Would International Adjudication Enhance Contextual Theories of Justice? Reflections on the UN Human Rights Committee, *Lovelace, Ballantyne* and *Waldman*

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When justice, rights and ethnocultural diversity are considered in contemporary political philosophy, there is a tendency to focus on the level of the state. This is understandable; from a pragmatic perspective, it reflects realities of political power and from a theoretical perspective, it reduces complexity in a way that rigorous analysis requires. Despite these advantages, focus on the state can obscure and work against universal interests in culture and human rights.

The risk of losing the universal in the particular is heightened in contextual theories of justice, which suggest that respect for cultural diversity requires that political arrangements be allowed to vary to reflect local contextual factors. These theories are appealing and I believe they point us in the right direction if we are ever to take cultural interests seriously in our thinking about justice. My concern, however, is that such theories risk undermining respect for cultural interests and human rights, because their focus on the state allows the state and its boundaries to determine the relevant "context." On the one hand, a focus on contextual consider-

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ations may result in the loss of a more universal perspective, which is necessary to ensure respect for justice and human rights. On the other hand, intercultural relations within states are often characterized by power imbalances between groups that may result in the rejection of cultural minorities' legitimate claims.

Some who consider issues of justice in multicultural societies have suggested international adjudication as a means of addressing such tensions. For instance, Will Kymlicka has proposed that the international community may provide "an impartial adjudicator to monitor the extent to which domestic provisions regarding minority rights are fairly negotiated and implemented" (2001). James Tully has suggested that appeal to institutions "such as courts, parliaments, international human rights regimes, non-partisan adjudicators or mediators, global transnational networks and so on ... [would] provide indispensable checks and balances on the powers of the dominant groups to manipulate the dialogue and manufacture agreement" (2004: 102). While the introduction of a role for international adjudication would represent an important innovation, it has not been explored in any detail. This article is intended to advance thinking on this matter by proposing the seemingly Panglossian thesis that, at least when viewed from the perspective of justice and cultural diversity in the modern state, the UN Human Rights Committee's individual communications procedure provides an attractive model for incorporating international adjudication into contextual theories of justice.

The article begins in the first section by describing "contextual justice" and illustrating the problems that make the introduction of an element of international adjudication appealing. It then speculates in the second section about the possible effects of such an innovation and concludes by suggesting that the best of all possible institutions of international adjudication would be one that issues non-binding decisions. Support is provided for this suggestion in the third section by reflecting on some Canadian experiences with individual communications to the United Nations Human Rights Committee that raised issues of contextual justice. The article concludes that international adjudication would enhance contextual theories of justice.

1. Contextual Justice

Contextual justice is an approach to justice that has developed within a broader literature, and which aims to reconcile universal egalitarian principles of justice with claims based on the identities and cultures of (sometimes illiberal) collectivities. In this article I consider the recent work of Joseph H. Carens (2000) and Bhikhu Parekh (2000) as representative of this approach.[1] Theories of contextual justice are distinguished within

Abstract. This article seeks to advance thinking about contextual theories of justice as found in Carens' *Culture, Citizenship, and Community* and Parekh's *Rethinking Multiculturalism* by considering the suggestion that such theories would be enhanced by the incorporation of an element of international adjudication. It explores possible advantages and disadvantages of this proposal both theoretically and by reflecting on Canadian experience with the UN Human Rights Committee (HRC) in its *Lovelace*, *Ballantyne* and *Waldman* views. The article concludes that international adjudication would enhance contextual theories of justice if it incorporated key elements of the HRC's individual communication procedure, including the non-binding nature of its decisions.

Résumé. Cet article tente de faire avancer la réflexion sur les théories contextuelles de la justice qu'on retrouve dans *Culture, Citizenship, and Community* de Carens, ainsi que dans *Rethinking Multiculturalism* de Parekh. L'article suggère que ces théories gagneraient à incorporer un élément d'arbitrage international. Il explore les avantages et désavantages possibles de cette proposition tant du point de vue théorique qu'en réfléchissant à l'expérience canadienne du Comité des droits de l'homme de l'ONU dans les causes Lovelace, Ballantyne et Waldman. L'article conclut que l'arbitrage international pourrait améliorer les théories contextuelles de la justice s'il incorporait les éléments clés de la procédure de communication individuelle du Comité des droits de l'homme de l'ONU, y compris le caractère non contraignant des décisions.

this literature by the way they approach reconciliation. These theories differ from ones that, like the theory proffered by Kymlicka (1995), treat universal principles such as personal autonomy as primary and try to find room for culture and identity claims within this framework. They suggest instead that justifications for cultural claims lie outside of universal egalitarian frameworks and argue that justice may even require adjusting universal egalitarian principles to accommodate these claims. These theories are *contextual* because they insist that such adjustments must be tailored to the particular circumstances of each context.

1.1 Basic Commitments

Theorists of contextual justice share a general liberal commitment to equality. But, as is typical of recent theoretical treatments of multiculturalism, they suggest that equal respect may require deviation from uniform treatment to accommodate claims grounded in the relationship between identity, culture and well being (for example, Carens: 262; Parekh: 217). Of course, the claim that equality is consistent with both uniform and differential treatment provides little practical guidance. In fact, Carens tells us, "there is no master principle that enables us to determine when we should respect claims advanced in the name of culture and identity and when we should deny them" (260). To determine what justice requires, "one must immerse oneself in the details of the case and make contextually sensitive judgements rather than rely primarily on the application of abstract general principles" (Carens: 14). Relevant contextual factors are said to include history, culture, morality and the circumstances of community and society. While theorists of contextual justice

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reject strict and uniform application of universal principles, the similarity of the challenges faced by all culturally diverse societies enables them to suggest general principles that can act as "navigational devices" for seeking resolutions (Parekh: 206).

1.2 Guiding Principles

We might encapsulate these navigational devices in four guiding principles. The first two require little explanation. First, and perhaps most obviously, differential treatment must benefit those who receive it. Parekh refers to well-being; Carens to interests. What increases well-being or satisfies interests, of course, will vary with context. A second, and similarly straightforward principle, is that the form differential treatment takes must also reflect contextual considerations (for instance, Parekh: 218).

The third principle is that in assessing the merits of a claim for differential treatment, both the group making the claim and the treatment it requests should comply with, to use Carens' term, minimal moral standards. In other words, theorists of contextual justice are not relativists (Parekh: 126–27; Carens: 100). The role and location of minimal moral standards in theories of contextual justice is perhaps best illustrated by Carens' idea of a moral map consisting of three "concentric circles." While Carens and Parekh would not draw identical maps, the circles can be reasonably characterized as follows: the innermost contains particular communities or collectivities in which context is most decisive; the middle circle contains a thinner public morality which is located, roughly, at the level of the state or political community (Carens: 34–35; Parekh: 171–72); and the outermost circle contains minimal universal values or standards that apply to all human beings (Carens: 24; Parekh: 126ff). While the relationship between these concentric circles is not entirely clear, the point, Carens says, "is that as one moves outwards, the understanding of justice is thinner in the sense that it settles fewer questions, but more extensive in the sense that it applies to more contexts" (33–34). Further, and most crucially, "minimal moral standards set significant constraints on morally permissible cultural variation" (250). Perhaps necessarily, neither theorist provides a clear and unambiguous statement of these standards, but they do seem to include rights to equal treatment and freedom from illegitimate discrimination. And, of course, the application of these minimal standards must be shaped by contextual considerations (Parekh: 135; Carens: 250). For this reason Parekh criticizes the Universal Declaration of Human Rights for having a "distinctly liberal bias," for "confusing human rights with particular institutional structures," and, thus, ignoring the possibility that respect for the same rights could be embodied in institutions that vary according to a "society's traditions and moral and political culture" (134).

The fourth principle is that contextual considerations may even justify the violation of minimal moral standards. We see this, for instance, when Parekh writes that, "it is difficult to think of a single universal value which is 'absolute' or inherently inviolable and may never in practice be overridden" (136). Carens also accepts that this may be justified, albeit only in extreme cases and only where the violations are not permanent (249).

While this willingness to permit contextual factors to play a significant role in considerations of justice is theoretically appealing and no doubt often practically necessary in culturally diverse societies, it can pose serious threats to universal human rights. The indeterminate nature of contextual justice and the willingness to compromise principles create a constant danger that the universal perspective which sustains human rights will be overwhelmed by contextual considerations.

1.3 Making Claims and Intercultural Dialogue

A different danger is associated with the suggestion that claims for differential treatment should be made and evaluated through processes of intercultural dialogue. Parekh writes that, "since there is no infallible or incontrovertible method of [determining when claims are justified], we should reach a decision by means of a democratic dialogue between the parties conducted in a spirit of goodwill and compromise" (219). Similarly, Carens writes: "My ideal of differentiated citizenship thus entails a dialogue between aboriginal people and non-aboriginal people over the meaning of justice" (197). While understandable, appeal to intercultural dialogue, when combined with acceptance of existing state boundaries, introduces the danger that legitimate cultural claims may be ignored.

At the root of this concern is the belief that borders are, in an important sense, morally arbitrary. For instance, while in Canada today the francophone majority in the province of Quebec must appeal to the anglophone majority in the country as a whole, if Quebec were to become an independent state, the anglophone minority in Quebec would have to appeal to its francophone majority. This is clearly arbitrary from the perspective of identity, culture and justice: what changes in each case is not the collectivities and their fundamental interests, but the distribution of power.

A number of undesirable effects may flow from this. First, as noted, state boundaries determine who must appeal to whom for cultural accommodation; in other words, boundaries determine which cultural group will play a dominant role when the state decides whether cultural accommodations are put in place and what the nature of those accommodations will be. Further, this will be true regardless of the nature of the conflict. As one anonymous reviewer of this article noted, conflicts over the nature

of state-sanctioned cultural accommodations can take at least three forms. Two may be described as *inter*cultural: the paradigmatic conflict, between a majority cultural community and some minority cultural community; and a less frequently considered conflict, between two minority cultural communities. A third type of conflict is best described as *intra*cultural: in this case members of a minority cultural community disagree with each other as to the nature of their community. The key point is that where these conflicts are settled by means of state-sanctioned cultural accommodations, the final arbiter will be a state that will tend to reflect the perspective and interests of one cultural group or another.

A second undesirable effect of the acceptance of states and state boundaries is that it can also affect the values and discourse within which appeals must be made. That is, all groups will usually have to phrase their appeals in terms of the values of the wider political community. Parekh calls these the society's "operative public values." He says they "represent the shared moral structure of society's public life" and are reflected in its constitutional, legal and civic values (267–70). This can be troubling since these values are likely to reflect the values, interests and perspective of the dominant group. Given the morally arbitrary nature of majorities and minorities, it is unclear why only minorities should have to justify their positions. Tully provides a nice illustration of this when he writes that when Aboriginal peoples make land claims in Canadian courts, "the onus of proof is not on Canada to prove that it has the underlying title to all indigenous territories" (2000: 47).

A crucial effect, then, of the generally uncritical attitude that contextual theories of justice take towards the boundaries of existing states is that recognition of legitimate cultural claims will often depend upon the open-mindedness of local majorities. Parekh acknowledges this when, addressing the issue of intercultural dialogue, he writes that, "if the majority remains unconvinced [by the minority's arguments] ... the operative public values of the wider society should prevail" (272).[2] Further, the majority is likely to remain unconvinced where it is under no pressure to act reasonably, and is allowed to offer "no reasons or ones that are flimsy, self-serving, based on crude prejudices or ignorance of relevant facts" (129).

Thus, when coupled with respect for existing state boundaries, appeal to intercultural dialogue may reify morally arbitrary imbalances of power between groups and leave the recognition of legitimate cultural claims, whether intercultural or intracultural in origin, dependent upon the open-mindedness of local majorities.

1.4 Addressing the Imbalance

It is surprising, then, that these theorists of contextual justice do not explore the possibility of empowering minorities to appeal the decisions

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of local majorities above the level of the state in any detail.[3] Parekh does say that we need to reconceptualize the modern state in a way that "involves loosening the traditionally close ties between territory, sovereignty and culture and re-examining the assumptions lying at the basis of the dominant theory of the state" (194). He even suggests that it might be good for states "to share their sovereignty in certain areas and exercise it through cross-border political institutions, as is currently being done in the case of Northern Ireland, or to create a wider political framework with the power to lay down and enforce rules concerning how they should treat their minorities as in the case of the European Union" (195). This, however, is as far as he goes. Carens, for his part, only mentions the UN incidentally (27, 167). These possibilities are important and deserve more thorough consideration.

2. International Adjudication and Contextual Justice[4]

The obvious benefit of allowing cultural minorities to appeal to an international adjudicatory body is that it would help address the arbitrary imbalances in power experienced within the boundaries of states. International adjudication could begin to redress the imbalance by reducing some of the advantages that accrue to the majority or dominant group within the state. On the one hand, it could help to level the playing field by requiring both the minority *and* the majority to defend, and offer reasons for, their positions. On the other hand, if properly structured, it could force both parties to express their arguments in terms of what we might call "operative international values." Unlike operative public values, which tend to privilege the dominant culture, operative international values are less likely to favour either group. Emphasis on operative international values also offers the advantage of introducing a more universal perspective into considerations of local issues.

Once the idea of international appeal is broached, however, a number of concerns can be identified from the perspective of contextual justice. One is associated with the need to make intercultural comparisons. This, Parekh says, requires an ability to evaluate cultural claims "from within" the meaning structure of each culture (173). This is necessary because contextual justice rejects the view of equality that treats equality as uniformity and suggests instead that we "take a contextualized view of equality, identify what respects are relevant, and demand equal treatment of those shown to be equal in these respects" (256). This requires an ability to make intercultural comparisons. On the one hand, it is necessary to determine what equality requires. For instance, the question of whether Muslims enjoy equal religious freedom concerns "not whether Muslims have a right to religious freedom but what, if anything, that

right entails in a specific context, and that involves deciding *what* features of the context are relevant and whether Muslims are equal in respect to *them*" (256–57). This, of course, would be difficult to assess without some understanding of what it means to be a Muslim from the inside. On the other hand, intercultural comparison is required to identify when claims are not justified. As Parekh suggests, those making identity-based claims will sometimes rely on the ambiguity that necessarily surrounds such claims to make arguments based on "specious reasoning and alarmist fears" (256). Again, without intimate knowledge of the relevant contexts and cultures, those judging would find it difficult to determine when this is happening.

Of course, the fact that such knowledge would be useful does not argue for its possibility. For their part, theorists of contextual justice seem to believe that reliable intercultural evaluation is possible, but elusive. For instance, Parekh writes that outsiders "should generally respect [a culture's] autonomy" because they are "unlikely to fully understand its complexity" (177). Carens exhibits a similar balance of possibility and elusiveness when he says he is more comfortable judging German than Japanese citizenship policy, because the "cultural differences between Japan and North America are much greater than the cultural differences between Germany and North America, and so, the risk of missing something that would make a difference to the moral argument seems greater" (32). Thus, we must be concerned about the ability of international adjudicators to acquire the contextual knowledge and intercultural understanding needed to reach just decisions.

Another concern is associated with the possible effects that international judgements may have on state-level politics. On the one hand, allowing minorities to appeal internationally may jeopardize dialogue by undermining the spirit of goodwill and compromise upon which it depends. If minorities believe they may be able to do better for themselves at the international level, they may be less likely to compromise in negotiations with the majority and perhaps more likely to challenge bargains to which they have already agreed. Similarly, the possibility that minorities will not respect their bargains may undermine the majority's willingness to compromise.

On the other hand, the solutions recommended by international adjudicators may prove corrosive to the very values and institutions that have made the society work as well as it has. These values and institutions are often the product of earlier iterations of intercultural dialogue, "hammered out in difficult negotiations and embodying such consensus as is thrown up by the parties involved" (Parekh: 207). The inner logic and even justice of such agreements, influenced as they are likely to be by contextual factors and often reflecting more compromise than principle, are unlikely to be transparent to outsiders adopting a universal or abstract

perspective. In such cases, solutions proffered by international adjudicators may be incongruent with the often idiosyncratic compromises that enable societies to function. As Parekh suggests, it is possible that a society's operative public values "cannot be radically revised without causing considerable moral and social disorientation" (273).

In sum, consideration of the possible effects of international adjudication from the perspective of contextual justice suggests that the benefits it offers may come at a price. While it holds out the promise of introducing an international perspective into local dialogues and of reducing the power imbalance between local majorities and minorities, it may also encourage behaviour that will undermine the goodwill which makes intercultural dialogue possible and the solutions it generates may undermine the institutions and compromises that allow the society to function at all.

Obviously, how this balance tips will be of no small significance to the successful incorporation of international adjudication into contextual theories of justice. And the likelihood of the balance tipping one way or the other will be highly influenced by the design of the adjudicatory procedure. I will argue that the balance is most likely to tilt towards improving the justice of the state-level outcomes and away from undermining the bases of intercultural dialogue where the adjudicatory procedure reflects three key features of the UN Human Rights Committee's individual communications procedure: *impartial adjudicators* issuing *nonbinding decisions* based on *universal standards*. I will provide support for this claim by reflecting on the Human Rights Committee's treatment of three Canadian communications.

3. Reflections on the UN Human Rights Committee, *Lovelace, Ballantyne* and *Waldman*

The UN Human Rights Committee (HRC) is a treaty-monitoring body established by the International Covenant of Civil and Political Rights (ICCPR). Its treatment of three Canadian cases that raised issues of contextual justice provides an excellent opportunity to consider the implications of international adjudication for contextual theories of justice.

3.1 The ICCPR and the United Nations Human Rights Committee

The HRC has several features that make it appropriate for considering contextual justice and international adjudication. First, the treaty that establishes the HRC concerns universal human rights, which are relevantly similar to the "minimal moral standards" of contextual justice; the ICCPR identifies a wide range of civil and political rights that mem-

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ber states are expected to respect in their relations with persons. While-Parekh might accuse the ICCPR of a "distinctly liberal bias," by 2004 152 states had found the treaty acceptable enough to ratify (UN Office of the High Commissioner for Human Rights, 2004).

A second relevant feature is that the HRC's composition is designed to give it an impartial and international perspective. Its 18 members must be citizens of states party to the ICCPR and they are elected to staggered four-year renewable terms by the states (Article 32 (1)). Besides representing a wide variety of countries, the independence and neutrality of HRC members is reinforced by the following facts: they must "serve in their personal capacity" (Article 28 (3)); they are required to be "persons of high moral character and recognized competence in the field of human rights" (Article 28 (2)); and they are recused from cases involving their own state (UN Human Rights Committee, 2004, *Rules of Procedure*: Rule 90).

A third relevant feature is that the HRC performs a (quasi-) adjudicatory function as part of its role in monitoring compliance with the ICCPR. It does this by issuing views in response to individual communications made under the First Optional Protocol (OP). States that have ratified the OP allow the HRC to receive and consider communications from individuals who believe the state has violated their rights. After considering written submissions, the HRC issues its "view" as to whether a violation has occurred. While the legal status of these views is unclear—hence the use of the term "view," not "decision"—it is clear that the HRC has no power to enforce compliance. Despite the basically hortatory nature of these views, this procedure has been widely accepted and well utilized; by 2004 the OP had been ratified by 104 states (UN Office of the High Commissioner for Human Rights, 2004) and the HRC had completed consideration of well in excess of 600 communications (Joseph et al., 2000: 16).

The fact that under the OP the HRC receives communications from individuals, rather than groups, has not been without controversy.[5] It is advantageous, however, from the current perspective because it allows individuals to advance both the claim, based on intercommunal conflict, that their cultural community has not been treated fairly by the state, and the claim, based on intracommunal conflict, that the accommodation instituted by the state for their community fails to treat them fairly as individuals. This will be illustrated in the discussion of *Lovelace* (below, at 3.3.2).

In short, the individual communications procedure under the OP has three key features that are relevant for our thinking about international adjudication and contextual justice: impartial and international adjudicators; rights similar to minimal moral standards; and individual communications that result in non-binding decisions.

3.2 Three Canadian Communications

To support the claim that a model of international adjudication based on the HRC's individual communication procedure would enhance contextual theories of justice, I will consider three views issued by the HRC in response to Canadian communications. These communications shared four important features. First, in each case the communicant, acting as a member of a minority cultural community, challenged actions taken by local majorities through federal or provincial governments. Second, in each case the relevant government defended its actions, at least in part, with arguments that raised issues of contextual justice. Third, the government's defence of its actions satisfied Canada's operative public values. Fourth, and finally, each case involved a cultural cleavage in Canadian society (Aboriginal/non-Aboriginal, French/English, Catholic/Protestant, respectively) that was crucial to Canada's stability and had at times been addressed by departing from the uniform treatment of citizens.

Sandra Lovelace v. Canada (1981) concerned Canada's then policy, under the Indian Act, of permanently removing legal Indian status from Indian women (but not Indian men) who took spouses who were not status Indians. In losing status these women lost the right to reside on their reserves. Lovelace suggested in her communication that this violated her ICCPR Article 27 right, as a person belonging to an ethnic minority, to enjoy her own culture "in community with the other members of [her] group." Rather than deny the obvious gender inequality, Canada presented contextual arguments to suggest that the impugned law was just. It said that the purpose of the Indian Act was to protect the Indian minority and because this required granting special privileges, "a definition of the Indian was inevitable." Further, it contended that there were good historical and contemporary reasons for defining membership as it did. Among the reasons it offered were that "patrilineal family relationships" were traditional among Canada's Aboriginal peoples, that allowing non-Indian husbands to settle on reserves would pose a threat to reserve land, and that Indians themselves "were divided on the issue of equal rights" (para. 5). The HRC sided with Lovelace.

Ballantyne, Davidson, and McIntyre v. Canada (1993) concerned whether the province of Quebec's Bill 178, which prohibited the posting of outdoor signs in any language other than French, violated the right to freedom of expression of the communicants, who were members of the province's anglophone minority. The government of Quebec, making submissions through the federal government, made the contextual argument that the law was justified because "historical developments since 1763 amply bear out the need for French speakers to seek protection of their language and culture" (para. 8.5). The HRC, however, sided with the communicants, writing that "it is not necessary, in order to protect the vul-

nerable position in Canada of the francophone group, to prohibit commercial advertising in English" (para. 11.4).

Arieh Hollis Waldman v. Canada (1999) concerned the province of Ontario's practice of providing full funding to Roman Catholic public schools, but not to other religious schools. The communicant, a Jewish parent, contended that this violated his Article 26 right to "equal and effective protection against discrimination." Among Ontario's responses was the contextual argument that the policy represented a "complex balancing of diverse needs and interests" (para. 8.1). Ontario argued that the policy was required to balance its need, as a multicultural society, to use public schools as "a rational means of fostering social cohesion and respect for religious and other differences" (para. 4.4.4) with its constitutional obligation to protect "the rights of the Roman Catholic minority." This constitutional obligation, it contended, "is seen by the Roman Catholic community as a correction of a historical wrong" and its "elimination would be perceived as undoing the bargain made at Confederation" (para. 8.3, 8.4). The HRC agreed with Waldman and left it to Canada to determine whether it would eliminate the discrimination by revoking funding from Catholic schools or by extending funding to other religious schools.

3.3 Reflecting on the Communications

Four aspects of the practice of the HRC as reflected in these views support the contention that the HRC provides a useful model for incorporating international adjudication into contextual theories of justice: the procedure helped improve the balance of power between majority and minority; the individual communications procedure facilitated the expression of intracommunal as well as intercommunal conflict; the HRC demonstrated a willingness to entertain contextual arguments while applying universal standards; and the views, while non-binding, have not been without effect.

3.3.1 Improving the balance of power between dominant and subordinate groups

The views suggest that international adjudication can help to even the balance of power in the dialogue between dominant and subordinate groups. Besides the fact that the communicant and the state are treated equally within the text of views, the key reason for this is that the HRC does not act as a court of appeal from national courts (Steiner, 2000: 28). This has two important effects. On the one hand, it forces the state to abandon many of the arguments that it was able to make within the domestic legal system. On the other hand, it encourages the state to trans-

form its arguments by reframing them in terms of operative international values.

Forcing the state to abandon arguments it could make in the domestic legal system is important because such arguments will typically be framed in terms of the society's operative public values. These values tend to favour the state because they will usually have been shaped by, and thus reflect, the interests of the dominant community. One benefit of international adjudication, then, is that by depriving the state of appeal to these "operative public values," it can force the state to be more "reasonable" by resisting the often "flimsy" and "self-serving" arguments these values may have supported (Parekh: 129).

The three views provide ample support for this observation. For instance, in the Canadian Supreme Court cases that preceded *Waldman*, the government of Ontario gained great advantage because its authority to legislate funding for the Roman Catholic school system was based on a provision in the Canadian Constitution (*Constitution Act, 1867*, s. 93). This had allowed the Supreme Court to say *both* that Ontario's policy appeared to violate equality provisions in the Canadian *Charter of Rights and Freedoms* ("these educational rights, granted specifically to the Protestants in Quebec and the Roman Catholics in Ontario, make it impossible to treat all Canadians equally") *and* that the policy should be allowed to stand because "the Charter cannot be applied so as to abrogate or derogate from rights or privileges guaranteed by or under the Constitution" (*Reference re: Bill 30*: para. 63, 60; see also *Adler v. Ontario*). The Court also recognized the contextual argument that these educational rights had been included in the Constitution because they had been necessary to achieve "the original Confederation bargain." Even if this context had changed, the Court refused to exercise judicial review to alter the terms of the constitutional bargain, suggesting instead that the way to address this was through constitutional amendment (*Reference re: Bill 30*, para. 63). While this argument was decisive in the Canadian context, it carried no special weight with the HRC, which looks for guidance to the ICCPR, not the Canadian Constitution. The HRC easily dismissed this argument, writing: "The Committee begins by noting that the fact that a distinction is enshrined in the Constitution does not render it reasonable and objective ... the Committee rejects the State party's argument that the preferential treatment of Roman Catholic schools is nondiscriminatory because of its Constitutional obligation" (para. 10.4).

Lovelace provides a similar lesson. Arguments that had been decisive for the Supreme Court in *The Attorney General of Canada v. Lavell—Isaac v. Bedard* were inoperative in *Lovelace*. *Lavell* had turned upon questions about the proper interpretation of s. 1 of the *Canadian Bill of Rights* (1960) and how, if at all, it applied to the federal government's exercise of its jurisdiction under s. 91 (24) of the *Constitution Act*, *1867*

over "Indians and lands reserved for Indians." In reaching its decision, the Supreme Court had taken for granted that the federal government's Indian Act was the appropriate starting point for determining who is an Indian. Again, the HRC would not be bound by these contextual aspects of Canada's "operative public values." The *Canadian Bill of Rights* was accorded no privileged status and, while the HRC was aware that "Sandra Lovelace does not qualify as an Indian under Canadian legislation," it followed its own lights in finding that "persons who are born and brought up on a reserve who have kept ties with their community and wish to maintain these ties must normally be considered as belonging to that minority within the meaning of the Covenant" (para. 14).

In *Ballantyne*, the HRC overcame another contextual aspect of Canada's "operative public values." In Canada, Quebec's language legislation could not be challenged as a violation of freedom of expression under the *Charter of Rights and Freedom*s, because the government of Quebec had protected it from judicial review by invoking section 33, the constitutional override provision. While this prevented the communicants from seeking a remedy in the Canadian courts, it could not prevent the HRC from applying the ICCPR.

A related benefit of international adjudication appears to be that, deprived of appeal to its operative public values, the state may be forced to transform its arguments by substituting appeals to operative international values. This can have three beneficial effects from the perspective of contextual justice. First, it introduces a universal perspective that may be missing in local dialogues. Second, when the state's arguments are phrased in the same values as those invoked by the communicant, they become commensurable and thus more open to comparative evaluation. And, third, forcing the state to justify its position in terms of operative international values may flush it out, so to speak, from the thicket of the domestic operative public values in which it could hide otherwise weak or indefensible arguments. Together, these effects can serve to weaken the state's position, and thus improve the balance of power for the minority.

Again, the views provide support for these observations. In both the *Lovelace* and *Waldman* cases the governments had to abandon the arguments they had made in the Canadian context and innovate by making what were clearly ahistorical arguments. In *Lovelace* the federal government quit defending the Indian Act by appeal to its constitutional jurisdiction and tried instead to justify its legal definition of Indian status as necessary to fulfil its international obligations, describing it "as an instrument designed to protect the Indian minority in accordance with article 27 of the Covenant" (para. 5). In *Waldman*, Ontario supplemented its appeal to the historical Confederation bargain by arguing that having a diverse student body in Ontario's public school system was necessary to

create "a tolerant society," which it suggested was part of the purpose of ICCPR Article 26's guarantee of equality before the law and equal protection under the law. If it had to "fund all private religious schools," Ontario argued, its "very ability to create and promote a tolerant society that truly protects religious freedom" would be undermined (para. 4.3.4). In *Ballantyne*, however, the government of Quebec was able to rephrase the arguments it had been making in the Canadian context. It contested the meaning of the right to freedom of expression guaranteed in the ICCPR, claiming that it should not "extend to the area of commercial advertising." It also tried to play down the role of Bill 178 as part of a uniquely Canadian compromise, trying instead to justify it as a legitimate implementation of ICCPR Article 27 obligations to protect Canada's francophone minority (para. 8.9, 8.5, 8.10).

In sum, these cases illustrate the ability of international adjudication to deprive majorities of the advantage of operative public values and to level the playing field by forcing them to couch their arguments in terms of operative international values. Further, by transforming arguments into the language of operative international values, a universal perspective is introduced into local arguments. Finally, as best demonstrated by the federal government's claim that the Indian Act was designed to secure minority cultural rights, this can have the effect of flushing out weak or embarrassing arguments.

3.3.2 Facilitation of the expression of intracommunal as well as intercommunal conflict

Lovelace is unique among the views considered here in that it demonstrates the ability of the HRC procedure to entertain intracommunal conflicts. I think it is fair to say that at the core of Sandra Lovelace's grievance was a disagreement internal to the (minority) community about the nature of that community. The federal government was involved because its Indian Act gave legal sanction to one competing view of the legitimate bases of membership in that community—the one that was supported at the time by many Indian leaders (although for reasons too complex to discuss here).[6] Thus, we might say that from Lovelace's perspective the problem was not that the state refused to accommodate her community, but that it accommodated her community in a way that violated her legitimate claim as an individual to full participation in that community. That the HRC was able to entertain this communication illustrates its ability to facilitate the expression of intracommunal conflict.

Now this observation may give rise to the reasonable concern that, by empowering disaffected individuals, such a procedure may not give adequate consideration to the views of members of minority communities who support the status quo. I think this need not be the case. On the

one hand, nothing prevents the state from making the rational decision to include the views of those members of the minority community who support its position in its defence; in fact, this seems to be what the federal government was doing with some of its arguments in *Lovelace* (section 3.1 above). On the other hand, there is nothing inconsistent with augmenting the individual communications procedure by allowing the HRC to recognize third-party intervenors who have legitimate interests in the outcome of the process (e.g., Canadian Indian leaders who disagreed with Ms. Lovelace).

3.3.3 A willingness to entertain contextual arguments

To this point, the discussion has demonstrated the capacity of international adjudication to inject a universal perspective into local dialogues, to help redress power imbalances that may prevent the recognition of legitimate cultural claims, and to consider intracommunal as well as intercommunal conflicts. This may leave the impression that international adjudicatory bodies are hostile to contextual arguments and are thus incapable of being incorporated into theories of contextual justice. The evidence does not support this.

Many of the HRC's comments in its views suggest an openness to contextual arguments. For instance, in *Ballantyne* the HRC rejected Quebec's argument, not because of its contextual nature, but because it disagreed with Quebec's assessment of the context. The HRC took seriously Quebec's contention that its commercial sign provisions could be justified, even though they restricted freedom of expression, because they were necessary to protect the francophone community in Canada. The HRC rejected Quebec's position because it simply did not accept that the right of Quebec francophones "to use their own language ... [was] jeopardized by the freedom of others to advertise in other than the French language." The committee even went so far as to suggest that Canadian francophones' Article 27 rights could justify a law requiring "that advertising be in both French and English" (para. 11.4).

The HRC demonstrated a similar openness to contextual arguments in *Waldman* when it wrote:

> The material before the Committee does not show that members of the Roman Catholic community or any identifiable section of that community are now in a disadvantaged position compared to those members of the Jewish community that wish to secure the education of their children in religious schools. Accordingly, the Committee rejects the State party's argument that the preferential treatment of Roman Catholic schools is nondiscriminatory because of its Constitutional obligation (para. 10.4).

The implication seems clear: had the context been different, and the Catholic community the one placed in such a disadvantaged position, the HRC might have reached a different conclusion.

Finally, in *Lovelace* the HRC said the Indian Act provisions challenged by Ms. Lovelace constituted "an unjustifiable denial of her rights under article 27" because the Committee did not agree that denying her "the right to reside on the reserve is reasonable, or necessary to preserve the identity of the tribe" (para. 17). It did, however, accept in principle the contextual argument that "restrictions on the right to residence, by way of national legislation, cannot be ruled out under article 27" so long as such restrictions "have both a reasonable and objective justification and [are] consistent with the other provisions of the Covenant, read as a whole" (para. 15–16). Here again, the HRC expressed a willingness to allow context to influence its decisions.

Thus, there seems to be no reason to believe international adjudicators cannot be open to contextually sensitive applications of universal principles. As a practical matter, there are reasons to be concerned about the HRC's ability to apply contextual justice, but these have more to do with lack of resources than of intent or aptitude (see Alston and Crawford, 2000).

3.3.4 Non-binding, not ineffective, decisions

As noted earlier, any attempt to integrate international adjudication into contextual theories of justice must be able to address the concern that, given the complexities of applying contextual justice, it is inevitable that international adjudicators will sometimes misread a context and make recommendations that are either unjust or, if just, so out of sync with a society's values or the compromises that make it work as to be destabilizing. Given this very real possibility, it might be asked how this is supposed to support the introduction of international adjudication into contextual theories of justice. Clearly, it would not provide any support if I were suggesting that the decisions of international adjudicators must be applied and strictly enforced. Fortunately, we do not have to advocate such a powerful role for international adjudication.

Here again, the HRC is instructive. While the inability of the HRC to enforce its views is often considered a shortcoming, this consideration of contextual justice suggests that it may actually be an advantage. In light of the weaknesses that contextual justice suggests will pertain to any international adjudicatory body—especially the challenge of conducting intercultural comparison and evaluating cultural claims "from within"—the non-binding, unenforced character of HRC decisions is very appealing. The advantage is that when international adjudicators "get it wrong"—if their decisions threaten intercultural dialogue, operative pub-

lic values, or the pragmatic compromises that make a community work—state parties can refuse to implement them. This is borne out by Canadian experience. Ontario has refused to comply with the HRC's view in *Waldman*, and the federal government responded to *Lovelace* with legislation that the HRC has subsequently deemed inadequate (see UN Human Rights Committee, 1999).[7]

This outcome begs the following question: What advantage is there to insisting on a right to appeal to international adjudicators, if the adjudicators' decisions are not necessarily going to be implemented? The answer, I suggest, is that issuing views that will not necessarily be enforced should not be equated with being ineffective. I say this for a number of reasons. First, consider the situation where the state loses, but refuses to implement the decision. On the one hand, the minority returns to the intercultural dialogue armed with the confirmation that a disinterested international body has affirmed its position and found the majority's arguments unpersuasive. This is how the *Lovelace* decision was used by Indian women and the *Waldman* decision continues to be used by advocates of public funding of religious schools in Ontario. On the other hand, the majority receives a blemish on its international record. The desire to remove this can be a source of motivation—at least in countries like Canada, whose elites generally care about such things.[8] Further, for governments that were inclined to move in the direction of the decision anyway, as seems a reasonable hypothesis with respect to the federal government and *Lovelace*, and the Liberal government of Quebec and *Ballantyne*, the decision may actually provide convenient political cover. Second, in the event that the minority loses, it may be more willing to engage in intercultural negotiations, having found that its arguments failed to persuade these impartial adjudicators. The possibility of such outcomes should also help to reduce the temptation to launch frivolous appeals that could undermine the goodwill upon which intercultural dialogue depends.

This draws our attention to a final, but very important observation about international adjudicators and their decisions. Their power lies not so much in their enforcement as in their legitimacy. And this legitimacy is enhanced, to no small extent, if the international adjudicative body is designed to address the problems that were associated with seeking justice within the bounds of the state. In order to ensure such legitimacy, the adjudicators need to be impartial, not influenced by the balance of power within the society, and not bound by its operative public values.

In sum, by associating international adjudication with non-binding decisions, we may tip the balance of advantages and disadvantages *toward* introducing an international perspective into local dialogues and reducing imbalances in power between majorities and minorities, and *away* from the worst outcomes that may ensue when international adjudicators misread contexts and make bad decisions.

4. Conclusion

This article has considered some of the potential advantages and disadvantages of introducing an element of international adjudication into contextual theories of justice, both theoretically and by reflecting on the HRC and its views in *Lovelace*, *Ballantyne* and *Waldman*. I have suggested that international adjudication holds the promise of reducing the imbalance in power within the state between majorities and minorities by depriving the majority of appeal to the society's operative public values and by forcing it to defend its arguments by appeal to the same operative international values as the minority. The main disadvantages associated with international adjudication are that its very availability may undermine the goodwill upon which intercultural dialogue depends and the likelihood, given the complexities of applying contextual justice, that international adjudicators will make bad decisions from time to time. An optimal way to tip this balance toward the benefits and away from the dangers, it was suggested, is to incorporate key elements of the HRC's individual communication procedure, including the committee's international and impartial composition, its willingness to apply universal standards in a contextual manner, and the non-binding nature of its decisions.

So long as the world is organized into sovereign states, this may be as close as we can come to achieving justice in our attempts to reconcile accommodation of cultural minorities with respect for the universality of human rights. Given the competing pressures created by the *universality* of human rights and the *particularity* of intercultural relations within states, there is much to be said for an international adjudicatory mechanism that can provide "constructive criticism" based on "an independent perspective on the state of human rights" in particular states (Canada, Foreign Affairs, 2004). While such a mechanism cannot promise to eliminate all tensions within contextual theories of justice, it does offer to mitigate some of the most serious tensions, and thus enhance the overall appeal of these theories.

Notes

1 Some may wonder why I consider Parekh and Carens together. This is understandable; after all, Parekh says he rejects liberalism as a central frame of reference, and Carens explicitly assumes "the moral validity of liberal democratic principles" (120, n. 9). The main effect of these different starting points, however, is the direction from which the authors approach very similar conclusions: for Carens, "the respect due to cultural difference" should lead liberals to "be open to, even supportive of, nonliberal cultures and ways of life" (7, 202); Parekh evinces a system that "retains the truth of liberalism and goes beyond it" by being "fair to both liberal and nonliberal cultures" (340, 108).

2 Carens does not explicitly address this issue, neither endorsing the role which Parekh assigns to operative public values, nor critiquing it. For instance, in discussing the

Amish in the US Supreme Court's decision in *Wisconsin v. Yoder*, the question of why the Supreme Court should have the final say is not raised (93–96).

3 To be fair, Parekh makes two suggestions that would help address this imbalance. One is to "insist that equality requires identical treatment and to place the onus of justification on those who would depart from it." This would be most effective where the majority initiates differential treatment, as in the British practice of publicly funding the Christian and Jewish but not Muslim schools. The other is to make it "possible for unconvinced minorities to appeal against government decisions to such public bodies as the courts or the Commission on Human Rights" (257).

4 Some theoretical arguments in sections 2 and 3.3 also appear in an as-yet unpublished manuscript (Andrew M. Robinson, *Autonomy, Identity, and Meaningful Life: A Theory of Liberal Multiculturalism*, chapter 7).

5 One concern is that the HRC refuses to accept individual communications based on the ICCPR Article 1 right of *peoples* to self-determination (see, e.g., Ghandhi, 116). Another is that "the 'individual right-bearer' is not a universally accepted model. It is a paradigm that reflects a Western individualistic focus, rather than the communitarian or 'collective rights' focus of certain non-Western societies" (Joseph et al., 19).

6 For a discussion of this complexity, see Andrew M. Robinson, "Have We Been Telling The Wrong Story About *Lovelace v. Canada?*: Applying a Framework to Assess the Effectiveness of the ICCPR," unpublished manuscript.

7 In making this observation I am neither endorsing nor denouncing these particular refusals to implement the HRC's views. I would note, however, that the issues and interests involved in both cases make identifying an adequate policy response much more complex than amending sign regulations, as *Ballantyne* required.

8 I would like to thank Joseph Carens and Marc Doucet, who both emphasized this point.

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