

# "DIGNITY AND RESPECT: THE ROLE OF LAW IN BUILDING ETHICAL COMMUNITIES"

14<sup>th</sup> Annual Harmony Brunch

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## Speaking notes

What are ethical communities? I think what they are all about is dignity and respect which are often said to be the foundations of human rights. Ethical communities are something like this: they are peaceful, and they are places where people live in dignity and mutual respect.

So, what is the role of law in building and sustaining such communities? Law has an enormously important role to play in building and sustaining ethical communities. The bundle of ideas surrounding that role is called the Rule of Law, which is a complicated matter to untangle, and not everyone agrees on what the Rule of Law amounts to. However, certain things are pretty clear. The approach of the World Justice Project (WJP) is a sound one to use as illustrative.

The WJP is an NGO based in Washington, D.C., which was started by the American Bar Association. WJP defines the Rule of Law as a “rules-based system in which the following four universal principles are upheld”:

- The government and its officials and agents are accountable under the law;
- The laws are clear, publicized, stable and fair, and they protect fundamental rights, including the security of people and property;

- The process by which the laws are enacted, administered, and enforced is accessible, fair, and efficient;
- Access to justice is provided by competent, independent, and ethical professionals.

In assessing the health of the Rule of Law in any particular jurisdiction the World Justice Project looks at the following “dimensions” of it: 1) limitations on government powers, 2) absence of corruption, 3) clear, publicized and stable laws, 4) order and security, 5) protection for fundamental rights, 6) open government, 7) regulatory enforcement, 8) access to civil justice, 9) effective criminal justice and 10) informal justice.

We are seeing across North Africa and parts of the Middle East the most recent examples of humanity’s rejection of arbitrary governance: given a chance, people will always reject corrupt governance, governance that serves the interests only of a few insiders and their cronies. Why? Because that kind of governance is exploitative; it denies everyone’s right to equal dignity and respect.

Some of the political activists in the Arab world we see covered by the media these days speak of the need for the Rule of Law in their countries. Many don’t – many would not have had the chance to learn much about it. But the need is there and establishment of the Rule of Law is an essential part of the reforms required if they are to have decent governance.

We Canadians are very fortunate: we have the rule of law comparatively well established but there are weaknesses, for example, our governments are overly secretive (not sufficiently open and transparent) and access to justice is not even remotely equal or adequate.

One element of the Rule of Law to which Canadians should pay particular attention is the requirement that state power be limited. Having the Rule of Law well established is not only a question of what law should address, but also what law should not address, for there must be limits on the extent of state power and the reach of the law. In this context, we need to give careful thought to the restrictions on speech imposed by Canadian law. I am going to say a little about the restrictions on speech found in human rights statutes.

As no doubt many of you know, in the Alberta Human Rights Act we have one of the more sweeping provisions on speech: section 3 of the Act makes it illegal to publicly state or publish anything that might expose an individual or group to “hatred or contempt.” Given the vast potential of remarks to arouse hatred or contempt, we need to worry about the excessive breadth of this provision. Section 3 has been at the centre of controversy, and I predict will continue to be so until it is amended or repealed.

In my view, it is a mistake to have such broad legislation in place because we need to know what each other thinks: in a democracy people must have a chance to express their views. Many people will be a bit careless, even reckless, in their speech, but they must have a chance to express themselves. Free speech can’t just be for those of us who are well-educated or are lawyers, that is, it can’t be only for those of us who have learned have to put caveats on the controversial things we say, so we won’t get in trouble for them. This isn’t just a point of democratic theory – one which goes to the legitimacy of majority rule – but also seems to be proven out in practice.

Take the debate in Canada over gay marriage, for example. In the course of that multi-faceted debate, much of what was said was ugly and certainly did

expose gays to the hatred and contempt of people who believed those ugly claims. But at the end of the debate, with gay marriage established as the law of the land, there is greater acceptance of that outcome by those who opposed it *because* – I think – they had a chance to have their say. Opponents of gay marriage didn't win the debate but my assessment is that they are more content with the outcome because the views they support were aired. This is, I think, how democracy has to work. It is messy and you have to hear things you don't want to hear, but the outcome is more solid for the free exchange of views.

In fact, I would say, the more diverse the Canadian population becomes, the more important that we all have a chance to express our views. We shouldn't want the law to exert much control over speech. We should – ethically should – always criticize talk that is abusive, and we should reject ugly, hateful ideas – always. You can protest, “tweet”, send letters galore, and so on, against the things said that you oppose. But the law should not penalize speech unless it falls into the realm of criminal behaviour where harm may be directly caused by it. The classic example is that you can't yell “fire” in a crowded theatre. Why? Because panic and a probably deadly stampede may ensue. (And there are other legitimate restrictions on speech such as the rules against defamation. No one can or does sensibly argue for completely free speech. There is no such thing as unfettered free speech, nor should there be.)

I think we need to appreciate more fully than many of us seem to do the distinction between what it is appropriate to prohibit by law and what ethics demands of us.

I offer some concluding thoughts on harmony, which I understand as “an orderly whole”. For those of us who have always been outside the mainstream, in

some sense or the other, harmony is a scary idea indeed. Why? I think it is basically this:

- To hold harmony out as the ambition, suggests that someone has written the script, or better in this context the score, and it is up to the rest of us to fall into line;
- To urge harmony is to suggest that conformity is desirable – worse, that conformity is normative – that you should conform for the sake of harmony;
- Progressive change often (usually?) flows from tension; advocates raising difficult questions are creating tension, even discord, they cannot be aiming at or even valuing harmony;
  - Women, gays, others – think of the US civil rights movement: when the suffragettes starved themselves to draw attention to their claim of a right to vote, they weren't aspiring to harmony. Quite the opposite, they were trying to smash through complacency and consensus to achieve social justice. So it always goes.
  - Those who demand social justice are always met with the objection that they threaten the cohesiveness of society, the very cohesiveness that always operates to the advantage of those who already have power.

## Summary

There is a delicate line to be walked if you are determined to make change ethically. You can't just go along with the status quo for the sake of harmony, or order. But you need always to try to be respectful in your challenge of it.

However, people are people, that is, imperfect. And what counts as respectful varies amongst us. In the end we have to let people have their say and unless what they have to say is either obviously preposterous or dangerous in the short run, we should try to listen to what they have to say. Otherwise, and this may sound paradoxical, we won't end up with the respect and dignity that underpin ethical communities.