

2008

Human Dignity and Judicial Interpretation of Human Rights: A Reply

Paolo G. Carozza

Notre Dame Law School, pcarozza@nd.edu

Follow this and additional works at: https://scholarship.law.nd.edu/law_faculty_scholarship



Part of the [Human Rights Law Commons](#)

Recommended Citation

Paolo G. Carozza, *Human Dignity and Judicial Interpretation of Human Rights: A Reply*, 19 *Eur. J. Int'l L.* 931 (2008).

Available at: https://scholarship.law.nd.edu/law_faculty_scholarship/683

This Response or Comment is brought to you for free and open access by the Publications at NDLScholarship. It has been accepted for inclusion in Journal Articles by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

Human Dignity and Judicial Interpretation of Human Rights: A Reply

Paolo G. Carozza*

COLUMBINE: Pierrot, you work too hard.
You need a rest. Come on out into the garden,
And sing me something sad.

PIERROT: Don't stand so near me!
I am become a socialist. I love
Humanity; but I hate people.¹

Human dignity and human rights are not lived as abstract concepts. They have tangible meaning and weight in the context and crucible of concrete human experience – history, freedom, reason, and community. This gap between universal and particular is the heart of the problem with which Christopher McCrudden's 'Human Dignity and Judicial Interpretation of Human Rights'² wrestles, as well as the fulcrum of the earlier article of mine to which, in part, his work responds.³

The difficulty is of course not unique to the concept of human dignity. It is common to all of the large and general principles involved in the interpretation and adjudication of human rights: for instance, foundational aspirations like equality, justice, and peace;⁴ criteria of limitation such as the necessities of 'a democratic society';⁵ judicial tests of reasonableness or proportionality;⁶ structural principles like subsidiarity⁷ or

* Associate Professor of Law, Notre Dame Law School; President, Inter-American Commission on Human Rights; Visiting Associate Professor of Law and John Harvey Gregory Lecturer on World Organization, Harvard Law School, Spring 2009. For sharing helpful discussions and comments I am grateful to A.J. Bellia, John Finnis, Mary Ann Glendon, Stefania Ninatti, Patti Ogden, Andrea Simoncini, Carter Snead, and Mykola Sorochinsky.

¹ St Vincent Millay, 'Aria da Capo', in *Selected Poems* (ed. J.D. McClatchy, 2003), at 75.

² 19 *EJIL* (2008) 655.

³ Carozza, "'My Friend is a Stranger': The Death Penalty and the Global *Ius Commune* of Human Rights', 81 *Texas L Rev* (2003) 1031.

⁴ See, e.g., Preamble, Universal Declaration of Human Rights (1948).

⁵ See, e.g., Articles 8–11 ECHR.

⁶ See Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (2002).

⁷ See Carozza, 'Subsidiarity as a Structural Principle of International Human Rights Law', 97 *AJIL* (2003) 38.

the common good.⁸ All these concepts have a multiplicity of possible valences and implications which can diverge significantly in context,⁹ and their underdetermined meanings make them susceptible to the risks of substantial manipulation. Still, the concept of dignity does have a pre-eminent place in the collection of ideas and principles applicable in the field of human rights. As McCrudden shows exhaustively, the idea of human dignity serves as the single most widely recognized and invoked basis for grounding the idea of human rights generally,¹⁰ and simultaneously as an exceptionally widespread tool in judicial discourse about the content and scope of specific rights.

1 The *Ius Commune* of Human Rights at Work

Moreover, as McCrudden acknowledges, his survey also confirms one of the main parts of the thesis (mine and others') of an emerging global *ius commune* of human rights: that the concept of human dignity, in virtue of its purchase on universality, serves as a common currency of transnational judicial dialogue and borrowing in matters of human rights.¹¹ That is, however, only one element of the modern, global *ius commune* of human rights, and unless seen in relationship to the other aspects of the *ius commune* can easily be misunderstood or overstated.

On the one hand, careful reading and comparative analysis of a broad range of judicial discourse on a core human rights norm like the right to life in capital punishment cases shows quite clearly that the concept of human dignity serves several purposes. First, it provides one of the principal justifications for courts to take foreign sources of law into account in their decision-making, independently of the constraints of positive law. Human dignity in this way serves as the basis for the 'suprapositivity' of borrowed principles of human rights which Gerald Neuman has identified and described.¹² By

⁸ See Carozza, 'The Universal Common Good and the Authority of International Law', 8 *Logos: A Journal Of Catholic Thought And Culture* (2006) 28.

⁹ Much of the problem which McCrudden grapples with, in fact, can be understood as arising merely out of the fact that fundamental rights operate as principles, not rules, a distinction which Dworkin elaborated decades ago: R. Dworkin, *Taking Rights Seriously* (1978), at 23–28, 71–80. Robert Alexy has explained more recently and more thoroughly many of the implications of understanding fundamental rights as principles, including the need for optimization: see generally R. Alexy, *A Theory of Constitutional Rights* (2002).

¹⁰ One additional important example to add to the many cited by McCrudden is the Universal Declaration of Bioethics and Human Rights, which provides that '[n]othing in this Declaration may be interpreted as implying for any State, group or person any claim to engage in any activity or to perform any act contrary to human rights, fundamental freedoms and human dignity'. In drafting that instrument the UNESCO Secretariat began the process by sending out a questionnaire asking participating states, among other things, which principles were most important to include in the draft declaration. 'Human dignity' was the only one to get 100% support: Snead, 'Assessing the Universal Declaration on Bioethics and Human Rights', 7 *National Catholic Bioethics Quarterly* (2007) 53, at 57–58.

¹¹ Carozza, *supra* note 3. The general conclusions about judicial discourse which are summarized in the following few paragraphs are drawn from the more detailed collection and analysis of judicial decisions in that article.

¹² Neuman, 'Human Rights and Constitutional Rights: Harmony and Dissonance', 55 *Stanford L Rev* (2003) 1863.

appealing to the principle of human dignity, courts establish the basic ground of commonality and comparability of their decisions with those of courts in other jurisdictions, despite whatever other differences may exist in their positive law or political and historical context. It indirectly ‘licenses’, in other words, comparative exercises in constitutional adjudication.¹³ Conversely, when judges make decisions in this area diverging from the decisions of other courts, they often take care to explain why their jurisdiction has particular requirements (of positive law or social necessity, for example) which justify a different outcome in spite of the commonality of human dignity at stake. In both cases, therefore, they reveal a working hypothesis that human dignity justifies reliance on foreign norms and requires a particular justification for departing from foreign models in judicial decision-making. Reliance on the idea of human dignity as a source of justification in this way simply does not make sense unless it is regarded, at least implicitly, as something the meaning and value of which transcend local context and constitute a commonality across the differences of time and place. One could not, for example, justify judicial borrowing by reference to a concept that did not carry normative weight in one’s own epistemic framework – say, importing Islamic understandings of gender relations into United States law by reference to the justificatory value of the *shari’a*.

On the other hand, the global *ius commune* of human rights is very far from merely an expression of the universality of human dignity. Crucially, it has what I have previously described as a ‘symbiotic’ relationship with the *ius proprium* of different jurisdictions.¹⁴ The universal value of human dignity remains in a complex and concrete relationship with the particular positive law of any given, specific legal context, such that ‘it remains informal, flexible and pluralistic in its relationship to local law and culture’.¹⁵ It is not sufficient, therefore, to regard the use of human dignity in human rights adjudication just as an exercise in the ‘universalistic naturalism’ that McCrudden describes and then rightly rejects as utopian optimism. Rather, it is a process of specification, of *determinatio* in the language of the classical natural law tradition – using human reason and freedom to give specific practical expression to more general abstract principles.¹⁶ Crucially, this means that the instantiation can be realized in a variety of different ways, each different from one another but each fully consistent with the general principle. That is the ‘working out of the practical implications of human dignity in varying concrete contexts’¹⁷ to which I refer in my descriptive analysis of global jurisprudence in human rights, and which in McCrudden’s synthesis could be misread to indicate only a process of broadening and deepening a uniform understanding of a universal norm.

¹³ See Tushnet, ‘The Possibilities of Comparative Constitutional Law’, 108 *Yale LJ* (1999) 1225, at 1231–1239 (arguing that comparative analyses constitute cogent legal arguments only when they address constitutional provisions for which the court has ‘licensed’ a policy accepting comparative arguments).

¹⁴ Carozza, *supra* note 3, at 1082–1084.

¹⁵ *Ibid.*, at 1043.

¹⁶ On the meaning and workings of *determinatio* see J. Finnis, *Natural Law and Natural Rights* (1980), at 281–290; George, ‘Natural Law and International Order’, in D. Mapel and T. Nardin (eds), *International Society* (1998), at 54, 62–64.

¹⁷ Carozza, *supra* note 3, at 1082.

In sum, ‘the idea of a new *ius commune* is a metaphor for a complex of human rights norms and legal relationships that combine unity and universality with pluralism and differentiation’.¹⁸ For this reason, it most definitely does not represent a process of ‘identifying the “best” approach with the ultimate aim of securing its universal adoption’.¹⁹ Instead, it is best understood as embodying the value of subsidiarity, with its attendant pluralism, rather than uniformity – this, I argued, is precisely one of the virtues of a *ius commune* approach to global human rights norms.²⁰ McCrudden certainly seems to agree, noting the parallel between what he perceives to be the functioning of human dignity in adjudication and the functioning of the principle of subsidiarity; both, in his estimation, ‘mediate the polarity of pluralism and the common good in a globalized world’.²¹

From this perspective, McCrudden’s analysis largely seems to confirm, in helpful detail, the descriptive accuracy of the *ius commune* thesis. He concedes that the universalism of the concept of human dignity is employed by judges to legitimate and license transnational jurisprudential openness. At the same time he shows that in practice, at least in certain important categories of issues and cases, the specification of the abstract universal principle in concrete legal contexts results in diverse instantiations of the concept of human dignity. His study of law-in-action, beyond the formalities of law on the books or mere judicial discourse, is an excellent example of a good comparative legal scholar’s appreciation of functional analysis and its fruits.

2 From the Core to the Margins of Human Dignity

Beyond those broad similarities of argument, there are nevertheless smaller yet important differences of emphasis between our respective attempts to describe and interpret the data regarding the use of human dignity in the judicial interpretation of human rights. In particular, McCrudden makes two interdependent points regarding (a) ‘a minimum core of the meaning of human dignity’ and (b) the absence of meaningful similarities among the ‘several different conceptions of human dignity’ present in judicial discourse beyond the minimum core.

First, he identifies the core of the idea of human dignity as containing three important ideas: an ontological claim about the intrinsic worth of the human person; a relational claim about how others should treat human persons in view of their inherent value; and a claim regarding the proper role of the state *vis-à-vis* the individual (i.e., that the state exists for the good of persons and not vice-versa). It is worth noting, first, that there are in fact two different but interrelated concepts at work in this idea of human dignity as McCrudden describes it: (a) the ontological claim that all human beings equally have this status, this equal moral worth; and (b) combining the second and third elements of McCrudden’s description, the normative principle that all

¹⁸ *Ibid.*, at 1043.

¹⁹ Contrary to what McCrudden claims to be the aim of my comparative analysis. McCrudden, *supra* note 2, at 696.

²⁰ Carozza, *supra* note 3, at 1085. See more generally Carozza, *supra* note 7.

²¹ McCrudden, *supra* note 2, at 719, quoting Carozza, *supra* note 7, at 38.

human beings are entitled to have this status of equal moral worth respected by others and therefore also have a duty to respect it in all others. One might more precisely refer, therefore, to the 'status and basic principle' of human dignity.²²

McCrudden at first acknowledges that this status and basic principle of human dignity are not merely fatuous or insignificant. Even stated at very high levels of generality and incompleteness, they have served to catalyse political action for human rights and their recognition in positive law. They are widely accepted and employed by judges in interpreting that law. And they are sufficiently robust in substance to challenge and undermine the legitimacy of a wide array of political and economic systems which at different times have wielded power in ways systematically contrary to the good of human persons. Nevertheless, despite this potency McCrudden thereafter seems relatively dismissive of the value of the minimum core content of the status and principle of dignity, referring to it as an 'empty shell'.²³

McCrudden sustains the empty-core thesis here by going on to describe the wide differences in the practical application of the idea of human dignity in various jurisdictions: 'when the concept comes to be applied the appearance of commonality disappears, and human dignity (and with it human rights) is exposed as culturally relative, deeply contingent on local politics and values, resulting in significantly diverging, even conflicting, conceptions'.²⁴ The array of examples he then assembles in support of this assertion is drawn from courts in North America, Europe, and South Africa, and relates to a range of highly contested issues in the adjudication of rights, such as abortion, euthanasia, the distribution of economic and social benefits, hate speech, and pornography. These do without doubt reveal highly variable, and at times mutually incompatible, uses of the language and concepts of human dignity by the different courts surveyed.

Surrounding this reduced appreciation of the minimum core of the status and basic principle of human dignity with the evidence of significant disagreement, McCrudden then proposes at least two possible conclusions, one more ambitious and the other relatively modest. The larger claim is that the gap between minimum core content and wide divergence at the margins exposes judicial dignity-talk as fundamentally a sham. The earlier 'recognition of the fundamental worth of the human person as a fundamental principle to which the positive law should be accountable' is just 'apparent'. The appeal to dignity in fact 'seems to camouflage' manipulability and indeterminacy with a superficially legitimizing (but in fact false and parasitic) claim of universality.²⁵ Acknowledging that his limited set of samples may not be sufficient to sustain that stronger claim, McCrudden then offers also the more restrained one: that 'in the judicial interpretation of human rights there is no common substantive conception of dignity, although there appears to be an acceptance of the concept of dignity'. A corollary

²² I am indebted to John Finnis for helping me to clarify and articulate this point.

²³ McCrudden, *supra* note 2, at 698.

²⁴ *Ibid.*

²⁵ *Ibid.*, at 710. Of course, as implied in the introductory paragraphs, this danger is no less present with respect to a number of other key normative concepts in human rights, such as 'equality' or 'autonomy' – and indeed it is true of the idea of 'human rights' itself.

of his more modest conclusion is that ‘the concept of human dignity has contributed little to developing a consensus on the implications of any of the three basic elements of the minimum core’. In other words, judicial use of ‘dignity’ is not dishonest, perhaps, but it is not particularly helpful either (at least insofar as we do or should seek common understandings of the status and basic principle of human dignity).

McCrudden’s more limited conclusion seems correct, and even his stronger one is sufficiently warranted to be taken quite seriously, provided that both are understood with some important qualifications. To begin with, I believe that McCrudden is a little too quick to declare the minimum core unhelpfully vacuous. As he himself pointed out earlier, relying on Neuman, even the claims contained in the most broad and general statement of the status and basic principle of human dignity have some important traction, and are sufficient to exclude from reasonable consideration many political and social systems that, for instance, engage in gross and systematic violations of the life, liberty, integrity, and equality of their people. In the context of legal systems, the general level of strength and maturity of which have taken human rights debates beyond such uncontested violations of human dignity, this minimum core may not seem terribly useful or significant. But for many, perhaps most, countries of the world the problems of extrajudicial killings, arbitrary detentions, systematic discrimination, disappearances, torture, or unspeakably inhuman prison conditions – to name just a few of the issues that are extremely close to the inviolable core of human dignity – are much more vital to people’s daily struggles and concerns than are (for instance) the legal and ethical dilemmas surrounding the end of life which are made possible only where highly sophisticated and expensive advanced medical care is available. Moreover, even in those countries or regions where such basic violations of human rights would seem to be a thing left behind in some dark past, we should be sober about the possibility for evil inherent in the human heart to be made manifest again. The grim United States experience with torture and degrading treatment in recent years,²⁶ and the Council of Europe’s current need to grapple with wholesale violations of life and physical integrity within its ranks for the first time in its history,²⁷ should be sufficient reminder to us that no human society may consider itself beyond the need to remain vigilant of the minimum core of human dignity. In all of these examples, one key commonality is the extreme vulnerability and dependence of the victims of abuse; those in such situations will gladly cash in whatever protection can be gained from the ‘minimum’, but hard, core of the status and basic principle of human dignity. In sum, then, with regard to the most acute and urgent human rights problems

²⁶ At one point in the ongoing struggles to ensure that US detainees were being treated humanely, George W. Bush noted, “This debate is occurring because of the Supreme Court’s ruling that said that we must conduct ourselves under Common Article III of the Geneva Conventions. And Common Article III says that there will be no outrages upon human dignity. It’s very vague. What does that mean, “outrages upon human dignity.” That’s a statement that is wide open to interpretation’: Press Conference of the President, 15 Sept. 2006.

²⁷ Consider, e.g., the entire series of cases involving violations of the right to life in Chechnya, the most recent of which is App. No. 20755/04, *Akhmadova v. Russia*, ECHR Judgment of 25 Sept. 2008, not yet reported.

worldwide, a judicial (among other actors) reinforcement and consolidation of the content of the minimum core of human dignity is well worth pursuing, even if it is limited to the bare outlines of the three interrelated claims McCrudden identifies.

In addition, perhaps one can go even a couple of steps further than McCrudden allows in describing the content of the minimum core. For instance, he lays out very synthetically and accurately the critical mediating function which the status and basic principle of human dignity played in the negotiation and adoption of the Universal Declaration of Human Rights. Given the agreement on dignity as the most significant pillar of the Universal Declaration's edifice, should we not regard the rest of the Universal Declaration as itself specifying to another degree the content of the more general recognition of the status and basic principle of human dignity?²⁸ Its 30 Articles by themselves still do not give us the specificity necessary to make hard choices about how to balance, say, the right to education or freedom of association against other aspects of the common good (including the rights of others), so the greater detailing of the content of human dignity does not obviate the need for judicial interpretation which reaches beyond the minimum core of the concepts.²⁹ But it does suggest that the minimum core may be a little thicker than McCrudden acknowledges, and accordingly more useful to judicial interpretation and protection of human rights.

Finally, we should not ignore the possibilities of bolstering our understanding of the minimum core of human dignity through serious philosophical reflection on human reality. McCrudden's emphasis on the existence or not of a consensus about its meaning is understandable – he rightly points out that such cross-cultural agreement has always been a part of the 'holy grail' of human rights concepts. As a practical matter, we do and must seek consensus on fundamental principles in order to secure widespread acceptance and effective realization of human rights. That does not mean, however, that consensus is itself the basis for the truth of any assertion of the requirements of human dignity. In other words, even where there is not an international consensus on some aspect of the minimum requirements of human dignity, there may be good reason to affirm its validity; conversely, the existence of an international consensus regarding human dignity is not an infallible sign of its truth. If the 'status' prong of the idea of dignity which McCrudden articulates – the ontological claim that each human being has inherent worth as an individual person – is true, then that dignity exists whether or not there is a consensus about its meaning and content. Where there is disagreement, then, it may well be the case that one of the positions is mistaken. Notwithstanding the mid-sixteenth century Spanish controversy over the rationality of the indigenous people of the New World, they nonetheless *did* have equal human dignity and natural rights; the lack of consensus on the question can hardly be

²⁸ See, e.g., the extended way in which this is achieved by John Finnis, in Finnis, *supra* note 16, at Chap. VIII.

²⁹ When read as an indivisible whole, however, the Universal Declaration may also help to establish some of the boundaries of such specification and balancing, by ensuring that none of the principles are interpreted with complete disregard for the others. Maintaining such a 'practical concordance' of the various principles is a technique used, for instance, by the German Constitutional Court: see D. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (2nd edn., 1997), at 45–46.

said to have destroyed the objective fact of their human nature and the basic requirements of justice that their dignity demanded. Thus Bartolomé de Las Casas was correct in asserting it and demanding its respect; Juan Gines de Sepúlveda was wrong to deny it.³⁰

In some cases, then, the capacities of reason and wisdom, drawn from the dynamics of human experience, can lead us to certain conclusions about dignity independently of majoritarian conventionalism. Indeed, often the protection of dignity is most urgent precisely where a majoritarian conventionalism refuses to recognize the personhood and worth of some class or other of individual human beings, because the *inherent* worth of the human person may be all that one has left, the only thing untouchable by power. None of this discussion is meant to brush aside the difficulty of identifying the requirements of human dignity or the desirability of seeking widespread agreement on the matter.³¹ I merely mean that a minimum *consensus* cannot be the decisive determinant of the minimum *content* of the status and basic principle of human dignity, if dignity is in reality what we claim it to be.

Along with a silent core, McCrudden introduces us to the cacophony of the margins. His descriptive analysis makes the case, beyond any serious doubt, that on a variety of contentious issues the idea of human dignity as used in judicial interpretation across jurisdictions has no identifiably coherent meaning. Focusing on beginning-of-life and end-of-life questions, on the distribution of economic benefits, on the complex and historically-conditioned balancing of expression and equality in different societies, it would be truly astonishing not to find a range of mutually incompatible assertions that one or another outcome is most expressive of the requirements of dignity. It is not self-evident that the same conclusion would be warranted with respect to a broader array of issues less contentious and less profoundly disputed at an ethical and social level than the ones McCrudden draws upon. The incoherence seems far less apparent in cases involving the death penalty, for instance – the example on which my initial *ius commune* thesis was based. The degree to which incoherence is apparent with respect to other questions of human rights that reach beyond the minimum core, but that are comfortably on the near side of the most contentious marginal cases which McCrudden examines, remains an open question unanswered by either McCrudden's work or mine.³²

Moreover, it is not obvious that the existence of intense controversy at the edges of a community of legal discourse necessarily undermines an affirmation of the value and coherence of the status and basic principle of human dignity in the overall system of

³⁰ For a full description and study of the disputation between Las Casas and Sepúlveda see L. Hanke, *All Mankind is One* (1974).

³¹ There are of course intense ongoing debates over the possibility and difficulty of giving greater definite content to the concept of human dignity in the context of bioethics. For one excellent collection of essays attempting to do so, while recognizing the difficulties of any such attempt, see *Human Dignity and Bioethics: Essays Commissioned by the President's Council on Bioethics* (2008), and especially the essays by Adam Schulman and F. Daniel Davis in that volume.

³² McCrudden himself seems to acknowledge this, and leaves the question to future research in the area: McCrudden, *supra* note 2, at 710–712.

law. The value of legal norms often lies in what a legal system takes for granted, and thus what may stand beyond the immediate purview of political and judicial actors, and other participants in and observers of the system. The more effectively a robust core of ideas about human dignity is at work, the less we may notice their coherence, acceptance, and rightness. One should therefore be very careful about making general judgements about the whole of a legal system, or about the overall value of any specific principle within it, primarily by reference to what is occurring at an observable margin.

If we unite this relative narrowing of the scope and significance of controversy at the far margins of the discussion on dignity with the more robust core discussed earlier, then the field of applicability of a substantive transnational dialogue about the requirements of the status and basic principle of human dignity may be substantially wider than McCrudden seems willing to recognize.

3 Trafficking in Human Rights or Dialogue about Human Goods?

In spite of the differences in emphasis outlined in the immediately preceding section, and in light of the convergence of McCrudden's analysis with a full understanding of the idea of the *ius commune* presented in the first part, overall there is much agreement in our respective understandings of the role that the status and basic principle of human dignity play in judicial interpretations of human rights. In particular, we can agree on the existence of a sizable and important gap between the universal idea of human dignity in the abstract and its deployment in the concrete practice of judicial interpretation of human rights. That gap has important implications for judicial practice at the national and transnational levels. For McCrudden, it means turning away from a focus on the substantive meaning and content of the concept(s) of dignity, and instead finding the utility of the idea of human dignity in a process-oriented and institutional analysis of the way dignity is used in human rights adjudication. Although these functional approaches can and do generate helpful insights, McCrudden's own work helps to show why a continued committed engagement in *substantive* dialogue about the status and basic principle of human dignity is indeed indispensable to the future of the global human rights enterprise.

McCrudden identifies three different functions which the status and basic principle of dignity perform in judicial interpretation: justifying particular resolutions of conflicts of otherwise incommensurable values; 'smoothing over' constitutional transitions to international human rights standards by facilitating the adaptation of those universal norms to local context; and justifying the creation of new rights or the extension of existing rights to new circumstances. It is worth noticing that in each case the idea of human dignity is capable of performing the designated function *only* because it appeals to, draws its authority from, and claims to be the bearer of some extra-legal and supra-positive value. It cannot otherwise coherently shift the weight of value toward one of the poles in a conflict between incommensurable values. It cannot otherwise be the mediator between local context and universal norms. It cannot

otherwise justify new or expanded rights not already recognized and contained in the existing positive law.

Of course, it is quite possible in any of these cases that judges *claim* to be appealing to some higher standard by reference to human dignity but in fact are not, and are instead deceiving their interlocutors or even themselves. McCrudden recognizes this possibility and often comes close to affirming its reality – he frequently qualifies the description of judicial uses of the status and basic principle of dignity as merely ‘appearing’ to incorporate a universal principle, for example. But he rightly acknowledges that if it were the case that such appeals to human dignity in fact did not have any objective referents, but instead were merely rhetorical disguises for some other operative criteria of judicial decision-making, the legitimacy of using dignity would be reasonably rejected. Thus McCrudden ultimately backs away from making any firm pronouncement on the point of judicial insincerity, but the question is critical because the very possibility of the rule of law is undermined if the status and basic principle of dignity are only a ‘smokescreen behind which substantive judgments are being made, but unarticulated as such’.³³ This is especially true if we move beyond the use of the concepts of dignity within a single jurisdiction and consider their function in justifying transnational transfers of human rights norms across different courts and contexts. That circulation of human rights norms, by definition not (save in a few exceptional cases) authorized by any appeal to positive law, can be justified only if there is some meaningfully intelligible commonality to the underlying value which gives the human rights norm at issue its claim to supra-positive authority. In the absence of that universality, the transnational circulation of human rights norms in adjudication is indistinguishable from the arbitrary or idiosyncratic preference of a judge for some norm over some other one. Judicial borrowing in that case risks being reduced to a brisk trade in whatever ideologies or fashions, prejudices and powers which happen to be dominant among the cultural and economic elites of the global scene – what I have referred to elsewhere as ‘trafficking in human rights’.³⁴

That is not to say that the only other alternative is to arrive at common results or a common meaning of human dignity in any thick sense of ‘convergence’ or ‘harmonization’. On the contrary, the transnational circulation of human rights norms admits of legitimate pluralism in the specification of the underlying justifying value of human dignity. This is one of the main points of the argument that human rights norms should be understood as a new global form of *ius commune* (to return full circle to the beginning of this commentary), rather than as a set of uniform norms. The idea of the *ius commune*, like other doctrines and analyses which embody structural subsidiarity, seeks to steer a path between the semantic emptiness of human rights that results in a dictatorship of relativism,³⁵ on the one hand, and the imperialism

³³ Yet again it bears repeating that this is the case of any foundational normative concept in law, not uniquely of human dignity.

³⁴ Carozza, ‘Il traffico dei diritti umani nell’età postmoderna’, in L. Antonini (ed.), *Il traffico dei diritti insaziabili* (2007).

³⁵ See, e.g., the self-declared ‘human rights nihilism’ of M.-B. Dembour, in *Who Believes in Human Rights?* (2006).

of falsely monolithic universals, on the other. It certainly may contribute to a cross-cultural convergence of understandings at some level, but only over a very long horizon: 'achieving uniformity in law through the relatively benign processes of importation and transplantation of legal norms and concepts, if it is even possible, is likely to be more like the movement of tectonic plates than the movement of consumer goods – it needs space and time in global and epochal proportions'.³⁶

In the more immediate frame, then, what is the end of the 'common enterprise' of a transnational judicial dialogue which rests on a principled affirmation of the universality of human dignity, and why is it worthy of our affirmation and support? Why is a functional focus on process and institutions not enough? McCrudden's historical reconstruction of the status and basic principle of dignity in the development of the human rights movement is a useful starting point here. He reminds us that, as used in the first efforts to articulate common standards of human rights at the international level, 'human dignity' represents the intersection of a variety of different traditions of thought, many of which in various degrees have mutually incompatible premises – especially premises about the nature of the human person and the source of his or her rights. In order to circumvent the obstacle of this theoretical pluralism, those who set out to forge the first global declaration of rights based their effort on a deliberate abstention from debate, let alone agreement, about the theoretical foundations of human rights beyond the ambivalent 'placeholder', to use McCrudden's designation, of the appeal to human dignity.³⁷ The focus of their agreement was on practical precepts alone. To this day, it remains a pervasive and persistent characteristic of international human rights that its fundamental principles are based on a very thin, if any, agreement about where they come from and what they mean. McCrudden's critique of the conceptual coherence of the idea of dignity thus describes paradigmatically the structural problem which has characterized the contemporary human rights movement from its origins.

To compensate for this precarious state, human rights lawyers and political actors have spent decades dedicating themselves to the building up of the positive law of international human rights – multiple treaties, institutions, and processes designed to 'translate' the underlying principles into hard norms with widespread global acceptance. Once 'constitutionalized' in this way, the validity of the norms can become conceptually distanced from their social or philosophical basis, like Hart's Rule of Recognition or Kelsen's *Grundnorm*, thus obviating (or at least obscuring) the need (and perhaps even the possibility) to inquire into, or shore up, their originally pluralistic ethical starting points. That effort has had great value and tremendous success over the last 60 years, and overall represents a noble and valuable labour on behalf of justice and the good of the peoples of the world. Nevertheless, it would be unrealistic and disingenuous to ignore the limitations of building the edifice of global human rights law merely on a positive law which has only a very thin practical accord beneath it.

A first difficulty with that arrangement is that, generally speaking, one frequently finds a widespread gap between formal international norms and instruments of

³⁶ Carozza, *supra* note 7, at 77.

³⁷ See the extensive reconstruction in M.A. Glendon, *A World Made New* (2001).

human rights law and the local social, political, and cultural contexts in which they are supposed to be operative in practice.³⁸ The law which is constructed without attentiveness to the underlying cultural context tends toward abstraction which separates it from the society that it purports to regulate. (The principal alternative that one finds in, for example, colonial contexts is that the formal and abstract law is maintained through the use of considerable coercive force, which, with respect to human rights law, would indeed be an intolerable self-contradiction.) That this problem is not very evident in certain well-functioning constitutional democracies, like those of Western Europe, is not principally due to a higher degree of ‘positivization’ of the principles, but rather to the fact that the underlying commitments and values necessary to sustain the positive law are in fact present, unlike in many other regions of the world.

But that observation actually leads us to the second problem area. The thinness of the cultural basis of human rights law becomes even more of a difficulty insofar as we recognize that law and rights do not by themselves *generate* the conditions and commitments necessary to sustain the prepolitical values that make the law effective. Even Jürgen Habermas – he of ‘constitutional patriotism’ and the self-sufficiency of the liberal legal state – has come to acknowledge that:

Taken by themselves, moral insights and the worldwide consensus in moral indignation at massive breaches in human rights would suffice only for a wafer-thin integration of the citizens of a politically structured world society (if that were ever to become a reality). An abstract solidarity, mediated by the law, arises among citizens only when the principles of justice have penetrated more deeply into the complex of ethical orientations in a given culture.³⁹

In short, the thin practical consensus on human rights alone is not self-sustaining; it depends on extra-legal sources of consensus about human status and worth and extra-legal sources of commitment to respecting that status and worth.

Without the nourishment of a genuine connection between the abstract human rights norms and the cultures which can sustain them and which are subject to them, a third set of problems arises. The mediation between the law and the social basis from which it arises and towards which it is directed would, in the focal case of a law-governed community, normally occur through the political life of the community, by the practical ‘art’ of reasoning together and persuading one another about the goods of the community and how to realize them.⁴⁰ Instead, the vacuum existing between the positive law of international human rights and the meaning-generative contexts in which people actually live their lives tends to get filled with an exaggerated role of bureaucratic institutions and political elites. As Philip Allott memorably put it, human rights in the international legal order have been ‘swept up into the maw

³⁸ This is most evident in the high degree of non-compliance with international norms in the human rights sphere. See, e.g., Chapter III of any of the recent annual reports of the Inter-American Commission on Human Rights, which detail degrees of state implementation of that Commission’s recommendations by the Member States, available at: <http://cidh.org/annual.eng.htm>.

³⁹ Habermas, ‘Pre-Political Foundations of the Democratic Constitutional State?’, in J. Habermas and J. Ratzinger, *Dialectics of Secularization* (2006), at 19, 34.

⁴⁰ Cf. Alexis de Tocqueville’s repeated references to the ‘art of association’ and the ‘art of pursuing in common’ the goals of democratic society: A. Tocqueville, *Democracy in America* (trans. Henry Reeve, 1904).

of an international bureaucracy. The reality of human rights has been degraded ... [T]hey were turned into bureaucratic small-change [and] became a plaything of governments and lawyers.⁴¹ Accompanying this reality is an emphasis on procedures; the masking of substantive discord with endless process. In short, the risk is of a reduction of political life and its substitution by a weak legalism and formalism. It should be no wonder that many international adjudicative bodies in the human rights sector are notorious for their poor legal reasoning, the loose conceptualization in their jurisprudence, and their frequent underappreciation of the need for political life to sustain the realization of human rights.⁴²

Finally, the thinness of the foundations of human rights and the resultant bureaucratic proceduralism only obscure the deeper differences among cultures which in fact persist. The arrangement merely defers disagreement on fundamental questions. Under the veneer of authoritative process, there continues to be controversy over the interpretation and application of even the most basic of rights, like life,⁴³ and over the relationship between fundamental rights and the most elemental forms of social life, like the family.⁴⁴ The divergent understandings are even more pronounced as one gets further away from the protection of the minimum core of human dignity (as discussed earlier) like life and physical integrity, and more into the difficult weighing of competing goods characteristic of constitutional claims generally.⁴⁵ This will be only truer as we continue to see deeply contested moral questions all becoming processed as juridified human rights claims, and as the challenges of new technologies and new threats to human existence continue to make themselves felt.⁴⁶

My goal is not to overstate the vices of contemporary human rights here – as I already acknowledged, the positive achievements have also been great – but instead to lay the foundations for understanding why a *substantive*, not merely procedural, bureaucratic-institutional, or formal and legalistic, dialogue on the meaning of human dignity is so vital to the future of the human rights experiment. I do not mean ‘dialogue’ in a weak sense, a mere interchange of discourse and deliberation without genuine difference or desire to get at the truth of things, but a *dia-logos*, a sharing of reason with one another. The ‘common enterprise’, in other words, is an occasion for exchanging reasoned and substantive judgements across cultural and geographic divides about the meaning of human flourishing, what it requires of us in justice, and how it can be variously understood and protected in communities constituted by their commitment

⁴¹ P. Allott, *Eunomia: New Order for a New World* (1990), at 288.

⁴² One of the most acute commentators on this depoliticization of social life and its relationship to different understandings and uses of rights is Pierre Manent: see, e.g., P. Manent, *A World beyond Politics?* (trans. M. Lepain, 2006).

⁴³ See, e.g., *Tysiac v. Poland*, 45 EHRR (2007) 42 (ECtHR) (failure to provide access to a therapeutic abortion constitutes a violation of Art. 8 ECHR).

⁴⁴ See, e.g., *I. v. United Kingdom*, 36 EHRR (2003) 53 (ECtHR) (Grand Chamber) (restriction on ability of post-operative transsexual to marry constitutes a violation of Art. 12 ECHR).

⁴⁵ See, e.g., *Hutton v. United Kingdom*, 37 EHRR (2003) 28 (ECtHR) (Grand Chamber) (finding that noise from Heathrow airport did not violate the rights of the petitioners).

⁴⁶ For instance, the Inter-American Commission on Human Rights is currently considering a number of cases alleging that laws restricting the use of *in vitro* fertilization techniques violate human rights.

to a common good. What reasons can I give you to care about and commit yourself to human rights? Why should we recognize the authenticity of *these* demands of dignity as opposed to others? What is the basis for regarding a particular thing as both good for me and good for others like me, both within the communities to which I belong and across their boundaries?⁴⁷ Transnational dialogue of this kind is a provocation to reflect more deeply, collectively, and comparatively on the breadth of human experience and the fulfilment of elemental human needs and desires.

Of course, there is no reason why judges should have a privileged position in conducting such a dialogue, and sometimes there are good reasons why their participation in it ought to be restrained by the contingent constitutional concerns of one jurisdiction or another. Still, in the majority of legal systems of the contemporary world, judges necessarily play a prominent role in the protection of human rights, and thus help to constitute our understandings of them through their words and actions, and so the dialogue on dignity has an evident place within the judicial sphere. In the end, however, reasoned reflection on human flourishing needs to take place at the level of individual persons in community with others. There, dialogue can lead to greater critical self-reflection, and a greater capacity to recognize and commit oneself in solidarity to the good of others. Only in that way will human rights be about loving people in their concrete experience – hard work, rest, and a sad song in the garden – rather than the abstraction of loving Humanity.⁴⁸

⁴⁷ On the necessity for law to give good reasons for practical decision see Finnis, 'On Hart's Ways: Law as Reason and as Fact' [2007] *American J Jurisprudence* (2007) 52.

⁴⁸ See the epigraph to this essay.