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CLASSIFYING CONSTITUTIONAL RIGHTS: EFFECTS ON THE JUDICIAL RESOLUTION OF CONFLICTS

The objective of this paper is to analyse how different typologies of constitutional rights affect the resolution of conflicts between such rights in constitutional adjudication. It addresses the theoretical and practical complexity of rights conflicts by examining two influential models of classification: first, the model proposed by Luigi Ferrajoli, one of the most influential Italian legal philosophers, and second, the model developed by Juan Antonio García Amado, a well-known Spanish legal philosopher. The paper compares these typologies and examines their application to concrete judicial cases in order to assess how differing understandings of constitutional rights shape judicial reasoning and judicial outcomes. Through a comparative case analysis, the paper demonstrates that the classification of rights – particularly the classification of rights as, for example, “fundamental rights” or “social rights” – has significant implications for the methods and results of constitutional decision-making. The findings highlight the normative consequences of rights typologies and their role in structuring approaches to rights conflicts.

Keywords: constitutional rights, fundamental rights, normative conflicts, Luigi Ferrajoli, Juan Antonio García Amado.

1. INTRODUCTION

Contemporary constitutional courts are routinely confronted with cases in which the exercise of one fundamental right appears to infringe upon another. The freedom to express oneself may clash with the protection of personal honour or private life; the protection of health may stand in opposition to the right to entrepreneurial freedom; the right to strike may conflict with the right to health; formal equality may seem to contradict substantive equality, etc. In such situations, judges are faced with a normative conflict that does not have a clear solution, since the classical criteria for the resolution of antinomies – *lex superior derogat legi inferiori*, *lex posterior derogat legi priori* and *lex specialis derogat legi generali* – are usually not applicable. This is due to the fact that both the conflicting norms are on the same hierarchical level (both are constitutional norms), they were usually enacted at the same time (at the time

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of the enactment of the constitution and its bill of rights) and no general-special relation can be convincingly established between them. How courts resolve such conflicts has profound implications for the protection of individual rights, but also for the understanding of the separation of powers.

The prevailing answer to the problem of the resolution of conflicts between constitutional rights is judicial balancing, a method whose theoretical foundations are most closely associated with the German legal philosopher Robert Alexy. Judicial balancing is not a purely theoretical construct developed by legal science – courts, both national (such as the German Federal Constitutional Court, for example) and supranational (such as the European Court of Human Rights, for example), use balancing as a method to resolve such conflicts (on the use of balancing, see, for example, Sardo, 2012, p. 85; Klatt & Meister, 2012, p. 4; Moreso, 2012, pp. 35–36, and Pirker, 2013, pp. 6–7). When balancing, courts assign “weight” to the competing rights, depending on the concrete circumstances of the case, and determine which of the rights should prevail in the concrete case (Alexy, 2002; Alexy, 2003, pp. 433–449; Alexy, 2014, pp. 51–66). While widely influential, balancing has attracted sustained criticism for allegedly expanding judicial discretion, weakening the normative force of rights, and introducing irreducible subjectivity into constitutional adjudication through the assignment of a contested notion of weight to the conflicting rights (among many criticisms of the Alexyan understanding of judicial balancing, see, for example, Brožek, 2012; Martínez Zorrilla, 2018; Ramião, 2018, and Ratti, 2009; for a summary of these and more criticisms, see Keršić, 2022, pp. 63–76).

This paper examines two alternative (non-balancing) approaches to the judicial resolution of conflicts between constitutional rights, those developed by Italian legal philosopher Luigi Ferrajoli and Spanish legal philosopher Juan Antonio García Amado (for a more detailed analysis of these and other approaches to the judicial resolution of conflicts between constitutional rights, see Keršić, 2022). Both methods offer alternative possible solutions to the problem of how conflicts between constitutional rights should be resolved? Both authors are legal positivists who reject judicial balancing – the dominant method for resolving such conflicts, associated primarily with Robert Alexy, a non-positivist – and propose structured interpretative alternatives. The paper analyses the theoretical foundations of each approach, applies them to a so-called comparative case, and critically compares their strengths and weaknesses. This is done in order to see how different typologies of constitutional rights affect the resolution of conflicts between them.

The first is guaranteeistic constitutionalism (*garantismo*) developed by Luigi Ferrajoli, which argues that most apparent conflicts between constitutional rights dissolve once rights are correctly classified according to the typology he proposes and that systematic interpretation – not balancing – should resolve such cases (Ferrajoli, 2011, pp. 15–53; Ferrajoli, 2012, pp. 791–817; Ferrajoli, 2013, pp. 111–137). The second is Juan Antonio García Amado’s interpretative-subsumptive method, a rigorously formalised five-step procedure that reframes judicial reasoning in cases of conflicts between constitutional rights as a process of norm-interpretation and subsumption, entirely bypassing the language and logic of balancing (García Amado, 2009, pp. 297–322; García Amado, 2017, pp. 81–115).

Methodologically, the paper relies on conceptual analysis and comparative case analysis. The two approaches are first examined in their theoretical foundations, with particular attention to their respective typologies of constitutional rights, and then applied to the same judicial

case – “comparative case”, which serves as a common reference point for the comparison. The paper proceeds as follows: Section 2 presents Ferrajoli’s *garantismo*; Section 3 presents García Amado’s interpretative-subsumptive method, and Section 4 offers conclusions.

2. LUIGI FERRAJOLI: GARANTISMO AND THE NON-CONFLICTIVIST APPROACH

This section presents Ferrajoli’s *garantismo* in two steps. First, it outlines the theoretical context of his approach and his classification of constitutional rights. Second, it applies his framework to the “comparative case” in order to demonstrate how his typology shapes the resolution of conflicts.

2.1. Context and classification of rights

The *garantismo* of Luigi Ferrajoli is examined in the paper for two main reasons. The first concerns the scope and lasting influence of his work, which stretches back to the 1960s. The second is the influence he has on legal discourse in Italy and in Spanish-speaking countries, especially in Latin America (see, for example, Atienza Rodríguez, 2008). His approach offers an alternative not merely to judicial balancing as a technique, but also to the broader legal and political philosophies behind it. The second reason lies in the substantial theoretical contribution that Ferrajoli has made to the subject through his distinctive understanding and classification of rights (for a more detailed summary of Ferrajoli’s views on conflicts between rights, see Keršić 2022, pp. 235–263).

Ferrajoli’s approach is marked by the idea that most, if not all, constitutional principles (in particular, the norms that protect fundamental rights) should be understood as having the structure of legal rules (and not that of legal principles) since they “imply the existence or impose introduction of rules consisting in prohibitions of injury or obligations of provisions that are their respective guarantees” (Ferrajoli, 2011, p. 21, translated by the author). On this basis, *garantismo* rejects three ideas: first, that there is a conceptual connection between law and morality; second, that the distinction between legal rules and legal principles is a strong or qualitative one (according to which legal rules and legal principles are two qualitatively different types of norms; for more on this distinction, see Pino, 2009, pp. 133–145); and third, the idea that balancing is a necessary operation in the application of legal principles (Ferrajoli, 2011). At its core, the regulatory ideal of *garantismo* is to ensure that the fundamental rights guaranteed by law are upheld within the constitutional state (Atienza Rodríguez, 2008, p. 214).

For Ferrajoli, a “right” is “any positive expectation (of services) or negative expectation (of non-infringement) ascribed to an actor by a legal norm” (Ferrajoli, 2001b, p. 1). Fundamental rights are, in turn, “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” (Ferrajoli, 2001b, p. 1). The definition of fundamental rights laid out here is a theoretical, and not a dogmatic one: it does not presuppose that these rights are expressly enacted in constitutions or other sources of positive law within a legal system (Ferrajoli, 2001b, p. 1). Put more precisely, 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 citizen or by virtue of their being capable of acting” (Ferrajoli, 2001b, p. 2).

Ferrajoli suggests two classifications of fundamental rights (Keršić, 2022, pp. 246–247): one subjective and one objective. The subjective classification is based on the subjects who hold the right, while the objective classification is based on the type of conduct that the right concerns (Ferrajoli, 2001a, pp. 284–285). In the subjective classification, Ferrajoli employs two parameters to differentiate among the subjects of the right: citizenship and the capacity to act – which he identifies as the only two status distinctions that still limit the equality of people. These two parameters yield two further distinctions between fundamental rights: between personality rights and citizenship rights and between primary (substantial) rights and secondary rights (instrumental rights or rights of autonomy; Ferrajoli, 2001b, p. 4). Combining these two distinctions results in four types of fundamental rights: (1) human rights, defined as “the primary rights of persons, to which all human beings are entitled without distinction” (for example, the right to life); (2) public rights, defined as “those primary rights to which only citizens are entitled” (for example, the right to form associations); (3) civil rights, defined as “secondary rights ascribed to all human beings capable of acting” (e.g., the freedom of enterprise); and (4) political rights, defined as “those secondary rights that are reserved only to those citizens who are capable of acting” (e.g., voting rights) (Ferrajoli, 2011b, pp. 4–5; Ferrajoli 2011a, pp. 7–9, translated by the author). The first (subjective) typology of fundamental rights is illustrated in Table 1 (Keršić, 2022, p. 246):

Table 1.

Fundamental rights	Personality rights	Citizenship rights
Primary (substantial) rights	Human rights	Public rights
Secondary (instrumental) rights	Civil rights	Political rights

The second (objective) classification of fundamental rights divides rights into rights that consist of negative expectations (non-infringements) and rights that consist of positive expectations (prestations) (Ferrajoli, 2001a, pp. 284–285). *Primary rights*, as Ferrajoli elaborates, are rights that everyone has regardless of their capacity to act, and they include *rights to liberty* and *social rights*. Rights to liberty are “negative” or immunity rights in the sense that they require omission of interference (for example, the right to life or freedom of the press). On the other hand, social rights are “positive” rights in the sense that they require some prestation (for example, 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* (for example, the right to vote). This can be illustrated in Table 2 (on these points, see Keršić, 2022, p. 247).

Table 2.

Fundamental rights	Personality rights		Citizenship rights
Primary rights (only expectations)	Rights to liberty	liberty from	Social rights (positive expectations)
		liberty to	
Secondary rights (expectations and powers)	Civil rights (rights of private autonomy)		Political rights (rights of political autonomy)

2.2. Theoretical framework and application

In order to facilitate the comparison and draw conclusions, the same “comparative case” will be used as a reference point for both approaches (the approach of using “comparative” case is based on the approach in Keršić, 2022, pp. 6–7). The case in question is the Titanic case from 1992 (BverfGE 86, 1-14, Order of 25 March 1992, 1 BvR 514/90) of the German Federal Constitutional Court, in which a conflict arose between freedom of expression and personality rights. The facts of the case are as follows (for a summary of the case, see Alexy, 2014, pp. 56–57 and Eberle, 1997, pp. 871–875): a satirical magazine called Titanic referred to a paraplegic reserve officer on two occasions: first as a “born murderer” and subsequently as a “cripple”. The officer, who had been injured in a car accident, had expressed his wish to continue serving in the army as a translator following his rejection by the military, a wish he made public in the widely circulated paper *Bild am Sonntag*. In response, the magazine featured him in its regular column “The Seven Most Embarrassing Personalities of the Month”, accompanied by a photograph and the description “born murderer”. When the officer brought legal proceedings against the magazine, Titanic published a rejoinder arguing that it was obscene that a “cripple” was determined to serve in the German army, whose purpose is to cripple or kill people, and that this was the reason why he was listed in “The Seven Most Embarrassing Personalities of the Month”. The lower court ruled in the officer’s favour and ordered Titanic to pay 12,000 DM in damages (an amount that would be broadly comparable in euros today, adjusted for inflation). Titanic then filed a constitutional complaint, prompting the German Federal Constitutional Court to engage in a “case specific balancing” between the magazine’s freedom of expression, protected under Art. 5(1) of the Basic Law, and the officer’s right of personality, protected under Art. 2(1), in conjunction with Art. 1(1) of the Basic Law for the Federal Republic of Germany.

To resolve the case under Ferrajoli’s approach, the first step is to qualify the rights that appear to be in conflict (for a reconstruction of the application of the approach, see Keršić, 2022, pp. 255–257). Freedom of expression is a primary right – the liberty to act. As Ferrajoli argues, this freedom of expression (as a liberty to act) only seems to be in conflict with other rights. A conflict between freedom of expression and the personality right (understood as freedom from interference) is resolved, in his framework, not through balancing, but by reference to provisions that qualify certain exercises of freedom of expression – such as insult or defamation – as criminal offences and therefore as prohibited conduct. What appears to be a conflict between two rights is, on this account, not a genuine conflict at all, but rather a constitutionally prescribed limitation on freedom of expression. In the German legal system, this limitation of freedom of expression is established by Art. 5(2) of the Basic Law for the Federal Republic of Germany; in the Italian legal system, such a restriction is regulated in Art. 21(3) of the Constitution of the Italian Republic. Such restriction is present in other constitutions, such as the Constitution of the Republic of Serbia – Art. 46(2). The task of the judge, then, is to decide whether the expression in question falls within the categories prohibited by criminal law, which constitutionally limit freedom of expression while protecting personality rights. Ferrajoli speaks of “limits” of rights rather than their “conflicts”. Since he conceives fundamental rights as universal, they must always, in his view, be understood as rules that are linked to corresponding duties. Freedom of expression thus translates into a rule prohibiting any restriction of free expression except in cases of offences expressly defined by law (Ferrajoli, 2011, pp. 39–40).

Correspondingly, the content of the right to honour, as a personality right, consists in the prohibition of expressions that harm another person's honour or reputation – a prohibition given concrete form in the norms of criminal law regulating insult and defamation. The problem is evident: language is inherently indeterminate, and the judge must decide, with regard to the circumstances of the case, whether the expressions “born murderer” and “cripple” can be qualified as legally prohibited insults and thus as instances in which the limitation on freedom of expression is justified. If this is the case, it would mean that at the same time the right to honour, as a personality right, is protected by the prohibition of such expressions. The decision is to be reached by systematic interpretation of the other norms of the legal system – norms from the criminal code regulating insult.

Applying Ferrajoli's approach and taking into account both the factual circumstances of the case and the reasoning of the German Federal Constitutional Court, the expression “born murderer” would not qualify as a formal insult, whereas the expression “cripple” would. The former would therefore be considered a permitted exercise of freedom of expression that does not infringe personality rights, while the latter would constitute a prohibited expression falling within the constitutional limitation on freedom of expression and, at the same time, an infringement of the officer's personality rights. In the concrete case, the consequence would be the imposition of a fine on *Titanic* magazine with regard to the expression “cripple”, but not with regard to the expression “born murderer” (Keršić, 2022, p. 257).

3. JUAN ANTONIO GARCÍA AMADO: THE INTERPRETATIVE-SUBSUMPTIVE METHOD

This section follows the same structure as the previous one. It first outlines García Amado's theoretical framework and his classification of constitutional rights, before applying his interpretative-subsumptive method to the *Titanic* case.

3.1. Context and classification of rights

The second alternative to judicial balancing presented in this paper is the approach of Juan Antonio García Amado (García Amado, 2014, p. 8). It was selected for two reasons. First, García Amado is one of the most prominent and outspoken critics of judicial balancing as a method. Second, he has developed a detailed, formalized “interpretative-subsumptive” method that consists of five steps that are logically formalized and can be applied to concrete legal cases in a relatively straightforward manner (Keršić, 2022, p. 264).

García Amado's views bear close resemblance to those of H. L. A. Hart: as a legal positivist, he subscribes to the separability thesis – the denial of any necessary conceptual connection between law and morality, as well as to the social sources thesis, according to which both the existence and the content of law are wholly determined by social facts. He also endorses the notion that judicial discretion is an irreducible feature of legal adjudication (Ortega García, 2017, p. 17).

García Amado distinguishes between four types of fundamental rights (García Amado, 2017, pp. 104-111): (1) *Inclusive or rule rights (R)* are rights whose object is the “natural activity” – a primary or “pre-normative” reality that exists independently of legal regulation. Since the activity itself precedes legal definition, the law does not define these rights normatively, but rather defines the limits of their exercise, for example freedom of expression. (2) *Exclusive or*

exception rights (E) are rights whose object of protection is normatively defined: this “area of protection” is protected against any interference, and interference with the scope of protection of the right is infringement of the right, for example the right to honour. (3) *Rights to a positive action by the state (A)* are rights that require specific action or performance from the state, such as the right to information in criminal proceedings. (4) *Right to an omission or abstention from the state (O)* are rights that impose a duty on the state to refrain from certain conduct; the prohibition of torture is an example of this type of right (for a more detailed reconstruction of García Amado’s approach, see Keršić, 2022, pp. 264–287).

3.2. Theoretical framework and application

The *Titanic* case, used here as a comparative case, is an instance of a conflict between an inclusive or rule right (R) and an exclusive or exception right (E) within García Amado’s framework. Such a conflict is to be resolved by examining the facts of the concrete case and deciding whether they can be subsumed within the scope of the protection of exclusive or exception right (Keršić, 2022, p. 273). If the answer is affirmative, the court concludes that the inclusive or rule right has been exercised in an impermissible manner. As García Amado argues, exclusive or exception rights are absolute rights in the sense that, once the norm regulating them has been interpreted so as to delimit their scope, no infringement within that scope is permissible. Accordingly, when a statement is made that arguably violates another person’s right to honour, the court will interpret the norm regulating the exclusive or exception right and decide whether the facts of the case fall within the protection of the norm expressing the exclusive or exception right (García Amado, 2017, pp. 106-107, Keršić, 2022, p. 273). To demonstrate this step-by-step through the interpretative-subsumptive method (Keršić, 2022, pp. 278–282):

I. The first element of the interpretative-subsumptive method proposed by García Amado consists in identifying the normative situation. In the *Titanic* case, the relevant normative situation consists of two constitutional provisions: Art. 5(1) of the German Constitution that guarantees freedom of expression and Art. 5(2) that sets out its limits. Together, these two constitutional provisions can be reformulated as the following statement: “Any expression that does not violate (among other things) the honour of persons is permitted” (García Amado, 2009, p. 299, translated by the author). In the *Titanic* case, the satirical magazine referred to a paraplegic reserve officer first as a “born murderer” and second, as a “cripple”, raising the question of whether either expression constitutes a violation of the right to honour protected by Art. 5(2) of the German Constitution. As García Amado points out, it is not immediately clear whether these two expressions can be considered to violate the right to honour, as they are borderline cases that fall into the penumbra zone of the norm (García Amado, 2009, p. 299). The interpretative-subsumptive method begins with interpretative reasoning – delimitation of categories, which would here be satire (s) and insult (i) (García Amado, 2009, p. 300).

II. In the second step, a general interpretative statement is made for each of the categories. A general interpretative statement is made according to which satire does not violate honour, whereas insult does.

III. In the third step, particular interpretative statements are stated. The Court has first defined the characteristics (n^x) of the two categories (satire and insult).

IV. In the fourth step, a subsumptive statement is made from the premises of the first three steps. A concretizing interpretation is necessary to subsume the expressions (e) “born murderer” and “cripple” under the category of satire or insult (García Amado, 2009, p. 301). To

do this, various circumstances (c) (semantic, intentional, historical, sociological, etc.) are put forward in favour of one option or another (García Amado, 2009, p. 301). In the concrete case, the German Federal Constitutional Court qualified the expression “born murderer” as satire, while the expression “cripple” was qualified as an insult (García Amado, 2009, pp. 304–319; for more details, see García Amado, 2017, pp. 166–172).

V. The fifth and last step of the application of the interpretative-subsumptive method yields a normative conclusion. Depending on the qualifications made in the previous step – whether the expression is classified as satire or an insult – it will be permitted or prohibited (see Keršić, 2022, p. 281 and Keršić, 2024 for a more detailed analysis of the interpretative-subsumptive method).

4. CONCLUSIONS

This paper examined how different typologies of constitutional rights affect the judicial resolution of conflicts between such rights, using two non-balancing approaches as analytical lenses: Luigi Ferrajoli’s guaranteeistic constitutionalism (*garantismo*) and Juan Antonio García Amado’s interpretative-subsumptive method. Both methods were applied to the same comparative case – the *Titanic* case decided by the German Federal Constitutional Court – in order to assess their practical applicability and internal theoretical consistency.

The analysis demonstrates that the classification of rights is not merely a theoretical exercise but has significant normative consequences for judicial reasoning and its outcomes. Ferrajoli’s typology, which distinguishes between rights to liberty and social rights on the objective axis, and between personality rights and citizenship rights on the subjective axis, leads to the conclusion that most apparent conflicts between constitutional rights are not genuine conflicts at all. What seems to be a conflict between freedom of expression and personality rights is, in the framework of Luigi Ferrajoli, better understood as a limitation expressly provided for in the constitutional text and elaborated through criminal law norms regulating insult and defamation. The task of the judge is therefore not to balance competing rights but to interpret systematically whether the expression in question falls within the legally defined limits of the right. Applied to the *Titanic* case, this approach results in the conclusion that the expression “born murderer” falls outside the statutory definition of insult and is therefore permitted, while the expression “cripple” constitutes an insult and is prohibited.

García Amado’s typology, which distinguishes between inclusive or rule rights, exclusive or exception rights, rights to positive state action and rights to state omissions, leads to a similarly structured but more formally explicit procedure. By reconstructing judicial reasoning as a five-step process of interpretation and subsumption, García Amado avoids balancing. In the *Titanic* case, the conflict between freedom of expression as an inclusive right and the right to honour as an exclusive right is resolved by interpreting the norm protecting honour and deciding whether the facts of the case fall within its scope of protection. The result mirrors that of Ferrajoli’s approach.

The two interpretation-based methods relocate the decision from the assignment of weights to the conflicting rights to the interpretative delimitation of the scope of the rights. Arguably, this is a move that enhances the legal predictability of adjudication. However, both approaches face shortcomings. Ferrajoli’s approach depends on sufficiently precise criminal law norms that can serve as constitutional limits on rights, which may not always be the case. García Amado’s method, while formally more explicit, ultimately cannot remove interpretative discretion

in the stage of subsumption, in which the judge must decide whether the facts of the case fall within a normative category whose boundaries themselves are contested. The indeterminacy of balancing that the two authors identify in Alexy's weight formula reappears in a different form in the interpretative step of subsumption.

Nevertheless, both approaches represent valuable contributions to the theory of constitutional adjudication, as they challenge the assumption that judicial balancing is a necessary method for the resolution of conflicts between rights. Their typologies are not merely classificatory models but normative frameworks that structure judicial reasoning. The choice between the approaches can be understood as a choice about the kind of adjudication a legal system wishes to pursue, and about the role and the level of activism that judges should play: judicial balancing favouring judicial activism, and the two methods analysed restricting it.

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