FROM REGENSBURG TO THE STRAND – VIA PAUL VALLELY[1]

John Duddington

Introduction

On Friday September 15th 2006 Pope Benedict XV1 delivered a thoughtful address at the University of Regensburg entitled 'Faith, Reason and the University: Memories and Reflections'[2]; on Thursday February 2nd 2008 the Archbishop of Canterbury delivered an equally thoughtful address at the Royal Courts of Justice in the Strand entitled 'Civil and Religious Law in England; a Religious Perspective'[3] and in this journal[4] Paul Vallely entitled his London Newman Lecture' English Catholicism 1951 – 2008' . What do they have in common?

In each case, whether directly in the case of the Archbishop or indirectly in the case of the Pope and Paul Vallely, they were offering insights into the relation between Christianity and the place of law in present day society. Let us begin with the Archbishop but first an introductory word must be offered. Readers who are not lawyers may be tempted to stop at this juncture and reflect that this article is not for them as it aimed at lawyers. Nothing could be further from the truth. The place of law in society and the development of a Christian theology of law are of vital importance to us all. With that in mind let us consider what the Archbishop had to say.

The Archbishop's lecture

As is well known, the impact of his lecture was dimmed by the effect of remarks which he made in an interview on BBC Radio 4 that day in which he said that the recognition of *sharia* seemed 'unavoidable and, as a matter of fact, certain conditions of *sharia* are already recognised in our society and our law ..' This of course caused an immediate storm with a spokesman for the Prime Minister saying that' *sharia* law could not be used as a justification for committing breaches of British law, nor could the principles of *sharia* law be applied in a British court in reaching a contractual dispute under British law'. Unfortunately for the Prime Minister's spokesman that is precisely what can and does happen and British law allows this as we shall see. The issue raised by the Archbishop is not whether British law can recognise and give effect to other systems but on what terms and, as an underlying theme, what basic principles should our law insist on as a *sine qua non* of any recognition of other systems of law.

Let us have a practical example. I wish to have a house built and my architect draws up a contract with the builders. This contact will contain various clauses which are deemed to be appropriate to my contract and may contain a clause that in the event of

---

[1] I must acknowledge at the outset my indebtedness to two articles by Frank Crammer 'The Archbishop and Sharia' and 'A Court of Law and not of Morals' both of which appear in the current issue of Law and Justice: (2008) 160 Law and Justice 4 and 13. Frank Cranmer had the advantage of actually hearing what the Archbishop actually said.

[2] The text can be accessed through numerous webpages. An accessible one is www.guardian.co.uk/world/2006/sep/15/religion.uk

[3] To be found at www.archbishopofcanterbury.org/1575

[4] The Newman No. 74 May 2008 2-11

any dispute the matter shall be referred to a surveyor appointed by the President of the Royal Institute of British Architects whose decision shall be final. Under the Arbitration Act 1996 this clause is valid so that instead of recourse to the courts the parties must go instead to the Arbitrator. It is only from this decision that there is aright of appeal to the courts of the land and then only on a point of law.

If we turn instead to the detail of what the Archbishop said we will see that he pointed out that the degree of recognition which might be given to the regulatory norms of a religious is not one which is particular to Islam. A recent example was the desire of Roman Catholic adoption agencies to be exempt from the Equality Act (Sexual Orientation) Regulations. Again the State makes provision for those with a conscientious objection to abortion by providing that anybody who would otherwise be required to participate in an abortion to refuse on grounds of conscience[5]. The real issue raised by the Archbishop was, to quote Cranmer. 'how does society balance the need for uniformity and social cohesion with the desire of disparate faith - communities to retain their distinctive identities and customs and the right to freely exercise their religion'[6]. This is not a matter of political correctness but recognition of a situation which we have now and an attempt to deal with it.

Before we go further there is another issue. There is, perhaps, an underlying assumption in the debate that the place of law is to uphold individual rights and freedoms. So it is. But there is more to law than that. As Nichols points out[7] the English medieval kings regarded law as something promised. '*Lex* is something guaranteed.' He quotes Wormald[8] '*lex* expressed royal *fidelitas* in return for that of the people'. Thus law was, and should still be seen, in broader terms that simply that of the assertion of individual claims and instead in terms of a covenant between ruler and ruled. As Nichols puts it 'reciprocity is integral to the ancient English understanding of law'. Not only can this but law change attitudes. It is often the case that a change in the law shapes and forms public opinion in a direction which later generations have recognised to be beneficial to society. Take for example, the emancipation of women where it can be argued that it was changes the law in the nineteenth century which ultimately led to a change in attitudes in society[9] and, in more recent times the anti-discrimination legislation dating from the Equal Pay Act in 1970 which has led to a climate in which discrimination is regarded as not only unlawful but also unacceptable. If law is seen simply in terms of individual rights rather than in the context of society it will simply feed that over - emphasis on individual's rights which has had such disastrous consequences for our society over the past thirty years.

If this is so then there are consequences for the debate raised by the Archbishop's lecture. For if law is more than the assertion of what I as an individual want and by contrast it expresses something deeper about the relationship between us all, and has a positive effect in changing attitudes, then it must follow that that law must be based on the same fundamental principles which apply to us all. And if that is true then there

[5] Section 4(1) Abortion Act 1967.
[6] At page 5 Law and Justice 160 *op. cit.*
[7] In '*The Realm'* Family Publications Oxford 2008 at page 38
[8] In *The Making of English Law: Alfred the Great to the Twelfth Century. 1. Legislation and its Limits* (Oxford 1999) quoted on page 38 of 'T*he Realm' op.cit.*
[9] See Dicey *Law and Public Opinion in the England* Oxford

is only scope for the law to accommodate the different beliefs and customs of individuals to a very limited extent.

This was to some extent recognised by the Archbishop in his lecture when he observed that 'It would be a pity if the immense advances in the recognition of human rights led …. to a situation where a person was defined primarily as the possessor of a set of abstract liberties and the law's function was seen as nothing but the securing of those liberties'. Where he and I may differ is in what he then said. He felt that the pity was that the emphasis on individual liberties was at the expense of 'the customs and conscience of those groups which concretely compose a plural society'. My point, to the contrary, would be that this emphasis should not be at the expense of the shared values which together make up that covenant between and ruled. The Archbishop referred to the notion of 'transformative accommodation' under which , in his words 'individuals would retain the liberty to choose the jurisdiction under which they will seek to resolve certainly carefully specified matters..' I would reply that the notion of jurisdiction is wrong, implying as it does parallel systems of law which would take away that common allegiance to a shared system of law which I regard as essential to society. My response to the issue posed by the lecture would then differ and would seek to accommodate within our legal system certain exceptions, for want of a better word, which would only apply where it was essential to accommodate the religious scruples of a group of believers.

On example known to me as a property lawyer is the *sharia* compliant mortgage under which, instead of paying interest on the mortgage a higher price is paid by the buyer and the ownership of the property passes to the lender. The lender lends the amount of that higher price and the difference between the higher price and the market price equates to the mortgage. Indeed at this level I do not think that the Archbishop and I are very far apart as in his lecture he mentioned 'aspects of marital law, the regulation of financial transactions and authorised structures of conflict resolution and mediation'.

If we are at that level of accommodation then I suggest that this is nothing more than sensible and practical and it is quite unnecessary to rest this on any large theory of separate jurisdictions. However, is we accept my thesis above that law does represent some kind of covenant between ruler and ruled then there is one further question which is, I think, the decisive one: on what principles should that covenant be based?

The Pope's lecture

This is where our focus moves from London to the Bavarian city where the Pope gave his lecture. This lecture was devoted to what he sees as his major philosophical task: to emphasise and strength the link between faith and reason[10]. As he said in his lecture 'the faith of the Church has always insisted that between God and us, between his eternal creator spirit and our created reason, there exists a real analogy.' He points out that this 'inner rapprochement between Biblical faith and Greek philosophical enquiry' (i.e. between faith and reason) remains the foundation, together with the Roman heritage, of Europe. The essence of this belief is that God is not capricious but instead our sense of the true and good is an authentic mirror of God who acts lovingly

[10] I am aware that the media made much of some incidental remarks made by the Pope concerning a discussion between the Emperor Manuel Paleologus and a Persian Scholar but this was entirely incidental to his main theme.

our behalf. He went on to speak of the dehellenisation of Christianity in that a distinction was drawn 'between the God of the philosophers and the God of Abraham, Isaac and Jacob' but I want to concentrate on the link drawn by the Pope between faith and reason as this is where a Christian theology of law comes in.

What the Pope is saying is that it is possible through reason purified in the light of faith to arrive at some fundamental norms which, in this context, can enable us to find an acceptable basis to found human rights[11]. This basis is not to be found in the fashionable language of human rights with its stress on the individualistic concept of the person but on something deeper: the notion of human dignity which brings with it respect for all persons whoever they are and what they are. So that is we are to face challenges of accommodating the requirements of different religious groups, even to the limited extent that I would argue is necessary, then even in this case we must insist that their legal systems both preserve and enhance the dignity of each individual and, if that is not so, no recognition can be afforded.

Paul Vallely's lecture

A final and brief mention of this lecture may help to clarify my argument. In it Mr. Vallely took issue with the response of the Roman Catholic bishops to certain recent legislative proposals of the present government. In particular he instanced the attempts made to achieve exemption for Roman Catholic adoption agencies from the Equality Act[12] and to defeat certain parts of the Human Fertilisation Embryology Bill. The reasoning behind his argument is that this can lead to polarisation in society and we as Catholics will once again be marginalised. Nor does the Pope escape his strictures for regarding 'doctrinal and theological clarity' as more important than 'social peace'. To which I would answer that I felt that the Bishops were entirely right to make the attempts which they did; in the case of the adoption agencies because it counts as a legitimate exemption to accommodate a religious group and in the case of the Human Fertilisation and Embryology Bill because to allow human/animal hybrids would be to offend against that fundamental principle of human dignity which I argued earlier should underpin our thinking about law. Mr. Vallely would, I expect, disagree. I can understand a contrary argument on whether the exemption is justified and whether it is indeed against human dignity to allow the creation of these hybrids. These are matters of legitimate debate. But to suggest that we should regard it as our first aim as Catholics not to be marginalised and to uphold 'social peace' even at the expense of truth seems to me to be extraordinary. It may be that I feel more comfortable amongst my secular acquaintances if my church does not speak out loudly, and if need be, combatively, but it does not mean that it is right to do so. We must have confidence in our Christian heritage of law; its vigorous defence, on the lines of the fundamental principles which have outlined and even at the cost of giving offence, is nothing to be ashamed of.

[11] There is no space to explore this theme here. Readers are recommended to '*When Might becomes Human Right*' Janne Matlary Gracewing Leominster 2007.
[12] See also above