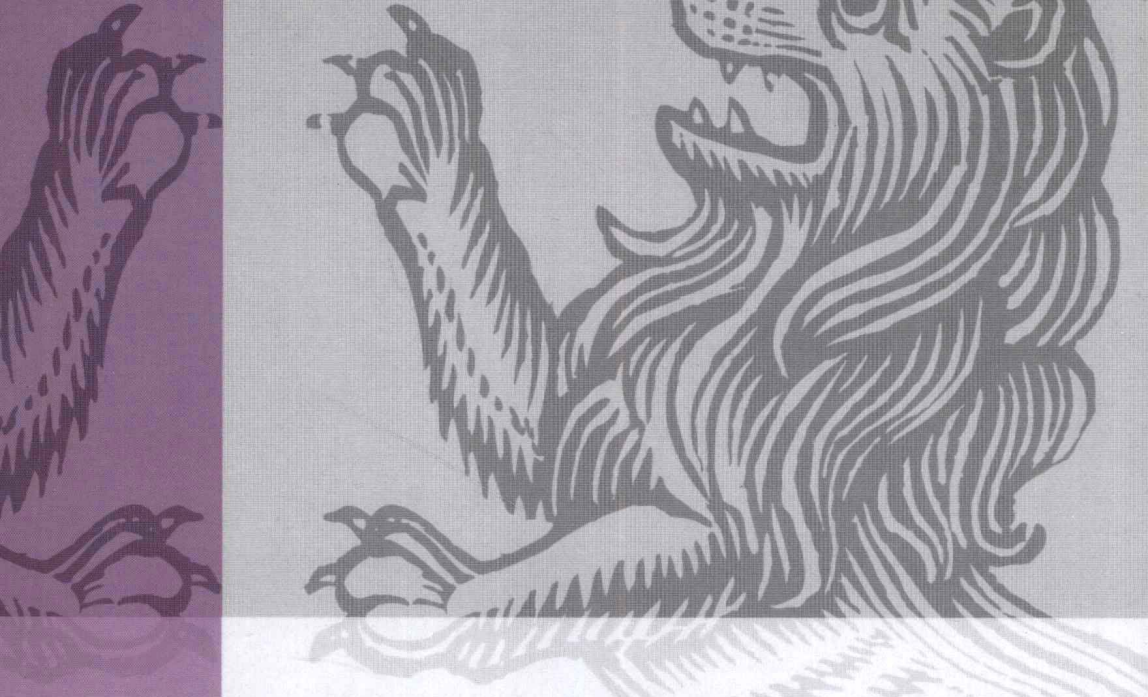

Philosopher Kings?

The Adjudication of Conflicting Human Rights and Social Values

GEORGE C. CHRISTIE

OXFORD

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PREFACE

The ambitious goal of this book, as suggested by its alternate title, is to examine how, if at all, courts can deal with cases involving the intersection and even outright conflict between freedom of expression and the growing number of other individual and social rights and values that developed societies have accepted as worth protecting through the judicial process. As someone whose academic concerns have always centered around the subject of legal reasoning, an interest in what has become the subject of this book was initially piqued when, as I describe in Chapter 3, I saw that significant differences existed between common law and civil law methods of legal argumentation and that, as a result, the same legal text might be applied differently in a common law system than it would be in a civil law system. I soon realized that not only were there different approaches to legal problems entrenched in those legal cultures, but also, and more importantly, that these differences were the result of different views of the nature and function of the state. These views of the nature and function of the state have become particularly visible as nations on the international as well as the national level choose to delegate to courts the difficult job of providing context to a wide range of so-called human rights that are vaguely worded, explicitly declared to be defeasible, and that, in some cases, are expressly declared to be of equal value to other similarly defined rights with which they might inevitably come in conflict. Given the increasing recognition of the existence of what might be called universal human rights, it is a subject that can only adequately be approached from a comparative perspective. I have focused much of my attention on decisions in the United States and on decisions in Europe rendered by courts in the United Kingdom and by the European Court of Human Rights.

The need to consider at the international level the decisions of the European Court of Human Rights is obvious. As of 2006, the number of judgments issued by the European Court of Human Rights had exceeded by a factor of at least twenty the number of judgments issued by the Inter-American Court of Human Rights. The third and only other international court of human rights, the African Court on Human and Peoples' Rights, issued its first judgment in December 2009. The European Court of Justice also deals with what might be called human rights. This is a natural consequence of the fact that the Treaty of Rome does contain a "Social Chapter" and that Article 6 of the Lisbon Treaty expressly adopts the European Charter of Fundamental Rights of 2000, as "adapted at Strasbourg on December 12, 2007," and directs the European Union to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Not surprisingly, the European Court of Justice has accepted the decisions of the European Court of Human Rights as part of its jurisprudence

although there is no formal requirement for it to have done so. In doing so, it declared that "respect for fundamental rights forms an integral part of the general principles of law protected by the Court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member states, must be ensured within the framework of the structure and objectives of the Community."[1] Thus far many of the European Court of Justice's decisions in this area have focused on discrimination in the workplace.[2] This is understandable because the treaties that originally established the jurisdiction of the organs of the European Union did not explicitly refer to individual rights and particularly not the individual rights on which we shall largely be focusing as the discussion proceeds.[3]

The reason for including many references to United States law is that the American decisions often conflict with those of European courts and this conflict provides a valuable platform for a comparative study. Finally, the decisions of the courts of the United Kingdom are also an obvious choice for major consideration not only because of their own intrinsic interest but also because they represent a major and good-faith effort to accommodate values long given primacy in the common law to the more complex and diffuse system of values enshrined in the European Convention.

The point of this book is to examine how the courts can deal with a world in which many values increasingly compete with freedom of expression, including freedom of religious expression, without the courts themselves taking on the role of moral arbiter. I will discuss ways in which this might be successfully done in contexts in which rights of privacy or important state interests are in potential conflict with freedom of expression, but I also will be obliged to acknowledge the possibility that we may in the end not be able to come up with a completely satisfactory method. In that case, we may be forced either to abandon our commitment to a regime of multiple basic rights some of which are of equal value, or accept that, despite our protestations to the contrary, we are in practice implicitly favoring one right or social value over another.

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1. Case 11/70, Internationale Handelsgesellschaft v. Einfuhr und Vorratsselle für Getreide und Futtermitel, [1970] ECR 1125, 1133.

2. *See*, e.g,. Case C-50/96, Deutsche Telekom v. Schröder, [2000] ECR I-743.

3. For a good summary of all but the most recent of these developments, see Elizabeth F. Defeis, *Human Rights and the European Court of Justice: An Appraisal*, 31 FORDHAM INT'L L.J. 1104 (2008). *See also* Suzanne Burri, *The Position of the European Court of Justice with Respect to the Enforcement of Human Rights, in* CHANGING PERCEPTIONS OF SOVEREIGNTY AND HUMAN RIGHTS: ESSAYS IN HONOUR OF CEES FLINTERMAN 311–27 (Ineke Boerefijn and Jenny E. Goldschmidt eds., 2008); Andrew Williams, *Respecting Fundamental Rights in the New Union: A Review, in* THE FUNDAMENTALS OF EU LAW REVISITED (Catherine Barnard ed., 2007).

CONTENTS

PART I

PROLEGOMENA

1. INTRODUCTION

One of the most important characteristics of the contemporary world is the growing acceptance of the idea that there are truly universal human rights, and that courts—whether on the international or the national level—are the appropriate bodies to adjudicate disputes as to the content of those rights and their application to concrete situations. This is a book about how courts might perform that task. It begins with a description of how courts have thus far tried to perform that task, then examines the problems that are encountered as they try to perform that task, and finally explores the several ways that have been suggested as to how they might more satisfactorily perform that task in dealing with the ever-expanding volume of litigation, particularly in Europe, on the content and scope of any such rights.

Because, as explained in the preface, the most developed jurisprudence on the content, scope, and application of human rights law is in Europe and the United States, this book will focus primarily, but not exclusively, on decisions from the United States and from European courts such as the House of Lords[1] and particularly the European Court of Human Rights, which has handled more human rights disputes than all other international courts combined over the entire course of human history.[2] The book focuses in large part, but not exclusively, on disputes involving the right to freedom of expression, the right to religious practice and expression, and the right of privacy, not only because these rights are involved in many contemporary disputes, but also because there is much disagreement as to the reach of these rights, since the exercise of any one of these three categories of rights often comes in conflict with the exercise of another of those rights or with certain important state interests. The problem faced by the courts here is one of interpretation and the resolution of conflicts between important human interests. These sorts of conflicts are generally not involved in cases involving the enforcement of what most people would accept as incontrovertible human entitlements such as not to be enslaved nor to be the victims of genocide or of torture—matters where, as a practical matter, the only real issue is normally the enforcement of these broadly accepted universal legal prohibitions by political means, including sometimes the application of force.

1. The appellate jurisdiction of the House of Lords ceased to exist as of July 30, 2009. Its successor, the Supreme Court of the United Kingdom, became operational on October 1, 2009. There are no substantive changes in jurisdiction or in the mode of hearing appeals. *See* note 15, *infra*.

2. *See* Karen J. Alter, *Delegating to International Courts: Self-Binding vs. Other-Binding Delegation*, 71 LAW & CONTEMP. PROBS. 37, 57–60 (2008).

The notion of human rights, and even of universal human rights, has a long history. We shall have occasion to refer to some of the historical development of the notion of human rights in the next chapter. What we might remark on here is the breathtaking expansion of the range of asserted universal human rights and the use of courts to protect those rights, a phenomenon that took wing in the last quarter of the twentieth century.[3] Undoubtedly the increasing globalization of the world economy has made it easier to envision a body of enforceable human rights law that, like trade law, transcends national boundaries. So has our rapidly changing vision of the role of the state and its growing responsibility for not only the economic but also the emotional welfare of its citizens, as well as, perhaps inevitably, the increasing dependence on courts to facilitate the smooth functioning of all these changes on both a national and an international level. This accelerating reliance on courts is a particularly prominent feature of the burgeoning field of human rights. On the national level, entrusting courts to resolve contentious and often extremely complex issues reflects a growing social demand for state recognition and protection of what are coming to be considered basic human rights. At the same time, this trend also reflects a mistrust of the ability of the legislative and executive arms of government to recognize and protect those rights adequately. On the international level, it also reflects the view that there are issues which transcend the authority of individual nation-states and which therefore can only be governed by a universal law that, though influenced by the actions of nation-states, must ultimately be discovered and declared by courts whose members are in some way independent of the political control of any individual nation-state. Since, however, there is no truly functioning world government, this in practice means courts that are subject to no effective legally sanctioned political control.

This resort to courts rather than political action to define and resolve the fundamental issues underlying the expansion of human rights law that is the focus of this book reminds one, in a way, of medieval natural-law theories in which there was no necessary connection between politics and law. There is, however, a major difference. In a dynamic world such as the one in which we live, it is the courts as expositors of an evolving law that are at the apex of the system, rather than a relatively static natural law which is not dependent on any human institutions for its authority. What is shared by these two situations is the belief that there are universally known or, at least, universally knowable norms of universal application.

Considering human beings in their capacity as discrete individuals, it is hard to deny that we each believe in some sort of universal values. As Chaïm Perelman noted, this appeal to universal values is implicit in our references to beauty,

3. *See* SAMUEL MOYN, THE LAST UTOPIA (2010).

justice, or even truth.[4] This human characteristic of appealing to universal values is what he tried to capture in what he called discourse directed to the "universal audience,"[5] a feature of human communication and argumentation that was also captured by George Herbert Mead's notion of "universal discourse."[6] As the discussion proceeds, we shall have several occasions to discuss this feature of human belief and practice at greater length.[7] What is even more crucial to the inquiry of this book, however, is the additional assumption—repeatedly made by many people and again reminiscent of natural law theory—that there is actual agreement on the content of many of our basic social values, and especially those that underlie the modern notion of universal human rights.

That many human beings have long believed in the potential knowability of universal and concretely applicable moral truths is undeniable. We may, for example, recall Cicero's response to the contention that there cannot truly be a universal natural law because there is no universal agreement as to the nature of its divine source. To this objection, Cicero replied that the fact that all people believe in some kind of divinity—even if they are mistaken about what kind of divinity it is—indicates that there is such a divine source for the moral excellence that resides in God and in man, and for the knowledge of which, despite inconsistencies and errors in their thinking, intelligent people turn to philosophy and reason in order to gain knowledge of the truth.[8] This is an argument picked up in the mid-seventeenth century by John Locke in his Essays on the Law of Nature;[9] and it was followed up by Locke's further assertion that the content of the law of nature is to be determined through the process of rational discourse taking as its starting point our sense experiences.[10] The point was further refined

4. CH. PERELMAN AND L. OLBRECHTS-TYTECA, THE NEW RHETORIC: A TREATISE ON ARGUMENTATION § 7 (J. Wilkinson & P. Weaver trans., 1969) [hereafter THE NEW RHETORIC]. This work was originally published in French in 1958 as *TRAITÉ DE L'ARGUMENTATION*, now in its 6th edition (2008). It is commonly referred to as Perelman's work. Olbrechts-Tyteca was Perelman's research assistant whose invaluable contribution included assembling many of the massive number of rhetorical examples contained in the work.

5. *See ibid*, and *passim*.

6. GEORGE HERBERT MEAD, MIND, SELF, AND SOCIETY 195 (1934).

7. *See* Chapter VI, *infra*.

8. MARCUS TULLIUS CICERO, LAWS, Bk. I, §§ 24–35, 47–63, Oxford World's Classics edition, THE REPUBLIC AND THE LAWS (N. Rudd trans., 1998).

9. JOHN LOCKE, ESSAYS ON THE LAW OF NATURE 115 (Essay I) (trans. from the Latin by W. von Leyden, 1954). Dr. von Leyden dates the ESSAYS to the period 1663–64 and states that they were probably delivered in Latin as lectures at Oxford at the end of 1664. *Id.* at 12–13.

10. *Id.* at 147–59 (Essay IV).

in Pufendorf's assertion that natural law consists of propositions propounded by the learned which the unlearned are unable to refute.[11]

In less obviously elitist terms, the belief in the hypothetically knowable content of a concrete normative order is captured in Adam Smith's notion of "an impartial spectator"[12] and in the nineteenth century legal philosopher John Austin's assertion that the convergence theory of truth applied not only to scientific inquiry but to deontological inquiry as well.[13] Finally, in our contemporary world, those who are not complete relativists but, like Jürgen Habermas, are nevertheless unwilling to impose their own view of moral truth on others can, by referring to an "ideal speech situation," hold out the promise that in such a situation, with unlimited time for discussion, universal agreement as to what is the appropriate resolution to social disagreement will eventually emerge.[14] Indeed, the belief that there is a core of knowable universal human rights may be proceeding on the assumption that such an ideal speech situation capable of dealing with a multitude of often competing ethical values actually can be created in the here and now simply by referring to the judiciary the difficult questions presented when important human interests and values come in conflict. The validity of any such assumption will be among the issues that will be discussed in this book.

The modern movement of enunciating certain general rights of all persons, in what might be called "constitutional" or "basic" or "fundamental" documents, and then actually resorting to courts to enforce these rights clearly raises important questions. This increasing reliance on courts, on the international as well as the national level, to meet the rising expectations of people around the world highlights the need to determine the proper social role of courts. If the judicial forum is to serve as the institutional setting in which disputes about contentious and often complex social issues are to be settled, we must face up to the question of how courts might be able to fill that role. This means that we must first

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11. SAMUEL VON PUFENDORF, DE JURE NATURAE ET GENTIUM, Bk. II, Ch. I, 513, first published in 1672. Hugo Grotius also relied on the agreement of "advanced" civilizations as the means for discovering the content of natural law in his great treatise on international law, DE JURE BELLI AC PACIS, Bk. I, Ch. I, xii, first published in 1625.

12. ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 118, 131, 134, 137 and *passim* (1759) (Liberty Fund facsimile edition, 1982). Smith sometimes refers to this imagined observer as the "indifferent spectator," as for example in *id.* at 85.

13. JOHN AUSTIN, I LECTURES ON JURISPRUDENCE, LECTURE III at 122–40 (Fifth rev. ed. by R. Campbell, 1885). The first six of Austin's lectures, which of course includes this one, have been reprinted a number of times under the title, THE PROVINCE OF JURISPRUDENCE DETERMINED.

14. *See* JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 185–86 (W. Rehg trans., 1996). A good discussion of what in English is called Habermas' notion of the ideal speech situation is contained in RAYMOND GUESS, THE IDEA OF A CRITICAL THEORY: HABERMAS AND THE FRANKFURT SCHOOL 64–70 (1981).

determine, in as concrete a way as possible, what are the questions society wants the courts to decide. We must then explore how courts might try to go about deciding those contentious questions. Finally, we must confront the difficult issue of whether courts can decide those questions in a way that satisfies the expectations of the public at large and the judges themselves as to the appropriate social role of judges.

It is axiomatic that, in any decisional context in which only a yes or no answer is required, any decisional body with an odd number of members will come up with a decision. If one is not troubled by a process in which, for example, five-to-four decisions of the United States Supreme Court or three-to-two decisions of panels of the House of Lords, or its successor, the Supreme Court of the United Kingdom,[15] are no longer an unusual outcome in controversial cases, there is no problem. One merely has to accept that social issues, no matter how contentious, must nevertheless be decided. The fact that one group of nine or five judges might very likely decide the issue differently than would another group of nine or five judges is either not a matter of consequence or something that cannot be avoided. After all, no one questions that judges are given authority by society to make such decisions, and every society needs a mechanism for deciding even controversial issues.

Recent declarations by judges sitting on the United States Supreme Court and in the House of Lords have indeed explicitly acknowledged that the particular composition of those final appellate courts in these highly contentious and emotionally charged cases will often lead to a decision different from that which would be reached by a tribunal composed of different judges. One might say that this is merely to recognize the inevitable. For example, in *Parents Involved in Community Schools v. Seattle School District No. 1*, a five-to-four decision of the United States Supreme Court involving race-based criteria in the assignment of students to public primary and secondary schools, Justice Stevens declared in his dissent that "[i]t is my firm conviction that no Member of the Court that I joined in 1973 would have agreed with today's decision."[16] In a similar but less emotionally charged vein, in an English case pitting the plaintiff's right of privacy

15. *See* Sir Richard Buxton, *Sitting en Banc in the New Supreme Court*, 125 L.Q. REV. 288 (2009). The title is ironic because, as the writer, a retired Court of Appeal Judge notes, the new court, like its predecessor, will never sit en banc. Although composed of twelve judges, it appears that it will normally continue to sit in panels of five, although occasionally perhaps in larger panels as the House of Lords did in *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*, [2000] A.C. 147 (1999) (panel of seven) and in *Secretary of State v. AF (No. 3)* [2009] 3 All E.R. 643 (H.L.) (panel of nine). Sir Anthony Mason, *Envoi to the House of Lords—A View From Afar*, 125 L.Q. REV. 584, 595–96 (2009), believes "that there is certainly a case for sitting no less than seven judges in any case and nine, or even eleven, in controversial cases or cases of exceptional importance."

16. Parents Involved in Community Schools v. Seattle School District No. 1, 551 U.S. 701, 803 (2007).

against the defendant-newspaper's right to freedom of expression, Lord Carswell conceded that "[w]eighing and balancing these factors is a process which may well lead different people to different conclusions, as one may readily see from consideration of the judgments of the courts below and by several members of the Appellate Committee of your Lordships' House."[17] That case, *Campbell v. MGN Ltd*, was a three-to-two decision in which the majority, of whom Lord Carswell was one, ruled in favor of the privacy claim. We shall have occasion to consider the *Campbell* case at greater length at several places later in this book. For present purposes, it is enough to note that the *Campbell* case was heard by nine judges as it wound its way through several layers of courts. Five of the judges—all three judges in the Court of Appeal and the two dissenters in the House of Lords—ruled in favor of the freedom of expression claim. Four judges—the trial judge and the three-judge majority in the House of Lords—ruled in favor of the privacy claim which was the claim that eventually prevailed.

As the House of Lords was increasingly required to decide cases involving serious basic issues of social policy, not all of them what we would call "human rights" issues, it is not surprising that it should have produced an increasing number of three-to-two decisions on at least some issues.[18] Nor should it be surprising that the conflicts between the rights of privacy and of freedom of expression should be among these closely divided decisions. If, however, one expects something more from those who perform judicial functions than simply deciding difficult and emotionally charged controversies, there are serious issues to be resolved and serious difficulties to overcome. Many of the most important questions that will be discussed concern disputes involving hotly contested issues concerning what are considered basic human rights. These developments force us to consider whether means exist by which courts might decide those issues such that the judges would, in the end, not so frequently be forced to admit that different and equally diligent judges might in good conscience reach the opposite conclusion.

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17. Campbell v. MGN Ltd, [2004] A.C. 457 at ¶ 168. On the continued use of panels by the Supreme Court of the United Kingdom, *see* note 15, *supra*.

18. Research done by my research assistant, Greg McDonough, reveals that there were 25 three-to-two decisions in the House of Lords in the ten-year period 1950–59, and 32 in the ten-year period 1990–99. But in the nine-year period 2000–08, if one includes three cases decided by the Privy Council, all of which included human rights issues and in two of these three the Privy Council split five-to-four, there were 51 cases in which there were such sharp divisions on at least some of the key issues. A significant number of all the sharply divided cases decided in the more recent period involved human rights issues. As is well known, the Judicial Committee of the Privy Council was largely and often exclusively composed of judges who sit in the House of Lords, and this practice of having judges of the highest appellate court sit in the Judicial Committee has not changed with the establishment of the Supreme Court of the United Kingdom.

In order to approach those ultimate questions, we shall have to consider first, in the context of legal discourse, what we mean by the term "right." More specifically, what do we mean by the term "human rights"? Are there any philosophical principles that might help us provide reasonably concrete and objective answers to all these questions? The study of all these questions is not made any easier by the fact that they also bring into play questions concerning the relationship of the state to its citizens and the role of the courts in the evolution of that relationship. If the state is not only required to refrain from certain sorts of interference in the lives of its citizens and to protect those citizens from third parties who might physically injure their persons and property, but is also required to provide them with certain judicially determined levels of economic and social welfare as well as emotional tranquility, the range of questions that might require judicial resolution expands greatly. Such a requirement obliges us to consider whether we might be approaching, at least in the so-called developed nations, a world in which, because of the enormous reach of the state's power to act, anything which the state allows anyone to do that affects others is traceable back to the state. This was Bentham's view of the logical nature of law at a time when the actual power of the state to intervene in the lives of its citizens was much less than it is today.[19] It is one of the issues underlying what, in the United States, is called the state-action problem,[20] a subject at one time much mooted but now relatively quiescent, perhaps because, being largely thought difficult if not impossible to answer, it was best ignored on the ground that "sleeping dogs are best left quiet."

If almost nothing that anyone can do that affects other people, and even to a large extent himself, can be done without the help of either resources or facilities provided by the state, almost everything is, in a practical sense as well as in the logical sense espoused by Bentham, quite plausibly either state action or, to adopt an alternate paradigm, potentially subject to state regulation. That, in turn, at the very least has the awkward consequence of making the individual in his actions the agent of the state and subject to all the duties and restraints imposed on public officials. By thus opening up an ever-broadening range of activities of private actors to state regulation, the number of instances in which courts will be asked to decide contentious social issues will only increase. This is a vast subject. A thorough treatment of it, were it even possible, would require a very extended discussion that is obviously beyond the scope of this work. Nonetheless, some of the conclusions reached in this book may be relevant to that inquiry and thus

19. JEREMY BENTHAM, OF LAWS IN GENERAL, Ch. II, § 6 (H.L.A. Hart ed., 1970).

20. One of the few recent discussions of the issues raised by the state-action problem provides a very good summary of the issues it raises and the problems it encounters. *See* Stephen Gardbaum, *The "Horizontal Effect" of Constitutional Rights*, 102 MICH. L. REV. 387, 411–34 and *passim* (2003).

justify the brief further discussion of this broader social issue in later portions of this book.[21]

It is no use denying or even decrying the fact that, in an increasingly urbanized society, the state is constantly expanding its role in the economic and social lives of its inhabitants. This development only accentuates the importance of perennial questions such as what are the differences not only in the roles of courts and legislatures but also in the decision-making processes of courts and legislatures. Certainly, the increased use of courts operating at the international level, even further removed from any meaningful political control than are national judicial tribunals, only heightens the urgency of dealing with these issues. Furthermore, with the increased involvement of courts in the details of governmental operations, are courts becoming just another part of an enormous, growing, and nominally democratically established administrative apparatus; or is judicial decision making something different in kind from that of an administrative organ of the state, however honest, efficient, and competent that administrative organ might be? Indeed, at the international level, where, outside of the area of world trade, there is very little of an efficient and effective administrative apparatus, are the courts, by default, in fact being asked to serve as essentially unreviewable, and therefore unaccountable, organs of administration as much as they are judicial bodies in the traditional sense?

These, of course, are all issues that transcend human rights adjudication and relate to all types of litigation, whether on a national or international level, but the issues involved in discussions about the proper role of courts are currently more prominently raised in contemporary human rights adjudication. In some of the most controversial cases, courts have had to deal with questions such as whether religious believers can wear head scarves or other indicia of religious belief in public buildings or whether it can be made a crime to deny that the events described by the term Holocaust ever took place.[22] Given the emotive reactions that these types of cases generate, it is no wonder that human rights litigation attracts the attention of the general public because non-lawyers not only have strong feelings on these sorts of issues but can even envision how the outcome of that type of litigation might affect them in both positive and negative ways.

We must finally not forget that, to be useful, our study must not only eventually bring the discussion to bear on some relatively concrete contexts, but must, if possible, also try to suggest concrete ways in which the methods of adjudicating actual clashes between competing human rights can be either improved or changed to address the current difficulties presented by that type of adjudication. In particular, we shall explore the repeated suggestion in the cases that we shall

21. *See*, in particular, the closing portions of Chapter 10, *infra*.

22. These are matters that we shall discuss in Chapter 4, *infra*.