

PRELIMINARY DRAFT:

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**Transnational interactions and the making of constitutional rights:  
Implications for human rights theory?**

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*Recent attempts to achieve an understanding of the nature of human rights based in political philosophy have tended to ignore or downplay two 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. What, if any, difference would it make to the recent political philosophy debates on the foundations of human rights if these elements of human rights discourse (particularly the second) were more widely appreciated?*

*Introduction*

In an article published in the *Oxford Journal of Legal Studies* in 2000,<sup>1</sup> 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

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<sup>1</sup> Christopher McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights,' (2000) 20(4) *Oxford Journal of Legal Studies* 499-532.

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.

#### *Trends in human rights comparative method*

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). 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 internationally 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.<sup>2</sup>

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,

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<sup>2</sup> Francesco Francioni, ‘The Jurisprudence of International Human Rights Enforcement: Reflections on the Italian Experience,’ in Benedetto Conforti and Francesco Francioni (eds), *Enforcing International Human Rights in Domestic Courts* (Martinus Nijhoff, 1997), 15 at 32.

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 also 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 also 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. Comparisons are also extensively used transnationally in the human rights context, by human rights activists such as NGOs. 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.<sup>3</sup> To do this systematically will 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

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<sup>3</sup> 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.

widespread for it to be regarded as part of current human rights discourse. The issue I am interested in exploring is what, if anything, these phenomena say about the nature of human rights, viewed philosophically?

### *Jeremy Waldron's analysis*

Jeremy Waldron has just published what might justifiably be considered the first full-length monographic treatment of *judicial* borrowing from a *jurisprudential* perspective.<sup>4</sup> In a characteristically well-written and ambitious argument, Waldron is concerned to address the issue of the use of foreign law in American courts. He considers, rightly, that the judicial use of foreign law says much about the way in which law develops and is interpreted in courts. His concern is to develop an appropriate *jurisprudential* response to, and justification of, the phenomenon of judicial use. His argument is, briefly, that the foreign law used in the judicial setting constitutes *ius gentium*, positive law grounded in an emerging global consensus. When courts apply this *ius gentium*, they are applying legal principles that supplement their national legal rules.

There are several elements of the book that distinguish our separate projects. He mentions, but does not really address, the role of foreign experience in the legislative and the broader political contexts (including the making of constitutional rights). Although, in places, Waldron hints at its general political application,<sup>5</sup> he does not discuss at all systematically the use of the comparative method in the political or non-judicial legal contexts as an application of the *ius gentium*. He simply does not address the issue, confining his argument to the judicial context. This may have something to do with the relatively modest implications of his thesis even for courts; it appears that Waldron wants to argue only that the *ius gentium* is legally relevant, constituting legal authority, not a set of legally binding rules.<sup>6</sup> Courts may (legitimately) take it into account, but there is no obligation on them to do so. It is a legitimate method for them to adopt for two broad principal reasons: because courts can learn

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<sup>4</sup> Jeremy Waldron, *'Partly Laws Common to All Mankind': Foreign Law in American Courts* (Yale U P, 2012). The book is an extensively revised version of his Storrs Lectures.

<sup>5</sup> Waldron, p. 28: 'The law of nations represents a sort of overlap between the positive laws of particular states, something they have in common. And the idea is that it has a claim on us by virtue of that commonality.' It is unclear who the 'us' is in this context?

<sup>6</sup> Waldron, p. 62.

from other courts ‘when they address questions which are the same or similar’ (particularly in terms of the judicial techniques that may be used to solve problems<sup>7</sup>), and because ‘there may be some virtue in sheer consistency across the decisions of different courts, even for courts belonging to different jurisdictions.’<sup>8</sup>

His identification of the *ius gentium* as a set of legal principles means that other actors *may* take them into account as well, in the same way that we expect domestic legal principles to be applied generally, and not just by the judiciary. But Waldron does not appear to consider this issue either interesting or controversial except in the judicial context, presumably because he sees what may legitimately be taken into account in the political sphere as much broader in any event. The use of comparison in the drafting of constitutions, for example, is simply a matter of a mixture of pragmatism and resort to ‘universal *moral* ideals’.<sup>9</sup>

There are several other aspects of Waldron’s book that help distinguish his project from mine. Waldron mentions, but does not primarily concern himself with the phenomenon of judicial borrowing outside the United States, restricting himself to some rather limited (and questionable) assertions about its popularity and the lack of controversy surrounding it. Waldron is also concerned to develop a general theory that applies to the use of foreign law in American courts *generally*, and not only in the context of human and constitutional rights, although he regards the use of foreign law in these contexts as one of the principal recent examples of such use. His concern is to develop a theory of law, and not a theory of human rights.<sup>10</sup>

All of this is fascinating, controversial, and deserves to be addressed in its own right. This is not the place for a full-length review of Waldron’s book, but my preliminary view is that even in terms of fulfilling his own conception of his project, the approach he takes is fundamentally flawed. In order to understand the phenomenon of judicial borrowing in the United States, I suggest he should have concentrated explicitly on such uses in the constitutional and human rights context, rather than seeing borrowing in this context as part of a wider phenomenon of borrowing generally –

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<sup>7</sup> Waldron, p. 93: ‘we stand to gain in terms of our acquisition and manipulation of specifically legal knowledge, knowledge of legal analysis’.

<sup>8</sup> Waldron, p. 76.

<sup>9</sup> Waldron, p. 32.

<sup>10</sup> Waldron, p. 22.

human rights borrowing seems to me *sui generis*. He should also have set the judicial phenomenon of human rights borrowing in the broader context of human rights borrowing generally (including in the political spheres of activity), seeing them as more intimately linked. And he should have set the American experience in a broader *global* context of human rights comparative approaches; ironically (for a book concerned to promote comparative approaches), the book is remarkably thin in its comparative analysis of the phenomenon.

In any event my project differs significantly from Waldron's stated project. My aim in this paper is both narrower in some respects, and broader in others. In contrast to Waldron, my focus in this paper 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*.

Because of my different focus, I am therefore concerned to engage with a somewhat different scholarly literature than Waldon. The crux of my argument is that, in the main, recent political philosophers have not attempted systematically to incorporate into their explanations these two features of human rights discourse (namely the interrelationship between constitutional and human rights, and the extensive use of experience from other jurisdictions in the development and interpretation of constitutional and human rights norms). My broader question is whether 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', about where it has come from, and (possibly) what their trajectory is. If so, how should these features of human rights discourse lead to a reformulation of the emerging political philosophy of human rights? What difference would it make to the recent *political philosophy* debates on the

foundations human rights if these elements of human rights discourse were more widely appreciated by political philosophers?

*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 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 18<sup>th</sup> 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 19<sup>th</sup> 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 20<sup>th</sup> 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, 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 17<sup>th</sup> and 18<sup>th</sup> 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.<sup>11</sup> 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

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<sup>11</sup> Cp Jacques Maritain, writing in the Introduction to a symposium held by UNESCO in 1948:

'It is related that at one of the meetings of a Unesco National Commission where Human Rights were being discussed, someone expressed astonishment that certain champions of violently opposed ideologies had agreed on a list of those rights. "Yes", they said, "we agree about the rights *but on condition that no one asks us why.*" That "why" is where the argument begins.'

The report is available at: <http://unesdoc.unesco.org/images/0015/001550/155042eb.pdf>.

to satisfy basic social needs, and some from ‘human dignity’, with the last emerging as a global front-runner (for the moment, at least).

In this paper, I am concerned to explore the implications of the two features of human rights discourse mentioned earlier for attempts to develop a normative theory of human rights. But what should such a theory consist of? Joseph Raz has identified the task of a theory of human rights, which seems generally convincing.<sup>12</sup> 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.’<sup>13</sup> I shall proceed on the basis of this general approach, but each of two critical terms in Raz’s explanation are problematic and need further discussion.

#### *What constitutes ‘human rights practice’?*

Turning to the first limb of Raz’s test, what is ‘contemporary human rights practice’? The importance of this question should not be underestimated, nor the difficulty in pinning down its meaning.

Its importance derives from its central place in the structure of determining the foundations of human rights for ‘political’ theories of human rights. Based on an initial sketch by John Rawls in *The Law of Peoples*,<sup>14</sup> a central (and very attractive) concern that ‘political’ conceptions of human rights share is an attempt to develop a normative theory of human rights that is in tune with ‘human rights practice’. Although it is never very clear how far this desire extends, human rights practice seems to encompass, at least, the central aspects of how human rights have developed over time, and particularly the fact that human rights is often thought of as a development of international practice governing relations between states.

Unlike those human rights theorists considered to be ‘naturalistic’,<sup>15</sup> the political understanding does not derive the meaning or authority of human rights directly from

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<sup>12</sup> Joseph Raz, Human Rights without Foundations, in Samantha Besson and John Tasioulas, *The Philosophy of International Law* (Oxford UP, 2010), chapter 15, 321.

<sup>13</sup> Raz, at 327.

<sup>14</sup> John Rawls, *The Law of Peoples*, Harvard U P, 1999.

<sup>15</sup> ‘Naturalistic’ approaches (or ‘orthodox’ or ‘traditional’, depending on the author) involve attempts to identify a particular norm or value from which human rights are derived, and which therefore limit their

some objective ‘deeper order of values.’<sup>16</sup> Unlike those who base their understanding of human rights on agreement,<sup>17</sup> human rights norms are regarded as serving ‘as much to frame disagreement as agreement.’<sup>18</sup> Instead, in a ‘political’ conception of human rights, human rights are seen as a ‘political doctrine constructed to play a certain role in global political life.’<sup>19</sup> We should ‘frame our understanding of the idea of human rights by identifying the roles this idea plays within a discursive practice.’<sup>20</sup> It is, essentially, a functional account.

Raz himself (and Rawls, who earlier adopted a somewhat similar approach, also focusing on ‘human rights practice’) is anything but forthcoming with respect to how the details of that ‘discursive practice’ beyond those already mentioned are to be identified. However, it is important to distinguish three different, if overlapping, dimensions of human rights practice, which I take to be uncontroversial: the political, legal, and judicial dimensions. By this I mean that human rights can be engaged at the level of political principle and political practice separate from legal and judicial principle and practice. Lawyers have a tendency, perhaps, to think of human rights as predominantly legal in form, which others find frustrating and unhelpful because so much human rights practice takes place largely outside the context of law and judicial adjudication (think of the initial role of human rights in the OSCE), or at what might be called the pre-legal stage (think

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scope and application. These approaches concentrate on the core idea of human rights as those rights that individuals have simply in virtue of their humanity, and attempt to explain and identify what the features of the human person are that generate these rights. We might say, for example, that human rights are derived from the idea of ‘human dignity’. Naturalistic approaches may be either metaphysical or non-metaphysical. Taking the example of ‘human dignity’, some argue that the concept of dignity depends on a metaphysical understanding of the human in relation to a deity, for example in the idea of the human person being made in the image of God. But there are also non-metaphysical understandings of ‘human dignity’ that are nevertheless ‘naturalistic’, where the dignity of the person is seen to derive from an understanding of what it means to be human, based on our observations of human experience.

<sup>16</sup> Beitz, p. 7.

<sup>17</sup> ‘Agreement-based’ understanding of human rights, focuses instead on human rights being derived from some degree of consensus or common view of what human rights are, seeing international human rights, for example, as properly reflecting the core, or basic minimum of that agreement. Hollenbach, for example, suggests that there are essentially two choices: a deductive approach, in which reasoning works from the more general to the more specific (characteristic of ‘naturalistic’ approaches), and (his own preference) an inductive approach in which reasoning works the other way, moving from specific observations to broader generalizations and theories, paying attention to what diverse communities think about how persons should be treated and seeking to determine where agreement may be possible across communities. This involves reasoned reflection on the experience of what it is to be human, and in particular reasoned reflection on what happens when these factors are denied.

<sup>18</sup> Beitz, p. 9

<sup>19</sup> Beitz, p. 49

<sup>20</sup> Beitz, p. 102

of political debates in Australia over whether to have a Bill of Rights), or as an alternative to law and litigation (think of the role of human rights in the development of business principles by Kofi Annan). So, too, we should distinguish clearly within the legal dimension between judicial and non-judicial approaches to legal rights. I would regard the drafting and enactment of a Bill of Rights as clearly involving legal issues, but seldom as directly involving issues of judicial adjudication, which normally occurs after drafting and enactment.

All of this is pretty obvious and, I hope, uncontroversial. Other dimensions of what constitutes 'human rights practice' are more problematic. For example, so far, I have not distinguished between 'constitutional' and 'human' rights in trying to identify 'human rights practice', for example. For Rawls, this would be a major category error: 'human rights' should be distinguished from other types of rights. '[S]ome think of human rights,' he wrote, 'as roughly the same rights that citizens have in a reasonable constitutional democratic regime; this view simply expands the class of human rights to include all the rights that liberal governments guarantee.'<sup>21</sup> For Rawls, however, 'human rights in the Law of Peoples,' by contrast, 'express a special class of urgent rights, such as freedom from slavery and serfdom, liberty (but not equal liberty) of conscience, and security of ethnic groups from mass murder and genocide.' For Rawls, human rights, are 'distinct from constitutional rights, or from the rights of liberal democratic citizenship, or from other rights that belong to certain kinds of political institutions, both individualist and associationist.'<sup>22</sup>

We can now see more clearly the relationship between the content of human rights and their function. One of the roles of human rights, in this sense, is that, when a state accords these human rights, this is 'sufficient to exclude justified and forceful intervention by other people, for example, by diplomatic and economic sanctions, or in grave cases by military force.'<sup>23</sup> Raz has a similar idea in mind. Raz argues that international human rights are best seen as setting the (very limited) conditions under which international intervention in another state (otherwise unjustified) would be

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<sup>21</sup> Rawls, p. 78.

<sup>22</sup> Rawls, p. 79-80.

<sup>23</sup> Rawls, p. 80.

justified to prevent action by a state against those on the territory of that state, including its own citizens.

In making this argument, Rawls makes two different moves that need to be distinguished. First, he makes a distinction between 'urgent' rights, such as the right to be free from slavery, and 'liberal democratic' rights, such as the right to a free and fair election process. An equivalent distinction is well known in human rights legal practice: international lawyers distinguish between a narrower category of *jus cogens* human rights norms, and other international human rights norms, for example. Second, Rawls labels the first type of norms 'human rights' norms, and denies this label to the others, which is a more puzzling move. This denial of the label of 'human rights' to the second set of norms does not accord with the human rights *practice* that Rawls sought to capture, which would call such democratic norms 'human rights' without much, if any, hesitation.

Indeed, it is increasingly the case, I suggest, that the distinction that Rawls 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'.<sup>24</sup> 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 there are provisions that require the ratifying state to implement the treaty effectively in the country's domestic law.<sup>25</sup> Also, whilst some human rights treaties provide for independent international supervisory mechanisms and procedures for ruling on complaints, as a general rule those complaining 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. That is, courts in dualist systems are having regard to the treaty norms even where the treaty

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<sup>24</sup> Heinz Klug, 'Transnational Human Rights: Exploring the Persistence and Globalization of Human Rights, (2005) 1 *Annual Review of Law and Social Science* 85, p. 93.

<sup>25</sup> E.g. ICCPR, article 2.

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.

Important though this clarification to the meaning of ‘human rights’ is (that we should regard human rights as including aspects of domestic constitutional rights protection), we are still left with a significant issue: what is human rights ‘*practice*’? Again, neither Raz nor Rawls appear to consider this in any detail. I take a ‘practice’, in the sense used here, to involve ‘the customary, habitual, or expected procedure or way of doing of something’.<sup>26</sup> This is itself a fairly vague definition but at least it seems to indicate that central to the idea of a ‘practice’ is a repetition of a way of doing something that is more than simply coincidentally connected to the ‘something’ that is being done. There is clearly no necessity, under this definition, for the procedure or ‘way of doing’ to be required in all cases, merely that it be pretty regularly observed. Nor is there any sense that those doing the ‘something’ have to feel under an obligation to undertake the procedure or ‘way of doing’ the something.

*Is the comparative method part of ‘human rights practice’?*

Defined in this way, is the comparative method part of ‘human rights practice’? Waldron has engaged with this issue in his book, if somewhat obliquely. Recollect that his argument is that the foreign law used in the judicial setting constitutes *ius gentium*,

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<sup>26</sup> OED.

positive law grounded in an emerging global consensus. He distinguishes between this *ius gentium* and what he terms the 'retail' use of the comparative method, where it is used occasionally and where it is not seen as part of a system. Whilst recognizing that the *ius gentium* is emerging, incomplete, and geographically scattered, Waldron nevertheless considers that there is sufficient evidence for a system of transnational borrowing to be identified.

I am less sanguine than Waldron on this point. Remember that the evidence that Waldron presents is anything but systematic, and almost entirely neglects non-judicial actors. When the judicial use in a limited set of countries is set alongside non-judicial practice, then a more complex pattern emerges. I shall be able to do nothing 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 (supporting Waldron to that extent), 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? Clearly not.

In each of these cases, to use Waldron's metaphor, we see more than simply a 'retail' use of the method, but we seldom perceive the method being used for similar functions. But if a similar method is used for vastly different purposes, can we really say that the use of the method constitutes a 'system'? To change the metaphor somewhat, is the comparative method any more of a method common to human rights practice writ large than, say, reading or writing? We need, I suggest, a considerably more detailed typology of the uses of the comparative method in the human or constitutional rights context than Waldron provides, and a greater clarification of what 'human rights practice' actually involves than Rawls or Raz provides before we can say with any confidence that the comparative method is a central part of 'human rights practice'.

*'Moral standards': normativity and comparative method*

Let us say, for the sake of argument, that the comparative method is a central part of 'human rights practice' in the sense of constituting part of a system. The rest of my discussion proceeds on this assumption. The interesting question, then, is what the role of the comparative method is in the context of the second limb of Raz's test: does the comparative method play a role in identifying the moral standards which qualify anything to be acknowledged as a human right? What, then, is the *normative* role of the comparative method, if any?

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 (echoing HLA Hart) identifies as part of the rule of recognition by which human rights are recognized legally.<sup>27</sup> Although he tackles this

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<sup>27</sup> James Griffin, 'Human Rights and the Autonomy of International Law,' in Samantha Besson and John Tasioulas, *The Philosophy of International Law* (Oxford UP, 2010), chapter 16, 339, at p. 351. Waldron also sees 'no particular reason ... that modern positivism, defined in terms of the tools and methodology of Hart's jurisprudence, should preclude the idea of *ius gentium*, defined as positive law', at p. 55.

issue in a more detailed and sophisticated manner, this is, essentially, what Waldron is also concerned to explore, and much of his book, therefore, concerns 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,’ and one of Waldron’s concerns is to explore how far that is so, concluding (*a la* Ronald Dworkin) that in the context of *ius gentium* it does.<sup>28</sup> 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 (I’ve argued above that I think this is a mistake). 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.

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<sup>28</sup> Waldron, p. 35: ‘I believe 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).

### *Political theories and comparative practice*

There are several problematic aspects of Rawls' and Raz's accounts, but the feature of their human rights analysis that is most problematic, I think, is the extent to which their accounts render almost unarguable as extensive a role for comparative methodology in the development of human rights norms as we assumed to be occurring. This is due to their view that human rights are justified, essentially, only in so far as they justify *international intervention*. That would seem to leave only a very narrow role for the comparative method, one which current practice clearly goes well beyond. Raz also appears to focus on human rights as operating in the context where international intervention would be justified, whereas human rights practice has long since ceased to operate, if it ever did, under this constraint. Griffin is surely right, however, that 'the point of human rights' go beyond Rawls' idea of human rights as merely establishing 'rules of war and conditions for justified intervention.'<sup>29</sup> For Griffin, human rights 'quite obviously have point intra-nationally.'

### *Charles Beitz's The Idea of Human Rights*

A much more convincing 'political' account of human rights is provided by Charles Beitz's in his recent book.<sup>30</sup> He argues that human rights 'are the constitutive norms of a *global practice* whose aim is to protect individuals against threats to their most important interests arising from the acts and omissions of their governments (including failures to regulate the conduct of other agents).' He continues: 'The *practice* seeks to achieve this aim by bringing these aspects of the domestic conduct of governments within the scope of legitimate international concern.'<sup>31</sup> Echoing Rawls and Raz, human rights practice is more than a simple description, since it has 'a certain authority in guiding our thinking about the nature of human rights.'<sup>32</sup>

Unlike Raz and Rawls, Beitz sets out in detail the 'most important features of this practice'<sup>33</sup> 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

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<sup>29</sup> Griffin at 343.

<sup>30</sup> Charles Beitz, *The Idea of Human Rights* (Oxford U P, 2009).

<sup>31</sup> Beitz, p. 197 (emphasis added).

<sup>32</sup> Beitz, p. 10.

<sup>33</sup> Beitz, p. 13.

human rights. ‘The discursive community in which the practice resides,’ he writes,<sup>34</sup> ‘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.*’<sup>35</sup> 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.’<sup>36</sup> Note, too, that the international dimension is softened: Raz’s ‘justifying international intervention’ becomes Beitz’s ‘object of legitimate international concern.’

Although 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. In his discussion of the ‘normativity’ of human rights, Beitz 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.’<sup>37</sup> 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.’<sup>38</sup> In an important passage, he indicates that this requirement 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).’<sup>39</sup>

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<sup>34</sup> Beitz, p. 8.

<sup>35</sup> Beitz (emphasis added).

<sup>36</sup> Beitz, ap p. 38, quoting Sally Engle Merry, *Mobilizing for Human Rights: International Law in Domestic Politics* (New York; CUP, 2009), ch 4.

<sup>37</sup> Beitz, p. 137.

<sup>38</sup> Beitz, p. 137.

<sup>39</sup> Beitz, pp. 137-38.

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 fit much better with Beitz than with Raz or Rawls, 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 much too sharp a line between what he calls a 'juridical paradigm of implementation' of human rights and a 'political' paradigm.<sup>40</sup> The former is characterized by two features: 'in its aspiration for juridical human rights institutions at the global level', and 'in its 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."<sup>41</sup> 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 his 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.'<sup>42</sup> Beitz's account needs to be modified in this respect because without such a change the different roles that the

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<sup>40</sup> Beitz, p. 41.

<sup>41</sup> Beitz, p. 41

<sup>42</sup> See Christopher McCrudden and Brendan O'Leary, *Courts and Consociations* (Oxford UP, 2013) (on the role of the Venice Commission); Christopher McCrudden, 'Consociationalism, Equality, and Minorities in the Northern Ireland Bill of Rights Debate: The Role of the OSCE High Commissioner on National Minorities' in J. Morison, K. McEvoy, and G. Anthony (eds) *Judges, Transition and Human Rights* (Oxford UP, 2007) (on the role of the OSCE High Commissioner on National Minorities).

comparative method plays in different contexts (including the legal and judicial) will be insufficiently appreciated.

### *Intersubjectivity*

Second, Beitz appears to me 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.<sup>43</sup> 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.'<sup>44</sup> 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,'<sup>45</sup> to become 'a suitable object of international concern,'<sup>46</sup> 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,'<sup>47</sup> but while we can agree that they may not

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<sup>43</sup> See, e.g., Joseph Raz, 'Human Rights in the Emerging World Order,' (2010) I *Transnational Legal Theory* 31 at 41.

<sup>44</sup> Beitz, p. 128.

<sup>45</sup> Beitz, p. 139.

<sup>46</sup> Beitz, p. 140.

<sup>47</sup> Beitz, p. 128

‘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 in general (including the making of constitutional rights), and not just in the context of particular rights.<sup>48</sup>

Griffin argues that we need to get beyond a purely functional approach to our understanding of what human rights are. For Griffin, ‘we need to know how to attach moral weight’ to rights.<sup>49</sup> We must ‘have a sufficiently rich understanding of the value that rights represent ...’<sup>50</sup> For Griffin ‘a rich understanding of the dignity, or worth of the human person’ would be 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, I think), the first question is important and, in a sense, obvious. But do we need to transcend a functional approach in order to incorporate his insight? I think not. My suggestion is that Beitz’s ‘practical’ approach should be supplemented by greater attention to the idea of intersubjectivity in our understanding of human rights practice.

How would this work in terms of 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 recent work of Lynn Hunt.<sup>51</sup> Hunt’s argument is that the spread of human rights thinking depends on the increasing incorporation of others within a circle of ‘empathy’.<sup>52</sup> 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, ‘revealed a tendency to cascade,’<sup>53</sup> 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.

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<sup>48</sup> Beitz, p. 138 (Beitz accepts that values such as dignity may have a place in an account of the basis of individual human rights, at fn 10.)

<sup>49</sup> Griffin p. 341.

<sup>50</sup> Griffin p. 341.

<sup>51</sup> Lynn Hunt, *Inventing Human Rights: A History* (New York, W. W. Norton, 2007).

<sup>52</sup> Hunt, 27.

<sup>53</sup> Hunt, 147.

One suggestion, with support from recent work by Jürgen Habermas,<sup>54</sup> is that ‘dignity’ may have provided the language in which empathy was 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.’<sup>55</sup> He describes the ‘catalytic role’<sup>56</sup> of the concept of human dignity in developing human rights as we currently understand them. Human dignity served as a ‘conceptual hinge’<sup>57</sup> that made possible the ‘improbable synthesis’<sup>58</sup> between, on the one hand, a morality of equal respect and, on the other hand, individually enforceable rights established by law, and a ‘portal’<sup>59</sup> through which it could be achieved. This is essentially a functional explanation but one that is able to incorporate the moral dimension that actors within human rights practice rely on heavily.

#### *Ignatieff’s minimalism*

Michael Ignatieff’s approach<sup>60</sup> 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

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<sup>54</sup> Jürgen Habermas, ‘The concept of human dignity and the realistic Utopia of human rights,’ *Metaphilosophy* 41(4): 464–80 (2010).

<sup>55</sup> Habermas, 479.

<sup>56</sup> Habermas, 466.

<sup>57</sup> Habermas, 469.

<sup>58</sup> Habermas, 470.

<sup>59</sup> Habermas, 469.

<sup>60</sup> Michael Ignatieff, ‘Human Rights: the midlife crisis,’ *New York Review of Books*, May 20, 1999.

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*

What is the relevance of all this for the use of the comparative method? Ignatieff's argument is particularly useful in helping further to identify that 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 any 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.'<sup>61</sup>

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.<sup>62</sup> 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.

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<sup>61</sup> Kenneth Baynes, 'Towards a political conception of human rights', (2009) 35 *Philosophy and Social Criticism* 371 at 372.

<sup>62</sup> Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights,' (2008) 19(4) *European Journal of International Law* 655.

*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, for example, combines two methodological elements in his proposed account.<sup>63</sup> He favours an inductive rather than a deductive approach, but in addition he attempts to use this 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. It 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.

However, this idea of an 'overlapping consensus', most clearly identified with John Rawls (although not in the human rights context), has come in for convincing criticism, much of which need not detain us here. In so far as the second element of 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'. 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.'<sup>64</sup> 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?

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<sup>63</sup> David Hollenbach, 'Human Dignity: Experience and History, Practical Reason and Faith,' in Christopher McCrudden (ed.), *Understanding Human Dignity* (British Academy/Oxford U P, forthcoming).

<sup>64</sup> Baynes, p. 377. 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.

Paolo Carozza is also sceptical of a consensus approach in the sense identified.<sup>65</sup> Although he considers 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 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 '[a]ctual agreement is, in general, too strong a condition to impose on critical standards, and therefore on human rights.'<sup>66</sup>

#### *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 and the role of proportionality, we are close to being able to identify an overlapping consensus on *method*, even when the consensus on substance seems further away than ever.

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<sup>65</sup> Paolo Carozza, 'Human Rights, Human Dignity, and Human Experience,' in Christopher McCrudden (ed.), *Understanding Human Dignity* (British Academy/Oxford UP, forthcoming).

<sup>66</sup> Beitz, p. 87.

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 a 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 my previous book *Buying Social Justice*,<sup>67</sup> quoting Ignatieff, that we should 'stop thinking of human rights as trumps and begin thinking of them as a language that creates the basis for deliberation',<sup>68</sup> 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'.<sup>69</sup> 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.

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<sup>67</sup> Christopher McCrudden, *Buying Social Justice* (Oxford U P) at 617, quoting Michael Ignatieff, 'Human Rights as Idolatry,' in Michael Ignatieff (Amy Gutman, ed.), *Human Rights in Politics and Idolatry* (Princeton U P, 2003), 53 at 95.

<sup>68</sup> Ignatieff 2003, 95

<sup>69</sup> *ibid.*, 22

Another possible good of the comparative method in this context might be to keep ‘agonists’<sup>70</sup> in conversation with each other, rather than to supply technical directions about how conflicting values and rights are to be accommodated.<sup>71</sup> 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. Others, however, may be more sceptical about the depth or acceptability of any integrative function that the use of the comparative method may serve. It is a question of empirical judgment whether the comparative method actually does do any work in terms of helping us keep in respectful conversation.

Finally, we may seek to rely on a strategy of incorporating the comparative method if, as Carozza argues, we understand that in the original human rights project its use was not meant to be an end point, but was intended instead to be the 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 reflection on human experience that goes to the origin of our understanding of our own humanity. Such a dialogue is all the more important because some involved in that dialogue 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.

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<sup>70</sup> ‘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.

<sup>71</sup> Compare Reva Siegel, ‘Dignity and the Duty to Protect Unborn Life,’ in *Christopher McCrudden (ed), Understanding Human Dignity* (forthcoming), in which Siegel discusses a similar role for the utility of human dignity itself.