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Law as a system of values

The Jan Grodecki lecture at the University of Leicester

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It is an honour to give this year's Jan Grodecki lecture. I did not have the pleasure of meeting Professor Grodecki but I know that he was a courageous man, a highly respected scholar and a much loved teacher. I am also pleased to see that he was an Honorary Bencher of Lincoln's Inn, which is also my Inn. Professor Grodecki was a firm believer in the view that the academic study of law should be rooted in other disciplines such as the social sciences.

In 1981 Kevin Gray and Pamela Symes published a book called Real Property and Real People, which brought a refreshing new approach to the study of land law. In the preface to that book they said that the ultimate purpose of a university education in law is not the learning of rules but "the critical perception of value." Of course, the study of law

can involve both. There is no inherent contradiction between the learning of rules, in other words a doctrinal or technical approach, and a broader study, which places law in its social context. The first approach might be compared to what Professor Hart called the "internal point of view" and the second corresponds to the "external point of view."[1] Many would suggest that both are important for a full and rounded legal education.

The theme of my lecture will be the relationship between law and values, a relationship which is not a straightforward one. I will use the term "values" broadly, to include what a society regards as most worthwhile. Often values are moral values but they need not be; and moral values certainly need not be founded on the doctrines of religion in general or any religion in particular.

To the scholar who approaches law from an external point of view, it is perhaps easier to see the relationship between law and values. The law of a given society at a certain point in time will be of interest to a sociologist, a social anthropologist or an historian because it may tell that scholar something of interest about the values of that society. It was for this reason that law was of interest to the pioneers of sociology in the 19th century, such as Durkheim and Weber.

[1] H. L. A. Hart, The Concept of Law (2nd ed., Clarendon Press, 1994) pp.89-91.

To take one obvious example, if a society is described as being "polygamous" or "monogamous" one is referring not only to its culture or a social institution; one is also making a statement about the law of that society, because the institution of marriage, although it often has its origins in social custom, and in particular the norms of a religion, is also usually governed by legal rules.

To take another, perhaps less obvious, example, a society which has abolished the death penalty can be contrasted with one that retains it. This can be seen as not just a difference between two legal systems; it tells the observer something important about the character of each society, about its basic values.

As I have said, the relationship between law and values is not a straightforward one. On the one hand, it is clear that many legal rules are intended to, and do, give effect to certain basic values of a society. Indeed this could be said to provide much of the moral force which is needed to support positive rules of law, in particular the rules of criminal law. Everyone understands, for example, that a society could not function without rules prohibiting murder or theft. One thinks immediately of the Ten Commandments. Such rules reflect fundamental values which

themselves may derive from religious traditions, not only the Judeo-Christian tradition, but would be needed in a wholly secular society as well.

Secondly, it is clear that rules of civil law, and not only the criminal law, will often reflect more basic values which are not themselves derived from the law. For example, the principle that promises should be kept lies beneath the law of contract; and much of the law of equity was historically founded upon principles of conscience. Indeed, the concept of "equity" was, and sometimes still is, used by way of contrast to the "law" in the sense of the common law.

As every law student knows, the foundations of the law of negligence were described in explicitly Biblical terms by Lord Atkin in Donoghue v Stevenson.[2] Six months before the decision in that seminal case, Lord Atkin had given a lecture in which he referred to the moral basis of civil law as follows:

> "The idea of law is that the obligations of a man are to keep his word. If he swears to his neighbour, he is not to disappoint them. In other words, he is to keep his contracts. … He is not to injure his neighbour by acts of negligence; and that certainly covers a very large field of law. I doubt whether the whole of the law of

[2] [1932] AC 562, at 580.

> tort could not be comprised in the golden maxim to do unto your neighbour as you would that he should do unto you."[3]

It is clear, thirdly, that legislation sometimes also seeks to reflect and promote certain values. A good example of this can be found in discrimination law, which, ever since the first Race Relations Act was passed in 1965, was intended not merely to make certain activities unlawful but, perhaps even more importantly, to promote the value of equality between human beings irrespective of colour, ethnic origins and so on. Indeed, it may be said that the symbolic or moral force of the discrimination legislation is even greater than its legal effect. Even if the law is not always complied with and it is often difficult to enforce in practice, that legislation still sends out a powerful signal of the kind of society we are – or at least the kind of society we think that we should be.

However, fourthly, it cannot be said that the law as it happens to be at any moment in a society's history necessarily and completely reflects the values of that society. Just because something is considered by many people to be morally wrong does not necessarily mean that it will be, or should be, prohibited by the law. The classic example is adultery, which many people regard as morally wrong, but which the law does not

[3] Quoted by Lord Morris of Aberavon in 'The Contribution of Welsh Lawyers' (the Lloyd George Memorial Lecture 2006), p.11.

criminalise in this country and has not done since the time of Cromwell: at the time of the Commonwealth the criminal law did prohibit adultery as the ecclesiastical courts had previously done. However, since that time the ordinary criminal law of the land has not sought to prohibit such conduct.

History suggests, indeed, that, if the law attempts to prohibit an activity thought to be morally objectionable but which many people nevertheless wish to engage in, the law may suffer and be exposed to ridicule. The best example perhaps of such a futile attempt was the constitutional amendment introducing prohibition in the United States in the 1920s.[4] Not only was prohibition ineffective to achieve its aim, it spawned further problems for society and the legal system and led to widespread criminal and gangster behaviour.

At a more general level caution is needed in case too much significance is attached to what knowing about the law of a given society tells one about its basic values. Take the relationship between religion and the state. The fact that Israel is defined by its Basic Law as being a

[4] 18th Amendment to the US Constitution, passed in 1919 and repealed in 1933 by the 21st Amendment.

Jewish state tells one something important about the character of that country.[5]

But the relationship is not always so straightforward. England has an established Church, which retains a legal status not afforded to other denominations of Christianity or to other faith groups, for example its bishops may sit in the House of Lords and the monarch is the head of the Church of England. However, the role that the established Church, indeed any religion, plays in the life of this country has diminished considerably over the last century.

Contrast that with a society like the USA or India. Both have legal systems which aim to create a secular state, with a clear wall of separation between church and state. Each, however, would generally be regarded as a society in which religion plays a more significant part in people's daily lives than it does in this country. As I will suggest later in this lecture, that does not mean that such a legal system is not based on fundamental values, rather its values are different from those of a society whose law gives a special status to a particular religion or denomination.

[5] Art. 2 of the Basic Law.

Nevertheless, the law is undoubtedly one of the most important features of any society. Indeed, it is in a fundamental sense constitutive of it. This is why it tends to be studied by sociologists and social anthropologists in order to understand what the values of a society are or may have been at a certain point in history. Although it is recognised that this will not give the full story, it is nevertheless an important indicator of what kind of society one lives in. After all, law is the means by which a community seeks to organise itself and give effect to the basic norms which it regards as most important.

Take, for example, two of the most controversial issues facing many societies, in particular the United States, in recent times. Whether a society permits abortion to take place or prohibits it tells one something about the nature of the values of that society. A current controversy on which there are widely differing views is the question whether gay people should be permitted to enter into marriage. In this country Parliament has recently enacted legislation to this end. The fact that opinion is so divided on that issue is an indicator that the values of a society are in the process of transition.

Although we may now like to think that the law is value-neutral, and certainly neutral as between different religious views, it is worth

recalling that it was not all that long ago that the English common law was said to rest on the values of Christianity. This was said to lie beneath the definition in English law of marriage as "the voluntary union for life of one man and one woman, to the exclusion of all others".[6] However, more recently it was said by the Divisional Court in R (Johns) v Derby City Council that:

> "The laws and usages of the realm do not include Christianity, in whatever form. The aphorism that 'Christianity is part of the common law of England' is mere rhetoric; at least since the decision of the House of Lords in Bowman v Secular Society Limited [1917] AC 406 it has been impossible to contend that it is law."[7]

In that case the Court also affirmed that judges "sit as secular judges serving a multi-cultural community of many faiths." At para 38, the Court observed that:

> "Although historically this country is part of the Christian West, and although it has an established church which is Christian, there have been enormous changes in the social and religious life of our country over the last century. Our society is now pluralistic and largely secular. But one aspect of its pluralism is that we also now live in a multi-cultural community of many faiths. One of the paradoxes of our lives is that we live in a society which has at one and at the same time become both increasingly secular but also increasingly diverse in religious affiliation."

At paragraph 55, the Court endorsed what had earlier been said by Laws LJ in McFarlane v Relate Avon Limited:

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[6] Hyde v Hyde and Woodmansee (1866) LR 1 P and D 130, at 133 (Lord Penzance).
[7] [2011] EWHC 375 (Admin), at para 39.

> "The general law may of course protect a particular social or moral position which is espoused by Christianity, not because of its religious imprimatur, but on the footing that in reason its merits commend themselves. So it is with core provisions of the criminal law, the prohibition of violence and dishonesty."[8]

However, I would suggest that Laws LJ is far from saying that the law does not protect certain values. It is ascertaining what those values are which is the question, a question to which I will return later. Earlier in the passage to which I have referred, he said:

> "The common law and ECHR [European Convention on Human Rights] Article 9 offer vigorous protection of the Christian's right and every other person's right to hold and express his or her beliefs, and so they should. By contrast, they do not, and should not, offer any protection whatever of the substance or content of those beliefs on the ground only that they are based on religious precepts. These are twin conditions of a free society."

That last sentence, it seems to me, although correct, is itself based upon a statement of value. It reflects the fundamental values of what in the 21st Century English law believes should be the foundation of the law in a society such as ours.

It was not always thus. An interesting and provocative account can be found by Eve Darian-Smith in her book Religion, Race, Rights: Landmarks in the History of Modern Anglo-American Law.[9] In that

[8] [2010] IRLR 872, at paras 21-23.
[9] (2010, Hart Publishing).

book she argues that, as a matter of historical development: "At times when new regimes of Western law were constructed, law makers typically invoked some concept of the sacred as a source of legitimacy for their actions".[10] As she says later:

> "Often glossed over in explorations of the development of Anglo-American Law are its histories of conflict and legal discrimination between Christians and non-Christians (i.e. colonists against native peoples), as well as between members of different Christian faiths (i.e. Protestants against Catholics). These conflicts determined a person's standing and status before the law. Just as the colour of a person's skin was and is used as a way of demarcating 'us' and 'them', a person's spiritual affiliation also historically functioned and continues to function as a marker of cultural identity and differentiation that can justify both explicit and implicit legalised intolerance."[11]

It is instructive to remind ourselves how far the law has travelled in the last half century. Just over 50 years ago the House of Lords had to consider the case of Shaw v Director of Public Prosecutions.[12] The question of law to be determined was whether there existed at common law a criminal offence of conspiracy to corrupt public morals. The House of Lords held by a majority, with Lord Reid dissenting, that there was such an offence at common law. What is of interest for present purposes is what the speech of Viscount Simonds (a former Lord Chancellor)

[10] page 13.
[11] page 15.
[12] [1962] AC 220.

reveals about what some of our most senior judges considered to be the function of the courts of this country.

Viscount Simonds said:

> "In the sphere of criminal law I entertain no doubt that there remains in the courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the state, and that it is their duty to guard it against attacks which may be the more insidious because they are novel and unprepared for."[13]

Viscount Simonds conceded that the law must be related to the changing standards of life, not yielding to every shifting impulse of the popular will but having regard to fundamental assessments of human values and the purposes of society. He acknowledged that:

> "Today a denial of the fundamental Christian doctrine, which in past centuries would have been regarded by the ecclesiastical courts as heresy and by the common law as blasphemy, will no longer be an offence if the decencies of controversy are observed."[14]

However he continued:

> "When Lord Mansfield, speaking long after the Star Chamber had been abolished, said that the Court of King's Bench was the *custos morum* of the people and had the superintendency of offences *contra bonos mores*, he was asserting, as I now assert, that there is in that court a residual power, where no statute has yet intervened to supersede the common law, to superintend those offences which are prejudicial to the public welfare."

[13] page 267.
[14] page 268.

Although Viscount Simonds acknowledged that such occasions would be rare, the example he specifically gave of when it might be appropriate at some point in the future is still of interest:

> "Let it be supposed that at some future, perhaps early, date homosexual practices between adult consenting males are no longer a crime. Would it not be an offence if even without obscenity, such practices were publicly advocated and encouraged by pamphlet and advertisement? Or must we wait until Parliament finds time to deal with such conduct? I say, my Lords, that if the common law is powerless in such an event, then we should no longer do her reverence. But I say that her hand is still powerful and that it is for her Majesty's judges to play the part which Lord Mansfield pointed out to them."

It should be recalled that Lord Reid, one of the greatest judges of the 20th Century, took a very different view about the appropriate role of the criminal law. He said:

> "Notoriously, there are wide differences of opinion today as to how far the law ought to punish immoral acts which are not done in the face of the public. Some think that the law already goes too far, some that it does not go far enough. Parliament is the proper place, and I am firmly of opinion the only proper place, to settle that. When there is sufficient support from public opinion, Parliament does not hesitate to intervene. Where Parliament fears to tread it is not for the courts to rush in."[15]

Subsequently, in Knuller Ltd. v Director of Public Prosecutions[16] the House of Lords held that, even if Shaw was wrongly decided, it

[15] page 275.
[16] [1973] AC 435.

must stand until it was altered by Parliament. However, more importantly, it also decided that Shaw was in no way to be taken as lending any support to the doctrine that the courts have some general or residual power to create new criminal offences. This was more recently reaffirmed by the House of Lords in R v Jones (Margaret).[17] As Lord Bingham of Cornhill said:

> "There now exists no power in the courts to create new criminal offences, as decided by a unanimous House of Lords in [Knuller] … while old common law offences survive until abolished or superseded by statute, new ones are not created. Statute is now the sole source of new criminal offences."[18]

Lord Bingham explained the underlying democratic principle which lies behind this:

> "It is for those representing the people of the country in Parliament, not the executive and not the judges, to decide what conduct should be treated as lying so far outside the bounds of what is acceptable in our society as to attract criminal penalties. One would need very compelling reasons for departing from that principle."[19]

In an earlier generation a judge like Lord Devlin might have regretted the path that the law has taken, since he believed that a fundamental function of the law is the enforcement of morals. However, the modern view itself reflects a basic value of our society – the value of

[17] [2007] 1 AC 136.
[18] at para 28.
[19] At para 29.

democracy. I shall have more to say about Lord Devlin's views about the enforcement of morals later.

Although the outside observer of a legal system may be able to see (from the "external point of view") that a legal norm reflects a moral or other fundamental value in a society, this does not offer much assistance to the participant within the legal system, who has to adopt the "internal point of view." In particular a judge has to decide a case in accordance with the law and nothing else. Certainly a judge is not entitled to impose his or her own subjective views of what is morally right or wrong on society.

In this context I think it instructive to keep in mind the wisdom imparted by Benjamin Cardozo in The Nature of the Judicial Process.[20] Cardozo, who was later to become a Justice of the US Supreme Court, said:

> "…A judge, I think, would err if he were to impose upon the community as a rule of life his own idiosyncrasies of conduct or belief. Let us suppose, for illustration, a judge looked upon theatre-going as a sin. Would he be doing right if, in a field where the rule of law were still unsettled, he permitted this conviction, though known to be in conflict with a dominant standard of right conduct, to govern his decision? My own notion is that he would be under a duty to conform to the accepted standards of the community, the *mores* of the times."[21]

[20] (1921, Yale University Press).
[21] at page 108.

However, it is not always easy to detect where a person's values come from even to that person. As Cardozo put it:

> "The spirit of the age, as it is revealed to each of us, is too often only the spirit of the group in which the accidents of birth or education or occupation or fellowship have given us a place. No effort or revolution of the mind will overthrow utterly and at all times the empire of these subconscious loyalties."[22]

Traditional legal education tends to take (implicitly if not always explicitly) a positivist view of law: it regards law as a system of rules. However, experience suggests that in many fields across the legal spectrum the rules are not clear-cut and perhaps even run out.

This can happen not just at the appellate level, where a court may have a choice as to the development of the law. It can occur every day at the level of a first instance court. Take one of the most important decisions that such a court has to make, the sentencing decision in a criminal case. Section 125 of the Coroners and Justice Act 2009 provides that the court should follow any relevant guideline issued by the Sentencing Council or its predecessor, unless it would be contrary to the "interests of justice" to do so. A black letter lawyer would search in vain

[22] at pages 174-5.

for a definition of the interests of justice; it is not to be found in an interpretation section.

Other examples could be given from the field of civil law. For example a contract may not be enforceable if it would be contrary to public policy. A covenant may be in unreasonable restraint of trade. A duty of confidentiality may be overridden where it is in the public interest to do so. How then is a judge to say when something is contrary to the interests of justice? Or contrary to public policy? Or whether a publication is in the public interest?

More generally the question may be asked: where are values to be found if not in the subjective views of the individual judge? It seems to me that the answer is to be found in using the conventional techniques of legal reasoning which are available to a judge in adjudication. The judge must strive to reach the correct answer by reference to relevant legal materials.

First, the judge will check any relevant authorities, in particular binding precedents or guidance from appellate courts.

Secondly, the judge can look to the structure and interstices of the common law itself, to detect that there are certain fundamental values which are well-established in our system of justice. To take the sentencing example I mentioned earlier, the principle of proportionality, that a sentence should be proportionate in all the circumstances of a particular offence and having regard to any personal mitigation, will provide guidance. However desirable it is to have consistency of treatment, at the end of the day the sentencing exercise is not a mechanistic one, and justice needs to be done on the facts of a particular case.

Thirdly, guidance as to the fundamental values of our legal system may be found in legislation, in particular statutes which have a constitutional character such as the Human Rights Act 1998. It is now acknowledged that the HRA, although not an entrenched bill of rights, is no ordinary statute, but a constitutional one. The rights set out in Sch. 1 to the HRA are not rights as traditionally understood in the common law but reflect basic values of a free and democratic society. They are rarely absolute: often they have to be balanced against other rights and with the general interest of the community. This calls for the exercise of judgement, especially when a judge is called upon to decide whether an interference with a right meets the test of proportionality.

However, the point I wish to emphasise in this lecture is that the rights set out in the HRA are a good guide, if not an exhaustive one, to what our society regards as fundamental values: after all the HRA was passed by Parliament. Other statutes which similarly proclaim fundamental values would include the Equality Act 2010, which has replaced earlier anti-discrimination legislation, such as the Race Relations Act 1976 and the Sex Discrimination Act 1975.

If legal positivism taught us that law can be regarded as a system of rules, the great contribution which the late Professor Ronald Dworkin made was to give us the insight that a legal system also includes principles, which are not as rigid as rules but have gravitational force.[23] They draw us in the right direction when trying to answer a legal problem: they do not necessarily dictate the result but they do suggest one that fits better with everything else we know about our legal system than the alternative answer would.

Without wishing in any way to expound a general theory of law (something which I would not in any event be qualified to do), I would

[23] R. Dworkin, Taking Rights Seriously (1977, Duckworth Press), esp. Ch. 4 on 'Hard Cases.'

suggest that such principles themselves can be regarded as being rooted in the values of that legal system.

I would not suggest that these values are necessarily inherent in any system of law in order for it to constitute law, since clearly they can change or develop over time and vary between societies, as the sociological study of law indicates. However, what can reasonably be suggested is that our legal system is based on certain values, which are well-established in its bedrock. Without attempting an exhaustive list I think that most observers of our legal system would acknowledge that its values include the concepts of fairness, equality, democracy and the rule of law.

Although the law does not any longer attempt (or even think that it should attempt) to enforce morals in the sense that Lord Devlin thought it should 50 years ago, that is not to say that the law is immoral or even amoral. It is based on values, which lie at its foundations, but one of those values is that we do not necessarily think it right to impose a subjective code of private or sexual morality on an individual. Our legal system now recognises, as the Wolfenden Report suggested in 1957, and as Professor Hart advocated in the early 1960s, that there are some things

which are none of the state's business, such as homosexual acts between consenting adults in private. As the Wolfenden Report famously put it:

> "Unless a deliberate attempt is to be made by society, acting through the agency of the law, to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business."[24]

But it is interesting with the perspective of time to look back on what the dominant view was until the 1960s. It was perhaps most eloquently expressed by Lord Devlin, one of the most respected judges that this country has produced, in The Enforcement of Morals. He said that:

> "an established morality is as necessary as good government to the welfare of society. Societies disintegrate from within more often than they are broken up by external pressures. There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions. The suppression of vice is as much the law's business as the suppression of subversive activities; it is no more possible to define a sphere of private morality than it is to define one of private subversive activity."[25]

Professor Hart's response was equally eloquent. He said, in Law, Liberty and Morality, that:

> "The unimpeded exercise by individuals of free choice may be held to be a value in itself with which it is *prima facie* wrong to

[24] Report of the Committee on Homosexual Offences and Prostitution (1957) Cmd 247, para. 62.
[25] P. Devlin, The Enforcement of Morals (1965, OUP) pp.13-14.

> interfere; or it may be thought valuable because it enables individuals to experiment – even with living – and to discover things valuable both to themselves and others."[26]

Note Professor Hart's repeated references in that passage to "values." As we now know the tide of history was on the side of Professor Hart. The law has turned 180 degrees. What was criminalised until 1967 has become the subject of a fundamental human right, in particular as a result of the Human Rights Act. The right to respect for private life in Article 8 includes a power of autonomy over many decisions which are intrinsic to a human being's personality, for example consensual sexual relationships.[27]

This does not mean that the law has become a value-free zone. Far from it. It means that the values of the law are now different from what they were 50 years ago. As Professor Hart anticipated it simply means that our society has changed; not that it has been subverted. It can still be said that law is a system of values.

[26] H. L. A. Hart, Law, Liberty and Morality (1963, Stanford University Press), pp.21-22.
[27] E.g. Dudgeon v United Kingdom (1982) 4 EHRR 149.