

CONSTITUTIONAL RIGHTS EXPANSION AND CONTRIBUTIONS FROM ROBERT ALEXY'S THEORY

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ABSTRACT

This paper, developed through the phenomenological-hermeneutical method, aims to research the Principle of Proportionality resulting from the Expansion hypothesis of Constitutional Rights. Based on this premise, it will present the contributions of the employment of Proportionality, considering the theoretical perspective of Robert Alexy. The relevance of this work, therefore, is founded especially on the assumption that the Expansion of Constitutional Rights and Robert Alexy's theory can contribute to this matter.

Keywords: Robert Alexy. Constitutional Rights. Proportionality.

1 INTRODUCTION

The overall objective of this research, guided by the Library Research¹, is to associate expansion of Constitutional Rights to the use of the Principle of Proportionality and, on this concept, present the contributions by linking to the theoretical model of Robert Alexy.

The present research therefore deals with the problem of the use of the Principle of Proportionality, since, at present, the judicial decisions that need to analyze possible violations of the Constitutional Rights use this Principle.

This Literature Review² was produced using the phenomenological-hermeneutical method³, for

- 1 PASOLD, Cesar Luiz. *Metodologia da pesquisa jurídica: teoria e prática*. 12 ed. São Paulo: Conceito Editorial, 2011, p. 207.
- 2 PASOLD, Cesar Luiz. *Metodologia da pesquisa jurídica: teoria e prática*, p. 210.
- 3 Martins and Theóphilo support that the phenom-

which the object of research is the expansion of Constitutional Rights, the Principle of Proportionality and its potential contributions.

The research techniques used are Category⁴ and Operational Concept⁵, and the object studied in this work is mainly inserted in the Category of Constitutional Rights, Expansion of Constitutional Rights and Constitutional Law.

The structure of the work was organized into four parts. In the first, the constitutional premises of the Constitutional Rights will be

enological-hermeneutical method function as a discover procedure which shows all the undercover but fundamental features from a phenomena. MARTINS, Gilberto de Andrade; THEÓPHILO, Carlos Renato. *Metodologia da investigação científica para ciências sociais aplicadas*. 2 ed. São Paulo: Atlas, 2009, p. 47.

4 PASOLD, Cesar Luiz. *Metodologia da pesquisa jurídica*, p. 25.

5 PASOLD, Cesar Luiz. *Metodologia da pesquisa jurídica*, p. 37.

developed and, in the second, the principles of the Principle of Proportionality will be presented. In the third, we will observe the contributions of Proportionality in consideration of the doctrine of Robert Alexy.

The specific objectives of this work are (a) to highlight the link between Constitutional Rights and the Constitution; (b) to know the theoretical foundations of the Principle of Proportionality; (c) identify the relationship between the Principle of Proportionality and the Expansion of Constitutional Rights; (d) discriminate the contributions of Alexy's doctrine highlighting the main theoretical elements of the Constitutional Rights Theory.

The theoretical arguments brought in this work are supported mainly from the perspective of international doctrine. This perspective understands that the legal debate promoted by Alexy has as its central objective the search for legal solutions to the problems occurred in the application of Constitutional Rights, among them, the Expansion of Rights presupposition interfering in the legitimacy of judicial protection of these Rights.

The intentions of this work, therefore, are justified throughout the study especially in the face of the investigation of the theoretical assumptions of Constitutional Rights as a possibility of understanding the conditions of legitimacy for the exercise of constitutional protection.

Therefore, in making a link between Proportionality, Constitutional Rights and Expansion of Rights, a critical view of Alexy's theoretical framework is proposed. This reflective condition is the starting point of this research that aligns the theme of the application of Constitutional Rights to the theoretical presuppositions of one of the broadest discursive theories of Law.

2 CONSTITUTION AND CONSTITUTIONAL RIGHTS

The starting point of this research is the link between Constitution and Constitutional Rights⁶. In Brazil the link between constitutional rights and the Constitution is multiple, especially because the Federal Constitution of 1988 is the legal

6 Miranda understood Constitutional Rights all the rights and positions available to a person because they are formally or materially grounded in a Constitution. MIRANDA, Jorge. *Manual de direito constitucional*: tomo IV - direitos fundamentais. 5 ed. Coimbra: Coimbra Editora, 2012, p. 09.

basis of Constitutional Rights, that is, deals with the primacy supported approaches to protection under⁷ of Constitutional Rights.

This relevance of the legal protection of the Constitution, with regard to Constitutional Rights, is part of the regulatory force that meets the constitutional norms. This force, based on legal and political power invariably guides the constitutional ideals towards a fundamental basis for all state activities⁸.

Thus, in the contents emanating from the Federal Constitution, it is possible to find all legal-normative substance capable of responding to Constitutional Rights. However, not only the State has an immediate link to the Constitutional Rights, but also the private acts are guided by the constitutional normative force. In this sense, the doctrine of Wilson Steinmetz notes that "In the framework of the constitutional order of the Republic of Brazil, the best arguments support the thesis that constitutional rights [...] link immediately or directly the particular"⁹.

In this line of thought, it is affirmed that the constitutional ideal can be divided in two perspectives: political and juridical. In the political perspective the Constitution appears as fundamental defense of the individuals in the face of the arbitrariness that accompanies the Public Power. Already the legal perspective approaches the Constitution of the so - called rule of law, especially because it comes as a criterion of validity of the internal legal order¹⁰.

Based on the assumption of the Constitution as a normative reference of democratic supremacy, it is inferred that the Constitutional Rights are contemplated at the center of the legal system of the Rule of Law and correspond to the rationalization of the legal order where its "constituent and organizing forces reason guarantee the legitimacy of legality and legality"¹¹.

7 The expansion of protection is defined by all the actions related to a Constitution Right and the State provides them a possibility of legal coercion. SILVA, Virgílio Afonso da Silva. *Direitos fundamentais*: conteúdo essencial, restrições e eficácia. São Paulo: Malheiros Editores, 2009, p. 72.

8 QUEIROZ, Cristina M. M. *Direitos fundamentais*: teoria geral. 2 ed. Coimbra: Coimbra Editora, 2010, p. 47.

9 STEINMETZ, Wilson. *A vinculação dos particulares a direitos fundamentais*. São Paulo: Malheiros Editores, 2004, p. 271.

10 GOYARD-FABRE, Simone. *Os fundamentos da ordem jurídica*. Tradução Irene A. Paternot. São Paulo: Martins Fontes, 2002, p. 126.

11 GOYARD-FABRE, Simone. *Os fundamentos da ordem jurídica*, p. 124.

This is how the legal system combined with its multiple influences should consider constitutional rights, that is, as true legal commitments responsible for guiding all the public and private activities inherent in its particular regulation.

A similar position is Cristina Queiroz which grants significant importance to rights, especially because these “must first be understood as defining elements and legitimating of all positive law”¹².

Thus, socio-political experiences erected from the invocations of Constitutional Law are part of the historical-cultural construction of society, especially on the basis of judicial activities to promote and protect Constitutional Rights. These activities are responsible for remitting to Constitutional Law a duty of legal understanding of contemporary social relations.

For the benefit of the individuals themselves, on the other hand, it is necessary that the Constitutional Rights receive delineation of their limits to depend on the concrete goods that they propose to protect. This is a condition capable of guiding the legal assessment of social activities without subjugation of Constitutional Rights and with a view to ensuring its normative force.

It is clear that the problem of the limit of state intervention in social relations gains space and calls for the development of a careful look on the part of the jurists. This need is even more complex since state intervention in public relations is involved in a system of various orders, e.g. political and economic issues.

In this context, we highlight the problem of the Judiciary’s role in judging actions that involve postulates of constitutional principles¹³ and, consequently, of Constitutional Rights. Often, in this context, the Courts are faced with cases of greater complexity, consequences of the contemporary scenario of the dynamic social system that involves Constitutional Law.

It is precisely on this basis, what are the limits of the prerogatives of the Judiciary in the protection of Constitutional Rights and in the operationalization of constitutional duties, that there are doctrinal critiques about the arbitrari-

ness committed by the Judiciary. For example, decisions supposedly not contain proper argumentative rigor and care can be effects of abuse on behalf of Law¹⁴.

The origin of the problems of the Judiciary’s performance is related to the Brazilian political field. This space is usually averse to radical ruptures, for example, the fact that the 1988 Constitution does not find ample room for its realization. In fact, the non-fulfillment of the Constitution had as main reason the impossibility of automatic operation of the constitutional norm. The constitutional requirements depend on the theoretical construction capable of effectively condition its practical effects also in the midst of legal interpretation¹⁵.

The problem is that this theorizing did not exist, what forced the jurisprudence and the doctrine to import theories that underwent its positions. This solution resulted in a new problem, namely the incompatibility of foreign theories with the Brazilian legal and political context¹⁶.

Among many imported doctrines in order to respond to the juridical dilemmas of the Brazilian social scene, one finds the Theory of Constitutional Rights of Robert Alexy. A large part of that theory is the argument by Proportionality, a kind of rule¹⁷ used by Brazilian courts supposedly as a means able to resolve claims involving the conflict of constitutional principles¹⁸.

The problem is that this path did not necessarily follow a rigorous application of the theoretical questions espoused by Alexy, in fact emerged in doubts and criticisms as to the mistaken practice of the use of Proportionality. The critical point especially in the use of proportionality as a mere judicial rhetoric enabling choices based on personal convictions of the judges¹⁹.

Faced with this context of uncertainties in the application of Constitutional Rights, the prin-

12 QUEIROZ, Cristina M. M. *Direitos fundamentais: teoria geral*, p. 49.

13 TOMAZ DE OLIVEIRA, Rafael. Método jurídico e interpretação do Direito: reflexões programáticas sobre a concretização dos Direitos Coletivos. *Revista Brasileira de Direito*. Passo Fundo, v. 9, n. 2, jul.-dez. 2013, p. 90-129. Disponível em: <<https://seer.imed.edu.br/index.php/revistadedireito/article/view/523>>. Acesso em: 17 mar. 2015.

14 STRECK, Lenio Luiz. *O que é isto – decido conforme minha consciência?*. 4 ed. Porto Alegre: Livraria do Advogado Editora, 2013a, p. 112.

15 STRECK, Lenio Luiz. *Jurisdição constitucional e decisão jurídica*. 3 ed. São Paulo: Revista dos Tribunais, 2013, p. 277.

16 STRECK, Lenio Luiz. *Jurisdição constitucional e decisão jurídica*, p. 277.

17 About terminological problems, see: SILVA, Virgílio Afonso da Silva. *Direitos fundamentais: conteúdo essencial, restrições e eficácia*, p. 168.

18 In this sense, Streck asserts there is a superficial use of Robert Alexy’s Theory in Brazil by scholars and courts. STRECK, Lenio Luiz. *Jurisdição constitucional e decisão jurídica*, p. 286.

19 STRECK, Lenio Luiz. *O que é isto – decido conforme minha consciência?*, p. 107.

ciple of proportionality has been provoking the event which could at first be considered positive: the Expansion of Constitutional Rights. This will be the object of the next section.

3 EXPANSION OF CONSTITUTIONAL RIGHTS

Based on the theoretical understandings developed above on the Principle of Proportionality, it is relevant for the present research to develop the issue of Rights and its relation with the supposed Expansion of Rights.

The starting point of this relationship is the consideration of Constitutional rights as autonomous interests of defending the theoretical assumption of self-conception of these rights, that is, each individual may have a different understanding of their own autonomies²⁰. Therefore, one is not talking about the exercise of Constitutional Rights, but of their material resources subjectively considered.

In the face of the practical contrast between Constitutional Rights and Expansion of Rights, it is observed that in the European territory the protection offered to the Rights often covers trivial matters. This argument is especially seen in the work of the European Court of Human Rights which in some cases is accused of not using a precise definition of the scope of protection of constitutional rights²¹.

As an example, the case *Hatton and others v. United Kingdom*²² which involved the discussion about the fact that aircraft on night flights interfere with the supposed right to sleep well (noise and pollution) of some residents. In this case, through the Principle of Proportionality, the interest in the private life of the residents was deprived as Fundamental Law by the decision of the European Court of Human Rights, especially in the face of the interest of the residents supposedly

not to be protected by the scope of protection of the Constitutional Right to life Private.

The problem in this context is that in other cases the European Court of Human Rights has granted constitutional rights protection based on Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms. As an illustration, it was granted protection law to privacy for sadomasochistic relationships held between homosexuals²³. Therefore, it is noted that there is a difficulty for the Court in defining which interests to private life should be considered as legitimate interests for the protection of Constitutional Rights.

On the other hand, the work of the German Constitutional Court, which makes a strict distinction between mere individual interest and definitive Constitutional Law, stands out. For example, in 1957, the Court held that the German Constitution protects the right of free development of personality and this constitutional design therefore was continuously interpreted as a Constitutional Right to freedom of action in defense of private interests²⁴.

However, this view of the German court does not suggest that any interest should be protected, in particular because the existence of the right - in this case the existence of the constitutional right - can not be confused with its guarantee or, more closely with its judicial²⁵.

Nevertheless, the positions of the German Constitutional Court were reaffirmed in various decisions, for example, the lawsuit which postulated the right to feed pigeons in public parks (*BVerfGE 54 at 143, Pigeon-Feeding*), and the right to ride on any area of forests (*BVerfGE 80 at 137, Riding in the Woods*)²⁶.

It is observed, therefore, that the trend of expansion of Constitutional Rights is especially found in the lack of interest or in the inability of the courts to identify an interpretative boundary that separates due Constitutional Rights of pro-

20 MÖLLER, Kai. Proportionality and Rights Inflation. In: HUSCROFT, Grant (Ed.). *Proportionality and the rule of law: rights, justification, reasoning*. New York: Cambridge University Press, 2014, p. 155-157.

21 For instance, in cases involving the Right to Privacy. MÖLLER, Kai. *Proportionality and the rule of law*, p. 157.

22 ECHR, European Court of Human Rights. *Case of hatton and others v. the United Kingdom*. 2003. Available on: <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61188>>. Acesso em: 17 mar. 2015.

23 ECHR, European Court of Human Rights. *Case of laskey and others v. the United Kingdom*. 1997. Available on: <<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61188>>. Acesso em: 17 mar. 2015.

24 MÖLLER, Kai. Proportionality and Rights Inflation, p. 158.

25 NOVAIS, Jorge Reis. *As restrições aos direitos fundamentais não expressamente autorizadas pela Constituição*, p. 103.

26 WOISCHINK, Jan. Prefácio. In: SCHWABE, Jürgen. *Cinqüenta anos da jurisprudência do Tribunal Constitucional Federal Alemão*. Tradução Betriz Hennig e Leonard Martins. Montevideo: Mastergraf, 2005, p. 233.

tection based on relevant interests of those interests that are considered trivial²⁷.

The problem is that the analysis of the interpretive limits of protection for constitutional rights is directly linked to the existence of the connection between (a) understanding of the scope of protection of constitutional rights in order *prima facie*, and (b) Expansion Rights as intercurrence of the principle of proportionality.

In fact, Proportionality is not only compatible with the Expansion of Rights, but also needs it. Therefore, Proportionality and the Expansion of Rights are elements that are part of the conception of Constitutional Rights.

The key question, however, concerns the use of Proportionality, especially in the balancing stage, not to carry out a differentiation of the normative force of mere private interests and democratic dimension of Constitutional Rights²⁸.

It is argued that without this minimum theoretical distinction any attempt to impose a limit on the rights can be arbitrary and, in view of this, the decisions come from the need to inflate the scope of protection of constitutional rights²⁹.

In this sense, the Expansion of Constitutional Rights, through Proportionality, is responsible for including all kinds of interest in the processes of deliberation of the Courts. The problem is that some interests are not important enough to be taken into account at all levels and in all contexts³⁰.

In order to solve the above mentioned problem, a proposal that contemplates a model of proportionality analysis capable of imposing a limit of relevance for each interest, and only the particular interests that reach a certain level in the relevance scale are protected as Constitutional Rights. If your protection is considered, then any limitation to those interests will only be allowed if proportional; in turn, a particular interest that

does not reach the limit will not be protected and may be limited at the expense of another law³¹.

Therefore, the proposal for the restriction model of the Principle of Proportionality can be contrasted with the extended model, according to which any particular, even trivial, interest would be sufficient to attract the protection of Constitutional Rights.

This problematic issue, which is to impose limits to the core of each Constitutional Right or individual interest subjectively considered, however, is not based solely on political-social phenomenon of recognition of new rights³², but specifically in the judicial understanding objectively considered.

It means that the theoretical discussion of the relevance of private interests is specifically inserted in the legal debate that the Constitutional Courts proceed on the scope of the protection of Constitutional Rights. In addition, this position is only a small margin of variation of the judicial understanding of the scope of protection of constitutional rights, always leaving intact its essential core, especially because this is part of the moral interests of individuals³³.

Thus the issue of the Rights Expansion is in conflict with the assumption that the constitutional rights are considered (a) Rights of particular importance and therefore (b) have a special normative force³⁴. The problem is that the Expansion of Rights denies these assumptions.

In order to respond to the disregard for the special character of Constitutional Rights, it is proposed to concentrate on the actual purpose of protection (for example of the individual freedoms) that a person has simply by virtue of his humanity. This argument implies that moral presuppositions “[...] are inescapable in any position relative to constitutional rights - just as, conversely, there is no philosophical system that does not directly or indirectly face the person, his value and his circumstances”³⁵.

On the other hand, the problem of inflating Rights has no conflicting relationship solely in

27 MÖLLER, Kai. Proportionality and Rights Inflation. p. 159.

28 The democratic dimension of Constitutional Rights supports that personal moral faculties are transformed by the Constitution in rights to be required from the State. PULIDO, Carlos Bernal. *El principio de proporcionalidad y los derechos fundamentales: el principio de proporcionalidad como criterio para determinar el contenido de los derechos fundamentales vinculante para el legislador*. 3 ed. Madrid: Centro de Estudios Políticos Y Constitucionales, 2007, p. 319-339.

29 MÖLLER, Kai. Proportionality and Rights Inflation, p. 160.

30 PORAT, Iddo. Some Critical Thoughts on Proportionality. In: BONGIOVANNI, Giorgio et al (Ed.). *Reasonableness and law*. Dordrecht: Springer, 2009, p. 249.

31 MÖLLER, Kai. Proportionality and Rights Inflation, p. 160.

32 BOBBIO, Norberto. *A era dos direitos*. Tradução de Carlos Nelson Coutinho. Rio de Janeiro: Campos, 1992, p. 68.

33 MÖLLER, Kai. Proportionality and Rights Inflation, p. 163.

34 MÖLLER, Kai. Proportionality and Rights Inflation, p. 166.

35 MIRANDA, Jorge. *Manual de direito constitucional*, p. 58.

determining the practical importance of Rights. Rather, the problem (generalization of protection) has a contradictory relation to the ultimate purpose of Constitutional Rights, that is, the particular form of respect and consideration of individuals.

It is evident that, in order to make proportionality compatible with the above arguments, some doctrines present a new concept of proportionality, which observes the following stages: (1) the medium must pursue a legitimate objective; (2) should be an appropriate measure to achieve this objective; (3) there should be no less restrictive but equally effective alternative; and (4) should not impose a disproportionate burden for the holder of the right³⁶.

Regardless of the effectiveness of new doctrinal concepts about the use of proportionality, it is stated that the fact that someone has an interest in something (law *prima facie*) does not mean you have the right to anything (definitive Constitutional Law).

For this argument, by the correlation between expansion and Proportionality of Rights, it must be accepted, in the foreground, a conception (*prima facie*) the right to autonomy of the individual interest. In the background, it is noted that the examination of proportionality should be used by means of (definitive) justification that assesses whether a certain restriction respects or violates the limits to the individual interests of individuals.

After the presentation of the relationship between Proportionality and Expansion of Rights, we proceed to analyze the contributions conferred to the Principle of Proportionality. This analysis is relevant because the circumstances analyzed support the thinking of Proportionality, on the one hand, as an element of protection of Rights, on the other, as responsible for the expansion of Constitutional Rights.

4 CONTRIBUTIONS OF THE PRINCIPLE OF PROPORTIONALITY

The Principle of Proportionality is considered one of the main issues on the interpretation of constitutional rights³⁷. It is not for other rea-

36 MÖLLER, Kai. Proportionality and Rights Inflation, p. 167.

37 IBÁÑEZ, Perfecto Andrés; ALEXU, Robert. *Jueces y ponderación argumentativa*. Cidade do México: Universidad Nacional Autónoma de México, 2006, p. IX.

son that within the jurisdiction and the Brazilian doctrine this element figures in a singular way, especially as a theoretical foundation of the Theory of Constitutional Rights of Robert Alexy.

In addressing the Principle of Proportionality, Ingo Sarlet's doctrine emphasizes that the aforementioned Principle is an essential element of the Brazilian Democratic State of Law and that "... emerges as a methodical instrument of control of the acts - both commissive and omissive - of the powers public, without prejudice to its possible application to private persons acts"³⁸.

As discussed in the preceding sections, discussions on the Expansion of Constitutional Rights are associated with the recognition of the possibility of extending legal protection via the Principle of Proportionality. This phenomenon leads the discussion about the positive and negative aspects of this practice.

It is possible to affirm, therefore, that in Brazil the use of Proportionality is present in the theoretical and practical legal environment. Therefore, it is noted that in many cases and lawsuits, including significant expressiveness on the national stage³⁹, the Supreme Court used the proportionality principle, making sometimes references to Alexy, especially when the discussion of principles and constitutional values⁴⁰.

If, on the one hand, the Brazilian Judiciary promotes a broad reference to the doctrinal elements of the German jurist, on the other hand, the use made does not strictly observe the scientific-methodological presuppositions of Proportionality conceived by the said jurist. Therefore,

38 SARLET, Ingo Wolfgang. *A eficácia dos direitos fundamentais: uma teoria geral dos direitos fundamentais da perspectiva constitucional*. 10 ed. Porto Alegre: Livraria do Advogado, 2009, p. 396.

39 Por Exemplo: STF - Rcl 2126; Agr 395662; HC 97677; RMS 27920; ADPF 101; ADPF 54; ADI 2240. STRECK, Lenio Luiz. *Jurisdição constitucional e decisão jurídica*, p. 290.

40 For instance, ADPF No. 54, dated April 12, 2012. This action had a significant social repercussion because it was arguing the unconstitutionality of a criminal prosecution of pregnancy interruption in anencephalic cases. Brazilian Constitutional Supreme Court held pregnancy interruption in case like that could not be considered a crime as typified in Articles 124, 126 and 128, Items I and II of the Criminal Code. In that opportunity justice Rosa Weber issued a vote based on the weighting method. It was used the Principle of Proportionality and its sub-principles. BRASIL. Supremo Tribunal Federal. *Arguição de descumprimento de preceito fundamental nº 54/DF (2012)*. Brasília. Available on: < <http://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=3707334> > Acesso em: 12 dez. 2014, p. 130.

there is a problem about the judicial application and use of Alexy's doctrine.

An example of this is the finding that the Federal Supreme Court itself disregards the whole of Alexy's constructed theory, focusing only on the application of proportionality as a concept simply associated with pondering. This stance of the Supreme Court does not keep proper relationship with that doctrine, because it represents only a small part of the theoretical proposal of the author⁴¹.

In addition, the argumentative insufficiency of the Brazilian Judiciary takes place in a superficial view of the Proportionality. This weakness is inserted in the difficulty of visualizing Alexy's theory as a system, whereby the proportionality must be applied with strict reasoning in danger of being transformed into a theoretical alibi⁴².

In addition to this problem presented above, it is possible to present proportionality doctrine of contributions⁴³. This proposal will now be considered.

It is one of the strengths of the doctrine of Robert Alexy⁴⁴ to submit (1) a dogmatic on Constitutional Rights. The German author contributes to legal science by making some distinctions about the norms of Constitutional Rights.

First, Alexy recognizes that the rules of constitutional rights are both those arranged in the Constitution as those attributed to the Constitution⁴⁵. To discuss this, his doctrine cares about the semantic and structural conditions of the Constitution.

41 "Analisando as referidas decisões que fazem referência ao princípio da proporcionalidade, identificou-se que o STF não segue rigorosamente a proposta teórica de Robert Alexy, desenvolvendo, por causa disso, uma concepção *sui generis* dessa categoria". English version: "There was analysed many decisions from STF (Brazilian Constitutional Supreme Court) – specifically 189 – and realized that the court does not follow strictly the theoretical Robert Alexy's proposal, creating a *sui generis* conception about proportionality". Cf. MORAIS, Fausto Santos de. *Ponderação e arbitrariedade: a inadequada recepção de Alexy pelo STF*. Salvador: Editora JusPODIVM, 2016, p. 249.

42 STRECK, Lenio Luiz. *Jurisdição constitucional e decisão jurídica*, p. 287.

43 This work does not intend to show all the contributions from Robert Alexy's Theory, but to highlight some particular aspects.

44 Following Jestaedt criticism: Cf. JESTAEDT, Matthias. The Doctrine of Balancing – Strengths & Weakness. In: KLATT, Matthias (Ed.). *Institutionalized Reason*. The Jurisprudence of Robert Alexy. Oxford: Oxford University Press, 2012.

45 ALEXY, Robert. *Theorie der Grundrechte*. 7. Aufl. Frankfurt am Main: Suhrkamp, 2015, p. 57-63.

That is, it would be possible to attribute norms to the Constitution by virtue of a semantic or structural opening of the constitutional devices. This field of openness would have as its object those norms possibly attributed to the Constitution. In the field of semantics, the terms used by the Constitution induce questions as to the scope of its meaning. As for the structural element, there would be room to question whether a given normative interpretation would justify the Constitution. It would be part of the dogma of the Constitutional Rights, therefore, to face the questions about what belongs or not to the normative framework of these Rights.

This dogmatic function is connected with the notion of (2) formal and material principles. Discuss this issue is to highlight the understanding of constitutional rights as rules and principles⁴⁶. Alexy argues that this distinction between rules and principles is at the heart of dogmatic constitutional rights.

The distinction between rules and principles will require the interpreter to take a different stance in the reasoning of these norms. Recognize the rule character of a constitutional standard would facilitate their reasons for recourse to the literal element of the constitutional provision⁴⁷. In turn, when faced with legal principles, the required argument would be more complex.

When speaking of the rules, their legitimacy stems from the legitimating power of the formal principles in which democratic power is attributed to the legislative power to construct rules to be followed. Otherwise, material principles would allow concrete problems to be discussed using legal principles. In this case, the analysis under the Principle of Proportionality would be the methodological resource available.

Something that in Alexy's theory makes perfect sense, but which in practice appears different, is the flexibilization of the law by recourse to legal principles. In this case, before the theory of Alexy, the formal principles would give way to the material principles⁴⁸. However, to be fair to the German author, this would only be in exceptional circumstances where the weighing could indicate extreme disproportion.

These described operations would be at the decision-making level and could be called by judg-

46 ALEXY, Robert. *Theorie der Grundrechte*. p. 71.

47 ALEXY, Robert. *Theorie der Grundrechte*. p. 77.

48 KLATT, Matthias; MEISTER, Moritz. *The constitutional structure of proportionality*. Oxford: Oxford University Press, 2012, p. 135-136.

ments. Judgments on the application of rules and principles. However, it is pointed out here the virtue of (3) legal argument as legitimizing element of law⁴⁹. That is to say that regardless of the application of rules or principles, what would be said for its legitimacy would be the justification presented.

As the German jurist points out, the validity of the constitutional norms (expressed or attributed) would depend on the correct grounds for considering the constitutional text, precedents of the constitutional court, legal dogmatics and, finally, general practical arguments.

Therefore, the role that legal argumentation can play in legitimizing decisions on Constitutional Rights can not be ignored. Legitimacy would arise from the rational justification of decisions from a significant institutionalized field (constitutional text, precedents, dogmatic) to, in extreme situations, general practical arguments.

In fact, these general practical arguments would develop the critical dimension of law (4). Alexy to the nature of the law has two dimensions: the real and the ideal⁵⁰. As a real dimension, positive law would demarcate what the law would be. It would be a descriptive element. Ideally, there would be the possibility of a critical judgment on positive law, allowing the passage to a prescriptive stance. Thus, in cases where it was not possible to decide in accordance with the right positive position (eg. Not provided or cases that required a decision *against legem*), the jurist could resort to an ideal size or critical of the law.

It is understood that the development of general practical arguments would support the critical positioning of the Direct and should serve to justify rationally what the Law should be.

Through the arguments presented in this research, it is noted that the principle of proportionality is one of the most important legal elements for the protection of constitutional rights. However, the theoretical understanding behind this principle is still something that needs to be explored by the Doctrine, especially in view of the Expansion of Rights.

5 CONCLUSION

This research identified the theoretical assumptions about the problem of Expansion of Constitutional Rights through judicial use of the Principle of Proportionality. This identification made it possible to understand the relationship between the Principle of Proportionality and the Expansion of Constitutional Rights, against the background of the vices and contributions of Robert Alexy's doctrine.

The problem of the Expansion of Constitutional Rights, emphasized by the hypothesis of interference in the delimitation of the essential content of Rights, has made it possible to know that Proportionality is an instrument of protection of these Rights, but that, in this capacity, its theoretical understandings must be constantly improved by legal doctrine.

Nevertheless, in the study of the theoretical elements of Alexy's doctrine, there are several positive and negative aspects of the use of the principle of proportionality in legal practice. In this paper, the following positive points were presented: (1) a dogmatic of Constitutional Rights; (2) the relationship between substantial and formal principles, with the requirement of maximum realization possible; (3) legal arguments as a legitimating element of decisions on Constitutional Rights; And (4) recognition of the prescriptive dimension of law.

In view of this balance, it seems clear that the Judiciary should pay greater attention to Alexy's doctrine, mainly to contrast the argumentative element as a rational justification for the application of the Principle of Proportionality.

This concern will result in a better development of the Principle of Proportionality, especially so that the constitutional nature of Rights is not vulgarized, as well as to the effective condition of legitimacy of the constitutional protection of Constitutional Rights.

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A expansão dos direitos fundamentais e a contribuição teórica de Robert Alexy

RESUMO

Este trabalho, produzido mediante o método fenomenológico-hermenêutico, propõe o estudo da Expansão dos Direitos Fundamentais decorrente do uso do Princípio da Proporcionalidade. Com base nessa premissa, apresentar-se-ão as contribuições do emprego da Proporcionalidade considerando a influência teórica de Robert Alexy. A relevância deste trabalho, portanto, funda-se especialmente no pressuposto que a Expansão dos Direitos Fundamentais e como a teoria de Robert Alexy pode contribuir a essa discussão.

Palavras-chave: Robert Alexy. Direitos Fundamentais. Proporcionalidade.

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