — morally wrong — for the community to sacrifice those interests just to secure an overall benefit. Political rights mark off and protect these particularly important interests. A political right, we may say, is a trump over the kind of trade-off argument that normally justifies political action[32].

30 Article 153, Paragraph 4, 'The tax [on rural property] (…):
I – shall be progressive and its rates shall be determined in such a manner as to discourage the retention of unproductive real property.

31 Article 5, XXIV: 'the law shall establish the procedure for expropriation for public necessity or use, or for social interest, with fair and previous pecuniary compensation, except for the cases provided in this Constitution.

32 DWORKIN, Ronald. **Is Democracy Possible Here?: Principles for a New Political Debate.** Princeton, N.J.: Princeton University Press, 2006. p. 31.

5. The Brazilian Supreme Court and the Ellwanger Case

A saída In the light of a deontological theory of rights would a correct decision be possible, even if based on axiological terms of value-weighting? The rationale for a decision in terms of conflicts of rights, reduced to mere values, is not expressed in terms of controversial claims on rights that would be non-disposable. It thus entails an inadequate description of the controversy that may lead to decisions that nullify rights in favour of the judges' personal preferences. However, in our opinion, this does not, of itself, prevent the decision from being the correct one.

We use as an example the decision of the Brazilian Supreme Court known as the *Ellwanger* case. It was discussed whether the constitutional provision that the crime of racism is not subject to any statute of limitations[33] would be applicable to the publication of anti-Semitic hate speeches[34]. The discussion revolved around the application of principles and, in the Court's current vocabulary, there was an attempt to make an argument based on the 'weighing' or 'balancing' of values, both by the majority (8 votes) and the minority (3 votes) of the Justices.

Establishing the arguments that prevailed in the final decision, Justice Gilmar Mendes sought to rely on the principle of proportionality for the reasoning of his opinion. Analyzing the Brazilian legal system in a complex and systemic way, with special attention to international treaties subscribed by Brazil, the Justice concludes that the correct interpretation of the Constitution could not be different:

> Thus I do not see how to attribute to the constitutional text a different meaning, that is, that the legal concept of racism does not divorce from the historical, sociological and cultural concept based on supposedly racial references, including anti-Semitism[35].

But Justice Gilmar Mendes identifies the controversial claims of the parties as a problem of conflict between rights, to the extent that 'racial discrimination carried out by the exercise of freedom of expression compromises one of the pillars of the democratic

33 Article 5, 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.

34 This decision has since served as a precedent for important cases regarding themes such as the constitutionality of affirmative actions in universities (ADPF 186, in 2012) and the qualification of homophobia as a crime (ADO 26 and MI 4733, in 2019).

35 BRASIL. **HC 82424/RS.** Habeas Corpus. Publicação de livros: anti-semitismo. Crime imprescritível. Conceituação. Abrangência constitucional. Limites. Ordem denegada. Relator orig.: Min. Moreira Alves. Relator para o acórdão: Min. Maurício Corrêa. <www.stf.gov.br>, Supremo Tribunal Federal, 2003.

system, the very idea of equality,' and mentions a decision of the European Court of Human Rights in which, with the application of the principle of proportionality, freedom of expression was confronted with a prohibition of abuse of rights, prevailing, in that case, freedom of expression.

The adequacy of this description of the problem can be questioned. Is it a conflict between rights, or a conflict between pretensions and interests? Can the legitimate exercise of a right, such as freedom of expression, constitute at the same time a violation of rights, an illegality? Marcelo Cattoni offers some criticism in this sense:

> After all, either we are facing unlawful, abusive, criminal conduct, or, then, the regular, not abusive, exercise of a right. ... How can the same conduct be considered both lawful (the exercise of a right to freedom of expression) and unlawful (a crime of racism, which violates human dignity), without breaking the deontological, normative, character of Law? As if there were a half licit, half illicit conduct?[36]

Despite the terminology used by the Justice in his reasoning, we understand that in this case his arguments are solid from the point of view of justice as requiring normative correction, since they are not proper balancing arguments.

Let us take a closer look at his arguments. When, based on the analysis of the specificities of the concrete case, he affirms that 'racial discrimination carried out by the exercise of freedom of expression compromises one of the pillars of the democratic system, the very idea of equality', this can be understood as showing the abusive nature of the pretension raised by the defendant, seeking to give an offense of racism the appearance of mere exercise of the right to freedom of expression. The problem here is only at the descriptive level, since, although the Justice expressly disqualifies the defendant's claim for being abusive for the purposes of the decision, he paradoxically continues to describe the crime in the vocabulary intended by the defendant, that is, as an exercise of the freedom of expression.

This contradiction at the description level is precisely what makes it possible to give the argument a balancing appearance., This requires the affirmation of validity and relevance in the general order of the norm to be discarded, since it is not applicable to the case, only an abusive defensive strategy of the defendant. The decision itself finally recognizes that such a claim could not be achieved by the "protective scope" of the rule.

36 CATTONI, Marcelo. O caso Ellwanger: Uma crítica à ponderação de valores e interesses na jurisprudência recente do Supremo Tribunal Federal In: CATTONI, Marcelo. **Direito, política e filosofia: contribuições para uma teoria discursiva da constituição democrática no marco do patriotismo constitucional.** Rio de Janeiro, 2007, cap. 8., p. 113-125.

The price of accepting this contradiction, in order to give a balancing appearance to the argumentation, is the weakening of the argument itself by trivializing the unalienable fundamental rights, presenting them solely as evaluative options available to the interpreter.

Due attention must be given to the concrete reasons underlying the decision which emerge from the analysis of the claims raised in the face of the unique characteristics of that particular case as well as of the integrity of the Law as a whole. Thus, the rationale for all possible decisions of the applicators shifts from the terrain of the adequacy of these claims to the field of available value preferences, which reduces the indispensability of fundamental rights to a discussion about their scope.

We can see in the following excerpt all that has been said about the costs of giving the reasoning a pondering feature , together with the fact that the sense attributed as constitutionally valid to the right to freedom of expression is, in the end, coherent with the requirements of the legal system in its integrity:

> Certainly, the protection granted by the framers to freedom of expression is not disputed. It cannot be denied its inextricable meaning for the democratic system. However, it is undeniable that such freedom does not protect racial intolerance and incitement to violence, as stated in the condemnatory sentence[37].

The same stance can be seen in Martin Kriele's passage transcribed in the decision, by showing the internal connection between fundamental rights and democracy:

> The use of freedom that harms and ultimately destroys the freedom of others is not protected by the fundamental right. If it is part of the purpose of a right to ensure the conditions for a democracy, then the use of that freedom that eliminates such conditions is not protected by the fundamental right[38].

Revisiting our recent institutional history allows us to assert the democratic potential of the increase in fragments of rationality that have informed decisions in the judicial sphere, in spite of the numerous shortfalls. For, despite the problems of normative description in their foundations, these decisions, as such, are revealed as the only correct

37 BRASIL. **HC 82424/RS.** Habeas Corpus, cit.

38 KRIELE, Martin. **Introducción a la teoría del Estado.** Buenos Aires: De Palma, 1980, p.475, apud Ibid., free translation.

ones in the Dworkian sense[39]. Although they have brought damage to the deepening of the courts' internal debate on the role of fundamental rights as guarantees for citizens, such decisions can nevertheless prove capable of discerning, in the concrete case - given the normative force these fragments of rationality and the possible sensitivity of the applicators -, between legitimate and abusive claims, and to deny course to the latter. It is precisely for this reason that they can act as normative corrective guidance for society as a whole, so as to enable the Law to deal consistently with the tendency towards abusive and merely instrumental use of Law itself.

Notwithstanding all the issues, such fragments of rationality can strengthen the possibilities of consolidating a still fragile democracy. They provide plausibility to the requirement of equal respect and consideration due to all members of the constitutional democracy inaugurated 30 years ago, on 5 October 1988, and constantly re-signified pursuant to the 'opening clause' of paragraph 2 of its Article 5[40].

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39 KRIELE, Martin. I**ntroducción a la teoría del Estado.** Buenos Aires: De Palma, 1980, p.475, apud Ibid., free translation.

40 'The rights and guarantees expressed in this constitution do not exclude others deriving from the regime and from the principles adopted by it, or from the international treaties in which the Federative Republic of Brazil is a party',

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