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Morality, Law, and Judicial Ethics in the Western Legal Tradition

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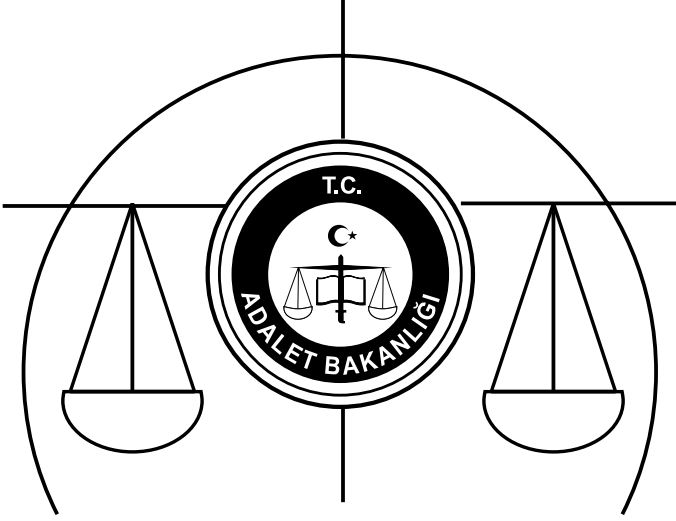
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MORALITY, LAW, AND JUDICIAL ETHICS IN THE WESTERN LEGAL TRADITION

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Introduction

You have asked me to speak about “Morality, Law, and Judicial Ethics in the Western Legal Tradition”. I am particularly glad to do so in Istanbul, which is the first and most important home of the Western legal tradition. I am honored to be in your beautiful city, which reminds us on every side what human beings can accomplish, when they work to build the rule of law, so that all can live together in justice and peace.

The focus of our symposium will be on judicial ethics, but I have been given a somewhat broader charge, relating morality, law, and legal ethics generally to the Western legal tradition as a whole. This topic is dear to my heart, important, fascinating, and very useful, but it requires some caution at the beginning, because our ultimate subject is universal, not parochial. The essence of legal and judicial ethics arises from human nature, which is the same everywhere, and therefore all societies participate or should participate equally in the search for justice and the rule of law. The Western legal tradition provokes our interest because its history is so well-known and well-recorded, but every legal tradition and all nations participate in this same vital struggle towards peace and justice through the rule of law.

The Origins of the Western Legal Tradition

The Western legal tradition is of particular interest in Istanbul, because it was here that the Emperor Justinian - Flavius Petrus Sabbatius



Iustinianus Augustus - inaugurated the compilation of the *Corpus Iuris Civilis*, including the Code, the Digest, and the Institutes, that became the basis of modern law in the West and guided legal developments everywhere through its vast (and often tacit) influence on enlightened judges and scholars, for a millennium and a half, until this very day. The vast erudition, rationality, and painstaking detail of the *Corpus Iuris* made it the constant (if often secret) recourse of every learned (or less learned) judge - for good and ill - for centuries. I say "for good or ill" because in addition to containing some excellent and very well-worked-out principles of law, the *Corpus Iuris* also contains some very poor ones, reflecting the self-interest and corruption of the emperors themselves.

I blame the emperors in this way for introducing some of their own worst attributes into the Western legal tradition, because the roots of the tradition go back further still, before there were emperors, to the legal ideas of the Roman republic, and the first guiding principle of that commonwealth - at least according to the Roman Titus Livius, who wrote the Romans' own history of Rome. This was the principle that the "*imperia legum*" ("rule of the laws") is or ought to be "*potentiora quam hominum*" ("more powerful than the rule of men.") This principle, Livy said, made Rome great, and led to the Romans' long-lasting felicity and success. When the rule-of-law principle declined, Livy observed, so did the beauty and influence of Rome herself.

The Ideals of the Western Legal Tradition

Rome claimed to be a "republic" ("*res publica*"), which is to say a polity ruled by law for the well-being of the people - all the people - and not according to the arbitrary will of an emperor, a few rulers, or those who have gotten control of the government, whoever they may be. This was the ideal, of course, and not always the reality, but it is a beautiful ideal. Nor is it only a Western ideal. The rule of law is a universal ideal, which every government and every legal system claims to serve, whether it really does so or not. The idea that the laws should rule and not the mere will or power of men is present in every legal system and every legal tradition - however hypocritically - because this principle is the essence of what



justifies or would justify any legal system, if that legal system were justified at all.

Legal systems are only justified when they actually maintain the rule of law. This signifies finding and maintaining those laws that really serve the well-being of the community as a whole and not just the interests of the rulers or some powerful faction. Rulers should not have arbitrary power, but should act in the public capacity to serve and protect the rule of law, for the common good and the benefit of society as a whole. This principle is at the heart of the Western legal tradition, but I believe it is also shared in one form or another by every legal system in the world, at least in theory, because without adhering to this principle, or at least asserting a claim to adhere to this principle, that legal system would be a nullity - illegitimate - not worthy of our obedience, our consideration, or the slightest respect.

The Foundations of the Rule of Law

The rule of law principle has been particularly deeply examined and elaborated in what we now call the West, because of the influence of Justinian, the *Corpus Iuris Civilis* and the heritage of Roman law. But even this valuable and interesting tradition is not without its faults. The Roman legal tradition as we received it from Justinian did not always support its sensible and timeless principles with equally sensible and timeless institutions. Roman students of the law knew and often lamented that the rule of law has two central and unavoidable desiderata: first, good principles of law and justice, but second, good institutions, to make the principles of justice real. It is not enough to declare fidelity to justice and the rule of law and not of men, there must also be procedures in place to prevent corruption, usurpations, and departures from the law by those who are charged to uphold it.

The need for good institutions to discover, enforce, and protect the principles of law is equally and perhaps more important than the principles themselves. Fortunately, the basic structural requirements of just government are well-known, including term-limits on executive power, elections to the legislature, the separation of powers and above all the



independence of judges, empowering them to protect law, justice, and the constitution against the usurpations of executive power. We should strive to implement these everywhere.

The Necessity of Judicial Independence

This brings us back at last to judicial ethics - the overall theme of this symposium - because the central virtue of a judge is fidelity to the rule of law, including justice and the common good, which are the proper basis of all law and legal authority. Judges should be faithful to the rule of law (and justice and the common good) and not to anything or anyone else. To fulfill their duties properly judges must be independent: independent of the government, independent of the legislature, independent of religion, even independent of the people. Their only fidelity when they act as judges should be to the rule of law, and not to anyone else.

I mentioned that the Roman emperors to whom we owe the preservation, strength and great detail of the Western legal tradition also introduced several great faults. Chief among these was the principle embraced by Justinian and his successors that they themselves were above or outside the law, that “*princeps legibus solutus est*” (Digest 1.3.31) - “the emperor is untrammelled by the law.” Or even worse, it was asserted “*quod principi placuit, legis habet vigorem*” (Digest 1.4.1) - “that which pleases the prince has the force of law”. Both of these principles are antithetical to the rule of law and have led to corruption, to injustice, to poverty and disaster wherever they have been practiced or intruded into concepts of the law.

The Subordination of Executive Power

A brief review of the origins of the Western legal tradition reminds us that the whole history of law and legal ethics in the West has been the battle to establish and maintain the first principle of justice - the “*imperium legum*” or “rule of law” - against the rival pretensions of emperors, kings, and other executive authorities that they themselves and those in control of the coercive powers of the state are ultimately in some way above or outside the law. The key to a just society is that those in positions of



authority themselves be bound by and subordinate to the rule of law. As Henry of Bracton said in England in the thirteenth century, the king himself must be “sub Deo et lege” - “beneath God and the law.”

The great fame of England as the home of liberty in the eighteenth century arose from the Act of Settlement in 1701. This was the Act through which the king and Parliament promised that judges should serve “quamdiu se bene gesserint” (“so long as they were not corrupted”) rather than at the will of the executive (“durante bene placito”). Federal judges under the United States Constitution enjoy the same protection (Art. III.1). The purpose of this protection is to assure that judges will have the security and independence to maintain the rule of law against the will and desires of the president, the government, the legislature, and even against the people, when the people or legislature or president desire something that violates the rule of law. Judges without this security remain subject to coercion by the very powers whom they should control.

The Virtues of Judges

The history of the Western legal tradition identifies two primary virtues that judges must have to protect the integrity and justice of the legal system which they exist to serve: judges should be independent and judges should be faithful to the rule of law. The heart of legal ethics rests on the judges’ fidelity to these two principles. The two judicial virtues are related, but they are not the same. The rule of law is the principle that no man nor government should ever enjoy arbitrary power. The principle of judicial independence protects judges against the arbitrary power of others.

The rule of law prohibition on arbitrary power raises important semantic points about the nature of law, the purpose of law, and the role of judicial power in relation to the state. The rule of law must be distinguished from rule by law. The rule of law exists when citizens are liberated from arbitrary power. Rule by law exists when powerful individuals use the forms of law to exercise their own arbitrary power. Judges have the duty to maintain the rule of law against the incursions of rule by law. Constitutionalism is the vehicle through which modern States strengthen



judges for this task of legal protection, but it is a duty they would have whatever the nominal structure of the State. Judges are by nature the ministers of justice and must protect law's integrity against those who would suborn the forms of law to serve their own private ends.

Judges in Unjust Legal Systems

The purpose of law is justice and all legal systems claim to be just. They claim to be just and they claim to deserve obedience because they are just. But although all legal systems claim to serve justice, sometimes they do not. This raises a dilemma for judges, whose duty it is to serve justice and the rule of law. When legal systems become corrupted or are seized or suborned by a ruler or a faction or a party, using the forms of law to serve their own ends, then it is not the rule of law that prevails, but the rule of men. At some point it becomes the duty of the judge to interpret or enforce the law in such a way that it serves its actual purpose, which is justice, rather than serving those who have diverted the legal system to their own private use.

Judges have a duty of justice that transcends the particular legal system in which they find themselves. Every legal system claims to serve justice, which is to say the common welfare of society as a whole. When this is true, then the duty of the judge is an easy one: simply to resist the influence of presidents, prime ministers, parliaments, or anyone else who would try to subvert the legal system and influence judges to disregard the law. But judges also have a duty to recognize when the legal system itself becomes unjust, and prevent this from happening. This is the heavier and more difficult role. At some point judges must resist growing injustice by interpreting unjust enactments - even against their plain meaning - in such a way as to make them more just.



The Bravery of Judges

The hardest duty of judges demands that they exhibit bravery in the face of state-sponsored injustice. Suppose that the government creates legislation to oppress minorities. Suppose that the legislature operates purely to enrich one class within society. Suppose that the president acts in his own interest and not the interest of the nation. Judges must have the courage to oppose these injustices, even at the risk of facing oppression and injustice themselves.

Here we encounter one of the most important aspects of the Western legal tradition, not just the realization that government and law exist for the good of everyone, but also the willingness to resist those with authority when they begin to abuse public powers for their own private interests. This is a duty that attaches to all citizens, but particularly judges, whose duty it is to uphold justice and the rule of law. The Western legal systems inspired most and flourished best when judges found the strength to defy bad governments, who violated the rights of the people.

Legal Ethics

We lawyers talk a lot about legal ethics in the United States, just as we frequently discuss judicial ethics, but nevertheless often fall prey to a professional deformation that leads us to confuse ethics with legislation, and forget the role of morality in the ethical life of the lawyer. By morality I mean the totality of what we ought to do, as opposed to the narrower province of law, which encompasses only those things which we must or are required to do. So, for example, in Maryland, where I live, we have drafted a code of legal ethics, which most lawyers read very carefully and try to follow the rules that it sets out. But this is not enough.

Lawyers and judges who treat their codes of ethics as enactments, or strict rules to be followed to avoid punishment, miss the point of the enterprise. Judicial and legal ethics should go beyond mere rules or enactments delineating what judges and lawyers must do, to the broader and more important question of what they ought to do to fulfill their professional roles correctly. These further requirements cannot and should



not be externally enforced. Judges ought to have an understanding of and loyalty to their underlying principles of independence, justice, and fidelity to the rule of law. They ought to have the fortitude to frustrate the desires of those with power in society, including the government of the day.

Freedom

England was famous in the eighteenth century for being the freest place on earth. The great philosopher and apostle of enlightenment, Voltaire, visited England, saw this, and tried to understand why. The reason he found was that the English had then better and more firmly than anywhere else on earth prescribed limits to the power of their kings. They did so by empowering judges, by making judges independent and safe from attack. Judges in England were independent beyond judges in any other nation of the world because they did not wait to receive independence from the hands of power. They took it - and punished those who slighted their authority.

The great English jurist Sir Edward Coke made clear that law was above the king. And when King Charles I violated the English Constitution and the rights of the English people, the English put King Charles on trial, found him guilty, and severed his head from his body. Then again, when Charles' son James II once more attempted to rule outside the law, the English removed James from office, and he fled to France. His fate, and the fate of his father, offer useful lessons for judges and governments everywhere. There is no liberty without the law and no law where judges cannot punish and restrain the executive, when he violates the limits of his power.

Conclusion

Reflection on the Western legal tradition yields a few obvious conclusions about law, judges, and judicial ethics. The heart of the Western legal tradition has been the struggle to create a world in which the law rules and not men. This will never be possible unless judges are independent, safe from attack, and devoted to the rule of law. This devotion remains the



central duty of all judges everywhere. Judges must have the courage and fortitude to apply the laws impartially, despite the interests and influence of other powerful actors in society. The legal system should be structured to make this easy, but judges must assert their independence even when established institutions deny them the protections they deserve.

Judges matter most when governments behave the worst. When presidents and parliaments use the forms of law to act corruptly, or to oppress individuals or groups in society, then judges must resist them too. They must use their powers of interpretation to make the legal system more just, when it falls away from justice. Judges are or can or should be the heroes of the rule of law. I am honored to have the opportunity to speak with so many brave judges here today!