

Reconciling Rights:
How should New Zealand courts approach the
issue of conflicting rights?

Emma Leahy
Supervisor: Paul Roth

A dissertation submitted in partial fulfilment of the requirements of the degree of Bachelor of Laws
(Honours)

University of Otago – Te Whare Wananga o Otago

5 October 2018

ACKNOWLEDGEMENTS

To my supervisor, Paul Roth, for inspiring my interest in human rights law and for your many entertaining anecdotes, both relating to this topic and otherwise.

To my flat mates, for always making sure my social life rivalled (or on occasion exceeded) that of my academic.

To Em and Alex for the bouncing of ideas.

To Kels, for keeping me sane throughout this process and also failing to meet the many unrealistic deadlines we set ourselves.

To Steph for your keen grammatical eye.

Finally, to my parents for your unwavering support, I attribute any success I have to you.

Reconciling Rights:

How should New Zealand courts approach the issue of conflicting rights?

Part I: Introduction	4
A. Concept and Origins of Human Rights	4
B. Conflicting Rights	5
Part II: The New Zealand Context	7
A. Case Analysis	7
B. Rights in New Zealand	10
C. Formal Procedure for NZBORA Conflicts	11
Part III: Other Jurisdictions	14
A. The European Court of Human Rights	14
B. The European Court of Justice	16
C. Canada	17
Part IV: A Hierarchy of Rights	19
A. The United Nations' Stance	19
B. Analysis of the Work of Legal Theorists.....	21
C. Can Rights be Ranked?	24
Part V: Alternative Methods	26
A. Balancing vs. Categorisation	26
B. Critique of Balancing	29
C. Methods of Balancing	32
D. Qualitative Factors for Resolving Rights Disputes	36
Part VI: Proposed Method	39
A. Step 1: Defining Rights	39
B. Step 2: Structured Balancing	41
C. Application to Cases	46
Part VI: Conclusion	49
Bibliography	51

Part I: Introduction

In this dissertation I will endeavour to unpack the complex issues surrounding fundamental and legally recognised human rights, with particular regard paid to how judicial outcomes should be decided by New Zealand courts when these rights are in conflict. This section briefly outlines what human rights are, and how they have been codified, as well as defining what constitutes a case of conflicting rights.

A. Concept and Origins of Human Rights

It has long been acknowledged that there are certain fundamental rights pertaining to our status as human beings that ought to be granted legal protection. The idea underpinning these rights is that every person is entitled to live with dignity. By definition, human rights are inherent, inalienable and universal.¹ This means that they apply to every person, purely by virtue of their standing as a human being. They are not contingent upon status. State powers cannot take human rights away, generally speaking. Fundamental rights apply to everyone regardless of condition, culture, status, sex, religion or race.

At international law, these rights were deemed worthy of heightened protection through their codification in the Charter of the United Nations 1945. Subsequent acknowledgment of fundamental rights came through what has come to be known as the “International Bill of Human Rights” comprising: the Universal Declaration of Human Rights 1948; the International Covenant on Civil and Political Rights 1966 (ICCPR); and the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR). New Zealand became a party to both covenants in 1978.

Among others, civil and political rights encompass the right to life and liberty, freedom of expression, equality before the law and the right to be free from discrimination.² These are often referred to as first generation rights. On the other hand, social, cultural and economic rights are second generation rights. These include,

¹ United Nations “Human Rights” (2018) United Nations <www.un.org/en/sections/issues-

² International Covenant on Civil and Political Rights 1966, arts 6, 9, 14, 19, 26.

among others, the right to participate in culture, workplace rights, rights to social security, the right to education and the right to an adequate standard of living.³

B. Conflicting Rights

For the purposes of this dissertation I will define “rights conflicts” as a clash between legally recognised human rights. This can occur between one or more different rights, or between two demands on the same right. When rights are in conflict it means both parties cannot assert their legally defined rights at the same time. The two cannot be jointly realised and thus some form of judicial intervention is required in order to achieve a just outcome. The central issue here is that by making inroads into and limiting rights we weaken their role in our legal system. We therefore need some method of reconciling conflicting rights without diluting their value.⁴ The purpose of this paper is to formulate a method for how this should be done by New Zealand courts.

Another way many legal philosophers have defined a “conflict of rights” is as a conflict between the correlative duties those rights dictate.⁵ Jeremy Waldron states, “When we say rights conflict, what we really mean is that the duties they imply are not compossible”.⁶ Waldron goes further and affirms that rights generate “waves of duties”, by which he means that any one right has several corresponding duties. According to Waldron’s thesis whenever any duties pertaining to rights are irreconcilable we have a conflict of rights.⁷ For the purposes of this paper I will take the stance that there is one central, correlative duty per right. For example, the right to freedom from discrimination places a duty upon the state and society to treat each citizen equally. Waldron would no doubt see this as oversimplifying rights and their content, however for the purposes of what I am trying to achieve this interpretation will aid my analysis. In such morally complicated and unresolved areas of law,

³ International Covenant on Economic, Social and Cultural Rights 1966, arts 6, 11, 13, 15.

⁴ Adina Preda, “Are There Any Conflicts of Rights?” (2015) 18 *Ethical Theory & Moral Practice* 677 at 1.

⁵ F. M. Kamm, “CONFLICTS OF RIGHTS: Typology, Methodology, and Nonconsequentialism” (2001) 7 *Cambridge University Press* 239 at 240.

⁶ Kamm, above n 5, at 240; Jeremy Waldron, *Rights in Conflict* (The University of Chicago Press, Chicago, 1989) at 506.

⁷ Waldron, above n 6, at 510.

simplifications can help to generate conclusions with heightened transparency. Hence my definition of “rights conflicts” can be expanded to cases in which the respective correlative duties of rights are irreconcilable.

There is an abundance of situations that lead to the mutual-exclusivity of two fundamental rights. For instance, physician assisted suicide calls into conflict the right to life⁸ and the right to be free from cruel or degrading treatment.⁹ Similarly, the abortion debate forces us to balance the right to life of a fetus against the right to autonomy and bodily integrity of the mother. International conflicts concern cultural practices such as female genital mutilation, in which the right to practice one’s culture is in direct divergence with the right to be free from cruel or degrading treatment.

Due to the vast array of potential rights conflicts, it is implausible to legislate for the ideal outcome in any given instance. Thus a flexible, multidisciplinary approach is needed in order to assess each new case and uphold the sanctity of fundamental rights.

⁸ New Zealand Bill of Rights Act 1990, s 8; International Covenant on Civil and Political Rights 1966, art 6.

⁹ New Zealand Bill of Rights Act 1990, s 9; International Covenant on Civil and Political Rights 1966, art 7.

Part II: The New Zealand Context

This section focuses on human rights in the New Zealand context, with particular regard paid to recent case outcomes in the realm of conflicting rights. This chapter then evaluates New Zealand's unique constitutional setting concerning rights legislation, and how the New Zealand Bill of Rights Act 1990 (NZBORA) has been interpreted by the courts.

As most cultures and religions traditionally favour males as the superior sex, conflicts often ensue between the right to practice one's culture and religion, and rights of women, children and minorities.

In New Zealand there have been tensions between the discrimination of women based on sex, on one hand and traditional Maori cultural practice on the other. For example there are certain parks and forestry areas in which female Department of Conservation workers are not permitted to work, due to the area being deemed Tapu. Another example of the same rights in conflict is Te Papa Museum's attitude towards pregnant and menstruating women, who are not permitted near certain exhibits due to Maori cultural beliefs concerning taonga.¹⁰

A. Case Analysis

When such conflicts occur, no just answer is immediately obvious. What we see is two values, which our society has deemed vital to our status as human beings, pitted against one another. We would all agree that everyone should be treated equally, regardless of sex. Yet, we would also all agree that Maori tradition and culture should be respected. This conundrum was illustrated in *Bullock v Department of Corrections* [2008] 5 NZELR 379 (*Bullock*). Following the completion of one of its courses, the Department of Corrections held a graduation ceremony. Due to an overwhelming proportion of the graduates being of Maori and Pasifika descent, the ceremony was held in the form of a traditional poroporaki. In essence this meant that front row

¹⁰ Andrew Geddis "Why does Te Papa hate women so much (and other outraged thoughts)" (12 October 2010) Pundit <<https://www.pundit.co.nz/content/why-does-te-papa-hate-women-so-much-and-other-outraged-thoughts>>.

seating was reserved for manuhiri and restricted to males only, as dictated by tikanga. Bullock was a female probation officer and had been responsible for two of the graduates throughout the programme. By virtue of her status as a female, she was told she would not be permitted to speak (unlike her male counterparts) and had to sit at the back of the audience. On the day of the graduation, Bullock sat in the front row and refused to move, accusing the Department of discrimination based on sex,¹¹ which is unlawful under Part 2 of Human Rights Act 1993. She was later dismissed by the Department.¹²

The Human Rights Review Tribunal held the detriment suffered by Bullock was not insignificant and fell within s 22(1)(a) of the Human Rights Act 1993. This finding was based on the Department's expectation that Bullock would sit at the back and remain silent, solely by reason of her sex. However, despite this ruling, Bullock's subsequent behaviour meant the Tribunal was unwilling to award damages. The Tribunal took into account Bullock's unprofessional actions, including: the public scene at the graduation; appearing on both radio and television shows (and thus violating her employment agreement); and showing a general disregard for Maori culture. Hence it was held that while the original ceremony did unlawfully discriminate against her, the Department's decision to suspend and dismiss Bullock had nothing to do with her sex and so this decision was not unlawful under s 22(1)(a) of the Human Rights Act 1993.¹³

The Tribunal steered clear of the competing rights claims in this instance, opting to treat the conflict as two distinct legal issues. As already noted, the Human Rights Act 1993 prohibits discrimination on unlawful grounds (including sex).¹⁴ Similarly, s 19 of the NZBORA affirms the right to freedom from discrimination.¹⁵ Further, s 20 of the NZBORA also provides for the rights of minorities and ethnicities to enjoy their own culture.¹⁶ This is a reflection of New Zealand's commitment to international human rights instruments, as Article 27 of the Universal Declaration of Human Rights and Article 15 of the ICESCR both affirm the "right to take part in cultural life",

¹¹ Human Rights Act 1993, s 21(1)(a).

¹² *Bullock v Department of Corrections* [2008] 5 NZELR 379.

¹³ *Bullock v Department of Corrections*, above n 12.

¹⁴ Human Rights Act 1993, s 22.

¹⁵ New Zealand Bill of Rights Act 1990, s 19.

¹⁶ New Zealand Bill of Rights Act 1990, s 20.

while the ICCPR upholds minority rights.¹⁷ Given that in *Bullock* these rights were impossible, this case provided an opportunity for the Tribunal to illustrate how competing rights claims should be reconciled in New Zealand. Unfortunately this conflict was sidestepped and no judicial method applied. This begs the question of how the courts should respond when two fundamental rights are in conflict and importantly, what principles should be taken into account.

A second noteworthy case concerning conflicting rights in New Zealand is that of *Brooker v Police* [2007] 3 NZLR 91 (*Brooker*). Here the Supreme Court had to reconcile the right to privacy¹⁸ and the right to freedom of expression,¹⁹ with emphasis on what limits on the latter were justified by the former. In this case, Mr Brooker, the appellant, opposed the use of a search warrant issued by a police officer. He took it upon himself to publicly protest outside the officer's house, at 9am, with the knowledge that the officer has just returned from a night shift. The protest began with a knock on the officer's door and after being asked to vacate the premises, Mr Brooker subsequently moved to the grass verge in front of the officer's house. There he sang and protested with banners for a duration of 25 minutes, before being forcibly removed by police. Brooker was charged with "behaving in a disorderly manner" under s 4 of the Summary Offences Act 1981.²⁰

The outcome of this case ultimately hinged on the fact that the majority of the Supreme Court did not deem Brooker's behaviour to reach the threshold of "disorderly conduct".²¹ However, the interesting discussion for our purposes is the conflict between Brooker's right to freedom of expression and the officer's right to privacy in her home. The majority found that freedom of expression should not be limited in this case, as any detriment caused by Brooker's actions was not significant enough to warrant a restriction on his right. In contrast to this, the minority referred to s 5 of the NZBORA, which permits rights infringements if demonstrably justified.

¹⁷ Universal Declaration of Human Rights 1948, art 27; International Covenant on Economic, Social and Cultural Rights 1966, art 15; International Covenant on Civil and Political Rights 1996, art 27.

¹⁸ Privacy Act 1993.

¹⁹ New Zealand Bill of Rights Act 1990, s 14.

²⁰ *Brooker v Police* [2007] 3 NZLR 91.

²¹ *Brooker v Police*, above n 20.

Both Justices McGrath and Thomas favoured a rights balancing exercise, with Thomas J stating:

I would much prefer that both freedom of expression and privacy be recognised as fundamental values and, as such, weighed against the other in a manner designed to afford the greatest protection to both.²²

Hence it appears that even our most authoritative court has not provided clear guidelines, nor a united stance on how such rights conflicts should be reconciled. I will use both the cases *Bullock* and *Brooker* to illustrate how proposed adjudication methods can be utilised to achieve just outcomes.

B. Rights in New Zealand

Our legal system does not afford fundamental rights the superior status of entrenched law. Unlike many other states, New Zealand has not codified such rights through any single constitution or entrenched enactment. Instead, we are left with a raft of policies and disparate laws, which each provide elements of protection. Among these are the NZBORA and the Human Rights Act 1993, both of which affirm our country's commitment to the United Nation's international rights instruments, most notably the International Covenant on Civil and Political Rights 1966.

The legal standing we have granted fundamental rights is key to the analysis going forward, as unlike in other jurisdictions, rights in New Zealand do not operate as "trumps". Rather, they occupy the same status as any other provision. Those rights contained in the NZBORA could even be seen as having subordinate legal power, due to the limitation clause in s 5. The effect of this is that when we run into rights conflicts, overseas stances concerning the absolute prohibition on making inroads into certain types of rights may not be appropriate in New Zealand. Rather, we need to assess how rights should be reconciled given our unique constitutional setting. International judicial reasoning is therefore persuasive, but not conclusive.

²² *Brooker v Police*, above n 20, at [285].

C. Formal Procedure for NZBORA Conflicts

Whenever there is a conflict between the NZBORA and another piece of primary legislation, s 5 dictates that the right in question may be limited. Thus s 5 maintains the position that rights are not absolute and can be restricted in certain circumstances, namely, reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.²³

This essentially involves a two stage test developed in *R v Hansen* [2007] 3 NZLR 1. First, the objective of the competing provision must be identified, and importantly, whether this objective is sufficiently important enough to warrant a rights breach. The second consideration is whether the means being proposed to achieve this desired objective is proportionate. With respect to the second limb, the court has regard to minimum impairment, rational connection and proportionality.²⁴ Therefore whether a limit on a right or freedom is justified under s 5 is essentially an inquiry into whether a justified end is achieved by proportionate means. Hence, we are left with a balancing exercise encompassing a proportionality component. Such a proportionality assessment could be useful in determining how New Zealand courts might resolve the issue of conflicting rights.

So what guidance have we been given by New Zealand courts concerning limitations on rights?

Cases such as *Ministry of Transport v Noort* [1992] 3 NZLR 260 and *R v B* [1995] 2 NZLR 172 affirm New Zealand's legislative position that rights are not absolute and that "individual freedoms are necessarily limited by membership of society and by the rights of others and the interests of the community".²⁵ This indicates that when two rights cannot both be satisfied, one may be restricted in order to fully realise the other. How one defines the scope of these rights therefore becomes the first paramount concern, as the only way to define when such conflicts occur is to first define the reach of these individual rights.

²³ New Zealand Bill of Rights Act 1990, s 5.

²⁴ *R v Hansen* [2007] 3 NZLR 1.

²⁵ *Ministry of Transport v Noort* [1992] 3 NZLR 260 at [282]; *R v B* [1995] 2 NZLR 172 at [182]; Andrew S Butler and Petra Butler, *Human Rights* (Lexis Nexis, Wellington, 2017) at 51.

When dealing with the scope of a fundamental right, two approaches can be taken. A broad reading of a right would lead it to encompass every form of action and duty feasibly covered by it. For example the right to freedom of expression²⁶ would still encompass hate speech. The purpose of this approach would be to afford heightened *prima facie* rights protection to expression and speech, which could later be limited by countervailing considerations such as reasonableness and proportionality. Thus, even when the speech in question had no merit or caused detriment, it would still be afforded some legal protection. The contrasting approach to this would be a narrow definition. Here, the meaning of each right would be interpreted with implied limitations, thus lessening its scope. Hence hate speech would never be protected by the right to freedom of expression, as this right would be interpreted as applying only to those forms of speech which do not bring about harm and demoralise the rights of others. By favouring this second approach we would be restricting the reach of fundamental rights, but we would also be lessening the potential conflicts between rights that might ensue. Unsurprisingly, New Zealand case law concerning this interpretive question is also divided.²⁷

In *Re J (An Infant)* [1996] 2 NZLR 134, the court balanced the right to practice one's religion²⁸ against the right of every person not to be deprived of life.²⁹ In that case a child was suffering from a serious nosebleed which could have proved fatal unless a blood transfusion was administered. The child's parents were Jehovah's Witnesses and therefore refused the advice of healthcare providers on religious grounds. The court took the stance that where rights conflicts are concerned, rights should be defined so as to "give effect to compatibility" and further, that "the scope of one right is not to be taken as so broad as to impinge on and limit other rights".³⁰ Here we see the court favouring a narrow approach to the interpretation of rights, in a bid to reduce conflicts before any rights balancing need take place.

²⁶ New Zealand Bill of Rights Act 1990, s 14.

²⁷ Andrew, Butler and Butler, above n 25, at 53.

²⁸ New Zealand Bill of Rights Act 1990, s 15.

²⁹ New Zealand Bill of Rights Act 1990, s 8.

³⁰ *Re J (An Infant)* [1996] 2 NZLR 134; Andrew, Butler and Butler, above n 25, at 35.

In direct contrast to this approach was the one followed by the court in *Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington)* [2000] 3 NZLR 570.³¹ This case concerned the production of videos by a religious organisation. Amongst other derogatory remarks, these videos publicly blamed and shamed homosexuals for the spread of HIV.³² Hence the competing rights assertions involved the right to freedom of expression³³ and the right to freedom from discrimination.³⁴ The court held that the right to freedom of expression was broad enough to encompass such publications. Hence, there were no implied limits involved in this definitional approach. This case illustrates the court's preference for defining rights widely and then weighing up opposing considerations at a later stage in the balancing process.³⁵

Thus it can be concluded that New Zealand has not yet developed a comprehensive solution to the issue of conflicting rights, nor a unified stance on how rights should be interpreted.

³¹ Andrew, Butler and Butler, above n 25, at 35.

³² *Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington)* [2000] 3 NZLR 570.

³³ New Zealand Bill of Rights Act 1990, s 14.

³⁴ New Zealand Bill of Rights Act 1990, s 19.

³⁵ Andrew, Butler and Butler, above n 25, at 53.

Part III: Other Jurisdictions

In this part of this paper I will review the approach to rights conflicts taken by overseas jurisdictions, particularly the practice of the European Court of Human Rights.

A. The European Court of Human Rights

The European Court of Human Rights (ECHR) is one of the most influential international human rights authorities. The ECHR has jurisdiction over disputes involving the European Convention on Human Rights. It seeks to uphold and promote the fundamental rights of those belonging to States within the Council of Europe.³⁶ I have chosen to analyse the functions of this court in particular, as the ECHR carries perhaps the most weight on the international stage concerning rights conflicts.

The central role of the ECHR is to adjudicate cases in which a fundamental right is in conflict with either another right, a state law, an international instrument, or the general public interest.³⁷ Hence the court habitually balances such values and legal standards against one another. To do this, the ECHR maintains a “fair balance principle” as articulated in *Soering v UK* (1989) 11 EHRR 439 where it was stated that:

Inherent in the whole of the Convention is a search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights.³⁸

This illustrates the court’s stance that rights are not absolute and can be restricted on account of countervailing interests.

³⁶ Equality and Human Rights Commission “What is the European Convention on Human Rights?” (19 April 2017) Equality and Human Rights Commission <www.equalityhumanrights.com/en/what-european-convention-human-rights>.

³⁷ S.A. de Vries, “Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice” (2013) 9 ULR 169 at 169.

³⁸ *Soering v UK* (1989) 11 EHRR 439 at [89]; Alastair Mowbray, “A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights” (2010) 10 Human Rights Law Review 289 at 289.

The fair balance principle has been evident in ECHR case history as far back as the 1968 case *Relating to Certain Aspects Of The Laws On The Use of Languages In Education In Belgium v Belgium* (1968) 1 EHRR 252 (*Belgium Linguistics*). Here the court had to balance the right to education³⁹ against the right to be free from discrimination.⁴⁰ It was noted by the court that along with rights considerations, the general interest of the community also has significant weighting on the case outcome under the fair balance principle. The court evaluated all relevant legal and social conditions, reaching a finding that the Convention implied an underlying balancing principle.⁴¹ Here we see judicial recognition of the need to assess facts on a case-by-case basis and that fundamental rights can be limited if they pose a threat to the public interest.

The ECHR's balancing exercise was also illustrated in *Boso v Italy*, App. No. 50490/99 ECHR 846 (2002) VII. Here, the conflict of rights included the right to life⁴² of an unborn fetus and the rights and interests of the pregnant mother. Again, the court invoked a balancing analysis of both rights against a background of strong religious, ethical and social values, concluding that there was nothing unlawful under Italian legislation regarding the abortion.⁴³ Moreover, in *Brogan and others v UK* (1988) 11 EHRR 117, the ECHR balanced in a similar manner the liberty of suspected terrorists against the protection of democratic institutions.⁴⁴

As the case law has developed, further interests and considerations have become relevant to the ECHR's Fair Balance Principle. For instance, in *Beyeler v Italy* (2000) 33 EHRR 52 the court held that:

In ascertaining whether such a balance existed requires an overall examination of the various interests in issue but also, as in the instant case, of the conduct of the parties to the dispute, including the means employed by the State and their implementation.

³⁹ European Convention on Human Rights, protocol 1, art 2.

⁴⁰ European Convention on Human Rights, art 14.

⁴¹ Mowbray, above n 38, at 290.

⁴² European Convention on Human Rights, art 2.

⁴³ *Boso v Italy*, App. No. 50490/99 ECHR 846 (2002) VII; Mowbray, above n 38, at 294.

⁴⁴ Mowbray, above n 38, at 301.

Hence the manner and actions of the parties, both leading up to and subsequent to the rights conflict, were deemed relevant to the balancing exercise. This suggests that the ECHR is widening the scope of relevant factors that can be utilised in order to justify rights limitations.

Such an approach has not gone without scrutiny. In *Belgium Linguistics*, Justice Terje Wold strongly dissented, stating that such a balancing act “carried the court into the very middle of internal political questions”.⁴⁵ This fear that the application of the fair balance principle will encourage the court to go beyond its jurisdiction and into the realm of political decision-making is not unique.

The ECHR is the adjudicatory body for a number of states, each with differing social, cultural and religious practices, as well as varied levels of resources. Hence the court affords states a “margin of appreciation” regarding compliance with the European Convention. This means when the fair balance principle is invoked, it can differ in application between both states and different types of rights.⁴⁶ In this way, the margin of appreciation, coupled with the fair balance principle, has a compounding effect on the flexible nature of the ECHR’s adjudication process and affords even more discretion to decision-makers.

B. The European Court of Justice

The European Court of Justice (ECJ) is the central adjudicatory body for the European Union.⁴⁷ Among other things, the ECJ monitors state compliance with the Charter of Fundamental Rights of the European Union (Charter). The ECJ adopts a similar approach to the ECHR in response to rights conflicts, by employing proportionality as a key consideration.⁴⁸ The Charter provides that restrictions on fundamental rights may be justified in accordance with Article 52(1). To achieve this, the limitation must be “provided for by law and respect the essence of those rights and

⁴⁵ *Relating to Certain Aspects Of The Laws On The Use of Languages In Education In Belgium v Belgium* (1968) 1 EHRR 252; Mowbray, above n 38, at 291.

⁴⁶ Mowbray, above n 38, at 316.

⁴⁷ European Union “Court of Justice of the European Union” (2018) Europa.eu <europa.eu/european-union/about-eu/institutions-bodies/court-justice_en>.

⁴⁸ S.A. de Vries, above n 37, at 170.

freedoms”.⁴⁹ Article 52(1) further dictates that limitations can only be made where it is necessary and proportionate to do so.⁵⁰ This reference to proportionality in the Charter affirms the idea that fundamental rights are not absolute and there is room for limitations where justified. The ECJ therefore also embraces a balancing approach to fundamental rights conflicts in order to assess how, on the basis of proportionality, rights can be reconciled.

C. Canada

Canada grants legal recognition to fundamental rights through the Canadian Charter of Rights and Freedoms. The Charter has been entrenched through its inclusion in the Canadian Constitution. It therefore holds superior legal status as compared to rights legislation in New Zealand. Canadian courts generally approach rights conflicts on a fairly ad-hoc, case-by-case basis.⁵¹ However the recent “Policy for Competing Human Rights” produced by the Ontario Human Rights Commission (Commission), aims to explain conflicts of rights for laypersons.⁵² While this policy is not aimed at the judiciary, but rather at individuals and organisations, it helps to shed light on Canada’s stance concerning fundamental rights.

The key principles outlined by the Commission are that:

- No rights are absolute;
- There is no hierarchy of rights;
- All rights must be given equal consideration;
- Rights may have limits in some situations where they substantially interfere with the rights of others;
- Rights may not extend as far as claimed;
- The full context, facts and constitutional values at stake must be considered;
- The extent of interference must be considered (only *actual* burdens on rights trigger conflicts);
- The core of a right is more protected than its periphery;

⁴⁹ Charter of Fundamental Rights of the European Union, art 52; S.A. de Vries, above n 37, at 170.

⁵⁰ Charter of Fundamental Rights of the European Union, art 52; S.A. de Vries, above n 37, at 171.

⁵¹ Ontario Human Rights Commission “Policy on Competing Human Rights” (2018) Ontario Human Rights Commission <<http://www.ohrc.on.ca/en/policy-competing-human-rights>>.

⁵² Policy on Competing Human Rights, above n 51.

- The ultimate aim is to respect the importance of both sets of right.⁵³

Hence, in both Canada and Europe, there is a move towards a decision-making framework that allows for limitations on rights following the assessment of all relevant factors.

⁵³ Policy on Competing Human Rights, above n 51.

Part IV: A Hierarchy of Rights

This section will feature a jurisprudential discussion of rights themselves. Primarily it will pose the question of whether rights can be ranked and if so, how this can be justified. This question is important because if answered in the affirmative, it will provide a means to resolving several types of rights conflicts. The operation of such a system involves higher status rights trumping lower ranking rights whenever a conflict emerges.

A. The United Nations' Stance

According to the conventional approach, all rights are of equal status. This is a nice ideal, however clearly the right to be free from torture⁵⁴ is more crucial than a right to social security.⁵⁵ The United Nations (UN) attempts to reconcile this by declaring that all rights are interrelated and mutually supportive,⁵⁶ maintaining that no right alone will have sufficient value, but rather a web of rights will offer the best protection of individual human dignity. In this way, it is argued rights cannot be ranked on a hierarchy, as all have been identified as equally important for enhancing human liberty.

There are many issues that can be identified concerning this ideology that all rights are of equal status. Both direction from the UN and provisions in rights instruments themselves suggest that some rights have been identified as more important than others. For instance, the UN has deemed certain rights “non-derogable”.⁵⁷ This means that governments cannot make inroads into them. Such rights include the right to be free from torture,⁵⁸ the right to life⁵⁹ and the right to be free from slavery and servitude.⁶⁰ We can likely agree that limitations on such rights would seldom be justified. Thus, the remainder of rights are “derogable”, meaning restrictions on these

⁵⁴ International Covenant on Civil and Political Rights 1966, art 7.

⁵⁵ International Covenant on Economic, Social and Cultural Rights 1966, art 9.

⁵⁶ UNFPA “Human Rights Principles” (2005) United Nations Population Fund <www.unfpa.org/resources/human-rights-principles>.

⁵⁷ International Covenant on Civil and Political Rights 1966, art 4.

⁵⁸ International Covenant on Civil and Political Rights 1966, art 7.

⁵⁹ International Covenant on Civil and Political Rights 1966, art 6.

⁶⁰ International Covenant on Civil and Political Rights 1966, art 8.

rights can be justified in some circumstances. In this way it appears the UN has differentiated rights into two separate categories, with “non-derogable” rights clearly being afforded enhanced protection, while limitations on derogable rights are provided for by article 4 of the ICCPR. This categorisation undermines the UN principle that fundamental rights are all equal.

In addition to this, rights also are classified into generations. Civil and political rights are referred to as “first generation” rights.⁶¹ These are rights aimed at preventing state interference. Such rights impose a duty on state powers to refrain from undertaking particular actions which interfere with the liberty of individuals. Importantly, the UN demands high levels of compliance from member states with respect to first generation rights. This is because these rights are seen as attainable regardless of social and economic conditions in the respective states. Second generation rights encompass economic, cultural and social rights.⁶² While maintaining the fundamental nature of these rights, the UN has lower expectations regarding compliance, in contrast to first generation rights. The UN recognises that realising such rights is heavily dependent on the resources states have at their disposal. Therefore the standard required is that governments are progressing towards fulfilment, but such aims do not have to be achieved immediately. The final category is third generation rights, rights of fraternity and solidarity.⁶³ Such rights are only targeted following established protections of first and second generation rights. The expected compliance requirements demanded for each generation of rights is yet another example of how the UN affords greater protections to some rights over others. Here we see another instance of rights regulation undermining the mantra that “all rights are equal”.

As mentioned above, we intuitively recognise that some rights seem more important than others (such as the right to be free from torture vs. the right to social security).⁶⁴ We have also seen that international law does prioritise the protection of some rights over others. But does this mean we can have a succinct ranking system or hierarchy for all rights? If so, we would be able to simply solve rights conflicts using lexical

⁶¹ The Levin Institute “Three Generations of Human Rights” (2017) Globalization 101 <www.globalization101.org/three-generations-of-rights/>.

⁶² Three Generations of Human Rights, above n 61.

⁶³ Three Generations of Human Rights, above n 61.

⁶⁴ International Covenant on Civil and Political Rights 1966, art 7; International Covenant on Economic, Cultural and Social Rights 1966, art 9.

priority, with the lower ranking rights, always being trumped by the higher ranking ones. Advantages of such a system would include transparency and predictability, judicial discretion would be limited and outcomes more efficiently realised.

B. Analysis of the Work of Legal Theorists

John Rawls suggests one potential framework for ranking the absolutism of rights.⁶⁵ Rawls maintains there are three types of liberties and in this way achieves an indirect hierarchy for the rights pursuant to each. “Basic liberties” are the first group identified and are said by Rawls to have special status. These are listed as: “freedom of thought and liberty of conscience; the political liberties and freedom of association; the freedoms specified by the liberty and integrity of the person; and finally, the rights and liberties covered by the rule of law”.⁶⁶ Rawls asserts that this would be the list derived from the perspective of someone operating under the “veil of ignorance”. A philosophical state of being that attempts to shed deductive reasoning from any preconceived bias, or status dependent opinion. According to Rawls, basic liberties are not completely absolute, but they do have sufficient priority to trump any countervailing interests such as social utility and the public good. Rawls’ second type of liberties are “non-basic liberties”. These are still significant, but do not carry as much weight at basic liberties when conflicts arise. “Liberties as such” is the final grouping. This last category carries the least status of the three and can be limited in justified circumstances. It is also important to note that not all fundamental rights fit into one of Rawls’ three prescribed categories; hence Rawls’ hierarchy essentially consists of four succinct ranks.

Despite being afforded the highest status of the three types of liberties, Rawls does not claim that basic liberties are absolute. This is because conflicts may arise between different basic liberties. In order to reconcile such conflicts clearly one or both liberties must be limited and hence both cannot act as trumps. Furthermore, the basic liberties afforded to an individual can only extend so far as to not restrict the basic

⁶⁵ Mark D. Rosen, “When Are Constitutional Rights Non-Absolute? McCutcheon, Conflicts, and the Sufficiency Question” (2015) 56 Wm. & Mary L. Rev. 1537 at 1560-1563; John Rawls, *Political Liberalism* (Columbia University Press, US, 1993) at 292.

⁶⁶ Rosen, above n 65, at 1561.

liberties of others. In this way, Rawls states that basic liberties are *self-limiting*.⁶⁷ The notion that “no liberty is absolute” fits well with the New Zealand constitutional context, in which rights do not act as trumps. However one issue with Rawls’ thesis in terms of reconciling rights conflicts is the sheer number of fundamental rights encompassed by his first category. Those liberties defined as “basic liberties” arguably contain the most fundamental rights and importantly, those rights which most often conflict. Hence a ranking system which grants the majority of these equal status is not overly helpful in deducing a judicial method for reconciliation when such rights are in conflict. If we are to rank rights we likely need a more detailed priority system, as there may not be much to be gained from such a loose hierarchy.

J. L. Mackie affirms the UN stance that human rights are all equal in status.⁶⁸ Mackie claims that in the case of conflict, mutual compromise should be made between the rights to achieve a just outcome. He is therefore in firm opposition to any type of rights ranking regime. Mackie’s approach of “equal sacrifice and compromise”⁶⁹ has been heavily criticised. One critic is Michael Freedon, who states that such a compromising formula, which demands that all rights are infringed equally, actually has the effect of dehumanising them all.⁷⁰ Freedon maintains the stance that equality of treatment does not guarantee fair treatment and additionally does not lead to just outcomes. The 1993 Vienna Declaration and Program of Action position is “to treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis.”⁷¹ According to Freedon this does not mean that equal status must be afforded to all human rights in all circumstances.⁷² I am inclined to agree with this view, given the empirical and intuitive evidence that illustrates the enhanced status of certain human rights.

Jeremy Waldron’s rights thesis poses another obstacle for the formulation of a succinct rights hierarchy. According to Waldron, each fundamental right generates

⁶⁷ Rosen, above n 65, at 1562; Rawls, above n 65, at 341.

⁶⁸ Xiaobing Xu and George Wilson, “On Conflict of Human Rights” (2006) 5 UNH Law Review 31 at 44.

⁶⁹ J. L. Mackie, “Rights, Utility, and Universalization” in R. G. Frey, *Utility and Rights* (University of Minnesota Press, US, 1984) at 88; Xu and Wilson, above n 68, at 44.

⁷⁰ Michael Freedon, *Rights* (Open University Press, 1991) at 99; Xu and Wilson, above n 68, at 44.

⁷¹ UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23.

⁷² Xu and Wilson, above n 68, at 44.

waves of duties that affirm its legal grounding.⁷³ For example the right to be free from torture is backed up by a duty not to torture. However, Waldron maintains that this same right also generates many other duties that may not be so immediately obvious. For instance: “a duty to instruct people about the wrongness of torture; a duty to be vigilant about the danger of and temptation to torture; a duty to ameliorate situations in which torture might be thought likely to occur; and so on”.⁷⁴ Therefore, for Waldron, a rights conflict occurs whenever a single duty generated by a right, conflicts with another duty generated by another (or the same) right. Waldron’s rights thesis thus poses a problem for devising a hierarchy of rights.

Waldron offers the intuitive example that a right to be free from torture is inherently more important to human dignity, than the right to free speech. He justifies this by affirming that we would never allow torture to occur, no matter the measure of free speech gained as a result.⁷⁵ However under Waldron’s thesis, trading off these two rights is not quite so straightforward. As Waldron maintains, the right to be free from torture generates waves of duties in order for the right to be fully protected. Some of these duties may be viewed as “lesser” and therefore not as crucial to protecting the core of the right. For instance the duty to educate against torturing is less significant than the duty not to torture. We therefore run into a problem when the lesser duties of a seemingly more important right, conflict with core duties of a supposedly less important right. Waldron states that surely we can never say every duty stemming from a right to be free from torture will *always* outweigh any duty generated by a right to free speech.⁷⁶ If this is true, then which right is initially deemed “more important” will not be determinate. Rather primary duties stemming from the “less important” right might take precedence, over lesser duties associated with the “more important” right.⁷⁷ This suggests that the right we initially deemed to have greater importance could be outweighed by a lower ranking right and thus undermines the effectiveness of a rights hierarchy in reconciling rights conflicts.

⁷³ Waldron, above n 6, at 509.

⁷⁴ Waldron, above n 6, at 510.

⁷⁵ Waldron, above n 6, at 515.

⁷⁶ Waldron, above n 6, at 515.

⁷⁷ Kamm, above n 5, at 251.

C. Can Rights be Ranked?

For simplicity's sake and to narrow my focus, I have not adopted Waldron's "waves of duties" definitional approach to rights. Instead I maintain that each fundamental right consists of one primary corresponding duty. Hence the immediate problems posed by Waldron's rights thesis are not directly applicable here. However, Waldron's works do help to shed light on the fact that the value of fundamental rights is context dependent. Arguably, we can never profess that one right will trump another in absolutely every conceivable scenario. The action or freedom protected by a right has varying degrees of significance, depending on how the rights holder seeks to implement it.

Thus, it is likely that a sophisticated rights ranking system is not desirable and a precise hierarchy not obtainable. It seems near impossible to create a full-fledged list of rights, ranked by their fundamental nature, because the weight of a right is context dependent and differs between sets of circumstances. The exercise of a right may hold more value in one instance than it does in another. For example, freedom of expression that causes oppression, is discriminatory or brings about detriment to another party could be considered of low value. Therefore, despite the right to freedom of expression being considered a right of "high rank", in such a case it would have limited value and diminished priority.

Due to their political and moral underpinnings, realistically, non-rights considerations are needed in order to evaluate conflicts between rights due to their contextual nature. This means that a rights hierarchy will never be able to completely reconcile rights on its own. It should also be noted that such an approach would be useless in cases where the same right is in conflict between two different rights holders. If anything, the most that could be achieved through such a rights hierarchy is to use the supposed "rank" of a right as just one of many considerations in a far more fact dependent method. Even then, it is unlikely a complete list would be helpful. Groupings of rights or "bands",⁷⁸ similar to that suggested by Rawls, would grant better flexibility.

⁷⁸ Rawls, above n 65, at 291-295.

It is also important to note that the central purpose of a lexical rights hierarchy is to limit discretion. A ranking system would mean conflicting rights cases could be decided in mechanical way, without the need for moral judgements. However, to formulate a rights hierarchy in the first place and decide which rights outweighed others and why, would require just such discretion, as well as moral analysis. So while we may intuitively acknowledge that human rights cannot all be equal in a realistic sense, any sophisticated legal ranking system also seems impractical and likely not attainable. Due to their unique, context-dependent nature, fundamental rights require some degree of moral analysis and flexibility.

Part V: Alternative Methods

If fundamental rights conflicts are evident and a rights hierarchy is not sufficient to resolve such conflicts – *how then should such conflicts be resolved?* In answering this question I will analyse and draw on a number of alternative methods proposed by legal theorists, as well as other jurisdictional approaches.

It is important to reiterate the uniqueness of the human rights system as one of gradual development, which is forever being modified. Not only have new rights been introduced since its establishment, the scope and nature of these rights have been subject to change. Therefore any system of rights reconciliation we approve must be one which is flexible enough to cope with the changing landscape of a legal rights system. It is not plausible to legislate for every conceivable conflict, in every possible scenario. Therefore a judicial process is required that allows courts to strike an appropriate equilibrium between fundamental rights. Outcomes will likely take one of two forms, either one right will trump the other, or a compromise will be made between the two rights in conflict.

A. Balancing vs. Categorisation

Though there are many interchangeable terms used by various legal theorists, there exists a dichotomy of two types of rights reconciliation systems.⁷⁹ Ultimately these can be distinguished by how much discretion they allow the decision-maker. The first, commonly referred to as “balancing”, involves appealing to the particular circumstances of the rights conflict. Each situation is assessed on a case-by-case basis and takes into account both relevant rights documents and the context dependent value of the rights involved. Such a system is extremely flexible, allows for moral and political judgements to be included in the decision-making process and is easily adaptable. As the name suggests, the interests at stake are balanced and weighed against each other in an effort to arrive at some sort of compromise. Proportionality

⁷⁹ Jos Philips, “On Setting Priorities among Human Rights” (2013) 15 Hum Rights Rev 239 at 240.

and social utility are often considerations used in the balancing system.⁸⁰ Proponents of the balancing approach claim such a malleable system is appropriate given the moral underpinnings of rights legislation. In contrast to this is a much more mechanical, principled system, known as categorisation. This latter system is far more rigid, providing principles and precise formulae to apply in order to generate largely discretion free outcomes. Deductive reasoning is used and brings with it the advantages of certainty, transparency and predictability, all desirable elements for a system of law. Categorisation identifies the rights in conflict and narrows the scope of each to such an extent that they are no longer incompatible. Once the content of a right has been determined, precedent is set and the same scope granted next time a similar conflict emerges. While limiting the scope of rights, by establishing boundaries, categorisation gives rights more power, as it does not allow them to be balanced against countervailing considerations.⁸¹ Rather, actions that violate rights are forbidden and actions that allow for the enjoyment of rights are permitted. Thus, this system is much more binary.

It is apparent there is a tension in rights jurisprudence between allowing judges too much discretion vs. not affording them enough. Too much discretion has the implication of diminishing certainty, leading to ineffective precedent and ultimately undermining the rule of law. While, not allowing enough discretion overly binds the courts, restricts their interpretive freedom and can lead to diminishing the protection afforded by these legally guaranteed rights.⁸² Furthermore, enhanced discretion means the decision-maker has a heightened ability to consider all the relevant facts of the particular case, including moral, political and other non-legal factors. Some would argue this would result in more just outcomes. However, with this comes the obvious hazard of the decision-maker's inherent bias and preferences bearing on the decision.⁸³

⁸⁰ Giorgio Bongiovanni and Gerald Postema Antonino Rotolo and Giovanni Sartor Chiara Valentini and Douglas Walton, *Handbook of Legal Reasoning and Argumentation* (Springer Nature B.V., The Netherlands, 2018) at 582.

⁸¹ Bongiovanni and Rotolo and Valentini and Walton, above n 80, at 608.

⁸² Stefan Sottiaux and Gerhard van der Schyff, "Methods of International Human Rights Adjudication: Towards a More Structured Decision-Making Process for the European Court of Human Rights" (2008) 31 HIC Law Review 115 at 121.

⁸³ Gustavo Arosemena, *Conflicts of rights in international human rights: A meta-rule analysis* (Cambridge University Press, Cambridge, 2013) at 29.

A useful way to further demonstrate the difference between balancing and categorisation is to liken the distinction to that between rules and standards.⁸⁴ Rules limit the principles and factors that a decision-maker can take into consideration and therefore restrict discretion. In contrast to this, standards act like guidelines and permit all background influences, moral ideals and political policies to be included in the decision-making framework. Categorisation equates to a system of rules, as once the scope of a right and its appropriate category has been identified, there is little room for departure from precedent. The balancing system can be likened to a system based on standards, allowing the judge to be influenced by the relevant facts, principles and interests at stake.⁸⁵

Categorisation and rule-based decision-making is desirable as it maintains certainty and consistency in a system of law. Arbitrary adjudication is limited as a result of diminished discretion and outcomes are more efficiently realised through a precedent based approach. The downside, however, is that relevant factors and interests may be discounted if they do not fit within the categorical rubric. With lack of discretion comes a regimented scheme, which may result in unfair decisions and substantive injustice. Furthermore, it is questionable whether categorisation really does away with discretion in the way it promises. In order to define the scope and content of rights in the first place, clearly other social, moral and political interests would need to be taken into account.⁸⁶ It is arguable categorisation merely shifts discretion to a different stage in the process – when the scope of rights are being defined and categories for future implementation formed.

Balancing provides an adaptive platform to consider all relevant rights and their associated interests. Arguably certainty can be sacrificed to a degree for a legal realm so heavily influenced by moral considerations. Aside from flexibility, another attraction of the balancing approach is its ability to heighten democracy. This is because increased discretion means decision-makers must fully justify and explain their decisions, leading to enhanced accountability and more transparency in the

⁸⁴ Sottiaux and van der Schyff, above n 82, at 118.

⁸⁵ Sottiaux and van der Schyff, above n 82, at 119.

⁸⁶ Bongiovanni and Rotolo and Valentini and Walton, above n 80, at 608.

law.⁸⁷ Overall balancing has strong appeal due to its promotion of fairness above all else.⁸⁸

Therefore if we are to proceed with the finding that balancing likely fits better within a system of rights than categorisation, what are the potential pitfalls of this?

B. Critique of Balancing

Despite its wide spread use in rights adjudication across the globe, the concept of balancing has been the centre point of much jurisprudential debate.⁸⁹ Among the most well known is the contest between Robert Alexy and Jurgen Habermas. Alexy holds a sympathetic view of balancing.⁹⁰ He accepts that such an interpretive system may appear ad hoc and difficult to define. However, Alexy maintains that such judicial practice is beneficial when applied consistently and with transparency. In contrast to this Habermas stands firmly in the opposite camp. Habermas is hostile towards balancing, claiming it is simply an exercise of arbitrary judicial discretion.⁹¹ Much like others supporting a hostile view, Habermas sees balancing as irrational and unjustified, considering the ideals of fundamental rights systems.

The Law of Balancing, according to Alexy is, “The greater the degree of non-satisfaction of, or detriment to, one principle, the greater the importance of satisfying the other.”⁹² Alexy argues that properly applied, balancing leads to the most just outcomes in rights adjudication, as it allows any relevant interests to be considered and weighed against one another. Alexy believes the exercise of judgement and discretion in rights adjudication is inevitable. Habermas has raised numerous objections to Alexy’s thesis.⁹³ The first point he makes relates to the purpose and

⁸⁷ Sottiaux and van der Schyff, above n 82, at 121.

⁸⁸ Basak Cali, “Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions” (2007) 29 Human Rights Quarterly 251 at 256.

⁸⁹ Bart van der Sloot, “The Practical and Theoretical Problems with ‘Balancing’” (2016) 23 Maastricht Journal of European and Comparative Law 439 at 442.

⁹⁰ Steven Greer, ““Balancing” and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate” (2004) 63 The Cambridge Law Journal 412 at 413-414.

⁹¹ Greer, above n 90, at 413-414.

⁹² Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press, Oxford, 2002); Robert Alexy, “Balancing, constitutional review, and representation” (2005) 3 International Journal of Constitutional Law 572 at 573.

⁹³ Greer, above n 90, at 414.

nature of fundamental rights. Rights were established in order to protect the liberty of the individual. Therefore any reference to aggregate or social utility does not fit well within a constitutional rights framework. Furthermore, by allowing non-rights considerations to make inroads into fundamental rights, the system of balancing essentially dilutes the value of these rights and diminishes their protective capabilities. Habermas's third objection concerns the issue of discretion afforded to decision-makers, especially the associated hazard of bias and preferential or arbitrary outcomes. This enhanced discretion leads to Habermas labelling the judicial practice of balancing as illegitimate, irrational and illogical. In addition, such wide discretion arguably takes judges outside the realms of their jurisdiction by making decisions that should perhaps be left to policy makers. Ultimately Habermas views the outcomes generated by a balancing approach as completely arbitrary and unjustifiable.

Habermas maintains that fundamental rights instruments are founded on deontological ethics.⁹⁴ A deontological framework ought to be based on prioritised principles, with a more rigid structure that best represents the rule-like touchstones we set for human rights. For Habermas, a balancing approach that deems every countervailing interest as relative directly undermines the deontological underpinnings of rights.⁹⁵

When we look to the recent jurisprudence of the ECHR and other rights adjudication bodies, a clear shift from a deontological decision-making framework towards a utilitarian one can be noted.⁹⁶ The ECHR test, preceding that of the "Fair Balance Principle", was one of Necessity.⁹⁷ This was a much more binary test that essentially evaluated whether a rights infringement was necessary or not. No balancing of interests took place and outcomes were far more black and white. This old test fits well with the deontological standpoint, which relies on absolute obligations and a hierarchy of principles.⁹⁸ As already seen, the ECHR now adopts a balancing standard, premised on utilitarian considerations. Utilitarianism is an ideology that guarantees the greatest good for the greatest number. Hence, this theory approaches moral dilemmas from the position that every relevant principle is relative. Basically,

⁹⁴ van der Sloot, above n 89, at 442.

⁹⁵ Bongiovanni and Rotolo and Valentini and Walton, above n 80, at 591.

⁹⁶ van der Sloot, above n 89, at 440-443.

⁹⁷ van der Sloot, above n 89, at 440.

⁹⁸ van der Sloot, above n 89, at 442.

this means an act is permitted if it causes more good than it does harm and prohibited if it achieves the opposite result. In terms of rights adjudication, the system of balancing is often justified using utilitarian ideals. Factors such as social utility and public good enter into the balancing process and if proportionate, can justify rights infringements. A utilitarian approach to human rights attempts to balance and weigh interests in an un-principled way, with the aim of promoting human dignity.

The first issue with adopting a balancing framework is that it allows for non-rights considerations to effectively trump and limit rights, if justified to do so by the “greater good”. The reason for the establishment of rights instruments was to provide enhanced protective measures for those interests we deem most fundamental to human dignity. It therefore seems counterproductive and undermining to the entire rights framework to allow rights to be trumped by other interests. As David Currie eloquently articulates:

A balancing test is no more protective of liberty than the judges who administer it. However strong, rights as substantive reasons are mere reasons that can be displaced by other reasons.⁹⁹

Balancing puts rights on a par with other interests and therefore dilutes their value and the protection they afford to individuals.

Another central concern with the balancing approach to rights adjudication is the difficulty of devising a common metric on which to weigh and balance countervailing interests. It is problematic to directly compare the value of free speech to the value of freedom to practice one’s religion, or to reconcile one form of discrimination against another. If we are going to weigh and balance such rights and their associated interests, we first need to formulate a scale against which to measure them.¹⁰⁰ This point has been made by Habermas and other legal scholars such as S. Tsakyrakis. These critics state “moral concepts such as human rights have no weight, there is no

⁹⁹ Vlad F. Perju, "Proportionality and Freedom - An Essay on Method in Constitutional Law" (2012) 1 *Journal of Global Constitutionalism* 334; Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press, Oxford, 2002); David P Currie, *The Constitution of the Federal Republic of Germany* (University of Chicago Press, Chicago, 1994) at 181.

¹⁰⁰ van der Sloot, above n 89, at 442.

objectively verifiable scale on which to weigh the interests and no universal standard or methods to weigh moral principles with”.¹⁰¹ The balancing of incommensurable interests without a common metric has been likened by Petersen to comparing “the length of lines to the weight of stones”.¹⁰²

Hence, if we are to implement a system of balancing, as promoted by Alexy, utilitarianism must be invoked to solve the issue of a common metric. It is questionable whether incommensurable values can be reconciled by reducing interests down to a quantifiable metric and then weighing them against one another. However, though many issues with this system can be noted, it is also important to acknowledge the moral underpinnings of rights. Such foundations mean that rights systems (arguably) do not require the same quantitative, mechanical approach demanded by other realms of law. There is a need for flexibility and discretion due to the very nature of rights and the interest they aim to uphold. Perhaps for this reason we might say that despite its flaws, balancing does offer the best platform to reconcile conflicts in a variety of changing circumstances.

With all this in mind, in the next two sections I will analyse ways in which to minimise the issues posed by a balancing approach to rights adjudication.

C. Methods of Balancing

As noted, balancing is not without shortcoming. These largely stem from the amount of unfettered discretion afforded to decision-makers. In this section I compare different methods of balancing. The goal here is to deduce whether the system of balancing can be refined, in order to minimise the concerns raised in the previous section.

¹⁰¹ van der Sloot, above n 89, at 442; Stavros Tsakyrakis, “Proportionality: An Assault on Human Rights?” (2009) 7 *International Journal of Constitutional Law* 468; Cali, above n 88, at 257.

¹⁰² Bongiovanni and Rotolo and Valentini and Walton, above n 80, at 592; N. Petersen, “How to compare the length of lines to the weight of stones: Balancing and the resolution of value conflicts in constitutional law” (2013) 8 *German Law Journal* 1387.

The first distinction within balancing methods is that which asserts a “winner” vs. that which reaches a compromise.¹⁰³ In the former case, following the weighing of common interests, one right would be deemed to supersede the other. Therefore one right would be upheld and the other declared to be justifiably infringed for the purpose of maximising utility. On the other hand, a compromising approach would seek to achieve equilibrium between the two rights, perhaps not upholding both equally, but affording some element of protection to both.¹⁰⁴ I favour the latter case as most conflicts give rise to situations in which there is not an intuitively more deserving party, nor an easily identifiable superior right. Hence it follows that when decision-makers engage in a balancing exercise, they should do so with the aim of granting maximum protection to both parties, rather than to the party comprised of the largest number. In this way the ideals of utilitarianism are upheld, as well as the function of rights to provide protections at an individual level. In some instances, compromises cannot be reached.¹⁰⁵ When this occurs, it becomes even more crucial to develop a fair decision-making model to identify the “winner”.

There are also disparities in the way in which balancing can be conducted. Balancing can take the form of being “ad hoc” or “definitional”.¹⁰⁶ Ad hoc balancing is tailored to the case at hand. It is a system that weighs up the competing rights and relevant interests, as well as any other influential considerations. It derives a result on a given day, for a given conflict and a given set of circumstances. There is no attempt to establish an authority to be imposed by subsequent decision-makers, rather a one off solution is provided.¹⁰⁷ In contrast to this, definitional balancing has a more binding effect. Here the court aims to derive a general rule or set of principles to be invoked as precedent in later cases.¹⁰⁸ The idea is that if a similar conflict were to arise in the future the same result would be reached. No other interests could be involved in the decision-making process, as the scope for balancing would be set. Hence the process for determining an outcome under this definitional approach is far more structured

¹⁰³ Stijn Smet and Eva Brems, *When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony?* (Oxford University Press, Oxford, 2017) at 10.

¹⁰⁴ Smet and Brems, above n 103 at 15.

¹⁰⁵ Smet and Brems, above n 103 at 15.

¹⁰⁶ Bongiovanni and Rotolo and Valentini and Walton, above n 80, at 602.

¹⁰⁷ Bongiovanni and Rotolo and Valentini and Walton, above n 80, at 581.

¹⁰⁸ Bongiovanni and Rotolo and Valentini and Walton, above n 80, at 581.

than that of an ad hoc system. This transparent structure is key, as it allows for the decision to be replicated by subsequent adjudicators.

The issues and benefits arising from these two contrasting approaches mimic that between categorical decision-making and balancing. Once again the more discretion allowed, the more the decision is criticised as arbitrary. At the same time, the more discretion, the more flexible the approach to the changing landscape of rights conflicts. Definitional balancing has been further criticised for offering illusory solutions to the issues associated with balancing.¹⁰⁹ Instead of increasing certainty and predictability, definitional balancing has been described as only offering artificial differences to the ad hoc method. Aleinikoff argues that general rules cannot be applied to future cases, with differing facts, without also weighing other relevant interests.¹¹⁰ I tend to support this view, as there will always be new factors that need to be included in the balancing process in order to gain the full advantages of such a judicial approach. However, I also think that the ad hoc decision-making system can be modified and moved towards a more structured form of balancing. In this way we can retain the flexibility of a balancing model, without granting decision-makers wholly unfettered discretion.

Gustavo Arosemena offers one solution to the arbitrariness of balancing. He maintains that we should construct “meta-rules” for resolving such conflicts.¹¹¹ A meta-rule is a rule that administers the application of other rules.¹¹² Arosemena lays out the unique difficulties in reconciling rights conflicts, namely that normal standards of legal interpretation do not sit well within a system of rights, and in the case of conflicts there are no higher legal values to evaluate claims. Hence, the conventional legal tools used to resolve impossible laws are not as readily available. Arosemena proposes that meta-rules would provide a more structured approach to the adjudication of rights conflicts. In this way he aims to encapsulate the flexibility of balancing, while ridding the approach of its vast indeterminacy. Arosemena’s meta-rules could be likened to a list of principles which judicial bodies

¹⁰⁹ Bongiovanni and Rotolo and Valentini and Walton, above n 80, at 581.

¹¹⁰ T. A. Aleinikoff, “Constitutional law in the age of balancing” (1987) 96 *The Yale Law Journal* 943; Bongiovanni and Rotolo and Valentini and Walton, above n 80, at 581.

¹¹¹ Arosemena, above n 83, at 6-35.

¹¹² D. Dubois, H. Prade and S. Schockaert, “Rules and meta-rules in the framework of possibility theory and possibilistic logic” (2010) 18 *Scientia Iranica* 566 at 566.

are compelled to adhere to when reaching decisions, thus enhancing the stability of such a system. The claim here is that while meta-rules do not eradicate discretion, they constrain it,¹¹³ a desirable quality for a system of rights. Furthermore, because the same meta-rules would be used in all future cases, this model promotes certainty and transparency in the legal system.

The first meta-rule advanced by Arosemena is that of a hierarchy of rights (as discussed in Chapter IV). Arosemena runs into similar problems as encountered earlier concerning a rights ranking system. Additionally, as he approaches his discussion from an international viewpoint, Arosemena notes the further difficulty of constructing a hierarchy of rights applying to all member states, considering their vast diversity in culture, religion, social values and economic resources. He voices a concern that Western values (civil and political rights) will be prioritised over Eastern ones (social, cultural and economic), due to the power imbalance between states. Ultimately, Arosemena dismisses the idea of a rights hierarchy as a useful, standalone meta-rule, but leaves open the possibility of it being one of many meta-rules employed to reach a decision.

The second proposal advanced by Arosemena is to use the method of balancing itself as a meta-rule.¹¹⁴ This would still involve the weighing of competing interests by a judicial body, but would provide more concrete factors and principles for consideration. Arosemena also makes the same distinction between the methods of balancing identified earlier in this section, concerning outcomes of either “winners” or “compromise”. However, he instead uses the terminology “displacement balancing” and “optimization balancing” respectively. If we choose to engage in displacement balancing by identifying the superior right, Arosemena puts forward a number of factors that could be used to devise a meta-rule for balancing. These include the abstract weight of rights in all circumstances, the absolute weight of rights in specific circumstances, societal expectations concerning the priority of certain rights, and the amount of aggregate utility likely to be generated.¹¹⁵ If we instead opt for the compromising approach of optimization balancing, Arosemena alters the

¹¹³ Arosemena, above n 83, at 15.

¹¹⁴ Arosemena, above n 83, at 18.

¹¹⁵ Arosemena, above n 83, at 18-19.

principles for consideration. He suggests that judicial bodies should then look at the relative weights of rights when considered together and how each can be afforded the maximum protection simultaneously. The necessity and inevitability of a rights limitation should also be determined, in order to assess whether such an infringement is justified.¹¹⁶

While my aim is not to promote Arosemena's exact meta-rules, I endorse the idea of deriving compulsory components to create stability in the balancing formula. In the next section of this paper I turn to propositions made by other legal theorists concerning the steps involved in decision-making under a balancing framework. The aim here is to further decipher which considerations are essential to reconciling rights conflicts.

D. Qualitative Factors for Resolving Rights Disputes

From the evidence gathered thus far, it appears we have reached an impasse. Balancing in the traditional sense offers all the required flexibility for a system of rights, but lacks structure and so undermines the rule of law. What is needed is to identify structured principles to be used in a qualitative balancing formula. Alcardo Zanghellini in his paper "Raz on Rights: Human Rights, Fundamental Rights, Balancing" identifies three such qualitative considerations that could be used when reconciling conflicts between rights.

The first is the idea of abstract weight.¹¹⁷ According to Klatt and Meister (2012a, 690) abstract weight is, "the weight that a principle possesses relative to other principles, but independently of the circumstances of any concrete case."¹¹⁸ It is proposed that an evaluation of the abstract weight of a right is undertaken, before the absolute or concrete weight is determined. This means we first assess the importance of the right and its role in promoting human dignity, irrespective of the circumstance at hand. By doing this we allow for the intuitive value of rights to enter the balancing formula. For

¹¹⁶ Arosemena, above n 83, at 20-21.

¹¹⁷ Alcardo Zanghellini, *Raz on Rights: Human Rights, Fundamental Rights, and Balancing* (John Wiley & Sons Ltd, Oxford, 2017) at 35.

¹¹⁸ M. Klatt and M. Meister, "Proportionality—a Benefit to Human Rights? Remarks on the ICON Controversy." (2012) 10 *International Journal of Constitutional Law* 687; Zanghellini, above n 117 at 35.

example the fact that we would hold the right to be free from torture as more important than the right to social security.¹¹⁹ This is one way in which the proposed “hierarchy of rights” could play a role in the balancing formula, without generating a result on its own. Abstract weights are not absolute, nor determinate. Taking into account abstract weights does not guarantee that the more heavily weighted right will always trump countervailing rights and interests. Rather, it affords the right a “winning margin”, making it harder to justify infringements concerning that right.¹²⁰

A subsequent consideration that could contribute to the decision-making process is Möller’s Harm Principle. Möller maintains that rights conflicts can be resolved using the rationale that rights do not exist, where to action them results in harm to others.¹²¹ Möller defines harm as actions that intrude upon another’s autonomy. Autonomy is the very basis on which we derive rights. Therefore an interference with another’s autonomy amounts to a violation of another’s rights.¹²² This essentially leads us to a cost-benefit consideration, in which the benefit accrued from exercising the right is weighed against the harm caused. When the harm principle is used in the strict sense, the inevitability of substantial harm could render the right null.

A third qualitative factor outlined by Zanghellini is Jeremy Waldron’s idea of “Internal Connections”. Waldron’s claim is that where an internal connection exists between the right and a countervailing interest, the right is to be granted superiority.¹²³ Waldron’s thesis can be understood as saying that rights have been established for specific purposes, so if the reason given for infringing a right directly undermines its purpose, the reason is not justified. An example is given of a kidnapper who is refusing to disclose to police any information concerning his victim’s location. In this scenario, the matter is urgent, as the victim has been deprived of food and water for several days. The question posed is whether the police are justified to resort to torture in order to extract the information they need. The

¹¹⁹ International Covenant on Civil and Political Rights 1966, art 7; International Covenant on Economic, Cultural and Social Rights 1966, art 9.

¹²⁰ M. Klatt and M. Meister, *The Constitutional Structure of Proportionality* (Oxford University Press, Oxford, 2012); Zanghellini, above n 117 at 35.

¹²¹ K. Möller, *The Global Model of Constitutional Rights* (Oxford University Press, Oxford, 2012); Zanghellini, above n 117 at 35.

¹²² Zanghellini, above n 117, at 35.

¹²³ Waldron, above n 6, at 516; Zanghellini, above n 117, at 36.

traditional balancing approach would likely render an infringement of the kidnapper's right to freedom from torture justified, in order to uphold the victim's right to life. However, it is likely that many would be uneasy with such an outcome. The concept of internal connections helps to shed light on why this is. Zanghellini explains this through the proposition that the likely reason for establishing a right to be free from torture, is that such violation of a person's bodily integrity should never be justified as a means to an end. From this stance, the very definition of the right to be free from torture implies that there can never be justified intrusions in the name of necessary means. There exists an internal connection between this right and the interests of the victim, hence Waldron would say, no justified limit can be imposed.¹²⁴

The human rights system is one of gradual development, hence a flexible adjudication approach is required to reconcile cases of conflicting rights. Balancing affords greater discretion to decision makers (than categorisation) and therefore allows for the context dependent value of rights to be properly analysed on a case-by-case basis. However balancing is not a perfect system, and in its most extreme form grants the judiciary unfettered discretion. The different methods of balancing analysed in this chapter, along with the qualitative factors for resolving rights disputes, will be drawn upon in the next section of this dissertation, with an aim to modify the system of balancing into a more structured approach.

¹²⁴ Waldron, above n 6, at 516-519; Zanghellini, above n 117, at 36.

Part VI: Proposed Method

How, then, should New Zealand courts approach the issue of two conflicting fundamental rights? In this section I will collate the various rights theories and judicial approaches evaluated thus far, in a bid to produce a proposed method for reconciling rights conflicts. Following this, the cases *Bullock* and *Brooker* will be used to illustrate how such a method would operate in practice.

The method I offer is two fold. The first step determines the definitional scope of the rights in question, in an attempt to limit the frequency of conflicts in the first place. Some conflicts will thus be reconciled at this first stage if the rights can be narrowed so to make the two actions compossible. If a conflict still persists then step two can be engaged. This takes the form of a structured balancing inquiry.¹²⁵ It draws upon the qualitative elements outlined in Part V of this dissertation and combines them to produce a more mechanical version of traditional ad hoc balancing. In this way, both certainty and flexibility are promoted and an equilibrium reached concerning discretion. In essence, my two-step method can be viewed as one that attempts to first eradicate the conflict all together and failing that, delivers the most just solution to the conflict.

A. Step 1: Defining Rights

An absolute theory of rights proposes that rights conflicts cannot occur if the scope of rights is simply restricted enough to be consistent with every other right.¹²⁶ This theory also upholds Dworkin's view that rights act as trumps and will always prevail over countervailing interests.¹²⁷ In order for this theory to truly resolve every type of rights conflict, the scope afforded to rights would be near negligible. Hence the solution it offers is less than ideal. Furthermore, the notion of "rights as trumps" would not fit well within New Zealand's constitutional context, as we treat rights as subordinate legislation (through the section 5 limitation clause),¹²⁸ or at the most on

¹²⁵ Sottiaux and van der Schyff, above n 82, at 143.

¹²⁶ Alexander Green, "An Absolute Theory of Convention Rights: Why the ECHR Gives Rise to Legal Rights That Cannot Conflict with Each Other" (2010) 16 UCL 75 at 76;

¹²⁷ Green, above n 126; Tsakyrakis, above n 101, at 489.

¹²⁸ New Zealand Bill of Rights Act 1990, s 5.

par with all other law. However this theory of absolute rights does prompt an interesting point regarding how rights can be defined and importantly, how this interpretive choice can directly affect the regularity of rights conflicts.

In “Part II: The New Zealand Context” the different approaches available for defining the scope of rights were discussed. Such definitions operate on a spectrum, with a very broad reading encompassing any action feasibly thought to be included by the right and a narrow approach vastly constraining the reach of the right. It is clear that the more narrowly rights are defined, the less rights conflicts will occur, as there will be less overlap between the liberties they protect. However, there would be danger in restricting the scope of rights too much, for fear that genuine claims might fall outside the realm dictated by the law. Another important consideration is the diluted power afforded to rights using each approach. If rights are defined broadly, they therefore offer protection to a wider range of situations and actions. However, this also means conflicts are more likely to persist and limitations frequently placed on the countervailing rights in order to reconcile the competing claims. When the adjudicators opt to restrict rights in this way, perhaps by balancing them against opposing interests, the very value of the rights decrease. In contrast to this, while a narrow reading would limit the protection granted by rights to more specific sets of circumstances, when these rights were able to be invoked they would carry greater weight. This is because courts could not so easily make inroads into them. In this way it could be argued that a more restrictive interpretation of the scope of rights actually increases their protective power. I therefore argue that rights should be defined far more narrowly than the all-encompassing, broad approach, although not so narrowly as to render them useless to vulnerable individuals.

One way that we might seek to do this mechanically is through use of Möller’s harm principle.¹²⁹ This would essentially mean that an action would not be protected by a fundamental right if to implement it in the way proposed would cause significant harm to another. When defining the scope of a right we would do so in a way which excluded such an action. This is different to balancing because we would not be weighing up competing rights and interests against each other, but rather defining

¹²⁹ Möller, above n 121, at 143; Zanghellini, above n 117.

rights narrowly so that only one action had any legal support. A classic example of this is the exclusion of hate speech from the protective umbrella cast by the right to freedom of expression.

This definitional approach will also help to promote certainty in the law, through the use of established authority. For every time an adjudicatory body is confronted with a conflict of rights they will define the scope of the rights in question and crucially, any exceptions that do not warrant rights protections. For example, if a court was to rule that slanderous hate speech was not encompassed by the right to freedom of expression, then every similar subsequent claim could also be reconciled on these grounds. The Euthanasia debate could also be addressed in this way, by the court ruling that the right to life does not extend to the act of ending one's own life.¹³⁰ So while it is perhaps impractical to legislate for the scope of rights and specifically actions that should be excluded from their realm. A judicial stance that upholds a narrow interpretation to rights, would gradually develop precedent to help reconcile fundamental rights conflicts at this initial stage. Therefore the reach of rights would become more clearly defined and rights law more transparent, accessible and predictable.

By narrowing the definitional scope of rights, many conflicts could be reconciled at this first stage. This is because one of the rights claims would cease to have any legal backing. However, where restricted definitions still give rise to two validly protected liberties, the second step of my inquiry process will need to be engaged.

B. Step 2: Structured Balancing

If a conflict cannot be avoided using the definitional technique described in step one, then the desired outcome should be that which infringes least upon the rights in question. The protections afforded to claimants through these fundamental rights should be optimised. This is likely to be best achieved through a compromising system. Due to the moral underpinnings and ethical nature of rights, I believe it is inevitable that non-rights considerations should enter into the adjudication process.

¹³⁰ Arosemena, above n 83, at 24.

For this reason I favour a balancing approach, despite the flaws outlined earlier. A balancing system allows for the context dependent value of rights to be assessed, along with any other interests warranting consideration. While other areas of law may require a much more mechanical adjudication process, the unique philosophy of fundamental rights demands a more flexible approach in order for their purpose to be achieved and human dignity upheld.

The idea that rights can be compared through a common metric and are commensurable is one central issue posed by a system of balancing.¹³¹ I aim to combat this by not using balancing in the sense of directly weighing one right against another, but rather as a method of reasoning that measures the costs against the benefits of a certain outcome. In this way, it is not argued that a freedom from discrimination and freedom of expression can be placed on metaphorical scales in order to determine a hypothetical tilt in favour of one or the other. Rather the moral benefits and costs of upholding one right against the other will be weighed, with the chosen outcome being one that maximises the fundamental purpose(s) of the rights in question be it autonomy, liberty, dignity, social utility or other. Such a model is similar to that put forward by Kai Möller's system of "balancing as reasoning".¹³²

As we have seen, the other principal concern raised by critics of balancing is the unfettered discretion it affords decision-makers, which then leads to uncertainty in the law and arbitrary outcomes. The form of balancing I propose for the second step in my inquiry is that of structured balancing,¹³³ also known as a subset of definitional balancing. Here the aim is to avoid preferential treatment and bias by virtue of status and to limit subjective influence by imposing a judicial structure that dictates how the balancing process ought to be carried out. Clearly defining which considerations are relevant to the balancing inquiry will limit discretion, while still providing a method flexible enough to account for a variety of circumstances. It is not argued that this is a perfect solution, but rather that it exists at the most rights-optimising point on the spectrum, between completely ad hoc balancing and categorisation. This second stage of the inquiry aims to promote certainty and transparency in a system of rights, while

¹³¹ Smet and Brems, above n 103, at 45.

¹³² Möller, above n 121; Smet and Brems, above n 103.

¹³³ Smet and Brems, above n 103; Sottiaux and van der Schyff, above n 82, at 143.

simultaneously allowing for changing contexts, rights and social conditions. Such a system will become more effective with the development of authority concerning cases of commonly occurring rights conflicts.

Stefan Sottiaux and Gerhard van der Schyff define structured balancing as modifying the “completely open-ended democratic necessity test into a more or less fixed set of parameters to be applied in all comparable subsequent cases.”¹³⁴ Hence, the balancing process becomes structured by specifying which factors and interests must be taken into account when reconciling a rights conflict. My aim is not to provide an exhaustive list or a complete framework that would generate the best structure for such a balancing exercise. I will, however, survey which factors I deem to be highly influential and how they could be incorporated as parameters for such an approach.

The first factor that I propose is evaluated in the structured balancing exercise is the inherent rank of a right. As was touched on in Chapter IV of this paper, a hierarchy of rights alone will never be a sufficient nor just way of resolving rights conflict on its own. However, as was demonstrated, there are both legal and empirical sources which indicate that some rights have enhanced status. This gives evidential backing to the idea that intuitively we recognise the right to life as more valuable than a right to social security. I do not suggest that rights be ranked in a complete hierarchy, as this would be impractical. Rather, I propose we recognise that rights have an abstract weight,¹³⁵ irrespective of the case specific circumstances. It is these ranks or abstract weights that should be taken into account when engaging in the cost benefit analysis and reconciling conflicts.

It is also crucial to consider the relative weights of the rights in conflict. Unlike their abstract weights, relative weights take into account the specific circumstances of the case at hand. Here concerns such as whether the core of the right or simply its periphery are engaged, are evaluated. This factor can either add to, or take from, the strength of a rights claim depending on how integral the proposed action is to upholding the right. For example, those actions encompassed by the core of a right will have the most weighting, while those at the periphery will have less. The ECHR

¹³⁴ Sottiaux and van der Schyff, above n 82, at 136.

¹³⁵ Arosemena, above n 83, at 19.

has deemed periphery actions concerning rights to include commercial speech under freedom of expression,¹³⁶ tax surcharges under the right to a fair trial,¹³⁷ and obstruction of traffic under freedom of assembly.¹³⁸ Additionally, the strength of the rights claim given the factual situation is assessed, including the conduct of the parties involved. The elements that make up the relative weight of a right can be likened to those invoked by the s 5 limitations clause in the NZBORA, hence we already have legislative approval in New Zealand for including such considerations in our decision making process.

Though it was touched on in step one, Möller's harm principle¹³⁹ can again be invoked at this second stage in the reconciliation process. This is because if allowing one claimant to action their right in the way they propose would cause significant harm to another, the validity of their claim may be weakened. This would allow courts to distinguish merit-worthy cases from those simply seeking to exercise their liberties in an extreme form and in bad faith. Importantly, it would set standards for rights such as freedom of expression and in doing so actually strengthen the protection offered by rights when validly invoked. Judith Thomson also discusses the use of the harm principle with respect to rights. She maintains that:

The worse the claim infringer would make things for the claim holder by infringing the claim, the larger the required increment of good... the more stringent the claim, the larger the required increment of good.¹⁴⁰

Hence, the idea of harm is key to the trade-off process. If harm is to be caused by the exercise of the right, the good generated as a result must be significant.

Fourthly, Jeremy Waldron's principle of internal connections should also form an influential component in this methodology.¹⁴¹ The idea of internal connections limits the valid reasons that can be invoked to justify rights infringements. Waldron offers

¹³⁶ *Asbby Donald and Others v France* [2013] ECHR 28 at [39]; Smet and Brems, above n 103.

¹³⁷ *Jussila v Finland* [2006] ECHR 994 at [104]; Smet and Brems, above n 103.

¹³⁸ *Kudrevicius and Others v Lithuania* [2015] ECHR 906 at [97]; Smet and Brems, above n 103.

¹³⁹ Möller, above n 121, at 143; Zanghellini, above n 117.

¹⁴⁰ Judith Jarvis Thomson, *The Realm of Rights* (Harvard University Press, US, 1990) at 158; Eugene Rice, *Resolving Human Rights Conflicts: Evaluating Judith Jarvis Thomson's High-Threshold Thesis* (Kluwer Academic Publishers, the Netherlands, 2004) at 205.

¹⁴¹ Waldron, above n 6, at 516; Zanghellini, above n 117.

the example of one group's exercise of free speech having the effect of preventing a second group from speaking freely. Waldron states that when such a conflict occurs the right of the first group cannot be justified due to the infringement of the second, "to count as a genuine exercise of free speech, a person's contribution must be related to that of her opponent in a way that makes room for them both".¹⁴² From this we reach the result that a rights claim should not be upheld if to do so could cause detriment to the very purpose that right is seeking to uphold.

One factor commonly engaged by courts to reconcile rights conflicts is that of aggregate utility, stemming from a utilitarian model of rights adjudication. Such an approach suggests the sheer number of individuals affected by the decision to uphold or limit a right is relevant to the inquiry. From a common sense view this seems cogent, as it is a direct measure of the social utility or cost generated by a decision. However, aggregate utility does not sit well with the nature and purpose of fundamental rights. The very reason rights were established and codified was to give individuals power to exercise their autonomy against more powerful majorities, namely the state.¹⁴³ Rights promote human dignity and are not contingent upon status. It therefore seems unfounded to afford one group's claim preferential treatment for the sole reason that they contain a greater number. Perhaps if we do wish the number of people involved to bear on our decision this could be incorporated in the relative weights principle, as opposed to giving such a concern increased influential power as a standalone consideration.

Finally, it should be noted that my proposed "structured balancing" formula is one that seeks to optimise the protection of both rights claims and where possible, reach a compromise between the two. The ideal solution will be one which best allows for the enjoyment of each right simultaneously. By implementing compulsory considerations to guide the balancing process, increased certainty and restrained discretion can be realised in an otherwise malleable process.

¹⁴² Waldron, above n 6, at 518.

¹⁴³ Cali, above n 88.

C. Application to Cases

In this section I will use the rights conflicts presented in *Bullock* and *Brooker* to illustrate how my two-step method could be implemented in practice.

Recall that the two countervailing rights in *Bullock* were Bullock's right to freedom from discrimination based on sex¹⁴⁴ and the right of the graduates to enjoy their own culture.¹⁴⁵ Both of these rights, prima facie, appear to meet the definitional threshold test in step one. Even on a narrow reading, the right to freedom from discrimination based on sex clearly encompasses derogatory treatment of females, compared to their male counterparts. Here Bullock was expected to sit at the back of the audience and not permitted to talk. Hence, there is a clear rights infringement under the definitional approach in step one. Additionally, the right to practice one's traditions and carry out customary ceremonies is more than likely to be encompassed by the right to enjoy one's culture, even on a strict reading. So the first stage in our analysis would render both claimants to have valid rights actions. Therefore we need to proceed to step two in order to achieve reconciliation.

As outlined above, the second limb of the test proposed is that of structured balancing. First, the abstract weights of the rights need to be considered. Freedom from discrimination arguably has a more fundamental role in upholding human dignity, than the right to enjoy one's culture. So without yet applying the facts of the case, Bullock's claim might be afforded initial preference based on its inherit rank within a system of rights. However, we must then consider the relative weight of the rights in question. Bullock was a person in a position of authority. She had a responsibility as a probation officer to put the needs of the inmates above her own and assist in their rehabilitation. The relationship between the two parties in this case bears upon the relative weight of these two rights. This is because it is arguably more important that the inmates who had achieved success in their course were celebrated in an environment that they could truly connect with, than it was for Bullock to sit where she liked and make a speech. Ultimately the purpose of this ceremony was

¹⁴⁴ Human Rights Act 1993, s 21(1)(a); New Zealand Bill of Rights Act 1990, s 19.

¹⁴⁵ New Zealand Bill of Rights Act 1990, s 20; Human Rights Act 1993, ss 21(f),(g); *Bullock v Department of Corrections*, above n 12.

rehabilitation and as a probation officer Bullock had a duty to respect this. Hence in this case the relative weight of the right to enjoy one's own culture is greater than its abstract weight, with the opposite being true for the right to freedom from discrimination. The harm principle can then also be engaged in the analysis, as allowing the ceremony to proceed in the traditional tikanga way restricted Bullock's autonomy by virtue of her status as a woman. This is clearly no meek infringement. In contrast, to have the cultural customs of Maori dictated and modified to serve the needs of one woman would also bring about significant harm and offense. Where the harm principle is concerned it seems that the harm caused to one probation officer could be justified through the positive, rehabilitative effect afforded to the group of Maori and Pacific graduates. Bullock's conduct, both at and subsequent to the graduation ceremony, also bears upon the weight of her claim. Her refusal to move from a seat reserved for manuhiri, illustrates her lack of respect for Maori custom and disregard of the graduates' right to practice their culture. Unfortunately, as these two rights cannot be reconciled in a compromising way that affords protection to both, one must be prioritised. Ultimately, this two-stage method leads to the conclusion that the graduates' right to enjoy their own culture, in this instance, outweighs Bullock's right to freedom from discrimination based on sex.

I will now turn to the case of *Brooker*. For simplicity's sake and in order to illustrate my proposed rights reconciliation method, I will not address the legal implications of this case concerning the Summary Offences Act 1981. Rather, I will proceed with the scenario of Brooker's right to freedom of expression conflicting with the Police officer's right to privacy. Clearly the desire for peaceful enjoyment of one's own home is encompassed by the right to privacy. Hence the Police officer would have a valid claim and meet the threshold in step one. One could argue Brooker's expression was of a malicious form and so by invoking Möller's harm principle it could be said to fall outside the realm of freedom of expression, on a strict interpretive stance. However the very purpose of the right to freedom of expression is to protect individuals in asserting their views, even if they are unpopular. In the most obvious cases the right extends to protests by minorities against larger more powerful bodies or governments. It follows that such protests are likely to be intrusive in order to generate a response. There is therefore no valid reason to limit the realm of freedom of expression in this case, on the grounds that the officer was troubled by Brooker's

actions. Both parties therefore have actionable rights claims, even after invoking narrow definitions of these rights.

Structured balancing can then be applied to reconcile this conflict. On an abstract reading of the two rights neither intuitively outweighs the other. However, when the relative value of each right is considered a better distinction can be noted. There is nothing that detracts from the weight of the officer's claim to privacy, except perhaps public protesting being a likely hazard given her occupation. Comparatively, the way in which Brooker expressed himself could provide sufficient grounds to weaken his rights claim. Brooker was aware that the officer had just finished her night shift and despite this chose to stage his protest at nine in the morning. He also had to be asked to vacate the premises and following this continued to sing and carry on just outside the property.¹⁴⁶ When we take into account Möller's harm principle it can be viewed that upholding Brooker's right to protest in such a manner results in clear detriment to the officer's wellbeing, while upholding the officer's right to privacy only restricts Brooker's right to express himself in a very selective way. Note that neither Waldron's internal connections thesis, nor an argument concerning aggregate utility, is relevant here. The aim of my structured balancing method is to optimise the two rights and reach a compromise that affords the utmost protection to both. Here the ideal solution would allow Brooker to protest and implement his right to express himself in a less intrusive way, so as to also uphold the officer's right to privacy. However on the facts of the case, Brooker's motive, conduct and timing tilt the balance in favour of the officer. By a slim margin my approach would hold that the officer's claim should prevail. If Brooker's protest had been more neighbourhood friendly, the relative weights of these rights and therefore the outcome, may be seen to reverse.

¹⁴⁶ *Brooker v Police*, above n 20.

Part VI: Conclusion

The purpose of this paper was to evaluate conflicts of fundamental rights and to propose a reconciliation system to be administered by the New Zealand courts.

Part I gave an overview as to the concepts and origins of human rights, particularly those enshrined in the International Bill of Rights. “Rights in conflict” are defined as a situation in which the primary duties stemming from each right are not mutually compossible, hence a choice or compromise has to be made between the two.

Part II then looked at how this choice or compromise has been conducted in New Zealand with reference to recent case law,¹⁴⁷ focussing on the cases *Bullock* and *Brooker*. A conclusion was drawn that New Zealand courts currently have no agreed interpretive stance concerning fundamental rights, nor a succinct procedure for addressing competing rights claims.

Part III then analysed the adjudicatory approaches of the European Court of Human Rights and the European Court of Justice, considering the balancing regimes adopted by these two judicial bodies, with special regard paid to the “fair balance principle” of the ECHR. The Ontario Human Rights Commission’s Policy for Competing Human Rights was also examined to outline the key principles underlying Canada’s rights jurisprudence.

Whether or not a hierarchy of rights is a practical and desirable reconciliation method was discussed in Part IV. Here, the UN’s stance that all rights are interrelated and are to be afforded equal status was weighed up against intuitive, legal and empirical evidence to the contrary. This paper concluded that a sophisticated rights ranking regime would not provide the best platform for reconciling conflicts on its own.

Alternative methods for resolving the issue of competing rights were then compared in Part V. It was concluded that although categorisation best upholds certainty in the law and restrains discretion, it is not flexible enough to justly deal with the changing

¹⁴⁷ *Bullock v Department of Corrections*, above n 12; *Brooker v Police*, above n 20.

landscape of rights jurisprudence. Instead, balancing provides a much more malleable approach to the context-dependent nature of rights. The system of balancing was then critiqued and its various forms explored, along with qualitative factors for resolving rights disputes.

Part IV then outlined the method proposed by this paper for reconciling conflicting rights. This essentially takes the form of a two-step inquiry. First, the rights in question are defined narrowly so as to limit the chance of conflict. The aim here is for only one legally valid rights claim to emerge, hence resolving the conflict through a simple interpretational approach. If both claims are held to have merit, step two can then be engaged. This second limb takes the form of a structured balancing inquiry, in which discretion is limited through the implementation of compulsory considerations. This paper does not seek to fully articulate which factors should be considered in the process, however a few notable elements are proposed. These include the abstract weight of the rights, the relative weight of the rights, Möller's harm principle,¹⁴⁸ and Jeremy Waldron's principle of internal connections.¹⁴⁹ This paper's proposed two-step system aims to optimise the rights in conflict by reaching a compromise between the two. Flexibility is upheld, but not at the expense of unfettered discretion. At the same time this structured approach allows for greater transparency and predictability in the law, with certainty increasing over time due to established authority.

The legal realm of fundamental rights is unique. Its strong moral underpinnings and context-dependent nature mean more malleable and qualitative considerations are needed in order to reach just outcomes than that demanded by other, more mechanical areas of law. Hence, we need a system that appreciates the ever-developing scope of rights and allows for individual case considerations to enter into the decision-making process. Given New Zealand's unique constitutional rights framework, in which rights are not superior law, countervailing interests should be considered when reconciling conflicts. It is proposed that this paper's two-step approach draws the most just line in the sand between certainty and flexibility.

¹⁴⁸ Möller, above n 121, at 143; Zanghellini, above n 117.

¹⁴⁹ Waldron, above n 6, at 516; Zanghellini, above n 117.

BIBLIOGRAPHY

A. Cases

1. New Zealand

Brooker v Police [2007] 3 NZLR 91.

Bullock v Department of Corrections [2008] 5 NZELR 379.

Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington) [2000]
3 NZLR 570.

Ministry of Transport v Noort [1992] 3 NZLR 260.

R v B [1995] 2 NZLR 172.

R v Hansen [2007] 3 NZLR 1.

Re J (An Infant) [1996] 2 NZLR 134.

2. Europe

Asbby Donald and Others v France [2013] ECHR 28.

Boso v Italy ECHR 2002 VII.

Brogan and others v UK (1988) 11 EHRR 117.

Jussila v Finland [2006] ECHR 994.

Kudrevicius and Others v Lithuania [2015] ECHR 906.

*“Relating to Certain Aspects Of The Laws On The Use of Languages In Education In
Belgium” v Belgium* (1968) 1 EHRR 252.

Soering v UK (1989) 11 EHRR 439.

B. Legislation

1. New Zealand

Human Rights Act 1993.

New Zealand Bill of Rights Act 1990.

Privacy Act 1993.

Summary Offences Act 1981.

C. International Materials

1. Canada

Canadian Charter of Rights and Freedoms.

Ontario Human Rights Commission's Policy on Competing Human Rights.

2. Europe

Charter of Fundamental Rights of the European Union.

European Convention on Human Rights.

3. International Instruments

Charter of the United Nations 1945.

International Covenant on Civil and Political Rights 1966.

International Covenant on Economic, Social and Cultural Rights 1966.

Universal Declaration of Human Rights 1948.

UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993,
A/CONF.157/23.

D. Books and Chapters in Books

Aleardo Zanghellini, *Raz on Rights: Human Rights, Fundamental Rights, and Balancing* (John Wiley & Sons Ltd, Oxford, 2017).

David P Currie, *The Constitution of the Federal Republic of Germany* (University of Chicago Press, Chicago, 1994) at 181.

Dr Andrew S Butler and Dr Petra Butler, *Human Rights* (Lexis Nexis, Wellington, 2017).

Eugene Rice, *Normative Strategies for Resolving Human Rights Conflicts* (Marquette University, Wisconsin, 2002).

Eugene Rice, *Resolving Human Rights Conflicts: Evaluating Judith Jarvis Thomson's High-Threshold Thesis* (Kluwer Academic Publishers, the Netherlands, 2004) at 203–216.

Giorgio Bongiovanni and Gerald Postema Antonino Rotolo and Giovanni Sartor Chiara Valentini and Douglas Walton, *Handbook of Legal Reasoning and Argumentation* (Springer Nature B.V., The Netherlands, 2018) at 581- 612.

- Gustavo Arosemena, *Conflicts of rights in international human rights: A meta-rule analysis* (Cambridge University Press, Cambridge, 2013).
- Jeremy Waldron, *Rights in Conflict* (The University of Chicago Press, Chicago, 1989) at 503-519.
- John Rawls, *Political Liberalism* (Columbia University Press, US, 1993).
- Judith Jarvis Thomson, *The Realm of Rights* (Harvard University Press, US, 1990) at 122–202.
- K. Möller, *The Global Model of Constitutional Rights* (Oxford University Press, Oxford, 2012).
- M. Klatt and M. Meister, *The Constitutional Structure of Proportionality* (Oxford University Press, Oxford, 2012).
- Michael Freedon, *Rights* (Open University Press, 1991) at 99.
- Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press, Oxford, 2002).
- Stijn Smet and Eva Brems, *When Human Rights Clash at the European Court of Human Rights: Conflict or Harmony?* (Oxford University Press, Oxford, 2017).

E. Journal Articles

- Adina Preda, “Are There Any Conflicts of Rights?” (2015) 18 *Ethical Theory & Moral Practice* 677.
- Alastair Mowbray, “A Study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights” (2010) 10 *Human Rights Law Review* 289.
- Alexander Green, “An Absolute Theory of Convention Rights: Why the ECHR Gives Rise to Legal Rights That Cannot Conflict with Each Other”(2010) 16 *UCL* 75.
- Bart van der Sloot, “The Practical and Theoretical Problems with ‘Balancing’” (2016) 23 *Maastricht Journal of European and Comparative Law* 439.
- Basak Cali, “Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions” (2007) 29 *Human Rights Quarterly* 251.
- D. Dubois, H. Prade and S. Schockaert, “Rules and meta-rules in the framework of possibility theory and possibilistic logic” (2010) 18 *Scientia Iranica* 566.
- David Martinez-Zorrilla, “The Structure of Conflicts of Fundamental Legal Rights” (2011) 30 *Law and Philosophy* 729.

- Eugene Rice, "Solving Human Rights Conflicts by Dissolving Them: The Failure of the Dissolution Strategy" (2003) 29 *Social Theory and Practice* 539.
- F. M. Kamm, "CONFLICTS OF RIGHTS: Typology, Methodology, and Nonconsequentialism" (2001) 7 *CUP* 239.
- J. L. Mackie, "Rights, Utility, and Universalization" in R. G. Frey *Utility and Rights* (University of Minnesota Press, US, 1984) 88.
- J. Waldron, "Rights in Conflict" (1989) 99 *Ethics* 503.
- Jos Philips, "On Setting Priorities among Human Rights" (2013) 15 *Hum Rights Rev* 239.
- Ken Kress and J.D., "Therapeutic Jurisprudence and the Resolution of Value Conflicts: What We Can Realistically Expect, in Practice, from Theory" (1999) 17 *Behav. Sci. Law* 555.
- Kristen Hessler, "Resolving Interpretive Conflicts in International Human Rights Law" (2005) 13 *The Journal of Political Philosophy* 29.
- M. Klatt and M. Meister, "Proportionality—a Benefit to Human Rights? Remarks on the ICON Controversy." (2012) 10 *International Journal of Constitutional Law* 687.
- Mark D. Rosen, "When Are Constitutional Rights Non-Absolute? McCutcheon, Conflicts, and the Sufficiency Question" (2015) 56 *Wm. & Mary L. Rev.* 1537.
- N. Petersen, "How to compare the length of lines to the weight of stones: Balancing and the resolution of value conflicts in constitutional law" (2013) 8 *German Law Journal* 1387.
- Phillip Montague, "When Rights Conflict" (2001) 7 *CUP* 1352.
- Robert Alexy, "Balancing, constitutional review, and representation" (2005) 3 *International Journal of Constitutional Law* 572.
- S.A. de Vries, "Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice" (2013) 9 *ULR* 169.
- Stavros Tsakyrakis, "Proportionality: An Assault on Human Rights?" (2009) 7 *International Journal of Constitutional Law* 468.
- Stefan Sottiaux and Gerhard van der Schyff, "Methods of International Human Rights Adjudication: Towards a More Structured Decision-Making Process for the European Court of Human Rights" (2008) 31 *HIC Law Review* 115.

- Steven Greer, "'Balancing" and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate" (2004) 63 *The Cambridge Law Journal* 412.
- Stijn Smet, "On the Existence and Nature of Conflicts between Human Rights at the European Court of Human Rights" (2017) 17 *Human Rights Law Review* 499.
- T. A. Aleinikoff, "Constitutional law in the age of balancing" (1987) 96 *The Yale Law Journal* 943.
- Vlad F. Perju, "Proportionality and Freedom - An Essay on Method in Constitutional Law" (2012) 1 *Journal of Global Constitutionalism* 334.
- Xiaobing Xu and George Wilson, "On Conflict of Human Rights" (2006) 5 *UNH Law Review* 31.

F. Internet Resources

- Andrew Geddis "Why does Te Papa hate women so much (and other outraged thoughts)" (12 October 2010) Pundit <<https://www.pundit.co.nz/content/why-does-te-papa-hate-women-so-much-and-other-outraged-thoughts>>.
- Equality and Human Rights Commission "What is the European Convention on Human Rights?" (19 April 2017) Equality and Human Rights Commission <www.equalityhumanrights.com/en/what-european-convention-human-rights>.
- European Union "Court of Justice of the European Union" (2018) Europa.eu <europa.eu/european-union/about-eu/institutions-bodies/court-justice_en>.
- Ministry of Justice "International Covenant on Civil & Political Rights" (11 May 2018) Justice.govt.nz <<https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/human-rights/international-human-rights/international-covenant-on-civil-and-political-rights/>>.
- Ministry of Justice "International Covenant on Economic, Social and Cultural Rights" (11 May 2018) Justice.govt.nz <<https://www.justice.govt.nz/justice-sector-policy/constitutional-issues-and-human-rights/human-rights/international-human-rights/international-covenant-on-economic-social-and-cultural-rights/>>.
- Ontario Human Rights Commission "Policy on Competing Human Rights" (2018) Ontario Human Rights Commission <<http://www.ohrc.on.ca/en/policy-competing-human-rights>>.

The Levin Institute “Three Generations of Human Rights” (2017) Globalization 101
<www.globalization101.org/three-generations-of-rights/>.

UNFPA “Human Rights Principles” (2005) United Nations Population Fund
<www.unfpa.org/resources/human-rights-principles>.

United Nations “Human Rights” (2018) United Nations
<www.un.org/en/sections/issues-depth/human-rights/>.