

1

The Global Model of Constitutional Rights

I. The project

Since the end of the Second World War and the subsequent success of constitutional judicial review, one particular model of constitutional rights has had remarkable success, first in Europe and now globally. In a nutshell, this *global model of constitutional rights* sees rights as protecting an extremely broad range of interests but at the same time limitable by recourse to a balancing or proportionality approach. Thus, it places itself in sharp contrast to the conceptions of rights proposed by most if not all moral and political philosophers who agree that rights protect only a limited set of especially important interests while enjoying a special, heightened normative force. However, while the global model of constitutional rights does not seem to sit well with the philosophical conceptions of rights that have been proposed to date, it has itself still not been sufficiently theorised. The important and interrelated questions which it raises are the following. (1) Which *theory* or *conception of rights* explains best the global model of constitutional rights, including the questions of which values are protected by rights and what are their limits? (2) How does the judicial enforcement of *this particular conception* of constitutional rights relate to the value of *democracy*? (3) How does it relate to the value of the *separation of powers*, in particular to considerations of the *relative institutional competence* of courts on the one hand and the elected branches on the other? A comprehensive theory of constitutional rights must provide an *integrated* answer to these questions: the theory of rights which it proposes must also reflect attractive conceptions of democracy and the separation of powers. The project of this book is to provide such a theory.

Its main features are the following. (1) It is *substantive moral* in that it provides a theory of rights which is grounded in political morality; this can be contrasted with a formal theory such as Robert Alexy's influential theory of rights as principles or optimisation

requirements.¹ (2) It is *reconstructive*, i.e. it is a theory of the actual practice of constitutional rights law around the world. I will explain this in detail further below. (3) It is *general* in that it does not focus on specific issues or rights but aims at identifying features of their moral structure which are shared by many or all constitutional rights.

II. The global model and the dominant narrative

This section will introduce the four central features of the global model of constitutional rights; and it will do so by contrasting them with what I shall call the *dominant narrative* of the theory of human and constitutional rights. The dominant narrative holds (1) that rights cover only a *limited domain* by protecting only certain *especially important* interests of individuals; (2) that rights impose exclusively or primarily *negative* obligations on the state; (3) that rights operate only *between a citizen and his government*, not between private citizens; and (4) that rights enjoy a *special normative force* which means that they can be outweighed, if at all, only in *exceptional circumstances*. Of these features of the dominant narrative, the general acceptance of the second – rights as imposing negative obligations on the state – has already eroded considerably, mainly because of the growing recognition of social and economic rights.² The third – limitation to the relationship between citizen and government –, while generally held to be true, does not normally attract much attention by rights theorists. The first and the fourth – limited domain and special normative force – are still almost uncontroversial. However, under the global model of constitutional rights *all four* elements of this narrative have been given up – and often a long time ago. The doctrines and developments in constitutional rights law which have led to their erosion are rights inflation, horizontal effect, positive obligations and socio-economic rights, and balancing and proportionality. These doctrines and developments form the core of the global model of constitutional rights and the basic materials out of which the following chapters will reconstruct the theory of rights proposed here.

¹ Alexy, *A Theory of Constitutional Rights* (Oxford University Press, 2002). My essay ‘Balancing and the structure of constitutional rights’, (2007) 5 *International Journal of Constitutional Law* 453 criticises the formal approach chosen by Alexy and recommends a substantive moral approach; this book, by providing such a substantive moral theory of rights, can thus be read as offering a constructive response to what I regard as deficits in Alexy’s methodology. For a generally positive review of Alexy’s book see Kumm, ‘Constitutional rights as principles: On the structure and domain of constitutional justice’, (2004) 2 *International Journal of Constitutional Law* 574.

² For a theoretical account of this development, see Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, 2008), ch. 1.

1. Rights inflation

Constitutional rights are no longer seen as only protecting certain particularly important interests. Especially in Europe a development has been observed which is sometimes pejoratively called ‘rights inflation’³, a name which I will use in a neutral sense as describing the phenomenon that increasingly, relatively trivial interests are protected as (*prima facie*) rights. The European Court of Human Rights (ECtHR) routinely reads such interests into the right to private life (Article 8 of the European Convention on Human Rights (ECHR)). For example, in the famous *Hatton* case which concerned a policy scheme which permitted night flights at Heathrow airport, thus leading to noise pollution which disturbed the sleep of some of the residents living in the area, the Court discovered as part of Article 8 the right not to be ‘directly and seriously affected by noise or other pollution’⁴, dismissively dubbed ‘the human right to sleep well’ by George Letsas.⁵ The broad understanding the Court takes towards the issue of private life becomes clear in one of its more recent attempts to circumscribe it:

The Court recalls that the concept of ‘private life’ is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It can therefore embrace multiple aspects of the person’s physical and social identity. Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Art. 8. Beyond a person’s name, his or her private and family life may include other means of personal identification and of linking to a family. Information about the person’s health is an important element of private life. The Court furthermore considers that an individual’s ethnic identity must be regarded as another such element. Article 8 protects in addition a right to personal development, and the right to establish and develop relationships with other human beings and the outside world. The concept of private life moreover includes elements relating to a person’s right to their image.⁶

Thus, it has for example considered the storing of fingerprints and DNA samples by the state⁷ and the publication of photographs of a person in her daily life by a magazine⁸ as falling within the scope of ‘private life’. With regard to sexual autonomy, the Court not only held that consensual homosexual sex was part of ‘private life’,⁹ but came close to saying that homosexual sado-masochistic group sex orgies involving considerable violence were

³ Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, 2007), 126.

⁴ *Hatton v. United Kingdom*, (2003) 37 EHRR 28, para. 96.

⁵ Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press, 2007), 126.

⁶ *S v. United Kingdom*, (2009) 48 EHRR 50, para. 66 (footnotes omitted).

⁷ *Ibid.*, para. 67.

⁸ *Von Hannover v. Germany*, (2005) 40 EHRR 1, para. 53.

⁹ *Dudgeon v. United Kingdom*, (1982) 4 EHRR 149, paras. 40-41.

protected as well.¹⁰ Article 8 also protects a right to access to the information relating to a person's birth and her origin.¹¹

While the ECtHR has not provided a comprehensive definition of the meaning of 'private life', it will still require that the interest in question be part of 'private life', whatever that term exactly means, and thus the Court will not necessarily accept *any* interest as falling within the scope of Article 8; in other words there is still be a threshold which needs to be crossed for an interest to become a right. By way of contrast, the German Federal Constitutional Court (FCC) has explicitly given up any threshold to distinguish a mere interest from a constitutional right. As early as 1957 it held that Article 2(1) of the Basic Law, which protects everyone's right to freely develop his personality, is to be interpreted as a right to freedom of action.¹² The Court provided various doctrinal reasons for this result, its main argument being that an earlier draft of Article 2(1) had read 'Everyone can do as he pleases' ('*Jeder kann tun und lassen was er will*'), and that this version had been dropped only for linguistic reasons.¹³ The Court affirmed this ruling in various later decisions; most famously it declared that Article 2(1) BL included the rights to feed pigeons in a park¹⁴ and to go riding in the woods.¹⁵

It must be noted that the broad understanding of rights does of course not imply that the state is prohibited from interfering with the right in question. Rather, there is an important conceptual distinction between *an interference with* and *a violation of* a right: an interference will only amount to a violation if it cannot be justified at the justification stage. Thus, the broad understanding of rights at the *prima facie* stage must be seen in conjunction with the proportionality test which permits the limitation of *prima facie* rights when they are outweighed by a competing right or public interest. But it is notable that contrary to the language used by philosophers, courts are very generous in labelling an interest a 'right', and therefore, again contrary to philosophical usage, they do not attach much weight to a right simply by virtue of its being a right. Furthermore, and again in contrast to some philosophical usage, what is referred to as the 'right' is only the *prima facie* right, not the definite right. So

¹⁰ *Laskey, Jaggard and Brown v. United Kingdom*, (1997) 24 EHRR 39, para. 36. The Court left open the question whether the activities in question fell within the scope of Article 8 in their entirety, but proceeded on the assumption that they did.

¹¹ *Odievre v. France*, (2004) 38 EHRR 43, para. 29.

¹² BVerfGE 6, 32 (*Elfes*).

¹³ *Ibid.*, 36-37.

¹⁴ BVerfGE 54, 143 (*Pigeon-Feeding*).

¹⁵ BVerfGE 80, 137 (*Riding in the Woods*).

European lawyers routinely speak of human rights to many things which people regularly do not have a definite right to.¹⁶

2. *Positive obligations and socio-economic rights*

Rights are no longer regarded as exclusively imposing negative obligations on the state. But while most theorists of rights only started to reconsider their views on this issue with the growing acceptance of socio-economic rights (particularly their inclusion in the final South African constitution of 1996), constitutional rights law had given up the view that rights impose only negative obligations at least since the 1970s when the doctrines of positive duties or protective obligations became established. The idea is that the state is under a duty to take steps to prevent harm to the interests protected by (otherwise negative) rights. Thus, the state must, as a matter of constitutional rights law, put in place a system which effectively protects the people from dangers emanating from other private persons, such as criminal activities which threaten, for example, life, physical integrity, or property; and it must also protect them from dangers which do not have a (direct) human cause, such as natural disasters.

In the jurisprudence of the ECtHR, the idea of positive obligations, first introduced in the *Belgian Linguistics* case of 1968,¹⁷ is well-established. In the case of the right to life, it is even supported by the text of the Convention, which states in Article 2(1) that '[e]veryone's right to life shall be protected by law.' The *Osman* case provides a good example of the Court's approach to this provision. The former teacher of Ahmet Osman, who was about 15 years old at the time, was obsessed with him and ultimately wounded the boy and killed his father. The family alleged that the police had not done enough to protect Osman and his father from the threat. The Court argued that Article 2(1) ECHR required not only that the state refrain from killing, but also that the state has to 'put in place effective criminal law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and sanctioning of breaches of such provisions'¹⁸ and that it may additionally 'also imply in certain well-defined circumstances a

¹⁶ This approach is sometimes criticised as 'guilty of "promoting unrealistic expectations"' (Webber, *The Negotiable Constitution: On the Limitation of Rights* (Cambridge University Press, 2009), 123), but whether it really is promoting such expectations depends on the way the word 'right' is used by the people. I am not sure that Europeans would be misled in the way Webber envisages; in any case the charge that they would is unsubstantiated. Furthermore, the linguistic meaning of the word 'human right' or 'constitutional right' as used by the population is likely to change over time, following the developments in the courts.

¹⁷ *Case Relating to Certain Aspects of the Laws on the Use of Languages In Education In Belgium*, (1979-80) 1 EHRR 252, para. 3.

¹⁸ *Osman v. United Kingdom*, (2000) 29 EHRR 245, para. 115.

positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual¹⁹.

In the case of other rights there is no explicit textual basis supporting the acknowledgement of positive obligations, but the Court nevertheless consistently accepts their existence. Of the countless cases, *von Hannover* provides a good example of the Court's approach. Princess Caroline of Monaco had unsuccessfully tried to stop the publication of certain pictures of her in German tabloids; she argued that the publication violated her right to private life under Article 8 of the Convention. The Court relied on its well-established case law to grant the existence of a positive obligation to protect privacy:

The Court reiterates that although the object of Art. 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves. That also applies to the protection of a person's picture against abuse by others.²⁰

The legally difficult question in cases involving positive obligations is not the existence of positive obligations as such; this is well-established case law. Rather, it is the question of whether the state has done enough to comply with its obligation (in *Osman* it had, and in *von Hannover* it had not). But that is a separate question concerning the limits of the right which does not affect the point to be made here, namely the move away from an understanding of rights as concerned exclusively with negative obligations.

The textual basis for the assumption that Convention rights generally impose positive obligations is weak. In particular, the limitation clauses especially of Articles 8 to 11 (the rights to private and family life, freedom of religion, freedom of expression and association and assembly) regularly refer to 'restrictions', 'limitations' and 'interferences', which indicates a negative understanding of rights. In its more recent case law, the Court has tried to support its approach by reference to Article 1. For example, in a case involving the right to property (Article 1 of Protocol No. 1) the Court stated:

The essential object of Article 1 of Protocol No. 1 is to protect a person against unjustified interference by the State with the peaceful enjoyment of his or her possessions. However, by virtue of Article 1 of the Convention, each Contracting Party 'shall secure to everyone within [its] jurisdiction the rights and freedoms

¹⁹ *Ibid.* (emphasis added).

²⁰ *Von Hannover v. Germany*, (2005) 40 EHRR 1, para. 115.

defined in [the] Convention'. The discharge of this general duty may entail positive obligations inherent in ensuring the effective exercise of the rights guaranteed by the Convention. In the context of Article 1 of Protocol No. 1, those positive obligations may require the State to take the measures necessary to protect the right of property.²¹

But obviously, the reference to the word 'secure' in Article 1 ECHR does not even come close to a water-tight doctrinal argument for the general doctrine of positive obligations. The Court was certainly not forced to its conclusion by such textual subtleties; rather it must have found the idea of positive obligations attractive as a matter of the theory of rights underlying the Convention as a whole. But it has never spelt out what this theory is.

In German constitutional jurisprudence, the idea of *protective duties* (*Schutzpflichten*) was acknowledged for the first time in the first abortion decision of 1975, where the FCC held that the state is under a duty to protect the fetus against the implementation of the woman's wish to have an abortion.²² To establish the existence of the protective duty, the Court referred to the idea of an 'objective system of values' set up by the Basic Law, which it had first established in the *Liith* decision, discussed below, and to the principle of human dignity enshrined in Article 1 of the Basic Law.²³ In subsequent case law it dropped the reference to dignity and replaced the phrase 'objective system of values' with the less controversial reference to the 'objective dimension' of the basic rights. Today it is uncontroversial in Germany that the doctrine of protective duties is a *general* doctrine whose application is not limited to certain rights; rather, the state is under a general obligation to take positive steps towards the protection of the rights of the people. In practice, most cases have been about life and physical integrity, however. In the *Schleyer* case of 1977, the Court held that the state was under a duty to take adequate steps to rescue Marin Schleyer who had been kidnapped by the terrorist Red Army Fraction (*Rote Armee Fraktion*). The following quotation shows nicely the FCC's basic approach to the issue.

Art. 2(2)(1) [the right to life] in conjunction with Art. 1(1)(2) Basic Law [the duty to protect and respect human dignity] obligate the state to protect every human life. This protective duty is comprehensive. It requires the state to protect and support each life; this implies mainly to protect it from illegal interferences by others. All state organs must, according to their special roles, orient their activities towards this task. As human life presents a supreme value, this protective duty must be taken particularly seriously.²⁴

²¹ *Broniowski v. Poland*, (2005) 40 EHRR 495, para. 143.

²² BVerfGE 39, 1 (*First Abortion Judgment*).

²³ *Ibid.*, 41-42.

²⁴ BVerfGE 46, 160, 164 (*Schleyer*).

The Court also had to deal with cases relating to the risks or harms flowing from the use of nuclear energy,²⁵ aircraft noise²⁶ and the storage of American chemical weapons²⁷. The Court stuck to its earlier jurisprudence and affirmed the existence of protective duties in all cases.

The South African Constitution explicitly endorses positive duties by stating in its section 7(2): ‘The state must respect, protect, promote and fulfil the rights in the Bill of Rights.’ Here, ‘respect’ refers to negative duties, whereas ‘protect’ refers to positive duties. The South African Constitutional Court has affirmed the existence of positive duties in its case law:

It follows that there is a duty imposed on the State and all of its organs not to perform any act that infringes these rights. In some circumstances there would also be a positive component which obliges the State and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection.²⁸

Furthermore, there is the aforementioned trend towards the acknowledgement of socio-economic rights, which obviously impose positive duties on the state and thus are in conflict with the dominant narrative which holds that rights are concerned with negative obligations. Socio-economic rights are explicitly included in the South African Constitution which contains in its sections 26, 27 and 29 rights to housing, health care, food, water, social security and education. Of course, it would be naïve to think that the inclusion of such rights in a constitution is a sufficient step to resolve poverty. As acknowledged by the South African Constitutional Court in its first decision on socio-economic rights, a major practical problem lies in the scarcity of resources,²⁹ and this cannot be fixed by a constitutional provision. But the important point for present purposes is that socio-economic rights are acknowledged at the constitutional level, however easily limitable those rights may be.

While the South African Constitution is explicit about the inclusion of socio-economic rights, as a matter of substance similar rights have also been read into other constitutions. The ECtHR, while repeatedly stressing that the ECHR ‘does not, as such, guarantee socio-economic rights’³⁰ has accepted some socio-economic entitlements mainly through the use of its doctrine of positive obligations, discussed above, as flowing from several Convention articles, including Articles 2 (life), 3 (prohibition of inhuman or

²⁵ BVerfGE 49, 89 (*Kalkar I*).

²⁶ BVerfGE 56, 54.

²⁷ BVerfGE 77, 170.

²⁸ *Carmichele v. Minister of Safety and Security*, 2001 (4) SA 938 (CC), para. 44. See also *Rail Commuters Action Group v. Metrorail* 2005 (2) SA 359 (CC), paras. 70-71.

²⁹ *Soobramoney v. Minister of Health (KwaZulu-Natal)*, (1997) ZACC 17, para. 11.

³⁰ *Pančenko v. Latvia* (App No 40772/98), Decision of 28 October 1999, para. 2.

degrading treatment), 6 (fair trial), 8 (private and family life), and 14 (non-discrimination).³¹ The German FCC holds the view that a right to a social minimum follows from Articles 1(1) and 20(1) of the Basic Law (the principle of human dignity in conjunction with the principle of the welfare state).³² Given the relative wealth of Germany compared to South Africa, the actual constitutional entitlements of a poor person will therefore be considerably higher in Germany than in South Africa, in spite of the absence of an explicit commitment to socio-economic rights.

It is remarkable that while positive obligations were first acknowledged by courts in Europe on the basis of constitutional texts which on their face offered very little support for this view, the new South African constitution, as the youngest constitution considered here, explicitly endorses both positive obligations and socio-economic rights. Both of these observations – the endorsement in absence of textual support and the subsequent explicit inclusion in the text of a new constitution – provide strong indicators that positive duties and socio-economic rights are indeed part of an emerging global consensus of thinking about constitutional rights which departs from the traditional narrative in important ways.

3. Horizontal effect

Constitutional rights are no longer seen as affecting only the relationship between the citizen and the state; rather they apply in some way between private persons as well. For example, the constitutional right to privacy may protect a person not only against infringements of his privacy by the state, but also against such infringements by his neighbour, landlord, or employer. The doctrinal tool which achieves this is called *horizontal effect* of rights, where ‘horizontal’ as opposed to ‘vertical’ indicates that rights operate between private persons. It is possible to see horizontal effect of rights as a subset of positive duties, discussed above: the state is under a positive duty to ensure that private persons do not violate other private persons’ rights. Alternatively, it can be seen as its own category which gives effect to constitutional rights between private persons.

The first court to acknowledge horizontal effect was the German FCC in its famous *Lüth* decision of 1953.³³ Erich Lüth had called for a boycott of a new film by director Veit Harlan on the ground of the latter’s previous involvement with the Nazi regime. As this call

³¹ For an overview, see Brems, ‘Indirect protection of social rights by the European Court of Human Rights’, in Barak-Erez and Gross (eds.) *Exploring Social Rights* (Hart Publishing, 2007), ch. 7.

³² Cf. most recently BVerfG, 1 BvL 1/09 of 9.2.2010 (*Hartz IV*), para. 133.

³³ BVerfGE 7, 198 (*Lüth*). English translation from the web site of the University of Texas School of Law, http://www.utexas.edu/law/academics/centers/transnational/work_new/ [copyright: Basil Markesinis].

for a boycott had the potential to result in substantial harm to the financial success of the movie, the producer and his distributing company obtained a court injunction against Lüth. When the matter came before the FCC, the Court had to decide whether constitutional law, especially the right to freedom of opinion (Article 5(1) BL) had any effect on the private law governing the relationship between Lüth and Harlan (and his distributing company). It first set out the traditional understanding of constitutional rights: ‘There is no doubt that the main purpose of basic rights is to protect the individual’s sphere of freedom against encroachment by public power: they are the citizen’s bulwark against the state.’³⁴ But it then adds one of the most famous paragraphs in its history:

But far from being a value-free system the Constitution erects *an objective system of values* in its section on basic rights, and thus expresses and reinforces the validity of the basic rights. This system of values, centring on the freedom of the human being to develop in society, must apply as a constitutional axiom throughout the whole legal system: it must direct and inform legislation, administration, and judicial decision. It naturally influences private law as well; no rule of private law may conflict with it, and all such rules must be construed in accordance with its spirit.³⁵

Applying this approach to the facts, it concluded that the lower court had failed to adequately take into account the right to freedom of opinion. The idea of an objective system (or order) of values subsequently became one of the cornerstones of German constitutional jurisprudence. It was heavily criticised by some academics in particular for its moralistic undertones; it was feared that the ‘objective order of values’ could easily lead to a ‘tyranny of values’ which would be relied upon to restrict individual freedom.³⁶ Presumably in response to these concerns, the FCC later quietly replaced the term with the less controversial idea of an ‘objective dimension’ of the basic rights. But what exactly the objective system of values or the objective dimension of the basic rights mean remains somewhat mysterious until this day. In spite of this open question, the important lesson to be drawn is that the idea of constitutional rights as affecting only the relationship between the citizen and the state was given up as early as 1953 in Germany. The FCC affirmed the horizontal effect of rights in numerous later decisions, many but not all of which are about freedom of opinion; it is uncontroversial that the doctrine is not limited to certain rights but applies across the board. For example, the Court decided that a judgment of a lower court violated the claimant’s personality right (Article 2(1) in conjunction with Article 1(1) BL) by upholding a contractual agreement between the claimant’s parents and their bank which led to the

³⁴ *Ibid.*, 204.

³⁵ *Ibid.*, 205 (emphasis added; references omitted).

³⁶ Denninger, ‘Freiheitsordnung – Wertordnung – Pflichtordnung’, (1975) *Juristenzeitung* 545, 547.

imposition of heavy debts on the claimant who was a minor at the time;³⁷ and it declared a judgment which relied on aesthetic reasons to deny a Turkish tenant the right to install a dish antenna which would have enabled him to receive TV programmes from Turkey a violation of his right to freedom of information.³⁸

In Canada, the question of whether constitutional rights operate between private persons was first considered by the Canadian Supreme Court in the *Dolphin Delivery* case in 1986, only four years after the Canadian Charter of Rights and Freedoms had come into force. Dolphin had obtained an injunction against a union, prohibiting secondary picketing; the union argued that this was unconstitutional in that it violated their right to freedom of expression. The important constitutional question was whether Charter rights applied between private litigants. While the Court in a first step denied the direct applicability of the Charter when the relevant law was, as in the case at hand, common law, it then continued by stating that even though the Charter was not directly applicable, the common law ought to be developed in a way consistent with Charter values, thus installing what is technically called weak indirect horizontal effect.³⁹

South Africa is, to my knowledge, the only jurisdiction today which has explicitly endorsed horizontal effect in its constitution. Section 8(2) of the South African Constitution states in slightly awkward language: ‘A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.’ This explicit endorsement of horizontal effect in this young constitution strengthens further the view proposed here that horizontal effect is by now a well-established feature of the global model of constitutional rights.

There exists a number of complex and controversial issues about horizontal effect; in particular, first, the question of whether it is strong or weak, i.e. whether in the case where it is not possible to reinterpret the statute in question in line with the requirements of constitutional rights, the statute is unconstitutional or not; and second, whether horizontal effect should be direct or indirect, i.e. whether constitutional rights ‘directly’ create rights between private persons or whether they do so only ‘indirectly’ via the (re-)interpretation of

³⁷ BVerfGE 72, 155.

³⁸ BVerfGE 90, 27.

³⁹ *Retail, Wholesale & Dep’t Store Union v. Dolphin Delivery Ltd.*, (1986) 2 SCR 573, 605. The subsequent judgment in *Hill v. Church of Scientology of Toronto*, (1995) 2 SCR 1170 confirmed this approach and fleshed it out further.

the existing private law.⁴⁰ The brief overview presented above cannot do justice to the complexities. But it does show that the practice of constitutional rights law no longer sees rights as exclusively concerned with the relationship between the individual and the state; rather, in some way, they have an impact on the relationship between private individuals.

4. Balancing and proportionality

Contrary to the dominant narrative, it is not the case that constitutional rights generally enjoy a special or heightened normative force in legal practice. While it is true that some rights are absolute – for example the right to freedom from torture and degrading or humiliating treatment in Article 3 ECHR, or the right to a fair trial in Article 6 ECHR – most rights – including the rights to life, physical integrity, privacy, property, freedom of religion, expression, assembly and association – can generally be limited according to a proportionality test, at the core of which is a balancing exercise where the right is balanced against a competing right or public interest. Proportionality has become *the* central concept in constitutional rights law today, and, in addition to the jurisdictions examined in this book, has been accepted by virtually every constitutional court in Central and Eastern Europe and is increasingly employed in Central and South American jurisdictions.⁴¹ Different courts use different formulations of what is essentially the same test. The German FCC follows a four-prong test according to which the policy interfering with the right must be in pursuit of a legitimate goal; it must be suitable to further the achievement of the goal (suitability or rational connection); it must be necessary in that there must not be a less restrictive and equally effective alternative (necessity); and it must not impose a disproportionate burden on the right-holder (balancing or proportionality in the strict sense). The ECtHR demands that the policy furthers a legitimate goal and a pressing social need and that it be proportionate to the achievement of the legitimate goal.⁴² The Canadian Supreme Court adopted proportionality analysis, which has become known as the ‘*Oakes* test’, in its most famous judgment to date:

⁴⁰ On these distinctions and other doctrinal problems involved in the doctrine of horizontal effect cf. Gardbaum, ‘The “Horizontal Effect” of Constitutional Rights’, (2003-2004) 102 *Michigan Law Review* 387; Gardbaum, ‘Where the (state) action is’, (2006) 4 *International Journal of Constitutional Law* 760; Kumm and Ferreres Comella, ‘What is so Special about Constitutional Rights in Private Litigation? A Comparative Analysis of the Function of State Action Requirements and Indirect Effect’, in Sajó and Uitz (eds.), *The Constitution in Private Relations* (Eleven, 2005).

⁴¹ Stone Sweet and Mathews, ‘Proportionality Balancing and Global Constitutionalism’, (2008-9) 47 *Columbia Journal of Transnational Law* 72, 112.

⁴² *Norris v. Ireland*, (1991) 13 EHRR 186, para. 41.

First, the measures adopted must be ... rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair 'as little as possible' the right or freedom in question ... Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of 'sufficient importance'.⁴³

Proportionality is also accepted in South Africa. It was first established in the *Makwanyane* case which was decided under the Interim Constitution, where the Court held:

The limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality ... [T]here is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.⁴⁴

The Court later affirmed this approach in its interpretation of the final Constitution of 1996. Finally, the U.K. House of Lords (now: Supreme Court) accepted as adequate the test

whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.⁴⁵

In a later decision, it added the fourth stage (the balancing requirement): '[the judgment on proportionality] must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent in the whole of the Convention.'⁴⁶

While these tests are all slightly different on the surface, they have in common a *balancing exercise* where the right is balanced against the competing right or public interest, which implies that in contrast to the dominant narrative, rights do not seem to enjoy any special or elevated status over public interests but rather operate on the same plane as policy considerations. This has been captured in Robert Alexy's influential theory of rights as

⁴³ *R. v. Oakes*, (1986) 1 SCR 103, para. 70.

⁴⁴ *S. v. Makwanyane*, (1995) 3 SA 391, para. 104.

⁴⁵ *R (Daly) v. Secretary of State for the Home Department*, (2001) UKHL 26, para. 27.

⁴⁶ *Huang and others v. Secretary of State for the Home Department*, (2007) UKHL 11, para. 19.

principles which have to be balanced against competing principles which include policy considerations;⁴⁷ and remarkably, this theory is widely regarded as the best reconstruction of constitutional rights law available.⁴⁸

III. Terminological clarifications

1. Global?

The notion of ‘the global’ model of constitutional rights requires explanation. My claim is not that the model introduced in the previous section is global in the sense that it is accepted by everyone; rather its global character flows from the combination of two factors: first, that its appeal is not limited to certain countries or regions (e.g. Europe); and second, that it can claim greater appeal on a global scale than any rival model (such as, in particular, the U.S. model of rights⁴⁹). Indicators of its dominant global appeal are, first, the convergence in the doctrinal arsenal that is employed globally, in particular the ideas of horizontal effect, positive obligations, balancing and proportionality, and, second, the historical links which provide explanations of how ideas and concepts travelled between jurisdictions. Some of the historical roots of the global model lie in Europe. The concept of horizontal effect was first acknowledged by the German FCC in 1953; the concept of positive obligations was first developed in the late 1960s by the ECtHR and from the mid-1970s by the FCC. The origin of the concept of proportionality – which is *the* core concept of constitutional rights law today – lies in German administrative law⁵⁰ and was imported into constitutional law by the FCC as early as 1957 in its famous *Pharmacy Judgment (Apothekenurteil)*.⁵¹ These doctrines, and inseparable from them a certain model of rights, travelled from Germany and the European level to other European jurisdictions, such as in particular the ex-communist countries, and to other parts of the world, such as Canada and South Africa.⁵² This is why some authors loosely speak of the ‘European’ model of rights; but this has to be understood in the sense of

⁴⁷ Alexy, *A Theory of Constitutional Rights* (Oxford University Press, 2002), ch. 3.

⁴⁸ Kumm, ‘Constitutional rights as principles: On the structure and domain of constitutional justice’, (2004) 2 *International Journal of Constitutional Law* 574, 596.

⁴⁹ See section IV on the question of whether the U.S. follows a different model of rights.

⁵⁰ Cf. Stone Sweet and Mathews, ‘Proportionality Balancing and Global Constitutionalism’, (2008-9) 47 *Columbia Journal of Transnational Law* 72, 97; Cohen-Eliya and Porat, ‘American balancing and German proportionality: The historical origins’, (2010) 8 *International Journal of Constitutional Law* 263, 271.

⁵¹ BVerfGE 7, 377 (*Pharmacy Judgment*).

⁵² Stone Sweet and Mathews, ‘Proportionality Balancing and Global Constitutionalism’, (2008-9) 47 *Columbia Journal of Transnational Law* 72, 112-131.

‘originating from Europe’ as opposed to ‘being endorsed (only) in Europe’; because of its global appeal it is more precise to speak of the global model of constitutional rights.

2. *Constitutional rights*

This book mainly considers materials – mostly cases – from the ECHR, Germany, the United Kingdom, South Africa and Canada. This selection may raise questions relating to its usage of the terms ‘constitution’ and ‘constitutional’. I include the ECHR here in spite of the fact that it is technically not a constitution but an international treaty; however, functionally the ECtHR performs review very similar to that of domestic highest courts, the main difference arguably being a somewhat relaxed intensity of review. Furthermore, I will generally refer to ‘constitutional’ rights in this book, a term which has some advantages over its alternatives, ‘human’ or ‘fundamental’ rights, in that it makes clear that we are concerned with *legal* (often justiciable) rights of a certain *elevated status* over that of ordinary legislation. This includes the rights of the ECHR and also the rights protected under weak systems of judicial review such as the one in the United Kingdom. Furthermore, I will refer to the courts adjudicating upon constitutional rights (in the sense just explained) as ‘constitutional’ courts, independently of whether they are technically supreme courts, constitutional courts, or – as in the case of the ECtHR – international courts.

IV. The U.S.: an outlier?

This book excludes U.S. jurisprudence from the set of materials which it seeks to reconstruct. The reason for this lies not in any claim to the effect that U.S. necessarily follows a model of rights which is entirely different from that of the rest of the world; the book leaves this issue open. Rather it is that at this particular point of its history, U.S. practice is on the surface different enough from the global model to justify leaving it aside, in order to avoid the long, complicated and controversial argument which would inevitably be needed to justify its inclusion and which would only distract from the book’s main claims.

U.S. constitutional rights law can be regarded as differing from that of the rest of the world in several respects. Most obviously, it is different with regard to the outcomes that it produces: many of the conclusions of the U.S. Supreme Court about what rights permit, require or prohibit are not shared by other courts, for example on issues relating to abortion, hate or other offensive speech, or gun control, to name a few. But more important in the

present context is that it seems, at least on the surface, that the U.S. follows a structurally different understanding of rights which seems much closer to the dominant narrative. First, there is no rights inflation in the U.S. Supreme Court, or at least not to the same extent as in Europe: the Court will only accept a liberty interest as a right if it can be shown to be ‘deeply rooted in this Nation’s history and tradition’⁵³; its reason for this caution is that ‘[b]y extending constitutional protection to an asserted right or liberty interest, we, to a great extent, place the matter outside the arena of public debate and legislative action. We must therefore “exercise the utmost care whenever we are asked to break new ground in this field”’⁵⁴. Second, there is no general acknowledgement of horizontal effect; rather, constitutional rights will only apply when there is ‘state action’.⁵⁵ Third, there is no endorsement of positive duties and certainly none of socio-economic rights. The *DeShaney* case illustrates this approach: the petitioner was a child who was subjected to a series of beatings by his father until he eventually suffered permanent brain damage and was rendered profoundly retarded. He and his mother argued that the state had violated his constitutional rights by failing to protect him from his father. The Supreme Court however held that the 14th amendment, which states that ‘no State shall ... deprive any person of life, liberty, or property, without due process of law’, was not violated. It relied on textual and historical reasons to support this conclusion, arguing that the clause was phrased as a limitation on the state’s power to act, not as a guarantee of certain minimal levels of safety and security, and that its history showed its purpose to be the prevention of government abusing its power or employing it as an instrument of oppression: ‘Its purpose was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political process.’⁵⁶ This understanding of constitutional rights thus places the Court in diametrical contrast to the ECtHR which would have applied its general doctrine of positive obligations and held that the right to life and the right to private life (into which the Court reads a right to physical integrity) place obligations on the state to protect the people’s lives and physical integrity from violations by third parties. Finally, U.S. constitutional law has not subscribed to the proportionality test to determine the limits of rights but uses a variety of standards, including the strict scrutiny test which demands that a law interfering with a fundamental

⁵³ See for example *Washington v. Glucksberg*, (1997) 521 U.S. 702, 720.

⁵⁴ *Ibid.*

⁵⁵ For an overview, see Barendt, ‘The United State and Canada: State Action, Constitutional Rights and Private Actors’, in Oliver and Fedtke (eds.), *Human Rights and the Private Sphere* (Routledge-Cavendish, 2007), 399.

⁵⁶ *DeShaney v. Winnebago County Department of Social Services*, (1989) 489 U.S. 189, 196.

right must serve a compelling government interest and be narrowly tailored to the achievement of that interest. According to common wisdom, this requirement is harder to fulfil than proportionality; as the saying goes, strict scrutiny is “strict” in theory and fatal in fact’⁵⁷.

It must be noted that all the above observations on the current state of U.S. law are controversial; and it would seem possible to construct an argument to the effect that upon closer inspection the U.S. model of rights is not far removed from the global model. With regard to rights inflation, it is arguable that the rational basis test which the U.S. Supreme Court applies to interests not deemed fundamental does in substance award those interests a protection similar to the protection offered to trivial interests under, for example, the German or European approaches, albeit without labelling those interests as ‘rights’. With regard to horizontal effect, the simple reference to the ‘state action’ doctrine raises the question of what counts as state action: under the broadest possible understanding, the creation of any (private law) statute or common law doctrine amounts to state action, from which it follows that there is indeed state action in *every* legal dispute; and furthermore, court decisions adjudicating claims between private individuals can always be constructed as involving state action.⁵⁸ At times the Supreme Court has come close to taking this view⁵⁹ which, taken seriously, would in substance lead to a broad acknowledgement of horizontal effect via the state action doctrine. Thus, referral to the requirement of ‘state action’ does not resolve the problem of whether and to what extent constitutional rights have an impact on the legal relationship between private parties. With regard to the absence of positive obligations, the *DeShaney* judgment has been sharply criticised as relying on a mistaken interpretation of the U.S. constitution.⁶⁰ And finally, with regard to balancing and proportionality, even within the U.S. Supreme Court, Justice Breyer has shown sympathies for the European approaches on balancing and proportionality and would prefer to see those approaches used more widely within the interpretation of the U.S. Bill of Rights.⁶¹ Furthermore, it is arguable that the

⁵⁷ This famous phrase was coined by Gunther, ‘The Supreme Court, 1971 Term – Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection’, (1972) 86 *Harvard Law Review* 1, 8.

⁵⁸ Kumm and Ferreres Comella, ‘What is so Special about Constitutional Rights in Private Litigation? A Comparative Analysis of the Function of State Action Requirements and Indirect Effect’, in Sajó and Uitz (eds.), *The Constitution in Private Relations* (Eleven, 2005).

⁵⁹ *Shelley v. Kramer*, (1948) 334 U.S. 1.

⁶⁰ Strauss, ‘Due process, government inaction, and private wrongs’, 1989 *Supreme Court Review* 53.

⁶¹ *District of Columbia v. Heller*, (2008) 128 S.Ct. 2783, 2852 (Breyer J, dissenting). For an insightful discussion, cf. Cohen-Eliya and Porat, ‘The Hidden Foreign Law Debate in *Heller*: The Proportionality Approach in American Constitutional Law’, (2009) 46 *San Diego Law Review* 367.

current tiered scrutiny (strict and intermediate scrutiny; rational basis review) amounts in substance to something similar to proportionality analysis.

Thus, it is certainly a possibility that upon deeper analysis it turns out that U.S. practice, too, is best explained by the global model and the reconstructive theory developed in this book. Furthermore, it remains of course true that U.S. constitutional rights law is a part of a Western liberal tradition of rights discourse and that for this reason examples and cases drawn from it will be useful for the analysis of specific issues even if its doctrinal structure arguably differs from the global model; therefore this book will occasionally rely on U.S. cases to illustrate a point. But for the reasons given, a comprehensive analysis of how U.S. law relates to the global model is beyond the scope of this book.

It is an interesting point to note that many of the leading philosophers of rights – Ronald Dworkin, Robert Nozick, James Griffin and others – are Americans; their theories may be influenced by, or, as in Dworkin’s case, reconstructions of the U.S. practice which, as explained, at least on the surface seems to be much closer to the dominant narrative. If so, then this makes even clearer the need for a theory of rights which is developed against the backdrop of the global model of constitutional rights.

V. The reconstructive approach

The theory proposed in this book is *reconstructive*, which means that it is a theory of the practice of constitutional rights law around the world (‘the practice’) and especially those features of the practice which I summarised under the label of ‘the global model of constitutional rights’. This can be contrasted with what we might call a ‘*philosophical*’ theory of constitutional rights which is insensitive to the practice. A philosophical theory will aim at providing the morally best account of constitutional rights while ignoring the question of the extent to which this account fits the practice. When the practice departs from the philosophical theory then this is for the philosophical theory a reason for regret only insofar as the practice is deficient; but it does not affect the validity of the philosophical theory. The reconstructive theory, by way of contrast, aims at providing a theory which, like the philosophical theory, is morally coherent but unlike it need not be the morally best (‘the one right’) theory, where ‘morally best’ is understood as morally best independently of the practice. Of the several morally coherent theories, the reconstructive theory will pick the one which fits the practice better than any other coherent theory. Thus, the reconstructive theory

is sensitive to both moral value and the practice it seeks to reconstruct; it is, in Ronald Dworkin's terminology, an *interpretive* theory.⁶²

There are two reasons why this book chooses the reconstructive approach. First, the practice of constitutional rights adjudication around the world provides scholars with a wealth of case law and doctrines produced by judges who often deal with questions of constitutional rights on a daily basis and accumulate a practical expertise in this area which cannot even nearly be matched by philosophers. It would simply be imprudent to ignore this wealth of materials and experience when developing a theory of rights. Second, the extraordinary amount of political power exercised by constitutional courts raises particularly urgent questions of legitimacy and requires an assessment of the moral justifiability of the practice; and for this the reconstructive account can be used.

The reconstructive theory can be employed for two further purposes. First, it can be used to assess specific aspects of the practice; where the practice departs from the reconstructive theory, this particular aspect of the practice is, all things equal, a mistake which should be corrected. For example, if the reconstructive account holds that the practice is best reconstructed as excluding moralism, then we can conclude that those cases in which moralism nevertheless features are, all things equal, mistakes and should have been decided differently. Second, one can assess the reconstructive account in light of a philosophical account and use the philosophical account to criticise the reconstructive one and recommend reform. However, for any philosophical theory to convincingly claim the need for reform of the practice, it must first provide the best possible understanding of the practice; otherwise the philosophical account risks fighting against a distorted account of the practice or a straw man.

There are two kinds of reconstructive theories. The first can be called *moral reconstruction*; this is the kind of theory which I have outlined above and which will be proposed in this book. It aims at finding moral value in a practice: something which makes it worth continuing with that practice. It is of course possible that there is no such moral value, in which case this would have to be acknowledged by adopting the perspective of what Dworkin calls the internal sceptic;⁶³ the consequence is that the practice ought to be discontinued. The second kind of reconstruction is morally neutral; one might call it *zeitgeist reconstruction*. Rather than aiming at identifying moral merit it aims at reconstructing the practice in a way which shows the *zeitgeist* predominant in shaping the practice. *Zeitgeist*

⁶² On interpretivism see Dworkin, *Law's Empire* (Hart Publishing, 1986), ch. 2.

⁶³ *Ibid.*, 78-79.

reconstruction is a valid scholarly enterprise and can be important for, in particular, historical and sociological purposes. Two examples will show the difference between the two kinds of reconstruction. We might be interested in a *zeitgeist* reconstruction of Nazi law. So we would look at the practice of Nazi law and try to identify important themes in it; and we would find one important theme which is the idea of the racial superiority of Aryans over Jews. So we might say that one aspect of our *zeitgeist* reconstruction of Nazi law is this presumed superiority. By way of contrast, if we had engaged in a *moral* reconstruction of Nazi law, we could not have held that the idea of a superiority of Aryans over Jews was a valid reconstruction: it lacks moral value; or in other words, it is not a principle but a falsity. So a moral reconstruction of Nazi law would look very different from a *zeitgeist* reconstruction. The second example is closer to contemporary constitutional rights law. Suppose that a look at the practice shows that sometimes the practice rejects moralism and sometimes it approves of moralism. For example, moralism towards homosexuals is no longer regarded as acceptable today by the courts, whereas 50 years ago it clearly was; but recently the German FCC regarded moralism towards people engaging in incest as acceptable.⁶⁴ Someone engaging in moral reconstruction must give a morally coherent account of the legitimacy of moralism which also fits the practice. She could not just argue that the correct moral reconstruction held that moralism was acceptable when directed against whoever is the unpopular group of the day: that blatantly lacks moral coherence because the mere fact that a group is unpopular does not justify limiting this group's freedom. But it might be a very good *zeitgeist* reconstruction: it might be the case that the *zeitgeist* in Western societies is such that it is regarded as permissible to engage in moralism towards a group only if that group is really unpopular. So, again, two persons engaging in reconstructive enterprises might come up with very different reconstructive accounts depending on what the goal of their reconstruction is. Since the project of this book is to assess the moral legitimacy of the practice it seeks to reconstruct, it must engage in a moral reconstruction.

VI. A summary

The book will rely on the four features of the global model of constitutional rights pointed out in section II in order to develop its theory of rights: first, rights inflation and the broad

⁶⁴ BVerfGE 120, 224, 248 (referring to a 'sense of wrongness (*Unrechtsbewusstsein*) anchored in society' as reinforcing the reasons supporting the prohibition).

understanding of (*prima facie*) rights, including a right to privacy which protects almost all, at least all non-trivial, interests; second, the existence of positive obligations and the growing acceptance of socio-economic rights; third, the acknowledgement of horizontal effect; and fourth, balancing and proportionality with regard to the determination of the limits of rights. My claim is that on the basis of this set of materials it is possible to construct a theory of constitutional rights which fits these materials and is morally coherent. To this end, the structure of this book will reflect the unanimous practice of courts in distinguishing between the *prima facie* stage of rights and the justification stage.

In Chapters Two to Four, the book develops a theory of the scope of *prima facie* rights which makes sense of the broad understanding of rights, horizontal effect, positive obligations and socio-economic rights. Chapter Two ('Negative and Positive Freedom') argues that the value protected by constitutional rights must be positive freedom or personal autonomy: in particular the doctrines of positive obligations and horizontal effect and the increasing acceptance of socio-economic rights indicate that the point of rights is to enable the people to live their lives autonomously, as opposed to disabling or limiting the government in certain ways.

Chapter Three ('Two Conceptions of Autonomy') discusses two competing conceptions of personal autonomy which I term the excluded reasons conception and the protected interests conception. The excluded reasons conception – related in particular to Dworkinian theories of rights – holds that in order to respect a person's autonomy, the state must not rely on certain (excluded) reasons in its treatment of him, in particular moralistic or paternalistic reasons or reasons based on the idea that some people are worth less than others. The chapter argues that while this is a coherent and intuitively appealing conception of autonomy, it cannot explain the broad scope of (*prima facie*) rights accepted today. The second and preferable conception of autonomy – the protected interests conception – focuses directly on the actions and personal resources which are important for the purpose of leading an autonomous life. For example, it recognises the importance of being able to choose one's intimate partners, utter one's political views, and control what happens to one's body, for autonomous persons, and takes the importance of these interests as the reason for protecting them. It is then possible to place a person's different autonomy interests on a scale according to their importance from the perspective of the self-conception of the agent. This approach is related but preferable to similar concepts used by courts and philosophers, such as the idea of developing one's personality which is widely used in European human rights law, James Griffin's idea of living one's conception of a worthwhile life, or the idea of self-realisation.

The chapter demonstrates that the protected interests conception can explain the broad scope of rights under the global model; in particular, it can make sense of those rights with which the excluded reasons conception struggled, such as the right to freedom of profession (a person's profession is often an important aspect of her self-conception), property (property being of instrumental value for the purpose of leading one's life autonomously) or the right to be informed of one's family descent (this being important information for understanding one's personality).

Chapter Four ('The Right to Autonomy') draws on the conclusions of the previous chapters to develop a comprehensive conception of (*prima facie*) rights. It demonstrates that it is coherent to accept rights to whatever is in the interest of the autonomy of a person, including socio-economic rights (which protect the preconditions of autonomy) and rights to engage in trivial activities (such as pursuing one's hobbies) and even immoral and harmful activities (such as murdering). It thus concludes that the almost unanimously held view that there is a threshold which separates interests from rights should be given up. The point and purpose of constitutional rights under the emerging global model is thus not to single out certain especially important interests for heightened protection but rather to ensure that *all* autonomy interests of a person are *adequately protected* at all times. The broad understanding of *prima facie* rights is simply a tool which ensures that all autonomy interests survive the *prima facie* stage in order to assess the adequacy of their protection at the justification stage, using, in particular, the proportionality test.

In the subsequent three chapters, Chapters Five to Seven, the book develops a theory of the justification stage, focussing on the core doctrinal tools used at that stage, namely the doctrine of balancing and the principle of proportionality. Chapter Five ('Towards a Theory of Balancing and Proportionality: The Point and Purpose of Judicial Review') starts from the insight that in order to develop a substantive moral theory of balancing and proportionality, we need a theory of the appropriate standard and, related, the point and purpose of judicial review which also fits the global model. Such a theory must integrate attractive accounts of the values of democracy and the separation of powers with the reconstructive theory of rights as it has emerged in the previous chapters. Having established in Chapter Four that constitutional rights comprehensively protect a person's autonomy, this chapter goes one step further and argues that not only rights but also (almost all) policies are oriented towards autonomy. It follows that constitutional rights and policy-making are concerned with the same subject-matter, namely *the specification of the spheres of autonomy of equal citizens*. This raises a problem for the legitimacy of judicial review because it seems to imply that

there is no room left for democratic decision-making. Relying on a reinterpretation of Mattias Kumm's work, the chapter proposes a way out of this problem by arguing that for a policy to be constitutionally legitimate and democratic properly understood, it must represent a *reasonable*, as opposed to *the one correct*, specification of the spheres of autonomy of equal citizens: a policy will be both undemocratic and in violation of constitutional rights if it cannot be defended as a reasonable specification of the sphere of autonomy of, in particular, the person on whom it imposes the greatest burden. It further integrates this result with the value of the separation of powers by arguing that even if one accepted the controversial proposition that considerations relating to institutional competence are the key to a proper appreciation of that value, no objection to judicial review would arise because it is plausible to assume that courts will be capable of assessing constitutional legitimacy in the specific sense just described.

The following two chapters build on these conclusions to develop an account of balancing and proportionality. Chapter Six ('Balancing') presents the operative heart of the doctrine proposed in this book: a theory of personal autonomy under conditions of *conflict*. When there is such conflict between the autonomy interests of one person with the autonomy interests of another person, constitutional law recommends that the competing autonomy interests are to be 'balanced'. The chapter first clarifies the various possible meanings of this idea by presenting four concepts of balancing: balancing as autonomy maximisation, interest balancing, formal balancing, and balancing as reasoning. It argues, negatively, that equating, without further argument, balancing with consequentialist reasoning or mechanical ways of quantification would be misguided; at the most general level, the doctrine of balancing properly understood simply refers to the need of resolving a conflict of autonomy interests in line with sound moral arguments (balancing as reasoning). Positively, the chapter proposes a set of moral principles to adequately deal with such conflicts, illustrating this with analyses of a broad range of important constitutional rights cases relating to issues including abortion, hate speech, religious drug use, euthanasia, and many others. It distinguishes between three kinds of policies – regulating harmful behaviour, redistributive, and providing public goods and services. With regard to the first and practically most important kind, the chapter argues that the key to striking the correct balance between the conflicting interests lies in the specific relationship which an agent's behaviour creates between him and others. Examples of this are the relationship which is created where the right-holder harms the other person in a way which uses him as a means; or where he, while not harming others, relies on a rule whose existence leads to harm to others. The chapter thus explores the considerable complexity that

hides under the convenient doctrinal label of ‘balancing’ and develops a workable theory of how this balancing ought to be conducted in the resolution of real cases.

The final chapter (‘Proportionality’) integrates the results of the previous chapters into a comprehensive theory of proportionality and fills remaining gaps along the way. It is argued that the principle of proportionality is a tool for the structured resolution of conflicts of autonomy interests. Each of the four stages of the proportionality test (legitimate goal; suitability or rational connection; necessity; balancing or proportionality in the strict sense) has its own role to play in this regard. The purpose of the legitimate goal stage is to exclude goals which, while sometimes autonomy-related, must not be accorded any weight: in particular moralistic or impermissibly paternalistic goals. The point of the suitability stage is to establish the extent to which there is a genuine conflict between the two autonomy interests at stake. The necessity stage deals with alternative policies which are less restrictive of the right. At the balancing stage the conflict is ultimately resolved, using the framework developed in Chapter Six. In assessing the balance, the courts grant the original decision-maker what in European terminology is called a ‘margin of appreciation’; other courts do the same under different terminologies. This margin of appreciation incorporates the reasonableness requirement proposed in Chapter Five into constitutional rights law: a policy will be regarded as constitutionally legitimate if it falls within the margin of appreciation of the elected branches, i.e. if it resolves a conflict of autonomy interests in a way which is reasonable (as opposed to correct). Thus, the principle of proportionality, properly applied, guides judges through the reasoning process as to whether a policy is constitutionally legitimate.

Towards a Theory of Balancing and Proportionality: The Point and Purpose of Judicial Review

I. Introduction

The most important tools employed by the global model in order to determine the limits of constitutional rights are the doctrines of balancing and proportionality. As indicated by their names, the doctrine of balancing requires competing values to be balanced and the principle of proportionality prohibits state measures which are disproportionate; but the problem is that these doctrines, because of the high level of abstraction at which they are formulated, offer no guidance as to what makes a measure disproportionate or how to conduct the balancing. In order to understand them properly, we must interpret them in light of coherent theories of the *standard* and, inseparable from this, the *point and purpose* of judicial review under the global model. Therefore, this chapter will shift the focus from the practice of constitutional rights law to a philosophical inquiry about the point and purpose of constitutional judicial review. In doing so it will however remain faithful to the reconstructive approach of this book: it will take the features of constitutional rights, so far as they have emerged in the previous chapters, as a given and ask which theory of judicial review fits these specific features *and* is morally coherent.

Such a theory must reflect attractive conceptions of constitutional rights, the value of democracy and the value of the separation of powers. With regard to democracy, it must find a reply to the most common objection to judicial review, namely that it is undemocratic because it gives unelected judges the power to strike down laws passed by a democratically elected legislature. With regard to the separation of powers, it must offer a response to the charge that judges and courts are institutionally poorly equipped to protect rights, or in any case less well equipped than legislatures, and that this raises problems for the legitimacy of judicial review. Therefore the relationship between constitutional rights, democracy and the separation of powers will be at the centre of this chapter. It will begin with the relationship

between constitutional rights and democracy (II.-IV.) and assess the institutional questions in a second step (V.).

II. Personal and political autonomy

The moral ideal of democracy is the people ruling themselves: they are the authors of the laws which bind them. Thus, democracy is about *autonomy* and in some ways similar to personal autonomy: at the political level, the people, collectively, are the authors of their laws; and at the individual level, each person is the author of his or her life. In order to stress this parallel between personal autonomy and democracy, I shall refer to the moral ideal of democracy as *political autonomy*. The political community as a whole exercises its political autonomy. At the level of the individual citizen, every citizen is entitled to *participate* adequately in the community's political autonomy.¹ The two kinds of autonomy, personal and political, reflect our different roles as individual persons, giving our lives meaning and direction, on the one hand, and as citizens, participating in elections and other democratic procedures in order to co-determine the political direction of the country, on the other hand. Rather than being passive recipients of other people's or bodies' directives, they empower us to become active (co-)shapers of our personal lives and the life of our political community.

The following sections will examine the relationship between personal and political autonomy. Speaking of personal and political autonomy, as opposed to constitutional rights and democracy, has the advantage of laying bare the moral ideals at stake and making it clear that the argument at this stage is not about institutional considerations (which will be dealt with in section V below). It will turn out that institutional considerations do of course play a role in a theory of constitutional rights, but a smaller one than often assumed in Anglo-American discourse; in other words: the step from a theory of the relationship between political and personal autonomy to a theory of the relationship between, in particular, legislatures and courts is much smaller than often assumed. As will be demonstrated, the moral ideals are in the driving seat and institutional design by and large follows the moral ideals, making the courts responsible for ensuring that the elected branches remain within their sphere of political autonomy and thus do not violate the personal autonomy of the citizens.

¹ On the right to participation, cf. Waldron, *Law and Disagreement* (Oxford University Press, 1999), ch. 11.

III. Three desiderata

As a starting point for the inquiry, I shall present three *desiderata* which a sound theory of the relationship between personal and political autonomy ought to satisfy. In the following section, I will discuss different theories of the justifiability of judicial review in light of the extent to which they comply with these desiderata.

1. The theory must provide for a meaningful role of personal autonomy.

The argument in the last chapters has established that as a matter of the reconstruction of the global model, constitutional rights comprehensively protect the autonomy interests of individuals. Therefore, it is evident that a theory which searches for a justification of this practice will have to accord a prominent, meaningful place to personal autonomy.

2. It must provide for a meaningful role of political autonomy.

All the discussion of constitutional rights and personal autonomy in the previous chapters must not lead to an underestimation of the undisputed importance of democracy or political autonomy. Surely any theory of political autonomy and democracy must endorse their being about deciding, collectively, questions of great *importance*, thus shaping the character of the political community in fundamental ways. This involves the existence of *genuine choice* on the side of the decision-makers. If it turned out that respecting personal autonomy imposed such constraints on political autonomy that, while political decision-makers were still required to make important decisions, the content of these decisions was predetermined by considerations relating to personal autonomy and did not leave any meaningful element of choice to the decision-makers, this would point to a serious flaw in the theory.

3. It must integrate personal and political autonomy in an attractive way.

To understand this desideratum, imagine the following, straightforward argument claiming to resolve the puzzle of the relationship between personal and political autonomy. It is important, the argument goes, that the people enjoy political autonomy and rule themselves through democratic procedures. It is however also important that each person enjoy personal autonomy and rule himself. Since sometimes we cannot have both at the same time, the argument continues, we must make compromises. When the two values of political and personal autonomy clash, we must balance them so that neither of them takes complete

priority at the cost of the other. So, as a result, we should, for example, conclude that when there is merely a light violation of personal autonomy, political autonomy takes precedence; however in case of a grave violation, personal autonomy takes precedence. We thereby ensure that the core of personal autonomy is protected, but that at the same time meaningful political self-government exists.²

I do not want to discuss this view in depth here, but rather use it to illustrate the necessity of the integration requirement. The balancing approach is based on the undefended assumption that political and personal autonomy clash. However, before concluding that there is a clash of values we must be careful to make sure that we have the right understanding of the two values at stake; we must look at the possibility of an *integrated account* which shows the two values – personal and political autonomy – in harmony rather than conflict.³ Only if we cannot come up with such an account are we justified in assuming that there is a genuine clash of values.

IV. The relationship between personal and political autonomy

1. 'Political autonomy takes precedence'

The view discussed in this section claims that political autonomy takes precedence over personal autonomy. It integrates political and personal autonomy in a peculiar way: it need not deny the importance of personal autonomy – it may even hold that the wise exercise of political autonomy will consist in creating conditions where the people enjoy personal autonomy. However, it creates a hierarchical order between the two values by insisting that freedom, properly understood, foremost means the freedom of political participation, and that the freedom to advance one's personal projects is protected only in so far as it is recognised under the scheme of policies flowing from the community's exercise of its political autonomy.

As a matter of identifying a conception of political autonomy which will help justifying judicial review under the global model, we can quickly dispose of this approach: it violates the first desideratum by not giving adequate protection to personal autonomy. Its natural mate in the world of constitutional design is undoubtedly a U.K.-style sovereign

² Cf. Sager, 'The Domain of Constitutional Justice' in Alexander (ed.), *Constitutionalism: Philosophical Foundations* (Cambridge University Press, 1998), 235, 248-249: constitutional justice should narrow its focus to extreme and rather clear breaches of political justice, partly because of a concern for democracy.

³ Cf. Dworkin, *Justice in Robes* (Harvard University Press, 2006), ch. 4.

legislature. However, apart from this approach not fitting the practice of judicial review under the global model, it fails also on grounds of philosophical attractiveness; and as its failure is instructive, I would like to press the matter further. There is something to be said for this view under conditions of *unanimity*, with everyone consenting to policies which thereby become reflections of the general will. Nothing seems wrong with a community of equals first deciding unanimously upon a scheme of justice, and then holding every member to be bound by it; in fact it would be absurd for someone first to agree to be bound and then claiming that the law violated his personal autonomy and should not be enforced. Obviously, however, in the real world unanimous decision-making is not practical because it would usually lead to political stagnation. Therefore, beautiful as the image of the general will may be, it is insufficiently close to majoritarian decision-making which is the only practicable form for a community to exercise its political autonomy.

Under conditions of majority-voting, it is not plausible to understand political autonomy as limitless and trumping personal autonomy. That approach would imply, for example, that if the political community decided to inflict genocide on a part of the population, it would be morally entitled to do so: it falls within their political autonomy which trumps the personal autonomy of the victims. Such a broad understanding of political autonomy must be unattractive. Note again that from this it does not necessarily follow that we should subscribe to constitutional judicial review; my argument is not about institutions at this stage. It may for example be possible to defend traditional U.K.-style conceptions of parliamentary sovereignty by reference to the idea that legislatures are better than courts in protecting personal autonomy adequately. All I am saying is that an understanding of political autonomy which regards the community as *morally entitled* to do anything it likes to its members *just because it so chooses* must be deficient.

Here lies an important difference between the self-determination of individual persons and that of political communities. As I have argued in previous chapters, individual persons are (*prima facie*) entitled to choose and to act upon their self-conceptions, i.e. the goals towards which they strive, and the state must not judge their goals. In contrast, a political community does not have such an entitlement: it cannot legitimately choose, for example, to prize the infliction of genocide on some of its members. In contrast to individual persons, the goal of its activities is fixed: at the most abstract level, it must be a value such as justice, the common good, or possibly a combination of different values (for example freedom, equality, solidarity). At this stage, I am not concerned with deciding which value or set of values exactly it is that communities must realise; rather, my point is only to illustrate that there must

be some value or set of values constraining the policies that political communities can legitimately adopt. At the very least, a community cannot claim to act within its political autonomy if it acts in a way *which cannot be defended as a bona fide attempt at these values*.

This has implications for the right to participation. Since this right is derivative of the community's political autonomy, its content is limited in exactly the same way as political autonomy: it means, at most, the right to participate in shaping a *bona fide* conception of the value or values which the political community must pursue. In particular, an individual's right to participate is *not* about trying to get most out of the political process for himself, at the cost of the legitimate interests of others. Of course, some democratic theorists have argued exactly this: that the value of democracy lies in the fact that legislatures are a suitable forum to take the partisan interests of everyone into account. This argument obviously does not paint a very flattering picture of the ways in which people think about political questions, and some would refute it as not only unflattering but inaccurate in its description of how people actually reason in their political roles.⁴ Be that as it may, this approach is not at odds with the account given above: the theorists defending it will either not see the value of democracy in political self-government (they might see it, for example, in advancing the happiness or the well-being of the people); or if they do, they must regard counting the partisan interests of everyone as the arrangement most likely to lead to the adoption of adequate policies (the idea being that if everyone's interests are taken into account on an equal basis, the result is likely to be adequate in terms of realising the values which political communities ought to pursue). They would, in other words, certainly not think that there was much value in democracy if it regularly led to results which could not be regarded as *bona fide* attempts at the relevant value(s). If that is true, then while this argument allows the people to be partisan and ignore the relevant values on an individual basis, it does so because it has in advance come to the conclusion that this procedure is actually likely to promote the realisation of these very values.

2. *'Personal autonomy takes precedence to the extent that its protection is necessary for the legitimacy of the processes of political autonomy'*

A popular way of integrating personal and political autonomy is the idea that for legitimate democratic decisions, certain procedural conditions must be satisfied. The best-known proponent of this approach is John Hart Ely, who argued in his book *Democracy and Distrust* that constitutional rights ought to be process-perfecting, i.e. they should be concerned 'on the one hand, with procedural fairness in the resolution of individual disputes (process writ

⁴ Cf. Waldron, *Law and Disagreement* (Oxford University Press, 1999), 221-222.

small), and on the other, with what might capaciously be designated process writ large – with ensuring broad participation in the processes and distributions of government.’⁵

I discussed this basic idea in Chapter Four,⁶ where I considered and accepted the idea that for some rights – including the freedoms of expression, association and assembly – there exist overlapping justifications based on personal autonomy *and* the legitimacy conditions of the procedures of democracy. The question to be addressed here is whether it is possible to interpret the *entire* set of rights protected under the global model as required for the procedural legitimacy of democracy. This, however, is a hopeless task. Ely’s theory seeks to limit the breadth of constitutional rights, not to expand the American understanding to the even broader one prevalent under the global model which, as I argued in the previous chapter, is best understood as including a right to everything which is in the interest of a person’s autonomy. The furthest Ely is willing to go is to award some protection to minorities.⁷ While it is already doubtful whether this can be justified under a *procedural* approach,⁸ under the global model *everyone’s* autonomy interests are protected, not only those of minorities or people at risk of suffering discrimination. Thus, while the procedural legitimacy approach may provide an overlapping justification for some rights, it cannot even nearly explain the breadth of the protection offered by constitutional rights today. It must therefore be rejected as unhelpful for an understanding of the point and purpose of judicial review under the global model.

3. ‘Political autonomy ends where personal autonomy begins’

A popular account of the relationship between democracy and human rights is the following: ‘Democracy in the sense of majoritarian decision-making is legitimate only when it does not violate human rights’⁹. The problem with this approach is that while it presents itself as an integrated account of democracy and human rights (democracy ends where human rights begin), the integration is only rhetorical because it does not show the substantive link between the two concepts. What makes it the case that democracy ends where human rights begin? What are the values at stake? A refined version of the idea can be formulated by replacing

⁵ Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980), 87.

⁶ Chapter Four, section III.

⁷ Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980), ch. 6.

⁸ Sager, ‘The Domain of Constitutional Justice’ in Alexander (ed.), *Constitutionalism: Philosophical Foundations* (Cambridge University Press, 1998), 235, 246-247.

⁹ See, for example, Fleming’s characterisation of constitutional democracies: ‘A constitutional democracy is a system in which a constitution imposes limits on the content of legislation: to be valid, a law must be consistent with fundamental rights and liberties embodied in the constitution.’ (*Securing Constitutional Democracy: The Case of Autonomy* (Chicago University Press, 2006), 77).

‘democracy’ with ‘political autonomy’ and ‘human rights’ with ‘personal autonomy’. The revised statement reads: ‘Political autonomy ends where personal autonomy begins’. On one interpretation of this statement, it divides issues by subject matter and claims that some issues properly fall into the domain of personal autonomy, and others fall into the sphere of political autonomy. For example, giving a political speech or choosing an intimate partner are issues that fall into the sphere of personal autonomy and are therefore no-go zones for the political community; whereas building a new road or deciding about economic policies are issues that fall into the sphere of political autonomy. Its claim for respecting the integration desideratum is more plausible now: rather than speaking of two concepts (democracy and human rights) which at the surface seem to have nothing to do with each other, it links both concepts to the same ideal, namely self-determination. To be a comprehensively self-determining person, one has to be personally autonomous in one’s private sphere and participate adequately in the political self-determination of one’s political community. Both kinds of self-determination have their respective spheres which can and must be delineated from each other according to the subject matter at stake.

So while there is an attempt at integration, the question is whether it is an attractive one. The argument rests on the premise that one can separate the two spheres of autonomy in a way so that each issue will fall into one of them. I explained in Chapter One that the domain of constitutional justice has constantly grown over the last decades. In the old days, when people thought, following what I called the ‘dominant narrative’, that constitutional rights apply only vertically and that they imposed only negative duties on the state, there was naturally a part of policy-making reserved for political autonomy where rights had no normative impact: the entire area of private law, and that part of public law which did not interfere with the negative liberty protected by constitutional rights. Conversely, it may have been possible in those days to identify certain areas of negative liberty which the state must not interfere with because they fell into the sphere of personal autonomy (e.g., speech, choosing and expressing one’s religion, etc.). But the situation has changed. Under the global model with its commitment to negative and positive obligations as well as vertical and horizontal effect, constitutional rights apply in the context of both actions and omissions and both private and public law. The state has to ensure adequate protection of personal autonomy; and since more or less *all* policies affect the personal autonomy of *someone*, it is not possible to delineate a sphere of political autonomy which is unaffected by the demands of personal autonomy. The consequence is that the idea that it is possible to separate personal and political autonomy into two separate spheres collapses.

4. The 'total constitution'?

The preceding sections point to the main challenge for a theory of judicial review which fits the global model of constitutional rights: metaphorically speaking, it is tempting to regard the domain of politics as a cake, and then to cut out one piece of the cake (constitutional rights) and remove it from politics. That piece could be the area of policy which is about the preconditions for the legitimacy of the democratic process (above, section 2), or a specific, limited personal sphere (section 3). This image, intuitively appealing as it may be, is however not compatible with the broad, autonomy-based understanding of rights employed by the global model. Rather, under the global model constitutional rights affect the whole domain of politics. In other words, the entire cake is about constitutional rights.

Mattias Kumm has recently put forward a theory of judicial review which wholeheartedly embraces this proposition.¹⁰ His approach can be summarised as follows.¹¹

(1) Kumm argues that in the enlightenment tradition, rights were not perceived to cover only a limited – and certainly not a negative – domain.

Indeed, the core task of democratic intervention in a true republic was to delimitate the respective spheres of liberty between individuals in a way that takes them seriously as equals and does so in a way that best furthers the general interest and allows for the meaningful exercise of those liberties. In this way democracy was conceived not only as rights-based, but as having as its appropriate subject matter the delimitation and specification of rights. Legislation, such as the enactment of the *Code Civil*, was rights specification and implementation.¹²

(2) What is new in post-WWII constitutionalism is not this broad understanding of rights, but the supervisory role of the judiciary. Courts engage in what Kumm calls 'Socratic contestation'. They challenge the authorities in order to establish whether their acts are susceptible to a plausible justification. Their role is not to assess whether the public authorities have found the 'one right answer', but rather to police whether the authorities have come up with a *reasonable* way of specifying the rights and duties of free and equal citizens.¹³

¹⁰ Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review', (2010) 4 *Law & Ethics of Human Rights* 141; Kumm, 'Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review' (2007) 1 *European Journal of Legal Studies*.

¹¹ The following account is faithful to Kumm's approach but does not discuss all strands of his arguments; in particular, I will not deal with his argument that once the step from direct democracy to representative democracy is taken, there is no 'issue of deep principle' anymore which would 'condemn judicial review, but not electoral representation'. Furthermore, my account will not rely on the idea of public reason, not because I consider that idea unattractive but because it is not necessary for my overall argument.

¹² Kumm, 'Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review' (2007) 1 *European Journal of Legal Studies* 23.

¹³ *Ibid.*, 23-24.

(3) This understanding of the role of courts connects to an attractive conception of democracy. The ideal of democracy is the *consent* of the governed, not *majorities*. Since actual consent is impossible to achieve in the real world, there are two surrogates that need to cumulatively be fulfilled in order for law to be constitutionally legitimate. First and procedurally, there must be a majoritarian decision-making process. Second and outcome-oriented, the outcome must plausibly qualify as a collective judgment of reason about what the commitment to rights of citizens translates into under the concrete circumstances: the result must be justifiable in terms that those who disagree might reasonably accept. In other words, even those burdened most heavily by the act in question must be able to interpret it as a reasonable attempt of specifying what the people owe to each other as free and equal citizens.¹⁴

a) Politics as oriented towards the specification of the spheres of autonomy of equal citizens

Kumm rejects the idea that rights cover only a limited domain of politics and claims, strikingly, that all of politics is about specifying the rights of free and equal citizens. This claim obviously makes sense only on the broadest possible understanding of rights. Kumm observes the tendency of contemporary constitutional rights discourse to include ‘all kinds of liberty interests’ in the catalogue of rights. In other places, he speaks of rights being affected whenever a person’s ‘interests’ are engaged. I will examine these two related claims in reverse order, starting with the broad understanding of rights, and then asking whether Kumm is correct in claiming that all of politics is about rights specification. In short, I agree with the core of Kumm’s argument, but think that it can be stated more precisely.

My reconstructive account as developed in the last chapters has defended rights as based on autonomy interests of individuals. When Kumm speaks of ‘liberty interests’ or, most often, simply ‘interests’, he must have in mind what I have called, more precisely, I think, autonomy interests. The term ‘interests’ is used in multiple ways in the theoretical literature. For example, Joseph Raz connects a person’s interests to his or her well-being. So for example, someone might argue that it is in a person’s interest to read the Bible. Such a claim makes sense under an approach which connects interests to well-being, but it is surely not an understanding of interests which has a legitimate place in constitutional rights discourse. The constitutional right to freedom of religion protects an individual’s *autonomy* interest in choosing and pursuing a (in the sense of: any) religion, but it is neutral with regard to the value of reading the Bible for a person’s well-being. More generally speaking, rights do not

¹⁴ *Ibid.*, 27-29; Kumm, ‘The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review’, (2010) 4 *Law & Ethics of Human Rights* 141, 168-170.

enable people to live objectively good lives, but they enable people to act upon their ('subjective') self-conceptions of what a good life requires; this is captured by referring to the relevant interests as 'autonomy' interests.

The next question is whether Kumm is right that all of politics is about rights specification. I have already argued above that under the global model there is no area of policy-making which remains unaffected by constitutional rights. Kumm's claim goes one step further: he says that policy-making is not only affected by constitutional rights but that all policy-making *is* rights specification. I will analyse this claim in two steps. First, I will argue that, with certain qualifications, all state policy is aimed at securing the conditions of personal autonomy. Let me start with the qualification: the point and purpose of political autonomy, insofar as it relates to *the duties the political community owes to its members*, is to secure the conditions of personal autonomy. Political communities have other duties as well. First, they owe duties to other political communities; for example, Britain may owe duties to Iraq. Second, they may owe duties to persons who are not members of the political community: non-naturalised immigrants, and possibly also individual people living in other political communities. Third, they may owe duties to future generations. Fourth, there may or may not be duties to animals or duties to preserve the environment; and these duties may be justified independently of the importance of animals or the environment for the personal autonomy of the people. Finally, there are duties which, one might say, the political community owes to itself (rather than the citizens one by one): political self-government requires a legal system, political institutions, political infrastructure, a bureaucracy, staff, and so on. At this point, I am only concerned with the duties the political community owes to its members individually; I will therefore ignore the other duties in the remainder of the chapter and indeed the book.

With this qualification out of the way, the question is whether all state policy is about securing the conditions of autonomy. Take the example of choosing an economic policy. Political communities choose economic policies in order to serve the interests of their members. We may speak of good economic policies being in the 'public' interest; but that is just a short form for saying that they are in the interest of the people. To be more precise, they are pursued in order to serve the people's *autonomy* interests: the very point of good economic policies is to lead to prosperity; and the reason prosperity is valued is that it enables people to take control of their own lives. When a very poor society reaches a modest level of prosperity, this may imply, for example, that the people do not have to constantly fight for physical survival. When a relatively wealthy society reaches an even higher level of prosperity, this means that the people will have even more resources to command; they have

even more options to choose from and more opportunities to give their lives meaning and direction. In both scenarios, the value in increased prosperity lies in its being instrumentally valuable for the people's autonomy.

The general conclusion towards which I am steering is that the very point and purpose of state policies is to enable the people to give their lives meaning and direction. Let me go through some other examples. The reason that many states maintain systems of health care lies in a concern for people's health which is a precondition of an autonomous life, as well as, partly, an element of it (control over one's body). The reason that states provide welfare (for example a social minimum) to unemployed persons is, first, to enable them to stay physically alive and healthy, which is a precondition of an autonomous life, and second, to enable them to some extent to give their lives meaning and direction even in the absence of the resources and increased opportunities which normally come with employment. The reason that states provide education is to enable people to live autonomous lives, or to increase the options they have later in life. The reason states maintain infrastructure (streets, public transport, etc.) is that this provides people with facilities which enable them to pursue their projects – get to work, meet friends, etc. The provision of public parks provides the people with facilities for recreation and the enjoyment of nature. Policies are also often aimed at securing and realising a beneficial social environment. Politicians care, for example, about creating or maintaining a sense of mutual respect, or a social climate without the presence of fear (of loss of one's job; of crime; of loss of status more generally). All these goals are autonomy-related. We should not think of autonomy as being exclusively about creating specific options which a person can then choose or reject. Rather, autonomy is more broadly about being able to give one's life meaning and direction, which takes place in a social context; and some social contexts are more beneficial than others in this respect. If all this is true, then we can generalise from the examples and conclude that *political autonomy is aimed at securing the conditions of personal autonomy*.

Second, while all state action is aimed at securing the conditions of personal autonomy, the design of policies ought not to be guided exclusively by autonomy-related considerations, but rather by a concern for the autonomy *of equals*: everyone's autonomy interests must be considered as equally important. Note that this is different from the narrower concern for 'equal autonomy'. Some might argue that the only way to treat the people as equals with regard to their autonomy is to make them equally autonomous; but others will disagree and claim that treating people as equals with regard to their autonomy requires, for example, that people who invest more effort command more resources and enjoy a higher

degree of autonomy as a result. I do not have to decide here which of the various possible interpretations of the equality principle is preferable; in fact it will turn out below that this is largely a question for the legislature to decide. At this stage, what matters is that the state should be concerned with the autonomy of equals, and that this has to be distinguished from the follow-up question of how the equality provision is best interpreted.

The equality principle is necessary in order to resolve *conflicts* between people's autonomy interests. Under the broad understanding of autonomy advocated here, it is clear that there will often be clashes between the autonomy interests of two or more persons: for example, there will be clashes between the autonomy interests of people who want to host parties with loud music in the middle of the night and the interests of their neighbours who want to sleep. The political community must devise a scheme which resolves such conflicts of autonomy interests, and the guiding principle must be to devise the scheme in a way which treats everyone's autonomy interests as equally important. The task of the political community is to devise a comprehensive scheme which *specifies the spheres of autonomy of its members in a way which respects their status as equals*. This is a reinterpretation of Kumm's formula of treating the people as free and equal. It reinterprets the freedom part, in line with the reconstructive account of the last chapters, as positive freedom or autonomy, and connects equality to autonomy by insisting that the role of equality is to guide the resolution of conflicts of autonomy interests.

b) No independent value of well-being

The view that there is no need for any values except for the autonomy of equals may seem extreme and one-sided to some who take a more pluralistic understanding of the values to be promoted by states. Cécile Fabre has argued that states have a responsibility not only for the autonomy of the people but also for a distinct value of *well-being*.

[W]e do not only give a wheelchair to the disabled, we also relieve their physical pain, even when doing so does not increase their autonomy. But there are other examples. Think about hunger. What we find unbearable when we watch images from Somalia, Ethiopia, from any country devastated by famine is not only the fact that these people are unable to be autonomous agents—in fact it is not generally the first thing we think of. Rather, it is the realization that they suffer horribly. Relieving hunger is also a matter of relieving this suffering. Equally, we do not want to give shelter or housing to homeless people only because without a home they cannot enjoy freedom and privacy and are therefore seriously restricted in the plans they can make

for their lives, but also because they suffer from cold and exhaustion.¹⁵

I disagree with Fabre's argument and will focus on her example of relieving pain to prove my point. Fabre has in mind that a person may be in pain but the pain may not hinder her from pursuing her projects. So relieving her from the pain does not, under this logic, improve autonomy. However, almost every person, when pain kicks in, immediately makes it her project – often her primary project – to get rid of the pain. Therefore, by relieving her pain, we assist her in succeeding in her project; and therefore, we have assisted her in living an autonomous life. As I have argued above, it is a mistake to regard autonomy as primarily concerning the ability to choose or reject certain options. It is *also* that, but it is broader: autonomy is about *being able to live one's life*; and the presence of pain makes a huge difference to the life one lives (even if it does not affect the options one can pursue).

Another way of making substantially the same point is this. The only difference between well-being and autonomy, on my account, is that well-being concerns the interests of an agent, judged from an objective perspective, whereas autonomy interests concern the interests of an agent, judged from the ('subjective') perspective of his self-conception. When it comes to relieving pain, pain is almost always undesirable both from the perspective of the agent and from an objective perspective: it is bad both from a well-being perspective and from a self-conception perspective. Therefore, there is no contradiction in defending the relief of pain from an autonomy perspective.

To this argument one may object that while it is possible to pull the relief of pain under the umbrella of autonomy, this may distort the real concern and motivation of the state. Again, I disagree. Not only is it possible to think about Fabre's examples in terms of autonomy; it is actually unattractive to think about it in terms of well-being. If we agreed that the state's role was to improve well-being detached from autonomy, this would imply that there was at least a *prima facie* case for the state to relieve pain (thus increasing well-being) even if the agent did not want to be relieved of the pain (e.g. she is a masochist): after all, the assumption is that relieving people of pain serves their well-being. To be sure, this concern for well-being might be outweighed by an independent concern for autonomy; but the fact remains that a responsibility for well-being as such generates a *prima facie* reason for action for the state to promote well-being, including cases where the agent autonomously rejects the action. This reasoning does not, however, correspond to how we think about these issues. Rather, it is common ground that respect for a person's autonomy requires not interfering with

¹⁵ Fabre, *Social Rights Under the Constitution: Government and the Decent Life* (Oxford University Press, 2000) 20.

her body unless she consents: there is no balancing between her well-being and her autonomy. So the state action must be justified on autonomy grounds, not on well-being grounds. The reason why we say that the state should relieve pain, and why this is sometimes confused with a concern for the well-being of the people, is that in almost all cases, people desperately want to be relieved of pain. But the fact remains that in those few cases where they do not want to be so relieved, the state should not interfere. Fabre says that what we find unbearable about pictures of starving people is to see these people suffering. But we do not generally find pictures of suffering people unbearable. Many will have seen the pictures of people in some parts of Indonesia and the Philippines who have themselves crucified for a limited time at Easter. These people presumably experience extreme pain, but we do not find it unbearable to watch them, at least not in the same ways as pictures of starving people; and the reason for this is that they are realising their projects: they *want* to suffer, temporarily, in the same way that Jesus suffered. The general point is that we do not care about people suffering as such; we care, and rightly so, about people who suffer against their will. Therefore, our concern is for autonomy and not well-being.

There are several possible objections to the rejection of well-being as a legitimate state concern, which I will briefly address. First, there is the case of people incapable of leading autonomous lives, for example senile or comatose persons, and it seems natural for the state, in these cases, to be concerned with their well-being rather than their autonomy. Fabre again:

Furthermore, taking well-being into account enables us to make sense of the fact that we assign rights to beings who belong to the human species but who do not have the potential for developing into autonomous persons, or who have lost their autonomy and sometimes even the potential for ever regaining it: people in deep coma, severely mentally handicapped people, and so on. They may not be autonomous, but they still belong to our species, and this, I think, is a reason for relieving their suffering, as a matter of right.¹⁶

This is true, to an extent, but it is not the whole truth. I agree with Fabre that there are duties towards people who have lost their capacity for autonomy and who will sometimes not even notice any longer what happens to them. These duties cannot easily be explained in terms of autonomy; rather, they seem to be based on some other value – Fabre says it is well-being; I would argue that intuitively, ‘dignity’ may fit better. So it may be necessary to introduce another value – well-being or dignity – for those who do not possess the capacity for autonomy. I am not convinced however that we can use this example to drive home the point that we should therefore also be concerned with the well-being of persons *capable* of

¹⁶ *Ibid.*, 21.

autonomy. On the contrary, I believe that our interpretation of what dignity requires in the case of persons not capable of autonomy must rely heavily on autonomy and not, as Fabre would have it, well-being. Take the following example. Pete has smoked all his life, and at an old age becomes senile so that he is incapable of making autonomous decisions (but his senility is unrelated to the smoking). His wife Sarah nurses him. She argues that she has always, correctly, been of the view that smoking was harmful for Pete's well-being; and given that she should now be in charge of his well-being, makes him stop smoking. There is something wrong with her reasoning. If we respect a person's choice to smoke while he is autonomous, then once he loses the capacity for an autonomous life, we cannot just reverse his lifestyle into whatever serves his well-being. Rather, even in the light of his incapacity for autonomy, we must respect a person's personality to the greatest possible extent – we must treat him with dignity –, and therefore Pete should, all things equal, still have his cigarettes. The example shows that what looks like a concern for well-being in the case of persons incapable of autonomy is really, often or possibly always, a concern for the *hypothetical autonomy* of this person. A concern for the well-being of a person comes in, for lack of any other guidance, only when there is no identifiable hypothetical will: we then conclude that the closest we can come to an appreciation of the hypothetical will of the person is to assume that he or she would want whatever serves his or her well-being. So rather than it being the case that we need the idea of well-being to understand the duties we have to people capable of autonomy, it is the reverse: we need the idea of autonomy to understand the duties we have to people who are no longer capable of autonomy.

Second, there is the issue of paternalism. Examples of paternalistic laws arguably include prohibitions or regulations of drug use (including alcohol and tobacco), seatbelt laws, and consumer protection laws. The objection might be that the autonomy-based theory proposed here must reject any paternalism and is therefore out of touch with widely held beliefs about permissible state activity. This is not how I want it to be understood, however. The objection would be correct if we thought about paternalism in the following way: 'Sometimes people make autonomous decisions which are harmful to themselves. So when considering whether the state can stop them from harming themselves, it should balance the autonomy of the people against their well-being. Depending on which value takes priority in the concrete case, paternalistic measures may be justified.' Under this approach, there would indeed be an independent value of well-being, to be considered alongside the value of autonomy. This is however exactly *not* the way in which almost all of the relevant literature proceeds, and rightly so. The mainstream arguments for (as well as, obviously, against)

paternalism focus on autonomy-related reasons. One line of argument is to justify paternalism when it is freedom (read: autonomy)-maximising, the idea being that it is permissible to force a person to give up a little bit of freedom now in order for her to enjoy much more freedom in the future.¹⁷ Another, to my mind more promising line of reasoning is to screen the decision of the agent for possible deficiencies which make it less than fully autonomous, and therefore, again, to base an interference with his autonomy on a concern for autonomy.¹⁸ My own view, largely following John Kleinig, is that paternalism cannot be justified if it imposes a set of values on a person which that person rejects; it can however sometimes be justified when it aims at realising the person's *own* values.¹⁹ What all these arguments have in common is that they insist that the only value that can possibly justify paternalism is a concern for the agent's freedom or autonomy. In other words, there is no independent concern for well-being, to be balanced against autonomy, even in the domain of permissible paternalism.

Third, one might argue that limiting the state's legitimate role to autonomy and equality neglects some crucial 'communitarian' values in favour of an 'atomistic individualism'. This is of course a debate that has been going on for a while,²⁰ and I have no intentions of resolving it. Suffice it to say that a concern for personal autonomy is compatible with a broad variety of arguments promoting 'community values', as long as a case can be made that realising these community values plausibly adds value to the lives of the people, judged on the basis of their own self-conceptions. In fact, given that it is uncontroversially true that it is ethically important to be an active member of various communities, it would be plainly irresponsible for the state not to be concerned with the conditions in which people can engage with others in various forms. Thus, some form of 'community politics' is not only compatible with personal autonomy but presumably required by it. From the autonomy perspective, the only form of 'community politics' which is flatly out of bounds is one which imposes on the people a set of values, community-related or otherwise, which the people reject under their self-conceptions. Community centres, public sports facilities, parks, pools, concert houses and opera houses have in common that they not only expand the options that people have, but also give them opportunities to socialise and form communities; and they are valued by the people for these reasons. Policies creating the possibilities for parents to stay at home while raising children, or alternatively to continue working, not only enhance autonomy

¹⁷ Regan, 'Paternalism, Freedom, Identity, and Commitment', in: Sartorius (ed.), *Paternalism* (University of Minnesota Press, 1983), 113.

¹⁸ Feinberg, *The Moral Limits of the Criminal Law*, v. 3: *Harm to Self* (Oxford University Press, 1986).

¹⁹ Kleinig, *Paternalism* (Manchester University Press, 1983); Möller, *Paternalismus und Persönlichkeitsrecht* (Duncker & Humblot, 2005).

²⁰ For an overview cf. Mulhall and Swift, *Liberals and Communitarians* (2nd edition, Blackwell Publishers, 1996).

by giving people options but also by facilitating family life and thereby making good and close relations within one's family – something that almost all people very much want for themselves – easier to achieve and uphold. A decent government trying to set up policies which create the conditions of autonomy on an equal basis will have such considerations at the very fore of its mind.

c) The reasonableness standard

The thesis that all state policy is about specifying constitutional rights seems to lead to the conclusion that constitutional rights completely determine all state policy, and that therefore the legislature must in each and every case specify constitutional rights in the one right, constitutionally predetermined way. The practical consequence of this would of course be unacceptable: the legislature would come up with some policy; it would be challenged in court, and the constitutional court would either hold that the legislature found the one right answer – thus upholding the policy – or that it did not find the one right answer. In the latter case, the court would send the matter back to the legislature to try again; and the new policy would again be challenged. This procedure would be repeated until the legislature had finally found the one right answer of specifying constitutional rights. To shorten the process, the constitutional court could just as well tell the legislature straight away what the one right answer was: after all, since all other answers are wrong, the idea of the democratic legislature designing policies is only a farce under this model anyway. *De facto*, all political power would reside with the constitutional court. It is obvious that there must be something wrong with this model. It clearly violates the second desideratum because it does not leave any, let alone any important, role for the legislature. It is flatly incompatible with our understanding of democracy as a form of government where the people or their representatives debate and face genuine choice with regard to a broad range of important issues.

Strategically, there are a few possible ways out of this dilemma, some of which I have discussed and rejected before. For example, limiting the domain of constitutional justice to negative freedom from the state would arguably leave large portions of policy-making unaffected by constitutional rights; but this comes at the cost of incoherence because an account of freedom as negative and vertical is morally unattractive. Another approach would be to protect as constitutional rights only *very important* autonomy interests, rather than the ever-broadening range of interests protected as a result of rights inflation under the global model. This argument does not work, however. It would lead to a situation where all the important questions are predetermined by constitutional rights (and thus eventually decided

by the constitutional court) whereas the not-so-important questions (feeding the birds in the park; horse-riding in the woods, etc.) are left to the legislature. This account would violate the second desideratum as well; and in some ways its unattractiveness is even more obvious: surely any attractive account of democracy must insist that legislatures will decide more than just the unimportant questions (such as the regulation of bird-feeding), while leaving the important questions to the constitutional court.

Kumm's thesis points to a coherent solution: while all acts of public authorities specify constitutional rights, the constitutional court reviews these acts only according to a reasonableness standard. So while the legislature and the constitutional court deal with exactly the same subject matter, they apply different standards: the legislature has the primary task of specifying the spheres of autonomy of equals in the correct way, and the constitutional court engages in a ('Socratic') review as to whether the approach chosen by the legislature is reasonable under the circumstances.

Does this model conform to the three desiderata? It respects the second desideratum because it insists on the primary responsibility of the legislature to design policies in all areas, including 'issues of high principle'²¹, in other words: very *important* issues. It also awards the legislature a genuine *choice* with regard to the issues at stake, namely a choice between different reasonable solutions. It therefore reserves a meaningful, important and comprehensive role for the legislature.

What about the first desideratum, namely adequate protection of personal autonomy? The keyword here is 'adequate'. Kumm's approach does not demand 'optimal' protection of personal autonomy, in the sense that it does not demand that the one right answer to protect personal autonomy be chosen by the legislature. Rather, it argues that 'reasonable' protection of personal autonomy is adequate. Can this be sustained?

Kumm's argument centres on the conditions of legitimacy under conditions of reasonable disagreement:

The outcome must plausibly qualify as a *collective judgment of reason* about what the commitment to rights of citizens translates into under the concrete circumstances addressed by the legislation. Even if it is not necessary for everyone to *actually* agree with the results, the result must be justifiable in terms that those who disagree with it *might reasonably accept*.²²

While this statement has some intuitive plausibility, it is partly question-begging. Why does the legitimacy of an act depend on grounds that might be reasonably accepted by the losing

²¹ Waldron, *Law and Disagreement* (Oxford University Press, 1999), 213.

²² Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review', (2010) 4 *Law & Ethics of Human Rights* 141, 168 (emphasis in the original).

side, as opposed to grounds which provide the one right answer under the circumstances? Why should the losing side accept the burdens that come with an act which does not represent the right answer in the situation at hand?

Kumm's answer focuses on the notion of reasonable disagreement (his work is in part a response to and critique of Jeremy Waldron's and Richard Bellamy's arguments against judicial review, which rely heavily on the notion of reasonable disagreement). He argues at one point, quoting a court's imaginary reply to an unsuccessful claimant:

Given the fact of reasonable disagreement on the issue and the corollary margin of appreciation/deference that courts appropriately accord electorally accountable political institutions under the circumstances, it remains a possibility that public authorities were wrong and you are right and that public authorities should have acted otherwise. But our institutional role as a court is not to guarantee that public authorities have found *the one right answer* to the question they have addressed. Our task is *to police the boundaries of the reasonable...*²³

He explains further:

Note how this understanding of the role of courts acknowledges that there is reasonable disagreement and that reasonable disagreement is best resolved using the political process. But it also insists that not all winners of political battles and not all disagreements, even in mature democracies, are reasonable. Often they are not.²⁴

One interpretation of this statement is to read it as being about institutional competence (courts are good at policing the reasonable, rather than finding the one right answer); but that line of reasoning does not sit well with Kumm's overall argument which at this stage is about moral legitimacy, not institutional competence. Rather, he accepts Waldron's claim that there will be disagreement about how to specify everyone's sphere of autonomy in the right way and that often the disagreement will be reasonable. So while there might be one right answer to the problem at hand, its existence does not help because the actors will be in reasonable disagreement about what it is. Given the existence of reasonable disagreement, an act of a public authority must be legitimate as long as the authority picks one of the reasonable solutions even if it is not the one right answer.

This argument is however not sufficient yet. It is true that often reasonable people will disagree in good faith about how to specify the spheres of autonomy of equals, and that we need some way of resolving this disagreement in the absence of a workable test which provides us with the correct answer. However, as has been pointed out by Joseph Raz and

²³ *Ibid.*, 169.

²⁴ *Ibid.*

Aileen Kavanagh, while we will often not be able to resolve reasonable disagreement regarding a specific policy question, we often have reason to trust certain people or certain procedures to be comparatively more likely to find the one right answer.²⁵ Imagine it turned out at some point that overall, courts are more likely than legislatures to find the one right answer to the question of how best to specify the citizens' spheres of autonomy. It seems to follow, under Kumm's argument, that this would imply that from then on, courts, rather than legislatures, should design policies. We are back to a variant of our old question: why should an act of a public authority which imposes a burden on someone be legitimate if it has not been reached by the procedure which is most likely to produce the one right answer?

I believe that the answer to the problem lies in a straightforward moral necessity. Given that we regard it as supremely important that legitimate political self-government be possible (second desideratum), we are forced to accord the elected branches some leeway in their decision-making. Imagine a person wondering if he should accept as legitimate a legislative decision which imposes a burden on him. Proponents of the view that political autonomy takes precedence over personal autonomy in all cases would argue that the act is legitimate simply by virtue of the fact that a vote took place in the legislature. As I argued above, a majority vote cannot be sufficient, however; if it were, then even a majority vote to authorise a genocide would be legitimate; and that must be wrong. At the other extreme someone might argue that a legislative decision was legitimate only if it identified the one right answer to the problem at hand. Obviously, being a conscientious citizen, our person could normally not be sure that he was right in assuming that the legislature had failed to find the one right answer. But leaving that issue aside, if this extreme approach were correct, then hardly any policy could ever confidently claim to be legitimate, and that is normatively unacceptable for someone who believes in political self-government. So the answer *must* lie somewhere in the middle. A reasonableness standard is appropriate because on the one hand, under normal conditions there is no reason to require anything *less* than reasonable solutions from the political process.²⁶ On the other hand, it seems equally inappropriate to require *more* than reasonableness: I cannot identify any intermediate standard between the reasonable and the correct. Any standard which requires more than reasonable results will demand the correct (the one right) result, and that is normatively unacceptable for the reasons given above.

Thus, the reinterpretation of Kumm's model proposed here respects the first two desiderata. What about the third: does it integrate personal and political autonomy in an

²⁵ Raz, 'Disagreement in Politics', (1998) 43 *American Journal of Jurisprudence* 25, 46; Kavanagh, 'Participation and Judicial Review: A Reply to Jeremy Waldron', (2003) 22 *Law and Philosophy* 451, 466-467.

²⁶ For a qualification of this statement in cases where the issues are extremely complex, see Chapter Six.

attractive way? Its main claim is that personal and political autonomy are not two separable spheres but deal with the same subject matter, namely the specification of the spheres of autonomy of equal citizens. Thus, it does not present the two values as clashing but rather in harmony: political autonomy is in the service of personal autonomy. A critic might object, however, that this integration represents exactly the same kind of lame compromise which the third desideratum was supposed to prevent: political autonomy is limited in order to ensure that personal autonomy is adequately protected, and personal autonomy is protected to a smaller degree than possible (because no correct, only reasonable solutions are required) in order not to limit political autonomy too much. This conclusion would however be rash. First, political autonomy is not limited in order to make it compatible with personal autonomy; rather, it turned out that the very point and purpose of political autonomy is to secure the conditions of personal autonomy. So there is no compromise, but rather a specification of the content of political autonomy. Second, with regard to personal autonomy, there is in fact a (limited) compromise. Someone might complain that he is less autonomous under the reasonableness approach than he would be under a scheme insisting on the one correct specification of his sphere of autonomy, or a scheme employing the procedures most likely to lead to correct policies. As I have argued above, this represents however simply a pill that has to be swallowed in the interest of democracy. As long as we insist on a democratic system with meaningful debate and real choice, there is no alternative to accepting this point.

d) Conclusion: an integrated account of constitutional rights and democracy

The upshot of the above discussion is that political autonomy is about the specification of the spheres of autonomy of equal citizens; and that an exercise of political autonomy is legitimate if it specifies the spheres of autonomy of equal citizens in a reasonable, as opposed to the one correct, way. From here it is only a small step to attractive conceptions of democracy and constitutional rights: democracy is about making majority decisions which reflect reasonable ways of specifying the spheres of autonomy of equal citizens; and constitutional rights give each citizen an entitlement to the effect that a policy which affects his personal autonomy must be based on a scheme which specifies his sphere of autonomy in a reasonable way. The doctrinal structure through which this is achieved is the acknowledgement of a general right to autonomy: any interference with this right triggers the need for justification, and this justification will succeed if the policy in question is legitimate in the sense just described.

5. The right to equality

The previous section introduced the *value* of equality into the theory of rights proposed here, and this allows us to derive some conclusions about the *right* to equality, whose discussion I had postponed earlier in the book.²⁷ The argument of this section will be that under the standard developed above – according to which constitutional legitimacy requires that policies reflect reasonable specifications of the spheres of autonomy of equal citizens – a separate right to equality is not needed: all cases which could be constructed as involving a violation of the right to equality or non-discrimination will also involve a violation of the right to autonomy. Thus, while it is not incoherent to accept a right to equality, it does not add anything to the protection offered by the right to autonomy.

Often, it simply does not matter whether one approaches a rights issue from an autonomy perspective or an equality perspective. Take the example of *Smith and Grady v. U.K.*,²⁸ where the ECtHR decided that the dismissal of members of the armed forces on the ground of their homosexuality violated their right to private life under Article 8 ECHR. While the ECtHR constructed this case as involving an unjustified interference with the (autonomy-based) right to private life, it would have been equally possible to resolve the case on equality grounds as being about unjustified discrimination on the ground of sexual orientation. Let me go through two further examples. A law banning hate speech can be seen as an interference with the right to freedom of expression or alternatively as discrimination on the ground of political conviction (people whose political views, if expressed, would amount to hate speech, are limited in their freedom whereas other people can freely express their respective views). Banning headscarves in public places can be regarded as an interference with Muslim women's rights to freedom of religion or alternatively as an unequal treatment on the basis of religious belief (or, if all and not only Muslim symbols are banned, as unequal treatment of religious believers compared to non-believers).

The above examples already indicate that regarding autonomy-based and equality-based rights as two sets of rights with distinct standards would be misleading. But my claim that equality rights are not needed goes further than this: it argues that all cases which raise equality issues can be resolved under an autonomy-based approach, and that therefore having a separate right to equality does not add anything to the protection afforded under the autonomy-based theory of rights proposed here. This can be demonstrated in the following way. Any claim to a violation of the right to equality is necessarily concerned with an instance of unequal treatment in relation to something which we might call X. For example, in *Smith*

²⁷ See Chapter Two.

²⁸ *Smith and Grady v. United Kingdom*, (2000) 29 EHRR 493.

and *Grady*, *X* would stand for ‘being eligible to serve in the army’: in relation to being eligible to serve in the army, homosexual people are treated differently from heterosexuals. The question would then be what kind of thing *X* must be for it to be the case that an unequal treatment in relation to it engages the right to equality. The straightforward answer is that an unequal treatment in relation to *X* is relevant if *X* is something which matters to people; something which has some importance for the ways in which they conduct their lives. But that is, of course, precisely what is protected by the conception of personal autonomy advocated in this book. Given that there is a general right to autonomy, it follows that there is also a right to *X*: thus, any unequal treatment with regard to *X* will necessarily also constitute an interference with an autonomy-based constitutional right, triggering the need for justification. Under the approach developed above, this justification will succeed if the policy in question is based on a reasonable specification of the spheres of autonomy of equal citizens. An unjustifiably discriminatory policy violates this standard: it does not specify the spheres of autonomy of *equal* citizens adequately. Thus, all constitutionally relevant considerations will be addressed at the justification stage of the autonomy-based right to *X*; a separate argument relating to a right to equality is unnecessary.

As an example, take the *Brown* case, where the U.S. Supreme Court decided that racial segregation in public schools violates the Equal Protection Clause of the Fourteenth Amendment of U.S. Constitution.²⁹ Intuitively, most people would regard this as a paradigm case on the right to non-discrimination. However, it can also be constructed as being about an autonomy-related right. The policy at stake specifies the spheres of autonomy of students as they relate to their education: in other words, it specifies the right to education, and given that there is plainly no morally valid reason supporting segregation, it does so in a way which is unreasonable. Thus, *Brown* could just as well be regarded as a case involving a violation of the right to education.

The conclusion that the right to equality is not needed must be qualified in three ways. First, where a constitution does not include a general right to autonomy, a separate right to equality will have a role to play to fill the gap resulting from the incomplete protection of autonomy. Thus, in *Brown*, there was no alternative to constructing the case as being about discrimination because the U.S. constitution does not contain a right to education. My argument is simply that under the theory of rights proposed in this book, a separate right to equality is not needed; it is not that equality rights cannot play a useful role under particular constitutions which depart from the conception of rights proposed here. To the extent that a

²⁹ *Brown v. Board of Education*, (1954) 347 U.S. 483.

particular constitution does not acknowledge a general right to autonomy, the resulting gap can indeed be filled at least partly by a separate right to equality: it comes in when the state chooses to provide a good access to which is not protected by a constitutional right, but does so in a discriminatory way – as was precisely the case in *Brown*.

Second, there is the special issue of the coherence of a policy. Often, the state chooses a policy which in isolation may be justifiable but whose fault is that it treats others in relevantly similar circumstances differently. For example, it may be justifiable (reasonable) to ban religious symbols in public universities, and it may also be justifiable to allow them. However, presumably coherence requires that either all religious symbols are allowed or all are prohibited. Unless there are special reasons justifying the difference in treatment, a policy which bans only the religious symbols of one particular religion – say, Muslim headscarves – but not those of other religions – Christian crucifixes – will be discriminatory. This is a scenario which can in principle be resolved without recourse to a right to equality: an incoherent policy does not specify the sphere of autonomy of the affected right-holder in a reasonable way. In the example, a policy banning only headscarves but not crucifixes would interfere with the right to freedom of religion of Muslim women wanting to wear headscarves; and given its incoherence, it would not specify the spheres of autonomy of the affected women in a reasonable way; thus there would be a violation of the right to freedom of religion. But while it is possible to pull this issue under the umbrella of autonomy-based rights, the principle of proportionality as it has developed in legal practice is not well-equipped to deal with this issue because it does not contain a separate ‘coherence stage’ in addition to the other four stages.³⁰ As long as this remains the case, the right to equality has a role to play with regard to the issue of coherence.

The third way in which it may be necessary to qualify the statement that a separate right to equality is not needed is that arguably such a right has a useful rhetorical function because invoking it can sometimes direct attention to the most problematic aspect of a policy (again, *Brown* is a good example). This may be true.³¹ My point in this section should not be understood as in any way critical of the right to equality as such, its possible rhetorical usefulness or its usefulness under particular constitutions or in the context of particular doctrines. All I am arguing is that under the theory of rights advocated here it is not necessary

³⁰ On the different stages of the proportionality test, see Chapter Seven.

³¹ There is however also a downside to this: invoking the right to equality can sometimes make a policy seem highly problematic when its reasonableness is in fact relatively straightforward. Some cases of policies involving affirmative action may fall into this category. Here, invoking the right to equality by focussing attention on the fact that the respective policy distinguishes, for example, on the basis of race detracts the attention from the important issue, namely that often policies involving an element of affirmative action will be entirely reasonable (if not correct).

in the sense that the protection that a right-holder is entitled to under the right to equality is also available to her under the general right to autonomy.

V. The institutional dimension

1. The separation of powers

The conception of constitutional rights and democracy proposed in the previous section translates into an institutional arrangement under which the elected branches design and execute policies and the courts scrutinise whether the elected branches have acted within their political autonomy, i.e. whether they have come forward with reasonable ways of specifying the spheres of autonomy of equals. The question to be addressed in this section is whether this division of labour between the elected branches and the judiciary is compatible with an attractive conception of the separation of powers. Under a common understanding, this doctrine requires that tasks ought to be assigned to that institution which is best capable of dealing with them.³² Thus, if the goal to be achieved is the protection of constitutional rights, then the institutional arrangement which ought to be chosen is the one which is most likely to lead to the protection of rights. It follows that judicial review is justified only if and to the extent that it leads to an improvement in the protection of rights over other institutional arrangements.

Until fairly recently, the above argument was uncontested: even staunch defenders of judicial review such as Ronald Dworkin³³ accepted that the justifiability of judicial review rested on its ability to improve the overall level of rights protection; consequently much work was invested in examining the comparative strengths of courts and, in particular, legislatures. It should however be noted that more recently, the question has become controversial: an emerging view in the literature denies that institutional competence is the key to the institutional question. Alon Harel and Tsvi Kahana have criticised the competence-focussed approaches as misguided and put forward an intriguing argument to the effect that there is a ‘right to a hearing’ before a court in situations where the claimant can make a plausible case

³² As a paradigmatic statement see Barber, ‘Prelude to the Separation of Powers’, (2001) 60 *Cambridge Law Journal* 59, 59: ‘The essence ... of separation of powers lies in ... the matching of tasks to those bodies best suited to execute them. The core of the doctrine is ... efficiency.’

³³ Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution* (Harvard University Press, 1996), 34: ‘I see no alternative but to use a result-driven rather than a procedure-driven standard for deciding [the institutional questions]. The best institutional structure is the one best calculated to produce the best answers to the essentially moral question of what the democratic conditions actually are, and to secure stable compliance with those conditions.’

that his rights have been violated, and that the justification of that right is at least partly independent of the quality of the resulting judicial decision.³⁴ Kumm's argument is more modest, but falls into the same category. He claims that there ought to be a system of judicial review even if it were 'less obvious that outcomes are improved'³⁵. For him, the commitment to legislatures and courts reflects democracy's commitment to majority decision-making and providing plausible justifications; and he finds value in this symmetry, speaking of '*archetypal expressions* of basic liberal-democratic constitutional commitments'³⁶.

I will not take sides in this emerging discussion here for two reasons. First, it would be a mistake to think that even if the authors who object to the focus on outcomes were correct, outcomes would not matter. Rather, they should be understood as saying that outcomes are not the only thing that matters: if it turned out that courts were manifestly ill-equipped to adjudicate constitutional rights claims, their defence of judicial review would collapse. Second, I believe that even on the traditional competence-based grounds one can make a plausible case for the involvement of courts. My interest at this stage is not to examine comprehensively the arguments for and against the relevance of institutional considerations, or for and against the institutional competence of courts. Rather, my ambition for the institutional question is to make a *plausible*, albeit not conclusive, case for the institutional appropriateness of having courts involved in the adjudication of constitutional rights on the basis of the reconstructive account which has emerged in this and the previous chapters. The reason for this limitation lies in the reconstructive nature of the theory of rights proposed here. To repeat, the goal of this book is not to design the best possible theory of rights or judicial review, but to propose a theory which is coherent and fits the global model. Thus, if it turned out that it would not only be problematic but straightforwardly absurd to think that courts could perform the kind of review advocated here, this would throw doubts on the correctness of my reconstructive account: it would seem unlikely that a theory of rights which is, for example, far too complex to be applied by courts could be the best possible reconstruction of the global model which, after all, relies heavily on the involvement of courts. But if a plausible case can be made for the institutional competence of courts, then this leaves the reconstructive account proposed here undamaged.

The following assessment of the institutional competence of courts will proceed on the basis of the assumption of a *well-designed* court. Thus, importantly, my argument will *not* be

³⁴ Harel and Kahana, 'The Easy Core Case for Judicial Review', (2010) 2 *Journal of Legal Analysis* 227.

³⁵ Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review', (2010) 4 *Law & Ethics of Human Rights* 141, 171 (emphasis in the original).

³⁶ *Ibid.*

that *any* court, *qua* being a court, will be comparatively good at adjudicating constitutional rights claims. Obviously, much turns on the specific design of the court in question: in particular the various procedural rules; but also the rules governing its composition, the appointment of judges, the length of their tenure, and so on.³⁷ Therefore, all I am purporting to demonstrate is that it is plausible to believe that a *well-designed* court will be institutionally competent to deal satisfactorily with constitutional rights claims.

The authority and respect that constitutional courts adjudicating rights claims have gained around the world in the last decades indicate that on the whole, courts seem to have fulfilled their task reasonably well. Two preliminary points have to be made. First, it has to be noted that the practice of constitutional rights adjudication is a relatively recent phenomenon, and it is too early to tell whether it is based on an institutional arrangement which is likely to continue to produce the well-respected results which, on the whole, it seems to have produced so far. Second, when analysing the practice in terms of whether it has in fact improved the outcomes, we must not make the mistake committed by some critics of judicial review, namely deriving general conclusions from a few carefully selected examples. Nobody can deny that there are instances where courts get it wrong and legislatures get it right. Kumm observes correctly that the one example Waldron chose in his recent article on judicial review, namely contrasting the U.S. Supreme Court's decision in *Roe v. Wade* with the debates on abortion legislation in the British House of Commons,³⁸ does not even come close to providing a comprehensive analysis of the ability of courts to engage in judicial review.³⁹ In fact, the helpfulness of much of the scholarly discussion of the merits of judicial review is limited anyway because it usually refers to the experiences in the U.S., which is unfortunate because U.S. constitutional rights jurisprudence seems to be an outlier in the spectrum of constitutional rights adjudication around the world.⁴⁰

Any argument about the institutional competence of courts must start with an account of their *task*: unless we know the courts' task, we cannot assess whether they are likely to be good or bad at it. Remember that courts assess policies not with regard to whether they represent the one right answer to the problem of how to specify the spheres of autonomy of equals, but whether they represent a plausible or reasonable way of doing so. So what courts do is at the same time *similar to* and *different from* policy-making: it is *similar* in that it deals with the same subject matter: both legislatures and courts deal with the subject-matter of the

³⁷ *Ibid.*, 171-172.

³⁸ Waldron, The Core of the Case Against Judicial Review, (2005-6) 115 *Yale Law Journal* 1346, 1384-1385.

³⁹ Kumm, 'Institutionalising Socratic Contestation: The Rationalist Human Rights Paradigm, Legitimate Authority and the Point of Judicial Review' (2007) 1 *European Journal of Legal Studies* 18.

⁴⁰ See Chapter One.

specification of the spheres of autonomy of equal citizens. It is *different* in that courts do not set up policies but assess the strength of reasons supporting a policy decision made by the elected branches. This is something we are familiar with in many different areas of life: artists and art critics deal with the same subject matter (art), but they need different capabilities: the former's emphasis is on creativity, the latter's on analysis. Politicians and political journalists, too, deal with the same subject matter (politics), but again, they need different abilities to carry out their tasks successfully, with the former being more active and pragmatic - identifying and tackling new problems, being receptive and responsive to changing circumstances and needs -, and the latter being more reactive and, again, analytical. But while it would never occur to anyone to criticise an art critic for not being a good artist, or to criticise a political journalist for not being a good politician, judges are often criticised for not being good policy designers. This criticism, which often refers to their supposed weakness of lack of expertise, rests on weak ground because it fails to appreciate the important difference between policy making and policy reviewing.

Let us examine the issue of expertise in more depth in order to assess whether or to what extent the criticism might be justified. Doubtless one needs *empirical expertise* in the subject matter at stake in order to competently design policies, but equally doubtless, this particular expertise is not the whole story: it must be complemented with *moral expertise*. In order to develop this point, let me start with the kinds of expertise needed by policy makers before turning to that needed by policy reviewers. To *make* policies, one must engage in a two-step process. First, one must collect all the relevant data; including data about likely consequences of different policies. To do this well, one mainly needs empirical expertise in the respective subject matter. Second, one must develop a scheme which, given the data identified in step one, is best in terms of specifying the spheres of autonomy of everyone; and this requires moral expertise. For example, a head-teacher who has to decide about the policy regarding the wearing of religious symbols at her school⁴¹ will need empirical expertise about the religious backgrounds of the students and the likely consequences of adopting one scheme or the other. She will however need something else as well: an idea of how to design a policy which, based on her expert knowledge and understanding of the situation, specifies the spheres of autonomy of her pupils and everyone else in a justifiable way. She might make mistakes with regard to both issues: she might get the expert knowledge wrong for whatever reason - for example, insufficient experience or lack of intelligence -, and/or she might get the policy design wrong for a number of reasons - for example, she could hold discriminatory

⁴¹ See *R (SB) v. Governors of Denbigh High School*, (2006) UKHL 15.

views about some religions; or, while not holding such views, she might just be a poor policy designer who, with the best of intentions, designs incoherent policies.

To an extent, a policy *reviewer* will carry out a task that is similar to that of a policy maker. An ideal policy reviewer must normally have the same empirical expertise as a policy maker because often (not always) the question of whether a policy is reasonable will depend on the data on which it is based. It seems plausible to assume that the elected branches will normally have more empirical expertise than judges in this regard. From this it does not follow, however, that judges should always unquestioningly accept the data presented to them. First, many policy decisions rest on evidence which is readily and easily accessible to everyone, and which a judge is capable of acquiring very quickly. Second, to the extent that the relevant expert knowledge is unclear or controversial, well-designed procedural rules must enable courts to invite independent experts to testify before the court. Finally, they can assess the reasonableness and fairness of the *procedures* by means of which the policy makers have acquired the relevant data. So while it may sometimes be impossible for judges to fully understand and assess all the relevant data, and while this may in such scenarios, to the extent that the reasonableness of the policy in question depends on this data, lead to some degree of justified deference, judges will still have an important role in policy review even to the extent that it is concerned with the identification of the relevant data.

Regarding their moral expertise, here the situation of a policy reviewer is in some respects *different* from and in some respects *easier* than that of policy makers. It is *different* in that his task is less creative and active, and more analytical and reactive. While the policy maker has to engage in the often complex task of designing policies which specify the spheres of autonomy of everyone on an equal basis, the policy reviewer analyses the proposed policy and screens it for possible mistakes. It is *easier* in that the policy reviewer is not under the burden of having to find out whether the best possible answer to the problem at hand has been chosen, but that he must only satisfy himself of the reasonableness of the answer. It is with regard to this second stage that judges can plausibly be regarded as having exactly the right kind of moral expertise because question-asking, pressing others for justifications for their actions, and assessing the reasonableness of the reasons given, are among the core qualities of a capable judge. This moral expertise is often overlooked by the critics of the competence of judges, but it is just as important as the empirical expertise needed for the identification of the relevant data.

2. Deference

The above account of the institutional competence of courts leads straightforwardly to a theory of deference. Just like an analysis of the institutional competence of courts, a theory of the appropriate degree of deference must rest on a distinction between empirical and moral questions: as has been pointed out, to engage in policy review, a court must, first, understand the empirical issues, and must, second, assess whether the policy, on the basis of the empirical facts, represents a reasonable specification of the sphere of autonomy of the right-holder. With regard to the *empirical* stage, deference may be appropriate to the extent that the court is institutionally incapable of acquiring the relevant knowledge even with the help of independent experts; however, as has been pointed out, even then the court can assess the *procedures* by means of which the original decision-maker has acquired the facts. With regard to the *moral* stage, deference will normally be inappropriate for two reasons. First, there is normally no need for it, given that, as has been argued above, holding public authorities to account by critically examining the reasonableness of their acts is something which capable judges are well-equipped to do. Second, if as a matter of constitutional law courts are entrusted with the task of deciding questions of constitutional legitimacy (and only then does any issue of deference arise), then it is hard to see why the fact that in a given case a judge might be incapable of fulfilling her task adequately should be relevant: the normal procedure must be the same as in any other legal case: she simply has to decide the case to the best of her abilities. While I wish to leave open the question of whether special considerations might apply in morally exceptionally difficult cases, a constitutional court would abdicate its constitutional role and responsibility if it *routinely* refused to interpret constitutional rights provisions, determine their normative content and apply this standard to the facts of the case before it.

To avoid a misunderstanding: when I say that deference with regard to the moral issues is inappropriate, this must not be confused with claiming that the court should engage in a correctness review. The job of the court with regard to the moral issues is to decide, without any deference, whether the policy is in the realm of the reasonable. As has been demonstrated above,⁴² the reasonableness requirement is part and parcel of the moral substance of constitutional rights: if it weren't, then all policy questions would be determined by constitutional rights and there would not be any room left for democratic decision-making. Thus, when a court decides that a policy, while possibly not correct, is nevertheless reasonable and therefore not in violation of constitutional rights, it does not apply any

⁴² Section IV.4.c.

deference; rather it fully decides, without any deference, that the policy in question respects the moral requirements of constitutional rights and is therefore constitutionally legitimate.

VI. Conclusion

This chapter has proposed a theory of the point and purpose of judicial review which is morally coherent and fits the global model of constitutional rights. It argues that a policy, to be constitutionally legitimate, must specify the spheres of autonomy of equal citizens in a reasonable, as opposed to the one correct, way. Thus, a person's constitutional rights will be violated if a policy which imposes a burden on him cannot be defended as reasonable. This understanding of constitutional rights fits the global model with its extremely broad understanding of *prima facie* rights. It also reflects attractive conceptions of the values of democracy and the separation of powers. Democracy demands not only, procedurally, that the policy has been passed by a majority, but also, substantively, that it is such that it could be accepted by the person who carries the greatest burden of the policy, and this will be the case if the policy represents a reasonable specification of the spheres of autonomy of equal citizens. The principle of the separation of powers as it is conventionally understood requires that powers are distributed in a way which makes each respective branch institutionally competent in dealing with the task assigned to it; the chapter has made a plausible case for the assumption that well-designed courts working under well-designed procedural rules will indeed be capable of performing the specific kind of judicial review required by the global model.

The conclusion of this chapter provides only a first step towards a theory of the justification stage of constitutional rights. Its main claim regarding the specification of the spheres of autonomy of equal citizens operates at a high level of abstraction and must be interpreted further in order to derive from it more concrete propositions. The next chapters will take up this task and demonstrate that it can be refined into a set of coherent and attractive tests: the doctrines of balancing and proportionality.

Conclusion

The theory of constitutional rights which this book proposes and defends employs a number of abstract concepts and values which it interprets in sometimes conventional, sometimes original ways. The value of *personal autonomy* was introduced in Chapter Two in a relatively innocent way as having some explanatory force with regard to some of the features of the global model. But in subsequent chapters it became clear that it is indeed, next to equality, the controlling value not only in constitutional rights law but in politics as well. (Almost) all policies are autonomy-related in that they must be directed at creating the conditions for the people to live their lives freely (autonomously). In particular the value of autonomy pushes a rival value, well-being, out of the picture; as has been shown, even when we might intuitively think of the state as protecting our well-being (such as arguably in the case of social rights, or in the case of so-called community values), this is actually better explained as serving autonomy.

Equality is, next to autonomy, the second abstract value which is important for both reasoning with rights and reasoning about policies. It is the controlling value in the common case of a conflict of autonomy interests: such conflicts must be resolved in a way which respects the equal importance of the agents whose autonomy interests clash.

The third important value, *democracy*, requires the introduction of a further dimension of autonomy, in addition to the personal autonomy protected by constitutional rights: *political autonomy*, which is about the citizens of a state collectively governing themselves. While collective self-government is based on the ideal of the consent of the governed, it must rely on the procedure of majority voting in practice. The resulting gap between ideal and reality is filled by a substantive requirement, namely that a policy, to be truly democratic and thus constitutionally legitimate, must represent a reasonable, as opposed to the one correct, way of specifying the spheres of autonomy of equals.

The concept of *constitutional rights* is given an interpretation here which flows from this understanding of democracy. Every citizen has an entitlement to have his or her autonomy interests treated adequately at all times, where ‘adequate’ means: in line with a reasonable specification of the spheres of autonomy of equal citizens. This philosophical point is translated into a doctrine of rights by protecting every autonomy interest of a person as a

prima facie constitutional right, and assessing the reasonableness of an interference with an autonomy interest at the justification stage.

Balancing and *proportionality* are the concepts used by constitutional lawyers to conduct this inquiry. They are doctrinal tools whose merit is to guide lawyers through or at least direct them towards the important moral issues in the resolution of constitutional rights cases, namely conflicts of interests. Their danger is that they may, if misunderstood, suggest a mistaken simplicity in reasoning with rights: the idea that the difficult questions about rights can be resolved by recourse to a largely mechanical exercise of quantification. However, reasoning with rights will often be extremely complex, and this complexity is reflected in the complexity that hides under the labels of balancing and proportionality properly understood.

For a theory of constitutional as opposed to moral or fundamental rights, the moral concepts, in the particular interpretations given to them, must become part of an *institutional arrangement* involving *legislatures*, *executives* and *courts*. While some believe that questions of institutional competence are really at the core of any attractive theory of constitutional rights, the view proposed here is that the moral questions occupy this privileged place. The institutional design follows by and large the moral parameters, entrusting to well-designed courts working under well-designed procedural rules the task of enforcing constitutional rights by conducting an inquiry into whether the policy in question represents a reasonable specification of the spheres of autonomy of equal citizens.

Under the theory proposed here, the main entitlement which rights confer upon a person is that to be treated with a certain *attitude*: an attitude that takes seriously his project of living his life. Every feature of the theory flows from this basic proposition. The *two-stage test*, dividing rights analysis into the *prima facie* stage and the justification stage, reflects a useful way of splitting the question of whether the person's autonomy interests have been taken seriously into two subquestions: the first question, to be considered at the *prima facie* stage, is whether the policy at stake affects a person's control over his life; the second question, to be considered at the justification stage, is whether this has been done in a way which takes his autonomy interests adequately into account and thus is justifiable to him. The *wide scope of rights* with its arguably counter-intuitive inclusion of trivial and even immoral activities reflects the fact that respect for a person's autonomy requires taking all his projects seriously, including those of lesser importance and those which are ethically worthless; this implies that they cannot without further consideration be excluded from the scope of rights. The *proportionality test* stands for the idea that respect for a person's autonomy implies that any measures restricting it must pursue a legitimate aim and be suitable, necessary and not

disproportionate to the achievement of that aim. Underlying the idea of *balancing* is the insight that taking everyone's autonomy interests seriously will involve the necessity of resolving conflicts of autonomy interests in line with the respective agents' status as equals. The doctrine of the *margin of appreciation* reflects the fact that 'adequate' protection of a person's autonomy must, in particular in the interest of democracy, leave a certain leeway to the elected branches.

This, then, is the core of the theory of rights proposed here: the entitlement of every person to be treated with an attitude of respect for her autonomy. There is something both simple and radical about this proposition. It is simple in that it is a straightforward reinterpretation of mainstream liberal views about the conditions under which an exercise of state authority is legitimate. What is radical about it is the institutional implementation and constitutionalisation of this simple idea: the constitutional acknowledgment of every person's right to challenge acts of public authorities in courts who have the final say with regard to whether the respective act shows adequate respect for his or her autonomy.

This radicalism was made possible by two groups of actors. The first is that of the framers of the respective constitutions. They seized the opportunity that arose, in particular, after the collapses of fascism, communism and apartheid, and set up constitutional arrangements which awarded judges the enormous powers that they have under strong systems of judicial review. But the more important contribution came from another group: the global model of constitutional rights is mostly the creation of judges all over the world, and it has flourished and matured in their hands. It is striking that none of its features is explicitly mentioned in the respective constitutions and that some of them even contradict both what the respective texts clearly state and what their framers intended. Rights inflation, horizontal effect, positive obligations and, to a lesser extent, socio-economic rights, as well as balancing and proportionality are all phenomena and doctrines which have first been developed by judges. They gradually created a bold jurisprudence which, guided as much by intuition as by theoretical reflection, engages in the difficult but crucially important work of making the abstract formulations used by constitutions meaningful and effective in legal practice.

The result of their combined efforts is the global model of constitutional rights: a practice which is not just a collection of cases but one which also developed a set of general and abstract doctrines, including most prominently the doctrines that form part of the global model: the broad scope of rights; negative and positive obligations; vertical and horizontal effect; balancing and proportionality. The goal of this book is to add a further layer of abstraction and integrate those doctrines into a comprehensive theory of constitutional rights

which fits the practice, is internally coherent and reflects attractive conceptions of other constitutional values, in particular the values of democracy and the separation of powers. If this project has been successful, then it is true to say that the global model is, in its simplicity and its radicalism, a success: not only does it work in practice in a way which has earned it the respect of the people and makes it a role model for young (and old) democracies; it also reflects a valuable and coherent political philosophy and, indeed, it has been an important inspiration for the very development of that philosophy.

But of course while it has merits, it also has its instances of failure in the past and risks for the future; and while it is widely endorsed, it also has its critics. Furthermore, the global model is still a young practice and many of its features are in flux. Thus, it is not only predictable but crucially important that there should be ongoing conversation about it: at the practical level of judges and other practitioners deciding or participating in actual cases and bringing in their unrivalled experience in dealing with questions of rights; at the more theoretical level of scholars; and at the political level of the citizens and their representatives of whose system of government judicial review is (or is not) a part. As a contribution to this conversation, this book has, first, tried to improve our understanding of the global model and, inseparably from this, assessed its moral justifiability. Second, it has raised the bar for critics of the practice: they must, in order to avoid fighting against a straw man, make the strongest case in favour of the practice before attempting to demolish it; thus, they are invited to engage with the account proposed here and show that their model is really superior to this one. These and other conversations are something to look forward to, and therefore this book can conclude on a happy note: the inspiring and important philosophical, legal and political discussions about constitutional rights and judicial review, dealing with moral concepts such as autonomy, equality, rights and democracy and institutions including constitutional courts, parliaments, governments and public agencies, are not nearly over. On the contrary, and in particular in light of the relative youth of the success of the global model of constitutional rights, it is closer to the truth to say that they have only just begun.