VII th World Congress of the International Association of Constitutional Law
Workshop 15: The Balancing and Proportionality in the Constitutional Review

Evolution of Constitutional Interpretation in Brazil and the Employment of Balancing "Method" by Brazilian Supreme Court in Judicial Review[*]

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Brazilian legal theory has always been markedly positivist in conceiving law as a set of norms established by legislators and other properly authorized public officers. Such prevailing view, influenced by Portuguese formalism, which implanted *Civil Law* when Brazil was one of its colonies, was definitely consolidated in early 20th century. Since then, an excessive attachment to the law text has been observed in both judges and courts. Legal interpretation constituted a syllogism: the major premise was the applicable statute, the minor premise were the facts, and the conclusion was the decision itself. Brazilian positivism has thus developed beneath the myth of the objectivity of law. However, when statutes were not sufficiently clear, attorneys, judges and citizens believed that conventional interpretation methods would direct judges toward a correct interpretation in hard cases. The methods generally employed by Brazilian Legal Positivism amount to the canons of interpretation suggested by Friedrich Carl von Savigny: grammatical interpretation, systematic interpretation, historical interpretation, and teleological interpretation[1].

Accordingly, judges were expected to do no more than to find out or to make plain the meaning of the norm, performing an act of mere knowledge, with no creative liberty at all. This can be explained by the belief, widespread among members of

[*] I dedicate this paper to Senator Mauro Fecury and Dean Aldy Mello for their integrity and intense devotion to education in Brazil. I thank my friends Luiz Henrique Rezende and Marcelo Brandão Cipolla for help and advice on matters of English style.
[1] See *Sistema del Diritto Romano Attuale*. Translated by Vittorio Scialoja. Torino, UTET, 1886.

the judiciary, that legal safety and certainty could only be assured by means of the disinterested and impartial enforcement of the laws by judges. Another reason was the strict interpretation of the separation of powers adopted by the Brazilian judiciary. This is illustrated by the fact that, in the first half of the 20th century, it became settled in Brazil that the Brazilian Supreme Court[2] and all other courts should confine themselves to strictly legal issues, shunning, by means of self-restraint, all political matters. The Brazilian Supreme Court claimed that it had no authority to review the constitutionality of acts seen as "political".

Thus, the positivist outlook of Brazilian judges and courts instituted a separation between the text of the law and its context of application. This trend was compounded by a strictly positivist model in the teaching of law, focused on a narrow, uncritical analysis of statutory law. This teaching model, that sees legal science as a 'neutral' and 'apolitical' discipline, was the dominant one in Brazil until very recently, among other things because it favored the military regime that held sway over the country for many years. In short, the positivist model perpetuates itself both in law schools and in the actual practice of law in Brazil, and is still dominant at the beginning of the 21st century.

Nevertheless, it is possible to assert that the 1980s mark the beginning of a change in conceiving Law. The positivist approach became the target of severe and sharp criticism. A number of lawyers started to perceive that the positivist method of interpretation both as insufficient and unsatisfactory. The country had already seen seven written and detailed constitutions[3], yet they all lacked efficacy and effectiveness.

> "The *lack of effectiveness* of Constitution after Constitution was the result of the non-recognition of the normative power of their texts, and of the absence of political will to give them immediate and direct applicability. Dominant in Brazil was the European tradition of the first half of the [20th] century, which saw the basic law as a mere coordination of policy programs, a call to action addressed to the legislature and to public officers in general. Hence, Brazilian constitutional charters have always been inflated by grandiose promises and would-be rights that never found their way into practice: a history marked by insincerity and frustration."[4]

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[2] The *Supremo Tribunal Federal* is the highest court in Brazil.
[3] 1824, 1891, 1934, 1937, 1946, 1967, and 1969.
[4] Luís Roberto Barroso, "O Começo da História: a Nova Interpretação e o Papel dos Princípios no Direito Brasileiro". In Luís Roberto Barroso (ed.), *A Nova Interpretação Constitucional: Ponderação, Direitos Fundamentais e Relações Privadas*, Rio de Janeiro, Renovar, 2006, at 328.

It is reasonable to assert that throughout Brazilian History, particularly at dictatorial rule periods, constitutional law had been assigned a minor, marginal role. At the present, however, constitutional interpretation affects civil law, criminal law, tax law, procedural law, family law, economic law, etc. Even before the enactment of the 1988 Federal Constitution, which included Brazil among democratic countries after twenty-five years of military dictatorship, a number of lawyers had already been concerned with the exam of political and axiological elements in Brazilian law[5]. Such pioneer enterprises opened up new scientific horizons in Brazilian Legal Theory. Thus, books and articles about Topic, The New Rhetoric and Legal Theory of Argumentation gradually gained space in the national legal scene. And the end of military repression as the country was redemocritized has certainly contributed to further such a renovation in Brazilian legal studies.

Many Brazilian lawyers describe the Brazilian 1988 Constitution as *dirigente* (directive). This term, taken from Portuguese constitutional law[6], reflects the inclusion, in the constitutional text, of norms that establish values, ends, policies, and goals for the state and for society in general, especially in the areas of education, culture, health, transport, housing, social welfare, and the realization of social justice as a value. This "directive constitutionalism" depends on the National Congress to enact laws that implement and develop the programmatic aims of the Constitution. The problem, recognized even before the 1988 Constitution, was not that fundamental rights were not written into the Constitutional text itself — influenced by the 1976 Portuguese Constitution and the 1978 Spanish Constitution, the 1988 Brazilian Constitution contains an extensive bill of individual, social, political, and economical rights. According to Brazilian lawyers, the problem of constitutional law at the time was the lack of efficacy of constitutional norms, especially of the norms that state fundamental rights. Constitution efficacy – at least along the last twenty years – has been a major

[5] Such lawyers include Miguel Reale, whose "three-dimensional theory of law" is well known. See *Teoria Tridimensional do Direito*, São Paulo, Saraiva, 1980; and the classic book *Curso de Direito Constitucional*, by Paulo Bonavides, São Paulo, Malheiros, 1982.

[6] See José Joaquim Gomes Canotilho, *Constituição Dirigente e Vinculação do Legislador: Contributo para a Compreensão das Normas Constitucionais Programáticas*, 2nd ed., Coimbra, Coimbra Editora, 2001.

concern among a number of Brazilian lawyers, above all concerned with the applicability of constitutional norms[7].

The applicability concept is attached to the eventual need of a legislative activity to enable the achievement of constitutional norms. Lawyers within such theoretical trend, leaded by José Afonso da Silva[8], have devised a number of typologies to classify types of efficacy in constitutional norms. The concept of "limited efficacy", for instance, stems from subordination to legislative activity to enable constitutional norms to produce their full applicability.

Such theoretical trend has been important in that it provided consistent arguments to accord the constitution a greater efficacy, replacing a previous typology which had not assigned any efficacy to certain constitutional norms. From José Afonso da Silva's contribution, a number of effects were attributed to constitutional norms, albeit many have remained not possible of autonomous application by the judiciary without the need of legislative production.

For a few lawyers, however, that theoretical trend has not given attention to the effectiveness problem, that is, to determine if the norms' potential effects are effectively produced. For some lawyers the problem could not be reduced to legal efficacy, as a possibility to apply the norm. It was necessary to consider the social efficacy, the possibility of a norm being effectively applied and observed by public officers and citizens. Effectiveness therefore means the full realization of constitutional norms in their social dimensions. That was the main concern from a number of Brazilian lawyers who compose a theoretical trend which terms itself "Brazilian constitutionalism of effectiveness"[9]. It is possible to assert nevertheless that Jose Afonso da Silva's doctrine has been the most employed one both in courts and law schools.

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[7] See especially João Horácio Meirelles Teixeira, *Curso de Direito Constitucional*, Rio de Janeiro, Forense Universitária, 1991; José Afonso da Silva, *Aplicabilidade das Normas Constitucionais*, 7th ed., São Paulo, Malheiros, 2007; Ingo Wolfgang Sarlet, *Eficácia dos Direitos Fundamentais*, Porto Alegre, Livraria dos Advogados, 2005.

[8] José Afonso da Silva, *Aplicabilidade das Normas Constitucionais*, 7th ed., São Paulo, Malheiros, 1999.

[9] Cláudio de Souza Pereira Neto, "Fundamentação e Normatividade dos Direitos Fundamentais: uma Reconstrução Teórica à luz do Princípio Democrático". In Luís Roberto Barroso (ed.), *A Nova Interpretação Constitucional: Ponderação, Direitos Fundamentais e Relações Privadas*, Rio de Janeiro, Renovar, 2006, p.288. See especially Luís Roberto Barroso, *O Direito Constitucional e a Efetividade de suas Normas: Limites e Possibilidades da Constituição Brasileira*, 7th ed., Rio de Janeiro, Renovar, 2006;

The acknowledgement of norms with limited efficacy, however, has influenced the Brazilian highest court – The Brazilian Supreme Court – in a negative fashion. Whenever there has been a will not to apply the Constitution along the last twenty years, all one needed was to term the norm "limited efficacy", and then transfer to the legislative a task which quite often belonged to the the judiciary itself[10]. These formal arguments, which are still invoked by some Brazilian Supreme Court Justices, are seen as artifices that favor a minimalist judicial approach. This approach has been the hallmark of many Brazilian Supreme Court decisions.

A reaction to such a minimalism came with the gradual acknowledgement of normative powers in the principles among a number of Brazilian lawyers influenced by Ronald Dworkin[11] and Robert Alexy[12]. The movement was termed "Post-positivism" or "new constitutional interpretation"[13] in Brazil. Since the 20th century last decade, a more active stance has been demanded from the judiciary power, particularly from the Brazilian Supreme Court, still seeking more effectiveness from the constitution. It is therefore possible to assert that the concern with the effectiveness of the constitution interpretation has evolved in Brazil. As a great Brazilian lawyer has put it, "the effectiveness of the Constitution is the ground over which new constitutional interpretation has developed in Brazil"[14].

Studies by Portuguese lawyers J. J. Gomes Canotilho, Jorge Miranda, and José Carlos Vieira de Andrade, and Pablo Lucas Verdú and Perez Luño in Spain, have also influenced the new movement for law effectiveness, particularly as they acknowledged the constitution as a "concrete order of values". Brazilian Constitutionalism therefore has celebrated reconciliation between ethics and law along the last two decades. Such shared

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[10] Many cases decided by the Brazilian Supreme Court illustrate this. The most notorious probably involve the interpretation of article 192, paragraph 3 of the Constitution. The Brazilian Supreme Court has repeatedly decided that "the rule of art. 192, paragraph 3 is a constitutional norm of limited efficacy, an integrative precept that calls for legislative mediation to gain full applicability. […] In the absence of the complementary legislation called for by the Constitution, the immediate application of the 12%-a-year rate of real interest, provided for in this constitutional clause, is not possible." RE 170131/RS. DJU 06/24/1994. Justice Celso de Mello.

[11] Ronald Dworkin, *Taking Rights Seriously*, Cambridge, MA, Harvard University Press, 1977.

[12] Robert Alexy, *A Theory of Constitutional Rights*. Translated by Julian Rivers. Oxford University Press, 2002.

[13] Other lawyers affiliated to the "new constitutional interpretation" movement relied on the theses of German authors, such as Konrad Hesse, Friedrich Müller, and Peter Häberle. It is important to note that Savigny's methods are still of great practical relevance to this new school of thought.

[14] Barroso, *supra* note 4, at 330.

values, according to the mentioned trend, are materialized in principles acknowledged as sheltered within the constitution, either implicitly or explicitly.

Among a number of Brazilian lawyers, the concern with Brazilian society values, which are to be respected and guaranteed by the judiciary, has prompted many lawyers[15] to identify a communitarian theory in Brazil.

> "The communitarian dimension of Brazilian constitutionalism is revealed when the Constitution is conceived as a '*concrete order of values*', and also […] when a predominantly political role is ascribed to the Brazilian Supreme Court, which [according to this view] should rely on 'processes which interpret and legitimate social aspirations' and should base its constitutional interpretation on shared ethical values."[16]

Such "Communitarian Trend" attempts to offer special protection of a substantive nature to fundamental rights based on the principle of the human being dignity[17] as it occurs in the German Federal Constitutional Court. Indeed, consideration for the human being dignity has began to be recognized by high courts[18] and state courts, where it has been stated that "the human being dignity, one of mainstays of a democratic state, enlightens the interpretation of ordinary law"[19]. Such a principle has also been invoked to justify a number of decisions: to ensure the mandatory supply of medical drugs by the State[20]; to make void a contractual clause that limits the period of internment in a hospital to be covered by a health insurance plan[21]; to reject an arrest for the non-payment of absurd rates of interest[22]; to allow the use of the Workers' Guarantee Fund for the treatment of a family member suffering from AIDS[23]; and to force a defendant to undertake a DNA test in a paternity suit, or to enjoin the Court from coercively imposing

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[15] Álvaro Ricardo de Souza Cruz, *Jurisdição Constitucional Democrática*, Belo Horizonte, Del Rey, 2004; Gisele Cittadino, *Pluralismo, Direito e Justiça Distributiva*, 2nd ed., Rio de Janeiro, Lumen Juris, 2000.

[16] Gisele Cittadino, *supra* note 15, at 134.

[17] The "human being dignity" is enshrined as one of the "Fundamental Principles" of the 1988 Constitution, which posits it as one of its guidelines in art. 1, III. See Ingo Wolfgang Sarlet, *A Dignidade da Pessoa Humana e os Direitos Fundamentais na Constituição Federal de 1988*, Porto Alegre, Livraria do Advogado, 2002.

[18] There are two high courts in Brazil: the *Supremo Tribunal Federal*, responsible for the 'guardianship of the Constitution', and the *Superior Tribunal de Justiça*, which unifies the interpretation of federal law.

[19] STJ, HC 9.892/RJ. DJU 03/26/2001. Justice Hamilton Carvalhido.

[20] STJ, ROMS 11.183/PR. DJU 09/04/2000. Justice José Delgado.

[21] TJSP, AC 110.772-4/4-00, ADV 40-01/636, 98.859. Justice O. Breviglieri.

[22] STJ, HC 12.547/DF. DJU 06/26/2000. Justice Ruy Rosado de Aguiar.

[23] STJ, RE 249.026/PR. DJU 06/26/2000. Justice José Delgado.

such a test[24]. Now, the Brazilian Supreme Court is about to decide whether the principle of human being dignity allows abortion of anencephalic foetuses[25].

Lawyers within that trend also advocate the Brazilian Supreme Court need to perform a "balancing of values" in cases wherein a state act meant to promote the realization of a fundamental right, or a collective interest ends up in restricting one or more fundamental rights. The situation is termed "collision of principles"[26]. According to such doctrine, the aim of balancing of values is to see that no restriction to fundamental rights assume disproportionate dimensions. It is to be a "restriction to restrictions".

> "The so called balancing of values or balancing of interests is the technique through which one seeks to establish the relative weigh in each of opposed principles. Since there is not any abstract principle to impose its supremacy over another one, in facing a concrete case, one must make reciprocal concessions, thus producing a socially desirable result, sacrificing a minimum in each of the fundamental rights or principles. The legislator cannot arbitrarily choose one of the interests at stake and render the other void, risking a violation in the constitutional text."[27]

In recent years, so called "balancing of values" has therefore attracted the interest of Brazilian lawyers, and a number of papers have been written on the matter[28]. In Brazil, balancing consists of applying the three sub-principles of proportionality advocated by Robert Alexy: "[t]he principle of proportionality consists of the three sub-principles of suitability, of necessity and of proportionality in the narrow sense. All three principles express the idea of optimization"[29].

The principle, which has won the support of most Brazilian lawyers, has soon become employed by Brazilian courts as decision criteria in collision of principles,

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[24] STJ, HC 6.802/RJ, Justice Vicente Leal; TJSP, AC 191.290-4/7-0, ADV 37-01/587, 98.580, Justice A. Germano.

[25] STF, ADPF 55. Justice Marco Aurélio de Mello.

[26] See Alexandre Reis Freire & Clèmerson Merlin Clève, "Algumas Notas Sobre Colisão de Direitos Fundamentais". In Eros Roberto Grau & Sérgio Servulo Cunha (eds.), *Estudos de Direito Constitucional em Homenagem a José Afonso da Silva*, São Paulo, Malheiros, 2003.

[27] Luís Roberto Barroso, *Interpretação e Aplicação da Constituição*. 6th. ed. São Paulo, Saraiva, 2004, at 330.

[28] Precursors on the matter in Portuguese language were, in Portugal J.J. Gomes Canotilho and José Carlos Vieira de Andrade, and in Brazil, Willis Santiago Guerra Filho and Paulo Bonavides. Presently, main papers on the matter are Virgilio Afonso da Silva, "O Proporcional e o Razoável", *Revista dos Tribunais*. vol. 798, 2002, Humberto Ávila, *Teoria dos Princípios: da Definição a Aplicação*, São Paulo, Malheiros, 2005, and Luís Roberto Barroso, "Os Princípios da Razoabilidade e da Proporcionalidade no Direito Constitucional", *Revista dos Tribunais*, vol. 23, 1998.

[29] Robert Alexy, "Constitutional Rights, Balancing, and Rationality", *Ratio Juris*, vol. 16. n. 2. June 2003, at 134.

although it had not been predicted in the 1988 Brazilian Constitution. The Brazilian Supreme Court has resorted to the principle in a number of cases: to render void laws which impose an exaggerated cost to a right, as the one requiring that gas containers are weighed before the consumer[30]; to annul laws which establish disproportionate advantages to civil officers, such as vacation payments for retired workers[31]; to analyze readjustment in school fees[32]; to analyze constitutionality in DNA paternity investigation screening[33]; and to determine whether or not publishing anti-Semitic material constitutes racism[34]. Based on Alexy's theory, according to the Brazilian Supreme Court, it is possible because "[c]onstitutional rights as principles are optimization requirements. As optimization requirements, principles are norms requiring that something be realized to the greatest extent possible, given the legal and factual possibilities"[35].

The employment of that principle however, is criticized by Brazilian lawyers who subscribe to Jürgen Habermas discursive theory[36]: Menelick de Carvalho Netto[37], Marcelo Cattoni[38], Marcelo Campos Galuppo[39], Àlvaro Ricardo de Sousa Cruz[40], José Alfredo Baracho Jr.[41], Cláudio Pereira de Sousa Neto[42], Gisele Cittadino[43], Lúcio Antônio Chamon Jr.[44], advocate a deontological understanding of legal principles, as well as agreeing with the two main objections to Habermas regarding balancing, which Alexy himself puts forward in one of his articles:

> Habermas's first objection is that the balancing approach deprives constitutional rights of their normative power. By means of balancing, he claims, rights are downgraded to the level of goals, policies, and values. They thereby lose the 'strict *priority*' that is

[30] STF, ADI-MC 855-2-PR. DJU 01.10.93. Justice Sepúlveda Pertence.
[31] STF, ADI-MC 1.185-8-AM. DJU 01.10.93. Justice Celso de Mello.
[32] STF, ADI-MC 319-DF. DJU 01.10.93. Justice Moreira Alves.
[33] STF, HC 71.373-4-RS. DJU 22.11.96. Justice Franscisco Rezek.
[34] STF, HC 82.424-2-RS. DJU 19.03.2004. Justice Moreira Alves.
[35] Robert Alexy, *supra* note 29, at 135.
[36] See *Between Facts and Norms*. Cambridge, Mass., MIT Press, 1996.
[37] See "A Hermenêutica Constitucional sob o Paradigma do Estado Democrático de Directo". In Marcelo Cattoni (ed.), *Jurisdição e Hermenêutica Constitucional*, Belo Horizonte, Mandamentos, 2004, at 25-44.
[38] See *Direito Processual Constitucional*, Belo Horizonte, Mandamentos, 2001.
[39] See *Igualdade e Diferença: Estado Democrático de Direito a partir do Pensamento de Habermas*, Belo Horizonte, Mandamentos, 2002.
[40] See *supra* note 15.
[41] See *Responsabilidade Civil por Dano ao Meio Ambiente*, Belo Horizonte, Del Rey, 2000.
[42] See *Teoria Constitucional e Democracia Deliberativa*, Rio de Janeiro, Renovar, 2006.
[43] See *supra* note 15.
[44] See *Teoria Geral do Direito Moderno: por uma Reconstrução Crítico-Discursiva na Alta Modernidade*, Rio de Janeiro, Lumen Juris, 2006.

characteristic of 'normative points of view' (Habermas 1996, 256). Thus, as he puts it, a 'fire wall' comes tumbling down:

> For if cases of collision *all* reasons can assume the character of policy arguments, then the fire wall erected in legal discourse by a deontological understanding of legal norms and principles collapses. (Ibid., 258f.)

This danger of watering down constitutional rights is said to be accompanied by 'the danger of irrational rulings' (ibid., 259). According to Habermas, there are no rational standards for balancing:

> Because there are not rational standards here, weighing takes place either arbitrarily or unreflectively, according to customary standards and hierarchies. (Ibid., 259).

The first objection speaks, then, to two supposed substantive effects or consequences of the balancing approach: watering down and irrationality. The second objection concerns a conceptual problem. Habermas maintains that the balancing approach takes legal rulings out of realm defined by concepts like right and wrong, correctness and incorrectness, and justification, and into a realm defined by concepts like adequate and inadequate, and discretion. "Weighing of values" is said to be able to yield a judgment as to its '*results*', but is not able to '*justify*' that result:

> The court's judgment is then *itself* a value judgment that more or less adequately reflects a form of life articulating itself in the framework of a concrete order of values. But this judgment is no longer related to the alternatives of a right or wrong decision. (Habermas 1998, 430).

This second objection is at least as serious as the first one. It amounts to the thesis that the loss of category of correctness is the price to be paid for balancing or weighing".[45]

The epicenter of employing the principle of proportionality and criticism for its application by the Brazilian Supreme Court was the "Ellwanger case"[46], certainly the most famous one ever decided by that Court in recent years. The case, decided in September 2003, was summed up by that court:

"**Subject:**

Breadth of the Expression "Racism"

Facts:

The defendant [Siegfried Ellwanger], a writer and associate publisher, was convicted of the crime of discrimination against Jews for exclusively publishing, distributing and selling anti-Semitic works. Acquitted in first instance, the defendant's condemnation at the appellate level only was possible because the statute of limitations was not applicable in his case pursuant to article 5, XLII of the Federal Constitution, which states: "the practice of racism is a non-bailable crime, with no limitation, subject to the penalty of confinement, under the terms of the law."

The defendant filed a petition for writ of *habeas corpus* claiming that the crime of discrimination against Jews does not have racial connotation and seeking the application of the statute of limitation for his conduct, which had already expired.

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[45] Alexy, *supra* nota 29, at 134-135.
[46] STF, HC 82.424-2-RS. DJU 19.03.2004. Justice Moreira Alves.

> **Issue:**
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> Are Jews considered a race to the effects of judging the defendant's conviction of discrimination as a race crime?
>
> **Decision:**
>
> The Full Court by majority concluded that that racism is, first and foremost, a social and political reality, with no reference to race as a physical or biological characteristic. This reflected, in truth, a reproachable behavior that stems from the conviction that there is a sufficient hierarchy among human groups to justify acts of segregation, inferiorization and even the killing of people. There were three dissenting votes, which did not consider Jews as a race, two of which also were based on the right to freedom of speech and on the absence of a conduct constituting incitement of discrimination."

Although the majority of Justices had denied the *habeas corpus* order, and many of them agreed with the decision, opinions from two Justices attracted attention of Brazilian lawyers, from both those who supported balancing of values and those who criticize it. Justices Gilmar Mendes and Marco Aurélio had understood that there had been a collision of values between principles of freedom of speech and human being dignity in the case, and both had employed the principle of proportionality and its sub-principles as a method for decision.

As he stated his decision, Justice Gilmar Mendes considered that the defendant Siegfried Ellwanger had incurred in the crime of racism by publishing works, both by himself and others, proposing an alleged historical revision of the holocaust. For this purpose he employed the principle of proportionality, following all the structure and methodology proposed by Robert Alexy. In fact, Justice Gilmar Mendes maintained the condemnatory decision, denying the *habeas corpus* because there had been no violation of the principle of proportionality. When his vote is analyzed, one may assert that his decision had privileged the principle of human being dignity.

Nevertheless, employing the same principle of proportionality and its sub-principles, Justice Marco Aurélio had reached a completely opposite result in relation to Justice Gilmar Mendes'. In his vote, Justice Marco Aurélio argued that, in employing the principle of proportionality, one would reach the result that the defendant's conviction was excessive and disproportionate. Therefore his decision privileged the principle of freedom of speech which acquitted Siegfried Ellwanger.

Thus it is evident that both, Gilmar Mendes and Marco Aurélio, had employed the same method, the principle of proportionality, however reaching disparate

results. How can the application of the principle of proportionality by distinct judges generate such disparate decisions? Has anyone been mistaken in applying the mentioned principle? Or is it an unreliable one? But is it not a method? Such queries have strengthened the position of lawyers who consider justified both objections to balancing by Habermas mentioned earlier.

The Brazilian Supreme Court has not pronounced on its position towards such criticism yet. As it seems, it will continue applying the principle of proportionality whenever the Brazilian Supreme Court itself identifies a collision of principles. Nonetheless debate remains.

Undoubtedly there must be restrictions to the power of judges to interpret the constitution in an arbitrary fashion, according to their own beliefs and values. However there is not any formula or method to assure that judges are not influenced by personal beliefs in most unusual and complex constitutional cases, let alone simple cases. Thus no method shall guide judges toward correct decisions and protect us from incoherent judicial decisions. We have to accept that in a number of cases honest judges will diverge on the reach or the limit to fundamental rights. However we must give up a useless search for restriction methods to those rights and pursue genuine restrictions in a good argumentation. I call "good argumentation" the one which considers and respects what Ronald Dworkin terms Law's Integrity[47], which demands the judge to test his/her interpretation, asking him/herself whether it could be part of a coherent theory which justifies Law as whole. We should therefore insist that the best possible arguments are presented in their decisions, and then ask ourselves whether their arguments are consistent or not. Thus, all that can be done regarding those decisions is to expose that the arguments employed to justify them are unacceptable, because they violate a genuine and independent restriction: the *integrity* which demands that judges must conceive Law as a coherent totality of principles, not a series of distinct decisions that they are free to make or amend, one by one, with nothing beyond a strategic interest[48].

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[47] See *Law's Empire*, Cambridge, Harvard University Press, 1986, especially chapters 6 and 7.

[48] I developed this idea based on Ronald Dworkin's theory and delve into its application in an important matter in Brazilian judicial review, in my dissertation *A Argüição de Descumprimento de Preceito Fundamental no Processo Constitucional Brasileiro: a Abertura Estrutural dos Parâmetros e a Indeterminação Processual do Objeto do Instituto*, presented and defended at Federal University of Minas Gerais Postgraduate Program in Constitutional Law, December 2005.

It may be concluded that, although what has been written so far demonstrates that a certain evolution has occurred in Brazilian Legal Theory, particularly in constitutional law, it is important to stress that the teaching of Law and the instruction of judges and attorneys in Brazil are still very positivist, in the sense discussed at this paper's beginning.

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