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The Idea of Human Rights Between Value Pluralism and Conceptual Vagueness

Gunnar Beck*

I. Introduction

Human or fundamental rights, two terms that will henceforth be used interchangeably,¹ enjoy a unique and privileged legal status in Western liberal democracies. Unlike ordinary legislation which is governed by the majoritarian principle, human rights alone are not subject to the will of the majority.² While ordinary legislation can be adopted only by representative institutions accountable to the electorate, rights are handed down without a vote and enforced by unrepresentative and unaccountable bodies. The courts are composed of judges who, unlike politicians, cannot be removed from office or otherwise held accountable; they are protected by the principle of judicial immunity, even in cases of gross negligence or bias. Liberal democracies, in other words, rest on two pillars: first, the principle of representative democracy which requires majority consent for ordinary legislation and policy-making, which is qualified by a second principle, that of fundamental rights, which acts as a side-constraint on the majoritarian principle. Human rights thus enjoy a privileged legal status that allows them to override the majoritarian principle. It is in this sense that Ronald Dworkin has described rights as trumps in liberal democracies. These facts are not new but they cannot be overemphasised in view of the conceptual and normative problems involved in the justification of rights.

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1. They will also, on other occasions, simply be referred to as "rights" as there are no other rights in issue in this discussion. The reason is purely stylistic, to avoid unnecessary repetition of the adjectival attribute.

2. In Germany, for example, where most constitutional provisions can be amended by a special procedure, the first nineteen articles of the Basic Law has the status of *Ewigkeitsklauseln* or "perpetuity clauses," which cannot be changed for as long as the present constitution is in place.

In short, arguments in favour of assigning a special legal status to human rights and entrusting their administration to unaccountable decision-making bodies, i.e., the courts, generally run roughly as follows. Amongst the wider range of human goods and values human rights can be justified as meriting special protection and attention. The grounds for justifying the special legal status assigned to rights are regarded to be of such overriding importance that they are exempted from the democratic process, which otherwise is recognised as the appropriate mechanism for resolving conflicts between competing interests and values and placed under the exclusive jurisdiction of the courts.³ This assumes, *inter alia*, that human rights meet the criteria of legal certainty and justiciability; otherwise, the courts would be free to impose their own values on their interpretation. A justification of human rights and their privileged legal status in liberal democracies thus must have both a normative and conceptual certainty dimension. Both aspects are inter-related. A normative justification is needed for two reasons: first, to establish and justify the priority of human rights over other values, and, second, to allow the judiciary to balance conflicting rights according to underlying ethical principles; otherwise the trade-off would simply be morally arbitrary. The need for conceptual certainty is closely related to the second reason and embraces the need for certainty of the moral criteria for adjudication between rights. Unless there can be a shared understanding of the meaning of both the term 'right' as well as of the meaning of individual rights and the central concepts they contain and those justifying them, it will remain contentious why the courts should be the appropriate forum for making judgments between those basic values and interests which human rights are designed to protect. In summary, without a normative justification it would remain unclear why human rights should be granted special legal protection, and in the absence of conceptual and legal certainty judges would simply be making policy and law based on value judgments without adequate political legitimacy.

It is the central purpose of this paper to show that contemporary human rights systems and the theoretical conceptions underlying them ultimately fail on both counts. As regards the justification for the privileged legal status afforded to human rights as opposed to other values, it is argued that contemporary conceptions and systems of human rights protection lack an adequate normative basis or even rational

3. Human rights are also often conceived and justified as second order preferences designed to protect the settled preferences of the majority against its own temporary desires. They hold the majority in check and to protect its best interests against its fleeting opinions. The basic justificatory problem remains: Which interests, values, and preferences are of such basic and lasting importance so as to justify exemption from the normal channels of democratic politics and enforcement through the courts?

criterion that could justify or even meaningfully communicate the priority assigned to certain values which are raised to the status of legally enforceable human rights, over other values that are not. Such systems and conceptions, it is argued, generally rest—expressly or impliedly—on the notion of value pluralism, which denies that there is a clear hierarchy of human values and which assumes instead that there is a plurality, though not an infinite number of, values which may not only conflict but also be incommensurable. Value pluralism denies the possibility of providing an objective, rational justification for choosing between certain ultimate human goods and values. Applied to the sphere of rights, this means, first, that where human rights are justified with reference to certain underlying ultimate values in the sense that they either are identified with certain values or represent conditions for their realisation, there can be no rational basis for the priority accorded to these values as opposed to other ultimate values which have not been given the same legal status of human rights over other human goods. It means, second, that where such rights derived from ultimate values conflict, there is no rational basis for balancing between their conflicting demands. It follows that the privileged status granted to human rights over rival other values is ultimately morally arbitrary; it is political.

The same is true of judicial decisions involving choices delimiting the scope of human rights and balancing their divergent requirements where such rights may conflict, which reflects the need for but actual absence of conceptual certainty in human rights and the very concept of human rights. The proper role of the courts in human rights adjudication consists in the application of human rights, whereas the basic value judgments involved in laying down and defining the human rights is the prerogative of the legislature, constitutional conventions or whichever other body may be deemed to possess the requisite legitimacy for laying down the highest norms of national or international law. It is argued that this distinction between the making and application of human rights, which is analogous to the distinction between making and interpreting law, is untenable for at least four reasons. First, the idea of value pluralism entails that there may be conflicts between rights to which there is no objective, rational solution and which can only be resolved by political judgments. Second, the concept of human rights as a priority subset of the wider range of human goods is essentially contestable in the sense that its meaning cannot be settled by rational-logical argument. This claim is different from the first reason that refers to the possibility of providing a normative justification for particular human rights and for trade-offs between conflicting rights. It asserts that there is no right answer to the question of what precisely is meant by the term human rights, whether rights are negative or positive, waivable or inalienable, or

vertical or horizontal in their application. Third, many concepts elevated to rights status or featuring in their definition, underlying them, or defining human rights limitations or qualifications are essentially contestable, with the result that there is no demonstrably correct interpretation of them which is better than others. Fourth, the principles of human rights adjudication, like the concept of human rights themselves, are themselves essentially contestable. Legal principles serve to provide guidance to judges in so-called hard cases. The absence of conceptually clear and precise principles of human rights adjudication, however, means that they amplify rather than reduce the scope for judicial discretion and value judgment. Value pluralism and essential contestability mean not only that judicial discretion is inevitable but also that in human rights adjudication it inevitably and habitually involves contestable value judgments. Conceptual vagueness and contestability also mean that rights are not obviously more justiciable than other human values. It is unclear in what sense, if any, judicial decisions involving human rights differ from political decisions involving trade-offs between conflicting goods.

Case examples designed in particular to demonstrate in particular the inadequate moral or rational basis for many judicial distinctions in the exegesis of human are drawn largely from the European Convention of Human Rights (“ECHR”) and domestic British human rights cases. The preponderance of some jurisdictions simply reflects the author’s lack of relative lack of familiarity with other jurisdictions. It does not follow that the claims of this paper should therefore be confined to the jurisdictions discussed. On the contrary, aspects of those jurisdictions that are sources of uncertainty not applicable across human rights jurisdictions and thus liable to distract from the discussion of the uncertainty arising specifically from value pluralism and essential contestability, such as the margin of appreciation under the ECHR, have been deliberately excluded from the discussion so as not to restrict the scope of its central claims unnecessarily.⁴

4. It might be argued that the above claims are presented as more radical and significant than they really are: rights, in common with other values, after the collapse of religious consensus and a loss of faith in the possibility of a purely rational foundation of ethics, clearly rest on certain normative assumptions; pluralism, as one such set of assumptions, implies both that values might conflict and that there might not be optimal answers to balancing conflicting values. This might apply to human rights, but, if so, it also applies to other values. It might also be argued that most legal concepts are essentially contested concepts, and human rights are not more so than other legal concepts such as intention, negligence, responsibility, causality, or trusts. Finally, one might add that most concepts, while having a core meaning, are contestable at the edges, and that there is nothing exceptional about rights in this respect. The answer to these objections is that, while they are valid in a limited sense, rights require a special justification simply because, compared to other legal concepts, rights are given an

II. Value Pluralism and the Normative Contestability of Rights

Modern conceptions of human rights have their origin in the idea of natural rights. Central to the doctrine of natural rights is a combination of a basic conception of equality with the idea of value monism: human nature is essentially uniform; all human beings are held to share the same ends that do not only determine moral rights and duties, but from which some laws too derive their objectively valid authority. Natural rights, on this view, essentially connote the enabling conditions for the attainment of the moral ends shared by all human beings. For natural rights theorists these rights are objective in as much as the ultimate human end is objectively true and not in question. Since the human legal order must not be contrary to men's final ends, a law which is contrary to natural right is no law. It may be enforced, but it lacks legitimacy. Natural rights theories thus imply both moral objectivism and value monism, that is, the beliefs that moral values represent objective truths that do not conflict, but are harmonious or at least hierarchically ordered. These characteristics define natural rights theories in both their Christian and secular variants.

For Aquinas, natural law linked eternal law with human law and essentially ensured that positive law neither violated the divine order nor conflicted with man's purpose within it. Hobbes, who was a determinist and psychological egoist, grounded the roots of human nature and natural rights in psychological empiricism. He argued that men have a natural right and duty to do whatever is most likely to further their own self-preservation. In civil society, natural rights survive in the right to rebel if the individual is threatened by the ruler. John Locke was another prominent modern Western philosopher who conceptualized rights as natural and inalienable; he derived his triad of the natural rights to life, liberty and property from a certain model of human nature as a possessive individual.⁵ Finally Kant, who rejected Hobbes' consequentialism and Locke's empiricism and is perhaps the purest secular natural law theorist, likewise grounded natural rights, above all the right to freedom of expression, in an ideal of a common human goal, the shared end of autonomy. In all these cases natural rights function as an objective and universal basis and minimum content of all positive law

elevated legal status. Even in Britain, Parliament cannot adopt legislation that would abridge or abolish rights in the same way it could simply abolish trusts established for avoiding inheritance tax. In relation to other values which face the same justificatory dilemmas as rights, the fact remains that, for the most part, these values are not generally justiciable, and, even when they are, they are so in a specific context and without the overriding status accorded to rights.

5. See generally CRAWFORD B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* (1962).

and derive their authority from a model of human nature and its ends, which are held equally objectively and universally true.

Modern conceptions of human rights share the equality and universality assumption of natural law theorists but, generally speaking, no longer rest on a monistic theory of human ends. This has created a "legitimation crisis" for human rights. On the one hand, human rights rest on a conception of human beings having certain universal rights regardless of legal jurisdiction and irrespective of whether these rights are recognised in positive law. While on the other hand, they lack a secure moral basis in a metaphysical theory of human nature and its purposes, which could sanction their authority. In its extreme form, the scepticism about both religion and reason that has undermined the belief in absolute truths leads to relativism. Relativism is ultimately incompatible with any belief in human rights as anything more than a diluted set of historically and culturally contingent dominant values in certain places at certain times. However, a more accurate description of the ethical position invoked or implied by most modern theories of human rights is that of value pluralism.

The idea of value pluralism as a tragic conflict between incommensurable values goes back at least to Max Weber, but it only became an established concept in philosophical ethics through the work of Isaiah Berlin. Central to Berlin's theory of value pluralism is his rejection of monism, the belief that all ethical questions have an answer and that these answers are both knowable and compatible with one another. Value pluralism, by contrast, is the idea that there is not one set of harmonious and coherent moral ends but several values which may be equally correct and fundamental, and yet in conflict with each other. In addition, value pluralism postulates that in many cases such incompatible values may be incommensurable, in the sense that there is no common measure, no "common currency" or master value that would allow comparison between values (such as the principle of utility). Value incommensurability connotes a breakdown or failure of transitivity. To say that two values are incommensurable is to say that they cannot be the subject of comparison. The mark of incommensurability among options or values shows itself when "If it possible for one of them to be improved without thereby becoming better than the other, and if there can be another option which is better than the one, but not better than the other, then the two original options are incommensurate."⁶

It follows that where incommensurability among values discloses itself, there is no general procedure for resolving value conflict. The resolution of such conflict would require the possibility of comparison

6. See JOHN GRAY, ISAIAH BERLIN 50 (1995).

and the existence of a common currency of value into which all values could be translated according to fixed formula. In cases of conflict it could then be established, at least theoretically, that the loss of so many units of value X in return for a gain in so many units of Y would result in a net gain or loss of (overall) value compared to any of the alternative combinations of those two values. For Berlin, the incommensurability of values prevents precisely this translation of different values into one common denomination.

Berlin's value pluralism differs from skepticism, subjectivism, and relativism in that it is a variant of objective moral realism which treats values as well as the central idea of commensurability as true matters of moral knowledge.⁷ Epistemologically, it is based, as Berlin puts it, on "the world that we encounter in ordinary experience," in which "we are faced with choices between ends equally ultimate, and claims equally absolute, the reali[z]ation of some of which must inevitably involve the sacrifice of others."⁸ Yet, although ultimately rooted in deep moral intuitions, Berlin holds that the doctrine of pluralism reflects a necessary truth about the nature of human moral life and the values that are its ingredients. The idea of a perfect whole, the ultimate solution in which values are combined in a quasi-Pareto optimal way so that there would be no other combination of values that would create more value, is not only unattainable in practice, but also conceptually incoherent. Berlin's idea of value pluralism poses a threat to modern conceptions of human rights at two levels: first, at the philosophical level where the prioritization of any particular set of human values is still open to debate and requires justification, and, second, at the level of adjudication which concern human rights documents which enshrine lists of particular rights which have been prioritized as a result of political rather than philosophical choices and which also involve conflicts between pluralistic values. The remainder of this section will focus on the first issue, whilst section two will deal with the second. It will become clear that both are interlinked.

Berlin gives many examples of conflicting values. Liberty can conflict with equality or with public order; mercy with justice; love with impartiality and fairness; social and moral commitment with the disinterested pursuit of truth or beauty (indeed the latter two values, contrary to Keats, may themselves be incompatible); knowledge with happiness; spontaneity and free-spiritedness with dependability and responsibility. Distinguishing between virtue and goods, which Berlin

7. *Id.* at 46-47, 49.

8. ISAIAH BERLIN, *LIBERTY: INCORPORATING FOUR ESSAYS ON LIBERTY* 213 (Henry Hardy ed., Oxford Univ. Press 2d ed. 2002) (1969).

fails to, do, in the hope of reducing the number of fixed stars on the firmament of human values, or grant that not all the remaining values necessarily conflict, does not invalidate Berlin's central assertion. Any morality of complexity and development that is not out of step with basic human moral experience and psychology recognizes values, which are by nature not combinable. For example, the values of autonomous agency and unreflective decency which are conceptually or logically incoherent in the sense that a single person cannot at all times possess or exercise both.⁹ Within any developed morality, conflicts will arise between intrinsic values that do not only collide in practice, but which are inherently rivalrous as the conflict between them cannot be resolved by reference to any overarching standard.

Berlin, however, goes on to argue that each of these conflicting values is itself internally complex and pluralistic, containing conflicting elements. An example is the concept of liberty which, according to Berlin divides into both positive and negative liberty.¹⁰ Moreover, the concept of negative liberty itself, defined as the freedom to act independent of external restraints, contains rivalrous and incommensurable liberties. For example, the liberty of the press to probe into people's private lives may limit individuals' freedom to do what they like without fear of disapprobation or intrusion. The same is true of equality which can be construed in terms of the incompatible and incommensurable equalities of welfare and of resources,¹¹ or of those of income or of opportunity. Individual values are not harmonious wholes but within themselves constitute arenas of conflict and incommensurability.¹² Conflicts of values, thus, for Berlin are "an intrinsic, irremovable part of human life"; the idea of total human fulfillment is a chimera.¹³

In a pluralist world of the kind outlined the legal priority accorded

9. Gray, *supra* note 6, at 45.

10. Negative liberty, put simply, consists in the absence of external impediments to the agent's doing as he likes, while positive liberty requires rational self-realization according to the agent is free only if he does what is rational or what he ought to do. On the negative view, the agent is free if others do not prevent him from experimenting with drugs and becoming addicted. In such a state, however, the agent is not free in the positive sense. See ISAIAH BERLIN, *Two Concepts of Liberty*, in *THE PROPER STUDY OF MANKIND: AN ANTHOLOGY OF ESSAYS* 191 (Henry Hardy & Roger Hausheer eds. 1997) (describing classic exposition of distinction between negative and positive liberty).

11. See generally Ronald Dworkin, *What is Equality? Part II: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981); Ronald Dworkin, *What Is Equality? Part I: Equality of Welfare*, 10 PHIL. & PUB. AFF. 185 (1981).

12. Gray, *supra* note 6, at 43.

13. "These collisions of values are of the essence of what they are and what we are," *The Pursuit of the Ideal*, in *THE PROPER STUDY OF MANKIND*, *supra* note 10, at 11; a world in which such conflicts are resolved is not the world we know or understand.

to human rights can only be defended rationally if these rights relate to those fundamental pluralistic values between which there is no possibility of rational choice but which enjoy priority over other goods either on the grounds that the latter are merely instrumental or that they are inferior. Human rights therefore must either be rights to attain or secure pluralistic values or goods or rights to those conditions that allow for their attainment. The natural law philosophers all defended their rights either as legal expressions of the requirements allowing for the realization of human nature properly understood. This meant that natural rights were either equated with certain cardinal values or goods or defined in terms of the conditions that would allow individuals to live up to them. Yet, if human rights are justifiable in terms of either being preconditions for or equivalent to pluralistic values, then, from a pluralistic perspective, this also poses a fatal problem. For if there is no way of choosing between different fundamental values so that any choice between them entails tragic loss and no choice is necessarily rationally preferable, then the same must apply to instances of choice between the rights derived from them, whether they are defined in terms of the enabling conditions for these values or as practically identical with them. Obvious examples referring to Berlin's above list of conflicting values would be the following: equality, whether equated with equality of opportunity, welfare or income, would sanction economic or social rights, such as a right to a just wage independently of the market price, that would be just as incompatible with the rights implied by the pursuit of knowledge or artistic freedom as with those sanctioned by the market demands of efficiency or innovation. These rights each express some ultimate value itself or a fundamental corollary thereof; yet they are both incompatible and incommensurable, and their incommensurability makes it impossible to say how much of each right the best society would contain or would give most value to individual lives. If there is no way of choosing between or balancing between, then, for those reasons, there cannot be a rational basis for prioritizing one set of rights, for example the negative liberties of intellectual and economic freedom as the legal guarantees favoring scientific advancement, artistic creativity and/or economic efficiency and progress, over alternative economic rights favoring the goal of equality or the satisfaction of basic needs. Choosing the former favors one value and choosing the latter favors the other, but, since there is no rational way of establishing the priority of either underlying value, there is no rational basis for prioritizing one set of rights over another. Contrary to much wishful thinking, rights cannot be neutral, and there can be no higher-order rational or moral criteria in trade-offs between rights which express or are essential to the safeguarding or realization of rivalrous human ends.

In general terms, if fundamental values can be incompatible and incommensurable, so that there is no rational way of either choosing between them or balancing their conflicting demands, then the same will be true of rights. No set of rights derived from one value can, by appeal to reason alone, be accorded priority over alternative sets derived from other values if no such priority can be established in the relation between the underlying values themselves. Consequently, if rights conflict, as they often will, it is impossible to say by reference to a common standard of value when, for example, a restriction in certain liberties such as the freedom to provide private sector education or healthcare may be outweighed by correlative gains in equality resulting from prioritizing rights to universal public education and free healthcare. In short, if we take value pluralism seriously, then if values are plural, so are rights. And if no value always take priority over others, then neither can any right or set of rights.¹⁴ We are faced with tragic choices where the promotion of one value may diminish others, and where the recognition and enforcement of one right or set of rights will inevitably be an infraction of another. If such rights conflict, there is no method to determine the perfect balance between them and hence no way of prioritizing one over another, either generally or often even in particular conflictual situations.

A good illustration of the pluralistic dilemma of the justification of human rights is provided by the history of human rights theory itself and the rights favored by the ECHR. It is common for human rights to be divided into three generations of rights. The first generation are civil and political rights, second generation rights refer to social and economic rights and third generation rights are commonly understood to connote miscellaneous collective rights such as minority rights, environmental or other group rights.¹⁵ Focusing on the first two categories, there is an undeniable conflict between civil and political rights on the one hand and social and economic rights on the other, which in essence is an expression of the underlying tension between the pluralistic values of individual liberty and social justice or equality. The extent to which any bill of rights favors one or the other is based on a value judgment or choice for which there is no rational basis. To the extent it may include both first and second generation rights and seek to compromise between

14. Except if that right could be shown to be an essential part or a precondition for the achievement of all pluralistic values. Given the divergence between those values with a credible claim to being ultimate values, this possibility does not merit serious discussion.

15. See HENRY STEINER & PHILIP ALSTON, *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 136-320 (2000) (describing first two generations of rights).

them, any such compromise may likewise be incapable of rational justification. The reason lies in the lack of transitivity between pluralistic values which precludes their optimization.

International and national human rights charters generally protect first generation rights together, in many cases, with specific protection for the protection of minorities or asylum seekers. In addition, modern human rights instruments also often refer to social and economic rights, although usually in such vague terms so as to render these rights non-justiciable. The ECHR is a prime example of a classic human rights instrument confined largely to first generation civil and political rights. As in relation to most other national and international bills of rights, the first generation rights contained in the ECHR can be divided into several broad sub-categories: first, rights protecting the integrity of the person,¹⁶ second, rights of due process or legality,¹⁷ third, the freedoms of speech, conscience, and religion which are at once civil rights and also safeguard individual autonomy,¹⁸ and, finally, the right to respect for private and family life and the bizarre right to found a family.¹⁹ Social and economic rights are practically absent from the ECHR, for the right to non-discrimination does not contain a general right to substantive equality, but is confined to equal enjoyment of the other ECHR rights.²⁰ Even on this briefest of all analyses, it is clear that, except for the rights protected by ECHR Articles 2 to 4 protecting the integrity of the human person and the minimal conditions of unimpeded agency, the ECHR unequivocally favors civil and political rights over social and economic rights even to the point where it comes close to treating children as the private property of their parents by granting to latter the ECHR Article 12 right to procreate even if they do not have the means. From the perspective of value pluralism, the privileged legally indefeasible status assigned to civil and individual liberties, but denied to the values of social justice or minimum needs, lacks a normative basis and cannot be defended on rational grounds. Unless one is prepared to endorse the premises that individual liberty is a higher value than equality in any form, that negative liberty generally trumps positive liberty and that the primacy of individual liberty over other values goes so far as to ground a general priority of negative liberties over social rights which is finds its acknowledged limit only in the need for general protection of the

16. European Convention for the Protection of Human Rights and Fundamental Freedoms arts. 2-4, opened for signature Nov. 4, 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5 [hereinafter ECHR].

17. *Id.* arts. 5-7, 13.

18. *Id.* arts. 9-11.

19. *Id.* arts. 8, 12.

20. *Id.* art. 14.

minimum social and psychological conditions of individual agency, the primacy assigned to civil and political rights is morally arbitrary.²¹ It is so in every ethical pluriverse that acknowledges a dilemma in reconciling competing values such as justice and liberty and would only cease to be so if either one became a liberal monist or, as will be examined later, if it could be shown that while social and economic values might be just as valuable as individual liberties, they do not lend themselves to enforcement by the courts.

III. Human Rights Adjudication Between Normative and Linguistic Contestability

It might be objected that in practice international and national human rights documents have resolved the pluralistic dilemma by factually prioritizing certain values on which the human rights they contain are based, even if that choice lacks a rational basis and is ultimately political. Value pluralism may pose a threat to providing a philosophical foundation for specific human rights but it is practically irrelevant as some values have *de facto* triumphed over others in the sense that they have found political and legal recognition in national and international human rights documents, whilst others have not. A distinction should therefore be drawn between two types of inquiry: the search for a philosophical foundation for rights on the one hand, and, on the other, the more limited attempt to bring coherence into human rights language at the level of judicial practice and political reality. Where legally enshrined rights clash, therefore, it might be argued, the conflicts between them do not have to be settled at the deep philosophical level of their underlying justifications but at the more accessible and more tangible level of the wording of charter provisions and legal principles.

This view may be questioned for at least three reasons. First, the problem of value pluralism remains relevant at the level of human rights adjudication. Second, the concept of human rights itself is an essentially contestable concept, and, third, many human rights either are or contain such concepts, as are or do the limiting conditions defining the scope of ECHR rights no less than the legal principles supposed to guide and constrain judicial discretion in case of conflict between rights.

21. It is probably best explained in terms of the specific historical background against which it was drafted and the reluctance of judges, even at national level let alone at international level, to get embroiled in the controversies involved in making policy decisions with budgetary implications. These, however, would inevitably flow from placing courts in charge of enforcing rights to free healthcare, a minimum wage, adequate pensions, or unemployment benefits.

A. *Value Pluralism and Human Rights Adjudication*

Not only do some modern constitutions such as the German constitution expressly mention certain basic values such as human dignity which underlie the other constitutional rights, but, as Conor Gearty,²² David Feldman,²³ and others have convincingly shown, national and international human rights documents generally contain rights that are clustered around a range of core values even if these values are not expressly mentioned in those documents. These core values tend to be human dignity including the right to life, procedural justice (or the rule of law), and the ideal of democratic government. Gearty mentions these three values, but some values in the ECHR and other bills of rights do not appear to be justifiable on those grounds. These include the rights to marry and to found a family, and above all the right to privacy.²⁴ A fourth core value may therefore be added, which is individual or negative liberty. Together these four values provide a justification for almost all the human rights contained in any national or international charter although one might also wish to add equality as a supplementary value—equality not in any substantive sense but as a source for the principle of non-discrimination or equal enjoyment of fundamental rights.²⁵ Bills of rights and human rights conventions either expressly affirm these values or, where they do not, the courts nonetheless often invoke and refer to them as underlying values or justificatory grounds for specific rights.

The Charter of the United Nations, for example, expressly affirms the “dignity and worth of the human person,” “the equal rights of men

22. See generally CONOR GEARTY, CAN HUMAN RIGHTS SURVIVE? (THE HAMLYN LECTURES) 17-59 (2006); CONOR GEARTY, PRINCIPLES OF HUMAN RIGHTS ADJUDICATION (2004).

23. DAVID FELDMAN, CIVIL LIBERTIES AND HUMAN RIGHTS IN ENGLAND AND WALES 1-51 (2d ed. 2002).

24. See, e.g., *id.* at 524, 527, 518.

25. Another common way of classifying fundamental rights is the distinction between civil liberties and human rights. Broadly speaking, civil liberties are those which individuals enjoy by virtue of being citizens of a society, while human rights proper refer to those rights derived from the principles of dignity and individual liberty. Freedom of association seems clearly a civil liberty, while the rights to life or the prohibition of torture are examples of rights based on human dignity. Some rights, however, can be classified as falling into either category, e.g., freedom of expression, and privacy for instance may be defended as grounded in human dignity on a liberal view of society, but may also be conceived as possessing little intrinsic value as it does little more than afford people the opportunity to do in private what they may not wish to admit to in public. It also remains unclear if political rights, such as the rights to vote or stand for office form a separate category or further examples of civil liberties. In general terms, not much hinges on such qualification although they are useful in drawing attention to the underlying justificatory ideas of human rights.

and women” as “the foundation of freedom.”²⁶ In the ECHR, the signatory states refer to the Universal Declaration of Human Rights and also refer to “fundamental freedoms,” which “are best maintained . . . by an effective political democracy.”²⁷ Both charters also expressly affirm several core values in their definition of particular rights. The same is true of national constitutions. The German or South African constitutions, for example, both mention “human dignity” together with other core values.²⁸ Such constitutions were inspired by the Universal Declaration of Human Rights and the ECHR, but likewise by some highly influential early national declarations. Thus, there has clearly been an international convergence in terms both of the content and underlying principles of human rights instruments. The shared basis of most human rights regimes is evidenced not merely by similarity in their references to the same core values; even where those core values are not mentioned in national bills of rights their near-universal importance is underlined by the fact that the national courts have nevertheless tended to refer to core values in human rights jurisprudence.²⁹ Value pluralism therefore has not disappeared at the practical level of human rights adjudication. It has simply been reduced to the plurality of four to five ultimate core values that, depending on the circumstances, may be harmonious, indifferent to, or in conflict with each other.

Where rights based on the core values conflict, the rivalrous rights will thus either express different values or different aspects of the same value. In either case, this conflict cannot be resolved by appeal to reason for there is no clear hierarchy between the underlying values or between different aspects of them. An example would be the potentially conflicting demands between freedom of expression and the right to privacy which may be presented as a straightforward clash between the requirements of the core values of democracy and of individual liberty or, alternatively, as a conflict between two different aspects of one concept, namely, negative liberty sub-divided into the two negative liberties of the freedom of expression as opposed to the liberty to conduct one’s life free from unwelcome publicity. Conflicts also exist between the freedom of the press as a subset of freedom of expression and the

26. U.N. Charter pmb1.

27. ECHR, *supra* note 16, at pbml.

28. See GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GG] art. 1; S. AFR. CONST. 1996 § 10.

29. Feldman provides a number of specific illustrations. The French Conseil Constitutionnel, for example, has repeatedly treated human dignity as a fundamental constitutional principle although it is not expressly mentioned in either the French Declaration of Human Rights or the French Constitution. Feldman shows that the same could even be said of the English Court of Appeal, which has not shrunk from relying on the notion of human dignity in all but name. See FELDMAN, *supra* note 23, at 125-132.

right to a fair trial, which precludes undue influence on the jury, e.g., by a virulent press campaign,³⁰ between the right to life and the right to abortion, which is often justified—somewhat debatably in terms of ordinary usage of language—as a derivative of the right to privacy, or perpetually between the rights to liberty, privacy, and fair trial with the exigencies of public security and emergency. In all these cases, the tensions between these rights are expressive of an underlying clash between competing values, or conflicting aspects within a single value. Philosophically such conflicts cannot be resolved if they occur between the competing demands of ultimate values or different aspects of equal or indeterminate rank within single values, and it follows that when rights justified in these terms and given equal or indeterminate status, come into conflict and judges have to adjudicate between their conflicting claims, there is no rational basis for favoring one over the other or one compromise solution over another. When a judicial choice is made in such circumstances, it is made in the absence of rational justification and “beyond good and evil.”³¹

The persistence of value pluralism at the level of human rights adjudication poses a threat to the distinction between law making and application of the law, which is at the heart of the notion of the rule of law and the separate functions of legitimacy and legality. It is hardly surprising, therefore, that it is not commonly acknowledged that the human rights jurisdiction of the courts is ill-defined and that judges routinely engage in value judgments in balancing conflicting cardinal values behind the legal veil of objectivist and value-neutral human rights

30. See, e.g., *Włoch v. Poland*, 2000-XI Eur. Ct. H.R. 1; *Priebke v. Italy*, No. 48799/99, (Eur. Ct. H.R. Apr. 5, 2001), available at <http://www.echr.coe.int/echr/> (French translation).

31. It is obvious that it does not follow from these or any of the above remarks that one judicial decision will always be as good as another. Only those judicial decisions that concern choices between equally ultimate, incompatible, and incommensurable values are not capable of rational or ethical justification and then only by comparison to other such decisions. There will always remain numerous judicial decisions which could be described as rational or ethically sub-optimal in the sense that they reconcile values *x* and *y* in a way that a greater amount could be realized of either value by an alternative decision without any detriment to the other value. It is difficult, however, to establish that one judicial decision will contain all the benefits in terms protecting one right also offered by an alternative decision plus sacrifice less of the conflicting right than the alternative. In such case, it could be argued that one judicial decision realized more value than another and is therefore preferable because the outcomes are not incommensurable. More typically, however, two alternative decisions will balance rights in ways that do not clearly allow for such comparative assessments, which means the results will be incommensurable provided both claims fall properly within the remit of the two or more conflicting rights identified. Whether they do, however, is not an issue resulting from the ethical indeterminacies of value pluralism but a question of conceptual certainty that is the subject of the next section of this article.

adjudication. Three propositions in particular may be advanced in support of the view that, even in the absence of a clear normative hierarchy of values, clear definitions of the limits and principles of practical human rights adjudication may nonetheless be capable of providing the legal certainty that could restrain arbitrary judicial decision-making.

First, it may be argued that where human rights are constitutionally or otherwise legally recognized, the question of their justification has been given a definitive politico-legal answer. And where these legally recognized rights clash, conflicts between them can be resolved by reference to established legal principles which tell judges which right takes priority under what circumstances. It is only where such principles themselves conflict or cannot provide adequate guidance for other reasons that the need for a justification for any given balancing act between conflicting rights may require a foundational normative answer. Some legal theorists, however most notably Dworkin, seem to suggest all legal questions including all questions involving conflicts between rights have one correct legal answer, and that, where strict legal rules run out, the answer is always provided by the appropriate legal principles properly understood and applied in the right spirit and order.³²

Second, rights recognized in constitutions and conventions are generally worded so as to provide for appropriate exceptions and qualifications which take account of the conflicting demands of other rights or considerations and thereby reduce the scope for conflict between rights.³³

Third, the possibility of clashes between rights is reduced even further in practice because bills of rights generally either exclude or only partially safeguard positive rights, that is, those rights requiring state action beyond legal prohibitions to enable individuals to achieve certain ends, nor do they generally endorse positive corollaries of negative rights. The general emphasis in the ECHR, for example, on non-interference with individual rights as distinct from the imposition of duties to aid or assist the enjoyment of those rights, provides clear guidance to the judiciary to construe rights negatively and not positively

32. See generally RONALD DWORKIN, *LAW'S EMPIRE: LEGAL THEORY* (1986).

33. There are numerous examples. An obvious one is the protection of private property in the ECHR or the German Basic Law that is qualified with reference to the public interest. Another and perhaps more surprising instance of a heavily qualified right is the right to life under ECHR Article 2, which for a long time was deemed compatible with the death penalty and remains so for those countries that have not signed the protocol abolishing the latter, and is subject to a whole array of other exceptions concerned with public security and the enforcement of the criminal law. In fact, Article 2 is one of the most heavily qualified rights of the ECHR in contrast, for example, with the unqualified prohibition of torture and degrading treatment under Article 3.

even where the Convention text of itself may be deemed ambiguous.

In summary, therefore, if true these three propositions would warrant the conclusion that hard cases resulting from pluralistic value conflicts have no or little practical significance at the practical level of legally recognized rights because conflicts between them can be settled without recourse to foundationalist language and reasoning. Unfortunately, however, none of the above claims which may be advanced to consign pluralism to the outer reaches of metaphysics are convincing. The discussion in the remainder of this paper is not structured around these three propositions. However, by considering the linguistic sources of uncertainty common to them, the resultant conclusions will indirectly provide the answers to those claims on which the tenability of the legal certainty as distinct from a more foundationalist normative defense of human rights adjudication ultimately rests. It will become clear that legal rights frequently conflict as a matter of judicial practice as judges disagree about the ways in which they should be balanced. There are compelling theoretical or methodological reasons for the persistence of vagueness, judicial discretion, and the need for basic value judgments at the level of judicial practice. They arise above all from the dual effects of value pluralism and the essential contestability of many legal and ethical concepts including the concept of human rights itself as well as the concepts underlying many individual rights. In the context of the ECHR and its application by the European Court of Human Rights ("ECtHR") and national courts their dual effect creates conceptual uncertainty (in addition to value conflict) in at least four respects: the essential contestability of (1) the concept of human rights itself, (2) the concepts underlying many individual rights, (3) the concepts defining the limitations and qualifications commonly imposed on human rights, and (4) the legal principles designed to govern the application of rights or to balance their conflicting requirements. Before dealing with these, however, it is necessary briefly to outline the notion of essentially contested concepts.

B. The Idea of Essentially Contested Concepts

In a well-known article, the philosopher Walter B. Gallie argued that there are concepts that are essentially contested; concepts the proper use of which inevitably involve endless disputes about their proper uses on the part of their users.³⁴ For Gallie, a concept is essentially

34. Walter B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 167 (1955-56).

contestable if it is impossible by means of rational-logical argument to resolve disagreements about its meaning and that whatever meaning is attached to it is contingent on substantive normative assumptions. He lists seven conditions a concept must fulfil to be essentially contested. Some of these partially restate one another, others are unclear and some are disputed by commentators.³⁵ I shall focus on the first three and later add a fourth condition:

(1) The concept must be evaluative or “appraisive”: it must indicate or signify something that is valuable, good, right, worthy, and so on.

(2) The nature of the concept must be complex, so that different aspects of it can be stressed.

(3) It is not manifest why the achievement of the condition signified by the complex concept is good, right, worthy, and so on; its goodness or rightness can be explained in different ways, depending on one’s view of the complex.

On this basis, a concept is essentially contested when it is appraisive in that the state of affairs it describes is a valued achievement which is variously describable and internally complex in that its characterization involves reference to several aspects or dimensions without any criteria of application which determine the order and weight of these multiple aspects or dimensions.³⁶

Gallie explains his idea of an essentially contested concept (“ECC”) through the example of championship. In contrast with familiar annual competitions where the rules for the selection of “the champion” are clear, Gallie suggests the following unusual scenario: The championship is not awarded according to some settled and agreed-upon body of rules, but rather in virtue of the style and level of play. Everyone agrees, though, that the champion is the team that “plays the best.” There is no fixed point at which a team becomes the champion, nor does it retain the title for a fixed period. The competition has no official judges, and there are no well settled or generally accepted rules for the designation of the champion. Each side has its supporters who insist that this is the “true” or “real” champion on the grounds that it “plays the game best.” Each team stresses some aspect of the game—speed, power, elegance, or strategy—and is supported by its fans who insist that this is the truly crucial aspect

35. See John Gray, *On Liberty, Liberalism and Essential Contestability*, 8 BRIT. J. POL. SCI. 385, 390 (1978).

36. The definition is the author’s, but it partly draws on that provided by William Connolly in *The Terms of Political Discourse*. See WILLIAM CONNOLLY, *THE TERMS OF POLITICAL DISCOURSE* 9-14 (1974).

of the game. So each side sees its team as the best because it expresses that part of the game that, they claim, is the most important. Gallie's point, of course, is that such a competition would be characterised by constant, intractable disputes about who is the champion. Indeed, it seems in principle impossible to resolve the dispute, for it seems impossible to show what aspect of the game is truly the most important and which team is truly the champion. In this sense, the championship is essentially contested.

One way to understand Gallie's point is to distinguish between a concept and various conceptions of it. Each of the competing interpretations of the concept is a conception of it. Each conception has at least some of the characteristics associated with the core—the concept. To show that the various conceptions really represent disagreement about a common concept and not different concepts themselves, Gallie adds a further condition, namely, that the parties agree on a common “exemplar”—a sort of perfect case—that embodies all the important features of the concept.³⁷ This appears mistaken. There need not be a common core which is shared by all the uses of a concept. A better analogy is that of Wittgenstein's idea of family resemblances: A conception identifies some parts of the cluster as features commonly found in conceptions of the concept, while insisting that other elements are less important and some perhaps irrelevant. Not all the cluster features, however, must be present in all conceptions of the concept.³⁸ The Hapsburg lip is an example of such a family resemblance: while not present in every family member, it was a recurring and common feature amongst the Hapsburgs in the sixteenth and seventeenth centuries.

The idea of concepts that are essentially contestable is conceptually distinct from that of value pluralism; although, many values are also ECCs. Moreover, where values are ECCs, the competing conceptions of the underlying concepts may sometimes relate to one another in a fashion analogous to value pluralism. An example would be the ECC of liberty—two of its conceptions, negative and positive freedom, may also be conceived as pluralistic values in their own right. It is therefore not surprising that in their effect value pluralism and ECCs often reinforce each other. That effect is not confined to the philosophical justifiability of human rights, but gives rise to uncertainty and the need for value judgments in human rights adjudication.

37. Gallie, *supra* note 34, at 180.

38. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* §§ 66-71 (1953).

C. *The Essential Contestability of the Concept of Human Rights*

It is common for political and legal theorists to distinguish between the good and the right. A good, put simply, is either a value or a *desideratum* that may be ultimate or instrumental. A right is a good that takes priority over other goods where it is given a special privileged legal status. The range of human goods is famously contested, as is the possibility of the *summum bonum* or the supreme good. Finally, many goods are essentially contested concepts. Examples include justice, liberty, equality, dignity, and even happiness. Further instances include political goods, such as liberalism or democracy.

If human rights enjoy priority over other goods, then the selection of rights as a subset of privileged goods requires a special contestable justification, as there is no settled, agreed, or demonstrably rational way of adjudicating between competing goods except with reference to some supreme value, the status of which is open to question. This is the dilemma of value pluralism. It entails the incommensurability of rights no less than that of goods and the absence of objective, rational criteria for resolving clashes between them.

Specific human rights, however, are not only normatively contested, the concept of human rights itself is also essentially contestable. In terms of Gallie's conditions, the concept of human rights clearly connotes something valuable; it is internally complex in that its meaning represents a cluster of different aspects or attributes, not all of which are compatible, that are not subject to any shared hierarchical order or criteria of application. In large measure, the conceptual uncertainty of the idea of human rights merely reflects competing theories of the nature of rights. One important distinction is between the will and interest theories of rights.

The will theory, propagated by Herbert L.A. Hart,³⁹ identifies the right-bearer by virtue of the power that he has over any corresponding duty. He can waive it, extinguish it, enforce it or leave it unenforced; the decision is his choice. Individual discretion is the distinctive feature of this concept of rights. Rights, in this view, may therefore also be called liberties. By contrast, the interest theory, which is espoused by Neil MacCormick, Joseph Raz, and others,⁴⁰ argues that the purpose of rights is not to protect individual assertion but certain interests. The interest theory enables one to talk of rights in advance of determining exactly

39. HERBERT L. A. HART, *ESSAYS ON BENTHAM: JURISPRUDENCE AND POLITICAL THEORY* chap. vii (1982); Herbert L. A. Hart, *Are There Any Natural Rights?*, 64 *PHIL. REV.* 175 (1995).

40. See LLOYD'S *INTRODUCTION TO JURISPRUDENCE* 355 (Michael D. A. Freeman ed., 7th ed., 2001).

who has the duty. It may therefore cover all types of rights including so-called socio-economic rights, such as those to health care, education, minimum income, etc. Wesley N. Hohfeld, in his famous typology of rights, draws another distinction between rights *stricto sensu* and liberties, which he also calls privileges. Hohfeld distinguishes further usages of the term “right” that are irrelevant to human rights.⁴¹ The important point is that the concept of right is used ambiguously. On the will view, rights are waivable; on the interest view they are not. The former clearly assumes that the rights-bearer must be an autonomous agent, while the latter can accommodate interests of those who may not be relied upon acting in their own best self-interest. Finally, while the latter conceives of rights as being concerned with promoting the good, the former views them as merely removing various obstacles that might prevent individuals from promoting or willing the good. Other attributes, however, are shared by rights on both views: they are individualistic, equal, universal or universalizable; they may also be either negative or positive, or procedural or substantive. Yet, not even the attributes shared by both theories are uncontested. Human rights documents generally show a bias towards negative rights; on some views, human rights should be solely or mainly procedural. Finally, certain third generation rights, such as minority or environmental rights, conceive of rights not necessarily as universal and equal, but as the properties of certain groups or minorities or even of those not yet alive and who may never be born. There is no settled criterion for deciding which of these attributes are essential, more important, or correct, for there is no universally shared or correct definition of the concept of human rights in the sense that there is no agreement as to the range of necessary and optional attributes of the concept. Further, there is no coherent conception of human rights that synthesises those features attributed to it by common usage in a demonstrably more coherent or rational manner than rivalrous conceptions. In that sense, the concept of human rights can be said to be essentially contestable.

In practice, the indeterminacy of the concept of rights has been overcome to some extent by a general judicial approach favoring the negative over the positive construction of human rights. Yet, just as human rights documents do not follow a uniform, coherent conception of what is common to the concept of human rights across the spectrum of individual rights, judicial attitudes have not been consistent. Indeed, both the Strasbourg and the British judiciary have shown a markedly greater willingness to impose positive obligations under ECHR Article 8,

41. Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, in LLOYD'S INTRODUCTION TO JURISPRUDENCE, *supra* note 40, at 510.

even where the imposition of more extensive obligations for the protection of privacy seems far from obvious when comparing the text of ECHR Article 8 with other provisions.⁴²

In *Von Hannover v. Germany*,⁴³ the ECtHR held that, by adopting too narrow a conception of privacy in public places, the German courts failed in their positive duty to protect the applicant's right to private life. This "Hanoverian" approach by the ECtHR has been taken to extremes by the English courts under the Human Rights Act 1998 ("HRA"), which makes the ECHR directly enforceable in British courts, but also generally restricts litigation of ECHR rights to cases against public authorities. In *Douglas v. Hello! Ltd.*,⁴⁴ two film actor claimants entered into an exclusive publication deal with a magazine, which effectively converted photographs of the actors' wedding from essentially private material into commercial and publicly available material. The English Court of Appeal upheld an earlier finding of a breach of the claimants' right to privacy when another national magazine published unauthorized photographs, thereby extending the concept of privacy to the right to the economic interest attached to waiving that privacy.

The Court of Appeal's decision in *Douglas* is remarkable in two respects. First, it impliedly asserts a will-based conception of privacy as an essentially alienable right. This is in sharp contrast to the more commonly held view in relation to most other human rights, which are inalienable and more than a commercial interest. Secondly, what is astonishing in the *Douglas* case as well as the ruling in *Campbell v. MGN Ltd.*,⁴⁵ where the House of Lords reached a similar conclusion that is more defensible on the facts, is the apparent ease with which the courts apply and extend Lord Chief Justice Woolf's decision in *A v. B Plc.*⁴⁶ to

42. For more detailed discussion and examples, see FELDMAN, *supra* note 23, at 54.

43. *Von Hannover v. Germany*, 2004-VI Eur. Ct. H.R. 294.

44. *Douglas v. Hello! Ltd.*, [2005] EWCA (Civ) 595, [2006] 1 Q.B. 125.

45. *Campbell v. MGN Ltd.*, [2004] UKHL 22, [2004] 2 A.C. 457 (appeal taken from Eng.).

46. *A v. B Plc.*, [2002] EWCA (Civ) 337, [2003] Q.B. 195 (2002). The court held that

[Articles 8 and 10] have provided new parameters within which the court will decide, in an action for breach of confidence, whether a person is entitled to have his privacy protected by the court or whether the restriction of freedom of expression which such protection involves cannot be justified. The court's approach to the issues which the applications raise has been modified because, under section 6 of the [HRA], the court, as a public authority, is required not to act "in a way which is incompatible with a [ECHR] right." The court is able to achieve this by absorbing the rights which articles 8 and 10 protect into the long-established action for breach of confidence. This involves giving a new strength and breadth to the action so that it accommodates the requirements of those articles.

Id. at 202.

use their powers as public authorities under section 6 of the HRA to ensure compliance with the ECHR in horizontal litigation involving private parties, when such litigation involves privacy claims by those whose economic fortunes largely seem to rest on their celebrity status. In these cases, the English courts have used that discretion to protect the indigenous law of defamation and even consolidate the law of confidentiality over and above the demands of freedom of expression, when the incorporation of the latter ECHR right into English law as part of the HRA might have been expected to have exactly the opposite effect.

Further, more obviously convincing examples where the ECtHR found ECHR Article 8 to carry with it positive obligations include its decisions holding that appropriate state bodies may have a duty to use environmental and planning law to control polluters whose activities make it difficult or unhealthy for people to live in affected areas, or to provide information about environmental hazards.⁴⁷ More controversially, the ECtHR has also used ECHR Article 8 to establish positive obligations to recognize the rights of transsexuals. In *I. v. United Kingdom*⁴⁸ and *Goodwin v. United Kingdom*,⁴⁹ the court found a breach of ECHR Article 8 where the State had not legally recognised a sex change, noting in particular that it was a relevant factor that the surgery had been provided by the state. The court's expansive approach under ECHR Article 8 can be contrasted with its generally restrictive approach favoring negative rights and its pronounced resistance to imposing positive obligations under other ECHR articles. For example, except in highly restricted circumstances, the court has repeatedly rejected claims that failure to grant legal aid in circumstances where applicants had no other realistic means of funding litigation amounted to a breach of the right to access to a court under ECHR Article 6.⁵⁰

In those less numerous cases that did not involve ECHR Article 8, but in which the ECtHR has nonetheless favored a positive rights interpretation, the reasoning behind its decisions has generally been logically more compelling. For instance, the ECtHR has interpreted ECHR Article 11 as implying an obligation on the state to take appropriate steps to ensure that counter-demonstrators do not make it

47. See FELDMAN, *supra* note 23, at 54 (providing detailed discussion of ECtHR "environmental legislation" under ECHR Article 8).

48. *I. v. United Kingdom*, [2003] 36 E.H.R.R. 53 (2002).

49. *Goodwin v. United Kingdom*, 2002-VI Eur. Ct. H.R. 483.

50. The court's reluctance to impose a public duty to fund civil litigation can of course be explained in terms of the general judicial reluctance to pass judgments with far-reaching budgetary implications; yet, this cannot detract from the fact that the courts seem to hover between negative and positive interpretations of rights almost at will and sometimes, admittedly, influenced by expediency.

impossible for demonstrators to assemble and protest peacefully. The court's reasoning can be summarised as follows: once a right has been established, it must not be negated by other persons having an analogous right to do the same.

The court's asymmetrical approach to the acceptance of positive dimensions of negative rights, however, is exemplified by its steadfast avoidance of delivering a definitive ruling on the issue of abortion, which it has generally preferred to be determined by domestic law. The Irish Constitution grants a right to life to the unborn child subject to the equal right of the mother. Although this clarifies or at least attempts to delineate the exceptional nature of the circumstances in which an abortion might be permissible under Irish law, the ECtHR nonetheless held that Ireland's censoring of information about abortion services violated the right to freedom of information and ideas under ECHR Article 10.⁵¹ While the court's refusal to give a definitive ruling on the issue of abortion might be justifiable under the ECHR's margin of appreciation, its ruling against the Irish government on this occasion is clearly unconvincing, as it appears to deny the Irish government at least some of the means of enforcing its own legitimate public policy goals, which are expressly recognized as appropriate qualifications under ECHR Article 10. Ultimately, the Irish case is merely an illustration of the well-ingrained differential treatment by the judiciary of the rights to privacy and freedom of expression under ECHR Articles 8 and 10. Although the Strasbourg Court has held that lack of impartiality in reporting in public broadcasting or television channels may be in breach of ECHR Article 10,⁵² it has consistently refused to extend that reasoning to impose a positive regulatory duty on public bodies to protect plurality of political opinion in the press and media against growing concentration of media power in private hands. Methodologically, this approach is unconvincing. If freedom of expression is a pillar of the political culture and debate underpinning an effectively functioning liberal democracy, then there is an equal justification for media regulation to prevent concentration with its attendant danger of abuse of media power and individual debasement as there is to watch over government interference with public broadcasting and to protect journalistic freedom. The court's steadfast reluctance to establish a regulatory duty on the basis of ECHR Article 10 has been in stark contrast to the more expansive approach to ECHR Article 8.

51. *See* *Open Door v. Ireland*, 246 Eur. Ct. H.R. (ser. A) at 29 (1992).

52. *See* CHRISTIAN WALTER, *GESCHICHTE UND ENTWICKLUNG DER EUROPÄISCHE GRUNDRECHTE UND GRUNDFREIHEITEN* [HISTORY AND DEVELOPMENT OF THE EUROPEAN FUNDAMENTAL RIGHTS AND BASIC LIBERTIES] 102 (Dirk Ehlers ed., 2d ed., 2005).

In summary, to the extent to which legal instruments may be said generally to favor negative over positive rights formulations, they have patently failed in restraining courts from extending positive duties to some rights as distinct from others. There are two principal reasons that have favored the persistence of broad judicial discretion in this regard. First, in the absence of shared agreement on a fixed set of core attributes definitive of the concept of human rights, there is no means of demonstrating the validity of one conception of human rights over another. Conceptual indeterminacy, however, favours judicial discretion. Secondly, judicial discretion is amplified by the basic logical point that, in the absence of a clear definition of particular rights and their scope, those normative reasons justifying non-interference with a particular right will often likewise justify additional positive measures to further those rights. While conceptual indeterminacy of the idea of human rights allows the courts, almost at will, to determine when to interpret rights negatively or more positively, the irreducibility to negative or positive interpretations of many arguments justifying individual rights ensures that whichever interpretation the courts may favor initially, they remain at liberty both either to expand their interpretation of individual rights with reference to the same reasons that existed for recognizing the right in the first place, or narrow that initial interpretation with reference either to the equally elastic moral reasons supporting conflicting rights or legitimate public policy goals. Courts, it seems, are entirely at liberty to impose positive duties with respect to some rights but not to others, free from the need for consistency or even its underdeveloped twin—reasoning by analogy—and subject only to the one condition on which all judicial discretion ultimately depends: sufficient political sensitivity not to challenge a popular government over an issue of fundamental public interest where the courts would be out of, and the government in tune with, the public mood.

D. The Essential Contestability of the Concepts Underlying Human Rights

Charters of rights, it has been demonstrated, are not neutral, but privilege certain claims over others, and generally elevate individual autonomy and liberty over competing values, such as social justice, and privilege the political ideal of liberal representative democracy over other political values. The ECHR is a prime example of a human rights document with a pronounced liberal, individualistic bias although it shares that characteristic with most international covenants and national

bills of rights.⁵³ It has been shown that the political settlement favoring these values among the wider range of pluralistic goods cannot overcome the pluralistic dilemma of incommensurability between conflicting values. It has also been shown that the concept of human rights as the foundation for favoring some, or some aspects, of those values over others is essentially contestable in that disagreements about its meaning and between rivalrous conceptions of it, each respectively emphasising certain aspects over and above others, cannot be settled by rational-logical argument.

However, not only is the concept of human rights essentially contestable, but so are many of the constituent concepts of many individual rights as well as the basic value concepts underlying the most widely recognized human rights. This creates a dual source of vagueness and uncertainty in judicial interpretations of individual rights, which is best illustrated by reference to the concepts concerned.

First, among the rights in the ECHR, but likewise those contained in most other human rights documents, the right to life and the prohibitions of torture, slavery, or arbitrary arrest (as well as the rights to private and family life, freedom of expression, or found a family) are based on a certain ideal of individual dignity or at least individual autonomy or liberty. While the core meaning of concepts such as life and torture may be clear, there will always be a penumbra of uncertainty in marginal cases.⁵⁴ In penumbral cases, judges seek to justify their decisions by reference to the values underlying individual rights. Individual dignity is such a value, and it is also an essentially contestable concept. The concept of dignity cannot furnish practical ethical, political, or legal prescriptions except in the context of a particular model of human nature and its ends. Which aspect of the multifarious concept of dignity is emphasized at the expense of others inevitably depends on the model of human nature adopted and also determines the nature and scope of the rights that can be grounded in dignity. While dignity is generally readily granted to all human beings in possession of the ordinary human faculties including, with qualifications, children, the concept becomes contestable at both the dawn and the end of human life. Birth in particular seems to make "all the difference," as a protracted and ongoing

53. In broad terms it could be said that the U.S. Constitution is at the libertarian end of the spectrum and the German, Canadian, or French constitutions at a slightly more social-democratic end where the general emphasis on negative liberties and political rights has been moderated to a degree by reference to social justice, the public interest, or, in the Canadian case, to the increasingly fashionable group rights.

54. The metaphor of the core and penumbra was popularised by Hart, see HERBERT L.A. HART, *THE CONCEPT OF LAW* 123 (2d ed. 1994), although Glanville Williams presaged Hart's claim that the judge has a law-making role in penumbral cases. See Glanville Williams, *Law and Language-III*, 61 L.Q. REV. 179 (1945).

judicial battle has been fought in most jurisdictions over the issue of whether, and if so, to what extent a human fetus enjoys a right to life. The answers reached invariably reflect conflicting visions of what it means to have human personality and the requisite attributes to acquire the infeasible quality of human dignity, but the existence of disagreements is an expression not only of conflicting values, but also of the ineliminable vagueness of the concept of dignity.

A second set of ECHR rights comprises the civil freedoms of association, religion, and expression,⁵⁵ the rights to private and family life,⁵⁶ and the *sui generis* right to found a family,⁵⁷ which all revolve around the ideals of individual autonomy or liberty.⁵⁸ Liberty, of course, in its two intuitively equally compelling but conflicting variants of positive and negative liberty, is an archetypal ECC: a drug addict is not free in the *negative* sense if somebody prevents him from administering his drug dose, but that does not make him free in the *positive* sense not to take the drug. Autonomy is essentially open to contestability for the same reason: it can be equated with rational self-government or merely with consent. Rational self-government assumes that there is a demonstrably rational stance, and a person is autonomous only if he embraces it. By contrast, consent is not concerned with rationality, but solely with whether or not the agent has agreed to something.⁵⁹

55. ECHR, *supra* note 16, arts. 9-11.

56. *Id.* art. 8.

57. *Id.* art. 12.

58. However, on certain models of human nature, they may also be justified by reference to a particular conception of dignity.

59. Consent, however, can be broken down further into conflicting conceptions. Consent is of particular importance in medical cases as the basis of the adult's right to accept or refuse treatment. The question is whether consent needs to be fully informed or merely express. The English courts have exploited the vagueness of the concepts of privacy and consent for the benefit of the medical profession and with very little regard for consistency. First, the English courts have generally been reluctant to extend human rights concepts to standards of medical care and to frame the relevant rules as an aspect of the law of professional negligence rather than patients' rights. Given the expansive approach adopted by the English courts to the interpretation of the concept of privacy in other areas, this appears as an instance of judicial deference and a sub-species of judicial discretion that appears difficult to justify. Instead of demanding fully informed consent, the refusal to treat consent as a right and as part of the law of negligence has enabled the courts to construe the law as protecting doctors against liability where (a) the patient is capable of understanding the implications of the consent and (b) the doctor has given as much information as a body of respectable medical opinion would consider reasonable. See *Sidaway v. Bd. of Governors of the Bethlem Royal Hosp.*, [1985] A.C. 871 (H.L.) (appeal taken from Eng.). Secondly, the vagueness of the concept of consent in the absence of a clear legal definition has effectively allowed the courts to reach opposite conclusions in analogous situations. In *Regina v. Richardson (Diane)*, [1999] Q.B. 444 (1988), patients were treated by a dentist who, unknown to them, had been suspended from practice. It is hard to believe that patients would have consented to treatment had they known of the suspension, but the Court of Appeal held that the dentist had not acted

The ECHR mentions a right to liberty,⁶⁰ but that right is confined, in general terms, to freedom from detention. Most cases involving restrictions of individual liberty or autonomy have been litigated under ECHR Article 8, protecting the right to privacy. Like the concept of liberty, that of privacy lacks an agreed set of necessary and sufficient attributes. In *Hannover v. Germany*,⁶¹ the ECtHR adopted a broad conception of privacy, encompassing intrusions into a person's life that take place in public when such interference does not concern an "issue of general interest."⁶² In the subsequent English case of *Howlett v. Holding*,⁶³ the English judge, who took cognisance of the Strasbourg case law and acknowledged the authority of the broad privacy test laid down in *Hannover*, nevertheless applied a simple test based on the distinction between conduct that takes place in public and intrusions into conduct in the private home. Leaving aside the misinterpretation of the Strasbourg authority by the English judge, the important point in this context is that each definition of the term "private"—its simple equation with the private home no less than the broader "private sphere of action" approach of the ECtHR—captures distinct, conflicting, and yet equally

without consent and was consequently not guilty of assault or breach of the patients' rights. Consent could be vitiated by a mistake as to the identity of the person carrying out the procedure, or as to the nature and quality of the procedure. The patients, however, had known the identity of the dentist. A mistake as to her qualifications did not vitiate that consent. By contrast, in *R. v. Tabassum*, [2000] 2 Crim. App. 328, the defendant had offered breast treatment to several women, holding himself out as a cancer specialist, and to be conducting a study of breast cancer. In reality, he had no relevant qualifications. Some of the women knew him as a lecturer for a computer course in which they were enrolled. All the women concerned had completed consent forms allowing him to examine their breasts. They later said they would not have let him examine them had they known that he was unqualified. He was convicted of indecent assault. His defense of consent and appeal were rejected. The Court of Appeal decided that the women had consented to the nature of his acts, but not to their quality, and had done so assuming he had the purported qualifications. In the light of *Regina v. Richardson (Diane)*, it is hard to see why his lack of qualifications or speculation as to his motives should have negated consent that was real, albeit not fully informed.

60. ECHR, *supra* note 16, art. 5.

61. See *Von Hannover v. Germany*, 2004-VI Eur. Ct. H.R. 294.

62. The ECtHR reasoned that the German courts had erred in particular in its decision that the ECHR right to privacy could only come into play in circumstances where the applicant found herself in a secluded place out of the public eye to which persons retire "with the objectively recognisable aim of being alone and where, confident of being alone, they behave in a manner in which they would not behave in public." *Id.* ¶ 54. Rejecting the "recogni[z]able aim of being alone" test, the ECtHR decided instead that the decisive factor in balancing the protection of private life against freedom of expression lay in the contribution that the published photos and articles could make to a debate of general interest. On the facts of the case, the court held that the photos made no such contribution as the applicant did not exercise any official function and as the publication related solely to her private life. *Id.*

63. *Howlett v. Holding*, [2006] EWHC (QB) 41.

valid conceptions of the concept of privacy—a classic case of an EEC.

At one level, the emergence and persistence of multiple privacy tests, of course, reflects the fact that the ECtHR has deliberately avoided defining the concept of privacy so as to be able to widen its application not only to many situations more appropriately described as involving the exercise of individual liberty, but also extend it to the workplace and even encompass conduct in public where not of general interest.⁶⁴ At a basic level, however, the inconsistency and ambiguity in the court's jurisprudence may be viewed as an expression of the conceptual indeterminacy surrounding the concept of privacy. Privacy does not simply mean secrecy or protection against surveillance by others, which would be of little value if the individual, while being protected against publicity, remained constrained and without individual freedom. The worth of privacy, therefore, presupposes the liberty to do as one pleases subject to certain legal restraints such as respect for the privacy of others. Hence, liberty is partly synonymous with self-determination, and so it may be argued that ECHR Article 8 protects the individual's private sphere of self-determination free from public scrutiny. This conception of privacy was applied by the ECtHR in *Van Kück v. Germany*,⁶⁵ where it posited a right to self-determination and extended it to issues involved in sex change surgery. It is not obvious, however, what, if anything, the issues of public recognition and reimbursement of medical expenses have to do with the right to privacy. Yet, the case is good example of how conceptual uncertainty arising from initial recognition of the interconnectedness of two concepts, e.g., those of privacy and self-determination, can be used to extend rights into politically fashionable but rationally and ethically questionable territory. Respect for private life then quickly ceases to be a mere matter of protecting people from embarrassment by external scrutiny of their personal lives—the natural meaning of the term “privacy”—and comes to involve respect for the individual's personality, recognition, and sense of being valued. This is not part of the obvious meaning of the term privacy, but part and parcel of the judicial usage of the term, or, at least, it is so when it is expedient.

The catch-all use of the concept of privacy by the judiciary has been particularly evident in the area of sexual freedom. In 1981, the ECtHR held in *Dudgeon v. United Kingdom*⁶⁶ that the blanket criminalization of homosexual acts violated homosexuals' right to privacy. That case concerned the law in Northern Ireland, although the court reached the same conclusion in relation to an analogous ban in the Republic of

64. For more detailed discussion, see WALTER, *supra* note 52, at 64–65.

65. *Van Kück v. Germany*, 2003-VII Eur. Ct. H.R. 73.

66. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 149 (1981).

Ireland⁶⁷ and in another case involving Cyprus.⁶⁸ Nowhere in Europe, however, did the courts stretch the concept of privacy as systematically and radically beyond its ordinary meaning as in the United States. In *Griswold v. Connecticut*,⁶⁹ the Supreme Court invalidated a Connecticut anti-contraceptive statute on the grounds that, by impinging on “an intimate relation of husband and wife,”⁷⁰ the statute violated “a right of privacy older than the Bill of Rights.”⁷¹ Two years later in *Loving v. Virginia*,⁷² the Court struck down Virginia’s law banning interracial marriages again on the basis of the allegedly time-honored right to privacy that is not even part of the Constitution. In *Eisenstadt v. Baird*,⁷³ the Court struck down a state statute confining distribution of contraceptive devices to married people. According to Justice Brennan: “If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”⁷⁴ The judicial stage was thus well set for the Court’s final extension of privacy into the realm of sexual self-determination in *Roe v. Wade*.⁷⁵ It seems that like the sea-encrusted statue of Glaucon which, ravaged by time, ceased to bear any resemblance to its original, the legal meaning of the term “privacy” no longer bears any meaningful relationship to the ordinary meaning of the word.

Finally, there remain some ECHR rights that, broadly speaking, derive their justification from the normative foundations of the rule of law and democracy. These are the rights of procedural justice in ECHR Articles 5 to 7 and the civil freedoms of ECHR Articles 9 to 11, which, as instances of individual liberties, nevertheless are crucial to a democratic political culture. Democracy is rarely questioned as a

67. See *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) at 186 (1988).

68. See *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (ser. A) at 485 (1993).

69. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

70. *Id.* at 482.

71. *Id.* at 486.

72. *Loving v. Virginia*, 388 U.S. 1 (1967).

73. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

74. *Id.* at 453 (emphasis omitted).

75. *Roe v. Wade*, 410 U.S. 113 (1973). The Supreme Court has been a well-known agent of social change outside the sphere of social justice in the sixties and seventies. It would be mistaken, however, to think the judicial activism was confined to the Federal judiciary. An extreme example of judicial defiance of linguistic convention by senior state court can be found in the judgment of the Appellate Division of the Superior Court of New Jersey in the case of *M.T. v. J.T.*, 355 A.2d 204 (N.J. 1976). In *M.T. v. J.T.*, the court ruled that official recognition of a person’s reassigned sex would “promote the individual’s quest for inner peace and personal happiness, while in no way disserving any societal interest, principle of public order or precept of morality,” *id.* at 211, all that under the name of the individual’s privacy.

political value, but it is a complex concept the different aspects of which have requirements that do not necessarily pull in the same direction. The following are all part of the cluster of attributes central to the concept of democracy: majority rule, effective accountability by the governors to the governed, a viable and vibrant political culture supported by recognizable demos (a people regarding itself as one), freedom of expression, and, on some views, pluralism and toleration. It is a matter of endless dispute which of these concepts, or which order, represents the right conception of democracy.

The courts do not generally expressly discuss, let alone get drawn into, defining notions of democracy and officially prefer to defer to the executive where possible. In reality, however, many judicial trade-offs between conflicting rights involve judgments about the meaning, legitimate limits, and security requirements of democratic government.⁷⁶ The same can be said in relation to many other judicial decisions involving references to the “general interest,” the “public interest,” or “public policy,” such as the “debate of general interest” criterion adopted by the ECtHR in *Hannover* to balance the conflicting demands of privacy and freedom of expression. The court here clearly assumed a certain “restrained” variant of democracy, which implies the controversial “private public sphere” distinction the court has sought to establish without giving adequate consideration to the creeping regulatory effect of restraints on free speech.

Similarly, the meaning of the concepts of the rule of law and procedural justice are inseparable from the notions of non-retrospectivity, certainty, equality before the law, between the parties, and arguably of access to the law, effective law enforcement, and extensive procedural safeguards. Any combination and hierarchical ordering between those aspects may be claimed to be the correct conception of the rule of law, or, conversely, none of these can be definitely ruled out as irrelevant and few, if any, of the various orderings of these concepts can be conclusively dismissed as irrational.

All this shows that where a right either amounts to an EEC or is justified in terms of such a concept, its meaning cannot be settled by appeal to rational-logical arguments; it is essentially indeterminable. Its

76. In *Lustig-Prean v. United Kingdom*, [2000] 29 E.H.R.R. 548 (1999), for example, the ECtHR held that “the hallmarks” of a democratic society include “pluralism, tolerance and broadmindedness.” *Id.* at 549. None of these attributes can be said to be incontrovertible attributes of the core meaning of democracy; indeed, none are democratic values on a classical view of democracy. The court here in fact assumes a historically highly contingent conception of liberal democracy where the requirements of majority rule are tampered by a high degree of social liberalism and perhaps even permissiveness.

application, therefore, is not only likely to give rise to judicial disagreement and inconsistency in adjudication as a matter of practice, but does so inevitably analytically because there cannot be theoretical agreement about the meaning.

E. The Essential Contestability of the Concepts Constitutive of Rights Limitations

Human rights are, of course, subject to limitations of scope. These limitations take account of the potential for conflict between individual rights or between rights and public interest and security considerations, and in effect set the parameters for the judicial resolution of such conflict. The ECHR does not adopt a single unified approach to limiting the scope of the rights it protects, but does so in different ways. Two in particular deserve mention: first, the limitations of ECHR Articles 8 to 11, which are subject to certain qualifying conditions, and, second, the provision of ECHR Article 15, which allows signatory States to derogate from part of the ECHR for reasons of war or public emergency. In practice, however, the degree to which such limitations on the scope of the rights protected are capable of reducing judicial discretion is only minimal. It may even be argued that, paradoxically, those apparent limits on judicial power have had exactly the opposite effect: for, by allowing the judiciary to show deference to the executive in sensitive areas such as national security or public order, they have allowed both the ECtHR and the domestic courts implementing ECHR rights to avoid political controversy in sensitive policy areas where decisions upholding human rights might have met with political or public hostility, and thus have strengthened rather than weakened their ability to adopt a more expansive approach to human rights in those fashionable areas of social policy that have little if any direct fiscal implications.⁷⁷

The principal reason for the failure of these limitations to rein in judicial discretion can be found in the persistence of the problem of conceptual vagueness. Many of the limitations are defined—expressly or impliedly—with reference to legitimate aims based on concepts that are just as essentially contestable as those defining the rights they are designed to qualify. ECHR Articles 8 to 11, for instance, make reference to a range of legitimate policy objectives whose conceptual vagueness mirrors rather than reduces that of the rights and liberties to which they refer and which they are designed to limit. Examples of the legitimate aims enumerated include the protection of health or morals, protection of

77. This is generally true of laws promoting social equality that may have economic costs. However, these costs are difficult to quantify and do not commonly have immediate budgetary implications or effects on personal taxation.

public order, national security, and the prevention of disorder and crime. Though some of these concepts are less vague than others, their meaning cannot be settled objectively, and judges may therefore rightly differ about their proper use. The problem of vagueness resulting from the conceptual and empirical indeterminability of key concepts in ECHR Articles 8 to 11 is exacerbated by the requirement that the qualifications shall not exceed what is “necessary in a democratic society.” Together with the conceptual ambiguity of the provisions themselves, the inclusion of the principle of proportionality as an essential condition of any legitimate qualification of those rights in effect amounts to an invitation to make value judgments behind the veil of legal objectivity.⁷⁸

An excellent example is provided by the English case of *R. (on the application of Gillian and another) v. Metropolitan Police Commissioner*,⁷⁹ where the Divisional Court was asked judicially to review police powers to stop and search under section 44 of the Terrorism Act 2000. Under the Act, the police may be granted the power to randomly stop and search individuals without suspecting that the individual is a terrorist or has been involved in acts of terrorism.⁸⁰ Although the ECHR manifestly asks the courts to carry out a balancing exercise between individual rights and public security and safety, the Divisional Court found no reason to question the compatibility of the blanket stop and search authorization powers with respect to ECHR Articles 8, 9, 10 and 11 and decided the judicial function in scrutinizing a

78. Under the ECHR, judicial discretion in all matters of rights qualifications and the derogations under Article 15 is complicated further by the doctrine of the margin of appreciation, which requires the court to defer to a signatory State’s interpretation of the situation in allowing a limitation on the rights guaranteed by the ECHR. The reasoning behind the doctrine is partly to allow States to make judgment they are better placed to make, but likewise to allow the ECtHR not to get embroiled in political controversies with national government. The doctrine, however, does not extend to the domestic situations where national courts are asked to enforce the ECHR against the executive. It follows that, in relation to the same ECHR right, the ECtHR may justifiably defer to a national government, while an English court, which must handle domestic controversies, cannot. The English cases involving national security issues under the HRA framework suggest that the courts remain reluctant to exercise their enhanced judicial scrutiny and review function.

79. *R. (on the application of Gillian and another) v. Metro. Police Comm’r*, [2003] EWHC (Admin) 2545.

80. The facts of the case were such that the two applicants in *Gillian* had tried to join a demonstration against an arms fair but were detained and searched and, as a result, prevented from joining the demonstration. Both applicants were of good character and nothing incriminating was found. In one case, the search of the applicant’s rucksack merely yielded a sandwich, notebook, and print-outs, which the police confiscated; the other applicant was searched in spite of wearing a photographer’s jacket and a press pass. The Divisional Court did not question the decision to grant the authorization, the manner of its exercise in this particular case.

power or decision of this kind was necessarily a limited one.⁸¹ In effect, the court chose to exercise its discretion by not exercising it and deferring to the authority of the policy-makers despite the ECHR provisions mandating judicial review of the authorization. In the areas of public safety and national security—those areas where rights abuses are arguably most likely to occur and potentially most serious—conceptual vagueness surrounding the qualifications of and the derogation from ECHR rights appears to have favored excessive judicial deference rather than judicial activism. Judicial deference and judicial activism, of course, are the two extreme ends of judicial discretion.

A further, more disquieting, example of the almost complete freedom enjoyed by judges under the HRA when seeking to balance the requirements of individual liberty under ECHR Articles 5 and 8 with the demands of national security and particularly of the higher threshold of public emergency exigencies under ECHR Article 15 is *A v. Secretary of State for the Home Department*.⁸² This case involved the issue of a possible serious breach of the right to liberty under ECHR Article 5 in connection with the U.K. Anti-Terrorism, Crime, and Security Act of 2001. The Act gives the Home Secretary power to imprison people indefinitely without trial under the ECHR Article 15 derogation from ECHR Article 5 “in time of war and of public emergency threatening the life of the nation.” The Special Immigration Appeals Commission (“SIAC”), which was asked at first instance to review the Home Secretary’s decision to make the derogation under ECHR Article 15, vindicated the executive detention without qualification or reluctance. In addressing these matters, the SIAC found that there was “a public emergency threatening the life of the nation” and that “imprisonment without trial” was “strictly required by the exigencies of the situation.”⁸³ Although “no other European country has found it necessary to derogate,” the SIAC found that “the United Kingdom could be distinguished from its neighbors.”⁸⁴ This was because the United Kingdom is regarded “as a prime target” and that an attack against the United Kingdom would be “devastating.”⁸⁵

The Court of Appeal appeared to agree with this part of the decision. Lord Chief Justice Woolf conceded that the threshold for

81. See, e.g., *id.* ¶ 35 (“The assessment of risk to the public safety and to national security . . . are primarily for the Government and Parliament on grounds of political legitimacy.”).

82. *A v. Sec’y of State for the Home Dep’t*, [2002] EWCA (Civ) 1502, [2004] Q.B. 335.

83. *Id.* at 368-69.

84. *Id.* at 354.

85. *Id.*

derogation under ECHR Article 15 is higher than that required by the interests of national security built into ECHR Article 5, but concluded that “the same general approach is clearly appropriate.”⁸⁶ The Court of Appeal even overruled the SIAC on the point of the actions taken to deal with the emergency, ruling that the SIAC had erred in not showing deference to the executive on this point, too. According to the Lord Chief Justice:

Whether the Secretary of State was entitled to come to the conclusion that action was only necessary in relation to non-national suspected terrorists, who could not be deported, is an issue on which it is impossible for this court in this case to differ from the Secretary of State. Decisions as to what is required in the interest of national security are self-evidently within the category of decisions in relation to which the court is required to show considerable deference to the Secretary of State because he is better qualified to make an assessment as to what action is called for.⁸⁷

The House of Lords later departed from the established practice of judicial deference in national security and emergency cases and overruled the Court of Appeal, but this only reinforces the image of unbridled judicial discretion on a central issue of civil liberties. Besides, an appeal to the House of Lords does not lie as of right and in any event will often be beyond the reach of most litigants who are neither publicly funded nor possess the deep pockets of public bodies and private corporations.

Remarkably, in both cases the courts at first and second instance were simply able to avoid a politically sensitive issue and potential clash with the executive by choosing not to exercise a crystal-clear duty to review both legislative and executive measures under the HRA. The reasons for this near complete freedom lie both in the vagueness of the underlying concepts and the absence of any common standard into which the respective gains and losses in liberty and security could be translated and thus compared. In these circumstances, judges are given no guidance as to how much security can and should be traded for liberty. Judicial trade-offs between incommensurable values thus remain unconstrained by rational choice because it cannot be demonstrated that the loss of liberty entailed by some measures is either greater or more limited than the correlative gains in security. No one can say how much security is enough, how many X units of liberty should be sacrificed for Y gains in security, and where a point may be reached at which the suspension of civil liberties in the name of making democracy safe will

86. *Id.* at 361.

87. *A v. Sec’y of State for the Home Dep’t*, [2004] Q.B. at 359.

actually transform the democratic order into a state which is no longer concerned with civil liberties and thus less worthy of protection in their name.

Believers in legal certainty, of course, will point out that such trade-offs need not be arbitrary, but are made with reference to legal principles. The rationality of judicial trade-offs between conflicting rights thus depends crucially on the clarity and precision of the legal principles that may resolve rights clashes. The alleged autonomy of these principles and their ability to fill the gaps where legal rules run out—a position associated in particular with Dworkin—is central to the final argument that human rights are not, after all, simply what judges say they are.

F. The Conceptual Indeterminability of Legal Principles

A problem common to all legal systems consists in the need for legal certainty in situations where legal rules run out either because of their lack of precision or the vagueness. Central to both civil law and common law systems is the assumption that in these circumstances, legal principles can provide objective rules capable of constraining judicial discretion. Legal principles, however, can provide such answers that escape the pluralistic dilemma, only if they are not subject to conceptual vagueness and can be divorced from appeal to underlying normative considerations. Neither is the case.

All human rights instruments include or presuppose certain general principles of law. In the case of the ECHR, examples include the principle of proportionality, which governs the application of most rights and acts as an express or implied condition of any judicial trade-off between ECHR rights and their limitations, including national security and public emergency considerations, the principle of non-discrimination as enshrined to ECHR Article 14, and the general principle of fairness governing the fair trial guarantees under ECHR Article 6.

The principle of proportionality requires a reasonable relation between the goal pursued and the means used. Courts often use it as a vehicle for conducting a balancing exercise between the demands of conflicting individual right or rights and its recognized security or other limitations. The principle of proportionality, however, does not directly balance the right against the reason for interfering with it. Instead, it balances the nature and extent of the interference against the reasons for interfering. As a matter of judicial practice, the principle of proportionality may thus serve as a useful reminder to look hard and critically at draconian measures a beleaguered government may be tempted to adopt in the face of perceived security threats or at measures singling out particular groups or individuals for unusually harsh

treatment. However, it cannot resolve genuine value conflicts or provide legal certainty in judicial trade-offs in such cases for several reasons.

Above all, the principle of proportionality can only come into operation once a specific aim has been selected, which implies that in the conflict between two rights, e.g., between privacy and freedom of choice, or between individual rights and national security, as in the above English cases where national security and emergency grounds were held to justify far-reaching infractions of ECHR rights, a basic choice favoring one value over others has to be made by the judges even before any discussion of proportionality. In these cases, security was prioritized, and proportionality could come into play only as a means of assessing whether certain measures involving losses of individual liberty were suitable, but no more than necessary to achieving the selected aim. However, this is possible only if there is transitivity between the various rights and interests concerned. In the absence of value transitivity, however, all judicial value transactions amount to short change.

The same is true of purported trade-offs between privacy and freedom of expression. In *Von Hannover v. Germany*,⁸⁸ the court referenced the proportionality of the interference, but it is not possible to express in common currency the comparative normative or legal weight of the subjective discomfort resulting from intrusions into a person's privacy set against the aggregate loss resulting from restrictions of freedom of expression. Moreover, in many cases, the choice between ECHR right or rights and national security is an all-or-nothing choice: a demonstration under ECHR Article 11 is either to be allowed or to be prohibited, an article invading another's privacy is either to be published or not, and, if the recent headscarf debate in both France and the United Kingdom is to be finally resolved judicially, the right to follow religious precept is either to prevail or give way to countervailing public order considerations.

A particularly striking example of the misuse of the proportionality principle in order to establish whether there has been a breach of an ECHR right is the case of *Van Kück v. Germany*.⁸⁹ The case involved a claim by a transsexual for reimbursement of her gender re-assignment surgery by her private medical insurance. The ECtHR purportedly did not make any finding regarding the entitlement to such expenses, but found that the requirement to prove the necessity of surgery and "genuine nature" of the applicant's condition was disproportionate and in conflict with her right to self-determination. Leaving aside that there is no such right under the ECHR, it is unclear what, if anything, could be

88. *Von Hannover v. Germany*, 2004-VI Eur. Ct. H.R. 294.

89. *Van Kück v. Germany*, 2003-VII Eur. Ct. H.R. 73.

described as disproportionate. Instead, the appropriate principle to apply in the case should have been the principle of non-discrimination in order to establish if the applicant had been treated discriminatorily by reference to others placed in an analogous position.

Finally, proportionality assessments as to what is necessary to achieve an appropriate goal often require detailed or technical knowledge that judges rarely possess or find difficult to evaluate. Moreover, in national security cases, not all the relevant information is usually made available to courts. Lack of information and technical expertise often reinforce and strengthen pre-existing judicial dispositions to show significant deference to political authority in national security cases. The English cases referred to above are but few of many examples.

The principle of equality as non-discrimination is another key principle found in most charters of rights. In the ECHR, it is enshrined in Article 14, which prohibits discrimination on any grounds with respect to all ECHR rights and adds a non-exclusive list of particular discriminatory grounds which are prohibited.⁹⁰ The basic idea behind ECHR Article 14 seems clear: an applicant must establish that he is subject to a difference in treatment from others in a comparable, analogous, or “relevantly similar”⁹¹ position in the enjoyment of one of the rights guaranteed under the ECHR unless that difference in treatment can be objectively and reasonably justified. The proviso is not part of the provision, but has been recognized by the ECtHR and national courts applying the ECHR as a public interest or public policy exception of the last resort. A ready example is provided by aforementioned case of *A v. Secretary of State for the Home Department*,⁹² where the Court of Appeal held that discrimination against non-British nationals who could be detained without trial (the legislation excluded the detainment of nationals) could be justified on the ground that, by taking such limited powers, the Home Secretary had done no more than was strictly necessary for the exigencies of the situation. It is as if ECHR Article 15 required the Home Secretary to discriminate notwithstanding the terms of ECHR Article 14.⁹³

A further source of conceptual and normative uncertainty is the vagueness of the non-discrimination principle itself. It arises in

90. The inclusion of some of those discriminatory grounds, such as property, is patently absurd, as personal wealth obviously affects the ability to seek legal address and advice or indeed the extent of one's private sphere from which one may have a right to exclude others, while the inclusion of both race and color is superfluous.

91. See *Marckx v. Belgium*, 32 Eur. Ct. H.R. (ser. A) at 23 (1979).

92. *A v. Sec'y of State for the Home Dep't*, [2004] Q.B 335.

93. K.D. Ewing, *The Futility of the Human Rights Act 1998*, PUB. L., Winter 2004, at 842.

particular over what precisely counts as “comparable” or “analogous,” for it is the answer to this question that decides which cases should be treated alike and which will be treated differently. A good example is provided by those cases in which national governments sought to justify differential treatment of children born out of and in wedlock and of unmarried and married couples. *Inze v. Austria*⁹⁴ and *Mazurek v. France*⁹⁵ both concerned the issue of inheritance rights of illegitimate children, and the ECtHR held in both cases that differential treatment of children born in and out of wedlock was a breach of ECHR Article 14 in conjunction with ECHR Article 8. By contrast, on several occasions, the court accepted arguments that married couples were not in an analogous position with unmarried couples and affirmed that marriage had a special status that grounded a distinct corpus of rights and obligations. Specific examples have arisen in particular in cases involving differences in the parental rights and responsibility over children accruing to natural fathers as compared to married and divorced fathers. On the whole, the court has accepted that differential treatment of natural fathers was justified in view of the difference in the nature of relationships of fathers with children born out of wedlock.⁹⁶ It is clear that together with the “objective and reasonably justified” proviso, the “relevantly similar situation” criterion, developed by the ECtHR as a test to distinguish between material differences and similarities for the purposes of ECHR Article 14, gives the court considerable flexibility in refusing to extend the equality of treatment principle to cases where it considers discriminatory treatment justified on the grounds of social or economic policy. The courts here effectively assume the role of policy-makers.

Fairness is the overriding principle for the determination of the specific procedural justice guarantees of ECHR Article 6. In theory, the right to a fair hearing is absolute with no expressed qualifications. In practice, however, it is qualified by the inherent vagueness of the concept of fairness which has allowed the ECtHR to avoid politically contentious decisions and show deference to national legal traditions. The availability of legal aid or reasonable contingency fees arrangements, for example, is undeniably one of the most important facilities for aggrieved parties to secure effective access to a court in the determination of their civil rights. Yet, unsurprisingly, the court has acknowledged no general right to receive legal aid or access to affordable fees arrangements exists except in highly exceptional circumstances.⁹⁷

94. *Inze v. Austria*, 126 Eur. Ct. H.R. (ser. A) at 38 (1987).

95. *Mazurek v. France*, 2000-II Eur. Ct. H.R. I.

96. *McMichael v. United Kingdom*, 307 Eur. Ct. H.R. (ser. A) at 27 (1995).

97. Circumstances such as extreme complexity of proceedings or cases where legal representation is compulsory. See KAREN REID, A PRACTITIONER'S GUIDE TO THE

National courts, in applying the ECHR, have likewise utilized the “fairness and impartiality” requirement under ECHR Article 6 to avoid making decisions with budgetary implications or that would conflict with established national legal and judicial traditions. A good example is provided by the *Alconbury* decision of the House of Lords,⁹⁸ which involved a challenge to the entire U.K. planning system on the grounds that the reserve jurisdiction of the Secretary of State over planning appeal decisions was in breach of ECHR Article 6(1). The House dismissed the challenge. Central to their lordships’ conclusion was the claim that in democracies decisions concerning the general interest should be made by democratically accountable bodies.⁹⁹ Planning decisions, they opined, fall into that category and so properly fall within the remit of the decision-making powers of the Secretary of State. As political theory, the court’s conclusions may be convincing to political freshmen, but as a matter of law it remains unclear how a tribunal that the Government created for the purpose of deciding disputes between planning authorities and developers, which involve the interpretation of government legislation and planning policy, may be regarded as impartial when the Secretary of State reserves to itself the right to “call in” any decision by the planning tribunal hearing the case.

Indeed, the fact that government quite appropriately legislates for the public interest in such matters or formulates policy documents on this basis in no way means that there neither should nor could be a check on the application of that policy, which is independent of the policy-maker. For example, in conflicts between ECHR Articles 10 and 8, the courts are constantly asked to adjudicate whether the disclosure of personal information or other speech requires protection in the general interest. The same applies in relation to other cases involving the right to property under Article 1 of ECHR Protocol 1 or the public interest exceptions to the right to private life, which are unrelated to ECHR Article 10. Why, therefore, is it not desirable, possible or appropriate for planning tribunals to decide what the public interest requires in specific cases that planning inspectors decide on the basis of government legislation, policy, and guidelines? This is a question their lordships do not answer, but it is testimony to the degree of discretion afforded by the principles of fairness and impartiality in the context of the putatively absolute, non-derogable fair trial guarantee of ECHR Article 6.

EUROPEAN CONVENTION OF HUMAN RIGHTS (2d ed. 2004).

98. *Regina (Alconbury Dev. Ltd. & Others) v. Sec’y of State for the Env’t, Transp. & the Regions*, [2001] UKHL 23, [2003] A.C. 295.

99. *Id.* at 325 (Lord Hoffman, J., concurring).

IV. Conclusion

Rights are not worded sufficiently precisely to prevent clashes, nor are legal principles sufficiently clear, autochthonous, and hierarchical to overcome the dependence of human rights adjudication on foundationalist values, and neither can they escape the normative dilemmas and conceptual vagueness and ambiguities attendant to those foundationalist values. In many clashes between legally recognized rights, no less than in the theoretical sphere of conflict between alternative sets of rights derived from rivalrous pluralistic values, there will always be cases where choices between conflicting rights can only be justified in terms of the values underlying these rights. Thus for as long as the human rights *de facto* recognized in human rights instruments are capable of colliding and, in addition, might also collide with public security or other public interest requirements, the philosophical dilemma of value pluralism remains relevant to the judicial and political choices that need be made in such cases. Competing pluralistic values are ethically and legally indeterminate and cannot furnish detailed prescriptions of how rights may be best balanced. Value pluralism means that indeterminacy in human rights adjudication is not merely an unavoidable consequence of legislative and judicial fallibility but a practical result of normative necessity.

It is common to draw a distinction, often a stark one, between the issue of a philosophical justification for human rights, which is regarded as the remit of philosophers, and the less abstract issue of bringing coherence into judicial and political human rights language as the basis and criticism for adjudication and legislation. This strict juxtaposition is mistaken: The foregoing discussion has shown that the normative and conceptual contestability of human rights not only raises fundamental normative questions about the justification for judicial value judgments; it likewise calls into question the very basis for the distinction between political and judicial judgments as both seem inescapably wedded to value judgments. Judicial decisions defining the meaning of individual rights or balancing the countervailing requirements of competing rights and between rights and their limitations lack both a distinctive justificatory legal and normative foundation. They lack certainty not simply as a matter of experience but by logical necessity and consequently share the characteristics of political decisions and balancing acts, just as any bill of rights must be regarded as essentially a political document to the extent to which its provisions are incapable of rational justification in terms of a coherent ideal of human ends, but explicable above all in terms of political choices made in a particular political and social context. However, value pluralism and conceptual

uncertainty do not only provide a useful theoretical framework for analyzing the use and abuse of judicial discretion in human rights adjudication; they likewise undermine the idea of human rights as ultimate legal values in a society characterized by ethical pluralism.

For there is nothing that renders human rights normatively less contentious or more suited for judicial enforcement than many other moral or political concepts. Human rights therefore lack the overriding normative status that is commonly assumed in justifying their privileged legal status, and they likewise lack the attributes of clarity, precision, or non-reducibility that would facilitate or allow for their justiciability through judicial adjudication in a way in which the conceptual structure of other moral claims does not. Where there are no moral absolutes, the defense of the priority of the right over the good fails, and the justification of human rights and of their exemption from the democratic process seems morally arbitrary.

Human rights are justifiable either if they are based on absolute moral truths, as in natural law thinking, or on non-foundationalist grounds. Analogously to the concepts of representative democracy and separation of powers, which are not commonly defended on *a priori* normative grounds, but in terms of outcome and their ability to reduce the danger of abuses of power and provide a widely accepted framework for settling conflicts between divergent interests and opinion, so human rights and the role of the courts in their enforcement may in the second sense be capable of justification in terms of their contribution to the institutionalization of a liberalism of fear, that is, a political framework of checks and balances designed to protect public decision-making as far as possible against the invasion by private interests and prevent institutionally sanctioned cruelty and violence and the crippling effects of the fear that comes from fear. It is difficult to imagine how the current inflation of human rights and human rights language and the quasi-gubernatorial role assumed by the courts as the *praetors* between divergent social norms and moral values in most areas that do not have obvious or significant fiscal implications can be defended on those grounds. In circumstances where courts have generally shown deference and restraint in areas of high politics where human rights violations are potentially most serious and they have often been most activist in areas of subtler discrimination and social and media pressure, the courts have often taken rights most seriously where they matter least and have been far less assertive where rights matter most in the sense that they protect basic human interests. The use, or abuse, of judicial discretion to this effect is inseparable from conceptual vagueness surrounding human rights concepts and the inevitable value conflicts between a multiplicity of values of equal or incommensurable status. In these circumstances, it

is difficult not to think that less would be more.

