ARTICLE

BALANCING PRINCIPLES IN JUDICIAL ADJUDICATION:

THE GAPS OF RATIONALITY IN THE CONVICTION OF ILLEGAL IMMIGRANTS

Lécia Vicente[*]

ABSTRACT

Weighing principles and considering rules in the context of judicial adjudication to create a general theory of State and Law is a challenge of hermeneutics that the Author makes. To meet this challenge the Author uses a decision of an administrative court in Portugal – the Tribunal Administrativo Central Norte. The fact-pattern of that decision involved a foreign citizen living illegally in the country. While illegally residing in the country, that citizen was a victim of a crime of bodily harm. She complained to the police. The police asked her for her passport to proceed with the claim. They realized she was Brazilian and that she was residing illegally in the country. Consequently, rather than proceeding with the complaint, the police activated the process of expulsion of the foreign citizen from the country for she was an illegal resident. A judge confirmed the order of expulsion. That foreign citizen filed an action for an injunction to stop the order of expulsion from being enforced. In this context, must or must not a judge within the trial of an action for an injunction confirm the decision of expulsion of a foreign citizen who is illegally in the country, but who was a victim of a crime of bodily harm? This case resonates with many other reported cases all over the world involving illegal immigrants, their children, and their

* Assistant Professor of Law, Louisiana State University Paul M. Hebert Law Center. The Author writes this text in the loving memory of António Manuel Hespanha. She thanks him and Manuel Atienza for helpful comments to an earlier version of this text. All translations into Portuguese language are free translations. All mistakes remain the Author's own.

families who face harsh judgments. For the judge, the challenge inherent in these cases is to balance fundamental rights in light of constitutional principles to avoid disproportionate solutions. Principles are measured up and scaled down; but ultimately, every citizen, illegally staying in a country or not, is lifted by their human dignity and that cannot be disregarded.

> Each person possesses an inviolability founded on justice that even the welfare of society as a whole cannot override. [. . .] Therefore in a just society the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interests.
>
> John Rawls[1]

1. JOHN RAWLS, A THEORY OF JUSTICE 3-4 (1999).

I. INTRODUCTION: THE PROBLEM

A judgment of an administrative court in Portugal—*Tribunal Administrativo Central Norte*[2]—dismissed the appeal from the decision of an Administrative and Tax Court—*Tribunal Administrativo e Fiscal de Penafiel*—filed by a Brazilian citizen. The appealed decision had dismissed the action for an injunction filed by that Brazilian citizen. The action for an injunction was meant to suspend the administrative act ordered by the General Director of the Portuguese Immigration and Border Services, determining the expulsion of that Brazilian citizen from Portugal. This citizen was an illegal immigrant in the Portuguese territory. While she was illegally staying in the country, she was a victim of a crime of bodily harm. Notwithstanding the analysis of the arguments used by the court throughout the judgment,[3] the central question of this Article is the following. In the event that a foreign citizen who illegally resides in the country is a victim of a crime of bodily harm and for that reason files a complaint with the police, should or should not a court, within an action for an injunction (and in an appeal against the lower court's decision) uphold the administrative decision to expel that illegal immigrant from the country? This scenario unfolds a conflict between the constitutional principle of equality between foreign citizens and Portuguese citizens and the principle of legality, inherent to administrative law. This case raises other fundamental questions. What does a principle mean? Is the conflict between the principles of legality and equality admissible in the realm of administrative law?[4] In other words, does this case raise

2. Opinion of the Administrative Court Central North No 00490/06.8BEPNF (2007) (Portugal), IGFEJ (Feb. 2, 2019), *available at* http://www.dgsi.pt/jtcn.nsf/89d1c0288c2dd49c802575c8003279c7/eb01fe0c46f395568025725a005d4381?OpenDocument&Highlight=0,00490%2F06.8BEPNF%20 [https://perma.cc/7HJP-ZYKH].

3. The Author examined this judgment for the first time for an investigative project about the theory of argumentation hosted by the Research Center on Law and Society of the Faculty of Law of the Nova University of Lisbon ("CEDIS") back in 2009. After more than a decade, the problems raised by the court decision in respect to immigration still resonate. For a reference to the investigative work developed by CEDIS, see the following link: https://cedis.fd.unl.pt/ [https://perma.cc/4Y3H-SXXD] (last visited Mar. 14, 2020).

4. The principle of legality (or the rule of law) is a core principle of administrative proceedings in most Member States of the European Union. This principle also is a fundamental principle of European Administrative Law, which, for the most part, reverberates the way French law conceives the principle of legality. For a definition of the principle of legality, see Ján Klucka, *The General Trends of EU Administrative Law*, 41 INT'L

a problem of legal and constitutional interpretation, or is it just a matter of principle in the sense that the acceptance of a common political morality can lead us?

The Portuguese legal system allows the primacy of the principle of legality over the principle of equality even in situations when that prevalence may violate the individual's rights, freedoms, and guarantees. To understand if the prevalence of the principle of legality is justified under the circumstances, the Author follows in the footsteps of Robert Alexy and starts from the premise that principles are commands of optimization. To this end, she lists the following ancillary questions to which she provides an answer throughout the text:

> 1. What are the interests that the applicable rules protect?
>
> 2. What is the relationship that exists or should exist between principles and rules, especially when administrative authorities subordinate the right to physical integrity to the principle of legality, and that fact, in and of itself, advocates an attack to the principles of equity and justice as the sole end of the democratic State and any other dimension of morality?
>
> 3. How can a court decision on the merits of an action for an injunction only be based on black letter law when there is a conflict between the principles of legality and equality that undermines the individual's fundamental right to physical protection?
>
> 4. Is judicial activism a solution to the problem?
>
> 5. If judicial activism is a solution to the problem, is it a reflection or reverberation of a current crisis of legal positivism and utilitarian perceptions of the Law?[5]

L. 1047, 1048 (2007) (saying that the principle of legality determines that administrative authorities act exclusively within limits set up by the law. Furthermore, the Author states that "The judicially reviewable principles that limit the autonomy of the administration are thus essential guarantees for the respect of the rule of law"). The question in the text regarding the apparent opposition between the principles of legality and equality aims at exposing that administrative law serves as a playing field for the interaction between *concordia discordantium principiae*.

5. The Author could ask other questions. For example: what is the role of the civil law judge in the application and interpretation of the law? Does the civil law judge have an active role in creating the law? If not, should the civil law judge claim it? To what extent can judges in the civil law tradition, by assuming a dynamic role within the sources of law, decide outside the parameters of the State law? Do civil law judges act *ex officio* - and, therefore, are limited by the normative production of the State - or, using the rationality of their arguments, will civil law judges have such legitimacy to construe legal arguments that

The Author analyzes how the judge's decision could have been different had they adequately weighed or ranked the principles and rules of law contained in the legal provisions applicable to the case. The Author analyzes this within the rationality and legal argumentation of Robert Alexy, and the ideas of morality, integrity, and material justice present in Ronald Dworkin's discourse. Besides, more than the analysis of the suitability of the norms, the analysis of the facts should be the object of a post-positivist hermeneutic attitude. There is an implicit context here dominated by xenophobic, sexist, moralistic values—the plaintiff is a Brazilian woman, and therefore, presumably a prostitute, a subhuman category that can be *beaten up* and that the judge did not scumble for purposes of appraising the merit of the plaintiff's pleadings.

II. PRACTICAL ARGUMENTS AND LEGAL ARGUMENTS IN CONTEXT

A. Robert Alexy: from practical discourse to legal discourse

Alexy, unlike authors like MacCormick,[6] starts from a theory of general practical argumentation to build the structure of the legal discourse and argumentation. Thus, legal discourse is considered by Alexy as a special case of general practical discourse or moral discourse.[7] The classification of legal discourse as a

go beyond the frontiers of positive law? However, these are prior theoretical problems. Moreover: considering the problem under analysis in the text, responding to these questions may be even a useless endeavor. Here, the judge does not seem to be creating the law. Instead, they are ranking the rules, for which it is enough to resort to hermeneutics or constitutional interpretative arguments.

6. The analysis of other modern theories of argumentation such as those of Wittgenstein, Austin, Hare, Toulmin, Stevenson, or Baier is equally compelling. These authors have greatly influenced Alexy's scholarship. However, Alexy's theory of argumentation places him closer to legal interpretivism alongside authors like Dworkin. *See* ROBERT ALEXY, A THEORY OF LEGAL ARGUMENTATION: THE THEORY OF RATIONAL DISCOURSE AS THEORY OF LEGAL JUSTIFICATION (Ruth Adler & Neil MacCormick trans., 1989) 1978 [hereinafter ALEXY ARGUMENTATION].

7. *See id*. at 14-15. Providing that legal reasoning is,

> [. . .] a linguistic activity which occurs in many different situations from courtroom to classroom. This linguistic activity is concerned, in a sense yet to be more precisely defined, with the correctness of normative statements. It will be expedient to designate such activity 'discourse' and, further, since it concerns the correctness of normative statements, as 'practical discourse.' Legal discourse is a special case of general practical discourse.

special case of general practical discourse is crucial to understand that both types of discourse are concerned with the correctness of normative statements. Legal discourse is a special case because it is limited by its own sources such as statutory law, precedents, procedure, and doctrine. A legal statement that is correct means that it is rationally justifiable despite the limitations of the legal discourse.[8] By adopting an "normative-analytical" approach,[9] Alexy developed a theory of original legal argumentation. Alexy's doctrine, which is of Kantian origin and Habermasian inspiration,[10] intends to create a normative theory of legal argumentation that allows to disentangle the good from the bad arguments,[11] and allows the analysis of the logical structure of the arguments, through the incorporation of empirical elements.[12]

But see JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY 233 (William Rehg trans., 1996) (1992) stating that,

> [. . .] one should not conceive legal discourse as a special case of moral discourses [. . .]. The procedural principles tested and confirmed in practice and the maxims of interpretation canonized in textbooks on legal method will be satisfactorily captured in a discourse theory only when the network of argumentation, bargaining, and political communications in which the legislative process occurs has been more thoroughly analyzed than it has been to date.

Later on, Habermas points out that, "Although the special case thesis, in one version or another, is plausible from a heuristic standpoint, it suggests that law is subordinate to morality. This subordination is misleading, because it is still burdened by natural-law connotations."

8. ALEXY ARGUMENTATION, *supra* note 6, at 16.

9. *Id*. at 16.

10. *Id*. at 114 (maintaining that "[t]he decisive step for Habermas consists in his claim that the 'naturally evolved and internally regulated' language-system on which every argumentation rests in the first instance must, in turn, itself be the subject of argumentation").

11. *Id*. at 178 providing that,

> To be sure, mere reference to the fact that normative statements are amenable to discussion is as yet no conclusive reason for speaking of their amenability to justification on their correctness. Such discussions might be no more than contrivances for persuading, for exerting psychological influence. The crucial question is whether there are criteria or rules for distinguishing good from bad reasons, valid from invalid arguments.

12. *Id*. at 28-29.

> These analytical investigations would have to be supplemented by empirical studies of legal decision-making behaviour. It might be seen as a defect in the current work that these things are not attempted here. It is, however, not possible for everything to happen at once. It would be enough if the investigations presented here could make a contribution to the foundation of a theory of rational legal argumentation—a theory which, it is to be hoped, will one day be so firmly grounded and so widely developed that it will not only

For Alexy and Habermas, the theory of argumentation is a theory of procedure.[13] The procedure, that is, the relevant decision-making process, may or may not include the possibility of modifying the individuals' normative and factual beliefs as well as their interests from what those normative and factual beliefs and interests looked like at the beginning of the procedure. This theory of procedure offers a solution to the so-called "Münchhausen Trilemma."[14] The procedure Alexy proposes consists of a set of semantic and practical rules to avoid what according to Alexy would be a real dilemma. Such a dilemma boils down to the following fact. The continuous justification of normative statements may either lead us to a situation of infinite regress, or to a rule that is psychologically and sociologically grounded but unamenable to argumentation.[15] Those semantic and practical rules that Alexy proposes aim to transform the practical discourse into a rational one.[16] However, because the rules of practical discourse do not guarantee a solution to an ethical-moral dilemma

---

> clarify the character of legal science as a normative discipline but will also provide practical guidelines for the practicing lawyer.

Alexy recognizes that "…almost all legal—just as almost all general practical—argument forms include empirical elements." *Id*. at 232.

13. JÜRGEN HABERMAS supra note 7, at 237 maintaining that "[t]he legal discourse of the court [. . .] is played out in a procedural-legal vacuum, so that reaching a judgement is left up to the judge's professional ability: "With respect to the effect of the reception of the evidence, the court decides according to its free conviction obtained from the entire trial." The aim is to preserve legal discourse from external influences by moving it outside the actual procedure." On the other hand, Dworkin rejects the proposition that, in order to demonstrate the rights the parties are entitled to under a hard case, it is necessary to resort to a procedure. The argument that "no proposition can be true unless it can, at least in principle, be demonstrated to be true" does not include, in particular, the application of claims about rights. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 81 (2009).

14. HANS ALBERT, TRATADO DA RAZÃO CRÍTICA [TREATISE OF CRITICAL REASONING] 26-28 (J.C.B. Mohr (Paul Siebeck) trans., 1976) (1968).

15. *See* ALEXY ARGUMENTATION, *supra* note 6, at 179. *See also* KARL R. POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY 93-94 (1968).

16. *See* ALEXY ARGUMENTATION, *supra* note 6, at 179.

> This 'Münchhausen Trilemma' (as H. Albert calls it) is, however, not without remedy. It can be avoided by dropping the demand for ever further justification of every statement by another statement, in favour of a set of requirements governing the procedure of justification. These requirements can be formulated as rules of rational discussion. The rules of rational discussion do not relate only to statements as do the rules of logic, but reach out beyond them to govern the conduct of the speaker. To this extent they can be called 'pragmatic rules.' Observance of these rules does certainly not guarantee the conclusive certainty of all results, but it does nevertheless mark the results out as rational ones.

legal procedure is a way of filling the rationality gaps of the practical discourse. Considering the illustration of the problem – the claim of the Brazilian citizen who was a victim of a crime of bodily harm while illegally residing in Portugal —the Author is interested in the justification of the Law, from a discursive point of view, based on its normative dimension.

B. Legal Discourse and Argumentation as Means of Rationality. The Creation of a General Theory of State and Law

In the legal discourse, similarly to the moral discourse, there is a claim for correction, and the rules of the general practical discourse described above are also applied. However, in this context, rather than demonstrating the level of rationality of a premise, by using the legal discourse the interpreter seeks to demonstrate that they can rationally ground a proposition within the framework of the current legal order. Consequently, the legal discourse has its own rules that impose subjection to the law, to propositions, and legal dogma.[17]

However, Alexy understands that due to the influence of the frailty of the practical discourse in the legal discourse, the application of the legal rules inevitably does not result in one sole correct solution.[18] We are, in effect, in the dimension of the discursively possible.[19] As in practical or moral argumentation, also in legal argumentation, discourse participants can rationally discuss normative conceptions and implicit values, modify or correct such conceptions or eliminate the shortcomings evident in the legal system.

The practical value of a theory of legal argumentation can only be revealed in the context of a general theory of State and Law, that is capable of uniting the model of the legal system as a system of procedures to the model of the legal system as a system of norms.

---

17. On the justification of a normative premise or legal decision through internal and external justification, see *id*. at 221-95.

18. Dworkin goes in the opposite direction, calling those who consider that there are no correct answers in the realm of morality or interpretation skeptics. *See* RONALD DWORKIN, LAW'S EMPIRE 76-86 (1998); DWORKIN, *supra* note 13, at 82 (saying "[s]o there is no important difference in philosophical category or standing between the statement that slavery is wrong and the statement that there is a right answer to the question of slavery, namely that it is wrong").

19. ALEXY ARGUMENTATION, *supra* note 6, at 135-36.

The judge that decided the case of the Brazilian citizen was not democratically elected. The case challenges the constitutional principle of equality. The judgment of the court needs justification. Democracies are subject to the rule of majority. However, courts lack that democratic legitimacy. So why should court decisions take precedence over constitutional principles that are reflection of human rights and have been accepted by the People of that state? The lack of democratic legitimacy of the courts raises the issue of institutional control of the controlling institution—the court. Alexy created a system that allows the interpreter to weigh constitutional principles. The interpreter's activity is constrained by rules of procedure, which means that interpretation also is an exercise of state authority. Again, all state authority stems from the will of the People. However, one must resist to only attributing a decisionistic effect to democracy for it follows the rule of majority. Argumentation complements the rules of procedure which courts abide by. Thus, the courts' agency is decisionistic and argumentative at the same time. Besides the procedural rules, their decisions must be grounded in good arguments that are just, normatively ideal, correct or rationally justifiable. A general theory of State and Law intends to show that the practice of law is not foreign to the fact that the normative system also contains fundamental rights or principles.[20]

III. BALANCING PRINCIPLES AND THE RULES OF JUDICIAL ADJUDICATION

A. The "Weight Formula" and the prevailing principle

There are several criteria set forth to distinguish rules from principles. [21] Alexy defines principles as "optimization requirements," because "they can be satisfied to varying degrees, and […] the appropriate degree of satisfaction depends not only on what is factually possible but also on what is legally possible."[22] In turn, he defines rules as "norms which are always either fulfilled or

20. *See* Robert Alexy, *Balancing, Constitutional Review, and Representation*, 3 INT'L J. CONST. L. 572 (2005); Robert Alexy, *Constitutional Rights, Democracy, and Representation*, 3 RICHERCHE GIURIDICHE [LEGAL RESEARCH] 197 (2014).

21. *See* ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 44-47 (Julian Rivers trans., 2002) (1986).

22. *Id*. at 47-48.

not." [23] For Alexy, rules have a "definitive character." [24] Alexy equates principles with standards that are part of an ideal normative dimension, placing the reader on a deontological sphere. From now on, the Author focuses on the collision of principles.

The set of principles, rules (and also political guidelines) that ground the Constitution do not always converge. Hence, the best way to resolve a situation of conflict of interests, that is, when the application of both principles seems to be adequate to solve the problem, is to weigh those conflicting principles. By following this path, the judge will try not to upset, or to upset as little as possible, the interests protected by the colliding principles.[25] The Author focuses on the collision between the constitutional principles of equality[26] and legality.[27]

---

23. *Id.* at 48.

24. *Id*. at 57.

25. *See, e.g.*, the case repeatedly cited by Alexy where the Federal Constitutional Court of Germany had to decide if the satirical magazine "Titanic" should be ordered to pay compensation in the amount of 12,000 *Marcos* for having used the term "*né Murderer*" ("*geborene morder*") in one of its editions, and having used the term "*cripple*" ("*Krüppel*") in a later edition to address a reserve officer who was paraplegic and had succeeded to be called to perform a military duty. In this case, the court had to ponder and weigh two fundamental rights—the right to freedom of expression and the right one has to their honor. *See* ALEXY, *supra* note 21, at 403-04.

26. Article 13 of the Portuguese Constitution sets forth the following:

> 1. All citizens possess the same social dignity and are equal before the law. 2. No one can be privileged, favored, prejudiced, prevented from exercising a right or exempted from any duty for reasons of their ancestry, sex, race, language, territory of origin, religion, ideological, or political convictions, education, economic situation, social condition or sexual orientation.

CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [CONSTITUTION OF THE PORTUGUESE REPUBLIC] art. 13. In the United States, the Fourteenth Amendment to the Constitution of the United States embodies the principle of equality through the equal protection clause that sets forth that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV. In the doctrine, for a definition of the principle of equality in the context of Canada's multiculturalism that comprises different ethnic minorities and linguistic heterogeneity, see Terrence Meyerhoff, *Multiculturalism and Language Rights in Canada: Problems and Prospects for Equality and Unity,* 9 AM. U. J. INT'L L. & POL'Y 913, 963 (1994) (defining the principle of equality as "equality of opportunity for individuals and equality in the treatment of, or respect for, groups." Meyerhoff maintains that the principle of equality is composed of two elements – one is "freedom from discrimination against individuals; the other … focuses on group survival in the form of assistance for the preservation of cultural and linguistic distinctiveness").

27. The principle of legality or the rule of law is crucial in administrative law to ensure fairness and consistency of the decisions of administrative agencies or authorities. See Sydney A. Shapiro, *The Top Ten Reasons that Law Students Dislike Administrative Law and What Can (or Should) be Done about Them?,* 38 BRANDEIS L.J. 351, 352 (2000)

The interpreter achieves the weighing or optimization of the principles through the implementation of the principle of proportionality.[28] This principle includes the sub-principles of suitability, necessity, and proportionality in its narrow sense. For Alexy, "fundamental rights" are principles. Like Alexy, the Author will dwell on the concept of principle rather than the concept of "fundamental right."[29] For Alexy, the core of the balancing process lies in the "Law of Balancing."[30] The Law of Balancing reflects the principle of proportionality in its narrow sense and can be formulated as follows: "The greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other."[31]

The Law of Balancing determines that the interpreter divide the balancing process into three stages. The first stage corresponds to the definition of the degree of non-satisfaction of, or detriment to a first principle. In the second stage, the interpreter defines the importance of satisfying the conflicting principle. In the third stage, the interpreter must determine whether the importance of satisfying the conflicting principle justifies the detriment to, or

(maintaining that administrative law is composed of three processes, the study of which is highly challenging. He says that "[t]here is the: empowerment process, or the process by which the agency receives its authority to make decisions and enforce them; internal decision-making process, or the process by which the agency makes its decisions; and external control process, or the process by which agencies are made accountable through judicial review and through review by elected officials". In all of these processes, statutory law more than case law embodies the principle of legality).

28. The principle of proportionality is set forth by the Portuguese Constitution in Article 18(2). CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [CONSTITUTION OF THE PORTUGUESE REPUBLIC] art. 18(2). This article maintains that the law may only restrict rights, freedoms, and guarantees in the cases expressly provided for in the Constitution. Those restrictions must be strictly necessary to safeguard other constitutionally protected rights or principles. *Id*. *See* Richard S. Frase, Limiting Excessive Prison Sentences under Federal and State Constitutions, 11 U. PA. J. CONST. L. 39, 48 (2008) (saying that when courts seek to enforce constitutional proportionality limits on sentencing (or on other government measures), they should only intervene if the burdens on the defendant are clearly excessive relative to the benefits, or if alternative sanctions or other measures are clearly less burdensome and equally effective). For a critique of the principle of proportionality, see Francisco J. Urbina, *A Critique of Proportionality,* 57 AM. J. JURIS. 49 (2012).

29 . Robert Alexy, *Sobre los Derechos Constitucionales a Protección [Regarding Constitutional Rights to Protection], in* ROBERT ALEXY: DERECHOS SOCIALES Y PONDERACIÓN [ROBERT ALEXY: SOCIAL RIGHTS AND BALANCING] 56-57 (Ricardo García Manrique ed., 2007).

30. *See* ALEXY, *supra* note 21, at 50-56, 66-69, 102.

31. *Id.* at 102.

non-satisfaction of, the first principle.[32] To ascertain the specific weight of each of the principles, that is, the principle of equality and the principle of legality, and which of them is of comparatively greater importance, the Author breaks the Law of Balancing down into its essential elements and applies the "Weight Formula" to the case.

The degree of non-satisfaction or restriction of one principle and the degree or importance of satisfaction of the other can be assessed through a Triadic Scale or a model of three intensities—*light*, *moderate,* or *serious* (*l*, *m,* or *s*).[33]

The first object of valuation as *l*, *m,* or *s* is the intensity of interference (*I*) with a principle (*Pi*) in a given case (*C*). Alexy assigns the meaning *IPiC* or *Ii* to the principle whose restriction or infringement is analyzed. The interference with a principle is concrete. Therefore, the intensity of interference or non-satisfaction of that principle has an equally concrete magnitude. Nevertheless, to stress the precise magnitude of interference, the letter (C) is associated to the meaning provided above referring to the circumstances of the case that are relevant to the decision.[34]

The second object of valuation as *l*, *m,* or *s* is the importance of satisfaction (*S*) of the conflicting principle (*Pj*). The importance of satisfaction of the conflicting principle also refers to the concrete importance or actual weight of that principle. In line with what the Author said on the intensity of interference with *Pi*, the same can now be said of *Pj*. The concept of concrete importance or weight is similar to the concept of the intensity of interference with *Pi*,

32. *Id*. at 105 ("stating that […] the Law of Balancing is not valueless. It identifies what is significant in balancing exercises, namely the degree or intensity of non-satisfaction of, or detriment to, one principle versus the importance of satisfying the other").

33. ALEXY, *supra* note 21, at 405. For a critique of these valuation measures, see José Juan Moreso, *Alexy y la Aritmética de la Ponderación* [*Alexy and the Arithmetic of Balancing*], *in* ROBERT ALEXY: DERECHOS SOCIALES Y PONDERACIÓN [ROBERT ALEXY: SOCIAL RIGHTS AND BALANCING] 232-33 (Ricardo García Manrique ed., 2007).

34. ALEXY, *supra* note 21, at 405-06. The balancing or weighing of principles Alexy engages in reflects his definition of principles as optimization requirements. He weighs principles involved in a case. Therefore, balancing which aims to help the interpreter find the most correct answer, does not rely solely on a deductive scheme by which the interpreter infers the applicable rule. Balancing, which is tied to argumentation, is based on the concrete or relative weight of the principles in a case. The circumstances of the specific case that are essential for the legal decision refer to the administrative order of expulsion from the country of the illegal immigrant who was a victim of a crime, and to the consequences which the implementation or non-execution of such order will have on the relevant principles under analysis.

because it deals with the intensity of a possible interference or restriction in the face of non-interference. Therefore, concerning *Pj,* the interpreter can adopt the analogous formula *SPjC*.[35]

What is the degree of interference (*I*) with *Pi* and what is the concrete importance of satisfaction (*S*) of *Pj*, to which the Law of Balancing refers? In other words, what is the concrete degree of interference with the principle of equality in relation to the principle of legality? What is the effect that the non-satisfaction or interference with the principle of equality produces in the satisfaction or fulfillment of the principle of legality? What kind of constraints does the Constitution impose on the principle of equality when it provides that the principle of legality is a cornerstone of the democratic State? Does satisfying the principle of legality justify restricting or not satisfying the principle of equality?

To respond to these questions, the interpreter must take the following three steps: (a) evaluate *IPiC* as *l*, *m* or *s*; (b) evaluate *SPjC* as *l*, *m* or *s*; and (c) relate the two previous valuations, by using criteria of comparability and, therefore, of commensurability, perceived from a common point of view. This common point of view is yielded by the Constitution, insofar as it stands for the shared feeling of the community. The judge in our case must evaluate the principle of equality and the principle of legality by resorting to classic criteria of constitutional interpretation. Generally, constitutional interpretation does not differ from other types of interpretation. However, constitutional rights norms have an open texture that challenges the interpreter in their craft.

The comparability of the principles as outlined above is carried out through a "Weight Formula". This formula illustrates the structure underlying the Triadic Scale with the help of numbers.[36] This formula determines the concrete weight of a principle. It reflects the idea that principles become stronger if the intensity of their constraint increases. It expands the Law of Balancing. It goes as follows:

$$WP_{i,j}\ C = IP_iC/SP_jC$$[37]

35. *Id*. at 406.
36. *Id*. at 408.
37. *Id*.

In our case, the interpreter measures the concrete weight (W) of the principle of equality (*Pi*) by the effects the non-interference with the principle of legality (Pj) has on the principle of equality. Put differently, the higher the weight of the principle of legality in a concrete case, the more restrictive the principle of equality will be.[38]

The Weight Formula determines that the concrete weight of a principle be obtained through the quotient of the intensity of interference with this principle (*Pi*) and the concrete importance of the competing principle, (*Pj)*. The concrete weight of a principle is, therefore, a relative weight, which is expressed by the formula *Pi,j.* The concrete weight of P_i is the concrete weight of *Pi* relative to *Pj*.[39]

Here, the Author shall refer to the Weight Formula to determine the intensity of the restriction on the principle of equality *(*P_i). By ascertaining the intensity of interference with the principle of equality, the Author will be able to assess the actual weight of the principle of equality and the importance of the principle of legality (P_j).

The author allocates the values 2^0, 2^1, and 2^2 , that is, 1, 2, and 4 to the three values of the Triadic Scale (*l*, *m*, and *s*) and applies such numbers to our case.[40] This way, the Author can verify that the order of expulsion of the foreign citizen interfered with the principle of equality (*Pi*) on the basis of value 4 (*s*). On the contrary, that order of expulsion interfered with the principle of legality (*Pj*) on the basis of value 1 (*l*).[41] Hence:

s, l = 4 / 1 = 4

However, let us consider the contrary situation—that is, the interpreter restricts the principle of legality (*Pj*) based on value 4, and restricts the principle of equality (*Pi*) based on value 1.

l, s = l / 4 = 1 / 4

---

38. *Id*. at 408-09.

39. *Id*. at 409.

40. *Id*. at 409-10.

41. ALEXY, *supra* note 21, at 410. Indeed, the basis of the restriction value of the principle of legality should be null, since the decision of the Immigration and Border Services, subsequently confirmed by the "*courts a quo and ad quem"*, merely applied the law *qua tale*. Nevertheless, the Author lets the values presented in the formula to guide her for she deems them sufficient to demonstrate what the Author intends.

This scenario allows us to conclude that the principles (*Pi*) acquire a higher concrete weight when the intensity of their restriction increases on minor grounds.[42] Inherent to this idea is the impression that principles increase their resistance as the intensity of the interference with them increases. Why? Because the resistant core of fundamental rights with the structure of principles manifests itself whenever it faces an interference. In this context, the more the interpreter interferes with the core of the right to equal treatment deriving from the principle of equality, the higher is the resistance of the principle of equality to that interference.[43]

In respect to the case under analysis, it is important to ask the following. Is there a disproportionate interference with the principle of equality considering the weight of the principle of legality?[44] What effect do the constitutional provisions that "[a]ll citizens have the same social dignity and are equal before the law"[45] and "[f]oreigners and stateless persons who are or reside in Portugal enjoy the rights and are subject to the duties of the Portuguese citizens"[46] have on the principle of legality?

In the case at hand, the restriction of the principle of equality was disproportionate. The Weight Formula demonstrates that disproportionality. The degree of protection the interpreter afforded to the principle of legality was higher than the protection

42. *Id*.

43. *Id.* at 424 (stating that "[. . .] as interference with a constitutional right increases, so also does [. . .] its substantive resistance").

44. It should be noted that the concrete importance of *Pj* (the principle of legality) is measured by the degree of the intensity of the interference with *Pj* as a result of the non-interference with *Pi*. In other words, the lower the interference with *Pi*, the higher the interference with *Pj*. Take, for example, the conflict that frequently arises between the right to honor and the right to freedom of expression. Although these are two fundamental rights, Alexy treats fundamental rights as principles. Thus, the present considerations apply both to fundamental rights and principles. If a judge considers that there is a reason not to restrict the right to honor given the circumstances of the case, then the right to freedom of expression will be restricted as a result of the non-restriction of the right to honor. Thus, the importance of the principle of legality arises from the calculation of the intensity of its restriction resulting from the non-restriction of the principle of equality.

45. Article 13 (1) of the Portuguese Constitution sets forth that "[a]ll citizens possess the same social dignity and are equal before the law". CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [CONSTITUTION OF THE PORTUGUESE REPUBLIC] art. 13(1).

46. Article 15 (1) of the Portuguese Constitution sets forth that "[f]oreigners and stateless persons who find themselves or who reside in Portugal enjoy the same rights and are subject to the same duties as Portuguese citizens." CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [CONSTITUTION OF THE PORTUGUESE REPUBLIC] art. 15(1).

they gave to the principle of equality. The interpreter did not interfere with the principle of legality by interfering with the principle of equality. The intensity of the interpreter's interference with the principle of legality was lower for their interference with the principle of equality was much higher.

The court restricted the principle of equality based on an idea of protection of the public interest and the public order. The Author does not believe that the reasons that led to the interference with the principle of equality were stronger than the reasons justifying the non-interference with the principle of equality. The rights that foreign nationals have to have the same rights Portuguese citizens enjoy extended to them because those foreign nationals share the same social dignity and have the right to not to be discriminated against the law justify the non-interference with the principle of equality. While reading this case, the Author adopts a universalist perspective that bears its stand from the idea that the interpreter should read legal and constitutional provisions in line with the Universal Declaration of Human Rights.[47] This sort of interpretation pays tribute to the fact that fundamental rights are not subject to political bargaining or loose judgments. They must and can be exercised by any person regardless of their citizenship or nationality. In this respect, it is essential to analyze the European Convention on Human Rights, which requires that Contracting Parties secure, recognize, and observe the human rights and fundamental freedoms of every person under their jurisdiction,[48] and the Charter of Fundamental Rights of the European Union.[49] Article 1 of the Charter sets forth that "Human dignity is inviolable. It must be respected and protected."

However, Alexy's assertiveness is infinite because he does not consider the system of precedence between principles as stagnant. Weighing allows the interpreter to move toward correctness and obtain more truth, but not all the truth. This incompleteness is a reality because the system of precedence between principles can

47. *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

48. *See* Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, Europ.T.S. No. 5; 213 U.N.T.S. 221.

49. *See* Charter of Fundamental Rights of the European Union, Dec. 18, 2000, 2000 O.J. (C364).

subside. That system will subside insofar as those who intend to undertake such a modification argue accordingly. (Again, we are in the realm of the discursively possible).[50] Their discourse must respect the limits of practical argumentation, legal argumentation, and the model of rationality of the democratic rule of law.

B. Ronald Dworkin: Principles or a Question of Principle? The Interpretative Model and the System of Monological Rationality - Hercules, the Judge.

Alexy, like Dworkin, considers that the difference between rules and principles is essentially conceptual or qualitative and not one of degree or commensurability.[51] Hence, the Author has chosen to compare Alexy and Dworkin. As she reads Dworkin's work, she realizes how Dworkin invokes profound moral principles that underlie the idea of *equality of all*. He understands the principle of equality as *equal concern and respect*. He almost treats it as a self-evident truth, which is in line with his understanding that there may be one single right answer to a hard case. Equal concern and respect for your fellow citizen would be the correct answer.

In a democracy, numbers count. However, in Dworkin's view, democracy represents more than the majority rule.[52] At a conference at the University of Nebraska in 2008, Dworkin lectured on democracy, religion, and relations between the United States of America and Israel (referring to themes such as Zionism and immigration). Therein, he reiterated an idea that has been widely reproduced in his scholarship -- "democracy must be a partnership that allows each citizen over whom the nation claims dominion and from whom it extracts allegiance to see the government as his government, and that […] is not possible unless the government shows to each citizen equal concern and equal

50. ALEXY ARGUMENTATION, *supra* note 6, at 135-36.

51. *See* ALEXY, *supra* note 21, at 48 (saying that " […] the distinction between rules and principles is a qualitative one and not one of degree. Every norm is either a rule or a principle").

52. *See* RONALD DWORKIN, LAW'S EMPIRE 177 (1986) (stating that "[w]e might think that majority rule is the fairest workable decision procedure in politics, but we know that the majority will sometimes, perhaps often, make unjust decisions about the rights of individuals").

respect."[53] Accordingly, the rights of those groups often referred to as "minorities"—thus categorized by criteria such as race, ethnicity, nationality, gender, sexual orientation, and religion—must be indisputably protected.

This appeal to the protective role of the state derives from Dworkin's personification of the state and the community, which, in his work are treated as moral agents, that like the partnership or the corporation have a separate personality from their members. The implication of this personification is the creation of an associative obligation [54] between the members of that community from which it derives a social responsibility of each member to feel outraged whenever state officials do not treat every single member of that community with the equal consideration and respect they deserve. He maintains that:

> Once we accept that our officials act in the name of a community of which we are all members, bearing a responsibility we therefore share, then this reinforces and sustains the character of collective guilt, our sense that we must feel shame as well as outrage when they act unjustly.[55]

In that talk he gave at the University of Nebraska in 2008, Dworkin uttered that a Democracy must show equal concern and equal respect for its citizens. However, he clarified that a Democracy does not need to show equal concern for every person who would like to be a citizen. No nation opens its doors to all those who would like to come, he said.[56] Indeed, the government of a State may not adopt an immigration policy nor have it as a priority. However, the State cannot fail to act with respect for those upon

---

53. *Democracy and Religion: America and Israel*, MEDIAHUB, https://mediahub.unl.edu/media/546 [https://perma.cc/YLZ2-R5UJ] (last visited Apr. 1, 2020) [hereinafter *Democracy and Religion*].

54. RONALD DWORKIN, supra note 52 at 196 (defining associative obligations as "[. . .] the special responsibilities social practice attaches to membership in some biological or social group, like the responsibilities of family or friends or neighbors." These are obligations that one does not necessarily deliberately choose to accept them. The duty to honor our responsibilities under social practices that define groups and attach responsibilities to membership depend on conditions of reciprocity. The members of the group must regard those obligations as special and personal. The members must understand their responsibilities as stemming from their concern for the well-being of others in the group. That concern must be equally shown for all members of the group. These associative communities are political communities. *Id*. at 198-202).

55. RONALD DWORKIN, *supra* note 52, at 175.

56. *See Democracy and Religion*, *supra* note 53.

whom it exercises and claims to have dominion, even if to maintain: "our law does not apply to you." At the very least, the State cannot do so in a way which shows complete disrespect for the fundamental rights of those citizens.

The neuralgic point of Dworkin's critique of the utilitarian theses and positivist conceptions of authors such as Jeremy Bentham, John Austin, and, in particular, Herbert L. Hart, lies in the realization that respect for individual principles and rights, which can be used as trumps against the state because they are prior to the State, binds judicial decisions.[57] He, therefore, adopts an anti-Archimedean stand. He refutes the existence of a fixed point, outside of common morality, through which it would be possible to leverage a response to a question in the context of a normative debate.

The theory of adjudication that Dworkin develops is based on an interpretative model of adjudication. He bases his model on a metaphor—Hercules, the judge.[58] It is an ideal mythological figure, endowed with superpowers because Hercules is part of the historical reality of a community in which it shares the idea of morality. Alone, Hercules evaluates the fundamental principles of that community, within the scope of an adjudication process created by himself.

The interpretation Hercules undertakes should conceive Law as integrity. That is, the judge, when analyzing the applicable norms, should try to understand what their best justification will be from the point of view of political morality.[59] By doing this, the judge must undertake a constant dialogue with history. Like the interpreter in the context of Alexy's theory of legal argumentation who aims to find the correct answer contextually, Dworkin's Hercules aims to find the principle that spells out the right thing to

57. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 233-39 (1977) (using the case of reverse discrimination to criticize utilitarian arguments. Utilitarian arguments rely on policies that are understood to make the community as a whole better off, even if they are discriminatory. Pursuant to the author, "[i]f we want to defend individual rights in the sense in which we claim them, then we must try to discover something beyond utility that argues for these rights"). *Id*. at 271.

58. RONALD DWORKIN, *supra* note 52, at 239.

59. *Id*. at 225. (explaining that "[t]he adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author – the community personified – expressing a coherent conception of justice and fairness").

do. However, unlike the cases adjudicated by the interpreter in Alexy's theory of legal argumentation, for certain cases which Hercules must adjudicate, there is one correct answer only, which is not subject to commensurability.

The Author also sees Dworkin's interpretive model of adjudication in light of a set of other metaphors: *law works itself pure; there is a higher law, within and yet beyond positive law, toward which positive law grows; law has its own ambitions*.[60] All of these metaphors acknowledge that judicial decisions or legislative acts change the law to a certain extent. Let us take as an example the petition of the Brazilian citizen who claimed the annulment of the order of expulsion from the Portuguese territory. If we link the decision of the judge to order the expulsion of the Brazilian citizen to those three metaphors, we can draw one of the following conclusions.

The change of the Law is inherent to a decision in favor of the annulment of the order to expel a foreign citizen whose physical integrity was violated. The decision of the court to annul such order of expulsion would produce a change in the law because the right to reside illegally in the country is not explicit in the Constitution. However, if the interpretative argument in favor of the annulment of the order of expulsion is a good argument, then, the Law itself advocated for that change. The Law fulfilled its own ambitions. A change of Law through adjudication is not neutral, but rather an improvement of the Law itself, in the sense that a pure or fair law is a better law. The change of the Law is a clarification of what the Law already is. If better interpretation of the Law results in the adjudication of a constitutional right to a certain citizen, denying that right is the same as denying the opportunity for the improvement of the Law. It is also a denial of the Law itself.

In the case under scrutiny, there are several things at stake. The right of a foreign citizen who illegally resides in the country, but over whom the State exercises its jurisdiction, to be treated in the same way as a national citizen would if they were a victim of a crime is at stake. The right of that foreign citizen to be protected by the relevant guarantees of the laws of the criminal procedure without having to undergo a test of confirmation of her situation in the country is at stake. The right of that foreign citizen to be

60. Ronald Dworkin, *Law's Ambitions for Itself*, 71 VA L. REV. 173, 173 (1985).

protected by the relevant rules of criminal procedure that prevent the judge from using inadmissible evidence is at stake.[61] The right of that foreign citizen to equal consideration and respect lies on the political belief that no citizen should have those rights put at stake. The idea of integrity derives from the political ideal that the community we live in is a principled one.

When the moment to decide comes, Hercules should ponder which of the principles that that political community embraces they should apply to the case.[62] Dworkin believes that when there is a conflict of principles whereby political guidelines clash on the one hand, and individual rights and guarantees collide on the other, the moral perspective must prevail.[63] In this context, the prevalence of the moral standpoint is a matter of principle.

C. Hermeneutics and the Process of Adjudication: Hercules and the Perception of the Other

From the above, a piece of evidence stands out: in Dworkin's doctrine, hermeneutics assumes a fundamental role. There is significant opposition between the current legal order and another one, of an altruistic nature, of solidarity and openness to the

61. Article 32 (8) of the Portuguese Constitution maintains that [. . .] all evidence obtained through torture, coercion, the offense to the physical or moral integrity of the individual, improper intromission into the individual's personal life, home, correspondence or telecommunications is void. CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [CONSTITUTION OF THE PORTUGUESE REPUBLIC] art. 32 (8). Article 126(1) of the Portuguese Criminal Procedure Code substantiates the constitutional provision and sets forth a list of inadmissible evidence. C.P.P. art. 126(1). The Fifth Amendment to the Constitution of the United States sets forth that "No person shall be [. . .] compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

62. Dworkin does not show how the court should act to ponder this. Nevertheless, the judge must analyze each principle and ask what principles and political guidelines offer a better justification of the Law. The judge must ask the following question: What interpretation of the Law based on the wording of the relevant legal provisions best serves those principles or political guidelines?

63. In our case, principles rather than political guidelines are at issue because the judicial decision to expel the foreign citizen from the country was based on the application of the terms of the law rather than the implementation of a political statement. In our case, the point is to understand whether there is a reason for the prevalence of the principle of legality over the principle of equality, from the moral standpoint. In the quest for the solution to this conflict, the interpreter will ignore the political guidelines that might have determined the enactment of the relevant legislation.

Other.[64] In postmodern States, or states that are situated in a "liquid modernity," the need for openness to the Other is pressing. Hermeneutics recognizes this need.[65] Thus, in addition to being a neo-constitutionalist, Hercules should be hermeneutic.

What does it mean to be a *foreign citizen* in the eyes of the administrative authorities and in the eyes of a judge? A possible answer can be found through the adoption of a discursive-interpretative approach to understand the world that surrounds us; through our historical context, and language to approach the past. However, the discourse adopted must be pragmatic, open, and capable of breaking with the traditions and preconceptions on which we base our finitude, our indigence, our partiality, and our previous involvement.

Essentially, defining the meaning of foreign citizen is the same as questioning the prejudices that bind us as a condition of access to knowledge. Providing such definition involves the immersion into a profound process of psychoanalysis, the voluntary submission to a Freudian treatment for the recovery of prejudice, through dialogue, discourse, and presentation of arguments to respond to the problems of the present. Looking for that meaning is what the judge in our case should have done. They should have questioned all existing preconceptions (including the legal ones) and presented arguments that would show, in the context of an action for an injunction, the judge's necessary sensitivity to the way the expulsion process had been triggered. The judge in our case should have proceeded in this manner not because the plaintiff-defendant was a Brazilian citizen, but because she was a foreign citizen, who was denied protection under the principle of equality. If no national citizen would have been denied that protection under the same circumstances, then neither should that foreign citizen face that denial.

64. ANTÓNIO MANUEL HESPANHA, O CALEIDOSCÓPIO DO DIREITO: O DIREITO E A JUSTIÇA NOS DIAS E NO MUNDO DE HOJE [THE KALEIDOSCOPE OF LAW: LAW AND JUSTICE NOWADAYS IN THE WORLD TODAY] 476 (2d ed. 2009).

65. Essentially, the Author refers to philosophical hermeneutics. On this matter and for a preliminary approach, see Zygmunt Bauman, *The Challenges of Hermeneutics, in* THE BAUMAN READER 125-138 (Peter Beilharz ed., 2001); Odo Marquard, *The Question, To What Question Is Hermeneutics the Answer?, in* FAREWELL TO MATTERS OF PRINCIPLE: PHILOSOPHICAL STUDIES 111 (Robert Wallace trans., 1989) (1981).

IV. THE CREATION OF A GENERAL THEORY OF STATE AND LAW: CONCLUSIONS

What is the value of fundamental rights and freedoms assigned to national and foreign citizens in light of the rule of law and the democratic state? Has the interpreter fulfilled the principle of the rule of law and the democratic state through an inflexible conception of the principle of legality? Are administrative authorities justified to deprive citizens, regardless of their nationality, of the constitutional protection afforded to their most fundamental rights and freedoms? [66] How far can or should administrative authorities go? How far can or should the judge go? How far can or should the State go? What is the fate of the foreign citizen?

Administrative authorities, while following criteria of efficiency, competence, and promptness in their responses to the claims of the citizens, must not fail to treat any individual as the human being they are. Thus, the interpreter should be open to reinterpreting the principle of legality and separation of powers. It is vital that besides their executive power, administrative authorities can fill in the gaps in the interstices of the law. It is crucial that the public administrator, as well as the judge, can intuit the correct answer (regarding the case at hand, the Author assumes her skepticism) to the case. That level of intuition requires the assumption of a more intense relationship with the law and accepts that the interpreter cannot reduce Law to only one positive set of rules; the Law also contains principles.

The interpreter must recognize that constitutionally consecrated rights are influential beyond the State-citizen relationship. The interpreter must recognize the "radiating effect" these rights have on the overall legal system.[67] No agnosticism is justified here. Thus, what is essential for the resolution of our case

66. In the text, the Author is referring to fundamental rights and freedoms such as the right to life, personal identity, citizenship, freedom of religion, etc.

67. *See* ALEXY, *supra* note 21, at 352, citing the Federal Constitutional Court of Germany:

> [A]ccording to the long-standing case-law of the Federal Constitutional Court, constitutional rights norms do not simply contain defensive rights of the individual against the state, but at the same time they embody an objective order of values, which applies to all areas of law as a basic constitutional decision, and which provides guidelines and impulses for the legislature, administration and the judiciary.

and other similar cases is to learn the way the judge should interpret and apply the constitutional provisions to the case.

As part of public administration, the conduct of the members of law enforcement was unacceptable from a constitutional point of view. In addition to the principles of equality and justice, the principle of impartiality[68] determines that their actions towards citizens (whether they are foreigners or not) be exempt, objective, neutral, and independent. The principles of equality, justice, and impartiality also determine that citizens subject to administrative proceedings be acknowledged the right to know why is it that, in those circumstances, they cannot be treated in the same way any national would have if that national had been a victim of a crime of offense to their physical integrity. The need that citizen has to be informed implies that administrative authorities provide public criteria for assessing the context. In our case, members of law enforcement should have felt compelled to explain the context that prompted them to ask that Brazilian citizen for her passport as a condition precedent to her filing of a criminal complaint, when they knew that such request would probably render the relevant criminal proceedings unenforceable.

The respect for the principles of equality and proportionality determines that foreign citizens cannot be denied fundamental rights to which national citizens also are entitled. If such denial occurs, it must lie on rational arguments. The principle of equality also encapsulates the right to judicial protection. Accordingly, denial of justice to a foreign citizen through administrative procedure restricts the principle of effective judicial protection.[69] The principle of effective judicial protection yields the adoption of precautionary measures that safeguard the effectiveness of the action. The principle of effective judicial protection also prevents fundamental rights or legally protected interests, which the plaintiff-defendant meant to protect through the action she filed, from getting seriously and irreparably injured.

---

68. Article 266 (2) of the Portuguese Constitution sets forth that administrative agents are subject to the Constitution and the rule of law and must act with respect for the principles of equality, proportionality, justice, impartiality, and good faith. CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [CONSTITUTION OF THE PORTUGUESE REPUBLIC] art. 266(2).

69. Article 20 of the Portuguese Constitution foresees the right to effective judicial protection and Article 268(4) lists a number of rights and guarantees constitutionally provided to citizens who deal with administrative authorities. CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [CONSTITUTION OF THE PORTUGUESE REPUBLIC] arts. 20, 268(4).

The correct resolution of the case that illustrates this text is a matter of principles, for which denial the judge did not find good reasoning. The interpreter can only give real existence to the rule of law and the informing principles of the democratic state by undertaking a correct interpretation of the law. They can achieve that by following rules of procedure that control their legal argumentation and by interpreting the law based on criteria of integrity and in line with the applicable constitutional norms. The constitutional interpretation that pays tribute to the ideals of integrity, coherence, and correctness will allow the realization of the rule of law and the democratic state. That interpretation will allow the creation of a general theory of the State and Law. The most fundamental constitutional principles will strengthen that theory to its core.

In the words of Habermas:

If one shares Dworkin's deontological understanding of law and follows the argumentation-theoretic considerations advanced by such authors as Aarnio, Alexy, and Günter, one will agree with two theses. First, legal discourse cannot operate self-sufficiently inside a hermetically sealed universe of existing norms but must rather remain open to arguments from other sources. In particular, it must remain open to the pragmatic, ethical, and moral reasons brought to bear in the legislative process and bundled together in the legitimacy claim of legal norms. Second, the rightness of legal decisions is ultimately measured by how well the decision process satisfies the communicative conditions of argumentation that make impartial judgment possible.[70]

70. JÜRGEN HABERMAS, *supra* note 7, at 230.