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ON THE BALANCING OF RIGHTS AND THE PROPORTIONALITY OF JUDICIAL DECISIONS: IS IT NOT MORE FICTION THAN REALITY?

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Abstract: This is a research paper on the prevalence of interests and values of the highest social groups against the interests and values of subordinate social groups, such as migrants, even in judicial decisions of apparently individual conflicts involving only plaintiff and defendant. Individual rights, on which the modern Government was structured, tend to prevail over social rights. This prevalence is crucial even in the context of the theory of constitutional rights of Robert Alexy, who states equal importance to individual or social rights and that, because of the proportionality, there would be a chance that social rights would prevail. It is even possible to say that each collision of rights will be determined proportionally and differently, but the proportionality does not confer rationality to the discretion needed to justify the decision. The proportional decision has more to do with the chosen criterion than the conflicting rights.

Keywords: Theory of Constitutional Rights - Balancing of rights - Proportionality - Migration

1. INTRODUCTION

We address, in this article, the instrument of conflict resolution par excellence of the theory of fundamental rights – the principle of proportionality, developed in accordance with the impressive theory of constitutional rights of Robert Alexy –, from an immanent critique to the statutes of that same theory. We found that proportionality has no innovative elements in relation to other means of conflict resolution, nor it is able to solve *real* disputes. How this form of conflict solution overcomes the solutions already developed by traditional theories? It seems to us that the answer is not on the proportionality, but on the structure of the theory proposed by Alexy which, unlike the traditional theories, does not predetermine standards from a set of values, more comprehensively comprising the political pluralism of today (i.e., all interests, values, and rights, as long as provided in a constitutional standard, must be protected to the greatest extent possible).

However, the theory of Alexy, in particular for its functionalist nature, would also need to overcome the other legal theories in its *application*. As the application inescapably depends on the proportionality, it would need certain clarifications on its definition and on its use. Interpreters have complete freedom to choose the criterion by which they will make the comparison between the colliding rights and the balancing, by which they will decide for one right or another; in this way, the proportionality occurs between the criterion adopted and the decision taken, and it might have no relationship with the conflicting rights at stake.

We structure this article as follows: in item 1, below, we address the transformation of real conflicts into legal conflicts, how legal theories seek to solve the real conflict by the solution given to the legal conflict and how this happens under the theory of constitutional rights. In item 2, we address the characters that give proportionality its fictional nature (in the terms of Vaihinger, 1952), presenting it as a form of conflict resolution that is not that different from the other solutions. In item 3, we show considerations on how proportionality, even if intended as fiction, relates the decision with the conflicting rights and these with the factual reality.

We do not intend to comprehensively analyze the theory of Robert Alexy, in particular, because it is already widely disseminated and known by commentators and critics of the highest quality,[1] and also because the space of this article would not allow such intent. However, some of its features will be outlined insofar as it is necessary for the development of this work.

1 See*, e.g.* Alexy (2001 and 2002); Klatt (2012); Kumm (2004); Möller (2007 and 2012); Silva (2011); Tsakyrakis (2009).

2. SOCIAL STRUGGLES, CRYSTALLIZATION OF POWER RELATIONS IN THE FORM OF RIGHTS. THE TRANSLATION OF THE STRUGGLES IN THE FORM OF LEGAL CONFLICTS

Real conflicts could be solved through physical force or economic power. These conflicts involve the struggle for goods or social positions, contested because of the value or interest that they represent. Any good or position has a value determined by the benefits it provides to its holder (these advantages are not just economic, which is the dimension that will eventually allow the assignment of *exchange value* to the good or position).

In the context of the science of Law, both authors (researchers) and judicial actors (in particular, the judges) start from the assumption[2] from which a real conflict must be no longer understood, in the context of discourse, as a conflict, but as a discussion involving competing values and interests. Moreover, the discussion is transformed into a collision of regulatory principles. The collision of principles is how, within the Rule of Law, the discussion is understood in order to solve it, not by force, but by a decision of the authority. In a conflict to be decided by the Government, the economic or physical power of the litigants should not be considered. The determining factor of the resolution of the conflict is the identification of which one party has a title that justifies winning the dispute. This title is the legal positions called subjective rights.

Rights are the crystallization, in legal standards, of values or interests considered as important by the society that made them into positive law. From a given historical context, certain behaviors are valued as good or bad according to the possibility of such behaviors allowing the satisfaction of interests or needs. Since it is not possible that two interests are met at the same time with the same scarce resources, there is a *dispute* on the assigning of positive value to the behaviors that lead to the satisfaction of the opposing interests. This is not simply negotiated in a social contract in which all are free and equal. There are concrete social relationships in which individuals and groups, because of their specific predominant social position, are able to make this dominance as prevailing also in the establishment of abstract

2 What we say here is not new. Under the Rule of Law, conflict solution with the use of physical force by the parties is illegal, because the *monopoly of physical power* is attributed to the Government as one of its essential elements. Hence the legal impossibility of any of the parties, as a rule, to use their physical condition (or economic, or social, or political) to maintain a good or position – or take it from the other party. This is why the Government-judge turns the conflict into a discussion: because the parties, within the Government, can only argue the legitimacy of their situation from prevailing social values and justify them from positive legal rules.

and general legal standards, which, when made into positive law, are applicable to all members of the society, so that the structure of social inequality is transformed into a planning that presents itself as if it were universally fair or good to all members of that society. And the science of law ends up addressing this regulatory structure as the neutral base of every intersubjective relationship, regardless of the historical situation of inequality from which the legal system has been established and the set of values that it determines as the social standard to be followed.

Fundamental rights also refer to legal positions, but they are not characterized by the absolute and exclusive nature of the subjective rights. They are aimed at the protection of certain attributes of their holder, generally related to the principle of human dignity, which can only be limited by the incidence of another fundamental right.

Now, if a value or interest can be characterized as a constitutional standard, it cannot and *must not* be disregarded. In legal terms, all interests with this feature have dignity, because it is based on a fundamental right and, therefore, must be protected. In this sense, in a collision between principles or fundamental rights of same constitutional dignity, it is unthinkable to imagine the elimination of a principle at the expense of the other, because both principles must remain, even if one prevails over the other. Hence the rivers of ink already poured to develop theories about the *balancing between principles* – so that the prevalence of a principle, when in conflict with another, does not cause its emptying – and about the proportion or *proportionality of the decisions* that, when opting for one of the conflicting principles, should apply the decision in the least expensive way possible to the defeated party.

In a dispute involving opposing fundamental rights, what is important, according to the prominent theory of constitutional rights of Robert Alexy, is the balancing between them, so that both can be implemented to the greatest extent possible.

This theory, based on studies of judgments of the Federal Constitutional Court of Germany, has been the basis for the understanding of conflicts between fundamental rights in numerous countries, either by researchers, or by the judges of constitutional courts, or by the judges of international courts. It is not different in Brazil. The doctrine of Robert Alexy is referred to in numerous judgments of the Federal Supreme Court and, based on it, it has been understood the underlying principle character of the standards that give fundamental rights, which enforces its implementation in the greatest extent possible: unlike theoretical standards that assign subjective rights, the known rules of positive law that, according to the theory of Alexy, do not admit balancing, must be applied absolutely (as stated by Ronald Dworkin, in a condition of *all or nothing*).

Roughly speaking, subjective rights, provided for in infra-

constitutional *rules*, that were of absolute application before, are now adjudicated *if* in accordance with a fundamental right, provided for in constitutional *principle*, and *insofar as* this does not improperly restrict other principles. We live in the age of balancing.[3] In this sense, the solution of a real conflict, within the framework of the Rule of Law, will be solved from the conformation of the opposing fundamental rights at stake, in each individual case. The preset set of values in the legal system is no longer a criterion to establish decisions when the conflict between parties involves fundamental rights.

The balancing between constitutional rights suffers major criticism from moral theorists, in particular from liberals, who understand the social structure as that formed by a *contract between Kantian moral agents*. According to this understanding, the balancing of rights is something impossible, either because the rights are absolute (Nozick, 1991), or because they are trumps (Dworkin, 2001), or because they have a constant predetermined order, with the precedence of freedom over equality (Rawls, 2000). In an article that started a heated debate about the balancing of rights in a known international journal, Tsakyrakis (2009, p. 491) states that addressing the balancing of rights is the same as to stop addressing the distinction between right and wrong, to address what is appropriate and convenient. Habermas (1997, p. 318) had already presented serious criticism, in this same sense, to the possibility to relativize rights by allowing the prevalence of opposing interests or values (thus removing their force or the *strict primacy given to normative points of view*). Moreover, and as a result, Habermas claims that the balancing, by replacing the normative arguments by the functionalist ones, raises the danger of *irrational judgments*.

In fact, the theory of fundamental rights has the feature of assigning equal validity to individual rights, social rights, public interests, etc. (Alexy, 2009, p.1-2; Alexy, 2003, p. 131-132), which makes it a *unique* theory on the understanding of the object of legal science. Perhaps for the first time in history, a theoretical structure obtains some success in translating, to the field of law, the pluralist social organization formed as the result of a ceaseless struggle for goods and positions (Ihering, 2010).

In traditional normative theories, based on subjective rights rather than fundamental rights, there is an (almost) absolute prevalence of public liberties, also understood as individual rights, first-dimension rights or abstention rights. The understanding of what is the modern Government and what are the social relations is the result of the worldview captured by liberal philosophers such as Locke, Rousseau, and Kant. The abstract freedom of an individual was declared a self-

3 Phrase attributed to T. Alexander Aleinkoff and used by Tsakyrakis (2009, p. 468). The phrase age of *proportionality* has also been used in Contiades and Fotiadou (2012, p. 660).

evident human right (Hunt, 2009), although, in the practice of social relations, such right was and has been used only by those who are part of the ruling class.

Not even the struggles for equality (the second slogan of the triptych of the French Revolution), seeking better working conditions, and which aimed at the assertion of rights beyond the abstract freedom, caused the modification of traditional theories of law: individual freedoms remained prevalent in relation to any new rights that were affirmed. In fact, when social rights are presented as second-dimension rights, traditional theories have claimed that this would be an unchangeable hierarchy[4] simply by *assuming the realization* that, in the practice of social relations, they were relegated to the status of second-class rights.

The theory of constitutional rights of Alexy, without going into the discussion on the concrete historical relations that led societies to assert certain rights, recognizes that every normative principle – identified as fundamental right or constitutional precept – represents a socially relevant interest or value and that, precisely because of their relevance (as they were raised to the status of fundamental law), must be somehow considered and awarded. The theory of Alexy, in this way, allows the prevailing of social rights, albeit balanced, on formerly absolute individual rights.

However, the fact that the theory allows a social right to exceed an individual right does not necessarily result in, in real life, conflicts between individual rights and social rights being solved in favor of the prevalence of the latter, albeit balanced, especially if it is the protection of the social rights of migrants (Vedovato, 2013, p. 73). The entire social structure has been based, for centuries, on the assumptions of the economic liberalism. Thus, individual rights, as they are considered as paramount, are those who receive more protection, precisely because they represent, in the field of law, the economic structure inherent in Western societies, and because they give rationality to this structure, allowing the free operation of the capitalist system.[5]

Holmes and Sunstein (1999) have demonstrated that all rights demand social cost for their implementation, and that the costs to ensure individual rights, while very high, are not perceived because they are

4 See, for example, the lexicographical order of the principles of Justice of Rawls (2000, p. 333).

5 In this system, its rationality requires the accumulation of capital, not its distribution, hence the neglect of social rights, related to the promotion of public policies and the use of scarce resources in activities unrelated to the economic production; hence the maximum protection of the property (in particular, of the means of production), the freedom of initiative (for those who produce goods) and the freedom of contract (for those who do not produce goods, to seek employment).

embedded in the cost of the Government apparatus (regulatory agencies of protection of markets, services of police and judiciary power for the protection of the property and contracts, etc.). At the same time that does not leave many public resources to be applied to ensure social rights, it feeds back the vicious circle of perception of which social rights are not as important, or that their effectiveness is dependent upon the prior protection of individual rights.

3. PROPORTIONALITY AS FICTION; PROBLEMS IN THE FICTIONAL ESTABLISHMENT OF THE BALANCING CRITERION

Every theory, because of its subject and method, has strengths and imperfections, with the understanding of its subject being more or less consistent at one point or another. The theory of Alexy is not different. Notwithstanding its undeniable qualities, it also has a number of problems, some because of its (mis)application, other inherent to the theory itself.

About the problems that would arise from its *mis*application, Möller (2011) wrote a dense defense about the proportionality of the theory of Alexy, which states that the criticisms made were not about the doctrine, but about the circumstances in which the doctrine was misapplied. We will not extend ourselves on the topic of misapplication of the theory, which is not the object of this work, but the point of defense of Möller seems to reside in the assertion that the theory of fundamental rights would have a *perfect essence* and that the problem would be only on the application of *unattractive interpretations of the theory*. Now, no social theory shows itself capable of being applied in its purity, in this way the criticism to the application should, at least in our opinion, be considered as an important theoretical problem. The theory of Kelsen has always suffered criticism because of its methodological purity, but Kelsen had as purpose to know the law *as it is*. Alexy, by searching the *function* of the right, addresses the purpose and, consequently, its application. The disregard for the points concerning the impossibility of the full application of the theory of Alexy in practical situations is to despise the *only* attribute that legitimizes it. Similarly, to say that the problem is the *lack of practice* of the applicator – and not the actual impossibility of its application according to the canons of Alexy – is the same as to state that only the truly prepared will be able to solve perfectly the problems of application of the theory (Silva, 2011, p. 274 and 301).

On the *immanent* problems of the theory of fundamental rights, we intend to address specifically the following: although the theory

of Alexy establishes adequacy, necessity and proportionality tests in the strict sense, and it is possible to identify mild, moderate or strong levels of restrictions on rights, so as to minimize the discretion of the judge, *there is no criterion* from which two constitutional rights can be objectively measured or balanced.

In fact, it is *assumed* that the proportionality of the method assigns rationality to the choice of a decision criterion. The judge ends, in each case, *creating* a reference value to perform the comparison (and to decide whether the restriction is mild, moderate or strong), which *makes the proportionality a relation between the discretionary election of the criterion of comparison and the judicial decision*, but not between the decision and the rights at stake. Although a principle can prevail over another, or that a decision can be considered as *proportional*, the balancing/proportion criterion *refers more to the judicial decision than to the conflict itself*.

According to traditional theories, the prevailing party of the conflict has the right to keep the good being disputed because the subjective right of the prevailing party gives them this legal position. According to the theory of fundamental rights, the prevailing party also gets *all* the good object of conflict being disputed. The balancing serves to decide who fully gets the object of the legal dispute, and not to distribute proportionally the good between the parties, to the greatest extent possible. Unlike traditional theories, in the theory of Alexy, the conflict *is not solved by a knockout, but by points*. After all, the solution of the conflict is not based on all or nothing, but on the balancing.

Finally, the decision, whether *proportional, whether based on any other theory,* serves to deliver the good of life to the prevailing party. The other party, the losing one, ends up without what it wanted in practice but *comforted* by knowing that it will keep its fundamental right (after all, it suffers a constraint on a lesser extent possible) to be used in other opportunities. This is not different from what occurs in the context of traditional theories, in which the defeated party also retains all the rights that the law gives, though without the good of life litigated in the case.

In this regard, it is noted that the proportionality serves to *justify* and *legitimize* decisions made in court proceedings and in Government speeches, but is not able to solve real conflicts in order to overcome, for example, the criterion of cost and benefit that consequentialists and utilitarians use to decide, in a collision of rights, what must be benefited and what must be sacrificed. It neither overcomes the ethical theories, which give prevalence to a right against another because of its conformation to a hierarchy of values provided for in the legislation.

In any case, so that a decision is proportionate, it is necessary the establishment of a criterion which acts as a benchmark between

colliding rights, so that they can be compared and balanced, and that criterion is not given by the theory. To make the situation even more problematic: if this benchmark value is chosen randomly or based on the preferences of the judge, the decision is *arbitrary*; if it is chosen based on a fact external to the positive law, it is *undemocratic*. This is a problem insofar as the assumption of proportionality was developed precisely to avoid or mitigate the discretion of government decisions. As judicial decisions, by means of proportionality, become *policies* (discretionary, aimed at the convenience and opportunity of promoting one right rather than another, based on a criterion freely established by the judge), the prevailing normative principle removes the effectiveness of normative rules linked to the defeated principle. In a normative structure, this *replaces* the legal certainty of a predetermined set of values in law for individualized solutions depending on the most appropriate values and interests according to the criterion chosen by the judge.

According to tests of proportionality, the stage of adequacy tries to know whether the exercise of a right interferes with another; the stage of necessity tries to know whether there is any less costly form of interference and, completed the analysis of the case in this second phase, it must be clear the existence of a conflict between rights (or interests, or constitutional values). Then there is the third step, the proportionality in the strict sense, in which there will be the choice for one of the rights which "*determines which of the two (or more) values in question will have the priority in the circumstances of the case*" (Möller, 2012, p. 715).

So that the discretion is legitimized, and that the decision on the conflict is, in fact, proportional, it is necessary to leave the decision to discuss the rationality of the *criterion* by which the decision must be made. The test of proportionality in a strict sense is when we stop solving the *real problem* to solve a *game of choice of criteria* that, somehow, will be used to support the solution of the conflict. Tsakyrakis (2009, p. 474) is skeptical about the proportionality because, according to him, the moral grounds that actually decide the conflict of rights are *hidden*. Möller (2012, p. 717) says that the moral argument that establishes the criterion should be discussed at the time of proportionality in a strict sense and that this tool assists in the presentation of acceptable balancing reasons.

This shows that, in the context of the theory of the fundamental rights of Alexy, the conflict of rights is decided by something external to the proportionality, and that this serves to justify the decision making through absolutely *any criterion*. In this situation, Tsakyrakis *is right* when identifying that the criterion was created only to justify a *decision that has been made* before any balancing between the conflicting rights, which shows that the proportionality in the strict sense did not help

to solve the conflict, but covered up the reasons that led the judge to decide it. Proportionality, in this sense, is more an *argument of authority* (Atienza, 2012; Copi, 1978) than a *rational argument*.

The issue about the measurement of rights, values and interests and their consequent balancing is not based, in our view, on the theoretical incommensurability[6] between them (since the real conflict between them determines the need to choose between one and the other based on some criterion), but precisely on *how* this criterion is chosen. If there is no criterion to ground the decision, we have the issue of the *basis of the criterion*: would we have to apply the test of appropriateness, necessity and balancing to *justify the choice of the criterion?* If so, this would lead to a regression for new demands in order to decide on the basis of that decision, and this regression would never end (*regressus in infinitum*). In this sense, it seems to us that the theoretical basis that legitimizes the proportionality is as fictional as, for example, the ground norm of the pure theory of law.[7]

The parameter to decide proportionally is not given by the theory of constitutional rights. In fact, this parameter *is not given by any legal theory*, but by the bases of a certain worldview that the judge considers as valid or legitimate to consider the rights at stake.[8] Nevertheless, and based on Vaihinger (1952), it must be clear that *any worldview is fictional*, because it is based on certain interests, values, and wishes – in the form of understanding the world, not the world itself – and they are violent not only in relation to thought and reality but to the interests of other individuals and social groups on which this worldview is enforced.

The treatment given to migration and the right of entry of a foreigner fits in this scenario in which decisions relating to them are taken with a view to the training of the individuals involved in the decision, elements that are essentially from outside of the right. In fact, the decision on the entry of foreigners in the territory of the country, which is founded, supposedly, in the availability of scarce resources to effective social rights, is taken by an individual who is in the country about the possibility of entry of who is outside it. The idea of nationality and that the Government can freely control its borders are present at the time of choosing the entry or not of migrants, either legal or illegal, and the non-existence of a migratory policy allows decisions to be taken individually and freely, exclusively attached to proportionality, which deepens the opacity of human rights in that context (Rubenstein &

6 Criticism presented by Tsakyrakis (2009) to the theory of Alexy and countered, successfully in our view, by Möller (2012) and Silva (2011).

7 Kelsen, 1986, p. 328-9.

8 These considerations are clear, in the field of legal interpretation, to authors such as Ross (2000, p. 169-170 and 175).

Adler, 2000).

Therefore, the fact whether the decision maker is a migrant or not in search of a new home interferes with the result of the balancing of principles and with the result of the application of the proportionality to the case put in front of them.

If the decision of entry does not refer to the foreigner as an equal, the result will always be the one that allows the Government to preserve the possibility of barring migrants at its border, although there are a wide variety of cases of search of entry around the world. In other words, if proportionality were to be applied in its pure form, it would provide inconceivable similar results all the time, invariably allowing Governments to define freely who can join their territory, despite the rules from international human rights treaties.

In this way, it is possible to say that migration is a controversial subject for Western nations in the late 20th century and early 21st century, just as the subjects related to barriers to trade and financial movements, which are being challenged and removed, in particular, because of the communication and transport technologies, responsible for shrinking the world. Nevertheless, what we see is that, because of the worldview based on segregation from nationalities, the barriers to the movement of persons remain rigid, what challenges the applied proportionality.

4. FINAL REMARKS

Real conflicts, if there were no Governments, would be solved, ultimately, based on the physical strength of the parties in dispute. With Governments, they are determined based on legal provisions (and on the social values that give their content and meaning). However, we highlight that *standards, while formally equal, do not have the same equality in material terms*, since it is the state of social forces that imposes the effectiveness of a fundamental right over another.[9] This means that some values and some standards are historically stronger than others. For example, it is very difficult to find judicial decisions in Brazil that give prevalence to the housing law when it is in collision with the right to property, and both rights are fundamental rights equally constitutionalized. Moreover, although nationality is a legal fiction, built to define that which is foreign (Carvalho Ramos, 2008, p. 722), it is used to limit the rights of migrants, such as the access to public services, accepting, for example, how natural the possibility of preventing the entry of foreigners is, except in rare exceptions in refugee situations (Vedovato, 2013, p. 83).

9 This has been addressed in Mastrodi (2012, p. 165): *"... although the logic allows a right to be effective today, but not tomorrow, the practice shows that effective rights are always conformed to the social structure."*

If constitutional rights are endowed with equal validity, being formally equal, what gives the prevalence of one over the other in any situation, which gives each right more or less normative force in relation to the other rights, is not within the law, but out of it.[10] Normative effectiveness is a data from the social reality and not the legal reality. Although law – and the science of law – show themselves as *objective and impersonal*, as if all rights were equally relevant,[11] the practical result ends up depending on knowing *what colliding rights* are related to a greater extent to the normative standard of the society.[12] The strength of a legal norm depends more on its content (appropriateness to social values and interests that structure the society) than on its form (adequacy to the legal system).

By enabling judges to set the balancing criterion, they tend to choose a value or interest that is relevant in their point of view, which is highly discretionary, to say the least. Although judged justify the criterion based on a *universal legal conscience* or in *judicial practice*,[13] or they base it on some moral argument, this obligation to state reasons is not an exclusive requirement of the theory of constitutional rights; on the contrary, in this respect (obligation to state reasons), it *is no* different from other theories.

If both within the theory of fundamental rights and within the other theories there are no elements to identify the criterion to be decided, then Kelsen remains current, given the assertion that it is possible to decide *anyway*, even in a manner contrary to law.[14] Thus, if there is *interest* in the solution of the conflict in favor of *right A* as opposed to *right B*, it would be enough to choose a criterion that would benefit *right A* so that the resulting decision would be considered as "proportional", and the result of a "rational" balancing.

This, incidentally, is the core of the criticism made by Enrique Haba to the conflict resolution methods presented by the majority of the

10 *Validity* is the quality of the standard that formally belongs to the regulatory system. In semiotic terms, it is the *syntactic* relation of the elements of the system with each other and in relation to the system itself. *Effectiveness* is related to the meaning (*semantics*) that the standards have in their relation with the real world, and this meaning is not obtained from the syntax, and it is not created *per se*, but it is built pragmatically in the relation between the legal world and the real world (which encompasses the legal world).

11 It is important to reaffirm that, in syntactic terms, yes, all rights and all legal provisions have equal validity, equal dignity within the legal system (Kelsen, 2003, p. 387-97). The sense of rights and standards, however, is not given by the system, but derived from the relation of this legal system with the social reality.

12 See item 1 of this work and, in more detail, Mastrodi (2012).

13 Which are the bases of the two most widely known aspects of realistic positivism, the *psychological* and the *behaviorist* (Ross, 2000, p. 97-100).

14 Or *"produce a standard which is completely out of the frame that the standard to be applied represents."* Kelsen, 2003, p. 394.

legal theories. With the support in the doctrine of the American realist Jerome Frank, Haba affirms the existence of a *basic legal myth*, the belief that well-prepared judges can solve a conflict simply from their diligent action in applying an aesthetically satisfying theory, systematizing the right in a harmonious, consistent and uniform way; then the right (or the solution of the case) "*will bloom when we shake the magic wand of a rationalizing principle*."[15] According to Haba, the *pragmatic* function of this myth is to camouflage both the indeterminacies inherent to the legal language and the *personal* responsibilities of the judges. The rationalizing principle, always given as granted but never proven, is nothing more than a *rhetorical resource par excellence*.[16]

What is the advantage, then, of the theory of Alexy over the other legal theories? In our view, it is not the proportionality, which absolutely does not solve the issue of election of the criterion of the decision in a better, wider or deeper way than other theories. It is unable, by itself, to justify the choice of one criterion over another, something that, regardless of the theory, must be based on reality, and not in the narrow framework of the theory or legal system. In this sense, the proportionality is presented as the way to solve conflicts within the framework of the theory of constitutional rights, but without any possibility of, by itself, providing the establishment of a rationally justified criterion to promote its implementation.

This, however, is no reason to suggest the ruling out of the theory of constitutional rights. It addresses, as stated in the introduction, the first theoretical structure which gives importance to rights and interests, as long as they are provided by the Constitution, at the same level that the so-called individual rights, inherent from a social structure that serves to maintain the social conditions of inequality. We do not want to assert with this that the theory of constitutional rights is the *only* way of giving constitutional force to social rights and that it will *make it possible* in the practice of judicial decisions, but that this inherent feature is highly conformed to the pluralistic social structure of today, which allows different social groups to have conditions to lawfully fight for certain values and interests and see them prevail. There is no problem in addressing the proportionality as fiction. The problem is not considering this important aspect of its nature.

15 *Apud* Haba, 2004, p. 50.

16 Haba, 2001, p. 192.Then, the author states: "*Indeed, this belief realizes something, be that as it may, that it is true what presents itself as that. Such a presence is not only the effect of certain real causes, on the one hand, but it also causes, on the other hand, subsequent effects on reality itself, because of those who* work *in such way because they* see so (believe in that). *Here comes up ... the Thomas theorem: 'If men define* [i.e. imagine] *situations as real, they* are *real in their consequences."* HABA, 2001, p. 192.

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