

ABSTRACT WEIGHT REVISITED: CONCEPT AND CHALLENGES

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UDK: 340.115:159.955.3

340.115:165.321

340.115:303.092

DOI: 10.3935/zpfz.76.2.3

Izvorni znanstveni rad

Primljeno: ožujak 2026.

This article examines the concept of abstract weight within Alexy's weight formula and the grounds on which it can be identified and employed as a premise in balancing. It argues that abstract weight is not a residual or merely intuitive variable but performs a distinct structural function: it expresses a defeasible priority between competing principles that operates independently of the case-specific intensity of interference. The article reconstructs abstract weight as a relational ordering premise, analytically distinct from concrete weight and epistemic reliability, and responds to two challenges: the non-deducibility objection, which contests its role in internal justification, and the epistemic impossibility objection, which questions whether it admits of determinate identification.

Key words: abstract weight; weight formula; balancing; legal principles; proportionality

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1. INTRODUCTION

The literature examining Robert Alexy's theses is vast and well known.¹ Moreover, the proportionality test has been employed by numerous jurisdictions to resolve countless hard cases. Notwithstanding this, it is possible to identify an underexplored problem: within the specialist literature, there is no abundance of studies that specify what abstract weight is or how it is to be identified. Nor is it beyond doubt that its inclusion in the weight formula is justified.

In light of this, the aim of the present article is to analyse what the notion of abstract weight refers to and what type of argumentation it seeks to clarify (or what type of argumentation may be advanced under the heading of abstract weight). More precisely, I shall address what abstract weight is and what kinds of discourse may be employed to identify it.

My discussion will be situated within part of the principlist literature of Alexian orientation. By this I include all those who adopt Alexy's theoretical framework and language, whether directly or by presupposition. I do not aim – nor would it be possible – to offer an exhaustive analysis of all this literature, and it is unnecessary to dwell at length upon aspects of the proportionality test that are already well known and widely debated. I shall focus, instead, on those discussions that have addressed abstract weight with particular clarity.

A word is in order on the standpoint from which the analysis is conducted. The argument that follows is offered as an internal rational reconstruction of Alexy's framework, rather than as an external critique of it or a free-standing theory of principles of my own. I take the framework's central commitments – the principle-theoretic conception of constitutional rights, the laws of balancing, and the embedding of balancing within the theory of rational practical discourse

¹ For overviews of the proportionality debate within the Alexian framework, see Klatt, M.; Meister, M., *The Constitutional Structure of Proportionality*, Oxford University Press, Oxford, 2012; and Bernal Pulido, C., *El principio de proporcionalidad y los derechos fundamentales*, 4th ed., Universidad Externado de Colombia, Bogotá, 2014. On the diffusion of proportionality across jurisdictions, see also Stone Sweet, A.; Mathews, J., *Proportionality Balancing and Global Constitutionalism*, Columbia Journal of Transnational Law, vol. 47, 2008, pp. 72 – 164; and Barak, A., *Proportionality: Constitutional Rights and Their Limitations*, Cambridge University Press, Cambridge, 2012. On the comparative scarcity of studies devoted specifically to abstract weight, see Moreso, J. J., *Alexy y la aritmética de la ponderación*, in: García Manrique, R. (ed.), *Derechos sociales y ponderación*, Fundación Coloquio Jurídico Europeo, Madrid, 2009, pp. 223 – 242; Sieckmann, J.-R., *Balancing, optimisation, and Alexy's "weight formula"*, in: Sieckmann, J.-R. (ed.), *Legal reasoning: The methods of balancing*, Franz Steiner Verlag, Stuttgart, 2010, pp. 101 – 120; and Klatt, M.; Meister, M., *op. cit.*

– as given, and ask what their best development requires us to say about abstract weight. The criterion of correctness employed throughout is accordingly internal: a claim about abstract weight is warranted when it most adequately concretises the requirements of argumentative rationality that the theory itself presupposes, and not when it is deducible from some external positivist or semantic premise. This standpoint is not incidental. As will become clear, both the case for retaining abstract weight within the internal justification of balancing and the assessment of the methods available for identifying it, depend upon it. It also underwrites the methodological recommendation defended in the conclusions: that abstract weight be identified, so far as the legal materials allow, by the most reliably ascertainable means, with any resort to more contested, construction-based grounds requiring a correspondingly heavier justification.

To achieve this aim, I shall proceed as follows. In Section 2, I shall address the question of what abstract weight is. In Section 3, I face what kinds of discourse may be employed to identify it. To do so, I will present and respond to two challenges: first, the challenge of whether its incorporation into the weight formula is justified; and second, an epistemic challenge, namely the problem of how abstract weight is to be identified.

2. CONCEPTUALIZATION

Abstract weight is one of the components of the weight formula: $G(P_i, P_j, C) = (I_i \cdot W_i \cdot R_i) / (I_j \cdot W_j \cdot R_j)$. This means, at the very least, that it is a necessary element for offering a rational argument that resolves hard cases involving conflicts between rights.²

The weight formula expresses the weight of principle P_i as against principle P_j in the circumstances C of the case. Each variable captures a distinct dimension of the collision. The concrete weight represents the intensity of the interference that the measure under examination produces upon P_i : how seriously is the principle in question affected? I_j symmetrically represents the importance of satisfying P_j by means of that same measure. This relationship between intensity and importance is what Alexy formulates as the first law of balancing: “the greater the degree of non-satisfaction of, or detriment to, one principle, the greater

² For the weight formula, the collision law, and the two laws of balancing on which they rest, see Alexy, R., *A Theory of Constitutional Rights*, Oxford University Press, Oxford, 2002, esp. the Postscript; and Alexy, R., *The Weight Formula*, in: Stelmach, J.; Brożek, B.; Załuski, W. (eds.), *Studies in the Philosophy of Law*, vol. 3, Jagiellonian University Press, Kraków, 2007, pp. 9 – 27.

must be the importance of satisfying the other”.³ W_i and W_j are the abstract weights of the principles, that is, their general relevance within the legal system independently of the particular case. Finally, R_i and R_j express the epistemic reliability of the empirical and normative premises underpinning the foregoing assessments: with what degree of certainty do we know that the interference with P_i is as intense as we claim, or that the satisfaction of P_j is as important as asserted? These variables capture the second law of balancing, which is epistemic in character: “the more heavily an interference with a constitutional right weighs, the greater must be the certainty of its underlying premises”.⁴

The weight formula is not an algorithm that automatically generates correct answers.⁵ The two laws explain why: the first requires the comparison of substantive intensities, and the second requires that such comparison be grounded in epistemically sound premises; both conditions must be satisfied simultaneously. Its value resides, therefore, in its function as a device for discursive rationalisation. By compelling the interpreter to decompose the balancing judgement into explicit variables – intensity, abstract weight, epistemic reliability – the formula prevents reasons from remaining concealed and renders intersubjective scrutiny of the decision possible. Any court, party to proceedings, or legal scholar may examine the value assigned to each variable, demand its justification, and identify inconsistencies.

³ Alexy, R., *Law's Ideal Dimension*, Oxford University Press, Oxford, 2021, p. 154.

⁴ *Ibid.*, p. 167.

⁵ That the formula is not an algorithm does not entail that its structure resists formal treatment. A growing body of work in the field of artificial intelligence and law has developed formal models of the balancing of principles: as teleological reasoning about the impact of alternative decisions on the values at stake, as argumentation frameworks in which principles are norms promoting values to different degrees, or as coherence-based evaluation of competing weight assignments. These models are relevant to the present discussion because they show that the variables of the balancing judgement admit of precise representation, and that disagreements about them can be located exactly. What they take as an input, rather than resolve, is the question addressed in this article: on what grounds the relative importance of the colliding principles is to be identified. For representative contributions, see Sartor, G., *Doing Justice to Rights and Values: Teleological Reasoning and Proportionality*, *Artificial Intelligence and Law*, vol. 18, no. 2, 2010, pp. 175 – 215; Zurek, T.; Araszkiewicz, M.; Stachura-Zurek, D., *Reasoning with Principles*, *Expert Systems with Applications*, vol. 210, 2022, art. 118496; and, most recently, Araszkiewicz, M.; Zurek, T.; Wyner, A. Z.; van Engers, T. M., *Tipping the Scales: Balancing Principles*, in: *Proceedings of the Twentieth International Conference on Artificial Intelligence and Law (ICAIL 2025)*, ACM, New York, 2025, pp. 258 – 267.

The formula is the technical expression of Alexy's collision law: a collision between principles is resolved by establishing a relationship of conditional precedence. It is not said that P_i always prevails over P_j , but rather that P_i prevails over P_j under the conditions C of the case. The formula operationalises precisely that conditionality: the quotient G is calculated as a function of the particular circumstances, such that the same interference may be justified in one context and unjustified in another.

Furthermore, the formula is valuable because it responds to the problem of the structural discretion of the legislature and the constitutional judge, without dissolving that discretion into arbitrariness or eliminating it by decree. When the result of the quotient is exactly 1 – the case of a stalemate – the formula openly acknowledges that neither principle takes precedence, and that the decision falls to the democratically legitimated organ.⁶

All of these presuppositions reflect the importance of the argumentation that must be offered in respect of each variable. Regarding concrete weight and the reliability of the premises, numerous open debates exist. Abstract weight, by contrast, tends to receive unduly hasty treatment. In particular, as Alexy himself rightly notes, it is assumed that in most cases abstract weights are equal and therefore cancel one another out.⁷ As a result, the topic is seldom examined in depth or subjected to critical scrutiny. It is clear, however, that abstract weight involves an argumentative burden, and that this burden may alter the outcome of the balancing exercise.

Alexy states that, when applying the weight formula, both the concrete and the abstract weight of each principle must be considered normatively relevant.⁸ Concrete weight refers to the place a principle occupies in the hierarchy of reasons in the particular case, determined by the relationship between how much is sacrificed by affecting it and how much is gained by satisfying the principle that competes with it. Whatever abstract weight may be, in order to have its own conceptual content, it cannot be superimposed upon that notion. As Alexy rightly notes, interferences in principles are always concrete. For this reason, the intensity of interference is a concrete magnitude. As such, it is distinguished from the abstract weight of P_i .⁹

⁶ On the structural discretion of the legislature in cases of stalemate, see Alexy, R., *A Theory of Constitutional Rights*, *op. cit.* (fn. 2), Postscript; and Alexy, R., *op. cit.* (fn. 3), on the two kinds of discretion.

⁷ Alexy, R., *op. cit.* (fn. 3), p. 158.

⁸ Alexy, R., *A Theory of Constitutional Rights*, *op. cit.* (fn. 2), pp. 418 – 419.

⁹ *Ibid.*, pp. 405 – 406.

What is abstract weight? For Alexy, the abstract weight of a principle is “the weight assigned to P_i in relation to other principles, independently of the circumstances of any concrete case”.¹⁰ Abstract weight is distinguished from the intensity of interference, which requires a necessarily concrete assessment. Abstract weight, by contrast, is not tied to the circumstances of the case. This difference entails a categorical distinction between both concepts and, consequently, necessarily a different formal representation of each within the weight formula.¹¹

In the first place, the notion of abstract weight is relational: it refers to a set of pro tanto reasons in favour of a principle P_1 as against another principle P_2 in a situation of mutual inconsistency. The abstract weight of a principle is always defined in relation to the other principle with which it collides. There is no such thing as a “pure” abstract weight of the right to life independent of what it is being weighed against. Nor is it an intrinsic characteristic of each principle. Abstract weight is a way of presenting the result of a preference relation between two principles. Depending on which principles come into conflict with one another, the abstract weight of a principle will vary.¹²

As may be seen, abstract weight does not account for an abstract ordering amongst all constitutionally recognised principles, but rather seeks to reflect a set of ordering discourses of one principle in comparison with another (P_1 and P_2) without taking into account the facts of the individual case under analysis. In that sense, it expresses considerations that are prior to and autonomous from the analysis of a concrete case, yet associated with one another by reason of the

¹⁰ Alexy, R., *op. cit.* (fn. 3), p. 147. See also Klatt, M.; Meister, M., *op. cit.* (fn. 1), pp. 8 – 15.

¹¹ Alexy, R., *op. cit.* (fn. 3), p. 162. See also Sieckmann, J.-R., *op. cit.* (fn. 1), pp. 105 – 107; Klatt, M.; Meister, M., *op. cit.* (fn. 1), pp. 27 – 41.

¹² Alexy, R., *A Theory of Constitutional Rights*, *op. cit.* (fn. 2), pp. 407 – 408. The determination of abstract weight is a matter of evaluative judgements concerning degrees of compliance with principles in hypothetical scenarios involving a principle P_1 in relation to a principle P_2 . This may be interpreted in the following ways: (1) If we are in a world $P_1 \cdot P_2$, then having a preference for P_1 means that we would rather lose P_2 and retain P_1 than lose P_1 and retain P_2 ; (2) If we are in a world $P_1 \cdot \neg P_2$, then having a preference for P_1 means that we would rather the world remain as it is than obtain P_2 at the cost of losing P_1 ; (3) If we are in a world $\neg P_1 \cdot P_2$, then having a preference for P_1 means that we would rather move from $\neg P_1$ to P_1 , regardless of whether this entails a transition from P_2 to $\neg P_2$; (4) If we are in a world $\neg P_1 \cdot \neg P_2$, then having a preference for P_1 means that we would rather obtain P_1 and continue without P_2 than obtain P_2 and continue without P_1 .

normative conflict.¹³ Moreover, every decision resolving a balancing operation must be articulated according to the argumentative structures proper to rational practical discourse. This means that each judge, when weighing the importance of P1 against P2, must formulate their arguments under universal criteria: what is affirmed for this case must also be applied to resolve analogous cases. In this way, abstract weight is not conceived as a merely subjective assessment but as a premise that must satisfy the demands of rationality, thereby guaranteeing the internal consistency and predictability of the law.

In the second place, abstract weight is context-relative – but the word “context” must be handled with care, because here it works on two different levels that should not be run together. The first level is the individual case, and at this level abstract weight does not vary: it takes no account of how the principle is concretised, of any derived norms, or of how seriously the principle is affected or satisfied on the facts of the case, all of which are the work of concrete weight rather than abstract weight. The second level is the legal order itself, and at this level abstract weight does vary: the preference it records between two principles holds only for a given constitutional system at a given time, and can change with the place, the period, and the institutional design. The two levels are independent: the weight of a principle can remain constant across every fact of a particular case and still shift as the surrounding legal order changes. This is exactly what “abstract” means here – not independence from every context, but independence from the facts of the case. Abstract weight is thus abstract relative to the case and relative to the system; it is not absolute. The diachronic variation discussed below in connection with the Solange jurisprudence is an instance of change of the second kind – change in the legal order – rather than of concretisation in a particular case.

In the third place, abstract weight fulfils a defined structural role within the weight formula, the scope of which may be understood in relation to concrete weight. Three possible relationships arise: (i) the abstract weights differ whilst the intensities of the concrete weights are equal, in which case the entire outcome of the balancing exercise depends, in part, upon the abstract weight; (ii) the abstract weights are equal and the intensities of the concrete weights differ, so that it is the latter that determine the outcome; and (iii) both the abstract weights and the intensities of the concrete weights differ, with the result that all four values prove decisive for the calculation.¹⁴ This range of scenarios reveals

¹³ See for all Sieckmann, J.-R., *Concepciones de la ponderación: Optimización y la “fórmula del peso” de Robert Alexy*, in: Clérico, L.; Beade, G. (eds.), *Desafíos a la ponderación*, Universidad Externado de Colombia, Bogotá, 2011, p. 215.

¹⁴ Alexy, R., *op. cit.* (fn. 3), p. 166.

that abstract weight is operatively determinative, particularly in cases where the intensities do not resolve the matter on their own, which confers upon it a subsidiary yet irreplaceable function within the formal structure of the formula.

For this function to be fulfilled, abstract weight must be representable on the same scale as the intensities of interference. Alexy employs for both variables the same triadic geometric scale – light, moderate, and serious, expressed as 2^0 , 2^1 , and 2^2 , that is, 1, 2, and 4.¹⁵ This design makes possible what may be termed comprehensive compensation: a light interference with a principle of high abstract weight may be equivalent, in terms of the formula, to a serious interference with a principle of low abstract weight. The common representation on a geometric scale does not imply, however, that both magnitudes are conceptually homogeneous; as noted above, abstract weight and the intensity of interference correspond to assessments of different kinds. It should be acknowledged that this very feature – the placing of intensities of interference and degrees of abstract weight on a common scale – has been among the most criticised aspects of the formula, on the ground that the magnitudes are incommensurable. Two considerations temper the objection. First, the structural claim advanced here requires only ordinal comparability on a shared scale, not the cardinal measurement that the criticism targets. Second, on Alexy's own account commensurability is secured not by measurement but by conducting the comparison from a common point of view – that of the constitution – so that, although the resulting judgements remain contestable, their contestability does not entail their irrationality.¹⁶

A particularly demanding consequence of this formal structure arises when the formula yields a result of 1, that is, when the concrete weights of the conflicting principles are equal. This tie scenario must not be treated as a trivial outcome, nor as a tacit authorisation for the measure to prevail. What follows from such a tie, however, must be stated with care, for Alexy's position has evolved. On his mature account, a stalemate is an instance of structural discretion: balancing determines no result, so the choice is left to the democratically legitimated legislature rather than resolved by any tilt built into the formula itself. This must be distinguished from an *in dubio pro libertate* rule – the rule

¹⁵ Alexy, R., *op. cit.* (fn. 3), Ch. 12, p. 175; Ch. 14, p. 204; Ch. 15, p. 216.

¹⁶ For the objection that balancing presupposes a commensurability the relevant magnitudes lack, see Tsakyrakis, S., *Proportionality: An Assault on Human Rights?*, *International Journal of Constitutional Law*, vol. 7, no. 3, 2009, pp. 468 – 493; for the rationalist reply adopted here, see Afonso da Silva, V., *Comparing the Incommensurable: Constitutional Principles, Balancing and Rational Decision*, *Oxford Journal of Legal Studies*, vol. 31, no. 2, 2011, pp. 273 – 301.

that, in the event of a tie, liberty enjoys a *prima facie* presumption such that the restricting measure is presumed disproportionate unless positively justified. That rule is one possible tie-break, but it is a substantive normative thesis in its own right, not a corollary of the weight formula, and Alexy does not endorse it in this general form.¹⁷ For present purposes the point is independent of which tie-break one adopts: whichever rule governs, it can be reached only once the equality of the relevant magnitudes – and, in particular, of the abstract weights – has itself been argued.¹⁸ What is important to underline is that establishing a tie is not an inconsequential matter: the judge must have determined, with explicit justification, the intensities of interference, the abstract weights, and the epistemic reliabilities of both sides, and must have established that their products are equal. This includes expressly reasoning as to why the abstract weights are considered equivalent in the particular conflict at hand. Analytically, a tie calls for greater justification, not less: to treat it as a case in which the measure simply passes the proportionality test would invert the logic of the argumentative burden.¹⁹

3. CHALLENGES

One of the most pressing questions surrounding abstract weight is whether its inclusion in the weight formula is theoretically justified. Although the literature specifically devoted to this notion remains sparse, at least two distinct objections have been raised: a non-deducibility objection and an epistemic impossibility objection.

3.1. Non-deducibility Objection

The non-deducibility objection has been advanced, mainly, by David Duarte and Jorge Silva Sampaio as part of a broader proposal for a positivist reformulation of the weight formula.²⁰ Their argument against abstract weight has two

¹⁷ Alexy, R., *A Theory of Constitutional Rights*, *op. cit.* (fn. 2).

¹⁸ *Ibid.*, pp. 406 – 410.

¹⁹ Bernal Pulido, C., *op. cit.* (fn. 1), pp. 160 – 162. A further point to be analysed concerns the relationship between the assignment of a high abstract weight and discourses about absolute rights (that is, rights that cannot be overridden by others). This issue will be explored in greater depth in future research.

²⁰ Duarte, D.; Silva Sampaio, J., *The Lisbon way: An alternative view on the Alexy–Ratti debate*, *Ratio Juris*, 2026, doi.org/10.1111/raju.70012 (advance online publication, 18

components. First, the substantive law of balancing does not, of itself, justify the inclusion of abstract weight as a variable in the internal justification of balancing: the substantive law is simply not explicit about the content of this premise.²¹ Second, and consequently, abstract weight should be excluded from the weight formula's internal justification and relocated – if it is to play any role at all – to the external justification of the determination of concrete weight.²²

It is correct to say that the relevance of abstract weight does not derive straightforwardly from the formulation of the substantive law of balancing. That law states that “the greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other”.²³ Read in isolation, this formulation concerns the relationship between degrees of interference and degrees of satisfaction in the concrete case, and says nothing explicit about a prior ordering between principles that is independent of those concrete degrees.

That concession, however, does not settle the question of whether abstract weight is justified as a premise in the internal justification of balancing. The relevant question is which interpretation of the substantive law is the best one within the Alexian framework itself, and the criterion adopted here is that the best interpretation is the one that most adequately concretises the requirements of argumentative rationality that the theory itself presupposes. From that standpoint, there are at least three reasons to resist the non-deducibility objection.

The first concerns the burden of argumentation. Alexy's proposal does not adopt an extreme position: it rejects, on the one hand, the idea that an indefeasible ordering between constitutional principles is justified; but it equally rejects the idea that all rights-recognising legal norms stand in a relation of mutual

March 2026), p. 18. For a discussion of part of this paper see also García-Yzaguirre, V., *La ponderación de Duarte. Comentarios y dudas*, Discusiones, forthcoming.

²¹ This point is also mentioned in Lindahl, L., *On Robert Alexy's weight formula for weighing and balancing*, in: Silva Dias, A. et al. (eds.), *Liber Amicorum de José de Sousa e Brito*, Almedina, Coimbra, 2009, p. 378.

²² Duarte, D.; Silva Sampaio, J., *op. cit.* (fn. 20). Following Wróblewski, and as adopted by Alexy, the internal justification of a decision concerns whether its conclusion follows logically from the premises invoked, whereas the external justification concerns the soundness of those premises themselves. The non-deducibility objection is, accordingly, that abstract weight — if it has any role — belongs to the external justification of the value assigned to concrete weight, and not among the premises of the balancing inference itself. See Wróblewski, J., *Legal Syllogism and Rationality of Judicial Decision*, *Rechtstheorie*, vol. 5, 1974, pp. 33 – 46; and Alexy, R., *A Theory of Legal Argumentation*, Clarendon Press, Oxford, 1989, pp. 221 – 230.

²³ Alexy, R., *A Theory of Constitutional Rights*, *op. cit.* (fn. 2), p. 102.

equality.²⁴ Fundamental rights possess, for substantive reasons, a defeasible priority over other constitutional norms – in particular, over collective goods – by virtue of the fact that they incorporate a limit on the measures that the state and private parties may implement.²⁵ A balancing framework that treats all principles as standing in a relation of mutual equality prior to adjudication – which is precisely what the exclusion of abstract weight entails – provides no principled basis for requiring positive justification for measures that restrict rights. Abstract weight is the variable through which that defeasible priority is expressed; without it, the formula lacks the resources to implement the burden of argumentation that Alexy's own framework requires.²⁶

The second reason concerns coherence with the principles of discursive rationality. The laws of balancing do not merely reflect a principlist conception of the theory of norms; they also seek to operationalise the rules and arguments of legal justification, understood as a special case of rational practical justification.²⁷ Assertions about abstract weight must satisfy those rules, and in particular the requirement of universalisability. Abstract weight expresses considerations that are prior to and independent of the analysis of the concrete case, yet bound together by the normative conflict at hand: whenever principles P1 and P2 collide, a judge who affirms that P1 carries a certain abstract weight relative to P2 is committed to maintaining that same position in analogous cases. Abstract weight is therefore not a merely subjective valuation, but a premise that must satisfy the requirements of internal consistency and legal predictability.

The third reason is that the inclusion of abstract weight prevents proportionality analysis from collapsing, to some degree, into a form of particularism. To dispense with abstract weight is to adopt a commitment to the discourse of interests: the normative thesis that decision-makers ought to treat rights as standing on equal footing with any other lawful interest, even one of lesser importance.²⁸ This would allow a right to be overridden by any public policy

²⁴ Rivers, J., *Proportionality, discretion and the second law of balancing*, in: Pavlakos, G. (ed.), *Law, rights and discourse: The legal philosophy of Robert Alexy*, Hart Publishing, Oxford, 2007, p. 167.

²⁵ Alexy, R., *A Theory of Constitutional Rights*, *op. cit.* (fn. 2), pp. 185 – 188; McHarg, A., *Reconciling human rights and the public interest: Conceptual problems and doctrinal uncertainty in the jurisprudence of the European Court of Human Rights*, *The Modern Law Review*, vol. 62, no. 5, 1999, p. 671.

²⁶ Alexy, R., *A Theory of Constitutional Rights*, *op. cit.* (fn. 2), p. 185.

²⁷ Alexy, R., *Discourse theory and fundamental rights*, in: Menéndez, A. J.; Eriksen, E. O. (eds.), *Arguing fundamental rights*, Springer, Dordrecht, 2006, p. 15.

²⁸ Klatt, M.; Meister, M., *op. cit.* (fn. 1).

consideration, without the structure of balancing offering any resistance. Abstract weight is precisely the formal instrument through which the results of prior balancing operations – the orderings already argued between P1 and P2 – bear upon the institutional design of future decisions: what was previously established regarding that relation of principles must be taken into account whenever both principles come into conflict again.²⁹ This idea is not captured by concrete weight, which by definition is exhausted by the circumstances of the case at hand. Only abstract weight can accommodate it.

As can be seen, the criterion of correctness is not explicit deducibility but rather the best concretisation of the rationality requirements inherent in Alexy's own framework.

3.2. Epistemic Impossibility Objection

The epistemic impossibility objection has been formulated, mainly, by José Juan Moreso and Ricardo Guibourg. Their concern, though differently framed, converges on the same point: abstract weight lacks a determinate method of identification, which renders it either unworkable or superfluous within the weight formula.

Moreso's formulation runs as follows. Since abstract weights are independent of any concrete circumstances, one would expect to have at one's disposal an ordering scale of all constitutionally recognised rights, assigned prior to any particular adjudication. Moreso is skeptical that any such scale can be reasonably accepted. Alexy's own suggestions in this direction are limited to isolated intuitions – for instance, that the right to life carries greater abstract weight than the general freedom to act – without providing even the nucleus of a comprehensive ordering.³⁰ The objection is not merely that the scale is incomplete, but that it is unclear what such a scale would even measure: what property of a constitutional right is being quantified when its abstract weight is assigned independently of any case.³¹

Guibourg's formulation is structurally distinct but points in the same direction. For Alexy, the principal source of rationality in legal reasoning is rational discourse. But rational discourse, as Alexy describes it, is a container for the exchange of good arguments – and if good arguments can be given both for and against a solution, then any decision reached through that process could qualify

²⁹ Atienza, M., *Juridificar la bioética*, Isonomía, no. 8, 1996, pp. 88 – 90.

³⁰ Moreso, J. J., *op. cit.* (fn. 1), p. 231.

³¹ *Ibid.*

as objective. Applied to abstract weight: if two principles are in conflict, each can be defended with good reasons. In that situation, if any solution is rational, it follows either that both principles have the same value, or that there is no method for establishing different values for two principles in conflict.³² Either conclusion undermines the independent role of the abstract weight variable.

Notably, Alexy himself agrees with the underlying premise of this objection: he is explicit that “an abstract hierarchical ordering of fundamental rights values – whether cardinal or ordinal – is unacceptable”.³³ The point of disagreement, however, is what follows from this concession. For Moreso and Guibourg, the absence of a determinate identification method renders the variable unworkable. Let’s face this challenge.³⁴

How can the abstract weight of a principle be identified? There appear to be two broad sets of options, each carrying different theoretical and normative commitments concerning the best way of understanding and applying the law. One alternative is to understand the abstract weight of a principle in relation to another as the product of acts of discovery, such that the interpreter’s task consists in determining true propositions about how that relation has been established. Another alternative is to understand this relation as the result of a set of argumentative acts that configure that relation, making it necessary to justify why it is correct.

³² Guibourg, R. A., *On Alexy’s weighing formula*, in: Sieckmann, J.-R. (ed.), *Legal reasoning: The methods of balancing*, Franz Steiner Verlag, Stuttgart, 2010, p. 156.

³³ Alexy, R., *A Theory of Constitutional Rights*, *op. cit.* (fn. 2), p. 97.

³⁴ A first element of an answer is supplied by the formal literature on balancing, which gives reasons to resist the inference from the absence of a complete ordering to the absence of any workable method. Sartor has reconstructed proportionality assessment as a form of teleological reasoning over the impacts of alternative decisions on the values at stake, in which the relative importance of those values enters as a comparative judgement restricted to the principles actually in collision; what rationality requires is not a scale ordering all constitutional rights in the abstract, but a justified comparison between the colliding principles. See Sartor, G., *op. cit.* (fn. 5). Araszkiewicz, in turn, has modelled the balancing of principles as a constraint satisfaction problem, in which the acceptability of a weight assignment depends on its coherence with a set of accepted elements of the legal system — rules, precedents, evaluations — rather than on access to a pre-given hierarchy. See Araszkiewicz, M., *Balancing of Legal Principles and Constraint Satisfaction*, in: Winkels, R. G. F. (ed.), *Legal Knowledge and Information Systems. JURIX 2010: The Twenty-Third Annual Conference*, IOS Press, Amsterdam, 2010, pp. 7 – 16. Both models make the same structural point: the rationality of an assignment of abstract weight may consist in the justificatory relations it maintains with other commitments, and not in its derivation from a complete ordering.

Before developing these alternatives, a clarification is required. Within Alexy's discourse-theoretic framework, the line between discovery and construction may appear to dissolve. Any legal premise used in justification must be raised as a claim to correctness and made answerable to reasons; in this sense, even an abstract weight presented as read off from the constitutional order is discursively mediated. The distinction proposed here is therefore not between non-discursive and discursive premises – all relevant premises are discursively assessable – but between two orientations of legal argument. Discovery-oriented argument seeks to establish a proposition about a preference relation that is taken to be already configured by the materials of the legal order, whether by the constitutional text, the intentions of the framers, or consolidated constitutional practice; its characteristic defect is misdescription. Construction-oriented argument operates where those materials do not determine the relevant relation and the interpreter must justify an attribution of relative priority; its characteristic defect is underjustification. Both forms belong to rational practical discourse and are governed by the same requirements of consistency, universalisability, and public justification. What differs is not their discursive status, but the kind of claim they raise and the justificatory burden they impose: the first purports to track a relation already settled by the legal materials, whereas the second purports to justify a relation that those materials leave open. As the discussion of epistemic reliability below will show, these two orientations carry systematically different burdens of justification.

a) Identification of abstract weight by acts of discovery

The approach available for understanding how abstract weight is determined holds that judges read a pre-existing hierarchy from the constitutional order itself. On this approach, abstract weight is a relative weight conditioned by the design of the normative system of reference, by the social conditions operating in the space-time in which the balancing takes place, and by other possible factors connected to facts.³⁵ The sources from which this hierarchy is identified are, at a minimum, three: the constitutional text, the intentions of the framers, and the historical evolution of constitutional practice.³⁶

Discovery from the constitutional text. The most direct source for the discovery of abstract weight is the constitutional text itself. Where the text establishes an explicit ordering – as in provisions that declare certain rights ‘inviolable’

³⁵ Sieckmann, J.-R., *op. cit.* (fn. 1), p. 105; Rivers, J., *op. cit.* (fn. 24), pp. 177 – 179; Alexy, R., *op. cit.* (fn. 2); Bernal Pulido, C., *op. cit.* (fn. 1), pp. 153 – 154.

³⁶ Alexy, R., *op. cit.* (fn. 2); Bernal Pulido, C., *op. cit.* (fn. 1), pp. 153 – 154.

or assign them a privileged position – the interpreter’s task is primarily one of identification rather than construction.

The attribution of abstract weight to a principle depends on the relevance of its connection with other principles, without this implying a mere accumulation of norms.³⁷ This connection is valuable as a function of concrete constitutional practice. In constitutional democracies, two principles regularly confer a high abstract weight on those with which they are connected: the principle of protection and respect for human dignity and the democratic principle. Following Clérico, for instance, it is justified to assign a high abstract weight to freedom of expression in the political arena because its protection operates as a necessary condition for the functioning of the democratic regime.³⁸

Another possible application case is to social rights principles, from which two rules of argumentation follow. Rule PA.1: whenever a high relative abstract weight can be assigned to a social rights principle by virtue of its connection either with another material principle or with a formal principle, it should be assigned. Rule PA.2: whoever seeks to depart from the assignment of high relative abstract weight to a social rights principle by virtue of such a connection bears the burden of argumentation.

This point is also clearly reflected in the assignment of abstract weight to formal principles. Formal principles incorporate an abstract weight that reflects the degree of deference granted to the democratically legitimated legislator. Following Borowski, a greater abstract weight expresses a commitment to parliamentary discretion.³⁹ The assignment of that weight does not consist in a mere accumulation of norms, but in evaluating the relevance of the connection of the principle with others in concrete constitutional practice – expressing the institutional design implemented in the community of reference.

A third example, cited by Alexy, to account for this approach is the abstract weight that may be identified from Article 1.1 of the Basic Law of Germany.

³⁷ This sub-case is better treated as intermediate than as pure discovery: although it takes a textual or institutional foothold as its point of departure, establishing the systematic relevance of one principle through its connection with another — dignity, democracy, social rights — calls for a reconstructive operation drawing on a substantive constitutional theory, and to that extent it shares the character of construction.

³⁸ Clérico, L., *El examen de proporcionalidad en el derecho constitucional*, Eudeba, Buenos Aires, 2009, pp. 222 – 223.

³⁹ Borowski, M., *Robert Alexy’s reconstruction of formal principles*, in: Klatt, M. (ed.), *Alexy’s theory of law: Proceedings of the Special Workshop “Robert Alexy’s Theory of Law” held at the 26th World Congress of the IVR*, Franz Steiner Verlag, Stuttgart, 2014, p. 107.

This provision establishes that human dignity is inviolable and imposes on the state an obligation to respect and protect it. One possible interpretation is that this provision places dignity at the apex of the normative hierarchy, with the consequence that its abstract weight is regularly deemed greater than that of any colliding principle.⁴⁰ Alexy draws a further implication: if human dignity is the highest principle of law, its abstract weight is cancelled out only in collisions in which human dignity stands on both sides.⁴¹ Here the hierarchy is inscribed in the text, and the judge's task is one of recognition.

On Alexy's account, the abstract weight of human dignity plays a pivotal role in balancing because it is regularly deemed greater than that of the colliding principle. This is one of the features of human dignity from which a certain tendency towards absoluteness stems.⁴² Alexy's analysis proceeds in two stages. At the level of principle theory, the guarantee of human dignity can be formulated as a principle – an optimisation requirement – whose content is the norm that all persons must be treated seriously as persons. This formulation renders human dignity susceptible to proportionality analysis: an interference with the right to be taken seriously as a person can be more or less intense, and the colliding principle – say, public security – may have greater or lesser weight depending on the circumstances.⁴³ This is the relative conception of human dignity.⁴⁴

⁴⁰ Alexy, R., *op. cit.* (fn. 3), p. 205.

⁴¹ *Ibid.*, p. 205.

⁴² *Ibid.*, p. 205. On Alexy's distinctive treatment of the abstract weight of human dignity and its tendency towards absoluteness, see also Alexy, R., *Human Dignity and Proportionality Analysis*, *Espaço Jurídico Journal of Law*, vol. 16, no. 3, 2015, pp. 83 – 96.

⁴³ Alexy, R., *op. cit.* (fn. 3), p. 205.

⁴⁴ For precision's sake, the relative conception does not amount to a "devaluation" of human dignity for several reasons. First, there are clear cases – racial or religious persecution, degrading prison conditions, denial of educational opportunity – where normative certainty is sufficiently high that the result of balancing is determinate and can be applied by subsumption. Second, the object formula provides an abstract condition of precedence: where a human being is treated as a mere object, thereby fundamentally calling their quality as a subject into question, the principle of human dignity prevails. Third, the abstract weight of human dignity is particularly high, and the epistemic reliability of the assumptions supporting the dignity side tends also to be high. In extreme or tragic cases – the ticking bomb scenario, the downing of a hijacked aircraft – an interference with human dignity will be proportionate only if all variables on the opposing side also reach their maximum values: one out of the 81 possible constellations generated by the refined Weight Formula (fn. 3, p. 205). This numerical result captures, within a formal framework, the near-absolute protection that the constitutional text appears to confer on human dignity.

Discovery from the intentions of the framers. Where the historical record reveals that the constituent power assigned a determinate hierarchical position to certain principles – for instance, by deliberately placing human dignity at the apex of the constitutional order in response to specific historical experiences – this intentional ordering may be taken as evidence of the pre-existing weight structure that the interpreter is called upon to identify. This source is particularly relevant in legal systems with a documented founding moment and an accessible record of constituent deliberation.⁴⁵

Discovery from the historical evolution of constitutional practice. In this view, the weight of a principle accumulates through a series of decisions that progressively consolidate its position within the normative order. The interpreter discovers this weight by reconstructing the trajectory of constitutional jurisprudence. This source is particularly important in common law constitutional systems and in those civil law systems where the constitutional court has developed a rich body of precedent.

Is the argumentative force of a principle P1 necessarily the same as it was before the balancing? Put differently, are the results of a balancing between principles P1 and P2 relevant, at least, for future conflict cases between the same principles?

The results of balancing can operate as reasons in favour of giving priority to a principle P1 over a principle P2. As Atienza notes, one way of reconstructing a line of jurisprudence is by identifying priority rules that offer a pro tanto reason in favour of one principle over another.⁴⁶ Distinguishing synchronic from possible diachronic consequences: where at moment T1 the force of reasons favouring P1 exceeds those favouring P2, this can generate, diachronically, at least three possible results: (i) deliberation generated a loss in the force of reasons favouring P1, such that at T2 we would not be prepared to assign it the same weight as at T1; (ii) deliberation generated a loss in the force of reasons favouring P2; or (iii) the same weights would be assigned at both T1 and T2.

The Solange jurisprudence of the German Federal Constitutional Court (FCC) illustrates this diachronic dimension with particular clarity, as Klatt has showed.⁴⁷ In *Solange I*, the circumstances were such that the EU had not yet developed a standard of fundamental rights protection equivalent to that of the German Basic Law. Accordingly, the material principles factor strongly supported

⁴⁵ Bernal Pulido, C., *op. cit.* (fn. 1), pp. 153 – 154.

⁴⁶ Atienza, M., *op. cit.* (fn. 29), pp. 88 – 90.

⁴⁷ Klatt, M., *Balancing competences: How institutional cosmopolitanism can manage jurisdictional conflicts*, *Global Constitutionalism*, vol. 4, no. 2, 2015, pp. 219 – 220.

the FCC's review competence: denying it would have had grave consequences for rights protection, whereas denying the Court of Justice of the EU (CJEU) any preference was relatively inconsequential given the EU's then-limited rights protection. In *Solange II*, the circumstances had changed considerably: the EU fundamental rights standard had been 'formulated in content, consolidated and adequately guaranteed'. The material principles factor now operated in the opposite direction, strengthening the weight of the CJEU's competence while the FCC's was no longer reinforced. The relationship of preference between the competing competences thus depends on the 'current state of integration', and the dynamics arising from this dependence can be reconstructed through the mode of balancing.⁴⁸

Reformulating Pollock, a possible result of balancing is that the reasons advanced against granting preference to P1 operate as diminishers of force.⁴⁹ This notion refers to a type of rebuttal operating on the schema 'P1 despite P2': although P2 is not sufficiently strong to completely defeat P1 – so the conclusion C is maintained – the existence of P2 means that the arguments for P1 are not as strong as before. Without the notion of abstract weight, balancing could not capture this information.⁵⁰

A clarification keeps this within the bounds of the present account. The results of prior balancings do not themselves constitute the abstract weight of a principle; they operate as reasons, or as indicia, for attributing it in a fresh balancing that the interpreter remains bound to justify. Were past outcomes treated as constitutive, abstract weight would collapse into a shorthand for conditional precedents and forfeit its standing as a premise prior to the present balancing – the very distinction this article seeks to preserve.

b) Identification of abstract weight by acts of construction

The alternative approach holds that abstract weight is not discovered but attributed or constructed through a process of argumentation. On this account, the interpreter does not read off a pre-existing hierarchy from the constitutional

⁴⁸ *Solange I*, BVerfGE 37, 271 (Order of 29 May 1974); *Solange II*, BVerfGE 73, 339 (Order of 22 October 1986).

⁴⁹ Pollock, J. L., *Defeasible reasoning and degrees of justification*, *Argument and Computation*, vol. 1, no. 1, 2010, p. 7.

⁵⁰ This diachronic dimension has recently received formal treatment in the field of artificial intelligence and law. See Maranhão, J.; Souza, E. G. de; Sartor, G., *A Dynamic Model for Balancing Values*, in: *Proceedings of the Eighteenth International Conference on Artificial Intelligence and Law (ICAIL 2021)*, ACM, New York, 2021, pp. 89 – 98.

order; rather, they build one by means of a set of argumentative operations that are subject to rational assessment. Several distinct methods of attribution can be identified.

Attribution by relationship between norms and modelling of legal practice. If the criterion of correctness is that the discourse on abstract weight gives an account of how legal practice is at a given space-time, then it is necessary to specify what the judiciary should offer when justifying this variable.⁵¹ One way to understand the requirement of abstract weight is to consider it as a requirement for judges to offer a model of practice – a discourse representative of a social phenomenon.⁵²

On this approach, the attribution of abstract weight to principles requires: (i) making explicit the commitment to the substantive theory of the Constitution that has been adopted⁵³; and (ii) demonstrating that it is useful for reconstructing local practice. For example, if the interpreter considers that the best available theory is a liberal-individualist conception, this will likely imply giving a defeasible priority to rights connected with freedom. Thus, abstract weight operates as a burden of argumentation – to justify why that commitment is correct and why it best accounts for the practice. An incorrect assignment of abstract weight would be one that employs normative discourse from a set of ideological preferences, or one where the reasons given are not adequate to reconstruct local practice.

Attribution by conceptualisation of the norm-type. The determination of abstract weight may follow from how we reconstruct the norms in question. This is the upshot, for example, of the distinction between principles in the strict sense and directives proposed by Atienza and Ruiz Manero.⁵⁴ For them, the norm-type

⁵¹ Bolaños, B., *Balancing and legal decision theory*, in: Sieckmann, J.-R. (ed.), *Legal reasoning: The methods of balancing*, Franz Steiner Verlag, Stuttgart, 2010, pp. 68 – 69.

⁵² Here I use the term “model” to refer to a representational scheme that abstracts and organises certain features of a phenomenon of social reality (in this case: the preferences mostly shared in favour of one principle over another). On this point, see Di Robilant, E., *Modelli nella filosofia del diritto*, Il Mulino, Bologna, 1968, p. 67; and Ferrater Mora, J., *Pinturas y modelos*, in: *Filosofía y ciencia en el pensamiento español contemporáneo (1960–1970): Simposio de lógica y filosofía de la ciencia*, Tecnos, Madrid, 1973, p. 87. This point makes sense if we understand that judicial practice, the constitutional history of the reference country, the prevailing ideologies within the legal community, and other such facts are sources of abstract weight. As can be seen, this does not commit us to a discourse based on moral arguments.

⁵³ Bernal Pulido, C., *On Alexy’s weight formula*, in: Menéndez, A. J.; Eriksen, E. O. (eds.), *Arguing fundamental rights*, Springer, Dordrecht, 2006, p. 55.

⁵⁴ Atienza, M.; Ruiz Manero, J., *A theory of legal sentences*, Springer, Dordrecht, 1998, p. 140.

can fix abstract weight structurally, independently of the circumstances of the case. The distinction between principles in the strict sense and directives entails that the former, as ultimate values, carry a defeasible priority over the latter, as utilitarian values. Deliberation with principles in the strict sense concerns which should prevail over others that are also concurrent and in conflict in a given case; deliberation with directives concerns the design of the set of measures that would best satisfy all desired states of affairs. Where a principle in the strict sense and a directive concur in a conflictive deliberation, the prescriptive thesis holds that the principle in the strict sense must prevail.⁵⁵

Attribution of abstract weight to formal principles. Klatt applies this approach to formal principles. Competences, understood as formal principles, establish who is in charge of deciding on a substantive matter; their object of optimisation is the authoritative power to set material content.⁵⁶ On this account, a competence is normatively established, dispositional, and declarative – it empowers a public authority to change the normative situation within a legal system, conditional on specified procedures and conditions.

Conflicts between competences are resolved through balancing, which establishes a conditional preference relation – primacy without strict hierarchy. Four factors determine the concrete weight of a competence in a given case: (i) the democratic legitimacy of the authority – the higher the legitimacy, the greater the weight; (ii) the value of the material principles at stake – the more intense the interference with a human right, the less important the authority's autonomous competence, and vice versa; (iii) the quality of the decision – the more extensive and persuasive the justification, and the greater the expertise brought to bear, the higher the weight assigned; and (iv) subsidiarity – the more clearly an authority is protected by the subsidiarity principle, the greater the weight of its competence.⁵⁷

Attribution by lexical priority. A more radical form of structural attribution is lexical priority: the assignment of absolute weight to a class of principles with respect to a specified set of competing reasons, such that no trade-off between them is permitted. Rawls' treatment of the basic liberties in *Political Liberalism*

⁵⁵ Ruiz Manero, J., *Principios, objetivos y valores: Otra vuelta de tuerca*, in: Ortega, S. (ed.), *Interpretación y razonamiento jurídico*, Hermeneia Editores, Lima, 2008, pp. 149, 176; Alexy, R., *El concepto y validez del derecho*, Gedisa, Barcelona, 1994, p. 207. See also Klatt, M.; Meister, M., *op. cit.* (fn. 1), p. 25; Dworkin, R., *Taking rights seriously*, Harvard University Press, Cambridge MA, 1977, pp. 274 – 278.

⁵⁶ Klatt, M., *op. cit.* (fn. 47), pp. 211 – 212.

⁵⁷ *Ibid.*, pp. 214 – 216.

offers the canonical formulation.⁵⁸ The priority of liberty means that the basic liberties – as given by a list – have an absolute weight with respect to reasons of public good and of perfectionist values. They cannot be denied or limited for reasons of economic efficiency, distributive advantage, or collective improvement; the only permissible ground for limiting a basic liberty is the protection of one or more other basic liberties. In this sense, none of the basic liberties is absolute *inter se* – since they may conflict with one another and must be adjusted into a coherent scheme – but all of them are absolute with respect to non-liberty considerations.

Two features of this model are theoretically significant for the present discussion. First, lexical priority does not eliminate balancing altogether: it restricts the domain of permissible trade-offs. Within the scheme of basic liberties, adjustments are still required to produce a coherent set; what is excluded is any trade-off between a basic liberty and a reason of public good or perfectionist value. Rawls is careful to distinguish restriction from regulation: the priority of liberty is not infringed when liberties are regulated – as they must be to be combined into one scheme and adapted to social conditions – provided that the central range of application of each basic liberty is preserved. Second, the priority of liberty is not required under all conditions but only under what Rawls calls reasonably favourable conditions – social circumstances that, provided the political will exists, permit the effective establishment and full exercise of the basic liberties. This conditionality introduces a structural similarity with the model of attribution by relationship between norms: the weight assigned is not purely a function of the norm-type in the abstract, but depends also on background social conditions.⁵⁹

c) *The Reliability of Empirical and Normative Premises*

The reliability of these premises is an epistemic dimension that follows directly from the methodological standpoint adopted in this article. If abstract

⁵⁸ Rawls, J., *Political liberalism*, Columbia University Press, New York, 1996, pp. 294 – 297.

⁵⁹ The contrast with Dworkin is instructive. Both assign structural priority to rights-based principles over policy considerations. But whereas Dworkin's trumps are defeasible – they operate as pro tanto reasons that prevail over external-preference-based arguments unless sufficiently weighty countervailing arguments of principle are available – Rawls's lexical priority is categorical within its domain: no accumulation of policy reasons, however large, can override a basic liberty. This makes Rawlsian lexical priority the strongest form of structural attribution and, at the same time, the form most resistant to integration within the standard weight formula, where all variables admit of gradation.

weight is reconstructed internally to Alexy's discourse-theoretic framework, then the relevant question is not only which method can be used to identify or attribute it, but also how reliable the normative premise generated by that method is. The distinction between discovery and construction therefore has epistemic consequences: discovery-oriented arguments and construction-oriented arguments are both discursive, but they do not carry the same justificatory burden. On this view, the reliability variable of the weight formula is not an external corrective to balancing, but the framework's own means of registering, within the balancing inference, how much epistemic confidence each attribution can command.

A caveat must be entered, lest the argument appear to positivise a variable that, in Alexy's framework, also answers to practical correctness. Reliability is not equivalent to substantive correctness. It refers to the epistemic warrant with which a premise may be used in balancing. In discovery-oriented arguments, this warrant will often depend on institutional ascertainability: how publicly, stably, and controllably the premise can be established from the legal materials. In construction-oriented arguments, by contrast, it will depend more directly on the strength, coherence, and stability of the reasons offered in support of the attribution. Textual anchorage may therefore make a weight assignment institutionally more reliable, but it does not, for that reason alone, make it more correct as a matter of practical reasoning. The reliability variable registers the epistemic status of the premise; it does not settle its ultimate discursive correctness.

These methods do not, however, enter the formula on equal epistemic footing: the premises on which they rely are not always available with the same degree of confidence. As is well known, the variable representing the reliability of the empirical and normative assumptions underlying the balancing operates as a genuinely epistemic factor.⁶⁰ This has direct relevance for the determination of abstract weight.⁶¹

The problem is twofold. On the empirical side, uncertainty arises when the factual premises underlying an interference – or those justifying a given abstract weight assignment – cannot be established with sufficient confidence. The Epistemic Law of Balancing offers a response: "The more heavily an interference in a constitutional right weighs, the greater must be the certainty of its underlying premises".⁶² The practical implication is that the degree of epistemic diligence required of the decision-maker varies proportionally with the severity

⁶⁰ Alexy, R., *op. cit.* (fn. 3), pp. 168 – 169.

⁶¹ *Ibid.*, p. 197.

⁶² *Ibid.*, p. 161.

of the interference at stake: a light interference may be justified on plausible (*p*) premises; a serious one demands reliable or certain (*r*) premises.⁶³ Klatt and Schmidt have refined this analysis by distinguishing two situations of empirical uncertainty: one where the intensity of interference is clear but the underlying justificatory premises are uncertain, and one where the intensity of interference is itself empirically indeterminate. The second law of balancing addresses only the first situation; the second requires what the authors call the “law of classification”, which governs the choice between competing intensity assignments when each carries a different degree of epistemic reliability.⁶⁴ Their proposed scale – reliable, moderately reliable, unreliable – replaces Alexy’s review-based scale with one that is universal and independent of the particular supervisory relationship between court and legislature.⁶⁵

On the normative side, the problem is of a different nature. Normative epistemic discretion arises when it is unclear what the correct abstract weight assignment for a relevant constitutional right is – that is, when two or more normative evaluations are equally defensible and it is not possible to determine which is better justified.⁶⁶ This is not structural discretion, which arises from stalemates in the weight formula itself, but a prior uncertainty about which values to insert into it. Rivers identifies three manifestations of this uncertainty: not being sure how to order the concrete affectations or realisations of a principle; not being sure how the satisfaction of one principle relates to the affectation of another; and – most directly relevant here – not being sure about the abstract weight of each principle relative to the other.⁶⁷

The connection between this epistemic problem and the methods of identification examined in the preceding sections is direct. Each method generates a normative premise about abstract weight, but each does so with a different degree of epistemic reliability. For purposes of clarity, it is possible to make some general assessments of how this tends to work across methods.

Discovery from the constitutional text usually (not always) produces the most reliable premises, since the textual basis is publicly verifiable and the interpretive operations are constrained by the document itself. The human dignity exam-

⁶³ *Ibid.*

⁶⁴ Klatt, M.; Schmidt, J., *Epistemic discretion in constitutional law*, International Journal of Constitutional Law, vol. 10, no. 1, 2012, pp. 113 – 119.

⁶⁵ *Ibid.*, p. 112.

⁶⁶ Alexy, R., *A Theory of Constitutional Rights*, *op. cit.* (fn. 2), p. 415; Klatt, M.; Schmidt, J., *op. cit.* (fn. 64), p. 83.

⁶⁷ Rivers, J., *op. cit.* (fn. 24), p. 65.

ple illustrates this well: where the constitutional text places a right at the apex of the normative order, the abstract weight assignment is textually anchored and requires minimal additional justification. Discovery by connection with other principles inherits the epistemic status of the anchor principles to which it appeals. Where the anchor principle itself enjoys a textually entrenched or jurisprudentially consolidated weight, the derived attribution is correspondingly reliable. Where the anchor is itself the product of a contested theoretical commitment, the epistemic vulnerability propagates downward

Discovery from the intentions of the framers involves greater uncertainty, since historical evidence is always revisable and its normative relevance contested. The inferential distance between the constituent record and a determinate weight assignment is longer, and reasonable interpreters may disagree about both the content and the authority of founding intentions.

Discovery from the historical evolution of constitutional practice sits between the two: the jurisprudential record is publicly accessible, but the normative implications of accumulated decisions – whether they establish a settled hierarchy or merely a defeasible tendency – are subject to interpretive dispute.

Attribution by relationship between norms and modelling of legal practice is epistemically complex. The claim that a given theoretical model best reconstructs local practice is a normative premise whose reliability depends on the availability of interpretive evidence and the degree of doctrinal consensus. Where consensus is high, the attribution carries significant epistemic weight; where the practice is contested or in flux, the reliability of the premise diminishes accordingly.

Attribution by diachronic effects of past balancing produces premises that are, in principle, publicly accessible through the jurisprudential record. However, their normative implications remain contested: whether past results should generate *pro tanto* reasons for future cases, operate as undercutters, or leave the weight assignment unchanged are questions on which reasonable interpreters may disagree, introducing a layer of normative uncertainty over and above the empirical record.

Attribution by conceptualisation of the norm-type and attribution by lexical priority are the methods most exposed to normative epistemic uncertainty. Both depend on background theories of rights and justice – Ruiz Manero and Atienza's distinction between ultimate values and utilitarian values, Dworkin's account of rights as trumps, Rawls's lexical ordering of basic liberties – whose justification is substantively disputed. The epistemic reliability of weight assignments derived from these methods is therefore inversely proportional to the degree of theoretical controversy surrounding the underlying framework.

Attribution to formal principles involves a second-order normative uncertainty: the correct weight of a formal principle depends on contested theories of democratic legitimacy, subsidiarity, and institutional quality. The factors identified by Klatt – democratic legitimacy, value of material principles at stake, quality of the decision, and subsidiarity – are themselves subject to normative disagreement, which means that weight assignments for formal principles carry a degree of epistemic fragility that is structural rather than contingent.

The practical consequence is that the methods of attribution cannot be applied as if they were epistemically uniform inputs into the weight formula. Each attribution produces a normative premise that must itself be assessed for reliability before it can function as a variable in the calculation. Where normative epistemic uncertainty is likely to be high – as it typically is in attribution by conceptualisation of the norm-type, by lexical priority, and by connection with other principles – the Epistemic Law of Balancing demands a proportionally greater burden of justification for any interference that depends on the disputed weight assignment. This generates a structural asymmetry: abstract weight attributions derived from constitutionally entrenched hierarchies require less argumentative support than those derived from theoretical models or conceptual analyses, because the reliability of their normative premises is higher. The consequence for judicial reasoning is that courts which assign differential abstract weights on the basis of contested theoretical commitments – without explicitly discharging the burden imposed by the Epistemic Law – fail to satisfy the requirements of the weight formula even at the level of its normative inputs.

What do the methods of identification and their epistemic risks reveal? At least the following. First, the objection that there are no methods for attributing abstract weight is mistaken: as we have seen, there are several. Second, each set of methods involves a theoretical and normative commitment. Each of them presupposes a different way of understanding interpretation and, in particular, different possible discourses about what abstract weight is. The first set of approaches implies that abstract weight is a relation between norms already configured, and that the work of the legal decision-maker will be adequately justified if it succeeds in identifying a true proposition about that legal relation. The second set of approaches implies that abstract weight is a decision of the legal decision-maker. As such, it may be correct or incorrect depending on how it is argued. In any event, what this point reveals is that legal decision-makers have a great deal to say with respect to this variable, and that failing to do so amounts to offering balancing results that are unjustified for want of reasons.

4. CONCLUSIONS

In this article I have argued the following:

- a) Abstract weight is an undertheorised variable within the weight formula. Although it is a necessary component of any rational resolution of conflicts between fundamental rights, the specialised literature has rarely examined what it consists of, how it is identified, or whether its inclusion in the formula is justified.
- b) The criterion for evaluating whether abstract weight belongs in the internal justification is not explicit deducibility from the formulation of the substantive law of balancing but rather the best concretisation of the requirements of argumentative rationality that the Alexyan framework itself presupposes. From that standpoint, three reasons support its inclusion: (i) abstract weight is the formal instrument through which the burden of argumentation operates; (ii) assertions about abstract weight must satisfy the universalisability requirement of rational practical discourse, making them publicly assessable and binding in analogous cases; and (iii) the exclusion of abstract weight collapses proportionality analysis into a discourse of interests in which rights carry no defeasible structural priority, opening the door to a form of particularism.
- c) There are multiple available methods for identifying abstract weight, falling into two groups. The first treats abstract weight as the product of acts of discovery – from the constitutional text, from the intentions of the framers, and from the historical evolution of constitutional practice. The second treats it as the product of acts of construction – through modelling of legal practice, through conceptualisation of the norm-type, through diachronic effects of prior balancing, and through lexical priority. The multiplicity of available approaches is not a deficiency but a structural feature of a variable that must be sensitive to different constitutional designs, historical contexts, and institutional configurations. More importantly, these methods are not of equal epistemic standing, and therefore do not impose the same burden of justification: an attribution anchored in constitutionally entrenched text or in consolidated practice is institutionally more ascertainable and demands less argumentative support, whereas one resting on a contested theoretical commitment demands more. This differential burden – not the mere availability of several methods – is the article's central claim about the identification of abstract weight.
- d) Cases of stalemate between the abstract weights of each principle require a different approach from the usual one. The burden of argumentation

applies with particular force here: the equality of abstract weights must be argued, not assumed. Courts that treat the stalemate as a default outcome systematically understate the argumentative burden imposed by the weight formula and produce decisions that are insufficiently motivated precisely at the point where motivation matters most. To treat the stalemate as a default outcome is to understate the argumentative burden imposed by the weight formula: a decision that does so is, by the standard internal to the formula, insufficiently motivated precisely at the point where motivation matters most

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Sažetak



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PONOVI OSVRT NA APSTRAKTNU TEŽINU:
POJAM I IZAZOVI

Ovaj članak ispituje pojam apstraktne težine u Alexyjevoj formuli težine te osnove na temelju kojih se ona može utvrditi i koristiti kao premisa u postupku odvagivanja. Autor zastupa stajalište da apstraktna težina nije rezidualna niti tek intuitivna varijabla, nego ima posebnu strukturnu funkciju: izražava oborivu prednost između suprotstavljenih načela koja djeluje neovisno o intenzitetu zadiranja u pojedinom slučaju. U radu se apstraktna težina rekonstruira kao premisa relacijskog poretka, analitički različita od konkretne težine i epistemološke pouzdanosti, te se odgovara na dva prigovora: prigovor nemogućnosti dedukcije, kojim se osporava njezina uloga u unutarnjem opravdanju, i prigovor epistemološke nemogućnosti, kojim se dovodi u pitanje može li se ona uopće odrediti na dovoljno određen način.

Ključne riječi: apstraktna težina; formula težine; odvagivanje; pravna načela; razmjernost

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