

Introduction: The Problems of Cross-Cultural Justice

Throughout humanity's long and arduous history, conflicts between cultures have arisen and resulted in armed struggle. Humanity has been influenced by these conflicts, which leave unmistakable imprints upon all cultures throughout the world. Mythologies of heroes and victims of epic battles have been recorded and become a part of a people's very self-identification. These myths and histories still confront the world today, as evidenced by the bitter hatred of the Croatians and Serbians in the former Yugoslavia. War and its associated horrors are still a very real aspect of modern life. The last century demonstrated the power that evil still holds in the hearts of individuals who are determined to create a world in their own hateful image, as evidenced by the Nazis. The holocaust has become a seemingly permanent scar upon the world's ethical and legal community. In fact, the horrors visited upon the world by the Nazis seem to arise in most discussions on ethics and international criminal law, but why are the atrocities committed during World War II of such great importance? The beginning of that same century also witnessed the Armenian holocaust, as well as the Imperial forces of Japan's brutal conquest of China. Yet the horrors of the Nazi regime hold a special interest, which seems to be warranted by the special circumstances of its crimes.

Although justice was sought against both the German and Japanese forces at the end of World War II, the Nazi regime had done something far greater in terms of humanly possible evil. The Germans had legislated their systematic and efficiently mechanized mass murder of millions of innocents. The Japanese had also committed mass murder, as evidenced by the Rape of Nanking. Millions of non-combatant Chinese civilians were tortured, raped, and murdered in order to send a message to other Chinese

cities that resistance would be harshly punished; over 200,000 men were killed and 20,000 women were openly and systematically raped.¹

All war is sad and all murder is atrocious, but the main difference between these two Axis powers is the legal tactics used by the Germans to achieve their ends. Granted that the Japanese constitution of the time specifically stated all actions of the Emperor were sacrosanct, but it did not state the outcome of all his actions were above reproach. It merely stated the responsibility fell to those who carried out his orders.² This absolution of all decisions made by a sovereign is nothing new in political philosophy. In fact, Kant argues that a sovereign is sacrosanct due to a secular interpretation of “All authority is from God.”³ This interpretation simply states that a citizen has a duty to obey laws as if they were commands from God. Therefore, the sovereign can lead as he sees fit, even if her commands are unlawful according to the legislation of a particular state.⁴ Additionally, history has often shown that the instruments of sovereignty are usually held responsible for carrying out the orders of their superior, but the sovereign’s authority remains absolute.

¹ Bergamini, D. Japan’s Imperial Conspiracy. New York: Morrow, 1971. 46.

² Bergamini. Conspiracy. 1. “(Constitution, Art. 3). The emperor is sacred and inviolable. He cannot be removed from the Throne for any reason, and he is not to be held responsible for over-stepping the limitations of law in the exercise of his sovereignty. All responsibility for the exercise of his sovereignty must be assumed by the Ministers of State and other Organs. Thus, no criticism can be directed against the Emperor, but only against the instruments of his sovereignty. Laws are not to be applied to the Emperor as a principle especially criminal laws, for no court of law can try the Emperor himself and he is not subject to any law.”

³ Kant, Immanuel. The Metaphysics of Morals. Trans. Gregor, Mary. Cambridge: Cambridge, 1996. (95). [Prussian Academy (P.A.) 6:319]

⁴ Kant. Metaphysics. 96. P.A. 6:319. “Even the constitution cannot contain any article that would make it possible for there to be some authority in a state to resist the supreme commander in case he should violate the law of the constitution, and so to limit him. For someone to limit the authority in a state must have even more power than he who limits it . . . [but] in that case, however, the supreme commander in a state is not the supreme commander, instead it is the one who can resist, and this is self-contradictory.”

This issue of sacrosanct authority shall be explored further, but the issue of whether other nations have the authority to punish those who dutifully follow the orders of their sovereign is a more fundamental issue. The reason this issue is of extreme importance is due to its very essence of relating to international relations, which strive for peace. Politics of power lead to many abuses, but a well reasoned approach to international affairs of justice has the power of persuasion as its force. If justice is seen as unequivocally fair and undeniably applicable to those who would transgress a universal law, then power is limited and softened by being bound within absolute and eternal limits. Of course, the difficulty becomes finding well-defined universal laws and an authority to enforce them. International tribunals are created for this purpose and the combined might of the international community insures their physical empowerment. It should be noted that simply because universal laws are not enforced does not detract from their authority and applicability. The goal of the philosopher and legal community is to discover and clearly define them so that they may be used in more enlightened times.

The troubling and deep philosophical issues resulting from World War II lie at the feet of the Nazis. Through the use of an internationally recognized sovereign state's legislation, not mere military orders, abhorrently evil actions became legal through the use of pen and ink. In effect, these laws made moral actions illegal and immoral acts legal. If one were to appeal to a divine power, this issue might be made easier, but humanity can only appeal to its laws with any sense of certainty. The issue of divine authority is even more ambiguous than human laws that can at least be accessed and investigated at will. The mere fact that God and Her will is continually disputed leaves humanity with the only real and practical choice of creating laws on its own. However,

how can the international community punish actions that were not ‘illegal’, or worse that were wholly ‘legal’, at the time they were committed? Do international communities exist within a state of nature where only might makes right? Or is there some base law, which all nations must conform to? Is there a fundamental authoritative law the international community can appeal to in order to mete out justice in the times of national transitions?

One possible question arising from this discussion may look to find the root causes of a regime’s brutal inhumanity to humanity, in order to stop it from ever happening again. Should one’s culture be assessed when defining guilt, or does it have any bearing what-so-ever in matters of justice? For instance, the German people held a view of their culture as quasi-divine; many believed they were arguably at the pinnacle of human achievement and had produced many of the Western tradition’s great artists and philosophers. The idea of German superiority and anti-Semitic beliefs had been in cultural existence long before the rise of the Nazis⁵. This question inevitably leads to questions of how to be just in the application of justice to the defeated. However, even a concept of what is just may be disputed. Is justice aimed at prevention, retribution, or ideally both? Once an atrocity has been committed, how should justice for the victims be sought? Should justice be swift or applied according to some formal procedure?

⁵ Dawidowicz, L. The War Against the Jews: 1933-1945. New York: Holt, 1975. 29. “The glorification of the natural man, the simple life, uncontaminated by the artificialities of civilization and the fetters of organized society, was a Romantic Rousseauist idea. The Romanticization of the peasant as the natural man turned him into a receptacle of certain mystic qualities in his relationship to the land. The Volkist conception turned these universal qualities into specifically German ones. The peasant, by virtue of his descent from Germanic-Teutonic stock and by virtue of the mysterious qualities of Germanness in the very soil he worked, became the embodiment not merely of natural man, but of Germanic man. The antagonist of Germanic man became the Jew, the embodiment of the urban man, the man of civilization. A money economy, for example, as the product of disintegrative civilization, was associated with Jews, who were buyers, sellers, and lenders. Whereas, rootedness was an essential element of Volk, the wandering Jew became the symbol of the flesh-and-blood Jews, condemned to eternal homelessness for having rejected the Messiah, whose fathers or fore-fathers had lived outside Germany, in other lands.”

However, before any application of justice may begin, the fundamental question of finding the legal authority to punish the former legal actions of the defeated must be found. An action may be immoral and internationally condemned as inhumane, but does this make this action necessarily illegal? If the answer is simply that might makes right and the agreements of the victors determine the legality of all former actions, then this discussion has reached its end. However, most laws have attempted to ground themselves on something more fundamental and stable than the mere fortunes of war.

It would appear that universal claims of right drive law and international interactions. These claims may often be cloaked in layers of political considerations, but the core of these claims attempt to rest upon the bedrock of consistent, immutable, and universally binding laws. Political alliances waver and international power is seldom held by one nation for long, which necessitates a pragmatic need for universal laws to facilitate international relations, as well as domestic relations. Laws which cannot be applied to all peoples at all times seem to be no laws at all. Laws that depend upon the relative circumstances of a culture or historical epoch seem to be mere enforced opinion. The superior armed force will always determine what is right, but this seems to be the opposite of what laws and justice are after.

This work shall explore the connection, if any, between international justice and universally binding laws that may not be transgressed, as theorized in Kant's ethical and political philosophy. This investigation shall focus upon the fundamental principles Kant uses in order to establish both his political and ethical writings. There is a severe danger of culture dictating what is right and wrong due to Kant's reliance on reason alone. This is due to inability to check the validity of one's premises, which are often loaded with

hidden presuppositions from one's social and historical context. Heidegger's philosophy of Dasein, or what it is to be a human, will be provided as a backdrop to highlight this concern. In this way, the authority of retributive justice will be addressed, specifically regarding the seeming problem of *ex post facto* laws, or the authority of the international community to criminalize the former nationally legal actions of a vanquished regime's citizens.

It will be my argument that Kant's presupposition of the lone and apt reasoning human is merely a cultural influence of his time. Community is paramount to the eventual creation of the individual, and not vice versa. Kant's individualistic presupposition influences Kant's entire ethical and political thought in many dangerous ways. The paradigm of the individual's power to reach an objective ethical course through reason alone has a high propensity to allow cultural norms to enter into the great Categorical Imperative machine without noticing their possibly harmful influence. Additionally, and possibly more dangerously for international relations, a political and ethical philosophy grounded upon the individual creates interactions solely based upon rights, which entail coercion in order to have these absolute rights recognized by others. A state nature of exists without any law, except the dictates of might. Like a physician who re-breaks a poorly mended bone, my intentions are not to kill the patient. My project will be an attempt to highlight fundamental problems in Kant's system, but in no way to destroy it. Instead, Kant's system of thought still has its valid place in the ethical and political arena, but not at such a fundamental level. There is something deeper that must be dragged out and investigated and this will be the course this work will take.

Three examples from recent history will be used as case studies to begin this investigation, in order to highlight the difficulties arising from transitional justice. It will become apparent that there is a current need for an authority from which to firmly ground justice beyond the reaches of mere might. But, the dangers of cultural colonization will be a continual threat when searching for universal laws, because what is seen as right and good is often what is normal to one's own culture. However, there exists an opposite danger, namely allowing abuses of individual human dignity to continue simply because these abuses are supposedly central to a culture's self-identity.