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CULTURAL RELATIVISM AND CULTURAL IMPERIALISM IN HUMAN RIGHTS LAW

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One of the most persistent theoretical debates concerning international human rights law is known as the "Universalism-Cultural Relativism" problem. This debate proceeds on the assumption that the legitimacy of international human rights law depends upon the existence and perspicuousness of fundamental principles of justice that transcend culture, society, and politics. Thus, the debate presumes that to assert the cultural relativity of justice is to deny the legitimacy of international human rights law and that to defend international human rights law is to assert the universal and transcendent validity of its norms. This comment seeks to challenge this presumed linkage between international human rights law and universally valid criteria of justice. It accepts the cultural relativity of justice while insisting that this position has no necessary implications for the legitimacy of international human rights law.

To understand the debate, it is necessary to recognize its background in the nineteenth century legal positivist account of international law as a product of the consent of sovereign states, whether manifested in treaties or in custom and usage. This theory of international law was securely rooted international law's validity in the will of powerful governments -- but it left little place for an international law of human rights that would constrain these governments from mistreating their own people or persons unprotected by another government. If international law can only be created through the consent of sovereign states, no state need answer to anyone concerning its treatment of its own people, unless it consents to do so. And a state will only subject its treatment of its own people to scrutiny if it already treats them decently (and gets to define what counts as decent treatment!). Thus, a state based model of international law would seem to render an international law of human rights either impossible or superfluous. A human rights law dependent on the will of sovereign states would appear to be no

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human rights law at all.

In response to this statist or legal positivist model of international law, human rights advocates attempted to ground international human rights law on a source of authority superior to the state. This source of authority was a universally valid moral principle. Drawing on the Lockean social contract tradition in political theory,[1] as well as such natural law theorists as Wolff[2] and Vattel[3], they asserted that all persons, regardless of culture, citizenship and nationality have inherent rights which precede and condition political societies and institutions. These universally valid, prepolitical rights of individuals were thought to justify international restraints on what sovereign states could do to their own populations. Indeed, some theorists of human rights went so far as to condition state sovereignty on respect for these human rights. On this view, international enforcement of human rights would not violate the principle of non-intervention in the internal affairs of sovereign states because such states were only sovereign in so far as they respected human rights. In Lockean fashion, human rights advocates conceived state sovereignty as derived from the (internationally protected) natural rights of individuals.[4]

Thus, supporters of an international human rights law confronted the state-based model of international law with a rival model of international law based on persons. Note that this rival model, in which states are created by the consent of individuals and legitimated by their contribution to the protection of individual rights, is structurally similar to the model it opposes. Both are essentially contractarian models, deriving the authority of government from a foundation in the inherent rights of smaller units. Indeed, the political philosopher Charles Beitz has defended the fundamentality of individual human rights in international law by arguing that the idea of state sovereignty was originally based on analogizing states to individuals and international law to the social

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[1] JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT (1948).
[2] CHRISTIAN WOLFF, JUS GENTIUM METHODO SCIENTIFICA PER TRACTATUM
[3] EMMERICH DE VATTEL, THE LAW OF NATIONS (1854).
[4] FERNANDO TESON, HUMANITARIAN INTERVENTION (1997).

contract.[5] Both models involve a strikingly formalistic-- and unrealistic-- conception of the political legitimation of governing institutions as a chain of deductive reasoning rather than an historical process.

If the authority of states derives, in Lockean fashion, from the consent or natural rights of individuals, then it is individuals rather than states that ultimately ground the authority of international law. By subordinating political society to deracinated individual human beings in this way, supporters of international human rights implied that there were moral absolutes that transcended society and culture. This claim that the international law of human rights derived from universally valid absolute moral principles set the stage for the universalism-cultural relativism debate.

This debate was initiated by critics of international human rights law -- critics usually identified with non-western societies. They argued that the core instruments of international human rights law-- the Universal Declaration of Human Rights[6] and the United Nations Covenant on Civil and Political Rights[7]- have little legitimacy outside the west.[8]These instruments, they said, reflect a liberal individualism prevalent in the West, and ignore the importance of group membership, of duties, and of respect for nature prevalent in many non-western cultures.[9] In addition, these instruments prioritize civil liberties over the economic and social needs that seem

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[5] CHARLES BEITZ, POLITICAL THEORY AND INTERNATIONAL RELATIONS (1979.)

[6] Universal Declaration of Human Rights, *adopted* 10 Dec. 1948, G.A. Res. 217A(III), U.N. GAOR, 3rd Sess. (Resolution, part 1), at 71, U.N. Doc A/810 (1948), *reprinted in* 43 AM. J. INT'L. L. SUPP. 127 (1949) [hereinafter UDHR].

[7] International Covenant on Civil and Political Rights, *adopted* 16 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* 23 Mar. 1976) [hereinafter ICCPR].

[8] Adamantia Pollis & Peter Schwab, *Human Rights: A Western Construct with Limited Application, in* HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES (Pollis & Schwab, eds. 1978).

[9] *See generally* Raimundo Pannikkar, *Is the Notion of Human Rights a Western Concept?*, DIOGENES 120, 75-102 (1982), Josiah A.M. Cobbah, *Africa Values and the Human Rights Debate: An African Perspective*, 9 HUM. RIGHTS Q. 309 (1987), *and* Makau wa Mutua, *The Banjul Charter and the African Cultural Fingerprint*, 35 VA. J. INT'L. L. 339 (1995).

more pressing in the developing world. Even in the west, cultural relativist critics contend, the norms embodied by international human rights law are legitimate only because they accord with the political cultures of these societies. Free speech, elections and the rule of law are fundamental to western traditions, not to human nature or human dignity.

Thus, beyond their specific criticisms of the content of international human rights norms, cultural relativists offer a more fundamental critique. They deny the existence of rights inhering in individual human beings independent of society and culture. No such pre-social rights can exist, they contend, because all values are socially constructed. On this view, values are products of human beings, acting in particular historical and social contexts. Hence, they are features and creatures of particular cultures and cannot exist apart from human society. The recognition of a right is merely a value judgment like any other: it may be better or worse than other value judgments as such, but not because it derives from some higher source of authority. Thus, human rights do not derive from some source of authority that is categorically superior to or more fundamental than state sovereignty. Rights are based on value judgments made by culturally and socially situated human beings, drawing on the social norms -- and the critical perspectives on those norms -- that are culturally available to them. In this sense beliefs about rights -- including the belief that they inhere in individuals by virtue of their status as human beings -- are culturally relative. As the products of particular societies or cultures, beliefs about the inviolability of individual human beings are not categorically superior to beliefs about other values like group solidarity, majoritarian democracy, national self-determination, or religious piety, that may conflict with the civil liberties of individuals.

"Universalist" supporters of international human rights law typically respond to this line of argument with a critique of the concept of cultural relativism. They typically argue that the relativism espoused by critics of human rights law is self-contradictory. They argue that if critics of human rights law believe that all values are culturally relative and that the cultural relativity of a value judgment undercuts its authority, these critics cannot take their own values

seriously. They point out that cultural relativist critiques of human rights law often invoke normative principles like the equal dignity and worth of all cultures, or the equal right of all peoples to participate in the formation of international law. These normative principles are merely value judgments, and yet "cultural relativist" critics of human rights law seem to treat them as universally valid absolutes. Moreover, if the "cultural relativists" really believe in some values, that means that they think some values are better than other values -- for example, that material welfare is more important than free speech, or that group solidarity is more important than the rule of law. And if they think that some values are superior to other values, then they cannot truly think that all cultures are of equal value. They must believe that cultures devoted to "good" values are better than cultures devoted to "bad" values. Otherwise, their value relativism collapses into value nihilism and they have no basis on which to prefer social democracy to Nazism, or to prefer an Islamic theocracy to a Satanic cult. Indeed, if cultural relativists really believe that all cultures must be tolerated as equally valuable, then they are compelled to tolerate even militant colonialists who regard non-western peoples as savages unworthy of self-rule.[10]

This self-contradiction argument is clever, but it involves a fallacy. That some values are better than others does not entail that they derive from a higher source of authority. Belief in and pursuit of a value does not logically entail some additional belief about the metaphysical status of the value. Critics of human rights law can assert that non-western cultures should be treated with respect and that international lawmaking should involve the democratic participation of non-western peoples, without asserting that all cultures and all values are categorically equal. They can also support the principle of equal participation in international lawmaking while acknowledging that the principle is itself merely a culturally situated

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[10] For thoughtful discussions of the question of whether the cultural relativism of human rights entails these sorts of self-contradictions *see* ALISON DUNDES RENTELN, INTERNATIONAL HUMAN RIGHTS: UNIVERSALISM VERSUS RELATIVISM (1990); *See also* JACK DONNELLY, INTERNATIONAL HUMAN RIGHTS: THEORY AND PRACTICE (1989).

value judgment.

At the same time, and for the same reasons, the admission that support for international protection of civil and political rights rests on culturally specific value judgments does not refute those value judgments. Advocates sought a foundation for international human rights law in the natural liberty of individuals only in order to overcome the foundationalist arguments of defenders of the absolute autonomy of sovereign states. But arguments for and against international human rights law or state autonomy need no foundations. We can always assess international legal institutions and doctrines in pragmatic terms, as contributing to human betterment, or as embodying broadly participatory decisions emerging from acceptably fair processes, or as tolerably useful and superior to available alternatives, or to the costs of pursuing change.[11] This is how we commonly assess domestic political institutions. Why should we treat international legal institutions any differently?

The legal positivist model of international law as the creature of sovereign states was developed over a hundred years ago, in what is conventionally viewed as an era of high formalism in legal theory. At that time, international law, such as it was, genuinely was the creature of a small number of mostly European nation-states, proceeding primarily by treaty. Today, jurisprudence has left that type of formalism far behind, and the international legal system is vastly different. Why do we persist in thinking about the legitimacy of international human rights law in nineteenth century terms? Why does the cultural relativism-universalism debate concerning international human rights presume that international human rights law can only be established upon a universalist theoretical foundation? Why does the legitimacy of international human rights law depend upon the possibility of establishing universal moral truths? We do not usually place such a heavy burden of proof on domestic legal regimes. We might expect them to be stable, orderly, popularly accepted, responsive to majority opinion and tolerant of

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[11] For an argument against foundationalist arguments in political justification, *see generally* DON HERZOG, WITHOUT FOUNDATIONS (1985).

minority opinion. Why do we demand something more of international human rights law?

I think there are two reasons.

First, we assume that international human rights law can only be legitimized as natural law because it fails so miserably as positive law. This is not to say that international human rights law has not been institutionalized at all. There are the Human Rights Committee and Commission, the U.N. covenants, with their systems of reporting and monitoring. There is the European Union system and other much less effective regional human rights regimes. But with the possible exception of the European Union, international human rights law is not part of an effectively functioning legal system that delivers on the promise of stability, social peace, humane living conditions and democratic responsiveness. So international human rights law cannot legitimate itself as law in the natural way, by proving its efficacy. It must stake its claim on the terrain of ideals and values. If international human rights law is not at this point effective it can only be defended as morally good.

But this is only a partial answer. Assuming that international human rights can only be defended as morally good, why must it be defended as universally good? The cultural relativism-universalism debate presumes that if international human rights are not rooted in universally valid truths, they must be rooted in culturally relative opinions. And so its participants fear that if an international human rights regime reflects culturally relative values, it will govern people of all cultures according to the values of one. Thus the cultural relativism critique of international human rights law implies the charge of imperialism. Implicit in the cultural relativism critique is an interpretation of human rights advocacy as the claim that non-western peoples should be governed by western opinions rather than their own. Both sides in the cultural-relativism/universalism debate see the same dilemma: either International Human Rights Law is rooted in universal truths or it is imperialist. This dilemma is premised on a simple but rarely articulated proposition: that if human rights. norms are culturally relative human creations, they are necessarily imperialistic.

This equation between cultural relativism and imperialism

deserves further scrutiny than it has thus far received. I suspect that the equation of cultural relativism and imperialism depends upon inadequately theorized conceptions of both culture and imperialism.

Let us consider the concept of culture first. What does it mean to say that conceptions of human rights are culturally relative? Most analysis of the concept of cultural relativism has focused on the meaning of relativism. For example Alison Dundes Renteln has usefully distinguished among apparent, descriptive and prescriptive relativism. Apparent relativism is the empirical claim that ethical beliefs in fact vary with culture. Descriptive relativism is the view that not just ethical beliefs, but ethical truth is culturally dependent -- that there can be no transcendent, culture-free criteria of ethical validity. Finally prescriptive relativism is the ethical belief that people should follow the ethical norms of their own cultures.[12] All three of these forms of relativism play some role in the controversy over the cultural relativity of human rights. Nevertheless, descriptive relativism is the most important norm of cultural relativism because it directly challenges the view that there are moral norms that are universally valid, irrespective of what people actually believe. Beyond that, however, the implications of cultural relativism are less clear. Granted that criteria of ethical validity are culture-dependent, what is this thing, "culture," that they depend on?

The answer implied by much of the universalism-relativism debate about human rights, is that criteria of ethical validity depend upon national cultures or religious traditions. In other words, cultural relativism has often taken the form of a claim that moral values depend not upon culture, but upon discrete, coherent, bounded *cultures.*

This interpretation of cultural relativism as dependence on discrete national cultures reflects a naive view of culture. I would define culture as the practice of making meaning and the totality of circumstances conditioning that practice in a given locale. I might add that culture in this sense is often organized by relatively stable structures. Examples of such structures include languages,

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[12] *See* RENTELN, *supra* note 10.

institutions, and socially recognized identities. These structures may overlap in the sense that individuals may generate meaning in relation to many different structures and may interact with others who share some structural conditions with them but not others. Culture need not take the form of discrete, comprehensive cultures.[13]

So where does this idea of the discrete, comprehensive culture come from? Why is it so influential? To make a long story short, the idea of a bounded culture is closely connected to the particular structure of the nation state, which links together a set of political institutions, a process of mass political mobilization, a territorial language of administration and education, a shared civic identity, and often an official ideology of patriotism, ethnocentrism and cultural renewal. This particular cultural structure is a distinctively modern and paradigmatically Western phenomenon. Even in the West, culture is much less bounded and coherent in reality than in ideology. But the idea of a national culture is nevertheless a Western idea closely associated with the institution of the modern state.

Now, we might ask, how much relevance does this institution have outside the West? To what extent are the post-colonial states of the developing world nation states? I think it is fair to answer that the nation-state ideal is rarely fulfilled in the post-colonial world. Indeed, this is part of what Western social scientists have meant in calling post-colonial states "developing" states. They have meant states that had not yet developed into nation-states -- states only superficially attached to political societies that had not yet developed a high level of national integration, mobilization and participation. In such societies, the state is a salient cultural structure only for certain societal sectors, primarily westernized elites. The post-colonial state can often be thought of as a successor to the colonial administration. It is formally independent of any particular colonial master, but may remain devoted to the colonial function of providing the legal infrastructure for foreign investment and trade. And it will likely be staffed by elites trained abroad or in educational institutions of

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[13] For a fuller discussion of this notion of culture, *see* Guyora Binder and Robert Weisberg, *Cultural Criticism of Law*, 49 STAN. L. REV. 1149 (1997).

colonial origin. The boundaries of such states are often of colonial origin and may little reflect received tribal, religious or linguistic identities. In sum, the state sector is as much a Western or international institution as it is an indigenous one.

Thus the state is often just one cultural structure among many in the developing world, rather than the center from which a national culture radiates. Indeed there may be no national culture as such. Instead there may be disparate cultural structures, some local and some international.

While ideas about fundamental rights in the developing world will of course be culturally conditioned, they may be conditioned by many different cultural structures, including local village custom, broad religious traditions, the global state system, and multinational corporate capital. It is not immediately evident that one or another of these cultural structures provides the most appropriate starting point in developing criteria to assess state policy. If the state sector of a developing society is essentially a colonial extension of a western dominated global state system, then it may simply be unrealistic to expect it to be responsive to local cultural norms. And if the more local institutions and other structures are disengaged from the state, that does not necessarily mean that they challenge the state with some more culturally authentic conception of fundamental rights and just state policy. They may have nothing at all to say about the just conduct of a bureaucratic state.

I have thus far argued that the idea of discrete national cultures is often inapplicable in the developing world because of the disconnect between the state sector and other cultural structures. I have also argued that the state sector is in some ways part of an international cultural structure with roots in the West, so that the post-colonial state is in some ways also neo-colonialist. This brings us to the second important concept underwriting the cultural relativism critique of human rights law: the idea of imperialism or colonialism. The idea of imperialism is analytically linked to its opposite, the idea of national self-determination. But what does national self-determination mean once we abandon the assumption that the societies of the developing world are "nations" possessed of "national cultures?" National self-determination becomes the aspiration for an

integrated, pervasively democratic political society that does not and perhaps cannot exist. The imperialism critique of human rights law hinges upon the ideal of national self-determination, but that ideal may be an unrealistic criterion of legitimacy.

In sum, the cultural relativism critique of international human rights law as an expression of western cultural imperialism depends upon the related ideals of national culture and national self-determination. And both of these ideals may be no less "foreign" than Western ideals of human rights. Of course human rights standards are culturally relative, and of course human rights law is a Western institution. So are the states that human rights law sets out to restrain. Imperialism is an intractable reality in the global state system and no scheme of human rights norms will be effective unless it is institutionalized within that imperial system.

Rather than asking whether human rights standards are authentic to the national cultures of the developing world, we should ask how human rights law contributes to building decent and democratic societies in a developing world suspended between local and global cultural structures. And here I fear the answer is that human rights law can contribute little to progressive social change as long as it remains an autonomous body of law administered by institutions exclusively devoted to expounding human rights law. For the most part, human rights law is directed at weak dependent states by institutions on which those states do not depend. Unless human rights norms become part of the global process of governance by which the neocolonial state is constituted they can have little impact for good or ill. The problem, in short, is not that human rights standards are too imperialistic, but that they are not imperialistic enough.