Case Note

Evans v. UK

European Court of Human Rights

The Tragedy of Ms Evans: Conflicts and Incommensurability of Rights, *Evans* v. *the United Kingdom,* Fourth Section Judgment of 7 March 2006, Application No. 6339/05

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> If, as I believe, the ends of men are many, and not all of them are in principle compatible with each other, then the possibility of conflict – and of tragedy – can never wholly be eliminated from human life, either personal or social.[1]

Introduction

Proportionality review and, in particular, *ad hoc* judicial balancing of competing rights and interests are probably the most celebrated tools propagated by the European Court of Human Rights (ECtHR) and are currently dominant features of the European discourse of rights. This methodology and its discourse, in fact, have gained such widespread popularity that, although the outcome of Convention-based and other fundamental rights claims is often far from certain, the way they will be treated by judges can be predicted with some confidence.[2]

Against this background, the recent decisions by the Court of Appeal for England and Wales and the Fourth Chamber of the EctHR in the sad case of *Evans* v. *The United Kingdom* stand out markedly. Neither court, to be sure, fully abandoned standard conceptualizations and discourse. However, both decisions contain a number of new and surprising elements that put them at odds with general practice. Put briefly: the Court of Appeal and the European Court opened a veritable Pandora's box of incommensurability between rights in conflict, grapple with the vexed question of the competence of legislatures to decide ethical dilem-

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[1] I. Berlin, *Liberty* (Oxford, Oxford University Press 2002) p. 214.

[2] *See* for example D. Beatty, *The Ultimate Rule of Law* (Oxford, Oxford University Press 2004); R. Alexy, 'Balancing, Constitutional Review and Representation', 3 *Int J Constitutional Law* (2005) p. 572-581; D. Law, 'Generic Constitutional Law', 89 *Minnesota Law Review* (2005) p. 652-743.

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mas and struggle to define their own roles in reviewing such decisions. Interestingly, these discussions engage problems that usually are glossed over and endorse positions that these same courts normally reject.

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

In the United Kingdom, such a procedure is strictly regulated by legislation. The main feature of this legislation is that it allows both parties to withdraw their consent at any time before the implantation of the eggs in the uterus. Mr Johnston reassured Ms Evans about his commitment to having a baby with her. Two years later, however, the relationship broke down. As a result, Mr Johnston asked the hospital to destroy the frozen fertilised eggs, thereby putting an end to the hopes of Ms Evans to have a child that would be biologically hers. In these circumstances, Ms Evans sought an injunction from the High Court requiring her husband to restore his consent, arguing that he validly could not vary it, as a matter of English law. In addition, she argued that the relevant legislation was incompatible with the Human Rights Act 1998. The High Court, The Court of Appeal, and the European Court of Human Rights ('ECtHR') all rejected Ms Evans' request.

Ms Evans' claim, like so many other emotionally, ethically or politically charged issues, was put forward in terms of fundamental rights: in her case, the right to respect for her decision to become a parent.[3] During the course of judicial discussions on the scope and meaning of this right, its relationship to other rights and interests and, still more fundamentally, on the role of courts in dealing with these questions, the judgments of the English Court of Appeal and of the European Court of Human Rights introduced an unusual series of difficult issues and novel positions. For example, Lord Justices Thorpe and Sedley, using language very seldom heard in judicial decisions, found that allowing for exceptions to the consent requirement would 'require a balance to be struck between two entirely incommensurable things'.[4] At the European Court, the majority, although emphasising that the need for a 'fair balance' was central to its approach, held that the fact that the UK legislation did not allow for the weighing of competing interests in each individual case was not *per se* contrary to Convention requirements; a conclusion the majority itself seemed to admit was exceptional.[5]

[3] *See* Evans, para. 57.
[4] *See infra*.
[5] Ibid.

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These remarkable judicial discussions and decisions give rise to three basic questions: *what* is it exactly that the Courts meant to say in this case, *how* does what they say in *Evans* differ from their position in other cases, and *why* do they raise these issues, and adopt such unusual positions in this case, given that they are content to apply standard methodology unquestioningly in so many other cases?

The answers to these questions are likely to lie somewhere between the following two extremes. On the one hand, it could be that in *Evans* the courts were identifying what they see as certain general limitations to, or weaknesses in, their standard practice that they feel are valid more broadly. The identification of these limitations could be part of an admission of a deeper sense of dissatisfaction with standard European rights adjudication methodology and, as such, could be a prelude to a call for alternatives to be developed. If this is in fact what the two courts were saying, then it becomes important to identify the perceived weaknesses as precisely as possible and evaluate them against the background of possible alternatives.

It is possible, however, that the courts actually were signalling something very different, namely, the idea that they would be happy to stick to standard methodology and discourse in ordinary cases, but that they perceived the case of *Evans* to be special in such a way as to warrant an alternative approach. If such is the case, the central issues become whether *Evans* can and should be, in fact, so distinguished. These questions, and the two hypotheses identified, form the subject of this article. Answering them has assumed special relevance since the referral, on 19 July, of the case to the Grand Chamber of the ECtHR.[6]

The article proceeds as follows. Part I deals with the issue of conflicts of rights. Here we analyze both the structural features of the case, as well as their reflection in discourse. We offer the technical notion of a 'dilemma' to characterize Ms Evans' case and try to distinguish this characterization from the broader concept of 'hard cases'; an enterprise with obvious ramifications for the questions raised above. Building on the idea that the *Evans* case, in fact, could be structurally different from many other fundamental rights cases, Part II analyzes both courts' discussion of the issue of incommensurability between rights. The main objectives of this section are to determine why it is that the two courts raised this issue in the case of Ms Evans, and to determine more precisely what the various judges understood the problem of incommensurability to entail. Finally, Part III analyzes the ambiguous notion of 'bright-line rules', as adopted by the European Court of Human Rights to characterize the relevant UK legislation and to legitimize its own deferential position. This part places the Court's approach in the context of a

[6] ECtHR Press release No. 438 of 19 July 2006.

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broader discussion of the role of formalism in rights adjudication, again against the background of the hypotheses set out above.

Of tragedies, dilemmas and conflicts of rights

Stripped of all legal technicalities, the plight of Ms Evans presented an obvious human tragedy. All judges agreed on this point. So, for example, Wall J in the English High Court found that:

> In human terms, the greatest sympathy must, of course, be extended to Ms Evans, who, as a result of this case, now lacks the capacity to give birth to a child which is genetically hers.[7]

Thorpe and Sedley LJ in the Court of Appeal used similar words:

> For Ms Evans this is a tragedy of a kind which may well not have been in anyone's mind when the statute was framed.[8]

Finally, the ECtHR simply reiterated previous concerns when it said:

> The Court, like the national courts, has great sympathy for the plight of the applicant who, if implantation does not take place, will be deprived of the ability to give birth to her own child.[9]

The tragic nature of the case, appreciated by all the judges, stems not only from the fact that a fundamental aspect of private and family life is concerned (the possibility to have a biological child), but also, and crucially, from the fact that the constellation of the private interests and factual constraints involved precludes any 'middle-way' solution. In practical, non-technical terms, the conflict in Evans is the following: Denying maternity or forcing paternity? Given the circumstances, we deny maternity if we stick to the words of the statute. We force paternity if we carve out an exception to the otherwise very clear wording of the statute that makes consent of both *a sine qua non* condition to proceed with the implantation in the uterus of in vitro fertilized eggs. In terms of rights doctrine, the case of course concerns a horizontal conflict between two fundamental rights, both guaranteed under Article 8 of the European Convention: the right to respect for both the decisions to become and not to become a parent, as facets of the right to

[7] *Evans* v. *Amicus Healthcare Ltd and others,* [2004] 2 W.L.R. 781.
[8] *Evans* v. *Amicus Healthcare Ltd*, [2005] Fam. 93.
[9] *See* Evans, para. 67.

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respect for choices made by individuals with regard to their private life. Both persons' rights are deemed protected by the requirement of consent. Both parties, therefore, claim respect for the same right, protected in the same way. These rights are deemed, in principle, to have an equal intensity.[10] The interests of the two parties, therefore, are directly related (in a relation of inverse proportionality). The more we protect the interest of one, the more we interfere with the interest of the other.

These factual and legal constraints mean that the Evans case presents a *tragedy*. A tragedy arises when we are faced with a choice between two separate goods (protected by rights). The nature of that choice inevitably leads to a sacrifice (or trade-off) of something of value, whichever way we decide.[11]

One important issue in analyzing *Evans* then, is to find out whether, and if so how, this dimension of 'tragedy' has been translated into a particular form of (legal) decisional methodology by the various courts. This question is of particular interest in view of the fact that all courts ultimately have gone on to approve the scheme outlined by the United Kingdom parliament.

It seems that a key step in this translation process, for several of the judges involved, was to cast the case as involving or constituting a 'dilemma'. This term was used, however, very loosely and in very different ways in the various judgments. We can distinguish three different explicit invocations. Firstly, the majority at the ECtHR refers to Wall J's use of the term in referring to a difficult choice facing Ms Evans.[12] But of course, Ms Evans merely wanted to exercise her autonomous will in defence of her interest to have a child. Therefore, it is not clear in what sense Ms Evans herself was confronted with a dilemma. Secondly, Lady Arden in the Court of Appeal, in a passage subsequently cited by the majority at the ECtHR, spoke of a moral dilemma that *would* present itself if a court would have to decide

> whether the effect on the applicant of Mr Johnston's withdrawal of consent would be greater than the impact the invalidation of that withdrawal of consent would have on Mr Johnston.[13]

Both the Court of Appeal and the ECtHR, however, were not prepared to deal with this moral dilemma by balancing the different interests at stake. Instead, they

[10] *See* Evans, para. 66 (majority judgment): 'the Court does not accept that the Article 8 rights of the male donor would necessarily be less worthy of protection than those of the female'.

[11] L. Zucca, *Constitutional Dilemmas. Conflicts of Fundamental Legal Rights in Europe and in the USA* (Oxford, Oxford University Press forthcoming). For a similar definition, *see* M. Nussbaum, *The fragility of Goodness* (Cambridge, Cambridge University Press 1986) p. 51-82.

[12] *See* Evans, para. 66.

[13] *Evans* v. *Amicus Healthcare Ltd*, [2005] Fam. 101.

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preferred to defer to parliament and accept the political solution reached by the statute.

The minority at the ECtHR, finally, talked of an *unavoidable* dilemma in the present case. The solution offered by the minority to this dilemma, cast in terms of conflicting rights, used the rhetoric of judicial balancing.

> The dilemma between the applicant's right to have a child and Mr Johnston's right not to become a father cannot be resolved, in our view, on the basis of such a rigid scheme and the blanket enforcement by the law of one party's withdrawal of consent. The dilemma should instead be resolved through careful analysis of the circumstances of the particular case, to avoid the unjust preservation of one person's right by negating the rights of the other.[14]

What are we to make of these various invocations of the notion of a dilemma? The relevant distinction is that between the second and the third notions outlined above. The minority used language of dilemma and compassion merely to signal that *Evans* was a *hard case*. Hard cases, as the term is understood here, arise under conditions of widespread disagreement as to whether a particular legal command should be followed where doing so would generate results that are found by some to be unduly severe on certain individuals or society at large.[15] In this sense, the *Evans* case certainly can be thought of as hard. Generally, however, hard cases can be solved through the articulation, and comparison, of the reasons in support of either of the two positions. For example, the minority subsequently attempted to do so through the application of standard methodology: balancing competing rights and interests. In methodological terms, therefore, the minority's qualification of the case as involving a dilemma carried no consequences.

This seems to be different for the majority at the ECtHR. Here the identification of a dilemma in the case went hand in hand with a subtly different methodological treatment. In a highly unusual move, the majority regarded the central issue of the case – the actual dilemma – as better dealt with by the national (United Kingdom) parliament, thus forsaking concrete proportionality review and *ad hoc* balancing.

[14] Evans (Dissenting opinion), at para. 3.

[15] *Cf.* A. Bhagwhat, 'Hard Cases and the (D)Evolution of Constitutional Doctrine', 30 *Con. L. R.* (1998) p. 966. As Bhagwhat notes, cases that are hard in this sense 'are not legally difficult, nor are they really factually difficult in the sense of involving unknown or unknowable facts; they are difficult for pragmatic, social, and generally extra-doctrinal reasons'. This definition of hard cases differs from definitions focusing on the indeterminacy of norms (*see* for example: R. Dworkin, 'Hard Cases', 88 *Harvard L. R.* (1974-1975). *See* also: M. Stone, 'Formalism', in J. Coleman (ed.), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford, Oxford University Press 2003) p. 167-205, at p. 179, describing the two categories of hard cases as involving 'doubts about what the rules require' and 'doubts about what should be done, even when it is clear what the rules require'.

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These aspects of the majority's decision raise two important questions: firstly, what is the relationship between the use of the language of tragedy and dilemma, on the one hand, and the heavily deferential departure from standard methodology, on the other? Secondly, what are the implications of the majority's deferential move more generally, i.e., if the majority was prepared to forsake *ad hoc* balancing in this case, in what sorts of future cases might it be similarly inclined to do so?

In our view, a plausible answer to the first question involves reading the majority's reference to a dilemma as a *technical* reference, intended to carve out a special category of cases that are to receive a different methodological treatment. The answer to the second question in turn depends on an understanding of the scope and content of this category of cases: the category of *dilemmas in a technical sense*.

Unfortunately, the majority of the ECtHR did not explain what it exactly meant by 'dilemma'. Instead, it illustrated the situation by citing a similar case from the Israeli jurisdiction, the *Nachmani* case.[16] In that case, the decision was reversed at each stage, with a strong dissent at the Supreme Court arguing for the solution adopted by the court below. From this viewpoint, a dilemma would merely mean a case of strong and persistent judicial disagreement. Mere disagreement, however, cannot possibly be the ultimate reason for which the majority gives up its favourite tool ever, the balancing technique. If the majority intended to suggest that a political decision was deemed more appropriate in conditions of unrelenting disagreement, then most of the past decisions reached by the ECtHR would be unjustified. For in these earlier cases, the balancing exercise was presented as a tool that mitigates the effects of disagreement by quantifying and comparing competing interests. In *Evans*, by contrast, the Court did not abandon the *language* of balancing, but accepted various possible ways in which parliament could have struck the required balance as equivalent, thereby in effect abandoning balancing as a *decisional tool*.

At the same time, one factor that *does* arguably distinguish *Evans* from at least some earlier decisions – the fact that the government's margin of appreciation is widened because of the absence of international agreement on the issue – is insufficient as, surely enough, it is not international conventional agreement that normally validates the Court's balancing exercise in the first place. Therefore, we are left without an explicit justification of why the ECtHR refused to use the balancing test.[17]

The best way of understanding the present case, we submit, involves drawing a *structural* distinction between hard cases and dilemmas. Dilemmas are similar to hard cases in that they also involve widespread disagreement. Constitutional dilemmas, however, have an added feature in that they involve a deadlock: there is

[16] *See* Evans, paras. 39 and 67.
[17] *See infra*, for a more extended discussion on this point.

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agreement that a solution cannot be found without sacrificing a core requirement of one or the other right at stake.[18] Dilemmas, following this definition, are found in situations in which two conflicting rights are jointly *incompossible*, that is, when their core requirements cannot be satisfied at the same time. As a consequence, one of the basic core requirements of a right will have to be sacrificed. The case of Ms Evans illustrates an instance of such dilemmas as it involved a genuine conflict of fundamental rights. In our case, either we side with Ms Evans and deny the essence of Mr Johnston's right, or vice versa. From this perspective, this is not merely a hard case, but it is a dilemma.

The rather peculiar position of the courts in this case now can be understood as follows. In hard cases, the Court of Appeal and the majority at the ECtHR still will be prepared to deploy their balancing dogmatic. When it comes to dilemmas, however, they seem to prefer to take a different approach, one that will be described below as *formalist*.[19] The field of bioethics, at issue in *Evans*, with its close relation to intimate private choices, public policy and its constantly changing boundaries of the practically possible, would seem to be a prime locus of such dilemmas.

Incommensurability and the right to privacy

The most striking aspect of the decision handed down by the English Court of Appeal, taken over by the European Court, is the use of the language of incommensurability. Thorpe LJ and Sedley LJ, writing for the majority, held that the use of a non-conclusive rule on the subject of consent would unduly violate the right of the man while upholding the conflicting right of the woman. Further they suggested that a non-conclusive rule would:

> require a balance to be struck between two entirely *incommensurable* things. Whatever decision was arrived at might be capable of being explained but would be practically impossible to justify.[20]

Lady Arden, separately concurring in the judgment, found that:

> as this is a sensitive area of ethical judgment, the balance to be struck between the parties must primarily be a matter for the parliament.[21]

She then hinted at the problem of incommensurability, writing:

[18] *See* Zucca, *supra* n. 11.
[19] *See infra.*
[20] *Evans* v. *Amicus Healthcare Ltd*, [2005] Fam. 91.
[21] *Evans* v. *Amicus Healthcare Ltd*, [2005] Fam. 101.

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> it would be difficult for a court to judge whether the effect of Mr Johnston's withdrawal of his consent on Ms Evan is greater than the effect that the invalidation of that withdrawal of consent would have on Mr Johnston. The court has no point of reference by which to make that sort of evaluation.[22]

In the view of the Court of Appeal, then, the court did not have a tool to measure the intensity of conflicting rights. In this case, the right of Ms Evans to be protected against state interference was equivalent to the same right held by J. As a result, it was impossible to hold that one right trumped another.

Incommensurability raises many fundamental questions in law and philosophy but generally is not dealt with explicitly by courts.[23] Much of fundamental rights law simply is based on the assumption that it must be possible for courts to make rational choices between incommensurable values or interests. Therefore, it is surprising to see the argument figure in this specific case. The case suggests, paradoxically and counter-intuitively, that even when the conflict is between the *same* rights (privacy), the interests at stake can be considered incommensurable.

The Court did not explain what it meant by incommensurability. Following others, we distinguish three different interpretations of that notion.[24] A mild notion of incommensurability insists that

> values cannot be ranked quantitatively, but can be arranged in a qualitative hierarchy that applies consistently in all cases.[25]

Some authors maintain a moderate form of incommensurability which holds that

> there is no single, ultimate scale or principle with which to measure values – no 'moral slide-rule' or universal unit of normative measurement.[26]

[22] Ibid.

[23] One exception, cited so often that it would seem to prove this point, is Justice Scalia's reference to the impossibility of comparing the weight of a stone to the length of a line (Scalia J., concurring in USSC *Bendix Autolite Corp.* v. *Midwesco Enters.*, 486 US 888, 897 (1988)). On the notion of incommensurability itself, there is a burgeoning literature: *see* for example the symposium held at the University of Pennsylvania Law School and published at 146 *U. Pa. L. Rev.* 1169. *See* in particular the contributions by Matthew Adler, 'Law and Incommensurability: introduction', 1169; Frederick Schauer, 'Instrumental Commensurability', 1215; Matthew Adler, 'Incommensurability and Cost-Benefit Analysis', 1371; Ruth Chang, 'Comparison and the Justification of Choice', 1569; Larry Alexander, 'Banishing the Bogey of Incommensurability', 1641; Brian Leiter, 'Incommensurability: Truth or Consequences?,' 1723. *See* also J. Waldron, 'Fake Incommensurability: A response to Professor Schauer', 45 *Hastings L.J.* 813.

[24] The language of incommensurability is tightly connected to value pluralism. One of the most prominent authors on the issue is Isaiah Berlin. A good account of Berlin's position is given in the Stanford Encyclopaedia of Philosophy, Entry on Isaiah Berlin (Joshua Cherniss and Henry Hardy): <http://plato.stanford.edu/entries/berlin/> accessed on 29 May 2006.

[25] Ibid.

[26] Ibid.

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Finally, some scholars believe in radical incommensurability, which takes the position that 'it is impossible to make judgments between values on a case-by-case basis'.[27]

According to this tripartite distinction, Lady Arden would probably subscribe to a moderate form of incommensurability when she says that the court has no point of reference by which to make the sort of evaluation required. This leaves the door open to a case-by-case analysis in future cases. It remains unclear whether Thorpe LJ and Sedley LJ adhere to a moderate or radical form of incommensurability in this case. It may be argued that they simply believe, as would appear to do Lady Arden, that there is no common scale to measure values. They also may be interpreted as saying that it is impossible to reach a meaningful judgment on a case-by-case basis in cases of the type of *Evans*, when they conclude that any decision reached would be practically impossible to justify.

One final issue should be dealt with. At first sight, one could argue that the rights involved in this case are eminently comparable as they are the same on both sides; the paradox referred to earlier. To compare privacy with privacy, the argument runs, is like comparing the weight of an apple with that of another apple. This fallacy, however, should be avoided for three reasons. Firstly, the use of this metaphor assumes that rights can be weighed in the same way apples can. This very well may not be the case, although the metaphor of weight long has been used in rights adjudication in a way that glosses over this problem.[28] Secondly, incommensurability points to the difficulty of a qualitative analysis. This is worsened by the fact that quantitative commensurability is not available, as we saw before. Thirdly, and most importantly in this case, any quantitative comparison would mislead entirely the sense of a right to (decisional) privacy, which amounts to the ability to take autonomous decisions on grounds that do not need public validation.[29] The interests protected by (decisional) privacy are valuable on the ground that the individual freely ranks his/her preferences. To compare private preferences would amount to denying their own value.

To conclude, it is not fully clear why the Court of Appeal mentioned the problem of incommensurability in this case. A lot would depend on future uses of this

[27] Ibid.

[28] Robert Alexy, for example, suggests that rights infringements can be quantified. *See* R. Alexy, 'Postscript', in R. Alexy, *A Theory of Constitutional Rights* (Oxford, Oxford University Press 2002).

[29] In the Court of appeal, Lady Arden states: 'Ms Evans's bodily integrity (private life) is affected. I do not consider that she could assert any right to family life with a future child whose embryo has yet been transferred to her'. Lady Arden interprets Art. 8 of the Convention as protecting bodily integrity, which is something completely different from decisional privacy. If that were the correct interpretation, then it would be very difficult to *see* why the father's interest needs protection.

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notion; something that the Strasbourg Grand Chamber may offer clues on. More regular use – broad admissions of incommensurability in moderate or strong senses – certainly would point to a remarkable shift in the discourse of rights, as deployment of incommensurability discourse prevents the use of proportionality to solve some of the most difficult cases. On the other hand, the Court's use of incommensurability discourse in *Evans* may have been part of a tactical move designed precisely to safeguard the legitimacy of ordinary judicial methods of deciding rights issues in cases the judges feel they can distinguish as structurally different from the present case. In the context of broader debates on the legitimacy of rights adjudication, debates that have been particularly prominent in the United Kingdom since the adoption of the Human Rights Act, explicitly asserting the limitations of standard methodology in extraordinary cases could be a useful way of preserving prerogatives for the courts' wider role. From this perspective, incommensurability could develop into a safe ground on which courts can claim deference to representative institutions.[30]

Bright-line rules, formalism and the search for a 'fair balance' without balancing

References to 'balancing' and 'weighing' are ubiquitous in Strasbourg case-law.[31] Unsurprisingly, both the majority opinion and the dissent in *Evans* invoked this widely used trope. Closer study of what exactly it is that the two opinions purport to 'balance' and, especially, how, does reveal striking differences in approaches.

Having established that Article 8 'incorporates the right to respect for both the decision to become and not to become a parent', the majority opinion began by elaborating the broader decisional framework for the case. In contrast to both domestic courts that had conceptualized Ms. Evans' claim as involving a governmental interference with her right to respect for her private life,[32] the majority at the ECtHR chose to view the claim as one alleging the existence of a positive obligation on the part of the State

[30] As Frederick Schauer has shown, such a 'strategic' position with regard to incommensurability need not be associated with intellectual dishonesty if that position is regarded by the judges as better capable of promoting primary values. *See* F. Schauer, 'Commensurability and its Constitutional Consequences', 45 *Hastings L.J.* 785-812.

[31] *See* for recent examples: ECtHR 18 April 2006, *Dickson* v. *The United Kingdom* (Appl. No. 44362/04), para. 32, 36 and 39; ECtHR 18 May 2006, *Rozanski* v. *Poland* (Appl. No. 55339/00), para. 61.

[32] For a recent description of the pertinent test under this approach, *see* ECtHR 15 Feb. 2005, *Steel and Morris* v. *The United Kingdom* (Appl. No. 68416/01), para. 88 ('The Court must weigh a number of factors in the balance when reviewing the proportionality of the measure complained of …').

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> to ensure that a woman who has embarked on treatment for the specific purpose of giving birth to a genetically related child should be permitted to proceed to implantation of the embryo notwithstanding the withdrawal of consent by her former partner, the male gamete provider.[33]

This impact of this difference in perspective is mitigated straight away, however, because of the Court's – standard – finding that under either approach

> the applicable principles are similar. In both contexts, regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole.[34]

This invocation of the need for a 'fair balance' may have obvious rhetorical significance; its meaning as a decisional tool is distinctly less clear. What the Majority's reference to a 'fair balance' – and with it to standard Convention methodology – *does* suggest, is that its approach should involve ultimately an *accommodation* of conflicting rights and interests, rather than a decision in favour of one right or interest over others and that this accommodation normally should be found in the context of *individual cases*, among the interests of the individual applicant and those of the community. The reference to the search for a 'fair balance' – and with it, the appreciation of the significance of these two elements of the Court's standard methodology – informed the opinions of both majority and dissenters in *Evans*, suggesting concord among the judges, if not as to substantive outcomes, then at least as to the applicable overall approach. Indeed, even in the wording of their main point of disagreement, the two opinions remained firmly within the Court's standard balancing paradigm; for the majority, the UK legislation 'did not upset the fair balance required',[35] the dissenters found that the government struck a 'rigid balance' and that the applicant deserved 'a fairer balancing'.[36] It is submitted, however, that conceptual and terminological confusion within each of the two opinions, and a number of striking differences among them, reveal vulnerabilities in a style of reasoning so heavily dependent on balancing metaphors and to unresolved structural tensions in the Court's standard approach.

The Court normally takes the view that the 'fair balance' required by the Convention should be achieved with regard to a specific individual's rights and interests – the applicant's. Therefore, the decisional process it described as 'balancing', in principle, should be carried out in the context of individual cases, based on all

[33] *See* Evans, para. 58.
[34] *See* Evans, para. 59. This phrase originates in ECtHR 21 Feb. 1990, *Powell and Rayner* v. *The United Kingdom* (A172), para. 41.
[35] *See* Evans, para. 69.
[36] *See* Evans (Joint Dissenting Opinion), para. 1 and 2.

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relevant circumstances. The Court often has held that 'blanket bans' and rules applied in a 'general, automatic and indiscriminate manner' or 'without further enquiry into the existence of competing public-interest considerations' violated the Convention,[37] and consistently has emphasized its own role as one involving an appraisal of 'all the circumstances of the individual case' before it.[38]

This is where the facts of *Evans* pose a particular problem. It may be recalled that the relevant United Kingdom legislation stipulated that either party to IVF-treatment, unconditionally, could withdraw their consent up to the point of implantation of an embryo. In so doing, the UK Parliament may have laid down, in the words of the Court, a 'clear and principled rule' being 'the culmination of an exceptionally detailed examination of the social, ethical and legal implications' of IVF-related developments,[39] but it specifically did not offer a scheme that allowed for the consideration of the circumstances in individual cases. The majority opinion and the dissent contained very different appraisals of this fundamental characteristic of the UK legislation.

The majority accepted the UK Parliament's choice. In a key paragraph, the opinion recalled

> on several previous occasions [the Court] has found that it was not contrary to the requirements of Article 8 of the Convention for a State to adopt legislation governing important aspects of private life which did not allow for the weighing of competing interests in the circumstances of each individual case.[40]

[37] ECtHR (Grand Chamber) 6 Oct. 2005, *Hirst* v. *The United Kingdom* (Appl. No. 74025/01), para. 82; ECtHR (Grand Chamber) 28 Oct. 1998, *Osman* v. *The United Kingdom* (Report 1998-VIII), para. 151. *See* for other examples of the aversion to absolute rules: ECtHR 22 Oct. 1981, *Dudgeon* v. *The United Kingdom* (A45), para. 61 ('To sum up, the restriction imposed on Mr. Dudgeon under Northern Ireland law, by reason of its breadth and absolute character is, quite apart from the severity of the possible penalties provided for, disproportionate to the aims sought to be achieved'); ECtHR 29 Oct. 1992, *Open Door and Dublin Well Woman* v. *Ireland* (A246-A), para. 73 ('The Court is first struck by the absolute nature of the Supreme Court injunction …'); ECtHR 24 Nov. 2005, *Shofman* v. *Russia* (Appl. No. 74826/01), para. 44 ('According to the Court's case-law, the situation in which a legal presumption is allowed to prevail over biological and social reality, without regard to both established facts and the wishes of those concerned and without actually benefiting anyone, is not compatible, even having regard to the margin of appreciation left to the State, with the obligation to secure effective "respect" for private and family life').

[38] *See* in place of many examples: ECtHR 13 June 1976, *Marckx* v. *Belgium* (A31), para. 68 ('In the particular circumstances of the case, the Court is of the opinion that …'); ECtHR 29 March 1979, *Sunday Times* v. *The United Kingdom* (A30), para. 63 ('[T]he Court cannot decide […] without examining all the surrounding circumstances.').

[39] *See* Evans, para. 69.

[40] Ibid., para. 65.

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The opinion cited two decisions to substantiate this proposition – *Pretty* v. *The United Kingdom* of 2002 and *Odièvre* v. *France* of 2003 – and found that in *Evans*, as in those cases,

> strong policy considerations underlay the decision of the legislature to favour a clear or 'bright-line' rule which would serve both to produce legal certainty and to maintain public confidence in the law in a highly sensitive field.[41]

Any other solution, as the Court of Appeal had observed, 'would not only have given rise to acute problems of evaluation', but would also have created 'new and even more intractable difficulties of arbitrariness and inconsistency.'[42]

For the dissenters,

> the dilemma between the applicant's right to have a child and J's right not to become a father cannot be resolved (…) on the basis of such a rigid scheme (…). The dilemma should instead be resolved through careful analysis of the circumstances of the particular case, to avoid the unjust preservation of one person's right by negating the rights of the other.[43]

A 'fairer solution', than the one envisaged by the majority, according to the dissenters, would be a 'case-specific test', which 'should rely upon a careful balancing of the private interests at stake with a view to protecting the essence of the rights from being destroyed.'[44] Under such a test, even 'bright-line' legislation in principle could be upheld. However,

> exceptions (…) should be allowed where, in the circumstances of the case, the rigid application of such a rule could lead to irreparable harm or to the destruction of the essence of one party's rights.[45]

In this case, the lack of any alternative for Ms. Evans to have a child that would be genetically hers meant that her interests should be 'allowed to override the interest of the other party.'[46]

These, then, are two diametrically opposed views, not only with regard to the substance of Ms. Evans' claim, but also on the appropriate role for the Court itself. Such clashes of opinion are not all that rare at the European Court. What is peculiar about *Evans*, however, is that the dissenters were seen arguing vigorously

[41] Ibid., para. 65.
[42] Ibid., para. 65.
[43] Ibid., (Joint Dissenting Opinion), para. 3.
[44] Ibid., para. 6.
[45] Ibid., para. 9.
[46] Ibid., para. 9.

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for a position that is normally occupied by majority opinions, while the majority in this case went against important trends in the Court's case-law.

The Dissent argued for *ad hoc* judicial balancing in individual cases, carried out, if need be, by the European Court itself. Such highly particularized decision-making is typical for the Court, which often presents its own task as one involving a fresh appraisal of all circumstances of the case, in spite of the 'margin of appreciation' accorded to national authorities.

The majority's position, by contrast, is essentially formalist. Often invoked pejoratively, the term formalism is used here merely to designate the view that justice and fairness do not necessarily require maximally contextualized decision-making in each individual instance, or, more specifically, that the interpretation of the requirements of Convention rights legitimately may be, at least to some extent, closed-off to 'all elements considered' reasoning.[47]

As argued above, formalism in this sense clearly is not a dominant feature of the Court's case-law. It is not, however, entirely new either, as the majority's reference to 'several previous occasions', on which individualized, *ad hoc* balancing had not been required, suggests.[48] A brief description of one of these cases may serve to illustrate the issues. *Pretty* v. *The United Kingdom* concerned the application of a law banning assisted suicide.[49] The applicant, Ms. Diane Pretty, maintained that being a terminally ill but mentally competent adult, she was not a member of the class of vulnerable individuals for whom the law had been written and that therefore the ban could not be applied in her specific case without violating her right to respect for her private life. In a unanimous judgment, the Court accepted the applicant's argument that she was outside the 'category of the vulnerable'. However, as many terminally ill individuals *would* be vulnerable, 'the vulnerability of the class' could provide the rationale for the legislation in question.[50]

Both the application of a rule to someone admittedly not part of the 'class' of individuals for whom it was written (as in *Pretty*) as well as the application of a

[47] There are about as many definitions of 'formalism' as there are authors. *See* for an overview, M. Stone, 'Formalism', in Coleman (ed.), *supra* n. 15, p. 170 and onwards. A common theme to many of the definitions espoused is the idea that formalism entails the application of legal norms without regard for all surrounding circumstances and underlying policies. *See* for a recent example the description offered by Lary Alexander and Frederick Schauer, who use the term 'formalism' 'in just the sense of treating legal prohibitions as at least partially opaque to all-things-considered morality'. L. Alexander and F. Schauer, 'Law's Limited Domain Confronts Morality's Universal Empire', *Legal Studies Research Paper* No. 07-44 (University of San Diego, 2006) <http://ssrn.com/abstract=900254>, 29 May 2006.

[48] *See* Evans, para. 65.

[49] ECtHR 29 April 2002, *Pretty* v. *The United Kingdom* (Appl. No. 2346/02), Reports of Judgments and Decisions 2002-III.

[50] Ibid., para. 74.

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rule without regard to the possible presence of strong countervailing interests (as in *Evans*, and in *Odièvre*,[51] the second case cited by the majority) are typical manifestations of a 'formalist' approach to adjudication. Formalist approaches often are defended through appeals to (formal) ideals such as equality, legal certainty and the integrity and coherence of the law. Such appeals are visible in *Evans*, in those passages where the majority refers to the danger of arbitrariness and inconsistency.[52] They could be seen earlier in *Pretty* as well, as in that case the Court found that a decision creating an exception for the case of the applicant 'could not, either in theory or practice, be framed in such a way as to prevent application in later cases.'[53]

Evans arguably goes further than *Pretty*, and possibly any other earlier decision of the Court, in acknowledging an explicitly positive role for formalist decision-making, rather than merely invoking the approach in order to limit potential negative consequences of alternative modes of reasoning. So, for example, while in *Pretty*, formalism-related ideals were invoked merely negatively, in an argument against the creation of an exception to the established rule, the Court in *Evans* drew specific attention to the *positive* benefits of having a clear and fixed legislative rule in a 'highly sensitive field'.[54]

This newly acknowledged positive dimension brings with it a specific new concept to designate legislative provisions that may offer the claimed benefits – the notion of a 'bright-line rule'.[55] This term was suggested to the Court in the arguments of the United Kingdom government, who in turn, based them on the judgment of Lord Griffiths in the House of Lords case of *Attorney General* v. *Observer Ltd.* (No. 2) of 1988.[56]

[51] ECtHR 13 Feb. 2003, *Odièvre* v. *France* (Appl. No. 42326/98), Reports of Judgments and Decisions 2003-III. The case of *Odièvre* v. *France* was similar to *Evans* in that the case was presented as involving a conflict between two elements of the right to respect for private life; a child's right to obtain information about her origins, and a mother's right not to have her identity revealed. ECtHR *Odièvre*, para. 44 (described as a 'conflict of interests'). The applicable French legislation did not allow for any balancing of interests, but granted absolute priority – 'blind preference' in the words of the Joint Dissenting Opinion – to the right of women to give birth anonymously. ECtHR *Odièvre* (Joint Dissenting Opinion), para. 7. The majority concluded that in setting-up a system that guaranteed unconditional anonymity to mothers but that allowed children to obtain some measure of non-identifying information, the French legislation had sought to 'strike a balance and ensure a sufficient proportion between the competing interests' in a way that fell within the margin of appreciation accorded to it under the Convention. ECtHR *Odièvre*, para. 49.

[52] *See* Evans, para. 65.

[53] ECtHR *Pretty*, para. 75 and 77.

[54] *See* Evans, para. 65.

[55] *See* Evans, para. 65, 68; Evans (Joint Dissenting Opinion), para. 1 and 8.

[56] UKHL *AG* v. *Observer Ltd (No. 2),* [1990] 1 AC 109, at 269.

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The European Court has referred to 'absolute' rules[57] or to the 'strict application' of rules[58] on earlier occasions. Here, for the first time, the judges chose to refer systematically to the new notion of a 'bright-line' rule.[59] This would suggest that, for them, the quality of 'bright-line' had a special significance. This impression is confirmed by the – unsubstantiated – affirmation in the dissenting opinion that 'bright-line legislation is exceptional in the European context and, therefore, must be strictly scrutinized by the Court'.[60] It is not clear, however, what this special significance entailed for the judges. It would appear that for the majority, the 'bright-line' quality of a rule referred to not only substantive rigidity of application, but also to perceived rigidity of form. A rigid rule not widely seen as such could hardly be said to contribute to maintaining 'public confidence in the law in a highly sensitive field'.[61] This, however, raises questions such as whether a rule with several clearly formulated exceptions still could qualify as a 'bright-line' rule.

This ambiguity surrounding the meaning of the term 'bright-line rule' is potentially problematic, for at least two reasons. First, it seems that the concept may not be easily transplantable. There apparently is no readily available German or Italian equivalent, to name two large Convention jurisdictions. The official French translation offered by the Court was '*règle intangible*'. This concept, however, seems to be concerned more with the intrinsic substantive importance of a provision than with its formal rule-like qualities. Second, study of the reception of Convention case-law in member states shows that national authorities have always been extraordinary quick in adopting the European Court's decisional rhetoric. The concept of 'balancing' itself forms a prime example. The Court had only just established this principle as a key Convention notion, when national governmental or judicial decisions of the widest variety started to be presented in Strasbourg as having 'struck a balance'.[62] It seems likely that it will not be long before governments will start defending strict legislation as 'bright-line' rules, with reference to *Evans*.

[57] *See* for example, ECtHR *Sunday Times*, para. 65

[58] *See* for example, ECtHR 28 Oct. 1998, *Perez de Rada Cavanilles* v. *Spain* (Appl. No. 28090/95), Reports of Judgments and Decisions 1998-VIII, para. 59.

[59] By way of contrast: The concept figures regularly in Judgments from the United States Supreme Court (*see* for a recent example: USSC 22 March 2006, *Georgia* v. *Randolph*, 546 US ___ (2006) (not yet published)) and from the Supreme Court of Canada (*see* for example: SCC 14 Nov. 2003, *National Trust Co.* v. *H & R Block Canada Inc.* [2003] 3 S.C.R. 160).

[60] *See* Evans (Joint Dissenting Opinion), para. 9.

[61] *See* Evans, para. 65.

[62] *See* for example: ECtHR *Sunday Times*, para. 65.

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Conclusion

Evans is novel and interesting, both at the level of the structure of rights and at the level of rights discourse. On the structural level, it provides an acute example of the difficulties involved in conflicts of rights: difficulties that are only beginning to be analyzed and understood.[63] Beyond this deep structural level, the case offers an interesting perspective on the role of rights discourse. Relatively new terms as incommensurability and 'bright-line' rule are used to help the court reach a decision, or more precisely to relieve the court from engaging in the difficult exercise of adjudicating on an extraordinarily difficult case that they perceive as a constitutional dilemma.

Apart from what it contains with regard to these two separate levels of analysis – structure and discourse – the case of *Evans* is ultimately also interesting precisely because of the links it exposes between the two. It seems that if the same structural issue had been presented in a case from another jurisdiction, for example France or Germany, the Court's reasoning would have looked very different. Both the discussion of the problem of incommensurability and the key concept of a 'bright-line' rule, are, after all, developed under heavy guidance from within the English legal order.

This guidance from the Court of Appeal and the United Kingdom's pleadings comes in the form of two deferential doctrines to complement the Court's traditional 'margin of appreciation': incommensurability and formalism. Each of these moves places considerable pressure on the role of the balancing metaphor in the solution of rights cases.

With regard to incommensurability, we have argued that the courts' references should be understood against the background of a judicial perception that the case of *Evans* is somehow different from 'ordinary' rights cases in which balancing plays a predominant role. To capture this distinction, we have offered the concept of 'dilemmas', as distinguished from hard cases involving not only disagreement, but also a deadlock. The European Court openly acknowledged the tragic and dilemmatic nature of the case but it is unclear whether that language was used merely to show empathy *vis-à-vis* Ms Evans or to underline the fact that this was a special case that needed to be dealt with in a different way than the conventional proportionality approach. We think such a more technical understanding is important if the overall legitimacy of the balancing metaphor is not to implode.

While incommensurability, unless tightly demarcated, could threaten the very foundations of the Court's standard balancing approach, the formalism impli-

[63] In the UK the literature on conflicts of rights is fairly limited, although it seems to be a topic of growing interest. *See* for example Helen Fenwick, 'Clashing Rights, the Welfare of the Child and the Human Rights Act', 67 *Modern Law Review* (2004) p. 889-927.

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cated in the Court's positive evaluation of 'bright-line' legislation and its refusal to balance *ad hoc* the opposing interests of the parties, may present a more deferential complement to standard rights adjudication under the Convention. It may be too early to tell, but the Court's citation of the relatively recent cases of *Pretty* and *Odièvre* as authority could point to a new trend in Strasbourg case-law.[64]

Ultimately, the decisions in *Evans* leave many questions unanswered. It should not be forgotten, for example, that, to reach a decision on the dilemma in this case, it sufficed to rely on the existing legislation, which was exceptionally clear-cut. What if, however, a comparable dilemma was raised by a jurisdiction that has no legislative framework? Would the Court be prepared to go back to the balancing rhetoric or would it simply follow whatever decision the national court reached?

There is of course still the possibility that the case may be just a 'one off' and that the Court may not be prepared to build on the notions introduced. However, the mere fact that the ECtHR's Grand Chamber has now been asked to pronounce itself on the case means that the decisions will remain in the spotlight for some time to come and that the issues are sure to receive renewed attention from the Court.[65] To what extent the reference is also indicative of a broader sense of unease over methodology and approach in Strasbourg remains to be seen. We do believe, however, that it is important to say more about all these issues, which is why this article hopes to contribute to a reflection about a new discourse of rights.

[64] The Court's Grand Chamber Judgment in the case of *Zdanoka* v. *Latvia*, delivered a week after the decision in *Evans*, would seem to confirm this trend. With regard to an absolute statutory prohibition in the field of election law, the Grand Chamber found that '[t]he requirement for "individualization", that is the necessity of the supervision by the domestic judicial authorities of the proportionality of the impugned statutory restriction in view of the specific features of each and every case, is not a pre-condition of the measure's compatibility with the Convention'. ECtHR (Grand Chamber) 16 March 2006, *Zdanoka* v. *Latvia* (Appl. No. 58278/00), not yet published.

[65] Questions of methodology and general approach may actually be likely to receive considerable attention at the Grand Chamber given the fact that judicial disagreement over the desired *substantive outcome* in *Evans* has, thus far, been actually rather limited: the High Court, the Court of Appeal and five (of the seven) judges at the ECtHR's Fourth Chamber all agreed that the applicant's substantive claim should be dismissed. This may be contrasted with the situation in the *Nachmani* case, cited above.

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