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Disciplinary Brief

VIRTUES AND THE LEGAL CONSCIENCE

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Virtues and Legal Professionals

Legal issues often involve the resolution of moral dilemmas. Law has its limitations, its areas of discretion or ambiguity. The extent to which just and fair decisions can be made depends not only on how good and comprehensive the law is, but also on how legal professionals interpret and practice the law, as well as on how they exercise discretionary powers within the legal system.

To uphold the rule of law, to advocate for its development, and to make good, principled and reasonable decisions, judges and legal practitioners often - perhaps always - must rely on virtues, notably courage and prudence. They must prioritize fairness and justice when exercising discretionary powers in the law in a range of contexts and circumstances.

Under a legal system governed by the rule of law, the judiciary conventionally prescribes rules about the conduct of judges in both their professional and personal spheres. Whether or not codified, these rules are frequently grounded on virtues. A virtuous judiciary and virtuous judges can uphold the legitimacy and authority of the law, enhance the public’s esteem of the legal system, and forestall perceptions of professional vices that could undermine judicial authority and reduce public confidence in their decisions.

Virtues and Judicial Decision-Making

I shall illustrate the significance of virtues in judicial decision-making from my specialty fields of public-interest law and socio-economic rights.

Common Law Legal Systems

Under the common law system, which is found in most countries of the British Commonwealth, it is not unusual for judges on the bench to hold differing opinions on contentious legal or moral issues. This is where dissenting decisions come from. Sometimes it is possible for judges to make reasoned, lawful and

completely justified decisions one way or the other according to the law. Many judges adhere to the theory of legal positivism by HLA Hart, [1] in which law and morality are regarded as completely separate. In practice, judges may assert that their decisions are based solely on the law and not influenced by any extraneous factors like personal preferences, societal values or politics. But a closer examination of some judgments may reveal that ethical values, social considerations and political preferences underpinned their decisions and guided their reasoning process. This phenomenon is explained by the theory of legal realism, [2] where judges are influenced by their social contexts and consider public policies in making decisions. A judge's background - for instance, middle or upper class, middle aged, with privileged education and a successful prior professional career – may affect their perspective on society and its structure. [3]

The core values embedded in the common law legal system are justice, fairness, liberty, equality and the protection of fundamental rights. All written law should align with these core values. Nevertheless, there are instances where omission, poor drafting, lack of foresight or a failure of the law to respond to social changes sometimes lead to situations where the strict application of the law may conflict with these core values. In such circumstances, we can find numerous examples where judges exercise their judicial discretion and practical wisdom to develop the law incrementally and by analogy, to ensure that fairness and justice is achieved in the case at hand despite the inadequacy of the law. A famous example is the right-to-food campaign case in the Supreme Court of India (*People's Union for Civil Liberties v Union of India & Ors* (Writ Petition (Civil) No. 196 of 2001). Here judges recognised that people suffering from famine and starvation had a right to food, which can be derived from the right to life under article 21 of the Constitution of India, even though the right to food is not expressly mentioned as an enforceable fundamental right in the Indian Constitution.

However, judges have to navigate this realm carefully. On the one hand, they cannot deviate from the clear wordings of the law in deciding cases, as judicial discretion (if any) must be legitimately exercised within legal boundaries and with self-restraint. Otherwise it would reduce the consistency and certainty in the application of the law and thus undermine the rule of law. On the other hand, failure to address moral dilemmas by blindly applying the law can lead to unfair and unjust outcomes that contradict the core values of the common law system. Such decisions may trigger public outcry, or at least set bad precedents.

There are of course numerous instances where judges must decide cases strictly according to the law even when doing so may lead to unsatisfactory outcomes. These are cases where the law clearly binds judges in making such decisions, leaving no room for discretion regardless of the potential for injustice. In such contexts legislative change with proper prior consultation and debate is necessary. However, in cases where there is room for different interpretations or applications of the law, some judges may be oblivious to the law's unfairness to the weak, or to the power imbalance between the rulers and the ruled in the legal process – a realization that requires virtues and reflection. Other judges may be aware of the moral dilemma but choose to align with the powerful if their concept of fairness is tilted towards established

power structures.

Authoritarian Regimes

In authoritarian regimes where judicial independence, separation of powers and the rule of law are undermined, the moral dilemmas that judges face may be more acute. Law may itself be biased and unfair, offering limited legal protections to the vulnerable and the dissenting. Judges may even face political pressure when making decisions. When met with moral challenges, judicial conscience plays a crucial role. It takes courage and wisdom for judges to deliver impartial and fair rulings even if they may displease the government. For example, it may be challenging for judges to strike down decisions of the government to approve the industrial extraction and development of certain sites with great environmental conservation value according to environmental protection laws and standards. The governmental approval may have been given without lawful and valid prior environmental impact assessments, perhaps because of the strong connections between (or even monetary reward from) powerful commercial developers and the government. Judges who rule against the government may jeopardize their career advancement, face reprimands, or encounter political backlash. They will need great practical wisdom, courage, and honesty to navigate these challenging arenas, to take appropriate steps to achieve justice and fairness in face of obstacles and in ways that are reasonable and practical.

Virtues and Rights Activism

Courage empowers lawyers and advocates to speak out and challenge established norms and practices that unfairly benefit the privileged or disadvantage minorities and vulnerable groups. Rights activists can bring about significant social changes and offer hope and opportunities to disadvantaged groups in ways that many did not think feasible. To name two examples:

The Right to Housing

Lawyers representing vulnerable groups claiming from the government the basic protection of housing and urgent relief from lack of shelter. In the South African Constitutional Court case of *Grootboom v Government of the Republic of South Africa* [2000] ZACC 19, lawyers represented the slum dwellers in a legal action against the government. Because of the appalling living conditions while waiting to be allocated low-cost housing, the slum-dwellers moved to nearby private land earmarked for low-cost housing. They were forcibly evicted by the government, which set fire to their dwelling places and left them homeless. The Constitutional Court of South Africa held that the government breached the duty to progressively realise the right to access to adequate housing under s.26 of the South African Constitution by failing to provide any form of immediate or short-term relief for people who were in the most desperate need of housing.

Social Welfare Rights

Advocates challenging the government in court to change law and policies that infringe the basic social welfare rights of citizens. In the Hong Kong case of *Kong Yunming v Director of Social Welfare* ([2013] HKCFA 107), the social welfare department removed the eligibility to receive basic safety-net social welfare assistance from residents who had been in Hong Kong for more than a year but less than seven years (before becoming permanent residents) The Court of Final Appeal decided that this policy was unconstitutional, as art.36 and art.145 of the Basic Law of Hong Kong guaranteed the right to social welfare for all residents at a level not lower than the time of Hong Kong's return to Chinese sovereignty.

To achieve the greater good sustainably, there is a delicate balance that requires virtues in advocacy endeavours on the path to justice. Many advocacy efforts are driven by anger, but this anger is to be balanced with love and self-control. According to the Bible, love does not delight in evil but rejoices with the truth, love is not self-seeking, it does not boast, it is not proud and not rude. There is a difference between raw, unconstrained anger (a vice) versus ethically driven anger (a virtue supported by action in service of love). In the former, rights activists may be perceived as self-righteous, impatient, lacking in prudence, seeking to receive self-recognition through doing good, while compromising the interests of the minorities they represent. The Bible reminds us that "everyone should be quick to listen, slow to speak and slow to become angry, because human anger does not produce the righteousness that God desires" (James 1:19-20).

Christian rights advocates guided by virtues and ethically driven anger often remind themselves that God is the ultimate judge of true justice. They are to fulfill God's requirement to do justice, love mercy and walk humbly with the Lord (Micah 6:8). They are contemplative in their advocacy journey through continuous reflection on their inner motives, advocacy strategies, and their relationship with stakeholders. In this way, they work towards the greater good while avoid falling into vices or actions that undermine rights activism.

Virtues in Legal Academia

In academia, virtues are integral to the shaping of one's scholarly life. Practical wisdom may guide a legal academic to allocate their time and resources well for the service of the institution, their students, the legal profession and the community, ultimately fostering human flourishing. The extent to which such virtuous decisions can be consistently made depends on the virtue ethics of the legal academic. As Professor Herdt has highlighted, Christian virtues are both infused and cultivated (p.8).

Fear and Love in the Virtuous Academic Life

Out of love and a conviction to pursue a particular cause or promote the welfare of a vulnerable group, virtues can empower a legal scholar to choose to research in particular areas or issues that contribute to human flourishing, even if these may not easily lend themselves to publication in prestigious journals or greatly boost the research or career profile of the academic. At the same time, political, social and

institutional pressure can force a person, driven by fear, to choose to prioritize self-preservation rather than to enhance the human flourishing of others out of love. Academics may feel pressured to meet publication quotas and thus strategically focus on topics that can secure more research funding and lead more easily to quick publication in top journals, giving up their calling to pursue other meaningful and interesting topics for the greater social good, which may take more time and effort to research and may not be a timely topic for top journals. At worst, as Professor Herdt points out, some academics may "neglect their teaching or other responsibilities" (p.12) towards students and prefer to spend most time on research and publication, which is the primary indicator for promotion and tenure. A concerning reality is that those academics usually achieve greater success in the academy and, quite often, far beyond it.

Academics as Public Intellectuals

Public intellectuals are frequently employed by academic institutions, yet their role extends beyond that of a teacher of mere employee. They have an important responsibility in the society to share their knowledge and insights to address societal needs and to promote the public good. For example, a land law scholar may be interviewed in the media about the implications of a proposed legislative change that affects the land rights of an indigenous population; or a social law academic may share her research findings with government officials and NGOs about how the law and policy on aged care and nursing homes can be modified to cater for the needs of older persons in the society and up to international standards.

As Prof Herdt suggests, they are to contribute to genuine human flourishing (p.12). However, this mission may sometimes put public intellectuals in conflict with institutional interests, for example, where the institutions or powerful authorities hold political or social biases that may clash with the research findings of the public intellectuals. This is especially true for illiberal societies where the rulers or a one-party state can feel threatened by public opinion research on sensitive political issues, or by the unpopularity of political figures, or by research findings that disclose the abuse of power or lack of accountability of public institutions. In such situations, public intellectuals must balance their social role and mission, while exercising practical wisdom. Virtues such as courage and prudence can serve as a moral compass to guide them to navigate these challenges.

Practical Wisdom in Career Trajectories

At some critical moments, Christian academics may face the choice of whether to continue to remain employed by the university they are working at, if they find it difficult to practise virtues that are counter to institutional or political pressures in their workplace. They may be staying at a high cost as it may risk their own fallenness of morality in the long run if they are compromising more and more in their actions, resulting in the stifling of their ability to continue to do good and meaningful work for the academic field, the students and the community. Or a Christian academic may choose to sever their ties with those institutions and authorities and find a more nurturing place that enables them to better promote human flourishing.

The decision to stay or to move on to a more nurturing environment can take into account a number of considerations. These include the level of support and pressure the Christian receives in the institutions, and whether there are people upholding similar values who could work together with the Christian. Are there “communities of faith” (as Professor Herdt mentioned at p.4) or is the Christian mostly fighting the battle alone? To what extent could the investment of time and effort make meaningful and positive changes to the situation and enable human flourishing? Could the Christian maintain his or her values despite the pressure? To what degree is the Christian’s well-being affected? What opportunities are available to move to a more nurturing environment?

Conclusion

A virtuous legal system is sustained by virtuous legal professionals, including judges, lawyers, rights activists and legal academics. The legal conscience, which embeds morality and virtues, m guide the thoughts and actions of legal professionals as they navigate challenging and contentious issues. The ultimate goal in a rule of law legal system is the attainment of justice, fairness, and equality.

End Notes

[1] Hart, HLA (1961). The concept of law. New York: Oxford University Press.

[2] Oliver Wendell Holmes Jr is one of the early exponents. See: Holmes, Oliver Wendell (1887). The Common Law. London: Macmillan.

[3] See Grossman, J. B. (1966). Social Backgrounds and Judicial Decision-Making. Harvard Law Review, 79(8), 1551–1564.

Further Reading

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