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### **Relating Law and Ethics**

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#### **Abstract**

It is sometimes remarked that law and ethics have very much to do with each other in theory but little in practice – especially in the practice of law! This article explores the relationship between law and ethics and proposes a process which might serve as a framework for relating these two important areas of social life. In constructing this framework, reference is made to elements of the Islamic tradition and in particular the nexus between *din* and *dunya*, the spiritual and the temporal.

#### **Key Words:**

Legal realists, critical legal theorists, constitution, rule of law, al-Farabi, Ummah, *din*, *dunya*, Qur'an, slavery, ethics.

At its most basic level, law represents a set of 'legal norms.' In contemporary discourse, the term 'legal norms' can mean simply legal rules, that is, the text found in statutes and judgements and, in the common law world, in case law. This is the 'stuff' of the law. But I would like to elevate this definition of legal norms somewhat so that we might think of legal norms as the grander, more general and more over-arching principles, standards and values which exist in every legal system. Legal norms in this sense are often found in constitutions and similar types of instruments.

It is my starting point, then, that legal norms always reflect a certain set of primary values. The great English legal theorist John Austin, perhaps the paradigmatic example of the 'legal positivism' school, described law as the "command of the sovereign." That is to say, the law constitutes whatever is commanded by the effective political power. This schema is classically represented by the absolute monarchies that existed in the past – whether in Europe, East Asia or other parts of the world – where the law was both the command and the whim of the sovereign. Some of this, regrettably, still exists in too many parts of the world, although in more obscured forms.

Another school of legal theorists called the 'legal realists' contends that the nature of law can only be explained by extra-legal factors, including the opinions of judges and economic factors. In this theory, judges were seen to have 'legislative' functions in making the law based on their own interpretations and applications of the law in the cases they decide. Finally, a third school, the 'critical legal theorists', takes the argument further and essentially reduces the law to politics and says, therefore, that to understand law we must see it as representing in legislation the

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contemporary politics of society.<sup>i</sup>

Implicit in all of these understandings is the notion that the law is formed on the basis of values – whether of the sovereign, or of judges, or of society through its political system. In societies that genuinely have more participatory and democratic forms of government, these values are usually based on a consensus of either the majority of people or, more commonly, of the peoples’ representatives. Let me give two examples of different types of value systems that are reflected in legal norms. The Constitution of the United States guarantees the right to “life, liberty and the *pursuit of happiness*” while the Canadian Charter of Rights and Freedoms (the major rights document of the Canadian Constitution) guarantees the right to “life, liberty and *security of the person*” (my italics).

Note the similarities and differences in the way a fundamental constitutional principle has been formulated by these two neighbours, both heavily influenced by European traditions and especially by the English Common Law. Commentators have remarked about the different emphases – and we might say different values – that are expressed in these basic statements of rights. Indeed, it is part of the national psyche of the USA to view itself as the land of opportunity where there is freedom to pursue ‘happiness;’ whereas in Canada there has been a more socially communitarian ethos with a heightened emphasis on protecting the person. The point here is that, despite much commonality between the two rights statements, there are different values at play in their formulations.

The same holds true, even more so, in the case of a country like Tajikistan. The Constitution of Tajikistan<sup>ii</sup> enumerates certain rights which are qualitatively different from the types of rights that are articulated in the American or Canadian constitutions. For example, Article 37 of the Tajik Constitution guarantees to its citizens the right to leisure. Article 38 affords the right to protection of health. Article 39 guarantees social security in old age, and Article 40 states that all citizens shall have the right to free participation in the cultural life of society.

I cite these rights to illustrate a point, namely, that they represent certain values of significance to the modern independent republic of Tajikistan. However, these are not rights which one will find in the constitutions of the USA or Canada, for example. In the case of Tajikistan, many of these rights may stem from the social values championed by the former Soviet Union of which it was a part.

Sometimes it is the case that the legal norms are difficult to realise – since no society is perfect. Unfortunately, it is also the case that sometimes they can be systematically ignored. There is a crucial difference between societies where there is the rule of law and where there is no such thing. What do we mean by the ‘rule of law’? This concept is often discussed in reified terms, but in reality, what the rule of law really means is a committed social consensus – in society and among social actors, i.e., courts, governments, organisations and individuals – to respect the rules they have agreed to live by.

In a country where this notion is well-developed, everyone is subject to the law. This is the case by and large of the USA, although in practise it is a continuing process as illustrated by the civil rights movement which had to struggle hard to achieve the rights guaranteed to all citizens for the African-American community. The President of the USA is one of the most powerful people in the world but, as we have all seen, even he can be subpoenaed, impeached or even removed from office by operation of the law.



The rule of law is important because we live in a world of moral choices. We can choose to respect each other or not, or to try to treat each other with fairness and equity or not. If we choose to, we can create systems to provide fairness, equity and respect for all. In short, only the effective rule of law can ensure the democratic governance of a people or nation.

As Ayn B. Sajoo has pointed out,<sup>iii</sup> the great Muslim scholar of the 4th/10th century, al-Farabi, in his book *Al-madina al-fadila (The Virtuous City)*, described two roles for Muslims – as members of the Ummah and *as citizens*. This is a connection between *din* and *dunya*. In the Islamic tradition, these two ideas do not represent a dichotomy. So then, how do we achieve the conditions which allow Muslims to draw on the lessons of their *din* (as members of the Ummah) and bring this to bear on their role in the *dunya* (as citizens)?

The answer, I would say, is that in our *dunyawi* or worldly institutions, like our nation-states, we must ensure fairness and equity, freedom and respect. The Holy Qur'an says: 'We created you [humanity] from a single soul' (4:1). This common source suggests a common dignity and nobility inhering in all people as creations of God. Only by ensuring fairness, equity and respect can we do justice to this common dignity; and the rule of law is an important part of this process. We should, to this end, commit ourselves and our societies to the rule of law. This is an ethical choice that each one of us must make.

However, this leaves open many other ethical choices. How do we make our legal norms? What ethical basis can we give to our law? I believe there is no simple answer to this question. There is no stock of ethical concepts that can thoroughly guide our laws. Rather, I propose a process that our legal norms must be infused with what I call *ethical conversations*. These are conversations which have to take place in every society and at all times. These must be conversations with history, with culture, with religion, with international norms and with intellectual perspectives.

These types of ongoing ethical conversations are important in every society. The conversations are constructed around received traditions, individual reflection and communal dialogue. The ongoing "World Faiths Development Dialogue" taking place under the aegis of the World Bank, where important contemporary global challenges are being discussed in the context of faith perspectives, is an example of an ethical conversation. The seminar in Tajikistan organised by the IIS at which ethics were addressed through literature, philosophy, history and religion is another example of this process.

This is not, however, a process that is only for communal or group settings; it must also be undertaken by individuals through reading and thinking about how society should be governed. We must reflect on the sources of our beliefs and customs, of our history and philosophy, in public dialogue and in individual reflection. In the context of Muslim societies, for instance, the Holy Qur'an represents a foundational source of ethical principles and values. We must reflect on these sources to ask the right questions, namely what values should our laws represent; not what can we do, but what should we do? Through these processes, laws can be changed and improved in response to basic human needs and rights for our time.

Today, for example, we forbid slavery which for thousands of years was accepted in many parts of the world. In addition, a group of Muslim countries have drafted a Universal Islamic Declaration of Human Rights in response to – and in conversation with – other international human rights norms.<sup>iv</sup> I submit that these types of ethical conversations are especially important



in the formation of law in societies now developing new social, economic, political and legal systems – as is the case in Central Asia today. This is a framework for a relationship between legal norms and ethical values; a relationship based on ethical conversations and dialogues.

Ethical engagement and conversation is not just a challenge for those who sit in the Parliament. Ethical choice is an *individual* obligation. As citizens, everyone must individually commit themselves to this challenge. So, ethics are about individuals and the ethical obligation rests on each individual.

It is for those who govern society, however, to provide enabling conditions that allow for this individual engagement which is essentially an intellectual process; and the engagement of the intellect is an important part of the tradition of Islam. The Holy Qur'an makes clear that intellectual capacity is invested in all human beings in these words:

(Allah) Most Gracious!  
It is He who has  
Taught the Qur'an.  
He has created [humanity].  
He has taught [them] speech  
(And Intelligence). (55:1-4)<sup>v</sup>

I end with a challenge. The challenge is to create in all parts of the world the conditions for a critical engagement and conversation between the legal norms and ethical values, conscious of the Qur'anic *ayat*: 'Surely the most noble amongst you in the eyes of Allah are the best in conduct' (49:13).<sup>vi</sup>

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## Notes

<sup>i</sup> For information and readings on the different schools of legal theory see, for example, M. D. A. Freeman, *Lloyd's Introduction to Jurisprudence* (7th ed.), (Sweet & Maxwell, London, 2001).

<sup>ii</sup> For the text of the Constitution of Tajikistan in English translation, see William E. Butler, ed., *Tadjikistan Legal Texts: The Foundations of Civic Accord and a Market Economy* (London and The Hague, 1999).

<sup>iii</sup> *The Ismaili UK*, no. 37 (London, Dec. 1999).

<sup>iv</sup> For a discussion of the Universal Islamic Declaration of Human Rights see Anne E. Mayer, *Islam and Human Rights: Tradition and Politics* (3rd ed.), (Boulder, Colorado, 1999).

<sup>v</sup> Translation of A. Yusuf Ali.

<sup>vi</sup> Translation of M. M. Pickthall