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CONSTITUTIONAL RIGHTS, FORMAL PRINCIPLES AND BALANCING

DIREITOS FUNDAMENTAIS, PRINCÍPIOS FORMAIS E PONDERAÇÃO

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ABSTRACT

This research aims to address the role of formal principles in the balancing of principles. The central question to be examined is whether formal principles can be balanced against material principles. A straightforward balancing with material principles or a mixed balancing leads to subconstitutionalization. The answer lies in the epistemic model of the balancing. Formal principles require respect for the legislator's decisions made in the space of epistemic discretion. The result is that formal principles serve to determine the limits of the intensity of the jurisdiction's control over the decisions of the democratically legitimated legislature. Research developed under the comparative bibliographical method.

Key Words: Formal principles. Epistemic uncertainty. Balancing. Second orders reasons.

RESUMO

Esta pesquisa tem como objetivo abordar a função dos princípios formais na ponderação de princípios. A questão central a ser examinada é se os princípios formais podem ser ponderados em relação aos princípios materiais. Uma ponderação direta com os princípios materiais ou uma ponderação mista leva à

subconstitucionalização. A resposta está no modelo epistêmico da ponderação. Os princípios formais exigem respeito às decisões do legislador tomadas no espaço de discricionariedade epistêmica. O resultado é que os princípios formais servem para determinar os limites da intensidade do controle da jurisdição sobre as decisões do legislador competente e democraticamente legitimado. Pesquisa desenvolvida sob o método bibliográfico comparativo.

Palavras-chaves: Princípios formais. Incerteza epistêmica. Ponderação. Razões de segunda ordem.

INTRODUCTION

Robert Alexy's principles' theory has been a matter of some controversies. One of the most discussed points is the one regarding the nature and role of the formal principles in the balancing of principles, especially when related to the material principles. Regarding this issue, two points may be appointed as central. The first one deals with the relationship between formal principles and epistemic uncertainty. The second one draws attention to the balancing between formal and material principles, particularly concerning the effects that the presence of formal principles produces on material principles in the balance of principles.

One argument present to address these issues says that formal principles, which require respect for what is decided by the competent democratically legitimated legislature, are second order reasons. Thus understood, formal principles play a decisive role concerning the problems of epistemic uncertainty in the balancing of principles. And, because they are considered as second order reasons, they do not affect the balance of material principles, but only the subjective evaluations in the balancing of reasons.

The purpose of this research is to examine whether these formulations are adequate to answer the objections raised to the theory of principles regarding formal principles and their balancing with material principles.

Moreover, the discussion around the balancing of formal principles is central to shed light on the decisive issue concerning the relationship between fundamental rights, democracy, and constitutional jurisdiction. The decisive point concerns the limits of judicial control over the decisions

of the democratically legitimate legislature on the degrees of intensity of interventions or restrictions on fundamental rights. About, something usually neglected, it concerns the degrees of certainty of the empirical premises supporting measures restricting fundamental rights. So, with this, it should be discussed whether the degree of intensity of the constitutional jurisdiction's control over what is decided by the infra-constitutional legislator will directly depend on the degree of certainty of its prognoses and its empirical premises.

In order that this goal may be accomplished, this research will be developed in three parts. In the first part, the research will discuss the possibility of balancing formal principles, examining the straight, combined and epistemic models of balancing. The second part will deal with the formulation of formal principles as second-order reasons, as an alternative solution to the discussion about the balancing of these principles. Finally, the third part of this investigation will analyze the role of formal principles in determining the degree of intensity of judicial intervention in the area of competence of the democratically legitimated legislator. The conclusion to be justified is that formal principles have a place in the balancing of principles, and are central elements in determining the limits of the intensity of the jurisdiction's control over the decisions of the democratically legitimated legislature.

This research was developed under the comparative bibliographical method based on the theoretical foundations of Robert Alexy's formulations of the theory of principles and his critical interlocutors, such as Jan Sieckmann, Julian Rivers, Matthias Klatt, Johannes Schmidt and Peng-Hsiang Wang.

FORMAL PRINCIPLES AND BALANCING MODELS

The theory of principles says that principles are optimizable commandments to be optimized in degrees, as much as possible, according to factual and legal possibilities. Thus, principles are requirements whose degree of optimization is determined exactly by other principles, notably,

principles to the contrary. For this very reason, the form of application of principles is balancing (ALEXY, 2014, p. 512).

The theory of formal principles says that formal principles are also optimizable commandments according to factual and legal possibilities. Then, formal principles can also balance against other principles, especially material principles. According to Alexy (2014, p. 516), the difference between formal principles and material principles is exactly in the “object of optimization”. The object of optimization of material principles such as the fundamental right to health, the fundamental right to freedom of speech or the fundamental right to religious freedom are health, freedom of speech and religious freedom, respectively. The object of optimization of the formal principles is not related to such values or content, but to the authority of the legal norms correctly given and socially effective, referring, therefore, to the factual dimension of the right.

The principle of democracy requires that the decisions of the democratically legitimized competent legislature obey to the greatest degree possible and understood as important as possible. Therefore, for example, the principle of democracy requires that not only the respect for the decisions of the democratically chosen competent legislator but also the objectives set by the legislative authority need optimization. Next to the formal principle of democracy, the formal principles of the division of powers and legal certainty can also be placed. The object of optimization of the formal principles consists in deference to what has been decided by the legally competent authority within the institutional framework of a given legal system.

In this broad sense, formal principles are optimization commands that confer competence to make binding decisions about legal situations, referring, therefore, to a normative competence. For this very reason, formal principles also lend themselves to explain the authoritative character of law, in the sense of identifying its factual, real, or procedural elements (SIECKMANN, 2014, p. 124-125).

The formulation that formal principles are principles to be further optimized according to factual and legal possibilities poses the problem of whether they can be weighed against other principles, especially material principles. Thus, for example, it can be asked: Can the formal principle

of democracy or the formal principle of the division of powers, which says that the decisions of the democratically legitimated legislator are worthy of obedience and respect, precisely because they are decisions made by the competent authority, be weighed against the principle of freedom of speech or the principle of environmental protection? About this, for example, Allan (2012, p. 136) doubts that a material principle can balance with the formal principle of democracy, notably because formal principles do not, by themselves, present any dimension of weight.

To answer this question, the theory of formal principles offers three models of balancing. The pure material-formal model; the mixed or combined material-formal model; or the epistemic model.

The pure material-formal model admits the direct weighing between a material principle and a formal principle. The result of the balancing may be the precedence of either the formal principle or the material principle, depending on the circumstances of the concrete case considered. Alexy (2014, p. 517) takes Radbruch's formula to exemplify a case of collision between the formal principle of legal certainty and the material principle of justice. Applied this formula, the formal principle of legal certainty takes precedence over the material principle of justice in all cases where extreme injustice is not the case. The material principle of justice takes precedence over the formal principle of legal certainty in all cases of extreme injustice. The definition of the precedence relationship between the principles in collision depends on the circumstances of the concrete case taken into consideration.

The mixed material-formal model or combined model refuses the direct weighing between a material principle and a formal principle. It only admits the balancing of a formal principle when a formal principle is combined with a material principle. The starting point is that a formal principle, by itself, does not have sufficient force to take precedence over a material principle. A formal principle can claim precedence over a material principle only if combined with another material principle (ALEXY, 2014, p. 517-518). In this model, then, the role of the formal principle is to reinforce the material principle with which it is combined, against the material principle that is located on the other side of the collision. Thus, for example, the formal principle of legal certainty and that of democracy

reinforce the material content of legal rules against material principles that may be put forward to justify exceptions to the application of these legal rules themselves. Not applying a legal rule based on a material principle requires that this material principle takes precedence over the combination of the formal principle of legal certainty and the material principle that justifies the legal rule to be set aside.

These two models, according to Alexy (2014, p. 519), lead to an under constitutionalization that deny the priority of the constitution over the decisions of the democratically legitimized ordinary legislature. An intervention in a material principle, such as in the fundamental right of freedom of expression, cannot be justified except by another material principle and not only based on a formal principle such as the principle of democracy. In fact, it is precisely the role of material principles to limit the area of competence of the democratically legitimated legislator. This also does not change if a material principle is combined with a formal principle. For this very reason, then, a better answer to the problem of the role of formal principles in balancing is achieved with the epistemic model.

The epistemic model has as a central element to consider the epistemic factor in the balancing of principles. At its basis is the second order balancing (ALEXY, 2014, p. 520). The determination of the concrete weight of a principle in relation to another principle in collision is determined from the relationship between material values and epistemic values. As the weight formula states, the concrete weight of one principle in relation to the other principle is determined by the quotient between, on the one hand, the product of the degree of intensity of intervention in a principle times the abstract weight of that principle times the degree of certainty of the empirical and normative premises about what the measure in question means for the non-realization of those principles, and, on the other hand, the product of those same values with respect to the other principle.

The material values of the weight formula are the degree of intensity of intervention or harm of one principle, the degree of satisfaction or fulfilment of another principle, and the abstract weight of the principles in collision. Since normally the abstract weights of the principles are equal in a constitution, they are not decisive in determining the precedence

relation between principles in a concrete case. Then, the substantial values that count decisively are the degrees of intensity of intervention or harm borne by one principle and the degree of importance of satisfaction or fulfilment of another principle. About this, the material law of balancing says that the greater the degree of intensity of intervention or harm borne by a principle the greater must be the degree of importance or satisfaction of the realization of another principle (ALEXY, 2014, p. 513).

The epistemic values of the weight formula refer to the certainty of the empirical and normative premises in the reasoning of balancing (ALEXY, 2014, p. 520). The epistemic law of balancing says that the greater the degree of intensity of intervention or harm borne by a principle, the greater must be the degree of certainty of the empirical premises supporting that intervention or harm. The epistemic law of balancing is concerned with the problem of decisions made by the democratically legitimated competent legislator, who restricts or limits fundamental rights, material principles, based on empirical and normative premises that are not certain, but only plausible or not false. As optimizing commands, the material principles of fundamental rights require that they be restricted or limited only based on certain empirical premises. The problem is that this degree of certainty, in many areas of knowledge, can hardly be achieved. If this requirement were to be maintained, the space for action by the competent legislature, democratically legitimated to conform the constitutional norms, including the norms of fundamental rights, would be reduced. On the other hand, based on uncertainty, the legislator could not consider himself free to make whatever decisions he wanted, including reducing the essential core of a material principle of fundamental rights (KLATT; MEISTER, p. 80-81). For this very reason, then, the epistemic law of balancing aims to achieve a conciliatory balance to these variables.

With that, then, the epistemic factor plays a leading role in determining the concrete weight of one principle in relation to the other principle in a given case of principle collision. According to Wang (2016, p. 433), the weight of a material principle is reduced to the exact extent that the greater the degree of uncertainty of the empirical premises about its realization. The weight of a material principle is only not affected by the epistemic factor when there is certainty or security about the empirical

premises about the degree of intensity of intervention in this principle or the degree of importance of its realization.

The epistemic model has a decisive difference from the pure and combined models described earlier. Formal principles do not appear directly in the balancing as one of the variables of the weight formula. According to Alexy (2014, p. 520), a distinction must be made between first order balancing and second order balancing. In the former, only material principles are balanced. In the second, formal principles are balanced with formal principles.

It is that fundamental rights as principles and optimization requirements require not only material, but also epistemic optimization. This means that the epistemic optimization of a fundamental right requires that the degree of empirical premises supporting an intervention in a fundamental right is as high as possible. And this applies to fundamental rights as well as to other material principles (WANG, 2016, p. 434).

But equally formal principles are optimization requirements. Thus, for example, the principle of democracy requires that the legislator be allowed to adopt measures under certain conditions of uncertainty. According to Alexy (2002, p. 416), the infra-constitutional legislator may adopt measures that interfere with fundamental rights still based on uncertain or not fully certain premises. This is the space of empirical epistemic discretion, which allows intervention in fundamental rights based on uncertain, tenable, or plausible factual premises. As Alexy says, the German Federal Constitutional Court, in its decision on the constitutionality of the ban on *cannabis* products, did not find the veracity of the supporting empirical premises assumed by the legislator to substantiate the ban. A certainty would exist if scientific knowledge showed that the prohibition is appropriate and necessary to reduce the risks related to the consumption of the drug. Since this certainty was not found, the German Federal Constitutional Court included in the empirical discretion the assumptions that justified the prohibition authoritatively given by the legislator (ALEXY, 2002, p. 414-415)

1. The factual ignorance about the suitability of the measure chosen to achieve the purpose and about the necessity of the measure configures the empirical epistemic discretionary space of the legislator.

Thus, the legislator's freedom to choose measures that are most likely to contribute to the realization of the purpose and measures that involve less intervention in fundamental rights or constitutionally protected collective legal goods is inserted in the legislator's space of empirical epistemic discretion. The requirement of certainty would make the legislator's actions unfeasible, compromising the formal principles of the division of powers and democracy, which "require a space of empirical knowledge" (ALEXY, 2007 p. 90).

The legislator cannot be freely authorized, based on only uncertain prognoses, to intervene intensely in fundamental rights. This would imply an absolute and unconditioned prevalence of the principle of the decision-making competence of the democratically legitimated legislator over the material principle of fundamental rights (ALEXY, 2002, p. 418). The limits are given by the epistemic law of balancing, mentioned above, which states that the greater the intensity of the intervention in a fundamental right, the higher must be the certainty of the premises supporting the intervention. Thus, when it is the case that the intensity of the intervention is high, the certainty of the empirical premises used in its justification must be equally high. If both the degree of intervention intensity and the degree of significance are high, the degree of certainty of the empirical premises cannot be only medium, nor can it be only low. Only plausible empirical premises cannot support the justification of a severe intervention in a constitutionally protected fundamental right or collective good. Much less, empirical premises that are just not patently false. No one can be deprived of liberty without such a high-grade intervention being justified by certain empirical premises. The mere plausibility or simple non-evidence of falsity that the patient's life is at risk cannot justify the coercive state measure of blood transfusion on a person who refuses to do so on religious grounds. This is a severe intervention to privacy and religious freedom that cannot be justified by empirical premises that are only plausible and not patently false. However, when it comes to a measure considered of only medium or low intervention, empirical premises only plausible can justify the intervention in fundamental rights or collective goods (GAVIÃO FILHO, 2011, p. 307).

For this very reason, then, the second order weighing between material principles and formal principles is inevitable, as a case of collision between the fundamental right of freedom of profession and the formal principle of the competence of the legislature democratically legitimated to limit this same fundamental right shows.

As a result, the establishment of the conditioned precedence relation between a formal principle and a material principle, such as a fundamental right, in the second order balancing will also depend on the epistemic values, that is, on the degree of certainty of the empirical premises. If the degree of certainty of the empirical premises is high, in which case the epistemic value is certain, the role of the formal principle in the second order balancing is zero since it does not affect the weight of the material principle at all. If, on the other hand, the degree of certainty of the empirical premises is medium, in which case the epistemic value is plausible, or low, in which case the epistemic value is not patently false, the weight of the material principle in the first order balancing is decreased (ALEXY, 2014, pp. 521-522). So, in the first case, the second order balancing does nothing to change the weight of the material principle in the first order balancing. In the latter two cases, when the epistemic value is plausible or just not patently false, the second order balancing alters the weight of the material principle in the first order balancing. In such cases, the second order balancing reduces the impact of the material principle in question in the first order balancing.

FORMAL PRINCIPLES AS SECOND ORDER REASONS

The theory of formal principles is intended to account for the epistemic discretionary space of the democratically legitimated legislator to make decisions based on empirical premises that are not always certain or certain. The empirical premises supporting a decision of the democratically legitimated legislator can be placed on such a scale, and can then be certain, just plausible, or, much less than that, just not patently false. To address this, Alexy proposes a connection between formal principles and the uncertainty of empirical premises by incorporating

epistemic variables into the weight-of-principles formula. This allows for the inclusion of formal principles in the balancing (2014, pp. 522-524).

The problem is that the weight formula says nothing about who is competent to decide in cases of uncertainty of empirical premises. As Wang (2016, p. 435) notes, the weight formula is neutral with respect to the division of decision-making competence, showing itself compatible with deference of competence to any authority. If so, the presence of epistemic values in the weight formula does not guarantee that formal principles are represented in the balancing. There is no necessary connection between the epistemic factor and the formal principles.

Another problem concerns the effect of the formal principle on the weight of the material principle in second order balancing. In the epistemic model, the formal principle functions to weaken the weight of the material principle. In the combined model, the formal principle acts to strengthen the weight of the material principle. In this case, it becomes more difficult for the outcome of the balancing to be the establishment of a precedence relationship unfavourable to the material principle supported by the formal principle. Wang's (2016, p. 437) criticism is that Alexy's theory of formal principles does not solve this contradiction. In more recent writings, Alexy (2014, p. 518-519) suggests abandoning the combined model in favour of the epistemic model, but the problem remains because reasons are not given as to how formal principles affect the determination of the weight of material principles. Likewise, the discussion about the relationship between formal principles and the epistemic discretion space is still open.

One argument that can draw to overcome these problems is that formal principles are second order reasons.

For this formulation to be sufficiently justified, two points should be initially highlighted. The first is that principles are normative reasons that can be weighed. The second is the distinction between first order reasons and second order reasons.

Principles should be taken as normative reasons. Material principles are normative reasons that say that acting or not acting in a certain way leads to certain consequences that are considered desirable or valuable. The decision about what should or should not be done depends on the

outcome of the weighing of reasons (WANG, 2016, p. 438-439). However, the weighing of reasons for determining what should be done or not be done depends on what is known about the facts that are relevant for decision making. When all true information is known, one speaks of objective weighing of reasons. But not all the facts can always be known, and even then, decisions must be made. In such cases, then, the determination of what should or should not be done can only be established based on the information that is known, even if incomplete or even wrong. This is the case where practical decisions are made based on insecure empirical premises. Under these conditions of epistemic insecurity, one speaks of subjective balancing of reasons (PERRY, 1989, p. 922). According to Perry (1989, p. 924-925), under the conditions of empirical insecurity and uncertainty facts relevant to the determination of what should or should not be done, decision making depends on the facts and the extent of insecurity and uncertainty about the truth of the empirical premises. So, in these cases, decision making is the result of subjective assessment of the facts known at the time, which means recognizing that it may be founded on incomplete or only partially accurate information.

The decision about what should be done on a particular practical issue depends on the weighing of reasons. According to Raz, reasons for or against a particular course of action are first order reasons. Thus, decisions, rules, and material principles are first order reasons. They are reasons for one to act in accordance with what has been decided or in accordance with what the rules and principles determine. In addition to these reasons there are second order reasons, which are reasons to act based on a reason or not to act based on a reason. We speak of positive second order reason and negative second order reason or exclusionary reason (RAZ, 2010, p. 31-32).

What must be examined is whether formal principles can be considered as second order reasons. According to Wang (2016, p. 442), formal principles require respect for what has been decided by the competent democratically legitimated legislator, regardless of what the weighing of reasons requires. In the case of epistemic insecurity, the one who is charged with making a practical decision must follow what is given by the competent democratically legitimated legislator and not what his

or her own weighing of reasons indicates. Thus, a formal principle can be regarded as a special kind of second order reason, since it is a reason to act according to what is given by the authority and a reason not to act according to a weighing of reasons that an individual agent could do in a given concrete situation.

With this, it is settled why the given by the competent authority of the democratically legitimated legislator should be respected in cases of epistemic insecurity. It is that relying on second order reasons is the most rational strategy to deal with epistemic insecurities in the balancing of reasons. This presupposes relying more on the given by the authority of the democratically legitimated legislature than on the weighing that an individual agent can do in a given case. It is recognizing that the competent authority deserves greater trust because it is wiser and has greater expertise, as well as being better able and qualified to coordinate conflicting interests. Likewise, the authority's organization and decision-making procedure make it less likely to be influenced by emotional factors and prejudices (RAZ, 2001, p. 75).

So, formal principles, as second order reasons, supply a content independent justification for following the one given by the authority of the democratically legitimated competent legislator. This, however, does not mean that formal principles do not realize any values, as is the case, for example, with democracy and legal certainty (WANG, 2016, p. 443-444). On the other hand, material principles, as first order reasons, are content-dependent justifications because they let it be known that an action is desirable or valuable in a certain sense.

The formulation that formal principles are second order reasons poses a problem for the epistemic model of principle balancing. The question is whether formal principles, as second order reasons, can be weighed with material principles, which are first order reasons. Can second order reasons be weighed with first order reasons?

According to Wang (2016, p. 444), material principles, as is the case with fundamental rights, are both first order and second order reasons, and these, of course, can be weighed against formal principles, which are equally second order reasons. Material principles are second order reasons as far as they are not only material optimization commands,

but also epistemic ones. This requires that the balancing of reasons must be based on sound empirical premises rather than on unsound ones, as far as possible. Thus, material principles are reasons to act according to the balancing of reasons and reasons not to act based on unsafe empirical premises.

Hence, the possibility of weighing formal principles against material principles. This is the second order weighing, which is indispensable to decide the limits of respect for the competent authority of the democratically legitimated legislator.

So, from this, the central question is to examine what contribution formal principles make to entrenching the decisions of the competent democratically legitimated legislature and what are the conditions and circumstances under which it is justified not to respect those decisions. As second order reasons in a positive sense, formal principles are reasons to function as given by the democratically legitimated competent legislature.

According to Wang (2016, p. 446), not following the legislator's authority-given can only be justified in two cases. First, when it is known beyond any empirical doubt what the objective balancing of reasons requires and that the first order reason of the material principle in conflict with the one given by the authority is decisive in the objective balancing of reasons. Now, the formal principle is a strategy to take care of epistemic insecurity. To the extent that this insecurity disappears, the role of the formal principle is none. In that case, then, what should be done is exactly what the objective balancing of reasons decides. Second, when the insecurity of the empirical premises on which the decision of the democratically legitimated competent legislator is based reaches such a degree that its judgment can no longer be trusted². In this case, when the degree of epistemic quality of the empirical premises supporting the intervention in a fundamental right is very low, for example, less than *not evidently false*, the material principle justifying this intervention, combined with the one given in the decision of the legitimately legitimated competent authority, may be easily overcome by another material principle to the contrary, even more so if based on empirical premises of good empirical quality. For this very reason, one can formulate formal principles are second order reasons with epistemic limits. What is given by the authority

of the democratically legitimated competent legislator must be respected if certain epistemic limits are watched by.

The determination of the epistemic threshold, the degree of certainty of the empirical premises below which deference to the given by the democratically legitimated competent authority can be dispensed, should be sought on a case-by-case basis in second order balancing. According to Wang (2016, p. 447), it can be formulated that the stronger the second order reasoning promoted by a material principle, the greater must be the security of the empirical premises supporting the decision given by the legislature's authority against this principle.

These formulations let one know that formal principles are to be taken as a special type of second order reasons. Formal principles are reasons to function as given by the authority of the democratically legitimated competent legislator and reasons to disregard one's own judgments based on the balancing of reasons. Reliance on formal principles is a rational strategy for dealing with the insecurity of empirical premises in practical reasoning. Formal principals pose the requirement that assessments of the authority of the democratically legitimated legislature on the strength of material principles should be accepted in cases of insecurity about empirical premises. The formal principals require respect for the given by the democratically legitimated competent authority when minimum limits of epistemic quality are not exceeded. These limits are defined by the second order balancing between formal principles and material principles.

FORMAL PRINCIPLES AND JURISDICTION

Formal principles as second order reasons play a leading role in the control of the judiciary over the decisions of the competent legislature democratically legitimated to conform constitutional norms, including fundamental rights norms. If the legislature holds such legitimacy, then it can legislate in a way that restricts fundamental rights. The question that arises is how much discretion the legislature must restrict fundamental rights without being controlled by the courts.

The central argument is that formal principles, as second order reasons, can justify that the competent democratically legitimated legislature, even based on unsafe empirical premises, establish restrictions on fundamental rights. However, this does not mean that any decision by the legislature can be justified.

Although Klatt and Schmidt (2012, p. 100) deny that formal principles play a role in the creation of the discretionary space of the competent democratically legitimated legislator and are meant for the verification and proof of exactly the legislator's discretionary space, they acknowledge that they lend themselves to the substantiation of discretionary spaces by stating *how* and *by whom* material contents may be determined. Likewise, they recognize that formal principles play a decisive role in the relationship between the democratically legitimated legislator's discretionary space and judicial control (KLATT; MEISTER, 2012, pp. 135-136).

On this, the second law of balancing plays a significant role. It can be taken to determine the intensity of judicial control over the legislator's balancing space. Thus, the greater the intensity of intervention in a fundamental right, the greater must be the intensity of judicial control over the legislator's balancing space (RIVERS, 2007, p. 187). The result of this interpretation leads to the following rules: (a) the greater the weight of a fundamental right principle, the smaller should be the space of epistemic discretion; (b) the greater is the intensity of the intervention on a fundamental right principle, the greater should be the investigation procedure on the empirical premises assumed to justify the intervention measure in question; (c) the greater the intensity of intervention in a fundamental right principle, the greater care judges should take to ascertain small achievable advantages to the fundamental right without prejudice to the state measure in question, and the greater should be the judges' willingness to differentiate the degree of achievement of the state measure in question from the degree of intensity of intervention in the fundamental right (RIVERS, 2007, p. 187). According to Rivers (2007, p. 187), this formulation of the second law of balancing represents the formal counterpart of the first law of material balancing. Its rationale rests on the formal principle that the guardianship of fundamental rights is incumbent on the jurisdiction.

With this, formal principles ensure both the epistemic discretionary space of the democratically legitimated legislator and the intensity of the jurisdiction's control over the determination of the concrete relative weight of material fundamental rights principles in the balancing.

CONCLUSION

The present research dealt with the theory of formal principals, which has been one of the most controversial points of Robert Alexy's theory of principles. The methodological approach was based on two problems. The relationship between formal principles and epistemic insecurity and the balancing between formal principles and material principles.

Formal principles play a leading role in determining the limits between the actions of the democratically legitimated legislator and the control of the constitutional court over interventions in fundamental rights principles. As a principle, formal principles contain normative requirements to respect the decisions made by the competent institutional bodies. The democratically legitimated competent legislature cannot make all decisions on fundamental rights, without any control, simply because it is democratically legitimated to make decisions on fundamental rights. This would lead to under constitutionalization. On the other hand, the jurisdiction's control over the decisions of the democratically legitimated legislature cannot be without limits, simply because it is the jurisdiction's competence to guard constitutionally guaranteed fundamental rights. This would lead to an over constitutionalization. Then, formal principles are conferred the establishment of competences for normative determinations, thus requiring the recognition of certain competences.

The relationship between formal principles and the epistemic discretionary space of the democratically legitimated competent legislator plays a decisive role for a correct understanding of the boundary between jurisdiction and legislation. Formal principles serve to justify precisely the epistemic discretionary space of the competent democratically legitimated legislator. In the case of epistemic insecurity, when the conditions for certain knowledge about what is claimed to be true are not given, as in

cases where the empirical premises supporting a decision or measure adopted are only plausible or, even worse, only not evidently false, the jurisdiction is not entitled to claim that the decision or measure taken by the democratically legitimated competent legislator is unconstitutional because it violates a fundamental right. It is because epistemic insecurity is creating the epistemic discretionary space for the competent democratically legitimated legislature to make decisions.

The balancing between formal and material principles requires a distinction between first and second order balancing or, if you like, first and second order reasoning. In the first order balancing, only material principles are considered, although the weight of one of the material principles may change depending on the result of the second order balancing. The second order balancing includes material principles, which are first order reasons and second order reasons, as well as formal principles, which are second order reasons.

Formal principles are to be taken as a special kind of second order reasons. They are reasons to function as given by the authority of the competent democratically legitimated legislature and reasons to disregard one's own judgments based on the balancing of reasons. Reliance on formal principles is a rational strategy for dealing with the insecurity of empirical premises in practical reasoning. Formal principals pose the requirement that assessments of the authority of the democratically legitimated legislature on the strength of material principles should be accepted in cases of insecurity about empirical premises. The formal principals require respect for the given by the democratically legitimated competent authority when minimum limits of epistemic quality are not exceeded. These limits are defined by the second order balancing between formal principles and material principles.

This research has shown that the theory of formal principles plays a significant role in determining the limits of the intensity of the jurisdiction's control over the decisions of the democratically legitimated competent legislature. Formal principles demand respect for the legislator's decisions made in the space of epistemic discretion. Likewise, as second order reasons, they admit second order balancing with material principles.

NOTAS

¹ On the decision of the German Federal Constitutional Court, see BVerfGE 90, 145.

² On the uncertainty of premises as a matter of degree, see Perry (1989, p. 934).

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