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Dignity, rights and the comparative method

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DIGNITY, RIGHTS, AND THE COMPARATIVE METHOD

Christopher McCrudden

Introduction

In this chapter, I single out for more extensive discussion one of the constitutional challenges that Rogers Smith and Richard Beeman identify in their *Introduction* to this volume: what should the purposes of a constitution be (Smith and Beeman, 2015, xx)? It is well known that one answer to this, an answer that post World War II constitution makers have increasingly given, is that their constitutions should reflect and incorporate the fundamental values of their society, often in the form of constitutional rights.

I have suggested in a previous article that there is also a growing trend to understand these constitutional rights as designed to secure a fundamental meta-principle, frequently framed as ‘human dignity’ (McCrudden, 2008). Though this feature of modern global constitutionalism can reasonably be seen as, at least in part, deriving from the duty of government to secure natural rights, such as those instantiated in late 18th and early 19th Century European and American constitutions, the growth of dignity-talk in the modern era has an additional, more diverse range of sources. These include Catholic traditions, Social-Democratic thought, and reactions against the horrors of the Second World War (McCrudden, 2013). In this respect, I suggested that we may be seeing a degree of convergence in world constitutionalism and in the interpretation of human rights. I argued, however, that the rhetoric of human dignity is far more widely shared than are understandings of what tasks and limits dignity actually sets for governments.

In this article, I try to make further sense of the role that dignity plays by considering in more detail how the emergence of dignity coincides with two other common phenomena in rights interpretation: the use of the comparative method, and the slow collapse of the distinction between international human rights and constitutional rights. The crux of my argument is that we need to incorporate into our

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normative understanding of rights in modern constitutions these three features of human rights discourse: the close interrelationship between constitutional and human rights; the extensive use of experience from other jurisdictions in the development and interpretation of constitutional and human rights norms; and the resort to 'human dignity' as an overall justificatory meta-principle. I shall suggest that there is something about the phenomenon of comparison and borrowing in human rights discourse that tells us something fundamental about the different ways in which we view the nature of 'human rights' and 'human dignity', about where they have come from, and (possibly) what their trajectory is, and therefore something important about modern constitutional development.

Before seeing how they combine together, however, we need to examine, in somewhat more detail, the comparative method, and the slow merging of international and constitutional rights, beginning with the latter.

International and constitutional rights

The distinction that some have sought to emphasize between 'constitutional' rights and 'human' rights has become fuzzy and indistinct, at least in those jurisdictions that enacted their constitutional rights protections after World War II (which is the bulk of states). Since 1945, 'domestic constitutional orders [are] shaped in part by demands that state reconstruction be negotiated within a framework that recognizes and implements particular forms of the range of available transnational human rights' (Klug, 2005, 93). At least in these states, it is clearly envisaged that the first port of call, as it were, for effective implementation of international human rights norms is to be at the domestic level. In several human rights treaties, such as the International Covenant on Civil and Political Rights (Article 2), there are provisions that require the ratifying state to implement the treaty effectively in the country's domestic law. Also, whilst some human rights treaties provide for independent international supervisory mechanisms and procedures for ruling on complaints, as a general rule those complaining that their rights have been violated must have exhausted domestic remedies before being able to complain successfully.

Increasingly, too, in several jurisdictions, courts have regard to international legal norms that have not even passed the test of formal validity for that legal system (McCrudden, 2014). That is, even courts in dualist systems are having regard to the treaty norms where the treaty is not 'incorporated' into domestic law. There are several different ways in which this may happen. There may be a requirement in that legal system that the courts should presume that the executive and/or the legislature did not intend to act contrary to legal obligations that bind that state in international law. This is often important in influencing the interpretation that is given to domestic legal requirements. Where, for example, more than one interpretation is possible, the interpretation is adopted which would enable that state to remain in conformity with its international legal obligations. Even more radically, some courts in some jurisdictions use international obligations in domestic litigation when the state has neither incorporated that norm, nor even ratified the treaty concerned. Some courts have taken the existence of these norms as evidence of customary international law. Others go even further, regarding the existence of the treaty norm as being relevant for the interpretation of national constitutional principles, in particular domestic Bills of Rights.

This subtle change in the relationship between constitutional rights and international human rights has percolated into some recent accounts of human rights by philosophers. Unlike Raz and Rawls, Charles Beitz sets out in detail the 'most important features of [human rights] practice' (Beitz, 2009, 13) and, unlike Raz and Rawls, he does not seek radically to distinguish the domestic practice of rights creation and interpretation from the global practice of human rights. 'The discursive community in which the practice resides,' he writes (Beitz, 2009, 8, emphasis added), 'consists of a heterogeneous group of agents, including the governments of states, international organizations, participants in the processes of international law, *economic actors such as business firms, members of nongovernmental organizations, and participants in domestic and transnational political networks and social movements.*' He quotes, with approval, Sally Merry's observation that '[i]nstead of viewing human rights as a form of global law that imposes rules, it is better imagined as a cultural practice, as a means of producing new cultural understandings and actions' (Beitz, 2009, 38, quoting Merry, 2009). Note, too, that the international dimension is softened: what Raz identified as a key feature of what

can count as a human right as that which ‘justify[es] international intervention’ if it is violated (Raz, 2010a, xxx) becomes Beitz’s ‘object of legitimate international concern’ (Beitz, 2009, 137).

Comparative method

One of the methods used in identifying and interpreting human rights norms is comparison, to which we now turn. In an article published some fifteen years ago (McCrudden, 2000), I argued that it was then commonplace in several jurisdictions for judges to refer to the decisions of the courts of foreign jurisdictions when interpreting domestic human rights guarantees, but that there had also been a persistent undercurrent of scepticism about this trend, and the emergence of a growing debate about its appropriateness. The article raised for debate the meaning and significance of national judges’ citation of judgments from other jurisdictions as part of their reasoning in cases with a significant human (or constitutional) rights aspect. Several questions were identified and explored in an attempt to consider various aspects of the general phenomenon. These included empirical questions (how far does it happen, and where?), jurisprudential questions (can we identify criteria that help explain why it does or does not happen?), and normative questions (is it legitimate?). After a review of the existing literature was undertaken with a view to determining how far scholars had succeeded in answering these questions, the article concluded that significant gaps existed in our understanding of the phenomenon and raised for discussion the methodologies that might be appropriate for addressing the phenomenon in the future.

Since then, the phenomenon of judicial borrowing has continued apace and the use by Justices of the United States Supreme Court of foreign jurisprudence in several high-profile cases has further intensified the debate (particularly in the United States) (McCrudden, 2007b). Due in particular to extensive research in the area, we now have a lot more information about global use of comparisons in the human and constitutional rights context than was available at the end of the last century.

Quite a lot of this further research concerns the issue of *judicial* borrowing, unsurprisingly. Numerous examples have been uncovered where the courts in one

jurisdiction have examined and cited the approaches adopted in a different jurisdiction, with a view to considering how the foreign approach might help in deciding the case before it. Increasingly, we can see the development in some jurisdictions of a view that international human rights provisions illustrate a set of shared values, and that it is part of the function of the national judiciary to put flesh on the bones of these provisions; to take part, in effect, in a common interpretative enterprise with judges in other jurisdictions. As one author has put it, some courts have 'construed human rights as part of an international public policy,' the expression of a 'higher law' thinking (Francioni, 1997, 32).

More recently, however (and significantly because of recent historical and political science research on human rights), we are now much more aware of the extensive nature of borrowing in *non-judicial* human and constitutional rights contexts, both historically and currently. At the national level, we see the use of comparison in the development of different systems of fundamental or constitutional or human rights, in particular from the perspective of the drafters of constitutional type documents like Bills of Rights. There are some prime examples to draw on, such as Germany, Ireland, the United States, and India, which illustrate how the drafting of modern constitutions drew extensively on comparison even at a time when there was no clearly articulated international human rights document.

At the international level, the use of comparison in the drafting of international human rights treaties, such as the European Convention on Human Rights and the UN Covenants, is now well known. The use of comparison in the development of customary international human rights law has also been extensively considered. Comparison is also used extensively in the interpretation of international and regional human rights texts by authoritative bodies. This may involve not only the use of domestic comparisons by international and regional bodies, but also the use of comparisons by one body of other international and regional bodies. For example, the Inter American Court of Human Rights now regularly cites the jurisprudence of the European Court of Human Rights, and *vice versa* (McCrudden, 2013b). Human rights activists such as NGOs also extensively use comparisons transnationally (McCrudden, 2015a). So too, other major

social actors use comparisons extensively, in particular in the context of the development of ‘non-state’ law, such as in developing codes of corporate practice.

I am not particularly concerned in this paper to document more extensively than this my claim that the popularity of the comparative method in the drafting and interpretation of constitutional rights is a significant part of human rights discourse, at least outside the United States.¹ To do this systematically would require much greater space than I have available for current purposes. I have no doubt, however, that it is possible to provide extensive evidence that this trend is both sufficiently significant and widespread for it to be regarded as part of current human rights practice. The issue I am interested in exploring is what, if anything, this phenomenon says about the nature of human rights.

My focus in this paper, in contrast to the recent analysis of Jeremy Waldron (2012), is: (a) to address the normative role of the use of comparison primarily as a *human and constitutional rights issue* rather than the use of the borrowing in other areas of law and policy more generally; (b) to consider the normative implications of the use of comparison *generally*, including in the political identification of constitutional rights, rather than primarily in the judicial context; and (c) to focus on the use of borrowing globally, rather than primarily in the United States context. This focus is adopted because I am interested in exploring the implications of the use of the comparative method for, and in particular the normativity of the comparative method in, *human rights theory*, rather than *jurisprudential theory*.

Descriptive versus normative methodologies for understanding human rights

How are we to determine what ‘human rights’ are? Several different methodologies have been proposed to answer that question. One approach to the question is

¹ To American readers, claims that these aspects have become important elements of human rights discourse may be greeted with some skepticism. After all, the relationship between constitutional rights and international human rights in United States law has long been somewhat distant both in theory and in practice, and the use of comparative methodology in the interpretation of United States federal constitutional rights is highly controversial. I do not want here to enter into the debate about American exceptionalism, or about trends in American constitutional practice; suffice it to say that all I want to suggest for the purposes of this paper is that readers should not reject my claims about what constitutes ‘human rights practice’, based on US constitutional practice – how United States practice fits within human rights theory is for another day.

descriptive; the other is normative (although the distinction is perhaps questionable). A descriptive approach attempts to answer the question by describing, for example, how the term has come to be used historically, and how it may have changed over time. The development of human rights thinking in Western thought has moved through various phases. In the 18th Century the view of human rights involved limited government, with negative duties against the state, and concentrated on liberty rights and, particularly, property rights. It was essentially a pessimistic view of the state, and an optimistic view of the individual: if left alone, the individual would flourish. In the 19th Century, came the rise of political and civil rights, with the emphasis being placed on civic participation and formal equality between citizens; the state was something which growing numbers saw themselves as having the right to exercise a degree of control over, and human rights thinking was closely associated with democratic thinking. In the 20th Century, we see the growth of social and economic rights, which depend on government for their realization; human rights moves from essentially being concerned with negative rights, to embracing positive rights; government has the role of protecting people from misfortune and guaranteeing a degree of distributive justice. Later still, we have the growth of further generations of rights, particularly those concerned with the environment, and with minorities as such.

Another type of 'descriptive' approach to the issue of how best to understand human rights, is that which lawyers often adopt. We say that human rights are those rights designated as such by law, whether domestic law, or international law. So, to the question, 'what are human rights?', one response is to say: look at the Universal Declaration of Human Rights, or look at the International Covenant on Civil and Political Rights, or look at the German Basic Law. The way to avoid getting into the deeper theoretical problems is to retreat to the texts. There are, however, at least two problems with this approach. The first is that the apparent consensus surrounding the international texts is largely illusory, even at the level of formal commitment. It wasn't until 1992 that the United States ratified the International Covenant on Civil and Political Rights 1966, for example, and only then after depositing an extensive array of reservations and declarations essentially limiting its obligations to those already recognized in United States federal constitutional law. More problematic still, the texts

are so open ended, and drafted at such a level of generality, that the really hard questions of interpretation are not at all clearly addressed, and we must (either explicitly or implicitly) adopt a theoretical approach to the meaning of human rights in order to interpret them.

The alternative to ‘descriptive’ approaches (if, indeed, they are simply descriptive) is to adopt a more explicitly ‘normative’ approach to the idea of human rights. By this I mean that there is some attempt to reason through to the position that a particular claim is a human rights claim from a moral or ethical position. In the 17th and 18th Centuries, advocates of rights derived them from God, or from what was ‘natural’. In our own day, there has been no shortage of moral or ethical explanations of the normative underpinnings of human rights, but little consensus.

The familiar story is that when the Universal Declaration of Human Rights was being drafted in 1948, the participants were able to agree on what they were against, but not on *why* they were against these violations. Since the 1970s at least, the human rights enterprise has become both more powerful and more controversial, legally, politically, and ethically, and this absence of a clear agreement on the foundations has threatened to undermine the project. As practical use of concrete rights proceeds, nagging questions about foundations come to the surface and beg for further discussion. Some have argued that human rights derive from the concept of ‘equal concern and respect,’ some from notions of distributive justice, some from ideas of what is necessary to satisfy basic social needs, and some from ‘human dignity’, with the last emerging as a global front-runner (for the moment, at least).

Human rights theory

In this paper, I am concerned to explore the implications of the three features of human rights practice I have identified (comparison, the merging of constitutional and human rights, and resort to ‘dignity’) for attempts to develop a normative theory of human rights. But what should such a theory consist of? Joseph Raz (2010a) has identified the task of a theory of human rights, which seems generally convincing. It is, he says, ‘(a) to establish the essential features which contemporary human rights practice attributes to

the rights it acknowledges to be human rights; and (b) to identify the moral standards which qualify anything to be so acknowledged' (Raz, 2010a, 327). I shall proceed on the basis of this general approach.

Comparative method revisited

We can return now to think a little more about the role of the comparative method in this context. When judicial practice is set alongside non-judicial practice in human rights identification and interpretation, a complex pattern emerges. I shall be able to do little more than sketch what appears to me to be the outlines of this pattern, leaving the evidence needed to justify this outline to be taken on trust in the interests of space and time. The evidence seems to me to indicate clearly a significant use of the comparative method, but one in which the *reasons* for the comparative method being adopted are varied in the extreme.

Such information as we now have discussing the broader political contexts in which such comparisons take place show how significantly the use of the comparative method may vary over time and place. One example must suffice. After the fall of the Berlin Wall, we saw a developing global 'market' in liberal ideologies, where states competed with each other to try to influence how far their own particular liberalism won out over other competing liberalisms. With the fall of the Soviet Union, liberal constitutionalism was the only game in town, and the main question was which version would emerge as dominant. There was a significant development in what might be called 'human rights tourism' (which I admit to taking part in), where different countries and organisations sent representatives to emerging democracies to sell 'their' brand of human rights protection. Is this use of the comparative method similar to the use of the comparative method in the construction of the Irish Constitution in 1922 or 1937? Or the use of the comparative method in the drawing up of the EU Charter of Fundamental Rights? Or the use of the comparative method in Cuba when Castro was embarking on a new Constitution? Or the use of the comparative method by the judges of the European Court of Human Rights compared to the use of that method by the judges of the United States Supreme Court?

We should distinguish initially between two different ways in which the comparative method is related to the normativity of human rights. We can identify the comparative method as normative in the sense that when, for example, a court interpreting the meaning of some human rights provision thinks that it should look to how other courts have interpreted this right, then the comparative method may become what James Griffin (2010, 351) identifies as part of the rule of recognition by which human rights are recognized legally. Waldron (2010, 55) also sees ‘no particular reason ... that modern [legal] positivism, defined in terms of the tools and methodology of Hart’s [positivistic] jurisprudence, should preclude the idea of *ius gentium*, defined as positive law’. Although he tackles this issue in a more detailed and sophisticated manner, this is, essentially, what Waldron is concerned to explore in much of his book on judicial borrowing from other jurisdictions and his primary concern, therefore, is what may make foreign law normatively relevant in this sense in the judicial context.

When Raz identifies the task of a theory of human rights as including the identification of the ‘moral standards which qualify anything to be so acknowledged,’ I understand him not to be interested in identifying normative elements in human rights practice in this ‘rule of recognition’ sense (*legal* normativity), but rather in identifying what moral standards provide good reasons for anything being identified as a human right, independently of being included as law within the rule of recognition. Can we say that the comparative method provides a good *moral* reason for identifying a particular norm or value as a human right in the political sphere, or in the context of drafting a new Bill of Rights, for example? This second way of considering the normativity of a human rights comparative method is my primary focus in this paper.

The two ways of considering the issue of normativity may be linked, of course, where ‘legal normativity’ incorporates considerations of ‘moral normativity.’ One of Waldron’s concerns (Waldron, 2010, 35) is to explore how far that is so, concluding (*a la* Ronald Dworkin) that ‘*ius gentium* consists of a body of *principles*, discerned interpretively from the commonalities that exist among the positive laws of various countries, by a legal sensibility that is both lawyerly and moralized’ (emphasis in original). Waldron’s argument, therefore, raises some of the philosophical issues explored below, but primarily in so far as they are relevant in determining the legal normativity in the

judicial context, and in the context of the use of comparative method generally, not in the human rights context specifically. The modesty of his primary arguments in support of transnational judicial borrowing (that we should learn from others, and that like cases should be treated alike) is explainable, perhaps, by his attempt to generate normative reasons to justify the use of the comparative across all legal categories, and not just human rights. This imposes significant limits, therefore, on how far Waldron can help us identify the normative role of the comparative method in the human rights context specifically, and in the making of human rights as well as in their interpretation.

Charles Beitz's The Idea of Human Rights

Other philosophers are more helpful in this regard. Although Charles Beitz does not, specifically, address the role of the comparative method, it is not particularly challenging to see how it would fit within his account. We have seen earlier that, in his discussion of the 'normativity' of human rights (in the second sense identified above), Beitz (2009, 137) develops a schema for justifying claims about the contents of human rights doctrine, including the contention that the interest should be such that a failure by a state to protect it 'would be a suitable object of international concern.' Importantly, he suggests that to be seen to be such, 'the account should not depend exclusively on beliefs and norms that are specific to a single culture or way of life' (Beitz, 137). In an important passage, he indicates (Beitz, 2009, 137-8) that this requirement that the beliefs and norms transcend the parochial can be satisfied in several ways:

'For example, some interests are sufficiently generic that it would be reasonable to expect anyone to recognize their importance (e.g. the interests in physical security and adequate nutrition). In other cases, although the interest when specifically described might not be widely shared, it may be able to be brought under a more abstract description that enables its importance to be recognized even by those who do not share it (e.g. "being able to follow one's religion"). In still other cases, the importance of the interest may be derivative: for example, it may be that under contingent but currently prevalent historical circumstances, the satisfaction of the interest would be instrumental to the satisfaction of other interests already identified as important (e.g. perhaps, interests in political participation or in the nondiscriminatory application of the law).'

In each of these ways of satisfying the requirement that the interest is not simply a parochial one, the comparative method is likely to be well to the fore. A potentially extensive comparative practice therefore seems to well with Beitz, but it requires not insignificant variations of Beitz's model for it to be able to be as fully integrated as our earlier description of human rights borrowing indicates that it should.

Juridical and political paradigms

First, Beitz draws too sharp a line between what he calls a 'juridical paradigm of implementation' of human rights and a 'political' paradigm (Beitz, 2009, 41). The former is said to be characterized by two features: an 'aspiration for juridical human rights institutions at the global level', and an 'expectation that to the extent possible individual states would carry out their obligations under human rights agreements by incorporating human rights protections in their constitutions and laws on the model of a "bill of rights"' (Beitz, 2009, 41). Most 'international and transnational efforts to promote and defend human rights are more accurately understood as political rather than legal', in this sense, according to Beitz.

There are two problems with this. The first is that Beitz, as most political philosophers appear to do, focuses essentially on a United Nations human rights paradigm, rather than one that encompasses the regional arrangements, which in many countries are considerably more important in practice and fit much more closely his juridical paradigm's second feature. The second, more important, problem is that the bodies acting under his juridical paradigm demonstrate many of the same features as those acting under Beitz's political paradigm. In particular, (juridical) human rights supply reasons for action not only to other legal actors, but also 'to other kinds of agents as well, frequently acting without specific legal authority' (see McCrudden and O'Leary, 2013, on the role of the Venice Commission, and McCrudden, 2007c, on the role of the OSCE High Commissioner on National Minorities). Beitz's account needs to be modified in this respect because without such a change the different roles that the comparative method plays in different contexts (including the legal and judicial) will be insufficiently appreciated.

Intersubjectivity

Beitz appears, secondly, to place insufficient weight on the extent to which global human rights practice draws, and continues to draw, from bottom-up social movements fighting to have their own and others interests recognized as worthy of inclusion as an object of international concern (Raz, 2010a, 41). Such movements use the banner of human rights as a portmanteau moral basis for their specific claims. They seek to use human rights as a moral umbrella to strengthen the normative weight of a specific claimed right, hence their desire to be seen as part of a human rights movement. Beitz's description of human rights practice, despite his explicit denial that this is so, appears too statist to fully encompass this dimension.

My concern in this regard is heightened by Beitz's statement that, 'human rights do not appear as a fundamental moral category,' as such. Rather, he suggests, we should seek explanations of the normativity of human rights in each particular human right. 'The reasons we have to care about them vary with the content of the right in question and the nature of our relationship, if any, with various classes of potential victims of abuse' (Beitz, 2009, 128). This seems to me not to capture adequately the moral connections between those norms that we consider human rights.

Beitz himself appears to accept that what holds human rights practice together is the idea that the interests encompassed by human rights are ones 'intersubjectively recognizable as [sufficiently] important or urgent' (Beitz, 2009, 139) to become 'a suitable object of international concern,' (Beitz, 2009, 140) but does not follow the logic of this intuition sufficiently far. Beitz is clear that he rejects the idea that human rights should be interpreted as 'deriving their authority from a single, more basic value or interest such as those of human dignity, personhood, or membership' (Beitz, 2009, 128), but while we can agree that they may not 'derive their *authority*' from such values as dignity, that does not mean that dignity (or some other value) is not in some way centrally *involved* in human rights practice (including the making of constitutional rights), and not just in the context of particular individual human rights, which is as far as Beitz is willing to accept may be the case (Beitz, 2009, 138 fn 10).

For an approach that appears to recognize more clearly the extent to which the category of human rights may have greater normative coherence than Beitz is willing to accept, we can turn to James Griffin. Griffin argues that we need to get beyond a purely functional approach to our understanding of what human rights are, such as that which hangs over Beitz (and even more Raz and Rawls). For Griffin, 'we need to know how to attach moral weight' to rights' (Griffin, 2010, 341). We must 'have a sufficiently rich understanding of the value that rights represent ...' (Griffin, 2010, 341). For Griffin 'a rich understanding of the dignity, or worth of the human person' is required. He asks, rhetorically: 'Do not human rights have their own intrinsically valuable purpose: the protection of human dignity? What more point do human rights need than that?' The second rhetorical question goes too far (we need an understanding of human rights practice as well, I think). We do not need to transcend a functional approach entirely in order to incorporate his insight. My suggestion is that Beitz's 'practical' approach should be supplemented by greater attention to the idea of intersubjectivity in our understanding of how human rights practice works *in practice*.

Human dignity as meta-principle

How does this produce a richer description of human rights practice? A useful framing for the inclusion of intersubjectivity as an element in the practice of human rights is suggested by the work of Lynn Hunt (2007). Hunt's argument is that the spread of human rights thinking depends on the increasing incorporation of others within a circle of 'empathy' (Hunt, 2007, 27). One of the ways in which claims of empathy were successfully made in the past was by appealing to universalistic rights language. '[R]ights questions,' according to Hunt (2007, 147), 'revealed a tendency to cascade,' and escape their original confines, leading to claims from a variety of individuals who came from groups previously outside the circle of empathy, such as slaves. But Hunt does not fully explain how the move from empathy to legal rights protection took place.

One suggestion, with support from recent work by Jürgen Habermas (2010), is that 'dignity' may provide the language in which empathy is conceptualized. Habermas' argument is, essentially, that human dignity provided the mechanism for bringing

universalistic moral ideas into the nation state. '[U]niversalistic moral notions,' he writes, 'have long since gained entry into the human and civil rights of democratic constitutions through the ... idea of human dignity' (Habermas, 2010, 479). He describes the 'catalytic role' (Habermas, 2010, 466) of the concept of human dignity in developing human rights as we currently understand them. Human dignity served as a 'conceptual hinge' (Habermas, 2010, 469) that made possible the 'improbable synthesis' (Habermas, 2010, 470) between, on the one hand, a morality of equal respect and, on the other hand, individually enforceable rights established by law, and a 'portal' (Habermas, 2010, 469) through which it could be achieved. This is essentially a functional explanation but one that is able to incorporate the moral dimension on which actors within human rights practice heavily rely.

Michael Ignatieff's approach (1999) is helpful at this point. He sees human rights as part of 'the argument about what we can, and cannot, should and should not do to other human beings.' In calling for an end to 'rights inflation', he urges the adoption of a minimalism based on 'the ground we share'. This has, in the past, been based on the intuitions that derive from our own experiences, and our capacity (which he terms a 'natural fact[] about human beings') to empathize with others: 'we possess the faculty of imagining the pain and degradation done to other human beings as if it were our own.' This 'secular' defence of human rights is based, then, 'on practical historical experience and a minimalist anthropology.' What the substance of this 'common ground' may be is likely to change over time, with the possibility that what we consider unacceptable will become acceptable, and vice versa. Our 'agreed ends' are thus, potentially at least, in constant flux and depend on historical experience interacting with our capacity for empathy, leading us to articulate a moral principle that some act is or is not acceptable, is or is not required, so far as other human beings are concerned. We might, and some do, describe the end sought as achieving the dignity of human beings, with what that requires being in a state of flux.

'Dignity' and the comparative method

Ignatieff's argument is particularly useful in helping us to identify how comparison becomes potentially relevant at three different stages: at the stage of identifying 'practical historical experience'; at the stage of testing and developing our intuitions of empathy; and at the stage of determining whether (and how far) rights are an appropriate way of delivering the required end of protecting and fulfilling human dignity. This is not to say that the rights (or dignity) *depend* on legal or political recognition; on the contrary (and here they share a similarity with older ideas of natural rights) they 'provide an independent standard or measure for judging the success or legitimacy' of any particular political society (Baynes, 2009, 372).

We are repeatedly told in human rights practice that dignity provides a good moral reason for identifying a standard as a human right (and many actors in human rights practice appear to believe this), but we know that 'dignity' is extraordinarily vague and indeterminate. Those who are committed to this position may be able to identify a basic minimum core to the idea but deriving any particular standards or principles or rights in any particular context is subject to considerable debate and dispute (McCrudden, 2008). The comparative method now enters the picture, in helping those actors in human rights practice to identify how this basic minimum core may be understood, both over time and in other contemporary societies. Essentially what is happening here is the use of an inductive method, based on experience, as a way of understanding the contemporary idea of the use of dignity, and of human rights.

The limits of 'agreement-based' theory

We need to be careful, however, not to slip into an agreement-based theory of human rights. David Hollenbach (2013), for example, uses an inductive method to identify where there appears to be a consensus, and then wants to rely on that consensus as a basis for arguing that this provides grounds for generating a normative obligation to further that consensus. This is similar to approaches that have sought to find ways of resolving fundamental political disputes by searching for an 'overlapping consensus' among the disputing parties. I do *not* suggest that this is primarily what is happening when comparison is resorted to in human rights practice.

Nor is it desirable normatively. The idea of an ‘overlapping consensus’, most clearly identified with John Rawls (although not in the international human rights context), has come in for convincing criticism, much of which need not detain us here. In so far as Hollenbach’s strategy does share a family resemblance with Rawls, it is subject to similar criticisms, particularly if one sees consensus as fully formed and not open to further development or refinement. Baynes objects to any approach that ‘seeks to gain wide support by looking for an empirical or de facto consensus on rights among the dominant traditions’ (Baynes, 2010, 377). This strategy, Baynes argues, ‘is not likely to succeed as there is no guarantee that such a consensus exists or that its content would be especially compelling ...’ For Baynes, an agreement-based approach also ‘reflects a compromise to existing political powers.’² Why would a given consensus be seen as a powerful basis for deciding what dignity requires, given that there may be a sexist consensus or a homophobic consensus, and we would not think that this should generate the norms required by dignity? But if we say we should only take into account ‘enlightened’ opinion, is that not assuming the very concept we are seeking to identify?

Paolo Carozza (2013) is also sceptical of a consensus approach in the sense identified. He accepts that it has operated to some degree in the past. He considers, for example, that the practical or overlapping consensus method that Jacques Maritain advocated in drafting the Universal Declaration of Human Rights was highly successful in many ways. He queries, however, whether we can follow the same path today, relying on a practical consensus around human rights to achieve similarly positive results. Constructing the human rights project solely on the grounds of a practical overlapping consensus, he argues, has contributed to several serious problems over six decades: problems of institutional weakness, problems of non-compliance, problems of ideological capture, the masking of fundamental differences, and heavy bureaucratization and proceduralization. All of these, he believes, are, in one way or another, related to the original structure of the discourse. In this, he appears to agree with Beitz that

² Baynes attributes these problems to Ignatieff. I disagree, however, with Baynes’s reading of Ignatieff on this point. When discussing Rawls, Baynes distinguishes between ‘what is feasible given human nature as we know it’ from a ‘compromise with existing power relations,’ but the former as accurately describes Ignatieff as it does Rawls; both rely, to that extent, on a minimal anthropology.

'[a]ctual agreement is, in general, too strong a condition to impose on critical standards, and therefore on human rights' (Beitz, 2009, 87).

Comparative method and human rights theory

That said, we can usefully distinguish a requirement of *substantive* moral agreement on dignity or rights from a *methodological* agreement on how to discuss our substantive moral disagreements on rights and dignity. The comparative method plays an important *methodological* role in the construction and interpretation of rights, as a descriptive matter. But it does more than that; it also appears to play an important normative role as well. If it has become a central part of human and constitutional rights practice, this is because it forms part of an emerging overlapping *methodological* consensus on the identification and interpretation of human rights, whether that is at the stage of constitutional drafting, or human rights interpretation and political debate. When we combine this practice with other, predominantly functional approaches to the determination of human rights, such as the role of dignity, we are close to being able to identify an overlapping consensus on *method*, even when the consensus on substance seems further away than ever.

There are several functions that the comparative method appears to serve in human rights practice, none of them unproblematic. We can say, uncontroversially, that one of the central, and abiding issues in discussions about human rights is the continual tension between the universal and the local. Comparison in the human rights context seems to play an intriguing role in dealing with this tension. On the one hand, comparison recognizes the local because it is dependent on a concept of the 'foreign', the 'other', and this seems to play into a way of thinking about human rights that emphasizes the state-based nature of where the drama of human rights is played out. On the other hand, the assumption of comparison is also that there is something sufficiently similar in the phenomenon of rights protection in different countries for the comparison to be at least relevant, appearing to strengthen a more universalistic view of rights. Comparison thus seems to play a deeply ambiguous role in the discourse of human rights, one that is linked closely to both universality and localism. At the moment

this ambiguity is a strength not a weakness because it provides a bridge for both to be considered.

An integrated theory of human rights and constitutional rights must also explain another central feature of human rights practice, namely the extent to which rights are balanced against other rights (e.g. freedom of religion *versus* equality) and against other values (e.g. due process *versus* national security). I suggested at the end of a previous book (McCrudden, 2007a, 617), quoting Ignatieff (2003, 95), that we should ‘stop thinking of human rights as trumps and begin thinking of them as a language that creates the basis for deliberation’, and that the role of human rights is to ‘reconcile moral ends to concrete situations and [in doing so] to make painful compromises not only between means and ends, but between ends themselves’ (Ignatieff, 2003, 22). There are significantly differing ways and means by which deliberation is conducted, and compromises are made, but they all depend on the contenting parties being willing to engage with each other.

Another possible good of the comparative method in this context, therefore, might be to keep ‘agonists’³ in conversation with each other, rather than to supply technical directions about how conflicting values and rights are to be accommodated (as may also be the case with ‘dignity’, Siegel, 2013). Observing the structure of struggle around the comparative method, we might argue that a conversation amongst agonists involves a common fidelity to the comparative method, even as they profoundly disagree about its entailments and about the forms of human flourishing they may prefer. So, on that view, the virtue of the comparative method is not that it provides answers but that it may create the conditions for the task of trying to look for an answer to, or at least an accommodation of, conflicting values and rights. Whether the comparative method in practice serves this integrative function, whether it actually does do any work in terms of helping us keep in respectful conversation, is a question of empirical judgment.

Finally, we may seek to rely on a strategy of incorporating the comparative method if, as Carozza (2013) argues, we understand that in the original human rights project its use was not meant to be an end point, but was intended only to be the

³ ‘Agonists’ refers, in brief, to those who are sceptical about the likelihood that politics can surmount the most basic societal divisions, and that the principal issue is how to manage such divisions.

starting point for a reasoned reflection and dialogue about the requirements of justice and the protection of the human. Carozza suggests, and I agree, that human rights theory needs to incorporate an understanding that human rights practice involves fundamental reflections on human experience that go to the origin of our understanding of our own humanity. Such reflection is all the more important because at least some involved in human rights practice consider that there is something irreducible about the human person that cannot be fully captured. This means that there is always going to be a need for discussion, the likelihood of disagreement, and a certain under-determination. The very nature of what we are talking about – the human person – means that we should never presume to be able to specify human dignity (or human rights) beyond contestation. The comparative method invites openness to the posing of the question of what it is to be human in our public and communal discourse, and a method for structuring that discussion.

Conclusion

In conclusion, I have suggested that to achieve an understanding of the nature of human rights practice we need to keep in mind three features of human rights discourse that are well-documented empirically. The first is the past and present interrelationship between constitutional rights at the domestic level, and human rights at the international and regional levels. The second is the past and present popularity of comparative methodology in identifying and interpreting both domestic constitutional rights and international human rights. The third is the extensive use of 'human dignity' in order to explain why human rights are important. Understanding these three elements in human rights practice in combination is important if we are to grasp the extent to which the identification and interpretation of human rights globally, and constitutional interpretation of constitutional rights nationally, is converging and diverging.

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