ALTERNATIVES TO JUDICIAL BALANCING: INTERPRETATIVE-SUBSUMPTIVE METHOD ACCORDING TO JUAN ANTONIO GARCÍA AMADO*

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Abstract: The paper deals with the problem of conflicts between fundamental rights by presenting and analysing one of the possible methods for the resolution of such conflicts. The method in question is the so-called interpretative-subsumptive method, developed by Spanish legal philosopher Juan Antonio García Amado. The interpretative-subsumptive method represents an alternative to the *mainstream* method used for the resolution of conflicts between fundamental rights – judicial balancing, and particularly the version developed by Robert Alexy. After the introduction, interpretative-subsumptive method is contextualised by presenting Garcia Amado's ideas which are of relevance for the inquiry – his inclusive legal positivist views, the theory of legal interpretation he ascribes to and his understanding and typology of fundamental rights and their conflicts. After that, in the central section of the paper, the theoretical framework of the interpretative-subsumptive method is presented, along with its application to a Spanish Supreme Court case, followed by the criticism that has been raised and ending with conclusions.

Keywords: fundamental rights; balancing; interpretation; normative conflicts; antinomies

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1. INTRODUCTION

The problem of conflict of fundamental rights is one of the most important problems modern societies are faced with. 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 etc. These rights can (and often do) come into conflict.[1] For example, a particular statement can be understood as

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[1] For an overview of the discussion about conflicts between fundamental rights, see MALDONADO MUÑOZ, M. *Derechos y conflictos: Conflictivismo y anticonflictivismo en torno a las derechos fundamentals* [Rights and conflicts: Conflictivism and anticonflictivism around fundamental rights]. Madrid: Marcial Pons, 2021, pp. 22–24. See also SMET, S. *Resolving Conflicts Between Human Rights: The Judge's Dilemma*. Abindgon: Routledge, 2017, pp. 499–521.

protected by freedom of expression (and therefore it would be permitted), but it could also be understood as infringing personality rights of others person (and therefore it would be prohibited). Judges are then faced with the problem of should the expression of such statement be *permitted* or *prohibited*? In such cases, the classical methods used for resolving normative conflicts (*lex superior*, *lex posterior*, and *lex specialis*) are usually not applicable, since the provisions regulating fundamental rights are usually on the same hierarchical level, were enacted at the same time, and no general-special relation can be established between them.[2] To decide such cases, various legal methods have been proposed and used. The most influential and widely used method among them is judicial balancing, and in particular the method developed by Robert Alexy and further refined by his disciples.[3] However, beyond different possible understandings of judicial balancing (the Alexyan and the other, non-Alexyan ones, such as the one from Aharon Barak,[4] Manuel Atienza,[5] or Riccardo Guastini[6]), other alternative, non-balancing methods for the resolution of conflicts between fundamental rights have been developed.

This paper presents a reconstruction of one of these alternative non-balancing approaches to the problem of conflict between fundamental rights, namely the one from Spanish professor Juan Antonio García Amado. Two reasons for analysing his method can be given: first, he is one of the most vocal critics of theories of judicial balancing, criticising various aspects of it and rejecting it altogether. Second, García Amado developed a procedural and formalized method, which he calls *interpretative-subsumptive* method, and which consists of five steps that are logically formalized and as such easily applicable to concrete cases.

The paper is divided into five sections: after the first introductory section, García Amado's ideas and his interpretative-subsumptive method will be contextualised by presenting his legal positivist approach (2.1), his understanding of legal interpretation (2.2), and his typology of fundamental rights (2.3). After this, the interpretative-subsumptive method is first presented (3.1) and its application presented on a Supreme Court of Spain case (3.2). This is followed by presenting some of the criticisms of the interpretative-subsumptive method (4.) and ending with conclusions (5.).

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2 See, for example, GUASTINI, R. *L'interpretazione dei documenti normativi* [The interpretation of normative documents]. Milan: Giuffrè, 2004, p. 218; and MARTÍNEZ ZORRILLA, D. The Structure of Conflicts of Fundamental Legal Rights. *Law and Philosophy*. 2011, Vol. 30, No. 6, pp. 730–731.

3 ALEXY, R. *A Theory of Constitutional Rights*. Oxford: Oxford University Press, 2002.

4 BARAK, A. *Proportionality: Constitutional Rights and their Limitations*. Cambridge: Cambridge University Press, 2012.

5 ATIENZA, M. *El derecho como argumentación* [Law as argumentation]. Barcelona: Editorial Ariel, 2006.

6 GUASTINI, R. Ponderazione: Un'analisi dei conflitti tra principi costituzionali [Weighting: An analysis of conflicts between constitutional principles]. *Ragion pratica* [Practical Reason]. 2006, Vol. 26, No. 1, pp. 151–159.

2. CONTEXTUALISING INTEPRETATIVE-SUBSUMPTIVE METHOD

2.1 GARCÍA AMADO'S LEGAL POSITIVISM

Contextualising Juan Antonio García Amado as an author is not challenging, since he explicitly addressed and analysed competing conceptions of law in his works and adopts a legal positivist view, criticising natural law approaches. 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.[7] García Amado is an *inclusive legal positivist*, highly critical of what he calls the *(neo)constitutionalist* approach to conflicts between fundamental rights. In García Amado's view, Alexy's theory of judicial balancing represents a version of such (neo) constitutionalist approach, and he develops his approach in response to it, as he finds it problematic.[8] As a vocal critic of (neo)constitutionalism, García Amado understands it as a version of legal moralism (*iusmoralismo*), which stands in contrast with the positivist position he advocates.[9]

The (neo)constitutionalist approach to conflicts between fundamental rights is characterised by four theses with which García Amado disagrees.[10] First, what can be labelled the *rights as principles thesis*: constitutional norms that express fundamental rights are principles, and principles are qualitatively different from other types of legal norms. 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 for resolving fundamental rights cases,[11] since such cases are always (or almost always)

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[7] ORTEGA GARCÍA, R. Nota introductoria [Introductory Note]. In: GARCÍA AMADO, J. A. (ed.). *Decidir y argumentar sobre derechos* [Deciding and arguing about rights]. Mexico City: Tirant lo blanch, 2017, p. 17. On García Amado's legal positivism, see GARCÍA AMADO, J. A. *El derecho y sus circunstancias: Nuevos ensayos de filosofia jurídica* [Law and its circumstances: New essays on legal philosophy]. Colombia: Universidad Externado de Colombia, 2010, p. 27.

[8] See GARCÍA AMADO, J. A. El juicio de ponderación y sus partes: Una crítica [The judgment of weighting and its parts: A critique]. In: ALEXY, R. (ed.). *Derechos sociales y ponderación* [Social rights and weighting]. Madrid: Fundación Coloquio Jurídico Europeo, 2009, pp. 249–331; GARCÍA AMADO, *El derecho y sus circunstancias*... [Law and its circumstances…], pp. 129–168; and GARCÍA AMADO, J. A. ¿Que es ponderar? Sobre implicaciones y riesgos de la ponderación [What is weighting? On the implications and risks of weighting]. *Revista Iberoamericana de Argumentación* [Iberoamerican Journal of Argumentation]. 2016, Vol. 13, pp. 1–22.

[9] 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, *Decidir y argumentar sobre derechos* [Deciding and arguing about rights], p. 128, fn. 5.

[10] Ibid., p. 81.

[11] The notion of "fundamental rights case" (*caso iusfundamental*), used by GARCÍA AMADO, *Decidir y argumentar sobre derechos* [Deciding and arguing about rights], pp. 90–94, is wider than the notion of "conflict between fundamental rights" (*conflicto de derechos fundamentales*). What makes a case a fundamental rights case is not the presence of a conflict of fundamental rights or constitutional principles; a case is a fundamental rights 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

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, what can be called 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.[12] First, what can be called 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 cases of 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 court 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. Fourt, the *conversion thesis*: virtually any case can be converted into a fundamental rights case, and any fundamental rights 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.

From these four main theses that García Amado puts forward, it can be seen that he is critical of judicial balancing as method for resolving conflicts between fundamental rights in four aspects: by advocating the first thesis, he criticises the *scope of the application of 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 putting forward the second thesis, he criticises what he considers to be the *misrepresentation of the method* used to decide fundamental rights cases. By defending the third thesis, he criticises the *convenience of the method*, arguing that it is easier for the judge to appeal to balancing instead of engaging into more complex legal argumentation. Finally, by defending the fourth thesis, García Amado criticises the perceived *danger of the method* for the protection of fundamental rights.

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one in *"in whose resolution the primary and essential normative argument is found in the constitutional norm which regulates that fundamental right"* [translation by the author] (ibid., 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 the 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 ibid. 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 criticises the idea that fundamental rights cases should be resolved by balancing: if there is no conflict between two fundamental rights in a fundamental rights case, what should be put on the imaginary opposite side of the scales? (ibid., p. 94).

[12] GARCÍA AMADO, *Decidir y argumentar sobre derechos* [Deciding and arguing for rights], pp. 81–82. See also GARCÍA AMADO, *El juicio de ponderación y sus partes…* [The judgment of weighting and its parts…], pp. 250–252.

2.2 LEGAL INTERPRETATION

García Amado understands interpretation as "establishment of meaning of legal statements",[13] and distinguishes three basic conceptions (or theories) of interpretation: first, a *positivist* or *linguistic* one, second, an *intentionalist* or *voluntarist* one, and third, the *axiological* or *material* one.[14] The theory of interpretation he adopts is the first one. This *positivistic* or *linguistic* theory (proponent of which is also H. L. A. Hart) is characterized by the following main ideas:[15] (1) all law is contained and exhausted in normative sentences; (2) such sentences, expressed in ordinary language (specialised or not) are characterised by the problem of indeterminacy: either by ambiguity or, more often, by vagueness;[16] (3) the consequence of this *inherent indeterminacy* makes interpretation a *mediating activity* between the expression of a norm-formulation[17] and the solution of the case to which it applies; (4) the interpreter must choose between the possible (but only between the possible) interpretations;[18] (5) this choice is discretionary, but must not be arbitrary, which means that the judge must justify their choice with arguments: (6) when the judge applies a norm by giving it a meaning that goes beyond the possible interpretations, they no longer *interpret* 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 and 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 they have created, for example, in cases of legal gaps or in cases of antinomies that cannot be resolved by applying meta-rules like *lex superior*, *lex posterior* or *lex specialis*.

2.3 TYPOLOGY OF FUNDAMENTAL RIGHTS

Having present García Amado's understanding of interpretation, we turn to his understanding of fundamental rights. García Amado distinguishes between four types of fundamental rights:[19]

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13 GARCÍA AMADO, *El derecho y sus circunstancias*... [The law and its circumstances…], p. 23.

14 Ibid., pp. 23–27. The other two conceptions (or theories) of interpretation are not of relevance for the purposes of this paper, so they will not be presented here.

15 Ibid., pp. 23–24.

16 GARCÍA AMADO, J. A. La interpretación constitucional [Constitutional interpretation]. *Revista Jurídica de Castilla y León* [Castile and Leon Law Review]. 2004, Vol. 2, p. 57, uses the notion of I 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, R. Ambiguity and Vagueness in Legal Interpretation. In: TEIRSMA, P. M. – SOLAN, L. M. (eds.). *Institutionalized Reason: The Jurisprudence of Robert Alexy*. Oxford: Oxford University Press, 2012, p. 129.

17 On the distinction between *norm* and *norm formulation*, see, for example, GUASTINI, R. *Interpretare e argomentare* [Interpreting and arguing]. Milan: Giuffrè, 2011, pp. 63–74.

18 *Possible* interpretations are those that are not incompatible with the semantic, syntactic and pragmatic rules of the language, either ordinary language or any specialised language that is not purely formalised, as GARCÍA AMADO, *El derecho y sus circunstancias*... [The law and its circumstances…], p. 21 explains.

19 GARCÍA AMADO, *Decidir y argumentar sobre derechos* [Deciding and arguing about rights], pp. 104–111.

(1) *Inclusive or rule rights* (derechos-R). The object of this type of fundamental rights is the *natural activity* or *pre-normative* reality. For this reason, the law does not define these rights normatively, but the limits their exercise. Examples of such rights are freedom of expression or freedom of movement.

(2) *Exclusive or exception rights* (derechos-E). These types of fundamental rights have a normatively defined object of protection of the right. This *area of protection* is protected against any interference, and interference with the scope of the protection of the right is infringement of the right. Examples of such rights are the right to privacy, the right to honour, and inviolability of the home.

(3) *Rights to positive action by the state* (derechos-A). These types of fundamental rights require a specific action or performance from the state or its institutions, since the norms 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-O). These types of rights, as the name implies, requires the state to make omissions or refrain from certain actions. An example of such a right would be the right not to be tortured (freedom from torture and inhuman and degrading treatment).

The distinction between different types of fundamental rights is relevant for the resolution of conflicts that arise between them. In the framework of García Amado's typology, three possible scenarios of conflict can be distinguished. First, when there is a conflict between an inclusive or rule right and an exclusive or exception right (for example, a conflict between freedom of expression and the right to honour), such conflict is resolved by examining the facts of the case and deciding whether they can be subsumed within the scope of protection of an exclusive or exception right. If the answer to this question is affirmative, there has been an impermissible exercise of the inclusive or rule right. García Amado's view (which is also supported by the 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 infringements within their scope of protection once the norm that regulates them has been interpreted to delimit them.[20] For example, if person A makes a statement that is arguably violating the right to honour of person B, 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 regulating the exclusive or exception right. Second, the rights to positive action by the state, which require a certain activity or provision by the state or its institutions (without which they are not effective) do not normally come into conflict with other rights. Rights to positive action by the state can result in fundamental rights cases (*caso iusfundamental*), but not conflicts between fundamental rights or fundamental rights and other constitutional principles (*conflictos de derechos fundamentales*). The courts do not resolve conflicts in these situations, but only decide whether the right in question has been violated.[21] Third, as for the rights to an omission or abstention from

[20] Ibid., pp. 106–107.

[21] Ibid., pp. 107–108. An example given here by García Amado is related to the right to be informed about the reasons of detention (protected by the Art. 24(2) of the Spanish Constitution). The right to be informed

the state, the general idea 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.[22] These type of 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 conflicts between fundamental rights and any other cases of normative conflicts (or there is no reason to be).[23] To summarize García Amado's views on conflicts between fundamental rights, it can be stated 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.

3. INTERPRETATIVE-SUBSUMPTIVE METHOD

3.1 THEORETICAL FRAMEWORK

As mentioned earlier, García Amado's approach is an example of a non-balancing, interpretative-subsumptive approach. He argues, based on the analysis of a decision from the Constitutional Court of Spain, that judicial reasoning in cases of conflicts between fundamental rights is interpretative-subsumptive, and not a balancing one.[24] García Amado advances two theses regarding judicial reasoning in cases of conflicts between fundamental rights.[25] The first is of a general nature: he suggests that the difference between balancing and interpretative-subsumptive method (as two methods for resolving conflicts between fundamental rights) is only superficial and that the majority of judicial cases (or at least all *hard* cases) can be reconstructed and resolved by both methods.[26] This raises the question why the interpretative-subsumptive method should be preferred over the balancing method. García Amado argues that and tries to show by reconstructing the cases such as *El Toro de Osborne* that the interpretative-subsumptive method seems to be more rational because the parameters used are *"more tangible and more openly analysable and arguable"*.[27]

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about the reasons for detention depends on how the provision and the information in question is specified and interpreted, with no other rights interfering with it.

22 Ibid., 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 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.

23 GARCÍA AMADO, *El juicio de ponderación y sus partes*... [The weighting judgement and its parts…], 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".

24 GARCÍA AMADO, J. A. ¿Conflictos entre derechos fundamentales? Sobre ponderaciones y otros trucos y a propósito de dos sentencias españolas [Conflicts between fundamental rights? On weightings and other tricks and about two Spanish judgments]. *Nuevos Paradigmas de las Ciencias Sociales Latinoamericanas* [New Paradigms in Latin American Social Sciences]. 2014, Vol. 5, No. 10, p. 8.

25 GARCÍA AMADO, *El juicio de ponderación y sus partes*... [The weighting judgement and its parts…], p. 292–293.

26 GARCÍA AMADO, *El derecho y sus circunstancias*... [The law and its circumstances…], p. 261.

27 GARCÍA AMADO, *El juicio de ponderación y sus partes*... [The weighting judgement and its parts…], p. 293 [translation by the author].

Before proceeding with the theoretical framework of the interpretative-subsumptive method, García Amado's critique of judicial balancing will be presented. This critique is relevant because he claims that the interpretative-subsumptive method overcomes many of the weaknesses of balancing method. His critique can be summarized as follows:[28]

(1) First, the use of the balancing method instead of the interpretative-subsumptive method weakens and relativizes the rights in question.[29] An example García Amado gives 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 whereabouts of those kidnapped and in danger of dying. The problem that might then arise is the question of is the right 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 approach: he introduces the notion of the *nucleus of meaning* (*núcleo de significado*) or *essential content* (*contenido essencial*) of the right. In this way, the nucleus of meaning in clear cases could be established, leaving unclear cases with penumbra zones open for argumentation.[30] 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 way or another. In this way, the argumentation is not casuistic, but general.[31]

(2) This weakening and relativization of rights occur, as García Amado argues, through the introduction of exception clauses. The problem with balancing for García Amado 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".[32] When the legislature formulates general and abstract norms, the number of possible

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[28] For García Amado's criticism of balancing, see GARCÍA AMADO, *El juicio de ponderación y sus partes…* [The weighting judgement and its parts…], pp. 249–297; GARCÍA AMADO, J. A. Sobre ponderaciones: Debatiendo con Manuel Atienza [On weightings: Debating with Manuel Atienza]. In: ATIENZA, M. – GARCÍA AMADO, J. A. (eds.). *Un debate sobre ponderación* [A debate on weighting]. Lima/Bogota: Palestra Editores/Editorial Temis, 2012, pp. 44–46; GARCÍA AMADO, *¿Conflictos entre derechos fundamentales?* [Conflicts between fundamental rights?], pp. 44–46; and GARCÍA AMADO, *Decidir y argumentar sobre derechos* [Deciding and arguing for rights], pp. 111–115.

[29] GARCÍA AMADO, *Sobre ponderaciones…* [About weightings…], pp. 45–49. For a similar criticism see, for example, MILLER, B. W. Proportionality's Blind Spot: "Neutrality" and Political Philosophy. In: HUSCROFT, G. – MILLER, B. W. – WEBBER, G. (eds.). *Proportionality and the Rule of Law: Rights, Justification and Reasoning*. Cambridge: Cambridge University Press, 2014, pp. 394–396; WEBBER, G. On the Loss of Rights. In: HUSCROFT, G. – MILLER, B. W. – WEBBER, G. (eds.). *Proportionality and the Rule of Law: Rights, Justification and Reasoning*. Cambridge: Cambridge University Press, 2014, pp. 132–137; and YOUNG, A. L. Proportionality Is Dead: Long Live Proportionality! In: HUSCROFT, G. – MILLER, B. W. – WEBBER, G. (eds.). *Proportionality and the Rule of Law: Rights, Justification and Reasoning*. Cambridge: Cambridge University Press, 2014, pp. 43–46.

[30] 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 person. See GARCÍA AMADO, J. A. ¿Existe discrecionalidad en la decision judicial? [Is there discretionality in the judicial decision?]. *Isegoría*. 2006, Vol. 35, p. 172.

[31] GARCÍA AMADO, *Sobre ponderaciones…* [On weightings…], pp. 56–57.

[32] Ibid., p. 65 [translation by the author].

exceptions is finite, and these exceptions are expressed in other norms. When a judge decides a case by balancing and introduces the exceptions to the norm, tow problematic consequences allegedly arise: first, the number of possible exceptions becomes infinite, and second, the possible exceptions are not known in advance.[33]

(3) Apart from these two problems, balancing is, in García Amado's view, a discretionary and subjective value judgement.[34] 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.[35]

3.2 METHOD APPLIED: THE EL TORO DE OSBORNE CASE

Let us now turn to the application of the interpretative-subsumptive method using a case that was decided by the Supreme Court of Spain in 1997, *El Toro de Osborne*.[36] The law regulating the highways (*La ley de Carreterras*) prohibited the placement of *advertisement* 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 is not *advertising*. This conflict can be understood as a conflict between the fundamental rights to freedom of enterprise and the fundamental right to health.

(1) The *normative situation* is created by the prohibition of advertising by the law regulating highways. This can be referred to as Px, with *P* signifying prohibited and *x* signifying advertising. Advertising has been understood by the Spanish Supreme Court as *"any object associated with a trademark which can distract the driver"*, which can be 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) falls 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.

(3) *Particular interpretative statement* is therefore formulated as 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*).

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[33] Ibid., p. 72. These two consequences are the exact opposite of what happens when the legislature formulates norms and their exceptions.

[34] Ibid., p. 83.

[35] GARCÍA AMADO, *El juicio de ponderación y sus partes…* [The weighting judgement and its parts…], p. 291. On this point, see also, for example, WEBBER, G. Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship. *Canadian Journal of Law & Jurisprudence*. 2010, Vol. 23, No. 1, p. 192.

[36] *Sentencia 652/1994*, from 30 December of 1997. The facts of the case are presented in GARCÍA AMADO, *El juicio de ponderación y sus partes…* [The judgment of weighting and its parts…], pp. 317–318.

(4) The fourth element, the *subsumptive statement* derived from (1), (2), and (3) is formally 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 reason 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 can be understood as a case of conflict between the fundamental right to freedom of enterprise and the fundamental right to health. In such cases, the court is confronted with a particular action (in the general sense) of the entrepreneur (in this case, the placement of the bull statue for promotional purposes) and must resolve the conflict. García Amado suggests that the case should be resolved by *interpretation* and *subsumption*, rather than by balancing of the conflicting rights. In this case, the Court concluded that the 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.

4. SOME CRITICISMS OF THE INTERPRETATIVE-SUBSUMPTIVE METHOD

What seems to be the strongest criticism that can be raised against the interpretative-subsumptive method is the one related to García Amado's understanding of interpretation of fundamental rights. We have seen that García Amado is an advocate 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's speaks of the "nucleus of meaning" (*núcleo de significado*) or *essential content* (*contenido essencial*) 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 mentioned in the previous section. Such an understanding has been criticised from the perspective of sceptical theories of interpretation. As Riccardo Guastini points out, almost no legal text can be considered to have just *one* unequivocal and unobjectionable meaning.[37] This is certainly true for modern democratic constitutions, which express a variety of values, resulting in different possible competing meanings of the provisions protect-

[37] GUASTINI, R. Interpretive Statements. In: GARZÓN VALDÉS, E. – KRAVIETZ, W. – VON WRIGHT, G. – ZIMMERLING, R. (eds.). *Normative Systems in Legal and Moral Theory: Festschrift for Carlos E. Alchourrón and Eugenio Bulygin*. Berlin: Duncker & Humblot, 1997, p. 289. As Guastini 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).

ing fundamental rights.[38] Judicial interpretation cannot be reduced to a sentence that describes meaning but is, as Guastini says, an ascription of definite meaning to legal provisions that are being interpreted.[39] In Guastini's view, such a position is untenable. When a judge interprets a provision, they ascribe a meaning to it, regardless of the fact that the meaning ascribed is uncontroversial.[40] From a sceptical standpoint, the problem with the positivist or linguistic (also called mixed) theory of interpretation lies in its understanding of text-oriented interpretation of interpretation *in abstracto*.[41] Judges actually exercise discretion when interpreting *in abstracto*, and interpretation is a matter of decision (not knowledge).[42] On this basis, mixed theory of interpretation can be understood as a version of cognitivist (or quasi-cognitivist) theory of interpretation.[43] Returning to García Amado and his ideas on the conflicts between fundamental rights, this calls into question the possibility of determining the *nucleus of meaning* (*núcleo de significado*) or the *essential content* (*contenido essencial*) of the fundamental rights through cognition, since it is a matter of decision and not cognition. Thus, there can be no *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 a fundamental right seems to be completely a matter of ascription and not (even partially) a matter of description.

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38 On this point, see, for example, GUASTINI, *Ponderazione…* [Weighting…], p. 156; PINO, G. Conflitti tra diritti fondamentali: Una critica a Luigi Ferrajoli [Conflicts between fundamental rights: A critique of Luigi Ferrajoli]. *Filosofia politica* [Political philosophy]. 2010, Vol. 24, No. 2, pp. 288–292; PINO, G. *Diritti e interpretazione: Il ragionamento giuridico nello Stato costituzionale* [Rights and interpretation: Legal reasoning in the constitutional state]. Bologna: Il Mulino, 2010, pp. 22–25; and CELANO, B. *Los derechos en el estado constitucional* [Rights in the constitutional state]. Lima: Palestra Editores, 2019, pp. 163–164.

39 GUASTINI, *Interpretive Statements*, 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."*

40 Ibid., p. 290. Guastini argues that mixed theories of interpretation confuse two different distinctions 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."*

41 Text-oriented interpretation (interpretation *in abstracto*) consists of 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, R. Lo scetticismo interpretativo rivisitato [Interpretive skepticism revisited]. *Materiali per una storia della cultura giuridica* [Materials for a history of legal culture]. 2006, Vol. 36, No. 1, p. 228.

42 Ibid., p. 229.

43 Ibid. 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, P. *Interpretation without Truth: A Realistic Enquiry*. Cham: Springer, 2019, pp. 79–82.

5. CONCLUDING REMARKS

A vocal critic of judicial balancing, professor García Amado has developed what he calls an interpretative-subsumptive method for dealing with the problem of conflicts between fundamental rights. He criticises both Alexyan and non-Alexyan (Manuel Atienza's, for example) theories of judicial balancing. His interpretative-subsumptive proposal is clearly structured and avoids the criticisms raised against the methods that rely on the qualitative distinction between rules and principles and, which understand balancing as a specific method for the application of legal principles (such as Robert Alexy's theory of judicial balancing). Compared with 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 will be given precedence. 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 the proponents of the sceptical theories of interpretation, who argue that its determination is a matter of choice or decision, and not of knowledge or cognition. However, since the five steps in its application are precisely described and logically formalised, it represents an interesting alternative to judicial balancing in the sense that it shows some of its shortcomings. By developing his interpretative-subsumptive method, García Amado has made a substantial contribution to the topic of conflicts between fundamental rights.

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