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## On Conflict of Human Rights

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# On Conflict of Human Rights

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## I. WHAT IS CONFLICT OF HUMAN RIGHTS?

For a striking example of conflict of human rights (CHR), one might recall the climactic scene portrayed in the Oscar-winning movie *Titanic*: in one dark, tragic night, the S.S. Titanic struck an iceberg, broke into two parts and sank into the cold sea. Hundreds of passengers struggled in the icy water, crying for help. A number of already-launched lifeboats refused to come to their assistance. Instead, the lifeboats stayed at a distance, watching and waiting until the sea became quiet again. Then, at the conclusion of the scene, one lifeboat came and saved perhaps the only survivor, the lead actress. This outcome seems inhuman and cruel, but it was reasonable: if the lifeboats had come to help from the beginning, there would have been the real danger that the desperate people in the water might have caused the boats to capsize and sink, and those aboard would have died too. Obviously, in such a situation (the number of lifeboats was limited), the rights to life of those in lifeboats and of those in the sea were in conflict, as the movie vividly demonstrated. The result was that the right to life of those in lifeboats (mostly women and children) prevailed over that of the people floundering in the sea.

Of course, not every CHR is so tragic. Many conflicts of human rights (CHRs) occur in daily life. For instance, worldwide, numerous abortions are performed quietly. To many, abortion involves the serious conflict between a fetus' right to life and a woman's right to choose to have an abortion. Such a conflict is extremely controversial and is governed by national laws and regulations. Consider the 2002 regulations issued by the National Population and Family Planning Commission of China, which prohibit ultrasound scans to determine the sex of a fetus, and authorize monetary and non-monetary punishments for sex-selection abortions.<sup>1</sup>

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\* Professor, School of Law, Shanghai Jiaotong University. The author wishes to thank Professor Henry Steiner for all his encouragement as well as his perceptive comments on the early draft of this article. Special thanks go to the Ford Foundation for providing the financial support for my stay during 1992-1993 at Harvard Law School, where this research began.

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1. The Chinese version of the law is available at National Population and Family Planning Commission of China, [http://www.chinapop.gov.cn/fzjw/flfg/t20040326\\_1895.htm](http://www.chinapop.gov.cn/fzjw/flfg/t20040326_1895.htm) (last visited Nov. 6, 2006).

China is also reported as considering formally criminalizing sex-selection abortions.<sup>2</sup>

The above examples indicate that while new CHRs develop as human society progresses, old CHRs, such as the S.S. Titanic tragedy, may repeat themselves from time to time. The historical method of quarantine, used when epidemic illnesses erupt, is another example.<sup>3</sup> During 2002 and 2003, the severe acute respiratory syndrome (SARS) epidemic spread from China into a number of countries and regions. The world responded with quarantines—restraining the movement of people—to control the spread of infectious disease. There was a conflict between the freedom of those who had contacts with SARS patients (as well as those who were misdiagnosed as SARS patients)<sup>4</sup> and the interests of public health and public safety (including the right to life and health of others); the rights of the former were constrained.<sup>5</sup>

They also demonstrate that although CHRs may be settled by the parties involved in the conflict themselves (for example, if a lifeboat is overloaded and in danger of sinking, those already in the boat can act to prevent more people from getting on it),<sup>6</sup> more often CHRs are resolved by a third party acting as a “judge.” Third parties can be state organs, or public or private institutions or individuals with special social responsibilities such as hospitals, doctors, lifeguards, etc. State organs may enact laws and regulations (legislatures) or act on their public authorities (administrative and judicial organs)<sup>7</sup> to resolve CHRs. In addition, public or private institutions and individuals may resolve CHRs in fulfilling their responsibilities, according to state laws and regulations as well as professional rules and judgments.

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2. See Sherry F. Colb, *China Announces That It Will Criminalize Sex-Selection Abortions*, FINDLAW'S WRIT, Jan. 26, 2005, available at <http://writ.news.findlaw.com/colb/20050126.html>.

3. See James S. Bromberg & Charles Vidich, *21st Century Role for Quarantines*, L.A. TIMES, Apr. 9, 2003, § 2, at 13.

4. See *Hundreds of SARS Cases Misdiagnosed in China's Guangdong Province*, AGENCY FRANCE PRESSE, Oct. 27, 2003.

5. See, e.g., Standards of Identifying People Having Close Contact with SARS Patients and Handling Principles (Trial Implementation) (promulgated by the Ministry of Health, May 8, 2003), available at <http://www.china.org.cn/chinese/PI-c/434396.htm>.

6. There may also be either heroic or immoral deeds that occur in a conflict situation. For example, in the movie *Titanic*, the lead actor provides his lover, the lead actress, the opportunity to survive, while her fiancé bribes his way onto a lifeboat, even though the priority was to restrict the lifeboats to women and children.

7. The European Court of Human Rights (ECHR) has dealt with a number of CHR cases where European countries imposed limitations on certain human rights in order to protect other conflicting human rights. When handling these cases, the ECHR balances the relevant values of the conflicting human rights. See Larry Catá Backer, *Disciplining Judicial Interpretation of Fundamental Rights: First Amendment Decadence in Southworth and Boy Scouts of America and European Alternatives*, 36 TULSA L.J. 117, 147 (2000).

The “judge” (especially state organs) often plays a pivotal role in resolving CHRs, especially those CHRs that lead to deep social controversy and attract strong social interference. For example, in regard to issues of euthanasia, abortion and the conflict between religious rights and duties of Islamic women in some Islamic countries and rights and duties of women provided in international human rights conventions, rights-holders in those CHRs no longer have the freedom to make their own decisions. They must accept the consequences of state and social interference, choose to evade state laws and pursue abortion and euthanasia in places where it is legal or else go into exile—as have some Islamic women who advocate for women’s rights.

On the other hand, third-party or social interference may not only play a pivotal role in resolving CHRs, but also may often be the reason or condition for the existence of some CHRs. For example, in the *Titanic* tragedy, if there had been no possibility of saving lives, there would have been no CHRs among the passengers. It is exactly because third party assistance exists, and the third party determines how to help, that CHRs may occur.

It should be pointed out that in addition to “judges,” everyone else in a society may form his/her own standards as to CHRs. Many CHRs may not lead to significant social controversies—such as the quarantines adopted during the 2002-2003 SARS epidemic, which did not prompt any serious dispute. Some CHRs (such as issues of abortion rights and euthanasia), however, not only cause great division of societies and racial groups as a whole, but also may lead the same CHR to different or even opposite results in different states or in different regions in one state (for example, in the United States, only the State of Oregon has legalized euthanasia); hence, the result that CHRs may diverge in different times and places.<sup>8</sup>

CHR is a fundamental theoretical issue of human rights. Rex Martin once pointed out that if the CHR issue is left unresolved, the status of liberal theorist John Rawls’ “basic rights as forming a stable system made up of mutually compatible elements” is uncertain.<sup>9</sup> Therefore, no serious human rights theory may ignore the CHR issue. On the other hand, CHR is also a difficult theoretical issue because, as indicated, CHR may cause serious division within a society or a racial group and may lead to different solutions and results at different times and places. To some scholars, CHRs can even be inherently intractable and thus regarded as a major ob-

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8. The conflicting rights may lead to conflicting human rights rulings by courts and engender forum shopping. See Laurence R. Helfer, *Forum Shopping for Human Rights*, 148 U. PA. L. REV. 285, 335-40 (1999).

9. See REX MARTIN, *RAWLS AND RIGHTS* 129 (1985).

stacle to the universality of human rights.<sup>10</sup> Is CHR a real obstacle to the universality of human rights? How should one interpret the controversial CHR phenomenon and explain the divergence of CHR results? And, overall, why it is useful to look at CHR issues? To try to answer these questions, we must first know more about CHR.

#### A. *The CHR Concept*

For the purposes of this article, CHR is simply defined as *a clash between same or different human right/s, which is/are held by the same or different rights-holder/s*. Hence, CHR may arise in variable occasions, depending on what human right/s is/are in conflict and by whom held. In other words, CHR may occur between different human rights; between two instances of the same right; between different rights-holders; and, in some special circumstances, one rights-holder may face two conflicting human rights.

An easy example is when two persons' lives are in danger but only one person's life can be saved due to a lack of available medical or other facilities. There will be an immediate conflict between their respective rights to life: the same right held by two rights-holders conflicts.<sup>11</sup> Another example occurs during a famine, when one person's property right may conflict with another person's (or a group of persons') right to life, such that the former's stored grain, for example, may be commandeered: different human rights held by different rights-holders conflict.<sup>12</sup> A third example concerns the controversial issue of euthanasia, in that one's own right to life may conflict with his/her own right to die—and with society's interference with the latter right: one rights-holder faces two conflicting human rights.<sup>13</sup>

Although the concept of CHR is not that complicated, in reality, many cases of CHR are not easily identified. One reason is that when we believe one right has overwhelming importance, we usually overlook the fact that there is another right conflicting with it. For example, in 1981, New Zea-

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10. See Philip Alston, *Human Rights in 1993: How Far Has the United Nations Come and Where Should It Go From Here?*, in WORLD CONFERENCE ON HUMAN RIGHTS, VIENNA, JUNE 1993: THE CONTRIBUTION OF NGOS: REPORTS AND DOCUMENTS 13-22 (Manfred Nowak ed., 1994).

11. The authors are indebted to Jeremy Waldron for this example. See Jeremy Waldron, *Rights in Conflict*, 99 ETHICS 503, 503-19 (1989). Another example is the conflict between religious landlords who refuse to rent their apartments to unmarried or gay/lesbian renters. See Marie A. Failing, *Remembering Mrs. Murphy: A Remedies Approach to the Conflict Between Gay/Lesbian Renters and Religious Landlords*, 29 CAP. U. L. REV. 383 (2001).

12. See S. I. BENN & R. S. PETERS, SOCIAL PRINCIPLES AND THE DEMOCRATIC STATE 96 (1959).

13. For a discussion of euthanasia as a right, see JOEL FEINBERG, *Voluntary Euthanasia and the Inalienable Right to Life*, in RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY: ESSAYS IN SOCIAL PHILOSOPHY 221-51 (1980).

land was criticized internationally, especially by black African countries, and buffeted by internal strife, over a series of rugby matches to be played between a select South African team (the Springboks) and a select New Zealand team (the All Blacks). Although there was one black player on the South African team, he was widely regarded as a mere token, and the team was perceived to be constituted on racially invidious grounds and representative of an apartheid country that deserved censure. The New Zealand government nevertheless justified its policy to allow the matches by citing the overriding importance of one consideration, namely, the policy of allowing all sports events as part of *the right of free association*.<sup>14</sup>

Clearly, the purpose of the international isolation of South Africa at that time was to help black people gain equal rights with white people in South Africa and to abolish apartheid at an earlier date. The resolutions adopted by the United Nations to sanction South Africa showed that black people's equal rights in South Africa were overwhelmingly important to the international community. However, the New Zealand government insisted that even for that purpose, the "right of free association" of the athletes from the two countries should not be sacrificed. Such a CHR was hardly recognized by the international community, especially by other (black) African nations. Even had they recognized it, they would arguably still have enforced the United Nations' sanctions and insisted that the equal rights of black people in South Africa overrode the "right of free association" of the athletes.

Another reason for difficulty in identifying cases of CHR may be that conflicting human rights are implied within more general, non-human-rights normative values. For example, during the two Gulf Wars, the United States has restrained the freedom of the press, citing the consideration of national security. The American public in general has understood that this is the consequence of the fact that the national security interest overrides the freedom of the press, not the consequence of a CHR. But, in fact, the *national security* consideration should contain notions of every American's (including every American soldier's) right to life or safety as well as be based on such individual rights. Another example is that, due to the burden of its population, China has long enforced a strict family planning program and restrained spouses' reproduction rights. According to Article 1 of the Population and Family Planning Law of China,<sup>15</sup> its aim is to maintain harmony between population and socio-economic development

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14. The authors are indebted in this case to Rex Martin. See MARTIN, *supra* note 9, at 145; see also WIKIPEDIA, ALL BLACKS, [http://www.wikipedia.org/wiki/All\\_Blacks](http://www.wikipedia.org/wiki/All_Blacks) (last visited Nov. 6, 2006).

15. An unofficial English translation of the law is available at United Nations Economic and Social Commission for Asia and the Pacific, [http://www.unescap.org/esid/psis/population/database/poplaws/law\\_china/ch\\_record052.htm](http://www.unescap.org/esid/psis/population/database/poplaws/law_china/ch_record052.htm) (last visited Nov. 6, 2006).

as well as to realize sustainable development. Thus, on the surface, the conflict is between human rights (spouses' reproduction rights) and non-human rights normative values (the sustainable development of the state and society). But the sustainable development of the state and society should include the development of the social and economic rights of all of us.<sup>16</sup>

In reality, conflicts between human rights and non-human rights normative values are commonplace. In addition to the conflict between freedom of the press and national security interests in wartime, as well as the conflict between reproduction rights and the sustainable development of the state and society under China's family planning program, other general terms of the normative considerations—such as public safety, public order, public health (e.g., the SARS epidemic), and public morality—may clash frequently with human rights. These conflicts have long been recognized in international human rights instruments. For example, Article 8(a) of the International Covenant on Economic, Social and Cultural Rights states:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in *the interests of national security or public order* or for the protection of the rights and freedoms of others . . . .<sup>17</sup>

It should be pointed out that, except for the non-right normative values recognized by international human rights instruments, which may outweigh human rights, it is a point of controversy whether other non-right values may constrain human rights. Thus, we cannot preclude the possibility that they may outweigh human rights. For instance, utilitarians always think that considerations of utility—such as public welfare, public safety, public interest, and economic efficiency—can outweigh human rights. Rawls, however, believes that “basic rights can be overridden by non-rights (e.g., the utilitarian considerations of general welfare, public safety, etc.) only when such an overriding is required in order to preserve a

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16. Eugene Brody argues that the idea that reproduction may be a right involves “questions of distributive justice or equal access to life’s goods. Thus, the presumed right of adults to have as many children as they wish may violate the rights of others—of the ensuing progeny for maximum life chances, or of other adults to share equally in scarce resources.” See EUGENE B. BRODY, *BIOMEDICAL TECHNOLOGY AND HUMAN RIGHTS* 36 (1993).

17. International Covenant on Economic, Social and Cultural Rights, art. 8(a), Dec. 16, 1966, S. EXEC. DOC. D, 95-2 (1978), 993 U.N.T.S. 4 (emphasis added); see also International Covenant on Civil and Political Rights, arts. 19-22, Dec. 19, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 172.

system of rights in existence.”<sup>18</sup> However, according to Rawls’ own judgment, it is almost impossible for other normative values to constrain human rights.<sup>19</sup> Indeed, to Ronald Dworkin, the human rights system is a “trump” over all other value systems.<sup>20</sup> If human rights may be overridden by other value systems, is it meaningful to set up a human rights system and to divide normative values into categories of human rights and of non-human rights?

As opposed to Rawls, who recognizes that it is possible that non-rights may outweigh basic rights but insists that it only happens when it “is required in order to preserve a system of rights in existence,” Alan Gewirth completely excludes the possibility of non-rights constraining human rights except those general non-right values that may contain human rights elements. He claims:

when a human right is overridden, it must be by another human right, especially when the latter’s Object is more necessary for action than the former’s. Even when a right is overridden by considerations of the *general welfare*, the latter criterion, to be genuinely overriding, must be composed of the rights of individuals. For example, the national defense or even the rules of the road involve the rights of individuals to security from attack and safety.<sup>21</sup>

This article supports Gewirth’s view: that is, the reason why utilitarian values such as national security, public safety, public order, public health, and public morality may outweigh human rights is that they contain human rights elements.<sup>22</sup> Thus, as a rule, whenever human rights clash with non-rights value considerations, we should analyze whether they contain human rights elements. If they do, they may override human rights that conflict with them. If they do not, they cannot.

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18. MARTIN, *supra* note 9, at 153.

19. *Id.* at 134.

20. See Ronald Dworkin, *Rights As Trumps*, in THEORIES OF RIGHTS 153-67 (Jeremy Waldron ed., 1984) [hereinafter Dworkin I]; RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978) [hereinafter DWORKIN II].

21. See ALAN GEWIRTH, HUMAN RIGHTS: ESSAYS ON JUSTIFICATION AND APPLICATIONS 6 (1982) (emphasis added).

22. For Dworkin, there is no general right to liberty but, instead, the right to liberties. It seems to him “absurd to suppose that men and women have any general right to liberty at all.” See DWORKIN II, *supra* note 20, at 267. Similarly, the authors would also argue that the notion of “general interest or welfare” is also absurd and that “general interest or welfare” should be possible to divide into those interests that have been characterized as rights and those interests that have been left as non-rights.



### B. *The Concept of Human Rights and CHR*

The issue of the concept of human rights, or what rights humankind possesses, has always been controversial. Some scholars even believe that discussion of the concept of human rights will inevitably produce “theoretical disagreements . . . [and] . . . can never be resolved into universally agreed responses.”<sup>23</sup> Thus, the first influence CHR has on the human rights concept is that a CHR sometimes is exactly what blocks a consensus on whether a right is a human right. For example, the controversy over whether a pregnant woman has a “human right to abortion,” or whether a very old or chronically ill person has a “human right to die,” is typical.

Obviously, expanding human rights lists and subjects leads to an increase in CHRs, as “[o]ccasions for conflict among rights multiply as catalogs of rights grow longer.”<sup>24</sup> Many are “worried about the proliferation of rights claims” and would rather limit any expansion of the human rights list and, in turn, rights conflicts.<sup>25</sup> For example, if one does not recognize social-economic rights as human rights, as Maurice Cranston does,<sup>26</sup> some instances of CHR would simply not exist. To enforce family planning programs would thus surely violate human rights. On the other hand, different outlooks as to who is entitled to be a rights-holder may also affect the issue of CHR. For instance, if only individuals can be rights-holders, instances of CHR involving collective rights will be excluded.

The authors disagree with such a narrow-minded approach and believe it is more meaningful to construct a broad concept of human rights based on the totality of international human rights efforts in the United Nations, including all United Nations human rights treaties and documents. The human rights concept is not static, but an evolving process,<sup>27</sup> through which different needs, goods, interests, and values will be gradually accepted and realized as human rights.<sup>28</sup> Such a concept is broad enough to

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23. MICHAEL FREEDEN, RIGHTS 5-6 (1991).

24. MARRY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 16 (1991).

25. Waldron, *supra* note 11, at 507.

26. Maurice Cranston, *Human Rights, Real and Supposed*, in THE PHILOSOPHY OF HUMAN RIGHTS 121-28 (Morton E. Winston, ed., 1989).

27. Thus, Donnelly is correct to say that “human rights are quite obviously historically specific, so much so that in recent years it has become popular to speak of successive ‘generations’ of human rights”; and, “[t]he evolution of particular conceptions or lists of human rights is seen in the constructivist theory as the result of the reciprocal interaction of moral conceptions and material conditions of life, mediated through social institutions such as rights.” JACK DONNELLY, THE CONCEPT OF HUMAN RIGHTS 35 (1985).

28. Indeed, to many, “leave with pay” is still a luxury in today’s world, not a basic human right. However, as society and economy develop, who can be certain that leave with pay will not become a

include not only traditional civil and political rights, but also economic, social, and cultural rights, rights of special groups (such as women, children, elders, the disabled, the mentally-ill, minorities, and indigenous people), as well as the so-called "third generation rights," such as the right to development and the right to the environment. In addition, human rights can be either individual or collective.<sup>29</sup>

Undoubtedly, a paradox of this broad approach toward the concept of human rights is that there may be more frequent occurrences of CHR and an increasing uncertainty as to what values, interests, and needs are human rights.<sup>30</sup> However, a broad human rights concept reflects both the whole picture of United Nations' human rights activities and the future direction of the international human rights movement. The paradox represents a reality that is neither avoidable nor can be eliminated by artificially adopting a narrow concept of human rights.

Thus, another influence of CHR on the human rights concept is that, although some human rights theories claim that they can prevent all or most cases of CHR from occurring, none may in fact eliminate the existence of CHRs. According to Robert Nozick, rights are *side-constraints*, namely, limits on a rights-holder's actions. Thus, if rights-holders act within the limits, there will be no conflicts of rights.<sup>31</sup> It seems what Nozick defines is an ideal state of human rights development. It does not appear to have much practical meaning, as the process of human rights development seems constant and endless.

It should be noted that CHR is essentially inherent to any comprehensive human rights system for several reasons. First, the establishment of a human rights system is a historical process of gradual development and perfection. Whenever new human rights emerge or the scope of protection of existing human rights expands, they may clash with established human rights. Second, even if new human rights no longer emerge, or the scope of protection of existing human rights no longer expands, it is impossible to eliminate all conflicts between existing human rights. Not only may similar CHRs repeat themselves, they may also lead to different solutions and results, as they may occur at different times and places and as the subjects of human rights change. For example, we cannot expect the result of the conflict between freedom of the press and the right to a fair trial or

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basic human right? International Covenant on Civil and Political Rights, art. 7, Dec. 19, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 172.

29. See, e.g., Yoram Dinstein, *Collective Human Rights of Peoples and Minorities*, 25 INT'L COMP. L.Q. 102 (1976). For a more detailed discussion, see HUMAN RIGHTS IN A PLURALIST WORLD: INDIVIDUALS AND COLLECTIVES § 2 (Jan Berting et al. eds., 1990).

30. See *The Problems of Human Rights*, in U.S. DEP'T OF STATE, 98TH CONG., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1982, at 5 (1983).

31. See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 28-33, 238 (1974).

privacy to always be the same.<sup>32</sup> Moreover, conflict may also occur between the same right claimed by different rights-holders.<sup>33</sup> Thus, it is unlikely that conflicts between established human rights will ever be eliminated.<sup>34</sup>

## II. CHR RESOLUTION METHODS AND UNCERTAINTY OF RESULTS

There have been many methods, principled or *ad hoc*, legal, or non-legal, realistic or imaginative, in practice or in theory, for resolving CHRs. No matter what methods we use to resolve CHRs, there are usually two types of results: either one of the conflicting rights overrides the other, or a compromise is reached between the conflicting rights. A classic example of the former is where the right to liberty conflicts with, and is temporarily

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32. A relatively recent example is that Colorado's highest court ruled, albeit deeply divided by a vote of four to three, that the judge in the rape trial of the basketball star Kobe Bryant was justified in barring the news media from publishing court documents that the trial court itself had accidentally released to the public. The documents detailed the sex life of Mr. Bryant's accuser. The majority of the court cited the privacy rights of the accuser and Bryant's right to a fair trial as the reasons for the ruling. However, one legal scholar pointed out that the United States Supreme Court has consistently concluded that once information gets out, whether by chance or happenstance, the news media cannot be restrained from publishing it. See Kirk Jognson, *Ban on Printing Information on Kobe Bryant Accuser Is Upheld*, N.Y. TIMES, July 20, 2004, at A12. After the ruling of the Colorado Supreme Court, the news organizations turned to the United States Supreme Court, filing an emergency application with Justice Stephen Breyer. Rather than rule directly on the validity of the Colorado restraint, Justice Breyer asked the trial judge to clarify whether he planned to release the transcripts immediately and to justify any redactions or edits if he released only part of them. The trial judge eventually released the transcripts with only a few lines edited out. The judge stated that after "careful consideration of the competing interests" and a review of the orders of the courts, he was "compelled to release these transcripts notwithstanding the concern that the release will compromise the rights of some of the participants." See Associated Press, *Kobe Transcripts Released*, Aug. 2, 2004, available at <http://www.allstarz.hollywood.com/kobe/trial.htm>.

33. Feinberg calls it conflict between "rights of its own kind." See JOEL FEINBERG, *SOCIAL PHILOSOPHY* 95-96 (1973). Waldron calls it an "intraright," as distinct from an "interright," conflict. See Waldron, *supra* note 11, at 513-14. Martin calls it an "internal" conflict. See REX MARTIN, *A SYSTEM OF RIGHTS* 118-23 (1993).

34. For example, in the aftermath of the September 11, 2001 attacks, the Pentagon proposed in 2003 the largest surveillance program in United States' history—the so-called Total Information Awareness program, later changed due to widespread criticism into the Terrorism Information Awareness program. The Pentagon was to establish a computer surveillance system that could "put a spyglass on Americans' every move, from literally the way Americans move to their virtual moves, scanning shopping, e-mail, bank deposits, vacations, medical prescriptions, academic grades and trips to the vet." The program was also to have a radar-based device that could identify people by the way they walk. As the program appeared to threaten Americans' privacy, Congress cut off the budget for it in adopting the Pentagon's spending plan for 2004. Nevertheless, Congress did allow the National Foreign Intelligence Program to use "processing, analysis and collaboration tools" developed under the Terrorism Information Awareness program for foreign intelligence purposes. Thus, in this conflict between national security and people's privacy, Americans were winners and foreign citizens losers. See Maureen Dowd, *Walk This Way*, N.Y. TIMES, May 21, 2003, at A31; Carl Hulse, *Congress Shuts Pentagon Unit Over Privacy*, N.Y. TIMES, Sep. 26, 2003, at A20.

overridden by, the right to life when authorities decide “to quarantine whole neighborhoods to prevent the spread of a plague.”<sup>35</sup> A typical example of the latter is when—in order to solve a conflict over freedom of speech—each speaker’s time in a public debate is limited as a compromise. Similarly, to solve the conflict between freedom of movement and freedom of demonstration, although the authorities may not deprive people of the right to demonstrate in the city, they may limit the time, place, and manner of demonstration.<sup>36</sup>

And no matter what result a CHR may lead to, a difficult issue is that the same CHR may produce a variety of results at different times and places with different rights-holders. For example, the result of the same conflict between a fetus’ right to life and a woman’s right to abortion<sup>37</sup> may be very different in different parts of the world. Some countries, such as largely Roman Catholic Ireland<sup>38</sup> and Spain,<sup>39</sup> generally prohibit abortion; other countries permit abortion with major limitations (in the United States, for example, abortion is generally allowed only within the first trimester of pregnancy); yet others generally allow abortions with minor limitations (in China, for example, only sex-selection abortion is illegal).<sup>40</sup>

This leads to the following observations: so far, on the one hand, there is no single method that has been generally accepted among philosophers and legal scholars and may be applied to all types of CHRs; on the other hand, no effective method may ensure that similar CHRs may achieve uniform results.

#### A. *A Variety of CHR Resolution Methods*

There are plenty of methods to resolve CHRs. From the point of view of judicial practice, Aharon Barak, Israeli Supreme Court President, has divided them into two categories: one is principled balancing, the other is

35. FEINBERG, *supra* note 33, at 72.

36. This case is quoted by Aharon Barak. See Aharon Barak, *A Judge on Judging: the Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 96-97 (2002).

37. In general, abortion supporters are called pro-choice while anti-abortion advocates are called pro-life.

38. Under Irish law, it is illegal for a woman to have an abortion unless there is a “real and substantial” risk to her life. See SARAH CLEARLY, IRELAND: ANTI-ABORTION REFERENDUM DEFEATED, <http://www.greenleft.org.au/2002/485/28581> (last visited Nov. 5, 2006).

39. Spanish abortion law is similar to that of Ireland. See Jason Horowitz, *Pope Warns Spain’s Leader on Gay Rites and Abortion*, INT’L HERALD TRIB., June 22, 2004.

40. See *China Bans Selective Abortion to Fix Imbalance*, CHINA DAILY, July 16, 2004, available at [http://www.chinadaily.com.cn/english/doc/2004-07/16/content\\_349051.htm](http://www.chinadaily.com.cn/english/doc/2004-07/16/content_349051.htm). In the West, with recent advances in reproductive technology, there have also been calls to limit parents’ selection of their children’s sex and other characteristics. See, e.g., Kelly M. Plummer, Comment, *Ending Parents’ Unlimited Power to Choose: Legislation is Necessary to Prohibit Parents’ Selection of Their Children’s Sex and Characteristics*, 47 ST. LOUIS U. L.J. 517 (2003).

*ad hoc* balancing. The former may be applied in future cases while the latter may not.<sup>41</sup> This article is more concerned with principled methods.

In practice, some CHR resolution methods have long been customs. For example, CHRs arising from material shortages may be resolved by technical methods.<sup>42</sup> If there are many patients waiting at the same time for donated organs and the supply is limited, certain technical factors may be used to determine their order of priority. For example, according to the rules of the United Network for Organ Sharing (UNOS) governing organ matching and allocation, these factors include: blood type and size of the organ(s) needed, time spent awaiting a transplant, the relative distance between donor and recipient, the medical urgency of the recipient, whether the recipient is a child or an adult, etc.<sup>43</sup> However, such technical methods do not work for most other CHRs.

International human rights treaties have provided various rules for handling particular CHRs. These rules are two types: those of human rights restrictions and those of derogation. The former is common to most human rights treaties. For example, Article 14(1) of the International Covenant on Civil and Political Rights stipulates that:

[t]he press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice . . . .<sup>44</sup>

The derogation clauses are linked to one of the often-mentioned principled methods, that is, a ranking system among human rights. According to this system, when a right of higher rank clashes with a right of lower rank, the former prevails. Indeed, once there were views taken by both the West and the South arguing that either civil and political rights take primacy over economic, social, and cultural rights, or vice versa. Another way of ranking rights is to divide human rights into absolute and non-absolute rights. When an absolute right clashes with a non-absolute right,

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41. See Barak, *supra* note 36, at 95.

42. Martin mentions the use of technical procedural points by courts to resolve CHRs. See MARTIN, *supra* note 33, at 122.

43. For the rules governing organ matching and allocation, visit the United Network for Organ Sharing website at <http://www.unos.org/>.

44. International Covenant on Civil and Political Rights, art. 14, Dec. 19, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 176. For provisions regarding human rights in international human rights conventions and related cases, see RHONA K. M. SMITH, TEXTBOOK ON INTERNATIONAL HUMAN RIGHTS 38-52 (2003).

the former prevails.<sup>45</sup> For example, Article 4 of the International Covenant on Civil and Political Rights stipulates:

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.<sup>46</sup>

According to Article 4(2), right to life, freedom from torture or cruel, inhuman or degrading treatment or punishment, freedom from slavery and servitude, freedom from guilt unless determined by law, right to recognition as a person before the law, and right to freedom of thought, conscience, and religion are underogatable human rights, and thus become “absolute” in international human rights law.<sup>47</sup> Nevertheless, except provisions in international human rights instruments, the efforts to establish a ranking system to resolve CHRs have not been successful.<sup>48</sup> Some of the efforts, such as the claims for the primacy of civil and political rights over economic, social, and cultural rights, sound more like downgrading or exclusion of the latter. As Professor Steiner has put it, “[i]n given contexts, a priority can of course amount to exclusivity.”<sup>49</sup>

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45. For example, Gewirth argues that “certain rights can be shown to be absolute.” GEWIRTH, *supra* note 21, at 219; *see generally id.* at 218-33.

46. International Covenant on Civil and Political Rights, arts. 19-22, Dec. 19, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 172.

47. *Id.* Article 15 of the European Convention on Human Rights and Fundamental Freedoms provides similar underogatable human rights. They include right to life, freedom from torture or cruel, inhuman or degrading treatment or punishment, freedom from slavery and servitude, and freedom from guilt unless determined by law. European Convention on Human Rights and Fundamental Freedoms, art. 15, Nov. 4, 1950, 213 U.N.T.S. 17.

48. Theodor Meron has observed that there is no accepted system by which higher rights can be identified and their content determined. *See* Theodor Meron, *On a Hierarchy of International Human Rights*, 80 AM. J. INT’L L. 1, 21-22 (1986).

49. *See* Henry J. Steiner, *The Youth of Rights*, 104 HARV. L. REV. 917, 928 (1991). Mary Robinson, former United Nations High Commissioner for Human Rights, has pointed out that:

[D]ivisions and ranking of rights is artificial. When President Roosevelt spoke of the famous “four freedoms,” freedom from want stood equally alongside freedom from fear. Human rights will not be truly achieved until all accept economic, social and cultural rights as rights that deserve and require equal attention to civil and political rights and freedoms. This imperative was endorsed by over 170 states at the Vienna World Conference on Human Rights, 1993: All human rights are universal, indivisible and interdependent and inter-

Contrary to the above view that rights are unequal, J. L. Mackie argues that all human rights are absolutely equal and, when they are in conflict, mutual compromise with equal sacrifice should be made. The following comment is from his debate with R. M. Hare, who holds a utilitarian view on human rights:

Conflicts between these prima facie rights might be handled by a utilitarianism of rights, so that what would count as the ideally just arrangement would be that in which total right-fulfillment was maximized, or total right-infringement minimized. Alternatively, they might be handled by assuming that, ideally, one person's rights should not be infringed more than another's. Again the two methods are not even extensionally equivalent, and again I suggest that the second is the more attractive. Such *equality of sacrifice* in compromises between our Lochean rights is, of course, not equivalent to the equal need-satisfaction in our second reading of the Marxist slogan, precisely because our rights include each individual's private property in his own body, energy, talents, and labor, and because each has a prima facie right to be free and to pursue happiness in whatever way he chooses, doubtless with very varying degrees of success.<sup>50</sup>

Mackie's views that "one person's rights should not be infringed more than another's" as well as "equality of sacrifice in compromises between our Lochean rights" are obviously not proven by the reality of CHRs, as it is widely accepted that one conflicting right may override another. Michael Freedden has strongly opposed Mackie's "compromise formula that would, when conflicts among rights arise, infringe all people's rights equally and therefore dehumanize them all. Not all equal treatment is *ipso facto* fair treatment: a tyrant may boil all his subjects in oil."<sup>51</sup> Clearly, to "treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis" does not mean that all human rights have absolute equal weight in all circumstances. As mentioned above, international human rights instruments emphasize that all rights are equally im-

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related. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.

Mary Robinson, United Nations High Commissioner for Human Rights, Second Annual BP Lecture on Human Rights and Global Civilisation (Nov. 29, 2001), <http://www.unhchr.ch/hurricane/hurricane.nsf/0/AFD931913249074EC1256B17002C27BF?opendocument>.

50. J. L. Mackie, *Rights, Utility, and Universalization*, in *UTILITY AND RIGHTS* 88-89 (R. G. Frey ed., 1984) (emphasis added); see also R. M. Hare, *Rights, Utility, and Universalization: Reply to J. L. Mackie*, in *id.* at 106-20.

51. FREEDDEN, *supra* note 23, at 99.

portant, but also prescribe some underogatable rights or provide that a right can be limited for the protection of another right.<sup>52</sup>

Several philosophers such as Dworkin and Martin have advanced the use of *scope drawing* and the idea of *weight* as the way to resolve CHRs.<sup>53</sup> According to Martin:

[t]he scope of a right specifies what the right is to (be it liberty of conduct or avoidance of injury at the hands of others or the provision of a service of some sort) and includes any limitations that are built into or decided upon for this right. The weight of a right is a determination, sometimes explicit and sometimes not, sometimes quite exact and sometimes rather imprecise, of how it stands with respect to other normative considerations and whether it would give way to them, or they to it, in cases of conflict.<sup>54</sup>

According to its advocates:

[o]nce these rights have been satisfactorily *balanced definitionally*, they cannot conflict with one another. Or in the rare but foreseeable case in which one right and another might conflict, the drafting bodies could add a determinate *weight* to policies under each, such that the possibility of real conflict would be wholly forestalled. Within its assigned *scope* and given its determinate *weight*, a well-defined right simply governs all applicable situations that arise in the domain of rights.<sup>55</sup>

To apply the concept of weight to resolve CHRs is realistic and practical, but to apply the concept of weight to prevent CHRs from occurring or to resolve all CHRs is idealistic at best. As will be shown in the next section, in fact, it is difficult to determine the weight of each human right in its relation to other human rights, not to mention that the weight of each human right may also be influenced in various scenarios by a variety of non-right values and/or other factors. Thus, it is very unlikely that the exact weight for all human rights in various circumstances can be deter-

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52. According to Aharon Barak,

[a] social principle (such as freedom of expression) does not have “absolute” weight. The weight of a social principle is always relative. The status of a fundamental principle is always determined relative to other principles, with which it may conflict. The weight of freedom of speech relative to freedom of movement is different from its weight relative to judicial integrity, both of these are different from the weight of freedom of speech relative to reputation or privacy, and all of these are different from the weight of freedom of speech relative to the public interest in security and safety.

Barak, *supra* note 36, at 95.

53. See, e.g., MARTIN, *supra* note 9.

54. *Id.* at 130.

55. *Id.* at 148 (emphasis added).



mined.<sup>56</sup> Feinberg has pointed out that “[a]ccommodation must often be worked out after the fact of conflict rather than prevented in advance by rules and decrees.”<sup>57</sup> Finally, even if the weight of each human right has been predetermined, it is not possible to guarantee that they will balance and lead to resolution of CHRs that are cause for serious social conflict. Martin himself has felt cautious enough to say that “we cannot assume that principles which are appropriate to the formulation and competitive weighting of rights, etc., even when the principles are expertly applied, can be used to resolve all disputes concerning conflict of rights.”<sup>58</sup> The euthanasia dispute is an obvious example.

### B. *Determining the Weight of Each Human Right*

Difficulties with notions of weight notwithstanding, it is still valuable to introduce the concept in terms of resolving CHRs. In fact, the concept of weight is perhaps the best way to deal with CHRs. How, then, should one determine the weight or importance of each human right? First, determination of the weight of a right requires an analysis of the right itself. For example, the weight of a right is often in direct proportion to its stringency. As mentioned above, in a time of famine, one person’s property right may conflict with another person’s right to life. As the right to life becomes more stringent, it will outweigh the property right “by the commandeering of food hoards.”<sup>59</sup> This is similar to an emergency situation when a police car, ambulance, or fire engine has the clear right of way on a road.

One important way to analyze a human right for determining its weight is through Professor Waldron’s reasoning that rights “should be thought of, not as correlative to single duties, but as generating a multiplicity of duties.”<sup>60</sup> An expanded interpretation of this view goes further to assert not only that each right may involve multiple duties but also that each duty may have multiple aspects. Thus, when a CHR occurs, it may affect neither all duties of a right nor all aspects of a duty. For example, during the current Iraq War, freedom of the press has indisputably been overridden by national security considerations. The United States press, however, has only been screened for any news and reports related to the war. In other

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56. Martin recognizes that it is very hard to determine in advance, as well as in the abstract, when to limit the exercise of the national security interest where it conflicts with free speech. *Id.* at 134.

57. FEINBERG, *supra* note 33, at 73.

58. See MARTIN, *supra* note 33, at 122.

59. BENN & PETERS, *supra* note 12, at 96.

60. Waldron, *supra* note 11, at 503.

words, only one aspect of the duty to protect freedom of the press has been affected.

Because there are “successive waves of duty,” as well as multiple aspects of a duty, and the importance of each duty or each aspect of a duty differs, the determination of the order of priority among them helps to determine the weight of a right. As to how to determine such an order of priority, Waldron has pointed out:

[t]ake two duties generated by the right to free speech: the duty not to suppress a person’s speech and the duty to punish suppressors. On Mill’s view, the first has absolute priority over any duty to avoid moral distress because the value of a persons’ speaking freely is precisely the disruptive effect it has on moral complacency. The point of punishing suppressers of free speech, however, is not directly to shake up moral complacency (in the way free speech itself does); though its aim is to vindicate and protect an interest which does have this point, it does not in itself have this internal relation to moral complacency. So balancing the second duty against a concern about moral distress may not be as misconceived as balancing the first duty against that concern would be.<sup>61</sup>

Waldron’s idea of “internal relation” is an important development in weighing conflicting human rights. It also proves how unrealistic it is to establish a ranking system among human rights. As not all the duties or aspects of a duty will have the same moral priority, the “successive waves of duty” make it difficult to fix any “lexical priority” among human rights. On the other hand, the “successive waves of duty” also demonstrate the complexity of resolving CHRs.

There is no doubt that the primary method for CHR resolution is to determine the weight of human rights by analyzing the rights themselves. This method, however, has its limitations. When the conflict is between two instances of the same right, or when the conflicting rights are both stringent, or of the same priority, it may be necessary to consider factors external to conflicting human rights for the weight determination. These factors refer first to human rights other than the conflicting rights. For example, H. J. McCloskey has proposed a case where there is only one lifeguard, but twenty persons “have been swept out to sea by a rip, where all are at risk of drowning . . . [w]hom ought he to save?”<sup>62</sup> McCloskey argues that “[i]n fact, most such conflicts are morally to be resolved purely

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61. *Id.* at 517.

62. H. J. McCloskey, *Respect for Human Moral Rights versus Maximizing Good*, in *UTILITY AND RIGHTS* 133 (R. G. Frey ed., 1984).

in terms of a rights-calculus. The rights of children, for example, may well determine that a parent, rather than a childless person, be saved.<sup>63</sup> So, when conflicting rights have the same weight or importance, we may calculate the importance of human rights related to the conflicting rights to resolve the conflict.

Even if, however, a lifeguard in such a situation is able to do a relevant rights-calculus, it is not an easy task to make such a calculation for twenty people. What happens if those who have no children must take care of their parents? Or, what if the majority of the twenty people are parents? In other words, if a relevant rights-calculus cannot determine the weight of conflicting rights, can we consider non-rights values and other factors—including utilitarian principles and practical considerations (such as who it is relatively easier to save: lighter body weight, shorter distance, etc.)—to determine the weight or importance of conflicting rights? This is a controversial issue.

For example, McCloskey is firmly against using utilitarian principles to resolve CHRs. He argues that to erect utilitarian considerations within the principle of general application for resolving conflicts involving rights to life would be to deny the basic importance of human rights. It would be tantamount to claiming that persons have not equal, but unequal, human rights. This is because it would amount to allowing utilitarian considerations to override moral rights in conflict of rights situations in a way that is seen to be morally intolerable when there is no conflict of rights, but simply a conflict between a right and a utility.<sup>64</sup>

Waldron has acknowledged that “[t]o many theorists of rights, the utilitarian approach to conflict resolution is unpalatable. Utilitarian reasoning involves *trade-offs*,”<sup>65</sup> while “[t]he idea of rights has been seized on as a way of resisting these trade-offs.”<sup>66</sup> However, “[t]he trade-offs contemplated by the rights theorist are unhappy enough, but probably inevitable: sometimes one life *must* be sacrificed so that a greater number of lives may be saved.”<sup>67</sup> Clearly, to deny that any utilitarian principle is primary over human rights is not to deny completely its relevance. When rights of equal weight conflict, to apply utilitarian principles for helping resolution is not to recognize such principles as values that take primacy over human rights or as means of general application for resolving CHRs. Instead, the

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63. *Id.* at 134. Even in a rights-calculus, however, the decision can be complicated and difficult to make. For example, if most people competing for scarce seats in a lifeboat are parents, or if the childless persons in the boat may have parents to take care of.

64. *Id.*

65. Waldron, *supra* note 11, at 507 (emphasis in original).

66. *Id.* at 508.

67. *Id.* at 509 (emphasis in original). For a general discussion of using the principle of utility to resolve the conflict of rights, see *id.* at 507-09.

utilitarian principles are subsidiary considerations for helping resolve the CHRs.

In addition to non-right values, it is also possible to apply various practical considerations for helping resolve conflict of human rights of equal weight. For instance, in McCloskey's example, it is reasonable to take some practical considerations into account and to save first those who are closer to a lifeguard and whose body weight is lighter, etc. Thus, the process of resolving CHRs is not only to analyze the weight of each conflicting human right, but also to consider other human rights related to conflicting rights, and non-right values, or even practical considerations, when rights of equal weight conflict. As James Nickel says, "appeals to human rights should be seen as part of moral and political argument, not as the whole of it. The presence of claims about human rights does not mean that less specialized forms of moral argument cannot be invoked."<sup>68</sup>

### C. *The Uncertainty of CHR Results*

Although there are many methods for resolving CHRs, nothing guarantees that identical results will be achieved in dealing with them. In fact, even applying the same method to the same CHR, the diverse nature of human societies may still lead to different CHR results in different parts of the world. There are multiple reasons for this. First, as the development of human rights has gained momentum in recent decades, both the number and content of human rights have been largely expanded. This has made it possible for more diversity in CHR results.

Second, while the number of independent states has drastically increased in recent history, a world government is not within sight. The international mechanism for human rights protection is relatively limited. Most CHRs have to be resolved domestically by national authorities. Even though the West has been actively promoting its model of political and economic development in other parts of the world, and despite the popularity of Francis Fukuyama's "end of history" claim since the conclusion of the Cold War,<sup>69</sup> there are still real differences in political, economic, social, and cultural systems among states. Samuel Huntington has warned that the end of the Cold War is not the "end of history" but the beginning of the

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68. JAMES W. NICKEL, MAKING SENSE OF HUMAN RIGHTS: PHILOSOPHICAL REFLECTIONS ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 50 (1987) (emphasis omitted). Originally, Nickel's argument was to suggest that other moral or normative considerations can be invoked to override the human rights. Our purpose in quoting it here is to argue that when, for example, human rights of equal weight conflict, other moral and practical considerations can be considered to add weight to one of the conflicting human rights.

69. See generally FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992); Francis Fukuyama, *The End of History?*, 16 NAT'L INT. 3 (1989).

clash of civilizations.<sup>70</sup> From the CHR point of view, although a clash of civilizations may not necessarily lead to any particular CHR, it constitutes an important reason for the uncertainty of CHR results. Indeed, between countries with disparate social and cultural systems, the divergence of CHR results may be very great.<sup>71</sup>

On the other hand, even among countries with similar political, economic, social, and cultural systems, divergence of CHR results may occur. For instance, in their handling of national, racial, or religious hatred and free speech, the rules in the United States and many other countries, including most other Western countries, are poles apart. Many countries' domestic laws,<sup>72</sup> as well as international human rights treaties—such as the

70. See SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1996); Samuel P. Huntington, *The Clash of Civilizations*, 72 *FOREIGN AFF.* 22 (1993); Samuel P. Huntington, *The Coming Clash of Civilizations-or, the West Against the Rest*, N.Y. TIMES, June 6, 1993, at E19; Samuel P. Huntington, *No Exit: The Errors of Endism*, 17 *NAT'L INT.* 3, 10 (1989).

71. One Chinese story from recent times quite vividly reflects the effect of cultural differences on views of freedom. It goes as follows:

A Chinese girl is going to marry an Australian boy soon. They travel together to the Thousand-Islands Lake in Hangzhou. The girl buys a bronze lock and asks a craftsman to carve her name and her fiancé's name—Wen and Kobe—on it. Kobe watches her smiling.

After the names are carved, Wen locks it to a handrail. Kobe does not understand and asks her why she is not going to take the lock back home.

Wen answers: "This is called the lock of one heart. It means that we will never be separated again in the future, just as if we are locked up by this lock."

Kobe feels even more puzzled after her explanation. He is unhappy after they return home from the trip.

Finally, Kobe raises the question: "Why lock two people up?"

Wen replies: "Because of love!"

Kobe then asks: "Love can restrict freedom?"

Wen smiles: "You do not understand Chinese culture. This is a blessing."

Kobe says: "So restricting freedom is a blessing?"

One month later, just a week before the ceremony, Kobe decides to postpone the wedding.

Wen asks him why? Does he no longer love her?

Kobe says he still loves her, but he cannot accept their love affair the way it has developed: "It is threatening. I will be locked up for the rest of my life. How can two people be locked up forever?"

After listening to Kobe, Wen also feels threatened, thinking: "Thank goodness he has revealed this. He has never intended to love me for his whole life." And so, because of mutual mistrust, they ultimately call off their engagement and wish each other farewell . . .

1 READER MAGAZINE 29 (2004) (in Chinese) (translation on file with the *Pierce Law Review*).

72. In Germany, people can be jailed for using symbols of unconstitutional organizations. Section 86(a) of the 1998 German Criminal Code provides that whoever domestically distributes or publicly uses, in a meeting or in writings disseminated by him/her, symbols of unconstitutional organizations, shall be punished with imprisonment for not more than three years or a fine. Symbols may be, in particular, flags, insignia, uniforms, slogans, and forms of greeting. Strafgesetzbuch [StGB] [Penal Code] Nov. 13, 1998, Reichsbgesetzblatt [RGBI] 127, § 86(a) (use of symbols of unconstitutional organizations). According to a Xinhua news report, German police detained about 110 persons—seventy-four of them neo-Nazis—on August 21, 2004, when about 2,000 people, most of them Neo-Nazis, gathered for a march in memory of Adolf Hitler's deputy, Rudolf Hess, in the town of Wunsiedel. Marchers were arrested for displaying outlawed Nazi symbols and for carrying weapons. Xin Hua News Agency, [http://news.xinhuanet.com/world/2004-08/22/content\\_1854883.htm](http://news.xinhuanet.com/world/2004-08/22/content_1854883.htm) (last visited Nov. 5, 2006) (translation on file with the *Pierce Law Review*).

International Covenant on Civil and Political Rights<sup>73</sup> and International Convention on the Elimination of All Forms of Racial Discrimination<sup>74</sup>—prohibit advocacy of national, racial, or religious hatred.<sup>75</sup> In the United States, however, such provisions are deemed violations of the constitutional protection of free speech.<sup>76</sup> Similarly, in France, schools may prohibit all overtly religious garb, including Muslim head scarves, but a similar prohibition in Britain on wearing Muslim gowns was recently held by the British Court of Appeals to be a violation of a student's freedom to manifest her religion or belief in public.<sup>77</sup>

The uncertainty of CHR results reflects disputes among people on what should be the reasonable result of a CHR. In the West, some scholars distinguish between infringement of human rights and violation of human rights. For example, according to Gewirth's terminology:

[a] right is *infringed* when the correlative duty is not carried out, i.e., when the required action is not performed or the prohibited action is performed. A right is *violated* when it is infringed without sufficient justification, i.e., when the required action is unjustifiably not performed or the prohibited action is unjustifiably performed. And a right is *overridden* when it is justifiably infringed, so that there is sufficient justification for not carrying out the correlative duty, and the required action is justifiably not performed or the prohibited action is justifiably performed.<sup>78</sup>

The problem with these detailed lexical distinctions occurs when the same CHR produces different results, such as in the case of abortion, which is generally allowed in China but not in Ireland. Such distinctions then lose their value. Obviously, there may be different understandings as

73. "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law." International Covenant on Civil and Political Rights, art. 20(2), Dec. 19, 1966, S. EXEC. DOC. E, 95-2 (1978), 999 U.N.T.S. 172.

74. Article 4 states:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.

International Convention on the Elimination of All Forms of Racial Discrimination, art. 4, Dec. 21, 1965, S. EXEC. DOC. C, 95-2 (1978), 660 U.N.T.S. 195.

75. Kathleen E. Mahoney, *Hate Speech: Affirmation or Contradiction of Freedom of Expression*, 1996 U. ILL. L. REV. 789, 803-06 (1996).

76. Joel R. Reidenberg, *Yahoo and Democracy on the Internet*, 42 JURIMETRICS J. 261, 264-65 (2002).

77. See Sarah Lyall, *British Court Says Banning Muslim Gown Violates Student's Rights*, N.Y. TIMES, Mar. 3, 2005, at A13; Daniel Williams, *Quiet First Day for France's Ban on Head Scarves in School*, S.F. CHRON., Sept. 3, 2004, at A3.

78. GEWIRTH, *supra* note 21, at 219.

to when a right is justifiably infringed at different times and places. In different parts of the world, it is more relative than absolute as to when a right may justifiably override another. Such justification may even change as a state changes its policies—for instance, when it shifts from prohibiting abortion to allowing limited abortion. Unless states agree on an identical solution to a CHR, just what constitutes a rational result to that CHR is relative. Consider the tense relation between discrimination and affirmative action as an example; there is no identical answer throughout the world as to when the latter may constitute a type of the former.

Thus, the uncertainty of CHR results reflects a basic fact: the world is plural and diverse. We cannot prevent all CHRs from occurring (either in theory or in practice), nor can we achieve identical results for all CHRs by applying any principled method. Principled methods can only form the starting point for resolving CHRs. They are not a panacea for reaching identical results. They assist us in analyzing concrete CHRs emerging in different times and places. They also tell us which factors may be used in determining the weight of conflicting human rights. As there are a variety of factors that can be used for such purpose, however, and the role of each factor in different societies and cultures may be distinct, diversity in CHR results can thus be expected.

### III. THE SIGNIFICANCE OF CHR STUDY

CHR study is significant in three aspects: (1) human rights development; (2) human rights theory; and (3) human rights practice.

#### A. *CHR and Human Rights Development*

CHR is closely linked to the development of human rights. To some extent, CHR is a symbol of the development of human rights. When the result of a CHR differs significantly, it reveals that the development of conflicting rights in relevant aspects is premature and has not reached the stage where resolution of the CHR may achieve identical results everywhere. Thus, it is not possible to determine the scope of conflicting rights and weight definitely. When the results of a CHR are generally identical everywhere, the development of the conflicting rights in relevant aspects has reached maturity. For example, there is generally a clear line between freedom of speech and the right to reputation. On the other hand, it is still controversial whether advocates of fascism are within the protected scope of the freedom of speech or not.

The development of human rights is essentially the outcome of the development of human society. Today, some CHRs involve a number of

controversies relating to important political, social, and legal issues, including the issues of abortion and euthanasia.<sup>79</sup> Just when, exactly, such outstanding CHR issues will find generally accepted solutions that lead to identical results among states will depend on the development of humankind itself—including its cultures, expectations, living conditions, science and technology, reasoning, thought, etc.

Currently, these important CHR issues are still in the process of a complicated evolution. For example, in regard to the abortion issue, if the opposing sides cannot reach a generally accepted compromise, the policies of each state may still be changed along with the rise and fall of forces and influences of both sides. In the United States, for example, even though the United States Supreme Court established the current abortion rules in 1973 in *Roe v. Wade*,<sup>80</sup> if conservative republicans are able to hold onto their current executive and legislative power so as to continue to change the composition of the Supreme Court, the established case law may well be overturned.<sup>81</sup> It is thus arguable that the results of the CHR concerning abortion may change, become uncertain, or even move back and forth from one outcome to another. Although in the long run the trend of CHR solutions is gradually toward uniformity—that is, we may find generally accepted principled methods and reach identical results—currently, no matter what methods we apply, there is no way that we will be able to readily resolve such thorny CHRs as abortion and euthanasia, which have already engendered serious social disputes and interference.

It is thus natural that uncertainty as to CHR results will persist for a long time. Here, there are two meanings implied in the word “long.” First, as mentioned above, some difficult existing CHRs do not have the prospect of being quickly resolved identically. In this sense, the specific uncertainty about them will exist for more than a short period. Second, even if/when these current CHRs are resolved in the same way one day in the future, new CHRs will be created and, thus, new uncertainty will emerge. As a consequence, the uncertainty in this sense will also exist for more than a short while. Whenever there is human rights development, there will be

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79. In the United States, the legal and political battle on euthanasia has been long and fierce. Perhaps the most prominent United States case concerned the fate of Terri Schiavo. It involved battles in both federal and state courts and legislatures. Although the case eventually ended on March 31, 2005, when Schiavo died peacefully after her feeding tube was removed, the debate over euthanasia did not. For legal documents and related information concerning the Terri Schiavo case, see Findlaw, <http://news.findlaw.com/legalnews/lit/schiavo/index.html> (last visited Nov. 5, 2006).

80. 410 U.S. 113 (1973). On the issue of abortion, see ROSAMUND SCOTT, *RIGHTS, DUTIES AND THE BODY: LAW AND ETHICS OF THE MATERNAL-FETAL CONFLICT* (2002).

81. See Jim Abrams, *30 States Ready to Ban Abortion if Roe v. Wade Falls, Group Says*, PRESS OF ATLANTIC CITY, Oct. 6, 2004, at A7.



both development of CHRs and the persistence of the uncertainty as to some CHR results.

### B. *CHR and Human Rights Theory*

The theoretical significance of CHR lies first in that it supports a comprehensive and expansive outlook on human rights. Debates over newly emerging human rights, or over developments of new aspects of existing rights, often relate to CHRs. Only an expansive and comprehensive outlook on human rights that does not subjectively exclude any CHR may take these debates seriously from the perspective of human rights development and adjust to their challenges to the traditional views of human rights.

Another theoretical significance of CHR is that it has provided a new angle for those in academic circles to view the clash between universality and relativism of human rights. To perceive CHRs that are difficult to resolve as a major obstacle to the universality of human rights overlooks the fact that “relative” CHR results are a matter of objective reality or a “normal” status in human rights development. While some CHRs may end with similar solutions (such as the SARS epidemic), others may have different results for a long time (such as abortion and euthanasia). The former undoubtedly support the principle of universality, while the latter support relativism. Such characteristics of CHRs require a balance between universality and relativism in human rights: that is, we should not pursue universality solely to the exclusion of objective relativism.

What is the universality principle? According to Professor Louis Henkin, “[h]uman rights . . . belong to every human being in every human society. They do not differ with geography or history, culture or ideology, political or economic system, or stage of societal development.”<sup>82</sup> If we look carefully at the reality of CHRs, however, Henkin’s view is idealistic. Even official United States’ behavior does not support Henkin. For example, as mentioned earlier, although the United States Congress has cut off the budget for the so-called “Terrorism Information Awareness” program, it has nonetheless allowed the technology developed under the program to be used for foreign intelligence purposes. As a result, the right to privacy of foreigners and Americans is treated differently.

It should be noted that while human rights are both rules in the international human rights instruments as well as ideals in the writings of human rights theorists, they are also a complicated social reality. On the one hand, humankind has achieved consensus on many aspects of human rights and, thus, human rights appear undeniably universal. On the other hand,

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82. L. HENKIN, ET AL., HUMAN RIGHTS 3 (1999).

the uncertainty of CHR results tells us that there is lack of consensus on many other aspects of human rights. Differences, even fundamental differences, do exist. Therefore, human rights also appear inevitably relative.

Consequently, universality, as either a reality or an ideal, should not take a denial or elimination of relativism as its precondition. On the contrary, for the foreseeable future, as CHR results may be either identical or diverse, human rights may be either universal or relative as well. In any stage of human rights development, there will be one reality of universality as well as one of relativism. There will be co-existence of the two. Therefore, CHR includes, rather than precludes, both universality and relativism. The CHR reality requires us to stop any futile debate of an exclusive character as to the universality and relativism controversy.

### C. *CHR and Human Rights Practice*

Conforming to the above analysis of the universality-relativism controversy, the practical significance of CHR is that while pursuing the goal of universal human rights, the reality of relativism—that the results of the same CHR may differ in different nations and societies—should also be acknowledged even when one disagrees.<sup>83</sup> No serious human rights critics may ignore this. Without a good understanding of what causes a different solution for the same CHR in other states and societies, human rights criticism and censure may be unhelpful, and even counter-productive.

Of course, to acknowledge a different, albeit appropriate, resolution of the same CHR chosen by other states and societies does not mean that transnational criticism or expression of different views is precluded or will be silenced. For example, based on its consistent position, the official newspaper of the Vatican publicly sided with Terri Schiavo's parents and called on the United States to keep her alive.<sup>84</sup> This kind of criticism or expression of opinion based on a principled position is the prerequisite of mutual understanding. On the other hand, conditions in a country are not fixed forever. When conditions change, the erstwhile best way to resolve a CHR in that country may change as well. For example, in recent years, according to new situations with regard to China's population, China has made some adjustments to its family planning policy.<sup>85</sup> Even if it is a good

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83. Respect for the choice of a different solution of the same CHR by other states and societies applies to relations between all states. For example, American scholars once called upon Europeans to respect the United States' position on the death penalty. See Borut Grgic & Paola Marusich, *The Death Penalty: What Europe Doesn't Know*, INT'L HERALD TRIB., Nov. 7, 2003, at 10.

84. See Laurie Goodstein, *Schiavo Case Highlights an Alliance between Catholics and Evangelicals*, N.Y. TIMES, Mar. 24, 2005, at A20.

85. For example, to cope with the so-called crisis of a "city of white hair," the City of Shanghai on December 31, 2003 issued the Regulations of Shanghai Municipal on Population and Family Planning.

policy that is in question, problems may occur in its enforcement. Therefore, it is necessary to prompt constructive criticism and suggestions not only toward inappropriate policies but also toward problems that emerge in enforcing a reasonable policy.<sup>86</sup>

The practical significance of CHR is not limited to and between states and societies. For example, the abortion issue has long been a knot that seems impossible to be undone among American politicians, scholars, and citizens. The political and legal fights as well as academic debates on this issue seem endless.<sup>87</sup> The most extreme form of such battles is violence against abortion clinics and the murder of abortion doctors and clinic workers.<sup>88</sup> For the human rights movement, to witness such violence and killing in a controversy involving a CHR is most unfortunate.

#### IV. CONCLUDING REMARKS

Whether it is the bloody killing of abortion doctors and clinic workers; the sad yet true-to-life climactic scene in the movie *Titanic*; the excruciating challenges in attempting to carry out euthanasia; or the confusion brought about by numerous other CHRs; mankind has no alternative but to face such difficult situations head on in daily life. Past, present, and future CHRs will always play an integral role in human rights evolution. While they present ancient issues, their revelation has both current and futuristic aspects. It will continue to be a long-term task for human society to treat

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*See* Regulations of Shanghai Municipal on Population and Family Planning, Dec. 31, 2003, available at [http://www.popinfo.gov.cn/popinfo/pop\\_doczwd.nsf/v\\_by4id/3161352475803E4D48256FC4002E](http://www.popinfo.gov.cn/popinfo/pop_doczwd.nsf/v_by4id/3161352475803E4D48256FC4002E) EFFC. The new regulations, effective April 15, 2004, drop a mandatory four-year interval before having a second child, as required by the former law, and extend people eligible for a second child to include those with a registered permanent address in the city (not just in the countryside) as well as remarried couples. *Id.*; *see also* So, *You Want a Second Child?*, XINHUANET, Sep. 28, 2004, available at [http://news.xinhuanet.com/english/200409/28/content\\_2033874.htm](http://news.xinhuanet.com/english/200409/28/content_2033874.htm). For an account of the recent relaxation of China's family planning policy, *see* Jonathan Watts, *Shanghai Eases China's One-Child Rule*, GUARDIAN, Apr. 14, 2004, at 14.

86. *See, e.g.*, Gao Huiqing, *Revamping Population Policy*, CHINA BUS. WEEKLY, Aug. 3, 2004, available at [http://www2.chinadaily.com.cn/chinagate/doc/2004-08/03/content\\_357294.htm](http://www2.chinadaily.com.cn/chinagate/doc/2004-08/03/content_357294.htm); Joseph Kahn, *China's Time Bomb: The Most Populous Nation Faces a Population Crisis*, N.Y. TIMES, May 30, 2004, at D1; Philip P. Pan, *Who Controls the Family? Blind Activist Leads Peasants in Legal Challenge To Abuses of China's Population-Growth Policy*, WASH. POST, Aug. 27, 2005, at A1.

87. Anti-abortion organizations were actively involved in the Terri Schiavo case. American pro-life activists view the case as "an issue aligned with their beliefs" and see assisted suicide as a "moral and religious issue of overriding importance." The Schiavo case showed that "social conservatives were as consumed with the end of life as they were with life in the womb." *See* Peter Wallsten, *How the Private Became Political*, L.A. TIMES, Mar. 20, 2005, at A1.

88. For an account and analysis of America's radical anti-abortion movement, *see* Ben Ehrenreich, *Operation Miscue: How Legal Problems, Cultural Shifts and Internal Turmoil Muffled America's Radical Anti-Abortion Movement, and Why the Battle Isn't Over*, L.A. WEEKLY, Apr. 11, 2002, available at <http://www.laweekly.com/ink/02/20/cover-ehrenreich.php>.

CHR issues seriously, deal with them rationally, and resolve cases involving them appropriately.