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Legitimation Crisis, Reifying Human Rights and the Norm-Creating Power of the Factual: Reply to Reifying Law: Let Them Be Lions

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Legitimation Crisis, Reifying Human Rights and the Norm-Creating Power of the Factual:* Reply to "Reifying Law: Let Them be Lions"

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I. Reifying Law, *Jurisdictio*, and Human Rights

Professor Backer's Article marks a much needed and refreshing change from much of the over-normatised and under-reasoned contemporary discourse in international and comparative constitutional and human rights law. Backer openly concedes that he is not interested in the perennial but unanswerable question concerning the "true" meaning of law as an abstract concept, but only in law as a protean pluralistic concept which is constantly transformed, reified and reincarnated in different guises. Aiming at sketching out the broad trends in the transformation of the meaning of law as a belief system from the seventeenth century to the twenty-first century, Backer indirectly develops a new and enticing non-reductionist conception of law as politics "by other means."

For Backer, questions regarding the "right" meaning of law are both fruitless and never ending, because law cannot be reduced to a fixed set of particular characteristics or normative principles. There is, therefore, not one right meaning and conception of law, but many. Although at any given time the meaning of law may be settled because there is a congruence as to its ultimate source, authority, scope and limits amongst all those concerned with making, enforcing and obeying it, such settlements do not last because they are either superseded by, or more

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* This quotation which is translated from German where it reads *die normative prägende Kraft des Faktischen* is generally attributed to Carl Schmitt although the author has been unable to locate the precise source.

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gradually evolve into different settlements and so ad infinitum. Whilst at any period of relative stability there will be a broad agreement as to the prevailing conception of law, no such agreement exists over time and there is no vantage point from which to lay down the one true conception of law over time. The meaning of law is always and everywhere tied up with variable, unstable and non-reductionist normative belief systems and structures of perception. This makes law an essentially contested concept whose meaning cannot be settled but remains forever open to reinterpretation and debate. According to this view, law as the source of legitimate authority and coercive governance is the reification of a distinct normative belief system, which is commonly informed by ethical norms, customs or their ethically enriched variant of *Sittlichkeit*,[1] positive law, economic considerations and religion, but not reducible to any one of them. According to Backer, we are currently witnessing a seismic shift away from a conception of law that had its heyday in the nineteenth century towards the emergent global conception of the twenty-first century. There are two major aspects to this shift. First, Backer notes that law, as the discourse of legitimate authority, is moving away from the nineteenth century notion of constitutionalism as a constraint on ordinary law and policy-making towards norms of international law, and especially international human rights law, as constraints on national law and politics. Secondly, and related to the resultant erosion of the sovereignty of the nation-state, is the emergence of private agents, e.g., both corporations and NGOs, as agents in the process of international law-making, law-enforcement and self-regulation. Such private agents may assume the role of lobbyists or self-appointed watchdogs, as in the case of NGOs, or that of actors driving and shaping emergent standards of the international legal order constrained invariably, as everything else, by the discourse of economics.

Unlike many traditional conceptions of law, Backer's notion of law can accommodate these changes. His notion of law is neither constrained by the preconceptions of traditional statehood and national sovereignty, nor does it yield to the reductionist desire to define law in terms of ethics, command, custom, and positive law. Although, law evidently is connected with each of these, it ultimately remains autonomous. For law deals with who has the final say, and the factual agreement between those who claim that authority and those who accept it, is ultimately a political phenomenon informed by each of these other

1. This term refers to the concept of "ethical life" furthered by Georg Wilhelm Friedrich Hegel in the *Elements of the Philosophy of Right*. *See* Stanford Encyclopedia of Philosophy, *available at* http://plato.stanford.edu/entries/hegel/ (last visited Dec. 11, 2007).

normative systems, which is distinct from other political phenomena. Backer, unlike many other legal theorists, embraces this notion of law as a *sui generis* normative system. Faithful to Bishop Butler's timeless dictum, Backer does justice to law by not denying that "everything is what it is and not another thing."

Backer's Article opens many promising avenues for further conceptual analysis and empirical investigation. I wish to content myself with mentioning two. First, Backer convincingly traces modern conceptions of law as an autonomous set of normative limits on state power back to Bracton's notion of *jurisdictio*. But there is an alternative genealogy which locates its source in the natural law tradition. The issue that Backer does not address, is which of the two—customary common law or an ethically or religiously grounded model of the individual and his ends—ultimately provides a more convincing framework for restraining *gubernaculum*. For, as Justice Scalia not unconvincingly shows, judicial law-making in the absence of either lacks foundational solidity. It remains to be asked whether such a foundation can still be provided in the absence of a unifying normative or social framework, or whether, ultimately, in modern times the only credible reason for dividing law-making authority between different agencies remains the need for separation and diffusion of power. Yet, where law is concerned, such division also poses a legitimation problem regarding the concentration of power in private hands, which is not subject to institutional checks and balances. Secondly, half way through his Article Backer provides a fascinating overview of how law is redefining itself in the post-national context of what he calls an emerging system of private law. What is clear is that in this international system explanatory devices, such as the rule of recognition, no longer provide adequate means for analysing the sources of the specific form of authority of legitimacy law lends to politics, nor for understanding the scope, source and limits of legal power. What even Backer does not quite elucidate, however, is who makes the new law in this new system and, even more importantly, how private *gubernaculum* is or can still be restrained through *jurisdictio*. Perhaps there are no answers except that the term "business law" will acquire a new and all-embracing importance.

Perhaps the prime example of a comprehensive framework for restraining *gubernaculum* through *jurisdictio* are bills of human rights which come in two forms: constitutional guaranties restraining national lawmakers, and treaties or conventions, which are at the heart of the emerging law of acceptable state conduct and international criminal law justice. In the theoretical and practical struggle for control of law as a normative concept predicted by Backer, the central battleground will be that of human rights. The concept of human rights is essentially

contestable and characterised by radical ethical and linguistic indeterminacy. The idea of value pluralism which permeates modern conceptions of *jurisdictio* is implicit in modern human rights systems and the thinking behind it, which Backer convincingly shows makes attempts to settle disputes about the meaning of the term "law" fruitless, ultimately also means that the ethical foundations of human rights must need to remain contestable, apart, that is, from "the norm-creating power of the factual."[2]

Human or fundamental rights, and the two terms will henceforth be used interchangeably, enjoy a privileged legal status in most Western liberal democracies. Unlike ordinary legislation, human rights are not subject to the majoritarian principle,[3] and are handed down without a vote and enforced by unrepresentative and unaccountable judges. Arguments in favour of assigning this special legal status to human rights and entrusting their administration to courts usually run as follows: amongst the wider range of human goods some values merit special protection. Such values should be granted the status of human rights. The grounds for justifying the special legal status assigned to rights are of such overriding importance that they merit exemption from the democratic process, which is generally recognised as the appropriate mechanism for resolving conflicts between competing interests, and exclusive jurisdiction by the courts.[4] Inter alia, this assumes that human rights not only enjoy moral primacy but also meet the criteria of legal certainty and justiciability; otherwise, the courts would be free to impose their own values on their rights interpretations. A justification of human rights and their privileged legal status in liberal democracies, thus, requires both a normative and conceptual dimension. Both aspects are inter-related and revolve around the idea of legal certainty.

A normative justification is necessary for two reasons: first, to justify the priority of human rights over other values, and second, to allow the judiciary to rank and balance conflicting rights, in the absence of which, any judicial trade-off between competing rights would be

2. This quotation which is translated from German where it reads *die normative prägende Kraft des Faktischen* is generally attributed to Carl Schmitt although the author has been unable to locate the precise source.

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

4. 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 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 combined with enforcement through the courts.

morally arbitrary. The trade-off would be arbitrary in the sense that it could not itself be justified in terms of a higher ethical reference point from which all interests concerned could be evaluated. Without a normative justification it would remain unclear why human rights should take priority over other legal claims and policy objectives, as well as what should happen if two rights conflict.

The need for a conceptual justification likewise relates to the issue of legal certainty. Unless there can be a shared meaning of both the term "human right," as well as of the meaning and scope of individual rights and central concepts they represent and those justifying them, human rights adjudication in general would lack legal certainty. Judges would effectively *make* and not merely enforce rights.

This Article shows that contemporary human rights systems and much of the thinking underlying them ultimately lack both a normative foundation, as well as conceptual certainty. More particularly, systems of human rights protection lack an adequate normative or rational basis that can justify their superior legal status over other values. Such systems generally lack a coherent foundation in a conception of human nature as meriting respect and legal protection and instead rest—expressly or impliedly—on the notion of value pluralism, which denies that there is a clear hierarchy of human values and assumes that there is a plurality of primary values which may not only conflict, but also may be incommensurable. To the extent to which the number and scope of pluralistic values exceeds those of the values protected by the system of human rights, the priority accorded to human rights as opposed to the remaining primary values which have not been denied the same legal status, lacks a normative or rational basis. In these circumstances, the privileged status granted to human rights over other values is morally arbitrary. This is the central claim in Section Two of this Article.

Leaving aside the problem of justifying the original choice favouring human rights over human values, actual human rights systems rest—expressly or implicitly—on the premise that the proper role of the courts consists in the application of human rights, whereas the basic value judgments involved in defining human rights are the prerogative of a special body, which possesses the legitimacy for laying down the highest constitutional norms.[5] It is argued in Section Three that value pluralism is not confined to the fundamental decision of which values are to be "the chosen ones," but resurfaces at the level of human rights adjudication. Where human rights conflict, the idea of value pluralism

5. Depending on the relevant context and political culture, this may be the legislature, a constitutional convention, another appropriate body or even the electorate *in toto*.

entails that there can be no objective, rational solution for balancing their conflicting demands. Conflicts of this type can only be resolved pragmatically.

Based on the idea of essentially contested concepts it is argued in Section Four that conceptual uncertainty is a pervasive feature of human rights adjudication in at least four respects. First, 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. There is no right answer to the question of what precisely is meant by the term human right. Second, many concepts elevated to rights status or underlying rights are themselves essentially contestable. There is no demonstrably correct or best interpretation of those concepts. It follows, therefore, that the rights which they define or underlie, are contestable. Third and fourth, it is shown that neither the textual limitations contained in human rights instruments nor the principles of human rights adjudication can escape essential contestability. The combination of value pluralism and essential contestability means that human rights adjudication inevitably and habitually involves contestable value judgments.

At this point several possible objections and a practical point deserve mention. First, it may be argued that conceptual vagueness is a pervasive source of uncertainty in the law and applies to human rights just as much as to other legal concepts such as intention, negligence, responsibility, causality or trusts. Moreover, legal realists, in common with linguistic philosophers, have long argued that concepts, while having a core meaning, are contestable at the penumbra. There seems nothing exceptional about rights in this respect. The reply to these observations is that, whilst they are valid, rights require a special justification simply because compared to other legal concepts they enjoy an elevated legal status, which means that the legislature cannot adopt legislation that would extinguish them in the same fashion in which it could simply abolish trusts established for avoiding inheritance tax. Furthermore, whilst legal realists in common with theorists as diverse as Hart, Endicott, Sunstein and Carl Schmitt have all emphasised conceptual uncertainty in the law as a source of judicial discretion, judicial freedom of interpretation feeds not only on vagueness but likewise on the normative contestability of human rights, which is rooted in value pluralism. Unlike other discussions, this Article emphasises the combined effects of conceptual and normative indeterminacy, which are inter-related and mutually reinforcing. Together they afford the judiciary almost unlimited freedom in human rights adjudication, subject only to one overriding constraint, namely, that they do not challenge the executive in politically sensitive areas such as national security, foreign

defence, and fiscal policy.

Second, it can be argued that conceptual vagueness is ineliminable while, with the erosion of religion and the loss of faith in the possibility of a rational foundation for ethics, moral objectivism lacks widely shared justificatory foundations. It does not follow, however, that human rights systems operate at anything like the ineliminable minimum of linguistic indeterminacy or that any alternative to moral objectivism, such as relativism, pluralism, or subjectivism, has any greater foundational justification. Nothing suggests that bills of rights could not afford greater legal certainty if they were shorter, less obscure and more concerned with what matters most, when, at present, judicial practice tends to take rights seriously only where they are trivial and ignore them where they matter most.

Third, it might also be said that it is slightly unrealistic to construct a stark contrast between an unelected judiciary handing down unaccountable decisions and a democratically legitimated and accountable legislature reflecting popular wishes and opinions. Realistically speaking, parliamentary democracy does not mean popular sovereignty, but merely represents a safety valve that prevents popular dissatisfaction from reaching boiling temperature. Moreover, human rights need not be conceived as moral values of the first order, but could equally well be, and in fact are, construed as goods most individuals want, regardless of whatever else they may want. In this sense, human rights are based on a kind of democratic consensus. The counter to these objections is that human rights language simply does not reflect this toned down version of human rights as second-order preferences, which keep things under control when popular opinion takes an aberrant holiday from its own considered wishes. First, judicial practice cannot realistically be construed in this restrained, non-moralistic sense. Second, consistent divergence between popular wishes and the lack of genuine choice offered by the political process yielding government policy which, in central respects, the majority does not endorse, raises serious issues of political legitimacy and accountability in view of foreign policy interventions in the name of international law, but undesired by most Western electorates and tax policies that effectively exempt the international elite from income and other taxes in any country. Yet, neither is an argument for placing decision-making in the hands of unelected and irremovable judges.

Case examples designed in particular to demonstrate the inadequate moral or rational basis for many judicial distinctions in the exegesis of human rights are drawn largely from the European Convention on Human Rights, British cases and U.S. Supreme Court decisions, with occasional references to Germany and other jurisdictions. From this,

however, it does not follow that the claims of this paper are confined to the jurisdictions discussed. On the contrary, aspects of those jurisdictions that are sources of uncertainty specific to that legal system and not applicable across human rights jurisdictions, such as the margin of appreciation under the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR"), have been deliberately excluded from the discussion so as not to distract from discussion of the broader uncertainty arising from value pluralism and conceptual uncertainty across all human rights systems.

II. Value Pluralism and the Normative Contestability of Rights

Modern conceptions of human rights have their origin in the idea of natural rights. They share the equality and universality assumptions of the natural law tradition 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 they rest on a conception of human beings as having certain universal rights irrespective of whether these rights are recognised in positive law, whilst on the other hand they lack a secure moral basis in a theory of human nature and ends, which could sanction their authority. In its extreme form, the scepticism that has undermined the belief in absolute truths and that has debunked both religion and reason as sources of value and moral certainty, leads to relativism, which is incompatible with any belief in human rights as anything more than the very diluted sense of a set of historically and culturally contingent dominant values in certain places at certain times. Richard Rorty, for instance, maintains that the list of human rights can be justified without grand foundational claims, pragmatically as historically contingent artifacts.[6] A more accurate description, however, 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 to Max Weber, but it only became an established concept in philosophical ethics through the work of Isaiah Berlin. Central to Berlin's ethics is his rejection of monism, i.e., of 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, Berlin argues is the idea that there is no clear hierarchy of moral ends, but a multiplicity of equally fundamental values that may not only be incompatible but also be incommensurable. To say of two values that they are incommensurable connotes a breakdown of transitivity. Gray

6. *See* Richard Rorty, *Human Rights, Rationality and Sentiment, in* ON HUMAN RIGHTS: THE OXFORD AMNESTY LECTURES (S. Shute & S. Hurley eds., New York 1993).

defines values or options as incommensurable if "it is 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."[7] More succinctly, two values are incommensurable if it cannot be said of one that is either better or worse than the other nor, importantly, that it is of equal value to another so that "reason has no judgment to make concerning their relative value[s]."[8] There is no general procedure for resolving conflicts amongst incommensurable values.

The resolution of such conflict would require the possibility of comparison, which in turn requires the existence of a common currency of value into which all primary values could be translated according to fixed formulae, so that in cases of conflict it could 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. The idea of an ultimate solution, therefore, 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.

Value pluralism poses a threat to modern conceptions of human rights at two levels: first, at the philosophical level where it challenges the possibility of a prioritisation of any particular set of human values over other values; and second, at the level of adjudication between particular rights that have been prioritised in human rights documents 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 the subsequent Section will deal with the latter. Both are interlinked.

Berlin gives many examples of conflicting values. Liberty can conflict with equality or public order; mercy with justice; love with impartiality and fairness; social and moral commitment with the disinterested pursuit of art as the commitment to either truth or beauty (indeed the latter two values, contrary to Keats, may themselves be incompatible); and intellectual freedom with both happiness and justice.[9] Moreover, Berlin argues that most conflicting values are internally

7. *See* JOHN GRAY, ISAIAH BERLIN 50 (London 1995) (citing Joseph Raz, *infra* note 8, at 325).

8. JOSEPH RAZ, THE MORALITY OF FREEDOM 322-24 (Oxford 1986).

9. *See* GRAY, *supra* note 7, at 45.

complex and pluralistic, containing conflicting elements. An example is the concept of liberty, which divides into both positive and negative liberty.[10] Moreover, the concept of negative liberty itself, defined as the freedom to act independently of external restraints, contains rivalrous and incommensurable liberties. For example, the liberty of the press to probe into peoples' private lives may limit the latter's freedom to do what they like without fear of disapprobation or intrusion. The same is true of equality, which may be construed in terms of the incommensurable equalities of income and opportunity, or of welfare and resources.[11] Individual values are not harmonious wholes, but within themselves constitute arenas of conflict and incommensurability.[12]

In a value pluriverse the legal priority accorded to human rights over other goods 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 nonetheless enjoy priority over other goods either on the grounds that the latter are merely instrumental or inferior. Human rights, therefore, must either be rights to promote pluralistic values or rights to those conditions that allow for their furtherance. Thus, for instance, for both Rawls and Nozick the priority of the right over the good is ultimately grounded in a belief (albeit to different degrees) that the value of negative liberty trumps that of all other rivalrous values. Put differently, all this means is that unless rights further or safeguard values that are more important than others, it seems unjustified to give them priority. To give priority to something, for instance by making it legally enforceable when other values are not, must mean that it is in some sense more valuable unless external enforcement is somehow antithetical to the achievement of a good. Subject to this qualification, the idea of protecting lesser as opposed to more fundamental values seems irrational.

Yet, in an ethical pluriverse where any choice between fundamental values entails loss and no choice is necessarily rationally preferable. The same applies to instances of choice between the rights derived from them, whether they are defined as enabling conditions for these values or

10. Negative liberty, put simply, consists in the absence of external impediments, whilst positive liberty equates freedom with doing what is rational or moral. On the negative view, a person is free if others do not prevent him from experimenting with drugs and becoming addicted. In such a state, however, the agent would not be free in the positive sense. For the classic exposition of the distinction between negative and positive liberty, *see* Isaiah Berlin, *Two Concepts of Liberty, in* THE PROPER STUDY OF MANKIND 191 (H. Hardy & R. Hausheer eds., London 1997).

11. *See* Ronald Dworkin, *What is Equality? Part I: Equality of Welfare*, 10 PHIL. & PUB. AFF. 185, 185-246 (1981); *see also* Ronald Dworkin, *What is Equality? Part II: Equality of Resources*, 10 PHIL. & PUB. AFF. 283, 283-345 (1981).

12. GRAY, *supra* note 7, at 43.

as identical with fundamental values. Obvious examples are the following: equality, whether equated with equality of welfare, income or opportunity, would sanction economic or social rights, such as a right to a just wage independent of the market price, that these choices would be just as incompatible with the freedoms of intellectual enquiry and artistic expression, as with the economic freedoms sanctioned by the demands of efficiency or innovation. These sets of rights each express some ultimate value or a fundamental corollary, such as justice, knowledge, aesthetic self-expression, and wealth maximisation. Yet they are both incompatible and incommensurable, and their incommensurability means that it is impossible to say how much of each right would prove to be the best for society, or indeed which are the values such a society would seek to protect as human rights and which it would leave legally unenforceable. If there is no rational basis for choice between the underlying values, then there is no such basis for prioritising one set of rights (e.g., the negative liberties of intellectual and economic freedom as the legal guarantees favouring the values of scientific advancement or economic efficiency) over an alternative set (e.g., the economic and social rights implied by social justice, equality or the satisfaction of basic needs). Choosing the former favours one set of value, choosing the latter favours the other, but since there is no rational way of establishing the priority of either underlying values, there is no rational basis for prioritising one set of rights over another.

In general terms, therefore, if fundamental values can be incompatible and are incommensurable, then the same will be true of rights. Consequently, if the 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 justified by correlative gains in equality resulting from prioritising rights to universal public education and free healthcare. In short, if we take value pluralism seriously, then, if no value always takes priority over others, neither can any right or set of rights. When pluralistic rights conflict, there is no rational way of prioritising one over another, either generally or often even in particular conflicting situations.

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.[13]

13. *See* Henry J. Steiner & Philip Alston, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 136-320 (Clarendon Press 1996).

Focusing on the first two categories, which remain the most influential, there is an undeniable conflict between civil and political rights on the one hand and social and economic rights on the other. This evidences social and economic rights on the other an expression of the underlying tension between the pluralistic values of individual liberty and social justice or equality. To the extent to which any bill of rights favours one or the other, it is based on a value judgment for which there is no rational basis. And to the extent to which it may include both first and second generation rights and seeks to compromise between them, any such compromise it may strike is likewise incapable of rational justification. The reason lies in the lack of transitivity between rights grounded in pluralistic values, which precludes their optimisation.

The ECHR is a prime example of a classic human rights instrument confined largely to first generation rights, which can be divided into several broad sub-categories: first, rights protecting personal integrity (Articles 2 to 4); second, rights of due process or legality (Articles 5 to 7 and Article 13); third, the freedoms of speech, conscience and religion, which are at once civil rights and also safeguard individual autonomy (Articles 9 to 11); and finally, the right to private and family life (Article 8) and the bizarre right to found a family (Article 12). Social and economic rights are practically absent from the Convention, as the right to non-discrimination (Article 14) does not refer to a general right to substantive equality, but is confined to equal enjoyment of the other Convention rights. Notwithstanding the rights protected by Articles 2 through 4, safeguarding the minimal conditions of unimpeded agency, the Convention unequivocally favours 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 the latter the Article 12 right to procreate, even if they do not have the means to a basic standard of living. From the perspective of value pluralism, the privileged legal status assigned to these liberties but denied to the values of social justice or minimum needs, lacks a rational basis. Unless one is prepared to endorse the premises that negative liberty generally trumps positive liberty and that the primacy of individual liberty over all other values including economic and social rights may be legitimately limited only to protect the minimum social and psychological conditions of individual agency, the primacy assigned to civil and political rights is morally arbitrary.

III. Value Pluralism and Human Rights Adjudication

It might be objected that whilst value pluralism may pose a threat to providing a philosophical foundation for prioritising specific human

rights, 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 human rights documents, while 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, the conflicts between them do not have to be settled at the deep philosophical level of their underlying justifications, but are confined to the more tangible level of the wording of charter provisions and legal principles.

This view is mistaken for three reasons. First, value pluralism remains a pervasive problem of human rights adjudication. Second, the concept of human rights itself is an essentially contestable concept. Third, many human rights either represent or contain such concepts, as do the limiting conditions defining the scope of rights no less than the legal principles supposed to constrain judicial discretion in balancing conflicting rights. The first reason is outlined in this Section; Section Four addresses the second and third reasons as part of the wider discussion of essentially contested concepts.

Not only do some modern constitutions, such as the German Constitution[14] expressly mention certain basic values such as human dignity which underlie other constitutional rights, but as Conor Gearty,[15] David Feldman[16] and others have shown, human rights documents generally contain rights that are clustered around a range of core values, even if these values are not expressly mentioned. 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 these grounds. These include the rights to marry, to found a family and to privacy.[17] 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

14. Grundgesetz für die Bundesrepublik Deutschland (F.R.G.) (promulgated by the Parliamentary Council on May 23, 1949) (as amended by the Unification Treaty of Aug. 31, 1990 and Federal Statute of Sept. 23, 1990), *available at* http://www.psr.keele.ac.uk/docs/german.htm (last visited Dec. 11, 2007).

15. CONOR GEARTY, PRINCIPLES OF HUMAN RIGHTS ADJUDICATION (Oxford 2004); *see also,* CONOR GEARTY, CAN HUMAN RIGHTS SURVIVE? 17-59 (Cambridge U. Press 2006).

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

17. *See id.* at 518, 524 & 527.

also wish to add equality as a supplementary value—equality not in any substantive sense but as the principle of non-discrimination or equal enjoyment of fundamental rights.[18] 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 Preamble to the Charter of the United Nations (1948), for example, expressly affirms the "dignity and worth of the human person" and "the equal rights of men and women" as "the foundation of freedom."[19] In the Preamble to the ECHR the signatory states refer to "fundamental freedoms," which "are best maintained . . . by an effective political democracy."[20] National constitutions also expressly affirm several core values in their definition of particular rights. The German or South African constitutions, for example, both mention "human dignity" together with other core values. There has clearly been an international convergence in terms both of the content and underlying principles of human rights instruments.[21] Value pluralism has not disappeared at the practical level of human rights instruments. It has simply been reduced to the plurality of four to five ultimate core values, which, depending on the circumstances, may be harmonious, indifferent to, or in conflict with each other.

Where rights based on core values conflict, the rivalrous rights will either express different values or different aspects of the same value. For example, the potentially conflicting demands between freedom of

18. 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 properly 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 may be defended as grounded in human dignity on a liberal view of society, but may also be conceived as possessing little intrinsic value because 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 qualifications; although, they are useful in drawing attention to the underlying justificatory ideas of human rights.

19. U.N. Charter pmbl. (1948).

20. European Convention on Human Rights pmbl. (1950), *available at* http://www.hri.org/docs/ECHR50.html (last visited Dec. 11, 2007).

21. 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. FELDMAN, *supra* note 16, at 125-32.

expression and the right to privacy, which may be presented as a straightforward clash between the requirements of the core values of democracy and individual liberty. Alternatively, these conflicting aspects of the rights can be viewed as a conflict between two different aspects of 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 right to a fair trial, which precludes undue influence on the jury, e.g., by a virulent press campaign.[22] Again, conflicts can be seen in the right to life and the freedom of abortion which is often justified, somewhat debatably in terms of ordinary usage of language, as a derivative of the right to privacy. The rights to liberty, privacy or fair trial are perpetually in conflict 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.

Conflict of this kind can only be resolved by appeal to reason if there is a clear hierarchy between the underlying values or the different aspects of them, so that the rights derived from them can themselves be ranked. Dworkin must have had such a balancing exercise in mind when developing his "one right answer" adjudication thesis. Yet, neither in *Law's Empire*[23] nor in *Taking Rights Seriously*,[24] in which he outlines his interpretative theory of justice and his "one right answer" thesis in favour of objectivity in legal judgments, does Dworkin spell out any criterion or formula according to which the right answers are to be found where two legal propositions support opposite conclusions or in cases where there is a "tie" between conflicting rights or legal rules generally.[25] Ultimately, of course, Dworkin merely refers to a wider social consensus supporting the "right to equal concern and respect" as the basis for resolving such ties.[26] Other strategies for ranking competing rights on a rational basis

22. *See e.g., Wloch v. Poland,* Eur. Ct. H.R. (Mar. 30, 2000); *Priebke v. Italy*, 48799/99, Eur. Ct. H.R. (Apr. 5, 2001).

23. RONALD DWORKIN, LAW'S EMPIRE (Belknap Press 1986).

24. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (Harvard Univ. Press 1977).

25. For an excellent discussion of the problems with Dworkin's objectivity claim for legal judgment, *see* STEPHEN GUEST, RONALD DWORKIN ch. 6 (Stanford U. Press 1991). For the apparent contradiction between his "one right answer" thesis and his distinction between absolute and less than absolute rights, *see id.* at 66-68. Absolute rights, according to Dworkin, withstand no competition. It follows that if there are several of them then, where they conflict, there is no way of avoiding absolute, incommensurable loss.

26. *See* Ronald Dworkin, *Do Liberal Values Conflict?, in* THE LEGACY OF ISAIAH BERLIN 73 (Ronald Dworkin, Mark Lilla, & R.B. Silvers eds., 2001); *see also* Guest, *supra* note 25, at 243-48.

include the ulititarian calculus; welfare maximisation in the "law and economics" movement; Rawls' overlapping consensus as the source of the principles of justice, and the metaphysical claims of theories of human flourishing underlying natural law thinking as found for instance in Finnis.[27] Where balancing exercises between rights are conducted on consequentialist grounds, the very appeal to consequences is evidently contentious because rights by their nature are designed to trump consequentialist, utilitarian, or majoritarian considerations. In other cases where the appeal is to supreme moral principles of one kind or another as grounded in liberal consensus, such as in Dworkin or Rawls, or to an anthropologically enriched conception of human flourishing as in Finnis, these strategies ultimately rest on a monistic assumption which asserts the priority of one value over all others. Consequentialism, once combined with a particular end, likewise is a variant of monism.[28]

Conflicts between values that are genuinely pluralistic cannot be resolved philosophically, as they occur between the competing demands of equally ultimate values or different aspects of equal or indeterminate rank within single values. It follows that when rights are justified in these terms, they too are equal or indeterminate. When they come into conflict and judges have to adjudicate between their conflicting claims, there is no rational basis for favouring 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."[29]

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27. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (Oxford Univ. Press 1980).

28. At a practical level, Sunstein suggests, conflicts between competing rights and other legal rules are regularly resolved by agreement of "low level" incompletely reasoned arguments that avoid issues concerning the broader principles behind them. For instance, most people might agree that discrimination based on sexual preference is wrong without a corresponding agreement as to the underlying broader principle behind that agreement. "Incompletely theorized arguments" produce agreement on particular outcomes without taking sides on social controversies. Sunstein even suggests that they enhance the legitimacy of the courts by allowing them to avoid identifying themselves with divisive issues of general principle which remain unresolved. *See generally* C. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT (Oxford 1996). Sunstein's analysis astutely demonstrates how judges provide socially acceptable judicial outcomes on issues characterised by wider ethical disagreements in society essentially by obfuscating the basic justificatory questions involved. By avoiding tackling the underlying incommensurables, however, this approach trivialises the idea of human rights and destroys its moral force. *See* JEREMY WALDRON, LAW AND DISAGREEMENT 220 (Oxford 1996).

29. 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 which 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 that could be described as rational or ethically sub-optimal in the sense that they reconcile values x and

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. It is hardly surprising, therefore, that it is not commonly acknowledged that the human rights jurisdiction of the courts is ill-defined, or that judges routinely engage in value judgments when balancing conflicting cardinal values behind the veil of legal objectivity and value-neutral human rights adjudication. Three propositions in particular may be advanced in support of the view that human rights instruments can be drafted and interpreted in ways capable of resolving rights conflicts without making monistic assumptions.

First, it may be argued that where human rights are constitutionally recognised, the question of their justification has been given a definitive politico-legal answer. Thus, conflicts between them can be resolved by reference to established legal principles, which tell judges which right takes priority under what circumstances. Some legal theorists, notably Dworkin, even seem to suggest that all legal questions, including all questions involving conflicts between rights, have one correct legal answer, and that where strict legal rules run out, that answer is always provided by the appropriate legal principles.[30]

Second, human rights instruments are generally worded so as to provide for appropriate exceptions and qualifications, which reduce the scope for judicial discretion in balancing rivalrous rights or the conflicting demands of rights and public goods.[31]

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y in a way that a greater amount could be realised 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 of protecting one right also offered by an alternative decision plus sacrifice less of the conflicting right than the alternative. In such a case it could be argued that one judicial decision realised 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 that 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 which is the subject of the next section of this Article.

30. *See* DWORKIN, *supra* note 24.

31. There are numerous examples. An obvious one is the protection of private property in the ECHR or the German Basic Law, which 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 Article 2 of the ECHR, 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. *See* European Convention on Human Rights, supra note 20.

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, such as those rights requiring state action beyond legal prohibitions to enable individuals to achieve certain ends. Nor do bills of rights generally endorse positive corollaries of negative rights.

If true, these three propositions would warrant the conclusion that "hard cases" resulting from pluralistic value conflicts have no or little practical significance, because conflicts between them can be settled by judges without recourse to foundationalist reasoning.

Unfortunately, however, these attempts to consign pluralism to the outer reaches of metaphysics are unconvincing. The discussion in the remainder of this Article indirectly refutes each of these claims by considering the linguistic sources of uncertainty in human rights adjudication. Conceptual uncertainty, in addition to value conflict, exists in at least four respects: regarding the essential contestability of the (1) concept of human rights, (2) concepts underlying many individual rights, (3) concepts defining the limitations and qualifications commonly imposed on human rights, and (4) legal principles designed to govern the application of rights and balance their conflicting requirements. Before dealing with these individually, however, it is necessary to briefly outline the notion of essentially contested concepts.

IV. The Idea of Essentially Contested Concepts

In a well-known article, the philosopher W.B. Gallie argued there are concepts that are essentially contested concepts ("ECC"), which inevitably involves endless disputes about their proper uses on the part of their user. For Gallie, a concept is essentially 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.[32] I shall focus on the first three essential ones, and later add a fourth condition:

> (1) The concept must be evaluative or "appraisive;" it must signify something that is valuable, good, right, worthy and so on;
>
> (2) The nature of the concept must be complex, so that different

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

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 which aspect of the complex one focuses on.

On this basis a concept is essentially contested when it is appraisive, in that the state of affairs it describes is a valued achievement that is variously describable and internally complex because its characterisation involves reference to several aspects or dimensions without any criteria of application which determine the order and weight of these multiple aspects or dimensions.[33]

Gallie explains his idea of an essentially contested concept through the example of championship.[34] 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 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 settled, generally accepted rules for the designation of the champion. Each side has its supporters who insist that it 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 own groups of faithful, who insist that this is the truly crucial aspect of the game. So each side sees its team as the best because it expresses the 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, because it is 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

33. The definition is the author's but it partly draws on that provided by William Connolly *in* WILLIAM E. CONNOLLY, THE TERMS OF POLITICAL DISCOURSE 9-14 (Princeton Paperbacks 1974).

34. Gallie, *supra* note 33.

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.[35] 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. Not all the cluster features, however, must be present in all conceptions of the concept.[36] 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 essentially contested concepts. An example is the ECC of liberty—two of its conceptions, those of negative freedom 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 the essential contestability of concepts often reinforce each other.

A. 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 in that it is given a special legal status. The range of human goods is famously contested, as is the issue of the possibility of the *summum bonum,* or the supreme good. Examples of many goods that are ECCS, include justice, liberty, equality, dignity and even happiness and political goods, such as liberalism or democracy.

Moreover, the concept of human rights is itself essentially contestable, as it clearly connotes something valuable and is internally complex in that its meaning represents a cluster of different aspects or attributes, not all of which are compatible and/or subject to any accepted 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 that between the will and interest theories of rights.

The will theory, propagated amongst others by H.L.A. Hart,[37]

35. *Id.* at 180.
36. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 66 - § 71 (1972).
37. H.L.A. Hart, *Are There Any Natural Rights*, 64 PHIL. REV. 175 (1955); *see also*

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. Individual discretion is the distinctive feature of this concept of rights. Rights of this view may, therefore, also be called liberties. By contrast, the interest theory, which is espoused by, amongst others, Neil MacCormick and Joseph Raz,[38] 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 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 or a minimum income.

The important point is that the concept of rights is used ambiguously. On the will view, rights are waivable, while on the interest view, they are not. The former simply assumes that the rights-bearer is an autonomous agent, while the latter can accommodate paternalism to protect those who may not be relied upon by acting in their own best self-interest. Finally, while the latter conceives of rights as promoting the good, the former views them as merely removing various obstacles to individual liberty.

Other attributes, however, are shared by both views of rights: they are individualistic, equal, and universal or universalisable; they also may be negative or positive, or procedural or substantive. But even these attributes shared by both theories are contested. Human rights documents generally show a bias towards negative rights. According to some views, human rights should be purely procedural. Furthermore, third generation rights, such as minority or environmental rights, conceive of rights as not necessarily universal, equal, and individualistic. Rather, these rights are linked to the properties of certain groups or persons, even 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, because there is no universally shared or demonstrably correct definition of the concept of human rights in terms of its range of necessary and optional attributes. In that sense, the concept of human rights can be said to be essentially contestable.

In practice, the indeterminacy of the concept of rights can be overcome partly by a general judicial approach favouring the negative construction over the positive construction of human rights. Yet, judicial attitudes are far from consistent. In particular, both the Strasbourg and the British judiciary have shown great willingness to impose positive

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H.L.A. HART, ESSAYS ON BENTHAM ch. VII (Oxford Univ. Press 1982).

38. *See* M.D.A. FREEMAN, LLOYD'S INTRODUCTION TO JURISPRUDENCE 355 (7th ed. 2001).

obligations under Article 8 of the ECHR which protects the right to privacy.[39]

In *Hannover v. Germany,*[40] the Eur. Ct. H.R. held that the German courts had failed in their positive duty to protect the applicant's right to private life by adopting too narrow a conception of privacy in public places. This "Hanoverian" approach by the Eur. Ct. H.R. has been taken to extremes by the English courts under the Human Rights Act of 1998[41] ("HRA"), which has made the Convention directly enforceable in the domestic British courts, but also generally restricts litigation of ECHR rights to cases against public authorities. In *Douglas v. Hello! Ltd.,*[42] two actors entered into an exclusive publication deal with a magazine, effectively converting photographs of their wedding from essentially private material into publicly available commercial material.[43] The Court of Appeal and House of Lords upheld an earlier finding of a breach of the claimants' right to privacy when another national magazine published unauthorised photographs,[44] thereby extending the concept of privacy to include the right to the economic interest attached to waiving that privacy.

The decision in *Douglas* is remarkable in two respects. First, it implicitly asserts a will-based conception of privacy as an alienable right. Second, what is astonishing in the *Douglas* case, as well as the House of Lords ruling in *Campbell v. MGN Ltd.,*[45] is the apparent ease with which the courts use their powers as public authorities under Section 6 of HRA[46] to ensure compliance with the ECHR in horizontal litigation involving private parties.[47] As these cases further indicate, this applies 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 their discretion to protect the indigenous law of defamation and even consolidate the law of confidentiality over and above the demands of freedom of expression, in spite of the expectation that the incorporation of the latter ECHR right into English law might have been expected to have exactly the opposite effect.

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39. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms art. 8, Eur. T.S. No. 005 (Nov. 4, 1950).

40. Von Hannover v. Germany, App. No. 59320/00, 40 Eur. H.R. Rep. 1 (2005).

41. Human Rights Act, 1998, c. 42 (U.K.).

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

43. *See id.*

44. *See id.;* OBG Ltd. v. Allan, [2007] UKHL 21, [2007] 2 W.L.R. 920.

45. Campbell v. MGN Ltd., [2004] UKHL 22, [2004] 2 All E.R. 995.

46. Human Rights Act § 6.

47. For the court's power under HRA § 6 in relation to the law of confidence, *see* A v. B Plc [2002] EWCA (Civ) 337, 2003] Q.B. 195.

The Eur. Ct. H.R. has also used Article 8 of the ECHR[48] to establish positive obligations to recognise the rights of transsexuals. In *I v. United Kingdom*[49] and *Goodwin v. United Kingdom,*[50] the court found a breach of Article 8 where the state had not legally recognised a sex change, noting in particular that the surgery had been provided by the state. The court's expansive approach under Article 8 can be contrasted with its generally restrictive approach to imposing positive obligations under other ECHR articles. For example, and except in highly restricted circumstances, the court has repeatedly rejected claims that failure to grant legal aid where applicants had no other realistic means of funding litigation amounted to a breach of the right to access to a court under Article 6 of the ECHR.[51]

The court's asymmetrical approach to the acceptance of positive dimensions of negative rights is exemplified by its steadfast avoidance of delivering a definitive ruling on the issue of abortion, which it generally prefers 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.[52] 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 Eur. Ct. H.R. nonetheless held that Ireland's censoring of information about abortion services in far wider circumstances violated the right to freedom of information and ideas under Article 10 of the ECHR.[53] The court's refusal to give a definitive ruling on the issue of abortion might be justifiable under the ECHR's margin of appreciation, but its ruling against the Irish government on this occasion is clearly unconvincing because it appears to deny the Irish government at least some of the means of enforcing its own legitimate public policy goals, an interest expressly recognised as appropriate under Article 10.[54]

Ultimately, *Open Door* is merely an illustration of the disparate

48. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 39.

49. I v. United Kingdom, App. No. 25680/94, 36 Eur. H.R. Rep. 53 (2003).

50. Goodwin v. United Kingdom, App. No. 28975/95, 35 Eur. H.R. Rep. 18 (2002).

51. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 39, at art. 6. The Court's reluctance to impose a public duty to fund civil litigation can be explained in terms of the general judicial reluctance to pass judgments with far-reaching budgetary implications. Yet, this does not detract from the fact that the courts seem to hover between negative and positive interpretations of rights almost at will, sometimes, admittedly influenced by expediency.

52. *See* IR. CONST., 1937, amend. VIII.

53. *See* Open Door Counselling Ltd. and Dublin Well Woman Ctr. v. Ireland, App. Nos. 14234/88, 14235/88, 14 Eur. H.R. Rep. 115, 131 (1992).

54. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 39, at art. 10.

treatment by the Eur. Ct. H.R. of the rights to privacy and freedom of expression under Articles 8 and 10 of the ECHR, respectively. Although the court has held that lack of impartiality in reporting in public broadcasting or television channels may be in breach of Article 10 of the ECHR,[55] 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 a growing concentration of media power in private hands. This approach is unconvincing: if freedom of expression is one of the pillars 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 oversee government interference with public broadcasting and to protect journalistic freedom. The court's steadfast reluctance to establish a regulatory duty on the basis of Article 10 has been in stark contrast to its more expansive approach to Article 8 of the ECHR.

In sum, to the extent to which legal instruments may be said generally to favour negative over positive rights, they have patently failed to restrain the courts from extending positive duties to some rights but not others. There are two principal reasons for 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 human rights, there is no means to demonstrate the validity of one conception of the term "human right" over another. In other words, conceptual indeterminacy favours judicial discretion. Second, judicial discretion is amplified by the basic observation that, in the absence of clear definitions of particular rights and their scope, those normative reasons justifying non-interference with a particular right will often also justify additional positive measures to further those rights. Although conceptual indeterminacy of the idea of human rights allows the courts 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, regardless of which interpretation the courts may favour initially, remain at liberty either to expand their interpretation of individual rights with reference to the same reasons that existed for recognising the right in the first place or narrow their initial interpretation with reference to the equally elastic moral reasons supporting conflicting rights or legitimate public policy goals. Courts, it seems, are free to impose positive duties with respect to some rights while denying them to others. In this way, courts are free from the need

55. *See* EUROPÄISCHE GRUNDRECHTE UND GRUNDFREIHEITEN 102 (Dirk Ehlers & Wlater de Gruyter eds., 2d ed., Berlin 2005).

for consistency or even its underdeveloped twin—reasoning by analogy—and are 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 disconnected from the public mood.

B. The Essential Contestability of the Concepts Underlying Human Rights

Charters of rights are not neutral; rather, they privilege some claims over others; 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, like most international covenants and domestic bills of rights, is a prime example of a human rights document with a pronounced liberal, individualistic bias. It has been demonstrated that the political settlement favouring these values among the wider range of pluralistic goods cannot overcome the pluralistic dilemma of incommensurability between conflicting values. It also has been shown that the concept of human rights, which legally elevates some of those values or aspects thereof over others, is essentially contestable: disagreements about its meaning between rival conceptions of it cannot be settled by rational or logical argument.

Not only is the concept of human rights essentially contestable, but so are many of its constituent concepts of individual rights and the basic values underlying the most widely recognised human rights. This creates a dual source of vagueness and uncertainty in judicial interpretations of individual rights. The dual effect arising from conceptual contestability is best illustrated by reference to the concepts concerned.

First, among the rights in the ECHR and most other human rights documents, the right to life and the prohibitions of torture, slavery, and arbitrary arrest are based on a certain ideal of individual dignity. While the core meaning of concepts, such as life and torture, may be clear, there will, however, always be a penumbra of uncertainty in marginal cases.[56] In penumbral cases, judges seek to justify their decisions by reference to the values underlying individual rights. Individual dignity is one such value. It is, however, also an essentially contestable concept. The

56. The metaphor of the core and penumbra was popularised by H.L.A Hart. *See* H.L.A. HART, THE CONCEPT OF LAW 119 (1st ed. 1961) ("Nothing can eliminate this duality of a core of certainty and a penumbra of doubt when we are engaged in bringing particular situations under general rules."). Glanville Williams, however, presaged Hart's claim that the judge has a law-making role in penumbral cases. *See* Glanville L. Williams, *Language and the Law-III*, 61 L. Q. REV. 293, 302-03 (1945).

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. The aspect or aspects of the multifarious concept of dignity emphasised at the expense of others inevitably will depend on which model of human nature is adopted, determining the nature and scope of the rights that can be grounded in dignity. Although dignity generally is 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, and a protracted and ongoing 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 answer invariably reflects conflicting visions of what it means to have human personality and the requisite attributes to acquire the indefeasible quality of human dignity. The existence of such disagreements is an expression not only of conflicting values, but also of the vagueness and contestability of the concept of dignity.

A second set of ECHR rights includes the civil freedoms of association, religion, and expression;[57] the rights to private and family life;[58] and the sui generis right to found a family.[59] All of these rights revolve around the ideals of individual autonomy or liberty. Liberty, of course, in its two equally compelling but conflicting variants of positive and negative liberty, is an archetypal ECC. For example, a drug addict is free in the *negative* sense—if nobody prevents him—to administer 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.[60] Common to both is the concept of self-government; the two conceptions of

57. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 39, at arts. 9-11.

58. *See id.* at art. 8.

59. *See id.* at art. 12.

60. Consent can be deconstructed into conflicting conceptions. Consent is of particular importance in medical cases where it forms the basis of the adult's right to accept or refuse treatment. The question then arises whether consent needs to be fully informed or merely expressed. However, the English courts have generally been reluctant to extend human rights concepts to standards of medical care and instead, with very little regard for consistency, have framed the relevant rules as an aspect of the law of professional negligence rather than patients' rights. *See* Sidaway v. Bd. of Governors of the Bethlem Royal Hosp., [1985] A.C. 871 (H.L.) (appeal taken from Eng.); R. v. Richardson (Diane), [1999] Q.B. 444; R. v. Tabassum (Naveed), [2000] Crim. App. 328.

autonomy differ in relation to the attributes the agent must possess.

Article 5 of the ECHR mentions a right to liberty, but that right is confined, in general terms, to freedom from detention.[61] Most cases involving restrictions of individual liberty or autonomy have been litigated under Article 8, which protects the right to privacy.[62] Like the concept of liberty, privacy lacks an agreed-upon set of necessary and sufficient attributes. In *Hannover v. Germany*, the Eur. Ct. H.R. 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."[63] In the English case of *Howlett v. Terry Holding*,[64] the English judge, obliged to recognise Strasbourg case law and who purported to apply the broad privacy test laid down in the *Hannover* case, nevertheless applied a simple test based on the distinction between conduct 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 and the broader "private sphere of action" approach of the Eur. Ct. H.R.—captures distinct, conflicting, and yet equally valid conceptions of the concept of privacy. This is a classic case of an ECC.

The emergence and persistence of multiple privacy tests reflects the fact that the Eur. Ct. H.R. has deliberately avoided defining the concept of privacy. This has expanded the application of the concept to include many situations more appropriately described as involving the exercise of individual liberty and also to extend privacy to the workplace and even conduct in public where not of general interest.[65] On a basic level, however, the inconsistency and ambiguity in the court's jurisprudence may be viewed as an expression of the conceptual indeterminacy

61. European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 39, at art. 5.

62. *See, e.g.*, *supra* notes 39, 48-50 and accompanying text.

63. *See* von Hannover v. Germany, *supra* note 40. In *Hannover*, the Eur. Ct. H.R. reasoned that the German courts had erred in its decision that the ECHR right to privacy only applied 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, behaves in a manner in which he or she would not behave in public." *Id.* ¶ 54. Rejecting the "recognisable aim of being alone" test, the Eur. Ct. H.R. decided instead that the decisive factor in balancing the protection of private life against freedom of expression was the contribution that the published photos and articles could make to a debate of general interest. *Id.* ¶ 76. On the facts of the case, the court held that the photos made no such contribution because the applicant did not exercise any official function and the publication related solely to her private life. *Id.*

64. Howlett v. Holding, [2006] EWHC 41, Q.B. 41.

65. For more detailed discussion, *see* EUROPÄISCHE GRUNDRECHTE UND GRUNDFREIHEITEN, *supra* note 55, at 64-65.

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 unable to do what he likes.[66] The desirability of privacy, therefore, presupposes individual liberty. Hence, privacy is partly synonymous with self-determination,[67] and it may be argued, that Article 8 of the ECHR protects the individual's private sphere of self-determination free from public scrutiny. This conception of privacy was applied by the ECHR in *Van Kück*[68] where the court posited a right to self-determination and extended it to issues related to sex change surgery. It is not obvious, however, what, if anything, the issues of public recognition and reimbursement of medical expenses for such a surgery have to do with the right to privacy. Yet, the case is a good example of how conceptual uncertainty arising from initial recognition of the interconnectedness of two concepts—those of privacy and self-determination, for example—can be used to extend rights into politically fashionable but rationally and ethically questionable territory. Respect for private life 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 both respect for the individual's personality and social recognition—not part of the obvious meaning of the term privacy, but part and parcel of the judicial usage of the term, at least 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 Eur. Ct. H.R. held in *Dudgeon v. United Kingdom*[69] held that the blanket criminalisation of homosexual acts violated the right to privacy of homosexual men. That case concerned the law in Northern Ireland, although the court reached the same conclusion in relation to analogous bans in the Republic of Ireland[70] and Cyprus.[71] 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 the 1965 case of *Griswold v. Connecticut*,[72] the U.S. Supreme Court invalidated a Connecticut anti-contraceptive statute on the grounds that,

66. For example, Paul Chadwick, Victoria Privacy Commissioner in Australia, argues that privacy serves three essential purposes: intimacy, liberty, and individuality. Paul Chadwick, *The Value of Privacy*, 2006 EUR. HUM. RTS. L. REV. 495, 497 (2006).

67. *See id.*

68. Van Kück v. Germany, App. No. 39568/97, 37 Eur. H.R. Rep. 51 (2003).

69. Dudgeon v. United Kingdom, App. No. 7525/76, 3 Eur. H.R. Rep. 40 (1981).

70. *See* Norris v. Ireland, App. No. 10581/83, 13 Eur. H.R. Rep. 186 (1988).

71. *See* Modinos v. Cyprus, App. No. 15070/89, 16 Eur. H.R. Rep. 485 (1993).

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

by impinging on "an intimate relation of husband and wife,"[73] the statute violated "a right of privacy older than the Bill or Rights."[74] Two years later, in *Loving v. Virginia,*[75] the Court struck down Virginia's law banning interracial marriages, also on the basis of the allegedly time-honoured right to privacy that is not even part of the U.S. Constitution. And in 1972, in *Eisenstadt v. Baird*,[76] the Court struck down a state statute confining distribution of contraceptive devices to married people. According to Justice Brennan, "[i]f 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."[77] The judicial stage was set for the Supreme Court's final extension of privacy into the realm of sexual self-determination in *Roe v. Wade*.[78] 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.

It is remarkable that the Eur. Ct. H.R., like the U.S. Supreme Court and the highest courts in Britain, Australia and other common law jurisdictions, has generally taken privacy seriously to further sexual freedom, but their attitude has been extremely restrictive when scrutinising invasive government anti-terrorism measures; government legislation allowing surveillance of internet browsing both on professional and private personal computers; and the use of genetic and other personal data including their transfer as part of international agreements and for healthcare and other purposes. Likewise, the widespread introduction of identification verification technology and surveillance cameras has been largely ignored by the courts. Data protection, which one reasonably may consider as the most sensitive and important aspect of privacy, has met with little judicial interest. Instead, the court has preferred to focus on the seemingly more pressing social

73. *Id.* at 482.
74. *Id.* at 486.
75. Loving v. Virginia, 388 U.S. 1 (1967).
76. Eisenstadt v. Baird, 405 U.S. 438 (1972).
77. *Id.* at 453.
78. Roe v. Wade, 410 U.S. 113 (1973). The U.S. Supreme Court was an agent of social change. It would be a mistake, however, to think the judicial activism was confined to the federal judiciary. An extreme example of judicial defiance of linguistic convention by a senior state court can be found in the case of *M.T. v. J.T.*, 355 A.2d 204 (N.J. Super. Ct. App. Div. 1976). There the Appellate Division of the Superior Court of New Jersey 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.

need to advance existing trends towards sexual freedom and fulfilment.[79]

Finally, there remain some ECHR rights which, broadly speaking, derive their justification from the normative foundations of the rule of law and democracy. These are the rights of procedural justice[80] and civil freedoms[81] which, as forms of individual liberty, nevertheless are crucial to a democratic political culture. Democracy is rarely questioned as a political value but it is a complex concept and its different aspects 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 a recognisable *demos* (a people regarding itself as one), freedom of expression, and, according to some, pluralism and tolerance. While the basic core of the concept is clear, it is a matter of endless dispute which of these, or which order of these, represents the proper conception of democracy.

The courts generally try to avoid participation in defining notions of democracy and, instead, 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.[82] The same can be said of many other judicial decisions involving references to the "general interest," the "public interest," or "public policy." For example, the "debate of general interest" criterion adopted by the Eur. Ct. H.R. in the *Hannover* case attempts to balance the conflicting demands of privacy and freedom of expression.[83] The court clearly assumed a 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.

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79. *See* Chadwick, *supra* note 66, at 498 (discussing the impact of new technology on the gathering, storing, transferring, and surveillance of personal data as well as the weak judicial response to these challenges).

80. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 39, at arts. 5-7.

81. *See id.* at arts. 9-11.

82. In *Lustig-Prean v. United Kingdom*, App. Nos. 31417/96, 32377/99, 29 Eur. H.R. Rep. 548 (2000), for example, the Eur. Ct. H. R. held that "the hallmarks" of a democratic society include "pluralism, tolerance and broadmindedness." *Id.* ¶ 80. None of these attributes can be said to be incontrovertible attributes of the core meaning of democracy; indeed, none are democratic values in a classical view of democracy. In fact, the court in *Lustig-Prean* assumed 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.

83. *See supra* note 63 and accompanying text.

Similarly, the meaning of the concepts of the rule of law and procedural justice is inseparable from the notions of non-retrospectivity; certainty; equality before the law, between the parties, and 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; conversely, none of these can be definitely ruled out as irrelevant and few of the various orderings of these concepts can be conclusively dismissed as irrational.

This demonstrates that where a right either amounts to an ECC or is justified in terms of such a concept, its meaning is essentially indeterminable. Its 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 and analytically because there cannot be theoretical agreement about the meaning.

C. *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. Furthermore, the effect of these limitations sets 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 Articles 8 through 11 of the ECHR, which are subject to certain qualifying conditions and, second, Article 15 of the ECHR, 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 constrain judicial discretion is only minimal. By allowing the judiciary to show deference to the executive in sensitive areas, such as national security or public order, the limits allow both the Eur. Ct. H.R. 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. Thus, the courts 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.[84]

The principal reason for the failure of these limitations to rein in

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

judicial discretion again 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 that are based on concepts that are just as essentially contestable as those defining the rights they are designed to qualify. Articles 8 through 11 of the ECHR, for instance, make reference to a range of legitimate policy objectives whose conceptual vagueness mirrors, rather than reduces, that of the rights and liberties which they are designed to limit. Examples of the legitimate aims enumerated include the protection of health or morals, protection of public order, national security, and the prevention of disorder and crime. Although 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 Articles 8 through 11 of the ECHR 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 amounts to an invitation to the courts to make value judgments behind the veil of legal objectivity.[85]

An excellent example is provided by the English case of *R. (on the application of Gillian and Quinton) v. Commissioner of Police of the Metropolis*,[86] where the Divisional Court was asked judicially to review police powers to stop and search under Section 44 of the Terrorism Act of 2000. Under the Act, the police may be granted power to randomly stop and search individuals without need to suspect that the individual is a terrorist or has been involved in acts of terrorism.[87] However, the

85. 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. *See generally* Eyal Benvenisti, *Margin of Appreciation, Consensus, and Universal Standards*, 31 J. INT'L L. & POL. 843 (1999); Thomas A. O'Donnell, *The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights*, 4 HUM. RTS. Q. 474 (1982). This doctrine 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 place to make but likewise to allow the Eur. Ct. H.R. not to get embroiled in political controversies with national governments. 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 Eur. Ct. H.R. may justifiably defer to a national government, while an English court, which must handle domestic controversies cannot. English cases involving national security issues within the HRA framework suggest that the courts remain reluctant to exercise their enhanced judicial scrutiny and review function.

86. R. v. Commissioner of the Police of Metropolis, [2003] EWHC 2545.

87. The facts of the case were such that the two applicants, in *Gillian* and *Quinton*

ECHR has manifestly asked the courts to carry out a balancing exercise between individual rights and public security and safety. Regardless of this request, the Divisional Court found no reason to question the compatibility of the blanket stop and search authorisation powers under the Act with respect to Articles 8, 9, 10 and 11 of the ECHR and decided that the judicial function in scrutinising a power or decision of this kind was necessarily a limited one.[88] In effect, the court chose to exercise its discretion by *not* exercising it and by deferring to the authority of the policymaker despite the ECHR provisions mandating judicial review. In the areas of public safety and national security—those areas where rights abuses are arguably most likely to occur and could potentially be most serious—conceptual vagueness surrounding the qualifications of, and the derogation from, ECHR rights appears to have favoured excessive judicial deference, rather than judicial activism. Judicial deference and judicial activism, of course, are the two extremes 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 Articles 5 and 8 of the ECHR with the demands of national security, and particularly of the higher threshold of public emergency under Article 15 of the ECHR, is the case of *A. v. Secretary of State for the Home Department*.[89] This case involved the issue of a possible serious breach of the right to liberty under Article 5 of the ECHR in connection with the U.K. Anti-Terrorism, Crime and Security Act of 2001. The Act gave the Home Secretary power to imprison people indefinitely without trial under the Article 15 derogation from Article 5 of the ECHR "in time of war or other 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 Article 15, vindicated the executive detention without qualification or reluctance. The SIAC found that there was "a public emergency threatening the life of the nation" and that "imprisonment without trial"

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had tried to join a demonstration against an arms fair but were detained and searched and, as a result, they were prevented from joining the demonstration. Both applicants were of good character and nothing incriminating was found. In one instance the search of the applicant's rucksack merely yielded a sandwich, a notebook and print-outs which the police confiscated. The other applicant was searched in spite of wearing a photographer's jacket and press pass. The Divisional Court did not question the decision to grant the authorisation, nor the manner of its exercise in this particular case.

88. *See id.* ¶ 35, *quoting* Lord Justice Brooke, "The assessment of risk to the public safety and to national security . . . are primarily for the Government and Parliament on grounds of public legitimacy."

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

was "strictly required by the exigencies of the situation."[90] The SIAC further held that "the United Kingdom could be distinguished from its neighbors," which had not found it necessary to derogate because the United Kingdom was "a prime target" and an attack against the United Kingdom would be "devastating."[91]

The Court of Appeal appeared to agree with this part of the decision. Lord Chief Justice Woolf conceded that the threshold for a derogation under Article 15 of the ECHR is higher than that required by the interests of national security built into Article 5 of the ECHR but went on to conclude that "the same general approach is clearly appropriate."[92] 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. 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.[93]

The House of Lords later departed from the established practice of judicial deference in national security and emergency cases and reversed the Court of Appeals.[94] However, 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 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 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.

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90. *Id.* ¶ 72-80.
91. *Id.* ¶ 33.
92. *Id.* ¶ 44.
93. *Id.* ¶ 40.
94. A. v. Secretary for the Homeland Department, [2004] UKHL 56, *available at* 2004 WL 2810935.

Judicial trade-offs between incommensurable values thus remain unconstrained by rational choice because it cannot be demonstrated that the loss of liberty required by some measures is either greater or more limited than the correlative gains in security. No one can say how much security is enough and how many "x" units of liberty should be sacrificed for "y" gains in security. Nor, can one say at what point the suspension of civil liberties in the name of making democracy safe will actually transform the democratic order itself into an authoritarian state which no longer safeguards civil liberties and thus ceases to be worthy of protection in their name.[95]

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 resolve such 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 simply just what judges say they are.

D. The Conceptual In-determinability 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 of the concepts contained in them. Central to both civil law and common law systems is the assumption that in these circumstances, legal principles can provide objective reasons capable of constraining judicial discretion. Legal principles, however, can provide answers that escape the pluralistic dilemma only if they are not themselves subject to conceptual vagueness and can be divorced from appeal to underlying normative considerations. Neither is the case here.

All human rights theories include or presuppose general principles of law. In the case of the ECHR, the principle of proportionality which governs the application requires a reasonable relation between the goal

95. The above examples illustrating the vagueness and elasticity of many human rights limitations have been drawn from the ECHR but equivalent provisions have been developed in other human rights systems. In the US, for instance, the Supreme Court has developed the "clear and present danger" and "bad tendency" tests for limiting free speech, and the *equal protection clause* which generally prohibits differential treatment of similarly situated people on the grounds of race and sex. In turn, these are qualified by the "rational basis" and "compelling government interest" tests. For a brief exposition of judge-made limitations on the rights in the U.S. Constitution, *see* A.T. MASON & D.G. STEPHENSON, AMERICAN CONSTITUTIONAL LAW, 473-74, 618-20 (Charlyce J. Owen ed., Prentice Hall, 14th ed. 2005).

pursued and the means used. The principle has its origin in German constitutional law where it is known as the *Verhältnismäßigkeitsgrundsatz.* Via the HRA, it has been imported into English domestic law and, although in name proportionality may not exist in other legal systems, in substance, it is an established general principle of law in all human rights jurisdictions. In the U.S., for example, the Supreme Court has grafted the "rational basis test" onto the constitutional right to equal protection of the law.[96]

Author Robert Alexy makes strong claims for the rationality of cost-benefit balancing exercises based on proportionality. He argues that proportionality expresses the idea of optimisation, requiring that constitutional rights be realised to the greatest possible extent given the legal constraints posed by the demands of conflicting rights and other interests.[97] Alexy's examples are instructive. In the first case, the Federal German Constitutional Court[98] held that health warnings for tobacco products were a relatively minor interference with the constitutional freedoms of occupation and commerce. The health risks from smoking were high, and so represented weighty reasons justifying the interference. However, the court opined that a "total ban" on the sale of tobacco might not have been proportionate.[99] Alexy's second example, the *Titanic Case,* involved a claim brought by a paraplegic reserve officer against a magazine that had described him as "a born murderer" and "a cripple." This case raised the classic conflict between the incommensurables of respect for personality and freedom of expression.[100] The Federal Constitutional Court held that the former statement was a comparatively trivial interference with the integrity of the claimant, whereas the latter statement went to the root of his identity and self-respect. The interference with freedom of expression was held to be disproportionate in the former but not the latter case.

However, Alexy's claim for the rationalisation or optimisation of trade-offs based on proportionality fails for the following reason: Alexy ultimately assumes that rights are transitive, quantifiable interests and capable of evaluation in terms of a common unit, such as money or utility. Incommensurable values precisely lack transitivity and comparability. It follows that, while Alexy may show that the outcomes are rational in the sense of being structured and neither arbitrary nor unreflective, he fails to show that the answers have any special claim to

96. *Id.* at 473-74.
97. Robert Alexy, *Constitutional Rights, Balancing, and Rationality, in* RATIO JURIS 131-40 (June 2003).
98. *Id.* at 136.
99. *Id.* at 187.
100. *Id.* at 137.

moral "truth" or "objectivity." It is submitted that, generally, the principle of proportionality cannot provide objective answers for judicial balancing exercises for several reasons. Above all, the principle of proportionality can only come into operation once a specific aim has been selected. The implication is that in the conflict between two rights (for example, privacy and freedom of choice, or individual rights and national security) a basic choice favouring one value over another has to be made by the judges even before any discussion of proportionality can take place. In the English cases discussed above, security was prioritised and proportionality only came into play as a means of assessing whether certain measures involving losses of individual liberty were suitable and necessary to achieve 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 all judicial value transactions amount to short change. The same is true of purported trade-offs between privacy and freedom of expression. In *Hannover v. Germany*,[101] the court referred to the proportionality of the interference. However, 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 rights or between such a right and national security is an all-or-nothing choice. For example, a demonstration under Article 11 of the ECHR is either to be allowed or to be prohibited. Furthermore, an article invading someone's privacy is either to be published or not. Finally, if the recent headscarf debate in both France and the United Kingdom is to be finally resolved judicially, the right to follow religious precept will either prevail or give way to public order considerations.

A particularly striking misuse of the proportionality principle occurred in *Van Kück v. Germany*.[102] The case involved a claim by a transsexual for reimbursement of her gender re-assignment surgery by her private medical insurance. The Eur. Ct. H.R. 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 provisions of the ECHR, it is unclear what, if anything, could be described as disproportionate. Instead, the appropriate principle to apply in the case should have been the principle of non-discrimination

101. von Hannover v. Germany, *supra* note 40.
102. Van Kück v Germany, *supra* note 68.

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 when presented with. 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 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 of the ECHR, which prohibits discrimination on any grounds with respect to all ECHR rights and then adds a non-exclusive list of particular discriminatory grounds which are prohibited.[103] The basic idea behind 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[104] position in the enjoyment of one of the rights guaranteed under the ECHR unless that difference in treatment can be objectively and reasonably justified. Obvious problems arise over what precisely counts as "comparable" or "analogous." It is the answer to these questions that decides which cases should be treated alike and which should be treated differently. Good examples are provided by those cases in which national governments sought to justify differential treatment between legitimate and illegitimate children and between unmarried and married couples. *Inze v. Austria*[105] and *Mazureck v. France*[106] both discussed the issue of inheritance rights of illegitimate children and the Eur. Ct. H.R. held in both cases that differential treatment of children born in and out of wedlock was a breach of Article 14 in conjunction with Article 8 of the ECHR. By contrast, the court has on several occasions 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 mainly in cases involving differences in the parental rights and responsibility over children accruing to natural fathers as compared to married and divorced fathers.

103. 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. In contrast, the inclusion of both race and colour is superfluous.

104. Markx v. Belgium, [June 13, 1979] 2 Eur. Ct. H.R. 330.

105. Inze v. Austria, 10 E.H.R.R. 394, [1987] Eur. Ct. H.R. 28.

106. Mazurek v. France, App. No. 34406/97, [2000] Eur. Ct. H.R. 48.

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.[107] It is clear that together with the "objective and reasonably justified" proviso, the "relevantly similar situation" criterion, which has been developed by the Eur. Ct. H.R. as a test to distinguish between material differences and similarities for the purposes of Article 14 of the ECHR, gives the court considerable flexibility in refusing to extend the equal treatment principle to cases where it considers discriminatory treatment justified on the grounds of social or economic policy or other reasons. The court here effectively assumes the role of policy-maker.

Fairness is the overriding principle for the determination of the specific procedural justice guarantees of Article 6 of the ECHR. In theory, the right to a fair hearing is absolute with no express qualifications. In practice, however, it is qualified by the inherent vagueness of the concept of fairness, which has allowed the Eur. Ct. H.R. to avoid politically contentious decisions and show deference to national legal traditions. For example, the availability of legal aid or reasonable contingency fee arrangements 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 that no general right to receive legal aid or access to affordable fee arrangements exists except in highly exceptional circumstances.[108]

National courts, when applying ECHR provisions, have likewise used the "fairness and impartiality" requirement under Article 6 to avoid making decisions with budgetary implications or decisions that would conflict with established national legal traditions. A good example is provided by the *Alconbury* decision of the House of Lords,[109] which involved a challenge to the entire English planning system on the grounds that the reserve jurisdiction of the Secretary of State over planning appeal decisions was in breach of Article 6(1) of the ECHR. Their lordships dismissed the challenge. Central to the conclusion was the claim that in democracies decisions concerning the general interest should be taken by democratically accountable bodies.[110] Planning decisions, they opined, fall into that category, and so properly fall within

107. McMichael v United Kingdom, [1995] 20 Eur. Ct. H.R. 205.

108. Such as extreme complexity of proceedings or cases where legal representation is compulsory. *See* KAREN REID, A PRACTITIONER'S GUIDE TO THE EUROPEAN CONVENTION OF HUMAN RIGHTS (2d ed., London 2004).

109. R. v. Sec'y of State for the Env't *(Alconbury),* [2001] UKHL 23, [2003] A.C. 295.

110. *Id.* ¶ 69.

the remit of the decision-making powers of the Secretary of State. As a political theory their lordships' conclusions may be convincing to political freshmen. However, 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 involves the interpretation of government legislation and planning policy, may be regarded as impartial when the Secretary of State reserves the right to call-in any decision by the planning tribunal hearing the case.

Indeed, the fact that governments quite appropriately legislate for the public interest in such matters, or formulate policy documents on this basis, in no way means that there neither should nor could be an independent check on the application of that policy. For example, in conflicts between Articles 8 and 10 of the ECHR 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 Protocol 1 of the ECHR or the public interest exceptions to the right to private life, which are unrelated to Article 10 of the ECHR. Why, therefore, is it not desirable, possible or appropriate for planning tribunals to decide what the public interest requires in specific cases on the basis of government legislation, policy and guidelines? This is the question their lordships fail to answer. However, *Alconbury* draws attention to the degree of discretion afforded by the principles of fairness and impartiality in the context of the putatively absolute fair trail guarantee of Article 6 of the ECHR.

V. Conclusion

Rights are not worded precisely enough to prevent value conflict. Neither are legal principles sufficiently clear, autochthonous and hierarchical so as to overcome the dependence of human rights adjudication on foundationalist values, and nor can they escape the normative dilemmas and conceptual ambiguities attendant to those foundationalist values. In cases where conflict between legally recognised rights arise, there will always be choices between conflicting rights, which can only be justified in terms of the values underlying those rights. Thus, for as long as the de facto human rights 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 to be made in such cases. Competing pluralistic values are ethically and legally indeterminate and cannot furnish detailed prescriptions of how rights may be balanced best. Value

pluralism means that indeterminacy in human rights adjudication is not merely an unavoidable consequence of legislative and judicial fallibility, but a logical 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 and the less abstract issue of bringing coherence into judicial and political human rights language as the basis for criticism of adjudication and legislation. This strict juxtaposition is mistaken. The foregoing discussion has shown that the normative and conceptual contestability of human rights raises fundamental normative questions about the justification for judicial value judgments. Likewise, this discussion 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, lack both a distinctive justifiable 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. Value pluralism and conceptual uncertainty thus do not only provide a useful theoretical framework for analysing 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 characterised by ethical pluralism. There is nothing that renders human rights normatively less contentious than many other contested 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 in a way in which the conceptual structure of other moral claims does not. In the absence of moral truth, the priority of the right over the good seems morally arbitrary, judges make rights, and their choices remain political.

The above discussion suggests that, ultimately, human rights are what the judge says they are. If Professor Backer is correct in the analysis of the reconstitution of legal reification as Global Common Law, then in the context of global corporations and transnational organised interests, this finding will acquire a further and even more sinister dimension. Human rights will then become the *jurisdictio* by which private interests will constrain *gubernaculum.*