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Bar, Bench, and Civic Culture

BY GEOFFREY C. HAZARD, JR.*

I. Introduction

The symposium primarily addresses the ethics of practicing lawyers, but it also addresses the ethics of judges. The conduct of practicing lawyers is necessarily linked to the conduct of judges, for rather obvious reasons. Practicing lawyers must adapt their conduct to that of people they deal with, particularly people in authority such as judges. When the conduct of judges is erratic, or subject to improper influence, or corrupt, lawyers are correspondingly constrained in how they conduct themselves. Otherwise, the lawyers' clients would suffer from the virtues of their legal counsel.

Honorable judges can find themselves confronting lawyers who are grossly incompetent or bent on misconduct. In such a situation, it can be difficult for a judge to function properly. Some judges and lawyers find themselves stationed in ethically hostile environments. In such an environment, it is difficult to maintain high professional standards.

Accordingly, in considering the ethical problems involved in either lawyering or judging, it is important to step back and to consider the larger context – the civic culture of the regime in which practitioners find themselves.

The judiciary is the highest legal authority in a national regime. As such, it receives legal matters from civil claimants and defendants, from the prosecuting authorities, and from other government agencies and officials. Many of these matters are presented by lawyer advocates. All of these legal matters result from events and transactions involving still other individuals and organizations with

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which they are affiliated. Often, these legal matters are public affairs that are important to the whole community.

Put more directly, judges and lawyers in any legal system are immersed in the culture of their society. In that situation they are influenced, inspired, and constrained by the ambient civic attitudes, specifically the attitudes toward law-abiding behavior and thus the rule of law. Within a general civic culture there are subcultures, including the subcultures of various workplaces. Speaking of legal workplaces, there is an identifiable workplace culture within law firms, local bars, courts, and judicial systems as a whole. The concept refers to an institution's morale, its efficiency, and its integrity.

The culture of legal workplaces is influenced by the larger civic culture and, at the same time, contributes to the larger civic culture. Competent and ethical legal professions and judicial systems directly contribute to law-abiding attitudes and public acceptance of the rule of law. Hence, in considering legal and judicial ethics in any given regime, account should be taken of the civic culture as a whole.

Even in generally law-abiding regimes there are of course variations and episodic deviations. Particularly those of us in the United States can remember the extreme resistance to constitutional law pronounced in *Brown v. Board of Education of Topeka*,¹ the Supreme Court's school desegregation ruling. More recently there has been similar but less extensive reaction to legal rulings regarding same-sex marriage. The maintenance of a positive civic culture and public attitude toward the rule of law therefore can be fragile.

Measuring or even describing a civic culture is difficult and inexact. Nevertheless, the ambient public attitudes toward the rule of law are real and of great practical importance for lawyers and judges.

II. Two Examples: Germany and Japan

Examples can make the point in more concrete terms. Two such cases are well known, that of Germany and Japan after World War II. In both countries there have been dramatic changes since the collapse of the previous regimes in those countries.

We are aware that up to and during the war, the regimes in both Germany and Japan were extremely authoritarian. So far as the rule of law is concerned, they were perverse and widely corrupt. Yet both

1. 347 U.S. 483 (1954).

countries now have constitutional governments, generally law-abiding citizens, and adherence to the rule of law. The influences contributing to the transformations include their respective geopolitical situations, long-term political histories, educational and professional institutions, religious traditions, and immediate experiences following the end of the war.

Developments in Germany can be understood by realizing that the Nazi regime was extraordinary, brief, and a disaster for its people. Upon collapse of the Nazi regime, the roots of an older and civilized society came to life in West Germany and later in East Germany. Modern Germany is a civilized and sober society committed to constitutional government.

How that transformation came about is of course very complicated. However, several important factors can be identified. One was the fact that the old Germany, going back before the first World War, had a strong tradition of the rule of law. A second was religious tolerance between predominating Catholic and Protestant traditions. The evolving new regime therefore was genuinely secular and not sharply divided in religious terms. German universities had a distinguished tradition that was revived. Its judiciary and legal profession had similar traditions that were also brought to life.

Another vital factor was the recession of the German military, which for centuries had exercised weighty influence in German society and government. Still another was the commitment to a welfare-capitalist economic system. A capitalist economic system functions through decentralized contracts and property rights, which requires maintenance of the rule of law. It also generates an autonomous body of citizens who have interests in maintaining the system and the resources to participate actively. The German welfare system smoothed and equalized economic outcomes.²

In Japan the transformation has been somewhat different but equally remarkable. In World War II and the period leading up to it, the Japanese regime was under the effective control of the Japanese

2. There is an enormous literature on Postwar Germany. While Wikipedia may not be suitable for academic research, first-time readers seeking to develop familiarity might find the article on Postwar Germany useful. See Wikipedia, Konrad Adenauer: Chancellor 1949-1963. The keys to Adenauer's thought and action were his strong attachment to Catholic Christianity and his antipathy to Prussian militarism.

military, acting under the aegis of the Emperor. Internally the regime was strongly authoritarian, reinforced by the tradition of deference in relationships to authority that inhered in Japanese culture.

By the 1960s, however, Japan had an established constitutional government that was free of military domination. That transformation was also complicated. An important factor of course was the recession of military domination, as in Germany. Another was the maintenance of the Emperor's formal authority. The system of government under the new Constitution was patterned on the British parliamentary system; the economy was based on private enterprise evolving under government guidance. In the new Japan, the Emperor reigns but does not rule; the institution of the emperor personifies a legitimating force that now supports parliamentary government. The society adheres to a unifying quasi-religious tradition. The political economy is welfare capitalism generally similar to that in Germany. The population remains strongly lawabiding.³

Another common feature of postwar Germany and Japan was their diminished geopolitical situation. Going into World War II, Germany and Japan were major players in international relations, and both notoriously sought greater domination. In the postwar world, they have substantially more modest positions. The postwar international community has been dominated by the United States, the Soviet Union (now Russia), and more recently China. Germany and Japan no longer conjure the geopolitical ambitions that impelled them into World War II. They have had to settle into practical politics in the international sphere, and by extension, in their domestic spheres as well.

The foregoing descriptions are of course very rough but make the basic point: An effective legal system – the rule of law – requires a supportive and realistic civic culture.

3. There is a large literature on the Japanese transformation. The classic work is JOHN W. DOWER, *EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II* (1999). While Wikipedia may not be suitable for academic research, first-time readers seeking to develop familiarity might find the article on post-war Japan useful. See Wikipedia, *Occupation of Japan* and *Constitution of Japan*.

III. Another Example, More Briefly: South Korea

South Korea has had a constitutional regime since no later than the 1980's. It has civic characteristics somewhat similar to those described above: secular government and religious toleration; a military establishment effectively subordinate to civilian government; and a welfare-capitalist economic system. It has a deeply rooted sense of identity vis a vis Japan and China. The separation from North Korea involves complicated sentiments including hopes for reunion, but the insular and repressive nature of the North Korean regime is a reminder that reunion on acceptable terms will be difficult.

The transformation of South Korea from the earlier authoritarian regime of Syngman Rhee was facilitated by the U.S. Paradoxically much of the impetus came from programs in education and public administration sponsored by the U.S. Army. But the South Korean military remains a power center of authority, which is understandable given the geopolitical relationship to North Korea and to China.⁴

IV. Two Other Examples, More Briefly: Poland and Algeria

A. Poland

Poland has transformed itself from a Soviet satellite to a constitutional regime over a remarkably short period, beginning in 1981. It too had a strong historically rooted sense of identity, located as it was between Germany, Austria and Russia. Poland's cultural legacy included highly developed German and Austrian administrative and legal systems.

The impetus for Poland's escape from Soviet domination was the labor movement originating in Gdansk, generating a peaceful revolution from below. That revolution was greatly assisted, perhaps made possible, by the turmoil in Soviet Russia under Gorbachev. The Polish military played an important role in the movement, being lenient – or simply inept – after its initial repression.

The strong religious sentiment of Polish Catholicism, particularly its spirituality, was a powerful influence. The leadership of Cardinal

4. A very useful analysis of the situation in South Korea can be found in GREGG A. BRAZINSKY, *NATION BUILDING IN SOUTH KOREA: KOREA, AMERICANS, AND THE MAKING OF A DEMOCRACY* (2007).

Wojtyla, later Pope John Paul II, provided inspiration and guidance in civility and tolerance, including sympathy toward the Jews.⁵

B. Algeria

Algeria is an unhappy example. Its history consisted of pre-European tribal government, replaced by French imperial domination for over a century, followed by civil war against the French, and then internal civil war. It had no indigenous secular tradition and continues divided between different branches of Islam. The regime remains dependent on its military for its stability. Its economy is dependent on extractive industry, particularly oil and gas. The prospects for constitutional government and the rule of law in Algeria remain unfavorable.⁶

There are illustrations that do not involve the United States. I am reminded of a study I read indicating that in several former English colonies the level of law-observance was higher than in comparable countries with a different history. The inference was that the English governance was a positive influence in transmission of rule of law – competent administration, courts that are efficient and not corrupt, and a competent and honorable legal profession.

There are also situations in which the U.S. influence has not been positive in terms relevant to legal and judicial ethics. Illustrations include the Central American countries of Guatemala and Honduras and, of particular note, Haiti.

V. Conclusion

Establishing a competent and ethical legal profession, and a judiciary that has competence and integrity, requires a supporting civic-minded culture. Elements of such a culture include probity and reasonable efficiency in government as a whole, a good basic educational system, an educated professional class, and active journalism. Without such a supporting culture, the “rule of law” at best

5. While there is no comparable resource on Poland such as Brazinsky's study of South Korea, TIMOTHY GARTON ASH, *THE POLISH REVOLUTION: SOLIDARITY* (2002), is an excellent analysis of the political lead-up to Polish constitutionalism.

6. A valuable analysis can be found in JAMES D. LE SUEUR, *ALGERIA SINCE 1989: BETWEEN TERROR AND DEMOCRACY* (2010).

would be merely formal.

This kind of support in postwar Germany, Japan and South Korea was provided by the United States, through its military, civilian agencies and NGOs. Such a position for the United States is no longer possible. Can some kind of similarly supportive instrument be fashioned – perhaps through the United Nations, the EU, or some new cooperative endeavor of the constitutional democracies? Working out a process of positive support without oppressive intrusion would be a formidable challenge. However, appreciating the magnitude of such a challenge would also yield appreciation of the importance of a supportive civic culture.
