

# *Rights trumped?*

## *Balancing in constitutional adjudication*

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### I INTRODUCTION

Many modern constitutional charters of fundamental rights authorize the limitation of the rights they entrench.<sup>1</sup> The very abstract terms in which constitutional rights are usually formulated make collisions among them, and between different individuals' entitlements under a single right, inevitable. Naturally, this requires determination of the limits of rival rights and of the entitlements they grant to individuals. It also seems to render legislative and administrative determination of these rights unobjectionable, provided that this is, as these constitutions require, policed by independent courts – there are typically many different ways in which clashing rights and interests might be reconciled in particular circumstances, and it seems appropriate that in democracies the choice of means should be left to an elected legislature and the government over which it exercises ultimate control, while the courts ensure that the choices so made remain within the broad framework of the charter of rights.

However, modern constitutional law does not stop there. Apart from providing for such 'intrinsic' limitations, it also authorizes 'extrinsic' limitations, that is, the limitation of fundamental rights on grounds that do not directly appeal to the entrenched rights but rely on general governmental goals, such as economic development, environmental protection, the promotion of public health and effective policing. The manner in which this is done varies from one jurisdiction to another, being sometimes the product of judicial activity and at others expressly provided for in the constitutional text. In the latter case, these grounds of limitation can be contained in the statement of each of the enumerated rights, or in a general limitations clause qualifying all rights – and there are of course different ways in which these various techniques are combined. The pertinent provision in the South African Constitution illustrates the general nature and breadth of such permissible limitations rather well:

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<sup>1</sup> For a handy if by now somewhat dated survey, see Armand de Mestral et al (eds) *The Limitation of Human Rights in Comparative Constitutional Law* (1986).

‘The rights in the Bill of Rights may be limited . . . to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom . . .’<sup>2</sup>

Is this genuinely consistent with the nature of rights? Or does it go too far to permit extrinsic as well as intrinsic limitations? Do these not take away with one hand what charters of rights purport to give with the other? Dworkin’s famous characterization of rights as trumps might be thought to suggest as much. ‘If someone has a right to something,’ he wrote, ‘then it is wrong for the Government to deny it to him even though it would be in the general interest to do so’.<sup>3</sup> And:

‘A right against the Government must be a right to do something even when the majority thinks it would be wrong to do it, and even when the majority would be worse off for having it done. If we now say that society has the right to do whatever is in the general benefit, or the right to preserve whatever sort of environment the majority wishes to live in, and we mean that these are the sort of rights that provide justification for overruling any rights against the Government that may conflict, then we have annihilated the latter rights.’<sup>4</sup>

Dworkin insists, however, that rights are not absolute: ‘Someone who claims that citizens have a right against the Government need not go so far as to say that the State is *never* justified in overriding that right.’<sup>5</sup> He recognizes that both intrinsic and extrinsic limitations may on occasion be warranted, allowing for ‘the definition of a particular right’ to be limited if otherwise ‘some competing right . . . would be abridged’ or ‘the cost to society . . . would be of a degree far beyond the cost paid to grant the original right.’<sup>6</sup>

The crucial question then becomes how the courts ensure that the choices that are made when rights clash with each other or with other objectives remain true to the obligations imposed by fundamental rights. When is it indeed legitimate, or, in the words used in the South African Constitution, ‘reasonable and justifiable’, to limit a right? Several jurisdictions have answered this question by stipulating a proportionality test, also clearly articulated by the provision in the South African Constitution quoted above, which requires the courts to take into account:

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;

<sup>2</sup> Section 36(1) of the Constitution of the Republic of South Africa Act 108 of 1996.

<sup>3</sup> Ronald Dworkin *Taking Rights Seriously* (1977) 269.

<sup>4</sup> *Ibid* 194.

<sup>5</sup> *Ibid* 191.

<sup>6</sup> *Ibid* 200.

- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

The balancing exercise involved in the application of the proportionality test is staunchly defended by Robert Alexy in his analysis of the work of the German Constitutional Court.<sup>7</sup> Alexy relies on Dworkin's account of legal principles in order to show how a legal norm may on occasion be outweighed by a competing consideration yet retain its validity. He describes constitutional rights as having a 'double aspect': they are, in Dworkin's terminology, simultaneously principles and rules.<sup>8</sup> This treats constitutional rights as containing stipulations that are to varying degrees incomplete, in that they do not, by themselves, enable the judicial resolution of *all* disputes. In their dimension as principles, constitutional rights function as 'optimization requirements', which means that each right can, indeed must, be balanced against other optimization requirements, represented by competing rights as well as social values not enshrined in rights.<sup>9</sup> This contrasts with an approach that would resolve conflicts between such competing norms by way of a ranking of values, which Alexy rejects.<sup>10</sup> He argues that the proportionality test, as the embodiment of such a balancing exercise, 'logically follows from the nature of principles'.<sup>11</sup> Alexy presents this test as designed to compare the cost and benefit of giving effect to a right and to bring about a balance between the right and competing considerations in a manner that optimizes the values on both sides of the conflict.<sup>12</sup> He argues that this is a rational and reflective process, involving characteristically legal judgments of correctness and incorrectness, but acknowledges that there can be uncertainties and reasonable disagreement in the determination of what is a proportionate limitation, leading to a measure of undecidability.<sup>13</sup> It is the latter fact that creates the space for legislative discretion within the framework of constitutional rights.

But Dworkin's work has also been called in aid of the rejection of such a balancing exercise as incompatible with a system of constitutional rights and democratic decision-making. Jürgen Habermas insists that 'as soon as

<sup>7</sup> Robert Alexy *A Theory of Constitutional Rights* (2002).

<sup>8</sup> *Ibid* chap 3.

<sup>9</sup> *Ibid* 47–8. The statement in the text is a simplification of Alexy's argument – to the extent that it contains a rule rather a principle, a right usually overrides non-right values. See *ibid* 83–4.

<sup>10</sup> *Ibid* 96–100.

<sup>11</sup> *Ibid* 66.

<sup>12</sup> *Ibid* 66–9. See also Robert Alexy 'On balancing and subsumption. A structural comparison' (2003) 16 *Ratio Juris* 433 at 436 ff.

<sup>13</sup> Alexy (n 7) Postscript, especially 396ff. See also Robert Alexy 'Constitutional rights, balancing and rationality' (2003) 16 *Ratio Juris* 131.

the deontological character of basic rights is taken seriously, they are withdrawn from such cost-benefit analysis'.<sup>14</sup> In his view, an approach such as Alexy's wrongly treats rights as having 'the teleological character of a desirable good that we can achieve to a certain degree under the given circumstances and within the horizon of our preferences'.<sup>15</sup> Moreover, in keeping with his general emphasis on value pluralism and the incommensurability of moral and ethical commitments, he denies that there are rational standards by which the cost and benefits of rights can be measured. Any balancing exercise therefore 'takes place either arbitrarily or unreflectively'.<sup>16</sup> Habermas takes the view that this 'is one reason why Dworkin regards rights as "trumps"'.<sup>17</sup> He sees the task of resolving collisions of the kind we are considering as requiring of judges 'to examine prima facie applicable norms in order to find out which one is most suitable to the case at hand',<sup>18</sup> i.e. as involving a selection among, rather than a balancing of, norms. On Alexy's approach, he warns, 'the constitutional court is transformed into an authoritarian agency'.<sup>19</sup>

It is a disconcerting suggestion that the balancing approach reflected in the proportionality test serves to undermine democracy. At least at first sight, it is a technique designed to safeguard legislative power from judicial colonization. In authorizing the limitation of rights, subject to its being reasonable and justifiable, this approach appears to reconcile the judicial protection of fundamental rights with due recognition of the necessary and legitimate role played by the legislature in working out the practical meaning of the charter of rights. But if Habermas is right, legal theorists and practitioners need to re-think the direction that fundamental rights jurisprudence and practice has taken in several jurisdictions. What exactly is involved in the limitation of rights is therefore a vital question to investigate. And it is one for which Dworkin's prolific work on the nature and place of rights in legal practice and theory is not only useful, but also the natural starting point.

In what follows, I use Dworkin's idea of rights as trumps in order to identify two ways of taking rights seriously. The first, which Dworkin shares with Habermas, sees the issue as one of interpreting rights in order to determine which right or value must be given effect to. This approach seeks to resolve collisions among rights, and between rights and public values that have not been sanctified as rights, by rendering the opposing sides commensurable, thereby enabling the more important norm to be

<sup>14</sup> Jürgen Habermas *Between Facts and Norms. Contributions to a Discourse Theory of Law and Democracy* (1998) 260.

<sup>15</sup> *Ibid* 261.

<sup>16</sup> *Ibid* 259.

<sup>17</sup> *Ibid*.

<sup>18</sup> *Ibid* 260.

<sup>19</sup> *Ibid* 258.

identified and applied. According to the second approach, defended by Alexy, the interpretation of rights does not provide a complete answer: once it is clear that a conflict exists, the court must shift its attention to optimizing the right in the face of factual and legal constraints, among which feature other rights as well as non-right values. Instead of attempting to select between the opposing values, this approach turns on their reconciliation by way of a balanced, or ‘proportionate’, pursuit of both.

I first seek to explicate Dworkin’s idea of rights as trumps. This notion has been explained and elaborated in many of his writings, spanning several decades, and dealing with somewhat different issues. This part of my essay is therefore reconstructive rather than purely descriptive in tone, and is inevitably oriented towards pursuing the general question I have identified. It is also critical, in that it shows that an approach such as Dworkin’s is unable to deliver on its promise. I then investigate the alternative conception, focusing in particular on whether it is compatible with the idea that rights trump, that is, the deontic character of rights. The general thesis that I advance is that the balancing of rights, as explained and defended by Alexy, is not only legitimate, but also necessary. I end with some reflections on the practical implications of this conclusion.

## II RIGHTS AS TRUMPS

What does it mean to say that constitutional rights are trumps? Dworkin has several times explained what this means substantively, ie what and when such rights trump.<sup>20</sup> These explanations focus on the role played by constitutional rights in inhibiting the unrestrained pursuit of the interests, preferences and values of the majority of citizens. Constitutional rights override other considerations, on this account, whenever this is necessary to ensure that all citizens are treated with equality of concern and respect. There is also an institutional dimension to this, which concerns the constitutional implications of Dworkin’s theory of rights and provides a justification for allowing courts to trump the decisions of democratically elected legislatures. This is especially relevant to the topic of this paper. But there is a further question worth asking – what does it mean conceptually: *how* do rights trump? I start by looking at the latter question, postponing the first two until later.

### (1) *How rights trump*

Dworkin’s explanation of how constitutional rights trump seems to distinguish between two types of collisions that a right might be involved

<sup>20</sup> See especially Ronald Dworkin (n 3); *A Matter of Principle* (1985); *Freedom’s Law* (1996); *Sovereign Virtue* (2000) Part II.

in. The first concerns collisions with competing individual rights: ‘a competing right to protection . . . must be weighed against an individual right to act’.<sup>21</sup> This, he indicates, presents no particular problem:

‘The individual rights that our society acknowledges often conflict . . . and when they do it is the job of Government to discriminate. If the Government makes the right choice, and protects the more important at the cost of the less, then it has not weakened or cheapened the notion of a right; on the contrary it would have done so had it failed to protect the more important of the two.’<sup>22</sup>

This description of how the government is to make the right choice points to how the conception of rights as trumps affects the resolution of conflicts among rights – ‘[i]f rights make sense, then the degrees of their importance cannot be so different that some count not at all when others are mentioned’.<sup>23</sup> That a particular right exists thus means that it cannot be ignored, that it must count for something. What determines how much a right must count and whether ‘the Government makes the right choice’ is a question I discuss below. For the present I want to point out that this is simply an instantiation of Dworkin’s general formulation of what it means to take rights seriously, which is encapsulated in his contention that we cannot ‘say that the Government is justified in overriding a right on the minimal grounds that would be sufficient if no such right existed’.<sup>24</sup>

That this is what treating rights as trumps amounts to is equally clear in Dworkin’s treatment of the second type of collision that rights may be involved in. This concerns clashes with objectives that have not been accorded the status of rights, typically (although not necessarily) the preferences, convictions or interests of the majority of citizens. In this case, we must ‘set aside talk of balancing as inappropriate’.<sup>25</sup> In his view,

‘[i]t cannot be an argument for curtailing a right, once granted, that society would pay a further price for extending it. There must be something special about that further cost, or there must be some other feature of the case, that makes it sensible to say that although great social cost is warranted to protect the original right, this particular cost is not necessary.’<sup>26</sup>

But what provides the metric of these measurements? How does one go about determining the relative importance of a right compared to other

<sup>21</sup> Dworkin (n 3) 193.

<sup>22</sup> *Ibid* 193–4.

<sup>23</sup> *Ibid* 203–4.

<sup>24</sup> *Ibid* 191.

<sup>25</sup> *Ibid* 201.

<sup>26</sup> *Ibid* 200.

rights or the social cost imposed by its protection? Dworkin's answer is that 'once a right is recognized in clear-cut cases, then the Government should act to cut off that right only when some compelling reason is presented, some reason that is consistent with the suppositions on which the original right must be based'.<sup>27</sup> And the suppositions to which this refers us are, it seems, that the right serves to secure the dignity and equality of individuals, or, as Dworkin also puts it, equality of concern and respect.

The necessity of investigating the connection between, on the one hand, particular rights, such as the right to free speech or the right not to be discriminated against on grounds such as race or gender, and, on the other hand, the pursuit of equality of concern and respect, has indeed often been stressed by Dworkin in his discussion of issues such as the banning of pornography, prohibition of abortions, and affirmative action.<sup>28</sup> In each case his analysis focuses on whether and how a particular right serves to secure equality of concern and respect, and seeks to show how a particular limitation of a right either jeopardizes this (prohibition of pornography or abortion) or is compatible with its pursuit (affirmative action programmes). In his more recent work he articulates this by speaking of 'the principle of victimization'.<sup>29</sup>

The general structure of his argument is clear from the following response to those who would restrict someone's freedom of expression on the ground that provocative public statements might incite riots that end in the violation of the rights of others. After stressing the connection between expression and dignity, Dworkin observes that,

'If . . . forbidding him to speak, does the damage that . . . the right of free speech assume[s], then it would be contemptuous for the State to tell a man that he must suffer this damage against the possibility that other men's loss may be marginally reduced.'<sup>30</sup>

This example concerns competing individual rights. What, then, of collisions between rights and non-right considerations? What would make it, in Dworkin's words, 'sensible to say that although great social cost is warranted to protect the original right, this particular cost [of

<sup>27</sup> *Ibid.*

<sup>28</sup> See the works cited in note 20.

<sup>29</sup> Dworkin *Sovereign Virtue* (n 20) 175. The argument in this work has a slightly different nuance from the earlier statement of his position which I draw upon here, as it depicts conflicts between rights as contingent upon the imperfections of the 'real real world' rather than essential, and treats the limitation of rights as serving the cause of moving society towards an ideal world of perfect equality where such conflict would be absent. See 172–183. In my view nothing turns on this difference between the later and the earlier arguments.

<sup>30</sup> Dworkin (n 3) 203.

sacrificing a competing social goal] is not necessary'<sup>31</sup> so that one may justifiably pursue that goal? The answer is that when collisions of this second type occur, the limitation of a right is legitimate only if the inclusion of a particular case within the scope of that right – for example, inclusion of the ritual smoking of marijuana by Rastafarians under the right to religious freedom – would impose a social cost that 'would not simply be incremental, but would be of a degree far beyond the cost paid to grant the original right'.<sup>32</sup> The distinction again turns on the protection of dignity and equality, or equality of concern and respect. Where cost to society is in play, Dworkin tells us, that cost must be of 'a degree great enough to justify whatever assault on dignity and equality might be involved'.<sup>33</sup> This is so, because the benefit brought to society by the institution of rights is that 'it represents the majority's promise to the minorities that their dignity and equality will be respected'.<sup>34</sup>

The views expressed in these quotations seem to occupy a middle ground between Habermas's and Alexy's positions. Like Habermas, Dworkin insists that the articulation of a norm as a right withdraws the norm from ordinary cost-benefit analysis. Dworkin therefore has something more in mind than, as Raz charged, the truisms that rights make a difference and may defeat other considerations.<sup>35</sup> They make a difference of a special kind, in Dworkin's view, one which reflects their deontological character and directs the inquiry to determining the right choice, not merely the most efficient or convenient one. In these quotations rights are treated as enjoying a special status compared to non-right considerations: while the relative importance of two colliding *rights* may be weighed up, there 'must be something special' about the cost that a right would impose on such other considerations. However, cost-benefit analysis is not entirely excluded when rights are in play. A right that is too costly by virtue of its impact in the circumstances of the case either on another right or on social interests may be curtailed. And this appears entirely compatible with Alexy's idea that rights must be reconciled as far as possible with each other as well as with important public purposes by way of a proportionality test.

Dworkin opens up this apparent middle ground by treating social values and interests as having a dual role. On the one hand, they operate on the same plane as constitutional rights and may therefore potentially come into conflict with them. On the other hand, however, social values and interests operate at a different, more fundamental level than

<sup>31</sup> *Ibid* 200.

<sup>32</sup> *Ibid*. This example is based on *Prince v President, Cape Law Society* 2002 (2) SA 794 (CC).

<sup>33</sup> *Ibid*.

<sup>34</sup> *Ibid* 205.

<sup>35</sup> Joseph Raz 'Professor Dworkin's theory of rights' (1979) 26 *Political Studies* 123 at 126.



constitutional rights. They are present at their birth, determining which values will be sanctified as rights in a given society.

Assigning rights such a dual role is made possible by a distinction he draws between ‘institutional rights’, which include constitutional and other legal rights, and ‘background’ rights.<sup>36</sup> The former, which may vary among societies and over time, are crystallizations of the latter: they express a particular political community’s vision of how to pursue justice and fairness and other social objectives and values.<sup>37</sup> It is in respect of these that Dworkin says that, if ‘someone has a right to do something, . . . it is wrong for the government to deny it to him even though it would be in the general interest to do so’.<sup>38</sup> At the deeper level where the rights are settled upon, however, public interests and values play a decisive role in that they constitute the goals of the political community, and hence establish the rights that express those goals in an individuated form.<sup>39</sup>

This does treat rights as deontic in the manner sought by Habermas. However, Dworkin does not, as Raz would have it, ‘claim that rights cannot be defeated by considerations of the general interest or by other considerations’.<sup>40</sup> The trump-theory of rights accepts that compelling reasons consistent with the supposition underlying the original right may curtail the right. Thus Dworkin says that the ‘strength of any particular right, within a particular theory [of justice in a given society] is a function of the degree of disservice to the goals of the theory . . . that is necessary to justify refusing an act called for under the right’.<sup>41</sup> In other words, although the right is withdrawn from ordinary cost-benefit analysis, its rootedness in these underlying considerations provides a legitimate metric for reconciling the demands of clashing rights and non-right considerations. This means that while Dworkin, along with Habermas, denies that rights may be subjected to ordinary cost-benefit analysis, he nevertheless endorses a special form thereof. However, the apparent similarity between this and the proportionality test defended by Alexy is deceptive, for Dworkin’s approach entails not a balancing but a ranking of clashing considerations, on the basis of their respective contributions to the pursuit of equal concern and respect.

## (2) *The content-independent value of rights*

In Dworkin’s account, if a specific consideration – e.g. freedom of religion – is conceptualised as a right, then something more has to be added on

<sup>36</sup> Dworkin (n 3) 93–4. See also his reply to Raz, *ibid* 364–8.

<sup>37</sup> This idea is present throughout his work. See especially Dworkin *Freedom’s Law* (n 20) Introduction; and Ronald Dworkin *Law’s Empire* (1986).

<sup>38</sup> Dworkin *Taking Rights Seriously* (n 3) 269.

<sup>39</sup> *Ibid*.

<sup>40</sup> Raz (n 35) 126.

<sup>41</sup> Dworkin (n 3) 169–70.

the other side of the scale than would have been the case if that selfsame consideration had not taken the shape of a right. Merely by virtue of being recognised as a right that consideration has extra weight when it is placed in the scale against non-right considerations. This is why utilitarian arguments, which seek only to balance the benefit of giving effect to the content of right against the cost of doing so, are in his view ‘ruled out by the concept of rights’,<sup>42</sup> while the relative importance of colliding *rights* may legitimately be weighed up. This treats a right as having a kind of double value, deriving in part from its content and partly from its structure. In keeping with this one could say that the content-independent structural value is cancelled out when rights collide, leaving only their content values to be compared, but comes into its own when a right collides with a non-right.

Whence this content-independent value? Answering this brings us back to what I have referred to as the deeper level where the constitutional rights are settled upon, to the suppositions underlying the rights recognized. The interests and values of a given society do more than determine which goals are to be cast as rights. They also determine whether goals should be cast as rights at all, that is, whether the institution of constitutional rights should feature in that society’s methods for making public decisions. Dworkin’s writings propose that the specific social goal that underlies the existence of the institution of rights is equality of concern and respect.

The content-independent value of constitutional rights therefore derives from a special connection between these rights and the goal of respecting the dignity and equality of all members of society by treating them with respect and concern. Dworkin has of course repeatedly emphasized this. An early form of this argument is his attempt to show that a system of rights is essential to ensuring that the pursuit of the collective good, if conceived along utilitarian lines as the maximisation of individual preference-satisfaction, treats every member of society as an equal.<sup>43</sup> More recently it has taken the shape of a general explanation of the legitimacy of judicial review of legislation in a constitutional democracy.<sup>44</sup> One aspect of this is a demonstration of how pure or statistical majoritarianism, in which an electoral majority freely pursues its own interests and convictions, is neither necessary nor sufficient for the existence of a democratic state; another, equally important, is an explanation of the limits of judicial power. Both turn on the idea of ‘choice-sensitive decisions’, that is, on the idea that there are some, but

<sup>42</sup> *Ibid* 203.

<sup>43</sup> *Ibid* 275–7.

<sup>44</sup> See Dworkin *Freedom’s Law* (n 20) Introduction; *A Matter of Principle* (n 20) 33–71; *Sovereign Virtue* (n 20) 203–10.

only some, decisions the correctness of which depends on choice. On this view, the exercise of judicial power, which is structured in a manner that does not lend itself to the summation and application of preferences, is both necessary and legitimate whenever, but only to the extent that, it involves decisions that are not choice-sensitive, that is, decisions which apply rights. Since Dworkin takes the view that this requires recourse to the ideal of equal concern and respect, constitutional review serves to safeguard equality understood in this way.

This, then, is what it means for legal or constitutional rights to be Dworkinian trumps: they have a special content-independent structural value but also limits by virtue of their role in safeguarding equality of concern and respect. Every such right has a weight that reflects not only the importance of its content, but also the value of the institution of rights. The content and structure of rights are linked because the reach of a right, ie its practical implications for a given situation, depends on how its content-independent value is best given effect to in the circumstances of the case. That is, the content of the right is treated by Dworkin as a particular instantiation of the general structural purpose of all legal rights. These two dimensions of rights are nevertheless distinct, as they can come apart – in discussing ‘evil legal systems’ Dworkin has argued that equality of concern and respect may support the enforcement of rights with an ‘acceptable’ content even though the society’s system of legal rights as a whole may be inimical to this value.<sup>45</sup> However, he sees such situations as pathological – the central case of legal rights is that in which the content of each right as well as the institution of rights aims at safeguarding equality of concern and respect.

We now know what Dworkin’s understanding of how rights are taken seriously means conceptually as well as substantively. Conceptually it means that, although rights are not absolute, conflicting objectives may only be acted upon if doing so is compatible with the underlying rationale of the right. That is, it means that rights override clashing considerations, whether these are cast in the shape of rights or not, in order to safeguard the background justifications of which they are intermediate generalizations. Since the underlying rationale of all rights is to ensure that all citizens are treated with equal respect and concern, its substantive meaning is that only objectives which treat all citizens equally in this way are permissible. Rights trump because, and when, this promotes equality of concern and respect.

It is vital to note that this drives a wedge between rights and goals not sanctified as rights. All rights enjoy this special content-independent value, but no social goals do. Since these do not necessarily conflict with

<sup>45</sup> Dworkin *Law’s Empire* (n 37) 105–8 and 218–9.

rights,<sup>46</sup> they may on occasion also serve this cause, but whether they do so is content dependent. Nevertheless, in light of the decisive role accorded to equality of concern and respect in resolving both types of collision examined so far, it seems clear that taking rights seriously in the Dworkinian manner does not in fact require of one to distinguish between clashes among rights and clashes between rights and non-right goals. The symmetry between these two situations means that nothing is gained by the adoption of different descriptions of what happens in the case of these two kinds of collisions. In both cases countervailing goals are ranked by means of the metric supplied by equality of concern and respect.

### III EQUALITY OF CONCERN AND RESPECT

We have now laid the groundwork for finding the answer to the questions that the debate between Habermas and Alexy led us to. Does equality of concern and respect provide a non-arbitrary metric for employing the proportionality test? Can it enable one to distinguish between permissible and impermissible limitations of rights? And does it show how balancing rights and goals in this way can remain true to the deontic character of rights? Can it, in other words, enable rights to trump and courts to ensure that they do so? I shall argue that equality of concern and respect cannot do the work expected of it: it lacks the ability to discriminate between permissible and impermissible curtailments of rights, it is not suited to resolving the issues it is meant to address, and it is based on a mistaken view of the social role of rights. My argument in this section therefore focuses on three fatal flaws of equality of concern and respect when used to weigh rights against each other and against other considerations.

#### (1) *The ability to discriminate*

Let us then first focus on Dworkin's view that equality of concern and respect rules out restricting rights on the ground of collective interests such as efficiency and administrative expense. According to Dworkin, rights usually trump countervailing collective interests, such as minimizing the cost of enforcement, and aggregated preferences in order to ensure that minorities are treated with equality of concern and respect. Why should such matters not count? What provides the distinction between unacceptable grounds for limiting rights and acceptable ones? Does equality of concern and respect explain the distinction Dworkin

<sup>46</sup> This is the implication of both his earlier view that constitutional rights can cure utilitarian decision-making of its defects and his later endorsement of collective decision-making processes in the case of choice-sensitive matters.

seeks to draw between different collective interests?<sup>47</sup> This is an important question, partly because courts, in several jurisdictions, have on occasion followed a different line from that suggested by Dworkin and have indeed limited rights in the interest of administrative and financial efficiency.<sup>48</sup>

We should begin by noting that there are two senses in which interests might be said to be collective. The first sense is that of interests representing a collectively determined choice or preference. Utilitarianism pursues collective interests of this kind, and so does a political system in which decisions are based only on what the majority deems right or in its interest. Examples of collective interests of this kind would be the promotion and protection of a religion held dear by the majority of a country's citizens, or its mirror image, the promotion of secularism. But many interests are 'collective' in a different sense – they are in the interest of every member of society whatever their preferences or values might be. One example of this is minimizing enforcement costs, which Dworkin rejects as a legitimate ground for curtailing rights<sup>49</sup> – by freeing up resources, this enables the pursuit of a wider range of policies, whatever these might be, and in doing so also potentially benefits those whose rights are being curtailed. In fact, there are many collective interests of this kind. Obvious examples are freedom of belief; the improvement of everyone's standard of living; the promotion of social integration; the existence of a functioning police and criminal justice system; opportunities for individual self-development, intellectual, cultural, spiritual and physical; the existence of a healthy and pleasant environment; a minimum level of healthcare, education, welfare for everyone; the functioning of the military and of industrial enterprises; an effective system of state administration governed through a political system characterised by democratic participation and the framework of civic liberties that this necessitates, and so on. Many, but not all, of these have been entrenched as constitutional rights, and there are significant differences among countries in this regard. Yet they all, irrespective of their constitutional status, serve the interest of individual members of society, jointly and severally.

Dworkin's description of how rights trump elides this distinction. His explanation of how and why rights exclude collective interests treats

<sup>47</sup> His suggestion at one point that it is a matter of the degree of interference (see text above to n 33) doesn't take us very far because it begs the question of the scale on which such degrees are to be plotted.

<sup>48</sup> See eg the German Constitutional Court's decision BVerfGE 77, 84 and that of its South African counterpart in *Prince v President, Cape Law Society* (n 32), in both of which the avoidance of excessive policing costs was treated as a legitimate ground for limiting a constitutional right.

<sup>49</sup> Dworkin (n 3) 201, 203.

collective interests of the second type as if they belonged to the former. But there is more to pointing this out than simply revealing Dworkin's failure to appreciate the true character of some of the collective goals treated by him as incompatible with taking rights seriously. Its true significance is that it serves as a reminder that collective interests can be perfectly compatible with showing equality of concern and respect.

Three implications for dealing with clashes between rights and collective interests flow from this. To begin with, this means that a distinction can indeed be drawn among collective interests according to their relationship to this conception of equality. However, it also means that there is often no principled reason why a particular consideration falls into the category of rights or not. This makes the special status accorded to rights look arbitrary. Finally, it follows that, as Raz has put it, 'it is impossible to insert a conceptual wedge between rights and collective goals in the way Dworkin has chosen'<sup>50</sup> – both can promote equality of concern and respect. Thus, although equality of concern and respect may enable us to discriminate among collective interests, it fails to mark them off from rights. In consequence, the idea that rights serve the cause of equality of concern and respect is not going to help resolve conflicts with countervailing collective goals.

While Dworkin's work provides answers to both of these apparent dilemmas, the answers still fail to justify the content-independent value he attributes to rights. His emphasis on the role that political rights play in maintaining particular political communities' specific background commitments, their own particular, characteristic ways of pursuing equality of concern and respect, refutes the charge of arbitrariness.<sup>51</sup> Once rights are seen as playing this role of maintaining the integrity of a community's conception of justice, the special status they enjoy in comparison with other means for pursuing equality of concern and respect no longer appears arbitrary. Raz's charge is met by Dworkin's acceptance of the possibility that collective goals can on occasion legitimately curtail rights. It is true that Dworkin has often written that rights exclude collective goals, and that many of those he mentions fall into the second group of collective goals identified above. But it seems best to regard these statements as over-hasty and inexact formulations and to pass them over, for his description of how rights trump also acknowledges that allowing collective goals to override rights can sometimes be compatible with equality of concern and respect.<sup>52</sup>

However, Raz's comment also casts doubt over the special, content-independent structural value that Dworkin accords to rights. This is a

<sup>50</sup> Raz (n 35) 128.

<sup>51</sup> See the works cited in notes 20 and 37.

<sup>52</sup> See the remarks quoted in the text above to notes 31 to 33.

point that neither of these answers addresses. If aims that have not been given the form of rights are also means for pursuing equality of concern and respect, then there seems to be no special relationship between rights and this form of equality, and hence no apparent reason why rights, as a class, should be thought of as having a special content-independent value. True, treating rights as rights – that is, letting them trump – promotes the consistent and coherent decision-making that is articulated in Dworkin's notion of integrity and thus ensures that all citizens are treated equally,<sup>53</sup> but this is not a peculiarity of rights: the same result would be achieved by treating any non-right goal in this way. Moreover, once we recall that both conflicts among rights and conflicts between rights and other goals must in Dworkin's view be resolved by having recourse to equality of concern and respect, it is clear that in the final analysis nothing turns on whether a particular goal is called a right. The idea that it is the promotion of equality of concern and respect that accounts for the special content-independent value of rights dissolves, rather than hardens, the deontic character of rights.

In other words, although Dworkin's explanation of the virtue of integrity shows why treating rights as trumps promotes equality of concern and respect, it does not show why only *rights* should be treated in this way and thus be allowed to trump other aims which, as we have seen, also often serve the cause of equality of concern and respect. The fact that a consideration is classified as a right therefore does not seem to produce the special content-independent value Dworkin claims for it. Why should it be thought worse to apply the goal of maximising law-enforcement efficiency consistently even if it curtails the rights of suspects, than to protect their rights at the cost of having a police force that is less efficient at combating crime to the benefit of all, including those who suffer at its hands? There is an answer to this, but equality of concern and respect cannot provide that answer as it is present on both sides of the scale.

This inability to discriminate between rights and collective goals is a serious matter, for it goes to the heart of the appeal of equality of concern and respect. Its appeal lies in the promise it holds out to individuals of protection against collective religious and cultural practices, whether of the majority or of sub-groups to which those individuals might belong. If it is the case that, as many have argued, such collective practices are a social good of the second type in as much as their presence in society is

<sup>53</sup> For his theory of law as integrity and its connection with equality, see Dworkin *Law's Empire* (n 37).

essential to the development of individuals,<sup>54</sup> then equality of concern and respect pulls in both directions.

Moreover, that equality of concern ultimately fails to explain why a legal right operates as a trump over collective goals suggests that the real reason for a right's power lies in a decision by the political community in which it operates to accord higher status to the value enshrined in that right than to others, and not in any content-independent reason. It is only on the basis of such a choice that one can explain, for example, why the interests of suspects and the innocent are in many societies allowed to trump the interest of all citizens in efficient and effective law enforcement. Importantly, there is no *a priori* reason for thinking that this choice would always be designed to protect individuals or minorities. Hence the mere choice by a society to endow a particular value with the status of a legal right cannot in itself justify its treatment as a trump. This raises the question whether the necessary further justification can be found in equality of concern and respect. Can the latter, even if it is not sufficient to explain why rights trump, at least *help* to explain it by showing why and when it is justifiable to give effect to a society's choice of rights?

(2) *Transposing the obligations of individuals onto social institutions*

The short answer to the question just asked is no. The reason is to be found in the second way in which Dworkin's conception of rights as trumps fails. This is that it mistakenly applies a measure that is appropriate to the evaluation of the conduct of individuals to the evaluation of social institutions.

The phrase equality of concern and respect signals that people are entitled to have their status as moral agents of intrinsic worth, their moral dignity, recognised. This is, of course, a restatement of Kant's categorical imperative that in its famous Kingdom of Ends formulation enjoins us to act only on principles which could be accepted by other members of a community of fully rational agents who share equally in legislating the principles for their community, and Dworkin indeed presents his approach as inspired by Kant.<sup>55</sup> Dworkin believes that this precludes the state from prescribing any particular vision of human flourishing to its citizens, although he correctly emphasizes that this does not amount to the view that the state should be morally neutral.<sup>56</sup>

<sup>54</sup> See e.g. Joseph Raz 'Multiculturalism' (1998) 11 *Ratio Juris* 193 at 200; K Anthony Appiah 'Identity, authenticity, survival' in Charles Taylor et al *Multiculturalism* (1994) 149.

<sup>55</sup> Dworkin (n 3) 198. Kant's formulation referred to here is particularly close to Dworkin's 'principle of abstraction' while his principles of 'authenticity' and of 'independence' are equally Kantian in inspiration. See *Sovereign Virtue* (n 20) 147–62.

<sup>56</sup> See especially Ronald Dworkin *Life's Dominion* (1993) 166–8.



Now, Kant directed this injunction at individuals, telling each of us how we must treat others, given the understanding that each of us has of what constitutes a worthwhile human life, that is, given our personal conceptions of the good. Dworkin transposes this from the level of individual behaviour to that of social institutions such as the state, and there's the rub. He endorses 'a particularly deep personification of the community or state', which 'attributes moral agency and responsibility to this distinct entity'.<sup>57</sup> The extent of this transposition may nevertheless not be immediately obvious, as he portrays the duty of the state to treat citizens with equal concern and respect as the product of the duties individuals owe each other by virtue of their common membership of the community.<sup>58</sup> However, it will not do to depict the state as merely an avenue by which individuals severally pursue the Kantian injunction. Whenever a social controversy arises that seems to call for the state to show equality of concern and respect there will *a fortiori* be different individual views of the good, each of which is compatible with the Kantian injunction and may therefore be legitimately pressed on the state by those who hold them. This is so because the categorical imperative does not require of individuals to abandon or compromise their conceptions of the good when others disagree with them, but merely to ensure that they treat others as autonomous moral agents given their own conceptions of the good. To put the same point in somewhat different terms: the categorical imperative requires that individuals treat each other as equals, not that they treat each other's conceptions of the good as equal. The upshot is that social institutions that function in the face of such disagreement can only do so on the basis of principles that are selected by way of a procedure that is distinct from that by which their members settle on their various conceptions of the good.<sup>59</sup> If the state owes its citizens equal concern and respect then its duties cannot be merely derivative from those of its citizens but must be truly its own.

The reason why it matters that Dworkin's approach transposes Kant's injunction onto social institutions is this. To treat someone with respect is to give that person his or her due. In other words, to fulfil this injunction it is necessary to know what respect requires, what treatment is due to persons. Does respect require concern with the salvation of another's

<sup>57</sup> Dworkin *Law's Empire* (n 37) 167–8.

<sup>58</sup> This can be seen in all his recent work, including Dworkin *Law's Empire* (n 37) 167–75, but is perhaps most obvious in *Sovereign Virtue* (n 20), especially in its explanation of equality by means of a reflection on how shipwreck survivors washed up on an island would go about settling fundamental questions of justice. Note that my argument in the following paragraphs would be strengthened if I am wrong about this.

<sup>59</sup> This is reflected in the structure and operation of social institutions such as legislatures and courts, as they enable public officials to decide matters on the basis of convictions that might differ from those held by citizens.

soul, or leaving others to their own religious devices? Does it mean that their religious, sexual or cultural commitments must receive the same protection as, or indeed special protection over and above that accorded to, their aesthetic, sporting, professional or financial interests? Does it mean that people should be held to their contractual undertakings or that they should be relieved of these when they turn out to be exploitative? Questions like these only have to be posed for it to be clear that the requirements of respectful behaviour are closely interwoven with specific views of what constitutes a flourishing, worthwhile, dignified life. Importantly, this cannot be evaded by substituting notions such as moral autonomy or authenticity for respect, as these invite similar questions. Respect, autonomy, authenticity, concern, and comparable notions have to be fleshed out with a conception of human flourishing before they can have any purchase. Anything less would offer only the truism that moral agents are entitled to be treated as moral agents. Morality is dependent on ethics.<sup>60</sup>

This is not peculiar to the pursuit of equality of concern and respect at the level of social institutions. Individual compliance with Kant's injunction also relies on a pre-existing notion of what is important to and about humans. But at the level of individual conduct the categorical imperative refers back to how someone believes people should be treated by others, and its satisfaction requires no more than keeping faith with that person's own conception of human flourishing. When we move away from interactions among individuals, however, and seek to apply it to how social institutions should act, then it begs rather than answers the question it is meant to address. If the state is to pursue equality of concern and respect, then it must, like each individual separately, decide what is intrinsically valuable and important about humans – yet this is precisely what is in issue in the contexts where equality of concern and respect is meant to guide collective decisions.<sup>61</sup>

Moreover, while individuals can refer back to their own conception of the good, the state has none to refer to. Social institutions are not persons; despite Dworkin's claim to the contrary, the state is not a moral agent in its own right with its own interests and ethics. This means that the problem does not disappear with acknowledgement that social institutions are inevitably faced with moral or ethical questions when determining what equal treatment requires. In deciding what is intrinsically valuable and important about humans, social institutions cannot

<sup>60</sup> I use Dworkin's terminology in *Sovereign Virtue* (n 20) 485 fn 1: 'Ethics . . . includes convictions about which kinds of lives are good or bad for a person to lead, and morality includes principles about how a person should treat other people.'

<sup>61</sup> Good examples are afforded by the arguments in the South African cases on the criminalization of gay sex (*National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC)) and prostitution (*S v Jordan* 2002 (6) SA 642 (CC)).

avoid selecting an ethical conception that 'belongs' to some of their members but not to others, satisfying some and frustrating others, for there is no conception that is an institution's own (and which could therefore provide an impartial perspective) rather than that of some actual moral agent. Thus, whenever a situation arises that appears to call for equality of concern and respect, a social institution is confronted with a question that individuals, who can justify their pursuit of one ethical conception rather than another with reference to their own moral agency, do not have to face. And in dealing with this question the Kantian injunction, which is dependent on a logically (but not morally) prior conception of human flourishing, offers no help.

It is worth emphasizing that this criticism of equality of concern and respect does not entail a rejection of respect for human dignity and autonomy as a guiding light for public policy. It merely asserts that this principle cannot dispose of an issue that turns on the question whether a particular conception of dignity, autonomy and so forth should be respected or whether a particular impact counts as harm, which is precisely the type of issue in respect of which equality of concern and respect is meant to do its work. Nor does it reject pursuit of the ideal of a pluralistic and tolerant society that Dworkin's notion of equality is designed to advance. Its message is only that this notion is inadequate to that task.

The argument so far has several important implications for the theme of this essay. In the first place, it means that it is a mistake to restrict the role of rights to the pursuit of equality of concern and respect. Even if one accepts that legal rights should play this role – which is queried in the next section – this can be but one aspect of rights. They at least *also* promote a vision of what is a good life. While this broader role is certainly compatible with the pursuit of a pluralistic and tolerant society of the kind Dworkin seeks to safeguard through the idea of equality of concern and respect, it does mean – and this is the second implication – that this idea does not furnish a workable criterion for balancing countervailing considerations when rights conflict with each other and with non-right goals and values. Whenever rights have the occasion to trump, equality of concern and respect begs rather than answers the question whether a communal goal that is being pressed on the state by some of its citizens should be protected or overridden. Finally, this means that equality of concern and respect cannot show why and when it is justifiable to give effect to a society's choice of rights. To do so, it is necessary to provide a substantive defence of the conception of a good and worthwhile human life reflected in its array of rights that goes well beyond the truism that moral agents are entitled to be treated as moral agents.

(3) *The content-independent value of rights*

Why should equality of concern and respect figure at all in the resolution of collisions among rights and with non-right goals? Why should constitutional rights, in trumping considerations that clash with them, do so in order to protect equality of concern and respect?

Dworkin's argument ties the answer to the cost of rights. He insists that the institution of rights imposes a significant social cost, that is, that society pays a price for having rights, independently of their content.<sup>62</sup> If rights deserve being taken seriously, then it must be the case, he argues, that the very institution of rights is valuable to society. Since a system of rights imposes social costs, its existence can be justified only if it contributes something to society – equality of concern and respect – that counterbalances such costs. This is why he treats rights as a having the special content-independent value that he finds in the protection that the institution of rights gives to equality of concern and respect. In other words, it is his view that rights as a class must be understood as serving to protect equality of concern and respect because it is only when they do this that their social impact is justified.

One might think that this cost flows from the way in which rights constrain democratically elected governments and limit individuals' pursuit of their ethical commitments. But much of Dworkin's work is taken up with denying that rights do so. He argues that rights in fact serve the cause of democracy by ensuring that citizens have an equal voice and equal stake in social decisions and that these respect their moral independence.<sup>63</sup> And he puts forward the view that justice – ie equality of concern and respect – is 'constitutive of ethics', that is, that leading a good life is not merely a matter of living well in the world as it is, but also involves making the world a more just place.<sup>64</sup>

However, these arguments undercut the idea that rights impose a content-independent cost. If rights are essential to democracy, and justice is to ethics, then the institution of rights imposes no cost as such. Everything then turns on the content of the rights: do they provide equality of voice and of stake and moral independence, and do they conform to the requirements of justice? Likewise, the benefits of a system of rights then become content-dependent. There is consequently no longer any reason for regarding rights as a special class of considerations that are characterized by a content-independent value that justifies treating them as trumps. It follows that even if one agrees with Dworkin that rights, uniquely, serve the cause of equality of concern and respect –

<sup>62</sup> See Dworkin (n 3) 193, 198.

<sup>63</sup> Ronald Dworkin 'Equality, democracy, and constitution: We the people in court' (1990) 28 *Alberta LR* 324.

<sup>64</sup> See *Sovereign Virtue* (n 20) 260–7.

a belief that I argued against above – the cost and value of the institution of rights have yet to be identified.

This is not intended to deny that the institution of rights is associated with constraints on autonomy, whether social or individual. It is. But it is not rights as such that impose this cost. We should therefore look elsewhere. Now, Dworkin's arguments focus on the role and value of rights rather than on their instantiation as *legal* rights – that is, the legal enforcement of rights is justified by him through a defence of rights rather than a defence of their legal enforcement. This treats their legal status as contingent rather than essential: other mechanisms for ensuring voice, stake and independence and for pursuing justice – for example unforced self-constraint on the part of citizens in pursuing their ideals – would also serve the cause of democracy and ethics.

The place to look for the missing content-independent cost and benefit of rights is therefore in the implications of the specifically *legal* institutionalisation of rights. These implications are as follows. Wherever there are legal rights, there of necessity also exist legal institutions that are accepted as having the authority to determine and apply such rights. Their authority may of course be legitimate, and it is tempting to think that this means that the existence of specifically legal rights no more imposes costs on individual and social autonomy than do rights as such. But that conclusion would be too quick.

To see why this is so, it is necessary to note two features of legal rights. First, legal rights apply generally, that is, to all who find themselves within the legal system's jurisdiction irrespective of whether these rights conform to the ethical and moral ideals or obligations of those to whom they apply.<sup>65</sup> Secondly, because legal rights are institutional rights they may nevertheless still be legitimate, as there may be good reason, including for those whose ideals and obligations are sacrificed, to support and maintain the existing legal institutions. For example, the fact that a particular legal system achieves a better balance than others between the degree of sacrifice imposed on some of its subjects' pursuit of the good and the satisfaction of their material needs, or supplies protection against demands for even greater sacrifice, or provides opportunities for fighting to reduce or eliminate such sacrifices, or even that it safeguards physical survival in a hostile world, and most importantly that it creates a social context essential for the formation of individual identity – all these features may, depending on the circumstances, render a given system of legal rights legitimate even in respect of those who are committed to and morally or ethically bound by an array of rights that diverges from that

<sup>65</sup> The formulation of this sentence is meant to refer to situations of moral pluralism where equally valid yet incompatible and incommensurate conceptions vie with each other, and to avoid the trap of moral subjectivism and relativism.

endorsed by the legal system. Hence, unlike moral rights, legal rights can, without losing their legitimacy, at least sometimes diverge from the conception of human flourishing held by those to whom they apply. This is the real reason why rights can have content-independent value that allows them to trump other considerations. As importantly, this means that legal rights can legitimately impose costs on individual and social moral autonomy. Those costs are always present in contemporary states, characterized as these are by religious and cultural pluralism. But they can be offset by the countervailing benefits flowing from the existence of a legal system and of the society it upholds. As a class, legal rights are indeed costly and beneficial irrespective of their content, but Dworkin wrongly conflates the institution of rights with the legal institutionalization of rights.

The identification of the true cost and benefits of legal rights brings us back to the conclusions reached in the previous two sections. If, as I argued, equality of concern and respect is not capable of resolving pervasive and frequent conflicts between rights and collective interests, and if a legal system that is committed to pluralism and tolerance is inevitably confronted with conflicts between incommensurable ethical demands, then the legal system must *decide* which conception(s) of human flourishing are to prevail in the event of a conflict. This is why the true cost of legal rights lies in their incarnation as legal.

The conclusions reached so far direct attention to the legitimacy of decisions by legal institutions that give effect to a specific vision of human flourishing. This depends on whether there is good reason for allowing legal institutions to make such determinations even when this constrains moral autonomy. Does the existence of the legal system in itself provide sufficient benefits to justify this kind of choice? And is the vision of human flourishing that is given effect to by the legal system a genuine conception of what it is to lead a worthwhile human life?

The answer to both questions lies, I believe, in whether a legal system maintains and indeed promotes pluralism and tolerance. As this is a widely-held view that is shared by Dworkin I will not defend it here. Rather, I wish to draw attention to the fact that we have reached this conclusion despite discarding Dworkin's idea that rights are intrinsically linked to equality of concern and respect. This is important, for it enables us to adopt a different and more convincing account of how rights trump, that is, a different explanation and defence of the limitation of rights.

#### IV BALANCING DEFENDED

Once it is accepted that legal rights and their application inevitably endorse a vision of human flourishing and that this can be legitimate despite imposing a cost on moral autonomy, it is clear that rights may only be limited in a manner that is, first, coherent with the vision(s) of a

worthwhile human life that is (are) reflected in that legal system, and, secondly, achieves the right balance between the advantages brought by the legal system and the cost that it imposes on autonomy. Does the balancing of rights by way of a proportionality test satisfy these requirements?

A charter of fundamental rights contains a legal system's most basic vision of what is required for the leading of a worthwhile human life in the state in which it applies. The first issue can therefore be explored by investigating whether the balancing of rights is consistent with fidelity to such a system of rights.

As a first step, we must note, as Alexy does, that the rights specified in such charters are the product of decisions about how competing values (or pre-legal rights) should be balanced, but are incomplete decisions.<sup>66</sup> For example, if, as in South Africa, there is a constitutional right to an environment that is not detrimental to health and well-being,<sup>67</sup> then this means that the constitution contains *inter alia* the decision that attention to environmental protection is not optional in that society. To treat environmental protection as something that could be wholly left out of account would amount to a failure to take this constitutional right seriously. But the decision encapsulated in the right is plainly an incomplete decision because the specification of the right fails to tell us whether this means that not the slightest impact on health and well-being is permitted, or whether there is a certain threshold below which environmental impacts are permissible. Because the specified right contains no decision on this, setting such a level would not fail to take the right seriously; to the contrary, it would constitute an application thereof. The existence of a constitutional right excludes only the re-consideration by a court of the question that underlies the right, *eg* whether there should be a constitutional right to an environment that is not detrimental to health and well-being. Considerations militating against the existence of the right may not be considered if the right is taken seriously, but other issues, those not underlying the decision whether to recognize the right, are not excluded.

Of course it must be borne in mind that the reach of this exclusionary effect of a right will vary along with the range of issues the resolution of which underlies the enactment of the right. But it is a universal feature of fundamental constitutional rights that they are always to some extent incomplete stipulations.<sup>68</sup>

<sup>66</sup> See the text above following note 8.

<sup>67</sup> Section 24 of the Constitution (n 2).

<sup>68</sup> See the text above to note 8. This means that the exclusionary effect of particular constitutional rights will vary along with the precision or concreteness of the formulation of right – the more general the formulation of the right, the less it excludes, and vice versa.

This brings us to the second step. Here it is useful to draw on Alexy's analysis of the balancing of rights, according to which the application of the proportionality test involves treating a right as (in part) an 'optimization requirement', a value that must be given effect to the greatest extent possible within the context, both legal and factual, in which it is to be applied.<sup>69</sup> Now, one can distinguish between two ways in which a constitutional right to a healthy environment can be measured against other considerations. First, we might treat the instruction that the environment must be protected in this way, i.e. the right itself, as a value to be balanced against others, for example economic development, so that on occasion this instruction, though applicable, would not be given effect to since doing so would defeat a more important goal. Secondly, we might treat the right as an optimization requirement stipulating complete protection against any impact whatsoever as the aim that is to be balanced against others. Then the focus would fall on the level of protection that is achievable in the given factual and legal context, so that on occasion the conclusion would be reached that application of the right does not require *complete* protection against all possible impacts on the interest it enshrines. Here it is not the right itself that is measured against a countervailing consideration, but only its full realization.<sup>70</sup> While the first way would indeed fail to take this right seriously, the same cannot be said of the second way, which applies, rather than fails to apply, the right.

Balancing rights by means of the proportionality test follows the second way rather than the first. This is so because applying the proportionality test does not come to an end with the determination of the relative importance of clashing considerations, but also requires that the less important must still be given effect to the extent that this is compatible with the more important consideration. This means that the proportionality test does not balance the right itself against countervailing rights or non-right goals, but rather balances the full realization of the right against such considerations. This provides the answer to the first issue, for it shows that the balancing of rights is consistent with fidelity to a charter of rights.

The second issue is whether the proportionality test achieves the right balance between the advantages brought by the legal system and the cost that it imposes on moral autonomy. The specific benefits brought by a particular legal system may, as was implied above, take a variety of forms, but they all derive in some way or other from the service performed by

<sup>69</sup> See note 9.

<sup>70</sup> This is what South Africa's Constitutional Court seems to have done when it was confronted in *Minister of Public Works v Kyalami Ridge Environmental Association* 2001 (3) SA 1151 (CC) with a conflict between this right and the government's efforts to provide emergency shelter to people rendered homeless by a flood.



the legal system in constituting and maintaining a given society. If, for example, the cost imposed on moral autonomy is made worthwhile by the fact that those who are made to bear this cost share in a level of material welfare that facilitates the (admittedly restricted) pursuit of their vision of the good life, then this benefit derives from their membership in a society that pursues a vision of human flourishing that produces this benefit, and hence from the support given to that vision by the legal system. We have just seen how the proportionality test serves to maintain such a vision.

But can this benefit ever outweigh the cost paid for it? It seems plausible to think that this feature of the proportionality test turns those who pay the cost into second-class citizens, for they appear condemned to leading lives that are only partly autonomous. Does its fidelity to the charter of rights not mean that the proportionality test fails to maintain the right balance between this cost and benefit?

The answer to this is that the proportionality test ensures that the legal system remains open to the fullest extent that is compatible with the existence of the society constituted thereby. This test is premised on the twin ideas that there may be legitimate social goals that fall outside the charter of rights and that the concrete impact of fundamental rights must vary along with the range of such goals with which they come into contact. The practical effect of the proportionality test is therefore that changing social values and goals can alter what fidelity to the charter of rights requires. This means that the autonomy cost is not locked in by the proportionality test, but that this test to the contrary allows that cost to be reduced, redistributed, or even eliminated. To give but one example: the proportionality test in principle makes it possible to reduce the cost that Muslim girls who are committed to wearing headscarves in state schools may have to pay for living in an affluent European society, because the practical effect of the right to religious freedom will shift as social goals shift from secularism to multiculturalism.

Of course it is not part of my claim that the proportionality test guarantees such results. What actually happens will depend on how social goals change and on how sensitive legal institutions such as courts and legislatures are to these changes. The point is that because the proportionality test allows such results it does not lock people into a rigid framework of law. This does not mean that it allows absolute flexibility. That would be incompatible with continued fidelity to the constitutional charter of rights. But absolute flexibility takes us out of the realm of the application of law and hence of the proportionality test, for it amounts to changing or replacing the constitution. The proportionality test does not promise that, but it makes no sense to criticize a leopard for its inability to fly.

It should be evident from what has been said in this section that the proportionality test takes seriously the fact that it is their incarnation as legal that results in the costs and benefits of rights. Its general aim and function is to mediate between these costs and benefits, recognizing all the while that it is a forlorn hope that legal systems can be neutral about the conditions of human flourishing. Although not necessary for my argument, and therefore not a point I wish to pursue here, one could argue that it is a virtue of this test that it sees the legal system as taking responsibility for the ethical quality of its citizen's lives, not merely their equality as rational beings. As Finnis puts it, 'the objective of justice is not equality, but the common good, the flourishing of all members of society'.<sup>71</sup>

## V CONCLUSION

The debate between Alexy and Habermas with which this essay started raises two issues that are of general interest. Does the balancing of rights by way of a proportionality test take the character of constitutional rights as *rights* seriously? And can it yield results that are rational and defensible, thus, in principle, making it legitimate for courts to undertake this task? Or is it better to rank rights against each other and against values not enshrined in constitutional rights?

Dworkin's theory of rights as trumps is perhaps the best-known account of the ranking of rights. It treats rights as having a special relationship with what justice demands of social institutions, which, in his view, is that all citizens are to be treated with equal concern and respect. This relationship is presented as content independent and as marking rights off from non-right social values and goals in a manner that endows all rights with prima facie authority over such other values and goals. But, I have argued, equality of concern and respect does not establish a content-independent distinction between rights and values that are not endowed with the status of rights. It is an inappropriate criterion of social justice, and dissolves rather than supports the deontic character of rights.

But constitutional rights plainly do trump other considerations. Is there an alternative explanation for this? I believe that there is, and have argued that it lies in recognizing the variety of services that legal systems provide and the wedge that this drives between the legitimacy of law and the equal protection of the moral autonomy of citizens. Since it is their legal character that accounts for this content-independent cost and benefit of constitutional rights, their relationship with non-right consid-

<sup>71</sup> John Finnis *Natural Law and Natural Rights* (1980) 174.

erations is governed by the need to maximise those benefits through upholding the vision of human flourishing enshrined in those rights.

The weaknesses in the ideal of equality of concern and respect make it tempting to think that this would lock society into the vision that courts extract from such rights. That would give substance to the fear of many that constitutional charters of rights turn judges into philosopher-kings. For, as Dworkin has consistently reminded us, the moral terms in which such rights are couched demands from judges a moral reading of the constitution that inevitably engages their own moral views which are likely to differ from those held by at least some citizens.<sup>72</sup>

That would indeed be the result if we were to substitute Dworkin's ranking exercise by another, which would use such a vision of human flourishing as a metric for the comparison of rights and other considerations. But a balancing exercise, which discards the search for such a metric and instead seeks to optimize rights and values to the greatest extent possible, avoids that result. It protects, at least in principle, the interests of those whose ethical commitments diverge from the one extracted by judges from the constitution, by allowing the maximum flexibility compatible with the continued existence of the legal system and society founded on the constitution.

Whether it does so in practice depends, of course, on how the courts employ the proportionality test when balancing rights with other rights and with non-right considerations. It is here that the abstract discussion in this essay has some practical implications of a general nature. On the one hand it shows that judges must be wary of focusing their attention to such an extent on avoiding rights conflicts through the restrictive interpretation of rights that the proportionality test becomes of little practical relevance. Such an approach enhances the risks attached to the inescapably moral reading of a constitution and threatens the benefits attendant on balancing rather than ranking. On the other hand it also points to the importance of avoiding the opposite extreme in which rights are endowed with such a wide reach that conflicts of the type discussed here occur so frequently that the proportionality test is engaged in virtually every case. This also threatens the benefits flowing from balancing, as its impact on the distribution of final decision-making power between the courts and the legislature might well put the advantages that a society provides to its members in jeopardy: courts are not always best at striking the right balance.

<sup>72</sup> *Freedom's Law* (n 20) Introduction.