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Lorenzo Zucca

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Sant'Anna School of Advanced Studies
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# *Conflicts of Fundamental Rights as Constitutional Dilemmas*

Lorenzo Zucca[1]

**Abstract**

This paper deals with one of the most important issues of philosophy of law and constitutional thought: how to understand clashes of fundamental rights, such as the conflict between free speech and privacy. The main argument of this paper is that fundamental rights may clash in such a way that no rational solution can be advanced. I call these conflicts 'constitutional dilemmas.' However, we should not despair: when we define precisely what amounts to a genuine conflict of fundamental rights, most of the cases will appear to be spurious conflicts, which can be rationally dealt with.

**Keywords**

Fundamental Rights, Rights, Balancing, Deference, Incommensurability, Value Pluralism, Legal Philosophy, Constitutional Theory, Conflicts, Law and Morality, Judicial Review, Constitutional Law, Comparative Constitutional Law, Judiciary, Right answer, Proportionality, Basic Liberties.

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# CONFLICTS OF FUNDAMENTAL RIGHTS AS CONSTITUTIONAL DILEMMAS[1]

Lorenzo Zucca[*]

## 1. INTRODUCTION

On 10 April 2007, the Grand Chamber of the European Court of Human Rights heard the case of Ms Evans, which I regard as a constitutional dilemma. In the words of the Grand Chamber:

> "*The dilemma central to the present case is that it involves a conflict between the Article 8 rights of two private individuals: the applicant and J. Moreover each person's interest is entirely irreconcilable with the other's, since if the applicant is permitted to use the embryos, J will be forced to become a father, whereas if J's refusal or withdrawal of consent is upheld, the applicant will be denied the opportunity of becoming a genetic parent.*" [2]

On 12 July 2000, Ms Evans together with her husband, Mr Johnston, had commenced a procedure for *in vitro fertilisation* ('IVF'). Shortly thereafter, Ms Evans was diagnosed with serious pre-cancerous tumours in both ovaries, which meant that they had to be removed. The hospital advised her that it would be possible prior to the necessary operation to 'harvest' her eggs, fertilize them with the gametes of her husband, and freeze them, in order to keep her hope to bear a child in the future alive.[3]

In the United Kingdom, such a procedure is strictly regulated by legislation. The main feature of this legislation is that it allows both parties to withdraw their consent at any time before the implantation of the eggs in the uterus. Mr Johnston reassured Ms Evans about his commitment to having a baby with her. Two years

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[*] Lorenzo Zucca is lecturer in law at King's College London. Email: lorenzo.zucca@kcl.ac.uk.

[1] This paper is freely inspired from my book, L. Zucca, *Constitutional Dilemmas—Conflicts of Fundamental Legal Rights in Europe and the US* (Oxford: OUP, 2007). The paper was presented at the conference on conflicts of human rights in Ghent, at the legal theory seminar in Edinburgh and at the legal research seminar in Aberdeen. It benefited from the comments of all the participants to these events. I also received extensive written comments from Guillermo Lariguet and Chris Townley, which were very helpful.

[2] ECtHR 10 April 2007, Grand Chamber, *Evans v. The United Kingdom*, para 73.

[3] For a comment of this case, see J. Bomhoff and L. Zucca, Evans v United Kingdom, 2 *European Constitutional Law Review,* 424–442 (2006).

later, however, the relationship broke down. As a result, Mr Johnston asked the hospital to destroy the frozen fertilised eggs, thereby putting an end to the hopes of Ms Evans of having a child that would be biologically hers. In these circumstances, Ms Evans sought an injunction from the High Court requiring her husband to restore his consent arguing that he could not, as a matter of English law, validly vary it. In addition, she argued that the relevant legislation was incompatible with the Human Rights Act 1998. The High Court, The Court of Appeal, the fourth section and the Grand Chamber of the European Court of Human Rights ('ECtHR') all rejected Ms Evans' request.

Should the Court deny maternity to Ms Evans or should it force paternity on Mr Johnston?[4] In legal terms, there is a conflict of fundamental rights as both parties are making a claim under art.8 ECHR. Ms Evans claims respect of the decision she took prior the operation. Mr Johnston claims respect for his decision two years later not to proceed with the implantation. I take this situation to be a constitutional dilemma from the viewpoint of the judge. If the court decides to uphold Ms Evans' claim, then it not only denies the rationale of the statute but it also forces a possibly lifelong burden on Mr Johnston. If the court finds in favour of Mr Johnston, it denies Ms Evans the possibility of having children for life and frustrates her expectations.

Whichever way you look at it, you are going to lose something fundamental. A constitutional dilemma typically involves two elements: a choice between two separate goods (or evils) protected by fundamental rights; a fundamental loss of a good protected by a fundamental right no matter what the decision involves.

Now let me state the basic thesis of this paper: conflicts of fundamental rights may entail constitutional dilemmas. In these cases, we are left with no guidance as to what to do. Legal reasoning, I suggest, is not capable of producing a single right answer in these cases; more importantly, these cases cannot be resolved rationally. Should we despair? I am going to conclude that we should not. On the contrary, I shall argue, it is important to take conflicts of rights seriously, which means that we should try to understand them. Only then will we be able to cope with them, even if no final solution will ever be achievable.

First, however, I will say something about what this paper is NOT about. I am not here dealing with conflicts between fundamental rights and other constitutional goods or interests. At best, these are *lato sensu* conflicts. For example, the conflict between the fundamental right to strike and the interest in public order is not a relevant object of examination here.[5] Instead, I focus on *stricto sensu* conflicts, namely conflicts between norms supporting fundamental rights.

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4 For an in-depth discussion of the moral issues involved in this problem, see M. Warnock, *Making Babies- Is there a right to have children?,* (Oxford: OUP, 2003).

5 See F. Kamm for a tripartite distinction of conflicts, F. Kamm, Rights, *Oxford Handbook of Jurisprudence and Philosophy of Law*, 476–513 (Oxford: OUP, 2004).

Also, I am not going to expand on the vexed issue of the foundation of fundamental rights. Nor am I going to expand on a general theory of fundamental rights. Thus, I will not suggest that fundamental rights are better understood in terms of, say, the paradigm value of dignity or, for what it matters, utility. For the purpose of this paper, I understand fundamental rights as constitutionally entrenched rules (typically permission to do or to refrain from doing something). These norms have identifiable right holders and assignable duty-bearers. If the state interferes with the sphere of liberty protected by fundamental rights, then a court is empowered to invalidate the action taken by parliament and compensate for any possible damage.

Moreover, in this paper I assume that fundamental rights entrenched in bills of rights display foundational value pluralism.[6] In other words, I believe that, as far as bills of rights are concerned, there is no convincing argument in favour of a thesis that would rank those rights in terms of a single overarching value.[7] If this was the case, then conflicts of fundamental rights would be a trivial notion. For it would suffice to ascertain what the overarching value requires in each case to solve a conflict.[8]

Finally, I am here not interested in the issue of the choice of forum.[9] If constitutional dilemmas exist, then neither parliament nor courts nor other specialised institutions are optimally positioned to solve them; no institution will find it easy to sacrifice a fundamental right in the decisional process. This does not mean that constitutional dilemmas should not be dealt with at all in the end. My point here is that it is necessary to understand them first, and this issue is independent from the procedure we use to settle them.

To sum up, then, in this paper I am interested in conflicts between rules that have been constitutionally entrenched and protect some fundamental aspects of individual liberty. We may also call the area of protection of fundamental rights 'a project of non-governance'.[10] By this I mean that a sphere of individual sovereignty has been carved out to the benefit of each individual. This sphere of individual sovereignty implies a transfer of power from the legislature to the individual. Courts are, in principle, the guardians of the project of non-governance. But of course, each individual will face issues in which his sphere of sovereignty

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6 E. Mason, Value Pluralism, *Stanford Encyclopedia of Philosophy*, website, http://plato.stanford.edu/entries/value-pluralism/ (accessed on November 29, 2006).

7 Contra see R. Dworkin, Moral Pluralism, in R. Dworkin, *Justice in Robes*, 105–116 (Cambridge (Mass.): Harvard University Press, 2006).

8 This would, however, be open to disagreement.

9 New republican theories insist on the importance of deliberation within representative institutions and away from the courts. P. Pettit, *Republicanism*, passim (Oxford: OUP, 1997). For an application of Republicanism to the UK Constitution, see A. Tomkins, *Our Republican Constitution*, passim (Oxford: Hart Publishing, 2005).

10 T. Macklem, Entrenching Bills of Rights, 26(1) *Oxford Journal of Legal Studies,* 107–129 (2006).

will intersect with someone else's sphere of sovereignty. Under these circumstances a constitutional dilemma may arise. To deal with such a case, it is at times possible to draw the boundaries of individual sovereignties in such a way as to avoid the conflict; at other times, however, it will be necessary to evaluate the strength of each claim to individual sovereignty when a clash occurs. Finally, if the claim is of equal strength (and possibly based on the same ground), then we have a constitutional dilemma.

Conflicts of fundamental rights are growing in importance in the present political context as politics is trying to fight back and regain control of what has been devolved to individuals. This can be illustrated with some examples.

We are witnessing a rise of political religion at the global level.[11] The implications of such a comeback are clear. Political liberalism, with its rights agenda, is not regarded as very attractive anymore. Many people, in the US in particular, feel that religion should play a more robust role in the public sphere. But if this is the case, then conflicts between rights as interpreted from a liberal and from a religious viewpoint become much more likely. The classical example is Antigone: the religious obligation to bury the body of the dead brother is in clear conflict with the authority of the city of Thebes which denies burial to traitors. In our days, religion is intervening aggressively in realms such as bio-ethics as it believes that our societies lack ethical guidelines to deal with such cases. Thus by intervening in the debate on the definition of the status of embryos, the beginning of life, the sanctity of life they prepare the grounds for inevitable conflicts. Take abortion for instance. If we all agreed that the foetus is a right holder with an absolute claim to life, then the conflict with the mother's right to choose whether to abort would be dramatic (as it is in the US).

Terrorism is a second major fertile background where competing claims of rights can be made. The usual example used to challenge conventional understanding of rights is that of a terrorist carrying a ticking time bomb into a skyscraper. What happens when we compare the value of his life to the value of anyone else's life? Are we entitled to kill in order to prevent other deaths? Terrorism also has the side-effect of empowering government to intrude into our private life in a growing way. Orwellian states undermine all our rights in the name of the paramount interest in security. CCTV cameras, biometric identity cards, electronic surveillance all contribute to the shrinking of informational privacy. As a consequence, it is not surprising that privacy is not respected anymore when it clashes with other rights, such as freedom of speech.

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11 For a very interesting argument on Democracy and Religious Violence, see M. Nussbaum, *The Clash Within,* passim (Cambridge (Mass.): Belknap, HUP, 2007). In the European context, see J. Casanova, Religion, European Secular Identities and European Integration, in K. Michalski, *Religion in the new Europe*, 23–42 (Budapest: CEU Press, 2006); see also P. Berger, Observations from America, in K. Michalski, *supra*, 85–93

The main question remains. What are we to do if legal reasoning is unfit to deal with constitutional dilemmas? We should not panic. In what follows, I will show that we can adopt a reasonably narrow definition of constitutional dilemmas, which means that the limits of legal reasoning are well-defined (part 1). This will in fact enable us to understand more clearly what legal reasoning can achieve (part 2). As a result, it is possible to identify the area in which a legal resolution of conflicts of rights is possible more precisely (part 3). Where it is not available, we still should not despair. Understanding constitutional dilemmas may be more important than solving them. It may alert us to the existence of areas in which we simply have to be more careful and we should pay more attention to the claims of other parties (conclusion).

## 2. DEFINING GENUINE CONFLICTS OF FUNDAMENTAL RIGHTS

I will start with another illustration, the case of the conjoined twins Jodie and Mary.[12] Mary's life was defined as being parasitic on her sister's life. The right to life of Jodie was pitted against the right to life of Mary. One had to be killed to save the other. If no action had been taken then the two would have died.[13] The doctor held that the only way to save Jodie was to kill Mary. However, the parents refused to accept the death of one to save the other on religious grounds. Thus, the court had to step in to solve the dilemma. The court concluded that Mary ought to be killed, in order to save Jodie.[14]

The gist of the problem lies in the reasoning. Most of the judges insisted that they were not evaluating the quality of life of either child. I insist that they were evaluating the quality of life of both, by stressing the abnormality and unnaturalness of conjoined twins. Their position is only the blatant statement of our ignorance on issues of conjoined twins.[15] The implicit preamble of that decision is: having a conjoined twin does not fall within our parameters and it is therefore abnormal. Then there is the problem with the definition of life. No clear definition is sought. Instead, life is defined through its 'normal standards': bodily integrity and autonomy. The most ridiculous aspect of all is that Mary is said to eventually regain her bodily integrity, even if it is bodily integrity in death.

12 Re A (Children) (Conjoined Twins: Medical Treatment) No.1 [2000] *Human Rights Law Reports*, 721.

13 Mary died after the operation. Jodie returned back home.

14 Per Ward LJ, at 775.

15 A. Domurat Dreger, *One of us: Conjoined twins and the Future of Normal*, (Cambridge (Mass.): Harvard University Press, 2004).

Compare the former case with 'Sophie's choice'.[16] Sophie has two children. They are in a concentration camp. A Nazi officer asks Sophie to nominate one of the two children. The other one will die. If she does not choose either, both will die. In this case, the definition of a dilemma is as clear as it gets. It involves two elements: a choice between two incommensurable goods on the one hand. On the other, the choice will inevitably entail a fundamental loss.

In some cases the court finds itself in the same position as Sophie. Even if it does not have the same familial ties with the people involved in dramatic circumstances, still the adjudicator finds itself in a position where its legal skills and ability in distinguishing fall short of a proper argument in favour of either solution. So, for example, in the case of the conjoined twins the court overrode the religious decision of the parents on ethical grounds: the value of life of a normal person is superior to the value of life of conjoined twins taken together and separately. Legal reasoning, in those cases, must be supplemented with some other justificatory elements that do not fall within the rational realm. In particular, one may appeal to emotional arguments to solve the case, or, for that matter, one may appeal to the same arguments to justify the necessity of deference towards another political body (Ms Evans). [17]

In any case, however, the resolution of a similar case will leave a (moral) residue. How do I know this when it comes to judicial decisions? It suffices to look at the language used by the court in reaching a solution. In *Evans*, for example, all the courts made ample use of the empathetic language of human tragedy.[18] Most of the judges explained that Ms Evans deserved the greatest sympathy, even if in the end she lost the case.

Thankfully, not all conflicts of fundamental rights are constitutional dilemmas. In reality we encounter few examples of such cases. Why am I paying so much attention to them then? The reason is that these few cases enable us to concentrate on what legal reasoning can achieve and what it cannot achieve. Moreover, constitutional dilemmas may force us to reconsider some age-old assumptions we hold concerning rights-adjudication. For example, we may want to rethink the widespread conviction that all fundamental rights hang harmoniously together without conflicting. In this heaven of rights, solutions are produced by weighing competing claims in a rational way; we eventually reach a conciliation of claims at the practical level.

By insisting that there are constitutional dilemmas, all I am saying is that fundamental rights inevitably conflict in a way that constitutes a limit to legal reasoning. Many will feel distressed by the prospect, at first. But if you bear with me, I am

16 W. Styron, *Sophie's choice* (Vintage: New York, 1992).

17 For a very interesting discussion on moral dilemmas, see M. Hauser, *Moral Minds – How nature designed our universal sense of right and wrong* (London: Little Brown, 2007).

18 See J. Bomhoff and L. Zucca, *supra* note 3.

going to show that it is healthier to acknowledge constitutional dilemmas rather than to attempt to avoid or disregard them. The first advantage is that by focusing on constitutional dilemmas we can identify the purest forms of conflicts of fundamental rights; as a consequence, we will be able to distinguish more effectively between genuine and spurious conflicts. The second advantage is that, having identified a more precise object of research, we will be able to enhance our conceptual understanding of genuine conflicts by formulating a typology of conflicts.

## 2.1. THE MAIN DISTINCTION

The central distinction is the following: a conflict between fundamental rights can be spurious or genuine. The main difference is that genuine conflicts of fundamental rights involve normative inconsistencies. It may be useful to list a certain number of spurious conflicts to illustrate the distinction.

Confusion arises as to conflicts involving equality. Often, these cases are treated as paradigmatic examples of genuine conflicts. I wish to argue that this should not be the case. Some writers present, for instance, matters of redistributive taxation, or matters of affirmative action, under the headings of conflict of rights.[19] I do not think that these are instances of genuine conflict of rights. They may instead be defined as instances of identification of right-holders. Should black people have a right to be hired in preference to any other? That is a potential question, and a very serious one, especially with regard to affirmative action policy. And yet, the question of the identity of right-holders should be kept separate from the question of conflict between fundamental rights. The central problem this paper addresses concerns the situation in which a right makes something permissible while a competing right makes it impermissible, thereby creating a joint incompossibility. I am not stating that the fundamental right to equality cannot conflict with another right. All I am saying is that sometimes issues involving the fundamental right to equality are misleadingly described as genuine conflicts of rights. Likewise, the redistribution of taxes does not concern a conflict between fundamental rights. Of course, the fundamental right to private property for some people is at stake. By the same token, there is a collective goal, namely the problem of selecting the policy that the state should fund with the taxation returns. If this can be seen as a conflict, then it is only a *lato sensu* conflict.[20] Hence, by redefining a right as a collective goal, it brings us back to the more general case of conflicts *lato sensu* that were already excluded here. A second type of spurious conflict between fundamental rights is that which occurs as a consequence of scarce resources (or

[19] J. Rowan, *Conflict of Rights – Moral Theory and Social Policy Implications* (Oxford: Westview Press, 2001).

[20] Namely, a conflict between a fundamental right and another constitutional good (not protected by a fundamental right).

of a technological advancement). Genuine conflicts of fundamental rights exist despite scarce resources, or other external elements. It may well be that scarce resources make conflicts more visible, but this alone does not constitute a conflict. This is the case because, as we have already pointed out, matters of conflicts of rights do not concern questions of distribution of resources. Thus, for instance, the fact that a hospital cannot help to cure a patient, because of the lack of money, as it has been used to build a new school, is not a situation of *stricto sensu* conflict between the right to health and the right to education. The choice between the two is a matter of policy. Every time that resources are allocated a similar choice is made, but this does not correspond to a situation of conflict of rights.

The same can be said for technological developments. It is sometimes said that new technologies, facilitating the acquisition of information, breach privacy. Thus, a right to free expression, which is based on the disclosure of certain information as acquired by new methods, is sometimes seen as clashing with the right to privacy. What makes it impermissible to disclose certain information is the content, not how the information was gathered. Of course, on certain occasions individuals go beyond the accepted boundaries and use illegal ways of acquiring information. However, this is not the point since I am concerned here with cases in which a genuine conflict of fundamental rights arises. So far we have examined what genuine conflicts of fundamental rights are not. In the next section, I will discuss the central features of genuine conflicts of fundamental rights.

## 2.2. A (PRACTICE ORIENTED) TYPOLOGY OF CONFLICTS

There are two fundamental aspects of conflicts that I wish to highlight here. Firstly, fundamental rights can clash in such a way that it gives rise to a total or a partial conflict.[21] Secondly, conflicts of fundamental rights take place at the level of their supporting norms. We can encounter either conflicts of different fundamental rights norms, or conflicts between two instantiations of the same norm. The former is an inter-right conflict, while the latter is an intra-right conflict.

The basic structure is as follows:

| | Intra-rights | Inter-rights |
|---|---|---|
| Total Conflicts | 1. fundamental right to life v. fundamental right to life | 2. fundamental right to life v. fundamental right to decisional privacy |
| Partial Conflicts | 3. fundamental right to free speech v. fundamental right to free speech | 4. fundamental right to free speech v. fundamental right to informational privacy |

21 H. Kelsen, *General Theory of Norms*, 123 (Oxford: Clarendon Press, 1991) (transl.), Chapter 29.

Intra-rights, total conflicts are the paradigmatic example of a constitutional dilemma. This is the case as the symmetrical claims are mutually, and totally, exclusive. If we support one claim, we extinguish the other forever.[22] An example of such a case would be that of the conjoined twins, Jodie and Mary.

Intra-rights conflicts can also be partial. This means that the right at stake is the same. This right, however, is susceptible of regulation on practical grounds (time, space, manner of exercise). Its regulation will generally not amount to a negation of the core of the right. An example of this case is the conflict between two groups claiming free speech. Imagine that a neo-nazi and a neo-communist group want to demonstrate in town. They ask for permission to do so at the same time, and place. Since this is likely to occasion problems, it is possible to allocate different spaces/times in order to solve the issue.

Conflicts can also be inter-rights, that is, they can involve two different rights. This conflict can be total when the rights at stake cannot be waived without simultaneously being alienated. One example of this could be the case of physician assisted suicide. The patient's right to decisional privacy, which includes in principle the liberty to suicide, is made more difficult in certain instances when the patient is unable to exercise his liberty alone. Does he have a right to be assisted in dying? The issue is highly problematic as this claim conflicts with the absolute prohibition to kill or to assist in killing someone embedded in the right to life.

Finally, a conflict can be inter-rights and partial. This is the case when two different rights conflict, but a case-by-case regulation is still available. An illustration of this category is the very widespread conflict between privacy and free speech, especially when a newspaper has to decide whether or not to publish delicate information regarding public figures.

Determining the correct type of instantiations depends on the guidance given by charters of fundamental rights, and by the manner by which officials interpret them. The way total or partial conflicts are shaped depends on the way fundamental rights are interpreted by institutions and operated by individual agents.

The aim of this section was to elucidate, insofar as possible, the main features of conflicts of fundamental rights. If the features identified are relevant, then the typology will offer a framework that can help in interpreting those conflicts in more illuminating ways. However, as already suggested, there is ample scope for further exploration, since the way fundamental rights conflict depends on the way bills of rights frame them, and also on the way officials interpret them.

In conclusion to this section I would like to draw your attention to the fact that if you analyse the discourse of conflicts more accurately, you can understand different sets of phenomena better that were previously all treated as analogous. An improved understanding will not enable us to resolve all the cases; however, it is only a small minority of cases that will fall within the category of constitutional

22 Incommensurability will be discussed below.

dilemmas. The remaining cases will either be spurious conflicts, which do not call for a special treatment. Or, genuine conflicts where there are indeed competing claims, but one claim can be rationally shown to override another. In our typology, for example, only some total conflicts will qualify as constitutional dilemmas.

## 3. BALANCING AND INCOMMENSURABILITY

Balancing offers jurists respite. Even if they acknowledge the existence of conflicts between fundamental rights, they carry on happily claiming that legal reasoning offers a master tool to solve particularly difficult cases. Contrary to conventional wisdom, I am going to argue that balancing is ill fit to solve constitutional dilemmas. It is, however, a useful tool when it comes to other conflicts of fundamental rights, in particular in cases of partial conflict, either between different rights or between instantiations of the same right. Perhaps it is advisable to refine the notion of balancing somehow. As a legal/judicial metaphor balancing is used in every possible context (as metaphor and image for justice for example). The broadest distinction to draw is that between structured and loose balancing.

Structured balancing is exemplified by the German notion and practice of proportionality.[23] The prophet of structured balancing is Alexy. In relation to fundamental rights, balancing is useful to determine the scope and the relative strength of rights as applied to certain specific circumstances. It cannot, however, help solving every case. It is interesting to note that this understanding of balancing is perfectly consistent with the existence of constitutional dilemmas.

Loose balancing is merely another name for an economic, or cost-benefit, analysis of law.[24] The prophet of this type of balancing is Judge Richard Posner. Here, balancing merely means that every decision should factor in a sovereign concern of the state in a time of emergency, namely security. Fundamental rights in this context are understood as weak side-constraints to the power of government. If security clashes with one or more fundamental rights, then the balance will inevitably tip in favour of the former. In his book, Posner justifies electronic surveillance, and many other Orwellian types of control of the state over the individual, in these terms.

It is obvious that loose balancing does not even consider the possibility of genuine conflicts. All legal/constitutional issues are conflicts and by the same token none of them is a genuine conflict of rights. Balancing takes place all the way down, from the most important constitutional issue to the puniest question of law. On the contrary, as said before, disciplined balancing is defined in such a

23 R. Alexy, Balancing, constitutional review, and representation, 3(4) I-CON, 572–581 (2005).

24 R. Posner, *Not a Suicide Pact: The Constitution in a Time of National Emergency* (Oxford: OUP, 2006).

way as to make room for an understanding of conflicts of rights as constitutional dilemmas. In Alexy's own words: 'Constitutional review as argument does not allow for everything insofar as good from bad or better from worse constitutional arguments can be distinguished from one another. […] It shows, too, that the existence of cases in which the *arguments lead to a stalemate* represents no danger at all for constitutional review.'[25]

Balancing should not, therefore, be understood as a magic tool that provides a solution to every possible case. If anything, we should display some scepticism towards those theories that claim such a position, in particular Posner's theory. Balancing, as a tool, has a limited sphere of application. In particular, it cannot be used to disentangle a stalemate situation, that is, a situation in which there are two symmetrical claims of rights in conflict.

There are many more incisive criticisms of balancing in relation to conflict of fundamental rights. The main criticism comes from the notion of incommensurability.[26] When two incommensurable values are embedded in a rights conflict, how is it possible to force them into a measurement of their weight or importance? Jeremy Waldron suggests a distinction between strong and weak incommensurability. He argues that strong incommensurability is the stuff of tragic choices: Agamennon facing the choice between his daughter and his expedition.[27] Strong incommensurability leads to agony and paralysis, and it does not offer any criterion of choice other than personal preference. Weak incommensurability, on the contrary, is merely expressed in terms of a 'simple or straightforward priority rule.' This means that, instead of a quantitative utilitarian-like balancing, decisions are taken by playing trumps, or enforcing the priority. However, sometimes it will be necessary to choose between trumps. At that point we will resort to balancing, albeit a qualitative type of balancing, that tries to work out the internal relationship of the values at stake, by way of philosophical reasoning.

The latter view suggests the existence of a fluid moral life where every decision should be carried out by way of unpacking moral considerations. It then compares them one to another in order to discover which values deserve to be better protected. Weak incommensurability is deemed to be central to this kind of moral

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25 R. Alexy, *supra* note 23, 580.

26 On this notion, there is a burgeoning literature: see for example the symposium held at the University of Pennsylvania Law School and published at 146 University Pennsylvania Law Review 1169 (1998). See in particular the contributions by M. Adler, Law and Incommensurability: introduction, 1169; E. A Posner, The strategic basis of principled behaviour: A Critique of the incommensurability thesis, 1185; F. Schauer, Instrumental Commensurability, 1215; M. Adler, Incommensurability and Cost-Benefit Analysis, 1371; R. Chang, Comparison and the Justification of Choice, 1569; L. Alexander, Banishing the Bogey of Incommensurability, 1641. S. Gardbaum, Law, Incommensurability and Expression, 1687; B. Leiter, Incommensurability: Truth or Consequences?, 1723. See also J. Waldron, Fake Incommensurability: A response to Professor Schauer, 45 *Hastings Law Journal* 813.

27 J. Waldron, *supra* note 26, 816.

and constitutional life, and indeed the most prominent theoreticians are deemed to subscribe to this view. In short, weak incommensurability still allows a certain form of moral comparison and therefore moral justification, after appropriate reasoning.

I think that some decisions that are presented to judges are made of strong incommensurability. Waldron, on the contrary, says that this may be the case in certain cases. But implicitly, he believes that constitutional, and moral thinking, exclude strong incommensurability from the scene. This is far from obvious, and no argument is provided with this intent. I would argue that there are certain constitutional cases where a strong form of incommensurability applies. It is better to ponder whether these cases would be better left to judges, or whether they should start a social conversation, that can lead to a better shaping of social preferences. Also, to acknowledge that some genuine conflicts of fundamental rights do exist can help in understanding the limits of constitutional adjudication, and of the strategies it applies in order to reach decisions. Balancing, for instance, can only perform a limited role, and not all the way up to conflicts of fundamental rights. When a genuine conflict of fundamental rights arises, it may be necessary to resort to second order type of reasons that may range from coherence to other types of considerations.

In an age of balancing, most of the conflicts are dealt with by appealing to the process of weighing competing interests, in order to come up with a reasonable solution.[28] But, to hold that rights can be balanced, implies a very complex groundwork involving the identification, quantification and comparison of the interests protected by constitutional rights. Even if this were possible, one wonders whether, in cases of conflict, the interests can be composed or conciliated as the idea of balancing suggests. In other words, by the act of weighing, one uses the same metric- that is he considers rights to be commensurable and therefore compossible. Now, the question is whether that assumption is compatible with the definition of rights conflicts, as entailing two actions that cannot be performed simultaneously.

In the framework of rights conflict, the language of balance seems more designed to avoid conflicts, rather than to solve them. To avoid conflicts is *prima facie* more appealing. It gives the impression that there are fewer hard decisions concerning rights. Moreover, even if hard decisions exist, the notion of balance gives the illusion of providing a reasonable method to take all the interests into account and to come up with a fair solution. But, the language of balance begs more questions than it solves. What interests go in the balance? What is the value of the outcome of a balance? Despite the pretended reasonableness provided by the balancing process, hard decisions persist. Rights conflicts cannot be defined away, they have to be taken seriously. This requires, on one hand, that we cast the

28 A. Aleinikoff, Constitutional Law in the age of balancing, 96 *Yale Law Journal* 943 (1986).

question of conflicts in a clear way, and on the other, for us to adjudicate the conflict, by stating the prevalence of one right over another.

Legal systems oscillate between the language of balance, and that of conflict. As most of the assumptions beyond these languages are implicit, legal actors cannot flag an explicit commitment to either one or the other. As a consequence, there are many inconsistencies in the language of legal and political actors. On top of that, the rights discourse that is produced is unclear and confused. When we look closer, we can, arguably, find some signs of primacy in the language of balance. This can be explained by the reasons which were put forward earlier; namely, the attractiveness of such a language when it comes to justifying hard decisions. Balancing occupies an overarching role in constitutional law. Unfortunately, the language of balancing is often so broad that many different things are encompassed under the label. In what follows, we will try to make some distinctions that may help elucidate the role of balancing. Moreover, we will suggest in the conclusion that balancing, as properly defined, plays only a marginal role in the question of conflicts of fundamental rights.

## 4. DEALING WITH CONFLICTS

Solving conflicts of fundamental rights is often regarded as the most important contribution to the debate. I disagree. I think that it is much more important to pause and try to understand the role and importance of conflicts within our legal-political systems. In fact, if we take conflicts seriously, the best we can do is to acknowledge that each conflict is an extremely hard case and we have to think carefully before producing a particular decision. Some conflicts (constitutional dilemmas) are not solvable by appeal to legal rationality. Some others are easier to handle but at the price of a hefty compromise. Many other cases are simply apparent conflicts. If you look more closely at them, they will boil down to easier cases. As a result, the most important lesson from the conceptual analysis of conflicts of rights is that we should use the language of conflicts more sparingly.

It is important to define conflicts narrowly for several reasons. First, it avoids the ideological use of conflicts of rights. This can happen when an institution wants to achieve a given result. To talk of conflicts is an easy way of making the decision look more difficult than it actually is. An apparent conflict, in other words, works as a smoke screen for a more robust use of discretion. So, for example, the French Constitutional Council displays an ambiguous attitude in relation to fundamental rights. At times it talks of reconciliation of the different interests at stake in a very pragmatic way, when it is pleased with the outcome; other times

it actively identifies conflicts between fundamental rights and the public interest so as to justify the limitation of a fundamental rights.[29]

Secondly, it allows us to make sense of the actual tragedies that may happen within our legal/political systems. If we rode roughshod over those tragedies, the likely result would be a polarization of our societies.

Thirdly, a better understanding of conflicts will result in a better method for resolution. There are four broad strategies in response to a situation of conflict. A theory may try to accommodate the conflicting elements; it may try to explain away the conflict; it may ride roughshod; or, eventually, it may even lose credibility.[30] The last two options are of less value, although one is more appealing than the other. Both, however, face the spectre of counterintuitive information. A theory that rides roughshod will attempt to dismiss counter intuitions using theoretical power. Other theories will simply acknowledge the impossibility of making sense of an extremely intricate issue.

The preferred approaches of both lawyers and philosophers consist in accommodation, or reductive explanation. By reductive explanation I mean, in this context, the task of showing that there are no genuine conflicts. This is supposedly achieved by dispelling false assumptions. By accommodation, I mean the task of redefining the elements in conflict so that theory can accommodate new cases. The aim of this process is to constantly refine rational arguments down to the constitutional essentials. Therefore, the problem can be resolved by expanding the scope of theory.

What are the major problems with these approaches? Reductive explanation tends to be unable to give a full account of the subtleties of conflicts; we have seen this in relation to the rhetoric of balancing in the former section. In what follows, I will focus on strategies of accommodation. I will use the press/privacy conflict as an illustration.

Can we really expand constitutional theories in order to fit hard cases, such as the conflict between the fundamental rights of free press and privacy? Many scholars believe that this is possible. Nonetheless, a sharp distinction must be drawn between those who believe in Constitution-perfecting theories[31], and those who develop accurate constitutional theories.[32] The difference lies in the fact that constitution-perfecting theories work to provide happy endings to any hard case; accurate theories, on the other hand, are able to accommodate a sense of tragedy in certain hard cases.

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29 N. Molfessis, *Le Conseil Constitutionnel et le Droit Privé,* (Paris: LGDJ, 1997).

30 On this point see P. Railton, *Facts, Norms and Values,* 249–292 (Cambridge: CUP, 2003).

31 J. E. Fleming, Constitutional Tragedy in Dying: Or Whose Tragedy Is It, Anyway?, in W. E. Jr. and S. Levinson (eds.), *Constitutional Stupidities Constitutional Tragedies*, 162 (New York: New York University Press, 1998).

32 L. Alexander, Constitutional Tragedies and Giving Refuge to the Devil, in William Eskridge Jr. and Sanford Levinson (eds.), *supra* note 31, 115.

In the ultimate analysis, a constitution-perfecting theory can only subscribe to spurious conflicts of fundamental rights. For, if there were genuine conflicts, there would always be a moral residue, which prevents striving towards a 'perfected constitution.' But this fails to grasp the tragic aspect of hard cases. In what follows, I will explore the press privacy conflict, from the point of view of constitution-perfecting theories. Then I will put forward my preferred, rule-based, alternative of conflicts accommodation.

## 4.1. CONSTITUTION-PERFECTING, CONFLICT-SOLVING, THEORIES

How would a constitution-perfecting theory resolve a conflict concerning the disclosure of truthful private information? That depends heavily on the background constitutional theory to which one subscribes. I will focus on American debates as there is extensive literature on this topic. However, this is not the place to map the intricate theories of American Constitutional law. Instead, I will select one main strand of the literature and treat it as representative. It is quite safe to hold that Rawls's political philosophy has had a great impact on many constitutionalists. The last generation of Rawlsian constitutional scholars grew up with the teaching of a *Theory of Justice*[33], as amended by *Political Liberalism*.[34] In the latter, Rawls presents his theory as a desirable brand of liberalism as applied to political affairs, and as opposed to a comprehensive theory which would obscure the fact of pluralism in our societies.

A growing number of scholars argue that Rawls's liberalism can provide a sound framework for the resolution of conflicts among basic liberties.[35] The key concepts that are relevant for such an endeavour are: the priority of the family of liberties; the constitution as a whole; and the distinction between regulating and restricting liberties. When basic liberties conflict they must be mutually adjusted, Rawls holds. Not balanced; not taken as absolute trumps. In order to do that, we have to accept that basic liberties may be regulated, but not restricted. Their central range of protection must always be secured. Regulation appeals to time, manner, and space types of rules. Thus, someone who wants to speak must be allowed to do so, but when, how, and where are up for the authorities to review.

Basic liberties form a family of constitutional essentials. They take priority over other interests as a family, and not individually. Hence, regulation is always aimed at enhancing the whole system of basic liberties, not just liberties individu-

33 J. Rawls, *A Theory of Justice*, (Cambridge, Mass: HUP, 1989 (revised edition)).

34 J. Rawls, *Political Liberalism,* (New York: Columbia UP, 2005 (2nd edition)).

35 A notable example is James Fleming who organized a symposium on 'Rawls and the law,' held in Fordham Law School on November 7–8, 2003.

ally. Moreover, regulation is not arbitrary and it should be carried out 'in order to guarantee the fair value of the equal political liberties.'[36] Rawls's political constructivism is the starting point of a constitutional constructivism which expands a framework for the resolution of difficult questions. Constitutional constructivism borrows from its political counterparts the two fundamental themes: deliberative democracy and deliberative autonomy.

Now, these two themes are relevant for our enquiry. For, privacy is at the core of deliberative autonomy. And free press, as an instantiation of free speech, is at the core of deliberative democracy. How would the framework help us in deciding our core case of conflict? To be fair, we have to acknowledge that the framework does not aim to give any legal answer to the specific question. It depends on a division of labour between law and philosophy, which Thomas Scanlon explains as follows:

> *"First, it [Rawls' framework] can distinguish clearly between rights and the values with reference to which they are to be justified and interpreted. Second, it may specify more fully how this process of interpretation (or definition and adjustment) is to proceed. Specifically, it may offer a particular view of how the values relevant to the justification of certain rights are to be understood. Finally, since such claims about values are bound to be a matter of controversy, the framework may provide a larger theoretical rationale for giving these particular values this special place in our thinking. Rawls' framework does all three of these things […]."*[37]

Rawls' framework helps to clear the ground of constitutional essentials, although it makes no claim as to the details. Constitution-perfecting theories are meant to carry on Rawls' project, at the level of constitutional law, thereby tackling actual constitutional cases.

But does that help in the resolution of our conflicts? Deliberative autonomy and deliberative democracy are presented as co-original and of equal weight. Thus, at the general level there is no guide as to whether we should prefer privacy or free press. We know that neither should be preferred to the other, on the grounds of principle alone. Hence, we may want to suggest that a regulation, as opposed to a restriction, can help in solving the dilemma of disclosure of private information. Free speech should not have absolute priority, nor should privacy.

How do we maintain the central range of both basic liberties while regulating it in such a way that helps reach one decision? Is the test of lawfully obtained information a good regulation? It does seem a regulation as to the manner in which we acquire information. But is it a good regulation? This can be legitimately doubted, since it is the exclusive responsibility of the government to screen cer-

36 J. E. Fleming, Securing Deliberative Democracy, 72 *Fordham Law Review* 1459 (2004).

37 T. Scanlon, Adjusting Rights and Balancing Values, 72 *Fordham Law Review* 1477, 1478–79 (2004).

tain information. However, if the government is negligent, then the press cannot be held responsible.

Is the newsworthy test a regulation that secures the fair value of both privacy and free press? I think that we can hardly make sense of privacy if we stick to the newsworthy test. A personal tragedy may well be considered newsworthy. Yet the central range of privacy should be there to protect precisely that piece of information.

Is the reasonable expectation of privacy test able to enhance the fair values of both privacy and free press? Even in that case, I do not think that is the case. A reasonable expectation is grounded on what the society commonly perceives as being harmful and intrusive. That is not necessarily in line with what a reasonable conception of privacy should allow protection of. Can there be a regulation that allows us to shield truthful information about individuals without restricting free speech? Conversely, can there be a regulation that allows the disclosure of private information, whilst preserving informational privacy?

The problem is that if we acknowledge the existence of genuine conflicts of fundamental rights we cannot hope to achieve a coherent 'happy' family of all basic liberties. In some cases, it is impossible to secure the central range of both fundamental rights as the conflict concerns the clash of the requirements falling within that central range of protection. We can only develop a framework that allows us to take decisions that explain sacrifices. In other words, the family of basic liberties cannot possibly be perfectly harmonious. To be sure, there are a lot of good intentions in striving to make the family as harmonious as possible. But, we cannot turn a blind eye to the possibility of genuine conflicts.

## 4.2. THE PRESUMPTION OF PRIORITY

Free press and privacy belong to the same family. There is room for their mutual adjustment in different cases. Sometimes, for instance, certain aspects of politicians' private lives could be brought to light in order to provide more information to voters. Nonetheless, I do not think that politicians' private lives should be fully exposed. Firstly, some of that information is plainly not relevant.[38] Secondly, other people, who are not politicians, can be caught in the disclosure of private information. Also, one may wonder why private tragedies should be publishable at all. Rape, kidnapping, thefts: why should victims be publicly named, if they do not want to make news? Of course, what happened to them is news, but why should we disclose their identities in this unfortunate situation?

Despite my privacy concerns, I would now like to argue that free press should be recognised as having qualified priority. Moreover, the press should be allowed

[38] See Fred Schauer on this point, F. Schauer, Can Public Figures Have Private Lives?, in: E. Frankel Paul, F. Miller, and J. Paul, *The Right to Privacy*, 293–309 (Cambridge: CUP, 2000).

to have a margin of manoeuvre when deciding what, when, and how to publish. I make these points in anticipation of the outcome I reach by application of my framework. In the remaining part of this section, I attempt to explain how the framework works, and why the solution that it reaches is supported by the best constitutional interpretation of fundamental rights.

The framework I favour is not rooted in a particular constitutional history. From a certain point of view, it can be considered a meta-framework, because it aims to be applied to all constitutional frameworks. It is an attempt to theorize the way in which fundamental rights affect the decision-making process in different countries.

Bills, charters, and declarations of rights, contain very similar lists of fundamental rights norms. Nowadays they are part of domestic legal systems. A system of enforcement of fundamental rights is often available, although it can vary considerably. Often, fundamental rights have been distinguished in different waves or generations. This was an attempt to provide a typology of fundamental rights with regard to its content. I would like to suggest that theories of fundamental rights are running short of arguments, when it comes to the decision of genuine conflicts of fundamental rights. What I propose is a second generation of fundamental rights systems. I think that new rules as to the functioning of these systems should be thought of in order to make hard case decisions more transparent, so as to properly allocate the burdens of the decision process. When applied to our press/privacy conflict, that means that we have to come up with rules, which regulate the behaviour of fundamental rights taken together, and could eventually allow sacrifices in certain cases.

There are two broad types of rules that can achieve that purpose. Firstly, there are substantive rules of priority. These rules are twofold. They can be internal to the fundamental rights systems, or external to them. Internal rules of priority concern the relationship between different rights. For instance, when we seek for a rule of priority concerning free press and privacy, we can start by laying down a spectrum of four broad possibilities: absolute priority for free press; absolute priority for privacy; qualified priority for free press; or qualified priority for privacy. Most of our systems of fundamental rights support one of these broad options. I think that it is particularly important to come up with a clear rule. That does not mean that the fundamental right that has priority would never be qualified. On the contrary, when we start with a clear priority, then we can elaborate sophisticated arguments in favour of the overruling of that priority. That qualified priority rule also has the advantage of avoiding the balancing and absolutism rhetoric which plague fundamental rights systems.

The second rule of substantive priority concerns the system of fundamental rights as a whole. Equally, that system has a qualified priority over any other considerations, interests and other countervailing reasons. Often, state interests or

public interests are erected to the status of fundamental rights, in order to provoke a conflict which state interests are meant to win. Recently, that technique has been preferred if we think about the state interest in security, which is often used to curtail fundamental rights. This device is not acceptable without strong reasons for its support. Fundamental rights, as a family, have qualified priority over any other types of interests.

Beyond substantive rules of priority, we have procedural rules. These concern the distribution of powers when it comes to hard cases. Firstly, they concern the distribution of power between different branches of government. Secondly, they concern the repartition of that power between the State and individuals. Free press versus privacy is a horizontal conflict.

Procedural and substantive rules of priority define what I call the qualified and contextualised 'presumption of priority.' In the US, the conflict between privacy and free speech is routinely won by the first amendment. The presumption of priority, as I conceive of it, would merely shed light on a factual situation. Some could argue that this would strengthen the position of free speech even more. I do not think so. In fact, to state how things work clearly may just trigger a debate on the limits of that priority. Opponents would have better arguments to fight in favour of a more robust protection of informational privacy. If anything, a presumption of priority would be a flexible option that keeps the door open for further discussion and refinements.

## 5. CONCLUSION

Conventionally, constitutional thinking aims at showing that conflicts of fundamental rights can be solved or defined away in every case. This paper attempted to show that there exist constitutional dilemmas that escape clear cut, final resolution. Deliberation on these issues, such as the boundaries of life and death, is likely to stay with us forever and haunt all the generations to come. It is not desirable to turn a blind eye on these issues. Instead we should understand them in order to know better what makes them so unpalatable. Only then, we will be able to propose compromises that will not polarize our societies.