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Two Competing Views on Formal Principles

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Abstract

This article presents two different proposals concerning the role that formal principles play in judicial review. Its methodology consists first in presenting the concept of formal principles and the models of formal principles that have been developed within principles' theory. Then it compares the existing models and, after that, it presents two different and new views, which are not comprised within the existing models. The first view, proposed by the first author, defends that formal principles can appropriately reconstruct judicial review insofar as they can embody both deviance (to a certain extent) and uncertainty that are present when authorities create the law. The second view, which is defended by the second author, does not understand formal principles as a necessary complement of principles' theory. According to this view, the only thing principles' theorists needed to do to answer the criticism that affirms that principles theory transforms the parliamentary democracy into a judicial state was explaining the institutional background of the theory, which is established by German's Fundamental Law concerning judicial review.

Keywords

Principles' Theory, Models of Formal Principles, Constitutional Rights, Judicial Review

1. Introduction

In the modern principles' theory, particularly in its German version, formal principles play an essential role, for they are the principles that express to what extent authority must be obeyed, regardless of the content of its decision (Borowski, 2013: p. 151; Alexy, 2014: p. 511 f.). But although they have such importance, a theory about them is not an easy task. That is why that in 2013 Martin Borowski stated, in a metaphoric way, that formal principles were the

last unoccupied territory in the map of the principles' theory (Borowski, 2013: p. 151). Since that affirmation from Borowski some important investigations have been published about this topic, from Borowski himself and from other authors[1], but there is still much to be done.

Formal principles are essential in order to circumscribe the extent of competences of legal authorities, to which the legal system assigns the power to create and apply the law, as well as to solve eventual conflicts of competence between them (Borowski & Travessoni Gomes Trivisonno, 2022: p. 24). This is particularly relevant in the case of judicial review, which, as states Wang, is an effective method to restrict the power of the executive branch (Wang, 2024: p. 15). There are two possible cases of application of formal principles and therefore of using a theory of formal principles: 1) judicial review and 2) the concept of law (Alexy, 2014: pp. 516-519; Borowski, 2017: pp. 451-457; Borowski & Travessoni Gomes Trivisonno, 2022: p. 24). a) Balancing decisions related to constitutional rights in judicial review are strictly connected to formal principles. Thus, a theory of formal principles can be an important toll in the reconstruction of balancing decisions made by both the legislature, when creating a statute, and by the constitutional court, in the context of the revision of the decision the legislature has made (Borowski, 2013: p. 193). b) Regarding the concept of law, formal principles are essential in the reconstruction of balancing the material principle of correctness (or justice) and the formal principle of legal certainty when a concept of law is elaborated (cf. Alexy, 2014: p. 516 f.; Travessoni Gomes Trivisonno, 2022: p. 439 ff.; Aguiar de Oliveira, 2015).

In this paper we will focus on the role formal principles play on judicial review. In order to do that, we shall, in section 2, handle the concept of formal principles. Then, in section 3, we shall describe the main existing models of formal principles. In section 4, we present two new and competing views on formal principles. The first one, developed by the first author of this paper (Alexandre Travessoni Gomes Trivisonno), defends a conception of formal principles that embodies not only uncertainty regarding authoritative decisions but also deviance. This means that not only discretion created by uncertainty about both empirical and normative assumptions used in balancing decisions, as Alexy's current model does, but also embodies deviance, at least to a certain extent. This means that decisions taken by legal authorities which deviate from a pattern of correction within the legal system (colliding to superior norms of the legal system) must be considered valid in certain cases. The second view, developed by the second author of this paper (Júlio Aguiar de Oliveira), defends that a theory of formal principles is simply not necessary to answer to the criticism that has been risen against the principles' theory, particularly the criticism risen by Ernst Böckenförde. This view stresses that the answer should focus not on formal principles, but rather on the fact that the German constitution (as well as some other constitutions) foresee judicial review as a way of limiting the power the

[1]For example, Alexy, 2014; Portocarrero Quispe, 2014; Borowski, 2017; Wang, 2017; Sieckmann, 2018; Azevedo Palu, 2022; Gorzoni, 2022; Nava Tovar, 2022; Travessoni Gomes Trivisonno, 2022a, 2022b.

constitution itself provides to the legislator. Thus, it advocates the substitution of a theory of formal principles for an analysis of institutional competences foreseen in a given constitution.

2. The Concept of Formal Principles

In the modern principles' theory, the importance of respect to an authoritative decision expresses itself through the so-called "formal principles". These principles and therefore a theory about them are important in order to grasp how the binding character of legal decisions takes place. More particularly, formal principles are essential in order to circumscribe the extent of competences of legal authorities to which the legal system assigns the power to create and apply the law, as well as to solve eventual conflicts of competence between them (Borowski & Travessoni Gomes Trivisonno, 2022: p. 24).

In Alexy's theory there are two kinds of norms: rules and principles. "[R]ules are norms which are always either fulfilled or not" (Alexy, 2002a: p. 48). On the other hand, "*principles* are norms which require that something be realized to the greatest extent possible given the legal and factual possibilities" (Alexy, 2002a: p. 47).

Still according to Alexy, "[f]ormal principles are principles", and "[t]hus, the definition of optimization requirements as 'norms which require that something be realized to the greatest extent possible given the legal and factual possibilities' applies to formal principles in the same way as to substantive principles" (Alexy, 2014: p. 515). Alexy affirms then that the difference between substantial and formal principles is related to their object of optimization: the objects of optimization of substantive principles "are certain contents, as, for instance, life, freedom of speech, existential minimum, and protection of the environment. By contrast, the optimization objects of formal principles are legal decisions regardless of their content. Formal principles require that the authority of duly issued and socially efficacious norms is optimized" (Alexy, 2014: p. 515 f.).

According to Borowski, characteristic of a formal principle is assigning power to an organ or a person in order this organ or person establishes the object of optimization of this principle (Borowski, 2013: p. 186). Still according to Borowski, in the case of formal principles the object of optimization is not related to a content, as it is in the case of substantial principles, but rather to the exercise of a legal competence or to the assignment of a legal power (Borowski, 2013: p. 186).

Among the cases of application of formal principles, it is noteworthy the reconstruction of balancing decisions related to constitutional rights in judicial review, that is, the reconstruction of balancing decisions made by both the legislature, when creating a statute, and by the constitutional court, in the context of the revision of the decision the legislator has made. Besides that, formal principles are essential also in the reconstruction of balancing the material principle of correctness and the formal principle of legal certainty, when a concept of law is elaborated (Travessoni Gomes Trivisonno, 2022: p. 423). In the context of these two cases, the modern principles' theory, particularly in its German version, has developed models of formal principles, which are going to be handled in the next section.

3. The Models of Formal Principles

According to Borowski and Trivisonno, in the German principles' theory the following models have been developed to reconstruct balancing decisions in the context of constitutional review:

1) Robert Alexy's first phase on formal principles—combination model or mixed substantial-formal model (draft only) (1985);

2) Jan Sieckmann—model of competing formal principles (1990-today);

3) Martin Borowski—combination model or mixed substantial-formal model (1998-today);

4) Robert Alexy's second phase on formal principles—mixed conception (2002-2003);

5) Robert Alexy's third phase on formal principles—epistemic model (2014 on) (Borowski & Travessoni Gomes Trivisonno, 2022: p. 10, 35 f.).

The "pure substantial-formal model" of formal principles, which has not been applied by any theorist, including Alexy, to judicial review, has been applied by Alexy to reconstruct balancing between moral correctness (or justice) and legal certainty in the context of the concept of law.

Thus, if we take the models and conceptions that were developed for reconstructing both balancing decisions in the context of judicial review and balancing decisions in the context of the concept of law, there are four models and one conception:

1) the combination model (or mixed substantial-formal model);

2) the model of competing formal principles;

3) Alexy's mixed conception;

4) the epistemic model;

5) the pure substantial-formal model.

a) The combination model. According to Borowski, the combination model appeared for the first time in Dworkin's works, which, although do not present a developed model of formal principles, conceived a joint balancing of formal and substantial principles. Dworkin defended not only that "substantive principles" existed, but rather also that there would be "conservative principles", such as the "supremacy of the legislature" and the "doctrine of Precedent". According to Borowski, these principles correspond to what the German principles' theory calls formal principles. From the point of view of Dworkin, a settled rule can only be changed when the weight of the substantive principles that justifies the change is higher than the weight of the substantive principles against the change taken together with the weight of the conservative principle (that is to say, the formal principle) that justifies obedience to the authority that created the rule (Borowski, 2013: p. 161 ff.; Dworkin, 1978: p. 38).

The combination model, more precisely, a draft of it, was defended by Alexy in *A Theory of Constitutional Rights*, which was originally published, in German, in 1985, and which establishes the base of the modern principles' theory in the German speaking space (Alexy, 2002a). In this work, Alexy mentions the existence of principles such as the one that determines that rules produced by a le-

gitimate authority must be followed and the one that determines that it is not correct to abandon, without a good reason, an established legal practice. Alexy terms such principles "formal principles" and conceives, as he later admitted[2], the possibility of balancing a formal principle together with a substantial principle against another substantial principle (Alexy, 2002a: p. 58).

Martin Borowski also defended, in different works, the combination model. The model began to be drawn in 1988, when, in his Ph.D. thesis *Constitutional Rights as Principles*, he distinguishes two kinds of collisions of principles and, therefore, two kinds of balancing: the collision between substantial principles on the one hand and, on the other hand, the collision between substantial principles in which a formal principle takes part in one side (Borowski, 1998: p. 78). After that, in the Lecture *The Structure of Formal Principles*, held at the IVR Congress in Krakow, in 2007 (but published only in 2010), Borowski handles the concept, the structure and some models of formal principles. He distinguishes expressly two kinds of formal principles, namely dependent and independent formal principles, which later, in a text written in German, he calls "accessory" and "non-accessory" formal principles[3]. According to Borowski, dependent formal principles are principles that "have an object to be optimised that necessarily is related to balancing other principles", while independent formal principles are those in which the object is not related to balancing of other principles (Borowski, 2010: p. 31).

In 2009, in *The Binding to the Determinations of the Legislature in Balancing Constitutional Rights*, Borowski develops deeper many ideas that are part of his conception of formal principles. The main problem that the article handles is the confrontation between the need, on the one hand, to respect the decisions of the democratically elected legislature and, on the other hand, the need to control the correction of these decisions (Borowski, 2009: p. 99 f.). Borowski defends a model that combines balancing substantial and formal principles, which, according to him, has two advantages over a model that separates substantial and formal balancing procedure. The first one is connecting, since the beginning of balancing procedure, the substantial and the formal dimensions of principles (Borowski, 2009: p. 116). The second is the fact that, insofar as it conceives balancing between two formal principles (one representing the authority of the legislator and another representing the authority of the constitutional court), the model that separates substantial from formal balancing procedures focuses the decision of the legislator to produce a statute. On the other hand, the model that defends balancing a formal principle together with substantial principles against other substantial principles, that is, the combination model which Borowski defends, focuses on the partial decisions that are part of the decision to produce a statute. Because of that, this model would be capable of analysing the different kinds of discretion that are assigned to each kind of partial decision (Borowski, 2009: p. 117).

In 2013, Borowski publishes the work in which he draws with the most preci-

[2]In 2014, Alexy stated: "Indeed, in the *Theory of Constitutional Rights*, first published 1985, I endorsed the combination model" (Alexy, 2014: p. 518).

[3]"akzessorische und nicht-akzessorische" (Borowski, 2013: p. 188).

sion his model of formal principles, the article *Formal Principles and the Weight Formula* (Borowski, 2013). In this work, after a detailed analysis of the concept, structure and models of formal principles (with special attention to Alexy's conceptions), Borowski proposes an elaborated version of the combination model. He distinguishes again direct and indirect formal principles, this time terming them non-accessory and accessory formal principles (Borowski, 2013: p. 195). After that, he states that non-accessory formal principles do not need to be related to other principles in order they can be balanced. Yet, balancing accessory formal principles takes place, according to Borowski, always in connection with balancing between substantial principles (Borowski, 2013: p. 195 f.). Borowski distinguishes clearly two substantial balancing decisions: the one taken by the controlled organ (for instance, but not only the legislature) and the one taken by the organ that controls (for instance, but not only the constitutional court) (Borowski, 2013: p. 193 *et passim*). According to Borowski, formal principles play a role when the balancing decision taken by the organ that controls, for instance the constitutional court, is different from the one taken by the controlled organ, for example the legislator: "Depending on the weight that is assigned to the formal principle under the circumstances of the concrete case and depending on the weight that the substantial principles have, it is expected that the constitutional court respects a greater or smaller variation between the result of the balancing decision taken by the court itself and the decision taken by the legislature" (Borowski, 2013: p. 191). The formal principle is placed, in the balancing, on the side of the principle that is overcome in the balancing decision taken by the legislator (and therefore that prevailed in the balancing taken constitutional court, in the context of the control it carries out), adding weight to it (Borowski, 2013: p. 193 f.)[4].

b) The model of competing principles. In 1990, therefore even before Alexy had developed a model on formal principles, in his Ph.D. thesis *Model of Rules and Model of Principles of the Legal System* (*Regelmodelle und Prinzipienmodelle des Rechtssystems*), Jan-Reinard Sieckmann proposed a model that conceives balancing two formal principles representing respectively the legal conceptions of the legislator and of the constitutional court, and which he called "the model of the competing legal conceptions" (Sieckmann, 1990: p. 163)[5].

The model is termed this way because its departing point is that there are two

[4]Other works in which Borowski develops his model are the lecture *Robert Alexy's Reconstruction of Formal Principles*, held in 2013 at the World Congress of the IVR, in Belo Horizonte (Brazil), and published in 2015 (cf. Borowski, 2015), and the article *Alexy's Third Model of formal Principles* (cf. Borowski, 2017).

[5]For the characteristics of this model and its name, cf. Borowski, 2010. After conceiving this model, Sieckamnn has developed it in different works, such as the book *Law as a Normative System* (*Recht als Normatives System*) (cf. Sieckmann, 2009) and the articles *Balancing Constitutional rights as Legal Application—the Problem of Delimitating Taxing* (*Grundrechtliche Abwägung als Rechtsanwendung. Das Problem der Begrenzung der Besteuerung*) (cf. Sieckmann, 2002) and *Problems of the Principles' Theory of Constitutional Rights* (*Probleme der Prinzipientheorie der Grundrechte*) (cf. Sieckmann, 2009). More recently, He handled this model in the book *Philosophy of Law* (*Rechtsphilosophie*), published in 2018 (cf. Sieckmann, 2018: pp. 188-213). Alexy called Sieckmann's model as the "separation model" (cf. Alexy, 2014: p. 524).

different legal conceptions, or, as Sieckmann acknowledges, two different conceptions about the constitution: the one of the legislature and the one of the constitutional court. Thus, there is, according to Sieckmann, a collision between principles, more precisely, a collision between the principle that determines deference to the competence of the legislature and the principle that determines the competence of the constitutional court (Sieckmann, 1990: p. 163)[6].

c) Alexy's mixed conception. As states Borowski, the second phase of Alexy's theory on formal principles of a mixed conception that appeared in the following works that he published in 2002 and 2003 (Borowski, 2013: p. 165 f.): the *Postscript* of the English edition of *A Theory of Constitutional Rights*, (Alexy, 2002a), a lecture that Alexy has presented in the Association of the German State Theorists, called *Constitutional Law and Ordinary Law—Constitutional Jurisdiction and Ordinary Jurisdiction* (*Verfassungsrecht und einfaches Recht—Verfassungsgerichtbarkeit und Fachgerichtbarkeit*) (Alexy, 2002b) and the article *The Weight Formula* (*Die Gewichtsformel*) published originally in German, in 2003 (Alexy, 2003).

In the *Postscript* of the English edition of *A Theory of Constitutional Rights*, Alexy states that the problem of epistemic discretion can be solved by means of balancing formal and substantial principles (Alexy, 2002a: p. 414), what seems to suggest, as stressed by Borowski, the adoption of the combination model (Borowski, 2017: p. 453). Yet, in the *Postscript* itself and in the other works from 2002 and 2003 in which Alexy handles the problem of legislative discretion, he does not develop a model that adds a formal principle to the balancing of two substantial principles (Alexy, 2002b; Alexy, 2003). This means that, in the works from 2002 and 2003, Alexy's conception of formal principles is not the same he had suggested in 1985, in *A Theory of Constitutional Rights* (the combination model). The conception that appears in the *Postscript* opposes the constitutional right demanding *prima facie* not to grant to the legislator epistemic discretion and the democratic principle *qua* formal principle, which demands *prima facie* that in cases of uncertainty referring to the empirical premises the last word is given to the democratically legitimated legislature (Alexy, 2002a: p. 416 f.). Alexy's idea is that, on the grounds of the epistemic law of balancing, which determines that "the more intense the interference in a constitutional right is, the greater must be the certainty of the premisses upon which this interference is based", a compromise must be made (Alexy, 2002a: p. 418).

d) The epistemic model. The third and last phase of Alexy's theory on formal principles appeared in the article *Formal Principles*: *Some Replies to Critics*, published in 2014, in which Alexy presents a model that he himself calls epistemic model (Alexy, 2014: p. 520).

The epistemic model, whose main elements, as stresses Borowski, had already appeared in 2012, in Alexy's answer to the criticism presented by Trevor Allan (Borowski, 2017: p. 462), is a model that, according to Alexy, places itself be-

[6]Klatt and Schmidt also developed a model that separates formal and material balancing (Klatt & Schmidt, 2010).

tween the combination model and the pure formal-substantial model (Alexy, 2014: p. 520). In this model, the role of formal principles is connected to epistemic discretion, which expresses itself through the variable "*R*" (reliability; "S" in German—"*Sicherheit*") in the weight formula. The model suggests that there is, besides first-order balancing, which is the one that involves substantial principles, second-order balancing, in which the epistemic dimension of a constitutional right collides with a formal principle (Alexy, 2014: p. 520).

The epistemic model considers that the realisation of constitutional rights increases when they can be limited only based on premisses whose truth is assured (Alexy, 2014: p. 520). Yet, when premisses below the level of certainty are admitted, the realisation of constitutional rights increases if the most favourable premise to the constitutional right is chosen, being legislative discretion excluded in this case (Alexy, 2014: p. 520 f.). According to Alexy, second order balancing consists essentially in a kind of balancing between constitutional rights as epistemic optimisation commands and the formal principle of the democratically legitimated legislature. Thus, according to Alexy, such balancing is one between a substantial and a formal principle, corresponding, to this extent, to the pure formal-substantial model. However, still according to Alexy, it is a special kind of balancing between a substantial and a formal principle, for it does not take place within the weight formula, but rather "at a metalevel, which handles the question of which variables with which kinds of scales must be inserted in the weight formula" (Alexy, 2014: p. 521).

e) The pure substantial-formal model. The pure substantial-formal model consists of, as its name suggests, balancing a formal principle against a substantial principle. This model has not been defended by any author in the reconstruction of balancing in the context of judicial review, but it is defended by Alexy as the model that can best reconstruct balancing between material correctness and legal certainty, which takes place in the context of the concept of law. Indeed, in the case of the concept law there are only two principles involved, being one of them formal (legal certainty) and the other substantial (material correctness or justice). In Alexy's inclusive non-positivist theory, legal certainty takes precedence over justice, except in cases of extreme injustice, in which justice prevails[7].

4. Two Competing Proposals

In this section, two different views will be proposed. In subsection 4.1 the first author of this paper (Alexandre Travessoni Gomes Trivisonno) presents a conception in which formal principles play an essential role in judicial review. In subsection 4.2. the second author of this paper (Júlio Aguiar de Oliveira) presents a different view, in which he points the appropriateness of principles' theory as a tool for reconstructing judicial review, but at the same time criticizes

[7]For an analysis of the concept of extreme injustice in Alexy cf. Aguiar de Oliveira, 2015; for a criticism on Alexy's reconstruction of balancing in the concept of law see Travessoni Gomes Trivisonno, 2022.

formal principles as the answer of principles' theory to the criticism raised by authors such as Böckenförde, who believe that the principles' theory would diminish the role of the democratically legitimated legislator.

4.1. Formal Principles and a Spectrum of Deviance and Necessity

The conception of the first author of this contribution departures from the fact that, in Alexy's principles' theory, when the norm created by the legislator is being checked by a control organ, the control organ, normally a constitutional court, must balance principles involved in the matter. If we leave formal principles aside, the result of the balancing procedure carried out by the control organ would determine whether the norm created by the legislator is constitutional or not.

Let us take as example the cannabis decision, which was mentioned by Alexy in his paper from 2014 on formal principles. The legislator has created a statute prohibiting the use of cannabis products. The constitutional court has then to decide whether such prohibition violates the freedom of the citizens or whether it is justified based on the protection of health. Both the freedom of the citizens and the protection of health are constitutional principles. In the framework of the principles' theory, in order to check whether the rule prohibiting the use of cannabis products is valid or not the court has to decide whether the prohibition is proportional or not. Leaving formal principles again aside, the court must take a balancing decision regarding the competing substantial principles.

4.1.1. Deviance and Necessity

In this subsection, it will be checked whether the rule prohibiting the use of cannabis products is proportional or not. This will be made with the help of two hypothetical scenarios; in the first (hypothetical) scenario there is no uncertainty but rather deviance, while in the second scenario there is only uncertainty. After that, in the next subsection, the first author of this paper suggests a solution for the problems related to both deviance and uncertainty.

1) First scenario: no uncertainty, but deviance. Suppose that the violation of freedom represented by the prohibition of cannabis products to be medium and the importance of prohibition of cannabis products to preserve good health of the citizens to be merely low. Formal principles left aside, in such scenario protection of freedom should prevail, and the statute created by the legislator should be considered void. Note that there is no uncertainty here, and therefore one could say that what takes place here is deviance between the court's decision and the decision taken by the legislator.

An important question that could be asked here is whether it is necessary to refer to a balancing decision performed by the legislator. Indeed, within the framework of the principles' theory, it can be said that the legislator has taken a balancing decision. Exactly like the control organ, that is, exactly like the constitutional court, the legislator would have balanced the principles of freedom and of the protection of health. The difference, in this scenario, would be the result:

the legislator would have come to a result which is different from the result that the court would later achieve.

Although it is possible to focus on the legislator's decision as a balancing decision, it is not necessary to do so; the important point is to consider that the court takes a balancing decision and then to compare the result of such balancing decision with the result of the balancing decision taken by the legislator, that is, with the statute. The comparison leads to the conclusion that statute is unconstitutional. Note that if the court is sure, to a certain degree, about its own decision, there is no uncertainty, but rather deviance: the legislator's decision and the court decision go in different directions, and the latter leads to the unconstitutionality of the statue made by the former.

2) Second scenario: uncertainty**.** A different scenario occurs when the court is not sure about which balancing decision is right regarding the substantial principles involved in the case. Let us take again the cannabis case. As states Alexy, when deciding the case, the court was not sure about which of the two theses regarding the risks that cannabis products represent to human health are correct: the low-risk thesis and the high-risk thesis. If the first possibility is right, the prohibition made by the legislator is unconstitutional; on the other hand, if the second possibility is the one which is right, the prohibition made by the legislator is correct. The court considers that is not possible to be sure about one of the assumptions regarding the risks of cannabis products to human health. Therefore, here, differently of what happens in the first scenario 1, there is uncertainty.

The legislator does not expressly declare its assumptions every time it makes a statute. Therefore, even when one considers that the legislator has taken a balancing decision, it is not always possible to know exactly what its assumptions are. Because of that, the constitutional court has to limit itself to comparing the statute created by the legislator and the result of the balancing decision that the court itself has taken. Now, if the court is not sure whether cannabis products represent a low or a high risk to the health of human beings, it cannot demand the legislator to be sure about it.

4.1.2. A Possible Solution: The Spectrum of Possible Decisions

In the analysis carried out in the previous section, formal principles have not been considered. But now they come into play. First, the cases of deviance will be handled.

The cases in which there is no uncertainty, but rather deviance, seem to be more difficult. Here there is a tendency not to accept a legislative decision that is different of the balancing decision taken by the constitutional court. Yet, if formal principles have normative force, they should be binding not only in cases of uncertainty, but also when the court is sure that the legislator has made a mistake, provided that the mistake *is not very significant*. Thus, in cases in which there is no uncertainty one can talk about a spectrum of deviance. When the court is sure about its decision and when its balancing decision is different of the one performed by the legislator one can say that the court is sure that the legisla-

tive decision is wrong. Nevertheless, it is not enough that court detects that legislator is wrong; it must also determine the spectrum of the acceptable deviance, that is, the spectrum of the substantial decisions that the legislator can take. This might sound strange, after all, if the legislator is wrong it should be corrected; there should be no tolerance. Yet, this is not the case. The formal principle of democracy shows its importance exactly when the legislator takes decisions that are wrong. Defining how wrong the legislator can be and still be respected, that is, defining a "deviance spectrum", is one of the main tasks of a constitutional court.

In cases in which there is uncertainty the establishment of a spectrum seems more reasonable. As we have seen above, in the cannabis case the court considered both the low-risk thesis and the high-risk thesis to be acceptable. This means that the court was uncertain about what was the right assumption. In such cases, establishing a spectrum which encompasses the two assumptions and therefore granting the legislator of choosing seems almost natural. It is not difficult to determine the uncertainty spectrum. It goes from the one plausible assumption to the other, covering all assumptions in the middle of the two extremes. The assumptions outside the extremes are excluded from the "uncertainty spectrum".

In short, according to the conception of the first author of this contribution, the discretion that the legislator possesses comes not only from the cases on uncertainty (regarding both the empirical and the normative assumptions), which corresponds here to the uncertainty spectrum, but also from the fact that the legislator's authority to create norms assigns to it a spectrum of deviance. The theory of formal principles has focused mostly on the latter, but according to the view of the first author the concept of formal principles embodies also the former. Now that the first view has been presented, it is time to advance the second view.

4.2. Institutional Competences

In this section, the second author of this paper presents a view that competes with the first view just presented in subsection 4.1. This view can be called "the institutional competence proposal", for, as it is going to be shown now, it departs from the decisive fact that the modern principles' theory developed by Robert Alexy is based on the judicial practice of the German Federal Constitutional Court, that is, the German Federal Constitutional Court.

In Chapter 3 of *A Theory of Fundamental Rights*, Alexy advocates the proposal of a mixed model of rules and principles as the most appropriate model for reconstructing the constitutional rights guaranteed in the Basic Law of Germany (Alexy, 2002a: p. 44 f.). For Alexy, the existence of principles implies balancing and vice versa. This means that if there are norms that are optimization commands there is balancing and if there is balancing there must be norms that are optimization commands, that is, there must be principles.

Alexy analyses three theoretical possibilities for conceiving the structure of constitutional rights: 1) a pure model of principles, 2) a pure model of rules and 3) a model of rules and principles (Alexy, 2002a: p. 44 f.).

For Alexy, objections against a pure model of principles, such as the model proposed by Eike von Hippel are obvious, since "it does not take the text of the Constitution seriously" (Alexy, 2002a: p. 70). The reason for that is, according to Alexy, the fact that this model "undermines the differentiated approach of the Basic Law to the limitations of rights" (Alexy, 2002a: p. 70).

According to Alexy, the pure model of rules has some hypothetical advantages, such as being linked to the text of the constitution, legal certainty and predictability (Alexy, 2002a: p. 71). This is precisely why its supporters argue that constitutional rights norms, despite needing to be supplemented, can be applied without balancing (Alexy, 2002a: p. 72). However, as Alexy demonstrates in detail in Chapter 3 of *A Theory of Fundamental Rights*, the pure model of rules fails to regulate constitutional rights without reservation, constitutional rights with simple reservation and constitutional rights with qualified reservation (Alexy, 2002a: pp. 72-79). Therefore, in his opinion, it cannot be adopted.

Once the failure of the two pure models has been confirmed, that is, once both the pure model of principles and the pure model of rules have been discarded, Alexy then defends the thesis that the model of rules and principles is the most appropriate for the reconstruction of constitutional rights (Alexy, 2002a: p. 80 f). Thus, for Alexy, constitutional rights norms can be rules or principles.

According to Alexy, balancing principles that guarantee constitutional rights gives rise to a derivative constitutional rights norm, which expresses the relationship of precedence of one principle in relation to another. This relationship obeys a law called by Alexy "law of competing principles", which states that "the circumstances under which one principle takes precedence over another constitutes the conditions of a rule which has the same legal consequences as the principle taking precedence" (Alexy, 2002a: p. 54).

This reconstruction of the practice of judicial review carried out by the German Federal Constitutional Court through the conception of principles that guarantee constitutional rights, and consequently through balancing, which has been developed by Alexy, has been the subject, since the beginning, to much criticism. Alexy himself sought to organize, in 2002, in the *Postscript to the English edition of A Theory of Constitutional Rights*, the criticism, dividing it into two large groups: one group which attacks the principles' theory because it would diminish the normative force of constitutional rights and another group which criticizes the theory for exactly the opposite reason, that is to say, because principles' theory would represent an overgrowth of constitutional rights, thus constituting a danger to the constitutional democratic state. For this reason, Alexy refers to these two kinds of criticism as "insufficiency" (too little) and "excess" (too much). An example of the first kind of criticism, that is, "insuffi-

ciency", would be the criticism by Jürgen Habermas, for whom principles would establish values that should be carried out in an optimal way and whose measure of fulfilment cannot be obtained from the norm itself. This would mean that the quantification of this fulfilment would be guided by purposes, meaning, therefore, that individual rights could be sacrificed in some cases (Alexy, 2002a: p. 388). Within the second kind of criticism, that is, the criticism of "excess", the analysis carried out by Ernst-Wolfgang Böckenförde would stand out. Böckenförde's criticism on the principles' theory states that conceiving constitutional rights as principles would have an unacceptable consequence, namely, that the role of constitutional rights would be profoundly altered. According to this view, while the effects of classical constitutional rights would be limited to a part of the legal system, the relationship between state and citizen, constitutional rights as principles would have an effect on the entire legal system, becoming true supreme principles of the entire legal order (Böckenförde, 1991: p. 188; Alexy, 2002a: p. 389). For Böckenförde, constitutional rights, conceived as principles would produce a radiating effect on all branches of law, eventually encompassing all law in themselves. Balancing would become the means for the concretization of the legal order, which would then already be completely contained in the constitution (Böckenförde, 1991: p. 188 f.; Alexy, 2002a: p. 390). The consequence of this would be the total cancellation of the autonomy of the parliamentary legislator, that is, the cancellation of the relevance of the legislative branch (Böckenförde, 1991: p. 196 f.; Alexy, 2002a: p. 391).

Despite the importance of all sides in this discussion, here the second author of this article limits himself to analysing Böckenförde's criticism. This is because in the view of the second author the development of a theory on formal principles is essentially a response provided by the principles' theory to Böckenförde's criticism. Thus, in order to evaluate the theory of formal principles it is necessary to begin with Böckenförde's criticism on the principles' theory. Then, some essential aspects of Alexy's theory of formal principles will be presented. After that, it will be possible to verify whether and to what extent Alexy's theory of formal principles solves the problem raised by Böckenförde's criticism. Next, some characteristics of German judicial review will be highlighted. According to the second author of this paper, these characteristics should be part of the response of the principles' theory to Böckenförde's criticism. In the end of this second view, it will be argued that the alternative which is available to the principles' theory would be either the explicit denial of the judicial review as foreseen in the German constitution or the adoption of a model of rules that would reduce such review to practically nothing. Both solutions, whatever their merits or defects, share the basic characteristic of not taking German positive law seriously, since the German constitution expressly foresees judicial review.

As previously noted, Böckenförde's criticism focuses on the alleged effects of the principles' theory in the context of the realization of constitutional rights. According to him, understanding constitutional rights as principles (that is to

say, as optimization commands) would lead to a serious violation of the democratic order. This is because the activity of the democratically legitimated legislator would be restricted to a simple observation of what was previously determined by the constitution. As Alexy states, according to Böckenförde, "[t]he democratic political process would largely lose significance, and the 'shift from parliamentary legislative state to constitutional adjudicative state', would be irresistible" (Alexy, 2002a: p. 390; Böckenförde, 1991: p. 196 ff.).

Alexy's theory of formal principles recognizes that there is a tension between the democratically legitimated legislator and the constitutional court which has the power, assigned by the constitution, to control the laws produced by the legislator. It seeks to solve this tension by proposing the establishment of a balance of powers guaranteed in the form of respect for epistemic legislative discretion, that is, the discretion that the legislator has in cases of uncertainty both with respect to the empirical premises and with respect to the normative premises involved in balancing procedures. Thus, cases of uncertainty are cases that, according to this view, should be left to the legislative decision. Therefore, the criticism of the swelling of constitutional rights, which would threaten the power of the democratically legitimated legislator, would be, at least in part, dismissed.

But there is a problem that remains. Within the scope of the theory of formal principles, the competent authority for determining cases of uncertainty is the constitutional court. It is the court that ultimately decides which cases of uncertainty exist. A critic of the reconstruction provided by the principles' theory, along the lines of Böckenförde's criticism, could argue that Alexy's theory of formal principles merely shifted the problem to another level, the level of second-order balancing. As it was already shown in this article, a second-order balancing occurs by assigning, in the weight formula, values to the variable *R*, reliability, a variable that refers to the certainty of the empirical and normative assumptions regarding balancing. But since the final word on what is certain or uncertain is and remains with the constitutional court and since this is determined by balancing (albeit, according to Alexy's epistemic model, a second-order balancing that occurs outside the weighting formula), a Böckenförde oriented criticism could argue that the problem remains: the problem of the transfer of power from the democratically legitimated legislator to the constitutional court.

Undoubtedly, this seems to be a problem and—despite the efforts of Alexy, Sieckmann, Borowski and the first author of this paper, the problem remains. But, even considering this as a real problem—as Böckenförde considers—, it is simply not a problem caused by principles' theory and it is not a problem able to be solved by something such as a formal principles' theory. In fact, being it a problem or not, it is essentially a feature of the German legal system, as it is foreseen int the German constitution.

The theory of formal principles was developed as a possible answer to a criticism such as Böckenförde's, since it does indeed advance the understanding

about the tension between the legislature and the constitutional court. However, a formal principles theory was simply not necessary to face a criticism like Böckenförde's. In order to face Böckenförde's criticism it would only be necessary to incorporate more clearly a dogmatic-institutional argument that highlights the fact that judicial review is, in countries such as Germany, expressly foreseen by the constitution.

In order to deal with the tension between judicial review and democracy in Germany, the alternative to the principles' theory is either the expressed denial of judicial review or the defence of a judicial review based on a rule-based model. The first alternative cannot be defended by anyone who takes the German constitution seriously. The second alternative, although apparently possible, would ultimately lead to exactly the result that Böckenförde wants to avoid, that is, to a disproportionate power of the constitutional court.

If the constitution and statutes are both sets of rules, the only difference between constitutional rights contained in the constitution and infra-constitutional norms will eventually be generality. In a pure model of rules, the rules contained in the statutes and the rules contained in the constitution may, in theory, either have the same degree of generality or have different degrees of generality. Cases of unconstitutionality of infra-constitutional rules that have the same degree of generality of constitutional norms are rare. In these rare cases, finding out whether the infra-constitutional rule violates the constitution or not does not generate many problems. But, in most cases, the conflict between a constitutional norm and an infra-constitutional norm is a conflict between a general norm and a special norm. As Hans Kelsen already pointed out, when the constituent legislator places very general norms in the constitution as a condition for the validity of infra-constitutional norms, it is attributing too much power to the constitutional court (Kelsen, 1929). Thus, a pure model of rules combined with the fact that constitutional rules are more general has the disadvantage of producing, in theory, exactly what Böckenförde wants to avoid: the expanded power of the constitutional court.

That said, and to conclude the point presented by the second author of this article, it is necessary only to add the following: the price of a judicial review such as Germans' is to assign power to the judges who belong to the constitutional court. The principles' theory needs to make it clear that judicial review is an option of the German constitution, not of the principles' theory, and that the price to be paid for judicial review is to assign power to judges who belong to the court that reviews the constitutionality of infra-constitutional norms. Böckenförde's criticism has the merit of explicitly calling attention to this price, but attributing it to the principles' theory developed by Robert Alexy has, as the second author has sought to demonstrate, the failure to attribute to the principles' theory something that it is not due to it. The judicial review in German constitution was a choice made not by the theorist, but rather by the constitutional legislator itself.

5. Conclusion

According to both views presented in this article, that is, according to both the first and the second author, the principles' theory is an appropriate form of reconstruction of judicial review in the way it is foreseen in parliamentary democratic states such as German. Devoid of the principles' theory, judicial review would be limited to poorly comparing constitutional and infra-constitutional norms. Yet, the two views are different, for although they both recognize that balancing substantial principles is an appropriate form of reconstructing judicial review, the view presented by the first author also recognizes that focusing on formal principles is appropriate, while the view presented by the second author defends that formal principles are not necessary either in order to reconstruct judicial review or in order to answer the criticism presented against the principles' theory, namely the criticism that the principles' theory would endanger the parliamentary democratic state by transferring the power from the democratically elected legislator to the judicial branch.

Conflicts of Interest

The authors declare no conflicts of interest regarding the publication of this paper.

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