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The Ideal and Non-Ideal in Behavior Guidance: Reflections on Law and Buddhism in Conversation with the Dalai Lama

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In a perfect society, where everyone is governed by the principles of compassion, where everyone sees everyone else's interests as having at least as much value as one's own, where everyone has mastered desire so that it no longer causes avoidable suffering, there would be as little need for law as there would be for the concept of justice.¹ But of course we don't live in a perfect society (far from it). So we need systems of behavior guidance to help us to do as best as we can by one another. Hence there is no perfect legal system because each must accommodate the different imperfections of various individuals and cultures. Clearly the Dalai Lama is aware of this and his remarks should be interpreted with this in mind.

Even admitting the need for systems to guide our interpersonal and social behavior, however, there are different forms these systems can take. Some systems seem to recognize and incorporate our imperfections and limitations. These seem to admit the impossibility of the task of perfecting society and seek rather to minimize the damage our imperfections do. Other systems seem to concentrate more on closing the distance between our

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1. See DAVID HUME, AN ENQUIRY CONCERNING THE PRINCIPLES OF MORALS 84-85 (Tom L. Beauchamp ed., Oxford University Press 1999) (1751) (arguing that, as a value, justice does not arise where people treat each other as dear as themselves). While it might be true that we still might have coordination problems that require solutions, it is not clear that we would need a legal system to do so. A mutually recognized authority might be enough to accomplish this without the need for a legal system to support it. See generally Leslie Green, *Law Co-Ordination and the Common Good*, 3 OXFORD J. LEGAL STUD. 299 (1983).

condition and perfection as much as possible, treating our limitations as surmountable given the right training and attitude. I will call these systems "ideal" in that they concentrate on the ideal situation and on inculcating in us behavior that is designed to get us as close as possible to that ideal. I will call the former kinds of systems "non-ideal" in that they seem to treat our limitations as unavoidable but minimizable.

It would be far too easy to associate the ideal form of behavior guidance with Buddhism and the non-ideal with law. We might be able to imagine systems that are completely ideal or non-ideal, but since these descriptions are meant to explain forms of behavior guidance, we are likely to find elements of both in any given system. Furthermore, the systems themselves are likely to intertwine and interact, as they can and do with Buddhism and law, law and etiquette, monastic law and secular law, Buddhism and local religions, custom and religion, custom and law, etc.

Take the example of morality. Clearly morality is reflected in some way in both Buddhism and law.² But morality itself has aspects of both ideal and non-ideal forms of behavior guidance. This is what Fuller calls the "morality of aspiration" and the "morality of duty."³ The morality of duty operates by setting basic standards of behavior that people ought to meet as they are seen as the minimum requirements for reasonably harmonious living.⁴ The morality of aspiration is seen in terms of "the fullest realization of human powers," as the imperative to excel as much as possible in all endeavors, realizing all of one's potential.⁵ There is no sharp distinction between these forms of morality; they represent, rather, attitudes or types of positions we can take with regard to morality's operation

2. The reflection in law is admitted even by the most ardent legal positivists. *E.g.*, H.L.A. HART, *THE CONCEPT OF LAW* 193 (2d ed. 1994); Joseph Raz, *About Morality and the Nature of Law*, 48 *AM. J. JURIS.* 1, 3 (2003). Of course, they deny that there is any necessary connection between law and morality (as opposed to reflection of one in the other).

3. LON FULLER, *THE MORALITY OF LAW* 5 (rev. ed. 1977). Fuller cites a variety of mid-century theorists (including Hart) to support this distinction. *See id.* at 5 n.2.

4. *See id.* at 6.

5. *Id.* at 5.

in guiding behavior.⁶ But we do have a tendency to use one or the other as we get farther from the middle of a spectrum between them.⁷ Hence we will tend to treat actions that seem to threaten the social fabric more basically as violations of duty, and actions that lessen our individual or collective ability to achieve our ideals and pursue perfection as regrettable wastes or character flaws.

Both of these styles of morality are represented in both Buddhism and law. In Western secular democracies, we are more accustomed to seeing the law as a system that basically operates according to the morality of duty, and Buddhism and other religious ethical systems as systems that operate according to the morality of aspiration.⁸ However, legal systems have their own forms of excellence toward which they are supposed to encourage people, and Buddhism has its basic rules (especially in the monastic traditions).

Problems arise when these two forms of behavioral guidance fall into tension as a result of disputes over our conceptions of the ideal. In religious circles, this can result in a schism. In the legal arena, it can result in civil war. So in the Western secular legal tradition, we prefer our legal systems to stick to the non-ideal, to remain silent on conceptions of the good or of the ideal, to focus on the morality of duty.⁹ However, a strange thing happens on the way to eliminating the ideal: rather than getting eliminated, it becomes internalized as the ideal of the rule of law, the “internal morality” of aspiration for legal systems.¹⁰ We idealize the procedures of the law and its operation, striving to make our “government of laws and not of men.”¹¹

6. *See id.* at 9.

7. *See id.* at 10.

8. *But cf. id.* at 5-6 (giving the Ten Commandments, and the Old Testament more generally, as examples of moralities of duty).

9. This is truer of modern Western legal systems and those based on them, than it is of more traditionally bound systems or legal systems in communities bound together by a common ideal they wish reflected in their law. If the risks of dissension are low due to the entrenchment of the ideology or the coercion of the people, then the law can be seen more easily as a tool for pursuing perfection.

10. *See FULLER, supra* note 3 at 41.

11. MASS. CONST. pt. I, art. XXX.

This means that we adopt and elevate procedures by which to guide our behavior and settle our disputes. Those procedures do not separate citizens based on their beliefs or what they hope to accomplish in life. The need for an internal, procedural ideal is magnified the more diverse society becomes and the more citizens have differing views of the good. In such circumstances, the fewer procedural norms a legal system has in place, the more prone that legal system will be to failures of the "internal" legal principles such as those against retroactivity or requiring that laws be clear.¹²

To take it one step further, a secular democratic legal system would, from the point of view of the ideal theory, reinforce and even inculcate pernicious patterns of behavior and misguided systems of belief. The ideal theory doesn't accommodate fundamental ignorance and disagreement, it corrects them.¹³ The non-ideal rule of law accommodates fundamental ignorance and disagreement insofar as it does not impinge on the pursuits of others. Once you endorse (as does the Dalai Lama) a secular democratic legal system and the notion of the rule of law that comes with it, then you magnify the tension between the ideal theory that claims universal principles as its basis and the non-ideal need to accommodate both the imperfections and differences in opinion.

Buddhist practice is perfectionist, based on an ideal of the attainment of enlightenment and nirvana through practices that must be correctly motivated on the basis of universal values such as compassion.¹⁴ As a universal value, natural compassion can make a claim to substantive inclusion in a legal system, but the more a legal system

12. Fuller cites eight principles as the internal moral principles of law: the need for general rules, the need to publicize, the need for prospectivity, the need for the rules to be understandable, the need for the rules not to contradict one another, the need for the rules not to require the impossible of those at whom they are directed, the need for the rules to be relatively stable, and the need for the rules as they are publicized to match with how they are actually administered. See FULLER, *supra* note 3, at 39.

13. While disagreement and debate are very much a part of many religious traditions, especially Tibetan Buddhism, these disagreements take place in the context of a commonality of purpose and a monastic legal framework that prevents them from leading to strife and disharmony.

14. It is still an ideal theory even if it counsels us to avoid goal-directedness in the pursuit of enlightenment.

endorses this value (and especially a particular method of its protection and promotion), the more substantive norms creep into the legal system, which risks alienating and disadvantaging those who disagree. Even if we say that, as a universal value, one cannot help but value compassion, people can still disagree fundamentally on the means of its pursuit. If the law does not make space for those disagreements, those in the minority or not in power will be disenfranchised and marginalized. Naturally, a legal system founded upon the principle of compassion would still treat those who resist that system compassionately. However, that compassionate treatment cannot rise to the level of inclusion in a system with which one has a fundamental disagreement. Disagreement, disenfranchisement, and marginalization, without an understructure of commonality and unity of purpose, are likely to lead to resentment, dissatisfaction, and strife. Hence the legal system itself, by its operation, runs the risk of undermining the very detachment and compassion Buddhism counsels.

Of course this is not to say that Buddhist law is oxymoronic. Rather, recognition of the tension between what Buddhism counsels and how secular democratic law operates can help to remind legal practitioners and citizens to reinforce their compassion in the face of legal failure or exclusion.

