

**THE BRAZILIAN SUPREME COURT  
NEEDS IOLAUS: A REPLY TO MARCELO  
NEVES' OBJECTIONS TO BALANCING  
AND OPTIMIZATION**

// O SUPREMO TRIBUNAL FEDERAL  
PRECISA DE IOLAU: RESPOSTA ÀS  
OBJEÇÕES DE MARCELO NEVES AO  
SOPESAMENTO E À OTIMIZAÇÃO

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**>> ABSTRACT // RESUMO**

In current Brazilian constitutional debate there may be no subject that has generated so many publications as that of constitutional principles. Many of these publications, however, are a mere repetition of what has been written before. The publication of Marcelo Neves' book "Entre Hídra e Hércules: princípios e regras constitucionais como diferença paradoxal do sistema jurídico" is certainly an exception in this scenario. Marcelo Neves' book brings new light to the debate and proposes a change of course. In this short article, I intend to defend my views against the objections Neves raises in his book in order to show that, on the one hand, his objections are unsound and on the other, that he does not in fact offer an alternative to what he calls "still dominant models". // Talvez não exista, no direito constitucional brasileiro atual, um debate que tenha gerado uma produção tão intensa quanto aquele sobre princípios constitucionais. Muito dessa produção, contudo, é mera reprodução do que já foi escrito antes. O recente livro de Marcelo Neves, Entre Hidra e Hércules, é com certeza uma exceção nesse cenário. Ele traz novas luzes ao debate e propõe mudanças de rumos. Neste breve artigo, pretendo defender minhas ideias em face das objeções que o autor suscita, para mostrar que ele, de um lado, não tem razão nessas objeções e, de outro, não oferece de fato uma alternativa àquilo que ele chama de "modelos ainda dominantes".

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**>> KEYWORDS // PALAVRAS-CHAVE**

Marcelo Neves; Legal Principles; Legal Rules; Constitutional Law; Brazilian Supreme Court. // Marcelo Neves; Princípios Jurídicos; Regras Jurídicas; Direito Constitucional; Supremo Tribunal Federal.

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**>> ABOUT THIS ARTICLE // SOBRE ESTE ARTIGO**

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## INTRODUCTION

In current Brazilian constitutional debate there may be no subject that has generated as many publications as that of constitutional principles. Many of these publications, however, are a mere repetition of what has been written before. The publication of Marcelo Neves' book *Entre Hídra e Hércules: princípios e regras constitucionais como diferença paradoxal do sistema jurídico* is certainly an exception in this scenario. Considering the academic career of the author, this is no surprise.

Marcelo Neves' book brings new light to the debate and proposes a change of course. Although I agree with some of his views, our theses on the issue are partially incompatible. In this short article I defend my views against the objections Neves raises to some of my ideas in his book to show that his objections are unsound and that he does not in fact offer an alternative to what he calls "still dominant models".

To achieve these goals, this paper is organized as follows. Initially, I address some of the criticisms that Neves makes of my works that have no direct connection with the concepts of principles and balancing (section 1). From the second section onwards, the article is dedicated exclusively to the debate on principles. I begin with a brief comment on the metaphor used in the title of Neves' book (section 2), and then analyse the strategy he uses to reject traditional forms of distinguishing between principles and rules (section 3). I then discuss what Neves calls hybrid norms (section 4) and shortly thereafter his own concept of principles and rules (section 5). Next, I analyse what Neves calls intraprinciple collisions (section 6) to show that this is a less important phenomenon than he deems it to be. I then argue that Neves often does not clearly distinguish which issues are theoretical and which are institutional (section 7). This paves the way to the next section, in which I discuss the "misuse of principles" to show that he does not clearly distinguish theoretical from practical issues (section 8). The next section (section 9) analyses the alternative Neves proposes to the theory of principles, especially in light of what he calls "comparative balancing". As Neves does in his book, the conclusion of this article (section 10) refers to Judge Iolaus, to demonstrate that, except perhaps for mythological judges, there may be a difference (sometimes a huge one) between what a theory proposes and what judges (and other legal practitioners) do when they say they are applying this theory. I shall try to demonstrate that Neves' objections to balancing and optimization, even though they may be sound in relation to a particular legal practice that uses principles, does not hit the theory itself.

### 1. A FEW ANSWERS TO SCATTERED CRITICISMS

In several parts of Neves' book, my work is used as a counterpoint to what he intends to defend. Although many of the objections he raises are not directly connected to the central issue of his book, I do not want to leave these objections unanswered. This preliminary section is dedicated to these objections.

The first of these objections is related to the so-called interpretation in conformity with the constitution (*verfassungskonforme Auslegung*). In an article on principles of constitutional interpretation and methodological syncretism, I argued that it is odd that Brazilian constitutional scholars usually consider interpretation in conformity with the constitution a principle of constitutional interpretation, “since it is easy to see that when it comes to interpretation in conformity with the constitution, one is *not talking about constitutional interpretation*, since it is not the *constitution* that must be interpreted in conformity with itself, but the *ordinary laws*. Thus, the interpretation in conformity with the constitution may be useful, but as a criterion for the *interpretation of ordinary laws*, not for constitutional interpretation”.<sup>1</sup> In passing, I argued that the interpretation in conformity with the constitution is not part of the list of principles of constitutional interpretation developed by Konrad Hesse in Germany, which often served as the basis for Brazilian works on the subject.<sup>2</sup>

Neves’ objection, based on Hesse’s work, has two arguments: (1) when one uses the interpretation in conformity with the constitution, it is not only the ordinary law that is being interpreted, but the constitution as well; and (2) the reception of Hesse’s work in Brazil was not inaccurate, since he himself included the interpretation in conformity with the constitution among the principles of constitutional interpretation.<sup>3</sup>

I have already rebutted the first objection elsewhere,<sup>4</sup> where I made it clear that while the interpretation according to the constitution is surely a method of interpretation of ordinary legislation, it is evident that the parameter for this is the constitution and, thus, “if the constitution is the parameter that guides the interpretation of ordinary legislation, the constitution itself must also be interpreted”.<sup>5</sup> Nevertheless, I concluded: “in the interpretation in conformity with the constitution, the main goal is not to interpret the constitution itself, but the ordinary legislation, which is why it cannot be considered a principle of constitutional interpretation”. My conclusion, therefore, absolutely does not stem from the assumption that when one interprets in conformity with the constitution only the ordinary law, and not the constitution, is interpreted. My reasoning is based on the simple fact that, contrary to the case of other so-called principles of constitutional interpretation, in the case of interpretation in conformity with the constitution the constitution is a parameter for the interpretation of ordinary legislation, not for the interpretation of itself. Therefore, this is not a principle of constitutional interpretation.

In relation to the question whether the reception of Hesse’s ideas was inaccurate or not, although this seems to me to be less relevant, I must stress that Hesse did not include the interpretation in conformity with the constitution among his principles of constitutional interpretation, at least not directly. Although he did include it in a very indirect way, through the so-called “interpretation of the constitution in conformity with the law” (*gesetzeskonforme Auslegung der Verfassung*),<sup>6</sup> I do not believe that Brazilian constitutional scholars had this in mind when they included the interpretation according to the constitution among the list of principles of constitutional interpretation.

Further, Neves raises objections to some examples of what I called “methodological syncretism”. The most important is related to the incompatibility between Robert Alexy’s and Friedrich Müller’s theories, especially with regard to balancing. According to Neves, since for Müller the legal norm arises only at the end of the interpretation process, it would naturally not be subject to balancing, in the same fashion that Alexy’s definitive rule obtained after balancing. Therefore Neves concludes that there is nothing incompatible between the two theories.<sup>7</sup>

These arguments are not convincing. It is Neves himself who argues that “for Müller, during the concretization process, balancing appears as a potentially irrational factor in the process of establishing legal norms”.<sup>8</sup> Therefore, if Müller argues that during the concretization process balancing is an irrational factor and that, after concretization, there is no longer any room for balancing, how can this be compatible with Alexy’s theory in which balancing is one of the most prominent features? The answer to this simple and straightforward question cannot be found in Neves book.<sup>9</sup>

Neves’ final objection to my thesis against a methodological syncretism asserts that the objections that I raised towards several commentators may also be raised towards my own work, at least “in relation to the distinction between the local and the universal”.<sup>10</sup> Neves argues that, through the reception of Alexy’s theory of principles, I do exactly what I criticise, i.e. I import a theory conceived for the reality of a given country and, above all, a theory that is not unanimously accepted, and try to make people believe it is a universal theory. To support this objection, Neves maintains that (1) Alexy did not intend to develop a universal theory, but a theory of the fundamental rights of the German constitution; (2) that even in the case of Germany, the jurisprudence on which Alexy’s theoretical reconstruction is based is being gradually abandoned; and (3) that this jurisprudence cannot be found in other countries with a strong legal tradition.<sup>11</sup>

The response to these arguments is quite straightforward. Firstly, Alexy’s warning in his Theory of Constitutional Rights, that his theory is a theory of the fundamental rights of the current German constitution, is well-known:

*“A theory of constitutional rights of the [German] Basic Law is a theory of certain specific enacted constitutional rights. This distinguishes it from theories of constitutional rights which were valid in the past (legal-historical theories), and also from theories about constitutional rights per se (philosophical theories). It also distinguishes it from theories of constitutional rights not part of the [German] Basic Law, such as the constitutional rights of other states or of the German Regions”.*<sup>12</sup>

Nevertheless, this local aspect is not enough to control the reach that the theory may have beyond the limits established by its author. And it is Alexy himself who points this out when he argues that “comparative accounts have an important role to play in the interpretation of the constitutional rights of the [German] Basic Law”<sup>13</sup> which clearly implies that theories about fundamental rights of specific countries, such as his theory,

may through a comparative approach, play a significant role in the interpretation of fundamental rights in the Brazilian or other constitutions.

Moreover, Neves' objection seems to assume that, when I argued there was no evidence that Hesse wanted to create a general theory of constitutional interpretation and that his work focused on German constitutional law, I was trying to argue that this national focus would prevent an international reception. But it would be naive to suppose this and a careful reading of my text would show that I argued something different. I explicitly stated: "To be sure, the fact that Hesse limits the scope of his work to German law does not prevent it from being relevant to other legal systems".<sup>14</sup>

Finally, Neves argument that the jurisprudence on which Alexy's theoretical reconstruction is based is being abandoned, is also not relevant. My preference for this or that theory has no relation to the courts that apply it. I am aware that Alexy's theory of fundamental rights, especially his idea of optimization requirements, is very controversial in Germany. And I am also aware that the jurisprudence of the German Constitutional Court on which Alexy's reconstruction is based is also being challenged. And Neves certainly also knows that I am aware of this, since he resorts to the very same debate — between Kahl and Hoffmann-Riem — which I analysed in a previous work.<sup>15</sup>

But knowing whether this or that theory is accepted or not by this or that court, in this or that country, has never been the core of my critique of methodological syncretism. I quite explicitly stated in the aforementioned work, that the low impact that that list of principles of interpretation had in his own country would not in itself be a problem, were it not also for the limited practical importance that these principles have for constitutional interpretation".<sup>16</sup> In other words, what matters is not the amount of people or institutions that follow a given theory, but how relevant it is for constitutional interpretation. What I questioned at the time was an often dilettantish and rhetorical reception, without any concern for consistency, compatibility and practical applicability of these theories.

Having made these considerations about the objections Neves raises against some of my ideas, which have no specific relationship to the main subject of his book, I shall, from the next topic onwards, examine more specifically his discussion of constitutional principles.

## 2. THE METAPHOR THAT GIVES TITLE TO THE BOOK

Marcelo Neves opens his book by explaining the metaphor of the book title. The reference to Hercules is clearly associated with the figure of Judge Hercules proposed by Dworkin.<sup>17</sup> According to Neves', Judge Hercules is "able to identify the appropriate principles for deciding a case, providing the only correct answer or at least the best judgement". Based on this, Neves claims that "one can say that principles are Herculean".<sup>18</sup> From there, Neves proposes an inversion: for him, rules should be considered Herculean, whereas principles have the character of the Hydra.<sup>19</sup> This is

because, like the Hydra, a multi-headed mythological figure, principles also have a multi-headed character, due to their plural nature, which enriches the argumentative process, “opening it up to a variety of starting points”.<sup>20</sup>

In contrast, rules are Herculean, since, as Hercules cut off the Hydra’s heads, rules serve to decrease plurality, limiting the argumentation process by absorbing uncertainty.<sup>21</sup>

Even though the metaphor is not central to the book, the fact that it is used as its title deserves some comments. There is clearly an unjustified step in Neves’ reasoning, when, after establishing a connection between Judge Hercules (Dworkin) and constitutional principles, he concludes that principles are Herculean. The fact that Judge Hercules must identify all the legal principles relevant to the decision of a given case does not allow us to classify principles as Herculean. Perhaps Hercules’ task is, as it should be, Herculean, but the principles themselves are not Herculean. Especially because Hercules task is not only to identify and manage principles, but also rules, precedents and legislation. This does not make rules, precedents and legislation Herculean. The labour of Judge Hercules is Herculean, and principles are just one among many “legal materials” that he must work with.

Neves apparently defines principles as Herculean to justify a novel endeavour: switching the roles of principles and rules. There certainly is a parallel between Hercules cutting off the Hydra’s heads and the rules restricting the scope of principles. But the role of a judge is Herculean, whether the judge is Hercules or not.

### 3. THE REJECTION OF A GRADUAL DISTINCTION BETWEEN RULES AND PRINCIPLES

Like Alexy<sup>22</sup> and other supporters of his theory of principles,<sup>23</sup> Neves rejects the traditional distinction between principles and rules based on degrees of precision, discretion, generality and others. Alexy calls these weak distinctions.<sup>24</sup>

However, it seems that the strategy Neves used to reject the gradual distinction between rules and principles errs by adopting a certain circularity. To illustrate this, I will use the example of distinction based on the degree of generality. According to this criterion, principles are more general than rules. To reject this criterion, Neves uses as an example legality in criminal law (Brazilian Constitution, article 5, XXXIX): although it has a high degree of generality, this norm is a rule, not a principle, because it “serves as a definitive criteria for deciding a case”.<sup>25</sup> For him this demonstrates that the level of generality cannot be used as a criteria for distinguishing between rules and principles.<sup>26</sup>

But this reasoning confuses two criteria. It is not possible to claim that legality in criminal law, although general, is not a principle, but a rule, because it “serves as the definitive criterion for deciding a case”, since this concept of a rule simply does not apply for those who classify legality in criminal law as a principle. For them, if a norm has a high degree of generality, this is enough for it to be regarded as a principle.

A more exaggerated example may make this clearer. Let us assume that someone set the following criteria for the distinction between rules and principles (within the fundamental rights of the Brazilian Constitution): if the number of the section of article 5 in which a given right is enshrined is an even number, then it is a principle; if it is an odd number, it is a rule. Thus, equality between men and women (article 5, I) and freedom of profession (article 5, XIII) would be rights guaranteed by rules, while freedom of expression (article 5, IV) and the prohibition of ex post facto criminal law (article 5, XL) would be rights guaranteed by principles. No matter how nonsensical this criterion is, the fact is that one cannot refute it by claiming that the prohibition of ex post facto criminal law is guaranteed by a rule, and not by a principle, since it does not admit balancing or because it “serves as the definitive criterion for deciding a case”; unless these concepts of rules were universally accepted, which is not the case. In other words, I cannot use my own concept of a rule (or a principle) to reject a classification based on different criteria.<sup>27</sup>

To be sure, this does not mean that one cannot raise objections to the criteria used to establish a given classification. For instance, one can point to some methodological weaknesses or lack of utility of certain classifications. In this sense, in a work published some time ago, I argued:

*“Classifications are either consistent and methodologically sound, or contradictory — when, for example, several distinguishing criteria are unduly combined — and therefore barely useful or not at all. If one defines a ‘principle’ by its fundamentality, it makes sense to speak of a principle of legality or a principle of nulla poena sine lege. These are undoubtedly two fundamental norms in any constitutional democracy. However, if one prefers to use the criteria established by Alexy, [...] one must leave out of her typology some norms traditionally called principles — legality etc. — since, despite their fundamentality, they could no longer be considered principles and should be included in the category of rules.”<sup>28</sup>*

#### 4. ALMOST RULE, ALMOST PRINCIPLE: THE HYBRID FORMS

Within the debate on rules and principles, a recurring issue is the existence of intermediate categories, or of norms that are sometimes principles and sometimes rules. In this context, Marcelo Neves refers to the concept of hybrid, as follows: “norms that are in an intermediate position between principles and rules.”<sup>29</sup> To justify his conclusion, Neves refers to the Weberian concept of ideal types. For Weber, ideal types are constructed from a one-sided accentuation of one or a few variables of the object being examined.<sup>30</sup> It is thus an abstraction, an intellectual construction that functions as a method for sociological analysis.

Even if one accepts that the concept of ideal type has some relevance to understanding the normative distinction between rules and principles,<sup>31</sup> it would certainly not be relevant to classifying some norms as hybrids.

If it is true, as stated by Weber, that ideal types are utopian and that “in their conceptual purity, this mental construction cannot be found anywhere”,<sup>32</sup> then the obvious conclusion would be that in the real world *everything is hybrid*. But would it make sense to say, for example, that the Swedish monarchy is not a monarchy, but a hybrid, because eventually some characteristics of the ideal type of monarchy are not present? Or, for the same reasons, that the German parliamentary system is not a parliamentary system, but a hybrid? Or that Beethoven’s Ninth Symphony, because it contains a choir, is not a symphony but a hybrid?

In the case of rules and principles, even if one assumes that there are cases in which it is not clear whether a norm is a rule or a principle, this has no relation to the concept of ideal type. If one accepts that principles are norms that establish a *prima facie* right and that rules are norms that establish a definitive right, there seems to be no room for hybrids. In other words, there may be difficulties, in many cases, in defining whether one is dealing with a rule or a principle, but this difficulty does not stem from the existence of hybrid figures. It is just a classificatory difficulty.

Still, leaning on Aarnio’s ideas,<sup>33</sup> Neves speaks of “principle-like rules” and “rule-like principles”<sup>34</sup> as examples of what he calls hybrids. A concrete example, also borrowed from Aarnio, would be the principle of freedom of expression, which if applied in isolation, without colliding with another principle, behaves as a rule, because it can be used directly to the solution of a case.<sup>35</sup>

The impression that this is a hybrid stems from the fact that Neves — in my view, without any sound justification — argues that only rules are “applied directly to the solution of a case”. Moreover: when he combines two criteria to distinguish rules from principles, he automatically creates a hybrid figure. If one defines principles as norms subject to balancing and, at the same time, as norms that cannot be used directly in the solution of a case, one creates, through this very definition, the possibility of hybrids: when a norm is subject to balancing and, at the same time, is used for the solution of a case, it does not fit neatly into the category of principles (precisely because it directly addresses the case) or into the category of rules (since it is subject to balancing). However, the emergence of hybrid norms here has nothing to do with the concept of ideal types, but with the improper combination of distinctive criteria. This will be analysed in the next section.

## 5. THE CONCEPTS OF RULES AND PRINCIPLES

For Marcelo Neves, principles are norms that are at the reflexive level of the legal order, and are designed to guide the interpretation of other norms, without being, however, definite reasons for a decision-norm. Rules, in turn, are “norms that are able to function as definitive reasons for legal issues, but do not act as reflexive mechanisms”.<sup>36</sup>

In this passage quoted here and in many others,<sup>37</sup> the main distinguishing criterion advanced by Neves is the ability or inability of a norm

to serve as a definitive reason for a decision. This is why, whenever a norm is applied to directly decide a specific case, it is readily classified by Neves as a rule or as a hybrid (a rule-like principle). It seems to me that this is the source of many misunderstandings.

The example borrowed from Aarnio — a case in which the freedom of expression (a principle) does not conflict with any other principle and therefore serves directly to decide a case — may be useful to illustrate my point. To do so, I will quote something that I wrote some time ago:

*“It is incorrect to say that whenever a norm does not collide with another norm and is therefore directly subsumed, it is thus a rule. [...] The fact that a norm has been applied to its full extent means neither that it is a rule, nor that no optimization took place. [...] The fact that the application of principles does not always require balancing does not alter the fact that the application of principles may require balancing. This is the decisive point: only norms that may be subject to balancing can be optimized and therefore classified as principles.”<sup>38</sup>*

In Aarnio’s example, the fact that the freedom of expression does not clash, in some cases, with any other principle and may therefore be applied without balancing, in no way changes its classification as a principle, since this norm — freedom of expression — can be subject to balancing if the situation so requires. It does not turn it into a hybrid, or into a “rule-like principle” simply because in certain situations it may be directly applied to a case and decide it definitively. The possibility of being applied directly to decide cases has never been a criterion to distinguish between rules and principles, at least not in the version supported by Alexy. Thus, one cannot criticize his theory for not accepting hybrids, if in fact the hybrids only emerged when Neves introduced a new criterion, alien to Alexy’s model. Neves’ new criterion may even be useful for other analytical purposes, but not to raise objections to a classification that, good or not, was based on other criteria.

## 6. INTRAPRINCIPLE COLLISION

Neves argues that the idea that principles are *prima facie* unlimited cannot be accepted. In his view, the existence of what he calls “intraprinciple collisions” is incompatible with this unlimited character. An intraprinciple collision occurs for instance when “the same principle is simultaneously invoked as the foundation of the reasoning of both parties in a constitutional controversy”.<sup>39</sup> Therefore, according to Neves, it would be possible to say that even *prima facie* “every right grounded on a principle, when invoked by one party, will always be intrinsically limited by the same right invoked by the other”.<sup>40</sup>

I do not think that there is a difference between a collision between two distinct principles and a collision involving the same principle. Especially for the definition whether principles are *prima facie* unlimited or not, this

distinction seems to be irrelevant. And the examples Neves uses are not convincing for demonstrating that it is. Especially those examples related to cultural clashes — like the different values attributed to the right to life in Western culture and in some indigenous cultures — seem to have no direct connection with the theoretical distinction between principles and rules. These clashes — and all their implications — take place irrespective of the underlying theory of norms.

## 7. THE NORMATIVE AND THE INSTITUTIONAL LEVEL

Some of the usual objections raised to the distinction between principles and rules as well as to balancing and optimization often seem to unduly combine the normative and the institutional realms. One of the objections raised by Neves also fails to distinguish these two levels.

In his analysis of the relation between the European Court of Human Rights and national courts, Neves argues, considering in particular the German Constitutional Court, that in the current stage of European integration, “the narcissistic denial of the decisions of the European Court of Human Rights by national courts, based on an optimizing balancing of their domestic constitutional principles, does not seem acceptable”.<sup>41</sup>

The background of this criticism was the stance of the German Constitutional Court to mitigate the effects of the decision of European Court in the Caroline of Monaco (or Caroline of Hanover) case. Instead of accepting a binding and direct effect of the decisions of the European court, the German court ascribed to them merely an argumentative value. The German court also affirmed that it is the duty of national courts to take into account, as far as methodologically sustainable, the standards of the European Convention on Human Rights, as interpreted by the European Court.<sup>42</sup>

There is no doubt that in this and other cases, there is a tension between domestic and supranational jurisdiction. But what this tension has to do with the optimization idea is something that is not clear in Neves’ analysis. The fact that the German court — supposedly — has an “optimizing stance”<sup>43</sup> is not a sufficient argument. Similarly to what occurs in the example of so-called intraprinciple conflicts, the tension between different levels of jurisdiction is independent from the underlying theory of norms. It seems to be possible — and necessary — to address institutional and normative tensions independently, except in those cases in which the institutional tension is caused — or at least enhanced — by the underlying theory of norms. But Marcelo Neves does not raise any arguments to demonstrate that this is the case in the example he uses. The fact that the German Constitutional Court — supposedly — adopts an “optimizing stance” is an insufficient argument. It would be necessary to demonstrate the link between this stance and the institutional tension he describes. But this link simply does not exist.

## 8. MISUSE OF PRINCIPLES: THE BRAZIL OF TODAY AND THE BRAZIL OF YESTERYEAR

One of the most frequent arguments of those who intend to criticize the theory of principles and the use of optimization and balancing is the one that points to a misuse of these methods. The argument usually has the following structure: judges throughout Brazil, at every level, have taken the most odd decisions claiming that they are balancing principles, therefore the theory of principles must be rejected.<sup>44</sup>

Neves, even though from a different theoretical framework than those underlying the most common criticisms, also raises a similar objection. First, Neves argues that the model of principles is superadequate to Brazilian social and political reality, due to the lack of law's autonomy vis-à-vis other social variables.<sup>45</sup> This lack of autonomy subordinates the law "to private interests and other social factors", undermining the relevance of rules and principles.<sup>46</sup> Assuming that legal consistency is guaranteed only if there is a reciprocal relationship between theory and practice, and assuming also that this reciprocal relationship does not exist in Brazil, due to the subordination of the law to other interests, Neves concludes that the theoretical reasoning is weakened.<sup>47</sup>

According to Neves, rules, with their definitive character, would make the mentioned deviations more difficult, whereas principles could help to conceal private interests behind an apparently legal guise. In Neves' own, sharp words: "principles are more prone to misuse in the interpretation process".<sup>48</sup>

Thus, Neves supposes that the lack of autonomy of law, if not caused by, is at least strongly bolstered by the use of principles. The theory of principles would therefore be at least partially responsible, if not entirely, for contaminating the law with private interests and for other deviations. Resorting to principles would then largely serve the accommodation of concrete and particularistic interests.<sup>49</sup>

Even though I also recognize that there is a certain infatuation with principles in Brazil, which tends to create an environment prone to undue balancing and bad decisions, it does not seem to make sense to blame principles (and balancing itself) for the questionable effects that several commentators, including Marcelo Neves, appear to bestow them. Just as the criticism that points to an alleged irrationality in balancing, especially in Brazil, seems to assume that before the "discovery" of the theory of principles Brazilian jurisprudence had been an example of consistency, coherence, objectivity and rationality, features that would have been undermined by the fascination with principles, Neves' critique, according to which principles are the gate through which private interests enter the law and undermine its autonomy, seems to assume that before the theory of principles, such autonomy actually existed and that legal rules were given their due value and prevented economic, political, relational, and familial interests from blocking the realization of the constitutional provisions.

But it is Neves himself who points out that: "Brazilian constitutional history is marked by the problem of a poor capacity to reproduce the law

in a constitutionally consistent manner. Both the past and the present [...] point to this problem”.<sup>50</sup> However, in light of this, if the theory of principles is superadequate to the Brazilian case, the same conclusion would apply to everything that came before.<sup>51</sup> But — as much for the past as for the present — this is an *empirical question*, not merely a theoretical one. In this sense, it requires demonstration, not just supposition, however plausible it may be.

Still, even if we set aside the requirement for empirical demonstration and limit ourselves to the theoretical issue, it seems naive to assume that a model composed only by strict and absolute rules would make deviations more difficult because these would supposedly become more explicit.<sup>52</sup> It is thus no surprise that the model proposed by Neves does not entail a system composed only of rules and it does not reject balancing as an interpretative tool. Therefore, it is necessary to ask whether and why the alternative offered by Neves could increase the reciprocal relationship between constitutional theory and constitutional practice in Brazil.

## 9. THE CRITIQUE OF OPTIMIZATION

Marcelo Neves’ main criticism of the theory of principles, as developed by Alexy, is directed to the concept of optimization. Since Neves assumes that balancing is unavoidable, it could be argued that, despite the objections analysed so far in this article, his model largely coincides with that of Alexy, in which balancing is also a central element. The attempt to move away from Alexy is then based on a strategy that accepts balancing, without accepting optimization.

### 9.1. OPTIMIZATION AND THE SINGLE CORRECT ANSWER

One of the main reasons for the preceding affirmation is the link that Neves establishes between optimization, in Alexy’s sense, and the idea of single correct answer, as found in Dworkin.<sup>53</sup> It is not the case here to analyse in depth the debate on the Dworkinian idea of single correct answer.<sup>54</sup> It suffices: (1) to refer to the objection that Alexy himself raised to the thesis of a single answer, which, as he said, is “destined for failure”<sup>55</sup> and (2) to note that, if optimizing were “seeking a single correct answer”, then the legislator would never be free to legislate, since this freedom is intrinsically based on the existence of different (correct) answers to the same problem.<sup>56</sup>

### 9.2. AN ALTERNATIVE TO OPTIMIZATION?

Since Neves accepts balancing as unavoidable and, at the same time, rejects the idea of optimization (although, in my view, for the wrong reasons, because he does so based on an unjustified association between optimization and single correct answer), one hopes to be presented with an alternative model. In other words, the reader of Marcelo Neves’ book who accepts

the objections raised to what he calls “optimizing balancing” surely expects Neves to present his own model. As a matter of fact, this should be the main expectation of any reader. At this point, however, it seems to me that this expectation is not fulfilled.

Neves uses the Brazilian Supreme Court decision in the ADI 3510 case, on the use of embryonic stem cells for research and therapy, as an example of why an optimizing balancing would be inadequate. At this point, Neves adds something to his criticism of optimization, something that goes beyond the (mistaken) association with the idea of a single correct answer. According to Neves, the inadequacy of the optimization thesis is due to the fact that the optimizing balancing is unsuitable for considering variables that go beyond the rights at stake and incorporating the impact of a decision “on the various social spheres involved”.<sup>57</sup>

However, Neves does not justify why the balancing based on the idea of optimization would be unable to take into account other variables that go beyond the constitutional rights at stake. The second example he uses also does not clarify his argument. According to Neves, in the decision of the ADPF 101 case, on the importation of second-hand tires:

*“one should not speak of an optimization of principles, but of a reaction to the danger and to the trend of economic dedifferentiation of society at the expense of an order based on fundamental rights. [...] the issue was not limited to the individual interests of the parties to the case (free enterprise versus the right to health), but also the impact on the relation among social spheres: the health system, necessarily associated to a healthy environment, vis-à-vis the economy”.*<sup>58</sup>

He concludes, partly based on Ladeur, that:

*“the optimizing balancing paradigm is strongly linked to the position of groups and therefore ‘is both cognitively and normatively focused especially on the short-term effects, neglecting the long-term ones’”*<sup>59</sup>

It is easy to notice that there is no justification for Neves’ objections. He simply states that the so-called “optimizing balancing” has this or that weakness, using this or that decision as an illustration, even if it is not clear that some form of balancing was used at all in these decisions. He quotes a number of authors who are critical of balancing, but in the end it is hard to know what in the concept of optimization justifies Neves’ conclusions.

### 9.3. THE VALUE OF PRECEDENTS

Moreover, Neves’ insists on ignoring the value of precedents within the theory of principles. As already mentioned, Neves often argues that balancing is connected to an ad hoc rationality “without a long-term perspective”,<sup>60</sup> and that the reasoning tends to be limited to the case to be decided and “does not offer any criteria for reducing the ‘surprise effect’ in future cases”.<sup>61</sup>

However, there is nothing within the theory of principles that limits the reasoning to the case currently being decided, nor any feature hostile to the use of judicial precedents. The recurring reference to precedents throughout Alexy's works, as well as in the works of other supporters of his theory of principles, is clear evidence of this.<sup>62</sup> As I have stressed elsewhere, legal uncertainty is closely associated to the idea of *ad hoc* decisions, which tend to occur where no social control is present, irrespective of method of legal interpretation and of the theory that underlies this method.<sup>63</sup>

#### 9.4. COMPARATIVE WEIGHING

As stated above, the reader of Marcelo Neves' book certainly expects him to provide his own model as an alternative to the model based on the idea of optimization. Despite the several objections that Neves raises to Alexy's theory, one of his central ideas — the need to balance principles — is not rejected. As already mentioned more than once above, Neves himself says: "There is no doubt that the requirement of weighing or balancing, when constitutional principles (and norms in general) conflict, is tout court unavoidable".<sup>64</sup>

Thus, in spite of some marginal disagreements, which, as I tried to argue throughout this article, are not convincing, the central dispute is Neves' rejection of the idea of optimization, which is central to Alexy's theory. As seen above, this rejection is based on a misapprehension of the idea of optimization within the theory of principles. Contrary to what Neves argues, optimization does not imply the existence of a single correct answer, nor is it unable to account for variables that go beyond the rights at stake. Moreover, its effects are not limited to the case currently being decided and, therefore, it is not synonymous with *ad hoc* reasoning.

Nevertheless, even exempting optimization from these criticisms, it could still be possible that Neves provides a model of balancing that could be *even better* than that based on the idea of optimization. But what is his model? What kind of balancing does his model embrace (since, in his own words, balancing is unavoidable after all)?

Marcelo Neves proposes a model that features what he calls "comparative balancing".<sup>65</sup> It is not easy, however, to understand the characteristics that differentiate this kind of balancing from that which Neves calls "optimizing balancing". At first, Neves only states that "[t]o speak of optimization requires assuming not only comparability but also commensurability".<sup>66</sup> This assumption, however, is not justified. It serves merely as a bridge for Neves' conclusion that: since fundamental rights are incommensurable, then optimizing balancing is inadequate. But this is a fallacy, because it is not correct to assume that balancing — whatever it may be — depends on commensurability. Precisely the opposite is true: balancing is only required when there is incommensurability, since when there is a common metric between two things, there is no balancing, but simple measurement. In our everyday lives, we are constantly faced with

incommensurable options for actions and decisions. This, however, does not prevent us from taking decisions nor make them irrational ones.<sup>67</sup>

The difficulty in understanding what Neves calls “comparative balancing” derives therefore from his strategy to define it mainly through a contrast to the negative characteristics that Neves sees in the idea of optimization. Thus, what characterizes his comparative balancing would be the fact that it does not have any of the supposed weaknesses of optimizing balancing. But if, as I attempted to demonstrate above, the weaknesses of the “optimizing balancing” seem to stem from Neves’ own interpretation (in my view a mistaken one) and not from the concept of optimization itself, then the differences between both forms of balancing simply crumble. Furthermore, it is symptomatic that, unlike in works based on the theory of principles, Neves does not strive to show how his “comparative balancing” could work in practice, by means of (real or hypothetical) examples. It is insufficient to say that comparative balancing has this or that strength or that it does not have this or that weakness that the “optimizing balancing” supposedly has. This must be demonstrated. This demonstration, however, is not found in Neves’ book.<sup>68</sup>

## 10. CONCLUSION: JUDGE IOLAUS

A last attempt to try to understand Neves’ model and what distinguishes it from the theory of principles would be through the figure of Judge Iolaus. But this last attempt is also unsuccessful.

In Greek mythology, Iolaus was Hercules’ nephew and helped him in the fight against Hydra. Just as Dworkin used the figure of Judge Hercules, as mentioned above, Neves uses Judge Iolaus. To become familiar with him, a longer quotation seems necessary:

*“Judge Iolaus [...] is not erratically subordinated to the power of principles [...]. He does not change his position ad hoc to satisfy every new strategy in which principles are invoked. He is not impressed by principle-based rhetoric. [...]. He does not recast a new principle in every case in order to cover up his actions in favour of private interests associated to power, money, religion, kinship, friendship, good relations etc. In other words, he does not use principle-based rhetoric to impress the parties to the legal disputes and hence conceal his inconsistent legal practice”.<sup>69</sup>*

But moreover, according to Neves, Iolaus “does not put himself in a position of intellectual superiority” and “does not isolate law from its social context”. Sometimes, he even resorts to balancing, but does so sparingly. Not surprisingly, Iolaus, like Neves, rejects the “optimizing balancing”, but accepts a comparative weighing. He considers all points of view, “from the social systems as well as from individuals and groups”. Iolaus rejects ad hoc balancing, takes judicial precedents into account and knows that his decision should serve as guidance for future cases. He is not naive and knows that the legal world does not begin again at every case!<sup>70</sup>

As it is easy to notice, like his uncle Hercules, Iolaus is a great judge and an exceptional being. Therefore, we can only hope that after further careful consideration he will realize that, unlike what Marcelo Neves claims, there is no difference between “optimizing balancing” and “comparative balancing”. I am sure that if Iolaus read Alexy and other advocates of the theory of principles unhurriedly, he would realize that optimization not only does not reject, but rather, requires consideration of all the variables that Marcelo Neves argues it despises.

In the end, Iolaus will realize that the problems Neves sees in the theory of principles are actually the result of an unsound equalisation between this theory and an undiscerning principle-based reasoning not unusual among Brazilian legal practitioners. This undiscerning practice may suffer from many of the weaknesses that Neves identifies, often resorting to the terminology of the theory of principles in an attempt to enhance its legitimacy and rationality. Still, it seems imperative to make some clear distinctions: when a theory falls prey to amateurish and undue appropriation, one cannot blame the theory. In other words, a theory is not invalid just because it is improperly used by some Brazilian legal scholars and practitioners. Deep down Neves knows this, but refuses to admit it. At one point, when criticizing a decision of the Brazilian Supreme Court that made rhetorical use of principles, Neves, mentions that the vote of the judge rapporteur “cites [...] Ronald Dworkin, Robert Alexy and Virgilio Afonso da Silva”. But the same Neves surprisingly argues that “it is not relevant [...] to discuss the compatibility of the reasoning underlying the opinion of the court with the views of the mentioned authors”.<sup>71</sup>

I am sure that Iolaus would never argue like this. Iolaus would probably say that if there is something truly important to discuss when using a given practice to reject a given theory, it is to determine whether the practice really follows the theory. Therefore, all of Neves’ objections that are based on the “use and misuse of principles” fall apart. Were it not so, if one day a judge uses Neves’ book in a completely distorted fashion to justify a decision whose purpose is simply to conceal private, economic, political, relational or familial interests, Neves could only come to one conclusion: his own model is wrong. After all, as he argues, it is irrelevant to know if what a judge says is really compatible with the theory he claims to use.

>> ENDNOTES

- <sup>1</sup> Virgílio Afonso da Silva, "Interpretação constitucional e sincretismo metodológico", in Virgílio Afonso da Silva (org.), *Interpretação constitucional*, São Paulo: Malheiros, 2005, 132-133.
- <sup>2</sup> *Ibid.*, at 120.
- <sup>3</sup> See Marcelo Neves, *Entre Hidra e Hércules: princípios e regras constitucionais como diferença paradoxal do sistema jurídico*, São Paulo: Martins Fontes, 2013, at 185.
- <sup>4</sup> See Virgílio Afonso da Silva, "La interpretación conforme a la constitución: entre la trivialidad y la centralización judicial", *Cuestiones Constitucionales* 12 (2005): 3-28; a Brazilian translation was published in the following year: Virgílio Afonso da Silva, "Interpretação conforme a constituição: entre a trivialidade e a centralização judicial", *Revista Direito GV* 3 (2006): 191-210.
- <sup>5</sup> Virgílio Afonso da Silva, "La interpretación conforme a la constitución", at 4; Virgílio Afonso da Silva, "Interpretação conforme a constituição: entre a trivialidade e a centralização judicial", at 192.
- <sup>6</sup> Konrad Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 19a. ed., Heidelberg: C. F. Müller, 1993, at 32 (n. 85).
- <sup>7</sup> See Marcelo Neves, *Entre Hidra e Hércules*, p. 186.
- <sup>8</sup> *Ibid.*
- <sup>9</sup> An in-depth analysis of this issue would go beyond the scope of this article. For a more detailed analysis of the incompatibility between both theories, see Virgílio Afonso da Silva, "Interpretação constitucional e sincretismo metodológico", at 136.
- <sup>10</sup> Marcelo Neves, *Entre Hidra e Hércules*, at 187.
- <sup>11</sup> See *Ibid.*, 187-188.
- <sup>12</sup> Robert Alexy, *Theorie der Grundrechte*, 2<sup>nd</sup>. ed., Frankfurt am Main: Suhrkamp, 1994, 21-22 (English translation: Robert Alexy, *A Theory of Constitutional Rights*, translated by Julian Rivers, Oxford: Oxford University Press, 2002, at 5).
- <sup>13</sup> Robert Alexy, *Theorie der Grundrechte*, at 22 [English translation, at 5-6].
- <sup>14</sup> Virgílio Afonso da Silva, "Interpretação constitucional e sincretismo metodológico", at 118, note 6.
- <sup>15</sup> See Virgílio Afonso da Silva, *Direitos fundamentais: conteúdo essencial, restrições e eficácia*, 2<sup>nd</sup>. ed., São Paulo: Malheiros, 2010, at 162.
- <sup>16</sup> Virgílio Afonso da Silva, "Interpretação constitucional e sincretismo metodológico", at 121.
- <sup>17</sup> First found in , Ronald Dworkin, "Hard Cases", *Harvard Law Review* 88:6 (1975), at 1083, later published in Ronald Dworkin, *Taking Rights Seriously*, Cambridge, Mass.: Harvard University Press, 1977, 81-130.
- <sup>18</sup> Marcelo Neves, *Entre Hidra e Hércules*, at XVI.
- <sup>19</sup> *Ibid.*, at XVII.
- <sup>20</sup> *Ibid.*
- <sup>21</sup> *Ibid.*, at XVIII.
- <sup>22</sup> See Robert Alexy, *Theorie der Grundrechte*, at 72 ss; [English translation at 45-47].
- <sup>23</sup> See Jan-Reinard Sieckmann, *Regelmodelle und Prinzipienmodelle des Rechtssystems*, Baden-Baden: Nomos, 1990, at 53; Martin Borowski, *Grundrechte als Prinzipien*, Baden-Baden: Nomos, 1998, at 61; Virgílio Afonso da Silva, *Grundrechte und gesetzgeberische Spielräume*, Baden-Baden: Nomos, 2003, at 38.
- <sup>24</sup> See Robert Alexy, "Zum Begriff des Rechtsprinzips", in Robert Alexy, *Recht, Vernunft, Diskurs: Studien zur Rechtsphilosophie*, Frankfurt am Main: Suhrkamp, 1995, at 184.
- <sup>25</sup> Marcelo Neves, *Entre Hidra e Hércules*, at 23.
- <sup>26</sup> *Ibid.*
- <sup>27</sup> Marcelo Neves seems to be aware of this problem when he states that one could simply say that his example is misleading, because legality in criminal law would be considered a

principle simply because it is a general norm. Still, he insists that the norm could be considered a rule, “given its ability to serve as definitive and immediate criterion for deciding a case” (Ibid, at 23, note 61).

- <sup>28</sup> Virgílio Afonso da Silva, “Princípios e regras: mitos e equívocos acerca de uma distinção”, *Revista Latino-Americana de Estudos Constitucionais* 1 (2003), at 614 (emphasis added).
- <sup>29</sup> Marcelo Neves, *Entre Hidra e Hércules*, at 104.
- <sup>30</sup> See Max Weber, “Die ‘Objektivität’ sozialwissenschaftlicher und sozialpolitischer Erkenntnis”, *Gesammelte Aufsätze zur Wissenschaftslehre*, 3<sup>rd</sup>. ed., Tübingen: J.C.B. Mohr, 1968, at 191.
- <sup>31</sup> For a critique on the usefulness of ideal types in the legal realm, see, for example, Florian von Alemann, *Die Handlungsform der interinstitutionellen Vereinbarung*, Berlin: Springer, 2006, at 12.
- <sup>32</sup> Max Weber, “Die ‘Objektivität’ sozialwissenschaftlicher und sozialpolitischer Erkenntnis”, at 191.
- <sup>33</sup> Aulis Aarnio, “Taking Rules Seriously”, *Archiv für Rechts- und Sozialphilosophie Beiheft* 42 (1989): 180-192.
- <sup>34</sup> Marcelo Neves, *Entre Hidra e Hércules*, at 105.
- <sup>35</sup> Ibid.
- <sup>36</sup> Ibid., at 109.
- <sup>37</sup> See for example page 84: “principles cannot be direct reasons for concrete decisions”.
- <sup>38</sup> Virgílio Afonso da Silva, *Grundrechte und gesetzgeberische Spielräume*, 65-66
- <sup>39</sup> Marcelo Neves, *Entre Hidra e Hércules*, at 162.
- <sup>40</sup> Ibid.
- <sup>41</sup> Ibid., at 158.
- <sup>42</sup> See BVerfGE 111, 307 (323).
- <sup>43</sup> Marcelo Neves, *Entre Hidra e Hércules*, at 159.
- <sup>44</sup> See, for example, Carlos Ari Sundfeld, “Princípio é preguiça?”, in Carlos Ari Sundfeld, *Direito administrativo para céticos*, 2a. ed., São Paulo: Malheiros, 2014, 205-229.
- <sup>45</sup> See Marcelo Neves, *Entre Hidra e Hércules*, at 189.
- <sup>46</sup> Ibid.
- <sup>47</sup> Ibid., at 190.
- <sup>48</sup> Ibid.
- <sup>49</sup> Ibid., at 191.
- <sup>50</sup> Ibid., at 190. The usual references here — which are also made by Neves — are Sérgio Buarque de Hollanda and Raymundo Faoro (see Sérgio Buarque de Hollanda, *Raízes do Brasil*, 26<sup>th</sup>. ed., São Paulo: Companhia das Letras, 1995; Raymundo Faoro, *Os donos do poder: formação do patronato político brasileiro*, 2<sup>nd</sup>. ed., Porto Alegre/São Paulo: Globo/Edusp, 1975).
- <sup>51</sup> This is one of the conclusions of Marcelo Neves, *Verfassung und Positivität des Rechts in der peripheren Moderne: eine theoretische Betrachtung und Interpretation des Falls Brasilien*, Berlin: Duncker & Humblot, 1992.
- <sup>52</sup> See Marcelo Neves, *Entre Hidra e Hércules*, at 190.
- <sup>53</sup> Ibid., at 141.
- <sup>54</sup> See, for example, Ronald Dworkin, *A Matter of Principle*, Cambridge (Mass.): Harvard University Press, 1985, at 119 ss.
- <sup>55</sup> See Robert Alexy, *Theorie der Grundrechte*, at 519 [English translation, at 385].
- <sup>56</sup> I cannot develop this argument in detail here. For an analysis of the relation between optimization and legislative freedom, see Virgílio Afonso da Silva, *Grundrechte und gesetzgeberische Spielräume*, at 113-209. See also Virgílio Afonso da Silva, “Direitos fundamentais e liberdades legislativas: o papel dos princípios formais”, in Fernando Alves Correia, Jónatas Machado & João Carlos Loureiro (orgs.), *Estudos em homenagem ao Prof. Doutor José Joaquim Gomes Canotilho*, vol. III, Coimbra: Coimbra Editora, 2012: 915-937.

<sup>57</sup> Marcelo Neves, *Entre Hidra e Hércules*, at 146.

<sup>58</sup> *Ibid.*, at 147.

<sup>59</sup> *Ibid.*, at 148. Ladeur's aforementioned work is Karl-Heinz Ladeur, *Der Staat gegen die Gesellschaft: zur Verteidigung der Rationalität der "Privatrechtsgesellschaft"*, Tübingen: Mohr Siebeck, 2006, p. 367.

<sup>60</sup> Marcelo Neves, *Entre Hidra e Hércules*, at 196.

<sup>61</sup> *Ibid.*, at 199.

<sup>62</sup> For a more evident example, see Robert Alexy, *Theorie der Grundrechte*, 504-508 [English translation, 373-377].

<sup>63</sup> See Virgilio Afonso da Silva, *Direitos fundamentais*, at 150.

<sup>64</sup> Marcelo Neves, *Entre Hidra e Hércules*, at 141.

<sup>65</sup> *Ibid.*, at 151.

<sup>66</sup> *Ibid.*

<sup>67</sup> For a further development of this argument, and others related to incommensurability, see Virgilio Afonso da Silva, "Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision", *Oxford Journal of Legal Studies* 31:2 (2011): 273-301.

<sup>68</sup> The examples Neves uses, as mentioned above (ADI 3510, ADPF 101, Caroline of Monaco), do not serve to demonstrate how his "comparative balancing" should be applied. They serve to show a supposed inadequacy of the "optimizing balancing". As I argued above, in all cases, this inadequacy is not really shown.

<sup>69</sup> Marcelo Neves, *Entre Hidra e Hércules*, 221-222.

<sup>70</sup> *Ibid.*, at 222.

<sup>71</sup> *Ibid.*, at 211.

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