

CONDITIONS OF AN UNFORCED CONSENSUS ON HUMAN RIGHTS By Charles Taylor

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I

What would it mean to come to a genuine, unforced international consensus on human rights? I suppose it would be something like what Rawls describes in his *Political Liberalism* as an “overlapping consensus.”¹ That is, different groups, countries, religious communities, civilizations, while holding incompatible fundamental views on theology, metaphysics, human nature, etc., would come to an agreement on certain norms that ought to govern human behaviour. Each would have its own way of justifying this from out of its profound background conception. We would agree on the norms, while disagreeing on why they were the right norms. And we would be content to live in this consensus, undisturbed by the differences of profound underlying belief.

The idea was already expressed in 1949 by Jacques Maritain. “I am quite certain that my way of justifying belief in the rights of man and the ideal of liberty, equality, fraternity is the only way with a firm foundation in truth. This does not prevent me from being in agreement on these practical convictions with people who are certain that their way of justifying them, entirely different from mine or opposed to mine, ... is equally the only way founded upon truth.”²

Is this kind of consensus possible? Perhaps because of my optimistic nature, I believe that it is. But we have to confess at the outset that it is not entirely clear around what the consensus would form, and we are only beginning to discern the obstacles we would have to overcome on the way there. I want to talk a little about both these issues here.

First, what would the consensus be on? One might have thought this was obvious: on human rights. That’s what our original question was about. But there is right away a first obstacle, which has been very often pointed out. Rights talk is something that has roots in Western culture. There are certain features of this talk which have roots in Western history, and there only. This is not to say that something very like the underlying norms expressed in schedules of rights don’t turn up elsewhere. But they are not expressed in this language. We can’t assume straight off, without further examination, that a future unforced world consensus could be formulated to the satisfaction of everyone in the language of rights. Maybe yes, maybe no. Or maybe: partially yes, partially no, as we come to discriminate some of the things which have been associated in the Western package.

¹ John Rawls, *Political Liberalism*

² From the Introduction to *UNESCO, Human Rights: Comments and Interpretations*, London: Allan Wingate 1949, pp. 10-11; cited in Addullahi A. An-Na’im, “Towards a Cross-Cultural Approach,” 28-9.

This is not to say that we already have some adequate term for whatever universals we think we may discern between different cultures. Jack Donnelly speaks of “human dignity” as a universal value.³ Yasuaki Onuma criticizes this term, pointing out that “dignity” has been itself a favourite term in the same Western philosophical stream that has elaborated human rights. He prefers to speak of the “pursuit of spiritual as well as material well-being” as the universal.⁴ While “dignity” might be too precise and culture-bound a term, “well-being” might be too vague and general. Perhaps we are incapable of this stage of formulating the universal values in play here. Perhaps we shall always be incapable of this. This wouldn’t matter, because what we need to formulate for an over-lapping consensus is certain norms of conduct. The deep underlying values supporting these will, in the nature of the case, belong to the alternative, mutually incompatible justifications.

I have been distinguishing in the above between norms of conduct and their underlying justification. The Western rights tradition in fact exists at both these levels. On one hand, it is a legal tradition, legitimating certain kinds of legal moves, and empowering certain kinds of people to make them. We could, and people sometimes do, consider this legal culture as the proper candidate for universalization, arguing that its adoption can be justified in more than one way. Then a legal culture entrenching rights would define the norms around which world consensus would supposedly crystallize.

Now some people already have trouble with this; e.g., Lee Kwan Yew, and those in South Asia who sympathize with him. They see something dangerously individualistic, fragmenting, dissolvent of community, in this western legal culture. (Of course, they have particularly in mind – or in their sights – the United States.) But in their criticism of Western procedures, they also seem to be attacking the underlying philosophy of the West, which allegedly gives primacy to the individual, where supposedly a “Confucian” outlook would have a larger place for the community, and the complex web of human relations in which each person stands.

For the Western rights tradition also vehicles certain views on human nature, society and the human good. In other words, it also carries some elements of an underlying justification. It might help the discussion to distinguish these two levels, at least analytically, so that we can develop a more fine-grained picture of what our options are here. Perhaps in fact, the legal culture could “travel” better, if it could be separated from some of its underlying justifications. Or perhaps the reverse is true, that the underlying picture of human life might look less frightening, if it could find expression in a different legal culture. Or maybe, neither of these simple solutions will work (this is my hunch), but modifications need to be made in both; however, distinguishing the levels still helps, because the modifications are different on each level.

In any case, I think a good place to start the discussion would be to give a rapid portrait of the language of rights which has developed in the West, and of the surrounding notions of human agency and the good. We could then proceed to identify certain centres of disagreement across cultures, and we might then see what if anything could be done to bridge these differences.

³ Jack Donnelly, *Universal Human Rights in Theory and Practice*, Ithaca/London: Cornell: U.P., 1989, pp. 28-37.

⁴ Yasuaki Onuma, “In Quest of Intercivilizational Human Rights,” p. 1, also n. 4.

II

First, let's get at the peculiarities of the language of rights. As has often been pointed out, there is something rather special here. Many societies have held that it is good to ensure certain immunities or liberties to their members – or sometimes even to outsiders (think of the stringent laws of hospitality that hold in many traditional cultures). Everywhere it is wrong to take human life, at least under certain circumstances and for certain categories of persons. Wrong is the opposite of right, and so this is in some sense in play here.

But a quite different sense of the word is invoked when we start to use the definite or indefinite articles, or to put it in the plural, the speak of “a right” or “rights”: or when we start to attribute these to persons, and speak of your rights or my rights. This is to introduce what has been called “subjective rights.” Instead of saying that it is wrong to kill me, we begin to say that I have a right to life. The two formulations are not equivalent in all respects. Because in the latter case the immunity or liberty is considered as it were the property of someone. It is no longer just an element of the law that stands over and between all of us equally. That I have a right to life says more than that you shouldn't kill me. It gives me some control over this immunity. A right is something which in principle I can waive.⁵ It is also something which I have a role in enforcing.

Some element of subjective right exists perhaps in all legal systems. The peculiarity of the West was, first, that it played a bigger role in European mediaeval societies than elsewhere in history, and, second, that it was the basis of the rewriting of Natural Law theory which marked the 17th Century. The older notion that human society stands under a Law of Nature, whose origin was the creator, and which was thus beyond human will, was now transposed. The fundamental law was reconceived as consisting of natural rights, attributed to individual prior to society. At the origin of society stands a Contract, which takes people out of a State of Nature, and puts them under political authority, as a result of an act of consent on their part.

So subjective rights are not only crucial to the western tradition, because they have been an important part of its jurisprudence since the Middle Ages. Even more significant is the fact that they were projected onto Nature, and formed the basis of a philosophical view of humans and their society, one which greatly privileges individuals' freedom and their right to consent to the arrangements under which they live. This view becomes an important strand in Western democratic theory of the last three centuries.

We can see how the notion of (subjective) right both serves to define certain legal powers, and also provides the master image for a philosophy of human nature, of individuals and their societies. It operates both as legal norm, and as underlying justification.

Moreover, these two levels are not unconnected. The force of the underlying philosophy has brought about a steady promotion of the legal norm in our politico-legal systems; so that it now occupies place of pride in a number of contemporary polities. Charters of rights are now entrenched in the constitutions of a number of countries, and also of the European Union. These are the basis for judicial review, whereby the

⁵ Which is why Locke had to introduce a restrictive adjective to block this option of waiver, when he spoke of “inalienable rights.” The notion of inalienability had no place in earlier natural right discourse, because this had no option of waiver.

ordinary legislation of different levels of government can be invalidated on the grounds of conflict with these fundamental rights.

That (subjective) rights thus operate today as trumps is the convergence of two different if intertwined lines of promotion. On one hand, there is the old conception of the fundamental law of our polity, which the decrees or decisions of the authority of the day cannot override. This played a role in pre-modern European societies, even as it did frequently elsewhere. The entrenchment of Charters means that the language of rights has become a privileged idiom for a good part of this fundamental law. This is one line of advance.

At the same time, European thought also had a place for a Law of Nature, a body of norms with even more fundamental status, because they are universal and hold across all societies. Again, analogous concepts can be found elsewhere. The place of rights in our political discourse today shows that it has also become the favoured idiom for this kind of law. We speak of a Universal Declaration of Human Rights. This is the second line of advance.

The rights we now entrench in Charters benefit from both these promotions. These rights occupy the niche which already existed in many legal systems, whereby laws were subject to judicial review. While at the same time, their great force in modern opinion comes from the sense that they are not just features of our legal tradition, that they are not part of what is culturally conditioned, one option among others which human societies can adopt, but fundamental, essential, belonging to human beings as such – in short inviolable.

So the Western discourse of rights involves, on one hand, a set of legal forms by which immunities and liberties are inscribed as rights, with certain consequences for the possibility of waiver, and for the ways in which they can be secured; whether these immunities and liberties are among those from time to time granted by duly constituted authority, or among those which are entrenched in fundamental law.

And it involves, on the other hand, a philosophy of the person and of society, attributing great importance to the individual, and making significant matters turn on his or her power of consent.

When people protest against the western rights model, they seem to have this whole package in their sights. Taking it as a whole is not simply wrong, of course, because the philosophy is plainly part of what has motivated the great promotion enjoyed by this legal form. Nevertheless, it will help to distinguish them, because we can easily imagine situations in which, for all their interconnections, the package could be untied and either the forms or the philosophy could be adopted alone, without the other. Of course, this might involve some adjustment in what was borrowed, but this inevitably happens whenever ideas and institutions developed in one area are taken up elsewhere.

It might help to understand a little better just what exactly we might want ultimately to converge onto in the world society of the future, as well as to measure our chances of getting there, if we imagine variations separately on two levels.