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Universal Minority Rights?

A Transnational Approach

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MORIGIWA Yasutomo

Preface

It is with great pleasure that my fellow editors and I present on behalf of the Japanese National Section of the International Association for Philosophy of Law and Social Philosophy (IVR Japan) and the Japan Association of Legal Philosophy (JALP), the proceedings of the Fifth Kobe Lecture. The invited lecturer, Professor Will KYMLICKA, read his Lecture "Universal Minority Rights? The Prospects for Consensus" in Tokyo and Kyoto, at the University of Tokyo and Doshisha University, respectively. Seminars were also given in Tokyo, Kyoto and Sapporo, where interesting discussion took place, especially between the designated commentators and Professor KYMLICKA. So much so, in fact, that instead of the usual format of the Kobe Lecture, which is the publication of the lecture in a regular issue of *the Archiv für Rechts- und Sozialphilosophie* (ARSP, the official publishing organ of the IVR), a project was developed to publish the lecture, commentaries and the lecturer's replies to the commentators in a single volume. With the kind understanding of the managing editors of the ARSP, the project became reality in the form you see here, entitled "Universal minority rights? A transnational approach."

The title expresses two aspects of the project. One, a discussion of an attempt to justify minority rights in non-liberal nations with reasons independent of liberal principles accepted in western political cultures. This is the approach Professor KYMLICKA has proposed in his lecture, the main title of which we have adopted for the volume. The other, an academic exploration involving scholars from two different nations, Canada and Japan, with little regard for the cultural differences involved. The arguments put forward and discussed are transnational: one finds that in Japan we have our share of libertarians, post-modernists and post-liberals; references to culture are made only on the object level or on points of method, not for justification of arguments. We hope that the volume manifests the grounds on which the proposed approach itself depends.

The Kobe Lecture is an international lecture program founded in 1988, commemorating the Thirteenth World Congress on Philosophy of Law and Social Philosophy held in August 1997 in Kobe, Japan. The lectures are administered by IVR Japan, in cooperation with JALP. As a rule, every two years, a scholar engaged in creative research of basic issues of legal, social and political philosophy is invited to Japan. The lecturer usually gives one or two lectures in major cities of Japan in addition to several informal seminars. Major works by the lecturer are usually translated into Japanese and published before the lectures take place.

Professor Ronald DWORKIN (Oxford and New York) gave the Inaugural Lecture in 1990. Professor Ralf DREIER (Göttingen) was the second lecturer in 1992. In 1994, Professor Joseph RAZ (Oxford) gave the third series of Lectures. The Fourth Lecture was extraordinary in that it was given in the form of the First Asia Symposium in Jurisprudence, the first international conference to be held under the program. The theme for the symposium, held in October 1996, was "Law in a changing world: Asian alternatives." Professor Will KYMLICKA (Queens, Canada) gave the Fifth Lecture in 1998. The Sixth was given in the year 2000 by Professor Randy BARNETT (Boston U). In 2002, Professor Emilios CHRISTODOULIDIS (Edinburgh) gave the Seventh Lecture. IVR Japan and JALP have decided to hold the Kobe Lectures every three years instead of two hereon in. The lectures are published in the ARSP. The proceedings of the Fourth Lecture are published as a special issue (Beiheft 72) of the journal, as is this Lecture.

The Kobe Lecture aims to advance our understanding of legal, social and the political spheres of life. Important theoretical issues are explored from a perspective that is philosophical yet sensitive to problems of implementation and administration. Through this program we hope to arrive at a deeper mutual understanding of both the similarities and differences among various forms of life.

The editors wish to thank Will KYMLICKA for his willingness to reply to the commentators and for his patience and cooperation in preparing the publication. We would also like to express our appreciation to the commentators for insights Professor KYMLICKA himself must have enjoyed. It is a pleasure to express our gratitude once again (see Beiheft 72) to Prof. Veronica TAYLOR, whose team she supervises has come through yet again to do a great job of editing for grammar, style and effect the papers written by our Japanese colleagues.

For the Fifth Lecture, the editors were themselves heavily involved in its organization. MORIGIWA Yasutomo, the president of IVR Japan during the Fifth Lecture, to gratitude ISHIYAMA Fumihiko, the chair of the organizing committee, for his contribution in making the lectures possible. The editors would like to thank KATSURAGI Takao, the present president, for managing the Tokyo lecture and seminars, and TSUNODA Takeshi for those held in the Kansai area. We would also like to express our deep gratitude for all those who had contributed their time and effort, working with the organizers to make this Lecture as fruitful as it has turned out to be.

The editors would like to thank President TAKESHITA Ken and the executive board of JALP for their unflinching support of the program. On behalf of the contributors to this volume, JALP and IVR Japan, we wish to express our appreciation to the managing editors of ARSP, Drs. Gerhard SPRENGER and his successor Annette BROCKMÖLLER, for accepting our proposal and their thoughtful advice. Thanks are also due to Mr. Gregor HOPPEN of Franz Steiner Verlag for his ever quick and positive response and help in the publication process.

ISHIYAMA Fumihiko

Introduction

The purpose of this volume is to explore whether and how a liberal approach to minority rights can be extended to societies that are not Western democracies.

Recently, a growing amount of literature on minority nationalism and/or multiculturalism is being produced. Some authors have taken a liberal approach to the issue of minority rights: they reject the idea that the expression of ethnocultural diversity should be relegated to the private sphere, and claim that minority rights that accommodate and publicly support diversity are consistent with, and even based upon, liberal values.

However, the liberal values referred to are of Western origin, while problems relating to minority rights are not exclusively a Western concern. The need to have peaceful and just ethnocultural relations is equally pressing inside and outside the West. Therefore it is of theoretical as well as practical importance to explore in detail the applicability of liberal approaches. Should a liberal approach to minority rights be applied only to Western democracies? Can non-Western societies learn anything from the Western experience? This volume attempts to take a step towards answering these and other related questions.

This publication has three parts. It begins with a chapter by Professor Will KYMLICKA, one of the leading representatives of the liberal approach to minority rights. The chapter, entitled 'Universal Minority Rights? The Prospects for Consensus', is followed by eight commentaries by Japanese scholars, which represent a variety of theoretical and political perspectives on his theories. This issue concludes with a reply by KYMLICKA, in which he clarifies his position and examines some of the issues raised in the commentaries.

KYMLICKA begins his paper with a statement that his theory of minority rights was developed in two of his previous publications, *Liberalism, Community, and Culture* (Oxford U.P., 1989) and *Multicultural Citizenship* (Oxford U.P., 1995). He explains that it is best described as a "Western liberal theory of minority rights," which explores "the shared experience of Western democracies" and is grounded in the principle of individual autonomy. By way of introducing the subject matter of this publication, KYMLICKA then asks whether this theory can be successfully applied to societies in which "communitarian sentiment is strong" such as (*ex hypothesi*) those found in East Asia.

KYMLICKA concludes that the first component of this theory, but not the second, is applicable to communitarian societies. As he summarizes it, his theory has two elements: first, an account of justice *between* ethnocultural groups, which calls for numerous "external protections" for minority groups against the exercise of power by the majority; and secondly, an account of justice *within* ethnocultural groups, which rejects "internal restrictions" that limit individual freedom within each group. He notes with regret that there is no prospect in the foreseeable future for an international consensus on the latter part of his theory. However, he argues that, with respect to the former part, communitarians and liberals can agree on the legitimacy of minority rights, which are justifiable on the "basic norms of fairness and reciprocity."

To illustrate his argument, KYMLICKA first describes how Western democracies are "nation-building states," and how the minority groups in those states respond to the

threats posed to them by majority-led nation-building projects. He then identifies similar nation-building phenomena in Asia, and similar responses from minorities. He thus contends that minority groups face comparable threats from nation-building states, regardless of whether those states are Western democracies or Asian "communitarian" entities. Moreover, both individualists and communitarians can find these threats unjust for the same reasons: namely, they "violate basic norms of reciprocity," majorities "deny to minorities what they claim for themselves," and impose on minorities the majority's collective identity. As such, the nature of the injustice caused by majority nation-building projects is similar in communitarian and democratic states; and the justification for minority rights is the same: i.e., to rectify this injustice.

In sum, KYMLICKA maintains that the difference between liberals and communitarians is less relevant to issues of *inter*-group relations than to issues of *intra*-group relations. He concludes his paper with a discussion of some possible objections to his theory.

Each of the eight commentaries in this publication raises a great variety of issues, only a few of which can be represented below. On the whole, three main questions are discussed in the commentaries: first, in what sense is the approach taken by KYMLICKA "liberal"? Second, is a liberal approach appropriate in the first place? And third, is KYMLICKA's theory applicable to Japan?

Although KYMLICKA has claimed that his own theory of minority rights is "distinctively liberal," when he attempts in the Lecture that formed the basis of his chapter to defend minority rights in non-Western contexts, he does not appeal to liberal values, but rather to "more widely shared values of reciprocity and decency found in both Western and Eastern cultures." This "slimming-down strategy," as MOURI Yasutoshi calls it in his commentary, invites several different interpretations of KYMLICKA's position with regard to liberal values. For example: perhaps his original defense of liberal values was meant only in the context of Western societies; or perhaps he has fundamentally revised his theory of minority rights. Alternatively, his previous theory may already have contained some latent inconsistencies with regard to liberal values, which have only become apparent in the Lecture.

While FUKADA Mitsunori and some of the other commentators raise a question as to the possibility of the first interpretation, ISHIYAMA Fumihiko believes that KYMLICKA has revised his theory. According to ISHIYAMA, KYMLICKA originally insisted in Chapter 8 of *Multicultural Citizenship* that illiberal minorities in Western societies should have minority rights, because they would best ensure the individual freedom of those minorities in the long run. Thus, he originally grounded minority rights on liberal values. However, according to the Lecture, minority rights can be justified – even in Western context – without referring to liberal values at all. There-fore, ISHIYAMA concludes, his theory of minority rights is no longer distinctively liberal (although it remains consistent with liberalism). ISHIYAMA maintains that liberals should be concerned as much about individual freedom in the non-Western as in the Western context.

By contrast, KATSURAGI Takao finds that KYMLICKA's theory has not changed. His theory on illiberal minorities according to KATSURAGI is a form of "strategic liberalism," and comparable to John RAWLS's concept of "political liberalism." Therefore, if RAWLS's "political liberalism" is incoherent, as KYMLICKA claims it is, then so is his own "strategic liberalism." However, coherence is less important for KATSURAGI than "workab[ility]"; and he finds that "strategic liberalism" may well be a workable theory. This leads KATSURAGI to wonder if KYMLICKA is too optimistic about the

possibility of social stability in multicultural societies, since he appears to assume that social stability is ensured solely by the willingness of minorities to participate in the larger community.

HIRAI Ryosuke also draws a comparison between KYMLICKA's theory and Rawlsian "political liberalism." He goes on to argue that KYMLICKA's theory needs further "politicalization," since "justice should not be defined prior to politics, but rather within a process of political deliberation." Hirai also notes that his commitment to comprehensive liberalism has been "lost" in the Lecture, which suggests that his theory was internally inconsistent from the beginning. KYMLICKA's original commitment to the value of individual autonomy was already "lost" when he discussed issues of illiberal minorities in Chapter 8 of *Multicultural Citizenship*.

Some of the other commentators do not share KYMLICKA's liberal viewpoints. In particular, two commentators discuss the idea of nation-building that, in the Lecture as well as in his other recent writings, is central to KYMLICKA's theory. According to him, individual freedom is dependent upon the presence of a "societal culture," which, in turn, is created and maintained through modern nation-building projects. Minority rights are required to enable national minorities to engage in nation-building projects of their own.

INADA Yasuaki worries in his commentary about the repressive effects of nation-building projects. According to INADA, although protective measures for minorities are needed, all claims of identity or difference must be approached with caution, since any group identity tends to understate internal diversity and overstate external differences. With respect to nation-building, INADA notes that it "has, like Janus, two faces" which are inseparable from each other: while its "bright side" extends freedom and equality to all citizens, its "dark side" suppresses national minorities. Thus, as a postmodern critic, INADA agrees with KYMLICKA's approach to minority rights only to the extent that his theory can be seen as a kind of "strategic essentialism."

By contrast, MORIMURA Susumu favors pre-modern empires coupled with the idea of human rights and rule of law. As a libertarian, he finds these empires more attractive than modern nation-states, since they do not impose any particular culture on the individuals within them. While MORIMURA agrees with KYMLICKA that the ethnocultural neutrality of a state cannot be realized completely, he argues that it should nonetheless serve as a regulative ideal that "we cannot reach but should aspire to." Using official languages as an example, MORIMURA demonstrates that a state cannot be ethnoculturally neutral in effect, but it can be so in reason. He also refers in this regard to the distinction between internal restrictions and external protections, which KYMLICKA firmly holds as an ideal despite the fact that this distinction cannot be realized completely either.

Another critic of KYMLICKA's theory is OZAKI Ichiro. In line with critical race theorists and critical feminist theorists, OZAKI ponders whether the concepts and principles of minority rights are inherently majority-oriented, such that they still make minority individuals feel "weak, insulted and miserable." He is also concerned about social stability, and ponders whether minorities demand inclusion into the larger society only reluctantly. OZAKI queries whether the toleration of illiberal minorities by liberal majorities, which involves giving incentives for internal liberal reforms, is an example of "soft paternalism," which insults minority people in their "pride, identity, and self-respect."

The question of whether KYMLICKA's theory of minority rights applies to Japan is taken up by the last two commentaries.