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Capturing the Insights: Commonalities and Differences

BY NAOMI ROHT-ARRIAZA*

The final panel of the symposium featured the Honorable John R. Tunheim, United States District Court Judge for the District of Minnesota, and Hastings Distinguished Professors Naomi Roht-Arriaza and Geoffrey Hazard. It captured the panelists' reflections on common themes, questions and new issues raised by the two days of discussions. Because the discussions were rich and varied, it was impossible to summarize everything that happened over the two days, so the final panelists tried to pull out some common themes and insights.

I. The Centrality of a “Culture of Legality?”

Many of the panelists over the two previous days discussed the idea that ethical integrity is closely intertwined with an expansive view of rule of law. As such, rule of law is not just about formal codes and procedures, but about adherence to an underlying set of values that make those codes and procedures operate in the interests of justice.¹ One common theme concerned getting beyond any set of technical fixes for improving rule of law to tackle the underlying problems of creating a *culture* of legality. This required many of the panelists at the symposium to think about how that change happens.

Professor Roht-Arriaza noted that creating a culture in which

1. For definitions of rule of law, see *What is the Rule of Law?*, UNITED NATIONS, http://www.unrol.org/article.aspx?article_id=3; see also *What is the Rule of Law?*, WORLD JUSTICE PROJECT, <http://www.worldjusticeproject.org/what-rule-law>. For an explanation of the difference between “rule by law” and “rule of law,” see DAVID DYZENHAUS, *HARD CASES IN WICKED LEGAL SYSTEMS: PATHOLOGIES OF LEGALITY* (2d ed. 2010).

ethical integrity can flourish involves deep political and cultural shifts. It has to come from the top, from the leadership of an organization, as the lunchtime panel on day one of the symposium showed. But it also must arise bottom-up, from broad buy-in and the creation of an organization-wide mystique. Sometimes it's a question of decentralizing power – as with judicial appointments and discipline, which are best taken out of the hands of higher-court judges – and sometimes of centralizing now-dispersed power. There is a role for education, the media, and politics, and sometimes shifts can happen very quickly when the moment is right, or where there's a scandal, as we saw in the discussion on Taiwan. In other places, change can happen slowly, even without an independent judiciary or a developed economy – China and Haiti, in different ways, are examples. Sometimes change can be aided from outside, but it has to be adapted to each specific setting in order to be effective: Bulgaria is an example. Another is the use of international mechanisms to beef up local accountability. An example here is the Commission on Impunity in Guatemala, as discussed by Mirte Postema.²

Many of the discussions raised the question of whether there is a universal culture of legality, or whether cultural variation is inevitable and desirable. Professor Roht-Arriaza noted that the debate around universality versus cultural particularity is common in discussions around human rights, and there is no right answer, just a spectrum.³ “Corruption” may vary in terms of how it is specifically defined and understood, but there is a base set of common norms.

Judge Tunheim tackled the relationship between a culture of legality and judicial independence. How do you create a culture of legality? First, by spending time to really understand the root causes of an absence of such a culture. Poverty, hoarding, and corruption are part of those root causes. A lack of stability in the political system is part of it, as is the desire to impose political control over legal systems. Outsiders do not necessarily have a role in changing these root causes

2. See Mirte Postema, *Why Reforms Alone are Insufficient to Strengthen the Judiciary: A Case Study of Guatemala's Judicial Selection Processes*, 39 HASTINGS INT'L & COMP. L. REV. 237 (2016).

3. For one of many discussions of this debate in human rights law, see Fernand Varennes, *The Fallacies in the “Universalism Versus Cultural Relativism” Debate in Human Rights Law*, 7 ASIA-PAC. J.H.R. & L. 67 (2006).

of the absence of a culture of legality, but they do need to understand them.

What should lawyers' and judges' role be in creating this culture, or in trying to change it? In some cases, change will involve taking to the streets at the right time. Judge Tunheim pointed out that we have great support in the United States for the legal system. We do not need to take to the streets to defend it. We have lawyers who do important work for the judiciary, via the American Bar Association, in local bar associations, in law schools, and so forth. Building a culture of legality takes numerous types of courage. For example, in Pakistan, the government removed the Chief Justice, the legal system responded, their lawyers did take to the streets, and the decision was reversed in response.

Judge Tunheim reminded participants that panelists had spoken earlier of the need to use high-level criminal prosecutions to send a message about respect for ethical integrity, and the importance of that message in changing culture. In addition, transparency is important for building a culture of legality, including an independent news media. Sometimes an old-fashioned public relations campaign can work. Advertising and other kinds of public education also play a role. Structural or institutional change are important too, as Judge Scirica discussed on the first day of the symposium, and accompany changes in the culture, which might include longer tenure, merit-based selection processes, separate budgets, and separate judicial governance. And for judges themselves, change includes training and building competency. There is a need to strengthen the role of judges vis-a-vis bar associations, including cross-border partnerships.

Professor Hazard disagreed with the utility of the concept of culture of legality, preferring the concept of rule of law in the symposium's title. He used the concept of gender equality under the law to illustrate. He posited that almost all women would say that rule of law entails equality before the law. Countries that do not hold to that view are dominated by aging traditions that we think and hope are in jeopardy. So we can view the appreciation of an essential element of society and of governance in the concept of the rule of law. This means that, in principle, everyone should be equally addressed, empowered, constrained, and enabled by the legal system as it is. That is the critical element we are lacking in some parts of the United States, even here in California. We have work ourselves to do.

II. The Role of Ethics Codes

Both Judge Tunheim and Professor Hazard spoke specifically about the role of ethics codes in building the kind of culture we want to see. Judge Tunheim affirmed that writing a judicial code or lawyer's code is not enough; we need to help people understand their provisions. A system should have rules and guidelines, but also helpful advice. Judges should want an ethics code because it protects them when they follow the rules (and provides illumination on difficult issues). You cannot write a code of conduct that covers every variable. There needs to be venues in which to discuss these issues. For example, in our system, Judge Tunheim noted that he finds it refreshing to sit down with judges to talk about these issues or to request an opinion from a group that best understands the code. In addition, to make a code-based system work, you need a discipline system that is fair and is well administered.

Professor Hazard thought that given the more challenging situations that exist in some other regimes, any ethics code should be less elaborate than ours in the U.S. There are a few fundamental principles in each of the key domains that can be expressed more concisely than we have conveyed in the U.S. Fashioning and publishing ethics codes, even if it is apparent they will not be immediately accepted, received and adopted, is key. If you put it on the shelf and in the media, it is there, and it is something that can serve as a reference point. In due course there will be acceptance of the idea that there are rules. To begin with, among lawyers, the rules entail avoiding conflicts, and a duty of loyalty. Among judges the duty of impartiality is central. From those bedrock concepts, we can move into greater detail.

III. Other Spurs to Ethical Action

In addition to codes, the panelists touched on other actors and techniques to encourage ethical performance. Professor Hazard discussed the role of tort law and malpractice cases. He noted that the trouble with all disciplinary systems is that they are not often used and are not always effective. Private tort claims can fill the gap. Unlike other approaches, malpractice is driven by the victims. Is the bar willing to take on that kind of case? In the U.S., until 30 years ago the answer was "no." But now that's history. Malpractice

litigation is of concern to all practicing lawyers. As a result, lawyers are now more careful with how they practice.

He also emphasized the roles of education and the media. Education involves being able to articulate the relation between law and social conduct, and how law – both criminal law and private contracting – contributes to the welfare of the community. There is a big educational challenge and opportunity there, to try to articulate the role of law broadly considered, in a way intelligible to 8th graders and college sophomores. And, we have to speak with some measure of candor about the deficiencies of any given system. Communication has to be through the media, including television (and mobile phones, which are the great democratizer of knowledge). One of the problems is to educate people in the media about why rule of law is important. These things can be done regardless of the politics, except in the very most repressive regimes.

Judge Tunheim recalled the discussion in the middle of the first day of the symposium, on the role of private global law firms in law and ethics reform in the countries in which they work. The panel then said that, by and large, firms do not take an activist role. Judge Tunheim asked, if global firm lawyers take an activist role via bar associations in the U.S., why is it different for their members in the other countries in which they work?

Professor Roht-Arriaza, drawing from remarks by Professor Rhode during the symposium,⁴ also mentioned the role of technology in democratizing access to justice. Roht-Arriaza noted that in the U.S., the monopoly of lawyers over legal services limits access to justice (as Professor Rhode noted). In many parts of the world, a combination of paralegals and community workers with new technologies, especially mobile phones, had improved access to justice for the poor. She also noted that technology can help with improved transparency, which lessens opportunities for corruption.

Professor Roht-Arriaza also noted the role of other actors in the system, including prison officials, investigators and court administrators, who all have to be part of ethics reform. Finally, she noted the role of violence in many parts of the world as a serious impediment to meaningful rule of law reform. Many people are

4. See Deborah L. Rhode, *Professional Integrity and Professional Regulation: Nonlawyer Practice and Nonlawyer Investment in Law Firms*, 39 HASTINGS INT'L & COMP. L. REV. 111 (2016).

frustrated with the shortcomings of legal systems or benefit from their inoperability, so they turn to violent forms of conflict resolution and enforcement of agreements. And violence against those working in justice systems, including lawyers and judges, is widespread and will give even the most courageous among them pause. Protection of judges, lawyers, rights defenders, and others thus becomes an integral part of the creation and maintenance of real rule of law.

Professor Hazard summed up the two days of panels and discussions at the symposium: "The discussions were impressive and helpful for each of us to better understand the nature of our calling and how we can improve it. There are conferences and conferences, and this one turned out to be a good one."