Individual versus collective freedom: antinomies and tensions

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Abstract: This article sets out to analyze the right to freedom as a human right, with the purpose of contrasting two of its aspects: the right to freedom as an individual right v. the right to freedom as a collective right, so as to reach a conclusion on the antinomies and collisions between these aspects. In this sense, the epistemic origin of the supremacy of collective rights over individual rights, as well as the potential risk to individual freedoms when indiscriminate privilege is given to collective rights, is questioned and discussed. To solve this dichotomy we propose, on the basis of Law, the use of the Weight Formula, which is a tool that makes use of the Law of Balancing applied in legal reasoning when there are antinomies and collisions between two or more human rights.
Keywords: individual freedom; collective freedom; human rights; legal antinomies; legal reasoning.

Resumen: El presente artículo analiza el derecho a libertad como derecho humano con la intención de confrontar dos de sus vertientes: la libertad como derecho individual frente a la libertad como derecho colectivo, para arribar a reflexiones sobre las antinomias y tensiones entre sí. En este sentido, se cuestiona y debate el origen epistémico de la primacía de los derechos de la colectividad sobre los derechos de corte individual y el riesgo que puede representar para las libertades individuales sí

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los derechos colectivos son privilegiados de forma indiscriminada. Para resolver esta dicotomía proponemos desde el derecho el uso de la denominada fórmula del peso, una herramienta que hace uso de la teoría de la ponderación desde la argumentación jurídica aplicada en el caso de colisiones o antinomias entre dos o más derechos humanos.
Palabras clave: libertad individual; libertad colectiva; derechos humanos; antinomias jurídicas; argumentación jurídica.

I. Preliminary ideas

This research aims to address the right to freedom as a human right with the purpose of contrasting two of its aspects, that is, the right to freedom as an individual right versus the right to freedom as a collective right to reach a conclusion on the antinomies and tensions between both of them. We focus on what we call "the fallacy of the supremacy of collective rights over individual rights" and our objective is to produce legal solutions that allow us to empower the right to individual freedom as the foundation of a democratic, equal, and plural society. To support the above, we will use the so-called Weight Formula, a tool based on the Balancing Law applied in legal reasoning when there is a collision or antinomy between two or more human rights.

II. Human right to freedom and its different aspects

Freedom throughout history has been a difficult word to define. From disciplines such as Philosophy, there has been a wide debate about its meaning. To define the concept of freedom, we will refer to two fundamental philosophical theories: utilitarianism and existentialism. On the one hand, we have the utilitarianism developed by John Stuart Mill, who established the concept of freedom from a social and civil perspective, leaving aside what he called "free will". Stuart Mill argues that individual choices, and not just collective ones, are of public importance, and that any action, whether individual or collective, that may have a negative impact on society transgresses the freedom of the individual and of the collectivity.[2] This, if applied strictly, is a dangerous theory and even a doctrine used in tyrannies.

[2] *See* Miguel Angel, Morales Sandoval, *¿Qué es la libertad? Hechos y Derechos*, Revista de la Facultad de Derecho, 2020.

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On the other hand, Jean-Paul Sartre stated, from the perspective of existentialism, that:

> Freedom is conceived in an absolutely unconditional way, although it remains within the limits of what exists in fact and is devoid of need in the world. However, since this facticity is indeterminate, because freedom is built from the choice to do or not to do of the being, it is also the reason why one is responsible for the world and for oneself concerning one's way of being.[3]

Existentialism also presents certain difficulties such as that of establishing that freedom can only be of an individualistic nature. We need to briefly review these philosophical theories in order to reflect on the concept of freedom as a starting point, as this article sets out to offer a legal contribution, based on human rights and legal reasoning. Therefore, we must begin by analyzing the concept of human rights, because from the perspective of the legal sciences freedom is a right of such nature.

Throughout history, different terms have been coined to address the matter of what we call today "human rights". At the beginning of the modern age, we find denominations such as natural rights; in France, "fundamental rights" was a common term after the French Revolution and, towards the end of the eighteenth century, "public freedoms" was another; during the nineteenth-century, in Germany the term "subjective public rights" was frequent and in more recent times we identify other denominations such as "moral rights". All the terms above are related to the matter of human rights.[4]

Leah Levin argues that:

> Human rights are inalienable and inherent moral rights that, by the mere fact of being a human being, all humans possess. These rights are articulated and formulated in what we now call human rights and have been embodied in legal rights established in accordance with the law-making procedures of each society in the national and international scope.[5]

In this sense, we can understand freedom as *a human right that has a multidimensional and complex nature*. In the first place, freedom, in a broad sense, according to Cecilia Medina:

> Is related to the possibility of self-determination, that is, the possibility to conduct oneself in life as one sees fit as long as one's actions do not affect the rights of third parties. Freedom, understood in this way, is in the foundation of human rights and it works, within the inventory of rights, as a special protection to certain aspects of

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[3] *Id.*

[4] *See* Juan Antonio Cruz Parcero, el lenguaje de los derechos. Ensayo para una teoría estructural de los derechos 21-70 (Trotta, 2007).

[5] Leah Levin, Human rights: Questions and Answers 14 (UNESCO, 1998).

> freedom such as, for example, the right to peacefully associate, the right to assembly, and the right to free speech.[6]

Furthermore, international legal documents that originated in this continent, such as the American Declaration of the Rights and Duties of Man, have recognized freedom since 1948 as a fundamental aspect for the life of a human being with a minimum framework of rights. This Declaration sets forth in Article I: "Every human being has the right to life, freedom and the security of their own person". This same instrument provides in Article XXV:

> No person may be deprived of their freedom except in the cases and in accordance with the procedures established by pre-existing law. No person may be deprived of their freedom for nonfulfillment of obligations of a purely civil nature. Every individual who has been deprived of their freedom has the right to have the legality of their detention ascertained without delay by a court, and the right to be tried without undue delay or, otherwise, to be released. They also have the right to humane treatment during the time they are in custody.[7]

Additionally, the American Convention on Human Rights recognizes the right to individual freedom as follows:

> 1. Every person has the right to personal freedom and security. 2. No one shall be deprived of their physical freedom except for the reasons and under the conditions established beforehand by the constitution of the State Party or by a law established pursuant thereto. 3. No one shall be subject to arbitrary arrest or imprisonment.[8]

On the other hand, Mexico in its Federal Constitution recognizes the human right to freedom from different perspectives, mainly in sections 1, 5, 6, 8, 9, 11, 14, and 24.[9] The forementioned sections are some of the most relevant regarding freedom: the abolition of slavery, the right to engage in work and to pursue

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[6] Cecilia Medina Quiroga, La Convención Americana: Teoría y Jurisprudencia. Vida, integridad personal, libertad personal, debido proceso y recurso judicial 212-213 (Centro de Derechos Humanos Facultad de Derecho de la Universidad de Chile, 2005).

[7] *American Declaration of the Rights and Duties of Man*, Adopted at the Ninth International Conference of American States, Bogotá, Colombia, (OAS, 1948) https://www.oas.org/es/cidh/mandato/basicos/declaracion.asp

[8] *American Convention on Human Rights*, Adopted at San José, Costa Rica, by the Organization of American States, November 22, (OAS, 1969. Effective date: July 18, 1978. The Mexican Senate passed it on December 18, 1980. Mexico adhered to it on March 24, 1981. It was published in the Federal Official Gazette (DOF by its acronym in Spanish) on May 7, 1981. Treaties entered by Mexico means any "international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." *See article 2, section A, of the Vienna Convention on the Law of Treaties from 1969.*

[9] *See* Mexico's Federal Constitution.

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an occupation, the right to free speech, the right to associate and assembly, the right to petition, the right to freedom of movement, and the right to religion.

It should be noted that while some of these freedom typologies are of an individual nature, others are of a collective one. For example, the right to freedom of speech has, *a priori*, an individual nature, while the right to associate and assembly, due to its nature, has an implicit collective nature. In this sense, in the case of the right to freedom of speech, one of the medullary aspects for individual freedom, the Inter-American Court of Human Rights has emphasized that

> Special attention must be given to the principles of a "democratic society". The right to freedom of speech constitutes one of the essential foundations of a democratic society. It is an important condition for its progress and for the development of the individuals. The right to freedom of speech is valid not only for the information or ideas that are favorably received or considered inoffensive or irrelevant, but also for those ideas that collide, disturb, or offend the State or any sector of the population. Such are the demands of pluralism, tolerance, and open-mindedness, all crucial elements for the existence of a "democratic society". This means that any formality, condition, limitation, or punishment imposed regarding this matter shall be proportioned for the legitimate end that is being pursued.[10]

For a democratic and plural society to exist, it is necessary that the right to freedom of speech is protected by the legal systems and that any person can exercise said right without the opposition of the State.

III. Problems with human rights: the case of right to freedom

We will analyze, according to Norberto Bobbio, what problems hinder the respect for and observance of human rights. Here lies the importance of the present investigation, as this analysis will allow us to understand the complexity of freedom as a dichotomous human right. Freedom, on the one hand, has an individual nature and, on the other hand, a collective one. In this sense, Bobbio points out that human rights have four issues from their very origin, namely:[11]

1) The term "human rights" is "obscure" (in other words, a tautology).
2) Human rights are a variable and historically relative category.
3) They are heterogenous and divergent.
4) They may be "antinomies" under certain contexts.

[10] *Case of the Last Temptation of Christ (Olmedo Bustos et al.) v. Chile*, C Series, no. 73, 68-69 (Inter-American Court of Human Rights, Judgement of February 5, 2001).

[11] *See* Norberto Bobbio, Sobre el fundamento de los derechos del hombre, in El tiempo de los derechos 55 and ss (Sistema, 1991).

The first problematic aspect points out that the term human rights is *obscure* and inaccurate, and, as a result, it impedes us from establishing an absolute foundation for this kind of rights. "This problem gives place to a discourse in which logical fallacies are present both in theory and practice. That is to say that it pulls away from the scientific classification criteria deriving from logical empiricism". In other words, a foundation built upon inaccurate and obscure terms as well as tautologies can hardly serve as a "foundation" for human rights in less more practical scopes.[12] A tautology, in simple terms, refers to a redundant concept. In the case of the term "human rights," the definition is the same as the term itself (faculties that correspond to an individual for their human nature). This, as we can see, does not add information, and simply repeats the information that had already been provided.

In second place, the issue regarding *the relativity of human rights as a historical concept* is related to the relativity of the values that are part of the ethical content of rights. For this reason, the history of mankind and the changes in religious, ethic, and political views must be taken into consideration. The evolution of the human being is characterized by the development of several ways of thinking, which is reflected in the historical development of human rights.[13] The right to freedom of thought and religion has a plurality of moral conceptions that are the reason for its existence. To put it another way, if there was an absolute foundation for religious and moral matters, it would not have been necessary to establish the freedom of thought and religion because all human beings would have to believe and think in the same way.[14]

In third place, *the heterogeneity and divergence*[15] argued by Bobbio implies that human rights are different to each other, because they arose from and are applied to diverse needs. This means that, to mention one case relevant to our analysis, the reasons that served to establish the right to freedom of religion are different from those that allowed the origin of other rights such as the right to education. Therefore, it is not possible to speak of an absolute foundation for human rights and, as a result, a foundation for each right must be established.[16]

Finally, the fourth problematic aspect of human rights and, in our view, the most important for the purpose of this article, is the one concerning the *antinomic nature* of human rights. These "antinomies" are present, specifically, between individual and collective rights, i.e., between those rights that consist in free-

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[12] Miguel Román Diaz, Los Derechos Humanos en el Pensamiento de Norberto Bobbio, Doctoral diss., 238 (Universidad Carlos III de Madrid, 2015) https://www.corteidh.or.cr/tablas/r38076.pdf

[13] *See* Norberto Bobbio, Sobre el fundamento de los derechos del hombre, in El tiempo de los derechos, 55 and ss (Sistema, 1991).

[14] *Id.*

[15] *See* Norberto Bobbio, Ciencia del derecho y análisis del lenguaje, in Contribución a la teoría del Derecho 181 (Debate, 1991).

[16] Diaz, *supra* note 12.

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doms and those that consist in powers.[17] In this sense, we find limits imposed by the State that under no circumstance must transgress the human dignity[18] of the individuals. The case of the limitation imposed on the right to freedom of movement during the COVID-19 pandemic is a case point. During this time, the State, for public health reasons, imposed limitations over the rights to individual freedoms like the aforementioned.

Nonetheless, citizens shall pay close attention when the State imposes limitations over certain rights and freedoms, because "despite the fact that human rights can operate as an emancipatory tool in a given historic moment (like the American civil rights movement), they can also become a regulatory discourse, i.e., a tool to hinder or co-opt more radical and political demands, or simply become the emptiest of the empty promises."[19] This is to say that human rights may be utilized as mere political discourses to manipulate, hinder or limit freedoms in an arbitrary way and, as result, they do not serve the purposes for which they were conceived.

Furthermore, as we will analyze with more deeply in the section regarding antinomies between rights, a specific set of human rights under a certain context may collide. In the case of the COVID-19 pandemic (where a valid and legitimate limitation was imposed over the right to freedom of movement due to the health emergency with the purpose of maintaining the public order), the right to freedom of movement of an individual is an antinomy of the right to public health and to the right to collectivity.

IV. Perspectives on and distinctions between the right to individual and collective freedom

As already discussed, freedom is a two-sided right, i.e., it has both an individual and a collective nature. To further explain this two-sided nature and to understand the collisions that may arise in practice and reality from the exercise of an individual right and a collective one, we will start with the basics. That is, we will give a general overview of both types of rights to find the differences between them.[20]

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[17] Eusebio Fernández, El problema del fundamento de los derechos humanos, in Teoría de la Justicia y Derechos Humanos 82 (1987, Debate).

[18] Human dignity is the conceptual framework that connects the morality of equal respect for any individual with Positive Law and a democratic law-making procedure which results in a public order founded in human rights. See Jürgen Habermas, *The concept of human dignity and the realistic utopia of human rights*, 4 Metaphilosophy 41, 464-480 (2010).

[19] *See* Wendy Brown, Lo que se pierden con los derechos, in La crítica de los derechos 83 (Siglo del Hombre Editores, 2003).

[20] C. Rosario Batista, Derechos humanos individuales y colectivos, ¿Individuales o Colectivos? Propuestas para la nueva Constitución desde diferentes miradas *passim* (Inter-American Court of Human Rights, 2011).

> Human rights are the result of a liberal vision in which the person, as an individual, prevails as the subject of law. The recognition and evolution of human rights within the international scope has been undoubtedly important since the adoption of the Universal Declaration of Human Rights from 1948, as well as the adoption of the International Covenant on Civil and Political Rights, and the International Covenant on Economic, Social and Cultural Rights from 1966. They have contributed to "humanize" the exercise of power by establishing limits and constitutional rights common to all the States that allow to protect the freedom and dignity of the individuals.[21]

Despite the existence of these international instruments, it is common to observe violations of rights, such as the right to freedom and dignity in contemporary societies because of authoritarian governments and States. Regarding individual rights, they are fragile in comparison with the state machinery, because they arise from an unequal position of power or from a disadvantageous situation with the state authorities. For example, the right to petition involves an asymmetrical relationship between the petitioner and the government.

> Furthermore, a considerable difference regarding the exercise of collective rights is that when we refer to the rights of a given group as collective rights, we are talking about rights inherent to a given group of people that have a common interest or characteristic that distinguishes them from others. Age is a case point as it allows recognition of different rights for children, adolescents, young adults, or elderly people. There are also different population sectors that enable the recognition of special rights, such is the case of disabled people and immigrants.[22]

We can also find collective rights with a broader scope. Such is the case of the human right to a healthy environment which is a right of the collectivity.

Concerning *freedom as an individual right*, it is crucial to point out that individual freedom is what makes us full and fulfilled human beings. Without individual freedom, individuals would fade out in the collectivity together with their demands, wishes, and identities. We believe that to be free in a social environment, there is no need to sacrifice our dreams to conform to the wishes of the majority or to protect their wellbeing, because the majority is not always right or acting in accordance with law. It is not fair to claim, *prima facie*, that collectivity deserves the best right.

In this sense, Justice Ketanji Brown Jackson (the first Black woman to serve in the U.S. Supreme Court) argued that "constitutions must be color-blind, despite the human reality not being color blind."[23] This statement implies *a priori* that there is equality before the law when rights are seen through those color-blind

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[21] *Id.*

[22] *Id.*

[23] *See* Bernd Debusmann Jr., *La decisión de la Corte Suprema de EE. UU. que elimina la 'discriminación positiva' por raza en las admisiones universitarias*, BBC News, June 29, 2023 https://www.bbc.com/mundo/articles/c84wnlw77nko.amp

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glasses. While in theory Law is general, abstract and has a design that serves for a common recipient, i.e., the *collectivity* (conceived as an homogeneous, unique and indivisible structure), in practice, the reality is that *the human being is heterogeneous and diverse and, as a result, rights cannot be applied in the same way all the time and this fact is what produces the challenge we have been discussing in this article.*

Even if the constitutional colorblindness provides an absolute solution for this discussion (individual rights v. collective rights), the reality is that arguing that collective rights must be given priority over individual rights constitutes a fallacy. The essence of the problem lies in the belief that collectivity has priority over the individual in any circumstance and context. This, being categorical, is inaccurate and fallacious as will be shown in the following section.

V. The right to collective freedom: Recurring fallacies concerning its supremacy

The interest and wellbeing of the majority is deemed, by antonomasia, to be superior to the freedom or interests of the individual. The constitutional colorblindness gives an advantage to the rights of the collectivity over the rights of the individual. But this advantage is not always fair. In this sense, figures such as public safety, national security, public order, and others, have been adopted by the governments to impose limitations over individual freedom. Such figures are interpreted as dogmas or undeniable mandates *prima facie,* which infer the supremacy of the collectivity over the individuality. Nonetheless, if we acknowledge that such figures belong to a mandatory category under any circumstance, variable or hypothesis, we are prone to embrace a fallacy from the perspective of logic and even more from the perspective of deontic logic or *ought-to-be* logic.

A fallacy is a failure in the structure of reasoning. They are commonly unintentional but result in knowledge that is false and misleading.[24] We are of the opinion that the idea arguing that "the collectivity must be given priority over the individuality when it comes to rights under any circumstance" is a fallacy, because if we acknowledged this idea we would give rise to an absolute, authoritarian, and dangerous context for the exercise of individual rights such as the right to freedom of speech and thought.

If we analyze the perspectives on freedom from the Middle Ages, we will realize that the individual element was sacrificed for the sake of the collective ideal of society as well as for the absolute submission to monarchic power. Nowadays, society aims to encourage diversity and tolerance by means of an equal environment that transforms freedom in a real "public good". That is, a right that makes accessible and exercisable for the individuals the possibility to govern within a new model of political organization ruled by the empire of Law.

[24] *See* J. E. Broyles, *The Fallacies of Composition and Division,* 2 Philosophy and Rhetoric 8, 108-113 (1975).

"A society in which any individual has the possibility to govern the affairs of the republic and an equal right to choose."[25]

This means that, if we acknowledge that collectivity must be given priority over individuality under any circumstance in any social environment, we are bringing back a concept of freedom that is highly restrictive and potentially harmful, especially if it is used as a political and governmental discourse to impose arbitrary limitations over the rights of the individuals. It may be misleading and, as a result, can give rise to decision-making practices within the spheres of political power that restrict individual freedoms and rights on the grounds of democracy to protect the wellbeing of the majority, but that rather constitute an actual limitation over the legitimate exercise of the individual freedom.

VI. What to Do When Two Human Rights Collide? A Brief Approach to Antinomies in Law

As we have argued, there are instances in which human rights can be antinomies. In this section we will analyze antinomies with more depth. "A legal system[26] presents an antinomy when a given case may have two diverse and opposite solutions on the grounds of existing norms within that system."[27] Guastini, a renowned constitutionalist author, has argued that an antinomy is present if the following criteria is met:[28]

a. When a given behavior is qualified, in a deontic manner, in two incompatible ways in two different norms within a legal system.

b. When two incompatible legal effects are triggered for a certain situation based on two pre-existing norms within that system.

In the case of human rights, particularly in the case of individual freedom v. collective freedom, this problem arises. For this reason, we must refrain from establishing absolute solutions (for in most cases said solutions put collective freedom before individual freedom vanishing the identity of the individual in the face of society's demands).

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[25] *See* Víctor Alarcón Olguín, *Libertad y Democracia*, Cuadernos de Divulgación de la Cultura Democrática 18, 55 (2000) https://portalanterior.ine.mx/documentos/DECEYEC/libertad_y_democracia.htm#relacion

[26] Legal system means "the articulated and coherent assembly of institutions, methods, procedures, and legal rules that constitute the Positive Law of a given time and place. Any free and sovereign State has its own legal system". *See* José Humberto Zárate, et al., Sistemas Jurídicos Contemporáneos, as cited by Nuria González Martín, *Nociones Introductorias y Familia Jurídica Romano Germánica*, in Sistemas Jurídicos Contemporáneos 1 (Mc Graw Hill México, 1997) http://historico.juridicas.unam.mx/publica/librev/rev/jurid/cont/30/cnt/cnt27.pdf

[27] Ricardo Guastini, Estudios sobre la Interpretación Jurídica 71 (Marina Gascón & Miguel Carbonell trans., Porrúa-Universidad Nacional Autónoma de México, 2014).

[28] *Id.*

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VII. Emerging answers on the basis of legal reasoning to solve antinomies concerning the human right to freedom

1. The balancing law and the weight formula as a possible solution

A. Note regarding the research's methodology

In this article, we will use the "illustrative case study" method. This type of case study is used to "[...]evidence a characteristic that we are interested in studying and that is present in other instances."[29] In this case, we are looking for clarifying the nature of the collisions between the individual freedom right versus the collective freedom right. Furthermore, due to the nature of this type of case study, it will be easier to "come up with a theory or a set of propositions regarding the functioning of a phenomenon."[30] In other words, research limited to an "illustrative case" allows us to contrast the theoretical proposals with reality.

In this sense, our main purpose is to provide a potential solution. For this reason, we named this section "Illustrative case", as it is precisely an example of a potential answer within the wide and diverse range of possible solutions.

B. The balancing law

In this article, we suggest a scientific answer using the legal *Balancing Law* and the application of the *Weight Formula*.[31] When we aim to solve a conflict on the grounds of Law there are, in general, two basic operations:

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[29] *See* Xavier Coller, *Estudio de casos,* 30 Cuadernos metodológicos, 31 (2000).

[30] Ibid.

[31] We will not go in-depth about the viability and objectivity of the *Weight Formula* as a reasoning tool within the Balancing Law´s theoretical framework. In other words, we will not reflect on the challenges and problems that may arise from applying the *Weight Formula* in general or specific cases. Therefore, we acknowledge that the Balancing Law´s is a radically subjective operation. It has been questioned because of the use of intuitive theories which may jeopardize the objectivity of a result. To understand more about this theoretical discussion and others, *see*: Frederick Schauer, Playing by the Rules (Oxford University Press, 1991) and M. Cristina Redondo, *Reglas «genuinas» y positivismo jurídico*, in Analisi e Diritto 243-276 (Paolo Comanducci & Riccardo Guastini eds., Ricerche di giurisprudenza analitica, 1998). Jonathan Dancy, Moral Reasons 60 (Blackwell, 1993). Bernard Schlink, La ponderación en el derecho. Evolución de una teoría, aspectos críticos y ámbitos de aplicación en el derecho alemán 75-110 (Universidad Externado de Colombia, 2014).

As we stated before, we aim to provide a potential solution to the tensions arising from the right to individual versus the right to collective freedom. Hence, the following section is called "Illustrative case", as it is a case that evidences a potential solution within the diverse and wide range of solutions that may exist. In other words, this illustrative case is not special *per se*, but it is a case that allows us to clarify in reality what has been theorized. To understand more about the methodology for case study selection and case studies, *See* Xavier Coller, *Estudio de casos*, 30 Cuadernos metodológicos, 31 (2000).

> *Subsumption* and *balancing*. While subsumption has been researched to a considerable degree, where balancing is concerned there are still several questions to answer. There are three basic problems with balancing: its structure, its rationality, and its legitimacy. There is a close link between these problems. The legitimacy of balancing in Law depends on its rationality. The more rational the ponderation, the more legitimate is its practice in Law.[32]

Subsumption consists in the application of a norm to a fact. For example, when a person decides to get a divorce, the law will find for that specific situation (i.e., children, property or other elements that arouse during the civil marriage) a legal solution. On the other hand, *balancing or making an operation of balancing* in Law entails understanding that Law provides more than one coherent answer because in most cases there are two human rights that cannot be applied at the same time involved. In this sense, we can find a basic logic rule, "*reality just is, A is A, and it cannot be not A*. If we apply this rule to geometric shapes, a square is a square and it cannot be a triangle, not at the same time."[33]

Human rights can be antinomies and the way to solve their contradictions or collisions is not expressly provided by Law as in the case of a civil divorce, where subsumption is used. Regarding individual freedom v. collective freedom, we have the following example: in Spain during the nineties, several young men decided to refuse the nation's call to join the military because it was against their freedom of thought, of conscience, of religious beliefs and individual moral values.[34] In this example,[35] we stand before a collision between two human rights: on the one hand, *the right to freedom of thought and the right to religion of an individual*, and, on the other hand, *the right to public order and the right to collective legal safety provided to the State by an active military*.

To solve this collision between human rights (the individual freedom to religious beliefs v. the State's faculty to call upon their citizens to enlist in the military in order to guarantee the public order and collective safety), one relevant option created in legal sciences that may provide an efficient answer is the so-called Law of Balancing and the Weight Formula proposed by Robert Alexy.[36]

Robert Alexy defines this law of competing human rights or principles as follows: "The conditions under which one principle or right takes precedence over another constitute the operative facts of a rule giving legal effect to the

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[32] *See* Manuel Atienza, Las razones del Derecho (Teorías de la Argumentación Jurídica), *passim*, (Universidad Nacional Autónoma de México, 2005).

[33] *Id.*

[34] *See* César Díaz, *De objetor a desertor*, El País, (November 2, 1985), https://elpais.com/diario/1987/11/03/espana/562892406_850215.html?event_log=oklogin.

[35] The methodology of the illustrative case study is used to select theoretically decisive cases in a general or specific research context. *See* Xavier Coller, *Estudio de casos*, 30 Cuadernos metodológicos, 31 (2000).

[36] Robert Alexy, Teoría de los derechos fundamentales 31-62 (Carlos Bernal Pulido trans., Centro de Estudios Políticos y Constitucionales 2d ed. 2008).

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principle deemed prior."[37] On the basis of this law, we can deduce that, as there are no absolute precedence relations between the rights of a legal system, no principle or right is prior, superior or hierarchically stronger (in its origin) to another, unless there are conditional precedence relations that precisely arise from that specific case. Now, we can have a better understanding of what it means to decide a case by balancing: "to decide a case by balancing consists in deciding by means of a rule that is based on the principles that play in the opposite direction."[38]

Regarding the Balancing Law, *per se*, Alexy argues that

> Between the proportionality principle and the fundamental structure of the principles there is an intimate connection and a correlation. Hence, as human rights are optimization commands within the field of factual and legal possibilities, it follows logically from it that the sub-principles of appropriateness, of necessity, and of proportionality in a narrow sense are deducible from the operation of balancing in a strict sense.[39]

The theoretical proposal from the author establishes that the balancing of rights can be broken down into three stages: "in first place, determining the degree of non-satisfaction of one principle; in second place, establishing the importance of satisfying the competing principle, and, in third place, justifying the priority or optimization of one principle over the other.[40] According to the above, human rights, unlike other types of legal norms, are more flexible as they are considered principles, and, as a result, we will have one definite answer when we face a specific case. In the following section we will analyze a case as a way of illustration.

C. "Illustrative case" on the priority of individual freedom over collective freedom

We cited above the case of the Spanish young men that opposed the mandatory enlistment in the military of their country. They put their right to freedom of thought, conscience, and religion over the right to public order and collective safety. In this case, the right of the individuals who did not wish to enlist in the military to freedom of thought for moral, ideological or religious beliefs is what we call an affected right, because they were forced by the State to enlist in the military as those who dropped out of the military were sanctioned with imprisonment (situation that occurred up until the nineties).[41]

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[37] Robert Alexy, Teoría de la argumentación jurídica 75 (Centro de Estudios Constitucionales, 1997).

[38] *Id.*, 100.

[39] *Id.*

[40] *Id.*

[41] *See* Miguel González, *25 de los 92 presos militares en 1990 eran desertores*, El País, (January 30) 1991), https://elpais.com/diario/1991/01/31/espana/665276402_850215.html.

The right to freedom of thought, conscience and religion is recognized by the Universal Declaration of Human rights in article 18 which provides: *Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change their religion or belief, and freedom, either alone or in community with others and in public or private, to manifest their religion or belief in teaching, practice, worship and observance.*

Additionally, the International Covenant on Civil and Political Rights in article 18.3 sets forth, about the limits of this individual freedom, that: "Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by Law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others". In this sense, we can identify two competing human rights or rights that are antinomies concerning freedom. On the one hand, we have the right to freedom of thought of each young man to not enlist in the military as it goes against their morals, principles, ideology or religion; on the other hand, we have the right of collectivity to safety, public order and protection provided by the military. In other words, in this illustrative case individual freedom is face to face with collective freedom in the following way:

COMPETING RIGHTS:
P1: The right to freedom of thought of everyone to not comply with the mandatory enlistment in the military.
V.
P2: The right of collectivity to safety, public order and protection provided by the military.
P1: *Principle or right potentially affected.*
P2: *Principle or right that aims to justify its protection and enforcement.*

By using the Balancing Law and by analyzing both rights in accordance with the Weight Formula, it is possible to justify the non-satisfaction of the second right (P2: The right of collectivity to safety, public order and protection provided by the military) so as to guarantee the right to freedom of thought, conscience, and religious beliefs of each individual that deems enlisting in the military as incompatible with their conscience, morals, and ideology.

WEIGHT FORMULA:

$$W = \frac{I.W.R}{I.W.R} =$$

$$W = \frac{4.4.1}{4.2.^{(1/2)}} = \frac{16}{4} = 4$$

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Alexy points out that in the Weight Formula, by making multiplications and divisions, three degrees of non-satisfaction may be obtained for each right: light, medium, and severe which are quantified in 1, 2, and 4; in the case of the last element to be determined by the Weight Formula the result may be 1, ½, and ¼. The result of the formula will determine which right or principle must prevail. He further explains that in instances where the result of the formula is greater than 1, the P1 (Principle or right 1) takes precedence over P2 (Principle or right 2). In the case of our example, the result we obtained is 4 (four) which means that *the right to freedom of thought of everyone to not comply with the mandatory enlistment in the military* takes precedence over *the right of collectivity to safety, public order and protection provided by the military*.[42]

The greater good in this case consists in protecting individual freedom over collective freedom for every time such a fundamental freedom as the freedom of thought, to make decisions and to believe in what one wishes is suppressed. If an essential foundation of a society that is truly free is lost, as a result, the society, as a collectivity, would inevitably be subjected to and affected by the violation of this individual right.

The core idea of the formula, according to the author, is that the competing rights in balancing are commands to be optimized in accordance with the factual reality. In our example, *the right of collectivity to safety, public order and protection provided by the military* is the command that must be optimized and made more flexible to fulfill the individual right which is fundamental and cannot be infringed regardless of the conditions, emergencies, or imminent need of a military of a country.

The respect for the individual freedoms is what makes a society a democratic and authentically free entity capable of guaranteeing the enjoyment of human rights. To conceive a "democratic society without a minimum frame of freedoms that work as a foundation triggers the blurring, to a great extent, of any defense of the civilization and the modernity, for freedom and democracy are a reference point for any individual and society in the constitution and expression of their most elementary actions."[43]

In this sense:

> Freedom must be exercised with the purpose of fully developing all human capacities and any attempt to manipulate its purpose results in its refusal. However, in different instances, it has been concluded that the oppression of freedom under a

[42] The *Weight Formula* is used at present time within the jurisdictional field; it is used in constitutional courts across different countries in the world to solve problems regarding Human Rights that are antinomies. In the case of Mexico, the Electoral Tribunal of the Judicial Branch of the Federation has used the *Weight Formula* in cases where political individual human rights and collective rights are concerned.

[43] *See* Víctor Alarcón Olguín, *Libertad y Democracia*, Cuadernos de Divulgación de la Cultura Democrática 18. https://portalanterior.ine.mx/documentos/DECEYEC/libertad_y_democracia.htm#relacion Alarcón Olguín, *supra* note 25.

> generalizing idea of democracy (as it has occurred with communism and fascism) results in the annulment not only of the first but also of the second. [44]

Although it is true, the Weight Formula cannot give us a generic answer. In this example we are interested in reflecting on the importance of individual rights. Freedom gives the power of raising one's voice without fear, fully exercising our human rights. Undoubtedly, individual freedom is a fundamental right to build a democratic and inclusive society which also implies reflecting on the legal mechanisms (like the Balancing Law) that allow to efficiently give priority to individual rights in collective rights contexts.

Finally, regarding the illustrative case referred, we must understand individual freedom as an articulating principle of contemporary democracies.[45] If this principle is violated, the essence of a free and autonomous society is broken. A society must be capable of protecting its individuals while building a heterogeneous and diverse collectivity that respects differences (a collectivity that seeks the common good while respecting the freedom and personal fulfillment of the individual). This is the great challenge of applying the human right to freedom in the social reality.

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[44] *Id.*

[45] *See* Robert A. Dahl, On Democracy, *passim* (Yale University Press, 2008).

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