Law & Society REVIEW

Commentary

Of Rights and Favors

David Nelken

> The thinker without the paradox is like the lover without passion: a mediocre fellow.
>
> Soren Kierkegaard

I am glad to respond to Michael McCann's eloquent, wide ranging, and thought-provoking Presidential speech. I have been privileged over many years both to learn from his work and to experience the warmth of his friendship. We share our admiration of Stuart Scheingold and I have enjoyed participating in the yearly visits when Michael brings his students to Rome and Bologna to learn about another legal culture.

McCann offers us an ambitious stocktaking of what scholars, broadly associated with the Law and Society Association (LSA), have discovered about the way rights work in society together with a challenge to go further. As with the LSA itself, his concern about understanding the mutual shaping of law and society has both intellectual and political goals. Following the footsteps of Scheingold, Michael wants to understand how rights can realize their emancipatory potential rather than ending up diverting political struggles or otherwise supporting existing hierarchies.[1] As part of this task, he insists on the need to consider the functions played by rights globally and so invites the increasing proportion of overseas members of the Association to share their insights. In these remarks, I shall first offer a critical appreciation of the framework Michael uses to summarize the lessons of the research he reviews. I then go on to underline some of the difficulties that face us in taking up Michael's invitation to study rights comparatively. I end

I would like to thank Malcolm Feeley for his comments.

[1] Scheingold (1974/2004) argues that rights should be seen as political assets but that the value of going to court as such should not be exaggerated. We should rather seek to see how mobilization for the assertion of rights helps solidify groups and change their self-conceptions and expectations and those of others. McCann (1994) further develops and qualifies these ideas.

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by offering some reflections on rights in Italy, the country where I have lived and worked for the past 25 years. My conclusion is that care is needed in using Michael's framework for the purposes of comparative enquiry.

Paradoxical Rights

Taking his inspiration loosely from Kundera, McCann explains that rights can be both light and heavy. But he is interested not only in the way rights are existentially experienced. He also wants to explore and weigh their social significance. He conceptualizes the heaviness of rights, for example, as referring to the social and legal support that gives them weight, or the forces arrayed against their realization. Lightness, on the other hand, is used to mean the fragility of some rights, as well as the ease by which they spread. But, because he plays with the terms themselves, it is often hard to tell whether heaviness and lightness are being proposed as possible alternative kinds of rights or as interdependent features of all rights. Sometimes, McCann even uses the terms at the meta-level of commenting on theorizing about rights, as when he suggests that, "we need to reduce the lightness of our abstractions with the weight of attention to institutional complexity and grounded experience in multiple contexts." But the general message is clear. He invites us to explore the way rights can, at the same time, both be light and heavy, how this can change over time, and how this affects their instrumental and communicative roles in bringing about social change.

McCann tells us that the potential for rights to contribute to greater social justice confronts four paradoxes. There is first, the problem of which rights claims count, for example, the fact that for every right a competing one can be formulated. Then, there is what he calls "the contradictory promise of individual freedom." Rights of property and contract set strict limits to what else rights can do by way of redistribution of life chances. Procedural rights leave substance unaffected (often they are trumpeted or improved just when resources are cut back). Some people may feel they have rights that do not actually exist, while, for others, the idea of individual responsibility that helps justify rights can lead people not to want assert legal claims but shoulder the burden themselves. Third, he points out the limits on those who can assert legal rights. Inclusion of some right-bearers always excludes others (the mentally ill, foreigners, etc.). More insidiously, even citizens with full entitlement have to conform to certain models and internalize expected behavior in order to "deserve" their rights. Finally, and in some ways most significantly, rights can only bring about more social justice under conditions in which collective social movements

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are able to give them sufficient force. But, by the same token, seeking justice through rights can marginalize other ways by which the same or better results could have been achieved.

McCann's use of the idea of "paradoxes"[2] in framing these arguments is best understood broadly. It reminds us of well-documented *dilemmas*, such as how to square freedom with equality, as well as the *tensions* between different kinds of rights, such as individual and group rights. It also points to *contradictions* in the way rights can be applied in practice (as with law itself), to *constraints* on the implementation of rights, and to *limits* on what they can deliver unaided. It shows us that the problem can lie either in the ideal of rights itself or in their nonrealization, the recognition that rights are "unbearable," or the discovery that they are unbearable. A further difficulty hinted at reflects the instrumental approach to law that makes their mobilization possible. Those seeking to obtain their rights expect others to treat them as permanent once they have been acquired. But, because their achievement results from political pressure, this allows their opponents to continue to hope for change in the opposite direction (Tamanaha 2006).

Is it really productive to lump together discussion of all imaginable kinds of rights? It is not so much that it is politically problematic to conflate struggles for specific entitlements with the defense of more basic human rights. Rather, the problem is that this sort of undifferentiated use of the term rights makes them a poor starting point for sociological analysis. It is also unclear how much of this analysis is relevant only to rights. All social life is produced by human action, even as it easily takes on a heaviness that constrains us. Likewise, it is surely not only this kind of struggle that may turn out to produce unpalatable outcomes. Other explicit (or implicit) criticisms of rights also do not hit their mark. It is true that rights as entitlements are always limited to some groups as compared to others. But the benefits of membership in any collective, however achieved, exclude nonmembers, conformity necessarily presupposes deviance; any given ideology devalues its competitors, and any way of being (or seeing) displaces another. Finally, it cannot be doubted that, as he says, "rights discourses often are implicated in global forces that decimate cultural traditions." But the issue is surely why rights regimes claim to be better than what came before—injustice does not deserve defending just because it is hallowed by tradition.

In any case, his verdict is in favor of rights, so that the real problem is their lack of weight rather than their destructiveness. He

[2] A paradox can be defined as a statement that apparently contradicts itself and yet might be true, that is ironic or unexpected or reaches a self-contradictory result by properly applying accepted ways of reasoning.

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admits that "if rights are so light and supple, they must also mean very little and carry little weight as a challenge to the status quo." But he insists that rights, "whatever their limits, their lightness, and their paradoxical heaviness, can and often do matter in struggles for social justice, especially given the limited availability of alternative normative discourses." They "gain weight as a resource for egalitarian challenge and transformation when they animate organized collective challenge by exploited, excluded, needy, or righteous persons." Can social science tell anything about when such challenges are likely to succeed. His advice to social movement activists is to watch for and take advantage of cracks in the power structure. But it may be in the nature of such struggles that the possibility of transformation only becomes clear in retrospect.

On Looking Elsewhere

Michael McCann's address also raises a second set of problems, however, and it is these that mainly concern me here. What if we want to gain distance from the shared wisdom of the *Law and Society Association*?[3] How far are his claims about the limits of rights influenced by American ethnocentrism, a reflection of the specific institutional, political social economic, and cultural features of the places with which most writing on rights is concerned? The assumption that, "The liberal society of rights-bearing subjects thus did not abolish status and tribal distinctions; rather, the new order transformed status into individual terms of merit and character," cries out for more attention to be given to variation. Not all countries, even in Europe, have evolved institutions that are well captured by this description. The same applies to his generalization that, "state elites are captured by neoliberal incentive structures."

It is therefore even more true than McCann alleges that, "in an ever more interdependent world, we must take on the challenge of studying rights in a comparative and international context." It is indeed obvious that rights will not do the same work within radically different institutional settings, so we need "greater sensitivity to the interconnected components of sociolegal organization, and the ways that legal transfers, including translations of new rights, can wreak havoc and divert as well as serve justice." Michael tells us that we must enquire into what rights may be displacing and who gains and loses by such changes. And we must be open to "learn from novel ideas about rights and justice taken seriously elsewhere but ignored, misunderstood, or undervalued in our own legal

[3] The commitment to social equality could interfere with us seeing all the actual social functions performed by rights.

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establishment." But we must also, I suggest, be willing to ask even more radical questions about the function of rights and rights talk.

Yet the lack of empirical traditions in sociology of law in many of the countries that we may want to compare with the United States makes such an endeavor a demanding one. What is needed is an agenda for international collaboration and intercultural conversations. Many contributors to the *Law & Society Review* have already made a good start on this, for example, by describing the ways groups mobilize for rights, or the transnational projects and transfers by which new ideas about rights are spread. At the same time, however, we are far from having developed anything resembling a systematic comparative sociology of law and rights. Even within Europe, there are significant differences between Western states and those Eastern Europe countries whose populations have had a rapid education in the fact that "rights" do not offer social guarantees. There are also less remarked contrasts between, on the one hand, countries such as those in Scandinavia where what matters is government mandated steering and the starting point is "Law as fact," and the many countries in southern Europe where law is more often "counterfactual," aiming to defend ideals precisely because these are in conflict with common social practice. We also need to add into the picture intergovernmental, nongovernmental, and other transnational efforts to change or harmonize laws, many of which are pursued in the name of rights, and often involve calling weaker states to account.

It would be a mistake to underestimate the methodological problems in grasping different "legal cultures" (Nelken 2012b). Should we be looking for similarities or differences? And how deep must the search for difference go? Certainly, it may be of interest to look for similarities in attitudes and behavior regarding rights against a background of other economic, social, and political differences. Lawrence Friedman, for example, seeks to describe the many similarities in the worldwide rise of human rights (Friedman 2012). In other comparative writing, he has applied his Anglo-American "functionalist-instrumental" approach to law to other places so as to provide a theoretical starting point for showing who is involved in dispute processing and the distribution of rights, and how these social functions are performed (Friedman, Perdomo & Gomez 2011). But, valuable as this is, there is also a risk in not seeing that the theoretical and practical concerns that lie behind any given starting point are themselves cultural variables that need to be examined (Nelken 2012a).

Alternatively, we can choose to concentrate on differences, for example, using other places as "a foil" so as to develop criticisms of our own system, rather than trying to understand others "in their own terms" (whatever that is taken to mean). Bob Kagan, for

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example, offers sharp criticisms of what he called "adversarial legalism" in the United States, showing that it is often very expensive and counterproductive (Kagan 2004). He rightly stresses that litigation cannot substitute for the political will to create a welfare state; courts cannot guarantee jobs, build subsidized housing, or restore the tax base of urban centers. But he goes further, arguing that, in the United States, "law often appears to be only an arena for political struggle not the authoritative normative anchor that it represents in most other democratic nations" (Kagan 2004: 20). But, seen from the perspective of these other countries that he treats as useful foils, such as Japan or Scandinavia, it is in the United States that law (and rights) is more likely to provide the "normative anchor" of daily life. In other countries, the predictability of social life owes more to a variety of extra legal normative systems and interdependencies than it does to impersonal state law.

As this suggests, when comparing the role and function of rights, we need not only to assess the objective circumstances and opportunities for enjoying them but also to think about how categories of law and right are thought about elsewhere. As McCann anticipates, that may mean that the paradoxes he identifies may sometimes be "magnified." But it is important to recognize that there is no "view from nowhere" from which to measure such magnification. A scholar coming from an Anglo-American type of legal cultures is likely to find that, in places with less "pragmatic" approaches to law, more effort is devoted to debating the ideas and ideals that the law is supposed to embody than it is to actually implementing them. Hence, the "gap" between rights and their application may be less often discussed as a problem in political debates and academic literatures in such contexts than it is Anglo-American cultures. From which point of view then does it make sense to praise the "vibrant civic culture of rights activism at local, national, and transnational levels throughout the European Union?"

Take the place of rights in a country like Italy. To start with similarities: we can, if we look for them, find many parallels in the battles for (and over) rights in the United States, for example, with respect to housing provision and work conditions, sexual discrimination, abuse and violence, or the protection of immigrants.[4] There may, of course, be some differences in the actors involved. Social protest movements (Della Porta 1996) play an especially significant role in environmental issues, as in the current opposition to the

[4] Many would-be immigrants from Africa die trying to reach Italy. Although regular and irregular immigrants, who make up roughly 5 percent of the population, play an important role in the economy, those accused of offences are disproportionately sent to prison, where they represent over one-third of inmates.

building of high-speed Continental rail link in Italy (through the Val di Susa), or in campaigning for referendums over resources such as water. Students occupy schools, and workers factories, though—so far—there is no U.S. style "Occupy" movement.[5] Union representatives and their lawyers and feminist organizations are particularly active in Italy, and Union offshoots (so-called Patronati) and consumer organizations seek to extract recognition of established rights from often nonresponsive businesses and national and local government bureaucracies.

On the other hand, the battle for rights in Continental European countries such as Italy does not rely on litigation strategies in the same way as in the United States. For example, it was the judges in the 1970s and 1980s who themselves set out to use the Constitution's promise about social equality to advance the interests of weaker social actors. And it is prosecutors and judges who invent new heads of damages, such as the so-called "moral damages" in tort, and state insurance schemes; and they who find legal remedies for asbestos victims (Boggio 2013). If we then ask how rights relate to other discourses, as McCann suggests we do, we would discover that they less often express individualist liberal (or neoliberal) ideas, with the limiting effects McCann complains about. Instead, they take sustenance from Marxist and Catholic ideologies of equality and solidarity. Some Italian scholars produce highly ambitious lay analyses of third and later generation rights. Such work, in part, influenced by Marxist ideals of solidarity, seeks to protect the resources of "the commons" (Rodotà 2011, 2012). At the same time, the influence of the Catholic Church (with the Vatican on the doorstep) means that legislation in the areas of family law and bioethics often seeks to circumscribe the rights of the individual where this conflicts with the stability of the family or the teachings of the church.

Both the Marxist and the Catholic traditions, as they are drawn on in Italy, can produce an inflation of rights talk whereby they are described as the solution to all social problems.[6] But, in practice, rights are easily manipulated for clientelistic purposes, as in the way welfare subsidies for those claiming to suffer from disabilities were frequently misused as a means of patronage, especially in southern Italy. On the other hand, the question of how rights are to be paid for is very rarely discussed—often because those pressing for them do not accept the legitimacy of the current political and economic

[5] Tony Negri (2013) suggests that this is because social movements are too tied to political parties and the nineteenth century "Socialist horizon."

[6] Alessandro Baratta, the inspirational "master" of left-leaning criminologists in Italy, insisted from the early stages of immigration there that security would only come from guaranteeing rights rather than through crime control (Baratta 1997).

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arrangements. Squaring the circle, Italy's notorious court delays can be understood as one way of rationing such rights *de facto*.[7]

Other institutions, including the bureaucracy, the family, and even the Mafia (and the other three major Italian organized crime groups), are also important for understanding what is actually made of rights. Some who rely on family (or family-like) connections may feel that they do not need rights, or at least that it is the family unit that should receive these rights. With the way bureaucracy works, it is often impossible to know or obtain your rights. Against the background of a high level of nonrespect for law, with one of the largest black economies in Europe, and a high level of systematic tax evasion, a vicious cycle emerges in which suspicious and formalistic bureaucracies often frustrate the rights they are supposed to implement. In the four regions where organized groups condition much of political life, the question of individual rights becomes otiose.

Michael McCann, clearly, is all in favor of gathering such comparative insights into the limits of rights in given contexts. But it still seems to me that there is little to be gained from linking this to a discussion about when rights count as heavy and light. A more fruitful way of understanding the local significance of rights would involve seeking to identify "the wrongs" that they are most likely to be invoked to remedy. In this way, it also becomes possible to open up the question whether rights are necessarily the best way of dealing with them.

One of the key features of rights talk in Italy is the way it promises the possibility of a world without the need to depend on favors. When I first arrived in Italy in 1989, the campaigning slogan of the PDS (the powerful ex-Communist party) was "do you want a country of rights or a country of favors?" Shortly thereafter, the *Tangentopoli* corruption scandal broke (Nelken 1995), showing just how much public life at all levels depended on forbidden exchanges between politicians, administrators, and businessmen. In the twenty years since, Berlusconi, probably Italy's richest businessman, has either been in power or threatening to retake it, even while under accusation for various crimes, and not a day has passed in which the newspapers have not reported some corruption scandal concerning illicit enrichment (and left-wing parties are by no means uninvolved). Italy's allegedly high level of corruption is

[7] Most of the many Italian cases that concern the unreasonable length of trials that finish up before the Strasbourg Court of Human Rights (as a breach of article 6 of the Convention on Human Rights) involve alleged breaches of employment or pensions rights; very few have to do with commercial disputes (Nelken 2004). Sometimes, there can even be a direct link between the (over) generous creation of rights and consequent court delays, as when no replacements are provided for judges going on maternity leave so that the cases finish up in the closet awaiting the judge's return to work.

also regularly stigmatized through international campaigns, especially that spearheaded by Transparency International, that rely largely on experts and the publics' perceptions and a supposed "universal" definition of the problem.

But the continual exposure of "corruption" by the courts and media has not, apparently, transformed behavior. And discussion in Italy continues to concentrate on the moral failings of those involved in forbidden exchanges. The issue of what can be done to mobilize the rights of those who have been victimized is rarely mentioned. Should this be understood as some sort of carnival, more evidence of the way the myth of rights can distract? Unfortunately, what McCann sees as the ultimate goal of rights, the "sublimation of power as interest into solidarity animated by social justice" can all too easily morph into satisfying the status envy of the less powerful.

The pursuit of a serious sociology (and anthropology) of rights requires us to explore why it is that in Italy rights talk is so often irrelevant to how resources are actually distributed—notwithstanding the continual scandalizing by the media. For example, for some of those most closely involved, forbidden exchanges may be experienced as an aspect of governance and micropolitics that serves to avoid the even worse fate of instability and endemic distrust (Nelken 2009). For others, relying on favors may be seen as ways of getting round an unjust system. Outside of the courtroom, protecting people's enjoyment of legal rights as rights-bearing individuals may often be seen as helping them to get benefits without their paying the appropriate price of social cooperation (and subordination)—hence, the opposite of social justice. But only those wedded to the idea of rights as a universal remedy for all wrongs would consider it a paradox that in some circumstances past favors are widely felt to justify entitlement more than legal rights.

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