UNIVERSITÀ DEGLI STUDI DI GENOVA
SCUOLA DELLE SCIENZE SOCIALI
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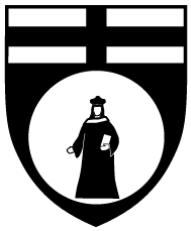

CORSO DI DOTTORATO IN DIRITTO
CURRICULUM FILOSOFIA DEL DIRITTO E STORIA DELLA CULTURA GIURIDICA

Ciclo XXXIV

LEGAL METHODS FOR RESOLVING APPARENT CONFLICTS BETWEEN FUNDAMENTAL RIGHTS

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Genova, ottobre 2022

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INTRODUCTION

I. Problem and research question

The subject of this thesis are apparent conflicts between fundamental rights, which represent one of the most important problems contemporary legal systems are faced with. More specifically, this thesis presents and analyses different legal methods that have been suggested as answers to the problem. Let us first determine the problem we are facing. Contemporary constitutions usually contain provisions protecting certain fundamental rights, such as the right to life, the right to privacy, the right to freedom of expression, personality rights, the right to health, etc. Tensions between these rights are evident in any legal system that protects them. Among the numerous examples, a classic one can be given, in which the right to freedom of expression and personality rights apparently conflict. For example, a particular statement can be understood as protected by the freedom of expression (and therefore it would be permitted), but it can also be understood as infringing personality rights of other (and therefore it would be prohibited). In this example, certain statements, protected by freedom of expression allegedly violate someone's personality rights. The problem can arise when two (or more) provisions protecting fundamental rights are relevant to the specific situation. The question can then arise: should the behaviour (expression of a statement) be *permitted* or *prohibited*? Judges (usually constitutional judges) may then be faced with the situation of having to decide the case without any explicit or clear guidance on how to decide the case. In such situations, *lex superior*, *lex posterior* and *lex specialis* are usually inapplicable, because the provisions regulating fundamental rights are usually on the same hierarchical level, were enacted at the same time and no general – special relationship can be established between them. The problem is further complicated by the fact that the norms expressing fundamental rights are generally understood as *legal principles*, supposedly different from legal rules. These cases are commonly referred to and known in the literature as *hard cases*. They can be understood as "hard" not only from this legal perspective, but also from a socio-political perspective, since they are usually associated with social tensions. In order to decide such cases and solve the problem we are faced with various legal methods have been proposed. These methods represent *possible answers* to the *problem* of the resolution of the apparent conflicts between fundamental rights. The term "apparent" is used, since there is a debate regarding the existence of "real" conflicts between fundamental rights, as it will be elaborated in the following chapter. The objective of the thesis is to provide an answer to the research question: *What are the legal*

methods of resolving apparent conflicts between fundamental rights and what are their merits in comparison to each other?

II. Structure of the work

In order to answer the research question, different legal methods that have been suggested as an answer to the problem of apparent conflicts between fundamental rights are presented, analysed and compared. In this way, the thesis aims to contribute to the understanding of the strengths and weaknesses of the different legal methods that have been proposed to solve the problem. To achieve this, the thesis is divided into three main chapters, each of which presents and analyses different legal methods on apparent conflicts between fundamental rights. In Chapter I and Chapter II, the main legal method proposed to resolve apparent conflicts between fundamental rights – *judicial balancing* – is presented and analysed. In Chapter III, *alternative, non-balancing* legal methods for resolving apparent conflicts between fundamental rights are presented and analysed.

In Chapter I, we first introduce the Alexyan theory of judicial balancing, developed by Robert Alexy and further refined by his disciples, among which the ideas of Jan-Reinard Sieckmann, Martin Borowski and Matthias Klatt are presented. The Alexyan theory of judicial balancing is presented first because it is the most influential and widely used among the theories of judicial balancing. It can therefore be regarded as the *standard* understanding of judicial balancing. The objective of the first chapter is to provide an answer to the question: *What is judicial balancing*, understood in the framework of the Alexyan theory? By answering this question, we get a reconstruction of the mainstream approach and a possible answer to the problem of the resolution of apparent conflicts between fundamental rights. In doing so, the strengths and weaknesses of the method are presented so that a comparison with other methods can be made later.

After presenting the mainstream understanding of judicial balancing in Chapter I, we will turn to *non-Alexyan* understandings of judicial balancing in Chapter II. This chapter introduces and analyses five authors and their understandings of judicial balancing. These are, in order: Aharon Barak, Manuel Atienza, José Juan Moreso, Riccardo Guastini and Susan Lynn Hurley. The objective of the chapter is to provide five alternative answers to the question *What is judicial balancing*, based on the theoretical framework developed by the authors, through the reconstruction of five non-Alexyan theories of judicial balancing. This is done in order to evaluate the alternatives to the Alexyan theory of judicial balancing, as various criticisms have been raised against it.

In Chapter III, we turn to and present *alternative, non-balancing* approaches to the apparent conflicts between fundamental rights. These proposals should be understood as alternative, since judicial balancing is the default approach to apparent conflicts between fundamental rights. The five authors whose approaches are analysed and presented in this chapter are, in this order: Ronald Dworkin, Luigi Ferrajoli, Juan Antonio García Amado, Lorenzo Zucca and Ruth Chang. The objective of this chapter is to answer the question *What are the alternatives to judicial balancing*, from the theoretical framework developed by the authors. By presenting some of the possible answers to the question, the chapter follows the idea of the previous ones: to present, analyse and compare different methods that have been proposed to resolve apparent conflicts between fundamental rights. The objective of such an endeavour is to analyse the strengths and weaknesses of the different proposals that have been put forward to solve the problem we are faced with.

III. Methodological remarks

Since answering the research question involves a comparison between different legal methods, methodological remarks on the comparison are necessary. The presentation of the authors in Chapter I, Chapter II and Chapter III generally follows the same structure. First, the introduction provides an explanation and justification for the choice of author whose theory is presented, as well as the structure of the subchapter. Second, the author and his legal philosophy are contextualised. Third, the basic notions relevant to the author's understanding of the apparent conflicts between fundamental rights are introduced. Here, the understanding of interpretation, norm and right and the views on the apparent conflicts between fundamental rights are presented so that a comparison can be made. In relation to interpretation, the authors' position on the supposed difference between constitutional interpretation and the interpretation of other legal texts is presented (since fundamental rights are declared in constitutions) and the theory of interpretation advocated by the authors is classified as cognitivist, mixed or sceptical theory of interpretation. Regarding norm and right, the authors' position on the possible distinction between legal rules and legal principles is presented (the so-called strong distinction thesis, the weak distinction thesis, and the thesis that no meaningful distinction can be made). Regarding the apparent conflicts between fundamental rights, the authors are classified as advocates of either the so-called conflictivist or the non-conflictivist positions. In the fourth and main sections, the method (which is itself a possible answer to the problem we are dealing with) is presented and applied to two cases. The first case is an example case used by the author; the second case is the German Federal Constitutional Court *Titanic* case. This case is taken as

a ‘comparison case’ so that a comparison between the methods is also possible in their application to concrete cases. The subchapters end with critiques of the proposals and with a conclusion and evaluation of each of the proposed methods.

CHAPTER I. ALEXYAN THEORY OF JUDICIAL BALANCING

Summary

The topic of Chapter I is judicial balancing, one of the legal methods proposed for resolving apparent conflicts between fundamental rights. More specifically, this chapter analyses the Alexyan theory of judicial balancing elaborated by Robert Alexy and further refined by his disciples: Jan Reinard-Sieckmann, Martin Borowski and Matthias Klatt. The Alexyan theory of judicial balancing will be analysed first as it is the most important (most influential and most widely used) among the theories of judicial balancing. It can therefore be regarded as the *standard* understanding of judicial balancing. The aim of the chapter is to comprehensively analyse the most important theory of judicial balancing (and at the same time the most important one regarding apparent conflicts between fundamental rights in general) in order to be able to evaluate it and compare with other methods. In this sense, the objective of the first chapter is to provide an answer to the question *What is judicial balancing*, understood in the framework of the Alexyan theory.

In terms of structure, the chapter consists of six subchapters. The first, introductory subchapter (I. 1.) presents the relevance and influence of Alexyan theory of judicial balancing. This introductory subchapter explains and justifies the choice of the topic of the chapter. The second subchapter (I. 2.) presents the theoretical background of the author. The subchapter contextualizes the legal philosophy of Robert Alexy in order to understand the theoretical background of his approach to the topic. The third subchapter presents the Alexyan understanding of the basic notions (I. 3.) that are relevant for understanding (apparent) conflicts between fundamental rights. These are first: interpretation, second: norm and right, and third: the question of (apparent) conflicts between fundamental rights. The third subchapter is followed by the third and most important subchapter, which deals with the Alexyan theory of judicial balancing in practice (I. 4.). This subchapter presents the theoretical outline of the method and its practical application to two cases used by Robert Alexy to illustrate its approach. The first one is the *Cannabis case* (1994), and second one is the *Titanic case* (1992), both of which are taken from the practice of the German Federal Constitutional Court. The fifth subchapter presents further developments (I. 5.) of the theory and the contributions of the most

important disciples of Robert Alexy. These are, in order of seniority, Jan-Reinard Sieckmann, Martin Borowski and Matthias Klatt. The chapter concludes with a sixth subchapter in which critiques and conclusions are presented (I. 6.).

By answering the question posed at the beginning of this chapter – *What is judicial balancing*, understood in the context of the Alexyan theory, the chapter provides a comprehensive overview and evaluation of the main method proposed for the problem of (apparent) conflicts between fundamental rights. In doing so, the strengths and weaknesses of the Alexyan approach are presented, so that a comparison can be made with other methods proposed for one of the most important contemporary legal problems – (apparent) conflicts between fundamental rights.

I. 1. Introduction

The present chapter aims to present a reconstruction of Robert Alexy's theory of judicial balancing, the best known and most influential among theories of judicial balancing. For this reason, we begin with his understanding of judicial balancing. By answering the question *What is judicial balancing* in the context of Alexyan theory we get an overview of what can be considered as a *standard* understanding of judicial balancing. This gives us a possible answer to the question *What are the legal methods of resolving apparent conflicts between fundamental rights*, so that we can then turn to other possible answers in the following chapters. This introduction will first present the importance and influence of Alexy's theory of judicial balancing, which justifies the choice to present it as the first among the legal methods proposed for resolving apparent conflicts between fundamental rights. The structure of the remainder of the chapter is then set out.

Robert Alexy (1945) first developed his theory of judicial balancing in his 1985 book *Theorie der Grundrechte*, translated into English in 2002 as *A Theory of Constitutional Rights.*[1] The book presents a "rational reconstruction of German constitutional rights reasoning" by analysing the judicial practice of the Federal Constitutional Court, *Bundesverfassungsgericht*

[1] Alexy, Robert: *Theorie der Grundrechte*, Baden-Baden: Nomos, 1985. English translation Alexy, Robert: *A Theory of Constitutional Rights*, Oxford: Oxford University Press, 2002, translated by Julian Rivers. *Theorie der Grundrechte* was Alexy's habilitation thesis, translated into Spanish in 1993 and again in 2007, English in 2002, Korean in 2007, Portuguese in 2008, and Polish in 2010, Klatt (2012) p. 7). The English translation includes a *Postscript* written by Alexy with responses to critics and new ideas, the most notable of which is the development of the famous "Weight formula", a mathematical model that elaborates Alexy's theory of balancing in greater detail and aims to provide a further rationalisation of his theory. In addition to the Weight formula developed in the *Postscript*, Alexy also elaborated his ideas of structural and epistemic discretion, as well as formal principles. See Alexy (2002a), pp. 388-425.

(*BVerfG*).[2] Although the author analyses the constitutional framework of a single state, his ideas have been more widely accepted and applied as a general theory of constitutional rights.[3] The book became the most influential work on the constitutional rights in Germany, and through the influence of German doctrine, the ideas it set forth spread to many other countries.[4] His approach and ideas, together with the German doctrine on fundamental rights, had an important influence not only on other countries, but also on the analysis of European fundamental rights in the Charter of Fundamental Rights of the European Union.[5] Alexy's analysis of constitutional rights has been described as laying the "foundations for a general theory of constitutional rights or fundamental rights in Europe and for liberal democracies generally".[6] As a result, Robert Alexy is considered the most important contemporary theorist of legal balancing, and his Weight formula is used as an argumentation scheme throughout the world.[7] His theory has been developed and reformulated since its inception, but its basic features have remained unchanged. Alexy understands judicial balancing a method proposed to resolve conflicts between conflicting fundamental rights and other constitutional principles. The idea of balancing is a key concept in the judicial practice of the German Federal Constitutional Court, whose case law Alexy analyses in his book.[8] Once the idea of balancing became widespread, it became an important concept in the practice of many other constitutional courts around the world.[9] Alexy's ideas on judicial balancing build on his earlier work on legal reasoning, most notably the 1978 book *A Theory of Legal Argumentation*, in which he addresses the issue of rational justification of legal decisions. Alexy argues that rational justification of balancing is possible and that balancing is a rational procedure that should be used to resolve conflicts between fundamental rights norms.[10] His theory of judicial balancing is characterized as an "essentially normative, but also partly descriptive" theory of judicial

[2] Rivers (2002), p. xvii.
[3] Alexy (2002a), p. 5, states that "The purpose of this book is to develop a general legal theory of the constitutional rights of the Basic Law". For broader acceptance of Alexy's theory, see, for example, Kumm (2007), p. 136, Martínez-Zorrilla (2011a), pp. 729-731, Menéndez & Oddvar Eriksen (2006), p. 4, Sardo (2012), p. 85 and Stone Sweet & Matthews (2008), p. 93.
[4] Borowski (2011), p. 579. On the influence of Alexy's theory of balancing, see Chiassoni (2019b), 191ff, Jestaedt (2012), pp. 152-153, Klement (2012), pp. 173-174, Kumm (2004), pp. 574-575, Martínez-Zorrilla (2018), pp. 171-172, Menéndez & Oddvar Eriksen (2006), p. 2, Moreso (2002a), pp. 18ff, Rivers (2006), p. 141 and Stone Sweet & Matthews (2008), p. 93. Jestaedt refers to the "Kiel school" founded by Alexy, and mentions J. Sieckmann, M. Raabe, N. Jansen, M. Borowski, H. Stück and M. Klatt as its representatives.
[5] Borowski (2011), p. 579. See also Menéndez & Oddvar Eriksen (2006), pp. 4-5.
[6] Borowski (2011), p. 586.
[7] Sardo (2012), p. 85. On this point, see also Hailbronner & Martini (2017), pp. 391-392, Jestaedt (2012), p. 157, Klatt & Meister (2012b), p. 4, Moreso (2009a), p. 223, Moreso (2012), pp. 35-36, Petersen (2020), pp. 163-165 and Pirker (2013), pp. 6-7.
[8] Alexy (2002a), pp. 1-4; Alexy (2003a), p. 134.
[9] Alexy (2005), p. 572. See also Borowski (2011), p. 579.
[10] Alexy (2003b), pp. 433-449. See also Feteris (2017), p. 118 and Sardo (2012), p. 85.

balancing, as it describes the methodology used by the German Federal Constitutional Court.[11] His theory of judicial balancing is also characterized as a procedural theory of balancing, since judicial balancing is understood as "an operation that can be rationally justified and should be rationally justified from a formal point of view".[12]

The subchapter consists of six sections (I. 1. – I. 6.) and is arranged as follows: after the introduction (I. 1.), which explains and justifies the structure and content of the chapter, the second section contextualizes Robert Alexy's legal philosophy (I. 2.). The third section (I. 3.) introduces the basic notions relevant to the problem of apparent conflicts between fundamental rights: first, Alexy's views on interpretation (I. 3. 1.), second, his understanding of 'norm' and 'right' (I. 3. 2.), and finally, his views on apparent conflicts between fundamental rights (I. 3. 3.). Before presenting Alexy's view on the issue of apparent conflicts between fundamental rights (I. 3. 3. 2.), we will present the discussion between *conflictivist* and *non-conflictivist* positions in the debate (I. 3. 3. 1.). In the fourth and most important section (I. 4.), the theoretical framework of Alexy's approach will be presented (I. 4. 1.) and illustrated on two legal cases (I. 4. 2.): first, the 1994 Federal Constitutional Court *Cannabis case* (I. 4. 2. 1.) and second, to the 1992 Federal Constitutional Court *Titanic case* (I. 4. 2. 2.). Both cases serve to present Robert Alexy's ideas on judicial balancing in practice, but the second case has another purpose, it is the 'comparison case', as we will apply to it the understanding of judicial balancing of every other author analysed in this thesis. The fifth section (I. 5.) presents further developments of Alexy's theory. The contributions of Jan-Reinard Sieckmann, Martin Borowski and Matthias Klatt will be presented. Finally, the chapter ends with an account of the criticisms that have been put forward to Alexyan theory of judicial balancing (I. 6. 1.) and with conclusions on the proposal (I. 6. 2.).

I. 2. Alexy's non-positivistic concept of law

Robert Alexy's theory of law has been characterized as a "holistic or systems-based approach" to law, with the author developing a "systematic philosophy covering most of the key areas of legal philosophy"[13]. According to Alexy, law has a dual nature, in that it

[11] Sardo (2012), p. 85.
[12] Sardo (2012), p. 88. On the characterization of Alexy's theory of balancing as "procedural" or "formal", see also Bomhoff (2008), pp. 574-575, Feteris (2017), p. 150, Maniaci (2002), pp. 49-50 and Zucca (2007), p. 12.
[13] Kumm (2004), p. 595; Pavlakos (2007), p. 1. On Alexy's holistic approach, see also Klatt (2007a), p. 531. Besides *A Theory of Constitutional Rights*, Alexy's most important works are *A Theory of Legal Argumentation*, first published in 1978, and *The Argument from Injustice: A Reply to Legal Positivism*, first published in 1992. See Borowski (2011), p. 575ff. On Alexy's non-positivism, see also Sieckmann (2021), pp. 720-741.

encompasses both a *real or factual* dimension and an *ideal or critical* dimension.[14] The claim that law has a dual nature (the so-called *dual nature thesis*) forms the basis of his non-positivistic concept of law, and the dual nature of law is seen as the "single most essential feature of law."[15] The real or factual dimension of law is represented by two elements: authoritative issuance and social efficacy (which are social facts), while the ideal or critical dimension of law is represented by the element of moral correctness (claim to correctness).[16] His non-positivism, as Viola elaborates, is based on the conceptual connection between law and morality, expressed in the idea of the *claim to correctness*.[17] The claim to correctness means that the issuance of a norm or a ruling is followed by the idea (implicit or explicit) that the norm or ruling itself is correct.[18] An essential feature of the claim to correctness is the "assurance of justifiability", i.e., that the claim to correctness is always accompanied by a claim to justifiability, i.e., that correctness entails justifiability.[19] Alexy accepts the Radbruch formula and argues that extreme injustice can result in the invalidity of legal norms.[20] Alexy formulates his view in terms of Radbruch formula:

> "…moral defects undermine legal validity if and only if the threshold of extreme injustice is transgressed. Injustice below this threshold is included in the concept of law as defective but valid law."[21]

Alexy's non-positivistic concept of law differs from both legal positivism and natural law.[22] His non-positivism differs from legal positivism in its rejection of both the descriptive thesis of separability and the normative thesis of separation between law and morality, and in its assertion that there is a necessary conceptual connection between law and morality.[23] Alexy describes non-positivism by what he calls the *connection thesis*, which defines the concept of law by including a third element of morality alongside the elements of authoritative decision and social efficacy (or effectiveness):

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[14] Alexy (2008), p. 281. On the dual nature thesis, see also Sieckmann (2021), pp. 271-282.
[15] Alexy (2010b), pp. 167. See also Alexy (2020), p. 239.
[16] Alexy (2010b), pp. 167-168.
[17] Viola (2016), pp. 82-84. See also Alexy (1989), pp. 167-168 and Alexy (2000b), pp. 138-143.
[18] Barberis & Bongiovanni (2016), p. 270.
[19] On this point, see Alexy (2002b), p. 34 and Barberis & Bongiovanni (2016), p. 270.
[20] Alexy (2007a), pp. 50-51 and Viola (2016), p. 83. Radbruch's formula is a variant of the extreme injustice thesis, which Alexy considers as a "kind of litmus test on the question whether a theory of law is positivistic or non-positivistic. One who accepts the thesis that extreme injustice is no law has to bid farewell to positivism."
[21] Alexy (2012), p. 6.
[22] For a distinction of Robert Alexy's non-positivistic concept of law from legal positivism and natural law, see Viola (2016), pp. 82-83.
[23] Alexy (1989), p. 167 and Viola (2016), p. 82. Alexy (1989), p. 167, writes: "My thesis is that there is a conceptually necessary connection between law and morality which means legal positivism fails as a comprehensive theory."

> "The thesis of connection aims to define the concept of law in a way that includes elements of morality. No serious non-positivist, however, excludes the elements of authoritative decision and social effectiveness from the concept of law. The difference between him and the positivist is established rather by his thesis that the concept of law is to be defined in such a way that, in addition to those features that refer to facts, it also includes elements of morality."[24]

Non-positivism also differs from natural law theories in that Alexy holds that the social, not just the moral element is essential to the concept of law. However, the natural law tradition does not overwhelmingly hold that only the moral element is essential to the concept of law, and as a result, Alexy's position has been held by authors to be close to the natural law theory.[25] To distinguish his non-positivism more precisely from legal positivism and natural law, Alexy contrasts it with two forms of positivism (*exclusive* and *inclusive*) and two forms of non-positivism (*exclusive non-positivism* and *super-inclusive non-positivism*) and calls his position *inclusive non-positivism*.[26]

To summarise the brief account of Alexy's legal philosophy, we can state that he has developed a non-positivistic concept of law, which he calls inclusive non-positivism and according to which law consists of two dimensions: the real or factual, which includes authoritative issuance and social efficacy, and the ideal or critical, which is represented by the claim to correctness. As will be shown in the following sections presenting Alexy's understanding of interpretation (I. 3. 1.), norm and right (I. 3. 2.), the apparent conflicts between fundamental rights (I. 3. 3.) and his understanding of judicial balancing (I. 4.), the ideal or critical dimension, a single most essential feature of law, concerns all of them.

I. 3. Basic notions

I. 3. 1. Interpretation

[24] Alexy (1989), p. 168. See also Alexy (2010b), p. 167, where he writes: "Authoritative issuance and social efficacy are social facts. If one claims that social facts alone can determine what is and is not required by law, that amounts to the endorsement of a positivistic concept of law. Once moral correctness is added as a necessary third element, the picture changes fundamentally. A non-positivistic concept of law emerges. Therefore, the dual-nature thesis implies non-positivism."

[25] Viola (2016), pp. 82-83.

[26] For a summary of his distinction between two forms of positivism and two other forms of non-positivism, see Alexy (2012), pp. 3-7. According to Alexy, his *inclusive non-positivism* (but also two other forms of non-positivism) is distinguished from *exclusive positivism* by the claim that morality is necessarily included in the concept of law (exclusive positivists, like Raz claim that morality is necessarily excluded from the concept of law). *Inclusive positivism*, advocated by Coleman, holds that morality is neither necessarily included in nor excluded from the law. Alexy distinguishes his inclusive non-positivism from exclusive non-positivism (according to which any moral defect, any injustice, leads to legal invalidity, as advocated by Augustine of Hippo) by arguing that the latter gives "too little weight to the factual or real dimension of law". *Super-inclusive non-positivism* (as advocated, for example, by John Finnis), according to which legal validity is in no way affected by moral defects is rejected on the grounds that it does not give sufficient weight to the ideal dimension of law.

This section presents Robert Alexy's views on interpretation. Since the aim of the work is to provide a comparative overview of the different legal methods used for the resolution of the apparent conflicts between fundamental rights, and since the understanding of interpretation is essential to any legal method dealing with the problem, we will also present Riccardo Guastini's distinction of the theories of interpretation, so that the understanding of interpretation from each of the authors can be classified (and later compared). Guastini's classification is chosen since it offers clear parameters and possibility to compare the views of the authors.

Robert Alexy sets out his views on interpretation in his 1978 book *A Theory of Legal Argumentation*, in which he addresses the rational justification of legal decisions as a type of normative statements.[27] Alexy places his views on legal interpretation in the context of the broader topic of legal argumentation. The process of justification of normative statements is understood by Alexy as practical discourse and the process of justification of legal decisions as legal discourse, and a theory of legal argumentation should be understood as a specific form of general practical discourse.[28] Practical questions can have more than one right answer, and in legal discourse (understood as a specific form of general practical discourse) two incompatible normative statements are possible.[29] As far as the justification of legal decisions is concerned, Alexy follows the distinction introduced by Wróblewski between *internal* and *external* justification.[30] For Alexy, external justification (which focuses on the acceptability of the premises of a legal decision) is the central topic for legal argumentation.[31] Regarding the external justification of legal decisions, Alexy divides the rules and arguments of external justification into six groups.[32] The first (and most important, as Feteris points out) group of the rules of external justification is related to arguments used in the *interpretation* of legal norms,

[27] Feteris (2016), p. 679: "The central question in the external justification is whether the arguments used in the internal justification are acceptable according to legal standards." See also Borowski (2011), pp. 577-579.
[28] Alexy (2007b), p. 44 and Feteris (2016), p. 679.
[29] Feteris (2016), p. 681. See Alexy (2007b), p. 291.
[30] Alexy (2007b), p. 306. On the distinction between internal and external justification, see Wróblewski (1971), p. 412, where he writes: "There are two kinds of justification of legal decision: internal and external justification. Internal justification deals with the *validity of inferences from given premisses to legal decision taken as their conclusion* [emphasis added]. The decision in question is internally justified if the inferences are valid and the soundness of its premises is not tested. In this respect internal justification is "formal" justification and it is not adequate for an analysis of the practical operation of legal decision and its institutional control. External justification of legal decisions tests not only the validity of inferences, but also *the soundness of premisses* [emphasis added]. The wide scope of external justification is required especially by the paradigmatic judicial decision because of the highest standards imposed on it." On the distinction, see also Klatt (2008), pp. 51-54 and Klatt & Meister (2012a), pp. 693-694.
[31] Feteris (2016), p. 679.
[32] Alexy (2007b), p. 320.

and these argument forms are based on the *canons of interpretation*.[33] Alexy points out that the number of these canons (elaborated by Friedrich Carl von Savigny) is disputed, but he distinguishes six of them: *semantic*, *genetic*, *historical*, *comparative*, *systematic* and *teleological* methods of interpretation.[34] The canons of interpretation are used to justify the interpretative choice (meaning) given to an expression susceptible to more than one interpretation.[35] In this sense, Alexy sees no difference between constitutional interpretation and the interpretation of other legal texts.[36] Alexy points out that a fully elaborated hierarchy between the canons of interpretation is controversial, since the use of different canons of interpretation can lead to different results, which remains a problem.[37] However, he presents his views on the relationship between some of them in the Appendix to his *A Theory of Legal Argumentation* under the rules and forms for legal discourse.[38] He formulates what he calls a 'saturation rule', which requires that a "full statement of reasons is required in every argument which belongs to the canons of interpretation" (J.6).[39] Regarding the hierarchical relationship between canons of interpretation, Alexy argues that arguments relating to the actual wording of the law (the *semantic* method of interpretation) or the will or intention of the historical legislator (the *genetic* method of interpretation) take precedence over other arguments, unless there are rational grounds to give precedence to other arguments (J.7).

To sum up: Alexy's views on legal interpretation are presented in the broader context of legal argumentation and the (external) justification of legal decisions. According to Alexy, when an expression is susceptible to more than one interpretation, preference should be given to the semantic interpretation of the wording of the normative provision to be interpreted and

[33] Feteris (2016), p. 683. The other groups include rules for the use of dogmatic argumentation; the use of precedents; the use of general practical argumentation; the use of general empirical argumentation and the use of what Alexy calls special legal argument forms, including *argumentum a contrario*, analogy, and *argumentum a fortiori*. See Alexy (2007b), p. 320.

[34] Alexy (2007b), pp. 324. These methods of interpretation are not understood as *rules* of interpretation, as Alexy (2007b), pp. 337-338 points out, and suggests that they can be called *argument schemes*, following Perelman.

[35] Feteris (2006), p. 683.

[36] Alexy (2002a), pp. 1-2: "Where the constitutional rights catalogue is written, the legal problem of constitutional rights is first and foremost a problem of interpretation of authoritative formulations of positive law. In this respect it is not different from problems of interpretation which arise generally in law." Constitutional provisions, as Alexy points out, are more often open-textured that other provisions. It does not follow, however, that they are (or should be) interpreted using different methods of interpretation. An example of what Alexy (2002a), p. 34, calls "structural open texture" of constitutional provision is Art. 5(3) of the Basic Law, according to which "Arts and sciences, research and teaching shall be free". This provision does not tell us, as Alexy indicates, whether such state of affairs is to be brough through the active intervention by the state or just ensured by its non-intervention.

[37] Alexy (2007b), pp. 30-31.

[38] Alexy (2007b), pp. 410-411, formulates rules (marking them with J, followed by a number).

[39] Feteris (2016), pp. 683-684. See Alexy (2007b), p. 410. The "saturation rule" also applies to special argument forms, among which Alexy mentions the *argumentum a contrario* (J.15), the analogy (J.16), and the *argumentum ad absurdum* (J.17).

to will of the norm-creator. How can Robert Alexy's views on interpretation be classified? To make a comparison with other authors whose ideas are presented in this work, I will use the classification developed by Professor Riccardo Guastini, who distinguishes between three theories of interpretation: cognitivist, mixed and sceptical.[40] Let us present the main ideas of these three theories of interpretation, according to Guastini:

(1) *Cognitive theory of interpretation* sees interpretation as a matter of "discovery" or knowledge, namely empirical knowledge of either the "proper", objective meaning of normative texts or the subjective intentions of normative authorities. The underlying assumption behind cognitive theory of interpretation, as Guastini indicates, is the belief that words have a "proper", intrinsic meaning and that there is one univocal and recognizable "will" of the normative authorities. The aim of legal interpretation, then, is the discovery of pre-existing meaning or intentions. According to the cognitive theory of interpretation, there is always one and only one "true" interpretation. Cognitive theory usually asserts, as Guastini points out, that legal systems are necessarily complete (gapless) and consistent. For this reason, there is no room for judicial discretion and, as a further consequence, every question of law is susceptible to one right answer.

(2) *Sceptical theory of interpretation*, on the other hand, sees interpretation as a matter of evaluation and decision. The underlying assumption behind sceptical theory of interpretation is the idea that words have no proper meaning at all, as Guastini explains, and that the words may bear meaning put upon it by the user or by each recipient. According to this theory, legal rules do not precede interpretation but are the result of interpretation. Statutory texts are likely to be interpreted in different ways, depending on the "evaluative attitude" of the interpreter. There is no "will" or "intention" on which we can rely to determine the meaning of the text. According to the sceptical theory of interpretation, no existing legal system is either complete or consistent. Faced with gaps and inconsistencies, judges can create new law or derogate existing law, and thus act as legislators. No "clear-cut distinction" can be drawn between adjudication and legislation, as Guastini concludes.

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[40] A summary of these theories is presented from Guastini (1997b), pp. 279-283. Later, Guastini (2006a), p. 227, argued for a distinction between cognitivism and scepticism, *tertium non datur*, understanding the so-called mixed theories as belonging to the cognitivist theories. A similar classification, but developed in the context of constitutional interpretation, is found in Moreso (1998), pp. 131-160, where he distinguishes between three positions: 'Noble Dream' (for cognitivism), 'Nightmare' (for scepticism) and 'Vigil' (for the intermediate position he defends). More on this in the subsection II. 3. 3. 1., where Moreso's views on interpretation are presented. Cf. also with Chiassoni (2019a), pp. 130ff, who distinguishes between three theories of interpretation: *formalism* ("the noble dream theory"), *realism* ("scepticism", "the nightmare theory") and *mixed* or *intermediate* theory ("eclecticism", "the vigil theory"). Cf. also with Martínez Zorrilla (2010), pp. 49-57, who distinguishes between *cognitivist*, *sceptical*, and *intermediate* theories of interpretation.

(3) *Mixed (or intermediate) theory of interpretation* holds that interpretation is sometimes the result of knowledge and sometimes a matter of evaluation and decision (or the output of the discretionary decision). Guastini distinguishes between two versions of the mixed theory of interpretation.

(3. 1.) According to the first and more influential version, the irreducible "open texture" of nearly all legal provisions has as a result the "core" of settled meaning and the "penumbra" of uncertainty in every legal rule.[41] Thereafter, a distinction is made between "clear" ("plain" or "soft") cases and borderline "hard" cases where the application of the rule is controversial. When judges decide a clear case, they do not exercise judicial discretion, but when they decide a hard case, judicial discretion is necessarily involved because deciding a hard case necessarily involves a choice between competing possible solutions.[42]

(3. 2.) According to the second version of the theory, there are clear and obscure legal texts, and judicial discretion depends on the wording of the legal texts. Clear texts, according to the proponents of this theory, have univocal or recognizable meaning. Obscure legal texts are ambiguous and liable to competing interpretations. While interpretation involves discretion, interpretation is not a necessary step in a judicial decision because, according to this theory, clear legal texts do not require interpretation (*interpretatio cessat in claris* or *in claris not fit interpretatio*). Interpretation of obscure legal texts, on the other hand, involves judicial discretion, as the choice between competing possible interpretations is discretionary.

How can Robert Alexy's views be classified, according to the scheme elaborated by Riccardo Guastini? I argue that his views position him as a proponent of the first variant of *mixed theory of interpretation*. Alexy emphasises the open texture of legal provisions.[43] Legal cases involving conflicts between rules are resolved by subsumption, while legal cases involving conflicts between legal principles are resolved by balancing, as will be explained in more detail in this chapter.[44] The cases in which the judge balances (and these are the cases of the apparent conflicts between fundamental rights, as Alexy understands them as conflicts between legal principles) can be understood as *hard cases*, as opposed to *clear cases*.[45] Alexy

[41] On the idea, see Hart (2012), pp. 124-136.
[42] Guastini (1997b), p. 282, writes that "In other words, facing a soft case, which falls within the core of settled meaning of the rule-formulation, the judge simply "discovers" and "describes" such an "objective" meaning. Facing a hard case, which is neither clearly included nor clearly excluded from the scope of the rule, the judge on the contrary is forced to "decide" and to "ascribe" to the rule-formulation the meaning of his or her own."
[43] Alexy (2002a), p. 34 and Alexy (2007b), pp. 27-28. For such a position, see also Hart (2012), pp. 124-136, who can be cited as an example of the proponent of the mixed theory of interpretation.
[44] Alexy (2003b), pp. 433-436. See also Poscher (2009), pp. 439-440.
[45] Guastini (1997b), p. 282. Poscher (2009), p. 439 writes: "For any given norm, adjudication may consist in mere rule-following in easy cases, of more complex analytical considerations when it comes to more complex cases,

rejects the idea of a one-right answer in hard cases, which is characteristic of cognitivist theories of interpretation.[46] On the other hand, Alexy's views rule out the possibility of a sceptical theory of interpretation by arguing for a primacy of the genetic method of interpretation (which takes into account the will of the historical legislator). For this reason, his views are closer to cognitivism than to scepticism. In the following subsection, Alexy's understanding of the notions of 'norm' and 'right' is presented.

I. 3. 2. Norm and right

Since judicial balancing is a legal method proposed for resolving apparent conflicts between fundamental rights, this section presents Alexy's understanding of the concept of norm and right. In terms of structure, we begin with the theoretical background and influence on Robert Alexy (particularly that of Ronald Dworkin) regarding norm and right, followed by an account of his understanding of norm (particularly his distinction between rules and principles, the most important distinction for his understanding of fundamental rights norms). We then present alternative approaches to understanding norm and right that Alexy considered and the reasons why he rejected them. The Federal Constitutional Court's case *Lüth*, which Alexy used to support his ideas, is presented. Finally, we conclude the section with Alexy's understanding of fundamental right before moving on to the next section, which deals with his understanding of the problem of apparent conflicts between fundamental rights.

We begin by outlining the theoretical background and influence on Robert Alexy regarding norm and right. Alexy adopts a so-called semantic conception of norm, according to which a norm is the meaning of a normative sentence or provision.[47] One of the central points for Robert Alexy's theory of law in general, and for his theory of constitutional rights in particular, is the distinction between two types of norms: *rules* and *principles*.[48] An important terminological remark is necessary here. For Alexy, all fundamental rights are constitutional

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and yet of *more complex argumentations and evaluations in hard cases, where even the balancing of legally protected rights in the sense of an optimization requirement may play a role*." [emphasis added]

[46] Aarnio (2008), p. 255, Brożek (2007), p. 322 and Feteris (2017), pp. 125-126. See also Alexy (2007b), p. 291.

[47] Alexy (2002a), pp. 21-25. On the distinction between the two conceptions of norms, hyletic (or semantic) and expressive (or pragmatic), see Alchourrón and Bulygin (1981), pp. 95-124 and Guastini (2018b), pp. 1-4. On Alexy's understanding of norm, see La Torre (2006), pp. 53-55.

[48] Alexy (2002a), p. 44, on the importance of the distinction between rules and principles: "…but the most important [theoretical distinction, emphasis added] for the theory of constitutional rights is that between rules and principles. The distinction is the basis for a theory of constitutional rights justification and a key to the solution of central problems of constitutional rights doctrine. (…) All in all, the distinction between rules and principles is the basic pillar in the edifice of constitutional rights theory". On the importance of the distinction between rules and principles for Alexy's theory, Klatt (2012), p. 7: "The central theme of Alexy's second book is to demonstrate how crucial problems of the theory of constitutional rights can be resolved by distinguishing two kinds of norm, namely rules and principles, and by pursuing the consequences that stem from this norm-theoretic distinction".

rights (but not vice versa). When the expression "constitutional rights" is used, it refers to fundamental rights (protected by constitutional norms), unless it is explicitly stated that the expression "constitutional rights" refers to other, non-fundamental constitutional rights.

Rules and principles are understood by Alexy as two types of norms, each norm being either a rule or a principle (*Exklusionstheorem*).[49] Norms expressing constitutional rights have the structure of legal principles, and Alexy argues that they are fundamentally different from legal rules. The distinction between rules and principles forms the basis of Alexy's *principles theory*, which he defines as the "system drawn from implications of the distinction between rules and principles".[50] Alexy's principles theory is based on three main theses: (1) the *optimization thesis*, according to which principles are "optimization commands", (2) the *collision law*, which explains the method of resolving conflict between principles that is fundamentally different from resolving conflicts between rules and (3) the *balancing law*, which states the relation between the intensity of interference of one principle regarding the non-satisfaction or detriment to another principle, and the importance of the realization of the other principle.[51]

The distinction between rules and principles has implications for a wide range of areas of law, from the concept of legal system to the relationship between law and morality, the theory of norms, the theory of rights (especially basic rights), and the application of law.[52] It has been in the focus of legal theorists since it emerged as a topic in the second half of the last century.[53] The distinction between rules and principles was, as Alexy points out, already a topic in the 1950s in Germany in the works of Josef Esser (albeit with a different terminology), and in the 1940s in Austria in the works of Walter Wilburg, who was the pioneer to the topic with his theory of flexible systems.[54] In Italy, the topic had already been taken up by Emilio Betti and Norberto Bobbio.[55]

[49] Alexy (2002a), p. 48 and Bäcker (2014), p. 2.
[50] Alexy (2010a), p. 22. See also Alexy (2009), pp. 82-83.
[51] Alexy (2000a), pp. 295-298. The three theses are explained throughout the section.
[52] Alexy (2000a), p. 294 and Duarte (2017), p. 1.
[53] Among many authors who have dealt with the topic, besides R. Dworkin and R. Alexy, M. Atienza, J. Ruiz Manero, R. Guastini, J. Raz, H. L. A. Hart, N. MacCormick and A. Marmor can be mentioned.
[54] Alexy (2000a), p. 294. Alexy refers to the works of Josef Esser, *Grundsatz und Norm in der Richterlichen Fortbildung des Privatrechts*, J. C. B. Mohr (Paul Siebeck), Tübingen, 1956 and of Walter Wilburg *Die Elemente des Schadenrechts*, Elwert and Braun, Marburg, 1941.
[55] Emilio Betti, *Interpretazione della legge e degli atti giuridici. Teoria general e dogmatica.*, Giuffrè, Milano, 1949 and Norberto Bobbio, *Princìpi generali di diritto*, in Novissimo Digesto Italiano, Vol. XIII, UTET, Torino, 1966.

An important influence on Alexy's comes from the ideas of Ronald Dworkin.[56] He influenced Alexy in at least two ways: first, with the idea that principles have "weight" and, second, with his distinction between "easy cases" and "hard cases". According to Dworkin, rules are applicable in "all-or-nothing fashion", i.e., if the facts a rule stipulates are given, then the rule is either valid, in which case it provides an answer to the case, or it is not valid, in which case it does not contribute to the solution of the case.[57] Principles, on the other hand, do not even purport to set out the conditions that make their conditions of application necessary. According to Dworkin, they provide reasons that exert a certain influence in one direction, but they do not impose a particular decision.[58] Dworkin argues that principles, unlike rules, have the dimension of "weight" or "importance", and in the case of conflict between principles, the relative weight of each must be considered.[59] The idea that principles have "weight" is a key one in Alexy's theory of judicial balancing; it is explicitly manifested as abstract and concrete weight in his Weight formula, which is discussed in the section I. 4. 1. In the case of a conflict between principles, each principle provides a reason for arguing in favour of a certain solution, but does not itself dictate a solution.[60] This differs from the situation of a conflict between

[56] Dworkin (1967), later reprinted as a chapter *The Model of Rules I* in his 1978 book *Justice in Robes*, which also includes chapter *The Model of Rules II*. In his 1967 article, Dworkin criticises legal positivism, especially H. L. A. Hart's version, and claims that lawyers use other legal standards besides legal rules, such as legal principles and legal policies in certain cases, which he calls hard cases. Dworkin uses the term legal standard to cover rules, principles, policies and "other sorts of standards". See Dworkin (1967), pp. 22-23. On the influence of Dworkin's theory on Alexy, see Borowski (2010), pp. 20-24, Hofmann (2016), p. 340 and Sardo (2012), p. 85. For a detailed account of Dworkin's views on this topic, see section 1. 3. 2. in Chapter III.

[57] Dworkin (1978), p. 24. Dworkin's use of the term 'valid' here is problematic. The term 'applicable' should be used instead. On this point, see Ratti (2006), p. 254 and pp. 258-259. On the problematic conflations of the concepts of 'validity' and 'applicability' of legal standards in Dworkin's theory, see also Munzer (1973), pp. 1156-1162, who points out that a rule can be valid without being applicable. Navarro & Moreso (1997), pp. 201-207, distinguish between two concepts of applicability: external applicability, which "refers to institutional duties; a norm N is externally applicable if and only if a judge is legally obliged to apply N to some case c", and internal applicability, which refers to "the so-called spheres of validity of legal norms. A norm N is internally applicable to actions regulated by its sphere of validity." The expression "spheres of validity" was introduced by Kelsen (1949), pp. 42-44, who put forward and elaborated the idea that legal norms have personal, material, territorial and temporal spheres of validity. In the context of the distinction proposed by Navarro and Moreso, the expression 'internal applicability' seems to cover the expression of 'validity' which Dworkin uses. For a reconstruction of different "models" of the validity of legal rules, see Ferrer Beltrán & Ratti (2010), pp. 603-606.

[58] Dworkin (1978), p. 26.

[59] Dworkin (1978), pp 26-27. The most well-known example of a legal principle given by Dworkin comes from the 1889 New York Court of Appeals case of *Riggs v. Palmer*, in which the court had to decide whether an heir named in his grandfather's will could inherit under that will even though he had murdered his grandfather in order to inherit. The grandson did not receive the inheritance, even though he would have inherited under the literal interpretation of statutory provisions. The court referred to the "general, fundamental maxims of common law", which, in this case, was that "no one may profit from his own wrong". See Dworkin (1978), p. 23.

[60] Dworkin (1978), p. 27. A case example Dworkin cites here is the 1960 Supreme Court of New Jersey case of *Henningsen v. Bloomfield Motors Inc*., in which the principles of consumer protection and freedom of contract came into conflict. The main issue in the case was whether (or to what extent) an automobile manufacturer may limit its liability in the case of the automobile is defective. For the details of the case, see Dworkin (1978), pp. 23-24.

rules, where one of the rules is declared invalid.[61] Rules are "functionally important" or "functionally unimportant"; they do not have the dimension of weight that principles have, according to Dworkin.[62] When rules conflict, one of them cannot be valid, and must be abandoned or reformulated. This is done by "appealing to considerations beyond the rules themselves", to meta-rules such as *lex superior*, *lex posterior*, or *lex specialis*, or by considering which of the rules is supported by the more important principle.[63] Alexy's understanding of the distinction between rules and principles follows Dworkin's idea that principles have the dimension of "weight", but with an important difference – Alexy characterizes principles as "optimization commands".[64] While a conflict between rules can only be resolved by either introducing an exception to one of the rules or by declaring one of them invalid, conflict of principles is resolved by balancing.[65]

The second point on which Dworkin influenced Alexy is the distinction between *easy cases* and *hard cases*.[66] Many cases that are easy can be solved simply by subsumption, while hard cases "are defined by the fact that there are reasons both for and against any resolution under consideration".[67] Most of these cases, as Alexy argues, must be resolved by balancing. In these hard cases, the collisions must be resolved by balancing the opposing reasons for each of the solutions.[68]

Having presented the theoretical background and influence of Dworkin, we now turn to Alexy's distinction between rules and principles. Both rules and principles are norms because they both state what ought to be the case, and both can be expressed in terms of the deontic modalities of command, permission, and prohibition.[69] Regarding the distinction between rules

[61] Dworkin (1978), p. 27. Ratti (2006), p. 254, points out that it is wrong to say that two contradictory or antinomic rules cannot both be valid; every legal system is full of valid but contradictory rules. As Ratti suggests, it can be said that two contradictory rules cannot both be *applied* in the same concrete case, and then the judge must decide which of the contradictory rules to apply. It is possible, he continues, that one of the two rules is to be considered invalid, but this depends on "the use of certain criteria of preference between rules" and "contingent facts, such as the moment of entry into force, the hierarchical relations and the contents of meaning attributed to the normative formulations from which the contrasting rules are derived" [translated by author]. A rule that is defeated in the conflict does not lose its validity (except in the case where the *lex superior* criterion is used). Ratti (2006), p. 258.
[62] Dworkin (1978), p. 27.
[63] Dworkin (1978), p. 27.
[64] The idea of principles as "optimization commands" is influenced by the work of one of Alexy's disciples, Jan-Reinard Sieckmann. The idea is explained in this section and in section I. 5. 2., which presents Sieckmann's contribution to the Alexyan theory of judicial balancing.
[65] Alexy (2002a), pp. 49-50. On the difference between rules and principles with regards to normative conflicts, Alexy (2002a), p. 50, writes: "Conflicts of rules are played out at the level of validity; since only valid principles can compete, competitions between principles are played out in the dimension of weight instead."
[66] Sardo (2012), p. 85.
[67] Alexy (2003b), p. 436.
[68] Alexy (2003b), p. 436.
[69] Alexy (2002a), p. 45.

and principles, we can distinguish three possible positions: first, the position that it is not possible to distinguish between these two types of norms (*no distinction thesis*); second, that the distinction between rules and principles is quantitative (*weak distinction thesis*); and third, that the distinction between rules and principles is qualitative (*strong distinction thesis*).[70] Alexy explicitly takes the third position by stating that there is a criterion according to which a distinction between rules and principles must be made.[71] His distinction between rules and principles is initially grounded on the criterion of the different kinds of satisfaction or fulfilment in their application.[72] The characterization of principles as "optimization commands" is the defining characteristic according to which one can distinguish between rules and principles, and a defining feature of principles theory.[73] According to Alexy, principles are norms

> "…which *require that something be realized to the greatest extent possible given the legal and factual possibilities* [emphasis added]. Principles are *optimization requirements*, characterized by the fact that they can be satisfied to varying degrees, and that the appropriate degree of satisfaction depends not only on what is factually possible but also on what is legally possible. The scope of the legally possible is determined by opposing principles and rules".[74]

Rules, on the other hand, are norms

> "…which *are always either fulfilled or not* [emphasis added]. If a rule validly applies, then the requirement is to do exactly what it says, not more nor less. In this way rules contain fixed points in the field of factually and legally possible".[75]

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[70] Alexy (2002a), p. 47. See Moniz Lopes (2017), p. 472, for the criteria for the distinction. The author proposes to distinguish between three main theses in the distinction between rules and principles: first, the thesis that there are no solid grounds for distinguishing between the two types of norms; second, the weak distinction thesis, which states that the differences between rules and principles are differences in degree (of possessing or exhibiting certain characteristics used for the distinction); and third, the strong distinction thesis which takes the position that there are qualitative differences between rules and principles. For such a 'tripartite' classification, see also Silva Sampaio (2018), pp. 76-77, fn. 30. On the strong and weak distinction thesis between rules and principles, see also Aarnio (2011), pp. 119-122, Comanducci (1997), pp. 56-63, De Fazio (2019), p. 307, Guastini (2014), pp. 69-71, Pino (2009), pp. 133-136 and Verheij, Hage & Van Den Herik (1998), pp. 3-26.

[71] Alexy (2002a), p. 47.

[72] Duarte (2017), p. 1. See Alexy (2002a), pp. 47-48. Before discussing the criterion for distinguishing rules from principles, Alexy considers some of the criteria proposed in the works of earlier authors, especially the generality of the norm, but also alternative criteria proposed in the literature. Among these alternative criteria, Alexy mentions the following: the "ability to state precisely the situations in which the norm is to be applied"; the manner of creation ("created" vs. "evolved" norms); the explicitness of evaluative content; the connection with the idea of law or with a higher legal statute; significance for the legal order, and also the distinction between reasons for rules and rules themselves and norms of argumentation an norms of behaviour. See Alexy (2002a), p. 46 for further reference to these criteria.

[73] Alexy (2000a), p. 295.

[74] Alexy (2002a), pp. 47-48. In *A Theory of Constitutional Rights*, the phrase "optimization requirements" is used. In later works, the phrase "optimization commands" is used. See Alexy (2005), pp. 572-573, Alexy (2010a), p. 21, Alexy (2014a), p. 52.

[75] Alexy (2002a), p. 48.

Rules are thus understood as *definitive commands*.[76] On the other hand, the realization of a principle to the "greatest extent possible" requires contrasting it with competing principles or with principles that support opposing rules. In these situations, competing principles support two *prima facie* incompatible norms that can be proposed as solutions to the case (for example, norm N_1 forbids A and norm N_2 commands A).[77]

To support his claims about the structure of constitutional rights, Alexy analysed the jurisprudence of the German Federal Constitutional Court and showed that, in at least some cases, the Court treats norms derived from constitutional provisions as principles. Modern democratic constitutions, according to Alexy, consist of two classes or categories of norms: first, norms that "organize legislation, adjudication and administration", and second, norms that "constrain and direct public power".[78] In Alexy's understanding, norms that confer constitutional rights are the most prominent type of norms in the second category. The question then arises of how to characterize constitutional rights norms, and Alexy considers three models: first, the *model of pure principles*; second, the *model of pure rules*; and third, the *mixed model of rules and principles*.[79] We will briefly present these three models and Alexy's assessment of each.

In the first model, the *model of pure principles*, the directly enacted guarantees from the constitutional rights provisions are understood as principles, and rules are derived from "the establishment of the conditions of precedence as the result of balancing exercises".[80] In this model, rules are totally dependent on principles, as Alexy points out. Alexy rejects the first model, arguing that it does not take the text of the Basic Law seriously, stating that it can even be argued that it contradicts the text of the Basic Law.[81] This model, in Alexy's view

> "…replaces the obligation to uphold the Constitution with a balancing exercise and misunderstands the character of the Basic Law as 'rigid constitution' having 'normative clarity and unambiguity'."[82]

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[76] Alexy (2000a), p. 295.
[77] Alexy (2000a), pp. 300-301; Bernal Pulido (2006b), p. 200.
[78] Alexy (2003a), p. 131. Alexy argues that this dichotomy "seems to be universally valid, at least in the universe of democratic constitutions".
[79] Alexy (2002a), pp. 69-86. For the model of pure principles, see pp. 69-71; for the model of pure rules, see Alexy (2002a), pp. 71-80, and for the model of rules and principles, see Alexy (2002a), pp. 80-86.
[80] Alexy (2002a), pp. 69-70.
[81] Alexy (2002a), pp. 70-71 argues that the model of pure principles does not take the text of the constitution seriously because the model "undermines the differentiated approach of the Basic Law to the limitation of rights. The makers of the Basic Law explicitly avoided general clauses limiting rights, choosing instead to modify various individual guarantees of constitutional rights with a wide variety of limitations. While the Federal Constitutional Court treats constitutional norms as principles, it also stresses the significance of this point when it speaks of a 'system of limitations which is carefully fashioned according to the nature of each individual constitutional right.'"
[82] Alexy (2002a), p. 71.

In the second model, the *model of pure rules*, constitutional rights provisions are understood as rules applicable by mere subsumption, without any need for balancing, or as "balancing-free norms".[83] Norms expressing constitutional rights are understood as legal rules that protect "certain abstractly described positions of the citizens against the state", and as such they are structurally indistinguishable from other norms in a legal system. The use of subsumption to apply constitutional rights norms can be problematic and often requires additional justification. However, the rationale behind this understanding is that the issues that may arise in the application of constitutional rights norms may be resolved "in essence *without* balancing".[84] Although proponents of the second model agree that there are situations in which the interpretation of constitutional rights provisions is complex, they nevertheless consider that these situations can be resolved through the methods of legal interpretation without the need for balancing.[85] Alexy also rejects the second model by analysing three types of constitutional rights: rights *guaranteed without reservations*, rights *with simple reservations* and rights *with qualified reservations*.[86]

Constitutional rights guaranteed without reservation are understood as constitutional rights to which constitution provides no limits (for example, the freedom of religion from Art. 4(1) of Basic Law). Under the model of pure rules, as Alexy argues, it would be possible to subsume religious oppression, if required by a particular faith, under the constitutional right.[87] The alternative of not classifying these measures under the corresponding constitutional rights would go against the wording of the constitution. However, if these constitutional rights are treated as "reasons for imposing limitations", the need for balancing arises, as Alexy argues, and a departure from rule construction is required, in accordance with the postulate of systematic interpretation.[88]

The problem with the second type of constitutional rights, those with simple reservations (e.g., personal freedom, more specifically, the freedom of physical movement

[83] Alexy (2002a), p. 71 and Alexy (2010a), p. 22.
[84] Alexy (2010a), p. 22. The application of constitutional rights norms can be problematic – for example, it may be doubtful whether a particular expression should be protected by freedom of speech or whether a certain act should be protected by freedom of religion – but the key to this "rule construction" understanding of constitutional rights lies in the fact that these and other questions arising in their application can be answered without balancing.
[85] Alexy (2002a), p. 71.
[86] Alexy (2002a), pp. 61-70.
[87] Alexy (2010a), pp. 22-23.
[88] Alexy (2010a), p. 23. On constitutional rights guaranteed without reservation, see also Alexy (2002a), pp. 71-76. The problem, according to Alexy, is that these rights would be limitless if one adheres to the literal approach; in practice, however, this is not the case, as there are arguments that there are at least some limitations to the rights. As Alexy goes to point out, the question then becomes how to determine the scope of constitutional protection of these seemingly unlimited constitutional rights. Alexy argues that a balancing test is required.

guaranteed by Art. 2(2) of Basic Law) is that such a right could be limited under the limiting clause by the legislature "down to its essential core". The problem with this, according to Alexy, is that these rights, if taken literally, "seem to guarantee too little". Therefore, balancing is required for these rights as well.[89]

Finally, the model of pure rules is considered inadequate in the case of constitutional rights with qualified reservations, such as the inviolability of the home guaranteed by Art. 13(1) of Basic Law. Not every state action can be justified just because it is a means to one of the ends mentioned in the same article (such as "accommodation shortage" from Art. 13(7)) and other formal requirements, as Alexy argues.[90] Balancing is also necessary here because the question of subsumption under the "qualified reservation" may arise.[91]

The two "pure" models have problems that make them unacceptable in Alexy's view. He therefore argues for a third, 'mixed' or 'combined' *model of rules and principles*, which "consists of a level of principles interconnected with a level of rules". Constitutional rights provisions have, according to Alexy, a "double aspect".[92] Constitutional rights norms, then, are not only principles. They can be rules as well, but the obligation to follow the rules itself "derives from underlying formal principles".[93] As Alexy argues,

[89] On this point, see Alexy (2002a), p. 76. See also Alexy (2010a), p. 23, where Alexy gives an example with the constitutional right to life and bodily integrity, which is guaranteed by Art. 2(2) of the Basic Law, and can only be interfered with on the basis of a law. If the model of pure principles (or "rule construction", as Alexy also calls it) is followed literally, the limitation clause would allow the legislature any interference with the right if it is based on law. In this way, Alexy argues, the constitutional right would be reduced to a special statutory reservation and would lose its binding power on the legislature. An attempt to avoid this situation where constitutional rights would lose their binding force on the legislature by adding more rules which would prohibit the infringement of the "core content" of the constitutional right, such as the Art. 19(2) of the Basic Law (which states that "In no case may the essence of a basic right be affected") would still be problematic, as determining the "core content" of a constitutional right would require balancing. See Alexy (2010a), p. 23.

[90] Alexy (2002a), p. 77. Art. 13(7) of Basic Law states that "Interferences and restrictions shall otherwise only be permissible to avert a danger to the public or to the life of an individual or, pursuant to the law, to confront an acute danger to public safety and order, *in particular to relieve an accommodation shortage* [emphasis added], to combat the danger of an epidemic or to protect young persons at risk.

[91] Alexy (2002a), p. 79. In the context of Art. 13(7) of the Basic Law, which speaks of "accommodation shortage", the problem arises in the cases that are not clear. According to Alexy (2002a), pp. 77-78, the question of the justification of the interference with the inviolability of the home arises when there is a shortage of housing, but it is not considered "severe" or "too serious": "The matter is different when there is a shortage of housing, but not too serious a shortage, and when the question arises whether its removal justifies a very intensive breach of the inviolability of the home. The attempt to solve this case rationally without engaging in a balancing exercise by subsuming it under the concept of accommodation crisis has to fail. The question is not whether the shortage of accommodation is correctly called an accommodation crisis, but whether as an accommodation crisis it justifies limiting the right."

[92] Alexy (2002a), pp. 84-86.

[93] Rivers (2002), p. xxviii. On the "double aspect" of constitutional rights norms, see Alexy (2002a), pp. 84-86.

> "It is inadequate to conceive of constitutional rights norms either purely as rules or purely as principles. An adequate model derives both rules and principles from the provisions of the Constitution. Both are combined in the double aspect constitutional rights norm."[94]

To support his claim that constitutional rights (more precisely, norms expressing constitutional rights) have "not only the character of rules, but also the character of principles", Alexy cites the 1958 *Lüth* case from the German Federal Constitutional Court.[95] In that case, Eric Lüth, a German politician, called for a boycott of films produced by Veit Harlan, who was a leading director during the Third Reich. The lower court ruled that Lüth must refrain from calling for a boycott.[96] Eric Lüth then filed a constitutional complaint to the Federal Constitutional Court, which considered his call for a boycott as *prima facie* fell within the scope of freedom of expression guaranteed by Art. 5(1) of the Basic Law, which states that

> "Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship."

Art. 5(2) of the Basic Law contains three limiting clauses to the freedom of expression, among which one is the "general law" clause, and the Court held that the Art. 826 of the German Civil Code is a general law in the sense of the first limiting clause. Art. 5(2) states that

> "These rights shall find their limits in the provisions of general laws, in provisions for the protection of young persons and in the right to personal honour."

In this situation, the question of what Alexy calls the "rule construction" (described as "narrow and strict") and the "principle construction" (described as "broad and comprehensive") becomes relevant.[97] According to the first view, norms that confer constitutional rights are legal

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[94] Alexy (2002a), p. 86.
[95] Alexy (2003a), pp. 132-134, BVerfGE 7, 198.
[96] The reason for this was that the appeal for a boycott violated Art. 826 of the German Civil Code, as "being contrary to the public policy". According to Art. 826 of the German Civil Code, "A person who, in a manner contrary to public policy, intentionally inflicts damage on another person is liable to the other person to make compensation for the damage." On this point, see Alexy (2003a), p. 132.
[97] On these two constructions, see Alexy (2003a) pp. 131-132 and Alexy (2010a), pp. 21-24. As noted earlier in this section, in *A Theory of Constitutional Rights* Alexy distinguishes between three models for understanding that express constitutional rights (model of pure principles, model of pure rules and "mixed" or "combined" model of rules and principles). The model of pure principles is rejected due to the problems we have presented. In his later work, Alexy distinguished between the latter two models, referring to them as "rule construction" and "principle construction" of constitutional rights. The first model is described as "narrow and strict", the second as "broad and comprehensive". The main difference between the two "constructions" is that, under the first, constitutional rights are applied by subsumption, while under the second, balancing is required. Alexy (2003a), pp. 131-132, adds that these two understandings (or "constructions", as he calls them) are not realized anywhere in their purest form, and they just represent different "tendencies", and "the question of which of them is better is a central question of the interpretation of every constitution that provides for constitutional review." Sardo (2012),

rules that protect "certain abstractly described positions of the citizens against the state", and as such, they are structurally indistinguishable from other norms in a legal system. Under rule construction, constitutional rights norms are seen as rules that are "applicable, in essence, without balancing".[98] The use of subsumption to apply constitutional rights norms can be problematic and often requires additional justification, but the rationale behind this understanding is that the issues that may arise in the application of constitutional rights norms can be resolved "in essence *without* balancing".[99] According to the second view, constitutional rights norms also have the character of principles and as such, cannot be applied by mere subsumption; in the case of a conflict between two constitutional rights, a process of balancing or weighing is required.[100]

If the rule construction approach is to be followed, Alexy continues, two questions would have to be answered: first, whether Lüth's call for a boycott can be subsumed under freedom of expression and second, whether Art. 826 of the German Civil Code applies in this case. The Court answered both questions in the affirmative, adding that "it is not enough to carry these two isolated subsumptions", but that a balancing or weighing of the colliding constitutional principles is necessary.[101] The result of the balancing that the Court undertook in this case was that freedom of expression must be given priority over the protection of public policy, so the Court reversed the lower court's decision and ruled in Lüth's favour. The significance of this decision, as Alexy points out, was threefold.[102] First, the Court concluded that "constitutional rights have not only the character of rules, but also the character of principles". Second, the Court held that "the values or principles found in the constitutional rights apply not only to the relations between citizen and the state but, well beyond that, to all areas of law".[103] The third and most important consequence was that the Court held that conflicts between principles can only be resolved through balancing, i.e., that in the cases of

pp. 84-85 argues that from this it can be questioned whether Alexy still holds the position of a strong distinction between rules and principles.

[98] Alexy (2010a), p. 22.

[99] Alexy (2010a), p. 22. The application of constitutional rights norms can be problematic, for example, it may be doubtful whether a particular expression should be protected by freedom of speech or whether a particular act should be protected by the freedom of religion, but the key to this "rule construction" understanding of constitutional rights lies in the fact that these and other questions that arise in their application can be answered without balancing.

[100] Alexy (2003a), pp. 132-133.

[101] Alexy (2003a), p. 133, quoting BVerfGE 7, 198, 207f. On the case, its effects and importance, see Kommers & Miller (2012), pp. 60-61 and pp. 442-450.

[102] Alexy (2003a), p. 133, quoting BVerfGE 7, 198, 205.

[103] Alexy (2003a), p. 133, quoting BVerfGE 7, 198, 205.

collision between principles "balancing of interests becomes necessary".[104] In this decision, balancing was established for the first time as a "methodological concept" in the adjudication of the Federal Constitutional Court. Thus, the "principle" or "broad and comprehensive" construction of constitutional rights, which requires balancing, was established by the Federal Constitutional Court, as Alexy argues.

Finally, we turn to Alexy's understanding of right. With the aim of clarifying the complex concept of right, Alexy proposes to use the term to refer to three distinctive legal positions, all of which belong to the category of "subjective right": rights to something, liberties, and powers.[105] Rights are understood by Alexy as bundles of these positions derived from a single provision. Alexy uses the term "complete constitutional right" (for example, the right to life or the right to free speech) to clarify his position.[106] The term is used to emphasise the idea that constitutional rights generally do not refer to single positions, but to a bundle of them.

> "…a complete constitutional right is a bundle of constitutional rights positions. That leaves us with the question of what it is that draws these positions together into a single constitutional right. Again, the simplest answer is their derivation from a single constitutional rights provision."[107]

This is an initial, simpler definition of a complete constitutional right given by Alexy. An extended definition of a complete constitutional right:

> "It is made up of elements with a well-defined structure, the individual positions of the citizens and the state, along with the clearly definable relations between these positions, relations of precision, of means to ends and of balancing."[108]

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[104] Alexy (2003a), pp. 133-134, quoting BVerfGE 7, 198, 210. On the "necessity of balancing", established by the Federal Constitutional Court, see Kommers & Miller (2012), p. 446 and p. 450.

[105] Alexy (2002a), p. 120. Because of the complexity of the notion of 'subjective right', 'liberty' and 'power', and because we are dealing with the problem of apparent conflicts between *fundamental* rights, we will focus on this notion. For Alexy's views on the notions of subjective rights, see Alexy (2002a), pp. 120-159.

[106] See Alexy (2002a), p. 159. An example given by Alexy (2002a), pp. 159-160, to illustrate the variety of positions a complete constitutional right consists of concerns freedom of expression, arts and sciences from Art. 5(3) of the Basic Law. As Alexy points out, three different positions were considered by the Federal Constitutional Court: a *legal liberty* to act in the field of academic life, a *right to an omission* (defensive right) against the state regarding the acts in the field of academic life and a *right to positive acts* on the part of the state to protect this liberty.

[107] Alexy (2002a), p. 159. For more on the notion of "complete constitutional right", see Alexy (2002a), pp. 159-162.

[108] Alexy (2002a), p. 162. There will be controversy, as Alexy points out, about what is included in a complete constitutional right. This controversy about what belongs to a complete constitutional right "is paralleled by the controversy about which norms are to be derived from constitutional provisions as constitutional rights norms." This is simply to say that different possible interpretations of a constitutional provision are possible, and depending on these interpretations, the content of the fundamental right will be different.

As for the notion of fundamental right, Alexy distinguishes between three concepts of fundamental rights: the *formal*, the *substantive* and the *procedural*.[109] The formal concept of fundamental rights defines fundamental rights as constitutional rights: they are rights "contained in a constitution or in a certain part of it", rights "classified by constitution as fundamental rights" or rights "endowed by the constitution with special protection, for example, a constitutional complaint brought before a constitutional court".[110] The formal concept of fundamental rights, while useful, is not sufficient to understand the nature of fundamental rights, Alexy argues. He supplements the formal concept of fundamental rights with a second, substantive concept that goes beyond the criterion of merely enumerating a right in a constitution. Under the substantive concept, fundamental rights are defined as "rights incorporated into a constitution with the intention of transforming human rights into positive law".[111] In this concept, the substantiation or foundation of fundamental rights is based on substantiation or foundation of human rights. According to Alexy, the substantiation, or foundation of fundamental rights is "essentially, a foundation of human rights".[112] In the third way of conceiving of fundamental rights, the procedural one, they are defined as rights "which are so important that the decision to protect them cannot be left to simple parliamentary majorities".[113] In Alexy's view, an adequate theory of fundamental rights must take into account all three concepts of fundamental rights and their mutual relationship. The substantive concept of fundamental rights expresses the "intrinsic relation between constitutional and human rights" and answers the question why the foundation of fundamental rights depends on the foundation of human rights. The institutionalization of fundamental rights in a legal system is the result of the transformation of human rights into positive law. When this transformation

[109] Alexy (2006), pp. 15-17.
[110] Alexy (2006), p. 15.
[111] Alexy (2006), p. 17. Alexy states that this "intention theory" of fundamental rights "makes it possible to conceive of the catalogues of fundamental rights of different constitutions as different attempts to transform human rights into positive law". See Alexy (2006), p. 17.
[112] Alexy (2006), p. 17: "one cannot raise the question of the substantiation or foundation of fundamental rights without raising the question of the substantiation or foundation of human rights". Alexy defines human rights by using a definition which uses their five characteristics to define them: human rights are "first, universal, second, fundamental, third, abstract, fourth, moral rights that are, fifth, established with priority over all other kinds of rights", Alexy (2006), p. 18. On Alexy's concept of human rights, see Alexy (2012), p. 10. Based on this definition, the problem of substantiation (justification) of human rights can be reformulated into the problem of substantiation of moral norms, which is "nothing other than a special case of the general problem of the justification of moral norms", Alexy (2006), p. 18. Alexy mentions eight approaches to the justifiability of moral norms, advocating amongst them the so-called "existential approach", based on discourse theory. See Alexy (2006), pp. 18-22.
[113] Alexy (2006), p. 17.

occurs at the highest, constitutional level in the hierarchy of a legal system, human rights become fundamental rights.[114]

Since not all provisions of the Basic Law express constitutional rights norms, a criterion is needed to distinguish between those provisions of the Basic Law that express constitutional rights norms and those that do not.[115] Alexy divides constitutional rights norms into two classes: those that are directly established by the text of the Basic Law and derivative constitutional rights norms.[116] Alexy uses the idea of "correct constitutional justification" on both classes of norms, defining constitutional rights norms as "all those norms for which correct constitutional justification is possible".[117] For directly established constitutional norms, reference to the constitutional text provides their "correct constitutional justification", while in the case of derivative constitutional norms their "correct constitutional justification" "depends on the constitutional reasoning which can be found to support it".[118] In Alexy's theory, the concept of fundamental rights norms is broader than the concept of fundamental rights, because whenever there is a fundamental right, there must also be a corresponding fundamental right norm, but the opposite is not the case; fundamental rights norms without fundamental rights are possible.[119]

Before moving on to the next section, we summarize Alexy's view of norm and right. By analysing the German legal system and the case law of the Federal Constitutional Court, Alexy developed a version of a general theory of constitutional rights. He bases this theory on what he calls the strong (qualitative or ontological) distinction thesis between rules and principles, which are understood as two types of norms. According to Alexy, fundamental rights norms have the structure of principles must therefore be applied by balancing, as opposed

[114] Alexy (2006), p. 22.
[115] Alexy (2002a), p. 30. An important terminological remark is necessary here. In his *Theorie der Grundrechte*, Alexy uses the term „die Grundrechtsnorm", while in the 2002 translation *A Theory of Constitutional Rights*, the term "constitutional rights norm" is used. When quoting *A Theory of Constitutional Rights*, I will use the original translation "constitutional right norm", but it can interchangeably be used with the term "fundamental right norm". See, for example, La Torre (2006), p. 55.
[116] Alexy (2002a), p. 35. The first class of constitutional rights norms, those directly established by the text of the Basic Law are the ones from Art. 1 to 19 and Art. 20(4), 33, 38, 101, 103 and 104 of the Basic Law. See Alexy (2002a), p. 32. The second class of constitutional rights norms, that is, the derivative ones are valid and count as constitutional rights norms "when it is possible to provide a correct constitutional justification for its ordering under a directly established norm".
[117] Alexy (2002a), p. 37. See also La Torre (2006), p. 55.
[118] Alexy (2002a), pp. 36-37. An example Alexy gives for derivative constitutional norms is derived from Art. 5(3)(1) of the Basic Law, which states that "…science, research and teaching are free". The Federal Constitutional Court has stated in BVerfGE 35, 79 that "The state must enable and support the fostering of free science and its transmission to future generations by making personal, financial and organizational means available". Alexy (2002a), p. 34.
[119] Alexy (2002a), pp. 19-20. But if one looks at the first concept of fundamental rights, the formal one, it seems that fundamental rights norms without fundamental rights are not possible.

to rules, which are applicable by subsumption. Fundamental rights are understood as positivized human rights expressed in constitutional norms and protected by a supermajority in the parliament.

I. 3. 3. Conflicts between fundamental rights

This section presents the Alexyan position on the issue of the apparent conflict between fundamental rights. However, since the position on the same issue is presented for each of the authors analysed in this work, it is necessary to present the theoretical positions on this issue. This is done in the next subsection (1. 3. 3. 1.), where *conflictivism* and *anti-conflictivism* are summarised and presented, as two opposing approaches. Then, the Alexyan understanding of conflicts between fundamental rights is presented (1. 3. 3. 2.). With this, we will complete the presentation of the basic notions in Alexyan theory of judicial balancing and move on to the analysis of the theory in practice (I. 4.).

I. 3. 3. 1. Conflictivism and non-conflictivism

The approach to the problem of the apparent conflict between fundamental rights we are dealing with, in the context of the positions of the authors whose ideas we analyse in this work, presupposes their understanding of the notions of conflict and relations between fundamental rights. In this regard, two theoretical positions are distinguished in the literature: the so-called *conflictivist* and the *non-conflictivist* (sometimes also called *coherentist*).[120]

The debate between conflictivists and non-conflictivists is a debate between those who argue that there are "real" conflicts between fundamental rights and those who deny the existence of such conflicts.[121] Of course, the position depends on how the authors understand the conflict. The debate, as it has been pointed out, is multidimensional and involves different points of contention that lead to different meanings of "conflictivism" and "non-conflictivism".[122] Because the debate is multidimensional, the same author may be associated

[120] On the debate see, for example, Cabra Apalategui (2021), pp. 217-218, Castillo-Córdova (2005), pp. 24-25, Celano (2005a), pp. 428-433, Celano (2019), pp. 165-197, Comanducci (2004), pp. 317-329, Maldonado Muñoz (2016), pp. 126-127, Pino (2008), pp. 66-90, Pino (2010b), pp. 143-172 and Smet (2017a), pp. 499-521.
[121] Maldonado Muñoz (2016), p. 106. On this point, see also Maldonado Muñoz (2021), pp. 19-22.
[122] Maldonado Muñoz (2016), p. 106 and Maldonado Muñoz (2021), pp. 22-24, mentions six points of debate between conflictivists and anti-conflictivists regarding the following issues:
(1) The *problem of the limits of the fundamental rights*, with two opposing theories: the theory of external limits (generally associated with conflictivism) and the theory of internal limits (generally associated with non-conflictivism);
(2) The *essential content of the fundamental rights*, with three positions: the absolute theory of essential content, the relative theory of essential content and the theory of non-restriction (or inalterability). The first two are conflictivist, while the last one is non-conflictivist;

with different positions that are not mutually consistent, depending on which point in the debate is taken into consideration. For this reason, and for the sake of clarity, I will focus the analysis of each author's positions on the following two points in the debate:[123]

(1) First, the discussion about *values* and two opposing views: value monism and value pluralism.[124] Proponents of value monism defend the view that there is an ultimate value in the legal system (which varies depending on the author) that encompasses other values, while value pluralists defend the view that there are many values that cannot be reduced to a single 'supervalue'.[125] This is relevant to the apparent conflicts between fundamental rights because the position on this issue directly affects the understanding of the relationship between fundamental rights: the existence of conflicts between fundamental rights is contested by the supporters of value monism and defended by supporters of value pluralism.[126] Value pluralists argue that conflicts between fundamental rights are inevitable. Value monists, on the other hand, disagree with this claim. The issue with this discussion seems to be that the authors often do not clarify their understanding of the term "conflict" in the context of fundamental rights. If we refer (by analogy) to the standard distinction between conflicts on conflicts *in abstracto*

(3) The *infringement and violation* debate, in which two positions can be distinguished: according to the specificationist position, rights do not collide as long as they are sufficiently specified; according to the infractionist position, the infringement of a right does not imply its violation in at least some cases. The first position is non-conflictivist, while the second one is conflictivist;
(4) The debate about *values*, with pluralist and monist positions (the first one conflictivist, the second one non-conflictivist);
(5) The debate about *coherence*, with coherentist and non-coherentist theory (the first one non-conflictivist and the second one conflictivist);
(6) Finally, the question of *hierarchy between fundamental rights*, with conflictivists assuming an unequal "weight" or hierarchy between fundamental rights, and non-conflictivists assuming an equal "weight" or hierarchy.

[123] On this, see Maldonado Muñoz (2016), p. 1, fn. 1, who points out that the ideas of the same author can cover different positions, depending on the dimension of the debate that is taken into consideration.

[124] On this, see, for example, Álvarez (2008), pp. 23-51, Barberis (2011a), pp. 93, Betzler & Baumann (2012), pp. 5-7, Maldonado Muñoz (2016), pp. 111-112 and Pino (2010a), pp. 288-292.

[125] Chang (2015d), p. 21. See also Pino (2010b), pp. 143-146. A well-known proponent of value pluralism was Isaiah Berlin, who wrote that "The world that we encounter in ordinary experience is one in which we are faced with choices between ends equally ultimate, and claims equally absolute, the realisation of some which must inevitably involve the sacrifice of others." Berlin (2002), pp. 213-214.

[126] Barberis (2006), p. 36ff. There is a leap from 'value' to (fundamental) 'right' here. Such leap, at least in this case, seems permitted since fundamental rights can be understood as rights that protect certain values (or even as values themselves. However, in such case, however, the distinction between value and norm is lost). The point is that the main idea in the debate between value monists and value pluralists remains. For a 'conflating' view, see Perlingieri (2017), pp. 125-147 and Zagrebelsky (1992), p. 161ff. Perlingieri (2017), p. 126 writes: "In actual fact, however, whilst a legal principle is a norm – and in fact a norm 'of particular general application and/or particularly fundamental status, that is with a more intense meaning on the historical and legal level – so too a value that is incorporated into the legal order 'is not a pure 'value' capable of exerting influence merely through guidance', but also a norm and as such a principle. Thus, for a jurist the distinction between principles and values – 'both of which are necessary for the proper functioning of the legal system – proves to be a nominalistic issue, and hence meaningless."

and conflicts *in concreto*[127], value pluralists do not exclude the possibility of conflicts between values *in abstracto*, while value monists exclude this possibility.[128]

(2) Second, the discussion of *coherence* between fundamental rights and the conflicting coherentist and non-coherentist views.[129] In the context of the apparent conflicts between fundamental rights, the coherentist position defends the thesis according to which rights form a harmonious or consistent system, either logically or practically.[130] In the coherentist model, constitutional interpretation is understood as a declarative activity that consists in determining the pre-established relationships between constitutional rights, principles and values.[131] According to this view, what initially appears as a conflict between fundamental rights *in abstracto* can be avoided through the *proper* interpretation of apparently conflicting fundamental rights. A well-known example of such an approach is that of Ronald Dworkin, which we analyse in subchapter III. 3. 1.

On this basis, we can say that the conflictivist account of fundamental rights conflicts presupposes value pluralism and a non-coherentist view, while the non-conflictivist account presupposes value monism and a coherentist view. The sections setting out the authors' views

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[127] Guastini (2011b), pp. 106-109.

[128] For example, a value monist (such as Ronald Dworkin, see section III. 1. 3. 3.) can argue that we must understand the values in question *correctly* before accepting that there is a conflict between them. He argues that, if values are *properly* understood, they may not in fact be in conflict at all. An example given by Dworkin are the values of liberty and equality, which, when properly understood, support each other. See Dworkin (2011), p. 4 and section III. 1. 3. 3. The idea that a value can be understood "correctly" or "properly" is problematic, as supporters of non-cognitivist theories of interpretation have argued.

[129] On this point, see the reconstruction from Maldonado Muñoz (2016), pp. 112-114.

[130] Maldonado Muñoz (2016), pp. 112-113, referring to Bix & Spector (2012), p. xvii for the definition of *logical* (formal) and *practical* (material) coherence. The concept of *coherence* has raised a number of issues in legal and philosophical debates. See, for example Ratti & Rodriguez (2015), p. 131, who point out that "The intensional properties and the boundaries of this concept are quite blurry, and its relations with consistency and completeness are consequently uncertain." See also Ratti (2007), p. 1, fn. 1, regarding the problem of the translation of the English term "coherence" into Italian. Coherence, as Ratti points out, is not limited to the mere absence of logical contradictions, but also includes cohesion or axiological harmony between the elements of the system. On the basis of this, the term "congruentismo" seems to better encapsulate the idea that the term "coerentismo" when translating "coherentism". I will follow the distinction presented by Bix & Spector (2012), p. xvii, who define logical (or formal) coherence as the "absence of contradictory normative solutions to the same type of case", while practical (or material) coherence means that the "normative system does not require pairs of conducts that are not jointly *compossible*".

[131] Pino (2010b), p. 144. "Coherentism" in the context of the apparent conflicts between fundamental rights is related to the mutual relationship between them. We can say that this is coherence in the *relationship between fundamental rights*, describing the idea that fundamental rights form a harmonious or consistent system, logically or practically. It is a view which does not deal with the question how the conflict between fundamental rights should be resolved (in fact, it is associated with non-conflictivism and the idea that fundamental rights do not "really" conflict with each other). On the other hand, "coherentism" can also be used to describe approaches that aim to resolve conflicts between fundamental rights taking coherence into consideration. We can say that this is *coherence* in the *resolution of conflicts between fundamental rights*. It is a normative proposal that suggests a way of resolving conflicts between fundamental rights. For such approach, see Hurley (subchapter II. 5 and sections II. 5. 3. 2. and II. 5. 4. 1. in particular). According to coherentist views (or coherence accounts), such as Hurely's the task of the deliberator is to search for the theory that best displays coherence. Understood in a legal context, the task of the judge is to decide the case in a manner that best display coherence.

on apparent conflicts between fundamental rights are presented will conclude with a qualification of their position in the context of these two points of debate between conflictivists and non-conflictivists. We start with this in the following section, with Robert Alexy's understanding of the apparent conflicts between fundamental rights.

I. 3. 3. 2. Alexy's understanding of conflicts between fundamental rights

Regarding the question of apparent conflicts between fundamental rights, Alexy takes a *conflictivist* position.[132] In fact, he distinguishes between rules and principles according to the differences in the cases in which they conflict. His principles theory and the three main theses on which it is based (the *optimization thesis*, the *collision law*, and the *balancing law*) all refer to principles and their application in cases of conflict between principles. In this section, we will focus on and present the second thesis of his principles theory – the *collision law* (or the Law of Competing Principles), which explains the method of resolving conflicts between principles, which is fundamentally different from resolving conflicts between rules.

Alexy formulates[133] the Law of Competing Principles to illustrate the structure of the resolution of the conflict between legal principles. An example he uses to illustrate his ideas is the 1979 Federal Constitutional Court case concerning the permissibility of a trial of a person who was in danger of suffering a heart attack due to the stress of the trial.[134] The principles that conflicted here, according to the Court, were the principle of the proper functioning of the criminal justice system (a part, or sub-principle of the rule of law principle) and the principle of the protection of life and bodily integrity. None of the competing principles, the Court held, had priority in the abstract; the question was which principle should take precedence with regards to the circumstances of the concrete case. The conflict, it sad, must be resolved by "balancing the conflicting interests".[135] Alexy points out that the option of resolving this case in the way conflicts between rules are resolved (by declaring one of them invalid or by introducing an exception to one of them) would not be a viable solution here.[136] The Court used

[132] Alexy is a proponent of value pluralism and for him, the difference between principles and values is only in "their respective deontological and axiological character." See Alexy (2002a), pp. 92-93. Fundamental rights, understood to have the structure of legal principles do conflict, and such conflict is to be resolved through balancing and by following the law of competing principles, as it is explained in this section. On Alexy's position, see also Martínez Zorrilla (2007), p. 63.

[133] Alexy (2002a), pp. 53-54. On the Law of Competing Principles, see also Alexy (2017), pp. 26-28.

[134] BVerfGE 51, 324, Alexy (2002a), pp. 50-51. On Alexy's reconstruction of the case, see Alexy (2002a), pp. 51-54. The case will be referred to as *The Fitness to Stand Trial* case.

[135] Alexy (2002a), p. 51.

[136] Alexy (2002a), pp. 51-52. See also Alexy (2000a), p. 296, where he writes: "It is obvious, however, that neither the invalidation of the basic right to life and inviolability of the body nor of the principle of a functioning criminal justice system as a sub-principle of the rule-of-law principle is a live option here. The second possibility for

the terms "tension" and "conflict" of "duty", "requirement", "constitutional rights", "claim" and "interest". Alexy argues that these terms can be understood as "competing principles" if we follow his terminology.[137] The competing principles, Alexy argues, each require fulfilment to the greatest extent possible (the *optimization thesis*), but they limit each other in the possibility of their maximum fulfilment. Because the Court held that the conflict between principles could not be resolved in the same way as conflicts between rules, the Court resolved the conflict by determining "the conditional relationship of precedence" between the principles, with respect to the circumstances of the case.[138] Principle P_1 (right to life and bodily integrity) and the principle P_2 (proper functioning of the criminal justice system) lead to mutually contradictory concrete legal-ought judgments: principle P_1 prohibits the trial, while principle P_2 requires the trial to be take place.[139] The "conditional relation of precedence" between the two principles, P_1 and P_2 referred to by the Court, can be either *unconditional* (abstract, absolute) or *conditional* (concrete, relative), as Alexy points out.[140] It follows that there are four ways of deciding the case in this framework: giving unconditional precedence to one of the competing principles (1) and (2) or giving conditional precedence to one of the competing principles, with respect to the circumstances of the concrete case (3) and (4). This can be illustrated as follows (where **P** stands for the relation of precedence and C for the conditions under which one principle takes precedence over the other):

Possible relation between principles	Decision of the case
(1) P1 **P** P2	Unconditional precedence for P1
(2) P2 **P** P1	Unconditional precedence for P2
(3) (P1 **P** P2) C	Conditional precedence for P1
(4) (P2 **P** P1) C	Conditional precedence for P2

The Court gave priority to principle P_1 (right to life and bodily integrity) over principle P_2 (proper functioning of the criminal justice system) in the situations where there is "a clear and specific danger that the accused will forfeit his life or suffer serious bodily harm in the case

solving a conflict of rules, namely introducing an exception, also fails to comprehend what is to be done in this case. The basic right to life and inviolability of the body does not count as an exception to the principle of a functioning system of a criminal justice, nor does this principle count as an exception to the right to life and inviolability of the body."

[137] Alexy (2002a), p. 51.

[138] Alexy (2002a), pp. 51-52. See also Alexy (2000a), p. 296.

[139] Alexy (2002a), p. 52.

[140] Alexy (2002a), p. 52.

the trial is held".[141] Alexy concludes the reconstruction of the case with two versions of the Law of Competing Principles, the longer and the shorter one.[142] In its longer formulation, the Law of Competing Principles states that

> "If principle P_1 takes precedence over principle P_2 in circumstances C: (P_1 **P** P_2) C, and if P_1 gives rise to legal consequences Q in circumstances C, then a valid rule applies which has C as its protasis and Q as its apodosis: C→Q".

In the shorter formulation, the Law of Competing Principles states that

> "The circumstances under which one principle takes precedence over another constitute the conditions of a rule which has the same legal consequences as the principle taking precedence".

The Law of Competing Principles "expresses the fact that the priority relations between principles of a system are not absolute but only conditional or relative", as Alexy argues.[143] The Law of Competing Principles forms one of the foundations of his theory of principles and reflects the fact that principles are optimization commands between which there is no relation of absolute precedence.[144] The task of optimizing is to determine "correct conditional priority relations" between competing principles.[145] According to Alexy, solving a case by balancing (or weighing) means to "decide by means of a rule that is substantiated by giving priority to the preceding principle".[146]

Alexy further explains the process of balancing by presenting another case, the 1973 *Lebach* rulling[147], in which the Federal Constitutional Court ruled on the television stations plan to broadcast a documentary "The Soldiers' Murder at Lebach", about a crime that involved murder and theft. At the time scheduled for the broadcast, the person who had been convicted as a secondary party in the crime was about to be released from the prison. The person claimed

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[141] Alexy (2000a), p. 296, quoting BVerfGE 51, 234, 346.
[142] Alexy (2002a), p. 54. The Law of Competing Principles is also called collision law by Alexy. See, for example, Alexy (2000a), p. 297.
[143] Alexy (2000a), p. 298.
[144] Alexy (2000a), p. 297.
[145] Alexy (2002a), p. 54.
[146] Alexy (2000a), p. 297.
[147] For Alexy's reconstruction of the case, see Alexy (2002a), p. 54-56, who refers to BVerfGE 35, 202. In this case, the crime was committed by murdering four soldiers of the Federal army who were sleeping at the munitions depot and by stealing the weapons in order to commit further criminal offences. On the details of the case, see also Kommers & Miller (2012), pp. 479-485 and Lindahl (2009), pp. 175-177. Kommers & Miller (2012), pp. 483-484 support Alexy's reconstruction of the reasoning of the Federal Constitutional Court, writing that "*Lebach* represents a model case of balancing in German constitutional law. Two values of equal weight are involved here, namely the protection of privacy and the freedom of the media to broadcast a program of major public importance. The tension between the two values cannot be resolved by allowing one value to trump the other in all circumstances. *According to the doctrine of optimization* (…) each value must be concretized to the maximum extent possible, and this means *a delicate weighing of competing interests in the light of all relevant circumstances*." [emphasis added]

that the documentary, which included his name and his picture, would breach his constitutional rights from Art. 1(1) and Art. 2(1) of the Basic Law and endanger his resocialization.[148] His appeal was rejected by the lower courts, and he brought a constitutional complaint against the decisions. Using this case, Alexy reconstructs the three stages of the balancing process. In the first stage, the Court establishes that there is a competition (or "tension") between competing principles, in this case between the principle of protection of personality, P_1 (Art. 2(1), in connection with Art. 1(1) of the Basic Law) and the freedom of media reporting, P_2 (Art. 5(1)(2) of the Basic Law). These two norms, when applied, lead to mutually incompatible results. Applied alone, principle P_1 would lead to a ban on the broadcast, while principle P_2 would lead to permission of the broadcast. This conflict, the Court continues, is not resolved by declaring one of the principles invalid. The Court stated that the conflict is to be resolved through balancing. The Court uses the terminology "conflict between constitutional values", which Alexy describes as a competition between principles, that must be resolved through balancing because both principles are of equal value in abstract.[149] In the second stage, the Court established that there is a general precedence of the freedom of media in cases of "up-to-date reporting of the crime" (C_1), in other words (P_2 **P** P_1) C_1.[150] However, this relation of precedence is only general and allows for exceptions, which means that not every media report of up-to-date crimes is permitted.[151] The decision is made at the third level, in which the Court established that the protection of privacy takes precedence over the freedom of media reporting in the case of a "repeated report of a serious criminal act, no longer covered by the interest in up-to-date information, which endangers the resocialization of the criminal" (C_2), which means that the broadcast is prohibited: principle P_1 took precedence over principle P_2, in other words (P_1 **P** P_2) C_1.[152]

According to Alexy, the Lebach judgment allows to better understand the Law of competing principles. It was mentioned that Alexy rejects the idea of absolute precedence in conflicts between constitutional rights and argues that the conflicts between competing constitutional principles are to be resolved by determining the concrete or relative relationship of precedence between the principles. The question here, as Alexy suggests, is under what

[148] Art. 1(1) of the Basic Law declares that "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority."
Art. 2(1) of the Basic Law states that "Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law."
[149] Alexy (2002a), p. 54.
[150] Alexy (2002a), p. 55.
[151] Alexy (2002a), p. 55.
[152] Alexy (2002a), p. 55. C_1, as Alexy indicates, consists of four conditions: repetition, no current interest, serious criminal offence and endangering socialization.

conditions one principle takes precedence over the other.[153] In the Court's decision in the case of the permissibility of a trial of a person in danger of suffering a heart attack, the conditions "under which there is a *breach of constitutional rights*" are identified by the Court.[154] If an action breaches constitutional rights, Alexy continued, it is prohibited. Here, Alexy articulated a rule here which states that "if some act fulfils conditions C then it is constitutionally prohibited".[155] Going back to the *Lebach* judgment, the Court gave a general precedence to the principle of the freedom of media in reporting in up-to-date crimes (P_2 **P** P_1) C_1, but since it was only a general precedence, not every report in up to date crimes was permitted.[156] Alexy goes on to state that "the conditions of precedence, and hence the legal rule which corresponds to the preferential statement under the Law of Competing Principles, include a *ceteris paribus* clause which permits exceptions".[157] Finally, the Court held that in those situations where reporting on a serious crime is no longer covered by the interest in up-to-date information, that threatens the resocialization of the offender (C_2), the principle of protection of privacy takes precedence over the freedom of media reporting (P_1 **P** P_2) C_2. The C_2 in this case consisted of four conditions: repetition (F_1), no current interest (F_2), serious criminal offence (F_3) and endangering resocialization (F_4).[158] Rule $C_2 \rightarrow Q$ consist of four conditions and has the following structure: $F_1 \wedge F_2 \wedge F_3 \wedge F_4 \rightarrow Q$.[159] This means (and this is how the case was decided by the Court) that in the case of repeated (F1) media report, no longer required by the interest in current information (F2), concerning a serious criminal offence (F3), that endangers the resocialization of the offender (F4), such report is (constitutionally) prohibited (Q). This formulation is the result of a reconstruction of the *Lebach* judgment by the Law of competing principles in its longer version. In its shorter formulation, the Law states that "The circumstances under which one principle takes precedence over another constitute the

[153] Alexy (2002a), p. 52.
[154] Alexy (2002a), p. 53. The notion of breach of constitutional rights is important, according to Alexy, since in the mentioned case, "the court is no longer speaking about the precedence of a principle, requirement, interest, claim, right or any other such objects; rather *conditions* are being identified under which there is a *breach of constitutional rights*".
[155] Alexy (2002a), p. 53. The condition of precedence (C) plays a twofold role in Alexy's theory: in the preferential statement (P1 **P** P2) C, it is the condition for a relation of precedence, while in the formulation of a rule which prohibits acts that breach constitutional rights (if an act A fulfils condition C, then A is constitutionally prohibited"), C is the protasis of the norm. As we have seen previously, in this case, the condition C was the existence of a "clear and specific danger that the accused will forfeit his life or suffer serious bodily harm in the case the trial is held".
[156] Alexy (2002a), p. 55.
[157] Alexy (2002a), p. 55.
[158] Alexy (2002a), pp. 55-56.
[159] Alexy (2002a), p. 56. This rule can be read as "a repeated (F_1) media report, no longer required by the interest in current information (F_2), concerning a serious criminal offence (F_3), which endangers the resocialization of the offender (F_4) is constitutionally prohibited (Q)".

conditions of a rule which has the same legal consequences as the principle taking precedence".[160]

By setting forth Alexy's *conflictivist* position through the presentation of the collision law (or the Law of the Competing Principles) in this section, we have laid the basis for reconstructing his theory of judicial balancing. In the following section, we will complete the reconstruction of his understanding of judicial balancing and its application to cases.

I. 4. Balancing

I. 4. 1. Theoretical framework

This section begins with an explanation of Robert Alexy's use of the term "balancing". This is followed by an exposition and explanation of the principle of proportionality and its three sub-principles (suitability, necessity, and proportionality in the narrow sense) and his well-known Weight formula. Alexy's understanding of judicial balancing is linked to the principle of proportionality, as balancing and the weight formula represent the final stage of the application of the principle of proportionality.

We begin by reconstructing his understanding of judicial balancing by following his approach and contrasting it with subsumption. The distinction between balancing and subsumption is important to Alexy because he understands them as two basic operations in the application of law.[161] Rules are applied by the means of subsumption, while principles require balancing to be applied. The process of subsumption under the general deductive scheme does not exhaust the possibilities of application of the law.[162] While subsumption has been clarified to a considerable degree, as Alexy indicates[163], many questions regarding balancing have yet to be answered in a satisfactory way. The subsumption procedure is structured in a deductive formula that follows the rules of logic, while the balancing procedure is structured in the weight formula that follows the rules of arithmetic, according to Alexy.[164] The main question is

[160] Alexy (2002a), p. 54.
[161] Alexy (2003b), pp. 433-435. However, in the article "Two or Three?" Alexy states that analogy could be qualified as a third basic operation in law. See Alexy (2010c), p. 18.
[162] Alexy (2003b), p. 434 argues that there are two reasons why subsumption is not the only possible way of application of law: "The first [reason, remark added] is that it is always possible that another norm, requiring another solution, is applicable. If this is the case, the question of precedence arises. The answer to this question may involve balancing, but it must not do so. Often meta-rules like *lex superior derogat legi inferiori*, *lex posterior derogat legi priori*, or *lex specialis derogat legi generali* are applicable. One might call this second subsumption 'meta-subsumption'. So long as conflicts of norms are resolved by meta-subsumption, we remain within the realm of subsumption. As soon as we resort, however, to balancing to resolve the conflict, we shift over from subsumption at the first level to balancing at the second level."
[163] Alexy (2003b), p. 433.
[164] Alexy (2003b), p. 433.

whether balancing can be considered as a rational procedure for resolving conflicts between norms. Alexy aims is to defend his theory of judicial balancing by arguing that it is a rational procedure for the resolution of the conflict. The rationality of balancing is one of the most criticized points in Alexy's theory. Critics claim that there are no rational standards for balancing and that the balancing is an arbitrary procedure that gives discretion to the judges under the disguise of a rationalized, objective procedure.[165] Although there are certain conflicts of norms that can only be resolved through the application of meta-subsumption rules such as *lex superior*, *lex posterior* and *lex specialis*, these are nonetheless cases in which one uses balancing as the method of applying the law.

The distinction between rules and principles, which forms the basis of the principles theory, is most apparent, in the situations of conflicts of norms, which he understands as situations in which the application of two norms leads to inconsistent results and "two mutually incompatible legal-ought judgments".[166] According to Alexy, there is a fundamental difference in the way these conflicts are resolved. The conflict between rules can be solved in two ways: either by introducing an exception into one of the conflicting rules or by declaring one of the conflicting rules invalid (to be precise, inapplicable).[167] In the latter case, when one of the conflicting rules is declared invalid, the rule which is declared invalid is "excised from the legal system".[168] A conflict between competing principles, in Alexy's view, is to be resolved in a completely different way. When two principles compete, one of the principles becomes outweighed, and when a principle is outweighed, it does not become invalid, nor an exception

[165] More on the criticism of Alexyan theory of judicial balancing in section I. 6. 1. (Criticisms).
[166] Alexy (2002a), pp. 48-49.
[167] Alexy (2002a), pp. 49-50. Regarding the first way of solving conflicts between rules, Alexy gives an example of a situation in which school regulation prohibits leaving the classroom before the bell rings but requires doing so when one hears a fire alarm. In a situation in which the fire alarm goes off, but the bell has not rung, is (easily) solved by introducing an exception to the rule prohibiting leaving the classroom before the bell rings. Regarding the second way of solving conflicts between rules, when the introduction of an exception to the rule is not possible, one of the conflicting rules is to be declared invalid using the maxims *lex superior*, *lex posterior* or *lex specialis* or by determining the substantive importance of the conflicting rules. For this situation, Alexy gives an example of the 1952 decision BVerfGE 1, 283 of the German Federal Constitutional Court in which two rules conflicted: one provision of the Working Time Act from 1934 and 1938 (federal law), which permitted the shops to be open weekdays from 7:00h until 19:00h, and the other provision of the Baden Regional Law from 1951, which prohibited the shops to be open on Wednesdays after 13:00h. The norm from the regional law was declared invalid by the application of Art. 31 of the Basic Law which states that "Federal law shall take precedence over Land law". In line with the previously mentioned differentiation between 'validity' and 'applicability' by Ratti and Munzer (see fn. 57 and fn. 61), the term 'inapplicable' seems to be more appropriate than 'invalid' in the context of the second way of solving conflicts between rules.
[168] Alexy (2002a), p. 49. There are cases where no longer valid rules have priority over currently valid rules because they were valid at the time in which the action under judgment took place. For example, the criminal law provision that states that the law in force at the time the criminal offence is committed shall be applied to the perpetrator.

has been introduced into it.[169] The outweighed principle may outweigh in another case, depending on the facts of the case.[170]

We see that in Alexyan theory the conflict between principles is to be resolved by balancing, whose outcome is determined by the weights assigned to the conflicting principles. The idea that principles can have "weight" forms an integral part of Alexy's Weight formula. Weight formula itself is a part of "balancing in the strict sense" (or proportionality in the narrow sense)[171]. Balancing in the strict sense, is in turn, a part of a broader principle of proportionality. The following paragraphs explain the principle of proportionality and its three sub-principles. As balancing plays a central role in the principle of proportionality (as its third sub-principle), it is often simply referred to as "balancing", without specifying that it is "balancing in the strict sense".

The principle of proportionality is one of the key concepts in Robert Alexy's theory of constitutional rights.[172] In the mid-1980s, when Alexy wrote his *A Theory of Constitutional Rights*, the ideas of proportionality and balancing played a central role in German constitutional law and the case law of the Federal Constitutional Court.[173] In the meantime, it gained popularity and spread from Germany to other legal systems. The basic idea behind proportionality is the idea that limitations of constitutional rights "must not be excessive or go beyond what is necessary".[174] If the constitution guarantees constitutional rights, those rights can be restricted or interfered with through legal decisions, but interferences with constitutional rights are permissible only if they are justified, and they are justified only if they are proportional, Alexy argues.[175]

Historically, the principle of proportionality developed in Germany in the late 19th century.[176] The principle gradually developed in the practice of German administrative courts,

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[169] Alexy (2002a), p. 50.
[170] Alexy (2002a), p. 50.
[171] Stone Sweet & Matthews (2008), p. 75.
[172] See, for example, Alexy (2002a), p. 397: "Principles are norms which require the greatest possible realization of something relative to what is factually and legally possible. It is one of the central theses of the *Theory of Constitutional Rights* that this definition implies proportionality with its three sub-principles of suitability, necessity and proportionality in the narrow sense, and that conversely, the principled character of constitutional rights follows logically from the principle of proportionality". See also Alexy (2002a), pp. 66-69 and Alexy (2014a), pp. 51-52.
[173] Borowski (2011), pp. 579-580.
[174] Bernal Pulido (2013), p. 489.
[175] Alexy (2003b), p. 436.
[176] Cohen-Eliya and Porat (2010), pp. 271-276. The first textual basis for the principle of proportionality appeared in Prussia, in its General State Laws for the Prussian States (*Allgemeines Landrecht für die Preußischen Staaten*) from 1794, which in Article 10(2) authorized the government to use police power in order to ensure peace, but it limited the use of those powers only to the measures that were essential for achieving the goal. The idea of proportionality is related to the idea of the *Rechtsstaat* principle, which imposes limits on governmental actions. Under the concept of the *Rechtsstaat*, the government could limit individual rights in the cases when such

without being explicitly declared by the Prussian Supreme Administrative Court.[177] After World War II, the principle of proportionality became part of German constitutional law, although it had no direct textual basis in the 1949 Basic Law for the Federal Republic of Germany; the German Federal Constitutional Court, established in 1951, deriving the principle of proportionality from the principle of *Rechtsstaat*.[178] Soon after, the principle of proportionality became a firmly established principle in German constitutional law.[179] The principle of proportionality, as Alexy indicates, is applied almost everywhere in constitutional review, either implicitly or explicitly.[180] From its German origins, the idea of proportionality spread to and found support in many other jurisdictions, including the case law of the European Court of Human Rights in Strasbourg and the case law of the European Court of Justice in Luxembourg.[181] The concept of proportionality is understood in different ways, but most scholars and courts agree that it consists of three sub-principles: the principle of *suitability*, the principle of *necessity* and the principle of *proportionality in the narrow sense* (or *balancing*)[182].

According to Alexy, the practical significance of the principles theory and the optimization thesis lies in its equivalence with the principle of proportionality.[183] The relationship between constitutional rights and proportionality can be viewed from three different positions: according to the first, there is a necessary connection between constitutional rights and proportionality analysis; according to the second, there is no necessary connection

limitations were authorized by law, and the principle of proportionality supplemented this idea and further limited the state since it permitted the government to "exercise only those measures that were necessary for achieving its legitimate goals". Cohen-Eliya and Porat (2010), p. 272.

[177] Cohen-Eliya and Porat (2010), pp. 272-273.

[178] Cohen-Eliya and Porat (2010), p. 284, footnote 86 and pp. 271-272. On the role of the German Federal Constitutional Court and the principle of proportionality, see also Grimm (2007), pp. 384-387.

[179] Grimm (2007), pp. 384-385 and Tschentscher (2014), p. 49. On the principle of proportionality in German constitutional law, see also Thorburn (2016), pp. 307-309.

[180] Alexy (2003b), p. 436. On the widespread use of the principle of proportionality, see also Bernal Pulido (2014), pp. 55-75, Bongiovanni & Valentini (2018), pp. 581-583, Bomhoff (2008a), pp. 555-558, Borowski (2021), pp. 135-136, Cianciardo (2010), p. 177-178, Cohen-Eliya & Porat (2011), p. 463, Engle (2012), pp. 6-10, Huscroft, Miller & Webber (2016), p. 1, Möller (2012), p. 709, Pino (2014c), pp. 597-600, Porat (2009), pp. 243-250, Pozzolo (2017), p. 214, Sieckmann (2018), pp. 3-5, Stone Sweet & Matthews (2008), pp. 73-74, Webber (2010), pp. 179-181 and Zaiden Benvindo (2010), pp. 31-34.

[181] Borowski (2011), pp. 579-580. See also Beatty (2004), p. 171, Grimm (2010), p. 42, Harbo (2010), pp. 158-160, Möller (2012), p. 709, Pino (2014b), p. 542 and Scaccia (2019), pp. 2-19.

[182] Bernal Pulido (2013), p. 484. See also Borowski (2021), p. 136. There are some scholars and judges, as Bernal Pulido indicates, who consider the first sub-principle of the principle of proportionality, to be two different sub-principles: the "legitimacy of the end" and the "factual appropriateness of the limitation to achieve the end". According to this understanding, the proportionality consists of four sub-principles. Alexy embraces the conception that the principle of proportionality consists of the three mentioned sub-principles. Historically, the idea that the principle of proportionality consists of these three sub-principles was expressed after the enactment of the Basic Law of the Federal Republic of Germany by Rupprecht von Krauss in his 1953 dissertation, in which he treated proportionality as a constitutional principle. Bernal Pulido (2013), p. 492. On the idea that proportionality consists of four elements, see, for example, Klatt (2011), p. 697, Möller (2017), pp. 136-137, Stone Sweet & Matthews (2008), pp. 75-76 and Urbina (2017), pp. 4-9.

[183] Alexy (2000a), p. 297.

but a contingent connection between constitutional rights and proportionality; and according to the third one, a connection between constitutional rights and proportionality is impossible.[184] Alexy calls the first position the "necessity thesis" and the second the "contingency thesis", and defends a version of the first.[185] He argues that there is a connection between the theory of principles and the principle of proportionality, and that this connection is "as close as it could possibly be", and that the nature of principles implies the principle of proportionality and vice versa.[186] The principles theory implies the principle of proportionality, and the three sub-principles of the principle of proportionality follow logically from it; they are deducible from it, according to Alexy. The same is true if we look at this relation from the other side; the principle of proportionality implies principles theory.[187] The principle of proportionality is valid, according to Alexy, if constitutional rights have the character of principles, and constitutional rights have the character of principles if proportionality determines their application.[188] The rejection of principles theory leads to the necessary rejection of the principle of proportionality.[189]

The principle of proportionality consists of three sub-principles: first, the *principle of suitability*; second, the *principle of necessity*; and third, the *principle of proportionality in the narrow sense*.[190] Each of these sub-principles represents a requirement which any limitation to constitutional rights must meet in order to be considered justified.[191] It has already been mentioned that Alexy understands principles as optimization commands, relative to what is factually and legally possible. The sub-principles of suitability and necessity concern optimization relative to what is factually possible, while the principle of proportionality in the narrow sense concerns the optimization relative to legal possibilities.[192] According to Alexy, optimization relative to what is factually possible consists in avoiding the avoidable costs, but

[184] Alexy (2014a), p. 51.
[185] Alexy (2014a), p. 51. The position Alexy takes is one variant of the necessity thesis, which Bernal Pulido calls the "weaker necessity thesis", since Alexy holds the position that there are constitutional rights norms which ought to be applied by subsumption; he refers to them as rules and distinguishes them from constitutional rights norms which he calls principles.
[186] Alexy (2002a), p. 66. Alexy later introduced a distinction between the "first necessity thesis", which is a thesis that there exists a necessary connection between principles theory and proportionality, and a "second necessity thesis", a thesis that there exists a necessary connection between constitutional rights and principles theory or proportionality analysis. See Alexy (2014a), p. 57.
[187] Alexy (2000a), p. 297.
[188] Alexy (2010a), p. 24.
[189] Alexy (2000a), p. 297.
[190] Alexy (2002a), p. 66. These sub-principles are rules, and not principles in the sense of "optimization commands". See Alexy (2002a), p. 66, fn. 84.
[191] Bernal Pulido (2013), p. 484.
[192] Alexy (2002a), p. 67.

the costs are unavoidable when principles collide and then balancing becomes necessary.[193] Let us now turn to these three sub-principles and explain them.

(1) The first sub-principle of the principle of proportionality, the *principle of suitability*, requires that the limitation to the constitutional rights must "contribute to the achievement of a legitimate end".[194] The sub-principle of suitability, in Alexy's words, "precludes the adoption of means that obstruct the realization of at least one principle without promoting any principle or goal for which it has been adopted. If a means M, adopted in order to promote the principle P_1, is not suitable for this purpose, but obstructs the realization of principle P_2, then there are no costs either to P_1 or P_2 if M is omitted, but there are costs to P_2 if M is adopted. Thus, P_1 and P_2 taken together may be realized to a higher degree relative to what is factually possible if M is abandoned. P_1 and P_2, when *taken together*, that is, as elements of a single system, proscribe the use of M".[195] The idea behind this sub-principle, expressing Pareto-optimality is that "one position can be improved without detriment to other".[196] According to Alexy, this principle has the status of a "negative criterion", that excludes "unsuitable means".[197]

A case example Alexy uses to illustrate the sub-principle of suitability is the decision of the German Federal Constitutional Court on the law requiring that persons applying exclusively for a falconry license must pass a shooting examination, just like those who apply for a general hunting license.[198] The Court concluded that the shooting examination for falconers presents the infringement of the general freedom of action of the falconer, guaranteed by the Art. 2(1) of the Basic Law. The Court declared that the requirement of a shooting examination for falconers is not suitable to promote the "proper exercise of these activities as intended by the legislator".[199] According to the Court, there was no "substantially clear reason" for the infringement of the general freedom of action of the falconer guaranteed by the Art. 2(1) of the Basic Law, the regulation was declared by the Court to be disproportional, and therefore unconstitutional.[200]

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[193] Alexy (2014a), p. 54.
[194] Bernal Pulido (2013), p. 484.
[195] Alexy (2014a), pp. 52-53. See also Alexy (2003a), p. 135. This sub-principle is sometimes referred to by Alexy as the sub-principle of appropriateness. See Alexy (2000a), p. 298.
[196] Alexy (2014a), p. 53.
[197] Alexy (2002a), p. 398.
[198] Alexy (2014a), p. 53. On the 1980 *Falconry License* case, see Kommers & Miller (2012), p. 404.
[199] Alexy (2014a), p. 53.
[200] Alexy (2014a), p. 53, quoting BVerfGE 55, 159 (166-167). Art. 2(1) of the Basic Law states that "Every person shall have the right to free development of his personality insofar as the does not violate the rights of others or offend against the constitutional order or the moral law."

(2) The second sub-principle of proportionality, the *principle of necessity*, requires that the limitations to the constitutional rights are made with the "least restrictive of all means that are equally suitable to achieve the pursued end".[201] The sub-principle of necessity requires that in the case of two means promoting the principle P_1 that are equally suitable, the one that interferes less intensively with the principle P_2 ought to be chosen.[202] This sub-principle also expresses Pareto-optimality, since the satisfaction of one principle can be improved at no cost to the satisfaction of the other principle by choosing the less interfering of the means.[203]

A case example Alexy gives here is the decision of the German Federal Constitutional Court on the labelling of sweets.[204] A ban on puffed rice sweets was issued in order to protect the consumers from mistaking puffed rice sweets with chocolate products. The Court found this ban to be a violation of the sub-principle of necessity, arguing that consumer protection could be achieved "in an equally effective but less incisive way by a duty of marking".[205] The Court declared the ban to be unconstitutional since equally effective consumer protection could be achieved by less intensive mean of marking the products.

(3) The third sub-principle, the *principle of proportionality in the narrow sense*, requires that the limitations on constitutional rights "achieve the pursued end to a degree that justifies the extent of the constraint on the constitutional right".[206] The sub-principle of proportionality in the narrow sense refers to optimization relative to legal possibilities and is identical to the Law of Balancing (or collision law), which Alexy expresses with a rule which 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".[207] Optimization relative to competing principles consists of, in Alexy's words, "nothing other than balancing".[208] The Law of Balancing, in Alexy's words, expresses the "basic idea of optimization relative to legal possibilities at hand".[209]

Alexy's Law of Balancing can be, according to the formulation of its author, broken down into three stages, which represent three stages of balancing.[210] In the first stage, the

[201] Bernal Pulido (2013), p. 484.
[202] Alexy (2014a), p. 53. See also Alexy (2003a), pp. 135-136.
[203] Alexy (2014a), p. 53.
[204] Alexy (2014a), pp. 53-54, BVerfGE 53, 135. On the 1975 *Chocolate Candy* case, see Kommers & Miller (2012), pp. 672-674.
[205] Alexy (2014a), p. 54, quoting BVerfGE 53, 135 (146).
[206] Bernal Pulido (2013), p. 484.
[207] Alexy (2002a), p. 102. See also Alexy (2003a), p. 136.
[208] Alexy (2002a), p. 401.
[209] Alexy (2010a), p. 28 and Alexy (2021a), p. 4.
[210] Alexy (2002a), p. 401.

degree of non-satisfaction or detriment to the first principle is established. In the second stage, the importance of satisfying the competing principle is established. In the third and final stage, it is established "whether the importance of satisfying the competing principle justifies the detriment to, or non-satisfaction of, the first".[211]

Alexy aims to prove, by analysing the judicial practice of the Federal Constitutional Court, that judicial balancing is a rational method that ought to be used when solving conflicts between fundamental rights. One of the main goals of Alexy's theory of judicial balancing is to prove that balancing, as a method of resolving conflicts between constitutional rights norms is a *rational* method (or at least more rational than other, competing methods).[212] He argues that it is possible to make rational judgments about the intensity of the interference and the degree of importance of satisfying the competing principles. To support his claim, Alexy points to case examples of the Federal Constitutional Court. One of the case examples Alexy gives to support his thesis about the possibility of making rational judgments in balancing is the decision on health warnings on tobacco products.[213] The Court held that the duty of the tobacco producers to place health warnings on tobacco products represents a "relatively minor" interference with the freedom of occupation, while a hypothetical total ban on all tobacco products would represent serious interference with the freedom of occupation. Between these two situations, moderate ones can be found, which allow the development of the scale with the stages of "light", "moderate" and "serious" intensities of interference, according to Alexy. Based on this scale, it is possible, as Alexy argues, to establish valid assignments to the various degrees of interference.[214] On the other hand, it is possible also to make rational judgments about competing reasons, as Alexy claims. Since the health risks posed by smoking are serious, the reasons justifying the interference with the freedom of occupation weigh heavily.

Since the publication of his book *A Theory of Constitutional Rights*, Robert Alexy has continued to develop and refine his theory. The most important of these developments was the new analysis of the structure of balancing through the famous weight formula, introduced in his *Postscript* to *A Theory of Constitutional Rights*.[215] The weight formula is the result of further elaboration of Alexy's theory of balancing and proportionality in the narrow sense (or

[211] Alexy (2002a), p. 401.
[212] Sardo (2012), p. 85. Alexy (2014a), p. 64, argues that weight formula is an "argument form of rational legal discourse" and that "A structure of constitutional rights-discourse that lays claim to still greater rationality is not possible." On this point, see also Alexy (2010a), p. 32.
[213] Alexy (2003a), pp. 136-137; Alexy (2003b), p. 437, BVerfGE 95, 179. On the 1997 *Tobacco Warning Label* case, see Kommers & Miller (2012), pp. 498.
[214] Alexy (2003a), p. 136.
[215] Alexy (2002a), pp. 408-414; Klatt (2012), p. 8.

the law of balancing). The weight formula is used to determine the weight of competing principles in a case so that the conflict between them can be resolved. The purpose of the weight formula is to provide a rational justification for judicial decision-making in the balancing process. Alexy does this through a formula that introduces numbers and mathematical operations. He presents his weight formula as a description of a rational procedure of balancing through which the conflict between principles is resolved by determining the concrete weight of one of the competing principles in relation to the other competing principle in the circumstances of the concrete case. In this sense, the weight formula belongs to the third element of the principle of proportionality – proportionality in the narrow sense and it complements the Law of Balancing. Alexy juxtaposes the weight formula used in balancing of principles with the deductive scheme used when applying rules by subsumption.[216]

The weight formula itself is a mathematical model that uses numbers to determine the concrete weight of a principle, relative to a competing or colliding principle in a particular case. Weight formula "expresses the weight of a principle under the circumstances of the case to be decided, in short, its concrete weight".[217] The simplest form of weight formula is the following:

$$Wi,j = \frac{Ii}{Ij}$$

I_i stands for the intensity of interference with the principle P_i, I_j stands for the importance of satisfying the competing principle P_j, while $W_{i,j}$ stands for the concrete weight of P_i.[218]

Since his weight formula expresses a quotient of two products, each consisting of three factors, the factors need to be represented by numerical values to be applicable. Alexy proposes a triadic scale, expressed by geometric sequences, for measuring the interference and the abstract weight of the principles, which consists of three grades: *light* (l), *moderate* (m) and *serious* (s).[219] He represents these values by the numbers 2^0, 2^1, and 2^2 (1, 2 and 4).[220] Here, the idea presented in the decision of the Federal Constitutional Court decision on the health warnings on tobacco products is refined by Alexy with a numerical triadic scale.

[216] Alexy (2006), p. 26.
[217] Alexy (2003b), p. 444.
[218] Alexy (2005), p. 576.
[219] Alexy (2002a), pp. 409-410. Alexy also occasionally uses the terms "minor" and "weak" and "high" and "strong" instead of "light" and "serious". See Alexy (2003b), p. 440.
[220] Alexy opts for geometric scale, and not arithmetic scale. If the arithmetic scale was chosen, the values assigned to factors in the weight formula would be 1, 2 and 3. Alexy argues that a geometric scale is more appropriate since it makes express his idea that "the power of rights increases overproportionally with increasing intensity of interference". Alexy (2003b), p. 446.

The three grades of the triadic scale can be expanded in Alexy's model, resulting in a "double-triadic scale", which has nine grades: (1) *ll*, (2) *lm*, (3) *ls*, (4) *ml*, (5) *mm*, (6) *ms*, (7) *sl*, (8) *sm* and (9) *ss*.[221] But the three-grade scale and the classifications in terms of light, moderate, and serious are often so difficult that introducing a more refined scale would further complicate the judgments and assignment of values in the weight formula, so a three-scale weight formula is enough for the weight formula to function, according to Alexy.[222]

How would the weight formula work when numbers are applied? Alexy explains that in all cases where the principle P_i takes precedence over P_j, the value of $W_{i,j}$ is greater than 1.[223] This would be in three cases: first, when the intensity of interference with the principle P_i is classified as serious, and the importance of satisfying the competing principle P_j is classified as light (s, l = 4/1 = 4); second, when the combination is serious and moderate (s, m = 4/2 = 2); and third, when the combination is moderate and light (m, l = 2/1 = 2).[224] If P_j takes precedence over P_i, the value will be less than one. Again, three scenarios are possible (based on three levels in the triadic scale): first, when the intensity of interference with principle P_i is classified as light, and the importance of satisfying the competing principle is classified as serious (l, s = ¼); second, when the combination is moderate and serious (m, s = ½); and, third, when the combination is light and moderate (l, m = ½). In the stalemate situations, the result is 1. Again, three combinations are possible, and all these are situation in which the intensity of interference with the principle P_i is assigned the same numerical value as the importance of satisfying the competing principle P_j is also classified as light (l, l = 1/1 = 1; m, m = 2/2 = 1 and s, s = 4/4 = 1).[225]

Alexy further expanded the weight formula by elaborating that not only the intensities of the interferences play a role in the balancing, but also the abstract weights of the principles. The abstract weights of the principles do not change the equation because they cancel each other out when the abstract weights of the principles are equal, but when the abstracts weights are different, they must be considered.[226] An enlarged weight formula is proposed by Alexy in the following form:

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[221] Alexy (2010a), pp. 30-31. In the double-triadic scale, the numerical values assigned to grades range from 2^0 (1) to 2^8 (256), and this overproportional increase expresses Alexy's idea that the increase of the intensity of interference increases the power of rights. See Alexy (2003b), p. 446.
[222] Alexy (2003b), pp. 443-44. See also Alexy (2010a), pp. 30-31 for a refined, double-triadic scale.
[223] Alexy (2003b), p. 444.
[224] Alexy (2003b), p. 444.
[225] Alexy (2003b), pp. 444-445.
[226] Alexy (2003b), p. 446.

$$Wi,j = \frac{Ii \times Wi}{Ij \times Wj}$$

Alexy also presented an extended, "complete weight formula" that includes an additional factor – the "reliability of empirical assumptions": R_i and R_j, or the "reliability of empirical assumptions" of the measure which in the concrete case result in the non-realization of one principle and the realization of another principle.[227] The structure of the complete weight formula is the following:

$$Wi,j = \frac{Ii \times Wi \times Ri}{Ij \times Wj \times Rj}$$

$W_{i,j}$ stands for the concrete weight of the principle P_i relative to the colliding principle P_j, and it is the quotient of the three factors.[228] Alexy connects the "reliability of the empirical assumptions" with the formula through the Second Law of Balancing, which he formulates in the following way: "The more heavily an interference with a constitutional right weigh, the greater must be the certainty of its underlying premises".[229] This second Law of Balancing, Alexy calls the Epistemic Law of Balancing because it refers to the epistemic quality of the reasons underlying the interference. The three grades of reliability of the empirical premises are referred to as "certain or reliable" (r), maintainable or plausible (p) and not evidently false (e), with r being assigned the value 2^0, p the value 2^{-1} and e the value 2^{-2} (0, ½ and ¼, respectively). By adding the third factor, the reliability of the empirical assumptions, alongside the first two, we obtain what Alexy calls an expanded, "complete weight formula".

Having presented the theoretical framework of Alexyan theory of judicial balancing, we turn in the following section to its application two Federal Constitutional Court cases: first, the 1994 *Cannabis* case, and second, the 1992 *Titanic* case. These were the examples that Alexy himself used to present and defend his understanding of judicial balancing.

I. 4. 2. Application

I. 4. 2. 1. The *Cannabis* case (1994)

The *Cannabis* judgment of the Federal Constitutional Court as an example of how, by using weight formula, the reasoning of the Court can be reconstructed, according to Alexy.[230]

[227] Alexy (2010a), p. 30 and Alexy (2021a), p. 4.
[228] Alexy (2010a), p. 30.
[229] Alexy (2003b), p. 446. The First Law of Balancing Alexy calls the Substantive Law of Balancing, because it refers to "substantive importance of the reasons underlying the interference".
[230] Alexy (2003b), pp. 447-448, BVerfGE 90, 145. On the *Cannabis* case (also called "*Hashish Drug* case"), see Kommers & Miller (2012), pp. 399-400.

In that case, the Court was faced with a conflict between constitutionally protected liberty and a constitutionally protected collective good – public health. Several ordinary courts had questioned the constitutionality of prison sentences imposed for the possession, use, or sale of so-called soft drugs such as hashish and marijuana, while the use of alcohol remains unpunished.[231] The question of whether the legislature may prohibit cannabis depends on whether prohibition of cannabis is a suitable and necessary means of preventing the dangers of drug use.[232] If prohibition of cannabis were not suitable or necessary, it would be prohibited on account of constitutional rights, as Alexy indicates. This would violate the first two sub-principles of the principle of proportionality – suitability and necessity. The Court explicitly stated that the empirical premises in this case were uncertain.[233] In the context of the proportionality analysis, the third sub-principle – proportionality in the narrow sense, which includes the weight formula must be examined in the context of this case too.

Alexy reconstructs the Court's decision in the light of his weight formula, noting that courts often do not explicitly assign values to all relevant elements at this stage of the balancing process. In this case, one such element is the intensity of the interference with the principle of constitutionally protected liberty, P_i. If the weight formula is used, I_i represents the interference with the constitutionally protected liberty by prohibiting cannabis products, while I_j represents the loss on the public goods (health) side if cannabis products were not prohibited. The abstract weights (W_i and W_j) of principles P_i and P_j were considered by the Court to be equal, so they cancel each other out from the equation. I_i, I_j and R_i and R_j remain to be determined in the weight formula. If the cannabis products were prohibited, as Alexy further states, the interference with principle P_i must be considered certain, so the value of R_i must be $2^0 = 1$.[234] The Court classified R_j, which represents the reliability of the legislature's empirical assumptions that the prohibition of cannabis was necessary to protect public health, as "maintainable" or "plausible", ($p = 2^{-1} = ½$) if we follow the terminology of Alexy's triadic

[231] Kommers & Miller (2012), pp. 399-400. The authors indicate that Lübeck Regional Court (*Landgericht*) even considered that the right to intoxication, like the right to eat and drink is protected by Art. 2(1) of the Basic Law, which protects liberty ("personal freedoms") and states that "Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law."

[232] Summarizing the decision and its importance, Kommers & Miller (2012), p. 400, write that the Federal Constitutional Court advised ("in an opinion more advisory than declaratory") the Parliament to decriminalize the possession of small amount of soft drugs: "The majority appeared willing to defend Parliament's judgment in determining the measures needed to curtail drug addiction; nevertheless, the Court warned that *the means used to achieve the goal should not be out of proportion to the scope of the law's objective* [emphasis added], particularly when small amounts of these drugs are consumed without endangering third persons."

[233] Alexy (2003b), p. 447, adding that the Court "considered it adequate that the empirical assumptions of the legislature were 'maintainable' (*BVerfGE* vol. 90, 145, 182)."

[234] Alexy (2003b), p. 447.

scale. According to Alexy, from the fact that the Court found the prohibition of cannabis products to be constitutional, we can conclude that the interference with P_i is not of the highest degree, with its highest possible value being *m* (moderate), or 2. If all this is inserted into the weight formula, the following result is obtained:[235]

$$1 = \frac{2 \times 1}{4 \times \frac{1}{2}}$$

Alexy concludes that the weight formula makes it possible to understand the relationship between its six elements "in order to determine the concrete weight of a principle in the case of a collision of two principles".[236] If the concrete weight $W_{i,j}$ is equal to 1, a "stalemate" arises and it is both allowed to implement and to refrain from implementing the measure whose constitutionality is in question. In this case, the state, in particular the legislature, has discretion.[237] While the Federal Constitutional Court ruled that the prohibition of cannabis is constitutional, it added that the "means used to achieve the goal should not be out of proportion to the scope of the law's objective".[238]

The application of the weight formula to the *Cannabis* case has raised issues that require further clarification, which we will now address. Three interrelated issues will be clarified: first, the situation of a possible "stalemate" in the weight formula (which raises the question of the burden of argumentation); second, the notion of legislative discretion in such situations (as a solution to the problem of the burden of argumentation); and third, the distinction between substantive and formal principles (as Alexy's solution to the problem of legislative discretion).

As to the first point, balancing may be understood structurally as consisting of three elements: first, the law of balancing; second, the weight formula; and third, the burden of argumentation.[239] The first two elements of the structure of balancing have already been presented, so the burden of argumentation (the possible situation of "stalemate" in the weight formula) remains to be elaborated in order to explain Alexy's position on the resolution of the "stalemate". The burden of argumentation arises when the application of the weight formula

[235] Alexy (2003b), pp. 447-448. As previously stated, Alexy elaborates that R_i must be ½ because the Court explicitly assumed the degree of reliability as "maintainable" or "plausible". R_j must be 1 because the interference in the case of prohibition is certain. $W_{i,j}$ must be at maximum 1, because if it was more than 1, the prohibition of the cannabis products would be unconstitutional, and the Court declared the prohibition to be constitutional. In this "constellation", as Alexy continues, the highest possible value I_i can be 2 (m), because the I_j, in the triadic model, cannot achieve value greater than 4 (s).
[236] Alexy (2003b), p. 448.
[237] Alexy (2014a), p. 55.
[238] Kommers & Miller (2012), p. 400.
[239] Bernal Pulido (2006a), p. 101.

leads to a stalemate ($W_{i,j} = 1$). Alexy put forward two different proposals to resolve the stalemate:[240] in *A Theory of Constitutional Rights*, he argued that the stalemates should be decided in accordance with the principle *in dubio pro libertate*, in favour of legal liberty and legal equality.[241] In the *Postscript*, Alexy proposed a different solution to the stalemate: a restriction of a right by the legislature should be considered proportionate and thus constitutional, in accordance with the democratic principle.[242] This is in line with the reasoning of the Federal Constitutional Court in the *Cannabis* case we just presented. This leads us to the notion of legislative discretion, which is relevant to the stalemate situations.

As for the second point, Alexy elaborated on the idea of structural discretion and balancing in the *Postscript*.[243] Structural discretion of the legislative is defined as that which "constitutional norms neither command nor prohibit"; the idea behind structural discretion is that the legislature is free "if the constitution contains no relevant obligations".[244] Alexy distinguishes between three types of structural discretion: end-setting discretion, means-selecting discretion and discretion in balancing.[245] The end-setting discretion concerns, in the first case, the discretion the legislature has in deciding "whether, and on the basis of which goals, ends or principles it wishes to limit the enjoyment of the right", and, in the second case, the "decision whether it wants to appropriate the goals, ends or principles identified in the authorization and limit the right".[246] The means-selecting discretion "becomes relevant whenever constitutional rights norms not only prohibit interference but also require positive acts, such as granting protection".[247] In the means-selecting discretion, the legislature can choose between different suitable means and is only prohibited from unsuitable means. Finally, discretion in balancing becomes relevant in the three stalemate cases of balancing, where the

[240] Bernal Pulido (2006a), p. 104.
[241] Alexy (2002a), p. 384: "...it is possible to demonstrate a prima facie precedence for the principles of legal liberty and legal equality, in other words a burden of argumentation in favour of these principles". A principle that would conflict with the principle of legal liberty or legal equality "would not be applied in the case at hand, unless 'stronger reasons' are put forward in its favour". See Bernal Pulido (2006a), p. 104 and Alexy (2002), p. 385.
[242] Alexy (2002a), p. 410: "The equal value of stalemates in balancing is the basis for structural discretion in balancing".
[243] Alexy (2002a), pp. 394-414. Besides structural or substantial discretion, there exists, according to Alexy, also an epistemic discretion, mentioned in the next paragraph. According to Alexy, the "scope of substantial discretion is identical to what the constitution has definitely left free". See Alexy (2014b), p. 519.
[244] Alexy (2002a), pp. 394-395.
[245] Alexy (2002a), p. 395.
[246] Alexy (2002a), p. 395. Examples from the German Federal Constitutional Court Alexy provides here are ends such as "preservation and support of manual crafts", contributions of the previous employers to the costs of unemployment benefit for their former employees resulting from the agreement on not to engage in competitive practice and, the "maintenance of the German merchant navy", from the Art. 27 of the Basic Law, which falls within end-setting discretion, since it is a goal the legislature may pursue.
[247] Alexy (2002a), p. 396.

infringement of one principle and the importance of satisfying the other principle are valued equally. In these stalemate situations, the legislature has discretion in the balancing process.[248]

Third, another development in Alexyan theory of judicial balancing was the distinction between substantive and formal principles. Alexy mentions the distinction briefly in the original text of his *A Theory of Constitutional Rights* and develops it further in the *Postscript*.[249] The elaboration of the distinction between substantive and formal principles is Alexy's response to the problem of epistemic or knowledge-related discretion.[250] Epistemic discretion occurs "whenever knowledge of what is commanded, prohibited or left free by constitutional rights is uncertain", and it poses a problem in constitutional justification, especially when considering the sub-principles of suitability and necessity.[251] At the heart of the problem of epistemic discretion lies the notion that if the legislatures are "permitted to base its interferences with constitutional rights on uncertain premises, then it is possible that the protection afforded by constitutional rights will be refused on the basis of false assumptions, even though constitutional rights have been in reality breached".[252] Alexy distinguishes between empirical epistemic discretion and normative epistemic discretion: the empirical epistemic discretion is the legislature's discretion with respect to relevant facts, while normative epistemic discretion arises "when it is not clear what the best weighting of the relevant constitutional rights is, and the legislature is given certain limits within which it can take decisions according to its own evaluations".[253]

The most important consequence of the distinction between two types of epistemic discretion for Alexy's theory is the further refinement of the weight formula by the introduction of the "reliability equation" which states that $R_i = R_i^e \times R_i^n$.[254] After these refinements, a final, "refined complete weight formula" can be introduced, which has the following structure:[255]

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[248] Alexy (2002a), p. 401.
[249] Alexy (2002a), p. 58, 82 and pp. 415-422. See also Alexy (2014b), pp. 515-516.
[250] Alexy (2002a), p. 414. Borowski adds that "Formal principles are indeed crucial for a reconstruction of the legal system of liberal democracies, for authoritative decisions form an essential element in these legal systems". Borowski (2011), p. 584. Epistemic discretion is, along with substantive or structural discretion, second type of discretion, according to Alexy. Formal principles "play no role with respect to substantive discretion" but in the case of epistemic discretion, they "play a decisive role". Alexy (2014b), p. 519.
[251] Alexy (2002a), p. 414.
[252] Alexy (2002a), p. 416. Alexy gives an example of the Cannabis decision (BVerfGE 90, 145) as an illustration for the problems with epistemic discretion. See Alexy (2014b), p. 520.
[253] Alexy (2002a), p. 415.
[254] Alexy (2014b), p. 514. The symbols R_i^e and R_i^n represent empirical epistemic discretion and normative epistemic discretion.
[255] Alexy (2014b), p. 514. Alexy states that the previously mentioned "complete weight formula" can continue to bear its name, since in a great number of cases only empirical reliability is the problem, but in the situations where normative reliability becomes problematic, R_i and R_j must be substituted through "reliability equation, thus resulting in a "refined complete weight formula".

$$Wi,j = \frac{Ii \times Wi \times R_i^e \times R_i^n}{Ij \times Wj \times R_j^e \times R_j^n}$$

It has been mentioned that Alexy defines principles as "norms that require something be realized to the greatest extent possible given the legal and factual possibilities".[256] In *A Theory of Constitutional Rights,* Alexy refers to a "distinction between two fundamental types of principles which is of wide-ranging significance, namely the distinction between substantive or material and formal or procedural principles".[257] Formal principles were introduced "in order to depict, first and foremost, the authoritative dimension of certain legal decisions".[258] The difference between substantive principles and formal principles lies in the object of optimization – to that to which the word "something" in the definition of principles refers.[259] Objects of optimization of substantive principles are certain contents, for example, life, freedom of speech or protection of the environment, while the objects of optimization of formal principles are legal decisions, regardless of their content, such as the principle of democracy or legal certainty[260]. Substantive principles "count as reasons for a decision, reasons that reflect the substantive content of the principle", while formal principles refer to the "authoritative dimension of certain decisions, e.g., authoritative decisions of the legislature and of the courts".[261] With respect to the balancing of formal and substantive principles, Alexy formulates the Law of Combination, which states that

> "Procedural formal principles can override substantive constitutional rights principles only in connection with other substantive principles".[262]

After having presented Alexy's theory of judicial balancing on the *Cannabis* case, the next section presents his theory in the context of another case of the Federal Constitutional Court, the *Titanic* case, in which freedom of expression and personality rights were in conflict.

I. 4. 2. 2. The *Titanic case* (1992)

[256] Alexy (2002a), p. 47.
[257] Alexy (2002a), p. 82. An example of a formal or procedural principle Alexy gives is the principle which says that "the democratic legislature shall take decisions which are significant for the society as a whole". Other examples of formal principles mentioned by Alexy are principles of legal certainty and separation of powers. See Alexy (2014b), pp. 517-518.
[258] Borowski (2010), p. 26. See Also Borowski (2015), p. 95.
[259] Alexy (2014b), p. 515.
[260] Alexy (2014b), p. 515.
[261] Borowski (2011), p. 584.
[262] Alexy (2002a), p. 423.

Another case Alexy refers to in order to argue that it is possible to make rational judgments about the intensity of interference and the degree of importance of satisfying the competing principles is the 1992 Federal Constitutional Court case *Titanic*.[263] In this case, a conflict arose between freedom of expression and personality rights. This case represents a classic example of a conflict of fundamental rights and is used as a "comparison case". This means that the approaches of all the other authors presented in this work will be applied to this case in order to enable a comparison and conclusions about the advantages and disadvantages of the approaches.

The facts of the case are as follows:[264] a satirical magazine called *Titanic* referred to a paraplegic reserve officer first as a "born murderer" and second as a "cripple". The details are as follows: the soldier, who was in a car accident, still wanted to serve in the army as a translator. In the widely circulated newspaper *Bild am Sonntag*, the soldier stated, "I don't know why the army declined my offer to serve; my head is still o.k. …"[265] The satirical magazine *Titanic* then featured him in a regular column, "The Seven Most Embarrassing Personalities of the Month", with a picture and the description "born murderer".[266] The text accompanying the picture read "My head is still o.k., he says…Soldiers are still able to act with impunity as potential murderers."[267] The soldier then sued the magazine, to which the magazine's responded with a rejoinder stating that it was obscene that he, a "cripple", was determined to serve in the German army "whose purpose is to cripple or kill people", and arguing this was the reason why he was listed in the seven most embarrassing personalities of the month section.[268] The lower court ruled in officer's favour and ordered *Titanic* magazine to pay the officer 12,000 DM in damages. *Titanic* filed a constitutional complaint, and the Federal Constitutional Court undertook "case specific balancing" of the magazine's freedom of expression (Art. 5(1) of the Basic Law) and the officer's right of personality (Art. 2(1), in

[263] Alexy (2003a), p. 138-140, BVerfGE 86, 1.
[264] On the *Titanic* case, see Alexy (2003a), pp. 437-442, Alexy (2014a), pp. 56-57 and Eberle (1997), pp. 871-875.
[265] Eberle (1997), p. 872, citing BVerfGE 86, 2-3.
[266] Eberle (1997), p. 873. The description "born murderer" was a pun. One of the other personalities listed as "embarrassing" in that month was listed with her maiden names which in German is "born" ("geb."). Richard von Weizsacker, who was the president of Germany then, was also listed as "born citizen". The term "born murderer" was satire directed as this common usage, as Eberle indicates.
[267] Eberle (1997), p. 873. The reference to soldiers as murderers related to an earlier speech of the publisher in which he asserted that every soldier is a potential murderer. The speech, as Eberle points out, attracted a lot of attention due to the cultural reference "soldiers are murderers" and its significance in Germany, which started with an article written by Kurt Tucholsky in 1931 in which the quote appeared.
[268] Eberle (1997), p. 873, citing BVerfGe 86, 4.

conjunction with Art. 1(1) of the Basic Law).[269] The mentioned articles of the Basic Law state the following:

> Art. 1(1): "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority."
>
> Art. 2(1): "Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law."
>
> Art. 5(1): "Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship."

Following the three-stage structure of balancing presented, the Court first determined the degree of interference with the rights of the two expressions. The judgment in damages represented "lasting" (Alexy uses the term "serious") interference with freedom of expression. This conclusion was justified by the argument that "awarding damages could affect the future willingness of those producing the magazine to carry out their work in the way they have done heretofore."[270] On the other hand, the description "born murderer" in the satirical context of *Titanic* magazine was qualified as "moderate, perhaps even only a light or minor intensity" with the soldier's personality rights. This conclusion was justified by the fact that several other individuals in the column were "described as having a surname at birth in a 'recognisably humorous' way, from 'puns to silliness'".[271] Such a context made it impossible to see the description as an "unlawful, serious, illegal harm to personality right".[272] In order for an award of damages to be justified (which was held to be a serious interference with freedom of expression), the interference with the personality rights had to be at least serious, but the Court held that it was at most moderate, so the interference with the freedom of expression was held as disproportionate.[273] The Court analysed the description "cripple" separately and classified it as a serious interference with the personality rights of paraplegic officer, arguing that it is so because it is "humiliating" and "shows lack of respect"[274]. The Court then treated this serious

[269] Alexy (2003a), p. 137, quoting BVerfGE 86, 1, 11.
[270] Alexy (2014a), p. 56.
[271] Alexy (2014a), p. 56, citing BVerfGE 86, 1, 11.
[272] Alexy (2014a), p. 56, citing BVerfGE 86, 1, 12.
[273] Alexy (2003a), pp. 137-138. The Federal Constitutional Court stated that the lower court misinterpreted the expression "murderer" by interpreting it in a literal sense, applying the criminal code. The Titanic is a satirical magazine, devoted to satire, and the readers "knew what to expect". On this point, see Eberle (1997), p. 873, fn. 348.
[274] Alexy (2003a), p. 138. The expression "cripple" is demeaning, since it connotes that a person is of lesser human worth. Even more, the expression is understood as a formal insult punishable by criminal code. On this point, see

interference with the rights of the officer as a justificatory reason for the serious interference with freedom of expression. The Court concluded that the damages for describing the officer as "cripple" were rightly awarded by the lower court. The Court concluded that "it could see no flaw in the balancing to the detriment of freedom of expression".[275] Ultimately, the *Titanic* magazine's constitutional complaint was justified with respect to the description of the officer as a "born murderer", but not with respect to the description of the officer as a "cripple". Alexy concludes by stating that the "formal structure of the reasoning" of the German Federal Constitutional Court is represented by the Disproportionality rule, which states that

> "An interference with a constitutional right is disproportional if it is not justified by the fact that the omission of this interference would give rise to an interference with another principle (or with the same principle with respect to other persons or in other respects), provided that this latter interference is at least as intensive as the first one".[276]

The Disproportionality rule, according to Alexy, "creates a relation between judgments about degrees of intensity and the judgment about proportionality. Judgments about the degrees of intensity are the *reasons* for the judgment about proportionality".[277] Using the *Tobacco*, *Cannabis* and *Titanic* judgments, Alexy argues that it is possible, at least in some cases, to make rational judgments about the intensity of the interference and the importance of satisfying the competing principle.[278] With this, we conclude with the part in which Robert Alexy's view is presented. Since Alexyan theory of judicial balancing has also been developed by other authors, we will now turn to these further developments of the theory and present them in the following section.

I. 5. Further developments

I. 5. 1. Introduction

This section presents the further developments of the Alexyan theory of judicial balancing. To this end, the most important contributions to this theory by Alexy's disciples are presented: Jan-Reinard Sieckmann, Martin Borowski and Matthias Klatt. Building on the work of Robert Alexy, these authors have further developed the Alexyan theory of judicial balancing.

Eberle (1997), pp. 873-874, who concludes that the case "teaches unmistakeably that certain words are prescribable as a violation of fundamental human dignity."

[275] Alexy (2003a), p. 138, quoting BVerfGE 86, 1, 13.

[276] Alexy (2003a), p. 138.

[277] Alexy (2003a), p. 139.

[278] Alexy (2003b), p. 439. These examples are used by Alexy, among other arguments, to reply to the criticism that there are no rational standards for balancing and that balancing is arbitrary and subjective, put forward by Habermas and Schlick. See Alexy (2003b), pp. 435-439. For the assignment of numerical values and application of the weight formula in the *Titanic* case, see Alexy (2005), pp. 575-576.

Because of their contributions, which have further expanded and developed the understanding of judicial balancing presented in this chapter, the entire chapter is titled 'Alexyan' rather than 'Alexy's' theory of judicial balancing. As will be shown in the following sections, these contributions addressed the following issues: norm (more specifically, the understanding of the concept of legal principle, the distinction between rules and principles and the concept of formal principles), right (the question of the possibility of absolute rights *stricto sensu*, which supposedly cannot be subject of judicial balancing) and the application of Alexyan theory of judicial balancing (the problem of judicial discretion in the application of the Weight formula).

I. 5. 2. Jan-Reinard Sieckmann

The first among the authors whose contribution to the Alexyan theory of judicial balancing is presented is Jan-Reinard Sieckmann (1960), a member of the "Kiel school" founded by Robert Alexy. Sieckmann's contribution is presented first, as he is the senior among the authors presented in this section. His contribution to Alexyan theory of judicial balancing presented here consists in his criticism of Alexy's understanding of legal principles, which led to a refinement and clarification of the concept that Robert Alexy developed under this criticism.

On this point, Sieckmann contributed to Alexyan understanding of legal principles by criticising the notion of principles as "commands to optimize" (or "optimization commands").[279] It has already been shown that Alexyan theory of judicial balancing is built on what has been called the 'strong' ('qualitative' or 'ontological') distinction between rules and principles. Sieckmann (but also Aulis Aarnio) argued that the idea of a principle as "command to optimize" (i.e., imposing the obligation that something is realized to the greatest degree that is factually and legally possible) is problematic because it is an obligation of a definite character, meaning that it can either be fulfilled or not fulfilled, and its complete fulfilment is always obligatory. It leads to the conclusion that principles, understood as optimization commands, have the structure of rules.[280]

Alexy responded to this criticism, rejecting the implication that this collapses his principles theory. He refined the idea of principles as "optimization commands" by introducing

[279] Alexy (2000a), pp. 300-301. The idea of principle as "command to optimize" (or "optimization command"), as Alexy (2000a), p. 300, defined it, means that principles "impose the obligation that something be realized to the highest degree that is actually and legally possible." In other words, principles are norms "…which require that something be realized to the greatest extent possible given the legal and factual possibilities". See Alexy (2002a), pp. 47-48 and previous section I. 3. 2., presenting his understanding of legal norms.

[280] Alexy (2000a), pp. 300-301. For the criticisms, see Sieckmann (1990), p. 65ff, Sieckmann (2015), pp. 151-153, Aarnio (1990), pp. 187-192, Borowski (2010), p. 21, fn. 7 and Poscher (2012b), pp. 233-235.

the distinction between "commands to be optimized" and "commands to optimize".[281] Commands to be optimized are the objects of balancing or weighing and they describe the "ideal ought" or "ideals", which are to be transformed into "real ought" by optimization. As such, commands to be optimized are placed at the object level. Commands to optimize (or optimization commands) are positioned by Alexy at a meta-level, from which they prescribe what is to be done at the object level. As Alexy explains commands to optimize:

> "They impose the obligation that their subject matter, the commands to be optimized, be realized to the greatest extent possible. As optimization commands they are not to be optimized but to be fulfilled by optimization."[282]

Therefore, as Alexy concludes the refinement of his theory, legal principles, as a type of norms that is applied through balancing are commands to be optimized:

> "As such, they comprehend an ideal "ought" that is not yet relativized to the actual and legal possibilities."[283]

By challenging Alexy's notion of "optimization commands" and directly influencing its clarification and refinement, Sieckmann points out the problems with Alexy's strong distinction between rules and principles. This distinction is often seen as a weakness in Alexyan theory of judicial balancing, which has also been criticized by other authors.[284] This problem will be further analysed in section I. 6. 1., in which the criticism of Alexyan theory of judicial balancing is presented.

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[281] Alexy (2000a), pp. 300-301. See also Alexy (2021b), Chapter 13. Duarte (2017), p. 2, writing on Alexy's theory of rules and principles, summarizes this further development of Alexyan theory: "This has lead to the subsequent distinction between *commands to be optimized* and *commands to optimize*: the former describe the ideal ought, which is what has to be transformed in a real ought through optimization, while the latter just refers to something that has to be done, in the sense of a command not to be optimized but fulfilled by optimization. (…) This distinction clarifies, thus, what is meant by *optimization requirements*. They are *commands to be optimized*, a refinement that does not justify, however, the abandonment of the initial concept, given the fact that it expresses in an altogether straightforward way the nature of principles."

[282] Alexy (2000a), p. 300.

[283] Alexy (2000a), p. 300. Regardless of this, as Alexy argues, it is still useful to talk about principles as "optimization commands" or obligations since this expresses the idea of nature of legal principles. According to Alexy (2000a), p. 301, "There is a necessary connection between the ideal "ought", that is, the principle as such, and the optimization command as a rule. The ideal "ought" implies the optimization command and vice-versa. These are the two sides of the same coin."

[284] For example, Poscher (2012b), p. 233, considers Alexy's reply to Sieckmann's criticism and his refinement of the notion of "optimization commands" as an "awkward rescue attempt" that fails. As Poscher argues, interpretation of principles as "optimization commands" requires that *something* is optimized. It does not require that commands themselves are optimized. An example given by Poscher to support this is Art. 2(2) of the Basic Law, which protects physical integrity and life. According to the principles theory, fundamental rights (which are understood as legal principles) include commands to optimize physical integrity and life. But physical integrity and life are not commands (nor normative objects at all). They are factual objects. Thus, as Poscher concludes, "everything can be optimized, from illness and death to width, height, temperature, time etc."

I. 5. 3. Martin Borowski

The second of the representatives of the Alexyan theory of judicial balancing presented here is Martin Borowski (1966), another member of the "Kiel school". He is also a well-known member of this school and contributed to the following aspects of Alexy's theory of judicial balancing: first, he wrote about the notion of 'formal principles', an important concept in the Alexyan theory of judicial balancing (see previous chapter, section I. 3. 2. 1.); second, he considered the possibility of absolute rights *stricto sensu*, which, if they existed, would be incompatible with judicial balancing.

Building on Alexy's Law of Combination, Borowski further developed the distinction between formal and substantive principles.[285] Substantive principles are defined as "reasons for a decision, reasons that reflect the substantive content of a principle."[286] A conflict between substantive principles is resolved by the Weight formula, which, as we have seen, takes into account three elements: the abstract weight of the conflicting principles, the intensity of the interferences and the reliability of the empirical premises. As for formal principles, Borowski complements Alexy's writing on the subject by defining formal principle as one that "grants the competence to create a goal to be optimised in the sense of the principles theory."[287] Formal principles represent the authoritative dimension of certain legal decisions.[288] An example of a formal principle is the principle of legislative authority which states that democratic legislature shall take decisions which are significant for the society as a whole.[289] Other examples of formal principles include legal certainty and separation of powers, all of which require that "what is authoritatively issued be respected".[290] The most important feature of formal

[285] For the distinction between formal and substantive principles, see Borowski (2010), pp. 24-31. Alexy's Law of combination states that "Procedural formal principles can override substantive constitutional rights principles only in connection with other substantive principles". Alexy (2002a), p. 423. For more on the notion of formal and substantive principles, see section I. 4. 2. 1.

[286] Borowski (2010), p. 24. Examples given by Borowski are freedom to conduct business from Art. 12 of the Basic Law and the principle of environmental protection from Art. 20a of the Basic Law. The two principles can conflict, as Borowski points out, since ecologically sound means of production of goods are often more expensive.

[287] Borowski (2010), p. 28.

[288] Borowski (2010), p. 26.

[289] Borowski (2010), p. 26, referring to Alexy (2002a), p. 82, where he suggested a distinction between "two fundamental types of principles which is of wide-ranging significance, namely the distinction between *substantive* or *material* and *formal* or *procedural* principles. A formal or procedural principle is, for example, the principle which says that the democratic legislature shall take decisions which are significant for a society as a whole." See also Borowski (2015), p. 95. The beginning of the distinction between two types of principles can be found, as Borowski indicates, in Dworkin (1978), p. 37, who distinguished between 'substantive' and 'conservative' principles. Alexy did not inquire into the structure of formal principles but settled for giving examples, as Borowski (2010), p. 26. points out.

[290] Alexy (2014b), p. 518.

principles, according to Borowski, is that they do not have a fixed, substantive content like substantive principles.[291] Formal principles

> "…confer power to create a goal to be optimised. This goal to be optimised represents the substantive content of the formal principle when it is subsequently balanced against competing principles."[292]

Formal principles are important to the Alexyan theory of judicial balancing because they can directly affect the conflict between two fundamental rights by adding "weight" to one of the two conflicting fundamental rights (understood as substantive principles).[293] Borowski illustrates this idea with an example of a conflict between two substantive principles, the principle of environmental protection and the freedom to conduct a business.[294] A statute intended to regulate the competition between these two principles by imposing a maximum level of sulphur dioxide in waste gas stemming from industrial production (as an instance of a formal principle of legislative authority) requires *prima facie* that the legislature's balancing decision be respected. If the constitutionality of such a statute is challenged, the constitutional court, which is supposed to resolve the conflict by judicial balancing, is also confronted with a legislative balancing decision made by the parliament between the same two principles:

> "The consideration of the formal principle has the effect of adding weight to one of the two substantive principles. To which substantive principle the weight is added depends simply on the decision of the parliamentary legislator."[295]

When the constitutional court balances between the two conflicting principles (for example, in the conflict between the principles of environmental protection and the freedom to conduct a business we mentioned), the more 'weight' it attributes to the formal principle of legislative authority, the greater discretion the legislature has.

Martin Borowski's second contribution to the Alexyan theory of judicial balancing is related to the idea of the possibility of 'absolute' rights *stricto sensu*. Such rights are understood as rights that are not susceptible to limitations and balancing.[296] In practice (in the

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[291] Borowski (2010), p. 29. As Borowski points out, Alexy (2002a), p. 416, goes even further and claims that formal principles have no content at all. A principle (for example, the principle of the democratically legitimated decision-taking competence of the legislature) is a formal principle "because it has no content, but rather states how content is to be established". But Borowski argues that formal principles can have substantive criteria which limit what can be the object of optimization. These substantive criteria represent a 'frame'

[292] Borowski (2010), p. 31.

[293] Borowski (2010), pp. 33-34.

[294] For the example, see Borowski (2010), pp. 33-36 and Borowski (2015), pp. 105-109.

[295] Borowski (2010), p. 294.

[296] Borowski (2013), pp. 385-386. An example of such rights would be the prohibition of torture and slavery, protected by Art. 3 and Art. 4(1) of European Convention on Human Rights or human dignity, protected by Art.

circumstances of the concrete case), competing rights can end up with the property of 'absoluteness' after they have been assigned weight, but Borowski argues for this *relative* absoluteness, which is established after judicial balancing, and against absoluteness *stricto sensu*, which rejects balancing altogether in the case of absolute rights *stricto sensu*. According to Borowski (and also Alexy), such an approach allows for a better reconstruction of cases of conflict between fundamental rights, without weakening protection of these rights.[297]

It is clear from this position of Alexy and Borowski that the Alexyan theory of judicial balancing rejects the idea of a hierarchy between fundamental rights. The relative 'absoluteness' of fundamental rights (i.e., the rejection of the idea that some of them cannot be balanced) allows for the resolution of the conflict between two absolute rights, which is a problem if they are understood *stricto sensu*, since there is no criterion for the resolution of such a conflict if judicial balancing is excluded.[298] Such an understanding of fundamental rights and the claim that they can always be subject to judicial balancing has been criticized by authors who argue that balancing weakens the protection of fundamental rights, as will be explained in more detail in the next section, where the criticisms of the Alexyan theory of judicial balancing will be set out.

I. 5. 4. Matthias Klatt

The third and final author whose contribution to the Alexyan theory of judicial balancing will be presented is Matthias Klatt (1973), also a member of the "Kiel school" who has made recent contributions to the Alexyan theory of judicial balancing. Klatt' contribution presented here consists of his work on judicial discretion (in particular, *structural* (or strong), and *epistemic* (or weak) discretion).

Discretion is a universal and unavoidable problem for existing legal systems and raises a number of issues that are also related to the topic we are dealing with.[299] Judicial discretion

1 of Charter of Fundamental Rights of the European Union and Art. 1(1)(2) of the Basic Law. See Borowski (2013), p. 393.

[297] Borowski (2013), p. 386. On Alexy's reconstruction of the absolute and relative conception, on the example of human dignity, see Alexy (2015), pp. 83-96.

[298] Borowski (2013), pp. 398-400, giving an example in which the dignity of one individual can be respected only if the dignity of another individual is interfered with. On the absolute and relative construction of dignity, see Alexy (2015), pp. 83-96.

[299] Klatt (2007b), pp. 506-507. Judicial discretion, as Klatt (2007b), p. 507 writes, "is not merely an argumentative-theoretical question, but raises the fundamental issues of the separation of powers, the binding of judges to the law, the distinction between hard and easy cases, and the separation of interpretation and law-making. It is not coincidence that judicial discretion has come to play the prominent role it enjoys in the debate on the concept of law. Furthermore, an adequate theory of judicial discretion is necessary to provide the basis for the legitimacy of decisions and the claim for correctness implicit in every judgment." Klatt (2007b), pp. 511-514 refers to the Hart-Dworkin debate regarding judicial discretion and argues for what he calls a "moderate" model of judicial

consists of the alternatives in respect of which the judiciary has freedom (the so-called "sphere of judicial freedom").[300] Alexyan theory distinguishes between *structural* and *epistemic* discretion, as we have seen in section I. 4. 2. 1. Structural discretion is a type of discretion in which "the law itself leaves open the choice between different, but equally legal possibilities. Structural discretion is constituted by the limits of what the law definitely commands and prohibits."[301] Epistemic discretion, on the other hand "arises from the limits of our capacity to know the limits of the law" and depending on the type of knowledge to which the discretion is related, epistemic discretion can be either *empirical* or *normative*.[302] According to Klatt, both structural and epistemic discretion of the judge can be understood as competence. "Competence" is understood here as "the legal position conferred by a legal norm to make a new norm valid by a specific action".[303] On the basis of this idea, in the case of structural discretion, judges

> "…decide a legal problem on which the given set of legal norms remains silent. They validate thereby a new norm, at least in the sense that decisions in each future case that correspond in all relevant matters to the one decided should go the same way. In the case of epistemic discretion, they make a norm commanding that some particular empirical or normative knowledge, even though uncertain, should be treated as certain."[304]

Discretion is important, as we saw in I. 4. 2. 1. And Alexy's reconstruction of the 1994 Federal Constitutional Court *Cannabis case*, which involved the conflict between two substantive or material principles (constitutionally protected liberty and public health). The resolution of this case (which, according to the Alexyan theory of judicial balancing is a conflict

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discretion which combines the strengths of the two models. Klatt (2007b), p. 514 summarizes strengths and weaknesses of the two models: "While Hart overestimates the law-making parts of adjudication, and thus grants judges too much discretion, Dworkin underestimates the law-making parts and argues for too little discretion. Neither Dworkin nor Hart give a full and correct picture of judicial discretion." On Dworkin's and Hart's views on judicial discretion, see Dworkin (1978), pp. 31-39 and Hart (2012), pp. 141-147.

[300] Klatt (2007b), p. 516.

[301] Klatt (2007b), p. 516.

[302] Klatt (2007b), p. 516. The distinction between two types of epistemic discretion is illustrated by Klatt by with hierarchy in the judicial systems and different functions of lower and higher courts with regards to the questions of facts and questions of law. Courts of first instance have *empirical epistemic discretion* since their primary function is the evaluation of facts, the hearing of witnesses, the hearing of evidence etc., as Klatt points out. Higher courts, bound by the facts established by the lower courts, generally evaluate questions of law, and have *normative epistemic discretion*. On this point, see Klatt (2007b), p. 517, where he argues that "…the two kinds of epistemic discretion already allow us to explain the different functions of higher and lower courts. The evaluation of facts, (…) is primarily the function of the courts of first instance (…) To that extent, the lower courts have epistemic-empirical discretion, i.e., they are entitled to evaluate and their evaluation is final. On the other hand, higher courts generally decide questions of law. Their primary function is to control and review the lower courts with regards to questions of law. Thus, higher courts, unlike the lower courts, have epistemic discretion on normative knowledge."

[303] Klatt (2007b), p. 518.

[304] Klatt (2007b), p. 518. In this way, as Klatt argues, since discretion can be understood as competence, we can distinguish between structural and epistemic competence.

between two principles) is, like any other such case, to be resolved by balancing. If one principle outweighs the other, there is no structural discretion; however, if there is a stalemate (i.e., when the concrete weights of the principles are equal, meaning that the law neither commands nor prohibits giving precedence to one of the conflicting principles), we are dealing with structural discretion. In this situation, the court should be deferential to the decision of the legislature and find the restriction on a right constitutional, in accordance with the formal principles of legislative authority we have mentioned.[305] As for epistemic discretion, its most important consequence, the refinement of the Weight formula by the introduction of the "reliability equation" led to the final, "refined complete weight formula" was presented in section I. 4. 2. 1.

As with other points we have presented in this section (Sieckmann and the distinction between rules and principles and Borowski and formal principles and the rejection of absolute rights *stricto sensu*), judicial discretion is, according to critics, another weakness of Alexyan theory of judicial balancing. According to these criticisms, to which we will now turn, judicial balancing gives judges too much discretionary power and weakens the role of the legislature.

I. 6. Criticisms and conclusions

I. 6. 1. Criticisms

In this section we will present the criticisms that have been raised against the Alexyan theory of judicial balancing. Following the structure of Chapter I, four criticisms will be presented. The first is directed against Alexyan understanding of norm and the strong distinction between rules and principles (I. 6. 1. 1.). The second relates to the understanding of the structure of conflicts between fundamental rights and the Law of Balancing (I. 6. 1. 2.). The third and central criticism refers to the theoretical framework of the Alexyan theory of judicial balancing and the rationality and balancing of the Weight formula as its central aspect (I. 6. 1. 3.). Finally, the fourth criticism presents the objections arising from the previous ones – the alleged weakening of fundamental rights and the judicial discretion (I. 6. 1. 4.).

I. 6. 1. 1. Types of norms: rules and principles

The first of the criticisms of theories of judicial balancing to which we turn is directed against Robert Alexy's understanding of norm and the *strong distinction thesis* between rules and principles, according to which there are logical or structural differences between rules and

[305] Alexy (2002a), p. 410.

principles. This criticism is important because the rest of the conceptual framework of Alexyan theory of judicial balancing is built on this distinction.[306] If the criticism is valid, a problem arises for Alexyan theory of judicial balancing, because principles are understood as norms that are *structurally* different from rules. It has already been mentioned that Alexy understands rules and principles as two types of norms, with each norm being either a rule or a principle (*Exklusionstheorem*). Principles, proponents of Alexyan theory argue, are norms that require *optimisation* (i.e., fulfilment to the "greatest extent possible", given factual and legal possibilities) through *balancing*, while rules, on the other hand, are definitive commands that are either applied or not through *subsumption*. The first problematic aspect of the strong distinction thesis in the Alexyan theory of judicial balancing we turn to is the notion of "optimisation", proposed as a distinct feature of legal principles.[307] Juan Pablo Alonso analysed the logical structure of legal principles in Alexyan theory and, in particular, their structure as "optimisation commands".[308] As for the logical structure, Alexy presents principles as a derivation of the deontic modality "obligatory", to which he adds the aspect of optimisation.[309] While rules can be represented as an obligation to do p ("O*p*"), principles, according to Alexy, impose an obligation to optimise p ("O Opt *p*").[310] The logical function of "Opt" in the general logical structure of legal principles could be understood, as Alonso points out, as an independent element (hypothesis 1), as part of a modalised action or state of affairs (hypothesis 2) or as part of a deontic modaliser (hypothesis 3).[311] As Alonso demonstrates, it is not clear what is the logical function of the element "O Opt *p*".[312] By analysing the three hypotheses

[306] As it was indicated in section I. 3. 2., Alexy himself considered the theoretical distinction between rules and principles to be the most important one in his theory of rights. He described the distinction as a 'pillar' of his theory of rights. On the importance of the distinction, see Alexy (2002a), p. 44. Regarding the importance of the Alexyan concept of legal principle and the strong distinction between rules and principles, Poscher (2015), p. 130 argues that it is the "central premise of the principles theory" and without it, "the theory must collapse and with it the theoretical imposition of a fundamental rights doctrine."

[307] For this criticism, see Alonso (2016), pp. 53-61. See also section I. 5. 2. on Jan-Reinard Sieckmann and Alexy's refinement of the idea of principles as "optimization commands" by introduction of the distinction between "commands to be optimized" and "commands to optimize".

[308] Alonso (2016), pp. 53-61.

[309] Alonso (2016), p. 53.

[310] Alonso (2016), pp. 53-54. As Alonso indicates, *p* here represents an empirical object of optimisation, and not a normative one. The logical structure of principles could alternatively be reconstructed in a way that the object of optimisation is not empirical but normative. In this case, the structure would be "O Opt O*p*". Alonso (2016), p. 55 refers to the "O Opt *p*" as the basic formula and to "O Opt O*p*" as the more complex formula but indicates that Alexy accepts the implication "O Opt *p*→O Opt O*p*".

[311] Alonso (2016), p. 55.

[312] Alonso starts by analysing three possible hypotheses regarding the status of the "Opt": first, that is an independent element; second, that is a part of modalised action (or state of affairs); and third, that it is a part of deontic modaliser. Although Alexy does not explicitly express his view, due to him accepting the implication "O Opt *p*→O Opt O*p*", it seems that the third hypothesis (according to which Opt is part of deontic modaliser) would be correct. This is so, as Alonso argues, because Alexy states that his logic of principles derives from deontic logic, and some models of deontic logic accept the theorem "Op→O O*p*". It seems that Alexy understands Opt as

concerning the logical function of "Opt", Alonso shows that the hypothesis 3 (according to which Opt is part of the deontic modaliser, and which is the position that Alexy seems to hold) does not intuitively seem to hold, since optimisation, like any other action, could be subject to modalisation (normativisation), which would imply that "Opt" should be considered as a modalised action or state of affairs (hypothesis 2). However, this reasoning would imply the viability of the view that "Opt" is an independent element (hypothesis 1), since both actions (optimisation and *p*) could be combined both with their action and their omission, as Alonso points out.[313] However, the view that "Opt" is an independent element (hypothesis) 1 is incompatible with Alexy's views on normativisation forms.[314]

The fact that the logical function of optimisation (the element that supposedly distinguishes legal principles from legal rules, since rules are either fulfilled or not, while principles can be fulfilled to a degree) is unclear leads us to the next problem with Alexyan understanding of legal principles. The idea of principles as optimization commands has also been criticized by authors who have pointed out that it is difficult to see how a norm can be "fulfilled to a degree" in a concrete case.[315] Brożek illustrates this problem with the well-known example of a vehicle in a park.[316] In the example, the relevant rule (prohibiting the entrance of vehicles for entering a public park) determines one obligatory course of action (not entering the park), but the relevant principle (protection of human life and health) also determines one obligatory course of action (driving through the park).[317] The two conflicting legal norms result in two mutually exclusive obligatory courses of action, with no possibility of a "fulfilment to a degree." The other way to account for the characteristic of a "fulfilment to a degree" of

part of deontic modalisation because otherwise, as Alonso argues, the theorem would be "O Opt p→O O Opt *p*", if Opt was considered as a part of modalised action or state of affairs (second hypothesis). Alexy does not hold the mentioned theorem to be valid, as Alonso points out. But from a very intuitive point of view, as Alonso argues, it seems that the second hypothesis is correct since optimisation (Opt) is an action that, like any other action, can be subjected to modalisation (normativisation). But such reasoning would imply the viability of first hypothesis, because both actions (optimisation and *p*) could be combined both with their action and their omission, according to Alonso. But this would entail eight, and not four basic normativisation forms, which is Alexy's position. For a demonstration of Alonso's argument, see Alonso (2016), pp. 55-56.

[313] Alonso (2016), pp. 55-56.

[314] Alonso (2016), p. 56. Hypothesis 1, as Alonso points out, entails the possibility of eight basic normativisation forms. This does not seem to be Alexy's view, since he proposes three ideal forms (ideal obligation, $O_i p$, ideal prohibition $\neg P_i p$ and ideal permission $P_i p$) and it can be assumed, as Alonso argues, that he accepts the fourth ideal form – ideal permission to permit ($P_i \neg p$).

[315] On this point, see Brożek (2012), pp. 222-223. See also Martínez Zorrilla (2018), pp. 173-177 and Ramiaõ (2018), pp. 164-168.

[316] Brożek (2012), p. 206 formulates the example as follows: "A local ordinance includes a norm that bans all vehicles from entering a public park. An ambulance carrying a seriously injured person has to go to the hospital. The shortest way to the hospital is through the park. The question arises of whether the ambulance can enter the park. For the original example, see Hart (2012), pp. 127-129.

[317] Brożek (2012), pp. 222-223.

principles would be, as Brożek argues, to hold that principles may be applied in different ways to different cases, while rules are applied in uniform way in any relevant case.[318] However, the logical difference between rules and principles cannot be established here, because rules can also be applied in different ways.[319]

The criticisms raised question the so-called strong (or qualitative) distinction between rules and principles proposed by Alexy. In fact, the majority of authors have argued that the distinction between rules and principles should be understood as the so-called weak (or quantitative) distinction, according to which there are no structural or logical differences between rules and principles.[320]

I. 6. 1. 2. Structure of conflicts: Law of Competing Principles

The second criticism raised against the Alexyan theory of judicial balancing concerns the understanding of conflicts between fundamental rights and the way in which they are resolved. Since fundamental rights are understood as rights expressed by norms that have the structure of legal principles, this criticism builds on the Alexyan understanding of legal principles as optimisation commands. As Martínez Zorrilla argues, a norm cannot be applied or satisfied partially or gradually: in the case of a conflict between freedom of expression and the right to honour (as in the *Titanic* case used by Alexy), the expression is either considered protected by freedom of expression (and permitted) or not (and prohibited).[321] Whenever a norm is applied, it is applied to the greatest extent possible, regardless of whether it is being understood as a principle or a rule; the claim that a principle ought to be applied to the greatest extent possible is argued to be meaningless.[322] Indeed, Alexy's formulation of the Law of

[318] Brożek (2012), p. 223.
[319] Brożek (2012), p. 223. The principle of protection of human life and health (formulated by Brożek as "Human life and health should be protected by law") may be realized variously realised, depending on the normative context (for example, by requiring ambulance to use the shortest way to hospital or by financing debts of all hospitals). But the rule according to which vehicles are banned from entering the park may also be realised differently, depending on the normative context (sometimes by banning bicycles form the park, and sometimes allowing them in the park).
[320] For such position, see, for example, Comanducci (1997), p. 60, García Amado (2009), p. 304, García Figueroa (2009), pp. 345-352 and pp. 367-370, Guastini (2011b), pp. 173-180, Hart (2012), pp. 259-263, MacCormick (1994), pp. 231-232, Marmor (2001), pp. 121-128, Moreso (2009b), p. 277, Pino (2009), pp. 136-137 and Raz (1972), pp. 834-839.
[321] Martínez Zorrilla (2018), pp. 174, concluding that "There is no gradual application of rights: one principle is fully applied and solves the case, and the other one is sacrificed. There is not an attempt to make both rights compatible in the case at hand or to broaden the scope of any of the relevant rights, so the notion of maximisation seems to be totally alien to the adjudication of fundamental rights."
[322] Ramiaõ (2018), pp. 167-168. The concept of optimisation, as Ramiaõ (2018), p. 168 argues, is an empty or tautological one. Martínez Zorrilla (2018), p. 175, agrees with the view that the distinction between rules and principles can be made according to the concept of optimisation. On the rejection of optimisation as the basis for logical distinction between rules and principles, see also Poscher (2009), p. 433-438 and Poscher (2020), pp. 134-

Competing Principles, presented in section I. 3. 3. 2., seems to support the idea that whenever a norm is applied, it is applied to the greatest extent possible. Let us briefly recall Alexy's ideas. Principles are optimisation commands among which there is no relation of absolute precedence. The Law of Competing Principles expresses the fact that the priority relations between principles are only conditional or relative, and not absolute. According to the optimization thesis, the competing principles require fulfilment to the greatest extent possible, but they limit each other in the possibility of their maximum fulfilment. The conflict is resolved by the court by determining the "conditional relationship of precedence" in light of the circumstances of the case.[323] In the example of the *Lebach* case cited by Alexy (I. 3. 3. 2.), two principles conflicted: the protection of privacy (P_1) and the freedom of media reporting (P_2). These two norms, when applied, lead to mutually incompatible results: P_1 would lead to a prohibition of the broadcast, while P_2 would lead to permission of the broadcast. In its decision, the Court established that the protection of privacy takes precedence over the freedom of media reporting in the case of a "repeated report of a serious criminal act, no longer covered by the interest in up-to-date information, which endangers the resocialization of the criminal", which means that the broadcast was prohibited: principle P_1 took precedence over principle P_2.[324] We see that the Court has established four conditions under which principle P_1 takes precedence over principle P_2. The Law of Competing Principles, in its shorter formulation, states that "The circumstances under which one principle takes precedence over another constitute the conditions of a rule which has the same legal consequences as the principle taking precedence".[325] Following the line of criticism presented by Martínez Zorrilla, we can see that in the *Lebach* case, just as in the *Titanic* case, the broadcast is considered either protected by freedom of media reporting (and permitted) or not (and prohibited). It is difficult to see how any of the competing principles in the case were applied "to the greatest extent possible". In its decision, the Court established four conditions under which the broadcast was prohibited (i.e., under which the broadcast was not protected by the freedom of media reporting and under which the protection of privacy took precedence).[326] One *could* understand the idea of principles as optimization requirements,

149. Poscher (2009), p. 438, writes that "By its own ontological standard, the theory of principles is a theory without an object. The kind of entity the theory is meant to cover – principles that do not have the structure of rule-type norms – do not exist."

[323] Alexy (2002a), pp. 51-52. See also Alexy (2000a), p. 296.

[324] Alexy (2002a), p. 55. C_1, as Alexy indicates, consists of four conditions: repetition, no current interest, serious criminal offence and endangering socialization.

[325] Alexy (2002a), p. 54.

[326] The reasoning of the Court and its reconstruction through the perspective of the Law of Competing Principles in its longer version was already presented in section I. 3. 3. 2. Here, we will just remind the reader that the Court held that in the situations in which repeated reporting on a serious crime is no longer covered by the interest in

which require fulfilment to the "greatest extent possible" (given the legal and factual circumstances), in the sense that the four circumstances established by the Court limit the fulfilment of principle P_2 (freedom of media reporting) to the greatest extent possible. However, this would then also apply to rules (for example, if an exception to a rule is introduced, this could be understood as limiting "fulfilment to the greatest extent possible"). However, this leads to a negation of Alexy's distinction between rules and principles based on the idea of optimisation and "fulfilment to a degree".[327]

Another criticism raised against Alexy's reconstruction of the conflicts between fundamental rights relates to the conflation of the notions of 'validity' and 'applicability' of norms. We have seen that Alexy states that conflicts between rules are resolved either by introducing an exception into one of the conflicting rules or by declaring one of the conflicting rules invalid, in which case the rule that is declared invalid is "excised from the legal system".[328] On the other hand, conflicts between principles are resolved through a balancing process, in which one principle "outweighs" the other, without introducing any exceptions or declaring invalidity. Here, reference should be made to 'applicability' rather than 'validity'.[329] Two conflicting (antinomic) rules can both be valid, and legal experience shows us that legal systems have many valid but contradictory rules, as Ratti notes.[330] In the examples given by Alexy (I. 3. 2.), it can be said that two conflicting norms are not both *applied* to the concrete case (i.e., that the judge must choose and apply one of them, disapplying the other), but not that one of the conflicting norms is *invalid*.[331]

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up-to-date information, and which threatens the resocialization of the offender (C_2), the principle of protection of privacy takes precedence over the freedom of media reporting (P_1 **P** P_2) C_2. The C_2 in this case consisted of four conditions: repeated report (F_1), no current interest (F_2), serious criminal offence (F_3) and endangering resocialization (F_4). Rule $C_2 \rightarrow Q$ consist of four conditions and has the following structure: $F_1 \wedge F_2 \wedge F_3 \wedge F_4 \rightarrow Q$, with 'Q' standing for the prohibition of the report.

[327] As Ramiaõ (2018), p. 168 argues, fulfilling a norm "to the greatest extent factually and legally possible" is a mere tautology. Whenever a norm is applied, he argues, it is applied to the greatest extent possible. See also Brożek (2012), p. 219-220 for the rejection of the strong distinction between rules and principles on the basis of defeasibility of both rules and principles.

[328] Alexy (2002a), p. 49.

[329] See Ratti (2006), p. 254 and pp. 258-259. On the meaning of 'applicability' and 'validity', see also Munzer (1973), pp. 1156-1162, who points out that a rule may be valid without being applicable. On this point, see also section I. 4. 1., fn. 167, where this issue was already mentioned. On the validity and applicability, see also Martínez Zorrilla (2010), pp. 41-45, who gives examples of norms that are valid, but not applicable (norms in the period of *vacatio legis*) and norms that are applicable, but not valid (norms from foreign legal systems, application of which is determined by the rules of the international private law).

[330] Ratti (2006), p. 254.

[331] Ratti (2006), p. 254. As Ratti point out, it can be possible that one of the rules is considered invalid, but this depends on the use of certain criteria of preference between the rules and contingent facts (such as the moment of entry into force or the hierarchical relationship between the rules etc.).

I. 6. 1. 3. Application: rationality of balancing and weight formula

The third criticism is directed against the irrationality of balancing and weight formula. The general idea and the structure of weight formula – particularly, the assignment of "weight" to principles and the use of numbers to represent the relations between conflicting fundamental rights – has been described as a subjective and irrational procedure, fraught with problems. To this end, we will present criticisms to weight formula and the rules of arithmetic it follows. This criticism is important because the weight formula, as a formalisation of balancing (the sub-principle of proportionality in the narrow sense), is a distinctive feature of Alexyan theory of judicial balancing, according to which the apparent conflicts between fundamental rights are resolved.[332]

Alexy contrasts balancing with subsumption and understands them as two basic operations in the application of law.[333] While subsumption follows the rules of logic, balancing (and the Weight formula) follows the rules of arithmetic, according to Alexy. This idea was criticized by pointing out that a model of reasoning must be based on logic, not arithmetic, and that subsumption cannot be contrasted with balancing on this basis.[334] Any formal theory of legal reasoning must be based on logic and not arithmetic, as Brożek points out.[335] The notion of "weight", which plays a central role in the Alexyan theory of judicial balancing because of its importance to the Weight formula, is arguably the most controversial in the Alexyan theory of judicial balancing. The idea that norms can have "weight" (if agreed with) must be understood as a metaphor, since norms do not have weight by themselves; "weight" is assigned to them by judges when they decide cases.[336] As Chiassoni points out, the Alexyan theory of balancing (as well as all other theories of judicial balancing), must provide an acceptable way of dissolving them metaphor, i.e., explain how to translate the metaphorical figure of "weight"

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[332] This is also the reason why we did not focus on the principle of proportionality in general and its first two sub-principles (suitability and necessity). The principle of proportionality, as we have seen in section I. 4. 1. is a product of 19th century German legal doctrine in the framework of which Robert Alexy developed his theory of judicial balancing.

[333] Alexy (2003b), pp. 433-435. However, as it was indicated in section I. 4. 1., in his later work, Alexy states that analogy could be qualified as a third basic operation in law. See Alexy (2010b), p. 18. Regardless of this consideration, Alexyan theory of judicial balancing is built upon the dichotomy between balancing and subsumption.

[334] Brożek (2012), pp. 221, writes that "The fact that one scheme "works according to the rules of logic" and the other "according to the rules of arithmetic" is devastating for any attempt of developing a formal theory of legal reasoning. *The problem consists in it that it is logic and not the arithmetic that sets standards for any reasoning*. Therefore, a 'model of reasoning' based on arithmetic formula is not, at the end of the day, a 'real' model of reasoning." [emphasis added].

[335] Brożek (2012), pp. 221. See also Zuleta (2017), p. 12.

[336] Chiassoni (2019b), p. 175. On weight as a metaphor, see also García Amado (2016), pp. 2-4, Mendonca (2017) pp. 180-183, Pino (2010b), pp. 57-58 and Tsakyrakis (2009), p. 482.

into non-metaphorical terms.[337] But it is doubtful whether this is possible. Questions about the meaning of weight, about the possibility of its measurement, about its source, and about the empirical evidence that allows for its determination must be answered if Alexyan theory of judicial balancing is to be regarded as a preferrable method for the resolution of the apparent conflicts between fundamental rights.[338]

The "weighing", that is, the ascription of "weights" to the norms protecting conflicting fundamental rights has been characterized as arbitrary process.[339] In its basic form, the weight formula consists of intensities of interferences (*I*) and abstract weights of the principles (*W*). In order to present the criticism, it is not necessary to refer to the extended weight formula which contains an additional factor – the reliability of empirical assumptions – since the same argument applies. The Weight formula, as the object of this criticism, can then be presented in the following way:

$$Wi,j = \frac{Ii \times Wi}{Ij \times Wj}$$

The result of the weight formula is a quotient of two products, and the factors are represented by numerical values. Alexy proposes a triadic scale, consisting of three grades represented by numbers: *light* (l, 2^0, 1), *moderate* (m, 2^1, 2) and *serious* (s, 2^2, 4). Many authors have argued that the lack of parameters to determine the factors in the Weight formula makes it a subjective and contestable judgment.[340] This can be illustrated by the example of *Cannabis* judgment, which Alexy also used to elaborate his weight formula.[341] In his reconstruction of the judgment, Alexy argues that the abstract weights of the colliding principles (constitutionally protected liberty and protection of public health) are equal. Therefore, the abstract weights of (W_i and W_j) in the equation could be neglected because they cancel each other out. This

[337] Chiassoni (2019b), p. 175. Chiassoni (2019b), pp. 175-178 lists six different conceptions of judicial balancing, corresponding to six different ways of dispelling the metaphor of weight. Alexyan theory of judicial balancing is classified as 'rationalist argumentative' one. 'Rationalist argumentative' conception of judicial balancing suggests rational justification to dissipate the metaphor of weight. These conceptions offer to translate balancing sentence "In relation to a legal problem P, the solution A weighs more than solution B" into sentence "In relation to a legal problem P, the solution A is supported by rational justification (that is, supported by a set of rational arguments) stronger that then solution B". On this point, see Chiassoni (2019b), p. 178.

[338] As Ratti (2010), p. 279 points out, these questions represent problems for any 'principialist' theory of judicial balancing.

[339] Aleinikoff (1987), pp. 982-983, La Torre (2006), p. 59, Martínez Zorrilla (2018), p. 188, Pino (2010b), p. 198 and Poscher (2009), p. 444.

[340] On this point, see Atienza (2006), pp. 173-174, Bernal Pulido (2003), p. 235, Chiassoni (2019b), p. 171, García Amado (2012), p. 82, Guastini (2004), p. 219, Guibourg (2011), pp. 167-170 and pp. 180-184, Martínez Zorrilla (2018), p. 188, Moreso (2012), p. 38, Pino (2010b), pp. 198-199, Poscher (2009), p. 444, Pozzolo (2020), p. 319, Sardo (2012), p. 93 and Tsakyrakis (2009), p. 482.

[341] See Smet (2017), pp. 193-195.

assumption could be accepted if there is no hierarchy between the two fundamental rights. But even if this is the case, the assumption is not self-evident.[342] As for the other variable in the Weight formula – the intensity of the interference – the judgment that the prohibition of cannabis *moderately* interferes with individual freedom is also questionable.[343] In the same line of criticism, it has been argued that the intensity of interference with a right cannot be evaluated without evaluating the importance of the right in question.[344] For example, in the case of freedom of movement and the interference with it by the closure of a street or the prohibition of the circulation of vehicles for an hour, how can we measure whether the intensity of the interference is "light", "moderate" or "serious", without stating the reasons in favour of the measure?[345] By stating these reasons, the importance of the competing right or principle is also evaluated.[346] The problem with the triadic scale and the assignment of grades in Alexy's triadic scale is, as Moreso points out, is that we do not have a feature of property upon which the classification depends.[347] Different features could be plausible candidates for classification, but that would open up the possibility of different scales that are not necessarily mutually compatible with each other.[348]

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[342] On this point, Petersen (2013), p. 1391. See also Moreso (2012), pp. 37-38 and Smet (2017b), p. 193.

[343] Smet (2017b), pp. 194-195 argues that Alexy uses weight formula not to *reconstruct* but to *shape* the reasoning of the Federal Constitutional Court to support the desired outcome (that the prohibition of cannabis is constitutional). If the intensity of interference with individual freedom was qualified as 'serious', the weight formula would yield unconstitutionality. Indeed, this observation holds when we look at Alexy's reconstruction of the *Cannabis* judgment (see section I. 4. 2. 1.). Alexy (2003b), p. 447 writes that "From this and the fact that the Court considered prohibition of cannabis products as constitutional, *it follows that the interference with Pi is not of the highest degree*. *Its highest possible value is 2, that is m*." [emphasis added]. As Smet (2017b), p. 194 concludes: "Instead of a useful vehicle to illustrate the rationality of balancing, it turns into a rhetorical device that inevitably confirms the presupposed rationality of balancing."

[344] Pino (2010b), p. 197.

[345] Pino (2010b), p. 197. Another example regarding the classification of measures is given by Zuleta (2017), p. 18. An interference with a right can be initially classified as 'serious' if there are other which are lighter, and as 'light' if there are others that are more serious, and as 'moderate' if we consider others in which there are light and more serious ones. For example, if we consider 1000$, 10 000$ and 100 000$ as possible interferences with the freedom of the press, the first one would be qualified as light, the second one as moderate, and the third one as serious. But if we consider death penalty for the editor or the closure of the media, the three monetary fines would be considered light and would have the same value on Alexy's scale, despite significant differences between them. On the problem of the quantification of the parameters in Alexyan theory of judicial balancing, see also Tuzet (2020), pp. 302-306.

[346] For this example, see Pino (2010b), p. 197. Pino points out to Celano (2005b), p. 483, fn. 38, who states that the weight is assigned when there is a contrast between the rights: "Le ragioni assumono un peso solo nel loro contrasto, e nel loro bilanciamento". Regarding the problem of the assessment of the abstract weights of principles (independent of any concrete circumstances), Moreso (2012), pp. 37-38 indicates that we would have to have a hierarchy of fundamental rights for such an abstract ordering. However, there is no such scale for ordering rights.

[347] Moreso (2012), p. 38.

[348] Moreso (2012), p. 38 indicates that "*We can only elaborate and ordinal or cardinal scales when we have a clearly defined property*, as in the case of mineral hardness testing (…) The hardness of minerals allows us to construct an ordinal scale, the Mohs scale. I cannot see how this is possible to do something similar in the case of interference in constitutional rights. We have nothing similar to the scratch test. *We do not know how to decide if a concrete interference is slight, moderate or serious*." [emphasis added] On the necessity of an algorithm for the assignment of weights, see Guibourg (2011), pp. 167-168.

In addition to the criticism of assigning weights to conflicting rights, there is also a line of criticism that questions the 'mechanism' of the Weight formula and its dependence on numbers. Hugo Zuleta developed an argument against the weight formula by showing that it operates with numerical values in an insignificant way, and as such, it cannot provide an insight into any kind of reasoning or method.[349] To be of significance, numerical operations would have to yield the same results when subjected to admissible transformations, and this is not the case with Alexy's Weight formula.[350] Zuleta gives an example and subjects it to lineal transformation of scales by multiplying the values in weight formula by 1.5 and by adding them 10.[351] Let us consider the following example:

$$Wi,j = \frac{Ii \times Wi \times Ri}{Ij \times Wj \times Rj}$$

If I_i (intensity of interference) is 1, W_i (abstract weight) is also 1 and R_i (degree of epistemic certainty) is ½, while I_j is 4, W_j is 1 and R_j is ¼, the result will be (1 x 1 x ¼) / (4 x 1 x ¼) = 0.5. This means that the principle P_j prevails over principle P_i, since the result is less than 1.[352] However, if a lineal transformation of I_i and I_j is made by multiplying them by 1.5 and by adding 10, I_i becomes 11.5 and I_j becomes 16, which leads to a result (11.5 x 1 x ¼) / (16 x 1 x ¼) = 1.4375. This means that P_i would prevail over P_j, since the result is higher than 1.[353] This shows, as Zuleta points out, that Weight formula is based on insignificant arithmetic operations and that it cannot be taken as an illustration of a rational decision procedure, as Alexy claims.[354]

The considerations presented leave open questions about the notion of "weight", which is a deciding factor for the resolution of the apparent conflicts between fundamental rights in Alexyan theory of judicial balancing. The idea that legal principles have a "measurable" weight cannot be taken as a logically meaningful assertion because it represents a metaphysical assumption about an alleged property of legal principles.[355] The idea that "weight" varies from case to case and that it is to be "measured" by judges in resolving conflicts is associated with

[349] Zuleta (2017), p. 12. On Zuleta's argument, see also Martínez Zorrilla (2018), pp. 189-190.
[350] Martínez Zorrilla (2018), p. 189.
[351] Zuleta (2017), pp. 16-17. See also Martínez Zorrilla (2018), pp. 189-190.
[352] Martínez Zorrilla (2018), pp. 189-190. Alexy (2003b), p. 444 explains that if the value of $W_{i,j}$ is greater than 1, the principle P_i takes precedence over P_j. When the value of $W_{i,j}$ is less than 1, the principle P_j takes precedence over the principle P_i. For the reconstruction of Alexy's weight formula, see section I. 4. 1.
[353] Zuleta (2017), pp. 13-14. See also Martínez Zorrilla (2018), pp. 189-190. The same happens when other variables in the weight formula (for example, the abstract weight of principles) are subjected to a lineal transformation. For a demonstration of this, see Zuleta (2017), pp. 14-16.
[354] Zuleta (2017), p. 22.
[355] On this point, see Ratti (2006), p. 279-280.

ideologies that support judicial activism, as Ratti points out.[356] In the next section, we will turn to and examine this critique.

I. 6. 1. 4. Consequences: weakening of rights and judicial discretion

The fourth and last criticism we present is directed against what can be understood as implied negative consequences of the previous criticisms. These are the weakening of fundamental rights and judicial discretion, which opens the possibility of judicial activism, often associated with principialist theories of judicial balancing. This criticism has been raised, among others, by the authors whose alternative, non-balancing approaches to the apparent conflicts between fundamental rights we will analyse in Chapter III. Most notably, by the Italian legal philosopher Luigi Ferrajoli (whose approach is presented in section III. 2) and the Spanish legal philosopher Juan Antonio García Amado (whose approach is presented in section III. 3.).

Luigi Ferrajoli argues that the idea of fundamental rights as principles (i.e., norms that have "weight" and are applicable by balancing, as opposed to rules) endangers the separation of powers because it empowers judges to create norms through the process of balancing.[357] He contrasts balancing with subsumption, arguing that the latter should be the preferred method for applying fundamental rights norms because the former generally gives judges greater discretion.[358] It has also been argued that judicial balancing of fundamental rights, understood as legal principles, weakens their normative force by allowing judges to operate with fundamental rights as a kind of ethical-political recommendations, allowing for discretion in the application of norms protecting fundamental rights.[359] According to this line of criticism, judicial balancing allows for greater discretion compared to subsumption because it allows the introduction of exceptions to the norm.[360] The summary of the idea can be presented as follows:

> "If a basic right is protected by a rule, the protection tends to be stronger than the protection afforded by a matter of principle. A legal rule can only be compromised by explicit exceptions specified

[356] Ratti (2010), pp. 279-280.
[357] Ferrajoli (2011a), p. 44, where he argues that: "De hecho, si se sostiene que los jueces no deben limitarse a interpretar las normas de derecho positivo, sino que también están habilitados para crear ellos mismos normas, aunque sólo sea a través de la ponderación de los principios, *entonces resultada anulada de la separación de los poderes.*" [emphasis added]
[358] Ferrajoli (2007a), p. 92. On this point, see also García Amado (2010b), pp. 400-405, García Amado (2016), pp. 8-9, Petersen (2017), pp. 4-5 and Pino (2010b), p. 181.
[359] Ferrajoli (2011a), p. 52. See also Ferrajoli (2011b), p. 352.
[360] García Amado (2016), p. 9.

in law. In contrast, a legal principle is always subject to balancing against other principles, so its protection cannot ever afford the same degree of legal certainty."[361]

This is particularly problematic, as García Amado argues, because these exceptions are based on moral, rather than legal, considerations.[362] In this sense, the Alexyan theory of judicial balancing denies the separation between law and morality by understanding legal reasoning as a special case of general practical reasoning.[363]

A related criticism that should also be mentioned because of its influence is one of the earliest and best-known critiques of the Alexyan theory of judicial balancing, put forward by Jürgen Habermas.[364] Habermas criticized Alexy's idea that fundamental rights are principles that should be subjected to balancing. By subjecting rights to a "cost-benefit analysis" in the context of balancing, one converts them from "deontological legal principles" into "teleological legal interests or goods".[365] According to Habermas, by operating with rights as teleological legal interests or goods, balancing contradicts the deontological understanding of fundamental rights and the "firewall" that ought to protect them.[366] Such relativization of rights, leads to arbitrariness and irrationality in the balancing process, it is argued.[367]

The common argument of the criticisms presented in this last point can be summarized by stating that understanding fundamental rights as principles weakens their normative force, since the conflict between them is resolved on the basis of balancing rather than subsumption. This, in turn, allows for a greater degree of judicial discretion.

I. 6. 2. Conclusions

In the last section of the chapter, we will present conclusions on the Alexyan theory of judicial balancing. To facilitate the comparison between the Alexyan approach and other approaches to which we turn in the next two chapters, the section begins with a recapitulation of the positions on the basic notions that we have analysed. The idea is to use them as points of comparison because of their importance in understanding the problem. These include, as we have seen: first, interpretation and, in particular, the preferred theory of interpretation (I. 3. 1.);

[361] Tschentscher (2014), pp. 44-45.
[362] García Amado (2016), p. 9.
[363] García Amado (2016), p. 11.
[364] Habermas (1996), pp. 256-259.
[365] Habermas (1996), p. 258. On this point, see Bongiovanni & Valentini (2018), pp. 591.
[366] Habermas (1996), p. 258. See also Bongiovanni & Valentini (2018), pp. 591.
[367] Bongiovanni & Valentini (2018), pp. 591-592, summarizing the criticism from Habermas. Tsakyrakis (2009), p. 487, argues that the balancing approach "…appears to pervert rather than elucidate human rights adjudication. With the balancing approach, we no longer ask what is right or wrong in human rights case but, instead, try to investigate whether something is appropriate, adequate, intensive, or far-reaching."

second, the understanding of norm and right, in particular, the typology of norms and the understanding of the distinction between legal rules and legal principles (I. 3. 2.); and third, the position on the apparent conflicts between fundamental rights – conflictivism or non-conflictivism (I. 3. 3.). After that, we will present a summary of the Alexyan proposal, and conclude with an evaluation of his proposal.

Robert Alexy developed the best known and most influential of the theories of judicial balancing, which can be considered the *standard* theory of judicial balancing because his ideas have been widely accepted and applied in both national and supranational legal systems around the world.[368] Alexy argues that his theory of judicial balancing represents a rational procedure that should be used in resolving fundamental rights conflicts. This assertion, as it has been shown, is contested by the critics of his proposal.

Alexy places his views on the subject of legal interpretation in the broader context of legal argumentation, as he understands the theory of legal argumentation as a specific form of general practical discourse. Understanding external justification (i.e., the acceptability of the premises of a legal decision) as a central topic in his theory of argumentation, Alexy holds that the most important rules for external justification are canons of interpretation.[369] They are used to justify the interpretative choice (meaning) given to an expression that is susceptible to more than one interpretation. Alexy also argues that there is no difference between the interpretation of constitutions and the interpretation of other legal texts. By emphasising the open texture of legal provisions, rejecting the one-right-answer thesis and by distinguishing between *easy* and *hard cases*, Alexy presents himself as a proponent of a mixed (or intermediate) theory of interpretation (I. 3. 1.).

Understanding norm as the meaning of a normative sentence or provision, Alexy develops his theory of constitutional rights by building on his central distinction – that between rules and principles. According to Alexy, the distinction between two types of norms is a so-called *strong* distinction, according to which there are qualitative or structural differences between rules and principles. Principles are optimization commands that can be fulfilled to a degree, while rules are definitive commands that are either applied or not. While rules are applied by subsumption, principles are applied by balancing (I. 3. 2.)

On the issue of the apparent conflict between fundamental rights, Alexy takes a *conflictivist* position. The three theses on which he bases his principles theory (the *optimization*

[368] On this point, see section I. 1 and, among the authors that have already been mentioned, Martínez-Zorrilla (2018), pp. 171-172, Moreso Stone Sweet & Matthews (2008), p. 93.
[369] See Alexy (2007b), p. 320 and Feteris (2016), p. 683 and section I. 3. 1.

thesis, the *collision law*, and the *balancing law*) all serve to explain the situations of conflict between fundamental rights, understood to have the structure of legal principles. While a conflict between rules is resolved by introducing an exception in one of the conflicting rules or by declaring one of the rules invalid, a conflict between principles (and between fundamental rights as rights expressed by norms having the structure of legal principles) is resolved by judicial balancing (I. 3. 3.)

Alexy understands judicial balancing as a method of resolving conflicts between fundamental rights in which the court gives ascribes greater concrete weight to one of the conflicting principles. The concrete weight is determined by the Weight formula, a mathematical model based on the factors to which values are assigned on a triadic scale, as explained in section I. 4. 1. As proponents of the Alexyan theory of judicial balancing argue, a rational assignment of numerical values to the factors in the Weight formula is possible, with the end result (also numerical, being a quotient of two products) indicating which of the conflicting fundamental rights should be given priority in the concrete case.

Although it is the standard understanding of judicial balancing and the most widely accepted theory of judicial balancing (both in theory and in court practice), the Alexyan theory of judicial balancing faces serious criticisms, as we have shown in the previous section. The so-called strong distinction between rules and principles, according to which there are qualitative or structural differences between the two types of norms, has been problematized by showing that the logical function of obligation to optimize ("O Opt p") that principles impose is unclear, as Juan Pablo Alonso has shown. The idea of principles as optimization commands has also been criticized by questioning the possibility of "fulfilment to a degree" of a norm in a concrete case and the possibility of applying the norm "to the greatest extent possible". Regarding the central part of the Alexyan proposal – the Weight formula – Moreso pointed out the lack of a feature or property on which the classification depends (according to which the numbers of the triadic scale are assigned). The idea that legal principles have a "measurable" weight was also characterized by Ratti as a metaphysical assumption about an alleged property of legal principles. Moreover, Hugo Zuleta has shown that the Weight formula cannot be considered as an illustration of a rational decision procedure, as Alexy claims, because it operates with numerical values in an insignificant way. This is because they do not yield the same results when subjected to admissible transformations.

Because of the criticisms leveled against the Alexyan theory of judicial balancing as the mainstream legal method for resolving the apparent conflicts between fundamental rights, we will turn to and analyze other, non-Alexyan theories of judicial balancing in Chapter II and

alternatives to theories of judicial balancing in Chapter III. This is necessary to explore further possible answer to the research question we are dealing with: *What are the legal methods of resolving apparent conflicts between fundamental rights and what are their merits in comparison to each other?*

CHAPTER II. NON-ALEXYAN THEORIES OF JUDICIAL BALANCING

Summary

The topic of the second chapter is judicial balancing, the most important method proposed for resolving apparent conflicts between fundamental rights. In Chapter I, we also presented and analysed the same topic, but from the perspective of the Alexyan theory of judicial balancing, which is the "standard" understanding of judicial balancing. In addition to this "standard" understanding, however, there are other ways of understanding judicial balancing and, thus, other ways of answering the question: *What is judicial balancing?* For this reason, in Chapter II we turn to non-Alexyan theories of judicial balancing and analyse them, along with their supposed advantages and disadvantages, when compared to the Alexyan theory of judicial balancing. By reconstructing these other, non-Alexyan theories of judicial balancing, this chapter provides alternative answers to the question *What is judicial balancing*? This is done in order to evaluate the alternatives to the Alexyan theory of judicial balancing, since various criticisms have been put raised against it, as previously shown in Chapter I. In this chapter, the approaches of five authors are analysed in the following order: Aharon Barak, Manuel Atienza, José Juan Moreso, Riccardo Guastini and Susan Lynn Hurley.[370]

[370] The choice of the authors is explained in the introduction to each section. The order in which they are presented represents their similarities with the Alexyan theory of judicial balancing, to which they are analysed as alternatives to. The inclusion of Aharon Barak, Manuel Atienza and Susan Lynn Hurley in chapter on judicial balancing is not problematic, since there is a consensus from other authors regarding their views (Barak, Atienza and Hurley) and since the authors themselves have explicitly qualified their approach as judicial balancing (Barak and Atienza). On this point, see, for example, Alexy (2018), p. 871, Atienza (2006), p. 169ff, Barak (2012), p. 20, Chiassoni (2019b), p. 165ff, Martínez Zorilla (2007), pp. 119-120 and Sieckmann (2010a), pp. 102-103. What could be, however, challenged, is the inclusion of José Juan Moreso and Riccardo Guastini in chapter on judicial balancing. Although Moreso does not use the notion of "weight" like Alexy, Barak and Atienza do, he offers a normative doctrine of judicial balancing and conceives it as a process of specification of principles (or more precisely, of relevant properties of the case). His approach is understood and analysed under 'balancing' approaches by authors such as Celano (2002), p. 21ff, Chiassoni (2019b), p. 187ff, Comanducci (2016), p. 100ff, Martínez Zorrilla (2009), p. 121 and Sardo (2012), p. 72ff. Further explanation of this point is provided in sections II. 3. 1. and II. 3. 2. As for Riccardo Guastini, he does not aim to offer a normative doctrine, but instead provides a descriptive theory of a legal reasoning in particular legal system, i.e., provides an explanation how judges decide in the cases of apparent conflicts between fundamental rights. See Guastini (2011b), pp. 206-210. Guastini's approach is also analysed as a 'balancing' approach by other authors. See, for example, Chiassoni (2019b), p. 189, Martínez Zorrilla (2007), pp. 169-173 and Sardo (2012), p. 60ff. Further explanation of this point is given in section II. 4. 1.

Structurally, the chapter consists of five subchapters, each of which introduces an author and his or her understanding of the notion of "judicial balancing". The structure of Chapter II follows the structure of Chapter I, in order to facilitate the comparison between the different understandings of the notion of judicial balancing. First, the introductory sections of the subchapters (x. 1.) present the explanation and justification for the structure and the content of the subchapter. In the second sections (x. 2.), a brief contextualization of the authors and their philosophy of law is given in order to better understand the theoretical background of their approach to the subject. In the third sections (x. 3.), basic notions relevant to the authors' understanding of the apparent conflicts between fundamental rights are introduced. These are, first, interpretation, second, norm and right, and third, the question of (apparent) conflicts between fundamental rights. These sections are followed by the main parts of the subchapters – the presentation and application of the method proposed by the respective author (x. 4.). In these sections, the methods proposed by the authors are applied to two cases: first, to the case used by the authors themselves to present their approach and its main idea, and second, to the *Titanic case*, which serves as a "comparison case" for all the different methods analysed. Such a "comparison case" facilitates the identification of the relative advantages and disadvantages of each proposed method. Finally, each subchapter concludes with a critique and conclusions (x. 5.) on the proposed method.

By presenting five other possible answers to the main question of the chapter – *What is judicial balancing*, the chapter pursues the main research objective of the thesis. This objective is to provide an overview, comparison and evaluation of the various methods proposed to resolve (apparent) conflicts between fundamental rights. The objective of such an endeavour is to analyse the strengths and weaknesses of the variety of the proposals put forward for dealing with one of the most important contemporary legal problems – conflicts between fundamental rights.

II. 1. Aharon Barak

II. 1. 1. Introduction

The first among the alternative, non-Alexyan approaches to judicial balancing analysed in this chapter is that of Aharon Barak (1936), an Israeli professor who served as judge and president of the Supreme Court of Israel. Barak's understanding of judicial balancing is

reconstructed first in this chapter for two reasons: first, compared to other theories of judicial balancing analysed in this work, it has the most in common with Alexyan theories of judicial balancing. In this sense, although it represents a non-Alexyan theory of judicial balancing, it nevertheless has the most in common with it, as will be shown in the following section. Barak develops his ideas within the framework set out by Robert Alexy, acknowledging Alexy's key influence, but because of the differences and disagreements between them (which will be presented in the next section), Barak's theory of judicial balancing will be analysed as an alternative to Alexyan theories of judicial balancing.[371]

The second reason why the approach of Aharon Barak was chosen for analysis is its influence. Barak's work is influential not only in Israel, but also in the United States and Eastern Europe.[372] In this sense, we analyse an approach to the issue of apparent conflicts between fundamental rights by a senior judge in the Israeli legal system who has often been associated with judicial activism and who has made significant theoretical contributions that spanned beyond the boundaries of his national legal system.[373]

The subchapter consists of five sections (1. 1. – 1. 5.) and is arranged as follows: After the introduction (1. 1.), which explains and justifies the structure and content of the subchapter, the second section contextualizes the legal philosophy of Aharon Barak (1. 2.). The third section (1. 3.) introduces the basic notions relevant to the problem: first, Barak's views on interpretation (1. 3. 1.); second, his understanding of 'norm' and 'right' (1. 3. 2.); and finally, his view on conflicts between fundamental rights (1. 3. 3.). Barak distinguishes conflicts

[371] On the influence of Alexy's theory on Barak's theory (and on the differences between the two), see Barak (2012), pp. 5-6 and Barak (2017a), pp. 324-327. Barak and Alexy also had a recent discussion regarding some differences in the understanding of judicial balancing. For the discussion, see Barak (2017b), pp. 347-357, and a reply from Alexy (2018), pp. 871-879. The discussion revolved around one of the points of disagreement between Alexy and Barak: the relationship between constitutional rights and proportionality. The disagreement is related to the following question: At which level proportionality operates (has effects)? While Alexy argues that proportionality has effects already on the constitutional level, Barak argues that proportionality only operates on the sub-constitutional level. On this point, see Alexy (2018), p. 871. Other differences between Barak and Alexy are analysed later in this section. It could be argued that the differences between the two approaches are too negligible in order to justify their separate analysis. However, it seems to me that the theoretical disagreements between the two authors and the resulting consequences are not negligible, as it will be argued throughout the rest of the section. Such a position is also held by other authors. See, for example, Bernal Pulido (2013), p. 486, fn. 20 and Smet (2017b), pp. 197-202. Also, Barak claims that he develops an approach which, although having a lot in common with the Alexy's approach, is different. See Barak (2012), pp. 5-6 and Barak (2017a), pp. 324-327. For the same point, see also a review of Barak (2012) by Huscroft (2014), p. 231.

[372] On the influence of Aharon Barak, see, for example, Harel (2021), pp. 174-194, Navot (2017), pp. 483-484, Sultany (2007), pp. 83-92 and Wagner (2011), pp. 437-464.

[373] See Harel (2021), p. 194 and Mersel (2011), pp. 339-346. Judicial activism and its understanding are a relevant issue in the context of the apparent conflicts between fundamental rights, since the authors who criticize balancing (as a method suggested for resolving apparent conflicts between fundamental rights) point out that it gives discretion to judges. On this point, see the criticism of Alexyan theory of judicial balancing regarding judicial activism in section I. 6. 1. 4.

between fundamental rights based on their structure (either rules or principles), so his views are presented in the following order: first, on conflicts between rule-shaped rights (1. 3. 3. 1.); second, on conflicts between principle-shaped rights (1. 3. 3. 2.) and finally, between rule-shaped and principle-shaped rights (1. 3. 3. 3.). In the fourth and main section (1. 4.), the theoretical framework of Barak's approach is presented (1. 4. 1.) and applied to legal cases (1. 4. 2.): first, to the 2003 Israeli Supreme Court case *Jane Doe v. Disciplinary Court for Government Employees in Haifa* (1. 4. 2. 1.), and then to the 1992 German Federal Constitutional Court *Titanic case* (1. 4. 2. 2.). The fifth and final section (1. 5.) presents the criticisms of Barak's proposal (1. 5. 1.) and ends with conclusions about his proposal (1. 5. 2.).

II. 1. 2. Barak's approach: an alternative to Alexy?

The approach of Aharon Barak to the issue of the apparent conflicts between fundamental rights has many similarities with the approach of Robert Alexy, as it was mentioned in the previous section. In this section, Barak's legal philosophy will be contextualized, and the two approaches will be compared and differences between them identified, so that a separate analysis of Barak's approach can be justified.

The fact that Barak was a judge at the Supreme Court of Israel for nearly three decades (and its president for more than a decade) played an important role in his writings. Barak emphasises in his works that he approaches the subject of fundamental rights from a judicial perspective and advocates an *eclectic* approach.[374] Barak does not advocate any philosophy of law in particular, and argues that, in order to understand the proper role of the judge, various philosophical approaches to law should be taken into account.[375] He defends this position on the basis of his role – that of a judge, rather than that of a legal scholar.

The central notion in the relation to the apparent conflict between fundamental rights for Aharon Barak is *proportionality*, and this is reflected in the title of his book *Proportionality:*

[374] Barak (2002), p. 19, writes: „I am not a philosopher. I am not a legal scientist. I am a judge – a judge in the highest court of my country's legal system." For the advocation of eclectic approach, see Barak (2002), p. 66, where he acknowledges that legal realism, legal positivism, natural law theories etc. have much truth in them, "legal reality is too complex to be adequately captured by any of these schools of thought". On Barak's ideas regarding the relationship between (his) role of a judge and legal philosophy, see also Barak (2008), pp. 116-121 and Barak (2012), p. 16.

[375] Barak (2008), pp. 116-117, writes: "From the outset of our studies in law school until the end of our professional lives, we are exposed to various philosophical approaches to the law: positivism, naturalism, realism, legal process, critical legal studies, law and sociology, law and economics, feminism, and others. I have found these theories to be of great interest, for each has an element of truth. Nonetheless, human experience is too rich to be imprisoned in a single legal theory (…) Indeed, in my view, only by considering all the theories and giving each of them appropriate weight it is possible to understand the role of the judge." On Barak's eclectic approach, see also Bendor & Sela (2011), p. 475.

Constitutional Rights and their Limitations.[376] In the book, Barak analyses the notion of proportionality, which according to him, stems from the two most important notions in the modern, post-second World War constitutional theory: democracy and the rule of law.[377] The notion of proportionality has various meanings in different contexts, as the author indicates, and in this book (and in his other writings) Barak focuses on the meaning of proportionality as "a limitation applied within a democratic system, on a constitutional right by a law (a statute or common law)".[378]

Although Alexy and Barak generally agree on many points[379], particularly the key role that proportionality plays in resolving apparent conflicts between fundamental rights, there are certain points on which they disagree. Barak states that his opinion differs from Alexy's on four key points regarding proportionality:[380] (a) first, in those situations where constitutional rights[381] (when understood as legal principles)[382] conflict, or where a constitutional right conflicts with a public interest, a rule formulated to resolve such conflict, operates only at the sub-constitutional level, without affecting the scope of the constitutional right itself.[383] In such situations, Alexy argues, as Barak indicates (and disagrees), that a rule formulated to resolve such conflict operates at the constitutional level and reduces the scope of the constitutional right.[384] (b) second, with respect to the balancing rule[385], Barak argues that what should be balanced is the importance of the *proper purpose* that the limiting law seeks to obtain versus the importance of *preventing the limitation* of the constitutional right. On the other hand, Alexy

[376] On the influence of Aharon Barak, see Navot (2017), pp. 483-484.
[377] Barak (2012), pp. 1-2.
[378] Barak (2012), p. 2.
[379] See Alexy (2018), p. 871, Barak (2012), p. 20 and Bernal Pulido (2013), p. 486, fn. 20.
[380] These differences are elaborated in Barak (2012), pp. 5-6.
[381] The term 'constitutional rights' is used here in order to follow Barak's terminology. The relationship between the terms 'constitutional right' and 'fundamental right' for Aharon Barak is analysed in more detail later in the subsection (1. 2. 2.). For now, it can be mentioned that for Barak, the notion of 'constitutional right' is wider than 'fundamental right', since not all constitutional rights are fundamental rights (but all fundamental rights are constitutional rights.
[382] And this is often the case. See Barak (2012), p. 49: "Constitutional rights are often phrased as principles." More about Barak's view regarding the distinction between rules and principles in the next subsection, 1. 2. 2..
[383] Barak (2012), p. 6. The 'rule' refers to the rule which is the result of balancing. Barak (2012), p. 38, following Alexy (2002a), p. 56., writes that a conflict between constitutional principles (and fundamental rights are usually expressed by constitutional norms which have the structure of legal principles) is to be resolved by balancing and that the result of balancing is a new rule, derived from the conflicting constitutional principles. This rule determines which of the conflicting principles has priority ("outweighs") another. For Alexy's understanding of this, see section I. 3. 3. 2, and the reconstruction of Law of Competing Principles. On the differences regarding the understanding of this rule, see Barak (2012), pp. 39-42.
[384] Barak (2012), p. 6 and p. 38. See Alexy (2002a), p. 56, where he writes: "Thus, the following proposition applies: the result of every correct balancing of constitutional rights can be formulated in terms of derivative constitutional rights norm in the form of a rule under which the case can be subsumed". For more on Alexy's view on the issue, see section I. 3. 3. 2, where his Law of Balancing is presented.
[385] Or 'Law of Balancing', as Alexy (2002a), p. 102 refers to it. On this difference between Barak and Alexy, see also Barak (2010), pp. 7-8.

argues that the importance of the proper purpose that the limiting law seeks to obtain is to be balanced versus *harm* (*or interference* – light, moderate or serious) inflicted upon the constitutional right.[386] Related to this second difference, Barak emphasises his view that for him, constitutional rights are not of equal importance.[387] (c) third, Barak distinguishes between the protection of constitutional rights and the protection of public interests. In Alexy's account of proportionality, the same rule applies to both the protection of constitutional rights and the protection of public interests.[388] (d) the fourth and final difference arises from Barak's position that proportionality can be applied even in cases where a constitutional right is shaped as a rule; according to Barak, the use of proportionality is not linked to the logical structure of constitutional right (and it being principle), but to considerations of democracy and the rule of law. In Alexy's account, proportionality analysis is applied only to constitutional rights which have the logical structure of legal principles.[389] These are the main differences between the approaches of Aharon Barak and Robert Alexy, which support a separate analysis of Barak's approach.

II. 1. 3. Basic notions

The following section presents Aharon Barak's understanding of the concepts of interpretation, the structure of the norm and right and his understanding of the apparent conflicts between fundamental rights. We begin with his views on interpretation (II. 1. 3. 1.) and the notion of *purposive interpretation*, which Barak assigns a central role in the process of interpretation. This is followed by his understanding of 'norm' and 'right' (II. 1. 3. 2.) and conflicts between fundamental rights (II. 1. 3. 3.), where he distinguishes between three types of conflicts between fundamental rights, depending on the structure of the norms expressing

[386] See Alexy (2002a), p. 102 and section I. 3. 3. 2 for his Law of Balancing.
[387] Barak (2012), p. 6. Barak (2010), p. 9 writes that "The social importance of a right – and by extension its weight in relation to conflicting principles – is derived from its underlying rationale and its importance within the framework of the society's fundamental conceptions."
[388] Barak (2012), pp. 364-365. Barak argues that his approach has advantages over Alexy's in this aspect, since Barak's approach also considers 'marginal social importance' of the limited right, along with the degree of the limitation. Barak argues that in this way, "rights are taken more seriously", in the sense that there is a higher threshold for limiting constitutional rights by public interests. In Barak's words, "socially important constitutional rights" could be labelled "trumps". But not in the Dworkinian sense, since, according to Barak, Dworkin's ideas are incompatible with balancing and the idea or rights as trumps is "meant to prevent balancing. On the idea of 'social importance' as an element in Barak's understanding of proportionality in the narrow sense (balancing), see Barak (2012), p. 349ff. For Alexy (2002a), pp. 65-66, even though the distinction between individual rights and collective interests is important, principles can express both and thus, they are balanced accordingly in the Weight Formula. Alexy mentions cases which were analysed in the previous chapter: the *Lebach* case, where the right to privacy and the freedom of expression conflicted (both individual rights) and *The Fitness to Stand Trial* case, where the right to life and bodily integrity (an individual right) conflicted with the principle of functional criminal justice system (a collective goal). For the presentation of the cases, see section I. 3. 3. 2.
[389] On the necessary connection between principles and proportionality, see Alexy (2000a), pp. 297-298.

them: conflicts between rule-shaped rights, conflicts between principle-shaped rights and conflicts between rule-shaped and principle-shaped rights.

II. 1. 3. 1. Interpretation

Interpretation, along with proportionality, is an important subject for Barak, on which he has written continuously.[390] In his book *Purposive Interpretation in Law*, Barak understands legal interpretation as a "rational activity that gives meaning to a legal text".[391] Interpretation is understood as an intellectual activity concerned with determining the normative meaning of the text and as an activity that "shapes the content of the norm 'trapped' inside the text".[392] The object of interpretation is the text, while the norm extracted from the text is the result of the product of interpretation, not the object.[393] In Barak's understanding, every text requires interpretation.[394] According to Barak, general hermeneutics can only contribute to legal hermeneutics in a limited way, because of the distinct nature of the law: its power to coerce.[395] Through the process of interpretation, the interpreter, according to Barak, extracts the legal meaning of the text from the semantic meaning of the text; it is the process of legal interpretation that transforms the semantic "text" into a legal norm.[396]

In his article *Hermeneutics and Constitutional Interpretation*, Barak argued that, as a judge, he needs a theory of interpretation – "a workable theory of how to read a legal text in general and a constitutional text in particular".[397] For Barak, the *purpose* in law is taken as a starting point. Since every law has a purpose, Barak sees interpretation as a "tool for effectuating the law's purpose".[398] But when an interpreter is faced with legal text, he cannot choose the "true" meaning because there is no such thing; there is only the "proper" meaning.[399] Barak suggests that from the spectrum of possible literal meanings, the interpreter should choose the one that "more than any other, furthers the purpose of the norm embodied in the text".[400] Barak considers purposive interpretation to be the best among methods of

[390] See Barak (1992), Barak (2005), Barak (2008) and Barak (2012).
[391] Barak (2005), p. 3 and Barak (2008), p. 122.
[392] Barak (2005), p. 3.
[393] Barak (2005), pp. 11-12.
[394] Barak (2005), p. 12. Barak rejects the idea that there can be 'clear' or 'plain' text which doesn't require interpretation; a text cannot be understood without being interpreted.
[395] Barak (2005), p. 59.
[396] Barak (2005), pp. 6-7.
[397] Barak (1992), p. 768.
[398] Barak (1992), p. 769.
[399] Barak (1992), p. 769.
[400] Barak (1992), p. 769. For more on purposive interpretation and its importance, see Barak (2005), particularly Chapter III – The Essence of Purposive Interpretation, pp. 85-96.

constitutional interpretation.[401] Since a legal text has no "true" meaning, the goal of the interpreter, according to Barak, is to determine the "proper" meaning of the text, i.e. the one that best furthers its purpose. Barak distinguishes between two types of purposes in purposive interpretation: the *subjective* (which aims to ascertain the intention of the author(s) of the legal text) and the *objective* (which relates to the goals that the legal community wishes to achieve).[402] When interpreting a legal provision, the results of these two different types of purposive interpretation "usually coincide", but not necessarily, making it necessary to distinguish between them, according to Barak.[403]

What is Barak's position regarding constitutional interpretation? Because of the "special character of the constitutional text", Barak argues that objective purposive interpretation should prevail in constitutional interpretation (as opposed to other types of legal interpretation).[404] More specifically, he argues for objective purposive interpretation in most cases, while subjective purposive interpretation is relevant in cases where there are conflicting objective purposes.[405] Barak refers to his doctrine of purposive constitutional interpretation as *holistic* and argues that it takes into account both subjective and objective purpose to provide a kind of synthetic approach to the interpretation of constitutional provisions.[406] Nevertheless, objective purpose has the upper hand.[407] How does this understanding of constitutional interpretation affect fundamental rights? Barak's general idea for interpreting fundamental rights as follows:

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[401] See Barak (2012), pp. 45-46.

[402] Barak juxtaposes these two notions of purposive interpretation by stating that subjective interpretation refers to the intent of the authors, while the objective interpretation refers to the intent of the system (or community). Barak (2005), p. 371. On the objective purposive interpretation, Barak writes the following: "These objective purposes are the ones that the legal community wants to achieve with its norms, and they represent the deep and basic understandings of the legal community. They consist of values and policies that establish the identity of the community. (…) See Barak (1992), p. 770. But idea that there might be a purpose or intent that a society wants to realize (as a whole) and that this purpose be ascertained by the judge (also labelled as 'objective') seems problematic. One could talk about the "purpose that the community wants to achieve" in the context of a democratically elected legislature, which acts on the behalf of the community which they represent. But when a judge interprets a legal provision (which logically has to happen after the norm has been enacted), it seems more plausible to think that a judge could reconstruct (through hypothesizing) the will of the norm creators (or the "subjective purpose") than what the "community wants to achieve". Purposive objective interpretation seems to also provide a wider judicial discretion. On criticisms put forward to Barak and his replies to these criticisms, see Barak (2005), Chapter XI – Purposive Interpretation and its Critique of Other Systems of Interpretation, pp. 260-304.

[403] Barak (1992), p. 770.

[404] Barak (1992), pp. 772-773, Barak (2005), pp. 190-191 and Barak (2012), pp. 45-48. On the interpretation of wills, contracts and statutes, which should be interpreted by subjective purposive interpretation, see Barak (2005), pp. 185-189.

[405] See Barak (2005), Appendix 3, for a table in which Barak distinguishes between three types of legal texts: contracts and wills, statutes and constitutions, and arguing which of the two types of purposive interpretation is most suitable for interpreting each these three groups of legal texts.

[406] Barak (2012), p. 48.

[407] Barak (2012), p. 48.

> "These rights [constitutional rights, remark added] are interpreted according to the reasons at their foundation, understood in the context of society's most fundamental values, the fundamentals of its existence, and with the basic principles shared by all constitutional rights".[408]

To reiterate: in the context of the apparent conflicts between fundamental rights, two of Barak's ideas regarding interpretation stand out: first, his position that constitutional interpretation is distinct from statutory (and other legal interpretations), and second, his notion of the special importance of purposive (especially purposive constitutional) interpretation.[409] Analysing Barak's theory of interpretation against the backdrop of the theoretical framework presented earlier[410], his theory exhibits traits of a cognitivist approach in some aspects, while it also exhibits some traits of a sceptical approach in other aspects. It could be classified as a variant of *eclectic* theory (mixed or middle way).[411] This is because Barak holds the view that every legal text requires interpretation, and that the interpreter chooses among the spectrum of possible literal meanings; however, since there is no "true" meaning, the interpreter should choose the meaning which best furthers the "purpose" of the norm.

II. 1. 3. 2. Norm and right

The understanding of the concept and structure of the norm is important for any author dealing with the subject of judicial balancing, since the supposed structural differences between different types of norms (e.g., between rules, principles, policies, etc. depending on the author) usually have important practical consequences for resolving the apparent conflicts between

[408] Barak (2012), pp. 46-47. For Barak's understanding of the relation between terms 'constitutional rights' and 'fundamental rights', see the following section 1. 2. 2. Norm and right.

[409] See Barak (1992), p. 772: "…constitutional interpretation is different from statutory, as well as other legal interpretation. The difference lies in the special character of the constitutional text." On the constitution as a "super-norm", which "sits at the top of the normative pyramid" and lays the foundation for a given society and other reasons of its uniqueness which, according to Barak, require that it is interpreted differently from other legal texts, see Barak (2005), pp. 370-372 and Barak (2012), pp. 47-48. Barak devoted his lengthy 2005 book *Purposive Interpretation in Law* to the topic.

[410] Guastini (1997b), pp. 279-292 and Guastini (2006a), pp. 227-236.

[411] This is not surprising since Barak himself states that he generally takes an eclectic approach. Barak (2002), p. 21 writes: "Legal realism, positivism, the natural law movement, the legal process movement, critical legal studies, and the movements to integrate other intellectual disciplines into law have provided new tools for understanding the complexity of the judicial role. I find much truth in all of these approaches. (…) legal reality is too complex to be adequately captured by any one of these schools of thought. In my opinion, it is time for what I call an "eclectic" re-examination of the various theories about the judicial role." Alternatively, if we follow Guastini (2006a), pp. 227-236, it seems to me that Barak's doctrine of interpretation seems to be quite sceptical, at least until he suggests selecting the "proper" meaning. What is sceptical in Barak's understanding is the rejection of the idea of "true" meaning. Purposive interpretation also involves a discretionary element, in the sense that judges choose among more than one interpretative possibility (On this point, see Barak (2005), pp. 91-92). However, the idea that through the process of interpretation the meaning "trapped" in the text is discovered and the idea that purpose (which plays a central role in Barak's theory of legal interpretation) can be somehow ascertained is characteristic for the cognitivist approach. See Guastini (1997b), pp. 279-283.

fundamental rights.[412] As Barak notes, constitutional texts contain more "opaque" expressions than other legal texts, which means that they can be interpreted in different ways.[413] Barak argues that there are three reasons why constitutional provisions are more "open-textured" than provisions of other legal texts:[414] first, because constitutions express "national agreements", more opaque and open-textured terms are used to reach agreement; second, fundamental values, covenants, and viewpoints are usually not expressed in clear and unequivocal language; and third, constitutions are enacted with their (relative) longevity in mind. Even though Barak distinguishes between rules and principles as two types of norms and shares the general idea with Alexy, Barak finds Alexy's understanding of legal principle "not analytically compelling" and argues that:

> "According to my view, a legal norm formed as a principle is made up of fundamental values. These values in turn reflect ideals aspiring to be realized to their maximum extent. In practice, however, at the sub-constitutional level, these ideals may not be realized to their full scope. (…) Again, these constitutional rights formed as principles at a high level of abstraction may be realized at the sub-constitutional level at varying degrees of intensity. This realization is not part of the right's scope, but only part of the extent of its protection. The rules of proportionality define the extent of that realization. They do not form a part of the right's scope."[415]

Barak understands constitutional rights, which have the structure of legal principles, not as *prima facie* rights (like Alexy does), but as definitive rights.[416] Notwithstanding the differences with Alexy's understanding, Barak's understanding of the distinction between rules and principles is a so-called 'strong' ('qualitative', 'ontological') one.[417]

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[412] For Robert Alexy, the norm-theoretic distinction between rules and principles is described as the 'pillar' in his theory of rights. See Alexy (2002a), p. 44, who considers it to be the most important theoretical distinction in his work. On the key importance of the understanding of the concept of the norm, see also sections dealing with other authors.

[413] Barak (2005), p. 372.

[414] Barak (2005), p. 372. Barak uses the term "open-textured", but it does not seem to be the right expression, since we are dealing with ambiguity here. Open texture, as any kind of vagueness, is a predicate of meanings, and not of texts. Ambiguous expressions have multiple meanings, while vague expressions have borderline cases. As Poscher puts it: "Ambiguity, then, is about multiple meanings; vagueness is about meanings in borderline cases". See Poscher (2012a), p. 129.

[415] Barak (2012), pp. 40-41. See also Barak (2012), p. 236, where he writes: "According to my approach, a principle is made up of fundamental values. These values reflect ideals seeking their maximum realization".

[416] Barak (2012), p. 41. The narrowed realization of a right, according to Barak, does not diminish the scope of the right, since the right is realized at the sub-constitutional level. One of the advantages of this approach, when compared with Alexy's understanding of *prima facie* rights is, according to Barak, is that it strengthens the right. On the supposed advantages of Barak's approach, see Barak (2012), pp. 41-42. On the idea of principles as *prima facie* requirements, see Alexy (2002a), pp. 57-61 and Alexy (2010a), pp. 21-22.

[417] The arguments in favour of this is the possibility of distinguishing between rule-shaped rights and principle-shaped rights and the idea of a possible "gradual" realization of principles. See Barak (2012), pp. 40-41 and pp. 86-87. See Pino (2009), pp. 133-136.

When we analyse Aharon Barak's understanding of 'fundamental right', a terminological remark is necessary. Barak advances a prescriptive thesis by arguing for a hierarchy of constitutional rights that distinguishes between what he calls two "levels".[418] The first category (or "level") consists of "fundamental" or "high-level" rights, while the other consists of all other constitutional rights. This hierarchy, Barak says, should be determined, "in relation to the legislative purpose in question".[419] Barak explicitly rejects the idea that all constitutional rights are equally important, arguing that it would lead to a lower level of protection of rights.[420] How can one distinguish between the two levels of rights? Barak argues that this is not a conceptual question, but one of historical context, to which each legal system should provide its own answer, based primarily on its "historical experience".[421] This view is not problematic for the application of Barak's theoretical framework: his ideas can be applied to all conflicts between constitutional rights, while it is left to each legal system to determine which rights are at 'higher level' and are considered to 'fundamental'. There is, however, one observation that is a practical consequence of the hierarchization of rights: Barak suggests that the purpose justifying the restriction of fundamental rights should be "compelling" or "pressing", while for all other rights, the purpose in question should be "important".[422] Constitutional rights (i.e., both fundamental and non-fundamental rights) are usually formulated as principles, as Barak points out.[423] Constitutional rights, however can also be formulated as rules, and Barak defines such a right as "right not made up of principle-based components".[424]

Barak introduces an important distinction in the understanding of 'right' that is of particular importance when we analyse the protection of rights. It is the distinction between the

[418] See Barak (2012), pp. 531-533.
[419] Barak (2012), p. 531.
[420] On this point, see Barak (2012), pp. 531-532.
[421] Barak (2012), p. 532 writes: "It is not logic, but historical experience, that should be the decisive factor here". Barak continues by arguing that, according to historical experience, it would be natural to consider equality, particularly racial equality, while according to the historical experiences of Germany and Israel, for example, human dignity should have the status of the highest right.
[422] Barak (2012), p. 540. When a phrase 'constitutional right(s)' is used in this section, it is done so in order to follow Barak's terminology. But under this term, both fundamental and other, non-fundamental rights are understood. When there are some particularities regarding only the first "level" of rights (fundamental rights), such as in this case of justifying the purpose of the limitation, it will be emphasized. Using Barak's terminology, all that applies to constitutional rights applies to fundamental rights (but not the other way around).
[423] Barak (2012), p. 49. See Barak (2011), p. 298, for the use of expression "fundamental rights" found in constitutions: he gives an example equality, human dignity, liberty and freedom of expression which "constitute vague standards, which allow every given society, at a given time, to assign them the meaning that reflects the fundamental societal views of that period." See also Barak (2015), p. 167, where he writes: "Most constitutional rights are formulated as principles. Some are formulated as rules."
[424] Barak (2012), pp. 86-87. Rule-shaped rights, according to Barak, "are also premised on principles; those principles, however, do not make up one of their components." See also Barak (2012), p. 150.

scope of the right and the *extent of the protection* of the right.[425] The scope of the right is the boundary and content of the right, while the extent of the protection of the right defines the legal limits on the right, within its scope. The extent of the protection of the right defines the justification for its limitation.[426] The main purpose of this distinction is related to the protection of individual rights and the requirement of justification every time when the right is limited.[427]

In summary, we can say that Barak's understands fundamental rights as rights that usually have the structure of legal principles and express fundamental values. Fundamental rights are not of equal importance; however, this is not a conceptual issue, but an issue related to the historical context of the legal system in question. It has been mentioned that in terms of interpretation, Barak favours (and builds his theory on) the idea of purposive interpretation of constitutional provisions. In the next section, we will examine how this idea affect his understanding of the apparent conflicts between fundamental rights.

II. 1. 3. 3. Conflicts between fundamental rights

In his book *Purposive Interpretation in Law,* Barak set out his views on the conflict between norms.[428] His position on the apparent conflict between fundamental rights is a *conflictivist* one, and he writes that

> "The constitution is enveloped with principles that reflects the nation's fundamental concepts, as well as society's most entrenched values. They contain an expression of national ethos, the cultural heritage, the social tradition, and the entire historical experience of that nation. (…) The different principles are often in a constant state of conflict. That conflict is resolved through act of balancing".[429]

When constitutional rights conflict, Barak argues that such a conflict usually involves only the statutory or common law level and does not affect the scope of the conflicting constitutional rights.[430] This, as noted above, is one of the points on which Barak disagrees with Alexy. Barak adds that the interpreter should always try to resolve the conflict in a way

[425] Barak (2012), pp. 19-24.
[426] A practical example Barak (2012), pp. 23-24 gives for the distinction between the scope of the right and the extent of the protection of the right is the right to freedom of expression regulated by the Art. 10(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The article determines the scope of the right to freedom of expression, which is extremely broad (in form and content). But the article contains a clause which allows for the limitation of the scope of the right. Art. 10(2) of the Convention, the 'special limitation clause' defines the circumstances under which it is justifiable to limit the right to freedom of expression (to protect person's reputation, to prevent hate speech or to restrict pornographic expression). See Barak (2012), pp. 21-22.
[427] Barak (2012), pp. 22. For more details, see Barak (2012), pp. 22-24.
[428] Barak (2005), pp. 74-77.
[429] Barak (2012), pp. 72-73. See also Barak (2012), pp. 81-82, where he writes: "The view just presented, according to which the scope of the constitutional right would only be determined according to reasons underlying its purpose, will inevitably lead to conflict between several rights at the constitutional level".
[430] Barak (2012), pp. 7-8. See also Barak (2010), p. 5.

that allows the two rights "to harmoniously co-exist".[431] As observation of everyday legal practice shows, this is often not possible, so some method of resolving conflicts between fundamental rights is necessary.[432] As will be shown in the following sections, Barak distinguishes between three types of conflicts between fundamental rights, depending on the structure of the norm (rule or principle) that expresses the conflicting rights. Conflicts between principle-shaped rights, which are the paradigmatic example of fundamental rights conflicts can be understood as partial-partial conflicts *in concreto*.[433]

Barak distinguishes between different types of conflicts, depending on the legal sources of the conflicting norms.[434] Conflicts between fundamental rights fall into the category Barak calls "contradiction between norms embedded in single text".[435] For him, the main difference that shapes this conflict lies in the structure of the conflicting norms (which can be rules or principles). Barak holds that there is a difference between conflicts between rules and conflicts between principles: When two legal rules conflict with each other, the resolution of such a conflict usually leads to the invalidity of one of them, while in the case of a conflict between principles (or values)

> "No similarly absolute contradiction can exist between principles or values, because the conflict can be resolved while maintaining the validity of each principle or value in the system. Contradiction among competing values and principles is inevitable, reflecting the ordinary and proper states of affair. Contradiction between rules, on the other hand, reveals a mistake in the legal system."[436]

Because of this difference, a conflict between principle-shaped rights leads to what Alexy calls a "derivative constitutional rule", that reflects proportionality but, according to Barak, operates only at a sub-constitutional level.[437] Conflicting principle-shaped fundamental

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[431] Barak (2012), p. 97. This is Barak's normative doctrine of legal application.

[432] The conflictivist perspective on fundamental rights can also be seen in Barak (1996), pp. 230-231: "…Basic Laws [constitutional laws of the State of Israel] were intended to grant private parties basic constitutional rights. If we apply the Basic Laws provisions also to relations between private parties, we will find that Basic Laws do not only grant rights, but also negate rights – since the right of one private party is the obligation of another private party."

[433] See subsection II. 1. 3. 3. 2. and fn. 455, where Ross's typology of conflicts is presented.

[434] Barak distinguishes between (1) contradictions between norm embedded in single text; (2) contradiction between norms of the same status embedded in different texts; (3) contradiction between superior and inferior norms. See Barak (2005), pp. 75-77.

[435] Barak (2005), p. 75.

[436] Barak (2005), p. 74. The idea that the "nature" of a conflict can be determined by the way we solve it, as it is suggested here by Barak, seems wrong. Also, the idea that the contradiction among competing values and principles is inevitable and that it reflects the ordinary and proper states of affairs is very debatable. More on this will be said in the section II. 1. 5. 1., which presents criticisms of Barak's theory of judicial balancing.

[437] Barak (2012), p. 84. On the other hand, when one (or both) rights in conflict are shaped as a rule, no derivative constitutional rule is created, since the conflict is resolved at the constitutional level, by the "rules of conflicting norms", such as *lex posterior* or *lex superior*. In such situations, as Barak indicates, the conflict "may affect the actual scope of the rights involved, or their validity". The derivative constitutional rule, created in the situation of conflict between principle-shaped rights, affects the realization of the right in question, and not their scope. It

rights norms are antinomies between norms of the same (constitutional) text, that cannot be resolved by *lex superior*, *lex posterior*, or *lex specialis* rule.[438] Barak argues that in these situations

> "Priority should be given to the instruction that more fully achieves the purpose at the heart of the text (constitution, statute, contract, will). Interpreters should prefer a primary norm over a secondary or subordinate norm and a specific norm over general norm".[439]

In Barak's view, how can conflicts between constitutional rights be resolved? He begins by stating that the answer to this question is to be found in the interpretative process of the legal system.[440] In doing so, Barak distinguishes between (1) merely interpretive issues and (2) conflicts-of-rights issues.[441] While the former refers to the meaning of the constitutional text, the latter refers to the validity of the constitutional text. From this distinction, Barak also distinguishes between (1) issues which are related to the scope of the constitutional rights, which are interpretive issues in nature, and (2) issues which are related to conflicts between rights, which are not interpretive in nature (i.e., cannot be resolved by purposive interpretation) but by constitutional rules about the validity of rights.[442] When two principle-shaped rights conflict, that conflict does not affect their validity or scope, but their realization.[443] In his writings on proportionality, Barak focuses on the proportionality of the limitation of the constitutional right by law. In such situations, however, there is not necessarily a conflict of fundamental rights[444]. An example of a fundamental rights conflict that Barak (and many others) use is the conflict between the constitutional right to free speech and the constitutional right to privacy or good reputation.[445]

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deals with the cases, as Barak indicates, where constitutional law is limited by sub-constitutional law, determining the constitutionality of this limitation. For Alexy's view of the derivative constitutional rule ("derivative constitutional rights norm"), see Alexy (2002a), p. 56.

[438] Barak (2012), p. 88.

[439] Barak (2005), p. 75.

[440] Barak (2012), p. 83.

[441] Barak (2012), p. 83.

[442] Barak (2012), p. 83. See also Barak (2005), p. 74.

[443] Barak (2012), pp. 83-84. What Barak means by this is that when principle-shaped constitutional rights conflict (and conflicts between fundamental usually belong to this category), the means by which a constitutional right is realized is determined at the sub-constitutional level (for example, by the statute limiting one of the conflicting rights). The resolution of such conflict requires a "derivative constitutional rule", which reflects the rules of proportionality. Such rule, according to Barak, operates only at sub-constitutional level, and "*it does not affect the scope of the rights involved; rather, it affects their realization*. It deals with cases in which a constitutional right is limited by a sub-constitutional law (either a statute or the common law). It then determines the constitutionality of this limitation, or lack thereof. It does not determine the scope of the limited right. The derivative constitutional rule's determinations operate only at the sub-constitutional level." [emphasis added].

[444] Take, for example, a law which gives some additional powers to a minister (or any official). This law could be subject to judicial review based on the claim that it conflicts (or more precisely, infringes) with some fundamental rights guaranteed by the constitution, but it would not be a conflict *between* fundamental rights.

[445] Barak (2012), p. 82. See Barak (2012), Chapter III – Conflicting Constitutional Rights, pp. 83-98.

Because constitutional rights can take the form of rules but also the form of principles, Barak distinguishes between (1) conflicts between rule-shaped constitutional rights and (2) conflicts between principle-shaped constitutional rights and (3) conflicts between principle shaped constitutional rights and rule-shaped constitutional rights. Let us examine how he proposes to deal with such conflicts, depending on the shape of constitutional rights.

II. 1. 3. 3. 1. Conflicts between rule-shaped rights

The starting points for resolving conflicts between fundamental rights are rule-shaped constitutional rights, defined as a "right not made up of principle-based components".[446] In these situations, Barak argues, the conflict should be resolved through by first determining whether the conflict is *genuine* or *imagined*. On these terms, Barak writes:

> "A conflict is genuine if it cannot be resolved once the interpretive process has been completed. In cases where the conflict disappears after applying the interpretive process, or where one constitutional rule is recognized as the exception to the other, then the conflict is imaginary."[447]

According to Barak, in the case of a genuine conflict, one of the conflicting rules *must* be, partially or completely invalidated. Here Barak refers to Alexy.[448] The conflict between rule-shaped constitutional rights is to be resolved according to the specific rules of the legal system in question. These are what Barak calls "canons of interpretation", in particular *lex posterior* and *lex specialis*.[449] Underlying all of these "interpretive canons", as Barak explains, is the notion that if there is a conflict between two rule-shaped right, one of them must lose its

[446] Barak (2012), pp. 86-87. An example of such, rule-shaped constitutional right given by Barak is the right to public hearings. See Barak (2012), p. 98.
[447] Barak (2012), p. 87. But, from a logical point of view, to say that a contradiction did not exist because it was solved, is a contradiction in itself.
[448] See Alexy (2002a), p. 54.
[449] For more on 'canons of interpretation', see Barak (2005), pp. 107-109. However, a critique should be added: *lex posterior* and *lex specialis* are criteria of preference (hierarchies or ordering in logical terms) and not canons of interpretation. I will keep Barak's terminology through the rest of the chapter but with inverted commas. Barak understands canons of interpretation as semantic rules, belonging to the field of language, and not legal rules, belonging to the rule of law. Other examples of such canons which Barak mentions are *noscitur a sociis* (the meaning of a word or phrase depends on its environment). But we can imagine a situation in which two rule-shaped constitutional rights are in conflict, and that this conflict cannot be resolved by applying *lex posterior* or *lex specialis* (obviously, neither *lex superior*). In such a situation, if we would follow Barak, a judge is left with discretion, since interpretive canons do not represent legal *criteria* for resolution of such conflicts.

validity.[450] A conflict between rule-shaped constitutional rights may affect their scope or validity, and in such cases no derivative constitutional rule is created.[451]

II. 1. 3. 3. 2. Conflicts between principle-shaped rights

According to Barak, such conflicts are more frequent and relevant because constitutional rights are (usually) expressed by norms which are principles. Conflicts between principle-shaped rights are paradigmatic examples of conflicts between fundamental rights. How should these conflicts be resolved? Barak argues that in such situations, what in fact conflicts (through principle-shaped rights) are *fundamental values*, that "reflect ideals aspiring for their maximum realization".[452] But in this case the canons of interpretation (as Barak calls them), such as *lex posterior* or *lex specialis*, are not applicable.[453]

A key difference with conflicts between rule-shaped constitutional rights is that both conflicting rights remain in the system, each according to its scope.[454] Barak seems to understand these conflicts as partial-partial conflicts *in concreto*, to be resolved not at the level of the scope or validity of the constitutional right, but in its realization, in its effects at the sub-constitutional level.[455]

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[450] Barak (2012), p. 87. For the same position regarding the conflict between rules, see Alexy (2002a), pp. 49-50. The use of the notion of 'validity' is problematic here; 'applicable' should be used instead of valid. This was already mentioned in the previous chapter in fn. 57, where Alexy's understanding of conflicts between norms was analysed. See Ratti (2006), pp. 254 and pp. 258-259 and Munzer (1973), pp. 1156-1162. *Lex superior* involves a declaration of invalidity; *lex posterior* is a method of repeal and *lex specialis* is a way of introducing exceptions which does not affect validity at all, since if the more specific norm is repealed at a certain point, the general norm recovers its whole applicability.

[451] Barak (2012), p. 84.

[452] Barak (2012), p. 87. For more on this, see also Barak (2012), pp. 40-42.

[453] Barak (2012), p. 88. While it could be agreed that *lex specialis* is not applicable (at least most of the times), it is not clear why *lex posterior* is not applicable in these cases. It is probably because Barak assumes (as it usually is the case) that the parts of constitution with fundamental rights norms are enacted as a whole, and not usually changed afterwards (at least not without other substantial constitutional changes), so in most cases, the maxim *lex posterior derogat legi priori* is not applicable.

[454] While conflicts between rule-shaped constitutional rights represent a "type of constitutional accident", conflicts between principle-shaped constitutional rights are "unavoidable, reflecting a perfectly natural state of affairs and expressing the very nature of those constitutional principles aspiring for maximum realization." Barak (2012), p. 88.

[455] Barak (2012), p. 89. I understand the following paragraph to reflect Barak's position on such conflicts: "Indeed, most legal systems acknowledge a situation where two constitutional rights overlap with regard to certain human behaviour while their provisions conflict with each other (at least in part). This legal situation – impossible in the case of rule-shaped constitutional rights – is natural to a conflict between two constitutional rights shaped as principles." Partial-partial conflicts (or inconsistencies, as Ross calls them) are situations "where each of the two norms has a field of application in which it conflicts with the other, but also further field of application in which no conflict arises." Ross (1958), p. 129. Besides partial-partial conflicts, two other types are mentioned by Ross (1958), pp. 128-129: total-total ones, as situations "where neither of the norms can be applied under any circumstances without conflicting with the other" and total-partial conflicts, as situations "where one of the two norms cannot be applied under any circumstances without coming into conflict with the other, whereas the other norm has in addition a further field of application in which it does not conflict with the first one."

Conflicting constitutional rights are usually concretised in laws, as is common with constitutional rights.[456] Because the rights conflict, judges must strike a balance between them, which Barak calls *interpretive balance*.[457] This interpretive balance is struck by interpreting the norms that regulate conflicting fundamental rights. What would be the *proper* interpretation of legislative acts regulating these constitutional rights? Barak argues that it is an interpretation that takes full account of the *underlying purpose* of both rights in their full scope, with the interpreter balancing between them.[458] This is consistent with Barak's views on interpretation, as he considers the *purposive interpretation* to be the most important one. This view is also consistent with Barak's understanding of the law, as he takes the purpose in the law as a starting point and argues that since every law has a purpose the aim of the interpretation is to achieve the purpose of the law. Barak refers to this type of balancing as *interpretive balancing*, where each of the rights is considered in light of its weight in the context of the particular facts of the case.[459] How does the judge determine the weight of the conflicting rights? For Barak, this weight represents only a metaphor.[460] When values and principles (which have weight) conflict, judges should consider their "relative social importance".[461]

Interpretive balancing, according to Barak

> "…considers each of the rights by taking into account their weight, in light of the facts of the case. It reflects, by analogy, the limitation's clause proportionality *stricto sensu*."[462]

Proportionality *stricto sensu* (balancing) is the final and most important step in the application of proportionality.[463] Limitation clauses (which can be specific or general) represent the most prevalent method for limiting constitutional rights in modern constitutions,

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[456] On the situations in which there is no legislation for one of the conflicting rights, see Barak (2012), pp. 94-96.
[457] Barak (2012), p. 92.
[458] Barak (2012), p. 92.
[459] Barak (2012), pp. 92-93. Barak distinguishes between balancing as one of the components of proportionality (proportionality *stricto sensu*, just as Alexy does), relevant for the judicial review of the law which limits a constitutional right, and *interpretive balancing*, which is "relevant for the examination of the interpretation of a law whose purpose includes conflicting principles". Interpretive balancing is related to the "balancing of the conflicting basic principles while granting each other their relative 'weight' in the legal system, reflecting their social importance". Barak (2012), pp. 72-75. The difference between these two types of balancing consists in that that balancing as one of the components of the proportionality is used to determine the constitutionality of the statute, while interpretive balancing is used to interpret the statute in accordance with its purpose. The "proportional" nature of interpretive balancing, as Barak argues, stems from the analogical application of the rules related to proportionality *stricto sensu*.
[460] In one of his cases, Barak wrote that "These expressions – balance and weight – are just metaphors. Behind them is the view that not all principles are of equal importance to society, and that, in the absence of constitutional guidance, the court must assess the relative social importance of different values". Barak (2005), p. 178.
[461] Barak (2005), p. 178 refers to Dworkin (1978), p. 26ff and his idea that principles have 'weight', which represents their importance.
[462] Barak (2012), pp. 92-93.
[463] Barak (2012), p. 340. Cf. Alexy (2002a), pp. 401-414, for understanding of proportionality *stricto sensu* (or proportionality in the narrow sense, as Alexy calls it).

as Barak points out.[464] Limitation clauses provide "both the purpose for which a limitation of a right is valid and the means by which such a purpose may be attained."[465]

What judges must do, in a situation of conflict between principle-shaped fundamental rights is to consider their weight (metaphorically understood) in the context of the facts of the case. This is done through a purposive interpretation of the conflicting fundamental rights and other norms, usually legislative acts, in which they are concretised. The fundamental right that has more weight will take precedence in the concrete case and limit the other right. This is the reason why Barak uses the analogy with proportionality *stricto sensu*. Interpretive balancing, a central concept in the resolution of fundamental rights conflicts

> "…determines the *objective purpose* [emphasis added] of law such as statutes or a constitution. It does so by balancing the conflicting principles underlying each norm. This balance is based upon the *social importance ascribed to each conflicting principle* [emphasis added]. The interpretive balancing is relevant for the interpretation of a text the purpose of which is conflicting principles – not for the determination of its constitutionality."[466]

These ideas form Barak's approach to conflicts between principle-shaped rights, the most important of the three possible scenarios since conflicts between fundamental rights usually belong to this category. This type of conflict will be the focus of the rest of the subchapter. However, before turning to the presentation of the theoretical framework of Barak's proposal and its application to cases, we will briefly examine the last type of conflict between rights: conflicts between rule-shaped and principle-shaped rights.

II. 1. 3. 3. 3. Conflicts between rule-shaped and principle-shaped rights

Barak distinguishes two possible scenarios in conflicts between principle-shaped rights and rule-shaped rights: In the first case, both conflicting rights are at the constitutional level, while in the second case, one of the conflicting rights is at the sub-constitutional level.[467] As for the first scenario, as with any other conflict between rights, the interpreter should first attempt to resolve the conflict so that both rights can "harmoniously co-exist". However, if such an attempt to resolve the conflict fails, "interpretive canons" such as *lex specialis* and *lex*

[464] Barak (2012), p. 141.
[465] Barak (2012), p. 141. Limitation clauses as a method were adopted by the European Convention for the Protection of Human Rights and Fundamental Freedoms and, as Barak indicates, most Western European countries after the World War II (Germany, Spain, Portugal, Italy), but also by for example India and countries which were the part of the former Soviet Union. For more on limitation clauses and their application, see Barak (2012), pp. 141ff. See also Sadurski (2014), p. 220.
[466] Barak (2012), p. 75.
[467] Barak (2012), p. 97.

posterior will usually apply. The second scenario involves a conflict between two norms that are at different hierarchical level. In this case, the conflict is resolved by determining the validity of the sub-constitutional norm (which restricts the right expressed in the higher norm) in accordance with the limitation clause.[468] In this scenario, the constitutionality of the lower norm is examined.

Since the conflicts between principle-shaped rights, analysed in the previous subsection are considered paradigmatic examples of conflicts between fundamental rights, they will be analysed in more detail in the next section.

II. 1. 4. Barak's proposal

In this section, Barak's proposal for resolving conflicts between fundamental rights is presented and applied to cases. First, the theoretical framework of his approach is presented, so that we have an overview and reconstruction of the steps involved in resolving such a conflict. Second, this proposal is applied to two cases: first, to the 2003 Israeli Supreme Court case *Jane Doe v. Disciplinary Court for Government Employees in Haifa*, and second, to the 1992 Federal Constitutional Court *Titanic* case.

II. 1. 4. 1. Theoretical framework

The presentation of the theoretical framework for resolving fundamental rights conflicts beings by exposition and recapitulation of central ideas from Aharon Barak. Structurally, conflicts of fundamental rights (usually conflicts between principle-shaped rights) are conflicts between fundamental values of the legal system in question and as such, "interpretative canons" (as Barak calls them), such as *lex posterior* or *lex specialis* are not applicable. The conflicts are partial-partial conflicts *in concreto*, which are to be resolved not at the level of the constitutional rights' scope or validity, but in their realization, in their effects at the sub-constitutional level.[469] Conflicting constitutional rights are usually concretized in laws and the

[468] Barak (2012), p. 97. As Barak (2012), p. 20 elaborates, human behaviour covered by the right is limited.

[469] Barak (2012), p. 86, fn. 16, writing his opinion in the case of *Jane Doe* about the resolution of the conflict and its effect on the constitutional and sub-constitutional levels: "One of the main characteristics of democracy is the wealth of rights, values, and principles, as well as the constant conflict between some of them. It has been suggested more than once that some of these rights, values, and principles are mirror images of each other, and are therefore in constant conflict. The resolution of such conflicts – which are not only a natural part of any democracy, but also nourish it and provide with much-needed vitality – is not through affecting the scope of such rights, values, and interests such that the 'losing' ones would be removed from the constitutional discourse and from the reach of the constitutional review. Rather, *the solution of such conflicts should be through leaving the conflict at the constitutional level 'as is', while determining the proper extent of the protection of the conflicting rights, values, and interests at the level of 'regular' legislation."* [emphasis added]

judges must balance between them in the process Barak calls *interpretive balance*.[470] This *interpretive balance* consists of a *proper* interpretation of the legislative acts that which regulate these constitutional rights. *Proper* interpretation "takes into account the underlying purpose of both rights, taking into account their full scope, with the interpreter balancing between them."[471] "Balancing" is understood by Barak as

> "…an analytical process that places proper purpose of the limiting law on the one side of scales and the limited constitutional right on the other, while balancing the benefit gained by the proper purpose with the harm it causes to the right."[472]

The "weight" of each of the conflicting rights (which is just a metaphor, along with the term "balance") is determined by considering their "relative social importance".[473] For Barak, balancing requires that

> "…in order to justify a limitation on a constitutional right, a proper relation ("proportional" in the narrow sense of the term) should exist between the benefits gained by fulfilling the purpose and the harm caused to the constitutional right from obtaining that purpose. This test requires a balancing of the benefits gained by the public and the harm caused through the use of the means selected by law to obtain the proper purpose. According, this is a test balancing benefits and harm. It requires and adequate congruence between the benefits gained by the law's policy and the harm it may cause to the constitutional right."[474]

Regarding the nature of balancing (or proportionality *stricto sensu*), Barak writes that

> "Any law limiting a constitutionally protected right must meet the test of proportionality *stricto sensu*. This is a test that examines the result of the law and the effect it has on the constitutional right. This test compares the positive effect of realizing the *law's proper purpose* [emphasis added] with the negative effect of limiting a constitutional right. This comparison is of a value-laden nature. It is meant to determine whether the relation between the benefit and the harm is proper."[475]

We can summarize the points presented by Barak and reconstruct the following steps in his method for resolving conflicts between fundamental rights: (1) first, determine which rights are in conflict and in which norms they are concretized; (2) second, preform the *interpretive balancing* by *properly* interpreting the conflicting rights through *purposive*

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[470] It is, of course, possible, that constitutional rights have no implementing legislation. On this, see Barak (2012), pp. 94-96.
[471] Barak (2012), p. 92.
[472] Barak (2012), p. 43. On Barak's understanding of judicial balancing, see also Bendor & Sela (2015), p. 538.
[473] Barak (2005), p. 178.
[474] Barak (2012), p. 340.
[475] Barak (2012), p. 342. Referring to a 2006 Israeli Supreme Court decision (at the time when he was the president of the Supreme Court of Israel) in *Adalah – The Legal Centre for the Rights of Arab Minority in Israel v. Minister of Defense*, Barak explains that balancing (or proportionality *stricto sensu*) is "value-laden", "since the main focus of this test is morality, and this focus should be reflected by its name". See Barak (2012), p. 342, fn. 8.

interpretation; (3) third, resolve the conflict by determining the limitation of which of the conflicting rights is justified.

II. 1. 4. 2. Application

II. 1. 4. 2. 1. Jane Doe v. Disciplinary Court for Government Employees in Haifa (2003)

Jane Doe v. Disciplinary Court for Government Employees in Haifa is an Israeli Supreme Court case from 2003 in which Barak (who was then the chair of the Supreme Court) summarized the facts which are presented here.[476] Disciplinary proceedings were initiated against the defendant who had allegedly sexually harassed Jane Doe. In order to protect the defendant's medical condition (which could have been revealed during the hearing), the court ordered that the hearing be held behind closed doors. Petitioner Jane Doe, who testified at one of these hearings, demanded to be present at all other hearings as well to have full access to the court's transcripts and proceedings. The administrative court (the court of first instance) refused, arguing that the defendant's right to privacy should prevail over Jane Doe's interest in attending the hearings. Jane Doe petitioned Israeli Supreme Court asking that the Court allow her to attend the hearings. The Court's reasoning developed in the following steps:

First, it was identified which rights are in conflict and in which norms they are concretized. The constitutional (also fundamental) rights in conflict *vis-à-vis* state are, as Barak points out, the right to public hearing, which can be derived from Israeli Basic Law: The Judiciary, Art. 3, and the right to privacy, which can be derived from Israeli Basic Law: Human Dignity and Liberty, Art. 7(a).[477] The relevant statute for both conflicting rights was the Law of the State Service (Discipline) from 1963, Art. 41(b), which states that the administrative tribunal may hold hearings behind closed doors "in order to protect morality".

The question confronting the judges in this situation was whether the "protection of morality" is a sufficient reason for the right to privacy to take precedence over the right to a public hearing, i.e., for the petitioner not to be present at the hearings. The Court decided whether the restriction, imposed by a provision specifying one of the conflicting rights, is justified in this case. What is necessary here is to interpret the statutory provision "in order to protect morality", and this should be done, as Barak argues, just as with any other statutory

[476] *Jane Doe v. Disciplinary Court for Government Employees in Haifa*, HCJ 1435/03 [2003] IsrSC 58(1) 527, 538. See Barak (2012), p. 90.

[477] Barak (2012), pp. 90-91. Regarding the *vis-à-vis* state formulation, Barak (2012), p. 90, argues that "we must realize that it is the legislator that ultimately makes the decision of preferring one person's constitutional right *vis-à-vis* the state (e.g. to enjoy good reputation) over another person's constitutional right *vis-à-vis* the state (e.g. the freedom of expression)".

provision – according to its underlying purpose.[478] Such an interpretation must take into account the underlying purpose of both of the conflicting rights (the right to public hearing and the right to privacy). A purposive interpretation of the conflicting fundamental rights is an interpretive balancing:

> "It considers each of the rights by taking into account their weight, in light of the facts of the case. (…) The purpose of this balancing, however, is not to determine the constitutionality of the statute; rather, it is designed to provide meaning to the statute in accordance with its purpose, where the purpose reflects a balance between the two conflicting rights. Accordingly, this is an interpretive balance."[479]

The Court, holding that the statutory provision "protection of morality" is not a sufficient reason to prevent petitioner from being present at the public hearing and that the right to a public hearing takes precedence over the right to privacy, granted the petition and reversed the lower court's decision. As interpreted by the Court (then presided over by Barak) the statutory language relating to the "protection of morality" does not include judgments limiting the victim's right to a public hearing.[480] The resolution of conflict between these two principle-shaped fundamental rights consisted in the interpretation of a statutory expression which limited one of the conflicting fundamental rights (limiting the right to public hearing for reasons of protection of morality). The court concluded that such limitation is not allowed, therefore gave precedence to the right to public hearing over the right to privacy.

The solution to this conflict, as Barak wrote in his opinion, is not found at the constitutional level, but in the proper interpretation of different legislative acts (statutes which limit both privacy and publicity).[481] In his opinion, Barak wrote:

> "We are dealing with an area in which the right to privacy and the principle of public hearings conflict. (…) … this kind of conflict does not require a re-determination of the boundaries of the rights, values, and interests while invalidating the right, value or interest that "lost" in the conflict. Thus, for example, we do not hold today that the right to freedom of expression does not entail an expression that

[478] Barak (2012), p. 92. This approach is in line with Barak's views on interpretation since he considers purposive interpretation to be the most important one. See subsection I. 3. 1. in this chapter.
[479] Barak (2012), pp. 92-93.
[480] Barak (2012), pp. 91.-92. In his judgment, Barak wrote: "We are dealing with an area in which the right to privacy and the principle of public hearing conflict. (…) Other that in most extreme cases, this kind of conflict does not require a re-determination of the boundaries of the rights, values, and interests while invalidating the right, value or interest that "lost" in the conflict. Thus, for example, we do not hold today that the right to freedom of expression does not entail an expression that may infringe upon another person's reputation. If we were to so hold, we would significantly reduce the scope of both the constitutional rights and the values and principles that enjoy constitutional protection, and we would have created a legal framework where regular legislation that relates to good reputation would not abide by the constitutional limitations of such a right. This is an unwanted result, and it should be avoided – save for those rare cases in which we have no choice but to determine – at the constitutional level – the boundaries of each right."
[481] Barak (2012), p. 92.

> may infringe upon another person's reputation. (…) The resolution of this conflict (…) – is not found at the constitutional level; rather, such a solution can be found within the different legislative acts and their *proper interpretation* [emphasis added]. These statutes limit both privacy and publicity. Their constitutionality is determined according to the provisions of the limitation clause."

Having presented Barak's views on a case from Supreme Court of Israel (in which he was also the presiding judge who wrote an opinion), we turn to the Federal Constitutional Court *Titanic* case. This case, which Alexy used to present his ideas on judicial balancing, will be analysed by applying Barak's method for resolving conflicts between fundamental rights. This is done in order to compare the different approaches and identify their purported advantages and disadvantages in resolving conflicts between fundamental rights.

II. 1. 4. 2. 2. *Titanic case* (1992)

In this section, we apply the approach of Aharon Barak to the *Titanic* case, an exemplary case of the conflict between freedom of expression and personality rights. Let us briefly recapitulate the facts of the case as a reminder. A satirical magazine Titanic referred to a paraplegic officer first as a "born murderer" and second as a "cripple". The lower court ruled officer's favour and ordered Titanic to pay the officer 12,000 DM in damages. Titanic appealed to the Federal Constitutional Court. The Federal Constitutional Court had to decide whether the appeal was justified with regard to the expressions "born murderer" and "cripple" used by the magazine in reference to a paraplegic officer. Are such statements by a satirical magazine protected by freedom of expression, or do the officer's personality rights take precedence?

If we approach the conflict from the theoretical framework developed by Barak, we can classify it as a conflict between principle-shaped rights: on the one hand, the freedom of expression of the Titanic magazine, protected by Art. 5(1) of the Basic Law and, on the other hand, the officer's personality rights, protected by Art. 2(1) of the Basic Law. These two articles from the Basic Law are formulated as follows:

Art. 5(1) – Freedom of expression, arts and sciences:

> "Every person shall have the right to freely express and disseminate his opinions in speech, writing and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship."

Art. 2(1) – Personal freedoms:

> "Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law."

What conflicts in this case, Barak argues, are *fundamental values* expressed in principle-shaped rights – freedom of expression and personality rights. Such a conflict cannot be resolved by "canons of interpretation" (as Barak calls them) such as *lex posterior* or *lex specialis*. We see that the source of the conflict between two fundamental rights is the expressions "born murderer" and "cripple", which represent the exercise of the freedom of expression from the *Titanic* magazine, but at the same time violate the personality rights of the officer described by these expressions.

The conflict between these two rights was interpreted by the Court in the light of Art. 1(1) of the Basic Law, which protects human dignity:

> "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority."

Barak's approach, as explained above, is based on determining the conflicting rights and identifying the norms in which the conflicting rights are concretized, since principle-shaped fundamental rights are usually concretized in sub-constitutional norms. In the *Titanic* case, however, Federal Constitutional Court did not explicitly consider sub-constitutional norms, but only its previous decisions (besides other constitutional provisions). In this case, the *extent of the protection* of the conflicting rights (to follow Barak's terminology) can be found in the second sections of the provisions of the Basic Law which regulate conflicting rights:

Art. 5(2) – Freedom of expression, arts and sciences

> "These rights shall find their limits in the provisions of general laws, in the provisions for the protection of young persons and in the right to personal honour."

Art. 2(2) – Personal freedoms

> "Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law."

The conflicting rights, Barak argues, must now be *properly* interpreted through a *purposive interpretation*. This purposive interpretation takes into account the underlying purpose of each right. Titanic magazine, as the defendant, argued that, since they are satirical magazine, the expressions "born murderer" and "cripple" were used as a satire and that this action should be protected by the Art. 5 of the Basic Law, which guarantees freedom of expression, arts and sciences. The final decision, in which the Court decided limitation of which of the conflicting rights is justified, depended on the Court's understanding of satire and insult and the line between the two. The core of the case revolved around the question of how the

expressions "born murderer" and "cripple" should be interpreted and whether they should be classified as either satire or insult, taking into account Art. 1(1), which protects human dignity. If the expression would be classified qualified as satire, then the restriction of personality rights would be justified, whereas if it was qualified as insult, the restriction of freedom of expression would be justified. The Court stated that the fact that *Titanic* was a satirical magazine did not automatically mean that the expressions used could be classified as satire. In its further reasoning, the Court considered the definition of satire, the expressions "born murderer" and "cripple" in relation to human dignity.[482] The reasoning of the Court can be reconstructed from the perspective of interpretive balancing of conflicting rights and purposive interpretation of conflicting rights: The Court concluded that, in the concrete case, the limitation of the freedom of expression is justified if the expression in question is "humiliating" and "shows lack of respect" towards the person it is addressed to.[483] Finally, the Court decided that the restriction of personality rights was justified with in relation to the expression "born murderer", while the restriction of freedom of expression was justified in relation to the expression "cripple", as the latter expression was qualified as "humiliating".

However, if we would analogically apply Barak's reasoning from the case *Jane Doe v. Disciplinary Court for Government Employees in Haifa*, we could, arguably, arrive to the opposite conclusion. Repeating Barak's quote from the same decision:

> "Thus, for example, we do not hold today that the right to freedom of expression does not entail an expression that may infringe upon another person's reputation. If we were to so hold, we would significantly reduce the scope of both the constitutional rights and the values and principles that enjoy constitutional protection, and we would have created a legal framework where regular legislation that relates to good reputation would not abide by the constitutional limitations of such a right. *This is an unwanted result, and it should be avoided – save for those rare cases in which we have no choice but to determine – at the constitutional level – the boundaries of each right.*" [emphasis added].

The opposite conclusion is plausible, I argue, because Barak relies on a *purposive interpretation* that takes into account what he calls the "underlying purpose" of both rights in their full scope. In the quoted paragraph, we see that in the case of a conflict between freedom of expression and personality rights, Barak explicitly gives priority to freedom of expression, unless its limits are set at the constitutional level, as is the case with Art. 5(2) of Basic Law, which states that freedom of expression may be limited by the right to personal honour. Such

[482] See Alexy (2003a), p. 139, where he presents the reconstruction of the reasoning of the Federal Constitutional Court. See BVerfGE, vol. 86, 1, 12 for the Court's view regarding the expression "born murderer" and BVerfGE, vol. 86, 1, 13 for the Court's view regarding the expression "cripple".
[483] See Alexy (2003a), p. 138.

a clause is not uncommon in constitutions, but the problem for Barak arises regarding his central notion – the *interpretive balance*, which is achieved through *purposive interpretation*. There seems to be no clear criteria by which we could distinguish between the purposive interpretation and the interpretive balance of conflicting rights with regards to the expressions "born murderer" and "cripple". The "underlying purposes" of freedom of expression and personality rights may collide in any court case of an insult, depending on how the limits of freedom of expression are understood. Following Barak's approach in the *Titanic* case, the expressions could be distinguished by *purposive interpretation* of the conflicting norms together with Art. 1(1) of the Basic Law, which protects human dignity. In fact, this is what the Federal Constitutional Court did: it resolved the case by arguing that the latter expression is "humiliating" and "shows lack of respect" towards the person. However, we are still facing the problem of "purpose" in purposive interpretation. As Barak wrote on the interpretive balancing between the conflicting principle-shaped rights in the case of *Jane Doe*:

> "Both relied on a statute – the Law of State Service (Discipline) – which allows for non-public hearings "in order to protect morality". The interpretation of this provision – like any other statutory provision – was done per its *underlying purpose*. This purpose, the court noted, should have taken into account not only the right to public hearings, but also the right to privacy."

In the next subsection, we will develop the idea further, starting with the view that "purpose", in the interpretation of conflicting fundamental rights, is a problematic notion, susceptible to a great degree of judicial discretion.

II. 1. 5. Criticisms and conclusions

II. 1. 5. 1. Criticisms

Aharon Barak develops his understanding of judicial balancing within the framework set out by Robert Alexy, and therefore, his theory of judicial balancing can also be qualified as a *proportionality-based theory of judicial balancing*. However, his theory of judicial balancing differs from the Alexyan one regarding proportionality in the narrow sense (or balancing), since he does not use the weight formula to determine the relation between the conflicting rights. Instead, he relies on the idea of interpretive balance to determine the relation between the conflicting rights. The two weakest points in Barak's theory of judicial balancing, I argue, are his reconstruction of conflicts between fundamental rights and the role of purposive interpretation, on which his resolution of conflicts between fundamental rights is based.[484]

[484] The first of the two issues are connected with subsections on norm and right (I. 3. 2.) and conflicts between fundamental rights (I. 3. 3.), while the second one relates to subsections on interpretation (I. 3. 1.) and the

These two points are also the central ones for any theory that offers a way to deal with the apparent conflicts between fundamental rights, because they provide answers to the questions How are conflicts between fundamental rights understood and How they should be resolved?

As to the first point, Barak suggests that the way how a conflict is resolved can determine its "nature". This idea seems wrong. In the section on conflicts between fundamental rights (II. 1. 3. 3.), Barak argues that in the situation of a conflict between legal rules, such a conflict is usually resolved by declaring one of the conflicting rules invalid. On the other hand, Barak continues, a conflict between legal principles can be resolved by maintaining the validity of each of the conflicting principles:

> "Resolution of the conflict usually invalidates one of the norms. No similarly absolute contradiction can exist between principles or values, because the conflict can be resolved while maintaining the validity of each principle or value in the system. Contradiction among competing values and principles is inevitable, reflecting the ordinary and proper state of affairs. Contradiction between rules, on the other hand, reveals a mistake in the legal system."[485]

Because of the difference in resolution of the conflict, a conflict between principle-shaped rights results in a "derivative constitutional rule", according to Barak. However, if one of the conflicting rights is shaped as a rule, no derivative constitutional rule is created, and the conflict can be resolved by *lex posterior* or *lex superior* maxims (see II. 1. 3. 3.). There seem to be (at least) two problems with this view. First, the resolution of conflicts between norms leads to the inapplicability, rather than the invalidity of the conflicting norms. Second (and more importantly), the idea that a contradiction between principles is "inevitable", while a contradiction between rules is a "mistake in the legal system" is debatable. Unless we have a clear criterion to distinguish between rules and principles (and to classify each norm according to that distinction), it is not possible to determine when a contradiction is "inevitable" and when it is a "mistake in the legal system", without leaving it to discretion of the interpreter. Barak provides no such criterion (and it seems that such a criterion is not possible). This is problematic because it is the premise upon which the later distinctions and ways of resolving conflicts are built upon.[486] The issues regarding the so-called strong (or ontological) distinction between rules and principles, held also by Barak, was already indicated in the previous chapter in the section I. 6. 1. 1.

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theoretical framework of his approach (I. 4. 2.). With this, whole of his understanding of the basic notions (interpretation, norm and right and conflicts between fundamental rights) as well as his theoretical framework proposed for dealing with the conflicts is considered.

[485] Barak (2005), p. 74.

[486] On this point, see Guastini (2011b), pp. 173-182.

As to the second point, we saw in the section introducing Barak's theoretical framework (II. 1. 4. 1.) that, for Barak, the balancing test serves to determine whether the relation between the benefit (positive effect of realizing the law's proper purpose) and the harm (negative effect of limiting a constitutional right) is *proper*. The question, however, is what is 'proper' and what constitutes a 'proper' relation?[487] According to Barak, a 'proper relation' is established by determining the relative weights on each side of the scale by balancing between positive and negative effects. The 'weight' of each of the conflicting rights is determined, as we have seen, by considering their 'relative social importance'. In this way, Barak's purposive interpretation of the conflicting fundamental rights is based on determining their "relative social importance". The problem is that the 'sources' according to which this relative social importance is to be determined are vague and even contradictory.[488] Urbina criticized this by indicating that

> "In specifying what social importance is, Barak does no more that enumerate the sources for the different considerations ('society's fundamental perceptions', 'political and economic ideologies', 'the legal system as a whole'), together with a type of internal consideration that *may* be relevant ('a right that constitutes a precondition to another right may be considered more important'). He does so without providing a method specifying how these different considerations relate so as to actually establish the social importance of realising a principle for a concrete case."[489]

Barak's position, according to which the outcome of judicial balancing depends on the ascertainment of the "proper purpose" of the law(s) that regulate conflicting fundamental rights or the "proper relation" between the benefits and harms of balancing, along with the "relative social importance" and "weight" of the conflicting fundamental rights, is problematic because it depends on vague notions that also gives greater discretion, opening the door to judicial activism.[490] The idea that the "purpose of the law" or the "proper relation between rights" can be objectively determined does not seem as defensible positions. The claim that the law expresses an objective purpose can be no more than a subjective position of the interpreter since this "objective purpose" cannot be a matter of knowledge or cognition.[491]

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[487] Urbina (2017), p. 30.
[488] On this point, see Urbina (2017), p. 31.
[489] Urbina (2017), p. 31. Also, regarding 'society's fundamental perceptions', the question is: whose perceptions (or which morals) this refers to? Guastini (2011b), pp. 199-200 and Guastini (2016), pp. 244-245 makes a distinction between social morality and critical morality of each interpreter, *tertium non datur*. However, in contemporary pluralistic societies, as Guastini points out, there is no definite social agreement on many controversial moral issues. As Guastini (2016), p. 245 argues: "Constitutional judges sometimes do refer to social morality, but it is social morality as imagined by judges themselves or perceived by them through the filter of their own critical morality."
[490] On the problem of judicial activism in Barak's theory, see, for example, Mersel (2011), pp. 339-345.
[491] For arguments supporting this view, see Chiassoni (2019a), pp. 1-8. See Chiassoni (2019a), p. 3 for ideological ambiguity of authoritative texts and their "proper meaning": "Authoritative texts are ideologically ambiguous. Legal cultures are typically characterized by ethical pluralism. Judges, jurists and people-at-large – typically

II. 1. 5. 2. Conclusions

In this section we will present a summary of Aharon Barak's views regarding his understanding of the basic notions and his proposal for resolving the apparent conflicts between the fundamental rights. This will allow for an easier comparison of his proposal with the proposals from authors whose approaches to this issue we are dealing with. Based on this summary, we conclude the subchapter by providing an overview of the strengths and weaknesses of Barak's proposal.

Aharon Barak develops his theory of judicial balancing in the framework of the Alexyan theory of balancing. In this sense, his theory of judicial balancing represents a proportionality-based theory of judicial balancing. However, his understanding differs from that of Robert Alexy, most notably with respect to the balancing rule (see section II. 1. 2.). In Barak's theory of judicial balancing, what is being balanced are the *underlying purposes* of the conflicting fundamental rights. In Barak's understanding, the balancing is

> "…an analytical process that places proper purpose of the limiting law on the one side of scales and the limited constitutional right on the other, while balancing the benefit gained by the proper purpose with the harm it causes to the right."[492]

In the process of balancing, the "weight" of the conflicting rights is determined according to their "relative social importance". Through the normative process of "weighing", relative social values are assigned to the conflicting fundamental rights (representing their relative social importance), on the basis of which the right with the lesser weight (value) is limited in its application or scope of protection in the concrete case.[493] In contrast to the

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entertain different views about the "proper" way to see the constitution, judicial review, the role of parliament, judicial interpretation, etc. As a consequence, the same legal provisions are likely to receive competing, mutually exclusive, interpretations, when they turn out as battlefields for ideological warfare. To be sure, they can also be the points where an overlapping consensus about their "proper meaning" obtains. See also Chiassoni (2019a), p. 4, where he argues that judicial interpretation is never a purely cognitive activity: "To begin with, any interpretation whatsoever necessarily depends on the previous selection of interpretive criteria (rules) and interpretive resources by the acting interpreter, and this involves volition and decision-making. Furthermore, interpretive criteria and interpretive resources are usually selected out of allegiance to some ideology (some vision of positive law), which sets the "proper" goals interpretation must realize." These two observations made by Chiassoni are true, even if one disagrees with other tenets of sceptical theory of legal interpretation.

[492] Barak (2012), p. 43. On balancing (or proportionality *stricto sensu*), Barak (2012), p. 340 writes that "According to proportionality *stricto sensu*, in order to justify a limitation on a constitutional right, a proper relation ("proportional" in the narrow sense of the term) should exist between the benefits gained by fulfilling the purpose and the harm caused to the constitutional right from obtaining that purpose." On Barak's understanding of judicial balancing, see also Bendor (2015), p. 538.

[493] Barak (2005), p. 178, where he writes that "*Values and principles have weight. We can rank the according to their relative social importance*. The "weighing" process is a normative process designed to locate the values and principles – and the purposive presumptions derived from them – within the legal system, and to assign them their relative social values. *When there is a contradiction among values and principles* – and the purposive

Alexyan theory of judicial balancing, there are no numerical factors (like those in the Weight formula) that determine the "weight".

With respect to the basic notions we have analysed, it was elaborated that Barak advocates an eclectic or mixed theory of interpretation. Among the possible literal meanings, the interpreter should choose the "proper" meaning – the one that best furthers the purpose of the norm. In the case of constitutional interpretation, objective purposive interpretation is to be preferred over subjective purposive interpretation (II. 1. 3. 1.). With regard to the understanding of norms, Barak is a supporter of the so-called strong distinction thesis between rules and principles (II. 1. 3. 2.), as he distinguishes between different types of fundamental rights conflicts depending on which norms are involved in the conflict (II. 1. 3. 3.). Fundamental rights are understood as a class of constitutional rights hierarchically above other, non-fundamental constitutional rights. This is not a conceptual issue, and the classification of a right as a fundamental right depends on the historical context of the legal system in question. Fundamental rights are usually, but not necessarily, expressed through norms that have the structure of legal principles. In this sense, conflicts between principle-shaped rights are paradigmatic examples of conflicts between fundamental rights. Barak takes a conflictivist view, as he points out that different constitutional principles are often in a constant state of conflict.[494]

The assessment of Aharon Barak's theory of judicial balancing as a method for the resolution of the apparent conflicts between fundamental rights should be done with reference to the Alexyan theory of judicial balancing, since it developed under its influence. In Barak's account, what is put on the scales when balancing are *proper purposes* of the norms protecting the conflicting fundamental rights, which determine their relative social importance or "weight" in the concrete case. The fundamental right to which greater "weight" is attributed is applied or protected in the concrete case. Unlike Alexy, Barak avoids any numerical representation in his reconstruction of judicial balancing. In doing so, he circumvents the criticisms that have been raised against the rationality of the weight formula (I. 6. 1. 3.).

Barak does not conceptually link proportionality with the structure of the norms protecting fundamental rights and argues that proportionality can be applied to the fundamental rights protected by the norms that have the structure of rules. In this respect (if we stay within the conceptual framework of proportionality and the strong distinction between rules and

presumptions derived from them – *judges resolve the conflict by taking their relative social importance into account*." [emphasis added]

[494] Barak (2012), p. 73.

principles), Barak's proposal has an advantage over Alexyan because of the criticisms raised against the idea that fundamental rights are expressed through principles. This idea entails that the fundamental rights are optimisation commands that can be fulfilled to a degree, and the criticism of this view has been presented in section I. 6. 1. 2.

A weakness in Barak's proposal, however, seems to be his reliance on proper purpose (either "subjective" or "objective") in interpretation. This position presupposes a cognitivist view, according to which it is possible to determine the intention of the author of the legal text that is interpreted (in the case of subjective purposive interpretation) or the objectives relevant to the legal community (in the case of objective purposive interpretation). Although Barak does translate the metaphor of weight with numbers, the idea of purpose and the relative social importance of the rights leave his approach susceptible to the last criticism that has been raised against Alexyan theory of judicial balancing – the criticism that relates to judicial discretion (I. 6. 1. 4.).

II. 2. Manuel Atienza

II. 2. 1. Introduction

The second author whose understanding of judicial balancing is analysed in this chapter is Manuel Atienza (1951), an influential Spanish legal philosopher.[495] Atienza's approach is chosen for reconstruction in this chapter for two reasons. The first is his influence, which is particularly strong in the Spanish-speaking world, and the second is the similarity of his approach to that of Robert Alexy. Let us now turn to these two points. In his works, Manuel Atienza wrote, among other topics, on the theory of norms, and developed (together with Juan Ruiz Manero) an influential analysis in their book *Las piezas del Derecho: Teoría de los enunciados jurídicos*.[496] In the work, Alexy's conception of principles as optimization commands is criticized, and a distinction between two types of rules (*action rules* and *end rules*) and two types of principles (*principles in the strict sense* and *policies*) is suggested. The distinction is based on the openness or closure of antecedent and consequent.[497] His other

[495] Atienza wrote his most well-known book *Las piezas del derecho* (*A Theory of Legal Sentences*) together with Juan Ruiz Manero, as many of his other works. A substantial amount of work was written in co-autorship between the two. See, for example, Atienza & Ruiz Manero (1991) and Atienza & Ruiz Manero (2000). One of the most well-known ideas was their distinction between different types of norms presented in *Las piezas del derecho*, which plays a key role in Atienza's understanding of judicial balancing. In this sense, one could argue that this section could refer to Atienza and Ruiz Manero. But since Atienza later in his writing focused on the topic of balancing (see, for example, Atienza (2012) and Atienza (2017b)), I include only Atienza. Of course, the ideas presented there could not be ascribed also to Ruiz Manero.
[496] Atienza & Ruiz Manero (1996), translated in English and published in 1998 as *A Theory of Legal Sentences*.
[497] Barberis & Bongiovanni (2016), pp. 261-262.

influential work is based on the idea of *law as argumentation*, further elaborated in the next section.

Atienza's approach, while representing a non-Alexyan understanding of judicial balancing, has some similarities (but also important differences) with the Alexyan theory of judicial balancing, as will be discussed in more detail in the next section. The structure of the chapter follows the idea presented in the previous subchapter, which analysed the approach of Aharon Barak. The idea is to first present non-Alexyan theories of judicial balancing which have more in common with the Alexyan theory of judicial balancing, in order to facilitate the comparison between them.

The subchapter is divided into five sections (2. 1. – 2. 5.) and has the following structure: First, introduction (2. 1.) presents the explanation and justification for the structure and content of the subchapter. This is followed by the second section, which contextualizes the legal philosophy of Manuel Atienza (2. 2.). In the third section (2. 3.), basic notions relevant to the problem are presented: first, Atienza's views on interpretation (2. 3. 1.), second, his understanding of 'norm' and 'right' (2. 3. 2.), concluding with his views regarding apparent conflicts between fundamental rights (2. 3. 3.). In the main, fourth section (2. 4.), the theoretical framework of Atienza's approach is presented (2. 4. 1.) and applied to legal cases (2. 4. 2.): first, to the 2003 Constitutional Court of Spain *Friedman* case (2. 4. 2. 1.), and then to the 1992 German Federal Constitutional Court *Titanic case* (2. 4. 2. 2.). The fifth and final section (2. 5.) presents criticisms of Atienza's proposal (2. 5. 1.) and conclusions about his approach (2. 5. 2.).

II. 2. 2. Law as argumentation

Atienza is known for his conception of *law as argumentation*[498] and his non-positivist understanding of law. Atienza himself stated that he is a non-positivist and defends moral objectivism.[499] As mentioned above, Atienza, together with Juan Ruiz Manero, developed a detailed and influential analysis of legal sentences in their work *Las piezas del Derecho: Teoría de los enunciados jurídicos*.[500] The distinction proposed by Atienza (together with Ruiz

[498] *Constitución y argumentación* (Atienza, 1997), *El derecho como argumentación* (Atienza, 2006), *Curso de argumentación jurídica* (Atienza, 2013) and *What is the Theory of Legal Argumentation For?* (Atienza, 2019). See Pino (2016), pp. 331-332.
[499] Atienza (2017b), p. 149: "...yo no soy iuspositivista y defiendo el objetivismo moral." See also Pino (2016), p. 339. On Atienza's position, see also Viola (2016), pp. 85-86.
[500] Atienza & Ruiz Manero (1996), translated in English and published in 1998 as *A Theory of Legal Sentences*.

Manero) into four types of legal norms (instead of two, as proposed by Robert Alexy) has taken Atienza close to *neoconstitutionalism*, as some authors have suggested.[501]

Balancing (*ponderación*) is a topic Atienza continuously deals with in his works[502], and it is identified as one of the most important elements in his argumentation theory.[503] Atienza generally agrees with Alexy's ideas regarding judicial balancing but argues that its errors are of rhetorical nature.[504] There are (at least) three differences between the two approaches. First, Atienza distinguishes between four types of legal norms (two types of rules and two types of principles), unlike Alexy, who distinguishes between two types of norms (rules and principles). Second, for Alexy, balancing considers the justification scheme as a part of internal justification, whereas for Atienza, balancing is part of external justification.[505] Third, what Atienza considers problematic in Alexy's account is also the understanding of the weight formula as an "algorithm".[506] Atienza suggests that Alexy's ideas should be used in a more pragmatic or opportunistic sense.[507]

In the following section, Atienza's understanding of basic notions relevant to the apparent conflicts between fundamental rights is presented. These are, in order: interpretation, norm and right and, finally, conflicts between fundamental rights.

II. 2. 3. Basic notions

We begin the section with Atienza's views on interpretation (II. 2. 3. 1.) and his understanding of the relationship of interpretation and argumentation, a key concept in his understanding of law. This is followed by his understanding of 'norm' and 'right' (II. 2. 3. 2.), and the distinction of norms he proposed together with Juan Ruiz Manero, concluding with his view on the apparent conflicts between fundamental rights (II. 2. 3. 3.).

II. 2. 3. 1. Interpretation

[501] Barberis & Bongiovanni (2016), p. 262.
[502] See, for example, Atienza (2006), Atienza (2012) and Atienza (2017b).
[503] For such characterization, see Pino (2016), p. 332.
[504] Atienza (2012), pp. 20-21: "En mi opinion, la tesis de fondo sobre la ponderación que sostiene Alexy son básicamente acertadas, pero la presentación que hace de las mismas no es del todo afortunada; *yo diría que sus errores han sido, fundamentalmente, de carácter retórico*". [emphasis added]. For a criticism of Alexy's theory of judicial balancing, see also Atienza (2006), pp. 172-174.
[505] Atienza (2012), p. 26. For Alexy's position, see Alexy (2005), p. 75. On internal and external justification, see Wróblewski (1971), p. 412
[506] Atienza (2006), pp. 173-174 argues that a mathematical formulation can give false impression that we are dealing with a calculus or a form of algorithm to follow. See also Atienza (2012), p. 21 and Chiassoni (2019b), p. 212.
[507] Atienza (2012), p. 22: "Mi sugerencia es, por tanto, la de no seguir a Alexy en su excesivo afán sistematizador, sino *hacer un uso más pragmático y, por así decirlo, oportunista de esas ideas*". [emphasis added].

'Interpretation' and 'legal interpretation' are terms of extraordinary ambiguity in many respects, as Atienza indicates.[508] 'Interpretation' can refer to two different things: to the *activity* of ascribing meaning to the object of interpretation) and to the *result* (product) of the interpretive activity.[509] Among the objects of interpretation, Atienza distinguishes three different objects:[510] first, it can refer to entity that can have a meaning, such as a historical event; second, it can refer to linguistic objects, especially written texts; and third, it can refer (in the 'strictest sense' of interpretation) to problematic texts, i.e. texts whose meaning is ambiguous and requires clarification. In addition to these two meanings of interpretation (*activity* vs. *result*), Atienza adds that, following the scheme of Letizia Gianformaggio, interpretation can be analysed from the *noetic*, *linguistic* and *dianoetic* perspectives.[511] The combination of these three criteria, together with the distinction between interpretation as activity and interpretation as result, gives six possible combinations that represent different meanings of interpretation. Atienza also distinguishes between interpretation in the broad sense (which is equivalent to understanding something) and interpretation in the strict sense (as a clarification of a doubtful meaning of an entity susceptible to having a meaning).[512]

Since the notion of 'argumentation' and in particular 'legal argumentation' plays a central role in the work of Manuel Atienza, the relationship between the notions of (legal) interpretation and (legal) argumentation will be presented. The notion of 'argumentation', and in particular 'legal argumentation' can, in principle, be analysed according to the same approach that is used to analyse the notion of 'interpretation' and 'legal interpretation', distinguishing between "arguing" in the broad sense and in the strict sense.[513] It is also possible to distinguish between argumentation as an *activity* and argumentation as the *result* (product) of argumentative activity.[514] To distinguish between the two terms, Atienza points out that one "interprets something" but does not "argue something" but argues for or against something, so that interpretive activity is seen more as a relationship between the text, the subject (the

[508] Atienza (1997a), p. 466 and Atienza (2010), p. 20.
[509] Atienza (1997a), p. 466 and Atienza (2010), p. 18.
[510] Atienza (2010), p. 18.
[511] Atienza (2010), pp. 17-19. See Gianformaggio (1987), pp. 90-91.
[512] Atienza (2010), p. 21.
[513] Atienza (2010), pp. 19-20. One could speak, according to Atienza, about "arguing" in the broad sense when it is said that judgments of the judges need to be justified (even if they are considered to be easy, non-problematic cases) or "arguing" in the more strict sense (according to which it is only argued in the presence of a problem, when reasons need to be given as an answer to a question which poses doubts).
[514] Atienza (2010), pp. 19-20. Argumentation as a product (result) signifies for Atienza both the conclusion of an argument and to all the premises of the conclusion.

interpreter) and the (new) text, while argumentative activity is a relationship between a subject (speaker or proponent), the discourse (or text) and another subject (audience or opponent).[515]

Accordingly, interpretation seems to be a broader notion than argumentation, i.e., interpretation in the broad sense does not involve any kind of argumentation, and the idea of argumentation appears only when one refers to the interpretation in the strict sense. However, one can also come to the opposite conclusion, according to which argumentation is a broader notion: if the law is considered as a series of decisions relating to certain practical problems (which need to be justified), then among the arguments put forward for these decisions, some would have interpretive character, according to Atienza.[516] According to this last approach, argumentation does not presuppose interpretation in the strict sense, but in a broad sense, as suggested by Atienza; argumentation necessarily implies understanding (the attribution of some meaning to premises and conclusion).[517] Thus, although argumentation is a key legal concept for Manuel Atienza, interpretation has a certain kind of priority. Atienza also makes a distinction between (1) the statement to interpret (2) the statement interpreted and (3) the interpretative statement.[518]

What about the interpretation of constitutions? Atienza analyses the argumentation of constitutional courts as a paradigmatic example of constitutional argumentation.[519] From a formal point of view, there is a difference between the argumentation of the ordinary courts and that of the constitutional courts. In the latter case, balancing plays an important role, arising from the role legal principles have in contemporary constitutions.[520] Thus, Atienza argues that the difference is institutional, in the sense that balancing plays a prominent role in the argumentation of the constitutional courts, as opposed to the role it plays in the argumentation of the ordinary courts.[521] For Atienza, the Latin maxim *in claris non fit interpretatio* is a

[515] Atienza (2010), p. 20.
[516] Atienza (1997a), p. 468 and Atienza (2010), p. 21.
[517] Atienza (2010), p. 21.
[518] An example used by Atienza (2010), p. 22 refers to Art. 15 of the Spanish Constitution. "Everyone has the right to life" is the statement to interpret (*enunciado a interpretar*), "Everyone in Art. 15 means born" is the statement interpreted (*el enunciado interpretado*) and "All born have the right to life" is the interpretative statement (*enunciado interpretativo*).
[519] Atienza (2007), p. 209.
[520] Atienza (2007), p. 211. Judges of the ordinary courts can also balance (in fact, they have to when they are faced with 'difficult cases' which cannot be resolved without resorting to constitutional principles in the cases where there was no previous decision of the constitutional court). When the constitutional court already did balance, ordinary judges must follow the balancing made by the constitutional court.
[521] Atienza (2007), p. 211: "Ahora bien, lo que *diferencia, desde un punto de vista formal, la argumentación de los tribunales ordinarios y la de los tribunales constitucionales es que*, en el caso de estos últimos, la ponderación adquiere un gran protagonismo, como consecuencia del papel destacado de los principios en las constituciones contemporáneas." [emphasis added]. On this point, see also Atienza (2007), p. 214.

tautology; if the legal text is clear, there is no interpretation in the strict sense.[522] From this, we can conclude that, in the framework of the distinction of theories of interpretation between cognitivist, sceptical and mixed theories[523], Atienza's theory of interpretation belongs to the *cognitivist* theories.[524]

II. 2. 3. 2. Norm and right

One of the main differences between the approaches of Manuel Atienza and Robert Alexy to the subject of judicial balancing is the distinction between different types of legal norms.[525] As for the structural approach to the distinction between rules and principles, Atienza and Ruiz Manero take as the starting point the work of C. E. Alchourrón and E. Bulygin.[526] In this sense, legal norms are understood as "correlations between generic cases (sets of properties) and solutions (i.e., the normative qualifications of certain behaviours).[527] Atienza and Ruiz Manero distinguish between four types of deontic (regulative) norms.[528] The authors argue that we can distinguish between two types of principles: principles in the strict sense and policies (or program norms) and two types of rules: rules of action (or action rules) and rules of end (or end rules). The distinction depends on the "openness" or "closure" of the antecedent and the consequent (generic case and normative solution).[529] Both types of principles – principles in the strict sense and policies have an open antecedent (open conditions of application).[530] In this sense, Atienza and Ruiz Manero note that principles could be understood as categorical norms, following von Wright's terminology.[531] But when it comes to consequent,

[522] Atienza (2010), p. 25.
[523] Guastini (1997b), pp. 279-283.
[524] Atienza's distinction on "easy", "hard", "intermediate" and "tragic" cases is used to support this claim. See section II. 2. 3. 3.
[525] According to Alexy, whose understanding of legal norms was presented in the previous chapter, distinguishes between rules and principles, with every legal norm being either rule or principle. Atienza and Ruiz Manero, on the other hand, distinguish between four types of legal norms, as it will be shown in this section.
[526] Atienza & Ruiz Manero (1998), p. 7
[527] Atienza & Ruiz Manero (1998), p. 7 and p. 29. Alchourrón & Bulygin (1971), p. 15, define norms as "sentences (i.e., linguistic expressions) which correlate cases with solutions". For Alchourrón an Bulygin norms are, as Ratti (2010), p. 274, points out "conditionals, the antecedent of which is a *sufficient* condition of the consequent". As it can be seen in Atienza & Ruiz Manero (1998), p. 175, this section deals with deontic (or regulative norms) and not with non-deontic (constitutive) norms. Regulative norms connect generic cases with deontic solutions, while constitutive norms connect generic cases with other generic cases. See Ratti (2010), p. 274.
[528] Atienza & Ruiz Manero (1998), Chapter I (pp. 1-25). See also p. 175, where an overview of their classification is visually presented. Deontic (or regulative), since the authors distinguish between them and non-deontic (or constitutive) norms, under which they distinguish between power-conferring rules and purely constitutive rules. See also their other work – Atienza & Ruiz Manero (2000), pp. 16-20 and Atienza (2006), pp. 168-169.
[529] Ratti (2010), p. 275. For details, see Atienza & Ruiz Manero (1998), pp. 164-165.
[530] Atienza & Ruiz Manero (1998), p. 10. The categories of 'principles' and 'policies' is also used by Ronald Dworkin (1978). See section III. 1. 3. 2.
[531] Atienza & Ruiz Manero (1998), p. 9. Von Wright (1963), p. 74 divides norms, from the point of view of their conditions of application into *categorical* and *hypothetical* ones. A norm is categorical "if its conditions of

principles in the strict sense have a closed one, while policies have an open one, according to Atienza and Ruiz Manero.[532] The four types of regulative norms can be illustrated with the following table:[533]

	Rules		Principles	
	Action rules	End rules	Principles in the strict sense	Policies
Antecedent	Closed	Closed	Open	Open
Consequent	Closed	Open	Closed	Open

What is the advantage of distinguishing principles on principles in the strict sense and policies? According to Atienza, there is an argumentative advantage, and it is twofold:[534] first, the hierarchy established in favour of principles in the strict sense over policies forms the most important element of the "weak order" Alexy writes about and second, the "internal duality"

application is the condition which must be satisfied if there is going to be an opportunity for doing the thing which is it content, *and no further condition*", while a norm is hypothetical "if its condition of application is the condition which must be satisfied if there is an opportunity for doing the thing which is its content, *and some further condition*".

[532] In the view of Atienza & Ruiz Manero (1998), p. 11, the distinctive character of policies is that this type of standard "leave their conditions of application as well as the prescribed pattern of behaviour open". Both rules and principles can be *action norms* and *end norms*, depending on whether an action or state of affairs is deontically modalized, as Atienza & Ruiz Manero (1998), p. 163 elaborate. The distinction between action rules and end rules is parallel to the distinction between principles in the strict sense and policies. Principles in the strict sense would thus be action norms, while policies would be end norms. On this point, see also Atienza (2006), pp. 168-169.

[533] The table is taken from Ratti (2010), pp. 274-275 and is a simplified version, as the author indicates, of a conclusion from Atienza & Ruiz Manero (1998), pp. 176-182. Atienza & Ruiz Manero (1998), pp. 165-167 give examples for each type of norms:
(1) Action rules – Art. 28. of the Workers' Statute, which equal pay for equal work: "The employer is obliged to offer equal payment for equal work, concerning the basic salary as well as salary supplements, without any discrimination on grounds of sex."
(2) End rules – Art. 66(1) of the General Statute of Penitentiaries: "For certain groups of inmates whouse treatment requires it, in the corresponding centers programs based on the principle of therapeutic community may be organized."
(3) Principles in the strict sense – Art. 20(1) a) of the Spanish Constitution, which protects freedom of expression: "The following rights are recognized and protected: a) Freely to express and diffuse ideas and opinions orally, in writing, or through any other means of reproduction (…)"
(4) Policies – Art. 51(1) of the Spanish Constitution, which protects consumers: "The powers of the state shall guarantee the defence of consumers and users, protecting their security, health and legitimate economic interests through effective procedures."

[534] Atienza (2012), p. 25. The notion of "weak order" is related to Alexy's theory of principles and the resolution of conflicts between principles. Alexy rejects the "strict order" between principles, arguing for a "weak order" between principles. This is what Alexy calls the "conditional relation of precedence", mentioned in Chapter I. The "strict order", or "absolute relation of precedence" between the principles, as Alexy calls it would mean that one principle always takes precedence over the other. See Alexy (1988), pp. 144-148 and section I. 3. 3. 2., where Alexy's Law of Balancing is presented.

of principles shows that the rationality of principles is not only of the economic or instrumental type, but also of the political and moral.[535]

The practical consequence of the distinction of principles to principles in the strict sense and policies, according to Atienza, is that Alexy's of principles as optimization commands (i.e., that they can be fulfilled in various degrees) applies only to policies, and not to principles in the strict sense.[536] Principles represent only *prima facie* reasons, so they are not suitable for solving concrete cases directly, as Atienza argues.[537] Atienza's understanding of the distinction between rules and principles is usually characterized as a 'strong one'.[538] In his later work, Atienza, however, seems to consider the distinction to be a gradual one, or one of degree.[539]

With regard to fundamental rights, Atienza notes that the related term "human rights" is often used.[540] According to Atienza, the relationship between the two terms can be seen in this way: human rights are *rights* when they are part of a positive legal system; in other cases, they are simply "ethical requirements".[541] Because of this ambiguity, it is common to use two different expressions: in the first case, the term "fundamental rights" (or "subjective public rights") and in the second case, the term "human rights" (or "natural rights").[542] Atienza opts for a historical grounding of human rights[543] and rejects what he calls a "normativist" approach

[535] Regarding this second advantage, Atienza argues that the prevalence that principles in the strict sense have in general over policies is not absolute; the reasons from policy can in some cases, have superior force to those from the principles in the strict sense. To illustrate this, Atienza (2012), pp. 25-26 refers to two cases: *Gürtel* case (2010) and *ADN* case (2007). In the first case, the principle of effective prosecution of crime prevailed over the right to defence, while in the second case the principle of effective prosecution of crime prevailed over the right to privacy. On the details of the case, see Atienza (2012), pp. 12-13 (*Gürtel* case) and pp. 18-19 (*ADN* case).
[536] Atienza & Ruiz Manero (1991), pp. 108-109.
[537] Atienza (2006), p. 168. Atienza (2016), p. 219 writes that: „Los principios, a diferencia de las reglas, son razones (operativas) no perentorias o simplemente *prima facie*: suministran razones para decidir en un determinado sentido, pero no tienen carácter concluyente; esas razones deben sopesarse con otras provenientes de otros principios y que pueden tirar en una dirección opuesta: la frecuencia de los conflictos entre principios – entre la libertad de expressión y el honor o la intimidad de las personas; entra la libertad y la seguridad; etc. – es consequencia de que los principios carecen de condiciones de aplicación o de que éstas son muy abiertas". See also Atienza (2007), p. 211.
[538] De Fazio (2019), p. 316, Moniz Lopes (2017), p. 473 and Pino (2009), pp. 133-134, fn. 17 and Pino (2017b), pp. 306-307, fn 2.
[539] Atienza (2017b), p. 150. This is a problem for Atienza's view since in the *Theory of Legal Sentences* he assumes a strong distinction (as the table shows) and develops his theory of judicial balancing on the basis of the strong distinction thesis and types of norms that are ontologically different. On the two views, see Pino (2017b), pp. 306-307, fn. 2.
[540] Atienza (1998), p. 151. But the expression is burdened with many ambiguities. It is both intensionally and extensionally vague, according to Atienza (1998), pp. 153.
[541] Atienza (1998), p. 151.
[542] Atienza (1998), p. 151.
[543] Atienza (1998), p. 155: "La única vía que nos queda abierta es, por tanto, la de tratar de encontrarles un fundamento historíco, relativo". But taking the approach of historical justification of human rights (related to a certain historical moment, society, and its economic relations etc.) does not imply, as Atienza indicates, indifference towards ethical theories that justify fundamental rights.

to law.[544] Thus, according to Atienza, an evaluative dimension must be added to the normative aspect of fundamental rights, which consists in understanding law as a social practice, "which achieves certain ends and satisfies certain values".[545]

II. 2. 3. 3. Conflicts between fundamental rights

For Manuel Atienza, the distinction between "easy" cases and "hard" cases plays an essential role in theories of legal argumentation and legal theory in general.[546] "Easy" cases are the ones in which all (or the majority) of judges resolve the case in the same manner since normative and factual premises do not raise any doubts. Such cases (probably) represent most of the cases with which courts are faced, according to Atienza.[547] But there are also cases (usually at higher courts) in which normative and/or factual premises raise various doubts and where jurists disagree on their resolution.[548] The distinction between "easy" and "hard" cases is not ontological, as Atienza indicates, since the qualification of a case as "easy" or "hard" depends on the context, social circumstances etc. Atienza adds two types of cases to the distinction: "intermediate" cases and "tragic" cases.[549] The first ones are the cases that do not seem easy at the first look, since they require certain deliberation, but after this process of deliberation has been finished, the solution of the case does not raise doubts and is unanimously (or at least by the majority, if not unanimously) accepted of the jurists. The second ones, called "tragic" cases are cases *beyond* hard cases: these are cases which are not necessarily disputed ones, but the ones in which no *satisfactory* resolution is possible.[550] These are not cases in which there are various (possible) right answers, but cases in which there are no right answers.[551] It can be seen that Atienza takes a clear *conflictivist* position with regard to fundamental rights conflicts.

Atienza introduces the notion of "equilibrium" to describe cases which are difficult to solve.[552] In the situation of conflicting values, they must be weighed, and weighed against each

[544] Atienza (2018), p. 27. A purely "normativist" conception of fundamental rights (which would be the understanding that fundamental rights are rights conferred by the constitution) Atienza finds problematic, arguing that it leaves out the notion of "value" or "good", which is exactly the reason why the subject is given the right.
[545] Atienza (2018), p. 28.
[546] Atienza (1997b), p. 8.
[547] Atienza (2017a), p. 18. Such cases are justified through syllogism.
[548] Atienza (2017a), p. 18. In such cases, the justification required is not only internal (deductive) one, but also external justification, directed at justifying normative and/or factual premises. Atienza's ideas regarding the distinction of cases on "easy", "hard", "intermediate" and "tragic" ones, in the context of the idea of one right answer are an argument in favour of classifying him as a proponent of cognitivist theories of interpretation.
[549] Atienza (2017a), pp. 18-20.
[550] Atienza (2017a), p. 19.
[551] Atienza (1997b), p. 13. For more on the notion of "tragic" cases, see Atienza (1997b), pp. 9-28.
[552] Atienza (1990), p. 152.

other, as Atienza indicates, in search of a point of equilibrium between them.[553] Depending on the difficulty of finding a "unique optimal equilibrium", legal cases are more or less difficult to solve, according to Atienza.[554] A case can be considered difficult to solve if

> "…one can, in principle, find more than one point of equilibrium between requirements which are opposed, but which necessarily all have to be taken into consideration in the decision, and if, therefore, one has to make (and justify) a choice."[555]

Conflicts between fundamental rights represent a case where values (or requirements deriving from values) of the same hierarchical rank conflict.[556] Such cases are considered the most difficult ones by Atienza, who labels them "tragic" cases.[557] In these tragic cases, "something essential" of each of the two conflicting values must be sacrificed in order to reach a solution, so it is not a simple alternative, but a dilemma.[558] As it was mentioned before, principles conflict due to their open conditions of application.[559] Due to this, it can happen (and often does) that, in a certain case, there are various principles which pose conflicting demands to the judge.[560] Such cases are to be resolved through judicial balancing, to which we will now turn and present Manuel Atienza's version.

II. 2. 4. Atienza's *ponderación*

In this section, Atienza's proposal for resolving conflicts between fundamental rights is presented and applied to cases. First, the theoretical framework of his approach is presented, so that we have an overview and reconstruction of the steps involved in resolving such a conflict. Second, this proposal is applied to two cases: first, to the 1991 Constitutional Court of Spain *Friedman* case, and second, to the 1992 Federal Constitutional Court *Titanic* case.

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[553] Atienza (1990), p. 148.
[554] Atienza (1990), p. 148. On the idea of equilibrium, see Atienza (1990), pp. 151-153.
[555] Atienza (1990), p. 152.
[556] Atienza (1990), p. 151.
[557] An example from the Spanish legal system given by Atienza (1990), pp. 151-152 is the decision of the Constitutional Court of Spain 160/1987 from October 27, 1987, regarding the constitutionality of the law of conscientious objection of 1984, where the right to conscientious objection (Art. 30(2)) and the principle of equality before the law conflicted (Art. 14). The Spanish Constitution also, in Art. 30(1), prescribes the general obligation to serve Spain. The majority held that the law was not unconstitutional. For more details of the case, see Atienza (1990), pp. 151-152.
[558] Atienza (1990), p. 154. Cf. with Lorenzo Zucca, whose approach we analyse in Chapter III and his notion of "constitutional dilemma" (III. 4. 3. 3. 2.).
[559] Atienza (2006), p. 219. Atienza (2006), p. 169, writes: "…dado lo abierto de las condiciones de aplicación, es prácticamente inevitable que, en un determinado caso, no haya un único principio aplicable; lo usual es que concurran varios principios que planetan exigencias contrapuestas. La ponderación es la manera de encontrar una solución para esa situación de tensión."
[560] Atienza (2006), p. 169.

II. 2. 4. 1. Theoretical framework

Atienza argues that three basic forms of justificatory reasoning of judges can be distinguished: *classificatory* or *subsumptive* one, *finalist* reasoning and *balancing*.[561] The third form – balancing – is the object of interest in this section. As Atienza elaborates, the first two forms of justificatory reasoning are used when judges apply *rules* to resolve cases; but judges also sometimes apply *principles* to resolve cases.[562] The necessity of balancing derives exactly from the fact that judges, and particularly judges of the constitutional courts, apply principles besides rules.[563]

It was mentioned previously that principles, in Atienza's view, are not suitable for resolving concrete cases in a direct way, since they are only *prima facie* reasons. In order to resolve conflicts between fundamental rights, which are expressed in norms which have the structure of principles, the application of principles is necessary. The application of principles is an operation which consists in two phases, according to Atienza: in the first phase, the principle (or principles) is converted into rule(s), and this is what Atienza labels 'balancing in the strict sense'; in the second phase, the created rule is applied according to one of the two previously mentioned forms of justificatory reasoning: *subsumptive* or *finalist* one.[564]

Following the distinction between two types of principles – principles in the strict sense and policies – Atienza distinguishes between two types of balancing.[565] In the first type of balancing, what is being balanced are principles in the strict sense (or action norms), and this is done in three steps of phases.[566]

(1) In the first step, it is established which principles or values are in conflict regarding certain behaviour (in the situation which we are dealing with), and that a certain type of adjustment is necessary, since both norms cannot be satisfied at the same time with regards to a certain concrete case.[567]

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[561] Atienza (2006), p. 164ff.
[562] Atienza (2006), p. 168. Judges use principles to resolve cases in two situations – normative and axiological gaps, according to Atienza: "Tienen que recurrir a principios *cuando no existe una regla aplicable a la situación* (*laguna normativa*) o *cuando sí que existe una regla, pero ella es incompatible con los valores y los principios del sistema* (*laguna axiológica*); o sea, se trata – en este segundo caso – de supuestos en los que la pretensión de la regla de servir como razón concluyente y excluyente falla, porque el aspecto directivo de la misma se separa del justificativo." [emphasis added].
[563] Atienza (2007), p. 211.
[564] Atienza (2006), p. 168.
[565] Atienza (2006), p. 169.
[566] Atienza (2006), p. 169. In the second type, directives are balanced. On this second type of balancing, see Atienza (2006), pp. 169-170. The second type of balancing is not done by judges, but by legislative and administrative organs, so it is not analysed here. See Atienza (2006), p. 174 for the distinction.
[567] Atienza (2006), p. 170.

(2) In the second step, a priority of one principle or value is established over the other, given the circumstances of the case, and the reasons for this are adduced.

(3) Finally, in the third step, a rule of action is constructed, which represents a "translation" of the priority of one principle over the other in deontic terms, and which forms the basis of the subsumption that follows.[568] As Atienza writes:

> "The balancing takes place, then, through a process of construction of a taxonomy in which generic cases and the corresponding rules are formed."[569]

From this it follows, as Atienza continues, that if one analyses a sufficient number of the decisions (of the court in question) in which the same two rights conflict, then one could observe how different rules of action are constructed, depending on the presence or absence of certain properties.[570] The process of judicial balancing can be presented more abstractly with two premises, which represent first two steps in balancing, while the conclusion presents the third step.[571] The premises would then be:[572]

1) In the concrete situation S, principles P1 and P2 establish conflicting normative requirements (for example, P1 permits q while P2 prohibits it).

2) In the concrete situation S, under certain circumstances C, one principle takes precedence over the other (for example, P2 over P1).

3) Thus, in this concrete situation S and under certain circumstances C, it is justified to introduce a norm which established that if p (a set of properties that includes those derived from the circumstances C), then prohibited q.

II. 2. 4. 2. Application

II. 2. 4. 2. 1. *Friedman case* (1991)

An example Atienza gives of the balancing between principles in the strict sense is the *Friedman* case (1991) from the Constitutional Court of Spain, in which the right to honour and freedom of expression (both understood as principles in the strict sense according to Atienza)

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[568] Atienza (2006), pp. 170-171.
[569] Atienza (2006), pp. 171-172 [translated by author].
[570] Atienza (2006), p. 172. Such properties would be (if the *Friedman* case is taken as an example) if the expression in question is a value judgment or factual statement, or the truthfulness of the statement(s) etc.
[571] Atienza (2006), p. 171.
[572] The scheme presented here is a slightly simplified one from Atienza (2006), p. 171. The whole scheme is logically formalized by Atienza in the following way:
( )→Pq [P1]
( )→Phq [P2]
S/Pq∧Phq
S, C/P2>P1
S,C/J(p→Phq)

came into conflict. The facts of the case are as follows:[573] Léon Degrelle, a former member of the *Schutzstaffel* (SS) who lived in Spain after World War II, expressed his opinion in the Spanish *Tiempo* magazine, in which he expressed doubts about the existence of concentration in Germany during the Nazi regime. Violeta Friedman, an Auschwitz survivor, initiated legal proceedings, claiming that her right to honour was infringed by Degrelle's opinion. How can this case be reconstructed using the theoretical framework proposed by Manuel Atienza? According to Atienza, the process of balancing between principles in the strict sense has three steps or phases, as mentioned earlier.[574]

(1) The first step is to determine which principles or values are in conflict with respect to particular behaviour (in the situation we are dealing with). In the *Friedman* case, this first step would be to determine that there is a conflict between the right to honour, which is an argument for prohibiting a particular behaviour, and the freedom of expression, which is an argument for permitting the same behaviour.

(2) The second step is to establish a priority of one principle or value over the other, taking into account the circumstances of the case, and to state the reasons for this priority. In the *Friedman* case the court considered three issues.[575] The first two were related to the previous practice of the Court. First, the Court emphasises the distinction between *freedom of expression in the strict sense*, which refers to the expression of value judgments and opinions and *freedom of information*, which refers to factual statements. The Court held that freedom of expression in the strict sense enjoys more protection because the condition of truthfulness is relevant only for factual statements and not for value judgments. Secondly, the Court stated that the right to honour has a *personal character*, which means that it enjoys more protection when its subjects are natural persons, as compared to legal persons and groups. The Court also found that Léon Degrelle expressed value judgment that referred to a group. However, the Court gave priority to the protection of the right to honour by adding a new criterion according to which the challenged expression, even if it is a value judgment referring to a group, does not enjoy protection under the freedom of expression if it has racist or xenophobic character.

(3) In the third and last step a rule of action is constructed. This rule expresses the priority of one principle over the other and is the basis for the subsumption that follows. The process of judicial balancing in this case can thus be reconstructed with two premises and a

[573] Atienza (2006), p. 169. For the full case, see *Sentencia 214/1991* from 11 of November 1991.
[574] Atienza (2006), pp. 170-171. For Atienza's theory of judicial balancing applied to another case (*Gürtel* case), see Atienza (2012), pp. 26-28.
[575] Atienza (1998), p. 86.

conclusion. The first two premises represent the first two steps of the balancing process, while the third step of the balancing process is represented in the conclusion:

1) In the concrete situation – the *Friedman* case – the norm protecting freedom of expression (Art. 20(1) of the Spanish Constitution) and the norm protecting the right to honour (Art. 18(1) of the Spanish Constitution) impose conflicting normative requirements. The norm protecting freedom permits expression of opinion, while the norm protecting the right to honour personality rights prohibits the same action.

2) In the concrete situation – the *Friedman* case – one right took precedence over the other in the circumstances C_x. The Court qualified Degrelle's statements as freedom of expression in the strict sense (expression of value judgments and opinions) and held that it enjoys more protection than freedom of information (reference to factual statements). Degrelle's statements and his freedom of expression conflicted with the right to honour of a group, the right to honour enjoying more protection when it has a personal character, i.e., when its subjects are natural persons. In this case (C_1), the right to freedom of expression would take precedence. However, the Court gave precedence to the right to honour by the criterion according to which a value judgment, even if it refers to a group and not to an individual, is not protected by freedom of expression if it has a racist or xenophobic character (C_2).

3) Thus, in this concrete situation – the *Friedman* case – and in the circumstances mentioned in the second step (the statement in question has a racist or xenophobic character), it is justified to introduce a norm stating that if p (a set of properties that includes those derived from the circumstances C), then prohibited q.

II. 2. 4. 2. 2. *Titanic* case (1992)

Let us now apply Manuel Atienza's approach to the *Titanic* case of the Federal Constitutional Court, using his model step by step. This will allow us to compare his approach to the issue with other approaches, in particular with the Alexyan theory of judicial balancing, with which Manuel Atienza partly agrees, but also raises objections against, as it has been mentioned in the section II. 2. 2. of this subchapter.

(1) In the first step, we determine what principles or values are in conflict regarding certain behaviour. As we already know, the *Titanic* case involves the conflict between freedom of expression and personality rights. The behaviour in question is the publication of a satirical magazine that referred to a paraplegic officer as a "born murderer" and a "cripple". The lower court fined the magazine and awarded the officer damages for both descriptions. As Atienza puts it, both norms (norm protecting freedom of expression and norm protecting personality

rights) cannot be satisfied at the same time in this concrete case. The fine violates the magazine's freedom of expression, and the magazine's free publication of the descriptions in question without legal consequences violates the officer's personality rights.

(2) In the second step, a priority of one principle or value is established over the other, taking into account the circumstances of the case, and to give the reasons for it. The Federal Constitutional Court considered the following:[576] the *intensity of the interference with the two conflicting rights* and their *relationship to each other*. The lower court's judgment awarding damages to the officer was qualified as "lasting" interference with the freedom of expression.[577] This was followed by placing the description "born murderer" in the context of the freedom of expression of a satirical magazine. Taking into account its previous case law, the Court concluded that such a description did not fall under "unlawful, serious, illegal harm to personality right".[578] The interference with personality rights was qualified as moderate at most. The Court concluded that the imposition of a fine on the magazine (constituting serious interference with freedom of expression) was not justified in this case, as the description "born murderer" constituted only a moderate or perhaps even light interference with personality rights.[579] The description "cripple", on the other hand, was qualified as a serious interference with personality rights by the Court, and the decision that the magazine be fined was therefore considered justified.[580] The Court's justification was based on consideration of two circumstances: the intensity of the interference with the two conflicting rights and their relationship to each other, and the interpretation of the descriptions in the context of human dignity as protected by Art. 1(1) of the Basic Law and in the context of formal insult, prohibited by German criminal law.

(3) In the third and last step a rule of action is constructed. This rule expresses the priority of one principle over the other and is the basis for the subsumption that follows. The

[576] Alexy (2003a), pp. 137-140. The intensity of interferences with the two conflicting rights is called "case-specific balancing" in the practice of the Federal Constitutional Court, as Alexy (2003a), p. 137 indicates.
[577] BVerfGE, vol. 86, 1, 10: "nachhaltig(en)", cited from Alexy (2003a), p. 137, fn. 8. The conclusion that the interference is "lasting" (or "serious", as Alexy translates to the vocabulary of his Weight formula) was justified by the Court with the argument that fining satirical magazines for their publications could affect their future work in the sense that they might not be willing to publish as they have published before the fines.
[578] BVerfGE, vol. 86, 1, 12. See Alexy (2003a), p. 137, fn. 9.
[579] Alexy (2003a), pp. 137-138.
[580] Alexy (2003a), p. 138. The conclusion that the description as a "cripple" represents a serious interference with personality rights was justified by the fact that describing a severely disabled person (paraplegic) as a cripple is humiliating and disrespectful. On this point, see also Eberle (1997), pp. 873-874: "Use of the word "cripple" is demeaning, the Court reasoned, because it connotes that a person is of a lesser human worth. (…) As such, it is a formal insult punishable under the German Criminal Code. *Cripple* teaches unmistakably that certain words are prescribable as a violation of fundamental human dignity." As it was mentioned earlier, the Court decided the case by also taking into account also Art. 1(1) of the Basic Law, which protects human dignity.

process of judicial balancing in this case can thus be reconstructed with two premises and a conclusion. The first two premises represent the first two steps of the balancing process, while the third step of the balancing process is represented in the conclusion:

1) In the concrete situation – the *Titanic* case – the norm protecting freedom of expression (Art. 5(1) of the Basic Law) and the norm protecting personality rights (Art. 2(1) of the Basic Law) impose conflicting normative requirements. The norm protecting freedom of expression permits describing a paraplegic reserve officer as a "born murderer" and as "cripple", while the norm protecting personality rights prohibits the same action.

2) In the concrete situation – the *Titanic* case – one right took precedence over the other in the circumstances C_x. The Court ruled on the designations "born murderer" and "cripple". In the first case (C_1, "born murderer") the Court held that freedom of expression takes precedence over protection of personality rights, while in the second case (C_2, "cripple"), the Court held that protection of personality rights takes precedence over freedom of expression. In the first case, C_1, freedom of expression took precedence over personality rights as the description "born murderer" did not qualify as a description violating fundamental human dignity and as a formal insult punishable under German criminal law. In the second case, C_2, the personality rights took precedence, since the description "cripple" was qualified as a description violating fundamental human dignity and as a formal insult punishable under German criminal law.

3) Thus, in this concrete situation – the *Titanic* case – and under the circumstances mentioned in the second step (violation of fundamental human dignity and status of a formal insult punishable under German criminal law), it is justified to introduce a norm stating that if p (a set of properties that includes those derived from the circumstances C), then prohibited q.

As mentioned above, Atienza points out that if one analyses a sufficient number of decisions (in this case, the Federal Constitutional Court, and in the previous case, the Spanish Constitutional Court) in which the same two rights are in conflict, one can observe how different rules of action are constructed according to the presence or absence of certain properties.

II. 2. 5. Criticisms and conclusions

II. 2. 5. 1. Criticisms

The criticisms of Manuel Atienza's theory of judicial balancing presented in this section will focus on two points: first, his understanding of norm and the typology of norms he developed with Juan Ruiz Manero, and second, his reconstruction of judicial balancing and the

three steps that it consists of. The first point is important because Atienza's theory of judicial balancing is based on the distinction between different types of norms (in particular, the idea of principles in the strict sense). The second criticism is directly directed against the theoretical framework and application of his proposal, pointing out the negative consequences of Atienza's approach to the problem of conflicts between fundamental rights. In this sense, the second criticism is directed against the central part of Atienza's theory of judicial balancing.

The first criticism is directed against Atienza's typology of norms and the distinction between them on the basis of their structure and the idea of the "openness" and "closure" of the antecedent and the consequent.[581] Principles, according to this view, are norms with an open antecedent, while rules are norms with a closed antecedent. Fundamental rights, Atienza also argues, are usually expressed in norms that have the structure of principles. A norm is usually considered a principle if it protects a particular good that is considered fundamental by a particular legal community.[582] However, in Atienza's typology of norms, as Ratti points out, there are not only evaluative tenets such as this one, but also structural, since Atienza argues that principles must have an open antecedent.[583] There is no *logical* reason why principles should be regarded as conditionals with an open antecedent and rules as conditionals with a closed antecedent.[584] Not only are there no logical reasons to support this view, as Ratti argues, but there is also a paradox in Atienza's theory.[585] In Atienza's conceptual framework:

> "…principles (or at least some of them) must, for logical reasons, have a closed antecedent (*i.e.* must be indefeasible), whereas rules (all rules) are always potentially open with regard to their antecedent (*i.e.* are essentially defeasible)."[586]

This, however, is exactly the opposite of what Atienza has argued.[587] A rule or principle can be overridden by a principle or set of principles in at least two situations: first, whenever a case which is *prima facie* resolved by a rule does not fall within the scope of application of the principle or principles that supposedly underlie the rule; and second, whenever a case which is

[581] On the criticism, see Ratti (2010), pp. 283-287 and pp. 288-290. As Ratti (2010), pp. 286-287 writes, "In brief, norms can thus be considered to have an open antecedent when their antecedent is treated as contributory condition to the consequent, and a closed one when it is regarded as a sufficient condition. Norms may be considered to have an open consequent when their consequent allows for further implicit disjuncts, and a closed consequent when it does not so allow."
[582] Ratti (2010), pp. 288-289. For such view, see also Guastini (2011b), pp. 175-176. This aspect of 'fundamental character' of a norm is, of course, not the only one according to which a norm can be classified as legal principle, but it is generally held by the authors (and also by Atienza).
[583] Ratti (2010), p. 289.
[584] Ratti (2010), pp. 288-290. The reasons given in favour of treating different norms in different ways are extra-logical (and can only be extra-logical, as Ratti indicates).
[585] For this critique, see Ratti (2010), pp. 287-288.
[586] Ratti (2010), p. 288.
[587] Ratti (2010), p. 287.

not resolved *prima facie* by a rule falls within the scope of application of a principle or set of principles.[588] This means, as Ratti summarizes it, that the "deontic qualification provided by a rule can change whenever the underlying principle suggests otherwise".[589] It follows that at least some principles are indefeasible and that rules are inherently defeasible, leading to a contradiction in Atienza's theory of norms.[590]

The second criticism relates to Atienza's understanding of judicial balancing. We have seen in section II. 2. 4. 1. that judicial balancing according to Atienza consists of three steps. In the first step, it is established which principles are in conflict regarding certain behaviour in the concrete case. In the second step, a priority of one principle over the other is established by taking into account the circumstances of the case and by stating the reasons in support of such priority. Finally, in the third step, a rule, which represents a "translation" of the priority of one principle over the other in deontic terms is constructed, which forms the basis of the subsumption that follows.

Atienza's theory of judicial balancing has been criticized and described as an *arbitrary* procedure leading to *dangerous* consequences.[591] According to the first point of criticism, judicial balancing is an arbitrary procedure because its outcome depends on the preferences and normative attitudes of judges.[592] Even in cases where judges are faced with a clear and univocal rule and a consolidated interpretation from precedents, judges (at least sometimes) discretionarily resort to judicial balancing to resolve the case.[593] This is problematic because

[588] Ratti (2010), p. 287. See Atienza & Ruiz Manero (2000), p. 91ff.
[589] Ratti (2010), p. 287.
[590] Ratti (2010), p. 287. As Ratti (2010), p. 288, points out, in Atienza's framework, the defeasibility of rules depends on the "weight" of the principles that underlying it have: "A rule is defeasible when the principles that underlie it are weaker (or have less weight) than other principles. However, whether a rule is defeasible or not always depends on principles: *i.e.* the non-contingent defeasibility of some principles is exactly what makes some rules contingently defeasible." And this, as Ratti concludes, leads to the paradox indicated above. For the problematic idea that principles have "weight", see section I. 6. 1. 3., where criticisms of Alexyan theory of balancing was presented.
[591] These two characteristics of balancing are identified by Chiassoni (2019b), p. 220 as two main points of criticism made by Juan Antonio García Amado. For an overview of García Amado's criticism and the subsequent debate with Atienza, see Chiassoni (2019b), pp. 220-227. For the criticism, see García Amado (2012), pp. 39-85. García Amado is a critic of judicial balancing, and he argues for an alternative, interpretative-subsumptive method for the resolution of conflicts between fundamental rights. His method is analysed in Chapter III (III. 3.).
[592] Chiassoni (2019b), p. 220.
[593] Chiassoni (2019b), p. 221. This criticism is illustrated by García Amado (2012), pp. 57-70 on *Gürtel* case (2010). The case concerned the admissibility of interference with the communication between prisoners and their defence attorneys. A legal provision (Art. 51 of the Ley Orgánica 1/1979, General Penitenciaria) stated the following: "Las Comunicaciones de los internos con el abogado defensor o con el abogado expresamente llamado en relación con asuntos penales y con los procuradores que lo representen, se celebrarán en departamentos apropiados y *no podrán ser suspendidas o intervenidas salvos por orden de la autoridad judicial y en los supuestos de terorismo*." [emphasis added]. Based on this provision, the court annulled the wiretapping of defendants (who were high-ranking party member accused of political corruption). Atienza (2012), pp. 27-28 supported a dissenting opinion, arguing that the intervention in communication by wiretapping is justified in this case. For Atienza's argumentation, see also García Amado (2012), p. 63. What García Amado (2012), p. 68 considers

judges can resort to balancing according to their preferences and qualify the case as an axiological gap, that Atienza argues should be resolved through balancing.[594] Judicial balancing is therefore criticized as a discretionary procedure that depends on the judges' evaluative preferences. What one judge considers to be "correct" balancing, another judge may consider "incorrect" balancing, with no way to rationally resolve this disagreement.[595] In this sense, judicial balancing is described as a "persuasion technique" aimed at resolving the conflict between fundamental rights (understood as legal principles) by claiming to be a rational and objective method, while in fact it is "methodologically anarchic, irrational and subjective".[596] As for the second point, that judicial balancing leads to dangerous consequences, judicial balancing is criticized as a method that makes rules defeasible (or subject to revision) dependent subjective preferences of the interpreter.[597] This, critics argue, leads to a weakening of the protection of fundamental rights, since judges (when they use judicial balancing to decide cases of conflicts between fundamental rights) can "weaken" the protection of fundamental rights prescribed by the legislature.[598] If Atienza's theory of judicial balancing is accepted as a method of resolving conflicts between fundamental rights, judges can introduce exceptions to the norms protecting fundamental rights.[599] Unlike the exceptions that the legislature prescribes, these possible exceptions are both infinite and not known in advance.[600]

II. 2. 5. 2. Conclusions

problematic in the resolution of the case suggested by Atienza is the affirmation that the principle of effective prosecution of crime prevailed the right to defence in virtue of having greater "weight".

[594] Chiassoni (2019b), p. 221. On Atienza's position, see Atienza (2006), p. 168.

[595] Chiassoni (2019b), p. 221. García Amado (2012), p. 82, arguing that balancing is a subjective valuation, writes that "*Ponderar, entonces, no es más que valorar subjetivamente* – aunque sea con ánimo de respaldar esas valoraciones con razones que tienen un honesta pretension de convecer a los interlocutores posibles – que los principios (en abstracto o en el caso) pesan." [emphasis added].

[596] Chiassoni (2019b), p. 221. See also García Amado (2012), pp. 81-82 and García Amado (2012), p. 68, where he argues (in the context of *Gürtel* case) that the right to defence should "outweigh" (more precisely, take precedence) over the principle of effective prosecution of crime. García Amado argues that the disagreement in this case is a matter of difference in personal preferences between individual rights and state interests.

[597] Chiassoni (2019b), p. 222. On this point, see also Chiassoni (2019b), p. 227 and Núñez-Vaquero (2017a), pp. 267-269.

[598] Chiassoni (2019b), p. 222. García Amado (2012), pp. 67-68 uses *Gürtel* case to support this point. The decision of the lower court which allowed the wiretapping of communication between prisoners and their defence attorneys was (correctly, in his view) annulled because the relevant provision (Art. 51 of the Ley Orgánica 1/1979, General Penitenciaria) leaves no space for a different decision. However, according to the dissenting opinion (supported by Atienza), the principle of effective prosecution of crime should have taken precedence. García Amado disagrees (correctly, in my view) with such "weakening" of the right to defence (in fact, defeat in this concrete case). For a similar criticism of judicial balancing, see also Ferrajoli (2007a), pp. 91-93 and Ferrajoli (2011a), pp. 44-52 and Chapter III, in which Ferrajoli's proposal, alternative to judicial balancing, is analysed.

[599] García Amado (2012), p. 72.

[600] García Amado (2012), p. 72. On this point, see also Núñez-Vaquero (2017b), p. 59, fn. 14.

We will now turn to Manuel Atienza's theory of judicial balancing and his understanding of the basic notions we have analysed and present a summary and conclusions about it. This is done to allow for a comparison of his approach to the issue of apparent conflicts between fundamental rights with the approaches of other authors with whom we deal with in this work. In particular, we will consider his theory of judicial balancing in the context of the two theories presented earlier from Robert Alexy and Aharon Barak.

Manuel Atienza has developed a theory of judicial balancing that is an alternative to the Alexyan theory of judicial balancing, stating that he agrees in part with Alexy's ideas but disagrees on three important points: first, Atienza distinguishes between four (rather than two) types of legal norms; second, he understands balancing as part of external (rather than internal) justification; third, he considers the use of the weight formula problematic, arguing that the use of a mathematical formula for legal reasoning can give the false impression that we are dealing with a calculus or a form of algorithm that can be followed to resolve cases. (II. 2. 2.).

Atienza understands judicial balancing as a form of justificatory reasoning that judges employ when they apply principles (more specifically, principles in the strict sense) to resolve cases. The process of judicial balancing, as Atienza understands it, can be represented by two premises, which are the first two steps of judicial balancing, with the conclusion being the third step:

1) In the concrete situation S, principles P1 and P2 establish conflicting normative requirements (for example, P1 permits q while P2 prohibits it).

2) In the concrete situation S, under certain circumstances C, one principle takes precedence over the other (for example, P2 over P1).

3) Thus, in this concrete situation S and under certain circumstances C, it is justified to introduce a norm which established that if p (a set of properties that includes those derived from the circumstances C), then prohibited q.

With respect to the basic notions we have analysed, it has been shown that Atienza is a proponent of a cognitivist theory of interpretation (II. 2. 3. 1.). He distinguishes between interpretation in the broad sense (which is equivalent to understanding something) and interpretation in the strict sense (as a clarification of a doubtful meaning of an entity susceptible to having a meaning). Judicial balancing plays a prominent role in constitutional interpretation, in contrast to the interpretation of ordinary courts, because the necessity of balancing arises from the fact that judges, and especially judges of constitutional courts, apply principles as well as rules. Therefore, judicial balancing is a method of applying principles in the strict sense. As for the typology of norms, Atienza (together with Juan Ruiz Manero) has developed a version

of the so-called strong distinction thesis, which distinguishes between four types of norms (two types of rules and two types of principles): action rules, end rules, principles in the strict sense and policies. His typology of norms is based on the "openness" and "closure" of the antecedent and the consequent[601] (II. 2. 3. 2.). Fundamental rights are understood as subjective public rights expressed in constitutions. Atienza rejects what he calls a purely "normative" conception of fundamental rights and argues for an evaluative dimension in the form of ethical theories that justify the classification of rights as "fundamental". Atienza takes a conflictivist standpoint with regard to the conflicts of fundamental rights (II. 2. 3. 3.).

The evaluation of Manuel Atienza's theory of judicial balancing as a method for resolving the apparent conflicts between fundamental rights is made with reference to the Alexyan theory of judicial balancing, since Atienza partially agrees with Alexy's ideas, but also disagrees on some points, as we have already shown in section II. 2. 2. The most important difference is Atienza's rejection of the weight formula, since Atienza rejects the idea that there can be such a mathematical formula that could serve as a calculus or algorithm for solving cases. In this way, Atienza, like Aharon Barak, avoids the criticisms raised against the numerical representation of the idea of weight, which was discussed in section I. 6. 1. 3.

Atienza criticized Alexy's idea of principles as optimization commands and proposed a distinction between two types of rules and two types of norms based on the openness or closure of antecedent and consequent. However, such a structural distinction between norms, according to which principles must have an open antecedent and rules must have a closed antecedent, has no logical grounds to support it, as with criticism in the previous section. Thus, Atienza's version of the strong distinction between rules and principles, just like the distinction proposed by Alexy, faces criticism that call it into question.

In Atienza's view, principles are not suitable for solving concrete cases directly because they are only *prima facie* reasons. In order to apply principles, they must first be converted into rule(s), and this is what Atienza calls 'balancing in the strict sense'. The idea that conflicting principles (as norms protecting conflicting fundamental rights) must be converted into rules in order to be applicable distinguishes Atienza's view from the views of Robert Alexy and Aharon Barak. As he argues,

[601] Action rules have closed both antecedent and consequent, while end rules have closed antecedent and open consequent. Principles in the strict sense have open antecedent and closed consequent, while policies have both antecedent and consequent open. On this point, see Atienza & Ruiz Manero (1998), pp. 7-11.

> "…balancing takes place through a process of construction of a taxonomy in which generic cases and the corresponding rules are formed."[602]

If we analyse a sufficient number of decisions in which the conflict between the same two rights is resolved, we can observe how different rules of action (representing the "translation" of the priority of one principle over the other in deontic terms) are constructed, according to the presence or absence of certain properties.[603] With this idea, Atienza explicitly emphasizes the relevance of properties and the possibility of observing their presence or absence as factors that determine which of the principles is assigned greater "weight" (i.e., which of the principles is given precedence). In this sense, Atienza's theory of judicial balancing is arguably less metaphorical Alexy's and Barak's, as it translates the metaphor of "weight" as a relationship of precedence determined by the presence or absence of certain properties, rather than as a product of the factors in the weight formula or as a result of the interpretive balance determined by the purposive interpretation of the norms protecting conflicting fundamental rights. However, criticism of subjectivism and arbitrariness of the balancing process has also been expressed, as authors such as García Amado have argued that judges can introduce exceptions to the norms protecting fundamental rights that have not been prescribed by the legislature (see section II. 2. 5. 1.). The idea that the absence or presence of certain properties is the decisive factor in judicial balancing is also central to the non-Alexyan theory of judicial balancing to which we turn next.

II. 3. José Juan Moreso

II. 3. 1. Introduction

The third author whose approach to the apparent conflicts between fundamental rights is presented is the Spanish legal philosopher José Juan Moreso (1959). Moreso's approach to the issue of the apparent conflict between fundamental rights and his *specificationist* proposal is presented and analysed in this chapter because of its impact and the attention it received among other authors dealing with the topic.[604] Moreso understands judicial balancing as the process of *specification* of principles, or more precisely, specification of the relevant properties of the case, as it will be further explained in the following sections. The specificationist

[602] Atienza (2006), pp. 171-172, translated from the Spanish original by the author.
[603] On this point, see Atienza (2006), p. 172 and section II. 2. 4. 1., in which Atienza's understanding of judicial balancing is presented. In the example of a conflict between freedom of expression and personality rights, these properties could be, for example, the qualification of the expression as a value judgment or factual statement, its truthfulness etc.
[604] Moreso's approach is analysed, for example, by authors such as Celano (2002), Chiassoni (2019b), Comanducci (2016) and Sardo (2012).

approach consists of five stages or steps that are precisely delineated, and it is in this sense that Moreso puts forward an elaborate proposal that has been noted by other authors and, for these reasons, is included in this chapter.

The subchapter is divided into five sections (3. 1. – 3. 5.). In the first section, the introduction (3. 1.), the explanation and justification for the structure and content of the subchapter is presented. In the second section, Moreso's legal philosophy is contextualized (3. 2.). The third section presents Moreso's understanding of basic notions relevant to the problem: first, his views on interpretation (3. 3. 1.); second, his understanding of 'norm' and 'right (3. 3. 2.), and third, his views on apparent conflicts between fundamental rights (3. 3. 3.). This is followed by the fourth, main section (3. 4.), in which the theoretical framework of Moreso's *specificationist* approach is presented (3. 4. 1.) and applied to legal cases (3. 4. 2.): first, to the 2009 European Courts of Human Rights case *Lombardi Vallauri v. Italy* (3. 4. 2. 1.) and second, to the 1992 German Federal Constitutional Court *Titanic* case (3. 4. 2. 2.). The subchapter concludes with a fifth section (3. 5.) presenting criticisms (3. 5. 1.) and conclusions (3. 5. 2.) on Moreso's approach.

II. 3. 2. Moreso's inclusive legal positivism

The problem of the apparent conflicts between fundamental rights is one of the most important topics that José Juan Moreso deals with in his works.[605] One of the issues of the contemporary societies, as Moreso indicates, is the application of constitutional norms that establish rights, since rights established by constitutional norms can come into conflict.[606] Moreso, a supporter of *inclusive legal positivism*, developed a theory of judicial balancing that he calls 'specificationism' as a response and a possible answer to the issue.[607] He developed his specificationist approach as an alternative to what he perceives as the shortcomings of *subsumptive* and *particularist* conceptions of practical rationality.[608] The distinction between these two conceptions of practical rationality is important for the application of norms that establish fundamental rights because it determines the method of their application.[609] Since the specificationist approach is developed as an alternative to both subsumptive and particularist

[605] Moreso developed his specificationist approach in number of his works. See, for example, Moreso (2002a), Moreso (2006a), Moreso (2009b), Moreso (2012), Moreso (2017b).
[606] Moreso (2009b), p. 51 and Moreso (2012), p. 31.
[607] On the Moreso as an inclusive legal positivist, see Moreso (2001), pp. 99-117 and Moreso (2017a), p. 206.
[608] Moreso (2009b), p. 51 and Moreso (2012), p. 31. See also Chiassoni (2019b), pp. 197-198.
[609] Moreso (2006a), p. 15.

approaches, these two approaches will be briefly explained in order to contextualize Moreso's theory and to show what he finds lacking in these approaches.

The adjudication of law is usually understood as an instance of the subsumptive account of practical rationality:

> "Applying the law consists in ascertaining the individual norm that correlates a certain normative consequence with a given individual case. The individual case is presented as an instance of a generic case that is connected with this normative consequence by an applicable norm. This operation is called subsumption."[610]

The subsumptive approach conceives of practical rationality, as Moreso elaborates, as justifying actions by resorting to an underlying principle that requires that the action be carried out in certain circumstances.[611] If it is possible for two principles to conflict (and therefore lead to incompatible actions), the subsumptive approach to practical rationality would be inadequate, he concludes. The only way to maintain the subsumptive approach is, as Moreso suggests, to maintain the position that obligations do not conflict.[612] However, he argues that this view is problematic.[613] From the perspective of the particularist approach, if a feature of a human action is relevant to its rightness in certain circumstances, this does not mean that this feature is also relevant in other circumstances.[614] Particularism, a common theme in moral philosophy (but less so in legal theory, as Moreso points out[615]), can be illustrated with a quote from one of its proponents in the field of moral philosophy, Jonathan Dancy:

> "The leading thought behind particularism is the thought that the behaviour of a reason (or of a consideration that serves as a reason) in a new case cannot be predicted from its behaviour elsewhere."[616]

Moreso finds the particularist critique of the subsumptive approach to the conflicts between fundamental rights convincing due to the value pluralism (characterized by the

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[610] Moreso (2012), p. 32.
[611] Moreso (2012), p. 32.
[612] Moreso (2012), pp. 31-32. Moreso further elaborates the subsumptive account with an example from moral philosophy and the moral principle which states that 'Promises ought to be kept'; while another person might reply that this is not a conclusive reason to do so, because a different principle might require breaking the promise (in this case, the other principle would *defeat* the first principle). Moreso refers here to Immanuel Kant and his *The Metaphysics of Morals*, where he argued that *obligationes non colliduntur* in order to maintain the subsumptive approach. See Kant (1991), p. 50.
[613] Moreso (2012), p. 32. Moreso analyses three cases in which there is a conflict of rights. Besides the Titanic case, which will be referred to later, Moreso presents two cases from Spain: the *priest of Hío* case (STC 20/1992) and the *child Marcos* case (STC/2002). For the details of these cases, see Moreso (2012), pp. 32-34.
[614] Moreso (2017b), p. 89.
[615] For more on particularism in legal theory, Moreso points to Schauer and Redondo. See Schauer (1991), pp. 77-78 and pp. 136-137 and Redondo (1998), pp. 243-276.
[616] Dancy (1993), p. 60.

"variety of our moral landscape").[617] When these criticisms are applied in legal theory, according to Moreso, the particularist conclusion would be that the resolution of the apparent conflicts between fundamental rights is always dependent on context which, in his view, results in the overwhelming amount of discretion being granted to the constitutional courts.[618] Moreso's approach to the apparent conflicts between fundamental rights and his theory of judicial balancing is characterized also by his critique and rejection of particularism.[619] Moreso develops his specificationist theory based on this idea, arguing that it is a version that circumvents (at least some of) the criticisms pointed towards the particularist approaches to resolving apparent conflicts between fundamental rights.[620]

According to Moreso, the *subsumptive* and *particularist* conceptions of practical rationality represent two extremes and between them, the *proportionalist* and *specificationist* approaches can be examined as "intermediate options".[621] Russ Shafer-Landau, an author who influenced Moreso's specificationist approach, writes that

> "When rights appear to conflict with other moral considerations, including other rights, we may resolve the tension by reducing either the scope of the right, or its stringency. I have argued that the best resolution of such cases is to retain maximal stringency while reducing scope through the addition of exceptive clauses."[622]

It follows that, according to Moreso, that there are two possible options, for the dealing with apparent conflicts between fundamental rights: either the *scope* of the rights or their *stringency* can be reduced.[623] Reducing the stringency of rights while maintaining their scope characterizes the proportionalist approach. Reducing the scope of rights while maintaining their stringency characterizes the specificationist approach. According to Moreso, one version of the proportionalist approach to judicial balancing is the approach elaborated by Robert Alexy, while Moreso himself develops a version of the specificationist approach.[624]

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[617] Moreso (2012), p. 34. The challenge that particularist conceptions put forward to subsumptive ones is the argument that moral duties are not absolute, but merely *prima facie*.
[618] Moreso (2012), p. 35.
[619] Moreso (2002a), pp. 22-23 and Moreso (2012), p. 41.
[620] Moreso (2012), p. 41. The criticisms that Moreso puts forward against particularist approaches to the apparent conflicts between fundamental rights are the following: first, he claims that particularist approaches do not offer enough predictability of judicial decisions, and secondly, that judicial balancing, when done from a particularist perspective, is not sufficiently susceptible to rational criticism and assessment.
[621] Moreso (2012), p. 35, referring to Dancy (2004), pp. 3-12.
[622] Shafer-Landau (1995), p. 225. See Moreso (2012), p. 35 and Moreso (2016), p. 363.
[623] Moreso (2012), p. 36.
[624] Moreso (2012), pp. 35-36. Regarding his approach, Moreso (2012), p. 36 states that: "…my position can be viewed simply as a variation on the Alexyan account. *Proportionalist or specificationist balancing* [emphasis added] may only be a development of the Aristotelian view of practical deliberation, of Aristotelian *phronesis*."

The approach to resolving apparent conflicts between fundamental rights we have just described is called 'specificationism', in the sense that the goal is to *specify* all the properties of the case that are potentially relevant.[625] Moreso understands judicial balancing to be the process of specification of principles or as "the activity of tailoring principles to a class of cases".[626] Before further presentation of Moreso's views about the apparent conflicts between fundamental rights, his understanding of interpretation, norm and right and conflicts between fundamental rights will be presented. This is necessary because the theoretical framework he developed depends on the understanding of these notions.

II. 3. 3. Basic notions

The following section introduces José Juan Moreso's understanding of the concepts of interpretation, the structure of the norm and right and his understanding of the apparent conflicts between fundamental rights. We begin with his views on interpretation (II. 3. 3. 1.), followed by his understanding of 'norm' and 'right' (II. 3. 3. 2.), and the distinction between conditional and unconditional norms and defeasible and indefeasible norms, on the basis of which he develops his *specificationist* approach to the conflicts between fundamental rights, the views of which are presented in II. 3. 3. 3.

II. 3. 3. 1. Interpretation

Moreso points out that the term 'interpretation' can mean an *activity* or a *result* of such an activity.[627] To interpret means to determine the meaning of provisions given in legal texts. The object of interpretation are legal texts, while the result of interpretation are norms.[628] Moreso distinguishes between *interpretation in the strict sense* and *interpretation in the broad sense*.[629] Understood in the strict sense, interpretation consists in the attribution of meaning only to those texts that give rise to doubts or controversy about their meaning. If, on the other hand, interpretation is understood in the broad sense, it consists of the attribution of meaning

[625] Sardo (2012), p. 72. See also Moreso (2012), p. 40. For a 'specificationist' approach in the resolution of concrete ethical problems, see Richardson (1990), pp. 279-310.
[626] As Sardo (2012), p. 75 points out, "In partial contrast to Robert Alexy (…), Moreso conceives balancing not as the activity of weighing the principles in a quantitative way, but as the activity of tailoring the principles to a class of cases or, in other words, to make principles more specific." See Moreso (2012), p. 41. On Moreso's specificationist theory as a variant of judicial balancing, see Chiassoni (2019b), p.187ff, who considers his theory to be one of the most original attempts to conceive balancing as a rational way of resolving conflicts between constitutional principles. On Moreso's approach as a variant of judicial balancing, see also Celano (2002), p. 21ff, Comanducci (2016), p. 100ff and Martínez Zorilla (2009), p. 121.
[627] Moreso & Vilajosana (2004), p. 147.
[628] Moreso & Vilajosana (2004), p. 148.
[629] Moreso & Vilajosana (2004), pp. 148-149.

to any legal text, regardless of the existence of doubts or controversies regarding its meaning. The second concept of interpretation is the one used by Moreso, but with the remark that interpretation is not always a value judgment.[630]

Moreso distinguishes three theories of interpretation: *cognitive*, *non-cognitive* and *intermediate*.[631] Moreso is an advocate of a version of the *intermediate* theory of interpretation.[632] This position is also held by H. L. A. Hart,[633] whose version of inclusive legal positivism he defends.[634] According to his intermediate theory, interpretation is sometimes a matter of cognition, and sometimes a matter of decision.[635] Moreso argues that a theory that aims to adequately describe interpretive activity must recognize that there are differences among cases in the sense of difficulties they pose in interpretation.[636] In the context of constitutional interpretation, he defends the so-called 'Vigil' thesis, which he summarizes in four propositions:[637]

> "(1b) *Metaphysical* thesis: Beyond our capacity for knowing the law, as constructed by human beings, there is no legal world that could make constitutional propositions true or false.
>
> (2b) *Semantic* thesis: The meaning of pure constitutional statements is determined by their conditions of assertability, that is by the possibility to show that certain consequences follow from the original legal system, i.e. from the constitution.
>
> (3b) *Logical* thesis: Not all constitutional propositions are true or false.

[630] Moreso & Vilajosana (2004), p. 149. With this remark, Moreso rejects sceptical theory of interpretation.
[631] Moreso & Vilajosana (2004), pp. 158-163. See also Moreso (1998), pp. 131-160, where, in the context of constitutional interpretation, he calls them 'Noble Dream' (for cognitivism), 'Nightmare' (for scepticism) and 'Vigil' (for the intermediate position, which he defends). This tripartite distinction is basically the same as the one from Guastini (1997b) and presented in section I. 3. 1. Cf. also with Chiassoni (2019a), pp. 130ff, who distinguishes between three theories of interpretation: *formalism* ("the noble dream theory"), *realism* ("scepticism", "the nightmare theory") and *mixed* or *intermediate* theory ("eclecticism", "the vigil theory").
[632] See Moreso (1998), p. 133 and Moreso & Vilajosana (2004), p. 160. Moreso rejects non-cognitivism (or scepticism) with an argument that there are, in everyday legal practice, numerous legal texts which do not pose any interpretive problems. As an example, Moreso mentions Art. 12 of the Spanish Constitution, which states that Spaniards legally come of age at eighteen. This provision, argues Moreso, does not seem to present any excessive problems in legal interpretation. In this sense, Moreso holds the position that interpretation cannot be understood only as a decisive or stipulative activity and that is cognitive character cannot be discarded.
[633] Hart (2012), Chapter VII – Formalism and Rule-Scepticism (pp. 124-154) and Hart (1977), p. 989. Moreso (1998), p. 170 indicates that the theses of the Vigil are compatible with Hart's version of legal positivism; even more, Moreso argues that the Vigil thesis represents a conception of interpretation in accordance with Hart's legal positivism.
[634] See Moreso (1998), p. 156 and Moreso (2001), p. 98.
[635] Moreso & Vilajosana (2004), p. 161. Cf. with Guastini (1997b), p. 283.
[636] Moreso & Vilajosana (2004), pp. 161-162. Here, Moreso refers to Hart's well-known idea of the *penumbra of uncertainty*. See Hart (2012), pp. 12-13. The idea is that there is a "core" of settled meaning and a "penumbra" of uncertainty in meaning. See Guastini (1997b), p. 282.
[637] Moreso (1998), p. 134. For the comparison with the other two, the 'Noble Dream' and 'Nightmare', see Moreso (1998), p. 133.

> (4b) *Legal* thesis: Sometimes there is a right answer in a constitutional case, and sometimes, there isn't. On some occasions, courts create law, on others they apply it. Therefore, in those cases where they apply previously existing law, courts can err in establishing the constitutional rights and duties of citizens."

Moreso holds that the process of interpretation is the same regardless of the legal text that is being interpreted, i.e., that these three theories of legal interpretation can be distinguished regardless of the legal text that is the object of interpretation.[638] If we would position Moreso's doctrine of interpretation in the context of Guastini's scheme presented earlier in section I. 3. 1., he would be classified as a proponent of a *mixed* or *middle-way* theory of interpretation. In the remainder of this subsection, we will examine how Moreso understands 'norm' and 'right' and his views on the apparent conflicts between fundamental rights.

II. 3. 3. 2. Norm and right

Regarding the concept of norm, Moreso the theoretical framework of C. E. Alchourrón and E. Bulygin and understands norms as "meanings of sentences correlating generic cases with normative solutions".[639] Norms assign normative consequences to generic cases and enable us to know the deontic status of certain individual cases that are instances of generic cases.[640] Moreso's theory of judicial balancing is based on the distinction between defeasible and indefeasible norms and on the revision of defeasible norms.[641] In this sense, he makes a distinction between conditional and unconditional norms and defeasible and indefeasible norms.[642] Conditional norms are all those that have conditions of application, while the conditions of application of unconditional norms are true in any possible state of affairs. Defeasible norms are the ones which do not admit either the *modus ponens* or the reinforcement of the antecedent.[643]

By combining these two distinctions, four types of norms can be distinguished: (1) conditional defeasible norms (CDN), (2) conditional indefeasible norms (CIN), (3)

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[638] See Moreso (1998), pp. 131-134 and Moreso & Vilajosana (2004), pp. 158-159. In the former, Moreso referred to 'constitutional interpretation', while in the latter, he referred to the interpretation in general.
[639] See Moreso (1998), p. 1, referring to Alchourrón & Buylgin (1971), p. 42. On the distinction between generic and individual cases, Alchourrón & Bulygin (1971), p. 28 give the following examples: the case of political murder and the murder of Mahatma Gandhi and the case of divorce and the divorce between Brigitte Bardot and Gunther Sachs.
[640] Moreso (1998), p. 1.
[641] Celano (2002), p. 34 and Sardo (2012), p. 72. For more on this point, see Moreso (2002a), pp. 23-28.
[642] Moreso (2002a), pp. 23-28. See also Celano (2002), p. 35.
[643] Moreso (2002a), p. 25. Regarding this distinction, Moreso refers to the influence of the ideas of C. E. Alchourrón. For the distinction between four kinds of duties by the criterions also used by Moreso, see Alchourrón (1996), p. 17.

unconditional defeasible norms (UDN) and (4) unconditional indefeasible norms (UIN). The proposed distinction can be illustrated by the following table:

	Conditional norms	Unconditional norms
Defeasible norms	Conditional defeasible norms (CDN)	Unconditional defeasible norms (UDN)
Indefeasible norms	Conditional indefeasible norms (CIN)	Unconditional indefeasible norms (UIN)

The failure to distinguish between the conditional character and defeasible character of principles leads to confusion in the literature regarding the apparent conflicts between fundamental rights, according to Moreso.[644] As for the rule – principle distinction, the difference is in the degree of openness of the conditions of application of norms: when there is a determined list of explicit conditions, we tend to speak of rules, and when the conditions of application are all implicit, we tend to speak of principles.[645] In this sense, Moreso is a supporter of the *weak* distinction thesis.[646] In the context of the distinction presented, Moreso is of view that most constitutional principles belong to the category of *unconditional defeasible norms (UDN)*.[647]

Fundamental rights, in Moreso's understanding, are usually established by constitutional norms that have the structure of principles.[648] Thus, they are rights protected by constitutional norms that have open conditions of application and are defeasible (unconditional defeasible norms, UDN). Moreso's theory of judicial balancing is based on the conception of legal principles as defeasible norms, and their revision through the specification of relevant properties of the case.[649] Let us now examine how the problem of apparent conflicts between fundamental rights is understood.

II. 3. 3. 3. Conflicts between fundamental rights

An antinomy (or normative contradiction) exists in the case C in the universe of cases of a normative system "if and only if C is correlated with at least two solutions which are

[644] Moreso (2002a), pp. 24-25 and Moreso & Vilajosana (2004), pp. 89-93.
[645] Moreso (2002a), pp. 27-28.
[646] Moreso (2009b), p. 277. Hart (2012), pp. 259-263 also adopts the so-called *weak* distinction thesis.
[647] Moreso (2002a), p. 27. Examples that Moreso gives here are freedom of expression, personal right and religious freedom.
[648] Moreso & Vilajosana (2004), p. 89, Moreso (2002a), pp. 23-24 and p. 27 and Moreso (2009b), p. 315.
[649] Sardo (2012), p. 72.

mutually incompatible".[650] Moreso follows Ross's classification of antinomies and distinguishes between three types of antinomies (or "inconsistencies", as Ross calls them):[651] (1) *total-total* antinomy, where neither of the conflicting norms can be applied under any circumstances without conflicting with the other one (the two circles coincide); (2) *total-partial* antinomy, where one of the two norms cannot be applied under any circumstances without conflicting with the other one, while the other norm also has a further field of application in which it does not conflict with the first one (one circle lies inside the other) and (3) *partial-partial* antinomy, where each of the conflicting norms has a field of application in which it conflicts with the other, but also another field of application in which no conflict between the norms arises (the two circles intersect).

Regarding the apparent conflicts between fundamental rights, Moreso adopts a *conflictivist* approach.[652] Following the distinction made by Jeremy Waldron, Moreso distinguishes between *intra*-right and *inter*-rights conflicts.[653] While the first ones are conflicts between different instances of the same right, the second ones are conflicts between particular instances of different rights.[654] Conflicts between fundamental rights are understood by Moreso as partial-partial conflicts *in concreto*. The arguments for this claim will be analysed in the following subsection, which presents Moreso's specificationist approach.[655]

II. 3. 4. Moreso's specificationism

In this section, Moreso's proposal for resolving conflicts between fundamental rights, known as *specificationism*, is presented, and applied to cases. First, the theoretical framework

[650] Moreso & Vilajosana (2004), pp. 104-105.
[651] Moreso & Vilajosana (2004), p. 105. See Ross (1958), pp. 128-132.
[652] Moreso (2009b), p. 323, criticizing Luigi Ferrajoli and his non-conflictivist position, writes that "…pretendo criticar esta tesis de Ferrajoli, mostrando la presencia inerradicable de posibles conflictos entre todos tipos de derechos." For a conflictivist view, see also Moreso (2012), pp. 31-32. For a conflictivist classification of Moreso's views, see also Martínez Zorrilla (2007), p. 63.
[653] Moreso (2009b), p. 324. See Waldron (1989), pp. 513-514.
[654] Waldron (1989), pp. 513-515.
[655] To summarize it here, the conflicts in question can be conceived of as partial-partial conflicts *in concreto* because of the following: in the first stage of Moreso's approach, the normative problem is delimited by selecting human actions which constitute the universe of discourse. In the second stage, the rules and principles *prima facie* applicable to human actions which constitute the universe of discourse are selected. See also Martínez Zorrilla (2011b), pp. 729-731, who uses the term 'Standard Conception' of conflicts between fundamental rights. The three theses which characterize the 'Standard Conception' of conflicts between fundamental rights are the following: first, the normative elements in the conflict (in most cases fundamental legal rights, but also constitutionally protected goods) are legal principles, as opposed to legal rules; second, these conflicts are not determinable *in abstracto*, since the conflicts arises due to the empirical circumstances of the case and is therefore conflict *in concreto*; third, the classical criteria such as *lex superior*, lex posterior and *lex specialis* cannot be used to resolve conflicts between fundamental legal rights. A specific method, called weighing and balancing is required to resolve such conflicts.

of his approach is presented, so that we can get an overview and a reconstruction of the steps required to resolve conflicts between fundamental rights. Secondly, this proposal is applied to two cases: first, to the 2009 European Court of Human Rights *Lombardi Vallauri v. Italy* case, and second, to the 1992 Federal Constitutional Court *Titanic* case.[656]

II. 3. 4. 1. Theoretical framework

The specificationist method of resolving fundamental rights conflicts consists of five stages or steps.[657] Moreso clearly outlined these five stages or steps, so a step-by-step reconstruction of his approach can be given. These five stages are the following:

(1) In the first stage, the *normative problem* is delimited.[658] The delimitation of the normative problem consists in the selection of the human actions that constitute the *universe of discourse*.[659] The purpose of the first stage – determining the universe of discourse – is to make the normative problem manageable. After the universe of discourse has been determined, we are not dealing anymore with all human actions.[660]

(2) The second stage consists of identifying rules and principles that are *prima facie* applicable to the universe of discourse selected in the previous stage.[661] In this stage, the conflicting norms are identified.

(3) In the third stage, certain *paradigmatic cases* (either real or hypothetical) of the universe of discourse selected in the first stage are considered. Paradigmatic cases are real or hypothetical cases for which there is a solution which, in hypothesis, is "obvious", since it is

[656] For details of the application of the five-stage specificationist approach on these two cases, see Moreso (2016), pp. 369-371 (for the *Lombardi Vallauri v. Italy* case) and Moreso (2012), pp. 39-41 (for the *Titanic* case). For Robert Alexy's reconstruction of the *Titanic* case, BVerfGE vol. 86, 1., see Alexy (2003a), pp. 137-140 and section I. 4. 2. 2. in the previous chapter.

[657] Moreso (2012), pp. 39-41. For a reconstruction of Moreso's approach, see also Chiassoni (2019b), pp. 198-200.

[658] Moreso's theory of judicial balancing was influenced by the writings of Carlos E. Alchourrón and Eugenio Bulygin, particularly their *Normative systems*. In the book, Alchourrón and Bulygin elaborated and defined some of the notions that Moreso uses in his approach, for example 'normative problem' and 'universe of discourse'. Alchourrón & Bulygin (1971), pp. 9-10, use an example from Argentinian law to define some basic notions they use. The example given is a normative problem of the recovery of the real estate from third holders, which arises when a person who is not the owner of the real estate (but only in possession of it) transfers it to a third person. A question then arises and consists in the following: How can the owner of the real estate recover his possession from the third person? A 'normative problem' is defined as a "question concerning the deontic status of certain actions, i.e. whether these actions are permitted or prohibited or obligatory etc.".

[659] The 'universe of discourse' is "the set of all particular situations in which the action(s) in question may be performed", Bulygin (2015), p. 347. See also Alchourrón & Bulygin (1971), p. 10, where the universe of discourse is defined as the "certain set of situations or states of affairs in which this action [restitution of the real estate, remark added] may take place".

[660] Moreso (2012), p. 40 and Moreso (2016), p. 369.

[661] Moreso (2012), p. 40 and Moreso (2016), p. 369.

assumed that "everyone" in the legal culture in question would consider it legally correct.[662] The function of the paradigmatic cases, as Moreso suggests, is to constrain the scope of admissible reconstructions and to admit only those reconstructions "that cover paradigmatic case in an effective manner".[663] Paradigmatic cases, as Moreso argues, show that judicial balancing is not a radically subjective value judgment because paradigmatic cases limit the choice of the possible solutions.[664]

(4) In the fourth stage the *relevant properties* of the universe of discourse are established.[665] These relevant properties lead to normative solutions. Relevant properties are those properties whose presence or absence leads to different solutions of normative problem.[666] The identification of relevant properties is made from the paradigmatic cases. This operation leads to the identification of the original set of relevant properties.[667] This original set of relevant properties can change in the presence of cases in the light of which other properties must also be considered relevant.[668]

(5) In the fifth and final stage, rules are formulated that univocally solve all the cases of the universe of discourse.[669] The rules obtained at the end of this five-stage process are then applied in the subsumptive form.[670] After the revision of conflicting principles, at the very end of the five-stage approach of specificationism, the norms obtained are compatible with each other. In Moreso's account, the solution of an individual case presupposes the solution of all individual cases of the same universe of discourse.[671] In this sense, when there is a conflict between two principles (e.g., freedom of expression and personality rights, such as in the *Titanic* case), these two principles should be reconstructed in such a way that not only the concrete conflict is resolved, but also that a rule valid for future cases is established.[672] These

[662] Chiassoni (2019b), p. 199.
[663] Moreso (2012), p. 40 and Moreso (2016), p. 369.
[664] Moreso (2002a), p. 23. Moreso uses a Kelsenian metaphor of 'frames' (*Rahmen*) for paradigmatic cases, arguing that they represent frames inside which the value judgment must be realized in order to be admissible. For the idea of *Rahmen*, see Kelsen (1960), p. 350ff.
[665] Moreso (2012), p. 40 and Moreso (2016), p. 369.
[666] Chiassoni (2019b), p. 199 and Moreso (2006a), p. 24.
[667] The terminology *original set of relevant properties* (*conjunto originario de propiedades relevantes*) is not used by Moreso, but suggested by Chiassoni (2019b), p. 199.
[668] Chiassoni (2019b), p. 199. This process, as Chiassoni indicates, is "tendentially inexhaustible". The establishment of the relevant properties of the universe of discourse is, according to the critics of Moreso's specificationist account, the weakest point in his theory. More on this in section II. 3. 5. 1., which presents criticisms of Moreso's theory of judicial balancing and in particular, his discussion with Bruno Celano.
[669] Moreso (2012), p. 40 and Moreso (2016), p. 370
[670] Moreso (2012), p. 41.
[671] Moreso (2012), p. 41.
[672] Sardo (2012), p. 73.

are the five stages or steps of the specificationist approach. In the next paragraph, their application to two cases mentioned (*Lombardi Vallauri v. Italy* and *Titanic*) is presented.

II. 3. 4. 2. Application

II. 3. 4. 2. 1. Lombardi Vallauri v. Italy (2009)

The facts of the European Court of Human Rights case *Lombardi Vallauri v. Italy* may be summarised as follows:[673] An Italian professor of philosophy of law, Eduardo Lombardi Vallauri taught at the law faculty of Catholic University in Milan, with his contract having been renewed annually for over 20 years. In the academic year of 1998/1999, he reapplied for the position. The Congregation of Catholic Education, an institution of the Holy See, informed the head of the University that some of Lombardi's ideas (namely, those about hell) were contrary to Catholic teaching, and stated that his application should not be accepted. In accordance with the Holy See's position, the faculty board decided to ignore Vallauri's application. The approval of the Congregation of Catholic Education was one of the conditions for admission to the position. The university authorities never informed the Vallauri of the reasons and his appeals were rejected by the Italian judicial bodies. Professor Lombardi Vallauri then appealed to the ECtHR.

(1) Following the theoretical framework presented in the previous subsection, we begin the application of the specificationist approach to the case with the first stage – the delimitation of the *normative problem*. Delimiting the normative problem consists in selecting the human actions that constitute the *universe of discourse*, with the aim of making the normative problem manageable. When we determine the universe of discourse, we are not dealing with all human actions, but only with certain ones. In the case of *Lombardi Vallauri v. Italy*, the universe of discourse may be university professors expressing religious opinions.

(2) The second stage of the specificationist approach is to identify rules and principles that are *prima facie* applicable to the universe of discourse selected in the first stage – university professors expressing their religious views. In the *Lombardi Vallauri v. Italy*, the applicable principles are those that establish freedom of expression and legitimate interest of the institutions.[674]

[673] See Moreso (2016), pp. 359-361 for more details and *Lombardi Vallauri v. Italy* (application no. 39128/05) ECtHR 20 October 2009.

[674] Moreso formulates it as 'the legitimate interest of the faith-based academic institutions to preserve their religious convictions'. Moreso (2016), p. 369.

(3) In the third stage, *paradigmatic cases*, either real or hypothetical, from the universe of discourse selected in the first stage are considered. In relation to the case of *Lombardi Vallauri v. Italy*, Moreso proposes to consider the following two paradigmatic cases:[675] the first, in which a university professor of a public, non-confessional university expresses atheist convictions and the second, in which a university professor at a Catholic university publishes a book which arguing that all Catholic dogmas are false. In the first case, the right to freedom of expression would take precedence, while in the second case it would be superseded by the other principle.

(4) In the fourth stage, the *relevant properties* of the universe of discourse are established, and these relevant properties lead to normative solutions. In the case of *Lombardi Vallauri v. Italy*, the relevant properties according to Moreso would be first, the tenure position in a faith-based academic institution, and second, the presence or lack of reasons given by the institution in case of dismissal.[676]

(5) Finally, in the fifth stage, rules are formulated that univocally solve all cases of the universe of discourse, and then applied in the subsumptive form. In the case *Lombardi Vallauri v. Italy,* Moreso proposes the following two rules as indisputable:[677]

> R1: 'In a non-confessional university, professors have the right to express their religious convictions.'
>
> R2: 'In a confessional university, the institution has a legitimate interest to protect the religious beliefs and, therefore, is authorized to dismiss professors who express opinions contrary to the dogma, giving adequate reasons.'

At the end of the five-stage process, after reviewing the conflicting principles (freedom of expression versus legitimate interest of the institution), the two norms obtained (R1 and R2) are compatible. In Moreso's view, the solution of this individual case presupposes the solution of all individual cases of the same universe of discourse. The reconstruction or specification of the two conflicting principles led to the establishment of a rule which is valid for future cases. The ECtHR ruled in 2009 that "the interference with the freedom of expression in this case was not justified. The lack of justification arose from the omission of the explanation of how the applicant's view, allegedly contrary to the Catholic doctrine, had affected the university's interests".[678]

[675] Moreso (2016), p. 369.
[676] Moreso (2016), pp. 369-370.
[677] Moreso (2016), p. 370.
[678] See Moreso (2016), p. 360 and *Lombardi Vallauri v. Italy* (application no. 39128/05) ECtHR 20 October 2009.

II. 3. 4. 2. 1. *Titanic case* (1992)

Let us now apply the specificationist approach to the *Titanic* case, the facts of which are already known from the previous subchapters, so it is not necessary to repeat them here.

(1) We begin by delimiting the *normative problem* – selecting the human actions that constitute the *universe of discourse* so that the normative problem becomes manageable. The normative problem becomes manageable when we limit it to certain human actions rather than all of them. The universe of discourse in the *Titanic* case, according to Moreso, can be "human actions of information in the mass media on the questions affecting concrete persons".[679]

(2) We proceed to the second stage – the identification of rules and principles that are *prima facie* applicable to the universe of discourse selected in the first stage. In the *Titanic* case, the applicable principles are those that establish freedom of speech and personality rights.

(3) In the third stage, *paradigmatic cases*, either real or hypothetical, from the universe of discourse selected in the first stage are taken into consideration. In relation to the *Titanic* case, Moreso suggests two paradigmatic cases to consider:[680] The first consists in the publication of an unfounded report, with no intention of providing confirmation, that the Archbishop of Barcelona is involved in a child prostitution ring. This, as Moreso goes on to point out, is a clear example in which the personality rights take precedence over freedom of speech. In another paradigmatic case, the publication of an accurate report stating that a minister accepted a large bribe from a certain company in exchange for a contract with the government, is a case where the freedom of speech takes precedence over personality rights.

(4) In the fourth stage, the *relevant properties* of the universe of discourse are established. In the *Titanic* case, the relevant properties according to Moreso would be first, the public impact of the news report; second, the ability of the report to overcome the malice test and third, the assurance that the report does not contain insults.[681]

(5) The fifth and final stage involves formulating rules that univocally solve all cases of the universe of discourse and then applying them in subsumptive form. In the *Titanic* case, Moreso argues that there are two indisputable rules that could be formulated:[682]

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[679] Moreso (2012), p. 40.
[680] Moreso (2012), p. 40. Regarding paradigmatic cases, Moreso uses two mentioned examples (in which there is a conflict between rights, understood as principles), to argue that we can often *intuitively* find a solution, with the solution being *obvious*. See Moreso (2002a), p. 23.
[681] Moreso (2012), p. 40.
[682] Moreso (2012), pp. 40-41.

R1: ‘News of public interest that overcome the malice test and does not contain insults is permitted’.

R2: ‘News that is not of public interest or that is unable to overcome the malice test or contains insults is forbidden and damages may be awarded’.

The rules that are the result of applying the specificationist method to fundamental rights conflicts provide us with mutually compatible rules that lend themselves to application in subsumptive form, resolving all conflicts between the two fundamental rights in question in the selected universe of discourse. In this sense, we can state that specificationism is a variant of judicial balancing that consists in the process of specifying principles and adapting them to a class of cases in the five-stage process just presented. The specificationist process has been subject to criticism, which will be analysed in the next section.

II. 3. 5. Criticisms and conclusions

II. 3. 5. 1. Criticisms

This section presents two criticism of Jose Juan Moreso’s theory of judicial balancing. The first and most important criticism, elaborated by Bruno Celano, is directed against the fourth step of his proposal – the identification of all *relevant* properties of the universe of discourse. The second criticism is made by Paolo Comanducci and is directed against the supposed confusion between “is” and “ought” in Moreso’s proposal. The first criticism is of particular importance because it is directed against a characteristic feature of Moreso’s proposal and also because it challenges the central point around which his proposal is built.

In Moreso’s framework, the rules that resolve the conflict between fundamental rights in the selected universe of discourse are obtained in the fifth stage and are the result of the selection of relevant properties, an activity carried out in the fourth stage. Bruno Celano criticized this idea by pointing out that an adequate *thesis of relevance* is necessary to identify these relevant properties. If this criticism is valid, the specificationist approach and its objective to successfully overcome the deficits of particularistic conceptions of judicial balancing, come into question.[683] We have seen that Moreso’s specificationism is based on the revision of defeasible norms (legal principles) expressing conflicting fundamental rights. The result of the specification process is two mutually compatible rules, R1 and R2, which are applicable in subsumptive form. These rules resolve all conflicts between fundamental rights in the selected universe of discourse and depend on the properties that have been identified as relevant. In

[683] Celano (2002), pp. 45-46, Chiassoni (2019b), pp. 187-188 and p. 201 and Sardo (2012), p. 78. On Moreso’s criticism of particularistic conceptions of judicial balancing, see section II. 1. 3. 2.

order to identify these relevant properties, an adequate *thesis of relevance* is necessary.[684] Celano begins his argument by questioning the (in)defeasibility of the norms obtained at the end of the specification process and setting out the problematic implications of the answers.[685] If they are treated as defeasible, Moreso's proposal would lose its theoretical and practical utility, since the conflict would not be resolved; it would be open to new revisions leading to new defeasible norms.[686] On the other hand, if they are considered indefeasible (as Moreso's proposal suggests), the specificationists' proposal would allow for a stable revision of the conflicting principles.[687] An *ultimate thesis of relevance* is that which would define in advance and in complete form all generic cases which are descriptively and prescriptively relevant.[688] This ultimate thesis of relevance would allow for stable revisions and the exclusion of further changes in the universe of relevant properties, Celano argues.

However, the possibility of a stable revision is not demonstrated by Moreso, and Celano argues that such a revision cannot be established and that the revision process necessary remains unstable, i.e., subject to further revisions.[689] As Bruno Celano concludes, it seems that it is impossible to establish stable revision, which means that it is always possible to refute any formulation of any thesis of relevance, arguing that there are other relevant properties of the case that have not been considered.[690] The defeasibility and selection of relevant properties that Moreso proposed is defeasibility based on "substantial moral considerations" or "defeasibility on ethical grounds", as Celano argues.[691] Moreso replied to this criticism by arguing that constitutional courts do not deal with an infinite set of properties, but only with a limited one.[692] If there is a new relevant property that was not previously considered, a more complex universe of properties that includes the new relevant property (or properties) into account must be used.[693] With the addition of the new relevant property into the more complex universe of

[684] Sardo (2012), p. 73, indicates that "In order to identify the relevant properties an adequate *thesis of relevance* is necessary. But it seems always possible to refute *any* formulation of *any* thesis of relevance, claiming that the considered ones are not the only relevant properties of the case: there are other relevant properties." On this point, see Celano (2002), pp. 40-41. On the thesis of relevance, see Alchourrón & Bulygin (1971), pp. 103-106.
[685] Comanducci (2016), p. 102. See also Celano (2002), p. 35.
[686] On this point, see Comanducci (2016), p. 102.
[687] Celano (2002), pp. 35-36 and Comanducci (2016), p. 102.
[688] Celano (2002), p. 40, explains what he understands under the ultimate thesis of relevance: "(…) bisognerebbe poter disporre di una determinazione ultima, tale da precludere la possibilità di ulteriori modifiche, dell'universo delle proprietà rilevanti; bisognerebbe, in breve, poter disporre di una tesi di rilevanza tale da definire anticipatamente, in forma compiuta, la totalità dei casi generici sia descrittivamente sia prescrittivamente rilevanti. Chiamero 'tesi di rilevanza ultima' una simile tesi di rilevanza." On the thesis of relevance, see Alchourrón & Bulygin (1971), pp. 103-106.
[689] Celano (2002), p. 35 and p. 39. See also Chiassoni (2019b), p. 209.
[690] Celano (2002), p. 35. See also Sardo (2012), p. 73 and p. 78
[691] Celano (2002), p. 37.
[692] Moreso (2009b), pp. 286-288. On this point, see Sardo (2012), pp. 73-74.
[693] Sardo (2012), p. 74. See Moreso (2009b), pp. 286-288.

properties, a new universe of cases is created.[694] This is what happens, as Moreso argues, when judges use the technique of *distinguishing*, by taking into account new relevant properties and refining the universe of cases.[695] We will return to the assessment of this debate (and the success of overcoming particularism) in the next section on conclusions.[696]

The second criticism, made by Paolo Comanducci, consists in the claim that the specificationist proposal lacks explanatory capacity to explain the practice of contemporary legal systems.[697] According to this criticism, the specificationist account does not tell us how judges resolve conflicts between fundamental rights, but how they *should* be resolved. Of course, offering a normative proposal for resolving conflicts between fundamental rights is not a problem and it can improve the functioning of legal systems, as Comanducci points out. What he finds problematic, however, is the confusion between proposals that are normative in an ethical and political sense (and therefore "value-compromised") and models that aim to explain the practice of contemporary legal systems.[698] As he notes with reference to Bobbio, this would mean confusing the *law as it is* with *law as it ought to be*.[699]

II. 3. 5. 2. Conclusions

We now come to the conclusions regarding Moreso's specificationist proposal. Since the work aims to provide a comparison of legal methods for resolving the apparent conflicts between fundamental rights, we will first present a brief summary of Moreso's views on the basic notions analysed and the proposal he developed. On the basis of this, a comparison with other methods will be possible. The section will conclude with an overview of the strengths and weaknesses of Moreso's proposal.

Moreso developed his five-stage specificationist proposal as an alternative to two conceptions of practical rationality, the subsumptive and the particularist (II. 3. 2.). These two conceptions are understood as extremes, and Moreso argues that his specificationist approach and Alexy's proportionalist approach represent the intermediate options. The difference between the two intermediate approaches is that specificationism reduces the scope of rights while maintaining their stringency, while proportionalism reduces the stringency of rights

[694] Moreso (2009b), p. 288.
[695] Moreso (2009b), p. 288. On this point, see Sardo (2012), p. 74.
[696] However, it can already be indicated that Celano (2002), pp. 45-46, Chiassoni (2019b), pp. 209-212, Comanducci (2016), pp. 101-102 and Sardo (2012), pp. 77 do not think that Moreso succeeded in overcoming particularistic conceptions of balancing with his specificationist proposal.
[697] Comanducci (2016), p. 102.
[698] Comanducci (2016), p. 102.
[699] Comanducci (2016), p. 102: "Lo que no me parace lícito, para decirlo con Viejas palabras de Bobbio, es confundir el derecho tal como es, con el derecho como debería ser."

while maintaining their scope.[700] Moreso suggests that the judicial balancing is understood as the process of identifying relevant properties based on paradigmatic cases (either real or hypothetical). The absence or presence of relevant properties leads to normative solutions, and in the final stage of judicial balancing, mutually compatible rules that univocally resolve all cases in the universe of the discourse are formulated and applied in subsumptive form (II. 3. 4. 1.). In this way, judicial balancing is understood as a process of revision of conflicting constitutional principles, at the end of which we obtain revised principles in the form of mutually compatible rules that univocally resolve all cases in the universe of discourse we are dealing with.

As far as interpretation is concerned, Moreso is a proponent of the mixed theory of interpretation (or, as he calls it, 'intermediate' or 'Vigil') and holds that the process of interpretation is the same regardless of the legal text being interpreted. In this sense, he considers that constitutional interpretation is no different from the interpretation of other legal texts (II. 3. 3. 1.). As for his understanding of norm, he bases his theory of judicial balancing on the distinction between defeasible and indefeasible norms and between conditional and unconditional norms (II. 3. 3. 2.). By combining these two distinctions, four types of norms can be distinguished, with Moreso holding that most constitutional principles belong to the category of unconditional defeasible norms.[701] As for the distinction between rules and principles, Moreso is a proponent of the so-called weak distinction thesis (II. 3. 3. 2.). The difference lies in the degree of openness of the conditions of application of norms: when there is a determined list of explicit conditions, we tend to speak of rules, and when the conditions of application are all implicit, we tend to speak of principles. In Moreso's account, conflicts between fundamental rights (as a class of constitutional rights that are usually established by constitutional norms that have the structure of principles) are resolved on the basis of the presence or absence of relevant properties of the paradigmatic cases (II. 3. 4. 1.).

Comparing Moreso's theory of judicial balancing with other theories of judicial balancing that we have analysed (in particular, with the Alexyan theory of judicial balancing as the mainstream conception of judicial balancing), the main difference that stands out is the absence of the notion of "weight" in the reconstruction of the process. In Moreso's specificationist approach, what provides normative solutions is not the "weighing" of

[700] Moreso (2012), p. 35-36.

[701] These norms are unconditional, which means that their conditions of application are true in any possible state of affairs, and they are also defeasible, which means that they do not admit either the modus ponens or the reinforcement of the antecedent. See Moreso (2002a), p. 25.

conflicting principles (in fact, he objects to the idea of "weight"[702]), but the presence or absence of relevant properties. In this sense, he shares the idea of the importance of relevant properties with Manuel Atienza (II. 2. 5. 2.) and differs even further from the Alexyan theory of judicial balancing, since he does not use weight formula, but also does not rely on the notion of "weight". By not relying on the idea of "weight", Moreso avoids the criticisms that have been raised against the use the notion. This eliminates a problematic metaphor that the three theories presented earlier must translate into non-metaphorical terms in order to be applied.[703]

The main challenge to Moreso's proposal came from Bruno Celano, who pointed out the need for an adequate thesis of relevance which would allow identifying the relevant properties that determine the normative resolution of the conflict in the selected universe of discourse. If the revised constitutional principles obtained at the end of the specification process are treated as indefeasible norms, Moreso's proposal would allow the possibility of a stable revision of the conflicting principles and prevent further changes in the universe of relevant properties, as Celano suggests. However, as he argues, since the initial defeasibility and selection of relevant properties is based on substantive moral considerations (since paradigmatic cases are understood as cases for which there is a generally acceptable "obvious" solution)[704], other properties may be considered relevant to the case, leading to further defeasibility and the impossibility of a stable revision of the conflicting principles. Thus, the revised principles obtained at the end of the specification process could be revised again and again.[705] Celano's critique shows that the specificationist approach does not completely overcome the particularism it attributes to the Alexyan theory of judicial balancing. The difference, however, is in the criticisms and assessment of judicial decisions: in the case of Alexyan theory of judicial balancing, the discussion revolves around the factors in the weight formula and the values assigned to them, whereas in the case of Moreso's specificationist account, the discussion revolves around the (in)admissibility of relevant properties and their impact on the resolution of the case.

II. 4. Riccardo Guastini

II. 4. 1. Introduction

[702] See, for example, Moreso (2012), p. 37-39.
[703] Chiassoni (2019b), p. 175.
[704] On this point, see Celano (2002), pp. 35-41 and previous section II. 3. 5. 1. with criticisms. On the notion of paradigmatic cases, see Moreso (2012), p. 40 and Chiassoni (2019b), p. 199.
[705] Celano (2002), pp. 45-46. See also Sardo (2012), pp. 78-79, who also points out that the selection of relevant properties depends on "epistemic and ethical parameters that are a product of value judgments (…)." On the same point, see Comanducci (2016), p. 102.

The fourth author whose understanding of judicial balancing, as a method of resolving apparent conflicts between fundamental rights is presented is Riccardo Guastini (1946). Guastini's theory is presented for two reasons. First, it stands out as a descriptive reconstruction of judicial balancing, as opposed to the previous approaches we analysed that have prescriptive aspect. The previous authors and their understandings of judicial balancing (Aharon Barak, Manuel Atienza and José Juan Moreso) have been presented in the order in which they share similarities with Alexyan understanding of judicial balancing.[706] In contrast to them, Riccardo Guastini's theory of judicial balancing is a descriptive theory of legal reasoning in a particular legal system, rather than a normative doctrine.[707] In this sense, it differs from the views presented earlier in this chapter, as these can be understood as normative doctrines. Regardless of this important difference, his ideas provide us with a possible answer to the research question of the chapter – *What is judicial balancing* in a non-prescriptive manner. For this reason, his understanding is presented after that from Aharon Barak, Manuel Atienza and José Juan Moreso. The second reason why Guastini's understanding of judicial balancing is presented is the influence of the Genoese school of legal realism and him as the most prominent member whose understanding of judicial balancing (and other related notions, presented in section 4. 3.) is well-known.

This subchapter consists of five sections (4. 1. – 4. 5.) and has the following structure: First, introduction (4. 1.) presents the explanation and justification for the structure and content of the subchapter. In the second section (4. 2.) the legal philosophy of Riccardo Guastini is

[706] Barak's approach shares many similarities with the one from Alexy, particularly regarding the central role of proportionality (see section II. 1. 2. of this chapter). Manuel Atienza writings focus on the idea of law as argumentation, a topic on which Robert Alexy wrote his dissertation, also stating that he generally agrees with his ideas, but that his errors are of rhetorical nature (see section II. 2. 2. of this chapter). The first two authors can be considered "principialists" (along with Robert Alexy), since they argue that principles have the property of "weight". On the term, see Ratti (2010), pp. 279-280. Moreso's approach is characterized by the author himself (and other authors) as a variation of Alexy's approach. For more on this, see the respective sections dealing with each of the authors in this chapter. To be clear, Guastini (2016), p. 245 writes that Alexy in his *A Theory of Constitutional Rights* presents a "masterful analysis of the balancing technique", writing that Alexy's analysis "looks perfect to his eyes".

[707] Sardo (2012), pp. 64-65. This is important to point out since the inclusion of Guastini in the chapter on judicial balancing could be contested. However, Guastini provides us with one possible answer to the research question of the chapter: *What is judicial balancing*? What makes him stand out among other authors is the fact that he provides a descriptive theory of legal reasoning in a particular legal system (how judges decide cases of apparent conflicts between fundamental rights), without the aim of offering a normative doctrine (how judges *should* decide the cases of apparent conflicts between fundamental rights).The difference between Guastini's views on judicial balancing and the views from other authors in this chapter should be highlighted, since he only argues that judicial balancing *is used* in everyday legal practice, and not that it *should be* used. Therefore, as opposed to other authors in this chapter, Guastini is not presented as an advocate of judicial balancing, but as an author who provides a (well-known and recognized) reconstruction of judicial balancing as a form of legal reasoning. This the most important argument why professor Guastini and his theory are analysed in this chapter. For a summarized understanding of judicial balancing, see Guastini (2011b), pp. 206-210. On Guastini and his understanding of judicial balancing, see also Chiassoni (2019b), p. 227ff and Martínez Zorrilla (2007), pp. 169-173.

contextualized. Then, in the third section (4. 3.), basic notions relevant to the problem of the apparent conflict between fundamental rights is presented: first, Guastini's understanding of interpretation (4. 3. 1.); second, his understanding of 'norm' and 'right' (4. 3. 2.) and his view regarding conflicts between fundamental rights (4. 3. 3.). In the fourth and most important section (4. 4.), Guastini's theory of judicial balancing is presented (4. 4. 1.) and applied to legal cases: first, to the 1993 decision of the Constitutional Court of Italy *Sentenza 109/1993* (4. 4. 2. 1.) and second, to the 1992 German Federal Constitutional Court *Titanic* case (4. 4. 2. 2.). The subchapter concludes with a fifth section (4. 5.) presenting criticisms (4. 5. 1.) and conclusions (4. 5. 2.) on Guastini's approach.

II. 4. 2. Genoese legal realism

In this section, which follows the structure of the preceding ones, we briefly contextualize the author and his legal philosophy before turning to the author's understanding of judicial balancing. Riccardo Guastini is the most prominent contemporary representative of the Genoese school of analytical legal realism, founded by Giovanni Tarello.[708] Besides Tarello, Guastini's work was also influenced by Hans Kelsen and Alf Ross.[709]

The views of analytical legal realism are described by Guastini with three main theses: interpretive, ontological, and epistemological.[710] Each of these theses answers a particular question. The interpretive thesis, "What kind of activity is interpreting legal texts?"; the ontological thesis, "What kind of entity (or set of entities) is the law?" and the epistemological thesis, "In what does the scientific knowledge of law consist?".[711] According to the first, interpretive thesis, interpretive sentences in legal discourse are ascriptive sentences with no cognitive function.[712] According to the second, ontological thesis, law is the set of norms in force, that is, the norms that are actually applied (used in deciding cases in the past) and predictably applied in the future. And the third, epistemological thesis states that legal science,

[708] For more on Riccardo Guastini as a representative of Genoese school of legal realism, see Barberis (2013), pp. 15-17, Barberis & Bongiovanni (2016), pp. 257-258, Chiassoni (1999), p. 21ff, Chiassoni (2016), pp. 658-664 and Faralli (2016), pp. 407-408.
[709] See Barberis & Bongiovanni (2016), p. 257, Chiassoni (2016), pp. 658-660, Faralli (2016), p. 407 and Sardo (2012), p. 60.
[710] Guastini (2015a), p. 45.
[711] Guastini (2015a), p. 45.
[712] Guastini (2015a), pp. 46-47 writes: "…interpretive sentences… - are not cognitive or descriptive, but *ascriptive* sentences. Just like stipulative definitions, they are not descriptions of the one and only preexisting meaning, but decisions about competing meanings. Therefore, they have no truth-value."

as a cognitive activity, must not be confused with legal scholarship.[713] As will be shown in the following sections, each of these theses has important implications for Guastini's understanding of judicial balancing. The interpretive thesis is relevant for his sceptical view of interpretation; the ontological thesis is relevant for his understanding the role of judges and judicial discretion; and the epistemological thesis is relevant for his reconstruction of the process of judicial balancing.

When legal realism is contextualised in relation to legal positivism (from which, as Guastini indicates, it is often distinguished and contrasted to), the three main features of contemporary legal positivism are also shared by legal realism.[714] The first of these features is the rejection of the idea of natural law and the acceptance of the idea of law as a human artifact: norms come into existence only through a human act of normative creation. The second feature is the distinction between law as it actually is and law as it ought to be. The third feature, which follows from the second, is that there can be no "objective" obligation to obey the law because knowledge of legal norms does not imply any obligation to obey them. These three features of legal positivism (properly understood) are also shared by legal realists, as Guastini concludes: Legal realism is positivistic view of law, and all realist legal scholars are positivists; but not all positivist legal scholars are realists. Having outlined the position of the legal realists, the following section presents Guastini's understanding of interpretation, 'norm' and 'right' and conflicts between fundamental rights, following the structure used for previously presented authors.

II. 4. 3. Basic notions

The following section presents Riccardo Guastini's understanding of the concepts of interpretation, the structure of the norm and right and his understanding of the apparent conflicts between fundamental rights. We begin with his views and contributions to the theory of interpretation and the conceptual distinctions he proposes (II. 4. 3. 1.), followed by his understanding of 'norm' and 'right' (II. 4. 3. 2.), followed by his view on fundamental rights conflicts (II. 4. 3. 3.).

II. 4. 3. 1. Interpretation

[713] Guastini (2015a), p. 51 distinguishes between *legal science*, which he defines as "the scientific (neutral, value-free) description of the law in force" and legal scholarship, defined as "usual academic investigation into the law, namely into those normative texts which are regarded as the official sources of law."

[714] On these features, see Guastini (2020), pp. 37-39. "Legal positivism" is generally regarded and understood here as a "methodological attitude toward the law", and the "classical" positivistic views (about the nature of the law, the structure of legal systems and legal interpretation) are by now mostly dismissed, as Guastini points out.

The writings of Riccardo Guastini on the subject of judicial balancing are closely related to his understanding of legal interpretation, so a brief outline of his views on legal interpretation is given here.[715] Riccardo Guastini and the Genoese school in general are known for a *sceptical*, non-cognitivist understanding of interpretation. We begin with an account of Guastini's contributions to the understanding of interpretation (in particular, the plurality of the meanings of the term) and then proceed to present the main theses of the sceptical theory of legal interpretation.

The meaning of the term "interpretation" is an ambiguous one. Professor Guastini has written extensively on the subject, distinguishing four aspects of ambiguity.[716] In the first sense of ambiguity, "interpretation" can refer to the activity *or* to the result, to the outcome or to the product of that activity.[717]

Second, the term "interpretation" can refer either to the "ascription of meaning to a legal text" or to the "inclusion of a particular case in the class of cases regulated by a rule".[718] In legal reasoning (understood as a *psychological* process), these two meanings of "interpretation" cannot be sharply distinguished, but from a *logical* point of view, they should be analysed separately.[719] From this first distinction comes another distinction – between *text-oriented* interpretation (*in abstracto*) and *fact-oriented* interpretation (*in concreto*). These two types of interpretation should be sharply distinguished, as Guastini points out:[720] Text-oriented

[715] For the importance of Guastini's theory of interpretation for his understanding of judicial balancing, see Guastini (2006b), p.151, Guastini (2008), pp. 21-22, Moreso (2002b), pp. 227-229 and Sardo (2012), pp. 60-63. As Chiassoni (2016), p. 659 points out, Guastini follows a "realistic, interpretation-dependent concept of legal norms" (influenced by the writings of Giovanni Tarello, the founder of the Genoese school of legal realism). For more about the sceptical theory of legal interpretation, see Guastini (2011b), pp. 149-151.

[716] Guastini (2008), pp. 13-19. For Guastini's views of legal interpretation in detail, see (among other of his works) Guastini (2004), Guastini (2005a), Guastini (2008) and Guastini (2011).

[717] Guastini (2008), pp. 13-14.

[718] Guastini (2011b), pp. 138-139. See also Guastini (2004), p. 82.

[719] Guastini (2011b), p. 139.

[720] Guastini (2005a), pp. 142-143. An important consequence that follows from this distinction is that mixed (intermediate or eclectic) theories of interpretation can be considered as variants of cognitivist theories of interpretation. This would mean that any theory of interpretation is either cognitivist or sceptical one, *tertium non datur*. Guastini (2006a), pp. 227-230 explains this by pointing out that the controversy (the alternative between cognitivism and scepticism) concerns the logical status of interpretative statements, and not of subsumptive statements. Interpretative statements answer the question of interpretation *in abstracto* (identification of a norm expressed by legal text), while subsumptive statements answer the question of interpretation *in concreto* (subsumption of a concrete case under the abstract case). Both mixed and sceptical theories of interpretation agree that subsumptive statements can have truth values. But the question is, as Guastini points out, whether *interpretative statements* can have truth value. On this question, mixed theories of interpretation are silent, and this silence admits only one explanation, according to Guastini: that mixed theories consider the identification of norms (accomplished through interpretative statements) as an unproblematic thing, in which the judges do not exercise discretion. Thus, as Guastini argues, mixed theory represents a tacit variant of cognitivist theory of interpretation. According to the sceptical theory, interpretative discretion is exercised primarily in interpretation (understood as the ascription of a meaning to a legal text, see fourth sense of the ambiguity), and not in the subsumption of a concrete case under a rule (as mixed theory, focusing only on the subsumptive statements, holds).

interpretation (*in abstracto*) consists in deciding what rule the legal text expresses, without referring to a particular case, whereas fact-oriented interpretation (*in concreto*) is a subsumption of an individual case under a rule, and its result is a "legal qualification" of the facts of the case.

Third, the term "interpretation" can refer to three different things: sometimes, it refers to a matter of cognition; sometimes to a decision, and sometimes to a rule-creation.[721] In the context of this distinction, "interpretation" can mean three different things: *cognitive* interpretation, *adjudicative* interpretation, and *creative* interpretation.[722] Through the process of cognitive interpretation, various possible meanings of a legal text are identified, without choosing any of those meanings. Through adjudicative interpretation, one of the meanings previously identified through the process of cognitive interpretation is chosen and the others are discarded. Creative interpretation, on the other hand, consists of ascribing a "new" meaning to the text that was not previously identified through the means of cognitive interpretation.[723] Among these three meanings of "interpretation", the first is a "purely cognitive operation devoid of any practical effect", while the last two are "political" operations.[724]

In the fourth sense of ambiguity, a distinction can be made between interpretation (strictly understood or properly called), which consists in ascribing the meaning – sense and reference – to a legal text, and "juristic construction", which consists in[725]

> "…many operations, almost commonly the work of legal scholars (although judges as well), that would be hard to list exhaustively – e.g. conjectures about the so-called *ratio legis*, counterfactual hypotheses about the intention of the lawgivers, creation of axiological hierarchies between rules, construction of unexpressed rules, concretization of abstract principles, balancing (especially constitutional) principles, and so on."

In legal discourse, the term "interpretation" generally has this meaning – to ascribe or to attribute meaning to a legal text.[726] Interpretation is not a cognitive activity, but one of a choice and decision.[727] This distinction is central for Guastini's understanding of judicial balancing, and we will return to it in the section III. 4. 4., where his views on judicial balancing are presented. Guastini's sceptical theory of interpretation is characterized by the distinction,

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[721] Guastini (2011b), p. 141. This distinction, as Guastini indicates, was inspired by Hans Kelsen. See Kelsen (2005), pp. 353-356.
[722] Guastini (2008), pp. 16-17.
[723] Guastini (2011b), pp. 141-142.
[724] Guastini (2011b), p. 142. Creative interpretation, as Guastini elaborates, "consists in deriving from a legal text some unexpressed ("implicit", in a large, non-logical sense) rules by means of a great variety of non-deductive arguments (e.g. *a contrariis*, *a simili*, etc.)". This derivation (or construction) of unexpressed rules is not an "interpretive act" (in a strict sense), but a form of "juristic construction". Guastini (2011b), p. 142.
[725] Guastini (2011a), p. 113. See also Guastini (2013), p. 98.
[726] Guastini (2013), p. 98 and Guastini (2015b), p. 2.
[727] Guastini (2013), p. 99. See also Atienza (2010), p. 74 and Sardo (2012), pp. 61-62.

established by Giovanni Tarello, between normative sentences (*dispozioni*) and norms (*norme*).[728] Legal texts are normative sentences, statements that express a finite number of possible norms.[729] Normative sentences in legal texts are the objects of interpretation, while norms are the result or output of interpretation;[730] norms are obtained from legal texts as a result of the interpretation process.[731] A normative sentence can express more than one norm, so there is no one-to-one relationship between them, as Guastini suggests.[732]

Since we are concerned with the apparent conflicts between fundamental rights, and since such rights are expressed in written constitutions in most contemporary legal systems, Guastini's views on constitutional interpretation must be mentioned. The specificity of constitutional interpretation cannot be related to the nature of the interpretive activity.[733] The specificity of constitutional interpretation can be related to three aspects, in Guastini's view: first, with subjects of interpretation; second, with techniques of interpretation; and third, with problems of interpretation.[734] In Guastini's view, constitutional interpretation is not different from the interpretation of statutes or other legal texts.[735]

Interpretive scepticism, according to which interpretive statements are neither true nor false, can be summarily defined by the following positions:[736] (1) lawyers disagree about the

[728] Guastini (1998), pp. 15-20, Guastini (2008), pp. 21-22 and Guastini (2017), pp. 23-30. On the importance of this distinction for Guastini's theory of interpretation, see also Moreso (2002b), pp. 228-229 and Sardo (2012), pp. 60-61. On the original distinction, see Tarello (1974), pp. 394-395. For Guastini's reference to Tarello regarding the distinction, see Guastini (1996a), pp. 19-21 and pp. 35-40. The distinction between normative sentences and norms, as Sardo (2012), p. 61 indicates, "has almost became a platitude" in legal theory in recent years.

[729] Guastini (2008), pp. 13-19. See also Guastini (2013), pp. 98-99.

[730] Guastini (2011a), pp. 8-9 and p. 63. See also Chiassoni (2016), p. 659.

[731] Guastini (2011a), pp. 8-9.

[732] Guastini (2011a), pp. 63-64 and Guastini (2018b), pp. 2-3.

[733] Guastini (1996a), p. 169 and Guastini (1998), p. 331.

[734] Guastini (1996a), pp. 169-185 and Guastini (1998), p. 331-356.

[735] Guastini (2018), p. 318. For Guastini's views on constitutional interpretation, see Guastini (2011b), pp. 343-377.

[736] Guastini (2005b), pp. 139-140. An interpretive statement is a "meaning-ascribing sentence, i.e., a sentence to the effect that a legal (e.g., constitutional, statutory, etc. text T means M or, in a slightly different formulation, that a legal provision P expresses a certain rule R.". Guastini (2005b), p. 139. Sceptical theories of legal interpretation are in opposition with the cognitivist theories of interpretation. Cognitivist theories, nowadays the most influential among the theories of interpretation, hold that the open texture of language is main interpretive problem. According to this view, any legal provision has a "core" of settled meaning and an area of "penumbra". From this, they distinguish between easy cases (which fall within the core) and hard cases (which fall within the penumbra). In easy cases, law-applying organs have no discretion, and there is a "right answer" given by the law, while discretion is present in hard cases and borderline cases. In easy cases interpretive statements are true or not, while in hard cases they have no truth value. This claim about truth value of interpretive statements, according to Guastini and other proponents of the sceptical theory, is correct regarding fact-oriented interpretation (*in concreto*), but not for the text-oriented interpretation (*in abstracto*). As Guastini (2005b) puts argues: "The open texture theory therefore gives a seriously misleading picture of legal interpretation, since *interpretive discretion relates almost entirely to text-oriented interpretation*, rather than to subsumption. As far as text-oriented interpretation is concerned no "right answer" exists, since various "answers", i.e., alternative interpretations are

meaning of most legal sentences; most legal provisions are interpreted differently (at least diachronically, as Guastini notes); (2) most legal provisions are subject to various competing interpretations; (3) there is no truth-criterion for meaning-ascribing sentences and (4) interpretation is an "act of will", and not an act of knowledge, since it represents a choice between competing possibilities that involves discretion. The last position, that interpretation is an act of will and not an act of knowledge, i.e., that it is not a cognitive activity and that it involves discretion, is of particular importance for Guastini's understanding of judicial balancing, as will be shown in section III. 4.4. In the remainder of this section, we will turn to his understanding of the notions of the 'norm' and 'right' and his views on the apparent conflicts between fundamental rights.

II. 4. 3. 2. Norm and right

According to Guastini, the term "legal norm" can refer to *legal norms in the strict sense* and to *legal norms in the broad or generic sense*.[737] A legal norm in the strict sense is a prescription (a command to do or refrain from doing) that has a conditional structure and a general and abstract content.[738] As mentioned above, in legal doctrine and legal theory, two types of norms are usually distinguished, namely rules and principles.[739] How can these two types of norms be distinguished according to Guastini? In legal practice, the distinction between rules and principles does not seem to depend on any previously accepted concept of rule or principle; interpreters seem to intuitively distinguish between rules and principles on a case-by-case basis.[740] Guastini points out, however, that lawyers usually consider a norm to be a legal principle if it has the following two characteristics: *fundamental character* and *special form of indeterminacy*.[741]

The first characteristic, *fundamental character*, has a twofold meaning, according to Guastini: first, principles provide a foundation and axiological justification for other norms in the legal system, and second, principles do not have (or do not require) any foundation or axiological justification due to them being perceived as evidently "just" or "correct" norms in

always available, and, from a purely descriptive point of view, no one of them can be deemed right." [emphasis added]

[737] Guastini (2014), pp. 33-34 and Guastini (2017), pp. 31-32.

[738] Guastini (2014), p. 34. On the norms in a generic sense, see Guastini (2014), p. 43ff.

[739] Guastini (2014), p. 67.

[740] Guastini (2018a), p. 315.

[741] Guastini (2014), pp. 67-69. The first of these characteristics refers to the position of the norm in a legal system (or a part of it), while the second one refers to the content of the norm and/or their logical structure, as Guastini indicates. See also Guastini (2011b), pp. 173-180.

the legal system in question.[742] The *special form of indeterminacy* of legal principles is related to three different aspects, as Guastini elaborates.[743] The first is related to the *openness of the antecedent* of the norm: principles are norms with an open antecedent, while rules are norms with a closed antecedent. The second aspect is related to *defeasibility*: principles are defeasible norms (in the sense that they allow implicit exceptions), while rules are indefeasible norms.[744] An important consequence that follows from this difference is that a defeasible norm cannot be applied by simple deductive reasoning.[745] The third and final aspect relates to *genericity*: principles are "generic" norms in two respects: first, they require the formulation of other norms that "concretize" them so that they are suitable for solving concrete cases; second, this concretization can take place in many different and alternative ways. Rules, on the other hand, are (relatively) "precise" norms.[746] The second aspect of the genericity of legal principles – their concretization – is important because it is the final step in their application and thus, in dealing with the apparent conflicts between fundamental rights, as will be shown later.

The distinction between rules and principles elaborated by Riccardo Guastini can be characterised as a so-called *weak* distinction (one of a degree or a quantitative one).[747] In the context of professor Guastini's sceptical theory of legal interpretation, the identification of a legal provision as a rule or a principle (in cases where this is not explicitly determined) is a matter of interpretation with important practical consequences.[748]

It is a platitude to mention the ambiguity of the term "right".[749] But in order to continue with Guastini's views on the apparent conflicts between fundamental rights, the meaning of the term needs to be analysed. In the discourse of legal doctrine, the term "fundamental rights" is used for rights given by the constitution, as Guastini states.[750] Fundamental rights are rights of citizens against (but not exclusively) against the state; they are *subjective public rights*.[751]

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[742] Guastini (2014), pp. 68-69.
[743] Guastini (2014), pp. 69-71.
[744] Guastini (1998), pp. 281-282.
[745] Guastini (2011a), p. 178. In order to be applied, must be concretized; concretization is a necessary part of their application. The idea of concretization of legal principles represents an important element in Guastini's understanding of judicial balancing. See following sub-sections II. 4. 4. 1. and II. 4. 4. 2. for details.
[746] Guastini (2014), p. 71.
[747] For such characterization of Guastini's position, see also Pino (2009), p. 136, fn. 19 and Sardo (2012), p. 62.
[748] Guastini (2018a), p. 317. An example given here by Guastini is Art. 81(1) of the Italian Constitution, which states that the state must balance the budget revenues and expenditures ("Lo stato assicura l'equilibrio tra le entrate e le spese del proprio bilancio"). As Guastini elaborates, if this provision would be considered as a rule, it would imply its indefeasibility, regardless of other constitutional principles which, for example, grant certain social rights. On the other hand, if this provision would be considered to express legal principle, it could be balanced with other principles.
[749] For some of Guastini's remarks regarding the notion, see Guastini (2014), pp. 82-100 and Guastini (2017), pp. 73-90.
[750] Guastini (2014), p. 94 and Guastini (2017), p. 110.
[751] Guastini (2014), p. 94.

Guastini proposes two distinctions of fundamental rights: the first, according to their content and the second, according to the holders.[752] According to the content of the right, a distinction can be made between the *rights to liberty* and *social rights*.[753] According to the holders, a distinction can be made between *human rights* and *citizen rights*.[754]

The distinction between different types of fundamental rights does not *a priori* affect judicial balancing. Of course, the category to which a particular fundamental right belongs may be considered as "more important" or "more fundamental" than another, but the process of judicial balancing is unaffected by this. Having set out Guastini's views on 'interpretation', 'norm' and 'right', we now turn to his understanding of the apparent conflicts between fundamental rights.

II. 4. 3. 3. Conflicts between fundamental rights

As mentioned earlier, the term "fundamental rights" is used to refer to rights that are contained in the constitution. Constitutional rights are often explicitly qualified as principles; sometimes, they are qualified by the interpreters as such. After World War II, a process of *constitutionalization* of the legal order spread throughout Europe.[755] These contemporary constitutions are incorporated with a variety of values.[756] Legal principles often come into conflict; this characteristic can be even considered to be the most defining characteristics of legal principles, as Guastini notes.[757]

A normative conflict (or antinomy) is defined by Guastini as a "situation in which two norms offer two different and incompatible solutions for a concrete dispute or for the same

[752] Guastini (2014), pp. 94-96 and Guastini (2017), pp. 84-86.
[753] Examples from the Italian legal systems are given here by Guastini. For the rights to liberty, it is the freedom of association (Art. 18 of the Constitution), while for social rights is the right to health (Art. 32(1) of the Constitution).
[754] An example for human rights is the religious freedom (Art. 18 of the Constitution), while an example for citizenship rights is the right to vote (Art. 48(1) of the Constitution).
[755] Guastini (2014), pp. 189-215. Constitutionalization of legal order is a term that has (at least) three possible meanings, as elaborated by Guastini (2017), pp. 213-214: (1) in the first and most intuitive meaning, constitutionalization is an introduction of a first written constitution in a legal system that previously lacked it: (2) in the second meaning, constitutionalization signifies a historical and cultural process between the XVII and XVIII centuries in which the relation between the sovereign and subject was transformed into a legal relation; (3) finally (and this is the meaning relevant here), constitutionalization of the legal system is defined by Guastini as a "process of transformation of a legal system, at the end of which the system in question is totally 'impregnated' by constitutional norms". Such legal system is characterized by an "extremely pervasive, intrusive and overflowing constitution".
[756] Guastini (2006b), p. 156.
[757] Guastini (1998), p. 302 and Guastini (2004), pp. 216-217.

class of disputes".[758] A normative conflict or antinomy occurs whenever two different norms connect two mutually incompatible legal consequences to the same case.[759] Consistent with his theory of interpretation, conflicts do not exist prior to interpretation.[760] Since normative conflicts are the result of interpretation, they cannot be resolved by interpretation for two reasons: First, interpretation is already "exhausted" when the normative conflict arises; second, the resolution of a normative conflict consists in "eliminating or discarding one of the two conflicting norms", and this, as Guastini indicates, is not an act of interpretation, but an act of legal production (or "negative legislation").[761]

According to Guastini, conflicts between legal principles (of which conflicts between constitutional principles are paradigmatic examples) generally have the following three characteristics:[762] first, they are antinomies between norms that are on the same level in the hierarchy; second, they are antinomies *in concreto*; and third, they are *partial-partial* antinomies. For this reason, conflicts between (constitutional) principles cannot be resolved according to the rules *lex superior derogat inferiori*, *lex posterior derogat priori* and *lex specialis derogat generali*.[763] The appropriate method for resolving such conflicts is balancing (*bilanciamento* or *ponderazione*).[764] A classic example of conflict between constitutional principles given by Guastini is the conflict between freedom of the press and personality rights (right to honour and privacy). As it can be seen, Guastini takes a *conflictivist* position on the issue of apparent conflicts between fundamental rights. We will now turn to the main section and present his reconstruction of judicial balancing as a method for resolving conflicts between fundamental rights.

II. 4. 4. *Bilanciamento* (*ponderazione*)

In this section, Guastini's proposal for resolving conflicts between fundamental rights is presented and applied to cases. First, the theoretical framework of his approach is presented so that we can get an overview and a reconstruction of the steps required to resolve such a

[758] Guastini (2006b), p. 151. In these situations, as Guastini continues, the first norm, N1, connects the legal consequence C to the factual circumstances F ("if F, then C"), while a second norm, N2, connects the non-C legal consequence to the same factual circumstances F ("if F, then non-C").
[759] Guastini (1998), p. 215.
[760] Guastini (2006b), p. 154: „However, normative conflict is a logical relation between meanings, not between texts, and meanings ("norms", understood as the meaning contents of normative texts) are precisely the result of interpretation." [translated by author].
[761] Guastini (2006b), p. 154.
[762] Guastini (2004), pp. 217-218. On the characteristics of antinomies between constitutional principles, see also Guastini (2011b), pp. 125-126.
[763] Guastini (2004), p. 218. See also Guastini (1998), pp. 302-303 and Guastini (2006b), p. 157.
[764] Guastini (1998), pp. 228-231. See also Guastini (2004), p. 216 and Guastini (2006b), p. 157.

conflict. Secondly, this proposal is applied to two cases: first, to the 1993 Constitutional Court of Italy decision *Sentenza 26 marzo 1993, n. 109*, and secondly, to the 1992 Federal Constitutional Court *Titanic* case.

II. 4. 4. 1. Theoretical framework

Judicial balancing (*bilanciamento* or *ponderazione*) is understood by Guastini as a technique used by (especially) constitutional courts to resolve conflicts between two constitutional principles.[765] Since judges cannot use classical criteria to resolve antinomies, they must balance in order to resolve conflicts between principles.[766] However, judicial balancing is only one step in the *application* of constitutional principles, and norms expressing fundamental rights are usually understood to have the structure of legal principles.[767] To resolve such conflicts between fundamental rights norms, constitutional principles need to be *applied*. Riccardo Guastini identifies four intellectual operations that take place in the application of (explicit) constitutional principles: *identifying*, *interpreting*, *balancing*, and *specifying*.[768] The first is the identification of principles as such and consists in attributing the status (or "value") of a principle to a particular constitutional provision. The second is the interpretation – the ascription of meaning – to the constitutional provision previously or contextually identified as a principle. The third one is balancing, in which the principle which will be applied is selected.[769] The fourth is the specification or concretisation of the principle selected for application by creating a rule suitable for resolving the concrete case in question.[770]

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[765] Guastini (1998), p. 228.

[766] Guastini (1999), p. 169 affirms that the *lex specialis* criterion could be used for solving conflicts between principles, but that it is seldom used.

[767] Martínez Zorrilla (2011b), pp. 729-731 uses the term 'Standard Conception' of conflicts between fundamental rights. The three theses which characterize the 'Standard Conception' of conflicts between fundamental rights are the following: first, *the normative elements in the conflict (in most cases fundamental legal rights, but also constitutionally protected goods) are legal principles, as opposed to legal rules* [emphasis added]; second, these conflicts are not determinable *in abstracto*, since the conflicts arises due to the empirical circumstances of the case and is therefore conflict *in concreto*; third, the classical criteria such as *lex superior*, *lex posterior* and *lex specialis* cannot be used to resolve conflicts between fundamental legal rights. A specific method, called weighing and balancing is required to resolve such conflicts.

[768] Guastini (2016), p. 241 and Guastini (2018a), p. 314. These four intellectual operations, as Guastini indicates, cannot be sharply distinguished from a psychological point of view, but they should be analysed separately, from a logical point of view. Guastini (2018a), p. 314, fn. 4.

[769] In Guastini's understanding of judicial balancing, only one of the conflicting principles is applied; the other(s) are set aside are not applied. Thus, balancing does not represent any 'reconciliation' of the two conflicting principles.

[770] Principles are not suitable for direct application, due to their indeterminacy; they need to be concretized in order to be applied. "Applying" principle in fact means concretizing it, according to Guastini. Concretization is not an interpretative operation, but a form of "juristic construction". To concretize a principle means to use it as a premise in reasoning whose conclusion is a new "rule", previously unexpressed. Guastini (2011b), pp. 201-202.

The following paragraphs contain remarks on each of the four intellectual operations (i.e., steps in applying constitutional principles).

(1) As to the first of these intellectual operations – the identification of principles as such – constitutional provisions are sometimes expressly qualified as principles. When this is not the case, however, the question arises as to the nature of the norm (rule or principles) expressed in the constitutional provision. It has already been mentioned in the previous section that the concept of legal principle is controversial in legal theory, as are the criteria by which the distinction is made.[771] For Guastini, the characteristics of legal principles are their *fundamental character* and their *specific form of indeterminacy*. Since the mainstream view, both in theory and in practice, is that the constitutional norms expressing fundamental rights have the structure of legal principles, we will deal with this mainstream view below. However, this view is not without problems.[772]

(2) The second intellectual operation – the interpretation of constitutional provisions previously identified as legal principles – is followed by the problem of moral judgments in their interpretation. As noted above, Guastini argues that the interpretation of constitutional provisions is no different from the interpretation of other legal texts. However, constitutional provisions, which (presumably) have the structure of legal principles, are sometimes phrased with evaluative "moral" language that requires constitutional judges, as interpreters, to make moral judgments.[773] If constitutional provisions "incorporate" morality (as inclusive positivists such as Hart argue), the morality in question cannot be social morality, but only the critical morality of the interpreter.[774]

(3) With regard to the third (and central) intellectual operation – balancing – Guastini points out that in the practice of constitutional courts (or supreme courts, depending on the legal system) conflicts between constitutional principles are usually resolved by means of a *preferential statement*.[775] The logical form of this preferential statement is

[771] See Guastini (2018b), p. 316.
[772] Guastini (2016), p. 243 mentions the problem of *defeasibility*, which is the second aspect of specific form of indeterminacy as a characteristic of legal principles. As Guastini points out, there is no definite answer in juristic practice to the question is a given norm principle because of its (assumed) defeasibility, or is it defeasible because it is (assumedly) a principle? This question has practical consequences in the decisions of the courts. An example Guastini mentions is Art. 81 of the Italian Constitution ("The State ensures the equilibrium of revenue and expenditure in its budget"). Treating such provision as a rule would imply that it is indefeasible but treating such provision as a defeasible one would allow the (constitutional) court to balance it with other principles.
[773] Guastini (2016), p. 244, referring to Dworkin (1996).
[774] Guastini (2016), pp. 244-245. See Hart (2012), p. 204. If this is true, constitutional provisions are subject to a "high degree of discretionary interpretive power", as Guastini concludes.
[775] Guastini (2018a), p. 320, referring to Alexy. See Alexy (2002a), pp. 100-101, for the notion of 'preferential statement'.

"The principle P1 has more weight (that is, more value), than the principle P2 in the context X"[776]

This preferential statement, as Guastini indicates, is a comparative value judgment whose (in most cases) tacit justification is found in another comparative value judgment concerning the justice or fairness of the decision that would result from the application of one of the two conflicting principles: Principle P1 would lead to decision D1, while principle P2 would lead to decision D2. Then either D1 or D2 is chosen, depending on which one is considered more "just" or "fair".[777]

Balancing consists in establishing an *axiological* and *mobile hierarchy* between two conflicting principles.[778] The first of the two – the axiological hierarchy between the two conflicting principles – consists in assigning different values to each of the conflicting principles and is established by preferential statement mentioned above. An axiological hierarchy is defined by Guastini as a hierarchy between two norms in which the interpreter attributes higher value to the one of the norms.[779] The hierarchy is axiological because it is a value judgment made by the judge that can be logically expressed in the form of the preferential statement, according to which principle P1 has more value (weight, importance) than principle P2.[780] The principle that is declared more valuable prevails over the other that is set aside.[781]

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[776] Guastini (2016), pp. 245-246. The "context" is a "case" here, which is dependent on jurisdictions, depending on the model of the judicial review. In the "centralized" model of review, in which only the constitutional court is entitled to review legislation, each case involves a particular statutory provision whose constitutionality is evaluated *in abstracto*, with no particular case being solved by the court. The context is an "abstract" case – a class of cases. In the "decentralized" model of review, in which any judge is entitled to review legislation, each case is a particular dispute between two parties, and the constitutionality of a particular provision is evaluated *in concreto*, taking into account its effect on the rights and obligations of the parties. The context is an individual, "concrete" case and the court decides just a particular dispute.

[777] Guastini (2018b), pp. 320-321. See also Guastini (2016), p. 246. On balancing as the establishment of an axiological hierarchy between the conflicting principles on the basis of a value judgment, see also Maniaci (2005), pp. 338-339.

[778] Guastini (2006b), p. 158 and Guastini (2011a), p. 206. We have previously mentioned some classical examples of such conflict, such as the conflict between freedom of expression and the right to privacy or between public health and freedom of occupation. Another example of such conflict, characteristic for Italian legal system, given by Guastini (2006b), pp. 158-159, is between formal and substantial equality. The principle of formal equality prevailed over the principle of substantial equality when the Constitutional Court of Italy declared the law which prohibited the night work of women unconstitutional and the law which provided female "quotas" on the electoral lists. The two decisions of the Constitutional Court of Italy in question here are *Sentenza 210/1986* (regarding the night work) and *Sentenza 422/1995* (regarding the female "quotas"). On the other hand, the principle of substantial equality prevailed over the principle of formal equality when the Court declared constitutional the law which provided for certain "positive actions" in favour of female entrepreneurs and also the law which provided favourable treatment of workers towards entrepreneurs in the labour process. The two decisions of the Constitutional Court of Italy in question here are *Sentenza 109/1993* (regarding the "positive actions" in favour of female entrepreneurs) and *Sentenza 13/1977* (regarding the favourable treatment of workers towards entrepreneurs). The conflict between formal and substantial equality is analysed in greater detail in the next section, which deals with the application of Guastini's approach to constitutional cases.

[779] Guastini (1997a), p. 471.

[780] The statement quoted is a value judgment, and not an interpretative decision. Guastini (2005a), p. 462.

[781] Guastini (2006b), p. 158. The principle set aside is not applied, but not abrogated or invalid; as Guastini indicates, it remains "alive", valid in a certain legal system, ready to be applied in future cases.

Having established an axiological hierarchy between the conflicting principles, the judge proceeds to the application of the more valuable (heavier, more important) principle.[782] The principle that is set aside is not applied, but it remains a valid norm in a legal system, applicable to other cases.[783] Balancing, as Guastini says, is not a *conciliation* between conflicting principles; there is no equilibrium to be found between the two; only one of the conflicting principles is applied while the other one is set aside.[784]

The hierarchy established between principles is also *mobile*; it represents a hierarchy with respect to concrete case (or class of cases) which can be (and often is) reversed in another concrete case.[785] When a judge establishes a hierarchy between the conflicting norms, he does so in relation to a concrete case; the "values" of two principles are not considered *in abstracto*, once and for all; the hierarchy established between two conflicting principles is not fixed or permanent.[786] The resolution of the conflict between two principles is valid only for a particular case, and the resolution of the conflict between the same two principles is not predictable for the future cases.[787] The preference statement regarding principles is *conditional*.[788] Balancing ends up as a *specification* of principles that are in conflict:

> "This way, balancing two principles ends up in specifying one of them (or both): in a definite case a certain principle is specified as entailing the rule R1 (whose antecedent is C1); in a different case the same principle is specified as implying the rule R2 (whose antecedent is C2)".[789]

Regarding the *mobile* character of the hierarchy established between the two conflicting principles, Guastini points to the *synchronic* effect (of a balancing between two principles in a single decision) and the *diachronic* effect (of a repeated balancing between the same two

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[782] The "weight" of principles is used as a metaphor by Guastini. See Sardo (2012), p. 62. On axiological (and other) types of hierarchies between the norms, see Guastini (1997a).
[783] Guastini (2011b), pp. 206-207.
[784] Guastini (2006b), p. 158. Guastini (1998), pp. 230, writes: "'bilanciare' non significa 'contemperare' (…) non significa cioè trovare una soluzione 'mediana', che tenga conto di entrambi i principi in conflitto (…) Il bilanciamento consiste piuttosto nel sacrificare un principio applicando l'altro." See also Guastini (2018a), p. 321. The (illusory) appearance that the axiological hierarchy established between the conflicting principles represents a "middle way", a "reconciliation" is due to the mobile character of the hierarchy instituted between the principles. On this point, see Guastini (2018), p. 322. For an opposite view, see Pino (2010b), 182-185.
[785] Guastini (2006b), p. 158 and Guastini (2011b), p. 207. The question if the hierarchy is established for a concrete case or for a class of cases depends on the type of judicial review in a legal system in question, as indicated by Sardo (2012), pp. 62-63.
[786] Guastini (2006b), p. 158.
[787] Guastini (2006b), p. 158.
[788] Guastini (2018a), p. 321, referring to Alexy (2002a), p. 52 for conditionality of the relation of precedence. If conditions C1 are met, the principle P1 prevails over principle P2; if conditions C2 are met, then the principle P2 will prevail over principle P1.
[789] Guastini (2016), p. 247. Cf. with Alexy (2002a), pp. 50-54 and his Law of Competing Principles, presented in section I. 3. 3. 2.

principles by the same court).[790] When principles are balanced in a single decision, one principle is applied while the other is discarded or sacrificed. However, if one looks at the evolution of judicial decisions (e.g., in the conflict between freedom of the press and the right to privacy), one principle will prevail in some cases and another in, and in others, depending on the circumstances of the case.[791]

When balancing is analysed from the point of view of interpretation (in the fourth sense of ambiguity presented in the previous section), it cannot be understood as interpretation in the strict sense, but as a form of juristic construction.[792] Judicial balancing represents, as Guastini states, "the exercise of double discretionary power" by the judge.[793] The first discretionary operation is the creation of an axiological hierarchy between the two conflicting principles, while the second discretionary operation is the change of the "value" of two principles in another instance of their conflict.

(4) After the balancing has been done (after one of the conflicting principles has been selected for application), the fourth and final intellectual operation in the application of constitutional principles is necessary – their *specification*.[794] Guastini points out that balancing of principles and the specification of principles are often regarded as one intellectual operation, which may be true from a psychological point of view, but from a logical point of view they must be distinguished: balancing consists in choosing the principle to be applied, while specification amounts to the subsequent application of the chosen principle.[795]

Constitutional principles, as already mentioned, cannot be applied directly to concrete cases, since they are characterized by a special form of indeterminacy. The application of principles consists in their specification or concretization, and the specification of principles is the process of extraction from them an unexpressed (or implicit) rule, as Guastini notes.[796] These unexpressed rules are constitutional rules because they are derived from constitutional principles; such judicial derivation of constitutional rules from constitutional principles "develops and enlarges constitutional law".[797] Guastini understands the structure of the

[790] Guastini (2018a), p. 322.
[791] Guastini (2018a), p. 322.
[792] Sardo (2012), p. 62. See Guastini (2011a), p. 209. Balancing is *not* an interpretative technique, as Guastini (2005a), p. 462 indicates.
[793] Guastini (2006b), p. 159.
[794] Guastini (2018a), pp. 322-324. As it was mentioned earlier, a characteristic of legal principles is their indeterminacy; they are not suitable for direct application to a concrete case without their previous specification or concretization.
[795] Guastini (2016), p. 247.
[796] Guastini (2016), p. 248.
[797] Guastini (2016), p. 247.

reasoning by which these constitutional rules are derived from constitutional principles as follows:[798] The constitutional principle is one of the premises, followed by a series of "arbitrary" premises (in the sense that they are not legal norms but factual statements, definitions, and dogmatic constructions of the interpreter), with the constitutional rule being the conclusion.[799] The application (specification) of principles represents an external (or second level) justification of a legal decision.[800] In Guastini's view, the *specification* of principles is a form of genuine law-creating (or, more precisely, *rule*-creating) operation.[801]

To summarize the theoretical framework: judicial balancing is understood by Guastini as an intellectual operation that judges perform when applying constitutional principles. It consists in establishing an axiological and mobile hierarchy between the conflicting principles and selecting one of them to be applied in the concrete case. This operation is preceded by two other intellectual operations: first, the qualification of the conflicting constitutional provisions as principles, and second, the interpretation of the same constitutional provisions. This is followed by the specification of the principle selected for application, and this specification is done by deriving an implicit constitutional rule from the selected principle. After these four intellectual operations, the process of applying constitutional principles (and at the same time the process of resolving the conflict between fundamental rights) is completed. Let us now examine how this theoretical framework is applied to two cases, one from the Italian Constitutional Court and one from the German Constitutional Court.

II. 4. 4. 2. Application

II. 4. 4. 2. 1. Sentenza 26 marzo 1993, n. 109 (1993)

Among the various decisions of the Constitutional Court of Italy Guastini mentioned to illustrate his understanding of judicial balancing, in this section we will analyse the 1993 decision *Sentenza 26 marzo 1993, n. 109*. The decision dealt with the constitutionality of Law

[798] Guastini (2016), p. 247.
[799] An example given by Guastini for the structure of the reasoning by which these constitutional rules are derived from constitutional principles:
"Health is a fundamental human right of individuals." (principle).
"Any violation of any fundamental right is 'unfair damage'."
"Any unfair damage ought to be compensated (as stated by art. 2043 of the Italian Civil Code)."
"Hence damages to health ought to be compensated." (rule).
"Therefore, Mr. Smith ought to pay 100 Euros to Mr. Jones." (further conclusion – judicial decision of the case).
Guastini (2016), p. 248.
[800] Guastini (2016), p. 247. Here, Guastini refers to Wróblewski. On the notion of external justification, See Wróblewski (1971), pp. 412-418.
[801] Guastini (2018a), p. 324. As Guastini (2016), p. 241 writes: "…judicial application of constitutional principles is a genuine law-creating practice, in such a way that, in a sense, 'the Constitution is what the judges say it is'".

No. 215/1992, which regulated "positive actions" (affirmative action) for women entrepreneurs. Appeal was lodged against the constitutionality of the law. The challenged law provided for financial incentives by the state aimed at promoting equal opportunities for men and women in economic and entrepreneurial activity by granting incentives to enterprises with predominantly female participation or to enterprises run by women.[802] The aim of the law was to redress (or mitigate) the historical imbalance to the disadvantage of women in entrepreneurship through positive actions.[803]

Let us now see how the reasoning of the Constitutional Court of Italy can be reconstructed, using Guastini's theoretical framework in which he identifies four intellectual operations that take place in the application of (explicit) constitutional principles.

(1) The judicial decision in question was about the conflict between the principles of formal and substantive equality set out in Art. 3. of the Constitution of the Italian Republic, which states that

> "All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions.
>
> It is the duty of Republic to remove those obstacles of an economic or social nature which constrain the freedom and social equality of citizens, thereby impeding the full development of human person and the effective participation of all workers in the political, economic and social organisation of the country."

Art. 3 is explicitly qualified as principle in the Constitution on the Italian Republic (Art. 1 – Art. 12. are "Fundamental principles" / "Principi fondamentali"). Thus, the first step is completed – the constitutional provisions expressing conflicting norms have been expressly qualified by the legislator as legal principles, and we can proceed to the next step.

(2) The second step is to interpret the constitutional provisions previously identified as principles. The first paragraph of Art. 3, expressing the principle of formal equality, does not raise interpretive issues, and is interpreted as a duty of equal treatment before the law, regardless of sex, race, language, religion, political and personal and social conditions. The

[802] See *Legge 25 febbraio 1992, n. 215. Azioni positive per l'imprenditoria femminile*, Gazzetta Ufficiale della Repubblica Italiana, Anno 133°, Numero 56. For example, Art. 2(1) stated that the benefits of the Law are accessible to companies that have certain percentage of women in employment or in administrative bodies. The original text of the Art. 2(1) states the following: "Possono accedere ai benefici previsti dalla presente legge i seguenti soggetti: a) le società cooperative e le società di persone, *costituite in misura non inferiore al 60 per cento da donne* [emphasis added], le società di capitali *le cui quote di partecipazione spettino in misura non inferiore ai due terzi a donne* [emphasis added] e i cui organi di amministrazione siano costituiti per almeno i due terzi da donne, nonché le imprese individuali gestite da donne, che operino nei settori dell'industria, dell'artigianato, dell'agricoltura, del commercio, del turismo e dei servizi; (…)".

[803] See Art. 1(1) of the Law.

second paragraph of Art. 3, expressing the principle of substantive equality, has been interpreted by the Court as including positive actions, which the Court considers to be the main instrument available to the legislator to fulfil the duty assigned to the State by the Art. 3(2) of the Constitution ("It is the duty of the Republic to remove those obstacles of an economic or social nature which constrain the freedom and social equality of citizens" (…)

(3) The third and central intellectual operation in the application of constitutional principles – the balancing – consists in the preferential statement, which is a comparative value judgment. The tacit justification of this preferential statement, as noted above, is usually another comparative value judgment which considers the decision D1 that would follow from principle P1 and the decision D2 that would follow from principle D2. Then D1 or D2 is chosen, depending on which decision is considered more "just" or "fair". If we refer to the principle of formal equality as P1 and the principle of substantive equality as P2, the preferential statement in this case would be that principle P2 has more weight (that is, more value) in context of this case. In this way the axiological hierarchy between principles is established. As for the justification of the preferential statement, the Court reasoned as follows: principle of formal equality (P1) would lead to a decision (D1) in which the positive actions of the contested law would be found unconstitutional, while principle of substantive equality (P2) would lead to a decision in which the positive actions of the contested law would be found constitutional. The Court opted for the second option, in which the principle of substantive equality takes precedence over the principle of formal equality.[804]

(4) Having established a hierarchy between the conflicting principles, the Court proceeds to the application of the more valuable (heavier, more important) principle, which must be *specified* or *concretized*. Since legal principles cannot be applied directly to concrete cases because they are characterized by a special form of indeterminacy, they must be specified

[804] *N. 109 Sentenza 24 – 26 Marzo 1993*, Gazzetta Ufficiale della Repubblica Italiana, Anno 134°, Numero 14. The Court explained the decision by arguing that the positive actions are the main tool available to the legislator to implement the duty from the Art. 3(2) of the Constitution. The positive actions (financial incentives) provided by the Law No. 215/1992, as the Court states, aim to compensate (or to mitigate) the historically existing imbalance and discrimination to the detriment of female entrepreneurs. These positive actions aim to remove obstacles to equality of citizens achieving effective equality between men and women. As Court stated in its judgment, in the section *Considerato in diritto*, 2.2.: "Since these are measures aimed at transforming a situation of effective unequal conditions into one characterized by substantial equal opportunities, "positive" actions involve the adoption of differentiated legal disciplines in favour of disadvantaged social categories, also in derogation from general principle of formal equal treatment, established in Art. 3, first paragraph of the Constitution. But *these differentiations, precisely because they presuppose the historical existence of discrimination relating to the social role of certain categories of people and precisely because they are aimed at overcoming discrimination* relating to personal conditions (sex) (…) [translated by author, emphasis added]. Therefore, the decision D2, which would follow from the priority of the principle of substantial equality, is considered by the Court to be more "just" or "fair" than decision D1, which would result from the priority of the principle of formal equality. See also Guastini (2006b), pp. 158-159.

by extracting from them an unexpressed or implicit constitutional rule. The final decision of the Court can be summarized in the following way: "Positive actions prescribed by the Law No. 215/1992 are constitutional and as such, ought to be implemented". Such specification of principles is a form of genuine law-creating (rule-creating) operation carried out by the constitutional courts.

II. 4. 4. 2. 2. *Titanic* case (1992)

Having presented Guastini's approach to the case from the Constitutional Court of Italy, we will now apply Guastini's analysis of judicial balancing to the comparison case used – the 1992 case of Federal Constitutional Court *Titanic*. Since the facts of the case have already been presented, we will not repeat them, but proceed directly to the application of the theoretical framework presented by Guastini.

(1) As a first step, the constitutional norms expressing conflicting fundamental rights are ascribed the status of legal principles. In the Titanic case, the constitutional norms in question are Art. 5(1) of the Basic Law, which protects the freedom of expression, and Art. 2(1) of the Basic Law, which protects personality rights. Apart from being qualified as such by the Federal Constitutional Court, these two norms can also be understood as legal principles if we take into account Guastini's understanding of legal principles, according to which a legal norm can be understood as a legal principle if it has a fundamental character and special form of indeterminacy, as stated in the subsection II. 4. 3. 2. dealing with the norm and right.

(2) The second step consists in interpretation, i.e., attributing meaning to Art. 5(1) and Art. 2(1) of Basic Law. Art. 5(1), which regulates freedom of expression states that

> "Every person shall have the right to freely express and disseminate his opinions in speech, writing and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship."

Art. 2(1) of the Basic Law, which regulates personality rights states that

> "Every person shall have the right to free development of his personality insofar as he does not violate the rights of the others or offend the constitutional order or the moral law."

The interpretation of these two constitutional provisions leads to the following conclusions: First, that Art. 5(1) of the Basic Law permits calling a paraplegic reserve officer a "born murderer" and a "cripple" and that the Art. 2(1) of the Basic law prohibits the same action. We are dealing with two constitutional principles (freedom of expression and

personality rights) that impose conflicting normative requirements regarding the statements "born murderer" and "cripple" in relation to the paraplegic reserve officer.

(3) The third step – balancing – is to select the principle to be applied. Conflicts between constitutional principles, such as the one faced by the court in the *Titanic* case, are usually resolved by means of a preferential statement that takes the logical form, "Principle P1 has more weight (that is, more value), than the principle P2 in the context X". In this case, the court had to decide on two expressions ("born murderer" and "cripple"). These two expressions, together with other circumstances considered by the court, constitute context X in the preferential statement. The court must establish an axiological and mobile hierarchy between the two conflicting principles. The Federal Constitutional Court held that the norm protecting freedom of expression (P1) has more weight (that is, more value) than the norm protection personality rights (P2) in the context of the expression "born murderer". The Court also held that the norm protecting personality rights (P2) has more weight (that is, more value) than the norm protecting freedom of expression in the context of the expression "cripple". The axiological character of the hierarchy between principles – the fact that it is a value-judgement by the judge – is the central feature of judicial balancing, which is an exercise of discretionary power by the judge.

The Titanic case is an excellent example of how the hierarchy between conflicting constitutional principles is not only *axiological* but also *mobile*. For in the same decision, the Court decided the relationship between the same two principles in relation to two different contexts (X1 and X2), where the defining circumstance of context X1 was the expression "born murderer" and the defining circumstance of context X2 was the expression "cripple". In context X1, priority was given to the freedom of expression (P1), while in context X2, priority was given to the protection of personality rights. The other circumstances of the context were made in the context of another constitutional provision, Art. 1(1) of the Basic Law, which protects human dignity and states that

> "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority."

Taking this constitutional provision into account contexts X1 and X2 were "formed" by the Federal Constitutional Court and the axiological hierarchy between the two conflicting principles was established. The decisive factor here was Court's distinction between the two expressions, holding that the expression "cripple" was "humiliating" and "shows lack of respect" for the paraplegic reserve officer.

(4) Finally, the principle chosen for application must be specified or concretized by creating a rule suitable for resolving the concrete case in question. The final decision of the Court can be summarized as follows: "The constitutional complaint of the Titanic magazine is justified regarding the damages awarded for the expression 'born murderer', and it is not justified regarding the damages awarded for the expression 'cripple'."

II. 4. 5. Criticisms and conclusions

II. 4. 5. 1. Criticisms

It has been pointed out that Riccardo Guastini considers balancing as a step in the process of *application* of (explicit) constitutional principles. This process, according to Guastini, can be understood as consisting of identification, interpretation, balancing and specification (or concretization). The criticism that has been raised against Guastini's understanding of judicial balancing relates to the last two steps of this reconstruction. According to the first remark, made by Giorgio Pino, it is not the case the one principle is always discarded or sacrificed; the balancing can be, as he argues, a conciliation between two conflicting principles.[805] According to the second remark, made by Enrico Diciotti, concretization is not a necessary step in the application of (explicit) constitutional principles.[806]

The idea that one of the principles is supressed in balancing can be interpreted, as Pino argues, in two ways.[807] According to the first, it would mean that it is not conceptually possible to reconcile two conflicting rights, but only to make one triumph at the total sacrifice of the other. According to the second, it would mean that it is conceptually possible to reconcile two conflicting rights, but that courts usually fail to carry out this operation correctly, with the consequence being the sacrifice of one right at the benefit of the other.

Pino argues that it is difficult to defend the first version because it presupposes an almost "entified" conception of fundamental rights.[808] Pino finds implausible the view that any limitation of a right represents a suppression of that right.[809] To support his view, he gives examples such as prohibiting the circulation of vehicles with even number on plates on certain

[805] For this criticism, see Pino (2007), pp. 253-255 and Pino (2010b), pp. 182-184. Pino (2007), p. 253 uses the metaphor with two glasses of rights to illustrate Guastini's understanding of balancing. After balancing, the glasses of rights are not partially empty or partially full; rather, the glass of one right is completely empty.
Sardo (2012), p. 63, also indicates that the idea that it is possible to conciliate two principles should not be discarded.
[806] Diciotti (2018), p. 117-127. On Guastini's understanding of 'specific form of indeterminacy' of legal principles, see Guastini (2014), pp. 67-69.
[807] Pino (2007), p. 253.
[808] Pino (2007), p. 254. See also Pino (2010b), p. 183.
[809] Pino (2007), pp. 254-255.

days of the week or installing a traffic light at an intersection, arguing that this is not tantamount to setting aside the freedom of movement.[810] From a logical point of view, Pino argues, it can be held that fundamental right F includes an indefinite set of implicit rights F1, F2, F3, etc. (in the case of freedom of expression – the freedom to write novels, to insult, to share private information about others etc.) and that, after balancing, some of these implicit rights give way to another right that is deemed more important. But that, as Pino argues, is not the same thing as saying that fundamental right F is sacrificed, without any further qualifications.[811]

The second version, according to Pino, is a factual judgment, and as such it can be considered true or false, depending on the empirical investigation of the justification of the decisions in which balancing is made.[812] This view, as Pino concludes, presupposes the conceptual feasibility of the idea of balancing, which serves to distinguish between good balances (those that are successful in conciliation of conflicting rights) and bad balances (those that completely sacrifice one of the conflicting rights).[813] In sum, Pino argues that conciliation (*contemperamento* or *conciliazione*) between conflicting principles is possible and that setting aside one of the conflicting principles (*accantonamento* or *soppressione*) is not a necessary outcome of balancing.[814]

As for the second point, Diccioti has argued that concretization is not always a necessary step in the process of application of (explicit) constitutional principles. As it was elaborated in section II. 4. 3. 2., Guastini argues that concretization is necessary because of the *genericity* of principles: principles are norms that require the formulation of other norms that "concretize" them, so that they can be used to solve concrete cases; this concretization can take place in many different and alternative ways. As Diciotti formulates Guastini's view, "concretization" is a process by which an inexpressed norm applicable to case C is derived from a norm that is not directly applicable to case C due to its generic nature.[815] Understood in this way, concretization, regardless of how genericity is conceived, has as its object *non-teleological principles*, since teleological principles require "concretization" because of their

[810] Pino (2007), p. 254.
[811] Pino (2007), pp. 254-255. See also Pino (2010b), p. 184.
[812] Pino (2007), p. 255.
[813] As Pino (2007), p. 255 argues: "Ciò però presuppone l'aver ammesso la praticabilità concettuale dell'idea del bilanciamento, che anzi serve a *distinguere tra buoni bilanciamenti* (che hanno successo nel contemperare i diritti in conflitto) *e cattivi bilanciamenti* (che sacrificano del tutto uno dei due diritti)." [emphasis added].
[814] Pino (2007), p. 253.
[815] Diciotti (2018), p. 119. On Guastini's understanding of specification or concretization, see Guastini (2016), p. 248, where he states that "…principles are applied – not by balancing them, as someone says, but – by deriving rules (*unexpressed*, so called "implicit", rules) from them."

teleological nature and not because of their genericity.[816] As an example of the applicability of principles without their concretisation, Diciotti mentions non-teleological principles in judgments on constitutional legitimacy.[817] An example from the practice of the Constitutional Court of Italy given is *Sentenza 22 giugno 1966, n. 87*.[818] In this decision, the Court examined the constitutionality of Art. 272(1) of the Penal Code (*Codice Penale*).[819] The article in question criminalized propaganda "for the violent establishment of the dictatorship of one social class over the other" and propaganda "for the violent suppression of a social class".[820] As Diciotti notes, the case in question can be understood as a (possible) conflict between two constitutional principles: freedom of expression (expressed by the Art. 21) and the democratic method (derived from the Art. 1 and Art. 49).[821] However, instead of resolving the conflict through judicial balancing, it was resolved (or removed, in Diciotti's view) through the restrictive interpretation of Art. 21 and by not considering "propaganda" to fall under "expression of thought".[822] Therefore, the Court concluded that there was no incompatibility between Art. 21 of the Italian Constitution and Art. 272(1) of the Penal Code, and the provision was declared constitutional. If the Court had interpreted Art. 21 by establishing that "propaganda" falls within the "expression of thought", the two provisions would be incompatible, resulting in the unconstitutionality of Art. 272(1) of the Penal Code.[823] Neither of these two possible decisions depends on the "concretization" of the principle expressed in Art. 21 of the Constitution, as Diciotti concludes.

II. 4. 5. 2. Conclusions

[816] Diciotti (2018), p. 119. A teleological norm is understood by Diciotti (2018), p. 119, as "a norm that prescribes judges to pursue a specific objective, taking into account other objectives to be pursued (because indicated by other principles) and facts which may vary over time." [translated by author]. Diciotti (2018), p. 120 understands generic norm as norm which does not indicate one of the following things: the actions that must be carried out by those who intend their behaviour to the norm or the content of the norm or the prescriptions that must be produced by the body that intends to implement or apply the norm.
[817] Diciotti (2018), pp. 122.
[818] Another example given by Diciotti (2018), pp. 123-124 refers to a hypothetical state of Freedonia and its constitutional principle that states "Freedonia is a Republic". If this principle is understood in the sense that the head of the state must be elected, it can be applied by the Constitutional Court of Freedonia without any concretization to judge the constitutionality of a law concerning the conditions that must be met to become head of the state.
[819] See Diciotti (2018), pp. 113-114.
[820] Diciotti (2018), pp. 113-114. [translated by author]. The original article states that "Chiunque nel territorio dello Stato *fa propaganda per la instaurazione violenta della dittatura di una classe sociale sulle altre, o per la soppressione violenta di una classe sociale* o, comunque, per il sovvertimento violento degli ordinamenti economici o sociali costituiti nello Stato, ovvero fa propaganda per la distruzione di ogni ordinamento politico e giuridico della società, è punito con la reclusione da uno a cinque anni." [emphasis added].
[821] Diciotti (2018) p. 114.
[822] Diciotti (2018), p. 114 and p. 124.
[823] Diciotti (2018), p. 124.

We now come to the conclusions regarding Riccardo Guastini's understanding of judicial balancing. In order to compare his ideas with those of other authors we are dealing with, we will first present a brief summary of his understanding of judicial balancing and the basic notions we analysed in the previous subchapter (interpretation, norm and right and conflicts between fundamental rights). Based on these points of comparison, we will conclude the subchapter by presenting the strengths and weaknesses of Guastini's proposal.

Riccardo Guastini's theory of judicial balancing, as noted above, is a descriptive theory of legal reasoning rather than a normative doctrine of adjudication.[824] Thus, it differs from the theories of judicial balancing that we presented earlier, because they all have a normative component. Guastini clarifies the concept of judicial balancing by distinguishing it from other intellectual operations in the application of (explicit) constitutional principles. Balancing, he states, is only one (third and central) step in the application of (explicit) constitutional principles, along with identification, interpretation, and specification (see II. 4. 4. 1.). It consists in establishing an axiological and mobile hierarchy between conflicting principles. The hierarchy established is axiological because it is a value judgment that attributes different values to each of the conflicting principles, which can be illustrated in terms of the preferential statement. It is mobile because it represents a hierarchy with respect to a concrete case or class of cases that can be (and often is) reversed in another concrete case. The form of the preferential statement that establishes the hierarchy among principles can be formulated as follows:

> "The principle P1 has more weight (that is, more value), than the principle P2 in the context X"[825]

The justification for this preferential statement (which is a comparative value judgment) is in most cases tacit and is found in another comparative value judgment about the justice or fairness of the decision that would result from the application of one of the two conflicting principles. As Guastini points out, in the process of judicial balancing, one of the conflicting principles is applied (through its specification, as the final step in judicial balancing), while the other is set aside.

As for the interpretation, Guastini is a proponent of the sceptical theory of interpretation, according to which interpretation is not a cognitive activity, but a choice and decision (II. 4. 3. 1.). Interpretation is therefore understood as an act of will and not an act of knowledge, thus rejecting cognitivist and intermediate theories of interpretation. Fundamental rights, as rights contained in constitutions, are usually expressed by norms that are either

[824] On this point, see Sardo (2012), pp. 64-65.
[825] Guastini (2016), pp. 245-246.

explicitly qualified as legal principles (by the constitution) or by interpreters. Guastini points out that jurists usually consider a norm to be a legal principle if it is characterized by a fundamental character and a special form of indeterminacy. The distinction between rules and principles is, in Guastini's view, a so-called weak distinction, and in line with his sceptical theory of interpretation, the identification of a norm either as a rule or as a principle is a matter of interpretation (II. 4. 3. 2.). Guastini takes a conflictivist position and argues that legal principles often conflict and that this can even be considered the most important characteristic of legal principles (II. 4. 3. 3.).

Comparing Guastini's understanding of judicial balancing with the theories presented earlier, what stands out is its descriptive character, in contrast to the normative character of the other theories. He emphasizes the discretionary nature of judicial balancing, arguing that it is a form of juristic construction, rather than interpretation in the strict sense. Therefore, it cannot be understood as an interpretative technique for resolving fundamental rights conflicts. When judges balance, they exercise a double discretionary power: first, when they establish an axiological hierarchy between the two conflicting principles, and second, when they change the "value" of the two conflicting principles in another concrete case. However, in Guastini's view, the conflict between fundamental rights cannot be resolved without specification. After the balancing – that is, the selection of the principle to be applied, the principle must be specified, which means that a norm must be formulated to make the selected principle suitable for the resolution of the concrete case. This consists in the formulation of an unexpressed (or implicit) rule, which is a form of genuine law-creating operation, as Guastini notes. With such a descriptive reconstruction of judicial reasoning that emphasizes the discretionary nature of judicial balancing, Guastini avoids this line of criticism previously raised against theories of judicial balancing.

The criticisms that have been raised challenge Guastini's reconstruction of judicial balancing. As Pino argues, it is not the case that one of the conflicting principles is always discarded or sacrificed, since he assumes that balancing be a conciliation of principles, as was elaborated in the previous section. Pino argues that, from a logical point of view, a fundamental right includes an indefinite set of implicit rights F1, F2, F3, etc., and that the fact that some of these rights give way to another right considered more important does not mean that the fundamental right is sacrificed without any further qualifications. According to Guastini, however, balancing is a choice – a value judgment – which of the conflicting principles protecting fundamental rights is to be applied in the context of the concrete case. Thus, if an axiological hierarchy is established in favour of principle P1 in context X (which means that

principle P1 will be specified and applied), the claim that one principle is set aside or sacrificed does not seem problematic. This is because the set of implicit rights F1, F2, F3, etc. of principle P2 is indefinite, and some of these rights can still be protected regardless of the balancing decision in favour of principle P1. The difference is that one of the principles (P1) is selected for application, while the other one (P2) can still have some of its implicit rights protected. Thus, P2 can be understood as set aside or sacrificed in terms of *application*, but not in terms of its *protection*. To illustrate with an example: the court can decide that the principle protecting personality rights (P1) takes precedence over the principle protecting freedom of expression (P2) in context X – when a newspaper describes someone as a "cripple". Principle P2 is set aside or sacrificed in terms of its application: the court decides that principle P1 takes precedence and will be applied. However, the set of implicit rights of principle P2 is indefinite, and we could name at least one of these implicit rights that has not been set aside or sacrificed in terms of its protection (for example, the freedom to publish novels in newspapers).

As for the second criticism raised by Diciotti, the decision can be presented as a matter of judicial balancing. From a Guastinian perspective, however, the judgment on constitutionality, i.e., whether an article is constitutional or not, can be made by interpretation *in abstracto* – by deciding whether "propaganda" falls under "expression of thought", without reference to the facts of a particular case. Indeed, Diciotti points out that the Court has interpreted the Art. 21., which protects freedom of expression, restrictively by not considering "propaganda" to be an "expression of thought". In such situations, then, the issue is not necessarily the application of constitutional principles (and their concretization) to concrete cases.

II. 5. Susan Lynn Hurley

II. 5. 1. Introduction

After analysing four proposals by lawyers, a method suggested for resolving apparent conflicts between fundamental rights made by philosopher (or primarily philosopher) is presented. The method analysed comes from Susan Lynn Hurley (1954–2007), a philosophy professor whose work focused on practical philosophy and philosophy of mind.[826] More specifically, Hurley developed a theory of practical reasoning in general and later applied her theory to law. Hurley's approach was chosen for analysis for two reasons: first, Hurley develops a *coherentist* theory of practical reasoning in general, so that by turning to her

[826] Among Hurley's bibliography relevant for this section, Hurley (1989), Hurley (1990), Hurley (2000) and Hurley (2004) should be mentioned.

approach, we analyse balancing from a philosophical perspective, alongside the legal perspectives analysed earlier. Secondly, her approach has been taken considered and analysed by other influential authors who have addressed the issue of apparent conflicts between fundamental rights from a legal perspective (notably David Martínez Zorrilla, but also Jan-Reinard Sieckmann).

The subchapter has five sections (5.1. – 5.5.) and the following structure: First, in the introduction (5. 1.), the explanation and the justification for the structure and content of the subchapter is presented. The second section contextualizes Hurley's philosophy (5. 2.). The third section (5. 3.) introduces basic notions relevant to the problem of the apparent conflicts between fundamental rights. These are, in order, interpretation (5. 3. 1.), coherence (5. 3. 2.), followed by Hurley's view of apparent conflicts between fundamental rights (5. 3. 3.). In the fourth and main section (5. 4.), Hurley's coherentist approach is presented (5. 4. 1.) and applied: first, to a conflict between the freedom of information and the right to honour, following the reconstruction made by David Martínez Zorrilla; and second, to the 1992 German Federal Constitutional Court *Titanic* case (5. 4. 2. 2.). The subchapter concludes with a fifth section (5. 5.) presenting criticisms (5. 5. 1.) and conclusions (5. 5. 2.) on Hurley's approach.

II. 5. 2. Hurley's coherentism

In her 1989 book *Natural Reasons: Personality and Polity*, the author developed a theory of practical reasoning in general, and in her later article, she focused on the applicability of her theory to law.[827] Influenced by the works of Ludwig Wittgenstein and Donald Davidson, *Natural Reasons* analyses the rationality of decisions and actions of persons in the context of interpersonal and intrapersonal conflicts.[828] Susan Hurley's theory is characterised by an explicitly *coherentist* approach.[829] Coherentism is understood as a view according to which

[827] Hurley (1989) and Hurley (1990).
[828] Hurley (1989), p. 3. The book is divided in four parts. Part I deals with the relations between mind and value and focuses on the concept of preference in the context of formal decision theory. Part II deals with the conflicting reasons and values, and Hurley argues that conflicts within persons are analogous in certain respects to conflicts between persons. Here, Hurely argues that conflicts of values are compatible with ethical cognitivism. In Part III, deliberation about what should be done, all things considered, is understood as "the search for a coherent set of relationships among the relevant conflicting reasons." Finally, Part IV is about knowledge what should be done and its relationship to personal autonomy and democracy. For a summary and overview of the book, see Hurley (1989), pp. 3-6.
[829] Hurley (1990), pp. 11-12 and pp. 221-222, Jackson (1992), p. 475, Martínez Zorrilla (2009), p. 123 and Nerlich (1991), p. 90.

> "…to say that a certain act ought to be done is to say that it is favoured by the theory, whichever it may be, that gives the best account of the relationships among the specific values that apply to the alternatives in question…"[830]

The coherentist view is an example of a non-centralist view about reason for action. The distinction between centralist and non-centralist views is based on the view about the conceptual priority and independence of general concepts (such as right and ought) in relation to specific reason-giving concepts (such as just and unkind).[831] As Hurley points out, centralist views assume that general concepts in a given category are conceptually prior and independent of the specific concepts, while non-centralist views reject this view. From a coherentist point of view, to say that a certain act ought to be done is to say that the act is favoured by the theory that best displays coherence. In other words,

> "A coherentist holds that when we say that a particular alternative would be right, it is part of what we mean that there is some theory which is best theory about specific values that apply to the alternatives at hand and that this theory favours a particular alternative."[832]

If we understand the situation in which the judge must decide a case involving an apparent conflict between fundamental rights as a situation in which the judge decides that something ought to be done, non-centralism (and Hurley's coherentist approach as a version of non-centralism)

> "…claims that there are conceptual connections between claims what ought to be done, all things considered, and a list of certain familiar specific values; the sense of *ought* that is a function of the specific values on the list can be used to challenge and revise views about the relationship among those values, but it cannot be used to endorse an entirely unfamiliar list."[833]

In the exposition of Hurley's proposal (II. 5. 4.) it is shown how it is based on the idea of *paradigmatic cases* and *hypotheses* about the circumstances of a case and their effect on the conflicting reasons and ordering of the possible alternatives (or solutions to the case). The coherence of the proposal consists in the claim that we should prefer the hypothesis that explains the largest number of paradigmatic cases.

Susan Hurley's work has been further elaborated and adapted to the legal context by the Spanish legal philosopher David Martínez-Zorrilla.[834] In his view, Hurley presents an

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[830] Hurley (1989), p. 11.
[831] Hurley (1989), p. 11.
[832] Hurley (1989), p. 12.
[833] Hurley (1989), p. 30.
[834] David Martínez Zorrilla introduced the thought of Susan L. Hurley to the mainstream discussions regarding conflicts between fundamental rights. His works is the basis for this section. See Martínez Zorrilla (2009), pp.

interesting alternative to the principle of proportionality when it comes to the rational justification of the resolution of apparent conflicts between fundamental rights.[835] He also argues that Hurley's proposal has advantage over Alexy's theory of judicial balancing.[836] The advantage, according to Martínez Zorrilla is that it allows for a greater degree of specification or delimitation of the relevant properties or circumstances of the case.[837] An important remark is necessary: Martínez Zorrilla indicates that Hurley's approach represents a normative theory for resolving apparent conflicts between fundamental rights. In this sense, it is not an alternative to "balancing" (understood as a normative theory), but a type of balancing.[838] This is the justification for the analysis of Hurley's approach in the chapter containing non-Alexyan theories of judicial balancing.

II. 5. 3. Basic notions

The following section presents Susan Lynn Hurley's understanding of interpretation, the notion of coherence and her understanding of the apparent conflicts between fundamental rights. We begin with her views on interpretation in general (II. 5. 3. 1.), followed by an explanation of coherence (II. 5. 3. 2.), a central concept in her theory. The explanation of coherence serves as an introduction to the deliberative process she proposes for dealing with the apparent conflicts between fundamental rights. This is followed by a reconstruction of Susan Hurley's views on the issue of apparent conflicts between fundamental rights (II. 5. 3. 3.).

II. 5. 3. 1. Interpretation

Susan Hurley does not directly address the issue of legal interpretation in her work, but her ideas on interpretation, influenced by Ludwig Wittgenstein, allow us to present a reconstruction of her understanding of interpretation and its adaptation to the legal context.[839]

119-144, Martínez Zorrilla (2007), pp. 252-272 and Martínez Zorrilla (2011b), p. 732. On Hurley's coherentism, see also Mason (1993), pp. 44-46

[835] Martínez Zorrilla (2009), p. 122.

[836] Martínez Zorrilla (2009), p. 122.

[837] Martínez Zorrilla (2009), p. 136.

[838] Martínez Zorrilla (2009), pp. 122-123. Martínez Zorrilla (2007), pp. 119-120, indicates that in the theoretical analysis of balancing three different aspects or dimensions can be distinguished: (1) first, we can understand balancing in its *conceptual* aspect (what is understood by "balancing"), (2) second, the methodological aspect (how the balancing is carried out) and (3) third, *normative* aspect of balancing (how balancing should be done, or, in other words, what conditions or criteria must be satisfied in balancing so that the result of the process can be considered correct or justified). Sieckmann (2010a), pp. 102-103 also understand Hurley's model as a version of balancing. On the analysis of the notion of "balancing", see also Martínez Zorrilla (2007), pp. 115-202 and Chiassoni (2019b), pp. 165-228.

[839] In particular, Hurley (1989), pp. 30-54 and pp. 84-101 (chapters on Disagreement and Interpretation).

Hurley develops her ideas on interpretation on the basis of the idea of a *conceptual* and *substantive difference* in relation to a given concept and a distinction between *uncontestable concepts*, *conceivably contestable concepts* and *essentially contested concepts*, as will be shown in this subsection.

Hurley proposes a distinction between *same-meaning-different-belief* cases and *different-meaning cases*.[840] With this distinction, she argues, we can distinguish between situations in which someone is mistaken in his or her application of a concept (*conceptual difference*) and situations in which someone is in substantive disagreement with someone else on how a particular concept should be applied (*substantive difference*). According to Hurley, the distinction between conceptual and substantive difference in relation to a particular concept admits of degrees and borderline cases.[841] The distinction between conceptual and substantive differences is made with reference to practices, and any disagreement about what ought to be done, all things considered, according to Hurley, requires at least one conceptual locus of disagreement.[842] With respect to these differences, Hurley distinguishes between uncontestable concepts, conceivably contestable concepts and essentially contested concepts.[843]

(1) *Uncontestable concepts* do not admit of substantive disagreement, only conceptual disagreement. Examples Hurley gives here are "redness" or "adding 1 to 4". The agreement in application of these concepts characterizes agreement in the form of life, according to Hurley; if a person disagrees about these concepts, the difference must be conceptual, and not substantive.

(2) *Conceivably contested concepts*, on the other hand, usually do not, but conceivably can, admit of substantive disagreements or conceptual disagreements. Examples include concepts such as "colour", "calculation" or "thinking". These concepts include categorial concepts that group uncontestable concepts. For example, calculation subsumes "4 + 1" and "add 2". With these concepts, reference to practice is necessary to identify substantive and conceptual disagreement.

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[840] Hurley (1989), pp. 36-37.

[841] Hurley (1989), pp. 43-44: "And they [conceptual and substantive differences, remark by author.] help us to develop a sense of how to place instances of strange ways of going on on a spectrum that ranges from cases of radical conceptual disparity at one extreme to purely substantive disagreement at the other. We learn to place cases on the spectrum by looking at the variety of ways in which the contexts and uses of words can be different from ours and akin to ours; we break our practices down by imagining small deviations against which to test and develop our awareness of which aspects contribute to 'the determination of a sense' and which to 'employment of a sense'".

[842] Hurley (1989), p. 48.

[843] The distinction is presented from Hurley (1989), pp. 44-50.

(3) *Essentially contested concepts* are, following W. B. Gallie's idea, "concepts that characteristically admit of substantive disagreement."[844] Examples Hurley gives here are general concepts such as "what ought to be done" but also specific ethical and legal concepts such as "distributive justice" or "contract".[845]

Since Hurley adopts the idea that there can be a "core" of meaning that is uncontestable, that there are "borderline" cases where subjects disagree and where the application of a concept is disputed (or contested) and should be resolved by reference to practice or through the process of deliberation that she has developed, her ideas, when we consider them in a legal context, can be understood as compatible with the *mixed theory of interpretation*. To find an answer to the problem of disagreement in interpretation of what ought to be done, Hurley proposes a deliberative process based on the idea of coherence. In the next subsection, we will turn to this idea and explain it in more detail.

II. 5. 3. 2. Coherence

Hurley's approach has been characterized as *coherentist*, and the notion of *coherence* plays a key role in her theory. In this section, we will first clarify what is meant by her coherentist view and secondly, what role coherence plays in her theory.

A coherentist view about reasons for action holds that

> "…to say that a certain act ought to be done is to say that it is favoured by the theory, whichever it may be, that gives the best account of the relationships among the specific reasons (such as ethical values, or legal doctrines and precedents) that apply to the alternatives in question."[846]

According to coherentist views (or coherence accounts), the task of the deliberator is to search for the theory that best displays coherence. Understood in a legal context, the task of the judge is to decide the case in a manner that best display coherence. But how does Hurley understand (the best display of) coherence? Hurley describes deliberation as a "kind of interpretation, an effort to make sense of a body of practice as a coherent whole."[847] As Hurley suggests, the deliberation involves a process of constructing hypotheses about the content of the *coherence function*. This content of the coherence function "takes us from alternatives ranked by specific reasons to all-things considered ranking in a way that meets certain

[844] Hurley (1989), p. 46, referring to Gallie (1956). Examples of essentially contested concepts Gallie gives are "work of art", "democracy", "Christian doctrine" and "champion". See Gallie (1956), pp. 167-171.
[845] Hurley (1989), pp. 46-47, argues that distributive justice may be conceived as equality of welfare or equality of resources or competing theories of contract.
[846] Hurley (1989), p. 225. For a more general definition of coherentist approach, see Hurley (1989), p. 11.
[847] Hurley (1989), p. 212.

conditions."[848] Drawing an analogy between deliberation and social choice, Hurley argues that there are two conditions that the coherence function must satisfy.[849]

The first, which Hurley calls *P** or *Dominance* (the analogue of P of the weak Pareto principle) states that

> "For all alternatives *x* and *y*, if all criteria rank *x* above *y*, then *x* ranks above *y*, all things considered."

According to this condition, if all the applicable criteria favour one alternative over the another, then that alternative must be followed, and the non-criterial characteristics of the alternatives cannot affect rankings of the alternatives all things considered.[850]

The second condition, which Hurley calls *D** or *Non-Dictatorship* (the analogue of the same condition D), states that

> "A coherence function must not give so much weight to one criterion that it outweighs any criterion that conflicts with it under any circumstances; that is, it must not be the case that there is one criterion such that any one alternative's superiority over any other according to this criterion would always result in its superiority all things considered, regardless of how other criteria might rank those alternatives."

This condition is a prerequisite of deliberation. If one criterion would outweigh all other criteria under any circumstance, we would have a solution for all cases in which that criterion is considered. This would amount to having a fundamental right that is absolute in the sense that it always takes precedence over other fundamental rights with which it might conflict.

To summarize, coherence accounts provide an answer what ought to be done as "some function of the various specific reasons that apply to the alternatives in question; deliberation involves a process of constructing hypotheses about the content of the function."[851] As it will be shown in section II. 5. 4., which presents Hurley's theoretical framework and its application to cases, a formulation of hypotheses and their reformulation according to the circumstances

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[848] Hurley (1989), p. 225. Hurley (1989), p. 230 explains the coherence accounts in a similar way: "…what ought to be done is some function of the various specific reasons that apply to the alternatives in question; deliberation involves a process of constructing hypotheses about the content of the function."

[849] Hurley (1989), p. 253 and p. 231 for the explanation of the conditions. For the elaboration of these conditions and rejection of other possible necessary conditions that have been considered but ultimately rejected, see Hurley (1989), pp. 231-253. Hurley draws an analogy between deliberation and social choice, as these conditions are inspired by Kenneth Arrow and his impossibility theorem and the work of Amartya Sen. Arrow, who analysed the relationship between individual and group preferences, demonstrated that the even if individual preferences are transitive (that is, whenever *R* relates *a* to *b* and *b* to *c*, then *R* also relates *a* to *c*), we cannot count on transitivity of group preferences. See Arrow (1950), pp. 340-342 for the explanation of the theorem and Hurley (1989), pp. 226-231 for her justification of the analogy.

[850] Hurley (1989), p. 232.

[851] Hurley (1989), p. 230.

of the case is necessary to solve it. These hypotheses represent partial specifications of the coherence function. Such a coherence function aims, as Hurley indicates, to represent a theory "that makes best sense of the relationships among various specific, sometimes conflicting reasons."[852] Applied to the context of the problem we are dealing with, this would amount to answering the question of which of the rights the judge ought to give priority to. The answer is reached by considering various circumstances of the case that apply to the alternatives in question and constructing hypotheses about those reasons. This very broad formulation implies that Hurley takes a *conflictivist* position on the issue of apparent conflicts between fundamental rights. In the following subsection, her position on this issue will be presented and analysed. Thereafter, her deliberative process will be presented, and this broad formulation will be clarified and explained.

II. 5. 3. 3. Conflicts between fundamental rights

On the issue of apparent conflicts between fundamental rights, Hurley takes a clear *conflictivist* position.[853] She does not refer directly to fundamental rights, since she deals with legal issues only in passing, but writes about the conflict between values or conflicting reasons for action. In Hurley's understanding, fundamental values are in conflict, and she argues for a democratic recognition of a "plurality of conflicting values." When values conflict, judgments about what should be done, all things considered, may be arrived through the process of deliberation she proposes. Conflicting values support different, conflicting reasons for action that support one of the conflicting alternatives.

As Hurley explains, when faced with "certain consequences and conflicting criteria", decision-makers (or judges, in the case of the conflict between fundamental rights) must "arrive at trade-offs between the various conflicting criteria, or values involved."[854] This process of deliberation, as we have already mentioned, is based on the idea of coherence. In the case of a

[852] Hurley (1989), p. 217. The meaning of this in legal context will be shown in more detail in section II. 5. 4., in which a reconstruction of Hurley's theoretical framework and its application to cases is presented. For now, we can say that, in legal context, it means the selection of a hypothesis (formulated for the relationship between the relevant circumstances of the case) which covers the largest number of settled cases. Such hypothesis is considered the best in displaying coherence (since it covers the largest number of settled cases and takes the relevant circumstances into consideration).

[853] For the views on conflict, see Hurley (1989), pp. 125-135. See also Hurley (1989), p. 262, argues for a coherent resolution of the conflict regardless of the conflicts being "ineliminable". Another example of embracing a clear conflictivist position by can be found in Hurley (1989), p. 322, where she writes that "In earlier chapters we have found that *values conflict* [emphasis by the author], and that though we try to make coherent decisions about what should be done, *our success in doing so does not eliminate the conflict* [emphasis by the author]; nor does the value of seeking coherence depend on a presupposition that conflict can be eliminated."

[854] Hurley (1989), pp. 69-70.

conflict of values and deliberation about what ought to be done, all things considered, we should try to "describe a coherent set of relationships among the conflicting values (…)".[855] In the context of conflict between reasons for action, the function of coherence consists in the fact that

> "…the deliberator must try to achieve a view about their [applicable reasons for action, remark added] relationships that will take her from the rankings of the alternatives by the various conflicting reasons to an all-things-considered evaluation."[856]

Having presented Hurley's position on the basic notions relevant to understanding the problem with which we are concerned (interpretation, coherence, and conflicts between fundamental rights), we turn in the next section to Hurley's deliberative process by introducing her theoretical framework and applying it to two cases of conflicts between fundamental rights.

II. 5. 4. Hurley's proposal: deliberative process

In this section, the deliberative process of Susan Hurley deliberative process is explained and applied to fundamental rights conflicts. First, the theoretical framework of her approach is presented so that we can get an overview and reconstruction of the steps required to resolve such a conflict. The deliberative process she proposes consists of five stages and is based on the concept of "settled cases", either real or hypothetical ones. This approach is then applied to two examples: first, to an example from the Spanish legal system, used by David Martínez-Zorrilla, who adapted Hurley's theory for application to legal cases, and second, the standard comparison case used previously to the 1992 Federal Constitutional Court *Titanic* case.

II. 5. 4. 1. Theoretical framework

The general account of deliberation that will be presented in this section is applicable to both legal and ethical reasoning, despite differences between them, according to Hurley.[857]

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[855] Hurley (1989), p. 173.
[856] Hurley (1989), p. 221.
[857] Hurley (1989), p. 223. Hurley understands legal reasoning as a type of moral reasoning, referring to MacCormick (1994), p. 272, who writes that "legal reasoning is a special, highly institutionalized and formalized, type of moral reasoning. Of course the very features of institutionalization and formality create important disanalogies between legal reasoning and moral reasoning in the deliberation of individuals, or the discourses and the discussions of friends and colleagues, or whatever." An example given by Hurley (1989), p. 223 to illustrate her understanding of difference between the two types of reasoning are the rules of evidence, which "artificially simplify legal deliberation, perhaps partly as a result of practical pressures to arrive at fair decisions as efficiently as possible."

We begin by outlining the theoretical framework of the deliberative process, which Hurley divides into five stages.[858]

(1) The first stage consists of the specification of the problem. The alternatives in the case are identified, and various specific reasons that apply to those alternatives (and how those reasons rank the alternatives) are determined.[859] The "reasons" referred to in this stage can be understood as legal norms applicable to the case that provide different, incompatible solutions to the case, as shown in the second stage.

(2) The second stage involves a more detailed analysis of various specific conflicting reasons applicable to the alternatives at hand.[860] On this "more careful examination" of the various specific reasons that apply to the given case, Hurley writes:

> "Perhaps when we consider the purpose of one reason, it will turn out to have a rather different import than we originally thought in this particular case. At any rate, at this stage we develop and firm up our local conceptions of the various specific reasons that apply, without yet trying to arrive at a global conception of their relation to one another."

Based on this formulation, it might seem problematic to distinguish between the first stage just mentioned (identification of reasons) and the second stage (more careful examination of reasons), as Martínez Zorrilla notes.[861] He proposes the following interpretation of Hurley's deliberative process to distinguish more clearly between the two stages: The "reasons" referred to in the first stage would be legal norms applicable to the case that support different, incompatible solutions. An example of this are two norms from the Spanish Constitution: Art. 20(1)(d), protecting freedom of information and Art. 18(1), protecting the right to honour.[862] On the other hand, in the second stage of the deliberative process, we are no longer dealing with legal norms, but with "underlying reasons" for these norms that are in conflict. These conflicting "underlying reasons" include, as Martínez Zorrilla indicates, various considerations, goals, purposes, moral principles, etc. that are taken as the basis of the

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[858] The deliberative process is explained in Hurley (1989), p. 211-217, Hurley (1990), p. 223-226.
[859] Hurley (1989), p. 211 and Hurley (1990), p. 223.
[860] Hurley (1990), p. 223 on the 'more careful examination' in the second stage writes: "Perhaps when we consider the purpose of one reason, it will turn out to have a rather different import that we originally though in this particular case. At any rate, at this stage we develop and firm up our local conceptions of the various specific reasons that apply, without yet trying to arrive at a global conception of their relation to one another."
[861] Martínez Zorrilla (2009), p. 124.
[862] Art. 18(1) of the Spanish constitution states that "1. The right to honour, to personal and family privacy and to the own image is guaranteed, while Art. 20.1.d. states that "1. The following rights are recognized and protected (…) d) the right to freely communicate or receive accurate information by any means of dissemination whatsoever. The law shall regulate the right to invoke personal conscience and professional secrecy in the exercise of these freedoms."

conflicting norms under consideration.[863] After the first two stages of the deliberative process, we should have identified the conflicting norms and their underlying reasons. In the third stage, Hurley introduces her central notion of settled cases.

(3) In the third stage, other cases are analysed. These other cases Hurley calls *settled cases*, which may be *actual* or *hypothetical*. Settled case is defined by Hurley as

> "…a case, which, if *actual* [emphasis added], is such that its resolution is clear to the relevant decision-maker or decision-makers, and which, if *hypothetical* [emphasis added], is such that its resolution would be clear to the relevant decision-maker or decision-makers were the case to be considered."[864]

Hurley adds that the resolution of a particular case as settled does not mean that it cannot be mistakenly resolved; the 'settledness' of a particular case is a matter of "what is or would be believed to be correct, not necessarily what is correct". So, from a conceptual point of view, not all actually decided cases are settled, and some settled cases are hypothetical, not actual.[865] There may be (and in legal practice there often are) actually decided cases that are not considered settled (if we follow Hurley's terminology), but there are also cases that are not decided, but only hypothetical, but which may be considered settled.

The settled cases (actual or hypothetical) considered are those for which the same reasons apply (identified in the second stage) as for the case to be decided. These cases are considered *paradigmatic cases*.[866] Paradigmatic cases are those whose solution is clear or evident and on which there is a broad consensus.[867] Paradigmatic cases are also cases that have been decided by the consolidated jurisprudence or the binding decisions from other instances, such as the supreme courts and constitutional courts.[868]

Settled actual cases may be given more weight than settled hypothetical cases, or they may be given equal weight, depending on the legal system in question and the existence of precedent.[869] But this possible difference between actual and hypothetical cases, as Hurley

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[863] Martínez Zorrilla (2009), pp. 125-126. Of course, the notion of "underlying reasons" behind the norm is a controversial one, as indicated by Martínez Zorrilla and it depends on the understanding of the law. One of the questions is do these "underlying reasons" belong to the legal system (by positivistic parameters). In the opinion of Martínez Zorrilla, the discussion about "underlying reasons" is valuable only to the extent and according to the extent of the agreement that exists between the jurists, since the determination of "underlying reasons" is the result of the act of will of an interpreter, and not a cognitive act of "discovery", except in the rare situations where there are express references in legal text about the purpose of the law.
[864] Hurley (1990), p. 223. On the third stage, see also Hurley (1989), pp. 212-213.
[865] Hurley (1990), p. 223 and Hurley (1990), p. 241.
[866] Martínez Zorrilla (2009), p. 126.
[867] Martínez Zorrilla (2009), p. 126.
[868] Martínez Zorrilla (2009), p. 126.
[869] Hurley (1990), p. 233.

notes, is only significant in certain circumstances and therefore does not change the general idea of the deliberative process.

(4) The fourth stage is considered the "heart" or "nucleus" of the deliberative process.[870] Here, the theoretical hypotheses for the solution of the issues found at the third stage are elaborated. The "issues" to be resolved are the relations between the various conflicting reasons under various circumstances from the paradigmatic cases under consideration. As Hurley puts it:

> "That is, we are trying to formulate the hypotheses about the relationships between the conflicting reasons under various different circumstances present in the stage three cases, which account for those resolutions. To this end we examine the stage three cases for distinctive circumstances or dimensions which seem to enhance or diminish the weight of one of the conflicting reasons in relation to the other."[871]

After a hypothesis has been formulated, it is tested by returning to the previous stage and looking for other settled cases in which the circumstances identified by the hypothesis are present and in which the same reasons apply.[872] The process of deliberation continues by going "back and forth" between the third and fourth stages, looking for actual and hypothetical settled cases that refine the hypothesis about the relationships between conflicting reasons in different circumstances.[873] The hypotheses are formulated to find out which circumstances or properties of the case contribute to increase or decrease the "weight" or importance of each of the conflicting reasons in relation to the others, as Martínez Zorrilla elaborates.[874]

The hypothesis formulated in this fourth stage takes the following form:

> "Reason X tends to outweigh Reason Y when it is the case that p, while Reason Y tends to outweigh Reason X when it is the case that q; when it is the case that both p and q, but not r, Reason X has more weight, but when r is present as well, Reason Y has more weight and so on."[875]

(5) Finally, in the fifth and last stage, the best hypothesis for the original case is applied. The application of this hypothesis refers to the relations between the applicable reasons to the circumstances or properties of the case.[876] This hypothesis is characterized by Hurley as

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[870] Hurley (1990), p. 224 and Martínez Zorrilla (2009), p. 126.
[871] Hurley (1990), p. 224. Hurley (1989), p. 213 explains the fourth stage: "At the fourth stage we analyse the settled issues in order to form hypotheses about the relationships between the conflicting reasons."
[872] Hurley (1990), p. 224.
[873] Hurley (1990), p. 224.
[874] Martínez Zorrilla (2009), p. 126. See Hurley (1989), pp. 212-213 and Hurley (1990), p. 224.
[875] Hurley (1990), p. 225. Hurley compares her schematization of deliberative process, when applied to legal deliberation to the programme HYPO, which was developed by Edwina Rissland and Kevin Ashley.
[876] Hurley (1990), p. 224.

"…a partial specification of a coherence function, which takes us from the rankings of alternatives involving various circumstances or dimensions by the conflicting reasons to an all-things-considered ranking".[877]

The deliberative process and its five stages are illustrated by Hurley with what she calls a *deliberative matrix*.[878] The deliberative matrix and its stages can be illustrated by the tables presented in the following paragraphs. Let us now introduce the five stages of the deliberative matrix.

(1) The first stage consists in identifying different possible alternatives to solve the case and the (legal-normative) reasons in favour of each of the alternatives:

Deliberative matrix (first stage):[879]

Deliberative matrix	*Reason X*	*Reason Y*	*Solution*
Disputed case	Alternative A	Alternative B	?
	Alternative B	Alternative A	?

(2) In the second stage, the considerations underlying each of the conflicting reasons are determined as 'underlying reasons' (shown in brackets as C and D):

Deliberative matrix (second stage):

Deliberative matrix	*Reason X (…C…)*	*Reason Y (…D…)*	*Solution*
Disputed case	Alternative A	Alternative B	?
	Alternative B	Alternative A	?

(3) In the third stage, paradigmatic cases are considered in order to analyse each of the conflicting reasons:

Deliberative matrix (third stage):

Deliberative matrix	*Reason X (…C…)*	*Reason Y (…D…)*	*Solution*
Disputed case	Alternative A	Alternative B	?
	Alternative B	Alternative A	?
Paradigmatic case 1	Alternative D	Alternative C	Alternative C

[877] Hurley (1990), p. 224.
[878] Hurley (1989), pp. 211-217, Hurley (1990), p. 224 and Martínez Zorrilla (2009), pp. 127-129. The five tables represented here are from Martínez Zorrilla (2009), pp. 127-129.
[879] Hurley (1990), p. 225, presents the matrix with only two conflicting reasons, X and Y, for the reasons of convenience; there is no restriction, as she indicates, on the number of reasons that may be represented in the matrix.

	Alternative C	Alternative D	Alternative D
Paradigmatic case 2	Alternative E Alternative F	Alternative F Alternative E	Alternative E Alternative F
Paradigmatic case 3	Alternative G Alternative H	Alternative H Alternative G	Alternative H Alternative G
Paradigmatic case 4	Alternative I Alternative J	Alternative J Alternative I	Alternative J Alternative I

(4) The fourth stage of the deliberative matrix involves various hypotheses about the circumstances under which the alternative favoured by one reason prevails over the alternative favoured by another reason in the paradigmatic cases.[880] A "purification process" is carried out, after which only the adequate hypotheses remain:

Deliberative matrix (fourth stage):

Deliberative matrix	*Reason X (…C…)*	*Reason Y (…D…)*	*Solution*
Disputed case	Alternative A Alternative B	Alternative B Alternative A	? ?
Paradigmatic case 1	Alternative D Alternative C	Alternative C Alternative D	Alternative C Alternative D
Paradigmatic case 2	Alternative E Alternative F	Alternative F Alternative E	Alternative E Alternative F
Paradigmatic case 3	Alternative G Alternative H	Alternative H Alternative G	Alternative H Alternative G
Paradigmatic case 4	Alternative I Alternative J	Alternative J Alternative I	Alternative J Alternative I
Hypothesis case 1	D prevails under "p∧q"	C prevails under "p∧q"	Reason Y prevails over X under "p∧q"

[880] Martínez Zorrilla (2009), p. 127. For the fourth stage of the deliberative process, see Hurley (1989), pp. 213-217.

Hypothesis case 2	E prevails under "¬p∧q"	F prevails under "¬p∧q"	Reason X prevails over Y under "¬p∧q"
Hypothesis case 3	G prevails under "p∧¬q"	H prevails under "p∧¬q"	Reason Y prevails over X under "p∧¬q"
Hypothesis case 4	I prevails under "¬p∧¬q"	J prevails under "¬p∧¬q"	Reason Y prevails over X under "¬p∧¬q"

In this fourth stage of the deliberative matrix[881], we arrive at a theoretical hypothesis according to which, in the case of conflict between reasons X and Y, Y prevails in all cases except the case in which the circumstances "¬p∧q" coincide. Then, if circumstances "p∧q" coincide in that case, the case should be resolved according to the reason Y, which prefers the alternative B in that case. Thus, the fifth and final stage of the deliberative matrix is reached:

(5) Deliberative matrix (fifth stage):

Deliberative matrix	*Reason X*	*Reason Y*	*Solution*
Disputed case	Alternative A Alternative B	Alternative B Alternative A	Alternative B Alternative A

Finally, we arrive at a ranking of the possible alternatives. This completes the deliberative process, and we arrive at a resolution of the conflict. Since the deliberative process is abstract and technical, we will illustrate it in the next subsection with two cases to better understand it and show its practical application, since it is a theoretical construct not built on observation of legal practice.

II. 5. 4. 2. Application

II. 5. 4. 2. 1. Conflict between freedom of information and the right to honour

In his exposition of Hurley's model, Martínez Zorrilla demonstrates its application to one of the most common conflicts between fundamental rights: that between freedom of information and the right to honour. The conflict between these rights, which are usually taken

[881] Martínez Zorrilla (2009), p. 129.

to have the structure of legal principles[882], frequently appears before the courts and is a classic example analysed in the literature. We will analyse it not only for this reason, but also because it was chosen by the author who adapted Hurley's ideas for practical application in legal reasoning. The conflict between the two fundamental rights will be analysed in the context of the Spanish legal system and Constitutional Court of Spain, but it is relevant for any legal system that protects the two right mentioned.

The problematic situation is that a case must be decided in which certain information is reported in the media, but which affects the right to honour of a particular person.[883] This situation, as Martínez Zorrilla reconstructs it, can be understood as a "conflict of reasons" that order the alternative possible solutions to the case differently. Within the Spanish legal system, the activity of reporting such information in the media is protected by the fundamental right to freedom of information, which is protected in Art. 20(1)(d) of the Spanish Constitution. According to this provision, such activity is allowed (Alternative A). On the other hand, the same activity affects the right to honour, which is protected by the fundamental right to honour (Art. 18(1) of the Spanish Constitution), according to which reporting such information would be prohibited (Alternative B). The term "reasons" is used to follow the terminology of Susan Hurley. These "reasons" can be understood as conflicting fundamental rights, since their conflict imposes on the judge the obligation to evaluate and order the alternative possible solutions to the case.

(1) If we were to apply the deliberative matrix to this case, the result in the first stage (specifying the problem) would be that we have one constitutional norm that protects freedom of information and another that protects the right to honour. One protects the publication of certain information in the media, while the other prohibits it. (The "reasons", or conflicting rights are shortened to "information" and "honour" in the table below.)

Deliberative matrix (first stage):

Deliberative matrix	*Information*	*Honour*	*Solution*
Disputed case	Alternative A	Alternative B	?
	Alternative B	Alternative A	?

[882] On this point, see Martínez Zorrilla (2011), pp. 729-731. Martínez Zorrilla (2011), p. 730 calls it the 'Standard Conception' of conflicts between fundamental rights. According to a thesis accepted by the 'Standard Conception', the normative elements in the conflict are legal principles, as opposed to legal rules. Principles and rules are conceived as structurally different categories of norms. The most prominent example of this position is Robert Alexy and his theory of judicial balancing.

[883] The information reported in the media are verified and therefore considered true, in the context of the practice of the Constitutional Court of Spain. Martínez Zorrilla (2009), p. 134.

(2) In the second stage, the "underlying reasons" for each of the "reasons" from the first stage (in fact, norms protecting fundamental rights) that order the alternatives in different ways are determined. In the jurisprudence of Spanish Constitutional Court, as presented by Martínez Zorrilla, the Court held that freedom of information has its basis or justification in the *formation of free public opinion*, which is the foundation of a modern democratic society.[884] For such free public opinion to exist, the Court held that it is necessary for ideas and opinions to be freely expressed (freedom of expression) and expressed without restriction or censorship (freedom of information).[885] As a hypothesis, the *formation of free public opinion* is considered to be the underlying reason behind freedom of information. As for the other norm that protects the right to honour, Martínez Zorrilla considers *dignity* as the underlying reason for it.[886] What follows next is the second stage:

Deliberative matrix (second stage):

Deliberative matrix	*Information (public opinion)*	*Honour (dignity)*	*Solution*
Disputed case	Alternative A	Alternative B	?
	Alternative B	Alternative A	?

(3) In the third stage, as already mentioned, paradigmatic cases are considered. Although there is extensive case law on the conflict between freedom of information and the right to honour, Martínez Zorrilla considers four hypothetical cases that form the third stage of the deliberative matrix.[887]

(a) In the first case, the Minister of Public Works approved a concession in exchange for a large provision. In this hypothetical case, despite the fact that the publication of such information adversely affects the minister's public image, freedom of information should prevail over the right to honour because such information is of great relevance to public opinion.

[884] Martínez Zorrilla (2009), p. 134. Martínez Zorrilla refers to the following decisions of the Constitutional Court of Spain: *Sentencia 57/2004*, from 19th of April, *Sentencia 2/2001*, from 5th of January and *Sentencia 144/1998*, from 30th of June.
[885] Martínez Zorrilla (2009), p. 134.
[886] Martínez Zorrilla (2009), p. 134, where he also states that the determination of the main underlying reason behind the legal norm that protects the right to honour is more debatable and that, as the main underlying reason, also self-respect can be taken (in the sense that the external projection also affects the image one has of himself). However, he opts for dignity as the underlying reason behind the right to honour.
[887] Martínez Zorrilla (2009), pp. 135-136.

(b) In the second hypothetical case, information about the Minister is published but has nothing to do with his position or public affairs.[888] In this case, the right to honour (at least as a hypothesis) prevails over the freedom of information, because the honour of the person is negatively affected, and the information published does not contribute to the formation of free public opinion.

(c) In the third case, the person in question is anonymous (without public relevance) and it is reported that this person endangered the security of the State by stealing intelligence documents.[889] In this case, freedom of information should take precedence over the right to honour.

(d) Finally, in the fourth hypothetical case, a public official has committed certain violations of the law in the performance of his or her duties, but the information is disseminated in such a way that many insults and insulting disqualifications are used, which are extremely seriously affecting the reputation of the person concerned. In this case, the right to honour is considered more important and therefore takes precedence. These four paradigmatic cases are presented in the deliberative matrix:

Deliberative matrix (third stage):

Deliberative matrix	*Information (public opinion)*	*Honour (dignity)*	*Solution*
Disputed case	Alternative A Alternative B	Alternative B Alternative A	? ?
Paradigmatic case A	Alternative C Alternative D	Alternative D Alternative C	Alternative C Alternative D
Paradigmatic case B	Alternative E Alternative F	Alternative F Alternative E	Alternative F Alternative E
Paradigmatic case C	Alternative G Alternative H	Alternative H Alternative G	Alternative H Alternative G
Paradigmatic case D	Alternative I	Alternative J	Alternative J

[888] Examples given by Martínez Zorrilla here are the information that the minister never pays for the meals when he is in a restaurant with his friends or that he like a certain type of movies.
[889] However, it can be counter-argued that there is opposing public interest, so that this does not seem like a good example. One can think of Edward Snowden, for example.

	Alternative J	Alternative I	Alternative I

(4) In the fourth stage, starting from the elaboration of the paradigmatic cases, hypotheses are made about how certain circumstances affect each of the conflicting reasons, how this affects the ordering of the alternatives and the resolution of the conflict. In this model, the better a hypothesis explains the larger number of paradigmatic cases, the more satisfactory it is.[890] In Martínez Zorrilla's view, this is precisely the advantage of Hurley's model over the model developed by Robert Alexy: it allows for a greater degree of specification or delimitation of the relevant properties or circumstances.[891]

The hypotheses in the fourth stage are formed by examining the paradigmatic cases.[892] The first hypothesis proposed by Martínez Zorrilla is that when a person being reported on is of public relevance ("p"), freedom of information should take precedence over the right to honour. This hypothesis would explain the paradigmatic case A. However, it is not adequate because it does not account for the paradigmatic case B (in which the information is also of public relevance, but the right to honour prevails) nor for the paradigmatic case C (in which the activity of an anonymous person is reported). The hypothesis must therefore be abandoned and replaced by a more satisfactory one that better accounts for the larger number of paradigmatic cases. A second hypothesis considered could relate to the public relevance of the reported information ("q"). This focuses on the information reported rather than the individual (although this fact may still influence the decision whether the reported matter is considered to be of public relevance). This hypothesis is more satisfactory because it accounts for the paradigmatic cases A and C, but also indirectly case B.[893] But this second hypothesis does not account for the paradigmatic case D, so another refined hypothesis should be presented to account for the case. To solve the case D, the "weight" or importance of freedom of information and the right to honour must be considered.[894]

[890] Martínez Zorrilla (2009), p. 136.
[891] Martínez Zorrilla (2009), p. 136. In Alexy's approach, as Martínez Zorrilla argues, only the "circumstances of the case" are referred to, but they are not obvious or unproblematic aspect. In Hurley's model, the "underlying reasons" considered in the second stage "delimit the frame of consequences that can be considered relevant". In the example given, if one of the underlying reasons is the formation of a free public opinion, only those properties that in some way impact or can impact the formation of such opinion can be considered as relevant circumstances. The advantage of such an approach is, as Martínez Zorrilla further elaborates, that it excludes irrelevant circumstances (for example, the colour of the car of the person who published information). Rather, it allows us to consider whether the fact that the person about whom the information is published is a public person can be considered relevant for the decision.
[892] Martínez Zorrilla (2009), p. 137.
[893] This second hypothesis indirectly accounts for the paradigmatic case B to the extent that when the information published does not have public relevance, the right to honour prevails. Martínez Zorrilla (2009), p. 137.
[894] This is the reason why Hurley's approach can be understood as a version of judicial balancing. See Martínez Zorrilla (2009), pp. 122-123. Hurley often refers to the notion of 'weight'. See, for example Hurley (1990), p.

The weight or importance of the conflicting reasons is determined in relation to the underlying reasons which support them.[895] That is, the weight or importance of the right to honour (one of the conflicting reasons) depends on the degree to which dignity (as the underlying reason for it) is affected. The applies to the weight or importance of freedom of information and the degree to which the formation of a free public opinion is affected. In Martínez Zorrilla's view, dignity is very seriously affected when insults are used; they are an unnecessary way of infringing the right to honour when publishing information.[896] Therefore, a hypothesis can be made according to which, when insulting expressions ("r") are used, the right to honour prevails, even if the information is of public relevance. Thus, for freedom of information to prevail, it is not only necessary that the information is of public relevance ("q"), but also that insulting expressions are not used ("¬r").[897] This final refinement leads to the hypothesis that accounts for all the paradigmatic cases mentioned above: in the circumstances "q∧¬r" freedom of information prevails, while under the circumstances "¬q" or "r", the right to honour prevails. After the refining hypotheses, the next step is the fourth stage of the deliberative matrix.

Deliberative matrix (fourth stage):[898]

Deliberative matrix	*Information (public opinion)*	*Honour (dignity)*	*Solution*
Disputed case	Alternative A Alternative B	Alternative B Alternative A	? ?
Paradigmatic case A	Alternative C Alternative D	Alternative D Alternative C	Alternative C Alternative D

224., where he writes about the "weights of the conflicting reasons" in relation with one another, or Hurley (1990), p. 225, where different hypotheses result in different weights of conflicting reasons: "A hypothesis would then take the form: 'Reason X tends to outweigh Reason Y when it is the case that p, while Reason Y tends to outweigh Reason X when it is the case that q; when it is the case that both p and q, but not r, Reason X has more weight, but when r is present as well, Reason Y has more weight', and so on."

[895] Hurley (1990), pp. 224-225 and Martínez Zorrilla (2009), pp. 137-138.

[896] Martínez Zorrilla (2009), p. 137. The idea that freedom of information can be exercised without insulting another's right to honour and that this circumstance should be the deciding factor for the resolution of the hypothetical case D) is similar to the second sub-principle of proportionality: the sub-principle of necessity. According to the sub-principle of necessity, when two means promote one principle, the one that interferes less intensively with the other principle should be chosen. See Alexy (2014), p. 53. In the paradigmatic case D), the mean M1 would be publishing information without insults, and mean M2 would be publishing information with insults. According to the sub-principle of necessity (and following the line of reasoning expressed by Martínez Zorrillla), mean M1 is to be preferred.

[897] Martínez Zorrilla (2009), p. 138.

[898] The matrix does not present the situation when the information published is of no public relevance, and insulting expressions are used ("¬q∧r"). Such situation is easily resolved under the definitive hypothesis for the case B. Martínez Zorrilla (2009), p. 138.

Paradigmatic case B	Alternative E Alternative F	Alternative F Alternative E	Alternative F Alternative E
Paradigmatic case C	Alternative G Alternative H	Alternative H Alternative G	Alternative G Alternative H
Paradigmatic case D	Alternative I Alternative J	Alternative J Alternative I	Alternative J Alternative I
Definitive hypothesis Cases A and C	C and G prevail under "q∧¬r"	D and H prevail under "q∧¬r"	Information prevails over honour under "q∧¬r"
Definitive hypothesis Case B	E prevails under "¬q∧¬r"	F prevails under "¬q∧¬r"	Honour prevails over information under "¬q∧¬r"
Definitive hypothesis Case D	I prevails under "q∧r"	J prevails under "q∧r"	Honour prevails over information under "q∧r"

(5) In the fifth and final stage, the best hypothesis is applied to the case to be decided and the solution depends on the presence or absence of the circumstances "q" (public relevant of the information) and "r" (presence of insulting expression).[899] If, in the case to be decided, the information is of public relevance and no insulting expression has been used, the solution will give priority to the freedom of information.

Deliberative matrix (fifth stage):

Deliberative matrix	*Information (public opinion)*	*Honour (dignity)*	*Solution*
Disputed case "q∧¬r"	Alternative A Alternative B	Alternative B Alternative A	Alternative A Alternative B

What advantages would Susan Hurley's approach have over Alexy's theory of judicial balancing and other proposed methods for resolving conflicts between fundamental rights? According to Martínez Zorrilla, the main advantage over Alexy's theory of judicial balancing is the more accurate analysis of the *circumstances of the case*.[900] What Martínez Zorrilla finds

[899] Martínez Zorrilla (2009), pp. 138-139.

[900] Martínez Zorrilla (2009), pp. 140-141. Alexy's Law of Competing Principles (or collision law), in the longer formulation, states that "If principle P1 takes precedence over principle P2 in circumstances C: (P1 P P2), and if P1 gives rise to legal consequences Q in circumstances C, then a valid rule applies which has C as its protasis and Q as its apodosis: C→Q". In the shorter formulation, the Law of Competing Principles states that "The

problematic about Alexy's theory of judicial balancing is the generic reference to "circumstances C", without further detail or specification, as if the determination of those circumstances were obvious or unproblematic. But circumstances C are not, of course, all the circumstances of the case in question, only the *relevant* ones. A normative or evaluative criterion is required, as Martínez Zorrilla argues, to select which circumstances of the case are *relevant* ("circumstances C"), as they affect the determination of the "weight" of the conflicting rights. The advantage of the model proposed by Susan Hurley is that instead of "indeterminate and generic reference" to the circumstances of the case, it is possible to determine "admissible relevant properties".[901] Admissible relevant properties are those that can affect the underlying reasons and determine the resolution of the case.[902] According to Martínez Zorrilla's view, the model proposed by Hurley has the advantage of providing a normative (evaluative) criterion for the selection of *relevant* properties of the case. The aim of Hurley's model is to extend the reasons underlying the solution to other cases of conflicts that have the same characteristics as the case in question.[903]

To recapitulate the conflict between freedom of information and the right to honour: If, in the case to be decided, the information is of public relevance and no insulting expressions have been used (q∧¬r), the freedom of information should prevail; if the information is not of public relevance or if insulting expressions have been used, the right to honour should prevail.

II. 5. 4. 2. 2. *Titanic case* (1992)

In this section we will apply the deliberative matrix to a case from the German legal system, the 1992 *Titanic* case. The facts of the case have already been stated, so we can proceed directly to the application of Hurley's deliberative process.

(1) In the first stage, the problem is specified. The problem is specified by establishing that two fundamental rights –freedom of expression, protected by Art. 5(1) of the Basic Law and personality rights, protected by Art. 2(1) of the Basic Law – are in conflict regarding the

circumstances under which one principle takes precedence over another constitute the conditions of a rule which has the same legal consequences as the principle taking precedence. Alexy (2002), p. 54.

[901] Martínez Zorrilla (2009), p. 141.

[902] Martínez Zorrilla (2009), p. 141. Two examples are given by Martínez Zorrilla in order to illustrate the process of the selection of relevant circumstances or properties of the case. In the first case, an informant publishes information that negatively affects the honour of a non-public person and the information published is not of public interest (for example, the news published affects the hygienic habits of the person in question). In the second case, information is published about alleged serious irregularities with public funds made by a major. Both cases, as Martínez Zorrilla elaborates, have circumstances or properties that are in common, but the decisive one for the resolution of each case is the public relevance of the information published.

[903] Martínez Zorrilla (2009), pp. 141-142.

deontic regulation of a particular action. The action in question, as we already know, is the description of a paraplegic reserve officer as a "born murderer" and as "cripple" in a satirical magazine Titanic.

(2) The second stage identifies the "underlying reasons" for the norms from the first stage. The "underlying reasons" rank the alternatives in different ways. As underlying reasons behind the conflicting rights, we can suggest free, democratic society for freedom of expression and dignity of the person for personality rights. These two "underlying reasons" (or values, we can say) are taken by the Federal Constitutional Court into consideration.

(3) In the third stage, we must consider paradigmatic cases to form the deliberative matrix. Following Martínez Zorrilla, I propose four hypothetical paradigmatic cases.

(a) In the first case, a disabled Minister of Defence, as a person in a political position, is described as a "murderer" in the newspaper for having a policy of ordering new weapons. The freedom of expression takes precedence here because the newspaper criticises a person in a political position (p) and express a political idea (q) of pacifism.

(b) In the second case, the same minister is described in the newspaper as a "drug addict" because he takes painkillers for condition. The right to honour takes precedence here because although a person in a political position is criticised (p), only private information is disseminated, and no political idea is expressed (¬q).

(c) In the third case, an anonymous disabled war veteran or a group of war veterans (as persons not holding a political position, ¬p), who publicly support the idea of ordering new weapons are called "murderers" by the newspaper. Here, freedom of expression takes precedence because the description promotes a political idea (q) of pacifism. The political position of person(s) (p or ¬p) makes no difference here.

(d) In the fourth case, the newspaper uses the description "murderer", while referring to the minister and/or war veteran(s) who support the policy as "cripples", referring to their physical inability to use the new war equipment and ridiculing them based on it. Here, the right to honour takes precedence. Although a political message is conveyed (q), it is accompanied by a negative reference to the disabilities of the persons (r) as their inherent characteristics, rather than to their opinions or activities.

(4) In the fourth stage, hypotheses are formulated about the circumstances of the case and their implications on each of the conflicting reasons. A hypothesis is better the more paradigmatic cases it explains. The first hypothesis could be that when the person being reported on holds a political position ("p"), freedom of expression takes precedence over personality rights. This hypothesis would explain the paradigmatic case A, but not cases B and

C. Following the model, the hypothesis must be replaced by a better one. A second hypothesis could be that if the expression puts forward a political idea ("q"), freedom of expression takes precedence over personality rights. This hypothesis is better because it accounts for paradigmatic cases A, B and C. But it does not account for the paradigmatic case D, so a final refined hypothesis is needed to solve case D. To solve this case, the "weight" or importance of the conflicting rights must be considered. This is done by determining the degree to which the underlying reasons from the second stage (free, democratic society for freedom of expression and dignity for personality rights) are affected. It could be argued (convincingly, in my view) that ridiculing disability seriously affects the dignity of individuals and that this is an unnecessary infringement of personality rights by the newspaper. From this, a final refined hypothesis can be made that considers all paradigmatic cases. According to it, in the circumstances "q∧¬r", freedom of expression takes precedence, while in the circumstances "¬q" or "r", personality rights prevail. In other words, the hypothesis can be formulated as follows: If a newspaper expresses a political idea (q), without negative reference to the disabilities of the persons (¬r), freedom of expression takes precedence. On the other hand, if the magazine does not express a political idea (¬q) or if it refers negatively to the disabilities of persons (r), the right to honour takes precedence.

(5) In the fifth and last stage, the best hypothesis is applied to the case to be decided, and the solution depends on the presence or absence of the circumstances "q" (expression of a political idea) and "r" (negative reference to disabilities of the persons).[904] If in the case to be decided, the expression puts forward a political idea and no negative reference is made to the disabilities of the persons, the solution will give priority to freedom of information.

II. 5. 5. Criticisms and conclusions

II. 5. 5. 1. Criticisms

Susan Hurley's ideas, when adapted for the legal context, allow the construction of a viable proposal for resolving conflicts between fundamental rights, as David Martínez Zorrilla notes. However, before summarising the advantages and disadvantages of the approach, we will first present the criticisms that can be raised against certain points of the deliberative process she proposed. They relate to the last four stages of the deliberative process, each of which raises certain doubts that will be presented here. The criticisms will be illustrated with

[904] Martínez Zorrilla (2009), pp. 138-139.

examples from the first case to which Hurley's approach was applied – the conflict between freedom of information and the right to honour in the context of the Spanish legal system.

The first problem relates to the identification of the "underlying reasons" in the second stage of the deliberative process. Following Martínez Zorrilla's reconstruction and interpretation of Hurley's approach, the second stage of the deliberative matrix consists in identification of the "underlying reasons" for norms in conflict (previously identified in the first stage of the deliberative process). These "underlying reasons" are, as Martínez Zorrilla says, are "various considerations, goals, purposes, moral principles, etc. that are taken as the basis of the conflicting norms under consideration". However, different underlying reasons can be suggested for the same norm identified in the first step. In the reconstruction of the first case (conflict between freedom of information and the right to honour), Martínez Zorrilla also pointed out to this problem. He suggested dignity as an underlying reason for the norm protecting the fundamental right to honour (Art. 18(1) of the Spanish Constitution), but points out that self-respect could also be considered, and that the choice of the underlying reason is open to debate.

The second problem is related to the identification of paradigmatic cases in the third stage of the deliberative process. Paradigmatic cases (either actual or hypothetical) that are considered are the cases for which the same underlying reasons (identified in the second stage) apply as for the case to be decided. In addition, the solutions of the paradigmatic cases must be "clear or evident" and there must be a "broad consensus" on their solution. Paradigmatic cases, as explained earlier, can also be cases from consolidated jurisprudence or cases decided by other instances whose decisions are binding (e.g., the supreme court or the constitutional court). However, if we look at the paradigmatic cases considered in the first analysed case, the proposed solution can be contested. For example, the third hypothetical case proposed by Martínez Zorrilla involves an anonymous person (without public relevance) who is reported to have compromised state security by stealing intelligence documents. In this case, a hypothesis is formulated according to which freedom of information should take precedence over the right to honour. But in this paradigmatic case, a different solution can be proposed by arguing that there are opposing public interests that support a different solution and the precedence of the right to honour over freedom of information (one can think of Edward Snowden, for example).

The third problem is related to the fourth step of the deliberative process and the identification of admissible relevant properties. As Hurley describes it:

> "That is, we are trying to formulate hypotheses about the relationships between the conflicting reasons under various different circumstances present in stage three cases, which account for those

resolutions. To this end we examine the stage three cases for distinctive circumstances or dimensions which seem to enhance or diminish the weight of one of the conflicting reasons in relation to the other."[905]

In the first case, Martínez Zorrilla considered the following properties: public relevance of the person, public relevance of the information, and the presence or absence of insulting words. However, in order to identify admissible relevant properties, an adequate *thesis of relevance* is required. This idea of the role that *relevant properties* play in resolving the conflict is also shared by José Juan Moreso in his specificationist approach. Therefore, the objections raised by Bruno Celano regarding the necessity of the thesis of relevance are also applicable to Hurley's proposal (see section II. 3. 5. 1.). In the context of the first case, one could also consider other admissible relevant properties, such as the status of the expression (e.g., satire or expression of a political opinion). We have seen in the *Titanic* case that this property, if considered relevant (by qualifying the expression as satire), can decide the conflict.

Finally, the last point is also related to the fourth stage of Hurley's deliberative process and the formulation of the hypotheses according to which certain circumstances or properties of the case increase or decrease the "weight" or importance of each of the conflicting reasons (in the case of conflicting fundamental rights, these reasons are understood as legal norms). Hurley explains the hypothesis formulated in the fourth stage of the process:

> "Reason X tends to outweigh Reason Y when it is the case that p, while Reason Y tends to outweigh Reason X when it is the case that q; when it is the case that both p and q, but not r, Reason X has more weight, but when r is present as well, Reason Y has more weight and so on."[906]

The criticism of the idea that norms can have the property of weight has already been presented in Chapter I, as it is central to the Alexyan theory of judicial balancing. In Hurley's proposal, "weight" is not a property directly attributed to reasons (or to norms when adapted to the legal context), but to the relevant properties, depending on their relation to the underlying reasons supporting the conflicting norms. To illustrate this to the case, it means that the weight of the right to honour depends on the degree to which dignity (as the underlying reason for the right to honour) is affected by the relevant property in question. In the context of the example, we have seen that Martínez Zorrilla argues that dignity is *very seriously* affected when insults are used, as they are an unnecessary way of infringing the right to honour when information is

[905] Hurley (1990), p. 224. Explaining the purpose of the fourth stage of the deliberative process further, Hurley writes that "When we have formulated such an hypothesis, we try to test it, by going back to stage three and looking for further settled cases in which the same reasons apply and in which circumstances identified by the hypothesis are present. We thus go back and forth between stages three and four, looking for settled cases

[906] Hurley (1990), p. 225. Hurley compares her schematization of deliberative process, when applied to legal deliberation to the computer programme HYPO, which was developed by Edwina Rissland and Kevin Ashley in the late 1980s.

published. Based on this assertion, a hypothesis can be made according to which the right to honour prevails, when insults are used, even when the information published is of public relevance. To follow the metaphorical language of balancing, the use of insults (as a relevant property of the case) *shifts the balance* in favour of the right to honour. Expressed without metaphors, this means that the right to honour takes precedent over freedom of information in the context of the case, provided other relevant properties are equal. In this sense, it can be argued that Hurley's theory, when adapted for the legal context, is a theory of judicial balancing that works with concrete, rather than abstract "weights" assigned to conflicting fundamental rights norms. These weights are determined according to the presence or absence of relevant properties and their relationship to the reasons underlying the norms.

II. 5. 5. 2. Conclusions

In this section, we will draw conclusions about Susan Hurley's proposal by identifying the strengths and weaknesses of her proposal. To this end, we will present a brief recapitulation of her main ideas on the basic notions we analysed, as well as a summary of her deliberative process, and compare them with the ideas of the other authors we have presented in this work.

Hurley builds her coherentist theory of practical reasoning on the idea of coherence: in the legal context, the coherentist proposal states that, when faced with a choice between the alternatives, we should prefer the one supported by a hypothesis that explains the greatest number of paradigmatic cases. Hurley's views on interpretation suggest that she agrees with the ideas of mixed theories of interpretation (see section II. 5. 3. 1. and the idea of the uncontestable "core" of the meaning and "borderline" cases). To resolve the disagreement, Hurley developed a deliberative process based on the idea of coherence, a central notion in her work (II. 5. 3. 2.). From a coherentist point of view,

> "…to say that a certain act ought to be done is to say that it is favoured by the theory, whichever it may be, that gives the best account of the relationships among the specific reasons (such as ethical values, or legal doctrines and precedents) that apply to the alternatives in question."[907]

Although she does not deal directly address the problem of fundamental rights conflicts, Hurley argues for the recognition of the plurality of conflicting values that support different, conflicting reasons for action, which in turn are reasons for different, conflicting alternatives. She takes a conflictivist view on this issue (II. 5. 3. 3.). Hurley's five-step deliberative process, adapted by Martínez Zorrilla for the legal context, begins with identifying the conflicting norms

[907] Hurley (1989), p. 225.

that provide incompatible solutions to the case and identifying their "underlying reasons".[908] Next, "settled cases" (either real or hypothetical) are considered for which the same reasons identified in the previous stage apply. Cases that are considered are those whose resolution is clear or evident and on which there is broad consensus, or cases that have been decided by consolidated jurisprudence or the binding decisions from other instances, such as supreme courts or constitutional courts.[909] The nucleus of the deliberative process is the formulation of the hypotheses about the relationships between the conflicting reasons regarding different circumstances in the paradigmatic cases, and to look for the "distinctive circumstances which seem to enhance or diminish the weight of one of the conflicting reasons in relation to the other."[910] The idea is to formulate and refine the hypotheses and arrive at the best hypothesis at the end of the deliberative process, i.e., the one that accounts for the largest number of paradigmatic cases (II. 5. 4. 1.).

Hurley's ideas were adapted to the legal context as an explicit alternative to the proportionality based Alexyan theory of judicial balancing. If we compare the two approaches, Hurley's proposal, as Martínez Zorrilla pointed out, allows for a greater degree of specification of the relevant properties or circumstances of the case because it offers a criterion for their selection.[911] As we mentioned in Chapter I, the result of judicial balancing in the Alexyan theory of judicial balancing is a rule that expresses the conditional relationship of precedence between conflicting principles.[912] The antecedent of this rule are circumstances under which one principle takes precedence, and the consequent of the rule are legal consequences of that principle.[913] As Martínez Zorrilla has indicated, however, the Alexyan theory of judicial balancing refers generically to the "circumstances C", without going into further detail or specifying them.[914] The circumstances in question are not all the circumstances of the case, but only the relevant ones. Hurley's model proposes a specification of these circumstances by offering a normative or evaluative criterion for the selection of the admissible relevant properties.[915] Admissible relevant properties are determined in Hurley's approach based on

[908] These "underlying reasons" are various considerations, goals, purposes, moral principles etc., that are taken as the basis of the conflicting norms. See Martínez Zorrilla (2009), pp. 125-126.
[909] Martínez Zorrilla (2009), pp. 125-126.
[910] Hurley (1990), p. 224. See also Hurley (1989), p. 213.
[911] Martínez Zorrilla (2009), pp. 141-142.
[912] Alexy's Law of Competing Principles states that "If principle P_1 takes precedence over principle P_2 in circumstances C: (P_1 **P** P_2) C, and if P_1 gives rise to legal consequences Q in circumstances C, then a valid rule applies which has C as its protasis and Q as its apodosis: C→Q". See Alexy (2002a), p. 54 and section I. 3. 3. 2.
[913] Martínez Zorrilla (2009), p. 141. See section I. 1. 3. 3. 2., where Alexy's understanding of conflicts between fundamental rights and his Law of Balancing is presented.
[914] Martínez Zorrilla (2009), p. 141.
[915] See Martínez Zorrilla (2009), pp. 140-141.

their aptitude to influence reasons that support different solutions to the case.[916] These circumstances determine the "weight" of the elements in conflict.[917] With respect to the analysis of the circumstances of the case that affect the "weights" of the conflicting alternatives, Hurley's theory of judicial balancing therefore has advantage over the Alexyan theory because it does not refer to circumstances generically.

Focusing on the selection of *relevant* properties that determine the resolution of the case, Hurley's theory of judicial balancing bears striking similarities to Moreso's theory of judicial balancing, which we analysed earlier in this chapter. Both methods are presented by their authors in five stages, with the last three stages essentially the same: consideration of the paradigmatic cases, selection of the relevant properties, and formulation of the rules that lead to the resolution of the case. As for the third step, we have seen that Moreso also builds his proposal on the notion of paradigmatic cases (either real or hypothetical, about which there is a broad consensus in the legal culture in question) and whose function is to limit the scope of admissible reconstructions of the universe of discourse (II. 3. 4. 1.). As for the fourth step, Hurley defines the admissible relevant properties as those that affect the "weights" of the conflicting reasons (and thus lead to different normative solutions, since "outweighing" in Hurley's account is synonymous with taking precedence), and for Moreso the admissible relevant properties are those whose presence or absence leads to different normative solutions. The fifth and final step establishes rule(s) that resolve all cases in the universe of discourse with which we are dealing with and that are applicable in the subsumptive form. In this sense, the objective of both proposals is to find, after a certain process of deliberation, a solution to the problem in the form of a rule that is applicable in the subsumptive form and that explicitly specifies the properties whose absence or presence affects the solution of the case.[918] The properties that are not mentioned in this rule are not relevant properties because they do not change the outcome of the case we are dealing with.

Hurley's theory of judicial balancing, however, is faced with the objection raised by Bruno Celano against Moreso's theory of judicial balancing (II. 3 5. 1.). According to this

[916] On this point, see Martínez Zorrilla (2009), p. 141.

[917] To illustrate this idea, we can give an example of the hypothesis formulated in the fourth stage of the deliberative process: "Reason X tends to outweigh Reason Y when it is the case that p, while Reason Y tends to outweigh Reason X when it is the case that q; when it is the case that both p and q, but not r, Reason X has more weight, but when r is present as well, Reason Y has more weight and so on." Hurley (1990), p. 225.

[918] In the example of a conflict between the freedom of information and the right to honour Martínez Zorrilla mentions (II. 5. 4. 2. 1.), the rule (or hypothesis, to use Hurley's terminology) obtained at the end of the deliberative process is the following: "If the information is of public relevance and no insulting expressions have been used ($q \wedge \neg r$), the freedom of information should prevail; if the information is not of public relevance or if insulting expressions have been used, the right to honour should prevail.

objection, several selection decisions that are made in the deliberative process depend on substantive moral considerations: the determination of "underlying reasons" (in the second step of the deliberative process), the identification of paradigmatic cases (in the third step of the deliberative process), and the selection of admissible relevant properties (in the fourth step of the deliberative process), as pointed out in the previous section with criticisms.

CHAPTER III. ALTERNATIVES TO THEORIES OF JUDICIAL BALANCING

Summary

After presenting and analysing the Alexyan theory of judicial balancing in Chapter I and the non-Alexyan theories of judicial balancing in Chapter II, this chapter presents and analyses alternatives to the theories of judicial balancing. Although theories of judicial balancing (especially the Alexyan one) are the most influential and widely used methods of resolving apparent conflicts of fundamental rights (both in the literature and in judicial practice), they face various criticisms, as shown in the previous chapters.[919] For this reason, in this chapter we turn to alternative, non-balancing methods proposed to resolve apparent conflicts between fundamental rights. The aim of this chapter is to provide a comprehensive analysis of those alternatives that have attracted the most attention in the literature. Five alternative proposals are analysed in order to critically assess their supposed advantages, as their proponents have raised various criticisms of theories and methods of judicial balancing. The authors whose approaches are analysed in this chapter are, in this order: Ronald Dworkin, Luigi Ferrajoli, Juan Antonio García Amado, Lorenzo Zucca and Ruth Chang.[920]

[919] See section I. 6. 1. and its four subsections (I. 6. 1. 1. – 1. 6. 1. 4.), in which the criticisms of the Alexyan theory of judicial balancing have been presented.

[920] The choice of the authors is explained in the introduction to each section. Among the authors presented in this chapter, Luigi Ferrajoli, Juan Antonio García Amado and Lorenzo Zucca build their alternative approaches on the explicit criticism of the standard understanding of judicial balancing, while at the same time offering their alternative methods. In this sense, their inclusion in the chapter with alternative, non-balancing methods proposed for resolving apparent conflicts between fundamental rights does not represent an issue. Ruth Chang, from a philosophical perspective, deals with the issue of choice, i.e., rational justification of choice in hard cases by building a unique theory revolving around the idea of 'parity' or 'fourth-value relation' between the two items (see section III. 5. 3. 2. for more details). The author whose inclusion under the chapter with alternative, non-balancing methods could be contested is Ronald Dworkin. As it will be shown and explained in the next section (III. 1. 1.), some authors consider his approach to be a version of judicial balancing, while others hold that his approach represents an alternative to judicial balancing. The arguments for each position are presented and a justification is given for inclusion of Dworkin in the chapter. What should be pointed out here is that the inclusion of Ronald Dworkin's approach under "balancing" would imply balancing in a broad sense, which does not seem theoretically useful and precise understanding of the notion. For more on this point, see section III. 1. 3. 2. and in particular fn 999.

The chapter consists of five subchapters, each presenting an author and his theory and method for resolving apparent conflicts between fundamental rights. The structure follows the pattern of the previous chapters facilitate comparison between different approaches to the topic. First, introductory sections of the subchapters (x. 1.) provide the explanation and justification for the structure and content of the subchapter. Second, a brief contextualization of the authors and their legal philosophy is given (x. 2.) to better understand the theoretical background of their approach to the topic. This is followed by the presentation of the basic notions (x. 3.) relevant to the authors' understanding of apparent conflicts of fundamental rights. These are: first, interpretation; second, norm and right, and third, the question of (apparent) conflicts of fundamental rights. The exposition of the basic notions is followed by the main part of each subchapter – the presentation and application of the method proposed by the respective author (x. 4.). In these main sections of the subchapters, the methods proposed by the authors are applied to two cases: first, to a case used by the authors themselves to present the basic ideas of their approach, and second, to the *Titanic* case, which serves as a "comparison case" for all the methods analysed. The idea of such a case is to facilitate the identification of the relative advantages and disadvantages of the proposed methods. Each subchapter concludes with a critique and conclusions (x. 5.) on the proposed method.

By presenting some of the possible answers to the main question of the chapter – *What are the alternatives to judicial balancing*, the chapter follows the idea of the previous chapters: to give an overview, a comparison and an evaluation of different methods proposed to resolve (apparent) conflicts between fundamental rights. The objective of such an endeavour is to analyse the strengths and weaknesses of the various proposals put forward to resolve one of the most important contemporary legal problems – conflicts between fundamental rights.

III. 1. Ronald Dworkin

III. 1. 1. Introduction

The first author whose understanding of the apparent conflicts between fundamental rights is analysed is Ronald Dworkin (1931–2013), one of the most influential American legal philosophers.[921] There are two reasons why Dworkin's theory has been chosen to be analysed in this chapter. The first is the influence of his works (especially on Anglo-American legal

[921] There is an extensive literature on Dworkin's influence on legal philosophy. Among it, I point out to Postema (2011), pp. 401-456, Ripsten (2007a), pp. 1-19, Shapiro (2000), p. 424 (where Dworkin is listed as the second-most cited American legal scholar of the 20th century) and an issue of *Harvard Law Review* dedicated to Dworkin (Vol. 127, No. 2 from 2013).

philosophy) and, of particular relevance for this work, his influence on the discussion about legal principles.[922] Fundamental rights norms, as already presented, are understood as legal principles by the majority of the authors, and such understanding is the predominant one in the legal discourse.[923] The second reason is the specificity of his theory, sometimes labelled as "third theory of law"[924], within the framework of which he developed an idea of rights understood as "trumps"[925]. In this sense, Ronald Dworkin's approach to the apparent conflicts between fundamental rights, which he began to develop already at the end of the 1960s and which already took shape by the 1980s[926] represents an alternative to theories of judicial balancing[927]. Before proceeding, however, an important explanation and justification is necessary concerning the classification of Dworkin's approach under alternatives to theories of judicial balancing (the position I argue for in this chapter). Such a classification of Dworkin's approach may be challenged by the competing view, according to which his approach represents just one variant of the theories of judicial balancing. Thus, while some authors claim that Dworkin's ideas are compatible with judicial balancing[928], I will argue, as other authors also had[929], that Dworkin's idea of rights as trumps precludes the possibility of judicial balancing, and thus, that his approach represents an alternative to theories of judicial balancing.

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[922] On this point, see section I. 3. 2. and Dworkin (1967), pp. 22-29. Even though Dworkin was not the first one who wrote on the topic of legal principles, his attack on H. L. A. Hart's version of legal positivism is the starting or the most important point of departure in works that deal with legal principles. Regarding the topic of legal principles, Dworkin was the one who reintroduced the topic into the contemporary debates. But legal principles were already a topic in Europe in the 20th century, in the works of Walter Wilburg in Austria, Josef Esser in Germany and Emilio Betti and Norberto Bobbio in Italy, as it was previously mentioned in Chapter I, section I. 3. 2.

[923] See Martínez Zorrilla (2011b), p. 730. Such understanding is particularly characteristic of Alexyan theory of judicial balancing, the most influential one in both theory and judicial practice. See Chapter I.

[924] "Third theory of law" in the sense of an alternative to both legal positivism and natural law theories. The phrase was coined by Mackie (1977), p. 3. The meaning of the phrase is elaborated in the next subsection, III. 1. 2.

[925] On the idea of rights as "trumps" see Dworkin (1984), pp. 153-167 and Pildes (2019), pp. 183-184. This idea is further elaborated in the subsection which deals with Dworkin's understanding of norm and rights (III. 1. 3. 2.).

[926] Dworkin's first influential work was *The Model of Rules I*, published in 1967, where he, by attacking H. L. A. Hart's version of legal positivism, proposed his distinction between rules and principles (and other sorts of what he calls standards 'standards' (which represent various type of legal norms, where he also included policies). See Dworkin (1967), pp. 17-29. He later articulated and developed his theory in 1970s in *Taking Rights Seriously* and in 1980s in *Law's Empire*. See Dworkin (1978) and Dworkin (1986).

[927] There is a debate about the relation between Dworkin's theory and judicial balancing. While some authors argue that the two are mutually exclusive options (see fn. 929), others argue that Dworkin's theory is perfectly compatible or even represents a variant of judicial balancing (see fn. 928). I decided to present Dworkin's proposal for resolving apparent conflicts between fundamental rights in the chapter titled 'Alternatives to theories of judicial balancing', siding with the first view. The arguments for and against are presented in the paragraphs that follow.

[928] See, for example, Costa-Neto (2015), p. 159, Hall (2008), pp. 771-773, Klatt & Meister (2012b), pp. 26-29, Möller (2018), p. 281, Weinrib (2016), p. 217 and Weinrib (2017), p. 341.

[929] See, for example, Aleinikoff (1987), p. 987; Barak (2012), p. 365, da Silva (2011), pp. 281-282, Greene (2018), pp. 34-35, Jackson (2015), pp. 3101-3102, Kumm (2004), pp. 590-592, Möller (2007); p. 460, fn. 22, Möller (2012), p. 710, Tsakyrakis (2009), p. 489, Waldron (1994), pp. 815-817, Waldron (2000), p. 303, Webber (2009), p. 117 and Young (2016), p. 48.

This issue will be addressed in the paragraphs that follow, before moving on to the main ideas of Ronald Dworkin.

The view according to which Dworkin's ideas are incompatible with judicial balancing and according to which Dworkin's approach to the apparent conflict between fundamental rights represents an alternative to judicial balancing is presented first. The following arguments can be made in support of this position. The first argument arises from the lexical meaning of the word 'trump':

> "…rights trump absolutely all competing considerations (call this account "rights as trumps"). Under a conception of rights as trumps, once the scope of a rights is infringed, that trumps all countervailing concerns. An act that violates the scope of the right is ipse facto unjustifiable."[930]

Following this understanding of the right, it would be necessary to precisely define the scope of the right by reformulating it to include exceptions. This is in line with Dworkin's understanding of norm and right, as will be explained in more detail later.[931] The idea is that if the scopes of the competing rights are properly defined (by specifying exceptions), then one of the competing rights will *trump* the other. When the scopes of the apparently conflicting rights are properly defined, one right will trump or block the other, in line with the given justification. In this sense, Dworkin's conception of rights as trumps has what Tsakyrakis calls a "justification-blocking function".[932]

The second argument follows from the idea that rights as trumps create a so-called "lexical ordering" among rights:

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[930] Kumm (2004), p. 592. Kumm (2004), p. 590 ties this idea of rights as trumps with Dworkin (as other authors and Dworkin himself did). See fn. 1006. Webber (2009), p. 117, notes the similarities between the theories of rights from Ronald Dworkin: "Although the theories of rights proposed by Nozick, Rawls, Habermas, Waldron and Dworkin all differ in important respects, none endorses the principle of proportionality or balancing-talk as an inherent part of the account of rights. They do not employ the vocabulary of 'optimization' and 'minimal impairment' and 'justifying infringements'."

[931] See section III. 1. 3. 2., where Dworkin's understanding of 'norm' and 'right' are presented. Dworkin (2006a), p. 49, gives an example with the right to free speech: "There is an important ambiguity in the claim that human rights are not absolute, however. *Sometimes it means that the description of a right in some document or in a common phrase is only an abstraction and must be refined before we know exactly what it means in concrete circumstances* [emphasis added]. We say that freedom of speech is a human right, but no one thinks that anyone's human rights are violated by reasonable restrictions placed on the time and place of demonstration and parades. *We say that free speech is a right, but we owe ourselves a more precise accounting of what that right is* [emphasis added]; we might decide, for example, that it is the right not the be censored in the expression of political ideas on the ground that such ideas are themselves wrong or dangerous, which explains why restrictions on timing of parades are acceptable. That is, *once we have a careful account of exactly what the human right in question really is* [emphasis added], we no longer find it embarrassing to claim that the right is absolute, to say that it brooks no violation."

[932] Tsakyrakis (2009), p. 489, writes: "The balancing approach, by contrast, reduces conflicts between rights or between rights and the common good to comparisons of relative weights and thus overlooks the justification-blocking function of rights."

> "When deciding such cases by means of balancing rights, courts necessarily take into account the factual and legal possibilities of each concrete case, which means that the same two rights can be ranked in opposite ways in two different cases. Trumping or similar relations cannot play a role here. (…) What is meant here is only that, whenever an argument based on trumping relation comes into play, balancing or weighing leaves the stage."[933]

The idea is that a lexical ordering (actually, a hierarchy) is pre-established between the competing fundamental rights; for example, the fundamental right to free speech always trumps over social and cultural values. In this sense, rights are not really weighed against each other or against other public goods, but a hierarchy is established between competing rights.[934]

An argument that can also be made for the position that Dworkin's approach is incompatible with judicial balancing is that Dworkin himself rejected a balancing approach to rights on several instances.[935] Finally, the view that Dworkin's idea of rights as trumps is incompatible with judicial balancing is understood to be the standard, or at least the prevailing, view in the literature.[936]

However, there are authors who argue that Dworkin's approach should be understood as a version of theories of judicial balancing. Their arguments can be summarized as follows. The first argument is based on the *relativity* of rights as trumps; since they allow for exceptions, they are not absolute, but relative, and it is through the process of judicial balancing that these exceptions are to be determined.[937] But this aim of reconciliation of trumping and balancing does not refute Dworkin's proposal that one of the competing rights, once their scopes and exceptions are specified, "trumps" the other.

The second argument in for the compatibility of trumping and judicial balancing is the one based on the distinction between the abstract weight of a right and other variables in the weight formula. Klatt and Meister argue that the lexical ordering established between competing rights (by assigning the different abstract weights) does not mean that the right

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[933] da Silva (2011), pp. 281-282, fn. 44, referring to Waldron (1994) and his ideas on 'trumping' and 'lexical ordering'. On the relationship between 'trumping' and 'lexical ordering', da Silva (2011), p. 281 writes "That is to say that when someone argues that right x trumps over right y, or that the relation between *x* and *y* is based on a lexical order (ie the fulfilment of *x* has precedence over the fulfilment of *y*), this implies that *a previous balancing* has been done to establish this trump relation or lexical ordering." The term 'lexical ordering' is misleading here since the ranking among rights is not lexical nor lexicographical. On this point, see Suárez Müller (2019), p. 48. 'Lexical ordering', understood this way, is in fact an axiological hierarchy between the rights, established by the interpreter, according to which one right 'trumps' the other one.

[934] da Silva (2011), p. 281. If balancing is the imposition of a mobile hierarchy between the norms, trumping seems to be the creation of a fixed hierarchy. The difference would then be in whether the hierarchy can change over time or not.

[935] Dworkin (1978), pp. 197-200 and Dworkin (2006a), pp. 31-32, 48-49.

[936] Alexy (2010a), pp. 22-23, Costa-Neto (2015), p. 159, Jackson (2015), pp. 3101-3102, Klatt & Meister (2012), p. 2, Thorburn (2016), pp. 310-311 and Weinrib (2016), p. 245, fn. 110.

[937] Costa-Neto (2015), p. 164; Klatt & Meister (2012), pp. 26-29.

assigned greater abstract weight would *definitely* trump the right assigned lesser weight.[938] Trumping according to greater abstract weight amounts only to *prima facie trumping*, but not *definite trumping*; the 'winning margin' established by greater abstract weight could be equalled or reversed by the other variables of weight formula, such as the intensity of interference with and epistemic reliability of the competing right (understood by Klatt and Meister as principle). Assigning a high abstract weight to rights would thus be "a proper way to combine proportionality and trumping".[939] If we accept the distinction between *prima facie* and *definite* trumping, judicial balancing and trumping still remain incompatible approaches since in Dworkin's approach, the scope of the rights ought to be specified first, and only then does trumping come into play.

Finally, trumping has been compared to, and seen as compatible with, proportionality on the basis of the idea that both justify limitations on the exercise of government authority.[940] In this sense, both proportionality and trumping specify the condition that governments must meet in order to limit fundamental rights, and it is argued that the idea of rights as trumps is consistent with the doctrine of proportionality and therefore, with judicial balancing.[941] However, this argument compares the two approaches to the apparent conflicts between fundamental rights by looking at the aim or purpose of the two methods, rather than their conceptual properties or structure.

The inclusion of Ronald Dworkin's proposal in chapter with alternative (non-balancing) methods, besides the arguments just presented, is also based on the observations explained in more detail in the sections that present Dworkin's understanding of the basic notions (III. 1. 3.) and his proposal (III. 1. 4.).

First, when comparing Dworkin's approach to the approaches presented in Chapter I and Chapter II, it can be seen that Dworkin does not show a *methodology of balancing*. In contrast to Robert Alexy, Aharon Barak, Manuel Atienza, José Juan Moreso, Riccardo Guastini and Susan Lynn Hurley, Dworkin did not offer a general framework applicable to cases, independent from the context and evaluation of the relationship between the fundamental rights in each case. There is no account on how the *balancing* process is (or should be) carried out

[938] Klatt & Meister (2012), p. 28. Klatt and Meister use the term 'principle' here, since they, in accordance with Alexyan theory of judicial balancing, understand fundamental rights to have the structure of legal principles.
[939] Klatt & Meister (2012), p. 29.
[940] Weinrib (2016), p. 252.
[941] Weinrib (2016), p. 251 argues that "The doctrine of proportionality takes the various considerations to which Dworkin appeals in reasoning about the moral complexity of constitutional conflicts, and orders them into a sequence of conditions that government must satisfy to justify the limitation of a constitutional right. The result is that the doctrine of proportionality coheres with the rights as trumps model but offers doctrinal guidance that the model lacks."

between competing fundamental rights. Instead, he suggested an approach based on the constructive interpretation and "moral reading" of the constitution (see sections III. 1. 3. 1. and III. 1. 4. 1.).

Second, his argumentation shows that he advances a political solution to the problem through the "moral reading" of the constitution. In Dworkin's view, cases of apparent conflicts between fundamental rights are susceptible to a single right answer, which is to be found at the end of the interpretative process. Interpretation must satisfy the criterion of "fit" with the existing legal practice, but among the possible interpretations that satisfy this criterion, the judge ought to choose the one that is best on the dimension of 'value', according to the political-moral evaluation. Therefore, Dworkin's theory has been described as *substantive*, rather than a procedural theory of apparent conflicts between fundamental rights (on this point, see section III. 1. 4. 1.).

Third, Dworkin allows us to think that the resolution of the apparent conflict between fundamental rights is a matter of discovery and that there is implicit law to be "discovered" in the process of interpretation that offers a solution to the problem we are faced with in each concrete case (see section III. 1. 4. 1.)

Having explained and justified the view according to which Dworkin's approach is an alternative to theories of judicial balancing (and therefore analysed in this chapter), we turn to the structure of the subchapter. The subchapter consists of five sections (1. 1. – 1. 5.). After the first section, the introduction (1. 1.), which has just presented the explanation and justification for the structure and content of the subchapter, Dworkin and his theory are contextualised in the second section (1. 2.). The third section (1. 3.) introduces basic notions relevant for the problem are presented: first, Dworkin's views on interpretation (1. 3. 1.), then, his understanding of the notions of 'norm' and 'right' (1. 3. 2.) and his approach to the apparent conflicts between fundamental rights (1. 3. 3.). In the fourth and main section (1. 4.) Dworkin's method is presented (1. 4. 1.) and applied (1. 4. 2.) to legal cases. The two cases to which Dworkin's method is applied are the well-known and controversial 1973 case *Roe v. Wade* and the 1992 German Federal Constitutional Court *Titanic* case, used to compare the different methods. The fifth and final section (1. 5.) presents the criticisms of Dworkin's proposal (1. 5. 1.), followed by conclusions about his proposal (1. 5. 2.).

III. 1. 2. Dworkin's "third theory of law"

In this section, legal philosophy of Ronald Dworkin will be briefly contextualized before presenting the basic notions in the next section. The contextualization of authors can be

made by either by looking at how he positioned himself in the context of contemporary debates or how other authors classified his theory. Let us turn briefly to the question of how Ronald Dworkin himself understood his approach to law and how it was classified by other authors, to grasp the theoretical foundations of his approach to the issue. Dworkin's early work began with a critique of the basic tenets of legal positivism, in the well-known debate with H. L. A. Hart.[942] Developing his legal theory as an alternative to both legal positivism and natural law theories, Dworkin considered it to represent an alternative, 'third way'.[943] John Mackie named it the "third theory of law" because it contrasts both legal positivism and natural law theories, and is "in some ways, intermediate between the two".[944] In addition to his criticisms of natural law theories and legal positivism (which he calls 'conventionalism'), Dworkin was also critical of legal realism (which he calls 'pragmatism').[945] Although Dworkin himself avoided the label

[942] Alexander & Bayles (1980), p. 267 and Postema (2011), p. 403. The debate started with Dworkin's article from 1967 *The Model of Rules*, in which he criticized the views H. L. A. Hart presented in his 1961 book *The Concept of Law*. Hart had final word in the debate, in the posthumously published *Postscript* of *The Concept of Law* from 1994. Dworkin's criticism builds upon the argument that, in the so-called 'hard cases' lawyers "make use of standards that do not function as rules, but operate differently, as principles, policies, and other sorts of standards." Dworkin (1967), p. 22. Brian Leiter identifies four points which Dworkin attributed to Hart (and rejected himself): first, that law consists of 'rules' (understood as legal standards different from 'principles', as Dworkin calls them); second, that legal rules are identified by a 'rule of recognition', that is "by tests having to do not with their content but their *pedigree*"; third, that in the situations in which a case is not resolved by the rule, judges have discretion and fourth, that in those cases in which the judges have discretion, "neither party has a pre-existing legal right to prevail". On these points, see Leiter (2003), pp. 19-20, who points out the problem of misrepresentation of Hart's views by Dworkin on the first three points. On the original formulation of the key tenets of positivism, as Dworkin understood it, see Dworkin (1967), pp. 17-18. Since further details of the Hart-Dworkin debate are not of relevance for this section, I will only indicate that it is generally accepted that Hart 'won' this debate. See Leiter (2003), p. 18 and Coleman (2000), p. 172. For a detailed presentation of the debate and arguments from each side, see Shapiro (2007), pp. 22-55 and Postema (2011), pp. 404-421. For Dworkin's view in the dispute regarding legal principles, see also Zagrebelsky (2003), pp. 621-626

[943] Postema (2011), p. 402. Postema indicates the following influences on Dworkin: Benjamin N. Cardozo and his principle-based jurisprudence, Lon L. Fuller, post-realist American legal theory and John Rawls and his notion of "reflective equilibrium". On Dworkin's legal theory as an alternative to both legal positivism and natural law theories, see also Alexander (1987), p. 438, Alexander & Bayles (1980), p. 267 and Guest (2013), p. 24.

[944] Mackie (1977), p. 3. This third theory of law, as Mackie (1977), p. 6. indicates, combines descriptive and prescriptive elements: "On the one hand, Professor Dworkin is claiming that it gives the best theoretical understanding of legal procedures and legal reasoning actually at work in such systems as those of England and the United States. But on the other, he wants it to be more explicitly accepted and more consciously followed. He wants it to become a truer description than it yet is (…)". Raz (1986), p. 1109, argues that the theory that Dworkin advocates is a 'hybrid' one.

[945] On 'conventionalism', see Dworkin (1986), pp. 114-150, and on 'pragmatism', see Dworkin (1986), pp. 151-175. In Law's Empire, Dworkin (1986), p. 94, makes a distinction between three conceptions of law, which he calls 'conventionalism', 'legal pragmatism' and 'law as integrity', arguing that the first one is the weakest conception of law, with the 'law as integrity' being the most plausible and defensible among the conceptions of law. On Dworkin's theory as a 'response' to these theories, see Rosenfeld (2005), pp. 366-373. In contemporary discussions, a distinction is usually made exclusive (hard) legal positivism and inclusive legal (soft) positivism. On the differences, see Priel (2005), pp. 675-696, in particular fn. 2 and fn. 3. Postema (2011), pp. 441, indicates that 'conventionalism', as Dworkin defined it, is exclusive positivism "*recast* as an interpretative theory of law", while considering inclusive positivism, "just an inferior variation of his own theory", Postema (2011), p. 442.

'natural law' for his theory[946], critics have argued that his theory either collapses onto the positions of natural law theories or faces serious objections that both legal positivism and natural law avoid.[947] It can be concluded that Dworkin aimed to develop an alternative to contemporary mainstream theories of law by distancing himself from them, while being closer to the ideas of natural law.

Dworkin developed the conception of *law as integrity*, a fundamental notion in his works, and understood law as *argumentative social practice*, so these two ideas will be developed further in the remaining of this subsection.[948] Law as integrity, in Dworkin's own words:

> "Law as integrity denies that statements of law are either the backward-looking factual reports of conventionalism or the forward-looking instrumental programs of legal pragmatism. It insists that legal claims are interpretive judgments and therefore combine backward- and forward-looking elements; they interpret contemporary legal practice seen as an unfolding political narrative."[949]

The idea of law as integrity requires that officials enforce the law only if this can be done on the basis of a "coherent scheme of principles of justice drawn from the practice of the community as a whole as recorded in its settled law".[950] Dworkin's conception of law as integrity is not a concept of law in the ordinary sense (it is no definition of "law"), as Guastini points out, but a "normative theory of both law and justice, aimed at planning a framework of legal reasoning in text construction and adjudication, especially in the adjudication of hard cases."[951] The moral notion of integrity, understood as an "important value of political morality"

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[946] As Postema (2011), p. 402, fn 1., points out, Dworkin applied the label to his own theory only once, preferring to consider his theory as an alternative, 'third way'. See Dworkin (1982b), p. 165.

[947] Alexander & Bayles (1980), p. 272. Regarding criticisms to Dworkin's jurisprudential that potentially collapse it the natural law positions (or face it with serious objections which make it weaker theory than the positivist and natural law ones), Dworkin's idea of 'one-right-answer thesis' is addressed in the later subsection which deals with the apparent conflicts between fundamental rights (III. 1. 3. 3.). Kress & Alexander (1997), p. 771, also argue that Dworkin's notion of integrity entails natural law, since it "demands not only action consistent with a set of principles, but also action based on set of principles which one believes to be best." On the relationship of Dworkin's theory with jusnaturalistic theories, see also Pintore (1982), pp. 69-71.

[948] On the notion of integrity, see Dworkin (1986), p. 225-275, Crowe (2007), pp. 167-180 and Postema (2011), p. 415, pp. 443-444. Besides the notion of integrity, another fundamental notion in Dworkin's theory is interpretation. See Postema (1987), p. 284 and Postema (2011), p. 425. Interpretation is presented in the following subsection, III. 1. 3. 1. On the relation between these two fundamental notions of Dworkin's theory, Postema (2011), p. 425, writes: "His theory of interpretation models argument in law and proper methodology in jurisprudence, while the notion of integrity supplies the pivotal moral value of his theory of law."

[949] Dworkin (1986), p. 225. Dworkin previously used the phrase "the rights thesis" to describe his theory, but later moved to the phrase "law as integrity". Postema (2011), p. 438. On Dworkin's use of "the rights thesis", see Dworkin (1978), pp. 81-130.

[950] Postema (2011), p. 446. On this point, see also Allan (1988), p. 266.

[951] Guastini (1988), p. 180. *Law's Empire* is a book on legal policy, and not on legal theory, according to Guastini. 'Legal theory' is defined as "a descriptive discourse on law, i.e. a set of both analytical and empirical sentences

> "…gives content to the abstract notion that present official or private actions are warranted by principles derived from past decisions. It explains how past political decisions yield present practical directives. Integrity also offers a rationale for law's alleged capacity to justify government action by linking law's project, understood in terms of integrity, to more fundamental values of political morality. That is, it purports to show why such directives are normative for officials and citizens."[952]

The basic question Dworkin poses in his theory is this: "What are the most attractive political/moral principles that, if followed, can account for most of the coercive political decisions our society has taken?"[953] In addition to linking law to the notion of integrity, Dworkin also understands law as an *argumentative social practice*.[954] Legal practice, unlike many other social phenomena, is *argumentative*, according to Dworkin:

> "Every actor in the practice understands that what it permits or requires depends on the truth of certain propositions that are given sense only by and within the practice; the practice consists in large part in deploying and arguing about these propositions. People who have law make and debate claims about what law permits or forbids that would be impossible – because senseless – without law and a good part of what their law reveals about them cannot be except by noticing how they ground and defend these claims."[955]

Dworkin's theory is described as *interpretive*,[956] and it is characterized by two central assumptions, as identified by Postema: first, that law is a self-reflective and argumentative practice and second, that the fundamental point of law is to offer "a framework for public justification of governmental exercise of power in protection of promotion of rights flowing from past political decisions of the community."[957] In conclusion, we analyse an approach that has developed within a strongly anti-positivist framework, close to the ideas of natural law. In the following subsection, Dworkin's understanding of the previously mentioned basic notions relevant to the apparent conflicts between fundamental rights will be presented.

III. 1. 3. Basic notions

about legal language, concepts, doctrines, practice, and so forth", while 'legal policy' is understood as "a normative discourse, i.e. a set of evaluations, suggestions, recommendations, pieces of advice, and directives either addressed to judges and concerning the "right" way of adjudicating (viz. the way of providing "right answers" to legal questions, especially in "hard cases"), or addressed to lawgivers and concerning the "right" way of legislating. Guastini (1988), p. 176.

[952] Postema (2011), p. 415

[953] Alexander (1987), p. 419. See Dworkin (1986), pp. 97-98.

[954] See Dworkin (1986), p. 13.

[955] Dworkin (1986), p. 13. For more on the meaning of law as argumentative social practice, see Postema (2011), p. 422-424.

[956] Postema (2011), p. 401.

[957] Postema (2011), p. 440.

This section introduces basic notions that are crucial to understanding Dworkin's approach to the apparent conflict between fundamental rights. The section begins by outlining Dworkin's conception of interpretation and his notion of constructive interpretation (III. 1. 3. 1.), followed by his understanding of norm and right, in which he introduced the idea of principles having "weight" (III. 1. 3. 2.) and concludes with his approach to the apparent conflicts between fundamental rights (III. 1. 3. 3.).

III. 1. 3. 1. Interpretation

Interpretation, along with integrity, is considered the second fundamental concept in Dworkin's theory of law.[958] Law, Dworkin argues, must be understood as an interpretive concept; law is an "exercise in interpretation".[959] Since law is an interpretive concept, any theory of law (or jurisprudence, as he calls it) must be built on some view of legal interpretation.[960] Before setting out the details of his doctrine of interpretation, Dworkin introduces the notion of *interpretive attitude*, which refers to the attitude towards *social practices* (and also towards law, since law, according to Dworkin should be understood as argumentative social practice).[961] This interpretive attitude is characterized by two independent assumptions:[962] first, the assumption that the social practice in question has a meaning, that is, that it "has value, that it serves some interest or purpose or enforces some principle" that can be stated without describing the rules of the practice. The second assumption is that the requirements of practice are "sensitive to its point", in the sense that they are subject to change as the understanding of the meaning of the practice changes and evolves over time.[963] When this interpretive attitude toward a particular social practice takes hold, people "try to impose *meaning* on the institution[964] – to see it in its best light – and then to restructure it in the light

[958] Postema (1987), p. 284 and Postema (2011), p. 425. Dworkin dealt with the topic of interpretation in several of his works and throughout his entire career. See Dworkin (1982a), pp. 179-200; Dworkin (1986), pp. 45-86 and Dworkin (2011), pp. 123-156.
[959] Dworkin (1982a), p. 182, argues that legal practice is "an exercise in interpretation not only when lawyers interpret particular documents or statutes but generally. Law conceived so is deeply and thoroughly political." See also Postema (2011), p. 438.
[960] Dworkin (1986), p. 50. Postema (2011), p. 403, uses the notion of 'robust interpretivist thesis' for Dworkin's position; according to it, "both law and its theory are essentially interpretive".
[961] Dworkin (1986), p. 47. An example Dworkin uses here is of a society whose members follow a set of rules on certain social occasions, which are called "rules of courtesy". One of such rules of courtesy requires that peasants take off their hats to nobility. Dworkin argues that initially, for a time, this practice is not questioned and has the character of taboo; after some time, this changes, and everyone develops a certain *interpretive attitude* towards the rules of courtesy.
[962] Independent in the sense that the first attitude towards some institution can be taken without also taking up the second. Dworkin (1986), p. 47.
[963] Dworkin (1986), p. 47.
[964] Dworkin (1986), p. 50 uses the term 'institution of x' to describe certain social practice; in the example given in the previous fn. 961, it would be 'institution of courtesy'.

of that meaning."[965] This idea of presenting the object of interpretation in its best light is a defining feature of Dworkin's approach to interpretation.[966]

Dworkin distinguishes between different forms of interpretation, depending on the object of interpretation: interpretation of social practice, artistic interpretation, scientific interpretation, and conversational interpretation.[967] Since law is understood by Dworkin as a form of social practice, legal interpretation is a special case of the interpretation of social practice.[968] Emphasizing the idea that there are similarities between the interpretation of social practice and artistic interpretation (he uses the term *creative interpretation* for both), Dworkin argues that creative interpretation (including the interpretation of law, since it is understood as social practice) is "*essentially* concerned with purposes rather than mere causes".[969] The purpose in interpreting law is not the purpose from the perspective of the author, but of the interpreter, Dworkin argues.[970] Such interpretation is called *constructive* by Dworkin, and it is

> "…a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form of genre to which it is taken to belong. It does not follow, even from that rough account, that an interpreter can make of a practice or work of art anything he would have wanted it to be (…) For the history or shape of a practice or object constrains the available interpretations of it (…)."[971]

In the process of interpretation, an interpreter of law (or an interpreter of any other form of social practice), according to Dworkin

> "(…) proposes value for the practice by describing some scheme of interests or goals or principles the practice can be taken to serve or express or exemplify. Very often, perhaps even typically, the raw behavioral data of the practice – what people do in what circumstances – will underdetermine the ascription of value: those data will be consistent, that is, with different competing ascriptions. (…) If the raw data does not discriminate between these competing interpretations, *each interpreter's choice must reflect his view of which interpretation proposes the most value for the practice – which one shows it in the better light, all things considered* [emphasis added]".[972]

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[965] Dworkin (1986), p. 47.
[966] Dworkin (1986), pp. 52-53; Postema (2011), p. 430.
[967] Dworkin (1986), p. 50. Dworkin understands interpretation of social practices and artistic interpretation as two forms of 'creative interpretation', in order to distinguish them from scientific and conversational interpretations.
[968] Dworkin (1986), p. 50, Atienza (2010), p. 58 and Postema (1987), p. 285.
[969] Dworkin (1986), p. 51. On the relation between interpretation and purpose, Dworkin (2011), p. 131, writes: "A particular interpretation succeeds – it achieves the truth about some object's meaning – when it best realizes, for that object, the purposes properly assigned to the interpretive practice properly identified as pertinent."
[970] Dworkin (1986), p. 52.
[971] Dworkin (1986), p. 52. Constructive interpretation is one possible approach to creative interpretation (interpretation of social practice and art), for which Dworkin opts, while the other possible approach to creative interpretation is to understand it as a special case of conversational interpretation. On the characteristics of conversational interpretation, see Dworkin (1986), pp. 51-52.
[972] Dworkin (1986), pp. 52-53.

Thus, before interpreting law (or, more precisely, the object of interpretation) as a form of social practice, there is an interpretive attitude in accordance with which the interpreter aims to interpret the object of interpretation in its best light. Having set out these introductory considerations of interpretation, we turn to the question of how Dworkin conceives of the *process* of interpretation.

According to Dworkin, three stages in the process of interpretation can be distinguished: the *pre-interpretive*, the *interpretive* and the *post-interpretive* stage.[973] This distinction between three stages of interpretation represents a refinement of constructive interpretation "into an instrument fit for the study of law as a social practice".[974] In the first, pre-interpretive stage, the interpreter identifies the object of interpretation (e.g., rules and standards that constitute the tentative content of the practice). In the second, interpretive stage, the interpreter constructs an interpretive theory of practice, which is "a scheme of values or principles the practice can be said to serve and a demonstration of how, when it is viewed in this way, the practice is shown in its best light".[975] Dworkin explains the central interpretive stage as follows:

> "Second, there must be an interpretive stage at which the interpreter settles on some general justification for the main elements of the practice identified at the preinterpretive stage. This will consist of an argument why a practice of that general shape is worth pursuing, if it is. The justification need not fit every aspect or feature of the standing practice, but it must fit enough for the interpreter to be able to see himself as interpreting that practice, not inventing a new one."[976]

In this stage, the task is to compare different interpretive theories (competing eligible interpretations of a social practice).[977] The theories are compared and evaluated on the basis of two parameters: their *fit* with the data of the practice and their evaluative *appeal*.[978]

Finally, in the third, post-interpretive stage, the interpreter considers the implications of the chosen theory and its implication for the participants. In this stage, some data from the pre-interpretive stage might be regarded as mistaken or inconsistent with practice.[979]

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[973] Dworkin (1986), pp. 65-69. On the reconstruction of these three stages of interpretations, see also Postema (2011), pp. 430-431.
[974] Dworkin (1986), p. 65. On Dworkin's constructive interpretation, see also Rodriguez-Blanco (2016), pp. 436-439.
[975] Postema (2011), p. 430.
[976] Dworkin (1986), p. 66.
[977] Postema (2011), p. 430.
[978] Postema (2011), p. 430.
[979] Postema (2011), p. 430. Regarding the interpretation of courtesy, as a form of social practice in third, post-interpretive stage, Dworkin (1986), p. 66 gives the example in which the interpreter can consider that consistent enforcement of the best justification of courtesy would require people also to tip off hats to soldiers returning from a crucial war, as well as nobles, or that it calls for an exception, exempting returning soldiers from displaying courtesy.

Dworkin's account of the interpretation of social practice (and the interpretation of law as a form of social practice) presupposes three things: first, an interpretive attitude; second, the realization of interpretive activity in the aforementioned three stages (pre-interpretive, interpretive and post-interpretive); and third, the interpreter's final consideration of whether his interpretation of the object in question is the best possible example of practice.[980] Legal interpretation is also inherently holistic, according to Dworkin.[981]

Regarding the constitutional interpretation, Dworkin indicates that constitutional provisions of most contemporary constitutions protecting individual rights are formulated in "very broad and abstract language", advocating what he calls a "moral reading" of the constitution.[982] As he argues,

> "Lawyers and judges, in their day-to-day work, instinctively treat the Constitution as expressing abstract moral requirements that can only be applied to concrete cases through fresh moral judgments."[983]

Dworkin therefore makes a distinction between constitutional and statutory interpretation but argues that they are both compatible with the one-right-answer thesis.[984] If we place Dworkin's doctrine of interpretation in the context of the scheme of Riccardo Guastini presented earlier, his ideas on interpretation would qualify him as a *cognitivist*.[985] Cognitivists leave no room for judicial discretion and assume there can only be "one right answer" to

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[980] Atienza (2010), p. 58.

[981] Dworkin (1992), pp. 390-391: "Legal interpretation is *inherently* holistic, even when the apparent target of interpretation is a single sentence or even a single clause rather than a document. Any interpreter must accept interpretive constraints – assumptions what makes on interpretation better than another – and any plausible set of constraints includes a *requirement of coherence* [emphasis added]. An interpretation of the Bill of Rights which claims that a moral principle embedded in one clause is actually rejected by another is an example not of pragmatist flexibility, but of hypocrisy."

[982] Dworkin (1996), p. 2.

[983] Dworkin (1996), p. 3. An example of a provision that requires "moral reading" is the First Amendment to the United States Constitution, which protects freedom of speech. The moral reading of the constitution requires deciding how an abstract moral principle is best understood. In the case of the First Amendment, such abstract moral principle, as Dworkin argues, is that it is wrong for the government to censor or control what individuals say or publish. When the judges decide whether pornography is protected by the First Amendment, they, as Dworkin (1996), p. 2, argues, "decide whether the true ground of the moral principle that condemn censorship, in the form in which this principle has been incorporated into American law, extends to the case of pornography."

[984] Rosenfeld (2005), p. 364.

[985] Guastini (1997b), pp. 279-280. Guastini (1997b) wrote that three main competing theories of legal interpretation can be found in modern legal thinking: (1) the *cognitive* theory, (2) the *sceptical* theory and (3) the *mixed* theory. Later, he revised his position, arguing that any theory of legal interpretation belongs to the camp of *cognitive* theories or *mixed* theories; *tertium non datur*. See Guastini (2006a), pp. 227-230. On the classification of Dworkin's theory of interpretation, see also Moreso (1998), p. 134-147, particularly pp. 139-143. Moreso (1998), pp. 134-135, following Hart (1983), uses the term 'Noble Dream' to label cognitivist theories. Hart (1983), p. 137 calls Dworkin the 'noblest dreamer' among the versions of the 'Noble Dream' theories.

question of law.[986] Having introduced Dworkin's understanding of interpretation, the following subsection presents his understanding of the notions of norm and right.

III. 1. 3. 2. Norm and right

Ronald Dworkin began developing his theory by attacking some of the central tenets of legal positivism.[987] In the influential article *The Model of Rules*, he criticized H. L. A. Hart's version of legal positivism by arguing that lawyers, especially in so-called *hard cases*, use legal standards other than legal rules – principles, policies and other types of standards.[988] Hard cases are understood by Dworkin as those cases "in which the result is not clearly dictated by statute or precedent" and in which "no settled rule dictates a decision".[989] Through his critique of positivist conception of a norm, Dworkin set out his own views, distinguishing between rules, principles and policies (but also leaving space for "other sorts of standards").[990] In the following paragraphs, Dworkin's understanding of norm is presented, followed by his understanding of the notion of right.

To illustrate his understanding of the notion of norm (and of rules and principles as types of norms or what he calls 'standards'), Dworkin uses the well-known 1889 case of *Riggs v. Palmer* to illustrate the distinction between rules and principles.[991] In Dworkin's understanding, rules consist of two parts, an antecedent and a consequent.[992] Rules "dictate

[986] Guastini (1997b), p. 280, indicating that the phrase (but not the theory) can be traced back to Dworkin (1985), p. 119ff. See also Moreso (1998), p. 139. On Dworkin's view regarding judicial discretion, see Dworkin (1978), pp. 30-39.
[987] For Dworkin's reconstruction of key tenets of legal positivism, see Dworkin (1967), pp. 17-22.
[988] Dworkin (1967), p. 22, reprinted in later as *The Model of Rules I* as Chapter II in *Taking Rights Seriously*. Dworkin (1978), pp. 14-45. Dworkin claims that H. L. A. Hart's version of legal positivism does not adequately take into account the role that these other standards have in law. Regarding Dworkin's *The Model of Rules I*, Coleman (2000), p. 172, writes that "Although no one nowadays considers this argument to be convincing, it would be hard to find an essay that has been more influential in the development of contemporary jurisprudence. In many ways, the importance of *The Model of Rules I* lie in its having provoked alternative explanations of the place of moral arguments in legal discourse."
[989] Dworkin (1975), p. 1057, 1060. The essay was later reprinted in *Taking Rights Seriously* as Chapter IV. Dworkin (1978), pp. 81-130.
[990] Dworkin (1978), p. 22. On this point, see also Ávila (2007), p. 9.
[991] In the case of *Riggs v. Palmer*, a court had to decide whether a grandson, who was declared as heir in the will of his grandfather, could inherit under that will, even though he had murdered his grandfather. The court stated that, under literal interpretation of the statutes regulating wills, the murderer would inherit. But the court stated that "all laws, as well as all contracts, may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime". In the end, the murderer did not receive inheritance. Dworkin (1978), pp. 23-24.
[992] Dworkin (1978), p. 23, Peláez Mejía (2019), p. 171. An examples of rules Dworkin gives are the ones, regarding the maximum allowed speed on a road and the signature of witnesses for the validity of the will. Dworkin (1978), p. 24.

results, come what may".[993] A principle, on the other hand, is defined by Dworkin as "a standard that is to be observed, not because it will advance or secure an economic, political, or social situation deemed desirable, but because it is a requirement of justice and fairness or some other dimension of morality"[994], and policy as "a kind of standard that sets out a goal to be reached, generally an improvement in some economic, political, or social feature of the community".[995] To present his ideas regarding the distinction between rules and principles, Dworkin refers to both principles and policies as "principles in the generic sense".[996] Legal principles, in Dworkin's understanding, are norms constructed from settled law (constitutional rules, legislative rules and judicial decisions) in light of the judge's understanding of moral principles.[997] When principles come into conflict, the relative weight of each of the conflicting principles must be taken into account in order to resolve the conflict.[998] This, as Dworkin says, cannot be an exact measure, and deciding which of the conflicting principles carries more weight will often be controversial, but nonetheless, the weight of principle is an essential part of the concept.[999]

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[993] Dworkin (1978), p. 35. But then Dworkin gives the example of Riggs v. Palmer, which contradicts what he said. See section III. 1. 5. 1., where criticism is presented.

[994] Dworkin (1978), p. 22. An example for principle he gives is the one that "no man may profit by his own wrong".

[995] Dworkin (1978), p. 22. An example of policy would be the standard that automobile accidents are to be decreased. The distinction between principles and policies can be, as Dworkin (1978), pp. 22-23 indicates, collapsed by reformulating the principle or policy. Regarding rules, Dworkin (1978), p. 24, gives an example "The maximum legal speed on the turnpike is sixty miles per hour" and "A will is invalid unless signed by three witnesses".

[996] Dworkin (1978), p. 23.

[997] Alexander & Sherwin (2001), p. 157. On Dworkin's conception of legal principles, they further write: "They are not identical with moral principles, because they must 'fit' the settled law, some of which will be morally mistaken. And they are not posited rules, not so much because they are vague standards, but because they are not posited by Lex, Super Lex, or any judge. Even the judge who, in deciding a case not controlled by an existing rule, *constructs a legal principle out of past settlements coupled with the judge's moral views* [emphasis added] is not positing a rule or standard to control future judges. The latter will be free to construct legal principles somewhat differently, merely adding the outcome the first judge's case to the body of settlements that serves as legal principles' raw material."

[998] Dworkin (1978), p. 26. On this point, see Barberis (2006), p. 36ff, Ripstein (2007b), pp. 82ff and Zucca (2007), pp. 18-19. The criticism of Dworkin's value monism is one of the ideas Zucca builds upon his approach to the issue of the apparent conflicts between fundamental rights. See section III. 4. 3. 3. in this Chapter.

[999] Dworkin (1978), pp. 26-27. An important difference between Dworkinian and Alexyan understanding of legal principles, presented in section I. 3. 2., should be mentioned again here. While both authors argue that principles have "weight", Alexy understands principles as "optimization commands" whose conflict is resolved through the process of judicial balancing and the application of his weight formula. The "weight" of principles plays a key role in Alexy's theory of judicial balancing and his weight formula since the weights (both abstract and concrete) of conflicting principles determine the outcome of the conflict and indicate which of the conflicting norms should take precedence in the concrete case (on this point, see section I. 4. 1.). Dworkin, on the other hand, seems to use "weight" in a broader and generic sense, i.e., to indicate that the principle carrying greater weight should take precedence. Dworkin, as opposed to Alexy, suggested another, non-balancing way of determining which principle should take precedence, based on his idea of constructive interpretation and "moral reading" of the constitution. To understand Dworkin's approach as a "balancing" then would signify balancing in a broad sense, as *pro et contra* reasons in favour of one or another norm. Such broad meaning of balancing, which does not refer to a

Dworkin argues that the distinction between rules and principles is a *logical* one, in the sense that

> "…they differ in the character of the direction they give. *Rules are applicable in all-or-nothing fashion* [emphasis added]. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision".[1000]

Dworkin adds that a rule can have exceptions, but an accurate statement of a rule would take these exceptions into account. He argues that, at least in theory, we could add all these exceptions (whose list would be very long, as he indicates), making a formulation of a rule more complete; the formulation of a rule that does not state all exceptions is incomplete.[1001] A principle, on the other hand

> "…does not even purport to set out conditions that make its application necessary. Rather, it states a reason that argues in one direction, but does not necessitate a particular decision. (…) *Principles have a dimension that rules do not – the dimension of weight or importance* [emphasis added]."[1002]

This idea that legal principles, understood as a type of legal norm, have "weight", influenced Robert Alexy and his understanding of legal principles, as mentioned in Chapter I. Rules, on the other hand, according to Dworkin, do not have the dimension of weight. They are "functionally important or functionally unimportant".[1003] However, it is often difficult to make a clear distinction between rules and principles, so that it may be unclear whether a particular legal standard represent a rule or a principle. The problem of distinguishing between rules and principles has important practical consequences for fundamental rights: for example, the First Amendment to the United States Constitution can be understood as a rule, which would have as a consequence absolute freedom of speech, or it can be understood as a principle, in which case other principles and policies considered to have more weight could limit it.[1004] Dworkin's understanding of rules and principles is an example of the so-called strong ('qualitative' or 'ontological') distinction.[1005]

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particular methodology, does not seem to be theoretically useful, since it is imprecise and could be used to describe almost any method of legal reasoning used to resolve the conflict between two norms.

[1000] Dworkin (1978), pp. 24-25. As it was mentioned previously in fn. 57, Munzer criticized the use of the term 'validity', suggesting that the term 'applicability' should be used instead. In Dworkin's view, rules "dictate results, come what may", while principles "incline a decision one way, though not conclusively, and they survive intact when they do not prevail." Dworkin (1978), p. 35.

[1001] Dworkin (1978), pp. 24-25.

[1002] Dworkin (1978), p. 25.

[1003] Dworkin (1978), p. 27.

[1004] Dworkin (1978), p. 27.

[1005] Dworkin (1978), p. 24, calls his distinction between rules and principles a 'logical' one. Pino (2009), p. 133 indicates that Dworkin's view represents a paradigmatic example of a 'strong' distinction between rules and

Having set out Dworkin's views on the norm, his understanding of the notion of right will be presented in the paragraphs that follow. As it mentioned earlier, one of his most well-known ideas is the idea of *rights as trumps*.[1006] Dworkin's understanding of rights is characterized by the idea that people deserve to be treated with *equal concern and respect* by their government, in accordance with their *dignity* as persons.[1007] The idea that people should be treated with equal concern and respect is the central idea in Dworkin's theory of rights:

> "A political community has no moral power to create and enforce obligations against its members unless it treats them with *equal concern and respect* [emphasis added]; unless, that is, its policies treat their fates as equally important and respect their individual responsibilities for their own lives. (…) Government has no moral authority to coerce anyone, even to improve the welfare or well-being or goodness of the community as a whole, unless it respects those two requirements person by person. (…) We *fix and defend particular rights by asking, in much more detail, what equal concern and respect require*."[1008] [emphasis added]

In his works, Dworkin uses different terms and proposes different classifications of rights. The terms he uses are *legal rights*, *constitutional rights*, *political rights*, *human rights* and *fundamental rights*. The meaning of *legal right* is quite simple. Dworkin uses the term to describe a right that has been enacted by a legislative body and can be enforced by an adjudicative institution such as a court. An example would be the right to property.[1009] The meaning of *constitutional right* is also quite clear: Dworkin uses the term to refer to certain legal (at the same time political) rights that have been given special status in constitutions, making it more difficult to change them by requiring a higher majority in the legislative body. An example of such a right would be the freedom of speech, guaranteed by the First Amendment of the United States Constitution. Such constitutional rights, according to Dworkin, are justified by the idea that people already have a *moral right* to what has been as a legal right by the constitution.[1010] The moral rights to which Dworkin refers are 'special' in the sense that they are not rights against other people, but rights against governments, and he refers to such 'special moral rights' as political rights.[1011] *Political rights* are understood by Dworkin

principles. The idea that there is a 'strong' distinction between them is usually associated with non-positivists, although, as Pino indicates, there are positivists who adopt a 'strong' distinction and non-positivist who adopt a 'weak' distinction. On this point, see Pino (2017b), pp. 306-307. On the strong distinction thesis, see also Moniz Lopes (2017), p. 472 and section I. 3. 2.

[1006] Dworkin (1984), pp. 153-167, Reeves (2017), p. 1.
[1007] Reeves (2017), pp. 1-2.
[1008] Dworkin (2011), p. 330.
[1009] Dworkin (2006a), p. 30.
[1010] Dworkin (2006a), p. 30.
[1011] Dworkin (2006a), pp. 30-31.

as *moral rights* that individuals assert against government.[1012] But for Dworkin, there can be a legal right that is not also political right, but there can also be a political right that is not protected as a legal right.[1013] This means that certain political rights that are considered particularly important (and therefore protected as legal rights) enjoy even greater protection by being given constitutional status.

A distinction considered important by Dworkin is the distinction between political rights and human rights. Not all political rights are human rights; human rights are understood by him as a "special and very important kind of political rights".[1014] The distinction Dworkin proposes between political rights and human rights is based on the government's treatment of human dignity, which, as noted earlier, is the central idea in Dworkin's theory of rights: political rights would be those in the violation of which mistakes were made by governments in "good faith", while human rights would be those in the violation of which the government has showed "contempt or indifference to human dignity":[1015]

> "But some acts of government are so obviously inconsistent with the principles of human dignity that they cannot be thought to be justified by any intelligible conception of those principles. We must draft our core list of human rights to restrict violations to acts of that character."

Dworkin supports the idea of a hierarchy between human rights, arguing that the most basic human right is the right to be treated with a certain attitude: "as a human being whose dignity fundamentally matters":[1016]

> "Someone's most basic human right, from which all the other human rights flow, is his right to be treated by those in power in a way that is not inconsistent with their accepting that his life is of intrinsic importance and that he has a personal responsibility for realizing value in his own life."[1017]

A fundamental right is defined by Dworkin as a "right against the Government, in the strong sense, like free speech, if that right is necessary to protect his dignity, or his standing as equally entitled to concern and respect, or some other personal value of like consequence."[1018] The values protected by fundamental rights, as Yowell points out, apparently have an objective

[1012] Reeves (2017), p. 1.
[1013] An example of a right which is political right, but not a legal right is the right to adequate healthcare and insurance in the legal system which does not legally regulate adequate healthcare and insurance. Thus, political rights are understood as moral right which ought to be legally protected but are not necessarily so. On the other hand, there can be a right which is legal right, but not a political right, such as the right which gives farmers subsidies for not growing a certain plant. See Dworkin (2011), pp. 331-332.
[1014] Dworkin (2006a), p. 33.
[1015] Dworkin (2006a), pp. 35-36.
[1016] Letsas (2015), p. 337
[1017] Dworkin (2006a), p. 35.
[1018] Dworkin (1978), p. 199.

character linked to the principle of equality, but the normative basis of these values is not defined by Dworkin.[1019]

To round out and summarize the variety of terms Dworkin uses in his work on rights, it can be said that the subject of our research, fundamental rights, are understood by Dworkin as political rights (and because they are political rights, they are also moral rights) that an individual has against the government and that are also constitutionally protected.

III. 1. 3. 3. Conflicts between fundamental rights

In the previous chapters, a distinction was introduced regarding the authors' position on the apparent conflicts between fundamental rights. The distinction can be made between *conflictivism* and *non-conflictivism*. The debate between *conflictivists* and *non*-conflictivists, as mentioned above, is not a univocal and one-dimensional discussion between two positions. On the contrary, it is a heterogeneous and multidimensional.[1020]

The *conflictivist* position is contested by adherents of value monism and defended by adherents of value pluralism.[1021] Dworkin is an advocate of the idea of value monism.[1022] His idea of law as integrity is underpinned by the value of *equality*, seen as dominant in law.[1023] Integrity, justice, and fairness are all based on equality, and a fundamental requirement of a society and of persons exercising political power is to "treat each citizen as an equal".[1024]

With regards to potential conflicts of values in general, Dworkin objects to what he sees as a hasty assumption of a conflict of values, arguing that we need to be sure that we understand the values in question *correctly* before we accept a conflict between them.[1025] This means that if the values are properly understood, they may not in fact be in conflict at all. Dworkin argues that liberty and equality, when properly understood support each other.[1026] Liberty and equality

[1019] Yowell (2007), p. 96.
[1020] See Maldonado Muñoz (2016), p. 106 and section I. 3. 3. 1.
[1021] Barberis (2006), p. 36ff. For a reconstruction of the debate between conflictivism and non-conflictivism, see Maldonado Muñoz (2016), Maldonado Muñoz (2021) and section I. 3. 3. 1.
[1022] Dworkin (2006b), pp. 105-116, where Dworkin, being critical towards the *conflictivist* conception from Isaiah Berlin, argues against value pluralism. On Dworkin's position in the context of value monism and value pluralism, see also Maldonado Muñoz (2016), p. 111 and Maldonado Muñoz (2021), p. 54.
[1023] Alexander (1987), pp. 426-431. Alexander labels this "the inflated value of equality". On this point, see also Pino (2010b), p. 145 and Postema (2011), p. 445, who writes that "On Dworkin's view, the moral value of integrity, like the values of justice and fairness, is grounded in a deeper moral concern – equality – the fundament of political morality, in Dworkin's view."
[1024] Postema (2011), p. 445.
[1025] Dworkin (2011), p. 4. Möller (2007), p. 426, fn. 27.
[1026] Dworkin (2011), p. 4, refers to the classical example of conflict between liberty and equality: the problem of taxation. Dworkin rejects the idea of general right to freedom and argues that rights to liberty rest on different bases. "They [people, remark added] have rights, including rights to free speech, that are require by their more general right to govern themselves, which right also flows from personal responsibility. They have rights, including rights to due process of law and freedom of property, that follow from their right to equal concern. *This*

are the two main potentially conflicting values in Dworkin's account because the idea of dignity, which is central to his theory of rights, consists of two principles: the principle of intrinsic value (the equality principle) and the principle of personal responsibility (the liberty principle).[1027] Returning to the classic example of taxation, Dworkin argues that taxation does not invade liberty.[1028] What Dworkin argues is that the values behind the apparently conflicting fundamental rights are not in conflict. If these competing values are properly understood, and if the scope of the competing fundamental rights is determined, the conflict can be dispelled. Dworkin thus takes a *non-conflictivist* approach to the issue of the apparent conflicts between fundamental rights.[1029]

III. 1. 4. Dworkin's proposal

In this section, the approach of Ronald Dworkin to the apparent conflicts between fundamental rights is presented and applied to cases. First, the theoretical framework of the proposal, based on his understanding of interpretation of law as a social practice is presented to provide an overview and a reconstruction of the steps involved in the process. Secondly, this proposal is applied to two cases: first, the landmark 1973 U. S. Supreme Court case *Roe v. Wade* which Dworkin has addressed on more occasions, and secondly, the 1992 Federal Constitutional Court *Titanic* case.

III. 1. 4. 1. Theoretical framework

If we compare Ronald Dworkin and his views on the subject with other authors previously presented in Chapter I and Chapter II, we can see that Dworkin has not developed a *general* framework applicable to cases without addressing the context and evaluating the relationship between the conflicting fundamental rights. For this reason, his approach depends on the outset on the interpreters' understanding of the competing fundamental rights in the

scheme for liberty rules out genuine conflict with the conception of equality just described because the two conceptions are thoroughly integrated [emphasis added]: each depends on the same solution to the simultaneous equation problem."

[1027] Möller (2018), p. 284. See Dworkin (2006a), pp. 36-37.

[1028] In the view of Dworkin (2011), p. 4, it cannot be determined "what liberty requires without also deciding what distribution of property and opportunity show equal concern for all. The popular view that taxation invades liberty is false on this account provided that what government takes from you can be justified on moral grounds so that it does not take from you what you are entitled to retain. A theory of liberty is in that way embedded in a much more general political morality and draws from the other parts of that theory. *The alleged conflict between liberty and equality disappears* [emphasis added].

[1029] On Dworkin's position as non-conflictivist, see, for example, Greene (2018), p. 34, who writes that "Because the rights-as-trumps frame cannot accommodate conflicts of rights, it forces us to deny that our opponents have them.". See also Pino (2010a), p. 289

specific case.[1030] Since constitutional provisions of most contemporary constitutions protecting individual rights are formulated in "very broad and abstract language", Dworkin argues for what he calls a "moral reading" of the constitution, which

> "…presupposes that we all – judges, lawyers, citizens – interpret and apply these abstract clauses on the understanding that they invoke moral principles about political decency and justice. The First Amendment, for example, recognizes a *moral principle* [emphasis added] – that it is wrong for government to censor or control what individual citizens say or publish – and incorporates it into American law. So when some novel or controversial constitutional issues arises – about whether, for instance, the First Amendment permits laws against pornography – *people who form an opinion must decide how an abstract moral principle is best understood* [emphasis added]. They must decide whether the true ground of moral principle that condemns censorship, in the form in which this principle has been incorporated into American law, extends to the case of pornography."[1031]

The lack of an elaborate and procedural method for dealing with apparent conflicts between fundamental rights is a drawback of Dworkin's approach. This makes Dworkin's approach to apparent conflicts between fundamental rights less appealing, in comparison with the methods proposed by other authors, since it is highly dependent on the value judgments of the interpreter, as it will be argued later in section III. 1. 5. To deal with the apparent conflict between fundamental rights, we are entirely dependent on the understanding of the right in conflict and its supporting value(s). Thus, it can be stated that we are dealing with a *substantive*, rather than a *procedural* theory of apparent conflicts between fundamental rights.[1032] Since interpretation (along with integrity) is a fundamental concept in Dworkin's theory of law, when there is an apparent conflict between fundamental rights, according to Dworkin's approach, we

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[1030] This claim can hold for any approach to any case, since interpreters' understanding of the object of interpretation undoubtedly affects the interpretation and the final decision in the case. But in Dworkin's case, since he suggests a normative theory of law and justice, there is no even pretention that the interpreter initially has to be 'objective' and refrain from evaluation of the conflicting fundamental rights and values behind them; rather, Dworkin's approach is in favour of judicial activism. See, for example, Brubaker (1984), pp. 504-511.

[1031] Dworkin (1996), p. 2. Dworkin adds that (at least in the American legal system) highest judges (Supreme Court justices) have the authority to morally read constitution and adds that there is nothing revolutionary in such "moral reading". Dworkin (1996), p. 3., writes: "So, to repeat, the moral reading is not revolutionary in practice. Lawyers and judges, in their day-to-day work, instinctively treat the constitution as expressing abstract moral requirements that can only be applied to concrete cases through *fresh moral judgments*." [emphasis added]

[1032] Zucca (2007), p. 12. Zucca juxtaposes Dworkin's substantive theory with Alexy's procedural theory. This can also be seen from Dworkin's approach to constitutional questions: his book *Freedom's Law: The Moral Reading of the American Constitution*, Dworkin discusses concrete constitutional issues, such as abortion, free speech, euthanasia and affirmative action and presents his views on the issues, without developing a general procedural theory for fundamental rights conflicts, in comparison to the authors we have previously analysed. Jori (2001), p. 48, writes that Dworkin "imagines that positive rights entail a network of already precisely determined rights that, strangely enough, always coincide with his own ethical and political conception of what those rights ought to be. (…) And the consequence is that the right in question will always look ambiguous, a mere papering over the cracks of subjective ethical and political solutions."

must *interpret* the conflicting rights (in Dworkin's understanding of the term) to resolve the case.

Let us reconstruct Dworkin's ideas, on the basis of which we will present his approach to this issue and present a method for dealing with the apparent conflicts between fundamental rights. Dworkin's approach is defined by two ideas. The first is his understanding of interpretation and the three-stage process involved in the resolving any legal case (*pre-interpretive*, *interpretive*, and *post-interpretive*), and the second is his idea of the one-right-answer thesis.

First, as we mentioned in introducing Dworkin's understanding of interpretation (presented in section 1. 3. 1.), he assumes that the interpretation of law is "essentially concerned with purposes rather than mere causes", and that this purpose is not the purpose from the perspective of the author but of the interpreter. This is what Dworkin calls constructive interpretation, which consists of three stages. In the first, pre-interpretive stage, the interpreter identifies the object of interpretation – legal norms that provide tentative content of the law as social practice. In the second, interpretive stage, an interpretive theory of practice is established. This interpretive theory of the practice represents a scheme of values and principles that the practice serves and shows the practice in its best light. In this stage, the interpreter compares various competing eligible interpretations under consideration, which are compared and evaluated on the basis of two parameters: their *fit* with the data of the practice and their evaluative *appeal*. Finally, in the third, post-interpretive stage, the implications of the chosen interpretation and its implications for the participants must be considered. In this stage, some data might be regarded as mistaken or inconsistent with the practice.

Second, he argues moral questions (and in legal cases involving moral question, i.e., hard cases) there is a one right answer.[1033] Consistent with the value monism position and the

[1033] See Dworkin (2011), p. 9 and pp. 40-68. On the one-right-answer thesis, see Alexander & Bayles (1987), pp. 267-271, Bix (2003), pp. 78-88, Canale (2017), pp. 93-94, Leiter (2004), p. 175, Poscher (2012a), pp. 141-142 and Zucca (2007), p. 13, who describes the thesis: "…moral evaluations have only one right answer. In other words they are either true or false. That is, as a matter of principle, it is possible to justify on moral grounds every single choice that an adjudicator makes. (…) The truth of a proposition therefore, depends on the weight of the arguments that support it. If there are good moral arguments to hold that euthanasia is desirable, then euthanasia must be truly and objectively desirable. The same applies to the death penalty, or any other moral issue we can think of. As such, the choice of the right conception of law is morally justifiable by correct moral evaluation. Equally, the resolution of FLR's [fundamental legal rights, remark added] has one, and only one, right answer based on strong moral arguments. Dworkin's position is deeply contested. For example, many modern moral and political philosophies insist on value pluralism. (…)"

one-right-answer thesis, any case of apparent conflict between fundamental rights, no matter how difficult, is susceptible to only one right legal (and simultaneously, moral) answer.[1034]

Dworkin's theoretical framework for dealing with apparent conflicts between fundamental rights can thus be summarized in the three stages of his *constructive interpretation*, supplement by the idea that conflicts between fundamental rights are susceptible to a single right answer, to be found after the interpretation. In the situations of the apparent conflicts between fundamental rights, a one right answer is to be found through constructive interpretation and moral reading of the constitutional provisions regulating competing fundamental rights. In Dworkin's view, interpretations (and the resolutions of the apparent conflicts between fundamental rights, since they presuppose interpretations) must satisfy the criterion of "fit" with the existing legal practice, but among those which meet this criterion, the judge must choose the interpretation of law that is best on the dimension of 'value', according to the political-moral evaluation.[1035] The approach to the apparent conflicts between fundamental rights suggested by Dworkin is based on systematic and historical interpretation of the constitution and past judicial decisions, with the purported output being the best (in the sense of *fit* with the data of the practice and their evaluative *appeal*) interpretation of the social practice in question.

III. 1. 4. 2. Application

III. 1. 4. 2. 1. *Roe v. Wade* (1973)

The first of the two cases Dworkin uses to present his approach to the issue is the landmark United States Supreme Court decision on abortion, *Roe v. Wade*. Not only was Dworkin an influential legal scholar, but he was vocal about his opinions on influential cases such as this one.[1036] The case was chosen for presentation for two reasons: first, because the attention Ronald Dworkin gave to it in his works, and second, because it presents a classic example of the conflict between two fundamental rights: the fundamental right to life versus the fundamental right to privacy. Let us now turn to the facts of the case and Dworkin's opinion of the United States Supreme Court decision, which continues to generate debate in the United

[1034] The term 'difficult' is used here to indicate that in the cases in question two fundamental, constitutionally protected rights conflict and at least one of them cannot be protected. Cf. with Manuel Atienza (Chapter II, section II. 2. 3. 3.) and the notion of 'tragic cases', and Lorenzo Zucca (Chapter III, section III. 4. 3. 3. 1.) and the notion of 'constitutional tragedies'.
[1035] Dworkin (1986), pp. 255-257. On this point, see Sieckmann (1992), p. 300.
[1036] See, for example, Dworkin (1990), Dworkin (1992) and Dworkin (1993).

States, as well as abroad.[1037] The case[1038] revolved around a woman (who was given the fictitious name Jane Roe to protect her identity) who filed a lawsuit against Henry Wade, the district attorney of a Texas county where she resided. She challenged a Texas law that banned all abortions except those necessary to save the life of the mother. Roe argued that the state law was unconstitutionally violating her right to privacy. The Supreme Court ruled in her favour, declaring the Texas law banning abortions unconstitutional and holding that the Constitution provides a right to privacy based on due process clause of the Fourteenth Amendment.[1039] More specifically, the Court held that the government may not ban abortions before the foetus is viable and that government regulation of abortions must withstand strict scrutiny standard.[1040] Since we are concerned with Dworkin's approach to this issue, we will not proceed with a reconstruction of the reasoning of the Court, but will present Dworkin's approach to the issue. Starting with the idea of a "moral reading" of the constitution and distinguishing between three stages of interpretation (pre-interpretive, interpretive, and post-interpretive), we will present the reasoning and the suggested resolution to the case.

In the first, pre-interpretive stage, the interpreter must identify the object of interpretation – legal norms (in fact, legal provisions, to be interpreted) that provide tentative content of the law as social practice. In this case, it is the Texas law whose constitutionality is challenged, prohibiting all abortions except those necessary to save the life of the mother.[1041] The provisions of that law protected the right to life of the foetus. The mother's right to privacy, on the other hand, was based on the due process clause from the Fourteenth Amendment.

In the second, interpretive stage, the interpreter compares various competing eligible interpretations under consideration based on two parameters: their *fit* with the data of the practice and their evaluative *appeal*. Legal discussion of the apparent conflict between the fundamental right to life and the fundamental right to privacy in abortion cases often boils down to the question whether the foetus is a person. Dworkin argues that the main question of the case is whether a foetus can be considered a *constitutional person*? By a "constitutional person", Dworkin means "a person whose rights and interests must be ranked equally important

[1037] Dworkin (1990), p. 68 writes that "No judicial decision in our time has aroused as much sustained public outrage, emotion, and physical violence, or as much intemperate professional criticism, as the Supreme Court's 1973 decision in *Roe v. Wade* (…)."
[1038] For the summary of the case (and the reasoning of the Court), see Chemerinsky (2019), pp. 885-891.
[1039] Chemerinsky (2019), p. 594-595. The due process clause in Fourteenth Amendment states that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."
[1040] 410 U.S. 113 (1973), Chemerinsky (2019), pp. 885-886.
[1041] Chemerinsky (2019), p. 888.

with those of other people in the scheme of individual rights the Constitution establishes".[1042] The question of whether a foetus is a constitutional person is a legal question that the court cannot avoid. Dworkin's reasoning for this is based on the argument that

> "…it makes no sense to consider what constitutional rights some people do or do not have, in any area of constitutional law, without first deciding who *else* has rights a state must or may also recognize."[1043]

Dworkin argues that the foetus is not a constitutional person because it "fits better with other parts" of the legal system in question.[1044] He supports this claim by appealing to the decisions of state legislatures (earlier laws regulating abortion) and judicial decisions concerning "privacy" (on sterilisation, marriage, and contraception).[1045] With respect to this key interpretive stage, Dworkin argues that

> "Judges should seek to identify the principles latent in the Constitution as a whole, and in past judicial decisions applying the Constitution's abstract language, in order to enforce the same principles in new areas and so make the law steadily more coherent."[1046]

In the final, post-interpretive stage, the implications of the chosen interpretation and its consequences for the participants must be considered. Dworkin points out that even while a foetus is not a constitutional person, it can be protected because of its "considerable emotional and moral significance in our culture", but only in a way that excludes "any substantial abridgement of a woman's constitutional right over the use of her own body".[1047] Therefore, this apparent conflict between the right to life and the right to privacy is resolved in favour of the right to privacy by arguing that the foetus is not a constitutional person. The apparent

[1042] Dworkin (1990), p. 70. Dworkin indicates that this question involves moral issues, but that it is different from the metaphysical question "Is the human foetus a person from the moment of conception?" It is consistent, according to Dworkin, to think that a foetus is as much as a human being as an adult, but also that the Constitution, on the best interpretation, does not grant a foetus rights equal to the rights of other people.
[1043] Dworkin (1990), p. 70.
[1044] Dworkin (1990), p. 72.
[1045] Dworkin (1990), pp. 72-74. Regarding the earlier laws regulating abortion, Dworkin points out that even the states that had the strictest anti-abortion law before *Roe v. Wade* did not punish abortion as severely as murder, concluding that they should have done so if they thought the foetus, was a constitutional person. Therefore, *a contrario*, Dworkin concludes that foetus is not a constitutional person. Regarding judicial decisions on "privacy", the 1965 case *Griswold v. Connecticut* upheld a right to contraception. Dworkin argues that abortion cannot be disentangled from contraception since some contraceptives act as abortifacients, so that the Court could not hold that the women's role in procreation ends with fertilization. In the 1972 case *Eistenstadt v. Baird*, which upheld a right to contraception for unmarried couples, the Court stated that "If the right to privacy means anything, it is the right of the *individual*, married or not, to be free from government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."
[1046] Dworkin (1990), p. 76.
[1047] Dworkin (1990), p. 77.

conflict is interpreted in a way which eliminates the conflict, since the subjects of the apparently conflicting rights are not ranked as equally important due to their constitutional status.[1048]

III. 1. 4. 2. 2. *Titanic case* (1992)

Having introduced Dworkin's understanding of the apparent conflicts between fundamental rights in the case of Roe v. Wade, we will now apply his approach to another classic example of a conflict between fundamental rights – the 1992 *Titanic* case, in which the fundamental right to freedom of expression and personality rights were in conflict. Let us briefly recall the facts of the case, which were already presented in more detail. A satirical magazine *Titanic* referred in its issues to a paraplegic reserve office officer first as a "born murderer" and later as a "cripple". Without going into the reasoning of the German courts (already presented in Chapter I), the question now arises as to how the case should be resolved using Ronald Dworkin's approach? It has already been mentioned that Dworkin understands law as interpretation. We will now apply his theoretical framework, based on the "moral reading" of the constitution and the distinction between three stages of interpretation (pre-interpretive, interpretive, and post-interpretive), to propose the following reasoning and solution to the *Titanic* case.

In the first, pre-interpretive stage, the interpreter must identify the object of interpretation – legal norms (in fact, legal provisions, to be interpreted) that provide tentative content of the law as social practice. We have already mentioned these provisions in the context of the German legal system (they are Art. 1(1), 2(1) and 5(1) of the Basic Law), so we will now mention the relevant provision in the context of the legal system of the United States. This transplantation of a German law case into United States case law is made because Dworkin elaborated his ideas regarding freedom of expression and personality rights in the context of the United States legal system. Of course, in order to allow for the comparison of Dworkin's approach with other approaches, we will also consider his approach and the solution to the case in the context of the German legal system.

It is the First Amendment to the Constitution of the United States which states that:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise of thereof; or abridging the freedom of speech, or the press; or the right of the people peacebly to assemble, and to petition the Government for a redress of grievances."

[1048] Dworkin (1990), p. 70.

The object of interpretation at this stage is quite simple. As interpreter, the judge must decide whether the expressions "born murderer" and "cripple" are protected by the fundamental right to freedom of expression (in which case the magazine would not have to pay damages to the soldier it used these expressions to describe). This leads us to the second and central stage of interpretation.

In the second, interpretive stage, the interpreter compares various competing eligible interpretations under consideration and compares and evaluates them on the basis of two parameters: their *fit* with the data of the practice and their evaluative *appeal*.[1049] According to Dworkin, the fundamental right to freedom of expression should be understood as an absolute right.[1050] This means that this right should trump competing rights.[1051] When a justification for this trumping or blocking of the other right has been given, the rights as trumps fulfil their "justification-blocking function".[1052] Such a justification is given by Dworkin by taking into account the aspect of the fit, i.e., the previous decisions of the Supreme Court and also the evaluative appeal of a view according to which the freedom of expression ought to prevail:

> "The claim that citizens have a right to free speech must imply that it would be wrong for the Government to stop them from speaking, even when the Government believes that what they will say will cause more harm than good. The claim cannot mean, on the prisoner-of-war analogy, only that citizens do no wrong in speaking their minds, though the Government reserves the right to prevent them from doing so."[1053]

[1049] In the second, interpretive stage, Dworkin (1986), p. 66, states that "the interpreter settles on some general justification for the main elements of the practice identified at the preinterpretive stage. This will consist of an argument why a practice of that general shape is worth pursuing, if it is. The justification need not fit every aspect or feature of the standing practice, but it must fit enough for the interpreter to be able to see himself as interpreting a new practice, not inventing a new one."

[1050] Dworkin (1975), p. 1069, understands absolute rights as those rights that cannot yield to other rights. Rights which are not absolute, in Dworkin's understanding have "weight", understood as the power to withstand competition from other rights.

[1051] In Dworkin (1996), pp. 203-205, Chapter 8 – Why Must Speech Be Free, Dworkin argues that even expression of racial hatred at a Ku Klux Klan rally is protected by the First Amendment (referring to the 1969 Supreme Court case *Brandenburg v. Ohio*, 395 U.S. 444) or that a group of neo-Nazis could not be prevented from marching with swastikas (referring to the 1978 Supreme Court case *Collin v. Smith* 578 F.2d 1197). *A fortiori*, it can be argued that the expressions "born murderer" and "cripple" should also be protected by the freedom of expression. However, these expressions target one person, not a group, so one could argue against such a conclusion. But in *The Right to Ridicule*, Dworkin argues that "Ridicule is a distinct kind of expression; its substance cannot be repackaged in a less offensive rhetorical form without expressing something very different from what was intended. That is why cartoons and other forms of ridicule have for centuries, even when illegal, been among the most important weapons of both noble and wicked political movements. *So in a democracy no one, however powerful or impotent, can have a right not to be insulted*. [emphasis added] (…) If weak or unpopular minorities wish to be protected from economic or legal discrimination by law – if they wish laws enacted that prohibit discrimination against them in employment, for instance – then they must be willing to tolerate whatever insults or ridicule people who oppose such legislation wish to offer to their fellow voters, because only a community that permits such insults as part of public debate may legitimately adopt such laws."

[1052] Tsakyrakis (2009), p. 489, mentioned in section III. 1. 1.

[1053] Dworkin (1978), pp. 190-191.

Dworkin defended this view, arguing that

> "It is very important the Supreme Court confirm that the First Amendment protects even such speech; that it protects, as Holmes said, even speech we loathe. That is crucial for the reason that the constitutive justification of free speech emphasizes: because we are a liberal society committed to individual moral responsibility, and *any* censorship on grounds on content is inconsistent with that commitment."[1054]

Finally, in the third, post-interpretive stage, the implications of the chosen interpretation and its consequences for the participants must be considered. Following Dworkin's understanding of the two conflicting fundamental rights, a fixed hierarchy in favour of freedom of expression is established: infringing the freedom of expression (in this case, freedom of the press) would violate a fundamental right necessary in a democratic society. More than that, Dworkin argues that there is no right not to be insulted.[1055] Freedom of expression therefore, trumps personality rights in this case.[1056]

III. 1. 5. Criticisms and conclusions

III. 1. 5. 1. Criticisms

This section sets out the criticisms of Ronald Dworkin's approach to the issue of the apparent conflict between fundamental rights. Three criticisms that have been raised against his ideas are presented: first, regarding his concept of "law as integrity"; second, regarding his understanding of norm and his proposed distinction between rules and principles; and third, his understanding of interpretation and the notion of constructive interpretation and the related one-right-answer thesis.

Let us begin with the first criticism of Dworkin's ideas, which is directed against his conception of "law as integrity". His idea of law as integrity is underpinned by the value of equality, to which he attributes the dominant position in law, as explained in section III. 1. 3. 3. In Dworkin's theory, the moral value of integrity, as Postema argues, is grounded in equality,

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[1054] Dworkin (1996), p. 205.

[1055] The reconstruction presented is based on Dworkin's understanding of the conflict in the context of the legal system of the United States. One could wonder how the conflict would be resolved by following Dworkin's understanding in the context of the legal system of Germany, in which the case was originally decided. An argument for a different decision could lie in the Art. 1(1) of the Basic Law, which states that "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority." However, due to Dworkin's understanding of the key role of fundamental right to freedom of expression, the article regulating human dignity would not "trump" freedom of expression and make descriptions "born murderer" and "cripple" prohibited. The dependence on his understanding of a particular fundamental right to resolve the conflict is the reason why his theory can be labelled as a substantive and not procedural one. See previous fn. 1032, in which Zucca's comparison of Dworkin's theory with Alexy's theory is presented.

[1056] Dworkin (1978), pp. 191-192.

which is seen as the foundation of political morality.[1057] Such an understanding, which has been described as "inflating the value of equality", represents an explicit preference for a particular value that is seen as the highest in the legal system.[1058] This can be seen as problematic for the resolution of apparent conflicts between fundamental rights: a particular conception of law ("law as integrity") suggests an axiological hierarchy of values in the legal system by placing the value of equality at the top. In the same way, freedom, or other values deemed equally important could be suggested. The existence of a hierarchy of values in a legal system is contingent, and it is indeed uncommon for such a hierarchy to exist in contemporary legal systems with a single value standing above the other values. Critics have also pointed out that the conception of law as integrity belongs to normative discourse, and not to descriptive discourse.[1059] This first criticism can be summarized by noting that Dworkin develops a normative proposal that suggests an axiological hierarchy to be applied to legal systems, regardless of whether such a hierarchy is supported in the system's legal sources (especially constitutions).

The second criticism is directed against his understanding of norm and the distinction between rules and principles. Dworkin argues that principles, unlike rules, have a dimension of "weight" (or importance) and that rules are "functionally important or functionally unimportant". Since the idea that principles have a dimension of "weight" is also shared by proponents of Alexyan theory of judicial balancing, the criticisms of this idea made earlier in Chapter I also apply to Dworkin. We will only point out here a paradox in Dworkin's theory and his claim that the distinction between rules and principles is a 'logical' one, i.e., that rules

[1057] Postema (2011), p. 445: "On Dworkin's view, the moral value of integrity, like the values of justice and fairness, is grounded in a deeper moral concern: *equality – the fundament of political morality*, in Dworkin's view."

[1058] Alexander (1987), p. 428, argues that "Dworkin's problems here stem from his taking of one moral value – and a problematic and possibly very weak one at that – and making that value dominant in the quest for law." Yowell (2007), p. 96, writes that, in Dworkin's account, "The values protected by fundamental rights apparently have an objective character connected to the principle of equality, but Dworkin does not precisely define their normative basis."

[1059] As Guastini (1988), p. 180 pointed out, "law as integrity" is not a concept of law in the ordinary sense (or definition of "law"), but a "normative theory of both law and justice aimed at planning a framework of legal reasoning in text construction and adjudication, especially in the adjudication of hard cases." 'Legal theory' is understood as "a descriptive discourse on law, i.e. a set of both analytical and empirical sentences about legal language, concepts, doctrines, practice, and so forth", while 'legal policy' is "a normative discourse, i.e. a set of evaluations, suggestions, recommendations, pieces of advice, and directives either addressed to judges and concerning the "right" way of adjudicating (viz. the way of providing "right answers" to legal questions, especially in "hard cases"), or addressed to lawgivers and concerning the "right" way of legislating. Guastini (1988), p. 176. Alexander & Kress (1997), p. 771 criticize the subjective character of integrity: "Integrity demands not only action consistent with a set of principles, but also action based on the set of principles one believes to be best. (…) Integrity requires that one act on the basis of the principles which one believes to be best. Put differently, integrity entails natural law, that one act on correct moral principles."

and principles can be distinguished according to their application. While rules are either applied or not (in an "all-or-nothing fashion"), principles only "state a reason that argues in one direction, but do not necessitate a particular decision", according to Dworkin.[1060] Dworkin uses the case of *Riggs v. Palmer*, presented in section III. 1. 3. 2. to illustrate his idea. According to Brożek, Dworkin's idea regarding the distinction and application of rules and principles can be interpreted in two ways: first, by considering that legal rules are conclusive (when the antecedent of the rule obtains, the conclusion always follows) and that principles are not conclusive, or second, by considering that principles, unlike rules, can be fulfilled to a degree.[1061] However, as Brożek points out, the principle in *Riggs v. Palmer* ("No one shall profit from his own wrongdoing") cannot be fulfilled to a degree, and the rule in that case proved inconclusive.

The third criticism is directed against Dworkin's understanding of interpretation and his notion of constructive interpretation and the associated one-right-answer thesis. What has been pointed out as problematic in Dworkin's theory of interpretation is his cognitivism: he understands interpretation as an evaluative activity, but one that is supposedly rational in nature, while arguing that it is possible to speak of a "true" or "correct" interpretation.[1062] Moreover, his theory of interpretation has been characterized as a non-descriptive theory of interpretation or a normative doctrine of interpretation, based on a "substantive conception of morality and politics".[1063] Within the framework of constructive interpretation, as developed by Dworkin, the interpreter compares various eligible interpretations on the basis of their *fit*

[1060] On Dworkin's distinction between rules and principles, see section III. 1. 3. 2. Brożek (2012), p. 224, argues that Dworkin's idea regarding the distinction and application of rules and principles can be interpreted in two ways: either by considering legal rules as conclusive (when the antecedent of the rule obtains, the conclusion always follows) and that principles as not conclusive, or by considering that principles, unlike rules, can be fulfilled to a degree.

[1061] Brożek (2012), p. 224. On Dworkin's distinction between rules and principles, see section III. 1. 3. 2. Leiter (2004), p. 172 points out that Dworkin later gave up the distinction. On *Riggs v. Palmer* as a problematic example to support Dworkin's ideas, see also Ratti & Rodriguez (2015), pp. 27-28. On the basis of principle according to which "No one shall profit from his own wrongdoing", the court introduced an unexpressed rule according to which "The unworthy beneficiary, though granted the inheritance by a valid will, is not entitled to inherit." Such rule conflicts with the rule according to which a valid will is sufficient to inherit. As the authors conclude, this case exemplified a situation "where the exigencies of axiological coherence brought the legal applicators to introduce a rule into the system which made it normatively inconsistent."

[1062] For this criticism, see Atienza (2010), p. 57. For the criticism of cognitivist theories of interpretation, see Guastini (1997b), pp. 279-280.

[1063] Atienza (2010), p. 57. Jori (2001), p. 48 strongly criticized Dworkin's position: "Dworkin-the-dreamer, who imagines that positive rights entail a network of already precisely determined rights that, strangely enough, always coincide with his own ethical and political conception of what those rights ought to be. He is a dangerous dreamer, even if by chance his idea of rights were to coincide with ours, because the certainty he produces is unwarranted, and there will always be plenty who do not like his vision and who will not fail to point out that the construction of rights, as dreamed of by the theorist, is short on democratic legitimacy – and on legitimisation by the political process of legislative production. And the consequence is that the right in question will always look ambiguous, a mere papering over the cracks of subjective ethical and political solutions."

with the data of the practice and their evaluative *appeal*. However, as critics point out, there cannot be a single "best fit", but only several different plausible fits.[1064] What is criticized is the claim to objectivity of moral judgments that Dworkin advocates.[1065] Dworkin's ideas about constructive interpretation and the idea of one right answer have also been criticized as supporting judicial activism.[1066] This, in turn, is detrimental to legal certainty.[1067] The "moral reading" of the constitution in cases of apparent conflicts between fundamental rights (under which judges decide how an abstract moral principle is best understood) proposed by Dworkin has been criticized as empowering judges to impose their own moral beliefs on the public and as shifting decision in political issues from the legislature to the judiciary.[1068]

III. 1. 5. 2. Conclusions

In this section, following the structure of the previous chapters, we will present conclusions about Ronald Dworkin's approach to the problem of apparent conflicts between fundamental rights. In order to be able to compare his approach with other approaches, we will present his views on the basic notions we analyse, together with a brief summary of his main ideas. On this basis, we will conclude with an evaluation of Dworkin's proposal.

Ronald Dworkin has developed an alternative to theories of judicial balancing based on the idea of rights as trumps (II. 1. 1.). The arguments in support of inclusion of Ronald Dworkin

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[1064] Rosenfeld (2005), p. 388: "Accordingly, the Herculean interpretive enterprise cannot possibly lead to a single "best fit", but rather to several different plausible fits depending on the contested or contestable substantive normative commitments involved. Thus, there may be a best libertarian interpretation of the constitutionality of affirmative action and a different and conflicting best egalitarian interpretation of it." Raz (1986), p. 1118, argues that "Saying that the answer to legal questions depends both on considerations of fit and on moral considerations is allowing that the problem exists rather than solving it." As Guastini (1988), p. 179 points out, no normative answer can be regarded as the "right" one.

[1065] On this point, see Mackie (1977), p. 10, who writes that "*Moral judgments typically include what I call a claim to objectivity* and to the objectivity precisely of their prescriptive authority. But these claims, I maintain, are always false. *Prescriptive moral judgments are really subjective*, though those who make them commonly think that they are objectively valid and mean them to be objectively valid. Suppose Hercules and another judge in the same jurisdiction, both following Professor Dworkin's methods, reach different conclusions about what the law on some issue is because each has reasoned coherently in the light of his own moral views. Though each of them will sincerely and consistently believe that the law is as he determines it, I maintain that they will both be wrong." [emphasis added]

[1066] Churchill (1980), p. 48ff.

[1067] Mackie (1977), p. 15: "A third important characteristic of Professor's Dworkin's theory is that its adoption would tend to *make the law not only less certain but also less determinate* than it would be on rival positivist view. (…) a much larger degree of freedom is introduced if a judge has to frame hypotheses, not merely about the rules which apply directly to cases, but also about far more general and abstract principles of justice and their implications. (…) Judges are then called upon to legislate, bringing in considerations of policy as well as morality, and it tells judges that they thus have discretion in the strong sense. His theory, on the other hand, holds that there is on every issue a determinate and, in principle, discoverable, though perhaps not settled or certain, law." [emphasis added]

[1068] Berger (1997), p. 1111. Dworkin (1990), p. 69, discussing the conflict between right to life and right to privacy in the context of the abortion, disagrees with the idea that controversial political issues, such as this one, should be resolved by the legislative body rather than the highest court.

in this non-balancing chapter were presented earlier. The main argument for such position is the fact that Ronald Dworkin, compared with other authors who have proposed a theory of judicial balancing, did not offer a *methodology of balancing*; there is no account on how the balancing process is (or should be) carried out. Instead, he suggested an approach based on the constructive interpretation and "moral reading" of the constitution, elaborated in sections III. 1. 3. 1. and III. 1. 4. 1. Regarding the interpretation as the first of the basic notions that we analyse, Dworkin developed a cognitivist theory of interpretation, according to which interpretation consists of three stages: the *pre-interpretive*, the *interpretive* and the *post-interpretive* stage. With respect to constitutional interpretation, Dworkin points out that constitutional provisions protecting fundamental rights are usually formulated in "very broad and abstract language" and require what he calls a "moral reading" of the constitution.[1069] As he argues,

> "Lawyers and judges, in their day-to-day work, instinctively treat the Constitution as expressing abstract moral requirements that can only be applied to concrete cases through fresh moral judgments."[1070]

The most important feature of his theory of interpretation in the context of apparent conflicts between fundamental rights is the claim that hard cases, understood as cases involving moral questions, admit of a single correct answer (his well-known "one-right-answer" thesis, II. 1. 3. 1.). Cases involving apparently conflicting fundamental rights fall into this category, and as such, according to Dworkin, there is a one right answer in these cases. As for his understanding of norms, Dworkin is a proponent of the so-called strong distinction thesis between rules and principles, according to which there is a logical difference between rules and principles: rules are characterized by an all-or-nothing applicability, while principles, with their dimension of weight or importance, only give a reason for a particular decision but do not necessitate a decision. Fundamental rights are understood by Dworkin as constitutionally protected moral rights that an individual has against the government and between which a hierarchy exists. According to the conception of rights as trumps, once the scope of a right is infringed, all countervailing considerations are trumped. (II. 1. 3. 2.). On the issue of the apparent conflicts between fundamental rights, Dworkin is a non-conflictivist and an adherent of value monism, arguing that equality should be regarded as the dominant value in law. Integrity, justice, and fairness are all based on equality (II. 1. 3. 3.). When an interpreter is

[1069] Dworkin (1996), p. 2.
[1070] Dworkin (1996), p. 3.

faced with what appears to be a conflict between fundamental rights, a "moral reading" of the constitution is required because fundamental rights protect what Dworkin understands as "moral rights". The "moral reading" of the constitution consists of deciding how best to understand an abstract moral principle and presupposes the possibility of a "correct" understanding of the conflicting rights.[1071]

As the first of the alternatives to theories of judicial balancing that we have analysed, Ronald Dworkin's proposal has weaknesses compared to the presented earlier. First and most importantly, his ideas do not seem to enable a viable formulation of the method for the resolution of the apparent conflicts between fundamental rights, mainly because his approach is a substantive one and not a procedural one. This means that the resolution of each case depends entirely on the "moral reading" of the interpreter of the constitutional provisions protecting fundamental rights, without a procedural framework to approach the conflicts, if we compare it with the previous proposals. This contrast is particularly evident when we compare Dworkin's proposal with the methods developed by José Juan Moreso and Susan Hurley. Second, Dworkin's cognitivism suggests that there is a one right answer in cases of apparent conflicts between fundamental rights and that it is possible to speak of a "true" or "correct" interpretation of a right. Such a cognitivist position seems unsustainable. As critics have pointed out, no normative answer can be considered the right one, and there cannot be a single "best fit", but only several different plausible fits.[1072] The claim to objectivity of moral judgments that Dworkin advocates has also been criticized and does not seem acceptable.[1073] Third, in addressing the problem of apparent conflicts between fundamental rights, Dworkin argues for the establishment of an explicit axiological hierarchy between the competing fundamental rights that results in one of the competing fundamental rights being trumped. In Dworkin's theoretical framework, "equality" is given the highest position among the legal values. For this reason, his theory of interpretation has been criticized as a normative doctrine based on a "substantive conception of morality and politics".[1074] Contemporary constitutions are characterized by the fact that they express a plurality of values and fundamental rights among which there is usually no explicit hierarchy. Dworkin's normative proposal – that constitutional judges decide fundamental rights cases on the basis of their "moral reading" of the constitution (i.e., according to how best to understand an abstract moral principle) – seems

[1071] Dworkin (1996), p. 2. On this point, see section III. 1. 4. 1., where the theoretical framework of Dworkin's proposal is presented.
[1072] See Guastini (1988), p. 179 and Rosenfeld (2005), p. 388.
[1073] On this point, see Mackie (1977), p. 10.
[1074] Atienza (2010), p. 57. See also section III. 1. 3. 1. in which Dworkin's theory of interpretation was presented.

inadequate when viewed as an alternative to the Alexyan theory of judicial balancing. This is because it does not develop a viable alternative to the imposition of moral judgments by the judges in fundamental rights cases (in fact, it agrees with it). In contrast, the main goal of the Alexyan theory of judicial balancing is to show that balancing can be understood as a *rational* procedure for addressing the issue of the apparent conflicts between fundamental rights.

III. 2. Luigi Ferrajoli

III. 2. 1. Introduction

The second author whose approach to apparent conflicts between fundamental rights is presented in this chapter is Luigi Ferrajoli (1940). Ferrajoli's approach to the apparent conflicts between fundamental rights is analysed for two reasons. The first reason is the influence and scope of his work, which dates to the 1960s and has influenced legal discourse not only in Italy, but also in Spanish-speaking countries.[1075] With his *axiomatic theory of law* and rejection of judicial balancing as a method of resolving the apparent conflicts between fundamental rights, Ferrajoli's approach is not only an alternative to theories of judicial balancing, but also an alternative to the legal and political philosophy behind the theories of balancing, as will be explained in this section. The second reason why the approach was chosen for presentation is its theoretical contribution to the notion of fundamental rights with which we are dealing with.

Structurally, the subchapter follows the pattern outlined earlier, and consists of five sections (2. 1. – 2. 5.). After the Introduction (2. 1.), which presents the relevance of Luigi Ferrajoli's approach and the structure of the section, Ferrajoli's theory, referred to as normative or "guaranteeistic" constitutionalism (or *garantismo*), is presented in more detail in the second section (2. 2.). Since Ferrajoli has developed a sophisticated theory of law, an exposition of his main ideas relevant to the topic is necessary to understand his approach.[1076] The third section (2. 3.), introduces the basic notions relevant to the problem: first, Ferrajoli's views on interpretation (2. 3. 1.), followed by his understanding of 'norm' and 'right' (2. 3. 2.), and finally, his views on apparent conflicts between fundamental rights (2. 3. 3.). In the fourth and most important section of the subchapter (2. 4.) Ferrajoli's proposal is elaborated and applied to two cases: the first one is the decision of the Constitutional Court of Italy, *Sentenza 26 marzo*

[1075] Atienza (2008), p. 214, Chiassoni (2011), pp. 334-335, Laporta (2011), p. 168ff, Mazzarese (2008), pp. 261-262, Moreso (2021), p. 606, pp. 375-376, Pino (2007), p. 231, Pino (2010a), p. 287 and Prieto Sanchís (2020).
[1076] This stems particularly from Ferrajoli's theory, which he calls 'garantismo', and the position of his theory in the context of the contemporary debates between legal positivists and (neo)constitutionalists, as it is shown in the next subsection. Ferrajoli's theory is presented, among other works, in his *opus magnum, Principia iuris.* See Ferrajoli (2007b), Ferrajoli (2007c) and Ferrajoli (2007d).

1993, n. 109, and the second is the *Titanic* case from the Federal Constitutional Court. Finally, in the fifth and last section (2. 5.), criticisms of the proposal are presented (2. 5. 1.), ending with conclusions on Ferrajoli's approach to apparent conflicts between fundamental rights (2. 5. 2.).

III. 2. 2. Ferrajoli's *garantismo*

In this section, we present a contextualization of Luigi Ferrajoli's legal philosophy before turning to the basic notions relevant to understanding the apparent conflicts between fundamental rights. This is done because Ferrajoli's writings on the issues relevant to the topic, namely his understanding of norm, right and his approach to the apparent conflicts between fundamental rights, are shaped by his critique of a conception of law that he calls argumentative (or principled constitutionalism). A disciple of Norberto Bobbio, Ferrajoli developed an axiomatic theory of law that culminated in his monumental work in three volumes: *Principia iuris*.[1077] Ferrajoli wrote extensively about fundamental rights in all their aspects – from their definition to their classification and structure to the apparent conflicts between them.[1078] In addition to writing about the various aspects of fundamental rights, Ferrajoli also expresses doubts and criticism of judicial balancing as the standard and most widely used method for resolving conflicts between fundamental rights.[1079]

Ferrajoli's legal philosophy can be contextualised either by presenting the positioning of the theory made by author himself or by other authors. Ferrajoli's works are in the tradition of legal positivism,[1080] and in the ethical field he is a proponent of non-cognitivism.[1081] His

[1077] Ferrajoli's main works include Ferrajoli (1970), Ferrajoli (1989), Ferrajoli (2001a), and the three-volume *Principia iuris*: Ferrajoli (2007b), Ferrajoli (2007c) and Ferrajoli (2007d). On Ferrajoli's *axiomatic theory of law*, see Barberis & Bongiovanni (2016), pp. 405-409, Gascón Abellán (2008), pp. 233-244, Laporta (2011), pp. 167-181, Mazzarese (2008), pp. 261-278, Moreso (2008), pp. 279-288, Moreso (2021), pp. 606-623, Pintore (2011), pp. 139-161, Prieto Sanchís (2008), pp. 325-354 and Sandro (2011), pp. 343-354.
[1078] Among his other works, see Ferrajoli (2001a), Ferrajoli (2001b), Ferrajoli (2006), Ferrajoli (2007b), Ferrajoli (2007c), Ferrajoli (2009b) and Ferrajoli (2014).
[1079] On Ferrajoli's criticism of judicial balancing, see, for example, Ferrajoli (2007c), pp. 71-75, Ferrajoli (2011a), pp. 44-52 and Ferrajoli (2011b), pp. 351-360, Ferrajoli (2014), pp. 219-222 and Ferrajoli (2015).
[1080] Barberis & Bongiovanni (2016), p. 277. More precisely, Ferrajoli's positions is (styled by the author himself) as critical legal positivism, in opposition to traditional legal positivism, with the difference "consisting in the legal paradigm change brought about by constitutionalization". On this point, see Ferrajoli (2002), p. 10-12. On Ferrajoli's theory of law, see also Atienza (2008), pp. 213-216, Barberis (2011b), pp. 89-93 and Guastini (2011a), pp. 113ff. Barberis & Bongiovanni (2016), p. 406 point out that Ferrajoli has been "…taking up such questions as those of the fundamental rights and the principles of law, an investigation that has drawn him closer to neoconstitutionalism". But as Barberis & Bongiovanni 2016, p. 406 also point out, Ferrajoli understands his own theoretical position not as a neoconstitutionalist one, but as an "updated version of legal positivism: as legal positivist theory extended to a new object, namely, the law of the constitutional state". On Ferrajoli's view of his theoretical position, see, for example, Ferrajoli (2011a), pp. 15ff and Ferrajoli (2012a), pp. 791ff.
[1081] See Ferrajoli (2011a), p. 32, Ferrajoli (2012a), p. 791, Atienza (2008), p. 213, Laporta (2011), p. 172-174 and Sandro (2011), p. 352.

position has been described as that of *critical legal positivism*, as opposed to *traditional legal positivism*, with the difference between the two being the changes in legal paradigm brought about by the process of constitutionalization.[1082] However, Ferrajoli's writings have placed him close to the neconstitutionalists, as some authors have argued.[1083]

To set out his views, Ferrajoli distinguishes between two conceptions of constitutionalism: *argumentative or 'principled'* (non-positivist) and *normative 'guaranteeistic'* (positivist).[1084] The first conception of constitutionalism, the *principled* one, is characterized, in Ferrajoli's view, by the idea that fundamental rights are values or moral principles that are structurally different from rules, that they have a weaker normative force, and that they are applied by balancing rather than subsumption.[1085] The second conception of constitutionalism, the *guaranteeistic* one, is characterized instead by a strong normativity, by the idea that most (if not all) constitutional principles, especially the norms of fundamental rights, behave like rules, since they "imply the existence or impose the introduction of rules consisting in prohibitions of injury or obligations of provisions that are their respective guarantees".[1086] The differences between the two conceptions of constitutionalism thus emerge in three controversial points: first, the question of the necessary connection between law and morality; second, the distinction between rules and principles; and third, the practical role of balancing and subsumption.[1087] While principled constitutionalism holds that there is a conceptual connection between law and morality, adopts the so-called 'strong' (or qualitative) distinction between rules and principles, and regards balancing as a necessary operation in the application of legal principles, guaranteeistic constitutionalism rejects these theses.

Ferrajoli, as an advocate of guaranteeistic or positivist constitutionalism, distinguishes three meanings of this term:[1088] first, as a model or type of a legal system; second, as a theory

[1082] Barberis & Bongiovanni (2016), p. 277. On the process of constitutionalization, see Guastini (2017), pp. 213-214 and section II. 4. 3. 3.
[1083] Faralli (2016), p. 406. Barberis & Bongiovanni (2016), p. 278 consider Ferrajoli's stance to be "essentially a theoretical legal positivism extended to law of constitutional state".
[1084] Ferrajoli (2011a), p. 20. For more on Ferrajoli's conception of 'constitutionalism', see Ferrajoli (2011a), pp. 16-28 and Ferrajoli (2011b). The authors who represent principialist constitutionalism and/or non-positivist constitutionalism mentioned by Ferrajoli are Ronald Dworkin, Robert Alexy, Carlos Nino, Gustavo Zagrebelsky and Manuel Atienza. See Ferrajoli (2011a), p. 28.
[1085] Ferrajoli (2011a), pp. 20-21. Ferrajoli (2011a), pp. 34-35, argues that principled constitutionalism holds the view according to which constitutional norms that express political objectives and/or moral values and/or fundamental rights have the structure of legal principles.
[1086] Ferrajoli (2011a), p. 21. On this point, also Ferrajoli (2015), p. 47, where he writes that majority of fundamental rights are reducible to rules, if we understand as rules all norms that prohibit or impose something, such as the rights to liberty, whose infringement or restriction is prohibited or social rights, whose satisfaction is mandatory.
[1087] Ferrajoli (2011a), p. 28. See also Laporta (2011), p. 174. On the differences, see also Barberis & Bongiovanni (2016), pp. 278-279.
[1088] Ferrajoli (2011a), pp. 25-26.

of law; and third, as a political philosophy. In the first meaning, it stands for the positivization of principles to which all normative production must be subjected. Thus, as Ferrajoli points out, guaranteeistic constitutionalism is conceived as a system of limits and obligations, imposed on all powers in a state by rigid constitutions and guaranteed by judicial control of the constitutionality of the exercise of those powers. The violation of these limits (in relation to the principle of equality and the rights to liberty) leads to antinomies and invalid laws that require annulment through judicial intervention, while the failure to fulfil obligations by omission (in relation to social rights) leads to legal gaps that require legislative intervention.[1089] In its second meaning, as a theory of law, it is a theory concerned with the divergence between *ought* (constitutional) and *is* (legislative). It is characterized by the distinction between "valid law" (legal validity) and "law in force" (legal existence).[1090] As a result of institutional change in modern democracies brought about by the process of constitutionalization, it is possible for legal authorities to enact legal rules that are in force (efficacious, followed by citizens, and applied by judges) even if they are incompatible with the constitution. However, such legal rules are invalid.[1091] The consequence of this position is that there can be legal rules that are in force but not valid.[1092] Finally, in the third meaning, as a political philosophy, guaranteeistic constitutionalism denotes a theory of democracy as a legal and political system articulated in four dimensions corresponding to the guarantees of constitutionally established rights – political rights, civil rights, rights to liberty and social rights.

The idea of c*ostituzionalismo garantista*, its 'regulatory ideal', is to ensure that fundamental rights guaranteed by law are upheld in the constitutional state.[1093] To explain this idea, we will begin by presenting Ferrajoli's understanding of interpretation, norm and right and apparent conflicts between fundamental rights in the next section, before arriving to the core of his proposal, presented in section III. 2. 4.

[1089] Ferrajoli (2011a), p. 25. See also Moreso (2021), pp. 609-601.

[1090] Ferrajoli (2011a), p. 26. See also Ferrajoli (2007b), p. 16 and pp. 499-500. The English translation is taken from Moreso (2021), p. 607 and p. 611. Barberis & Bongiovanni (2016), p. 278 mention distinction between "mere *being in force* of legal norms" and "their genuine *validity*", adding that "Legislative norms that comply with constitution in a formal way only, i.e., statutes produced by the organs of state in keeping with the procedure set forth in the constitution itself, can only be said to be *in force*; by contrast, norms that comport not only formally but also materially with the constitutional principles are said to be *valid*." On the idea, see also Ferrajoli (2001b), p. 17, where he writes that "The paradigm of constitutional democracy is none other than the subjection of law to the law generated by this dissociation between *being in force* and *validity* [emphasis added] of the law, between mere legality and strict legality, between form and substance, between formal legitimation and substantial legitimation or, if you prefer, between 'formal rationality' and 'material rationality'".

[1091] Moreso (2021), p. 609. See Ferrajoli (2011a), pp. 25-26.

[1092] On this possibility, see, for example, Ferrajoli (2011b), p. 323.

[1093] Atienza (2008), p. 214 writes: "El objetivo último de Ferrajoli, el ideal regulativo que propone a los juristas, viene a ser éste: debe procurarse que el Derecho (nuestros Derechos del Estado constitucional) cumpla(n) sus promesas en relación con los derechos fundamentales."

III. 2. 3. Basic notions

This section introduces basic notions relevant for understanding the approach to the apparent conflict between fundamental rights presented by Luigi Ferrajoli. The section begins with his understanding of interpretation and the distinction between doctrinal interpretation and operative interpretation he developed (III. 2. 3. 1.), followed by his understanding of norm and right and the classification of fundamental rights he proposed (III. 2. 3. 2.), concluding with his understanding of the apparent conflicts between fundamental rights (III. 2. 3. 3.).

III. 2. 3. 1. Interpretation

As Ferrajoli points out, legal interpretation is commonly understood as "any cognitive activity that is aimed at understanding the meaning of a legally relevant act in social life".[1094] "Act" is understood here in its broadest meaning, that is, apart from the law, any utterance, public or private, that has legal significance. Thus, "legal interpretation" is a general term that encompasses various distinct, epistemologically heterogeneous cognitive activities. Based on this observation, Ferrajoli distinguishes between doctrinal interpretation (*interpretazione dottrinale*) and operative interpretation (*interpretazione operativa*), which he elaborated in his earliest works and retained in his theory of law.[1095]

In the first sense of the word, legal interpretation, understood as doctrinal interpretation, is the analysis of normative language by the jurist-scientist, which is a cognitive activity of a scientific nature. As such, it can be described as a method of legal dogmatics.[1096] As Ferrajoli points out, doctrinal interpretation, properly understood, is a method of forming concepts and statements of legal dogmatics, but not of legal science as a whole.[1097]

In the second sense, legal interpretation, understood as operative interpretation, refers to interpretation by legal operators (*operatori di diritto*), i.e., by those subjects who perform relevant legal activities within the legal system. Operative interpretation, as Ferrajoli says, has

[1094] Ferrajoli (1966), p. 290.
[1095] Ferrajoli (1966), pp. 290-304. See also Ferrajoli (2007b), p. 219-222 and pp. 319-321. The distinction is also given by Wróblewski (1985), pp. 243-246, who refers to Ferrajoli.
[1096] Ferrajoli (1966), p. 290. Cf. Wróblewski (1985), pp. 245-246, who also indicates that doctrinal interpretation is "proper for legal dogmatics".
[1097] Ferrajoli (1966), p. 291, fn. 3. Examples given by Ferrajoli are "contract", "will" and "homicide". However, the meanings of terms such as "subjective right", "obligation", "validity", "efficacy" or "norm" cannot be established by mere doctrinal interpretation, according to Ferrajoli. See also Ferrajoli (2007b), p. 291

as its object concrete legal experiences in which the operator is personally involved and interested.[1098]

The distinction between doctrinal and operative interpretation is important because it is better than other distinctions of interpretation, according to Ferrajoli:[1099] other distinctions, such as the distinction between doctrinal interpretation (*interpretazione dottrinale*) and judicial interpretation (*interpretazione giudiziale*) or the distinction according to the type of document interpreted, are lacking. As for the first distinction, judicial interpretation is only a type of operative interpretation, while the second distinction is made by the individuation and dogmatic differences of the acts that are the objects of interpretation. Ferrajoli does not consider these differences as relevant and holds that there is no specific difference between constitutional interpretation and interpretation of other legal texts. Moreover, one of the main criticisms Ferrajoli makes against principled constitutionalism is the difference it attributes to constitutional interpretation and balancing as a method of application of legal principles. Doctrinal interpretation is focused on the normative, conceptual level, which consists of legal norms, while operative interpretation is focused on the operative level and experience. Therefore, as Ferrajoli concludes, the universe of the discourse of the former consists of a set of propositions considered as legal norms, while the universe of the discourse of the latter is the set of acts considered as legal experience.[1100]

If we were to classify Ferrajoli's views on interpretation according to the scheme used earlier, his views would classify him as a supporter of *mixed* theories of interpretation, a position usually associated with legal positivism. According to him, legal language is characterized by vagueness, which leads to discretion in interpretation; interpretive statements are not only the product of cognitive activities regarding the meaning of the text but are also prescriptive and based on the evaluation and argumentation of possible options.[1101]

[1098] Ferrajoli (1966), p. 292. See also Ferrajoli (2007b), p. 97. Wróblewski (1985), p. 244, understands operative interpretation to take place when "there is a doubt concerning the meaning of a legal norm which has to be applied in a concrete case of decision-making by a law-applying agency. This interpretation is thus a case-bound interpretation. Operative interpretation has to fix a doubtful meaning in a way sufficiently precise to lead to a decision in a concrete case". Cf. Guastini (2015b), p. 3, where he distinguishes between interpretation "in abstracto" (or text-oriented) and interpretation "in concreto" (or fact-oriented). Guastini (2005a), pp. 142-143 understands interpretation *in abstracto* as consisting in deciding what rule the legal text expresses, without referring to a particular case, whereas interpretation *in concreto* is a subsumption of an individual case under a rule and its result is a "legal qualification" of the facts of the case. See section II. 4. 3. 1. on Guastini. See also Ferrajoli (1966), p. 300 and p. 304.

[1099] Ferrajoli (1966), p. 292, fn. 4.

[1100] Ferrajoli (1966), p. 304.

[1101] See Ferrajoli & Ruiz Manero (2012), pp. 77-78. On this point, see Ruiz Manero (2015), p. 207 and Prieto Sanchís (2020), p. 388, fn. 38. Ferrajoli (2011a), p. 32 rejects cognitivism and Dworkin's one-right-answer thesis. He also argues that the alternative is not to be found in emotivism.

III. 2. 3. 2. Norm and right

In this section we will introduce Luigi Ferrajoli's understanding of the notions of 'norm' and 'right'. We will first focus on his understanding of norm and his understanding of the distinction between rules and principles, followed by his understanding of right and fundamental rights, since these are the subject of the work. As will be explained, Ferrajoli argues for what he calls a 'purely formal' definition of fundamental right and a 'subjective' and 'objective' classification of fundamental rights (the first based on the subjects of the right and the second based on the objects of the rights).

A norm is defined by Ferrajoli as "any rule that is the effect of an act".[1102] His definition of norm includes two elements.[1103] The first element concerns the nature of norms. Norms are rules and have all the characteristics of rules: either they are directly prescriptions (of modalities, expectations, or status) or they enable the enactment of prescriptions (of modalities, expectations, or status). The second element concerns their linguistic nature: like all rules, norms have (in fact, are) meanings whose effectiveness depends on their social acceptance. Norms also have a universal content (they refer to a class of objects rather than to a particular object. Since we have seen in the previous chapters that norms expressing fundamental rights are usually understood to have the structure of legal principles (the 'Standard Conception' described by Martínez Zorrilla[1104]), we now turn to Ferrajoli's understanding of the distinction between rules and principles.

In his works, Luigi Ferrajoli criticises and rejects the "strong" (or qualitative) distinction between rules and principles, proposed by the advocates of principialist constitutionalism.[1105] In Ferrajoli's view, the distinction leads to a "normative weakness" of principles.[1106] However, Ferrajoli is also sceptical of the so-called "weak" (or quantitative)

[1102] Ferrajoli (2007d), p. 245. Ferrajoli's theory is based upon axioms and definitions he gives in *Principia iuris* and which are assigned a letter and a number. The definition of norm is given under D.8.1. On norms, see Ferrajoli (2007d). On Ferrajoli's understanding of norm and types of norms, see Ferrajoli (2007b), pp. 395-415.
[1103] Ferrajoli (2007b), p. 396.
[1104] See Martínez Zorrilla (2011b), pp. 730-731.
[1105] On this point, see Aguiló Regla (2011), pp. 64-66 Atienza (2008), p. 215, Barberis (2011b), pp. 91-93 and Barberis & Bongiovanni (2016), p. 279.
[1106] Ferrajoli (2011a), p. 34ff and Barberis & Bongiovanni (2016), p. 279, who refer to 'principialist constitutionalism' as 'neoconstitutionalism'. Here, Ferrajoli refers to distinctions made by Ronald Dworkin, Robert Alexy, Manuel Atienza and Juan Ruiz Manero and Gustavo Zagrebelsky. The idea of 'strong' distinction between rules and principles, characteristic for principialist constitutionalism, is, as Ferrajoli (2011a), pp. 35-36 elaborates, "of exclusive and exhaustive type, founded on the differences of ontological, structural or qualitative nature". On this point, see also section I. 3. 2.

distinction between rules and principles.[1107] By rejecting the position that there is a qualitative difference between rules and principles, the quantitative difference between these two types of norms is also obscured: indeterminacy, genericity, and ponderability are characteristics (no less and sometimes even more, as Ferrajoli argues) of rules as well, and not just principles.[1108] Besides doubting that there is a criterion by which a meaningful distinction between rules and principles can be made, Ferrajoli also finds the explanatory power of this distinction to be questionable, since he argues that most principles behave like rules.[1109] Based on his views, we can qualify his position as the one according to which there are no solid grounds for a distinction between rules and principles.[1110]

Ferrajoli accepts the idea that there are principles expressing values and directives of a political nature, whose observance or non-observance is not easily discernible but considers them to be of "relatively marginal importance".[1111] Based on this observation, Ferrajoli distinguishes between *directive principles* or *directives* and *regulative principles* or *imperatives*, that are non-defeasible.[1112] Directive principles are enacted to pursue specific constitutional purposes, while regulative principles are "both principles in the form of argument and definite rules which are applied by subsumption".[1113] Directive principles are described by Ferrajoli as "generic and indeterminate expectations, not of acts but of results", while regulative principles, on the other hand, are "specific and determinate expectations".[1114] Directive principles can be understood as Alexy describes them, as "optimization commands", in the sense that they can be fulfilled to varying degrees. But non-observance of regulative principles (such as equality and principles expressing liberties) is deontically prohibited. Regulative

[1107] Ferrajoli (2011a), p. 36. On this point, see also Prieto Sanchís (2011), pp. 237-238. The authors mentioned by Ferrajoli who argue that the distinction between rules and principles is a "weak" one are Luis Prieto Sanchís, Riccardo Guastini and Paolo Comanducci. On Ferrajoli's position regarding the distinction, see Laporta (2011), pp. 176-177

[1108] Ferrajoli (2011a), p. 36. See also Atienza (2008), p. 215 and Barberis (2011b), p. 92.

[1109] Ferrajoli (2011a), p. 36. To illustrate his view, Ferrajoli mentions the case *Riggs v. Palmer*, which Dworkin used to explain his distinction between rules and principles. It is doubtful, as Ferrajoli argues, that the decisions in this case were based on principles, and not on rules. For this point, see section III. 1. 5. 1., where criticism of Dworkin's ideas is presented.

[1110] The framework used for classification is the one mentioned earlier, from Moniz Lopes (2017), p. 472. For such a view of Ferrajoli's position, see also Stamile (2019), p. 104.

[1111] Ferrajoli (2011a), pp. 36-37.

[1112] Ferrajoli (2011a), pp. 37-43, Ferrajoli (2011b), pp. 345-346, Ferrajoli (2012a), p. 801 and Ferrajoli (2014), p. 211. The idea that fundamental rights, understood as principles, are defeasible, weakens them. See Ferrajoli (2011a), p. 40.

[1113] Ferrajoli (2014), p. 211. On the distinction between directive principles and regulative principles, see also Ferrajoli (2015), pp. 47-48.

[1114] Ferrajoli (2011a), pp. 37-38. Majority of principles which regulate social and economic policy are directive principles or directives, in Ferrajoli's view. An example would be Art. 1(1) from the Constitution of the Italian Republic, which states that "Italy is a democratic republic founded on labour" or Art. 9(1), which states that "The Republic promotes the development of culture and of scientific and technical research."

principles are norms that are merely phrased differently from ordinary rules.[1115] So the difference between most principles and rules is not structural, but a "little bit more than in style".[1116] Many constitutional norms, especially fundamental rights norms, are phrased linguistically in such a way that they might be qualified as "principles", but are really rules.[1117] Ferrajoli suggests that there are two reasons for formulating fundamental rights in this way in contemporary constitutions.[1118] The first is that such formulations have political relevance, since principles express certain ethical and political values, whereas rules are "opaque" in this respect.[1119] The second is that when principles express fundamental rights, they serve to "make explicit the titularity of constitutional norms that confer rights on individuals or citizens, and hence, their placement in a super-ordered position in a legal order".[1120]

Fundamental rights, according to Ferrajoli, are expressed by regulative principles that have the nature of arguments, as all principles have, but also of rules, and as rules, are to be applied by subsumption.[1121] Any principle expressing fundamental right is, according to Ferrajoli, equivalent to the rule consisting of correlative obligation or prohibition. This follows from his idea that a right has reciprocal implications that link the right to a corresponding obligation or prohibition.[1122] The idea that fundamental rights, even when expressed in the form of principles, should function as rules is illustrated with examples. Rights expressed in constitutions, such as the right to health, freedom of expression or freedom of movement are universal (*omnium*) and as such, should be interpreted as rules to which correspond absolute duties (*erga omnes*), which also consist of rules.[1123] For this reason, there is no real difference

[1115] Ferrajoli (2011a), pp. 38-39. An example of regulative principle would be the principle of equality expressed in Art. 3(1) of the Constititution of the Italian Republic, which states that "All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions."

[1116] Ferrajoli (2011a), p. 39. The distinction between directive principles and regulative principles can be compared with the distinction between policies and principles in the strict sense, made by Manuel Atienza and Juan Ruiz Manero. See Atienza & Ruiz Manero (1998), pp. 176-182. Norms that confer fundamental rights should be understood as regulative principles – rules, and, at the same time, principles. On this point, see article where Ruiz Manero referred to Ferrajoli's ideas, Ruiz Manero (2012), p. 826.

[1117] Ferrajoli (2012b), p. 96, where he writes that the majority of constitutional norms, starting with those that establish fundamental rights, have the structure of (deontic) rules, or regulatory principles, as he calls them. Such rules are not different from any other rules when it comes to their application.

[1118] Ferrajoli (2011a), p. 39.

[1119] Ferrajoli refers to Pino (2010b), p. 52 and p. 130 here. The "opaqueness" of rules means that there is no explicit reference to certain values or their expression. Pino (2010b), p. 130.

[1120] Ferrajoli (2011a), p. 39.

[1121] Ferrajoli (2014), p. 211.

[1122] Ferrajoli (2011a), pp. 39-40. Ferrajoli (2011a), p. 40 writes that "Rights and duties, expectations and guarantees, principles regarding rights and rules regarding duties are, in short, two sides of the same coin, the violation of the former being equivalent – whether by action or omission – to the violation of the latter." [translated by author.]

[1123] Ferrajoli (2011a), pp. 39-40. Art. 32(1) of the Constitution of the Italian Republic, which protects the right to health, is equivalent to the norm (in the Italian case, it is also explicit) according to which the Republic guarantees

between rules and principles when they are violated: "the violation of a principle makes it a rule that provides corresponding prohibitions or obligations", according to Ferrajoli.[1124] He agrees with the description of his theory of norms as a "theory of rules", rather than "theory of principles", because he understands all legal norms to have the structure of rules, with a typology of norms being entirely a typology of rules.[1125] Ferrajoli argues that it can be even be said that behind every rule there is a principle, arguing that the "argumentation is always by principle, while the application is always of the corresponding rules."[1126] However, it should be indicated that principles in this sense are not legal principles, at least not explicit, and at best, implicit ones.[1127] As we will see later in this subchapter, this idea of correlativity and reciprocity is central to Ferrajoli's understanding of fundamental rights.

Having set out Ferrajoli's understanding of 'norm' and his position on the distinction between rules and principles, we now turn to his understanding of 'right' and his definition and classification of fundamental rights. A 'right' is defined by Ferrajoli as "any positive expectation (of services) or negative expectation (of non-infringement) ascribed to an actor by a legal norm".[1128] With regard to fundamental rights, Ferrajoli proposes what he calls a "theoretical, purely formal or structural" definition of fundamental rights, according to which fundamental rights are "all those rights to which 'all' human beings are universally entitled by virtue of having the status of persons, or of citizens, or of persons capable of acting."[1129] The definition of fundamental rights proposed by Ferrajoli is a theoretical one and not a dogmatic one, since it does not presuppose that these rights are formulated in constitutions (or other

(that is, it must guarantee) free medical treatments. Art. 16, which protects freedom of movement is protected by constitution (withing the limits imposed by health or security) is equivalent to the prohibition of the freedom of movement, except "for reasons of health or security".

[1124] Ferrajoli (2011a), p. 40.

[1125] Ferrajoli (2011b), p. 349, where he writes: "Es cierto: *la mía es una teoría de las reglas*, como acertadamente esribe Barberis, y no de los principios. (…) En mi léxico *todas las normas jurídicas son reglas* (D8.1, T8.1) y *la tipología de las normas es integramente una tipología de las reglas*." [emphasis added] On this point, see also Moreso (2008), p. 283

[1126] Ferrajoli (2012a), p. 805. Ferrajoli (2011a), pp. 38-39 gives an example with the rule that prescribes the obligation to stop at the red light in traffic, behind which there is a principle of safety and greater efficiency and rationality of road traffic.

[1127] In the example with the obligation to stop at the red light in traffic, principles of safety, greater efficiency, and traffic rationality that Ferrajoli mentions, cannot be understood as principles in the context of typology of norms (to which we refer to in this work), but as reasons (or arguments) in favour of enacting a particular provision (for example, provision in a law that regulates traffic) by the legislature. It could also be understood as purpose of the norm (for example, by the authors who refer to subjective purposive interpretation, such as Aharon Barak). See also Ferrajoli (2012a), p. 805, where he mentions this "normogenetic" function of principles, that is, "their ability to justify the plurality of rules, whether explicit or implicit." [translated by author]

[1128] Ferrajoli (2001b), p. 1. See also Baccelli (2011), p. 371, where a shorter definition and translation from *Principia iuris* is given: "A (subjective) right is any expectation of services or the absence of harm".

[1129] Ferrajoli (2001b), p. 1. See also Ferrajoli (2007b), p. 686.

norms of positive law) of legal systems.[1130] Defined differently, fundamental rights are "those rights that are ascribed by a legal system to all physical persons by virtue of their being so, or by virtue of their being citizens or by virtue of their being capable of acting".[1131] The definition of fundamental right is also *formal* or *structural*.[1132] This means, as Ferrajoli states, that the recognition of a particular right as a 'fundamental right' is based solely on the universal character of their attribution. The term 'universal' is understood in the "purely logical and non-evaluative sense of the universal quantification of the class of authors who are entitled to it".[1133] Rights such as personal liberty, freedom of thought, political rights, social rights, etc., are protected as universal and are therefore 'fundamental' rights. But in situations where these rights are alienable (for example, in a society that practices slavery), these rights would not be universal and therefore not 'fundamental'.[1134] If a futile right were universal (for example, the right to be greeted in public or the right to smoke), it would be a fundamental right in Ferrajoli's view.

Ferrajoli argues that his definition of fundamental rights has advantages over competing definitions.[1135] First, it is valid for any legal system since it holds true irrespective of the factual circumstances and regardless of the fundamental rights provided for or not provided for in the legal system in question (including totalitarian and pre-modern legal systems). Second, it is ideologically neutral, since it is valid regardless of the goods or values protected by fundamental rights. In this way, it is valid regardless of the legal or political philosophy embraced, from legal positivism to natural law, liberal or socialist, or even illiberal and anti-democratic. In Ferrajoli's understanding, fundamental rights do not have to be enacted in constitutions (although they usually will be). They can also be expressed through norms from ordinary, non-constitutional laws.[1136]

[1130] Ferrajoli (2001b), p. 1. A dogmatic definition of fundamental rights is dependent on the formulation of fundamental rights in positive legal systems, while a theoretical definition does not require that fundamental rights be required in norms of positive law at all, as Ferrajoli points out.

[1131] Ferrajoli (2001b), p. 2.

[1132] Ferrajoli (2001b), pp. 2-3. On the formal character of Ferrajoli's definition of 'fundamental right', see Zolo (2011), pp. 71-74.

[1133] Ferrajoli (2001b), p. 2. Second type of rights in Ferrajoli's theory are patrimonial or property rights, which are structurally different from fundamental rights: while fundamental rights are non-disposable and universal, patrimonial or property rights are disposable and individual. Ferrajoli (2001b), p. 1. See also Baccelli (2011), pp. 371-372, who uses the term 'patrimonial rights' and Jori (2001), p. 41, who uses the term 'property rights'.

[1134] Ferrajoli (2001b), p. 3. As an answer to the question which rights should be guaranteed as fundamental, Ferrajoli (2010), p. 157 proposes four criteria that are, in his opinion, confirmed by historical experience and constitutionalism, both national and international. These criteria are personal dignity, equality, protection of the weakest subjects and peace.

[1135] Ferrajoli (2001b), p. 3.

[1136] Ferrajoli (2001b), p. 2. An example given by Ferrajoli for such right is the right to defence of an accused person, ascribed by the code of criminal procedure.

Ferrajoli proposes two distinctions of fundamental rights: the first is 'subjective' and depends on the subjects of the right, while the second is 'objective' and is based on the type of the conduct that is the object of the right.[1137] The distinctions partially overlap, as it is can be from the two tables below. In the first, 'subjective' classification of fundamental rights, Ferrajoli adopts two parameters on the basis of which he distinguishes the subjects of the right: *citizenship* and the *capacity to act* (which are the only status distinctions that limit the equality of people today).[1138] On the basis of these two parameters, he makes two distinctions of fundamental rights: the first between *personality rights* and *citizenship rights*, and the second between *primary rights* (or *substantial rights*) and *secondary rights* (or *instrumental rights* or *rights of autonomy*).[1139] Combining these two distinctions, we get four classes of fundamental rights: (1) *human rights*, defined as "the primary rights of persons, to which all human beings are entitled without distinction"; (2) *public rights*, defined as "those primary rights to which only citizens are entitled; (3) *civil rights*, defined as "secondary rights ascribed to all human beings capable of acting" and (4) *political rights*, defined as "those secondary rights that are reserved only to those citizens that are capable of acting".[1140] This first, 'subjective' typology of fundamental rights can be illustrated by the following table:[1141]

Fundamental rights	Personality rights	Citizenship rights
Primary (substantial) rights	Human rights	Public rights
Secondary (instrumental) rights	Civil rights	Political rights

The second, 'objective' distinction of fundamental rights is based on the idea that fundamental rights can consist of negative expectations (non-infringements) and positive expectations (prestation).[1142] The primary rights that everyone has, regardless of their capacity to act, include *rights to liberty* and *social rights*. Rights to liberty are 'negative' rights, or

[1137] Ferrajoli (2001a), pp. 282-288. See also Ferrajoli (2007a), p. 47.
[1138] Ferrajoli (2001b), p. 4.
[1139] Ferrajoli (2007b), pp. 691-696 and Ferrajoli (2001b), p. 4.
[1140] Ferrajoli (2001b), pp. 4-5. See also Ferrajoli (2001a), pp. 7-9. Ferrajoli gives several examples for his classification from Italian legal system. *Human rights* are, for example, the right to life and the right to integrity of human being, personal freedom, the freedom of conscience and of expression of thought and the right to health and to an education. *Public rights* are, for example, the right of residence and freedom of movement, the right to form associations, the right to work and the right of those unable to work to receive assistance and insurance. *Civil rights* are the freedom to enter contract, the freedom to choose and change job, the freedom of enterprise, the right to initiate legal proceedings and all other subjective rights which are the manifestation of private autonomy. Finally, *political rights* are the passive and active voting rights. On this typology of fundamental rights, see also Ferrajoli (2007b), pp. 696-701.
[1141] This is a slightly simplified version taken from Ferrajoli (2007b), p. 698. For the same table, see Ferrajoli (2001a), p. 284.
[1142] Ferrajoli (2001a), pp. 284-285. See also Ferrajoli (2006), p. 22.

immunity rights, in the sense that they require omission of interference (they include 'liberty from' rights, such as the right to life, and 'liberty to' rights, such as freedom of the press). Social rights are 'positive' rights in the sense that they require some prestation, such as the right to health or the right to education. Secondary rights, to which all persons capable of acting are entitled, include *civil rights*, for example freedom of enterprise, and *political rights*, such as the right to vote.

<table>
<tr><th>Fundamental rights</th><th colspan="2">Personality rights</th><th>Citizenship rights</th></tr>
<tr><td rowspan="2">Primary rights (only expectations)</td><td rowspan="2">Rights to liberty</td><td>liberty from</td><td rowspan="2">Social rights (positive expectations)</td></tr>
<tr><td>liberty to</td></tr>
<tr><td>Secondary rights (expectations and powers)</td><td colspan="2">Civil rights (rights of private autonomy)</td><td>Political rights (rights of political autonomy)</td></tr>
</table>

Ferrajoli defines fundamental rights independently of a concrete legal system, but also independently of modern constitutions.[1143] Taking into account the parameters used to classify fundamental rights (personhood, citizenship, and the capacity to act), Ferrajoli argues that fundamental rights have existed in the West since Roman law (albeit usually limited to a number of actors).[1144]

Having presented his understanding of the fundamental right and the classification of fundamental rights, we continue with his understanding of conflicts between fundamental rights and the relationship between these types of rights in the context of their apparent conflict. As will be shown in the next section, Ferrajoli takes a non-conflictivist approach to the issue, which differs from the prevailing conflictivist view in Chapter I and Chapter II.

III. 2. 3. 3. Conflicts between fundamental rights

Ferrajoli's position is understood by the authors to be *non-conflictivist*.[1145] Ferrajoli argues that there is a tendency to inflationary use of the category "conflicts between rights", (also "conflicts between principles", whether constitutional or not) in situations that should not be understood as conflicts, but merely situations in which there is a discretionary power that is

[1143] Ferrajoli (2001b), p. 5.
[1144] Ferrajoli (2001b), p. 5. Here, personhood is included as a third parameter, since historically people were discriminated on different basis and were denied the status of personhood. See Ferrajoli (2001a), pp. 7-9.
[1145] See, for example, Barberis (2011b), p. 93, where he argues that Ferrajoli defends a monist position, according to which there are conflicts between values, principles, and fundamental rights, but these conflicts are minimal and marginal and would be drastically reduced if the system of concepts from *Principia iuris* is adopted. On Ferrajoli's position, see also Comanducci (2016), pp. 96-100, Martínez Zorrilla (2007), p. 63, Moreso (2006b), p. 134, Moreso (2008), p. 284, Pino (2007), pp. 231-235, Pino (2010a), pp. 287-304, Prieto Sanchís (2008), p. 342 and p. 346 and Prieto Sanchís (2011), pp. 229-244.

unavoidable to the proper exercise of any power.[1146] He argues that the scope and the frequency of conflicts between fundamental rights should be minimized to avoid weakening and relativizing rights.[1147]

The issue of apparent conflict between fundamental rights is illustrated by explaining the relationships between the types of rights presented in the table in the previous section (rights to liberty, social rights, civil rights, and political rights). Ferrajoli explains four types of relationship between fundamental rights, on the basis of which his *non-conflictivist* position can be determined:[1148]

(1) Rights to liberty as primary rights, more specifically *liberties from*: these rights, such as freedom of conscience or the prohibition of torture, cannot conflict with other rights, because they are immunities that do not consist in any exercise, but only in the negative expectation of not being violated. They do not interfere with other rights, and the other rights cannot limit them because they are themselves limits, as Ferrajoli argues.[1149]

(2) Rights to liberty as primary rights, more specifically *liberties to*: these rights, such as right to freedom of expression or the right to strike seem to conflict with other rights, but in these cases, Ferrajoli argues, a "conflict" is usually resolved by the constitutions themselves. Ferrajoli cites two examples of "conflict" to illustrate this point. In the first example, a "conflict" between freedom of expression and personality rights is resolved by the Art. 21(3) of the Italian Constitution, which states that certain actions which represent freedom of expression are offenses (such as insult or defamation) and as such are prohibited. In the second example, a "conflict" between the right to strike and public health (when the right to strike would be exercised by health workers without restriction) is resolved by Art. 40 of the Italian Constitution, which states that the right to strike shall be exercised in accordance with the law.[1150]

(3) *Social rights* as primary rights: regarding the third type of relationship between fundamental rights, Ferrajoli argues that the economic costs and difficulties involved in

[1146] Ferrajoli (2007a), p. 93. See also Ferrajoli (2001a), pp. 330-331.
[1147] Ferrajoli (2007c), p. 72. On this point, see also Pino (2010a), p. 292.
[1148] Ferrajoli (2007c), pp. 71-73. For the reconstruction of Ferrajoli's view, see also Moreso (2006b), pp. 133-138, Pino (2010a), pp. 292-296 and Prieto Sanchís (2011), pp. 237-241.
[1149] Pino (2010a), p. 295 points out that Ferrajoli uses the terms "tendentially" (*tendenzialmente*) and "usually" (*di solito*). From this, as Pino argues, it can be concluded that the non-conflictivism of these rights is not a logical or conceptual necessity, but only an empirical circumstance, and therefore, contingent. On Ferrajoli's view regarding this type of rights, see also Prieto Sanchís (2008), p. 345.
[1150] As Pino (2010a), p. 295 indicates, this seems to be the only case where Ferrajoli is willing to admit that fundamental rights might conflict, although he prefers to talk about the "limits" of the rights. On Ferrajoli's view regarding this type of rights, see also Prieto Sanchís (2008), pp. 345-346.

satisfying various social rights should not be confused with conflicts between fundamental rights. For example, fundamental rights to health or education require resources for their realization. Since resources are limited, the decision must be made on where to allocate them. However, this decision is a purely political decision, and not a limitation of one right by another right.[1151]

(4) *Civil rights* and *political rights* as secondary rights: the fourth type of relationship concerns the relationship between classes of rights: civil rights (such as the freedom of enterprise) and political rights (such as the right to vote), as secondary rights, and rights to liberty and social rights, as primary rights. Civil rights and political rights, according to Ferrajoli, should not be understood as conflicting with primary rights, but as subordinate to them. Both primary and secondary rights are fundamental rights, but there is a hierarchy between them, with secondary rights being subordinate to primary rights.[1152] The relationship of secondary rights, which consist of expectations and powers (as opposed to primary rights, which consist only of expectations) to the other fundamental rights cannot be configured as a conflict, but as a subjection to the law, since these rights are those which the laws limit in order to ensure the protection of the other constitutional rights.[1153]

Ferrajoli prefers to speak of "limits" rather than "conflicts" between rights. Such a *non-conflictivist* position, which aims to minimize or eliminate "genuine" conflicts between rights naturally has implications for the application of the law.[1154] In the following section, we will introduce Ferrajoli's theoretical framework before applying it to cases to see what these implications are in concrete cases.

III. 2. 4. Ferrajoli's proposal

III. 2. 4. 1. Theoretical framework

The two aforementioned features of non-positivist or principled constitutionalism that Luigi Ferrajoli criticizes are the notion of a necessary connection between law and morality and the "strong" or qualitative distinction between rules and principles. The third feature of principled constitutionalism that Ferrajoli criticizes is the idea that balancing is the method for

[1151] Ferrajoli (2001a), p. 329. See also Prieto Sanchís (2008), pp. 349.
[1152] Ferrajoli (2007c), p. 82-83. See also Ferrajoli (2001a), pp. 329-331 and Moreso (2006b), p. 138.
[1153] Ferrajoli (2001a), p. 330. Secondary rights, in Ferrajoli's account, cannot conflict with primary rights since they are "constitutively" delimited by them. Only an apparent conflict between (acts of the exercising) secondary rights and other fundamental rights can exist because that would be an antinomy resolved in the favour of the latter according to the hierarchical criterion. See Pino (2010a), p. 295. According to Prieto Sanchís (2008), pp. 346-347, this situation best illustrates the anti-conflicitivst position of Ferrajoli.
[1154] Pino (2010a), p. 295. See also Ferrajoli (2013), pp. 122-123.

applying principles, while subsumption is the method for applying rules.[1155] Ferrajoli criticizes judicial balancing by arguing that it undermines legal certainty because it gives the judge more discretion when compared to subsumption.[1156] The problem Ferrajoli sees with judicial balancing is also that it gives judges more power than they should have and that judicial balancing potentially annuls the separation of powers.[1157] If fundamental rights are understood as principles to be applied through balancing, their normative force is weakened and their guaranteeing role as constitutional norms is weakened.[1158]

Ferrajoli's theoretical framework for the apparent conflicts between fundamental rights depends on his understanding and classification of fundamental rights and his understanding of conflicts between different types of rights, as presented in the previous two subsections. In the context of Ferrajoli's typology of four types of relations between fundamental rights, and his clear anti-conflictivist position on three out of four types of these relations, we are interested in the second type of rights, the rights to liberty as a type of primary rights (more precisely, liberties to). The reason is that the possible conflict in the other three types of relations (liberties from, social rights and secondary rights) is resolved in accordance with the framework presented in the previous subsection. "Liberties to" types of right are the only possible rights where Ferrajoli allows for a possible "conflict" between rights.[1159] If we consider Ferrajoli's typology of rights in the context of their possible conflict, we can see that he proposes a three-level hierarchy between them:[1160] at the first level, *liberties from*; at the second level, *liberties to* and *social rights*; and at the third and lowest level, *civil* and *political rights*.

[1155] Ferrajoli (2011a), p. 44 and Ferrajoli (2013), pp. 128-129. These three positions are identified as three characteristic elements of principled constitutionalism. See Ferrajoli (2011a), p. 28.

[1156] On Ferrajoli's criticisms of judicial balancing, see Ferrajoli (2007a), pp. 91-93 and Ferrajoli (2011a), pp. 44-52. On Ferrajoli's views regarding judicial balancing, see also Atienza (2008), p. 215, Barberis & Bongiovanni (2016), p. 279, Di Carlo (2015), pp. 9-10 and Prieto Sanchís (2011), p. 241-244. Regarding the role of the judge, Chiassoni (2011), p. 339 writes that "*Garantismo's* basic normative attitude favours judicial passivism and opposes judicial activism (…)" and that "Judges are called upon for the everyday protection of people's fundamental rights. They need carefully to police the area of what is 'non-decidable' (*sfera del non decidibile*). This is the area that democratic legislators cannot trespass into, and on which they have no powers to make decisions." On Ferrajoli's understanding of the role of the judges, see also Ferrajoli (1999), pp. 70-73.

[1157] Ferrajoli (2011a), p. 44 and Ferrajoli (2015), p. 47. Ferrajoli (2013), pp. 129-130, writes that if we understand balancing as "deliberate choice of one norm to the detriment of another, and therefore admit the defeasibility of constitutional norms, the result is nullification of the judge's subjection to the law: in this sense (…) balancing is an operation that is legally incompatible with the principle of legality and with the logic of the rule of law." [translated by author] If, on the other hand, balancing is understood as a type of interpretative option, it is better to avoid the use of the word since it has been compromised by all the theories which have contrasted it with subsumption, according to Ferrajoli.

[1158] Ferrajoli (2011b), p. 352. On this point, see Redondo (2011), p. 258.

[1159] See Pino (2010a), p. 295, where he writes that this is the only case of conflicts between fundamental rights that Ferrajoli is willing to admit, but that he still prefers to talk about the "limits" and not about "conflicts" of rights.

[1160] See Ferrajoli (2012a), p. 809, Ferrajoli (2013), p. 124, Prieto Sanchís (2011), pp. 239-240 and Ruiz Manero (2012), p. 828.

The theoretical framework Ferrajoli proposes for dealing with the apparent conflicts between fundamental rights can be reconstructed as consisting of the following three steps:

(1) First, we need to identify what kind of fundamental rights seem to be in conflict, or more precisely, what kinds of fundamental rights are expressed by the constitutional norms that protect them. According to the classification proposed by Ferrajoli, the fundamental rights in question are classified as either 1) liberties from, 2) liberties to, 3) social rights, or 4) civil and political rights.

(2) Having qualified the fundamental rights expressed by the applicable norms, we must determine the relationship between them according to the hierarchy Ferrajoli has established between them. In the case of primary rights as liberties from, such rights are immunities that cannot conflict with other rights. In the case of social rights, there is no legal conflict, only a political one: since the resources to satisfy competing rights are limited, a political decision must be made which of the rights will be satisfied. In the case of civil rights and political rights as secondary rights, they are subordinated to primary rights (rights to liberty and social rights), and such conflict is resolved in favour of the latter. Based on this classification, we must focus on the potential "conflict" between liberties to, since this is the case in which conflicts (or "limits" as Ferrajoli prefers to describe them) of fundamental rights can occur. Only in this last case is the third and final step necessary, since no "conflict" occurs in the other three possible relations between fundamental rights.

(3) When we are dealing with a conflict between liberties to, a third step is necessary to determine which of the competing norms expressing the fundamental rights will be applied in the concrete case. Ferrajoli rejects the idea that these situations are to be resolved by balancing. He points out that what is "balanced" in the concrete cases are not principles, but factual circumstances of the case, and argues that holding a view according to which principles are being balanced confuses norms with facts.[1161] In practice, norms remain the same, while facts change depending on the case. Concrete cases are "unrepeatably different" from each other, even though they may be subsumed under the same norms. What must be evaluated and balanced then, are the "singular and unrepeatable" facts of each concrete case.[1162] As such,

[1161] Ferrajoli (2015), p. 48. See also, for example, Ferrajoli (2014), p. 221.

[1162] Ferrajoli (2015), p. 48. To illustrate his point, Ferrajoli (2015), pp. 48-49 mentions examples from criminal, civil and constitutional law. In criminal law, the assessment of mitigating and aggravating circumstances of the case or the judgment on the proportionality of the defence to the offense; in civil law, assessment of the various circumstances related to the assessment of good faith or unjust damages; in constitutional matters, assessment of competing interests and factual circumstances for the purposes of evaluating violations of the principle of equality or of dignity of the person. Ferrajoli refers to Alexy and his example of *Tobacco Warning Label* case, arguing that what is "balanced" or "weighed" in this case are not principles (nor norms in general) but the concrete circumstances of the case. As an argument to support his thesis that balancing has as its object circumstances or

these facts are evaluated on the basis of the applicable rules and their systematic interpretation.[1163] In Ferrajoli's view, a preferrable alternative to judicial balancing should be systematic interpretation, understood as the interpretation of the meaning of a norm in the context of other norms of the legal system.[1164] Systematic interpretation is preferable to judicial balancing because, in Ferrajoli's view, the latter method expands judicial discretion, nullifies the judge's submission to the law, and jeopardizes legal certainty and equality before the law through the idea of the "weight" of a principle that is necessarily a discretionary judgment.[1165] Ferrajoli summarizes the approach of guaranteeistic constitutionalism as follows:

> "In short, guarantee constitutionalism involves the recognition of a strong normativity of rigid constitutions, by virtue of which, given a constitutionally established fundamental right, in order to take the constitution seriously, there must be no norms that contradiction it, and there must be – in the sense that it must be obtained by systematic interpretation, or introduced by ordinary legislation – the corresponding duty in the public sphere."[1166]

In the next section, we will apply this theoretical framework to two cases in order to see the application of Ferrajoli's ideas to the resolution of the apparent conflicts between fundamental rights.

III. 2. 4. 2. Application

III. 2. 4. 2. 1. Sentenza 26 marzo 1993, n. 109 (1993)

The first case to which we will apply Ferrajoli's approach is the decision of the Constitutional Court of Italy, *Sentenza 26 marzo 1993, n. 109*. This decision has already been used to present Riccardo Guastini's understanding of judicial balancing, and we will also use it to present Luigi Ferrajoli's approach for two reasons. The first is that Luigi Ferrajoli has written about the concept of equality and has set out his understanding of the relationship between formal and substantive equality (expressed in Art. 3 of the Italian Constitution), which is relevant to this case. The second reason is that Riccardo Guastini referred to the same case,

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facts of the case, and not the rules, Ferrajoli mentions Robert Alexy and Manuel Atienza and their reference to different weight of principles in different concrete cases.

[1163] Ferrajoli (2013), p. 128, where he writes: "Ma ciò che cambia non sono le norme, che sono sempre le stesse, ma i fatti, che sono sempre diversi e che il giudice legge *sub specie iuris*, cioè sulla base della pertinenza delle regole che è chiamato ad applicare e della loro interpretazione sistematica." To clarify his point, Ferrajoli gives an example when two constitutional norms are applicable, one protecting freedom of the press and the other protecting the right to privacy. In this case, as Ferrajoli argues, what is being "balanced" are facts that justify the application of an exemption or not. An example of such fact is the public role of the person whose privacy has been violated. For the example, see Ferrajoli (2013), p. 123.

[1164] Ferrajoli (2011a), pp. 46-47 and Ferrajoli (2011b), p. 352.

[1165] Ferrajoli (2011a), p. 47.

[1166] Ferrajoli (2011a), pp. 52-52. [translated by author]

as we have shown in Chapter II. By reconstructing the case using Luigi Ferrajoli's framework, we can compare the approaches of the two prominent Italian legal philosophers to the same case from their legal system.

A brief reminder about the decision: the Court ruled on the constitutionality of Law No. 215/1992, which regulated "positive actions" (affirmative action) for women entrepreneurs and whose constitutionality was challenged. The law provided for financial incentives by the state, aimed at promoting equal opportunities for men and women in economic and entrepreneurial activity by granting incentives to enterprises with predominantly female participation or to enterprises run by women. The provision relevant to the decision in this case is Art. 3 of the Italian Constitution, which states that

> "All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions.
>
> It is the duty of Republic to remove those obstacles of an economic or social nature which constrain the freedom and social equality of citizens, thereby impeding the full development of human person and the effective participation of all workers in the political, economic and social organisation of the country."

This provision can be understood as expressing two conflicting principles: in the first paragraph, the principle of formal equality, and in the second paragraph, the principle of substantive equality.[1167] The decision in this case depends on the understanding and interpretation of "equality" from Art. 3.

Returning to the three-stage reconstruction of the approach proposed by Ferrajoli, we must first qualify the fundamental rights that appear to conflict (or, more precisely, the rights expressed by the norms applicable to this case). The principle of equality expressed in Art. 3(1) represents a primary right, a liberty from discrimination before the law.[1168] However, Art. 3(2) is not understood by Ferrajoli as a principle of substantive equality (as distinct from formal equality), but simply as the provision governing the effectiveness of the principle of equality. The effectiveness of the principle depends on the measures taken by the state. These measures are understood as the guarantees of the principle of equality and the consequent prohibition of discrimination, as the meaning of the principle of equality.[1169] If we look at the factual situation, as Ferrajoli argues, we can see that there are indeed, such discriminations that violate the

[1167] On such understanding, see Prieto Sanchís (2011), p. 239. For the interpretation of this article, see also Guastini, section II. 4. 4. 2. 1.
[1168] Ferrajoli (2011b), pp. 352-353.
[1169] Ferrajoli (2011b), pp. 352-353.

prohibition of discrimination of Art. 3(1).[1170] Once it is admitted that there is unjustified discrimination, measures such as affirmative actions in favour of women entrepreneurs, provided for by the Law No. 215/1992, are not understood as violations of principle of (substantive) equality, but, on the contrary, as guarantees of the effectiveness of this principle, as provided in Art. 3(2).[1171] On this basis, Ferrajoli argues that there is "no distinction, much less opposition between the principles".[1172]

Applying Ferrajoli's approach, we see that there is no conflict in this case and that there is no room to proceed with the other two steps of his framework. In fact, Art. 3(2) is understood to be a "supporting" provision to Art. 3(1), enabling its effectiveness. Ferrajoli supports this understanding by considering the purpose of introducing the principle of equality.[1173] The principle of equality is introduced in constitution because people are *different*, in the sense of having different personal identities (such as sex, race, etc. mentioned in Art. 3(1)) and *unequal*, in the sense of having different social and material conditions of life (such as their social status, etc., mentioned in Art. 3(2)). The principle of equality was defined by Ferrajoli as follows:

> "equal value associated with all identity differences that makes each person an individual different from all others and each individual person like all others".[1174]

Based on the framework proposed by Ferrajoli, this case is to be decided by declaring the law constitutional. There is no distinction between the principles expressed in Art. 3(1) and 3(2) and thus no "conflict" between formal and substantive equality. The financial incentives provided by the state are a guarantee of the effectiveness of the principle of equality. Since the principle of equality is a norm expressed through the Art. 3, it can be violated, and even more:

[1170] Ferrajoli (2011b), p. 353. An example given by Ferrajoli is the very low percentage of women elected to the Italian Parliament. On this example, see also Ferrajoli (2007b), pp. 753.
[1171] Ferrajoli (2011b), p. 353. See also Ferrajoli (2009), pp. 315-317. The Law No. 215/1992, whose constitutionality was challenged, regulated "positive actions" (affirmative action) for women entrepreneurs. It provided for financial incentives by the state aimed at promoting equal opportunities for men and women in economic and entrepreneurial activity by granting incentives to enterprises with predominantly female participation or to enterprises run by women. Cf. with section II. 4. 4. 2. 1., where Guastini's reconstruction of the case is presented.
[1172] Ferrajoli (2011b), p. 353. As Ferrajoli points out, another question is the concrete assessment of factual circumstances, i.e., whether a certain measure is compatible with the principle of equality on the basis of judgment about the existence or non-existence of the alleged discrimination. In this case, the discrimination exists, according to Ferrajoli, so the provision of financial incentives provided by the law to the women entrepreneurs is compatible with the principle of equality.
[1173] Ferrajoli (2009), pp. 311-312.
[1174] Ferrajoli (2009), p. 312, where he writes: "Por esto, he definido varias veces el principio de igualdad como el igual valor asociado a todas las diferencias de identidad que hacen de cada persona un invididuo distinto de todos los demás y cade de individuo una persona como todas las demás."

its fulfilment requires the introduction of specific guarantees, as required by the second paragraph of the article.[1175]

III. 2. 4. 2. 2. *Titanic case* (1992)

The second case to which we will apply Luigi Ferrajoli's approach is the 1992 German Federal Constitutional case *Titanic*, which serves as a comparison for the different approaches to the problem of apparent conflicts between fundamental rights we are dealing with. The case itself represents a classic example of what is usually described as a conflict between two fundamental rights: freedom of expression and personality rights. To briefly recall the problem in the case: a satirical magazine *Titanic* described a paraplegic reserve officer first as a "born murderer" and second as a "cripple". Both sides of the dispute argued that such an action was regulated by constitutional norms. The magazine argued that the action was protected by freedom of expression, while the soldier argued that the action should be sanctioned to protect his personality rights. The Federal Constitutional Court had to decide whether the *Titanic* magazine should be fined for these two expressions.

Following the framework proposed by Ferrajoli, we must first qualify the rights that seem to conflict. The freedom of expression is a primary right, the liberty to. This freedom of expression, as a liberty to, only seems to conflict with other rights, as Ferrajoli argues. A conflict between the right to freedom of expression and personality right (as freedom from), is resolved, according to Ferrajoli, on the basis of the constitutional provision that qualifies certain actions (which are, in effect, the exercise of the right to freedom of expression) as criminal offenses (such as insult or defamation) and as such are prohibited. Thus, what appears to be a conflict between freedom of expression and personality rights, is in fact not a conflict, but a restriction on the freedom of expression provided expressly for in the constitutions. In the German legal system, such a restriction of freedom of expression is regulated in Art. 5(2) of the Basic Law:

> "Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures and to inform himself without hindrance from generally accessible sources. Freedom

[1175] Ferrajoli (2009), p. 316. Ferrajoli (2006), p. 28, argues that in the absence of guarantees (that is, obligations of duties corresponding to the constitutionally established rights), there is a legal gap and not the non-existence of established right. If there is an established constitutional right, there is also an obligation to ensure the implementation of the guarantees that the right consists of. See Ferrajoli (2006), pp. 29-30. This point in Ferrajoli's theory has been criticized by other authors, as will be shown in the following section. See fn 1122, where rights and duties, expectations and guarantees are referred to as "two sides of the same coin".

of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship."

"*These rights shall find their limits* in the *provisions of general laws*, in provisions for the protection of young persons and in the *right to personal honour*." [emphasis added]

In the Italian legal system, such a restriction is regulated in Art. 21(3) of the Italian Constitution:

"Anyone has the right to freely express their thoughts in speech, writing, or any other form of communication."

"The press may not be subjected to any authorisation or censorship."

"Seizure may be permitted only by judicial order stating the reason and only for *offences expressly determined by the law* on the press or in case of violation of obligation to identify the persons responsible for such offences." [emphasis added]

The decision in this case depends on the understanding of freedom of expression and its constitutional limits in relation to personality rights. More specifically, the judge must decide whether the expressions fall within the categories prohibited by criminal law, which constitutionally limit freedom of expression while protecting personality rights. Ferrajoli prefers to speak of "limits" of the rights, rather than their "conflicts". Since fundamental rights are universal, they should always be understood as rules that are linked to corresponding duties; freedom of expression is equivalent to the rule according to which it is prohibited to restrict free expression except in the case of offences expressly defined by law.[1176] The content of personality rights (or the right to honour) consists in the prohibition of expressions that harm the honour and reputation of others, which is expressed in the norms of criminal law on insult and defamation. The problem we are dealing with here is the inevitable indeterminacy of language and evaluation of expressions such as "offending" and "reputation" in criminal offences.[1177] In this situation, the limit that the personality rights (or the right to honour) imposes on the right to freedom of expression must be determined by assessing the specific circumstances of the case.[1178] This means that in this case the judge must decide, taking into account the circumstances of the case, whether the expressions "born murderer" and "cripple" can be qualified as criminal offences prohibited by law (in this case insults) and therefore as restrictions on the freedom of expression. This would mean, at the same time, that personality right is protected by the prohibition of such expressions. Such a decision is to be made by

[1176] Ferrajoli (2011a), pp. 39-40.
[1177] Ferrajoli (2011a), p. 48.
[1178] Ferrajoli (2011a), p. 49.

systematic interpretation of the other norms of a legal system, in this case the norms from the criminal code regulating insult.[1179] Applying Ferrajoli's approach,[1180] and taking into account the factual circumstances of the case and the reasoning of the Federal Constitutional Court set out above in Chapter I (in section I. 4. 2. 2.), the expression "born murderer", would not qualify as a formal insult, whereas the expression "cripple" would.[1181] The first expression would therefore be permitted and would not be considered an expression justifying a restriction on the freedom of expression, while the second would be prohibited and would be considered as a limit (in fact, an exception) on the freedom of expression. At the same time, this means that, in the context of the case, the expression "born murderer" is not an expression which infringes personality rights, while the expression "cripple" is an expression which infringes personality rights and as such, is be prohibited. In the concrete case, as we have seen, the sanction was a fine for the *Titanic* magazine with respect to the second expression.

III. 2. 5. Criticisms and conclusions

III. 2. 5. 1. Criticisms

In this section we will present the criticism that have been raised against Luigi Ferrajoli's proposal. Because of the scope and influence of his work, these criticisms are directed not only against the proposal he suggested for the resolution of the apparent conflicts between fundamental rights, but also against his other ideas, such as his understanding of fundamental rights or the distinction between rules and principles. The critique will focus on four points that reflect the structure of the subchapter. First, we will present the criticism of his understanding of the notion of fundamental right and its universality. This will be followed by a critique of his understanding of the norm (and his distinction between rules and principles). Third, his non-conflictivist view of the apparent conflicts between fundamental rights will be considered. Fourth, the criticisms raised against his proposal and its application in practice will be presented.

[1179] If Ferrajoli's theory is to be applied as a general theory for the apparent conflicts between fundamental rights, we end up here with a decision that is contingent on the legal system in question and its regulation of insult.

[1180] It has been mentioned that, as an answer to the question which rights should be guaranteed as fundamental, Ferrajoli (2010), p. 157 proposes four criteria that are, in his opinion, confirmed by historical experience and constitutionalism, both national and international. These criteria are personal dignity, equality, protection of the weakest subjects and peace. See also Ferrajoli (2014), pp. 212-213.

[1181] The qualification of an expression as a formal insult depends on the provisions of the criminal law of the legal system in question. Since the case, with all its specific circumstances is from the German legal system, we followed the qualification of the Federal Constitutional Court regarding the subsumption of the expressions under the category of "insult". Naturally, in other legal systems, the category of "insult" can encompass different set of expressions.

The first criticism is directed against his conception of the fundamental right and its universality. This universality of fundamental rights is a central feature of definition, as we have seen in section III. 2. 3. 2. Fundamental rights are all those rights to which *all* human beings are universally entitled to by virtue of having the *status of persons*, or of *citizens*, or of *persons capable of acting*. Riccardo Guastini has raised three concerns about such an understanding of fundamental rights.[1182] First, the three criteria proposed by Luigi Ferrajoli (personality, citizenship, and the ability to act) differ in scope: the class of citizens and the class of those capable of acting are less extensive than the class of physical persons, as Guastini points out. Thus, it can be said that a right ascribed on the basis of citizenship or capacity to act is not universal at all, compared to the rights ascribed to all physical persons.[1183] Second, the identification of exactly these three criteria is questionable. For example,[1184] a norm regulating elections could give the right to vote to all those who reside in the local area, regardless of citizenship or even capacity to act. Such a norm would give the right to a class of actors that is more extensive than the class of citizens and those capable of acting. However, under Ferrajoli's proposed definition of fundamental rights, such a right would not be considered a fundamental right. The third point raised concerns the problem of distinguishing between rights and privileges on the basis of universality (or universal quantifier).[1185] As Guastini points out, norms that confer rights to any class of actors depend on other norms that identify the members of the class in question. For example, the term "citizen", as a legal concept, is defined by another norm (1) that establishes conditions of citizenship. But such a norm may also be a norm of privilege (2):

(1) "For every x, if x is a citizen, then x holds the right D."

(2) "For every x, if x is Professor of Philosophy of Law at the University of Camerino, then x is a citizen.

Ferrajoli has also argued that the definition of fundamental rights, based on the idea of universality, is a formal one, that has no axiological connotations. However, it has been pointed out that his definition is neither formal nor free of axiological connotations.[1186] It is not formal because in order to determine whether a particular right is fundamental, it is necessary to look at the content of the right, or more precisely, with the aspect of the content that consists in the

[1182] Guastini (2001), pp. 37-38, questioning the supposed universality of fundamental rights as proposed by Ferrajoli.
[1183] Guastini (2001), p. 38.
[1184] The example is given by Guastini (2001), p. 38.
[1185] Guastini (2001), pp. 37-38.
[1186] Pino (2018), pp. 137-140. On this point, see also Pino (2014a), pp. 101-105 and Zaccaria (2018), p. 140.

identification of the holder of the right.[1187] Arguably, his definition is not free from axiological connotations either, since the concept of fundamental rights refers to the value of equality, since it necessarily belongs to "everyone" withing the categories mentioned.[1188] Therefore, the idea that the universality is a defining characteristic of fundamental rights seems problematic.[1189]

The second point of Ferrajoli's theory that has been criticized is his view of the distinction between rules and principles. The idea that rules and principles are "two sides of the same coin"[1190] is seen as problematic and criticized by Giorgio Pino for two reasons.[1191] First, he argues that such a view is subject to a simple falsification and second, that such a view fails to account for the *normogenetic* dimension of principles. On the first point, Pino argues that while it may be true that principles are usually formulated with reference to their observance, it is not true that rules are always formulated with reference to their violation. Rather, rules are formulated by associating a more or less determined conduct (antecedent) and by associating it to a more or less determined legal consequence (consequent) by means of a deontic qualification. And it is precisely in this "more or less" aspect that the difference between rules and principles lies, as Pino argues, because in the case of principles both the antecedent and consequent are very generic and indeterminate, since principles can be applied in many different ways, not all of which can be exhaustively foreseen *ex ante*.[1192] This criticism

[1187] Pino (2018), p. 138. This, as Pino points out, is because only rights that belong to certain categories of holders (persons, citizens, or all those capable of acting) can be fundamental rights.
[1188] Pino (2018), p. 138. Pino (2018), pp. 138-139 considers the universality to be problematic since there are, as he argues, rights that are attributed to "everyone", but certainly would not be considered as "fundamental" (for example, the right of precedence to those coming to the intersections from the right regulated by the laws concerning road transport) or rights that are not attributed to "everyone" but would be considered as fundamental (for example, the rights attributed to workers or working women by Art. 36 and Art. 37 of the Italian Constitution). For a similar criticism regarding the universality of fundamental rights and the value of equality, see also Jori (2001), pp. 53-54. Jori (2001), p. 54 writes that Ferrajoli's ideas contain "indications that hint at universalism as an ethically positive value. (…) He also makes a heartfelt call for the rights of citizenship to achieve the same destiny, to move towards the substantive equality of all human beings in this respect. Are these mere obiter dicta, or slips in his definition that indicate there is a problem in his theory?". As Jori (2001), p. 54, fn 21 argues, "The justice of a *determination of a right's universalism is thus at the mercy of a rather fine, controversial value judgment*." [emphasis added]. On the importance of equality for Ferrajoli and his definition of fundamental rights, see also Baccelli (2011), p. 375 and Ferrajoli (2010), pp. 157-159.
[1189] Guastini (2001), p. 38. On this point, see also Jori (2001), p. 54.
[1190] Ferrajoli (2011a), p. 40. According to this view, a principle behaves as a rule when it is violated, and principles are, in reality, rules seen by a specific perspective. As Pino (2011), p. 979, writes: "Di conseguenza, *secondo Ferrajoli, regole e principi sono in realtà la stessa cosa, o meglio sono due facce della stessa medaglia*: un principio diventa un regola quando è violato (e dunque quelli che vengono designati come principi, sono, in realtà, regole viste da una specifica prospettiva)." [emphasis added] Here, Pino refers to Ferrajoli (2011a), p. 40. See section III. 2. 3. 2. and fn 1122, in which "two sides of the same coin" were mentioned.
[1191] Pino (2011), p. 980.
[1192] Pino (2011), p. 980. Cf. with Guastini (2011b), pp. 176-177 and section II. 4. 3. 2. regarding for understanding of principles as norms characterized by a special form of indeterminacy and its aspect related to the openness of the antecedent. See section II. 4. 3. 2. For a critique of Ferrajoli and a suggestion of a weak distinction between rules and principles, see also Laporta (2011), pp. 180-181.

is made from the perspective of the so-called *weak distinction thesis* between rules and principles to Ferrajoli's position according to which there is no (or at least that no meaningful) distinction between rules and principles can be made. As for the second point, the *normogenetic* dimension of principles is related to their aptitude to justify other norms, either the already existing ones (in relation to which the principles are identified as *ratio*) or the implicit norms that the interpreter himself formulates through argumentation on the basis of the principle.[1193] As Pino concludes, principles require rules in order to be implemented, and the relationship between them cannot be one of equivalence, but of justification.[1194]

The third criticism is directed against his non-conflictivist view. Critics of this view point out that because of the pluralism of values present in contemporary constitutions, such constitutions express multiple, heterogeneous fundamental rights that are rarely or never hierarchically ordered.[1195] It has been argued that the plurality of fundamental rights and the possibility of conflict among them is a "structural" feature of contemporary constitutions.[1196] We have seen in section III. 2. 3. 3. that Ferrajoli proposed a distinction and hierarchy between four categories of fundamental rights (liberties from, liberties to, social rights, and civil and political rights). Critics of Ferrajoli's ideas challenge this typology and indicate with examples that conflicts can arise between the categories of fundamental rights, both within the same category (*intra*-) and between categories (*inter*-) of rights.[1197]

[1193] Pino (2011), pp. 980-981. Cf. with Guastini (2011b), pp. 175.176 and section II. 4. 3. 2. regarding for the understanding of principles as fundamental norms (as norm that provide a foundation and axiological justification to other norms in the legal system and as norms that do not have (or do not require) and foundation or axiological justification themselves due to them being perceived as evidently "just" or "correct" norms in the legal system in question. Barberis (2011), pp. 92-93 argues that the distinction is necessary in order to explain the role of the parliaments in constitutional democracies and realization of constitutional principles. Parliaments, as Barberis argues, apply, specify, and balance plural, generic and conflicting constitutional principles, which themselves represent legal formulations of values of the value pluralistic societies.

[1194] Pino (2011), p. 982. Cf. also this point with Guastini (2011b), pp. 179-180 regarding genericity as an aspect of the special form of indeterminacy of legal principles and Guastini (2016), pp. 247-249 and his views regarding the necessity of the derivation of unexpressed, "implicit" rules in the application of (constitutional) principles. For the criticism of Ferrajoli's view and on the necessity of the distinction between rules and principles and their justifying function in relation to rules, see also Aguiló Regla (2011), pp. 65-66. For the weakness of Ferrajoli's view for explanation of the legal argumentation in practice, see also Atienza (2008), p. 215.

[1195] Pino (2010a), pp. 288-292 and Pino (2010b), pp. 143-144. On this point, see also Bin (2007), pp. 22-25, Celano (2019), pp. 163-164 and Pino (2017a), pp. 145-148.

[1196] Pino (2010a), pp. 291. Bin (2007), p. 24 writes that "Che i principi incorporati dalla costituzione siano incoerenti, anzi antitetici, non è dunque un diffeto imputabile alla costituzione, ma una sua struttura ineliminabile." See also Comanducci (2016), pp. 89-99.

[1196] Pino (2010a), pp. 291. On criticism of Ferrajoli's anti-conflictivist view and the possibility of conflicts between fundamental rights, see also Prieto Sanchís (2008), pp. 340-351.

[1197] Jori (2001), p. 50ff, Pino (2010a), pp. 297-302, Moreso (2006b), pp. 134-139 and Moreso (2008), pp. 283-284. Pino (2010a), pp. 297-302 gives several examples of conflicts to support illustrate the claim. Regarding intra-rights conflicts, even liberties from (or immunities) can come conflict: the fundamental right to health (understood as an immunity, and not social right) of Tizio and Caio can conflict regarding the compulsory vaccination (with the risk of damage to one's health in order to protect the health of the community). Another example given is the

Finally, the fourth criticism is directed against Ferrajoli's proposal for the resolution of the apparent conflicts between fundamental rights. In Ferrajoli's view, the majority of cases of apparent conflict can be resolved by referring to categorization of fundamental rights he suggested and through their systematic interpretation.[1198] However, his non-conflictivist view and hierarchization of categories of rights was challenged by pointing out possible conflicts between them. As for the cases of "conflicts" between *liberties to* (the only type of conflict that Ferrajoli seems to admit to, while he still prefers to speak of the "limits" of rights[1199]), the "balancing" of norms, in his opinion, confuses norms with facts. In this sense, Ferrajoli understands judicial balancing as a new designation for the old and well-known technique of systematic interpretation, albeit the one that introduces the idea of "balancing" between the apparently conflicting norms, while in his view, the resolution of the conflict should depend exclusively on the factual circumstances of the concrete case, and not on the "balance" and "weight" of the conflicting norms.[1200] The idea that "singular and unrepeatable" facts of each concrete case, rather than, should be subjected to evaluation and "balancing", has been questioned.[1201] It is argued that the facts of a case can acquire relevance and "weight" only by reference to a normative criterion (such as constitutional principles). Then, taking into account the factual circumstances of the case, an order of preference is established between the principles (or "weight" is assigned to them).[1202] In other words, what should be balanced, critics argue, are reasons in favour of a conflicting fundamental right relative to the generic circumstances of the case.[1203] In order to justify the resolution of the case, each "singular and unrepeatable" fact of each concrete case must be considered as an instance of generic properties that support one of the conflicting fundamental rights.[1204]

III. 2. 5. 2. Conclusions

We now turn to the last section regarding the approach to the issue of the apparent conflicts between fundamental rights proposed by Luigi Ferrajoli. The section begins with an

inter-right conflict between liberties from and liberties to, on the one hand, and social rights, on the other, hand regarding the right to strike of the hospital employees.

[1198] See sections III. 2. 3. 3. and section III. 2. 4. Referring to Ferrajoli (2013), pp. 122-123, Di Carlo (2015), p. 15, indicates: "In Ferrajoli, al contrario, è l'idea di gerarchia costituzionale rigida da scoprire per via interpretativa che nasconde un'assoluta predilezione per diritto positivamente statuito." See Ferrajoli (2011a), pp. 46-47. See also Prieto Sanchís (2011), p. 243.

[1199] Pino (2010a), p. 295. See also section III. 2. 4. 1., in which Ferrajoli's theoretical framework is presented.

[1200] On this point, see Pino (2011), pp. 16-17 and Prieto Sanchís (2011), pp. 242-243.

[1201] See Pino (2011), pp. 16-17, Prieto Sanchís (2011), pp. 242-243 and Ruiz Manero (2012), p. 832.

[1202] Pino (2011), p. 16.

[1203] Ruiz Manero (2012), p. 832.

[1204] Ruzi Manero (2012), p. 832.

overview of his views on the basic notions that we are analysing, followed by a brief summary of his proposal. Finally, following the structure used in other sections, we will conclude with an overview of the strengths and weaknesses of the proposal.

Within the framework of his normative or 'guaranteeistic' constitutionalism, a positivist conception of constitutionalism (as opposed to the argumentative or 'principled' constitutionalism, a non-positivist conception of constitutionalism) professor Ferrajoli developed an alternative proposal to judicial balancing (III. 2. 1.). He rejects the three main theses associated with argumentative or 'principled' constitutionalism: the conceptual connection between law and morality, the so-called strong distinction thesis between rules and principles, and necessity of balancing in the application of legal principles.

Regarding the understanding of interpretation, Ferrajoli's central distinction is that between doctrinal and operative interpretation (III. 2. 3. 1.). The first is an analysis of normative language, a method of legal dogmatics carried out by legal scientists, while the second refers to the activity carried out by legal operators in relation to their concrete legal experiences. Other distinctions, such as the one according to the type of document that is the object of interpretation, are not as relevant, as Ferrrajoli considers that there is no specific difference between the interpretation of constitutions and the interpretation of other legal texts. Ferrajoli's views on legal interpretation allow us to qualify him as a proponent of a mixed or intermediate theory of interpretation. With respect to the typology of norms, Ferrajoli rejects the so-called strong distinction thesis, and argues that it leads to a "normative weakness" of legal principles. However, he is also sceptical of the so-called weak distinction thesis, arguing that there are no solid grounds for distinguish rules from principles (III. 2. 3. 2.). Ferrajoli proposes a 'formal' or 'structural' definition of fundamental rights, based on their universality and suggests two distinctions of fundamental rights: first, 'subjective', based on the subject-holders of the rights, and second, 'objective', based on the type of the conduct that is the object of the right (III. 2. 3. 2.). Building on the second, 'objective' distinction, Ferrajoli explains the types of relationships between different classes of fundamental rights (*liberties from, liberties to, social rights* and *civil rights* and *political rights*) in the situation of their apparent conflict, preferring to speak of "limits" rather than "conflicts" between rights. (III. 2. 3. 3.). As for the issue of apparent conflicts between fundamental rights, a defining characteristic of Ferrajoli's proposal is his non-conflictivist position.

Ferrajoli criticizes judicial balancing, arguing that it undermines legal certainty and the normative force of fundamental rights because it gives judges more discretion, compared to subsumption (III. 2. 4. 1.). As an alternative, Ferrajoli proposes a three-level hierarchy of

fundamental rights, with *liberties from* being on top, followed by *liberties to* and *social rights*, and *civil* and *political rights* at the bottom. Accepting "conflict" only between the "liberties to" types of rights (while still preferring to speak about the "limits"), Ferrajoli proposes a systematic interpretation as an alternative to judicial balancing. He argues that what must be evaluated and balanced are the facts of each concrete case in the context of the systematic interpretation of the applicable rules (III. 2. 4. 1.)

Ferrajoli's critique of judicial balancing and the alternative he develops arise from a concern regarding the level of protection of fundamental rights. The 'regulatory ideal' of his guaranteeistic constitutionalism is to ensure that fundamental rights guaranteed by law are upheld in a constitutional state.[1205] To this end, he develops a proposal aimed at a higher level of protection of fundamental rights, through the expansion of the circle of subjects of fundamental rights and through the idea of their guarantees. The idea of universality, on the basis of which he defines the notion of fundamental right, distinguishes his proposal from the others we analyse in this work. We have mentioned that, in his account, fundamental rights norms "imply the existence or *impose the introduction of rules* consisting in prohibitions of injury or *obligations of provisions that are their respective guarantees*".[1206] [emphasis added]. Ferrajoli's claim that his definition of fundamental rights is purely theoretical and formal (or structural) and ideologically neutral has been criticized, as we have shown in the previous section. His non-conflictivist position, according to which a "conflict" (or rather, "limits") is recognized only between the *liberties to* type of fundamental rights, has been criticized by rejecting the typology and hierarchy between classes of fundamental rights and pointing to possible conflicts and conflictivism as a "structural" feature of contemporary constitutions.[1207]

Ferrajoli's proposal is a normative, *de lege ferenda* proposal that argues for a broader definition of fundamental rights, based on the idea of equality and a hierarchy between different classes of fundamental rights. Focusing on the changes brought by the process of constitutionalisation, his guaranteeistic or positivist constitutionalism (understood as a theory of law) is a theory concerned with the divergence between constitutional *ought* and legislative *is*.[1208] It is an alternative that points out the weaknesses of theories of judicial balancing, but which also relies on normative proposals (universalism of fundamental rights and non-conflictivism) that are challenged from a *de lege lata* perspective.

[1205] On this point, see Atienza (2008), p. 214 and section III. 2. 2.
[1206] See Ferrajoli (2011a), p. 21. Ferrajoli (2015), p. 47
[1207] See previous section with criticisms, Pino (2010a), p. 291. See also Bin (2007), p. 24, Comanducci (2016), pp. 88-89 and Moreso (2006), pp. 134-139.
[1208] Ferrajoli (2011a), pp. 25-26.

III. 3. Juan Antonio García Amado

III. 3. 1. Introduction

The third author whose alternative, non-balancing approach to the apparent conflicts between fundamental rights is presented in this chapter is the Spanish legal philosopher Juan Antonio García Amado (1958). García Amado is not only critical of theories of judicial balancing (as are many other authors), but he has also developed and proposed a what, at least initially, seems a viable alternative approach to apparent conflicts between fundamental rights. The approach of Juan Antonio García Amado was chosen for analysis for two reasons: first, he is one of the most vocal critics of theories of judicial balancing, criticizing various aspects of it and rejecting it altogether, as it will be presented in the following sections. What is of relevance to this work, he made critical remarks against the theories of judicial balancing from Robert Alexy, presented in Chapter I and Manuel Atienza, presented in Chapter II.[1209] In this way, he criticized not only the mainstream theory of judicial balancing (Alexy), but also other theories of judicial balancing (Atienza). The second reason is that García Amado, building on what he saw as the shortcomings of theories of judicial balancing, develops and proposes a detailed procedural and formalized method, that he calls the "interpretative-subsumptive" method. This method consists of five steps and precise description (and logical formalization) of each of step makes it suitable for application to concrete legal cases. In this way, García Amado has made substantial contribution to the topic by proposing a method by which we can approach any case resolved by judicial balancing.

The subchapter consists of five sections (3. 1. – 3. 5.) and has the following structure: After this introduction (3. 1.), which presents the explanation and justification for the structure and the content of the subchapter, the second section deals with the contextualization of García Amado's legal philosophy (3. 2.). The third section (3. 3.) introduces basic notions relevant to the problem: first, García Amado's views on interpretation (3. 3. 1.), followed by his understanding of 'norm' and 'right' (3. 3. 2.), concluding with his view regarding conflicts between fundamental rights (3. 3. 3.). In the fourth and main section (3. 4.), García Amado's interpretative-subsumptive approach is presented (3. 4. 1.) and applied to legal cases (3. 4. 2.): first, to the 1997 Spanish Supreme Court case *El Toro de Osborne* (3. 4. 2. 1.) and second, the 1992 German Federal Constitutional Court *Titanic* case (3. 4. 2. 2.). The fifth and final section

[1209] For García Amado's criticisms of Alexyan theory of judicial balancing, see sections I. 6. 1. 3. and I. 6. 1. 4.

(3. 5.) presents the criticisms of García Amado's proposal (3. 5. 1.), followed by conclusions about his proposal (3. 5. 2.).

III. 3. 2. García Amado's positivism

In this section, a brief contextualization of García Amado's legal views is presented. Positioning him as an author is not a problematic issue, since he explicitly addressed and analysed competing conceptions of law in his works, expressing his legal positivist views and criticising natural law approaches to law. García Amado's views are close to those of H. L. A. Hart: he defends the separability thesis, the thesis of the social sources of law and the idea of the existence of judicial discretion.[1210] García Amado's position is that of an *inclusive legal positivist*. From the perspective of a legal positivist,[1211] García Amado is highly critical of what he calls the *(neo)constitutionalist* approach to the apparent conflicts between fundamental rights. In García Amado's view, Alexy's theory of judicial balancing represents a version of such a (neo)constitutionalist approach, and he develops his approach in response to it, because he finds it problematic.[1212] As a vocal critic of (neo)constitutionalism, García Amado understands it as a version of legal moralism (*iusmoralismo*) that contrasts with the positivist position he advocates.[1213]

The (neo)constitutionalist approach to the apparent conflicts between fundamental rights is characterized by four theses with which García Amado disagrees, and which are given short labels here.[1214] First, the *rights as principles thesis*: constitutional norms that express fundamental rights are principles, and principles are different from other types of legal norms (rules, directives etc.). Second, the *necessity of balancing thesis*: the method used for the application of principles is balancing, and their application does not follow the interpretative-subsumptive method. Third, the *suitability of balancing thesis*: balancing is particularly

[1210] Ortega García (2017), p. 17. On García Amado's positivism, see also García Amado (2010a), p. 27. As Ortega García indicates, the topic of judicial discretion is a recurring one in the works of García Amado. See, for example, García Amado (2006), pp. 151-172 and García Amado (2013), pp. 13-43.
[1211] See Mora Sifuentes (2016), p. 259. 'Legal positivism', as referred to by García Amado, is characterized by two main theses: the separability thesis and social sources of law thesis. See García Amado (2010a), p. 23 and Mora Sifuentes (2016), pp. 270-271.
[1212] See García Amado (2009), pp. 249-331, García Amado (2010a), pp. 129-168, García Amado (2016), p. 1-22, García Amado (2019), p. 98 and Mora Sifuentes (2016), pp. 259-276.
[1213] García Amado differentiates between two variants of *iusmoralismo*: the 'iusnaturalist' (*iusnaturalista*) and 'non-iusnaturalist' (*no iusnaturalista*) one. The most important contemporary legal philosopher who is a supporter of iusnaturalist variant of iusmoralism is John Finnis, and among the authors who embrace non-iusnaturalist variant of iusmoralism are Robert Alexy and Manuel Atienza. García Amado (2017), p. 128, fn 5. See also Rivaya (2016), p. 230, where García Amado writes: "A tal efecto, a mí me gusta diferenciar entre iuspositivismo y iusmoralismo. Los iusnaturalistas son iusmoralistas, pero no todos los iusmoralistas son iusnaturalistas."
[1214] García Amado (2017), p. 81.

suitable for resolving fundamental rights cases,[1215] since such cases are always (or almost always) cases of conflicts between fundamental rights (or between fundamental rights and other constitutional principles), and as such, they are cases of conflicts between principles. Fourth, the *exemplariness of balancing thesis*: in their best decisions, constitutional courts resolve fundamental rights cases by balancing.

García Amado, on the other hand, defends the following four theses.[1216] First, the *preliminary distinction thesis*: it is not true that the majority of fundamental rights cases (*caso iusfundamental*) are cases of conflicts between fundamental rights (or conflicts between fundamental rights and other constitutional principles, *conflictos de derechos fundamentales*). Second, *the application of balancing thesis*: constitutional courts, such as the Spanish or the German ones, do not, as a matter of fact, resolve most fundamental rights cases by balancing. Third, the *elusiveness of balancing thesis*: even when it appears that courts use the method or language of balancing, the reasoning of the courts is interpretative-subsumptive; but sometimes, in order to avoid the more complex argumentation of their interpretative choices, the courts act as if they have used balancing. Fourth, the *conversion thesis*: virtually any case can be converted into a fundamental rights case, and any fundamental right case can be converted to the case of conflicts between fundamental rights that can be resolved by balancing, but this has dangerous consequences for the protection of fundamental rights.

It can be concluded, from these four main theses that García Amado defends, that he is critical of judicial balancing as a method for resolving apparent conflicts between fundamental rights in four aspects: by defending the first thesis, he criticizes the *scope of the application of*

[1215] The notion of 'fundamental right case' (*caso iusfundamental*), used by García Amado (2017), pp. 90-94 is wider than the notion of 'conflict between fundamental rights' (*conflicto de derechos fundamentales*). What makes a case a fundamental right case is not the presence of a conflict of fundamental rights or constitutional principles; a case is a fundamental right case when it has to be resolved by determining if, in the concrete case, the essential content (*contenido esencial*) of the fundamental right in question is limited. A fundamental right case is the one "in whose resolution the primary and essential normative argument is found in the constitutional norm which regulates that fundamental right" [translated by author]. García Amado (2017), p. 92. A hypothetical example given by García Amado to illustrate one fundamental right case is one of a country which has a fundamental right to religious freedom and no norms which prohibit sacrifice of gorillas. The question he poses then if a religious rite which includes the mass sacrifice of gorillas could be prevented or sanctioned? If the principle of legality is valid in that country, such practice could not be prevented or sanctioned since it is not prohibited, and since it would also arguably violate the fundamental right to religious expression. The justification of a prohibition of such sacrifice would have to be done by referring to some other fundamental right or some other constitutional right regulating basic functions of the state. See García Amado (2017), p. 92. Not all fundamental rights cases are cases of conflicts between fundamental rights; there can be fundamental rights cases which do not presuppose conflicts between two fundamental rights. Based on the distinction between the notions of 'fundamental right case' and 'conflicts between fundamental rights', García Amado criticizes the idea that fundamental rights cases should be resolved by balancing: if there is no conflict between two fundamental rights in a fundamental right case, what would be put on the imaginary opposite side of the scales? García Amado (2017), p. 94. This idea, as García Amado indicates, was also mentioned by Ruiz Manero (2009), p. 287.

[1216] García Amado (2017), pp. 81-82. See also García Amado (2009), pp. 250-252.

the method of judicial balancing and its alleged inflation, arguing that in many cases which are resolved by judicial balancing we do not have conflicts between fundamental rights at all. By defending the second thesis, he criticizes what he considers to be the *misrepresentation of the method* used to decide fundamental rights cases. By defending the third thesis, he criticizes the *convenience of the method*, arguing that it is easier for judges to appeal to balancing instead of engaging into more complex legal argumentation. Finally, by defending the fourth thesis, García Amado criticizes the perceived *danger of the method* for the protection of fundamental rights. After having briefly contextualized García Amado's legal philosophy and his basic objections to theories of judicial balancing (as well as his initial theses), we turn in the next section to his views on interpretation, his understanding of the notion of 'norm' and his views regarding the apparent conflicts between fundamental rights.

III. 3. 3. Basic notions

This section introduces basic notions relevant to understanding García Amado's approach to the apparent conflict between fundamental rights. As with other authors whose approaches are analysed in this work, the section begins with an exposition of his understanding of interpretation (III. 3. 3. 1.), followed by his understanding of norm and right, (III. 3. 3. 2.) and concludes with his approach to the apparent conflicts between fundamental rights (III. 3. 3. 3.).

III. 3. 3. 1. Interpretation

Interpretation, as García Amado notes, one of the most important concepts in law, both in theory and in practice.[1217] Not only interpretation is a recurring theme in his works, but it also plays a key role in addressing apparent conflicts between fundamental rights.[1218] The Spanish professor developed what he calls an 'interpretative-subsumptive' method. In order to understand the theoretical background of his approach, which will be presented in section III. 3.4., this section first sets out his views on interpretation. The term 'interpretation' in legal theory is used, as García Amado indicates, to refer to "establishment of the meaning of legal statements".[1219] García Amado distinguishes between three basic conceptions (or theories) of interpretation: first, *positivistic* or *linguistic* one; second, *intentionalist* or *voluntarist* one and

[1217] García Amado (2003), p. 192.
[1218] On García Amado's views of interpretation, see García Amado (2004), García Amado (2010a), pp. 17-48.
[1219] García Amado (2005), p. 32 and García Amado (2010a), p. 23.

third, *axiological* or *material* one.[1220] The focus is on the first conception of the interpretation, since it is the one adopted by García Amado, with a brief reference to the other two conceptions in order to compare them.

The theory of interpretation that García Amado advocates he calls the *positivist* or *linguistic* theory, defended by authors such as H. L. A. Hart.[1221] This positivistic theory of interpretation is characterized by the following main ideas:[1222] (1) all law is contained and exhausted in normative sentences; (2) such sentences, expressed in ordinary language (specialized or not), are characterized by the problem of indeterminacy: either by ambiguity or, more often, by vagueness;[1223] (3) the consequence of this "inherent indeterminacy" makes interpretation a "mediating activity" between the expression of a norm-formulation[1224] and the solution of the case to which it applies; (4) the interpreter must choose between the possible (but only between the possible) interpretations;[1225] (5) this choice is discretionary, but must not be arbitrary, which means that the judge must justify his choice with arguments; (6) when the judge applies a norm by giving it a meaning that goes beyond the possible interpretations, he no longer 'interprets', but creates a new norm that replaces (and neither specifies nor complements, as García Amado indicates) the applicable norm; (7) the situation just described "raises a serious problem of legitimacy", especially in a democratic society since the judiciary lacks the legitimacy to create norms, unlike the legislature, which is the representative of popular sovereignty; (8) finally, there are situations in which the judge is entitled to apply norms that he has created, for example, in cases of legal gaps or in cases of antinomies that cannot be resolved by applying meta-rules *lex superior*, *lex posterior* or *lex specialis*.

One of the consequences of these main ideas of contemporary legal positivism is the recognition of a broad judicial discretion in the interpretation and application of the law – discretion in the sense that judges must choose (and justify their choice) between: (1) rules that, on the basis on their possible interpretations, appear *prima facie* applicable to the case; (2) possible interpretations of the rules chosen to resolve the case; (3) the norm to be preferred in

[1220] García Amado (2004), pp. 38-49 and García Amado (2010a), pp. 23-27.
[1221] García Amado (2010a), p. 23. On this, see also Bix (1991), pp. 51-72.
[1222] García Amado (2010a), pp. 23-24.
[1223] García Amado (2004), p. 57, uses the notions 'ambiguity' and 'vagueness' in the following meanings: a word is ambiguous if it may have various meanings, and it is vague if it has borderline cases. As Ralf Poscher phrased it, "Ambiguity, then, is about multiple meanings; vagueness is about meanings in borderline cases". See Poscher (2012a), p. 129. On the notion of vagueness, see also Luzzati (2012), pp. 4-9. It should be pointed, however, out that vagueness is a predicate of meanings, not of texts.
[1224] On the distinction between 'norm' and 'norm formulation', see Guastini (2011b), pp. 63-74.
[1225] 'Possible' interpretations are those that are not incompatible with the semantic, syntactic and pragmatic rules of the language, either ordinary language or any specialized language that is not purely formalized, as García Amado (2010a), p. 21, explains.

the case of antinomies that cannot be resolved by the application of *lex superior*, *lex posterior*, or *lex specialis*; and (4) the norm to be used to resolve the case "for which the legal system does not contain previously applicable normative provisions" (the case of legal gaps).[1226] In contrast to this *positivistic* or *linguistic* theory of interpretation, there are two other theories of interpretation: the intentionalist or voluntarist and the axiological or material. Let us compare them briefly to better understand the views of García Amado.

The advocates of the *intentionalist* or *voluntarist* theory of interpretation hold the following theses: (1) the 'law' is a set of contents of a person or persons entitled to enact legal norms; these contents are not manifested only in normative statements; (2) the content of the law may be expressed indeterminately, but this indeterminacy of normative statements does not imply the indeterminacy of the law itself; (3) the creator of the norm may err in expressing his will, so that there is a discrepancy between what was expressed in the normative statements and what the creator of the norm intended to express; such discrepancy must be resolved in favour of the latter, since the "essence of the law is not in its letter and can contradict it"; (4) the judge is not legitimised to supplement the will of the creator of the norm with his own, and can do so only in those situations where it is not possible to ascertain the will of the creator of the norm.[1227]

The *axiological* or *material* theory of interpretation is characterized by the following theses: (1) the legal system is based on certain values, and these values, considered to be the essence of a legal system, determine the ultimate meaning of normative statements; (2) these values, expressed in normative statements may contradict the literal meaning of normative statements; (3) there is supposedly a certain "axiological essence" of the law that governs the law, and even in cases where a wording of the law is unambiguous, it is sometimes necessary to apply the law in accordance with this "axiological essence of the law".[1228]

The positivistic (or linguistic) conception is, in García Amado's view, the one that is *required* in a democratic legal system, since, first, it is based on the idea of popular sovereignty and organized according to the idea of separation of powers and the elimination of arbitrariness, and, second, according to this conception, law is something that citizens, and not only jurists

[1226] García Amado (2010a), p. 24.
[1227] García Amado (2010a), p. 25. García Amado indicates that the intentionalist or voluntarist theory underlies the so-called *originalist* theories of interpretation in the USA.
[1228] García Amado (2010a), pp. 25-26. Axiological or material theories of interpretation have a "strong metaphysical and idealistic component", according to which law is not a 'linguistic reality' (as positivists claim) nor an 'empirical reality' (as realist and sociological theories of law claim).

can understand.[1229] For the positivistic or linguistic conception of interpretation advocated by García Amado, constitutions, as objects of interpretation, do not exhibit *qualitative* differences from other legal texts, but only *quantitative* ones.[1230] By stating that there is no *qualitative* difference between constitutions and other legal texts, García Amado means that the constitution is a set of linguistic statements embodied in a text, just like any other legal text. This does not call into question the importance of the constitution; it ranks first in the hierarchy of legal texts, but its importance is not overstated.[1231] The *quantitative* difference between constitutions and other legal texts relates to the idea that the problems of interpreting a legal provision are greater when it comes to interpreting the constitution.[1232] These 'problems', as García Amado calls them, arise from the degree of indeterminacy of constitutional provisions, which is often (but not always) higher than that of other legal provisions.[1233] The higher degree of indeterminacy of constitutional provisions (which usually includes "generic proclamations of goals and values") leads to a "greater margin of legitimate interpretative freedom".[1234]

In sum, García Amado favours a positivistic approach characterized by what he calls a *positivistic* or *linguistic* theory of interpretation. He criticizes competing interpretive approaches run counter to his preferred method of literal interpretation and which, in his view, introduce subjectivity, relativity and arbitrariness into the interpretation and application of law. In the classification of theories of interpretation presented by Guastini, García Amado's view would fall under the *mixed theories* of interpretation.[1235]

III. 3. 3. 2. Norm and right

[1229] García Amado (2004), p. 69. García Amado is illustrative in his criticism of non-positivistic conceptions of interpretation, using the phrase 'priests of law': "Se trata, en suma, de que el derecho sea algo que los ciudadanos pueden entender y no algo a lo que ciertos *sacerdotes del derecho* [emphasis added], imbuidos de no sé sabe qué extraño don, tienen acceso exclusivo en virtud de su innata sintonía con la esencia de los conceptos o la verdad de los valores materiales."
[1230] García Amado (2004), pp. 69-70. Here, García Amado refers to Guastini (1996b), p. 169.
[1231] García Amado (2004), p. 70, on the importance of constitution: "This importance is simply not clothed in any mythical or quasi-transcendent garb." For the supporters of intentionalist (or voluntarist) and axiological (or material) conception of interpretation, the constitution is either an expression of the individual or collective "supreme will" or "objective order of values". See García Amado (2004), p. 70.
[1232] García Amado (2004), p. 72. Here, García Amado refers to judge Antonin Scalia. On the "distinctive problem of constitutional interpretation", Scalia (1997), p. 37. wrote: "The problem is distinctive, not because special principles of interpretation apply, but because the usual principles are applied to an unusual text".
[1233] García Amado (2004), p. 72. Besides this indeterminacy, constitutional provisions often have a "powerful emotive component", as Schauer (1982), p. 801 indicates.
[1234] García Amado (2004), p. 72.
[1235] Guastini (1997b), pp. 281-283. If we would follow the updated classification from Guastini (2006a), p. 227ff, mixed theories of legal interpretation would fall under the category of cognitive theories.

This section presents García Amado's understanding of the notions of 'norm' and 'right'. A norm is understood as consisting of an antecedent and a consequent.[1236] As far as the typology of norms is concerned, García Amado argues against a *strong* distinction between rules and principles.[1237] Any legal norm can be represented either as a rule or a as principle, and this representation depends on the language and the scheme adopted at the time of its application.[1238] This is in line with his inclusive legal positivist views and his critique of (neo)constitutionalism. García Amado bases his argument against a *strong* distinction between rules and principles on two premises. The first of these two premises is based on the method of application of a norm. Even if a norm expressing a certain fundamental right is explicitly qualified as a principle, it is still applied by the interpretative-subsumptive method; the balancing as a method is not autonomous, since its results depend on the interpretation of the norms applicable to the particular case.[1239] The Spanish professor argues that all norms are applied through an interpretative-subsumptive method and that there is no particular method for applying legal principles (and no ontological difference between different types of norms, as Robert Alexy argues). The second premise is related to the two theses advocated by García Amado, already mentioned in section III. 3. 2.: the *application of balancing thesis* and the *elusiveness of balancing thesis*. The two theses can be summarized into the claim that constitutional courts do not resolve most fundamental rights cases through balancing, and even when it appears that the balancing method is applied, the court's reasoning is in fact interpretative-subsumptive. This is an important observation because García Amado's approach to apparent conflicts between fundamental rights can be understood as a reaction to and critique of the theory of judicial balancing developed by Robert Alexy, strong distinction between rules and principles, and balancing as a supposed method of applying legal principles.[1240]

García Amado distinguishes four types of fundamental rights:[1241]

(1) *Inclusive or rule rights* (*derechos inclusivos*/*derechos regla*/*derechos-R*). The object of this type of fundamental rights is the "natural activity" or primary or "pre-normative"

[1236] García Amado (2017b), p. 31.
[1237] García Amado (2009), p. 304: "No hay diferencia qualitativa entre el tipo de normas que Alexy llama reglas y las que llama principios."
[1238] García Amado (2012), p. 323.
[1239] García Amado (2009), p. 250.
[1240] On García Amado's critical view of Alexy's theory of judicial balancing, see García Amado (2009), pp. 251-252 and pp. 274-275. On the importance of the distinction between rules and principles put forward by Alexy, see Alexy (2002a), p. 44 and section I. 3. 2.
[1241] García Amado (2017), pp. 104-111.

reality. For this reason, the law does not define these rights normatively, but the limits of their exercise. Examples of such rights are freedom of expression or freedom of movement.

(2) *Exclusive or exception rights* (*derechos de exclusion*/*derechos excepción*/*derechos-E*). This type of fundamental right has a normatively defined object of protection of the right; this "area of protection" is protected against any interference, and interference with the scope of protection of the right are infringements of the right. Examples of such rights are the right to privacy, the right to honour and the inviolability of home.

(3) *Rights to positive action by the state* (*derechos a un hacer positivo del Estado/derechos-A*). These rights require a specific action or performance from the state or its institutions, since the norm entitles the addressee of the norm to a specific object that is the result of that activity or provision. An example of such a right would be the right to information in criminal proceedings.

(4) *Rights to an omission or abstention from the state* (*derechos a omisión o abstención del Estado/derechos-O*). The fourth and final group of fundamental rights, as the name implies, require the state to make omissions or refrain from certain actions. An example of such a right is the right not to be tortured (freedom from torture and inhuman or degrading treatment).

Based on his typology of fundamental rights and the relationship between the different types of rights, García Amado draws conclusions relevant to his understanding of the apparent conflicts between fundamental rights. These conclusions, together with his other views regarding on the subject, are presented in the following section, III. 3. 3. 3.

III. 3. 3. 3. Conflicts between fundamental rights

If we return to the distinction between *conflictivism* and anti-*conflictivism* in relation to the question of apparent conflicts between fundamental rights, García Amado's views classify him as a *conflictivist*. He holds a clear *conflictivist* position.[1242] Modern democratic and constitutional states are characterized by the existence of different and heterogeneous moral systems that coexist with equal legitimacy.[1243] Law can be generally understood, as being composed of certain statements (exclusively, basically, or partially) that regulate conflicts.[1244]

[1242] For example, García Amado (2017), pp. 122-123 writes: "El pluralismo moral de nuestras sociedades es un hecho indubitado. Por otro lado, el lado normativo, *esas plurales creencias morales y su expresión verbal y vital están constitucionalmente protegidas bajo la forma de derechos fundamentales* [emphasis added], y hasta se considera un supremo bien moral en sí, una especie de "metabien" moral, que dicho pluralismo exista y se manifieste."
[1243] García Amado (2016), p. 9.
[1244] García Amado (2009), p. 35. Another question is whether law is composed exclusively, basically or partially of these statements.

García Amado relies on his distinction between four types of fundamental rights (inclusive or rule rights, exclusive or exception rights, rights to positive actions by the state and rights to an omission or abstention from the state) with observations on conflicts between these rights. We present these observations because they are relevant to the resolution of fundamental rights conflicts, which we address in the next section.[1245]

First, when there is a conflict between an inclusive or rule right and an exclusive or exception right (a typical example is the conflict between freedom of expression and right to honour), this conflict is resolved by examining the facts of the case and deciding whether they can be subsumed within the scope of the protection of exclusive or exception right. If the answer to this question is affirmative, it is determined that there has been an impermissible exercise of the inclusive or rule right. García Amado's view (which is also supported by constitutional jurisprudence on conflicts between fundamental rights, as he argues) is that exclusive or exception rights are absolute rights in the sense that they do not admit infringement within their scope of protection once the norm that regulates them has been interpreted to delimit them.[1246] For example, if person A makes a statement that is arguably violating person B's right to honour, the court will interpret the norm regulating the exclusive or exception right and decide whether the facts of the case can be subsumed under the protection of the norm expressing the exclusive or exception right. If the court gives preference to freedom of expression, it will find that the right to honour has been infringed, but that this harm has been "compensated by the weight that the freedom of expression has in this case".[1247]

Second, the rights to positive action by the state are an example of what García Amado is talking about when he posits the *preliminary distinction thesis*, mentioned in section III. 3. 2. Rights to positive action by the state are fundamental rights cases (*caso iusfundamental*), but not cases of conflict between fundamental rights or fundamental rights and other constitutional principles (*conflictos de derechos fundamentales*). These rights require a certain activity or provision by the state or its institutions, without which they are not effective. Conflicts of rights with respect to these rights arise solely by reference to them and the interpretation of the norms that govern them, and do not normally arise as conflicts between rights, as García Amado notes.[1248] The courts do not balance in such situations, but only decide whether or not the right in question has been violated.

[1245] García Amado (2017), pp. 105-111.
[1246] García Amado (2017), pp. 106-107.
[1247] García Amado (2017), pp. 106.
[1248] García Amado (2017), pp. 107-108. An example given here by García Amado is related to the right to be informed about the reasons of detention (Art. 24(2) of the Spanish Constitution). The right to be informed about

Third, as for the rights to an omission or abstention from the state, behind these rights is the idea of a general right that is reinforced by the concrete rights of this type (such as the right not to be tortured) against a specific danger posed by the state.[1249] These rights are understood by García Amado as absolute rights that are not subject to balancing.

In García Amado's view, there is no qualitative difference between decisions on fundamental rights conflicts and any other cases of normative conflicts (or there is no reason to be).[1250] As a summary of García Amado's views on conflicts between fundamental rights we can state that, as a rule, conflicts occur between inclusive or rule rights and exclusive or exception rights, while rights to positive action by the state and rights to an omission or abstention from the state are not subject to balancing. At this point, we can return to the other theses put forward by García Amado: *the application of balancing thesis*, according to which constitutional courts do not resolve most fundamental rights cases by balancing and the *elusiveness of balancing thesis*, according to which even when it appears that courts use the method or language of balancing, the court's reasoning is interpretative-subsumptive; but sometimes, to avoid the more complex argumentation of their interpretive choices, the courts act as if they have used balancing. Having set out García Amado's views on conflicts between fundamental rights, we turn to his interpretive-subsumptive method by presenting its theoretical framework and applying it to cases.

III. 3. 4. An alternative: interpretative-subsumptive method

In this section, García Amado's approach to fundamental rights conflicts is presented and applied to cases. First, the theoretical framework of his interpretative-subsumptive approach is presented so that we can have an overview and a reconstruction of the steps involved in the process. Secondly, this proposal is applied to two cases: firstly, the 1997 Spanish Supreme Court case *El Toro de Osborne*, which García Amado uses to illustrate his method, and secondly, to the 1992 Federal Constitutional Court *Titanic* case, which is used by

the reasons of detention depends on how the provision and the information in question is specified and interpreted, with no other right interfering with it.

[1249] García Amado (2017), p. 110. García Amado gives few examples for illustration: the right not to be illegally detained is a concrete expression of the generic right to freedom, the right not to suffer the death penalty is an expression of the right to life and the right not to be tortured is an expression of the right to physical integrity.

[1250] García Amado (2009), p. 304. This understanding is connected with his view that there is no qualitative difference between the two types of norms Alexy calls 'rules' and 'principles' previously mentioned.

Robert Alexy to present his theory of judicial balancing, and which serves as a 'comparison case' for different approaches to fundamental rights conflicts.[1251]

III. 3. 4. 1. Theoretical framework

As mentioned above, García Amado's approach is a non-balancing, *interpretive* approach.[1252] He argues, on the basis of an analysis of decisions from the Spanish Constitutional Court, that judicial reasoning in cases of conflict between fundamental rights is interpretative-subsumptive, and not balancing one.[1253] García Amado advances two theses regarding judicial reasoning in cases of conflict between fundamental rights.[1254] The first is of a general nature: he suggests that the difference between balancing and interpretative-subsumptive methods, as possible methods for resolving fundamental rights conflicts is only superficial, and that the majority of judicial cases (or at least all 'hard' cases) can be reconstructed and resolved by both methods (or 'procedures').[1255] This naturally raises the question of why the interpretative-subsumptive method should be preferred to the balancing method. García Amado argues that, as he tries to show by reconstructing the cases of *El Toro de Osborne* and *Titanic*, the interpretative-subsumptive reconstruction seems to be more rational because the 'parameters' used "are more tangible and more openly analysable and arguable".[1256]

Before turning to the theoretical framework of the interpretative-subsumptive method, we will introduce García Amado's critique of balancing. This critique is relevant because he claims that the interpretative-subsumptive method overcomes many of the weaknesses of balancing method. His critique balancing can be summarized as follows:[1257]

(1) First, the use of the balancing method instead of the interpretative-subsumptive method weakens and relativizes the rights in question.[1258] An example García Amado gives here is the prohibition of torture (the right not to be tortured) from Art. 15. of the Spanish Constitution and the classic example of kidnappers being interrogated by the police about the

[1251] For García Amado's reconstruction of the *El Toro de Osborne* case, see García Amado (2009), pp. 316-322, and for his reconstruction of the *Titanic* case, see García Amado (2009), pp. 297-316. On Alexy's reconstruction of the *Titanic* case, see Alexy (2003a), pp. 138-140, Alexy (2005), p. 575 and section I. 4. 2. 2.
[1252] Chiassoni (2019b), p. 165.
[1253] García Amado (2014a), p. 8.
[1254] García Amado (2009), pp. 292-293.
[1255] On this point, see also García Amado (2010a), p. 261 and García Amado (2014b), p. 62.
[1256] García Amado (2009), p. 293 [translated by author].
[1257] For García Amado's criticism of balancing, see García Amado (2009), pp. 249-297, García Amado (2010c), pp. 285-336, García Amado (2012), pp. 82-85, García Amado (2014a), pp. 44-46, García Amado (2014b), pp. 59-62 and García Amado (2017), pp. 111-115.
[1258] García Amado (2012), pp. 45-49.

whereabouts of those kidnapped and in danger of dying. The problem that might then arise is the question: is the right in question absolute and can it be subject to balancing? For García Amado, balancing is problematic because it opens the possibility of introducing exceptions to the right in question which, in his opinion, would be subjective. García Amado proposes the other, non-balancing way, which he calls the *interpretative way*: he introduces the notion of the 'nucleus of meaning' (*núcleo de significado*) or 'essential content' (*contenido esencial*) of the right. In this way, the nucleus of meaning in clear cases could be established, leaving unclear cases with penumbra zones, which would then remain open for argumentation.[1259] The advantage García Amado sees in this approach is that it is not the facts of the case or the consequences of the right not to be tortured to other rights that are discussed, but *reasons* to interpret the norm in one or way or another. In this way, the argumentation is not casuistic, but general:

> "*No se argumenta sobre las consecuencias para el caso, sino sobre las consecuencias generales de una o otra interpretación*. En otras palabras: la decisión no se reconduce a ser decisión de cada caso, decisión puramente casuística".[1260] [emphasis added]

(2) This weakening and relativization of rights occurs, as García Amado argues, through the introduction of exception clauses. The problem with balancing, for García Amado (who labels it 'revolutionary'), lies in the possibility that norms expressing fundamental rights become fluid and subject to the exception clause, such as "except that in the circumstances of the case there is sufficient reason to weigh more a justifying principle of the opposite solution".[1261] When the legislature formulates general and abstract norms, the number of possible exceptions is finite and these exceptions are expressed in other norms. When a judge decides the case by balancing and introduces the exceptions to the norm, two problematic consequences allegedly arise: first, the number of possible exceptions becomes infinite, and second, the possible exceptions are not known in advance.[1262]

[1259] An example of 'nucleus of meaning' given regarding the interpretation of the norm that prohibits torture would be prohibition of burning parts of body in order to force confession of the location of the kidnapped persons. On this position, in which García Amado follows H. L. A. Hart, see also García Amado (2006), p. 172. Hard cases have a 'penumbra zone' and there is no one 'correct' solution (or one-right-answer, to use Dworkin's terminology); any decision which does not violate the meaning of the legal text on the basis of which is it made can be considered 'correct'.

[1260] Garcia Amado (2012), pp. 56-57.

[1261] Garcia Amado (2012), p. 65. [translated by author]

[1262] García Amado (2012), p. 72. These two consequences are the exact opposite of what happens when the legislature formulates norms and their exceptions.

(3) Apart from these two problems, the balancing is, in García Amado's view, discretionary and subjective value judgement.[1263] For this reason, García Amado advocates an interpretative-subsumptive method for resolving conflicts between fundamental rights. The interpretative-subsumptive method is not devoid of subjective elements, but its advantage is supposedly that it acknowledges the limits of objectivity and rationality.[1264]

These are the criticisms on which García Amado built and developed his interpretive-subsumptive method, which consists of five steps. These five steps are mentioned here but understanding of the whole process is facilitated by real case examples and further elaboration of these steps, with which we deal with in the following section. The five steps of the interpretive-subsumptive method are the following:[1265] (1) normative situation; (2) general interpretive statement; (3) particular interpretive statement; (4) subsumptive statement; and (5) normative conclusion.

III. 3. 4. 2. Application

III. 3. 4. 2. 1. *El Toro de Osborne* (1997)

We begin the application of the interpretative-subsumptive method with the 1997 Supreme court of Spain case *El Toro de Osborne*.[1266] The facts of the case can be summarized as follows: The law regulating highways (*La Ley de Carreteras*) prohibited the placement of "advertisements" in places visible from the highways outside urban sections. After the law came into force, the Osborne company, which advertised itself with a bull statue with inscriptions, removed the inscriptions but kept the bull statue, which was visible from the roads. The company was sanctioned for "advertising" and appealed to the Spanish Supreme Court, arguing that the bull statue was not "advertising". This conflict can be understood as a conflict between the fundamental rights to freedom of enterprise and the fundamental right to health. Let us now reconstruct the case on the basis of interpretative-subsumptive method and its five elements (normative situation, general interpretive statement, particular interpretive statement, subsumptive statement, and normative conclusion).

[1263] García Amado (2012), p. 82, where he writes: "Ponderar, entonces, *no es más que valorar subjetivamente* [emphasis added] – aunque sea con ánimo de respaldar esas valoraciones con razones que tienen una honesta pretension de convencer a los interlocutors posibles – lo que los principios (en abstracto o en el caso) pesan." For the same criticism of balancing, see also García Amado (2006), p. 171.
[1264] García Amado (2009), p. 291.
[1265] García Amado (2009), pp. 323-325.
[1266] *Sentencia 652/1994*, from 30th December of 1997. The facts of the case are presented in García Amado (2009), pp. 317-318.

(1) The *normative situation* is created by the prohibition of advertising by the law regulating highways. This can be referred to as Px (P signifies prohibited, while x signifies advertising). Advertising has been understood by the Spanish Supreme Court as "any object associated with a trademark which can distract the driver", which is formally represented by 'a' in the interpretative-subsumptive scheme.

(2) The *general interpretative* statement is formally represented as a ↔ x. The Court had to decide whether the statue of the bull (the Osborne Bull) fell within the category of "object associated with a trademark which can distract the driver", represented by 'a'. The Court concluded that the bull, formally represented by 'b', did not fall within this category. This leads us to the next element in the interpretative-subsumptive method.

(3) *Particular interpretative statement* b→¬a, which means that the bull ('b') does not fall under the category of "object associated with a trademark which can distract the driver" ('a').

(4) The fourth element, the *subsumptive statement* derived from (1), (2) and (3) is represented as b→¬x, which means that the bull statue placed alongside the road does not represent advertising.

(5) Finally, the *normative conclusion* is formally represented as ¬Pb, which means that it is not prohibited (¬P) to place the statue of the bull (b) alongside the road. The determining reasons for such normative conclusions are those that support the general interpretative statement (2) and the particular interpretative statement (3).

The *El Toro de Osborne* case (and similar cases) can be understood as a conflict between the fundamental rights to freedom of enterprise and the fundamental right to health, which are usually protected by contemporary constitutions. In such cases, the court is confronted with a particular 'action' (in the general sense) of the entrepreneur (in this case, the erection of bull statue for promotional purposes) and must resolve the conflict. García Amado suggests that this case should be resolved by *interpretation* and *subsumption*, rather than by the balancing of conflicting rights. In this case, the Court concluded that Osborne Bull ('b') does not fall within the definition of advertising ('a'), which was defined as "any object associated with a trademark which can distract the driver". Thus, the Court's normative conclusion was that the statue of the bull placed alongside the road is not prohibited because it is not considered advertising.

III. 3. 4. 2. 2. *Titanic case* (1992)

Before reconstructing the *Titanic* case using the interpretative-subsumptive model, let us briefly recall Alexy's reconstruction of the case:[1267] a widely circulated satirical magazine, *Titanic*, described a paraplegic reserve officer as a "born murderer" and a "cripple". A German court ruled against the magazine and ordered it to pay damages to the officer. The magazine filed a constitutional complaint at Federal Constitutional Court. The Federal Constitutional Court undertook a "case-specific balancing"[1268] between the freedom of expression of *Titanic* magazine (protected by Art. 5(1) of German Constitution) and the officer's general right of personality (protected by Art. 2(1), in connection with Art. 1(1) of German Constitution).

The interpretative-subsumptive method proposed by García Amado, as we have already seen in the analysis of the case *El Toro de Osborne*, consists of five elements:[1269] normative situation; general interpretative statement; particular interpretative statement; subsumptive statement and normative conclusion. We will now proceed with the reconstruction of the case by applying the method proposed by García Amado.

The first element of the interpretative-subsumptive method, the *normative situation*, consists in this case of two constitutional provisions: the one that guarantees freedom of expression (Art. 5(1) of the German Constitution) and the other that sets the limits of freedom of expression (Art. 5(2) of the German Constitution).[1270] These two constitutional provisions can be, with regards to the facts of the case, reformulated into the statement according to which

> "Any expression that does not violate (among other things) the honour of the persons is permitted".[1271]

This statement is formally represented as

(1) $Px \leftrightarrow (x \rightarrow \neg h)$, where P stands for 'permitted', x for 'any expression', and h for 'honour', where $x \rightarrow \neg h$ means any expression that does not violate the honour of persons. In the *Titanic* case, the satirical magazine referred to a paraplegic reserve officer first as a 'born murderer' and second, as a 'cripple'. The question is whether these expressions constitute a violation of the right to honour guaranteed by Art. 5(2) of the German Constitution. As García Amado argues, it is not immediately clear whether these two expressions can be considered as

[1267] Alexy (2005), p. 575. For García Amado's reconstruction of the case, see García Amado (2017), pp. 159-172.
[1268] BverfGE 86, 1, 11, cited from Alexy (2005), p. 575.
[1269] García Amado (2009), p. 325.
[1270] Art. 5(1) of the Basic Law for the Federal Republic of Germany, which establishes the freedom of expression states that "Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship.". In Art. 5(2) limits to the freedom of expression are established: "These rights shall find their limits in the provisions of general law, in provisions for the protection of young persons and in the right to personal honour."
[1271] Translated from García Amado (2009), p. 299: "Está permitida toda expresión que no atente contra el honor de las personas".

"expressions that violate the honour of the persons". They are borderline cases that, in his view, fall into the so-called penumbra zone of the norm.[1272] In the first step of the interpretative-subsumptive method, the aim is to determine, through the process of *interpretative reasoning*, whether or not these two statements fall into the category of "expressions that violate the honour of the persons".[1273] Interpretative reasoning begins by delimiting categories of the intermediate degree of abstraction between these two poles (the concrete expressions – "born murderer" and "cripple", and the right to honour.[1274] The two following categories are used in this case: satire (s) and insult (i).[1275]

In the second step of the interpretative-subsumptive method, a *general interpretative statement* (in this case two propositions, one for each category – satire and insult) is made about these two categories and the right to honour. A satire (s) does not represent an attack on honour, whereas an insult (i) does. This is formally represented as

(2) $s \rightarrow \neg(\neg h)$

This is to say that satire (s) is compatible with the right to honour (h):

(2′) $s \rightarrow h$

Insult (i), on the other hand, infringes the right to honour (h):

(3) $i \rightarrow \neg h$

In the third step of the interpretative-subsumptive method, a *particular interpretative statement* is formulated (in this case, two). The Court has first defined the characteristics (n^x) of the two categories (satire and insult). This is formally represented as

(4) $(n^1 \wedge n^2 \wedge n^3) \rightarrow s$

(5) $[(n^1 \wedge n^2 \wedge n^3) \rightarrow s] \rightarrow h$

In the fourth step of the interpretative-subsumptive method, a *subsumptive statement* is made from the premises of the previous three steps. Returning to the expressions (e) of this case ('born murderer' and 'cripple'), a concretizing interpretation is necessary to subsume the expressions under the category of satire or insult.[1276] To this end, various circumstances (c) are invoked in favour of one option or the other.[1277]

(6) $(c1 \ldots cn \rightarrow n1 \ldots nn) \rightarrow (e \rightarrow s/i)$

[1272] García Amado (2009), p. 299.
[1273] García Amado (2009), p. 299.
[1274] García Amado (2009), p. 299 and García Amado (2017), p. 163.
[1275] García Amado (2009), p. 300.
[1276] García Amado (2009), p. 301.
[1277] Such circumstances can be, according to García Amado, of very different types: semantic, intentional, historical, sociological etc. García Amado (2009), p. 301.

In this case, the Federal Constitutional Court qualified the expression "born murderer" as satire, while the expression "cripple" was qualified as an insult.[1278]

Finally, in the fifth and last step of the interpretative-subsumptive method, a *normative conclusion* is drawn. Depending on whether the expression is classified as satire or insult, it is either permitted or prohibited:

(7) [c1…cn→n1…nn)→(e→s/i)]→Pe/¬Pe

Having presented the five steps of the method to the case, we can now present García Amado's summary of the interpretative-subsumptive process:

(1) Px↔(x→¬h) (any expression that does not violate the honour of the persons is permitted)

(2′) s→h (satire is compatible with the right to honour)

(3) i→¬h (insult, on the other hand, infringes the right to honour)

(4) ($n^1 \wedge n^2 \wedge n^3$)→s (defining n^x as the characteristics of satire)

(5) [($n^1 \wedge n^2 \wedge n^3$)→s]→h

(6) (c1…cn→n1…nn)→(e→s/i) (defining the circumstances in favour of or against understanding that the expressions discussed are satire or insult)[1279]

(7) [c1…cn→n1…nn)→(e→s/i)]→Pe/¬Pe (so, depending on how we qualify the expressions (e) – either as satire (s) or as insult (i), the expression is either permitted or prohibited).

In the *Titanic* case, the expression "born murderer" was qualified under the category of "satire", while the expression "cripple" was qualified under the category of "insult". Therefore, in relation to the right to honour, the expression "born murderer" is permitted, while the expression "cripple" is prohibited.[1280] In the interpretative-subsumptive reasoning set out, there was no *balancing* or *weighing* of rights, neither in the abstract nor in the concrete case.[1281] The

[1278] On the reasoning of the Court, see García Amado (2009), pp. 304-319. See García Amado (2017), pp. 166-172 for Court's reasoning regarding the qualification of the expressions "born murderer" and "cripple". For the expression "born murder", see p. 171, and for the expression "cripple", see p. 171-172.

[1279] For the circumstances which were considered by the Federal Constitutional Court for qualifying the expressions "born murderer" and "cripple" as a satire and as an insult, see García Amado (2017), pp. 166-172.

[1280] A constitutional complaint from the *Titanic* magazine was not successful with regards to damages they were ordered to pay to the officer on the basis of calling him "cripple", but it was successful with regards to damages they were ordered to pay on the basis of calling the officer "born murderer". In García Amado's (2009), pp. 315-316 interpretative-subsumptive reconstruction of the reasoning of the court, this was because the expression "cripple" was qualified as an insult by the Court, and thus constituted a violation of the right to honour, while the expression "born murderer" was qualified as a satire by the Court, and as such was not a violation of the right to honour. In the end, the Titanic magazine had to pay damages for the expression "cripple", while the expression "born murderer" was protected by the freedom of expression. Alexy, as presented in an earlier chapter, reconstructs the reasoning of the court in a different way, presenting it as a case of the application of the balancing method. See Alexy (2003a), pp. 137-140, Alexy (2005), pp. 575-577 and section I. 4. 2. 2.

[1281] García Amado (2009), pp. 302-303.

only things weighed are *interpretative reasons* that support each step in this process of interpretative concretization, as García Amado points out. These interpretative reasons are reasons for or against subsuming a given category under the reference of a more general category, in this case, two mentioned expressions ('born murderer' and 'cripple') under two mentioned categories (satire and insult). Thus, as García Amado argues, 2), 3), 4) and 6) are results of evaluating (weighing).[1282]

Having presented the interpretive-subsumptive approach to the two cases, we turn to the final section, which will analyse the criticisms and conclusions regarding García Amado's method proposed for resolving fundamental rights conflicts will be analysed.

III. 3. 5. Criticisms and conclusions

III. 3. 5. 1. Criticisms

In this section, we will present the criticisms that can be raised against García Amado's ideas and his interpretative-subsumptive method proposed for the resolution of fundamental rights conflicts. Two criticisms will be presented. The first one is related to his understanding of the interpretation of fundamental rights, and the second one is related to his formalization of the interpretative-subsumptive method.

As for the first criticism, we have seen that García Amado is a follower of the mixed theory of interpretation, according to which, due to the irreducible open texture of nearly all legal provisions, we can distinguish between the "core" of settled meaning and the "penumbra" of uncertainty. In the context of fundamental rights, García Amado speaks of the "nucleus of meaning" (*núcleo de significado*) or "essential content" (*contenido esencial*) of the fundamental right. According to this idea, the nucleus of meaning could be established in clear cases, leaving unclear cases with penumbra zones that would then remain open for argumentation. García Amado builds his interpretative-subsumptive method on this distinction, as explained in section III. 3. 4. 1. Such an understanding has been criticised from the perspective of interpretive scepticism. As Riccardo Guastini points out, almost no legal text can be considered to have just *one* unequivocal and unobjectionable meaning.[1283] This is

[1282] The premise (2) is the result of the evaluation (weighing) the reasons why a satire is not considered incompatible with the right to honour; the premise (3) is the result of the evaluation (weighing) the reasons why an insult is considered to infringe the right to honour; the premise (4) is the result of the evaluation (weighing) what is the best definition of satire (what are its defining characteristics) and finally, (6) is the result of the evaluation (weighing) of the concurrent circumstances in order to establish whether or not the conduct (expression) in question can fit under the categories of satire or insult, as defined in the previous steps. García Amado (2009), pp. 302-303.

[1283] Guastini (1997b), p. 289. As he points out, the text (T) which is the object of interpretation can convey different competing meanings (M_1 or M_2 or M_3 or M_n).

certainly true for modern democratic constitutions, which express a variety of values, resulting in different possible competing meanings of the provisions protecting fundamental rights. Judicial interpretation cannot be reduced to a sentence that describes meaning, but is, as Guastini says, an ascription of a definite meaning to legal provisions that are being interpreted.[1284] The problem with the mixed theory of interpretation is that

> "…according to the mixed theory, the descriptive or ascriptive character of interpretive statements seems to depend on the identity of the stated meaning – the statement is descriptive whenever the stated meaning falls within the "core", it is ascriptive each and every time the stated meaning falls within the area of "penumbra".[1285]

In Guastini's view, such a view is untenable. When a judge interprets a provision, he ascribes a meaning to it, regardless of the fact that the meaning ascribed is uncontroversial.[1286] From a sceptical perspective, the problem with the mixed theory of interpretation lies in its understanding of text-oriented interpretation or interpretation *in abstracto*,[1287] Judges actually exercise discretion when interpreting *in abstracto*, and interpretation is a matter of decision (not knowledge).[1288] On this basis, mixed theory of interpretation can be understood as a version of cognitivist (or quasi-cognitivist) theory of interpretation.[1289] Returning to García Amado and his ideas in the context of fundamental rights, this calls into question the possibility of determining the "nucleus of meaning" (*núcleo de significado*) or the "essential content"

[1284] Guastini (1997b), p. 289: "Unlike interpretation performed by academic lawyers, judicial interpretation can never be reduced to a sentence that describes meaning. For purely logical reasons, any judicial interpretation whatsoever necessarily amounts to the ascription of a definite meaning to the sentences uttered by the lawgivers."
[1285] Guastini (1997b), p. 290.
[1286] Guastini (1997b), p. 290. Guastini argues that mixed theories of interpretation confuse two different distinction which, in his view, do not overlap. The first one is the distinction between two kinds of speech acts (describing vs. ascribing meaning) performed by different interpretive agents (the "detached" jurist vs. the judge) and/or by one and the same agent in different contexts. The second one is the distinction between two kinds of texts (clear vs. unclear texts) and/or cases (plain vs. hard cases). As he concludes: "The nature of the speech act performed by the interpreter does not depend on the kind of meaning (plain or controversial) actually ascribed to text at hand – rather, it only depends on the "linguistic game" the interpreter is playing."
[1287] Text-oriented interpretation (interpretation *in abstracto*) consists in deciding what norm the legal text expresses, without referring to a particular case. On the distinction between text-oriented (*in abstracto*) and fact-oriented (*in concreto*) interpretation, see Guastini (2005b), pp. 142-143 and Guastini (2006a), p. 228.
[1288] Guastini (2006a), p. 229.
[1289] Guastini (2006a), p. 229. As Guastini points out here, interpretative discretion is exercised by the judges primarily in the text-oriented interpretation, and not in the fact-oriented interpretation. For the criticism according to which mixed theories of interpretation are "quasi-cognitive", see Chiassoni (2019a), pp. 79-82. One of the claims of the mixed ("intermediate", "midway" or "vigil") theory of interpretation, as formulated by Chiassoni (2019a), p. 81, is the following: "Whenever a legal provision proves to be ambiguous, it is up to the interpreter to decide which one, out of its alternative linguistic meanings, is to be regarded as "its" proper, legal correct meaning." However, no "proper" or "legally correct" meaning can be "discovered", so to say. Chiassoni (2019a), p. 85 points out that "…when semantic formalists (quasi-cognitivists) claim that there are cases where interpretation is just a matter of discovery, they call "discovery" the practical attitude of conformism, on the part of interpreters, towards some culturally dominant interpretive doctrine or some piece of "living law" (*lebendes Recht*)."

(*contenido esencial*) of the fundamental right through cognition, since it is a matter of decision and not cognition. Thus, there can be no content of the "core" of the fundamental right that is the result of cognition; just as the "penumbra" of the fundamental right, it is a matter of decision. In other words, the interpretation of a provision protecting the fundamental right seems to be completely a matter of ascription, and not (even partially) a matter of description.

As for the second criticism, it is related to the logical formalisation of the interpretative-subsumptive method. García Amado's formal application of the method to the *Titanic* case leads to two perplexities. The first is the use of the same symbolization (¬h) to symbolise two different (in fact, opposite) propositions, while the second is related to the symbolization of satire (s) and its relation to the right to honour (h).

Let us present the reconstruction of the problematic parts. As for the first issue, in his reconstruction of the *Titanic* case, García Amado formalises the first step (*normative situation*) as Px↔(x→¬h), where P stands for 'permitted', x stands for 'any expression', h stands for 'honour', and x→¬h stands for *any expression that does not violate the honour of persons*. However, in the third step (*particular interpretative statement*), it is stated that i→¬h stands for an insult, *which violates the right to honour*. Thus, the same symbolization means different things (in fact, the opposite) in the different steps (first and third one) of the interpretative-subsumptive method. As for the second point, in the second step of the interpretative-subsumptive method (*general interpretative statement*), it is stated that a satire (s) does not violate the right to honour, while an insult (i) does. The part with satire is formally represented as s→¬(¬h), and García Amado explains that the formalisation can also be formulated as s→h, indicating that this means that satire (s) is compatible with the right to honour (h).[1290] But the conditional here says much more than that; it affirms that satire is a sufficient condition for honour, which is very strange. In the context of resolving the case, this poses a problem because the aforementioned formalisation was used to distinguish between two general interpretive statements: one for satire and one for insult, and their relationship to the fundamental right to honour, one of the conflicting fundamental rights in the case. Based on this distinction and its formalisation, the last two steps of the interpretative-subsumptive method were determined, and the *normative conclusion* was drawn in the last step. These two points can also be seen in the summary of the interpretative-subsumptive process presented in the previous section, III. 3. 4. 2. 2.

[1290] García Amado (2012), p. 300. On the other hand, insult (i), as we have seen, violates the right to honour, represented in the third step as i→¬h.

III. 3. 5. 2. Conclusions

We now turn to the conclusions regarding García Amado's proposal. In this section, we will first give a brief summary of his understanding of the basic notions we are analysing and of his interpretative-subsumptive method. This will allow us to compare his views with those of other authors whose ideas we analyse in this work. Finally, we will conclude with an overview of the strengths and weaknesses of García Amado's proposal.

A vocal critic of judicial balancing, professor García Amado has developed what he calls an interpretative-subsumptive method for dealing with the problem of apparent conflicts between fundamental rights. He criticizes both the Alexyan and non-Alexyan (Manuel Atienza) theories of judicial balancing and rejects the theses usually associated with the balancing approaches: the *rights as principles thesis*, according to which fundamental rights are expressed through principles that are supposedly structurally different from rules; the *necessity of balancing thesis*, according to which balancing is the method of applying principles; the *suitability of balancing thesis*, according to which conflicts between fundamental rights are conflicts between principles for which balancing is a particularly suitable method of resolution; and finally, the *exemplariness of balancing thesis*, according to which constitutional courts in their best decisions resolve fundamental rights conflicts through balancing. García Amado argues that courts do not resolve most fundamental rights cases by balancing and that even when it appears that courts use the method or language of balancing, their method is actually an interpretative-subsumptive one. As García Amado suggests, balancing can be (and often is) used to avoid more complex argumentation in the decisions courts make (II. 3. 2.).

As for his views on interpretation, García Amado is a proponent of what he calls a *positivist* or *linguistic* theory of interpretation, which corresponds to the mixed theory of interpretation within the framework of Riccardo Guastini that we use to classify authors' positions. García Amado considers that there is no difference in the interpretation of constitutional texts from the interpretation of other legal texts. Like any other legal text, constitutions are understood as a set of linguistic statements contained in a text. Constitutional provisions often have a greater degree, of indeterminacy which allows for a greater degree of interpretative freedom, but the interpretative process is essentially the same (II. 3. 3. 1.). With respect to norms, García Amado is critical of the so-called strong distinction thesis between rules and principles, arguing that there is neither an ontological difference between the two types of norms, nor a particular method of applying legal principles (II. 3. 3. 2.). García Amado takes a conflictivist position and distinguishes between four types of fundamental rights

(inclusive or rule rights, exclusive or exception rights, rights to positive action by the state and rights to omission or abstention by the state) and develops a framework in which the resolution of conflicts depends on the types of conflicting rights (II. 3. 3. 3).

The non-balancing interpretative-subsumptive method, influenced by H. L. A. Hart's ideas on legal interpretation, is based on the idea of the *nucleus of meaning* or *essential content* of the right. The idea is that the nucleus of meaning of a right can be established in the clear cases and the hard cases with the penumbra zone remain open for argumentation (II. 3. 4. 1.). The advantage of such an approach in fundamental rights conflicts, according to García Amado, is that it is more rational, since the argumentation revolves around the *reasons* to interpret the norm in one way or another (which are arguably parameters more tangible and open to analysis and argumentation than the *facts* of the case or the *consequences* of the rights in question).[1291] The idea of the essential content of rights, as García Amado argues, precludes the weakening and relativization of the fundamental rights in question and the (subjective) introduction of exceptions.[1292] Judicial balancing, García Amado argues, leads to the weakening and relativization of rights through exception clauses, resulting in an infinite number of possible exceptions that cannot be known in advance, compared to the finite number of possible exceptions that are known in advance when they are prescribed by the legislature.[1293] All this leads García Amado to characterize judicial balancing as a discretionary decision and a subjective value judgment.[1294]

Let us now turn to the observations on García Amado's proposal and the comparison of Alexy's and Atienza's proposals that he criticizes. His proposal is clearly structured and consists of five steps: starting from a particular normative situation (1), a general interpretative statement is formulated (2); this is followed by a particular interpretative statement (3) and a subsumptive statement derived from the previous three steps, which act as premises (4); finally, the application of the proposal is concluded with a normative conclusion (5), as shown in the sections with the application of the proposal. Compared to the theories of judicial balancing of Robert Alexy and Manuel Atienza, García Amado's approach avoids the criticism raised against the supposed strong distinction between rules and principles and the idea that balancing is a specific method for the application of legal principles (see sections I. 6. 1. 1. and II. 2. 5.

[1291] On this point, see García Amado (2009), p. 293 and section III. 3. 4. 1., in which a reconstruction of García Amado's interpretative-subsumptive method was given.
[1292] García Amado (2012), pp. 45-49. This idea was illustrated in section III. 3. 4. 1. on an example with the prohibition of torture (Art. 15 of the Spanish Constitution).
[1293] García Amado (2012), p. 72.
[1294] García Amado (2012), p. 72.

1.). Compared to Alexy's proposal, the interpretative-subsumptive method also does not rely on the assignment of abstract weights or intensities of interference to decide which of the conflicting fundamental rights is given precedence (I. 6. 1. 3.). Compared to Atienza's proposal, the interpretative-subsumptive method is always applied (since conflicts between fundamental rights are no different from other normative conflicts), as opposed to balancing, which is applicable when there is an axiological gap (and the classification of a case as an axiological gap is subject to a subjective judicial decision). What is contested in the interpretative-subsumptive method, however, is the possibility of determining the nucleus of meaning or essential content of the fundamental right. This problem has been raised by proponents of sceptical theories of interpretation, who argue that its determination is a matter of choice or decision, and not of knowledge or cognition. García Amado's proposal, while avoiding the criticism of the supposed weakening of fundamental rights, does not rely on an uncontroversial basis, but on a decision that is a matter of evaluation and choice, and of cognition.

III. 4. Lorenzo Zucca

III. 4. 1. Introduction

Having presented the views of three prominent legal philosophers in the previous subchapters, this fourth subchapter presents an approach to the apparent conflicts between fundamental rights developed by Lorenzo Zucca (1976), an Italian legal philosopher. Zucca's approach to apparent conflicts between fundamental rights is chosen for presentation and analysis in this chapter because he proposes and elaborates a novel, alternative approach to the problem of apparent conflicts between fundamental rights, based on the so-called 'rules of priority'. In addition, Zucca has made other theoretical contributions to the subject: He proposed the notion of 'constitutional dilemma' and a distinction between *stricto sensu* and *lato sensu*, and between *spurious* and *genuine* conflicts of fundamental rights, as will be shown later in the subchapter. We are thus not only dealing with a novel approach to the problem, but also with a potentially useful theoretical contribution in the form of the distinction between different types of fundamental rights conflicts. Zucca also explicitly disagrees with both Ronald Dworkin and Robert Alexy on key issues of fundamental rights, so his approach is worth exploring as an alternative to the theories of both authors.[1295]

[1295] Zucca disagrees with the Ronald Dworkin's view that there is a right answer to every case (for Dworkin's views on this, see section III. 1. 4. 1.). He also disagrees with Robert Alexy and his idea that courts can reach a maximizing outcome in most cases through balancing. On this point, see Zucca (2007), pp. 5-6. The relevance of

The subchapter follows the same structure as the previous ones, and after this Introduction (4. 1.), Zucca's work is contextualized, and his theoretical position is presented (4. 2.). Next, basic notions (4. 3.) relevant to understanding apparent conflicts between fundamental rights are introduced: first, Zucca's views on interpretation (4. 3. 1.), followed by his understanding of the notions of norm and right (4. 3. 2.), and finally, his position on apparent conflicts of fundamental rights (4. 3. 3.). The last section (4. 3. 3.) is divided into two subsections explaining Zucca's central concept of 'constitutional dilemma' (4. 3. 3. 1.), followed by his proposed typology of conflicts between fundamental rights (4. 3. 3. 2.), as these form the basis for his understanding of the problem. The theoretical framework of Zucca's proposal is then presented (4. 4. 1.) and applied to two cases (4. 4. 2). The first one is the House of Lords decision in *Campbell v MGN Limited* (2004) and the second is the German Federal Constitutional Court *Titanic* case (1992). Finally, the subchapter ends with criticisms (4. 5. 1.) and conclusions (4. 5. 2.) regarding Zucca's approach.

III. 4. 2. Zucca's theoretical position

Contextualizing Lorenzo Zucca is a more difficult task compared to the authors presented in the previous three subchapters, as he neither attempted to develop a theory nor explicitly positioned himself in the context of the mainstream contemporary philosophies of law. Notwithstanding this, it is important to briefly outline the main areas of his research interests relevant to understanding his approach to the topic we are dealing with to contextualize his ideas. In most of his works, Zucca dealt with the topic of conflicts between fundamental rights, focusing on the conflict between religious rights and the idea of the secular state.[1296] From his writings on the topic, it can be seen that Zucca takes a *positivist* position, rejecting Dworkin's and Alexy's accounts of fundamental right and their critique of legal positivism.[1297] In his main work, *Constitutional Dilemmas*[1298], Zucca developed a normative

Lorenzo Zucca's approach has also been noted by David Martínez Zorrilla and mentioned together with proposals from well-known authors such as Alexy, Dworkin and Guastini. On this, See Martínez Zorrilla (2011a), pp. 347-348, Martínez Zorrilla (2011b), p. 730, fn 1. On Zucca's approach as a possible alternative to judicial balancing, see also Smet (2017b), pp. 184-186.

[1296] See Zucca (2007), Zucca (2008), Zucca (2012a), Zucca (2013b) and Zucca (2019).

[1297] Zucca (2007), pp. 8-26. On Alexy's theory of fundamental rights, Zucca (2007), p. 21. referring to Alexy (2003b), p. 449, writes: "The important point to notice is that the overlap between values and principles is meant to capture the fundamental unity between the language of law and that of morality. Moreover, this relationship means the determination of legal sources is entangled with moral evaluation and it ultimately boils down to that. Consequently, competition of principles is dealt with by using moral evaluation."

[1298] Zucca (2007). This work is the most important source for the reconstruction of Zucca's approach to the topic. A 'constitutional dilemma' is understood by as a conflict between fundamental rights in which there is no legal guidance, and which cannot be resolved rationally. See Zucca (2007), p. 26 and Zucca (2008), p. 20 and section III. 4.3.3.2.

proposal for resolving conflicts between fundamental rights, based on the idea of the so-called 'rules of priority'. In short, his proposal suggests that conflicts between fundamental rights should be resolved by establishing the 'rules of priority', that are deferential to the existing legislative frameworks of the legal systems in question. These 'rules of priority' can then, as Zucca argues, be used for the resolution of the apparent conflicts between fundamental rights, as elaborated in section III. 4. 4. As for his understanding of fundamental rights, Zucca uses the terms 'fundamental rights' and 'human rights' interchangeably, arguing that the terms have no metaphysical connotations. In the following sections, Zucca's understanding of interpretation, norm and right, and his position on apparent conflicts of fundamental rights will be presented before discussing the model he proposed for addressing the issue.

III. 4. 3. Basic notions

This section introduces basic notions relevant to understanding Lorenzo Zucca's approach to the apparent conflict between fundamental rights. The section begins with his understanding of interpretation (III. 4. 3. 1.), followed by his understanding of norm and right, (III. 4. 3. 2.) and concludes with his approach to the apparent conflicts between fundamental rights (III. 4. 3. 3.). The last section is divided into two parts: The first presents Zucca's typology of conflicts between fundamental rights (III. 4. 3. 3. 1.) and the second introduces his notion of the constitutional dilemma (III. 4. 3. 3. 2.).

III. 4. 3. 1. Interpretation

Lorenzo Zucca treats the subject of interpretation (focusing on constitutional interpretation) only in passing, in the context of conflicts between constitutional norms. He develops his views on (constitutional) interpretation mainly on the basis of the framework developed by the authors from the USA and their debates on constitutional interpretation.[1299] For this reason, his terminology regarding interpretation follows the terminology of the authors from the USA. Zucca's starting point is the observation that constitutional norms, because of

[1299] Zucca (2007), p. 70, where he refers to originalism and interpretivism. On originalism and interpretivism, see (among vast literature on the topic) Goldford (2005), pp. 90-121. Goldford (2005), p. 96 puts forward the following understanding of the two notions: "Generally speaking, *interpretivism* is the position that judges may enforce only those norms found to be explicit or clearly implicit in the text of the Constitution, while noninterpretivism is the position that judges may enforce additional norms not found within the text. *Originalism* is the position that judges must enforce constitutional norms only as they were understood by those who wrote and ratified them, while nonoriginalism is the position that judges may enforce such norms as they are understood in the present." [emphasis added].

their *broad texture* require "intensive interpretative work".[1300] However, Zucca does not seem to indicate that there is any qualitative difference between constitutional interpretation and interpretation of other legal texts.[1301] Interpretation, according to Zucca, can sometimes "explain away" the conflict between fundamental rights norms, while in other cases interpretation can "only shed light on the existence of a conflict, without being able to define it away."[1302] Based on this difference between an interpretation that "explains away" the conflict and an interpretation that "only sheds light on a conflict", Zucca adopts the first between the so-called *modest* and *comprehensive* interpretations, elaborated by Andrei Marmor.[1303] As Marmor puts it:

> "(…) we must draw a distinction between modest and comprehensive interpretative claims. An interpretative claim is modest if it does not claim truth (that is, in terms of exclusivity, or some other form of privileged status) for the choice of its underlying scheme, but only for the truth of the interpretation from the perspective of the scheme chosen; and an interpretative claim is comprehensive if it does claim truth for the choice of the scheme as well."[1304]

Zucca favours the so-called modest interpretations, arguing that they are "best suited for understanding constitutional practices".[1305] Comprehensive interpretations imply that there is always one right answer in cases of conflict, while modest interpretations "acknowledge the existence of a plurality of perspectives".[1306] If comprehensive interpretations would be used to interpret fundamental rights, a *genuine conflict* of fundamental rights would not be possible.[1307] It can be seen from Zucca's views on interpretation that he takes the position of *value pluralism*.[1308]

The second distinction used by Zucca concerning interpretation is that between its two different *aspects*, which Zucca calls *stricto sensu interpretation* and *specification*.[1309] The difference between these two aspects of interpretation, as Zucca conceives it, is that

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[1300] Zucca (2007), p. 74. This is Zucca's starting point regarding interpretation of fundamental rights norms, and he points out to influential authors who dealt with the topic. See Zucca (2007), p. 74, fn 26. Among the authors Zucca refers to, the ones which are of relevance, and which are also referred to in this work) are Robert Alexy and Ronald Dworkin.
[1301] Zucca (2007), pp. 74-79.
[1302] Zucca (2007), p. 74.
[1303] Zucca (2007), pp. 74-75. On the distinction, see Marmor (2001), pp. 133-134.
[1304] Marmor (2001), p. 133.
[1305] Zucca (2007), p. 75.
[1306] Zucca (2007), p. 75.
[1307] The idea of genuine (as opposed to spurious) conflicts between fundamental rights is one of the fundamental ideas in Zucca's approach to conflicts between fundamental rights. The main difference between them is that genuine conflicts involve normative inconsistencies. The distinction is presented in the section III. 4. 3. 3. 1.
[1308] This issue of *value monism* versus *value pluralism* is discussed in more detail later, in subsection III. 4. 3. 3.
[1309] Zucca (2007), p. 75. The second aspect of interpretation, specification is also called *concretization, instantiation, articulation* etc., as Zucca indicates, but for the sake of uniformity, he uses the word 'specification'.

> "*stricto sensu* interpretation attempts to understand the meaning of FLRs, while specification attempts to determine the object to which to which a FLR applies. Therefore, when we have a new case in front of us, we do not want to imply that the meaning of a FLR must be changed. In this sense, whichever interpretative process is used, it has to guarantee a certain consistency. What we mean by a 'new case' is that we are unsure whether it falls within the protective scope of a given FLR. Is for instance, the right to die an instantiation of a right to life? This is the kind of problem that specification is concerned with."[1310]

Using the distinction between these two aspects of interpretation, Zucca goes on to discuss *modest* interpretations and the connection between these two distinctions he makes. Interpretation *stricto sensu* is

> "mainly a looking backward exercise that attempts to understand why and when a value has been selected as a constitutional essential. Specification, however, plays a role in modest interpretations, albeit a contested one. Specification can be described as a forward looking exercise. It aims to grasp the actual context and understand whether a FLR can explain its reading. Specification amounts to a form of discretion requiring from the relevant institution a set of value choices."[1311]

In Zucca's view, specification is subordinate to *stricto sensu* interpretation in the sense that the latter sets limits to possible value choices. Specification must be understood within "institutional constraints". These "institutional constraints" are prior hard cases and their interpretation, since new hard cases are never "taken in a vacuum", but they are "placed withing a line of cases and prior interpretations".[1312]

From this we can draw two conclusions and classify Zucca's doctrine of interpretation according to the scheme used earlier, developed by Riccardo Guastini.[1313] First, by expressing his preference for the so-called modest interpretation, Zucca affirms his value pluralist position. He rejects the one-right-answer thesis and therefore cannot be considered as a cognitivist. His initial position, in which he points out that constitutional norms have a "broad texture" and require "intensive interpretative work" and his understanding of interpretation *stricto sensu* and

[1310] Zucca (2007), p. 75. The abbreviation 'FLR' stands for fundamental legal right.
[1311] Zucca (2007), p. 75.
[1312] Zucca (2007), p. 75. This idea gives a hint of what is the main idea in Zucca's approach to resolving conflicts between fundamental rights: to consider the *rules of priority* established by the legal system. More on the key notion of *rules of priority* in 4.4.2. and in Zucca (2007), pp. 140-141 and pp. 168-170 and Zucca (2008), pp. 36-37. 'Hard case' is defined by Zucca in the following way: "Hard cases, as the term is understood here, arise under conditions of widespread disagreement as to whether a particular legal command should be followed where doing so would generate results that are found by some to be unduly sever on certain individuals or society at large. Bomhoff & Zucca (2006), p. 429. More about the notion of 'hard case' in subsection III. 4. 3. 3. 1.
[1313] Guastini (1997b), pp. 279-283. For the classification of various theories of interpretation, see section I. 3. 1.

specification in the context of "constitutional constraints" would qualify him as a proponent of the third, intermediate, or mixed theory of interpretation.[1314]

III. 4. 3. 2. Norm and right

In this subsection, Zucca's understanding of norm and right is introduced through his understanding of fundamental rights norms and fundamental legal rights (FLRs, or simply 'fundamental rights', since there are no non-legal fundamental rights in Zucca's account). The notion of norm, like the notion of interpretation presented earlier, is discussed in the context of fundamental rights, and is not treated separately or directly. The two notions are interrelated in Zucca's work, so they are presented in this way. In his works on the subject[1315], Zucca uses the term 'fundamental legal rights' to distinguish them from moral rights and ordinary rights.[1316] The terminology used by Zucca in his works shows that he uses the terms 'fundamental rights' and 'human rights' interchangeably, understanding fundamental rights as rights enumerated in bills of rights, without the term 'human rights' having metaphysical connotations.[1317]

Fundamental rights are understood by Zucca as "constitutionally entrenched rules (typically permissions to do or refrain from doing something)".[1318] They are "rights entrenched in bills of rights and therefore protected by a specialized institution, against the violation of norms on an inferior level".[1319] Fundamental rights norms expressing fundamental rights have "identifiable right holders and assignable duty-bearers", and in the event of state interference with the sphere of liberty protected by fundamental rights, a court has the power to invalidate the action taken by the parliament and to compensate for any damages.[1320] Zucca argues that

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[1314] Guastini (1997b), p. 282, mentioning G. C. Carrió as a supporter of such position, writes: "The first and most influential version of the theory emphasizes the irreducible "open texture" (i.e., vagueness, indeterminacy) of nearly all legal provisions (…) Judges make use of no discretion when they decide a clear case. On the contrary, judicial discretion is necessarily involved each and every time a hard case is to be decided, since such a decision asks for a choice among a number of competing, possible solutions."

[1315] Zucca (2007), Zucca (2008)

[1316] Zucca (2007), p. 27, where Zucca explains why he uses the expression "fundamental legal rights" and acronym FLR: "Fundamental Legal Rights (FLRs) are complex concepts that have several layers. The very acronym I have selected points to this issue. We are not simply talking about rights. We are concerned with legal rights as opposed to moral. Moreover we are focusing on fundamental rights as opposed to ordinary ones". I will use the expression "fundamental rights" in this section (as I use it throughout the whole work), since I am not dealing with the notion of "moral rights".

[1317] See, for example, Zucca (2008), p. 21, Zucca (2012b), p. 331 and Zucca (2017), p. 99 and p. 109.

[1318] Zucca (2008), p. 21. By giving such definition of fundamental legal rights, Zucca does not make a necessary ontological distinction between a norm (constitutionally entrenched rule) and right (permission to do or to refrain from doing something). Therefore, it seems correct to reformulate the definition given and state that norms expressing fundamental legal rights are constitutionally entrenched rules, and that fundamental legal rights are typically permissions to do or refrain from doing something.

[1319] Zucca (2007), p. 1.

[1320] Zucca (2008), p. 21.

fundamental rights norms have the structure of legal rules, as opposed to the conventional understanding of fundamental rights norms as legal principles.[1321] Such an understanding of fundamental rights norms is at odds with the basic idea of Alexyan theory of judicial balancing. The idea that fundamental rights norms have the structure of legal rules, and not of legal principles is one of the points on which Zucca builds his critique of judicial balancing, arguing that understanding fundamental legal rights as principles "undermines the inherent strength of rights".[1322] According to Zucca, the view that fundamental rights norms have the structure of legal rules strengthens the rights from such norms, as there is no room for 'optimization' through balancing. Even though Zucca did not deal explicitly with the distinction between rules and principles, he criticizes and rejects the so-called strong distinction thesis, suggested by Robert Alexy and Ronald Dworkin.

Fundamental rights are associated by Zucca with two notions: *constitutional status* and *individual sphere of inviolability*. This idea stems from the notion that fundamental rights are a special kind of rules, which he calls *constitutional permissions*. The permissions they grant he calls 'constitutional status':

> "FLRs are constitutional permissions that determine a *constitutional status* [emphasis added], whose scope coincides with an *individual sphere of inviolability* [emphasis added], and whose function is to distribute freedom and power."[1323]

Let us explain these two concepts in more detail. Constitutional status, conferred by fundamental legal rights, which depends on the social practices of a given legal system, can be

[1321] Zucca (2007), p. 25 and Zucca (2011), p. 116. By structure, Zucca means 'logical structure'. He defends his view by referring to Dworkin and Alexy and their understanding of the resolution of conflicts between norms. What he criticizes is their understanding of conflict between rules and the view that every time when rules conflict, one of them loses validity. He also disagrees with the view the resolution of conflict between principles depends on the evaluation of their importance. For Zucca, conflicts of constitutional rights are conflict between rules, resolved by either declaring one of the rules invalid or by considering one rules as an exception of the other rule. According to Zucca (2007), pp. 11-12: "In the language of the court, there is no clear sign to distinguish a conflict of rules from those of constitutional rights. (…) I believe that Alexy's outline is misleading from the outset. Both Dworkin and Alexy encounter problems in their interpretation of conflicts of rules, and competition of principles. According to their sketchy discussions, the manner by which rules conflict can be summarized is a question of validity. But this is *inaccurate* because it is clearly not the case that every time rules conflict, one is valid and the other invalid. Sometimes one rule will be considered as the exception to the other. Moreover, it is not the case that the solution of a conflict of rules depends on the application of another rule, while the solution of a competition of principles depends on the evaluation of their importance." On the so-called 'Standard Conception' of conflicts between fundamental rights, see Martínez Zorrilla (2011b), pp. 730-731.

[1322] Zucca (2007), p. 47.

[1323] Zucca (2007), p. 48. It should be noted that permissions and power belong to two different kinds of normative discourses: prescriptive the first, constitutive the second.

passive or *active*.[1324] Zucca vividly compares passive constitutional status to a shield and active constitutional status to a sword. A passive constitutional status

> "A status may be active or passive. It is passive when the individual uses it to protect his inner citadel from the interference of either the state or other individuals. A passive status works like a *shield* that protects each individual's action. To infringe this screen, one would have to produce a stringent countervailing argument."

An active constitutional status, on the other hand

> "(…) individuals can also operate their FLRs as *swords*. This is the case, for example, when an individual wants to use his FLR in order to express his thoughts and beliefs. Free speech is a good example."

Constitutional status, conferred by fundamental rights, protects an individual sphere of inviolability. Zucca connects the three notions (fundamental rights, constitutional status and individual sphere of inviolability) and argues that

> "If our idea of constitutional status is correct, then it is possible to argue that to have a FLR to x is to belong in a legal system that guarantees, through its institutions, a sphere of inviolability for each individual. This sphere of inviolability requires the compliance of all institutions. So what really makes a difference in a legal system with FLRs is the fact that the sovereign is limited in its power to alter the rights of individuals."[1325]

To summarize, it can be stated that Zucca understands fundamental rights as permissions granted by constitutional norms that have the structure of legal rules. In Zucca's understanding, fundamental rights have a *hybrid nature*: they are legal rules that 'encapsulate' moral values.[1326] Because of this hybrid nature of fundamental rights, it is necessary to elaborate on how rules conflict, on the one hand, and how values conflict, on other, in order to define conflicts between fundamental rights.[1327] This is presented in the following subsection.

[1324] Zucca (2007), p. 48. Both aspects of constitutional status, passive ('shield') and active ('sword') confer both negative (consisting of prohibition of infringement of the status of the right holder) and positive fundamental rights (consisting of positive claims of the right holder.

[1325] Zucca (2007), p. 44.

[1326] Zucca (2011), p. 125: "Los derechos fundamentales son reglas jurídicas que encapsulan valores morales." As it was hinted previously, the relationship between 'norm' and 'right' in Zucca's account is not exactly clear. It seems problematic to reduce right to a rule 'infused with moral value(s)'. To encapsulate moral values, it should be first clarified what are moral values. If something relevant for morality is a moral value, then any norm would contain some moral values, but this is irrelevant for legal analysis. Because of this supposed hybrid nature of fundamental rights, it is hard to delineate what belongs to the legal domain and what to the moral domain. This is exactly what Zucca (2011), p. 125 affirms immediately after defining fundamental rights as rules that encapsulate moral values: "Es por tanto siempre difícil desentrañar qué pertenece al ámbito del derecho y qué pertenece al ámbito de la moral."

[1327] Zucca (2011), p. 125.

III. 4. 3. 3. Conflicts between fundamental right

III. 4. 3. 3. 1. A typology of conflicts between fundamental rights

A starting point in Zucca's approach to apparent conflicts between fundamental rights is his critique of value monism, which he attributes to theories of both Ronald Dworkin and Robert Alexy.[1328] In rejecting value monism, Zucca argues that the fundamental rights entrenched in bills of rights of contemporary constitutions exhibit value pluralism:[1329]

> "The underlying value pluralist thesis that I prefer insists on the importance of the conflict of values. The implication of that position is that FLRs are very likely to conflict in the legal realm. As a corollary to that position, the notion of FLRs as principles can be doubted."[1330]

As a result, Zucca argues that fundamental rights cannot be ranked in terms of 'single overarching value'.[1331] A strongly *conflictivist* position on the issue of apparent conflicts between fundamental rights is the basis of Zucca's approach. According to this approach, conflicts of fundamental rights cannot be avoided in contemporary societies because of the value pluralism of their constitutions. Fundamental rights "inevitably conflict in a way that constitutes a limit to legal reasoning."[1332]

Conflicts between rights, as Zucca understands them, "take place between two norms or principles that require from individuals incompatible behaviours".[1333] Such conflicts typically arise in national legal systems, as

> "FLRs protect such a wide range of actions that it is unavoidable that two or more of them sometimes overlap in a way that make them mutually incompatible. Consequently, the application of one FLR, in some cases, entails the violation of another."[1334]

[1328] On Zucca's reconstruction of theories of Ronald Dworkin and Robert Alexy, see Zucca (2007), pp. 12-23. Zucca labels Dworkin's theory as a 'substantive' theory of constitutional rights and Alexy's theory as 'procedural' theory of constitutional rights. Zucca (2007), p. 12 argues that "despite using different methods in solving issues of competition of principles, both Dworkin and Alexy express views that are, as such, incompatible with a full understanding of the problems raised by FLR's conflicts. More precisely, they assume a harmonious (coherent or objective) order of values from which any decision can be drawn. But that very assumption is the object of unrelenting controversy and obscures rather than illuminates the central question of conflicts of FLRs."

[1329] Zucca (2008), p. 21.

[1330] Zucca (2007), p. 23. See also Zucca (2011), p. 125.

[1331] Zucca (2008), p. 21. For an opposing view, see Dworkin (2006b), pp. 105-116. On Zucca's scepticism and rejection of Dworkin's "one right answer thesis", see Zucca (2011), p. 128 and Zucca (2013a), pp. 189-190.

[1332] Zucca (2008), p. 24, criticizing the *non-conflictivist* view and the idea that there exists a harmony between fundamental rights: "Moreover, *constitutional dilemmas* [emphasis added] may force us to reconsider some age-old assumptions we hold concerning rights-adjudication. For example, we may want to rethink the widespread conviction that all fundamental rights hang harmoniously together without conflicting. In this heaven of rights, solutions are produced by weighing competing claims in a rational way; we eventually reach a conciliation of claims at the practical level." See also Zucca (2011), pp. 113-114 and Zucca (2017), p. 96, fn 7. The notion of constitutional dilemma is explained in the upcoming paragraphs of this subsection.

[1333] Zucca (2012b), p. 331.

[1334] Zucca (2007), p. 4. Zucca refers to Kelsen and his definition of norm conflict: "A conflict exists between two norms when that which one of them decrees to be obligatory is incompatible with that which the other decrees to

Law, as Zucca adds, is a "tool" for resolving conflicts, but in the case of conflicts between fundamental rights, the problem is that there are no explicit (and no implicit) rules for resolving such conflicts.[1335] Conflicts between fundamental rights norms are conceptually not different from conflicts between other norms. A conflict between fundamental rights occurs when one norm permits doing x, while another norm prohibits doing x; in this situation, "the actions permitted by both rights are not jointly performable."[1336] Notwithstanding the lack of conceptual specificity of conflicts between fundamental rights norms, however, Zucca introduces two important distinctions in his typology of conflicts between fundamental rights: first, the distinction between *lato sensu* and *stricto sensu* conflicts; second, the distinction between *spurious* and *genuine* conflicts.[1337]

The first distinction, between *lato sensu* and *stricto sensu* conflicts is introduced to distinguish between conflicts of fundamental rights norms and conflicts between fundamental rights and other types of norms. *Stricto sensu* conflicts are defined as conflicts between fundamental rights norms, while *lato sensu* conflicts are defined as conflicts between fundamental rights and other constitutional goods or interests.[1338]

The second and central distinction is between *spurious* and *genuine* conflicts of fundamental rights. The main difference between them is that genuine conflicts involve normative inconsistencies.[1339] In such situations of normative inconsistency, one fundamental right norm prohibits a certain action, while another fundamental right stipulates that the same

be obligatory, so that the observance or application of one norm *necessarily* or *possibly* involves the violation of the other." Kelsen (1991), p. 123.

[1335] Zucca (2011), p. 116.

[1336] Zucca (2007), p. 50.

[1337] Zucca points to Kamm and his tripartite distinction of conflicts. See Kamm (2004), pp. 476-513. On the importance of the distinction, see Zucca (2017), p. 103, fn 20.

[1338] Zucca (2008), pp. 20-21. An example given by Zucca for *lato sensu* conflict is the conflict between the fundamental right to strike and the interest in public order. An example for *stricto sensu* conflict is the conflict in *Evans v. the United Kingdom* (application no. 6339/05) ECtHR 10 April 2007. The case in question represented a conflict between rights of two private individuals established by Art. 8 of the European Convention on Human Rights ('Right to respect for private and family life'). A married couple, Ms Evans and Mr Johnston, had begun the process of *in vitro* fertilization, and Ms Evans was diagnosed with ovary cancer shortly thereafter. The doctors advised Ms Evans to fertilize her eggs with genetic material of her husband, since the treatment of ovary cancer required removal of her ovaries. By fertilizing her eggs with gametes of her husband, the possibility of her becoming a mother remained. Sometime later, Ms Evans and Mr Johnston separated, with Ms Johnston requiring the destruction of fertilized eggs. In this conflict, fundamental rights to privacy of Ms Evans and of Mr Johnston conflicted, and the court had to decide whether to deny maternity to Ms Evans or to force paternity on Mr Johnston. The case went from the UK courts to the Grand Chamber of the European Court of Human Rights, and Ms Evans request was rejected. In the case decided in 1996, *Nachmani v. Nachmani* 50(4) P.D. 661 Isr, the Israeli Supreme Court faced the same dilemma, but decided in favour of the woman. For more, see Löhmus (2015), pp. 66-67. Another case mentioned by Zucca, decided in 2000, a in which court (this time in USA) faced the same dilemma is the *A.Z. v B.Z.* (2000, 431 Mass. 150; 725 N.E. 2d 1051), deciding in favour of the man. See Zucca (2017), p. 102.

[1339] Zucca (2008), p. 25.

action is not prohibited.[1340] Zucca uses the metaphor of "constitutional tragedies" to describe genuine conflicts between fundamental rights, as it shows the idea of *choice* between two irreconcilable goods (or evils) and the idea of *loss* of something valuable, regardless of what is chosen. Genuine conflicts between fundamental rights

> "…typically involve two norms that are incompossible, that is to say that the two norms cannot be jointly upheld, and one has to be set aside. The two norms must have been duly interpreted in light of constitutional principles and specified in light of the facts of the case. If by any chance the competing claims are compossible, or if it emerges that the two norms can both be factually satisfied, then there is no genuine conflict of rights."[1341]

Spurious conflicts, on the other hand

> "…if we closely look at them, we will be able to present the case in a way that dispels the conflict. It will be possible either to reconcile the two parties' claims, or it will be possible to rank them hierarchically, in a way that allows the increased weight of one claim over the other."[1342]

In order to avoid, as he argues, confusion between spurious and genuine conflicts of fundamental rights, Zucca excludes two types of conflict (understood in the broadest sense) from the notion of genuine conflict of fundamental rights: first, conflicts between fundamental rights and collective goals, and second, conflicts concerning the distribution of resources.[1343]

In addition to introducing these distinctions, Zucca also illustrates the typology of conflicts between fundamental rights by distinguishing between *intra-* and *inter-* rights conflicts and *total* and *partial* conflicts. This distinction refers to *stricto sensu*, genuine conflicts of fundamental rights, as Zucca focuses on these and leaves aside *lato sensu* and

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[1340] Zucca (2011), p. 115. The source of this normative inconsistency is twofold, according to Zucca. One the one hand, it is the result of relative indeterminacy of fundamental rights norms, while on the other hands, it is the result of value pluralism. This, as Zucca elaborates, comes from the fact that fundamental right norms are hybrid norms in a legal system, since they are composed of two elements: they are norms of a certain legal system that have addressees and are protected by the courts, but they also 'encapsulate' values such as freedom of expression etc. Fundamental rights "force us to move between domains of norms and of values, often producing more confusion than clarity."

[1341] Zucca (2017), pp. 103-104.

[1342] Zucca (2007), p. 4. Zucca gives an example of what, as he argues, is a spurious conflict between fundamental rights. The example refers to the conflict between free speech and privacy, in which two famous people are getting married, and a journalist, who has acquired photographs of the wedding wants to publish them. The journalist can claim protection under the fundamental right to free speech, while the couple can claim their fundamental right to privacy. The question then arises: which right should prevail?

[1343] Zucca (2008), pp. 24-25. An example of such conflicts, which Zucca excludes from the notion of genuine conflicts between fundamental rights, are issues of redistributive taxation or affirmative action. Such issues, in Zucca's view, are not situations of conflict between fundamental rights, but either a *lato sensu* conflict (in the case of redistributive taxation, since there is a conflict between the fundamental right to property and a collective goal) or question of identification of right-holders (in the case of affirmative action, the question should a people having the characteristic x have a right to be hired in preference to any other). As Zucca (2008), p. 25, writes: "The central problem (…) concerns the situation in which a right makes something permissible while a competing right makes it impermissible, thereby creating a joint incompossibility."

spurious conflicts between fundamental rights. Intra- rights conflicts are conflicts between different fundamental rights, while inter-rights conflicts are conflicts between "two instantiations of the same fundamental right."[1344] This can be illustrated with the following table:

	Intra-rights	Inter-rights
Total Conflicts	1. fundamental right to life v. fundamental right to privacy	2. fundamental right to life v. fundamental right to decisional privacy
Partial Conflicts	3. A's fundamental right to free speech v. B's fundamental right to free speech	4. fundamental right to free speech v. fundamental right to informational privacy

Intra-right, total conflict between fundamental right are a paradigmatic example of what Zucca calls *constitutional dilemmas*: In these cases, the claims are symmetrical and mutually exclusive in their whole; choosing one claim forever eliminates the possibility of choosing the other.[1345] An example of such an intra-right, total conflict cited by Zucca is the case *Re A (Children)* from 2001 (conflict between right to life and right to privacy) and the situation from William Styron's *Sophie's choice*.[1346] Although Zucca focuses on intra-rights, total conflicts which, he believes are the best examples of constitutional dilemmas, he offers some examples of the other three types of conflict between fundamental rights: inter-rights total, intra-rights partial and inter-rights partial.[1347] An example of an *inter-rights, total* conflict would be the case of physician-assisted suicide, where the patient's right to decisional privacy collides with the right to life. Such conflicts involve two distinct rights where the choice of one claim precludes the possibility of choosing other, or as Zucca puts it, "the rights at stake cannot be waived without simultaneously being alienated". An example of an *intra-rights, partial* conflict is the conflict between two groups claiming freedom of speech and wishing to exercise that right in the same place and at the same time. Such conflicts involve the same right, but a

[1344] Zucca (2008), pp. 26-27. On the notion of total and partial conflicts, see Kelsen (1991), p. 123.
[1345] Zucca (2008), p. 27. The notion of constitutional dilemma, central in Zucca's work (the title of his main work from 2007 is *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA*).
[1346] Zucca (2008), pp. 23-24. The first case Zucca refers to is *Re A (Children) (Conjoined Twins: Medical Treatment) (No. 1)* [2000] HRLR 721. The second one is from the novel of an American author William Styron. In the novel, Sophie's two children are in concentration camp, and a Nazi officer asks Sophie to choose which of her two children will be spared. If she refuses to choose, both children will die.
[1347] Zucca (2008), p. 27.

case-by-case regulation is possible. Finally, an example of an *inter-rights, partial* conflict is the conflict between privacy and free speech, in a situation where a newspaper must decide whether to publish sensitive information about public figures. In such conflicts, two different rights are in conflict, but a case-by-case regulation is possible.

Zucca also argues that conflicts between fundamental rights are conflicts *in concreto* and not conflicts *in abstracto*:

> "And this is an important point concerning genuine conflicts of rights: human rights do not conflict in abstract, but they may conflict once they are properly specified in lights of the facts of a case. Most of the time, the facts are such that a compromise can be reached. Rarely, we face a situation in which the decision is truly either/or. Courts are required to appreciate the singular nature of genuine conflicts of rights, and should refrain from engaging in any complex balancing of values, since the problem lies in the very special circumstances and not at the level of constitutional values."[1348]

In his approach to conflicts between fundamental rights, Zucca highlights the notion of individual liberty and points that what he is analysing are conflicts between constitutionally entrenched rules that 'protect some fundamental aspects of individual liberty'.[1349] The area of protection of fundamental rights, as Zucca suggests, is also called the 'project of non-governance', in the sense that a 'sphere of individual sovereignty' is created by transferring power from the legislature to the individual.[1350] This 'sphere of individual sovereignty' is protected by the courts, but it can of course overlap with the sphere of sovereignty of another individual, in which case a constitutional dilemma can arise. When spheres of sovereignty of individuals overlap, in some situations it is possible to delineate those spheres in a way that avoids conflict; in other situations, where a clash inevitably occurs, the strength of each of the conflicting claims to individual sovereignty must be evaluated.[1351] But when such claims are equally strong (and possibly based on the same ground, as Zucca elaborates), a constitutional dilemma arises. Having introduced Zucca's typology of conflicts between fundamental rights, the next subsection addresses one of the key concepts in his work: constitutional dilemma.

III. 4. 3. 3. 2. 'Constitutional dilemmas'

[1348] Zucca (2017), p. 99.
[1349] Zucca (2008), p. 21.
[1350] Zucca (2008), p. 21. On the understanding of 'right', see also Zucca (2011), p. 116: "Si entendemos los derechos como dominios de minosoberanía dentro de los cuales cada individuo puede tomar decisiones informadas sobre sus acciones, entonces cada vez que las minisoberanías se superponen o entrecruzan el principal problema que afrontamos se refiere a la cuestión de quién va a decidir."
[1351] Zucca (2008), p. 21.

Conflicts between fundamental rights can lead to *constitutional dilemmas*, a term introduced by Zucca in the context of conflicts between fundamental rights. A constitutional dilemma consists (typically) of two elements: first, a choice between two separate goods or evils protected by fundamental rights, and second, a fundamental loss of a good protected by a fundamental right, regardless of the decision in the case.[1352] In the situations where fundamental rights conflicts give rise to constitutional dilemmas, there is no legal guidance on what to do and, Zucca argues, not only is legal reasoning incapable of providing a single right answer, but these cases cannot be resolved rationally.[1353]

Constitutional dilemmas, such as the opposition between pro-life and pro-choice sides in the abortion debate arising from the conflict between the right to life and the right to privacy, pose a "potential threat to the unity and cohesion of a society and of a legal system".[1354] It should be noted, however, that only a small minority of fundamental rights conflicts fall into the category of constitutional dilemmas, while the remaining majority of cases fall into either the category of spurious conflicts (which do not require special treatment in order to be resolved) or genuine conflicts that can be rationally resolved.[1355] In the typology presented in the table in the previous subsection, only some total conflicts qualify as 'constitutional dilemmas' (those that have both of the above mentioned elements).[1356] As noted above, intra-rights, total conflicts are paradigmatic examples of constitutional dilemmas.

Zucca argues that legal reasoning is inadequate to deal with constitutional dilemmas, in the sense that they represent a limit to legal reasoning. Before moving on to the next subsection and Zucca's approach to fundamental rights conflicts, a question arises: what is the idea behind Zucca's approach when constitutional dilemmas cannot be resolved rationally? Zucca argues that his ideas are useful for the following reasons:[1357] First, by establishing a "reasonably narrow" definition of constitutional dilemmas, the limits of legal reasoning are clearly defined. Second, by defining the limits of legal reasoning, it will allow a clearer understanding of what

[1352] Zucca (2008), p. 20. It might seem odd at first that an 'evil' can be protected by a fundamental right. Zucca phrases it like that, but the meaning of 'evil' in this definition of constitutional dilemma can be understood as a consequence of selecting one option in the situation of conflict. Regardless of this, the choice of words seems odd. Cf. with Manuel Atienza, whose approach we analysed in Chapter II and his notion of "tragic case" (II. 2. 3. 3.).
[1353] Zucca (2008), p. 20.
[1354] Zucca (2007), p. ix. However, pro-life, and pro-choice are political positions, and they have nothing with legal norms and legal system proper.
[1355] Zucca (2008), pp. 27-28. However, Zucca (2011), p. 114 and Zucca (2017), p. 96, fn 7, argues that no legal reasoning can help to resolve genuine conflicts of rights. What can be done in the case of genuine conflicts of rights is "manage the conflict by showing that we have to accept the loss of something valuable no matter what."
[1356] Zucca (2008), p. 28.
[1357] Zucca (2008), p 23.

legal reasoning can accomplish. Third, it will make it possible to define more precisely the area within which conflict resolution is possible. But even if this is not the case, Zucca argues that

> "Understanding constitutional dilemmas may be more important than solving them. It may alert us to the existence of areas in which we simply have to be more careful and we should pay more attention to the claims of other parties."[1358]

After introducing and clarifying the concept of conflicts between fundamental rights and their typology, the following subsection presents Zucca's proposal for resolving conflicts between fundamental rights.

III. 4. 4. Zucca's proposal

In this section, Lorenzo Zucca's approach to fundamental rights conflicts is presented and applied to cases. First, the theoretical framework of the proposal, based on the so-called rules of priority, is presented in order to provide an overview and a reconstruction of the steps involved in the process. Secondly, this proposal is applied to two cases: first, the 2004 House of Lords case *Campbell v MGN Limited* and secondly, to 1992 Federal Constitutional Court *Titanic* case.

III. 4. 4. 1. Theoretical framework

Before proceeding to Zucca's proposal, his views on judicial balancing (as elaborated by Robert Alexy) are presented. The presentation of Zucca's views on judicial balancing is relevant because he develops his proposal as an alternative to the perceived weaknesses of judicial balancing. After presenting the issues Zucca sees with balancing, the theoretical framework of his proposal, based on what he calls 'rules of priority' is presented.

While balancing is useful for resolving conflicts between fundamental rights (partial ones, both intra- and inter- rights), it is not suitable for resolving constitutional dilemmas, according to Zucca.[1359] He distinguishes between 'structured balancing', exemplified in Robert Alexy's theory of balancing and principle of proportionality and 'loose balancing', exemplified in Richard Posner's economic or cost-benefit analysis of law.[1360] 'Structured balancing', Zucca

[1358] Zucca (2008), p. 22.
[1359] Zucca (2008), p. 28. It has been mentioned that constitutional dilemmas are total conflicts between fundamental rights, either intra- or inter-, which have the following two elements: first, a choice between two separate goods or evils which are protected by fundamental rights; and second, a fundamental loss of a good protected by a fundamental right, regardless of the decision in the case.
[1360] Zucca (2008), p. 28. Regarding 'structured balancing', Zucca refers to Alexy (2005), pp. 572-581. For more detail, see Chapter I of the thesis, devoted to Alexyan theory of judicial balancing. For 'loose balancing', Zucca points to Posner (2006).

argues, can be useful in determining the scope of rights and their relative strength when applied to the circumstances of the case, but it cannot help resolve every case. 'Loose balancing', on the other hand, only takes into account spurious conflicts between fundamental rights, and does not take into account genuine conflicts between fundamental rights at all. Because of this, according to Zucca, balancing should not be understood as a 'magical tool' that provides a solution for every possible case, as it has a limited sphere of application and is not useful for 'stalemate situations' – situations where two symmetrical claims of rights are in conflict.[1361]

In Zucca's view, not much is gained by calling "balancing" reasoning in cases of conflict between fundamental rights (or human rights), since balancing is only a metaphor for reasonable judgment.[1362] The term "balancing" can be used to properly describe action undertaken by all of the institutions in a state when reaching a particular decision; as Zucca argues, the parliament 'balances' between competing claims, values and interests when producing legislation.[1363] Here, Zucca proposes the distinction between 'legislative balance' and 'judicial balance', the former being a balance of values *in abstracto* and the latter a balance of values *in concreto*. The implication of this is, Zucca continues, is that the language of balancing could be set aside and simply refer to an abstract and concrete decision.[1364] Zucca finally argues that balancing, "as properly defined, plays only a marginal role in the question of conflicts between fundamental rights".[1365] The problem with balancing, Zucca argues, is that those who argue for balancing overestimate the capacity for rationality and rational decision-making.[1366] As a method of resolving conflicts between fundamental rights, balancing is enthusiastically embraced by judges because it gives the impression of rationality in decision-making.[1367]

Let us now examine Zucca's approach to fundamental rights conflicts. What Zucca emphasises and argues is that when fundamental rights conflict, courts should be "deferential

[1361] Zucca (2008), p. 29.
[1362] Zucca (2017), p. 110.
[1363] The problem with this view is that the parliament does not 'balance' between competing claims, but conciliates different ends, which is not the same as ordering competing claims. Here, Zucca is falling into equivocation fallacy. This point is further elaborated in the section III. 4. 5. 1., dealing with criticisms.
[1364] Zucca (2017), p. 110. This is quite imprecise criticism of balancing made by Zucca; balancing is a bit more complex procedure, at least in Alexy's theory of judicial balancing. This point is also further elaborated in the section III. 4. 5. 1., dealing with criticisms.
[1365] Zucca (2008), p. 31.
[1366] Zucca (2011), p. 116 writes that "proponents of balancing believe in a quasi-superhuman capacity for rationality", or in Spanish original: "Los defensores de la ponderación creen en una capacidad de racionalidad quasi sobrehumana."
[1367] Zucca (2011), p. 124.

to the existing legislative framework".[1368] The deference towards the existing legislative framework is the idea on which Zucca's builds his proposal, which is based on the idea of 'rules of priority'. The proposal claims to be a "meta-framework", as it is supposed to be applicable to all "constitutional frameworks" (legal systems with fundamental rights conflict), since it is not based on specificities of a concrete legal system.[1369]

Zucca argues that the methods of resolving fundamental rights conflicts belong to one of two theories: the so-called *constitution-perfecting theories* and the *accurate constitutional theories*. In his view, the constitution-perfecting theories aim to "provide happy endings to any hard case", while the accurate theories, on the other hand, "are able to accommodate a sense of tragedy in certain hard cases".[1370] The problem with constitution-perfecting theories, according to Zucca, is that they can only capture spurious conflicts between fundamental rights; if there were genuine conflicts between fundamental rights, there would always be a "moral residue" that prevents the pursuit of a "perfected constitution". Such an approach supposedly fails to recognize the tragic aspect of hard cases.[1371]

Zucca's approach to conflicts between fundamental rights is based on the idea that, in order to resolve the conflict, rules, called *rules of priority*, which regulate the behaviour of the conflicting fundamental rights taken together should be established. Such rules, which need to be established, "could eventually allow sacrifices in certain cases".[1372] The supposed advantage is more transparent decisions and a proper allocation of the burden of the decision-making process. Two types of such rules are distinguished: *substantive rules of priority* and *procedural rules of priority*.[1373] Substantive rules of priority are further distinguished by Zucca into those that are internal to the fundamental rights system (*internal rules of priority*) and those that are external to the fundamental rights system (*external rules of priority*). Internal rules of priority

[1368] Zucca (2017), p. 110. Zucca (2007), p. 79, supports this position and argues that since genuine conflicts between fundamental rights provoke disagreement, which cannot be resolved without "sacrifice" of one of the competing views, the courts "should defer the matter to more representative institutions." Zucca (2007), p. 84 writes that "Genuine conflicts of FLRs are not only fraught with disagreement but characterized by a deadlock. In my opinion, courts are there to judge whether we are facing a genuine conflict of FLRs. If they do this, however, they are implicitly acknowledging that their decision is not going to be more than just any other institution's decision. In this case, it may be desirable to consider a greater degree of deference. On Zucca's views regarding deference and conflicts between fundamental rights, see Zucca (2007), pp. 79-84.

[1369] Zucca (2008), p. 140. Zucca's proposal, as he writes, is "an attempt to theorize the way in which FLRs affect the decision-making process in different countries". Zucca (2007) analyses examples of conflicts between fundamental rights from France, United Kingdom and USA and European Court of Human Rights.

[1370] Zucca (2008), p. 31. The name Zucca chooses for the theory he supports is quite suggestive. Since Zucca is focused mainly on the literature of the North American authors, he mentions two of them who developed these theories and to whom he refers to: Fleming (1998), p. 162-171, as a proponent of a constitution-perfecting theory and Alexander (1998), p. 115-120, as a proponent of accurate constitutional theory.

[1371] Zucca (2007), p. 137.

[1372] Zucca (2008), p. 36.

[1373] Zucca (2008), p. 35.

establish the relationship between different rights. When a rule of priority in the conflict between two rights is to be established, four options are possible. In the example of the conflict between two fundamental rights, A and B, these for options are: (1) absolute priority for A; (2) absolute priority for B; (3) qualified priority for A; and (4) qualified priority for B. According to Zucca, most legal systems support one of these four options, and therefore he argues that it is important to come up with a clear rule of priority. Then, arguments can be made to override such a priority. The idea that there can be a qualified priority rule of one fundamental right over another (which could then be overridden) avoids what Zucca calls "balancing and absolutism rhetoric which plague FLRs' systems".[1374] External rules of priority concern the system of fundamental rights as a whole in relation to other "considerations, interests and countervailing reasons". The idea of external rules of substantive priority results in priority of fundamental rights norms over state or public interests. In Zucca's view, fundamental rights, as a group of rights in a legal system have qualified priority over all other types of interests.[1375] In Zucca's model, in addition to these two types of substantive rules of priority, there are also procedural rules of priority. These rules "concern the distribution of powers when it comes to hard cases".[1376] Procedural rules of priority, as Zucca argues, concern two "objects": first, the distribution of power among different branches of government and second, the "repartition of that power between the State and individuals".[1377]

Substantive and procedural rules of priority together define a *qualified* and *contextualised* 'presumption of priority'.[1378] The idea is to, by applying rules of priority, to "duly define and circumscribe" fundamental rights in order to formulate a rebuttable presumption between the instantiations of conflicting fundamental rights.[1379] This rebuttable presumption depends on the legal culture and social practices of the legal system in which the

[1374] Zucca (2007), p. 141. This criticism of theories of judicial balancing, and particularly of Alexy's version, on which Zucca focuses oversimplifies the balancing process. Zucca's ideas regarding qualified rule of priority are, in fact, quite comparable with the idea of weight from Alexyan theory of judicial balancing: in the situation of conflict between fundamental rights, principle A can be assigned greater 'abstract weight', and still be defeated in the conflict by competing principle B due to the other factors in Alexy's weight formula.
[1375] Zucca (2008), p. 37. Fundamental rights, in Zucca's view, have priority because they are fundamental. One of the criticisms Zucca puts forward against balancing is that it negates this priority of fundamental rights over "governmental or other interests". This is why Zucca also excludes such conflicts from the notion of "genuine" conflicts. Zucca (2007), p. 90., writes that "What is wrong with balancing, then? The problem is that it allows limiting the value of basic liberties on grounds of public interests that are not recognized as FLRs. This is wrong, because it fails to respect the priority of FLRs. *Priority, here, means that when we rightfully claim the protection of a FLR, this creates a strong presumption that governmental or other interests are trumped by the value protected by FLRs.*" [emphasis added]
[1376] Zucca (2008), p. 37.
[1377] Zucca (2008), p. 37.
[1378] Zucca (2008), p. 38.
[1379] Zucca (2007), p. 170.

conflict arises. Once this central task is accomplished, the conditions under which this rebuttable presumption can be reversed must be established. Zucca argues that it is possible to establish a *qualified* and *contextualized* priority of one of the two conflicting fundamental rights. This priority is qualified in the sense that a fundamental right takes priority but allows for "a number of well-defined exceptions", while it is contextualized in the sense that this priority "only applies in a discrete area where the two FLRs conflict".[1380]

Zucca's approach can be reconstructed in two steps. The first step is to determine the rule of priority between the two conflicting fundamental rights by examining the provisions of the legal system in question. Once a clear rule of priority has been established, one of four options is possible: absolute priority or qualified priority for one of the two conflicting rights. In this way, we obtain a qualified and contextualized "presumption of priority". The second step is to determine the conditions under which this "presumption of priority" established in the first step can be reversed. The process can thus be summarized in two steps, which we may call *establishing the rule of priority* and *defining the conditions to reverse the rule of priority*. In the next section, we apply his approach to two cases, one from the House of Lords and one from Federal Constitutional Court.

III. 4. 4. 2. Application

III. 4. 4. 2. 1. *Campbell v MGN Limited* (2004)

To illustrate his method of dealing with conflicts between fundamental rights, Lorenzo Zucca frequently refers to the conflict between the fundamental right to free press and the fundamental right to privacy. Among the cases he mentions is *Campbell v. MGN Limited*, which was decided by the House of Lords. This case is used by Zucca as a good example of the conflict between two fundamental rights mentioned.

The facts of the case are the following:[1381] Naomi Campbell, a British supermodel, was photographed by a reporter from *The Mirror* newspaper as she left a drug rehabilitation meeting

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[1380] Zucca (2007), pp. 114-141.

[1381] *Campbell v Mirror Group Newspaper Ltd* (2004) UKHL 22. For the summary of the facts of the case, see Zucca (2007), pp. 124-126. The norms on the basis of which the judges decided were Art. 8 and Art. 10 of the European Convention on Human rights, which were incorporated the rights from the Convention into UK law.
Art. 8 of the Convention (*Right to respect for private and family* life) states that
"1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others."
Art. 10 of the Convention (*Freedom of expression*) states that

("Narcotics Anonymous"). Pictures of her were published and her history of drug addiction was mentioned. Previously, Naomi Campbell had publicly denied her addiction on several occasions. Her public denial of drug addiction on several occasions was the issue in this case, as the argument of the press was that they have published a truthful information or that they were "merely straightening the record". Naomi Campbell accepted that the story was worth publishing but argued that the press went too far in publishing the details of the story, thereby infringing her fundamental right to privacy. If we follow the distinction of conflicts between fundamental rights suggested by Zucca, we can qualify this conflict as 1) *stricto sensu* conflict, 2) *genuine* conflict, and 3) *inter-rights, partial* conflict *in concreto*. It is a *stricto sensu* conflict since it is a conflict between fundamental rights (and not a conflict between fundamental rights and other constitutional goods or interests) and it is a *genuine conflict*, since it involves a normative inconsistency. Finally, it is also an *inter-rights*, *partial* conflict *in concreto*, since two different rights are in conflict, but a case-by-case regulation is possible. In Zucca's view, as mentioned above, any conflict between fundamental rights is a conflict *in concreto*.

How would this case be resolved if we follow Zucca's method? As mentioned in the previous section, Zucca's approach to conflicts between fundamental rights is based on the idea of *rules of priority*. These rules are established to resolve the conflicts between fundamental rights taken together. Of particular importance to this case are the *internal rules of priority* – rules that are internal to the fundamental rights system, which establish the relationship between different rights. In Zucca's model, there are four possible options in establishing this rule of priority between two rights. In the context of the case, these four options are: (1) absolute priority for free press; (2) absolute priority for privacy; (3) qualified priority for free press and (4) qualified priority for privacy. Most legal systems support one of these four options, according to Zucca, and the idea is to formulate a *qualified* and *contextualized* presumption of priority of one of the conflicting fundamental rights. This first step consists in *establishing the rule of priority*. By formulating such a presumption of priority, a rebuttable

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health and morals, for the protection of the reputation of rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

presumption is established as to the relationship between the two conflicting fundamental rights. Once this presumption is established, it is necessary to define the conditions under which it could be reversed. This second step we called *defining the conditions to reverse the rule of priority*. These are the two steps in Zucca's framework. We will now examine how they apply to the case *Campbell v. MGN Limited.*

The first step is to establish a presumption of priority. In the example of the conflict between the fundamental right to free press and the fundamental right to privacy, Zucca argues that free press should be given 'qualified priority' over privacy.[1382] In the context of the conflict between these two rights, it is generally the case that the contemporary legal systems support the solution according to which the fundamental right to free press (or, more generally, the fundamental right to freedom of expression) has a *qualified priority* over the fundamental right to privacy.[1383]

Having established the qualified priority of the fundamental right to free press over the fundamental right to privacy, the second step is to determine the conditions under which this rule of priority might be reversed. To do so, we will first examine what the judges in the case considered. The judges in the case (which was decided by the House of Lords 3–2 in favour of Naomi Campbell) considered the following circumstances in their reasoning:[1384]

(1) Factual accuracy of the information: in this case, there were certain inaccuracies with respect to the information published.[1385] These inaccuracies were not considered by the judges to be of decisive relevance for this case. However, it can be plausibly argued that factual inaccuracies can reverse the qualified priority of freedom of the press, as is apparent from the prohibition of libel. However, there remains a problem in determining the degree of inaccuracy

[1382] Zucca (2007), p. 140 and Zucca (2008), p. 35

[1383] It can be convincingly argued that fundamental right to free press has qualified priority over fundamental right to privacy. In most contemporary societies (at least democratic ones), the media has freedom to publish information, but under certain circumstances that freedom may be restricted. The opposite position, according to which the fundamental right to privacy would have priority over freedom of press is usually rejected by legal systems, since it would mean that privacy has priority, and that the media could publish information only under certain circumstances.

[1384] The information from the report were classified into five categories and the judges were deciding where the threshold has been passed, i.e., which information should not be publishable. The five categories were (1) the fact of drug addiction; (2) the fact that she was receiving treatment; (3) the fact that she was receiving treatment at "Narcotics Anonymous"; (4) the details of the treatment (how long she had been attending the meetings, how often she went, how was the treatment on the sessions, the extent of her commitment and the nature of her entrance on this specific occasion) and (5) the visual portrayal of her leaving a meeting with other addicts. The first two categories of information were accepted as publishable due to her previous lie regarding her addiction, so the case was about the remaining three categories of information. Zucca (2007), p. 124.

[1385] First among the five judges, Lord Nicholls of Birkenhead (who was in favour of freedom of the press), indicates that the inaccuracies were related to the length of the attendance of the meetings of Narcotics Anonymous, frequency of the attendance and the fact that the photographs showed Naomi Campbell leaving the meeting and not arriving, as it was indicated in the article. See point 7 of the decision.

required to reverse primacy, as this involves a subjective judgment about a certain threshold for inaccurate information. Thus, articulating a "well-defined exception", as Zucca suggests, is problematic.

(2) Earlier context in relation to published information: the judges have taken into account the fact that Naomi Campbell has previously denied her addiction, and some of them have argued that the press should be entitled to "put the record straight".[1386] This condition seems to work only in favour of the priority of freedom of the press, and not as a condition that could reverse it.

(3) Status of the person about whom the information is published: the fact that Naomi Campbell is a public figure was a deciding factor for the judges who ruled in favour of the newspaper. They argued that the right to privacy would take precedence if the same information was reported about an anonymous person.[1387] So, this can also be taken as a condition that could reverse the qualified priority of the free press.

(4) Activity about which the information is published: the judges have also taken into account the fact that the newspaper has reported on an activity that takes place in public. This condition can also reverse the qualified priority of the free press.[1388] For example, if the press publishes information together with pictures obtained by intrusion into a private space.

(5) Details of the information: this circumstance also played a role in the judges' reasoning. The problem with this circumstance, however, is that it is not suitable for

[1386] As Lord Nicholls of Birkenhead argues (24), "When talking to the media Miss Campbell went out of her way to say that, unlike many fashion models, she did not take drugs. By repeatedly making these assertions in public Miss Campbell could no longer have a reasonable expectation that this aspect of her life should be private. Public disclosure that, contrary to her assertions, she did in fact take drugs and had a serious drug problem for which she was being treated was not disclosure of private information. As the Court of Appeal noted, *where a public figure chooses to present a false image and make untrue pronouncements about his or her life, the press will normally be entitled to put the record straight*." [emphasis added]

[1387] The second among the judges, Lord Hoffmann (who was also in favour of the freedom of press) argued (37) that "Naomi Campbell is a famous fashion model who lives by publicity. What she has to sell is herself: her personal appearance and her personality. She employs public relations agents to present her personal life to the media in the best possible light just as she employs professionals to advise her on dress and make-up. That is no criticism of her. It is a trade like any other. But *it does mean that her relationship with the media is different from that of people who expose less of their private life to the public*." [emphasis added] Also, at (53), Lord Hoffmann argues that "*If Ms Campbell had been an ordinary citizen, I think that the publication of information about her attendance at NA would have been actionable* and I do not understand the *Mirror* to argue otherwise." [emphasis added]

[1388] Lord Hoffmann (73) argued that taking pictures without the consent of Ms Campbell is not enough to amount to a wrongful invasion of privacy. As he argues, "The famous and even not so famous who go out in public must accept that they may be photographed without their consent, just as they may be observed by others without their consent." Hoffman continues (74) by adding that "the fact that we cannot avoid being photographed does not mean that anyone who takes or obtains such photographs can publish them to the world at large." In Lord Hoffman's opinion, if the photograph reveals a person in a situation of "humiliation or severe embarrassment" or if the photograph is taken by "intrusion into a private place" (even if there is nothing embarrassing about the picture) can lead to opposite decision, i.e., giving priority to privacy.

formulation in the form of a condition that could reverse the qualified priority of one of the conflicting rights, as it involves a subjective judgment about the degree of the detail that can be considered appropriate.[1389]

(6) Type of free speech the information expresses: the judges also considered the "nature of freedom of expression", distinguishing between different types of free speech, with some arguably deserving more protection than the other.[1390] However, this condition, in the context of the case, was taken as only possibly strengthening the priority of the freedom of the press.

Following Zucca's approach, the conditions in (1), (3) and (4) could be established as conditions that reverse the qualified priority of freedom of the press in favour of the right to privacy. In light of Zucca's proposal and in the context of this case, this would mean that freedom of the press has qualified priority (first stage), but that this priority is reversed in favour of privacy when a threshold of factual inaccuracies has been passed, when the report relates to an anonymous person and when the information has been obtained through intrusion into a private place.

III. 4. 4. 2. 2. *Titanic case* (1992)

In this section, Zucca's approach to fundamental rights conflicts is applied on the *Titanic* case. In this case, as we already know, the conflicting fundamental rights are the freedom of expression and personality rights. The conflict can be qualified as 1) *stricto sensu* conflict, 2) *genuine* conflict, and 3) *inter-rights, partial* conflict *in concreto*. The conflict is *stricto sensu* since it is a conflict between fundamental rights (and not a conflict between fundamental rights and other constitutional goods or interests), and a *genuine conflict*, since it involves a normative inconsistency. It is also an *inter-right*, *partial* conflict *in concreto*, since two different rights are in conflict, but a case-by-case regulation is possible.

The problematic expressions were "born murderer" and "cripple" used to describe a paraplegic officer. Prohibiting these expressions would infringe the magazine's freedom of expression, which is protected by Art. 5(2) of the Basic Law, which also lists the limitations to

[1389] The third among the judges, Lord Hope of Craighead (who was in favour of the right to privacy) holds that (121) "Had it not been for the publication of the photographs, and looking to the text only, I would have been inclined to regard the balance between the rights as about even." In these situations, the effect of the margin of appreciation would result in the priority of the freedom of press.

[1390] The fourth among the judges, Baroness Hale of Richmond (who was in favour of the right to privacy) holds that (148) "There are undoubtedly different types of speech, just as there are different types of private information, some of which are more deserving of protection in a democratic society than other. Top of the list is political speech (…)."

the freedom of expression (as exceptions to the general fundamental right to freedom of expression). On the other hand, permitting these expressions would infringe the personality rights of the officer, which are protected by Art. 2(1) of the Basic Law. In order to resolve the conflict and solve the case according to Zucca's model, it is first necessary to establish *rules of priority* leading to a qualified and contextualized presumption of priority, followed by the definition of the conditions under which this presumption of priority can be reversed.

As for the first step, four options are possible: (1) absolute priority for freedom of expression; (2) absolute priority for personality rights; (3) qualified priority for freedom of expression; and (4) qualified priority for personality rights. If we look at the reasoning of the Federal Constitutional Court, we see that a qualified priority is established for freedom of expression. This view is also supported by the Art. 5(1) of the Basic Law. Such normative regulation of conflicting rights is common in contemporary legal systems, as we mentioned in the analysis of *Campbell v MGN Limited* case. This completes the first step of Zucca's method. The second step is to establish the conditions under which the qualified priority of freedom of the press may be reversed in favour of the right to privacy. The Federal Constitutional Court considered the following circumstances:

(1) Status of the person in relation to the expressions: the person in question, described by the magazine as a "born murderer" and "cripple", was a young paraplegic reserve officer. This fact was taken into consideration by the Court, but was not of decisive importance, as the analysis of the other circumstances will show.

(2) Status of the expressions used: here, the Court considered whether the expressions could be subsumed under "satire". However, subsuming an expression under "satire" has no bearing on the possible reversal of qualified priority, as the expression could be qualified as satire but still yield to the right to privacy.

(3) Illegality of the expressions used: the Court did not qualify the expressions as criminal offences (insults or other prohibited expressions within the meaning of the German Criminal Code). If the expressions were qualified as criminal offences, the qualified priority of the freedom of expression would be reversed in favour of personality rights.

(4) Status of the publication in which the expressions were published: the status of the satirical magazine was considered by the Court but had no decisive relevance for the decision. The formal status of a satirical magazine does not, of course, automatically qualify the expressions as satirical, and even if the expressions were subsumed under "satire", this would have no bearing on the reversal of the qualified priority.

(5) Relationship of the expressions to human dignity: this circumstance is of particular importance for the German legal system. Zucca points out that legal systems regulate the relationship between fundamental rights differently. In the case of the German legal system, human dignity has a special status, which is reflected in its position in Art. 1(1) of the Basic Law. The expression "cripple" was considered as "humiliating" and "showing lack of respect" for the dignity of the person.[1391] This was not the case with the expression "born murderer".

If one follows Zucca's approach and takes into account the reasoning of the Court, the conditions in (3) and (5) could be established as conditions that reverse the qualified priority of freedom of expression in favour of personality rights. In light of Zucca's proposal and in the context of this case, this would mean that freedom of expression has a qualified priority (first stage), but that this priority is reversed in favour of privacy if the expression used is an illegal criminal offence or when a threshold of infringing human dignity has been crossed.

The application of Zucca's approach shows that it is a challenge to "duly define and circumscribe" fundamental rights and to formulate rebuttable presumptions and conditions or "well-defined exceptions" under which they can be reversed. In the following section, we will elaborate on this idea and present criticism of Zucca's proposal before drawing conclusions about it.

III. 4. 5. Criticisms and conclusions

III. 4. 5. 1. Criticisms

In this section we will present the criticisms of Lorenzo Zucca's ideas concerning the apparent conflicts between fundamental rights. The first relates to his understanding of the notions of 'norm' and 'right' and the relationship between them (in particular, his understanding of 'fundamental right'). The second is related to his reconstruction of conflicts between fundamental rights. The third and final point relates to his critique of balancing, upon which he developed his proposal based on the so-called rules of priority. A comparison and evaluation of his approach with other approaches we have analysed in this work is made in the last section, focusing on the idea of rules of priority.

As for the first point of criticism, which was already hinted in section III. 4. 3. 2., we have seen that Zucca uses the term 'fundamental legal rights' to distinguish them from moral rights and other, 'ordinary', legal rights. Zucca understands fundamental rights as rights enumerated in bills of rights and uses the terms 'fundamental rights' and 'human rights'

[1391] See Alexy (2003a), p. 138, quoting BVerfGE 86, 1, 13.

interchangeably, giving the term no metaphysical connotations. What is problematic in Zucca's understanding of 'fundamental rights' is the relationship between 'norm' and 'right', which is not entirely clear in his account. Zucca understands fundamental rights as legal rules that 'encapsulate' moral values.[1392] It seems problematic to reduce rights to rules that encapsulate moral values without first clarifying what moral values are. If moral value is understood as something relevant to morality, then any norm would contain some moral value, but that is irrelevant for legal analysis. Because of this supposed *hybrid nature* of fundamental rights, it is difficult to delineate what belongs to the legal domain and what belongs to the moral domain. This is exactly what Zucca confirms after defining fundamental rights as rules that encapsulate moral values.[1393] Since conflicts between fundamental rights cannot be resolved by *lex superior*, *lex posterior*, and *lex specialis*, legal reasoning is open to moral considerations in cases of conflict between fundamental rights, as Zucca argues.[1394] In other words, to resolve the conflict between fundamental rights, "it is necessary to know more about the values encapsulated by those rules".[1395] But it is unclear whether (and how) one can know this at all, except by resorting to our own value judgments.[1396]

The second criticism that can be levelled against Zucca's ideas builds on the first and is directed against what appears to be a conflation of political positions with the issues of the legal system proper. As an example of a constitutional dilemma Zucca mentions that he sees as potentially threatening for the "unity and cohesion of a society and of a legal system" he cites the opposition between pro-life and pro-choice advocates in the abortion debate. The problem arises from the conflict between the right to life and the right to privacy (see section III. 4. 3. 3. 2.). While it may be that these and other similar debates threaten the cohesion of a society, pro-life and pro-choice are political positions and have nothing to do with legal norms and the legal system proper. In this sense, at least some constitutional dilemmas seem to represent extra-legal disagreements.

As for the third and final point, the criticisms Lorenzo Zucca has raised against Alexy's theory of judicial balancing, along with his own understanding of balancing deserve attention. This criticism is based on Zucca's understanding of conflict *in abstracto* and conflict *in*

[1392] Zucca (2011), p. 125: "Los derechos fundamentales son reglas jurídicas que encapsulan valores morales."
[1393] Zucca (2011), p. 125: "Es por tanto siempre difícil desentrañar qué pertenece al ámbito del derecho y qué pertenece al ámbito de la moral."
[1394] Zucca (2011), p. 127.
[1395] Zucca (2011), p. 127, where he writes that "Dicho de otro modo, para saber cuántas normas que protegen derechos interactúan *es necesario saber más sobre los valores encapsuladas por esas normas*. Por ende, *los conflictos de derechos fundamentales son también híbridos*: implican consideraciones jurídicas y morales." [emphasis added]
[1396] For this, see Guastini (2011b), pp. 58-59. See also Guastini (2016), pp. 244-245.

concreto in the context of balancing. As noted earlier, Zucca understands balancing as a metaphor for reasonable judgment, and argues that the term can be used to describe a way of decision-making by all institutions in a state: by parliament, through 'legislative balance', and by the courts, through 'judicial balance'. Parliament, as he continues, balances competing claims, values, and interests when drafting legislation by balancing *in abstracto*, while the courts balance *in concreto*. Thus, in cases of conflicts between fundamental rights, the language of balancing could be set aside, as not much is gained by it, and we could refer to abstract and concrete decisions, Zucca concludes.[1397] However, the 'balancing' done by parliaments is not the same as 'balancing' done by courts. Parliaments do not 'balance' competing claims, but conciliate between competing claims, which is not the same as the ordering of competing claims that courts do. Here Zucca seems to fall into an equivocation fallacy. Both 'legislative balance' and 'judicial balance' are, at least partially, balances *in abstracto* between competing values.[1398] Even if we follow Zucca's model to reconstruct the conflict between two fundamental rights (e.g., the right to freedom of the press and the right to privacy), as an *in abstracto balance* between the competing rights is established when a presumption of priority of one of the competing fundamental rights is established on the basis of rules of priority (as, for example, when the judge declares that the right to freedom of the press has qualified (but not absolute) priority over the right to privacy, as is the case in most contemporary legal systems).

III. 4. 5. 2. Conclusions

In this section we will present conclusions by providing a summary of Lorenzo Zucca's understanding of the basic notions we analyse in this work, and an overview of the method he proposes to resolve the apparent conflicts between fundamental rights. As in the other sections with the conclusions, this will allow a comparison of his proposal with the proposals of the other authors we analyse. We conclude the section by pointing out the strengths and weaknesses of Zucca's proposal.

Regarding interpretation (III. 4. 3. 1.), Zucca focuses on constitutional interpretation and adopts the terminology of Andrei Marmor, distinguishing between the so-called *modest*

[1397] Zucca (2017), p. 110: "There is, however, a difference between a legislative balance and a judicial balance. The former is a balance of values *in abstracto*, while the latter is a balance of values *in concreto*. As you can see, we can easily put aside the language of balancing and simply refer to them as abstract and concrete decisions." However, this is quite imprecise criticism of balancing, since it is a more complex procedure, at least in Alexy's theory of judicial balancing. Legal principles, in Alexy's theory of judicial balancing, are assigned both abstract and concrete weight. See section I. 4. 1. for the reconstruction.
[1398] On this point, see Guastini (2011b), pp. 15-18.

interpretation and the *comprehensive* interpretation, giving preference to the modest interpretation, which rejects the idea of a single correct answer in cases of conflict between fundamental rights. In Zucca's view, there is no qualitative difference between constitutional interpretation and the interpretation of other legal texts. The only difference is that constitutional norms are usually characterized by their broad texture, which requires "intensive interpretative work".[1399] Zucca accepts the distinction between easy cases and hard cases and points out that the interpretation of hard cases is limited by "institutional constraints", i.e., previous hard cases and their interpretation. His views qualify him as a proponent of the mixed (or intermediate) theory of interpretation. As for his understanding of norm and right (III. 4. 3. 2.), Zucca understands fundamental rights (also called human rights, but without metaphysical connotations) as rights enumerated in bills of rights that are distinct from moral and ordinary rights. He argues that fundamental rights are expressed in norms that have the structure of legal rules, in contrast to the conventional understanding of fundamental rights norms as legal principles.[1400] These rules have a hybrid nature, since they "encapsulate" moral values.[1401] Zucca develops his understanding of fundamental rights norms by criticizing both Alexy and Dworkin and rejecting the so-called strong distinction thesis they advocate between rules and principles. In Zucca's view, there is no "optimization" of principles through balancing, as he also argues that such an understanding of fundamental rights would lead to a weakening of rights.[1402] The idea that fundamental rights norms, if understood as legal principles, would lead to a weakening of fundamental rights is common to the alternatives to judicial balancing, as already pointed out in the sections on Dworkin, Ferrajoli and García Amado, as well as in the critique of the Alexyan theory of judicial balancing (I. 6. 1. 4.). As for the issue of apparent conflicts between fundamental rights, Zucca criticizes value monism and points out that bills of rights of contemporary constitutions exhibit value pluralism. He takes a conflictivist position and argues that fundamental rights inevitably conflict (III. 4. 3. 3.). He introduces the distinctions between conflicts *lato sensu* and *stricto sensu*, and between *spurious* and *genuine* conflicts. The first distinction is a distinction between conflicts of fundamental rights norms and conflicts between fundamental rights norms and other constitutional goods or interests.

[1399] Zucca (2007), p. 74.
[1400] Zucca (2007), p. 25 and Zucca (2011), p. 116. On the so-called 'Standard Conception' of conflicts between fundamental rights, see Martínez Zorrilla (2011b), pp. 730-731. More precisely, as it was explained in section III. 4. 3. 2., fundamental legal rights are understood by Zucca (2007), p. 48 as "constitutional permissions that determine a constitutional status, whose scope coincides with an individual sphere of inviolability, and whose function is to distribute freedom and power." This constitutional status can be active or passive, as Zucca compared it to a 'sword' and a 'shield'.
[1401] Zucca (2011), p. 125.
[1402] Zucca (2007), p. 47.

The second distinction serves to distinguish between conflicts between norms that can be jointly upheld and those that cannot, i.e., those that involve normative inconsistencies (III. 4. 3. 3. 1.). The central notion in Zucca's proposal is the notion of 'constitutional dilemma'. These are types of fundamental rights conflicts where there is no legal guidance on what to do and they cannot be resolved rationally, i.e., they represent a limit to legal reasoning (III. 4. 3. 3. 2.). Even if they cannot be resolved rationally, by defining them we can establish the limits of legal reasoning and define more precisely the area within which a rational resolution of the conflict is possible, according to Zucca.

Building on the criticism of the Alexyan theory of judicial balancing, Zucca developed an alternative proposal for the resolution of fundamental rights conflicts, based on the so-called *rules of priority* (III. 4. 4. 1.). The idea behind this proposal is increased deference to the existing legislative framework and the claim that the legal systems, by their provisions, allow reconstruction of the relationship between the conflicting fundamental rights in terms of *absolute* or *qualified* priority for one of the conflicting rights. Rules of priority serve to establish *qualified* and *contextualised* presumption of priority in favour of one of the conflicting fundamental rights, which can then be overridden by exceptions. This rebuttable presumption depends on the legal culture and social practices of the legal system in which the conflicts occur. Qualified priority could then be contextualised by defining exceptions (or conditions) under which it can be reversed.

The idea of first establishing a qualified priority for one of the conflicting fundamental rights based on the legislative framework of the legal system in question, and only then allowing a number of well-defined exceptions in which that priority can be reversed is, in Zucca's view, a better alternative than judicial balancing because it is deferential to the legislature. Judicial balancing, Zucca argues, gives the impression of rationality in decision making, and this is the reason why judges embrace it.[1403] Zucca argues that conflicts between fundamental rights should be resolved in two steps: first, by *establishing the rule of priority*, and then, in a second step, by *defining the conditions to reverse the rule of priority* (III. 4. 4. 1.). The first step of such a proposal would arguably limit the discretion of the judiciary, as it depends on the legislative framework that defines the relationship between the conflicting fundamental rights. In this sense, it can be understood as a proposal sceptical towards judiciary's discretionary power and in favour of the legislature and the framework that supposedly allows the reconstruction of the relationship between the conflicting rights. The

[1403] On this point, see Zucca (2011), pp. 116 and p. 124.

same scepticism toward the judiciary and in favour of the legislature is also found in the proposal of Ferrajoli and García Amado. However, Zucca argues that conflicts between fundamental rights are hybrid in nature (i.e., they involve both legal and moral considerations) and that to resolve conflicts between fundamental rights it is necessary to refer to the values 'encapsulated' in the norms that express fundamental rights. Establishing exceptions in which the rule of priority can be reversed leaves open the possibility of subjective value judgments. Thus, the criticism of judicial balancing – that it gives the impression of rationality in decision-making – can also be made against Zucca's proposal. However, he insists on defining any reversal of the hierarchy between conflicting fundamental rights as a well-defined exception. According to Zucca's proposal, the hierarchical relationship between conflicting fundamental rights is not as indeterminate as it may seem and as theories of judicial balancing claim. Accordingly, the legislative framework allows for the reconstruction of a conditional hierarchy between fundamental rights, which can then be reversed in concrete cases only by a "number of well-defined exceptions".[1404]

III. 5. Ruth Chang

III. 5. 1. Introduction

The fifth and last author whose work will be analysed as an alternative to the theories of judicial balancing is Ruth Chang (1967), an American lawyer and philosopher. The aim of this subchapter is to present a reconstruction of a viable method for dealing with the apparent conflicts between fundamental rights by adapting Chang's comparativist theory. Even though the writings of Ruth Chang belong to the field of philosophy, her ideas are useful for the issues addressed in this thesis, as she analyses notions relevant to the apparent conflicts between fundamental rights. For this reason, her theory has been chosen for analysis.

In her works, Ruth Chang addresses the question "What grounds objectively rational choice?" or, in other words, "What makes something that you have most or sufficient reason to choose (or do)?"[1405] This question is relevant to the problem of apparent conflicts between fundamental rights, since the objection raised in such situations relates to the objectivity and rationality of the decision made by the judges. Besides this, Chang analyses the notion of *hard choices*, and conflicts between fundamental rights have generally been classified as *hard cases*,

[1404] Zucca (2007), p. 170.
[1405] Chang (2016), p. 213.

as we have seen in the previous subchapters.[1406] In addition to hard cases, Chang focuses on the related notions of *incommensurability* and *incomparability* (especially the latter), which have been used to challenge the very core of the idea of judicial balancing.[1407] Chang argues against the idea of incomparability of alternatives and develops the idea of *parity* or a "fourth value relation". The idea of parity or a "fourth value relation", along with the notions of incommensurability and incomparability, is central to her work, as will be explained in the following subsections.

Finally, in the context of hard cases, the (supposed) incommensurability and incomparability of alternatives in such situations, and the possibility of parity or the fourth value relation, Chang analyses the notion of *choice* and the *justification of choice*.[1408] Chang treats these (and all other related issues) with the aim of providing an answer to the question: How can one make *rational decisions* in hard cases?[1409] When judges decide fundamental rights cases, they face the same question. For this reason, the ideas of Ruth Chang provide a theoretical insight into the key issues addressed in this work.[1410] In addition to addressing issues that are undoubtedly relevant to the question of apparent conflicts between fundamental rights, another reason why the work of Ruth Chang has been chosen for analysis in this chapter is its influence in the field of the philosophy of practical reason.

The structure of this subchapter reflects the one presented in the previous four subchapters. After this introduction (5. 1.), the work of Ruth Chang is briefly contextualized and her *comparativist* approach summarized (5. 2.). This is followed by the presentation of the basic notions (5. 3.). The structure of this section differs slightly from that of the previous four

[1406] The two notions will be presented and compared in subsection III. 5. 3. For Chang, who deals with primarily with the problem choice and the rationality of choice, 'hard choices' are what 'hard cases' are for other authors. These are the situations in which the agent has to opt for one among the two competing options, and the choice of one option makes the choice of the other option impossible. If this problem is seen from the context of the apparent conflicts between fundamental rights, it translates to the situation, a concrete case in which a judge has to opt for one of the competing fundamental rights. His choice to protect one of the competing fundamental rights results in the impossibility to protect the other, competing fundamental right. On the notion of 'hard choice', see Chang (2012a) and Chang (2017). But Chang also uses the notion of 'hard case', for example in Chang (2002), p. 679.

[1407] According to the idea of incommensurability, which has been put forward against theories of judicial balancing, when two fundamental right norms conflict (and when judge has to make a choice), such choice is problematic since the values behind fundamental rights norms "seem irreducibly plural in their nature". The values seem to be not only irreducible one to the other, but also not reducible to a third value which could be used as a common measure for them (to provide *commensurability*). On this point, see Chapman (2013), p. 261. On the rejection of the idea of incomparability, see Chang (1997), pp. 1-34.

[1408] See, for example, Chang (1998), Chang (2004a), Chang (2005), Chang (2009), Chang (2012a), Chang (2015b) and Chang (2017). On the potential of application of Chang's work to legal context, see Boot (2017), p. 14 and Caviedes (2017), p. 165.

[1409] See, for example, Chang (2009) and Chang (2016).

[1410] The ideas of Ruth Chang, particularly her idea of the existence of the *parity* as a so-called 'fourth value relation' have been connected with law by Boot (2017) and Caviedes (2017). More about parity in the section III. 5. 3. 2.

subchapters. Rather than structuring the subchapter to introduce Chang's understanding of interpretation and the notions of norm and right (as was done in the first two subchapters' analysis of the previous four authors), section 5. 3. is structured as follows: 5. 3. 1. introduces the ideas of incommensurability and incomparability, while 5. 3. 2. elaborates Chang's key idea of *parity* or "fourth value relation". The section ends with an adaptation of Chang's views to conflicts between fundamental rights in subsection 5. 3. 3. This variation is necessary because Chang, as a philosopher (even though also being a lawyer by education), has not explicitly addressed the notions of interpretation, norm and right. However, since the aim of this subchapter is to adapt Chang's *comparativist* theory to the apparent conflicts between fundamental rights, the author considers this modification appropriate.[1411] The subchapter continues with the elaboration and application of Chang's comparativist theory (5. 4.) by first setting out the theoretical framework of her theory (5. 4. 1.), then introducing her approach through an example she herself used (5. 4. 2. 1.) and applying it to the 1992 German Federal Constitutional Court *Titanic* case. The subchapter ends with criticism (5. 5. 1.) and conclusions (5.5.2.).

III. 5. 2. Chang's comparativism

Since Ruth Chang is primarily concerned with philosophical issue, her approach and main ideas must be briefly contextualised before we apply her ideas to apparent conflicts between fundamental rights. Chang's approach has been called "comparativist" both by the author herself and by other authors.[1412] In comparativist account, comparability of alternatives is necessary for the possibility of justified choice between alternatives, and if the alternatives are incomparable, no justified choice can be made between them.[1413] This is the starting point for Chang. She argues for a much broader concept of comparability, in which she distinguishes incomparability from noncomparability and introduces the idea of a fourth value relation in comparisons, called parity, in addition to the three standard ones (better than, worse than, and equally good). Comparativism is the view according to which all choice situations are comparable, and in this sense, it rejects the idea of incomparability.[1414] Chang's ideas can be

[1411] If parallels with subchapters presenting the approaches of other authors from this and previous chapters would be drawn, Chang's views of incommensurability and incomparability are similar to views of other authors regarding interpretation, as I argue, since she understands these two notions as initial problem that has to be dealt with before approaching any conflict between values that also includes decision-making. Chang's idea of *parity* or *fourth value relation*, a central notion in her work, represents her answer to the problem of incomparability and the notion upon which she builds her proposal for making rational decisions in hard cases.
[1412] See Caviedes (2017), p. 166, Chang (2016), pp. 213-215 and Miller (2014), p. 690 and p. 698.
[1413] Chang (2015a), p. xvii.
[1414] Chang (1997), p. 9.

understood as an alternative way of challenging the proportionality-based theories of judicial balancing, analysed in Chapter I (Alexyan theory of judicial balancing) and Chapter II (Aharon Barak's theory of judicial balancing).[1415]

Chang gives an initial, rough definition of comparativism, defining it as "the view that a comparison of the alternatives with respect to an appropriate covering value 'determines' a choice as justified."[1416] More precisely, it is a view about practical reason, in the sense that it tells us "that in virtue of which a choice is rational, however we should arrive at it", rather than how we should arrive to rational choice.[1417] The comparativist approach to rational choice is defined by Chang in two versions: first, in terms of values ("values" version of comparativism) and, second, in terms of reasons ("reasons" version of comparativism):[1418]

> First, 'values' version of comparativism: "Comparative facts about the evaluative merits of the options with respect to what matters in a well-formed choice situation is that in virtue of which a choice is rational in that situation."
>
> Second, 'reasons' version of comparativism: "Comparative facts about the strengths of the reasons for and against the options with respect to what matters in a well-formed choice situation is that in virtue of which a choice is rational in that situation."

What Chang proposes is an account of practical justification according to which a justified choice is determined by a "comparative fact about the alternatives with respect to the value at stake in the choice situation."[1419] Or, to put it more formally

> "Comparativism holds that it is the fact that x stands in such-and-such relation to y with respect to choice value V that determines which alternative one rationally ought to choose."[1420]

In order to understand these two definitions of comparativism, the notion of *choice situation* must be defined. A choice situation is defined as "any actual or possible situation in which an agent must choose only one of a multiple, but finite, number of available

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[1415] Caviedes (2017), p. 165, suggests that Chang's idea of parity, as an alternative way of challenging proportionality-based theories of judicial balancing has similar results as the criticisms based on incommensurability, but without the premise of incomparability between the alternatives. According to Caviedes (2017), p. 195, Chang's approach, which challenges proportionality-based theories of judicial balancing from the notion of *parity*, and not *incommensurability*, has two advantages: first, parity acknowledges the human intuition that comparability is a pre-condition for rational decision-making, and second, parity does not exclude the possibility that, with sufficient quantitative changes one alternative can become unquestionably better than other, thus accepting the distinction between clear and hard cases.
[1416] Chang (2015a), p. 43.
[1417] Chang (2016), pp. 215-216.
[1418] Chang (2016), pp. 214-215.
[1419] Chang (1998), p. 1596.
[1420] Chang (1998), p. 1577. A choice value is "*what matters* in the choice *given the specific facts of the situation in which it figures*". Chang (2015a), p. 44.

alternatives."[1421] In her later work, Chang elaborated the idea further and defined a *well-formed choice situation* as the situation

> "…in which there is a determinate and small set of alternatives, each of which one is capable of choosing, something that matters in the choice – 'a covering consideration(s)' – and a reasonably determinate set of background facts that are circumstances in which a choice is to be made."[1422]

In the comparativist approach, *comparative facts* are those on the basis of which we should do what we should do. In the examples she gives, Chang focuses mainly on personal choices between two alternatives, such as choosing one of two careers or one way to spend one's time, but she also gives legal examples and examples that can be understood as conflicts between fundamental rights.[1423] By comparative facts, Chang means *positive* comparative facts that tell us something positive about the relationship between two items in a particular aspect. Under comparative facts, Chang also includes normative comparative facts, that is, comparisons of alternatives "with respect to some evaluative criteria or reasons with respect to strength or importance or weight with respect to what matters in the choice."[1424]

Chang argues that if comparativism is correct, more attention must be paid to comparisons, evaluative relations, and choice situations, since these notions are seen as "central to understanding practical reason."[1425] In her work, she is mainly concerned with practical reason, value conflicts, decision making, and choice.[1426] Although she does not deal directly with conflicts between fundamental rights (at least not from a legal point of view), there are several topics that she addresses in her works that are relevant to this thesis (and which have already been mentioned) and which will be presented in the following sections. These are incommensurability, incomparability, hard cases and justification of choice in hard cases.[1427]

[1421] Chang (2015a), p. 44.
[1422] Chang (2016), p. 215. Chang makes a remark that, to simplify the exposition of her ideas, she will treat choice situations as having only two alternatives. This makes here theory fit for adaptation to the apparent conflicts between fundamental rights, as these are in fact situations where a judge must make a decision between two alternatives in a case.
[1423] For example, in Chang (2001), pp. 34-35, the issue of campaign finance law in the context of the First Amendment or in Chang (2009), pp. 155-156, the conflict between civil liberties and security in the context of terrorism.
[1424] Chang (2016), p. 217.
[1425] Chang (2016), p. 239.
[1426] See Chang (1997), Chang (1998), Chang (2001), Chang (2004a), Chang (2005), Chang (2009), Chang (2012a), Chang (2012b), Chang (2013a), Chang (2013b), Chang (2015a), Chang (2015c) and Chang (2017).
[1427] See Chang (1997), Chang (2013b) and Chang (2015c), where she proposes and elaborates a distinction between *incommensurability* and *incomparability*; Chang (1998) and Chang (2016), where she explains what makes a choice justified when we are faced with making one; Chang (2002), Chang (2012a) and Chang (2017), where the notion of hard cases is analysed and Chang (2009), where she deals with *rational* and *reasonable* in conflict resolution.

III. 5. 3. Basic notions

This section introduces basic notions relevant to understanding Ruth Chang's approach to the problem of the apparent conflict between fundamental rights with which we are dealing. It has already been mentioned in the introduction to this thesis that the sections presenting the authors' views on the basic notions generally follow the same structure. As with the presentation of Hurley's approach, a change is necessary here because Ruth Chang is a philosopher concerned with practical reasoning rather than directly with legal problems. Thus, the section begins with her understanding of incommensurability and incomparability (III. 4. 3. 1.), followed by an exposition of the central notion in her work – that of parity or fourth value relation (III. 4. 3. 2.) and concludes by adapting her approach to apparent conflicts between fundamental rights (III. 4. 3. 3.).[1428]

III. 5. 3. 1. Incommensurability and incomparability

The initial notions on the basis of which Ruth Chang develops her comparativist approach to practical reason are *incommensurability* and *incomparability* of values. The question of incommensurability and incomparability of values has attracted the interest of moral, political, and legal philosophers to find an answer to the question: "How to make a justified choice between incommensurables?"[1429] The relationship between the two terms is not entirely clear in the literature, as different authors have used them in different meanings, and sometimes as synonyms, as Chang points out.[1430] In her work, she focuses on the notion of *incomparability* and leaves incommensurability aside.

Chang distinguishes between incommensurability and incomparability by arguing that two items are *incommensurable* "just in case they cannot be put on the same scale of units of value, that is, there is no cardinal unit of measure that can represent the value of both items", while two items are *incomparable* "just in case they fail to stand in an evaluative comparative

[1428] The change of structure in this section is necessary since Chang does not deal with (legal) interpretation or with norm and right in any of her work. Because of this, an adaptation was made. First, the notions of incommensurability and incomparability are presented as a substitute for Chang's views on interpretation. The two notions can be understood as a kind of interpretation (in the sense of determination of meaning) of the problem of rational decision-making she is dealing with. The second notion of parity or fourth value relation is a substitute for her views on norm and right. Her understanding of 'parity', a fourth value relation she suggests besides the three standard ones (better than, worse than, and equally good) is central to the problem of rational decision-making she deals with. In the same way, the understanding of 'norm' and 'fundamental right' are central to the problem of the apparent conflicts between fundamental rights.

[1429] Chang (1997), p. 1, Chang (2015a), p. 1. Among the authors who dealt with incommensurability, we mention here Aleinikoff (1987), Bomhoff & Zucca (2006), Endicott (2014), Schauer (1994), Tsakyrakis (2009), Urbina (2015), Veel (2010), Waldron (1994) and Webber (2009).

[1430] Chang (1997), p. 1 and Chang (2015c), p. 207. Raz (1988), Chapter 13, for example, has used 'incommensurability' as synonymous with 'incomparability. See also Raz (1997), p. 110, fn 1.

relation, such as being better than or worse than or equally good as the other".[1431] Following this idea, incommensurability does not entail incomparability, while incomparability entails incommensurability – values or value bearers may be comparable even if they are incommensurable.[1432] Her comparativist theory is based on the idea that there are no incomparable bearers of value.[1433]

In other words, Chang uses the term *incommensurability* to refer to "items that cannot be precisely measured by some common scale of units of value" and the term *incomparability* to refer to items that cannot be compared, with two items being incomparable "if no positive value relation holds between them."[1434] In order to understand Chang's views on incomparability, the notion of a positive value relation must be clarified.

Value relations can be *positive* or *negative* and *generic* or *specific*. A positive value relation between two items means that one is saying something affirmative about the relation between them, for example that x is "better than", "less kind than" or "as cruel as" y. Claims that relate items by positive value relations are called by Chang positive comparisons or simply comparisons, while negative comparisons would be, for example, that x is "not better than" y. If items are incomparable, it is possible to say what their relation is not, and perhaps what their relation is to other items, but it is not possible to say anything about what relation holds between them, Chang says.[1435]

Value relations can also be generic or specific. Generic value relations presuppose a covering value, while specific value relations have their covering values already built in.[1436] Specific value relations are understood by Chang to have a relativized generic equivalent. For example, a specific value relation "kinder than" is equivalent to a generic value relation "better than with respect to kindness". When Chang speaks about "comparison" and "value relations", she refers to their generic and positive varieties.

In addition to value relations, there are other notions Chang uses to illustrate her understanding of incomparability that should be introduced to understand her views, besides

[1431] Chang (2015c), p. 205.
[1432] Chang (2015c), p. 207.
[1433] Chang (1997), pp. 3-4.
[1434] Chang (1997), p. 2 and p. 4. See also Chang (2015a), p. xvii. But a 'positive comparison' would at the same time be 'negative comparison' because if one states that x is better than y, that also means that y is not better then x, which is an example of 'negative comparison'.
[1435] Chang (2015a), p. 1.
[1436] Chang (2015a), pp. 3-4. Examples of generic value relations Chang gives are "better than", "as valuable as" and "worse than". Examples of specific value relations she gives are "kinder than", "as cruel as" and "tawdrier than".

value itself. Any comparison, as Chang indicates, must be made with reference to some value, and she defines value (calling it "covering value" in the case of comparisons):

> "A 'value' is any consideration with respect to which a meaningful evaluative comparison can be made. Call such a consideration the *covering value* of that comparison."[1437]

The content of a value is determined by two factors: first, by its (multiple) *contributory values*, i.e., the values that contribute to its content, and second, by its *structure*, i.e., the particular organization of its content, as Chang elaborates.[1438] A value that is relevant to determine how good something is with respect to the value V is a contributory value of value the V. These contributory values are distinguished in the sense that they contribute more or less to a value V. An example Chang gives to illustrate the content of a value is philosophical talent, which is used as a value (or, more precisely, as a covering value) for comparing two candidates applying for a position in a philosophy department. The content of philosophical talent is given by its contributory values (originality, creativity, clarity of thought, insightfulness, historical sensitivity, style, etc.) but also from its structure, in the sense that originality (according to Chang) makes a greater contribution to philosophical talent than clarity of thought, which in turn makes a greater contribution to philosophical talent than historical sensitivity. To determine the philosophical talent of a candidate, one should first look at the contributory values that make the greatest contribution, according to Chang. Building on the notions of covering value and positive value relation, Chang proposes a refined and expanded definition of incomparability:

> "two items are incomparable with respect to a covering value if, for every positive value relation relativized to that covering value, it is false that it holds between them."[1439]

How well an item does with respect to a value is what Chang calls *merit*.[1440] An *evaluative difference* between two items is how the items differ with respect to the covering value.[1441] The evaluative difference between items is their comparability, and the lack of an evaluative difference between them is their incomparability: two equally good items have an

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[1437] Chang (1998), p. 5. Examples of covering values Chang gives are generosity ('oriented towards the good') and cruelty ('oriented towards the bad'); prudence ('general') and tawdriness ('specific'); happiness ('intrinsic') and efficiency ('instrumental'); pleasurableness of outcome ('consequentialist') and fulfilment of one's obligation ('deontological'); courage ('moral') and foresight ('prudential') and beauty ('aesthetic') etc.
[1438] Chang (2015a), pp. 6-7.
[1439] Chang (2015a), p. 9. A definition given in Chang (1997), p. 6 differs from this only in phrasing – by stating "not true" instead of "false".
[1440] Chang (1998), p. 5. An example for multiple contributory values to a single covering value given by Chang is originality, clarity of thought, insightfulness and so on for the covering value of philosophical talent.
[1441] Chang (2015a), p. 14.

evaluative difference of zero, and two incomparable items have no evaluative difference at all. Chang alternatively defines incomparability in terms of evaluative difference:

> "Two items are incomparable with respect to a covering value if it is false that there is an evaluative difference between them with respect to that covering value."[1442]

Incomparability is also distinguished from noncomparability by understanding the former as a "substantive" failure of comparison and the latter as a "formal" failure of comparison.[1443] Having introduced the initial distinction based on which Chang builds her comparativist theory, we move to the central notion of her theory – the idea of a *sui generis*, fourth value relation in a comparison, the idea of parity or alternatives being 'on a par'. This is the most notable idea Ruth Chang has developed, and it is the main argument she makes against the idea of incomparability.

III. 5. 3. 2. Parity: fourth value relation

When it comes to discussing comparability between two items, there is an almost universally accepted assumption that Chang calls the *trichotomy thesis*. According to the *trichotomy thesis*, which is generally accepted as true, the conceptual space of comparability between two items encompasses three relations: 'better than', 'worse than' and 'equally good'; if none of these three relations holds, the items are incomparable.[1444] Indeed, this idea seems intuitive at first when we talk about comparing two items or two alternatives. But Chang argues that the trichotomy thesis is false and that there is a fourth possibility – the possibility of parity, or that two items or alternatives are "on a par". Only when this fourth value relation is included alongside the traditional three, is the logical space of comparability exhausted.[1445] The most novel idea in Chang's approach is her rejection of the *trichotomy thesis*. Chang rejects this universally accepted assumption and argues that

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[1442] Chang (2015a), p. 15.

[1443] Chang (2015a), p. 9. An example given by for incomparability or "substantive" failure of comparison is the failure to compare two philosophers with respect to their philosophical talent, while an example given by Chang (2015c), p. 216 for noncomparability or "formal" failure of comparison is the failure to compare the number four (but also rotten eggs) and beauty with respect to tastiness since "no positive, basic, binary value relation holds between them with respect to tastiness." But the two items could be compared, according to Chang with the respect of idea more pleasant to think about. The number nine would the, according to Chang, perhaps be better.

[1444] Chang (2002), pp. 660-661. See also Chang (1997), p. 4. In her works, Chang primarily deals with decision-making regarding short-term or long-term personal choices (examples she usually gives are choosing between two careers or ways to spend a day and similar examples), with the aim of providing a justification for the choice chose between the two alternatives.

[1445] Chang (1997), pp. 4-5. Boot (2009), p. 76 states that "Chang regards parity as fourth relation of comparability, in addition to the standard value relations, 'better than', 'worse than', and 'equally good as'. She suggests that the preservation of comparability in the case of parity secures the possibility of a rationally justified choice.

"(…) the logical space of positive value relations for any two items is exhausted by the trichotomy of relations *better than*, *worse than*, and *equally good*."[1446]

The existence of parity as *sui generis*, fourth value relation is defended by Chang with a three-stage argument:

(1) First, using the *Small Improvement Argument*, Chang argues that there are items that are not related by the traditional trichotomy of relations.[1447]

(2) Second, by examining the *Pareto Argument*, Chang argues that there are at least some items between which the trichotomy does not hold, but which are nevertheless comparable. Thus, as she argues, there are comparable items that are neither better than one another nor equally good.[1448]

(3) Third, Chang defends the first two arguments by rejecting the *Vagueness argument* and arguing that the comparatives at issue are not vague. She does this by distinguishing hard cases from borderline cases.[1449]

Evaluative difference between two items (how the items differ with respect to the covering value) is understood by Chang along two axes: *magnitude* (the difference is zero or

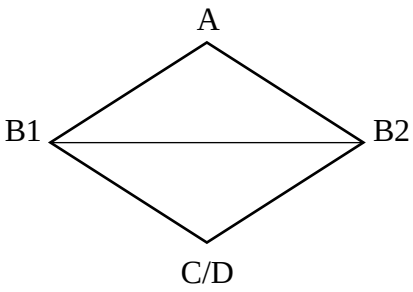
[1446] Chang (1997), p. 4. Chang argues that there exists a fourth positive value relation, 'on a par', which, together with the three mentioned relation (better than, worse than, and equally good) exhausts the logical space of comparability between the two items.

[1447] The argument from Chang (2015a), p. 128 goes as follows: Take two evaluatively diverse items, *r* and *s* to compare. A spectrum of r-items can be imagined by adding or subtracting from r (for example, dollars from a wage in a certain career, such as lawyer). If we add enough, we get an r+ item which is better than s, and if we subtract enough, we get an r- item which is worse than s. Chang argues that by adding a dollar a choice between two careers, compared with respect to the wages, cannot make a difference. Therefore, she argues that there must be an item r* in the spectrum of r+ and r- that is neither better nor worse than s. From the perspective of trichotomy thesis, this relation seems to be "equally good". But this cannot be true, according to Chang, "for if we add fifty cents to r*, we get an item that is better than s; if we take away fifty cents from r*, we get an item that is worse than s. And the difference between r*-plus-fifty-cents, which is better than s, and r*-minus-fifty-cents, which is worse than s, is a dollar. Thus, r* and s cannot be equally good." Chang (2015a), p. 136 rejects the objection that this approach generates a sorites paradox, by arguing that it does not, when iterated, "provide what is needed to generate a sorites paradox, namely that there is no amount of added dollars that could make r better than s."

[1448] This argument from Chang (2015a), p. 135, goes as follows: If *P* (philosophical career) is comparable with something that differs from *L* (legal career) only by being Pareto-better or Pareto-worse, P is comparable with L. Thus, given that P is comparable with L+ and L-, P is comparable with L. It is plausible to think that P is comparable with L+. Chang supports this claim by arguing that we could detract from P until we find some P- that is unequivocally comparable with L+. If P- is comparable with L+, P is comparable with L. Chang concludes by stating that if we assume that P and L are (determinately) not related by the trichotomy, they must be related by some fourth value relation beyond the traditional trichotomy.

[1449] The third argument from Chang (2015a), pp. 137-139 rejects the claim that hard cases are cases of borderline application of predicates. The claim goes that just as a person can be borderline case of "bald", the legal career and philosophical career are a borderline case of "better than with respect to goodness as career". Chang argues that borderline cases, "we are willing to judge that the predicate applies, but also that it does not apply", while in hard cases, "the evidence we have inclines us to the judgment that one item is *not* better than the other (and not worse than and not equally good)." The difference, according to Chang, is that the resolution of borderline cases is a matter of arbitrary situation, while the resolution of hard cases cannot be a matter of arbitrary stipulation but is "a substantive matter concerning which *is* better."

nonzero) and *direction* (the difference is biased or unbiased).[1450] The traditional trichotomy of relations is explained by these two axes: one of the items is better than the other if the difference is nonzero and biased; if instead the difference is zero (and therefore unbiased), the items are equally good. Chang argues that we should not rule out the possibility of *nonzero, unbiased* differences, and holds that such items are on a par. Such differences are akin to zero differences in the sense that they are unbiased, but they are also akin to biased differences in that they have magnitude, Chang argues. This idea is supported with examples, all based on the idea of a "sufficiently small difference" between the two items that results in the decision not to deliberate between them.[1451] The fourth value relation ("Diamond Picture of Broad Comparability") is illustrated by Chang:[1452]



With respect to the numerical representation of the evaluative differences between items compared, Chang distinguishes firstly between, *mere ordinality*, secondly, *precise cardinality*, and thirdly, *imprecise cardinality*.[1453] Following Derek Parfit's idea, she argues for imprecise cardinality, according to which the imprecision is in the ratio by which items are related:

[1450] Chang (2015a), pp. 141-142. A difference is biased "if it favors one item and, correspondingly, disfavors the other (i.e., if there is a difference between the difference between A and B and the difference between B and A. A zero difference, then, must be unbiased."

[1451] Chang (2015a), p. 142 gives the following examples. We might want to know the nonzero, unbiased difference between the length of two novels or in price between two kitchen appliances or in mass between two heavenly bodies.

[1452] Chang (2015a), p. 144. As Chang explains the picture: "A is better than B_1, B_2, C and D. C and D are equally good. C/D are worse than B_1, B_2 and A. B_1 and B_2 are on a par." The picture is an adaptation from Morton (1991), pp. 34-35, who uses the diamond structure to illustrate comparability to support the Trichotomy Thesis.

[1453] Chang (2015a), pp. 25-33. An example for *mere ordinality* Chang gives is the Mohs scale of mineral hardness, a comparative criterion for hardness of minerals: x is harder than y just in case x scratches y and is not scratched by y, and x and y are equally hard if neither scratches the other or they both scratch one another. If Mohs scale is applied to three minerals, as Chang continues, we will end up with a ranked list of these minerals according to their relative hardness. But from this ranking, we would not have further information about the comparative hardness of the items. *Precise cardinality*, on the other hand, can be either *ratio cardinal* (x is twice as good as y) or *interval cardinal* (difference between x and y with respect to V is 5 p-units, if x is 10 p-units, and y is 5 p-units).

> "…instead of saying that x is precisely twice as good as y, we say that x is between two and three times as good as y."[1454]

Parity is understood as imprecise cardinal equality; however, it differs from "equally good" in the sense that "equally good" is transitive, whereas "on a par" is not.[1455] We conclude the subsection with the consequence of the idea of parity. Chang argues by rejecting the trichotomy thesis and arguing for the existence of parity, understood as *sui generis* fourth value relation, that we should be *tetrachotomists* and not *trichotomists* with respect to the structure of normativity.[1456] In the next subsection, we will apply Chang's ideas to the question of apparent conflicts between fundamental rights before moving on to the comparativist proposal and its theoretical framework and application.

III. 5. 3. 3. Conflicts between fundamental rights

Chang takes an explicitly *conflictivist* approach when it comes to conflicts between values, advocating the position of value pluralism.[1457] Values inevitably come into conflict, and it is up to practical reason to determine what would be the rational resolution of a conflict. This leads us to the notion of hard cases. By hard cases, Chang means cases that

> "…involve two evaluatively diverse items and a covering consideration such that one of the items is better in some respects of the covering situation while the other item is better in others, and yet there is no obvious truth about how the items compare with respect to the covering consideration."[1458]

By analysing some instances of comparison in *hard cases*, Chang argues that the so-called *trichotomy thesis* is false and that there is a fourth value relation of comparability which she calls the relation 'on a par' or 'parity'.[1459] Three types of hard cases are distinguished:[1460]

(1) *"Chalk and cheese" type hard cases*. These are cases that involve items belonging to fundamentally different categories. Chang argues that these are not cases of incomparability, but of noncomparability.

[1454] Chang (2015a), p. 32, arguing that both mere ordinality and precise cardinality are not satisfactory accounts: "There is more than mere ordinality to comparisons, but there is not as much as precise cardinality; typical evaluative comparisons are neither merely ordinal nor precisely cardinal. What we need is something stronger that mere ordinality and weaker than precise cardinality, namely, *imprecise cardinality*."
[1455] Chang (2015a), p. 145. As Chang argues, most comparisons are imprecisely cardinal, and "better than" and "worse than" can be understood also as imprecisely cardinal relation, but "equally good" cannot, since if two items are equally good, their difference has no magnitude, precise or imprecise.
[1456] Chang (2017), p. 16.
[1457] Chang (2015d), pp. 21-26, for value pluralism. On the explicit conflictivist position, see Chang (2004b), pp. 118-121 and Chang (2009), p. 138ff.
[1458] Chang (2002), p. 679.
[1459] Chang (2002), pp. 659-662.
[1460] Chang (2015a), p. xix.

(2) *"Friendship and money" type hard cases*. These are cases that involve items that constitutively require different "attitudes of valuing". Chang argues that these items are emphatically comparable.

(3) *"Beethoven and Picasso" type hard cases*. The most important type of hard cases involves items that belong to the same category of item but are nevertheless so different that it seems that they cannot be compared. Chang argues that in these cases the items are related by *sui generis*, fourth value relation, which she calls parity. Two alternatives (or items) can be compared without any of the trichotomy relations holding between them: if A is neither better nor worse than B, and A and B are not equally good, A and B may nevertheless be comparable by being 'on a par'.[1461] This is the case when the two alternatives are neither better nor worse than one another, but a small improvement in one does not make it better than the other.[1462]

A conflict between fundamental rights can be understood, if we use Ruth Chang's terminology, as a *choice situation*.[1463] We have seen that a choice situation is defined as "any actual or possible situation in which an agent must choose only one of a multiple, but finite, number of available alternatives".[1464] A commonly used example of a conflict between the freedom of expression and the right to honour (or a conflict between two other conflicting fundamental rights) presents a choice situation for a judge who must decide how to resolve the case. According to the comparativist view, all choice situations are comparable.[1465] From the comparativist viewpoint, it is the fact that x stands in a certain relation with y with respect to choice value V that determines which of the alternatives ought to be rationally chosen.[1466] The justified choice is thus determined by a "comparative fact about the alternatives with respect to the value at stake in the choice situation".[1467] According to Chang, what matters in resolving a conflict between values is how they relate to each other in the context of the choice, not how they relate to each other metaphysically.[1468] Thus, it can be argued that conflicts (between fundamental rights) are understood as conflicts *in concreto*.

[1461] Chang (1998), pp. 661-662.
[1462] Chang (1997), pp. 25-26. However, "equally good" seems to be the same thing as "being on a par". We will elaborate this point in section III. 5. 5. 1., in which criticism of Chang's theory is presented.
[1463] Chang (1997), p. 7.
[1464] Chang (1998), p. 1574.
[1465] Chang (1997), p. 8. On comparativism, see also Chang (1998), p. 1572, where she writes: "In particular, I defend a view of practical justification according to which a comparative fact about the alternatives determines which alternative one is justified in choosing. Call this view *comparativism*."
[1466] Chang (1998), p. 1577.
[1467] Chang (1998), p. 1596.
[1468] Chang (2015d), p. 25.

On the comparativist view, the alternatives are always comparable in terms of what matters in the choice, and no matter how challenging the situation, practical reason can in principle determine a justified choice.[1469] In the following subsection, we will present an adaptation of Chang's ideas and see how a justified choice can be made in the case of a conflict between fundamental rights.

III. 5. 4. Comparativist proposal

In this section, Ruth Chang's ideas will be applied to the problem of conflicts between fundamental rights. First, her ideas are adapted to the legal context and a theoretical framework for dealing with the conflicts is presented. Then, her approach is presented using a non-legal situation that she repeatedly uses as an example in her work: a choice between two careers, that of a lawyer and that of a philosopher. This is followed by the application of her approach to the case we use as a 'comparison' case – the 1992 Federal Constitutional Court *Titanic case*.

III. 5. 4. 1. Theoretical framework

Since Ruth Chang did not apply her ideas to the issue of conflicts between fundamental rights, a reconstruction and adaptation of her theory is necessary to make it applicable to the issue with which we are dealing with. Chang also pointed out that her ideas can be applied to the problem we are dealing with:

> "But the key idea behind the proposal is that *resolution of conflicts between any type of considerations* – whether they be values, desires, reasons, ends, and so on – holds in virtue of a more comprehensive consideration that includes the conflicting considerations as parts."[1470] [emphasis added].

I suggest that Ruth Chang's *comparativist* approach can be adapted for resolving conflicts between fundamental rights in four steps.

(1) In the first step, it is necessary to clarify the *choice situation* with which we are faced with. A choice situation in the context of conflicts between fundamental rights is one in which a judge must choose one of the available alternatives. This first step is simple and consists in declaration that in the concrete case the judge decides upon, two fundamental rights are in conflict. An example can be a constitutional court review case in which restrictions on the sales of tobacco in vending machines were imposed by a statute. Such statute protects public

[1469] Chang (1998), p. 1598.
[1470] Chang (2004b), p. 120.

health, but at the same time, infringes freedom of conducting business.[1471] The judge is then faced with two alternatives: declare the law constitutional or declare it unconstitutional. Any other situation in which a particular action protects one fundamental right and violates the other (for example, certain expression which infringes one's personality right) can be understood as such a choice situation in which the judge must choose one of the alternatives. The alternatives in such a conflict would be the prohibition or permission of the expression.

(2) In the second step, it is necessary to determine the *covering value* in relation to which the comparison and the decision are made in the choice situation the judge is faced with. We have seen that Chang argues that every choice situation is governed by a value that she calls covering (or choice) value. It was also explained that her initial definition of comparativism was based on the idea of covering value. Comparativism was defined as a view according to which a comparison of alternatives with respect to an appropriate covering value determines the choice of one of the alternatives as justified. Covering values have multiple contributory values. A common example given by Chang is the choice between two candidates for a position in a philosophy department. A covering value of philosophical talent (according to which the choice between candidates is to be made) can be understood as consisting of contributory values of originality, clarity of thought, thoughtfulness (but also others). Once the contributory values to the covering value have been established, the alternatives are compared against each other based on these values. Chang's idea is that the importance of a particular contributory value (i.e., its contribution to the covering value relative to other contributory values) ultimately determines the ranking of the alternatives. Covering value, as a more comprehensive value that includes multiple contributory values, often does not have a name.[1472] In fact, the decision according to the *covering value* is understood by Chang as an *all-things-considered judgment*. In the context of the comparison between two philosophers, Chang argues that

> "For example, in the all-too-familiar task of evaluating philosophers for a job, one might judge that philosopher #1 is more original and insightful that philosopher #2, that philosopher #2 is clearer and more historically sensitive than philosopher #1, but that, all things considered, philosopher #1 is better.

[1471] This example is mentioned by Burazin (2018), pp. 113-114, referring to a 2015 constitutional court review case from Croatia: Decision of the Constitutional Court of the Republic of Croatia, U-I-4537/2013 and U-I-4686/2013 of April 21st 2015.

[1472] Chang (2004a), p. 3, arguing that "…if, as I claim, there is a more comprehensive value that includes, say, cost, taste, and healthfulness as parts, what is it? Here my proposal may seem to get curiouser and curiouser. I believe that, in many cases in which the considerations relevant to the all-things-considered judgment are very different, *the more comprehensive value that accounts for their normative relations has no name*." [emphasis added]

Here, 'all things considered' is a placeholder for a value – philosophical talent – that has the things considered – (philosophical) originality, insightfulness, clarity, historical sensitivity – as parts, and it is in virtue of this more comprehensive value that originality counts for so much as against historical sensitivity, and so on." [1473] [emphasis added]

This is the most difficult among the four steps, since there is no clear indication in Chang's work of how to determine the covering value, its content, and its structure (i.e., the contributory values and their contribution to the covering value).[1474] But it serves to illustrate her idea: the choice between alternatives A and B should be made by *all-things considered judgment*, i.e., by comparing the alternatives in terms of the contributory values of the covering value.

(3) The third step is to determine the *evaluative difference* between the alternatives. This is done by evaluating the alternatives in terms of each of the contributory values. As mentioned earlier, the alternatives at hand differ with respect to the covering value along two axes: *magnitude* (the difference is zero or nonzero) and *direction* (the difference is biased or unbiased).[1475] The traditional trichotomy of relations is explained by these two axes: one of the items is better than the other if the difference is nonzero and biased; if the difference is instead zero (and thus unbiased), the items are equally good. Chang argues that we should not rule out the possibility of *nonzero, unbiased* differences, and holds that such items are on a par. With this idea, she rejects the trichotomy thesis and argues for a tetrachotomy thesis with respect to the structure of normativity. This tetrachotomy with respect to possible value relations between two items between which a choice is made can be illustrated as follows:

Magnitude of evaluative difference	Direction of evaluative difference	Relation between items
nonzero	biased	better than / worse than

[1473] Chang (2004a), p. 3. Chang further explains her view that an all-things-considered judgment is a placeholder for the covering value: "My suggestion is that even when the things considered appear to be very different – cost, taste, and healthfulness; utility and maximin; simplicity and explanatory power – an all-things-considered judgment that gives each of these considerations its proper due does so in virtue of a more comprehensive value that has the things considered as parts. *If my proposal is correct, then, as a general matter, 'all things considered' is a placeholder for a more comprehensive value that determines the relative importance of the things considered*." [emphasis added]

[1474] Chang argues that alternatives which might seem incomparable at first can be compared by referring to a covering value. Examples of comparisons she gives are comparison between apples and oranges or the comparison between samurai code of honour and Protestant work ethic. In the first case, oranges are better with regards to 'preventing scurvy', while in the second case, Protestant work ethic is better with regards to creating wealth. See Chang (1997), p. 7. On the problem of establishing covering value, see Da Silva (2011), p. 284.

[1475] Chang (2015a), pp. 141-142. A difference is biased "if it favors one item and, correspondingly, disfavors the other (i.e., if there is a difference between the difference between A and B and the difference between B and A. A zero difference, then, must be unbiased."

zero	unbiased	equally good
nonzero	unbiased	on a par

(4) In the fourth and final step, the judge makes an *all-things-considered judgment* and selects one of the alternatives based on the covering value of the comparison and the evaluative difference between the alternatives with regards to the covering value. Three relations between the alternatives are possible: first, that one of the alternatives is better than the other; second, that the alternatives are equally good; and third, that the alternatives are on a par. In the first situation, it is clear that the alternative that is considered "better than" should be chosen. What interests us here, however, are the other two situations (and the difference between them). Chang holds that in the second situation – when choosing between the alternatives that are "equally good", the alternatives are the same and it does not matter which one is chosen:

> "And if alternatives are equally good, practical reason tells us that it does not matter which alternative we choose, for the alternatives are, with respect to whatever matters to the choice, exactly the same."[1476]

In the context of a judicial decision, this would mean that the judge would have the complete discretion in choosing between the alternatives. Given that the covering value of a comparison consists of multiple contributory values, the "equally good" situation does not seem likely, since the alternatives would have to be "equally good" with respect to each contributory value.

In the third case, to resolve "on a par" situation, the decision involves taking a "substantive position" regarding the contributory values. In the example of choosing between two careers:

> "By choosing one career over the other, one "declares" a substantive position regarding the contributory values of "goodness as a career". In other words, favoring one understanding of the covering value predicate over another involves taking a substantive position on how the various contributory values of the covering value should be "weighed". Taking this substantive stand has only *practical* and not theoretical import. For the theoretical truth is that the predicate admits of multiple legitimate understandings. (…) Given my substantive stand, the determination of which of two items on a par I should choose follows. The stand I take in one case may have implication for future choices I make."[1477]

The situation "on a par", in the context of conflicts between fundamental rights seems to resemble situations where there are no criteria for resolving the conflict and the only way to resolve it is for the judge to take a substantive position on the rights in question. In such

[1476] Chang (2015a), p. 171.
[1477] Chang (2015a), p. 172.

situations, the judge would have discretion, but a substantive position regarding the contributory values would have to be expressed, as this is the factor on which the decision (the choice between alternatives) is made.

III. 5. 4. 2. Application

III. 5. 4. 2. 1. A non-legal example: a choice between two candidates

Let us begin with an example that Ruth Chang uses throughout her work to illustrate her approach. It involves a choice between two candidates for a position in the philosophy department.[1478] Although the example is relatively simple and non-legal, it captures Chang's ideas regarding decision-making and choosing between alternatives and serves to illustrate her approach before we apply it to the *Titanic* case. The reconstruction is rudimentary because Chang did not apply her approach in the context of judicial decisions, but it serves to illustrate her idea of choice between alternatives.

(1) In the first step, we establish the *choice situation*. This step is quite simple in this example because we are faced with a choice between candidate A and candidate B, and only one of them can be chosen. In Chang's example, two candidates, Eunice and Janice are competing for a position in the philosophy department and only one of them can be chosen.

(2) The second step is to determine the *covering value* with respect to which the comparison will be made. In the example with Eunice and Janice, Chang suggests *philosophical talent* for covering value. The covering value of philosophical talent, she continues, has multiple *contributory values*. Chang suggests three contributory values: originality, clarity of thought, and historical sensitivity.[1479] This suggestion is used by Chang to illustrate her idea, as she points out that other contributory values to the covering value of philosophical talent can be taken into consideration. Philosophical talent is, of course, a vague concept, and there are multiple ways to understand it.[1480] Chang suggests one way of ranking contributions of the three values. According to this ranking, originality would make the greatest contribution to the covering value of philosophical talent, followed by clarity of thought, and finally, historical sensitivity.[1481]

[1478] For the example, see Chang (1997), pp. 22-23 and Chang (2015a), pp. 5-9.
[1479] Chang (2015a), pp. 6-7.
[1480] Chang (1997), p. 22. In another reference to the basically same example, Chang (2004a), p. 7, mentions 'flair', 'originality' and 'clarity' as contributory values to the covering value of 'philosophical promise'.
[1481] Chang (2015a), pp. 6-7, where she suggests the following: "Take for example, philosophical talent. Its content is not given merely by its contributory values of originality, creativity, clarity of thought, insightfulness, historical sensitivity, style, and so on; philosophical talent has a structure. That structure can be roughly described by comparisons of its contributory value with respect to the greatness of their contribution to philosophical talent.

(3) The third step is to establish the *evaluative difference* between the alternatives with respect to the contributory values. In this case, but also in general, we do not have a method for determining the contribution (importance) of each of the contributory value to the covering value. However, the general idea for choosing between the alternatives proposed by Chang can be reconstructed regardless of this. Depending on the importance assigned to each of the contributory values and taking into account the comparison of the alternatives with respect to each of the contributory values, the relation between the alternatives at hand (better than/worse than, equally good or on a par) is established. In the example given by Chang if Eunice is slightly better than Janice in terms of originality, worse than Janice in terms of clarity of thought, and better than Janice in terms of historical sensitivity, Eunice would be the better choice, i.e., the alternative to be selected.

(4) The fourth and final step is to make an *all-things-considered* judgment. If the relations between alternatives A and B (Eunice and Janice) in terms contributory values are as in the previous step, alternative A (Eunice) is to be chosen.

III. 5. 4. 2. 2. *Titanic case* (1992)

Having presented Chang's approach using a simple, non-legal example, we will now turn to the Federal Constitutional Court's *Titanic* case to suggest an application of her approach to that case. Since the details of the case have been presented, we now turn to the application of the proposal to the case.

(1) The first step is to define the *choice situation*. *Titanic* magazine filed a constitutional complaint regarding the fine it received from the lower court for calling a paraplegic reserve officer, first, a "born murderer" and, second, a "cripple". After receiving the complaint, the Federal Constitutional Court was faced with two choice situations, each of which consisted of two alternatives. The Court had to choose between fining the magazine (alternative A) or not fining the magazine (alternative B) in respect to each statement. By choosing to fine the magazine (alternative A), the Court gave priority to the norm protecting the officer's personality rights (Art. 2(1) of the Basic Law), while in deciding against a fine, it gave priority to the norm protecting the magazine's freedom of expression (Art. 5(1) of the Basic Law).[1482]

Originality makes a greater contribution to philosophical talent than does clarity of thought, which in turn makes a greater contribution than does historical sensitivity."

[1482] Art. 5(1) states that "Every person shall have the right freely to express and disseminate his opinions in speech, writing and pictures and to inform himself without hindrance from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films shall be guaranteed. There shall be no censorship." Art. 2(1) states that "Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law."

(2) The second step is to determine the *covering value* (and *contributory values*) in relation to which comparison between the alternatives is made. It was mentioned in section III. 5. 4. 1. that covering value can be nameless, and that an all-things-considered judgment can be a placeholder for the covering value. This all-things-considered judgment "is a placeholder for a more comprehensive value that determines the relative importance of the things considered."[1483] Before comparing the alternatives, the contributory values to the covering value of the comparison ('things considered') must be determined in order to have a point of comparison. This is the most discretionary part of Chang's proposal, as she herself points out that there are multiple legitimate ways to understand the covering value (and the contributory values as its components) and their importance (contribution) to the covering value. In order to adapt her ideas for the legal context and to limit the virtually unlimited set of possible contributory values, I propose two criteria that could be used in their selection. The first is the systematic interpretation of norms protecting conflicting fundamental rights and the second is previous court practice regarding the relationship between conflicting rights.[1484]

In the *Titanic* case, a simple reconstruction of the contributory values to the all-things-considered judgment could be as follows: first, (protection of) free expression; second, (protection of) personality rights; and third, (protection of) human dignity. The first two contributory values contribute equally to the all-things-considered decision because they are conflicting fundamental rights in a constitution that does not institute any explicit hierarchy between them. The conflicting fundamental rights would always be the first contributory values to the all-thing-considered judgment because the choice between alternatives is always made (at least) with respect to them. As a third contributory value to the all-things-considered judgment, human dignity can be proposed in this case. This value, protected by the Art. 1(1)

[1483] Chang (2004a), p. 3.

[1484] This suggestion is based on the proposal for the resolution of conflicts between fundamental rights suggested by Burazin (2018), pp. 114-116, based on the idea of *legal system's institutional history*. This proposal suggests reference to other norms that concretise the content of the conflicting fundamental rights and to previous court practice. Burazin (2018), pp. 114, writes that "…within every legal system constitutional fundamental right norms have as their manifestation *a whole set of statutory legal rules that reflect these norms and concretise their content*. (…) For example, the content of the right to privacy usually finds its expression in the form of, e.g., rules of a particular system's criminal code, family act and media act. Moreover, legal systems usually also provide for a number of legal rules regulating possible intersections between different fundamental rights norms. Thus, for example, defamation or libel law regulates one possible intersection between the right to free speech (freedom of expression) and the right to private life (right to protect one's reputation). (…) Moreover, *if in a legal system there exists already a certain court practice regarding the application of fundamental rights*, both the content of those rights and the regulation of some of their possible intersections are also manifested in the interpretation given to them by the relevant courts. It may thus be said that *in every legal system's institutional history*, in addition to guaranteeing the respect of fundamental rights through the enactment of abstract charter legal standards, concretises the content of fundamental rights through the enactment of explicit legal rules and provides for the regulation of at least some of their possible intersections." [emphasis added]

of the Basic Law, was considered by the Federal Constitutional Court (and it ultimately affected the Court's decision).[1485]

(3) In the third step, an *evaluative difference* between the alternatives in relation to the covering value must be established. In the first situation (with respect to the expression "born murderer"), not fining the magazine (alternative B) is better in relation to the protection of free expression, while fining the magazine (alternative A) is better in relation to the protection of personality rights. As for the third contributory value, one could argue (if one accepts the tetrachotomy thesis) that the alternatives A and B are on a par. This is because the expression "born murderer" was given in a satirical context and arguably expresses a political opinion (pacifism). The evaluative difference in terms of covering value would then be nonzero (since the alternatives are not equally good, see the table in section III. 5. 4. 1.), but also unbiased (since it does not favour one item and disfavour the other). Following the proposed theoretical framework, this would imply that the judge has discretion since legal system supposedly does not provide any guidance on how to resolve the conflict. The judge resolves the conflict by taking a substantive position on the rights in question (i.e., whether the freedom of expression or personality rights take precedence with respect to the expression "born murderer"). But if the alternatives here are on a par, the magazine arguably should not be fined because petitioner's claim is not declared "better than" the respondents. Therefore, not imposing a fine may be suggested as the preferred choice here. In the second situation (with respect to the expression "cripple"), the same two observations hold regarding the alternatives A and B and their relation to the first two contributory values. What makes the difference is the relationship to the third contributory value, the protection of human dignity. Fining the magazine (alternative A) is better in terms of protecting human dignity. Thus, if the first two contributory values are equally important in the all-things-considered judgment, the comparison of the

[1485] Art. 1(1) of the Basic Law states that "Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority." The inclusion of 'human dignity' as a contributory value to the all-things-considered judgment is based on the first among two criterions suggested: systematic interpretation of norms protecting conflicting fundamental rights. Human dignity, protected by Art. 1(1) of the Basic Law was also taken into consideration by the Federal Constitutional Court, along with articles protecting freedom of expression and personality rights. Constitutional provision protecting officer's personality rights (Art. 2(1) of the Basic Law) was interpreted "in conjunction" with the provision protecting human dignity of the officer. The Court considered the expression "cripple", in the context of Art. 1(1) of the Basic Law as "humiliating" and "showing lack of respect". See section I. 4. 2. 2. and Alexy's reconstruction of the case. The second criterion could be used if there was previous court practice relevant for the case. For example, if *Titanic* or any other (satirical) magazine previously used other expressions that supposedly violated someone's personality rights.

alternatives with respect to the third contributory value is decisive and results in alternative A being better than alternative B, all-things-considered.[1486]

(4) The fourth and final step is to make an *all-things-considered judgment* and select one of the alternatives based on the evaluative difference between the alternatives in relation to the covering value. With respect to the expression "born murderer", it would be not to fine the magazine, while with respect to the expression "cripple", it would be to fine the magazine.

This attempt to reconstruct and adapt Chang's proposal to the legal context can be subject to sound criticisms. There are (at least) two criticisms that can be pointed out: first, the criticism of the tetrachotomy thesis and the impossibility of a fourth value relation; and second, the problem of discretion in the selection of contributory values. Notwithstanding these criticisms (which we will discuss in more detail in the next section), I suggest that we can draw observations and conclusions that are useful for analysing and comparing different methods of resolving conflicts between fundamental rights (to which we will turn in more detail in the section on conclusions). They are related to the notion of incommensurability and the problem of selecting the *relevant* points on the basis of which the comparison and evaluation of conflicting fundamental rights is carried out.

III. 5. 5. Criticisms and conclusions

III. 5. 5. 1. Criticisms

The critique of Ruth Chang's ideas presented in this section focuses on two points: first, the idea of *covering value*, its content and structure, and second, Chang's rejection of the trichotomy thesis through the Small Improvement Argument and her proposal of *parity* as the fourth value relation. These two points were chosen for critique because of their importance in Chang's theory. Regarding the first point, the comparison and choice between the alternatives is made with reference to the covering value (and its contributory values). In this sense, the covering value is what determines and justifies the choice between alternatives (or the conflicting fundamental rights, if we apply it to the subject). Chang's comparativist proposal, as we have seen, presents an account of practical justification in which the justified choice is determined by the relation ('merit') of the alternatives to the covering value. As to the second point, the idea of parity or fourth value relation is the distinguishing feature of her theory and

[1486] The judge, of course, also takes a substantive position if he holds the view that fining the magazine is better in relation to the protection of human dignity.

the basis on which Chang develops her comparativist proposal and rejects the idea of incomparability.

According to Chang, a covering value, and the relationship between alternatives to the covering value is what justifies the choice between alternatives. It was mentioned in section III. 5. 4. 1. that covering values can be nameless and that an *all-things-considered judgment* can be a placeholder for the covering value. In fact, the decision according to the *covering value* is understood by Chang as an *all-things-considered judgment*. What is challenging in applying Chang's proposal is determining the content (the set of contributory values) and the structure (the importance of each contributory value to the covering value), since we have no criteria for how to determine them.[1487] We can say that we need a *thesis of relevance* to determine the contributory values to the covering value.[1488]

The choice between the alternatives in terms of covering value (or all-things-considered judgment) is made by determining the *value relations* between the alternatives. Chang distinguishes between *positive* and *negative* and *generic* and *specific* value relations (see section III. 5. 3. 1.). The first distinction is important because Chang builds her comparativist proposal on the notion of a positive value relation and understands incomparability as a relation between two items where there is no positive value relation.[1489] But a 'positive comparison' is at the same time a 'negative comparison', because saying that x is better than y also means that y is not better than x, which is an example of a 'negative comparison'. The second distinction also does not seem clear. As Chang points out, generic value relations presuppose a covering value, while specific value relations have their covering values already built in.[1490] However,

[1487] In the example where a choice between two candidates for a position in a philosophy department must be made, the content and the structure of the covering value (philosophical talent) and the importance (rankings) between contributory values vary. As Chang (1997), p. 22 concedes: "Take for example, a comparison between Eunice and Janice with respect to philosophical talent. There are multiple contributory values of philosophical talent: originality, insightfulness, clarity of thought, and so on. But perhaps there is no single correct way to 'weigh' these aspects of philosophical talent: *each contributory value contributes to the covering value in multiple, alternative ways*. Put differently, there are different ways we can 'sharpen' our understanding of the covering value." [emphasis added] With regards to the covering value 'philosophical talent', Chang (2015a), pp. 6-7 suggests 'originality', 'clarity of thought' and 'historical sensitivity' as the contributory values. But she also suggested a different structure of the covering value of philosophical talent, including 'flair', 'originality' and 'clarity'. See Chang (2004a), p. 7.

[1488] Cf. with section II. 3. 5. 1. and section II. 5. 5. 1., where the same criticism was mentioned as relevant for the proposals of José Juan Moreso and Susan Lynn Hurley.

[1489] Chang (1997), p. 2 and p. 4. See also Chang (2015a), p. xvii.

[1490] Chang (2015a), pp. 3-4, explains the idea: "Generic relations, like "better than", "as valuable as," and "worse than," presuppose a covering value. (…) Specific value relations, like "kinder than," "as cruel as," and "tawdrier than", have their covering values built in. It is plausible to suppose (as implied by the Trichotomy Thesis) that every specific value relation has a relativized generic equivalent; "kinder than," for example, is equivalent to "better than with respect to kindness." Thus, we can dispense with talk of specific value relations in favour of their relativized generic counterparts. "Comparison" and "value relation" shall refer to their generic, positive varieties."

the distinction between positive and negative, or generic and specific value relations seems to be merely a matter of formulation, since in both pairs a given value relation can be formulated as the opposite. For example, when we say that alternative A is "cheaper than" alternative B, we express a positive and a specific value relation. If we consider 'cheapness' as the decisive contributory value to the covering value (in an all-things-considered judgment) of the concrete case of comparison, we are stating that the alternative A should be chosen on the basis of this particular value relation. But this value relation can be at the same time expressed as a negative and a generic value relation, by stating that alternative B is "not better than with respect to cheapness" than alternative A. In this sense, the purpose and role of the two distinctions is unclear.

As for the possibility of parity or a fourth value relation, I will argue against the rejection of trichotomy by challenging the Small Improvements Argument that Chang presented in Section III. 5. 3. 2. Mathematically, there are >, <, or =. If one of the relations is negated, we have a disjunction of the other two; there seems to be no room for a fourth "internal" relation. In fact, the only fourth possibility seems to be "incomparable", with "equally good" and "on a par" being the same thing. Let us explain why. Chang's Small Improvements Argument is based on the idea that when we compare two items, for example wages in two careers, *r* and *s*, we can imagine a spectrum of r- items by adding or subtracting from r (e.g., dollars from a wage in certain career, such as lawyer). If we add enough, we get an r+ item which is better than s, and if we subtract enough, we get an r- item which is worse than s. The argument can be accepted for now, but it must be pointed out that the threshold for "better" and "worse" here depends entirely on a subjective value judgment, especially since Chang points out that an all-things-considered decision involves covering values that consists of multiple contributory values. Chang argues that adding a dollar to a wage, when faced with a choice between two careers (compared with respect to the wages) cannot make a difference.[1491] On this basis, she argues that there must be an item r* in the spectrum of r+ and r- that is neither better nor worse than s. From the perspective of the trichotomy thesis, this relation seems to be "equally good". But she argues that this cannot be true:

> "According to our intuition that a dollar can't make a difference, however, this is impossible. For if we add fifty cents to r*, we get an item that is better than s; if we take away fifty cents from r*, we get an item that is worse than s. And the difference between r*-plus-fifty-cents, which is better than s,

[1491] Chang (2015a), p. 128: "Now according to our abstract intuition, adding a dollar, pleasurable tingle, etc., cannot make a difference to whether one item is better or worse than another item evaluatively very different from it."

> and r*-minus-fifty-cents, which is worse than s, is a dollar. Thus, r* and s cannot be equally good. Therefore, we must reject the assumption that one of the trichotomy always holds; r* is not better than s, it is not worse than it, and the two are not equally good."

The Small Improvement Argument must be rejected because *any* addition to an item r, no matter how small it is, makes it *objectively better than* s with respect to wage in a given career. The wage in career r is higher, which may lead to an all-things-considered judgment that this alternative is to be chosen (depending on other contributory values). Chang seems to conflate value relation and the relevance of difference here. In this case, the difference might be considered negligible, but that is a purely *subjective* matter in certain choice situations (in this case, a career). But r, no matter how small improvement, ends up better than s. In the context of choice situations such as these, Small Improvement Argument might seem convincing in that it does not necessarily affect the choice, but it is hard to see how the argument challenges the trichotomy thesis and establishes a fourth value relation.

III. 5. 5. 2. Conclusions

In this final section, we will offer conclusions about Chang's ideas and their applicability in the context of the apparent conflicts between fundamental rights. The section begins with a presentation of a brief summary of Chang's position, her views on the basic notions we have presented (III. 5. 3.), and the proposal constructed from her ideas (III. 5. 4.). We will then conclude with an evaluation of the relevance and potential applicability of her ideas to the topic.

In her works, Ruth Chang attempts to provide an answer to the question regarding the grounds of the objectively rational choice. By analysing the notion of choice and the justification of choice, she aims to provide an answer to the question of how one can make rational decision in hard cases (III. 5. 1.). Her ideas are based on "comparativism", i.e. the rejection of the idea that some choice situations are incomparable. (III. 5. 3. 1.) In the comparativist account, what determines the justified choice between the alternatives is the appropriate *covering value* and the relationship of the alternatives to that value. The covering value with respect to which an evaluative comparison between alternatives is made consists of multiple *contributory values* that determine its content and structure.[1492] Chang rejects the

[1492] In the example commonly used by Chang that we often referred to, a choice between two candidates for a position in the philosophy department is made. According to Chang, this is a *choice situation* in which only one of the candidates can be chosen, and the comparison (and choice) should be made with respect to the *covering value*. The covering value suggested by Chang is philosophical talent, consisting of three *contributory values*: originality, clarity of thought and historical sensitivity. The first covering value makes the greatest contribution

trichotomy thesis, according to which the conceptual space of comparability between alternatives comprises three relations: 'better than', 'worse than', and 'equally good', and argues that there is a fourth *sui generis* possible value relation – parity, where the two alternatives are 'on a par' (III. 5. 3. 2.). Parity is understood as an imprecise cardinal equality, different from 'equally good' in the sense that 'equally' good is transitive, while 'on a par' is not. On the issue of apparent conflicts between fundamental rights, Chang takes a *conflictivist* approach. She argues that values inevitably come into conflict and that the role of practical reason is to determine the rational resolution of a conflict. Indeed, Chang uses the notion of *hard cases* to challenge the trichotomy thesis and argue that there is a fourth value relation (III. 5. 3. 3.).

We have suggested that Chang's ideas can be adapted for the problem we are dealing with by constructing a four-step procedure (III. 5. 4. 1.). In the first step, we understand a fundamental rights conflict, in Chang's terminology, as a *choice situation* in which a judge must choose one of the available alternatives. In the second step, a *covering value* in terms of which the comparison between the alternatives is made is determined, together with its structure and *contributory values*. In the third step, an *evaluative difference* between the alternatives is determined by evaluating the alternatives in terms of the covering values. In the fourth and final step, the judge makes an all-things considered judgment and selects one of the alternatives, i.e., conflicting fundamental rights to be protected. Chang's ideas suggest that at least in some cases (when the alternatives are on a par), legal reasoning cannot provide a rational solution to the conflict. Such an idea is also found in Manuel Atienza and his notion of "tragic cases" (II. 2. 3. 3.) and Lorenzo Zucca and his notion of "constitutional dilemmas" (III. 4. 3. 3. 2.)

The evaluation of Chang's ideas and their applicability in the context of the apparent conflicts between fundamental rights must refer to the idea of covering value, because that is what justifies the choice between alternatives. However, we do not have a criterion determining the content (the set of contributory values) and the structure (the importance of each covering value to the contributory value). A thesis of relevance, according to which the determination of the contributory values to the covering values is necessary. The same problem was addressed in the subchapters dealing with the proposals of José Juan Moreso (II. 3. 5. 1.) and Susan Lynn Hurley (II. 5. 5. 1).

to the covering value and so on. The three mentioned values form the content of the covering value, while their contributions to the covering value form the structure of the covering value.

The main problem with the applicability of Chang's ideas to the problem we are dealing with is her tetrachotomy position, i.e., the view that there is a fourth value relation – *parity*. This view is a distinctive feature of her proposal and distinguishes her from all the other authors we have previously analysed. According to this view, the relation between alternatives that are 'on a par' is different from the relation between alternatives that are 'equal'. However, as it was shown in the previous section with criticism, the rejection of the trichotomy thesis and the idea that there is a fourth value relation besides 'better than', 'worse than', and 'equally good' does not seem to hold.

However, Chang's ideas about the covering value, its content and structure, which determine which choice between alternatives is justified, when applied to the context of apparent conflicts between fundamental rights, show the importance of explicitly referring to the factors that determine the choice between alternatives in a concrete case. It represents an aim to develop an approach in which the choice between alternatives is made according to their merit (relationship) to an overarching covering value to which multiple values contribute.

CONCLUSIONS

The objective of this thesis was to provide an answer to the research question: *What are the legal methods of resolving apparent conflicts between fundamental rights and what are their merits in comparison to each other?* To answer the research question, we first analysed in Chapter I the main method that has been proposed as an answer to the problem – the Alexyan theory of judicial balancing. In Chapter II, we analysed five other, non-Alexyan theories of judicial balancing from Aharon Barak, Manuel Atienza, José Juan Moreso, Riccardo Guastini, and Susan Lynn Hurley. In Chapter III we presented five alternative, non-balancing methods from Ronald Dworkin, Luigi Ferrajoli, Juan Antonio García Amado, Lorenzo Zucca and Ruth Chang. The analysis of the different methods, each of which offers a possible answer to the problem of apparent conflicts between the fundamental rights we are dealing with, allows us to compare their strengths and weaknesses and to draw conclusions that will be presented in this last section.

Structurally, we will start with the presentation of the authors' position on the basic notions that we analysed. First, the theory of interpretation to which the authors adhere and their views on the purported difference between constitutional interpretation and the interpretation of other legal texts will be presented. Second, their understanding of the distinction between rules and principles is set forth. Third, the authors' position on the issue of

(apparent) conflicts between fundamental rights is given. This allows for easier comparison of the methods. The section ends with observations and conclusions on the research question.

The Alexyan theory of judicial balancing, which we analysed in Chapter I as the main method suggested as an answer to the problem, builds on the *mixed* or *intermediate* theory of interpretation and assumes that there is no difference between the interpretation of the constitution and the interpretation of other legal texts (I. 3. 1.). It is based on the *strong* (*qualitative* or *ontological*) distinction thesis between rules and principles (I. 3. 2). It is also a *conflictivist* theory, which holds a value pluralist and non-coherentist positions (I. 3. 3. 2.).

Aharon Barak's theory of judicial balancing, the first among the non-Alexyan theories of judicial balancing that we discussed in Chapter II, also follows the *mixed* or *intermediate* theory of interpretation, but holds that there is a difference between interpreting the constitution and interpreting other legal texts (II. 1. 3. 1.). It also advocates the *strong* distinction thesis between rules and principles (II. 1. 3. 2. 1.) and a *conflictivist*, value pluralist and non-coherentist position (II. 1. 3. 3.). Manuel Atienza's theory of judicial balancing, the second one that we analyse in Chapter II, follows a *cognitivist* theory of interpretation and assumes that there is a difference between the interpretation of the constitution and the interpretation of other legal texts (II. 2. 3. 1.). In relation to the distinction between norms, it relies on the *strong* distinction thesis (II. 2. 3. 2.), and in relation to fundamental rights conflicts, it is characterised by a *conflictivist*, value pluralist and non-coherentist position (II. 2. 3. 3). The theory of judicial balancing developed by José Juan Moreso (specificationism) follows the *mixed* or *intermediate* theory of interpretation and sees no difference between the interpretation of constitutions and the interpretation of other legal texts (II. 3. 3. 1.). As far as the distinction between the norms is concerned, the theory differs from previously presented ones, as the author advocates a *weak* (*quantitative*) distinction thesis in relation to rules and principles (II. 3. 3. 2.). In terms of fundamental rights conflicts, it is a *conflictivist*, value pluralist and non-coherentist theory (II. 3. 3. 3.). Riccardo Guastini's theory of judicial balancing stands out, characterised by the authors' *sceptical* theory of interpretation (II. 4. 3. 1.). The distinction between rules and principles is understood as *weak* (*quantitative*) (II. 4. 3. 2.), while the author's position on fundamental rights conflicts is a *conflictivist* one, with a value pluralist and non-coherentist view (II. 4. 3. 3.). Finally, the last non-Alexyan theory of judicial balancing analysed in Chapter II, that of philosopher Susan Lynn Hurley, adapted for the legal context by David Martínez-Zorrilla, follows a *mixed* theory of interpretation (II. 5. 3. 1.). Hurley did not address the issue of norms, so her views on coherence, a central concept in her theory, were presented (II. 5. 3.

2.). She did, however, present her views, which indicate that she he takes a *conflictivist*, value pluralist and non-coherentist view with respect to fundamental rights conflicts (II. 5. 3. 3.).

Chapter II groups together authors who do not initially seem to have much in common in their approaches to the problem we are dealing with. As it was previously mentioned, the inclusion of Riccardo Guastini in this chapter, when compared with authors such as Manuel Atienza, could be contested. However, we have shown that all authors from Chapter II provide us with different answers to the research question presented at the beginning of the chapter: *What is judicial balancing?* In this sense, the authors offer us different perspectives and understandings of the same issue. They explain how judicial balancing *should be* done or how it *is* done. Therefore, the answers provided to the research question range from normative doctrines with different prescriptive elements to descriptive theories of legal reasoning. What is gained by such approach is better understanding of the subject of the thesis – apparent conflicts between fundamental rights – through better understanding of one of the possible legal methods that have been suggested as an answer to the problem.

Among the alternative, non-balancing methods suggested as an answer to the problem of fundamental rights conflicts to which we turned in Chapter III, we began with Ronald Dworkin and his proposal. Dworkin is a proponent of a *cognitivist* theory of interpretation and argues that there is a difference between interpreting constitution and interpreting other legal texts (III. 1. 3. 1.). As for the distinction between rules and principles, he advocates the *strong* distinction thesis (III. 1. 3. 2.). As for the issue of fundamental rights conflicts, he advocates a *non-conflictivist*, value monist and coherentist position (III. 1. 3. 3.). The second author whose ideas were presented, Luigi Ferrajoli, is a proponent of the *mixed* theory of interpretation and considers that there are no differences between the interpretation of constitutions and the interpretation of other legal texts (III. 2. 3. 1.). On the issue of rules and principles, he takes a third position, namely, that there are no solid grounds for distinguishing between rules and principles (III. 2. 3. 2.). On the issue of fundamental rights conflicts, he also takes a *non-conflictivist*, value monist and coherentist position (III. 2. 3. 3.). The third alternative, non-balancing approach – the interpretative-subsumptive method of Juan Antonio García Amado – is based on the *mixed* theory of interpretation and the view that there is no difference between the interpretation of constitutions and the interpretation of other legal texts (III. 3. 3. 1.). García Amado advocates the *weak* distinction thesis between rules and principles (III. 3. 3. 2.) and a *conflictivist*, value pluralist and non-coherentist position in relation to fundamental rights conflicts (III. 3. 3. 3.). Lorenzo Zucca's proposal follows the same positions regarding interpretation, i.e., the *mixed* theory and the position according to which there is no difference

between the interpretation of the constitution and the interpretation of other legal texts (III. 4. 3. 1.). With respect to the distinction between rules and principles, Zucca holds a *weak* distinction thesis (III. 4. 3. 2.), and with respect to fundamental rights conflicts, he is an advocate of a *conflictivist*, value pluralist and non-coherentist position (III. 4. 3. 3. 1.). Finally, Ruth Chang, the last author whose ideas were presented in Chapter III, as a philosopher, did not deal with interpretation and the distinction between norms. Instead, we have presented her views on the notions of incomparability (III. 5. 3. 1.) and parity (III. 5. 3. 2.) as the central notions in her theory. However, she has presented her ideas from which it is clear that she holds a *conflictivist*, value pluralist and non-coherentist position on fundamental rights conflicts (III. 5. 3. 3.).

Like Chapter II, Chapter III also includes some authors whose inclusion in the same chapter might seem unusual, particularly Ronald Dworkin and Luigi Ferrajoli. However, besides the explanation and justification why these authors are included in the chapter dealing with alternative, non-balancing methods, the authors have in common the dependence of their approaches on *other* norms of the legal system. Dworkin relies on his constructive interpretation and "moral reading" of the constitution (III. 1. 4. 1.), while Ferrajoli builds his proposal on systematic interpretation (III. 2. 4. 1.). Besides this only these two authors, among the authors presented in the thesis, take a non-conflictivist, value monist and coherentist position regarding the basic notions that were analysed.

There are also authors who have been analysed in separate chapters but whose approaches appear similar. Here, the differences between Alexy and Dworkin and Moreso and García Amado should be stressed out. Regarding Robert Alexy and Ronald Dworkin, the latter did influence former in the distinction between rules and principles. However, Alexy developed the idea of principles as optimization commands and his understanding of the notion "weight", which he incorporated into his weight formula. Besides this, the authors differ on their positions regarding interpretation and the question of conflicts between fundamental rights. Due to these differences (and the reasons justifying the inclusion of Ronald Dworkin under non-balancing approaches), the well-known influence of Dworkin on Alexy with regards to rules and principles does not seem sufficient to justify the inclusion of both authors together under theories of judicial balancing. The inclusion of Moreso and García Amado in different chapters is based on the position they take towards judicial balancing. While their approaches have many points in common (both authors are proponents of mixed theory of interpretation, holding that there are no differences between interpretation of constitution and interpretation of other legal texts, while also holding a weak distinction thesis between rules and principles, along with a

conflictivist position), the key difference is their understanding and attitude towards judicial balancing. José Juan Moreso developed what he calls 'specificationist' approach, as a variation on the 'proportionalist' approach of Robert Alexy. On the other hand, Juan Antonio García Amado, as one of the most vocal critics of judicial balancing, not only criticized its various aspects, but rejected it altogether as a method, both as developed by Robert Alexy, but also as elaborated by Manuel Atienza.

Having summarised the authors' positions, we turn to conclusions on the basic notions, followed by observations and conclusions on the methods themselves. With respect to interpretation, it has been pointed out that the prevailing view among the authors whose proposals have been presented is that of a mixed (intermediate or eclectic) theory of interpretation. We have also seen arguments according to which the cognitivist theory of interpretation does not seem plausible, and which suggest that it should be rejected. However, as Riccardo Guastini has argued, mixed theory of interpretation represents a tacit variant of the cognitivist theory of interpretation.[1493] He points out that interpretative statements lack truth value, i.e., they are not capable of truth or falsity, and as such, are not descriptive, but *ascriptive*.[1494] This means that any interpretative decision is an "act of will", which includes a choice between competing possibilities, and not an act of knowledge.[1495] If the claim that mixed theories of interpretation represent a tacit variant of cognitivism is accepted, we are left with two alternatives: cognitivism and scepticism. Faced with the choice between these two alternatives, the arguments presented in section III. 3. 4. 1. lead us to the rejection of cognitivism, but also to the challenging of prevailing mixed theory of interpretation in favour of interpretative scepticism. As for the question of the distinction between different types of norms, we have seen that the Alexyan theory of judicial balancing is built on the strong (qualitative or ontological) distinction between rules and principles. However, the criticisms that have been levelled against the different versions of the strong distinction thesis (both Alexyan, but also non-Alexyan, such as those of Barak, Atienza, or Dworkin) lead us to reject such a position.[1496] This is important because the strong distinction thesis, a pillar of Alexyan theory of judicial balancing, is rejected by the majority of the authors whose proposals we have

[1493] On this point, see Guastini (2006a), pp. 227-220 and section II. 4. 3. 1., in particular fn 720. The controversy between the theories, as he points out, does not revolve around the logical status of subsumptive statements, but around the logical status of interpretative statements and the question whether they can have truth values.
[1494] Guastini (2005b), p. 140.
[1495] Guastini (2005b), pp. 139-140.
[1496] This position is based on the criticisms of the strong distinction between rules and principles held by the authors mentioned. For these criticisms, see section I. 6. 1. 1. (for Alexy), II. 1. 5. 1. (for Barak), II. 2. 5. 1. (for Atienza) and III. 3. 5. 1. (for Dworkin)

presented in this work, but also by other influential authors.[1497] Indeed, the distinction between rules and principles seems to be a *weak* distinction (qualitative or of a degree), with no logical features that separate rules and principles into two ontologically distinct types of norms. Finally, as to the question of (apparent) conflicts between fundamental rights, the *conflictivist* view, which rejects the idea that conflicts are merely apparent, is the dominant one among the proposals we have analysed.[1498] This is an important observation, since the research question we deal with in this work presupposes an answer to the question whether conflicts between fundamental rights are merely apparent or not. Contemporary constitutions are characterised by *value pluralism*, and it has been argued that the possibility of conflicts arising from the plurality of fundamental rights is a "structural" feature of contemporary constitutions.[1499] Conflicts between fundamental rights are understood to have the structure of partial-partial conflicts *in concreto*.[1500]

Finally, we come to the observations and conclusions regarding the theoretical framework of the approaches we have presented in this work. The Alexyan theory of judicial balancing, which has been proposed as the main method for the resolving fundamental rights conflicts, is based on the distinction between rules and principles which does not seem to hold. According to Alexyan strong distinction between rules and principles, rules are applied by subsumption, while principles are applied by *balancing*. The criticism of the idea of principles as "optimization commands" – that is, norms that can be fulfilled to a degree that was presented leads us to conclude that rules and principles are not *logically* different types of norms. The method of judicial balancing, as understood by Alexy, depends on the metaphorical notion of "weight". The explanation of this metaphor, which is necessary to understand the concept, is offered by the Weight formula, in which numerical values are assigned to the factors in the equation. As indicated earlier, however, the assignment of numerical values is problematic because it allows for a greater degree of judicial discretion, while the Weight formula operates with numerical values in an insignificant way. As such, it cannot be taken as an illustration of

[1497] The strong distinction thesis is rejected by José Juan Moreso (II. 3.), Riccardo Guastini (II. 4.), Luigi Ferrajoli (III. 2.), Juan Antonio García Amado (III. 3.) and Lorenzo Zucca (III. 4.), but also by authors such as Paolo Comanducci, H. L. A. Hart, Neil MacCormick, Andrei Marmor and Joseph Raz. See fn 320. A summary of such position and its main ideas is given in Pino (2009), pp. 133-145.
[1498] The proposals from Ronald Dworkin (III. 1.) and Luigi Ferrajoli (III. 2.) represent non-conflictivist positions.
[1499] Pino (2010a), p. 291. On this point, see also sections III. 2. 5. 1. and III. 2. 5. 2.
[1500] See Duarte (2010), pp. 57-58, Guastini (2006b), p. 157, Martínez Zorrilla (2011b), pp. 129-131 and section II. 4. 3. 3.

a rational decision procedure.[1501] The idea that legal principles have a "measurable" weight has also been criticized as a logically unmeaningful metaphysical assumption about an alleged property of legal principles.[1502]

To overcome these weaknesses of the Alexyan theory of judicial balancing other, non-Alexyan methods of resolving conflicts between fundamental rights have raised certain points that we now turn to. As Manuel Atienza argues, judicial balancing consists in giving priority to one of the conflicting principles in the concrete situation under certain *circumstances* (II. 2. 4. 1.). This view is also held by Robert Alexy in the presentation of his Law of Competing Principles, and his reconstruction of the *Heart attack* case and *Lebach* case (I. 3. 3. 2.). However, when exemplifying his theory with other, more well-known examples (such as the *Cannabis* and *Titanic* case), and in majority of his work, Robert Alexy focuses on the use of the Weight formula. This represents a transition to a metaphorical explanation of the resolution of the conflicts between fundamental rights: the reference is made to abstract and concrete "weights" of conflicting principles that determine which of the conflicting fundamental rights takes precedence, as compared to the *circumstances* in which one of the conflicting principles takes precedence. The role of *circumstances* in determining which of the conflicting principles will take precedence is highlighted by José Juan Moreso, whose specificationist proposal is based on the paradigmatic cases used to determine the *relevant properties* that determine the resolution of the conflict. The absence or presence of these relevant properties leads to different normative solutions of the conflict between fundamental rights that we face (II. 3. 4. 1.). The idea of paradigmatic cases is also found in Susan Hurley's deliberative process, whose goal is to formulate hypotheses to determine which *circumstances* or *properties* of the case contribute to increasing or decreasing of the "weight" (importance) of each of the conflicting reasons in relation to the others (II. 5. 4. 1.). The identification of the relevant circumstances or properties depends on the thesis of relevance, as Bruno Celano has pointed out. However, the thesis of relevance can be refuted by claiming that there are other relevant circumstances of properties that have not been considered (II. 3. 5. 1.). This shows the problems with identifying *relevant circumstances or* properties, the presence or absence of which determines the solutions to the conflict between fundamental rights. But an approach built on the idea that a fundamental right A takes precedence over fundamental right B because of the presence or absence of

[1501] See sections I. 6. 1. 3. and I. 6. 1. 4. In particular, the criticism from Zuleta (2017), who has shown that the Weight formula operates with numerical values in an insignificant way, i.e., that it does not yield the same results when it is subjected to admissible transformations.
[1502] On this point, see section I. 6. 1. 3. and Ratti (2010), pp. 279-280.

circumstance(s) C_x is not metaphorical as an approach built on the idea that a fundamental right A takes precedence over fundamental right B due to its greater "weight".

Riccardo Guastini's reconstruction of judicial balancing shows that judicial balancing as a method is not a uniform intellectual operation, but only a step in the application of explicit constitutional principles. He points to the *axiological nature* of the hierarchy established between conflicting norms and the discretionary power of the judges who establish that hierarchy. Balancing, as he states, consists in the choice of the principles to be applied, while the subsequent application of the chosen principle requires *a genuine rule-creating operation*: the *specification* or concretisation, i.e., the creation of a rule suitable for the resolution of the concrete case in question (II. 4. 4. 1.). The notions of tragic cases (Atienza), constitutional dilemmas (Zucca) and the possibility of alternatives being on a par (Chang) point to the possibility of cases in which legal reasoning cannot provide a rational answer to the conflict.

The approaches of Aharon Barak (II. 1. 4.), Ronald Dworkin (III. 1. 4. 1.) and Juan Antonio García Amado (III. 3. 4. 1.) are *interpretative*, in the sense that they argue that the solution can be reached through a certain type of interpretation: either purposive (Barak), constructive (Dworkin), or the one that can be labelled 'essentialist', i.e., the one that aims at determining the nucleus of meaning or the essential content of fundamental rights (García Amado). García Amado points out the need to limit the number of possible exceptions to the protection of fundamental rights that judicial balancing allows.

As an alternative to the balancing approach and the judicial discretion it allows, Luigi Ferrajoli proposed an approach based on the systematic interpretation, indicating that *other norms* in the legal system can determine the solution of what only appears to be a conflict between fundamental rights (III. 2. 4. 1.). The idea that the answer to a conflict between fundamental rights can usually be found in other norms of the legal system is also found in Lorenzo Zucca's proposal, which is based on the rules of priority and the deference to the existing legislative framework (III. 4. 4. 1.). Zucca's proposal, in which substantive and procedural rules of priority together define a *qualified* and *contextualised* 'presumption of priority', and the 'earlier' Alexy and his reconstruction of Law of Competing Principles build on the same idea – that we can establish a (usually conditional) relation of priority between the conflicting rights that can be overturned under certain circumstances. However, as we have seen, the 'later' Alexy and his theory of judicial balancing focus on the Weight formula and the weights of the conflicting principles, which is the 'mechanism' with which it resolves conflicts between fundamental rights.

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