

# Faith and Thought

A Journal devoted to the study of the inter-relation  
of the Christian revelation and modern research

Vol. 93

Number 1

Summer 1963

---

LORD DENNING, MASTER OF THE ROLLS

## The Influence of Religion on Law \*

I HAVE come this evening to talk to you about the influence of religion on law. Its influence was obvious in primitive communities, but is not so obvious in modern societies, though I have no doubt it is just as real. In primitive communities religion, morals, and law were indistinguishably mingled together. In the Ten Commandments, for instance, you find the first commandment which is *religious*: 'God spake these words and said: I am the Lord thy God: Thou shalt have none other Gods but me.' You find the fifth commandment which is a *moral* precept: 'Honour thy father and thy mother: that thy days may be long in the land which the Lord thy God giveth thee.' You find the eighth commandment which is a *legal* duty: 'Thou shalt not steal.' This intermingling is typical of all early communities. The severance of the three ideas—of law from morality, and of religion from law—belongs very distinctly to the later stages of mental progress.

These precepts were laid down for the guidance of people who had not sufficient mental development to appreciate the reasons for them: and in the course of time those people came to treat the rule as the thing that mattered, and not the reason behind it. The Mosaic Law came to be interpreted in a very narrow and rigid way. This was for instance the case about the Sabbath day. The fourth commandment ordained 'Six days shalt thou labour, and do all that thou hast to do: but the seventh day is the Sabbath of the Lord thy God. In it thou shalt do no manner of work.' That one day of rest for mind and body was a very wise provision: but the Jews carried its literal observance much too far. The striking instance is given by St Mark ii. 23-28 when our Lord went through the corn fields on the Sabbath day: and his disciples began, as they went, to pluck the ears of corn. And the pharisees said unto Him: 'Behold, why do they on the Sabbath day that which is not lawful?' . . . He said unto them: 'The Sabbath was made for man, and not man for the Sabbath. . . . Therefore the Son of Man is Lord also of the Sabbath!' Time after time Our Lord pointed out to the Jews their error. In St Mark vii. 8, he tells them 'laying aside the commandments of God, ye hold the traditions of men, as the washing of pots and cups; and

\* Message given at the Quarterly Meeting of the Lawyers' Christian Fellowship held at the Law Society on the 22 May 1950.

many other such like things ye do'. That sort of thing often happens in early communities. A parallel can be seen in India. A wise provision for ensuring general cleanliness is turned in time into a long routine of ceremonial ablution.

This part of the teaching of our Lord—his teaching about the interpretation of the Mosiac Law—was very necessary in his day, but it does not touch the fundamentals of the Christian religion. Before I pass from it, however, I would like to give you two illustrations of its practical application in modern society. We tend—as indeed all communities tend—to become too narrow in our interpretation of previous laws. Once a rule of law has been laid down, it often continues to be a rule, long after the reason for it has disappeared—indeed when the reason for it has been forgotten. A good illustration from our own law was the presumption that if a wife committed a felony in the presence of her husband, she was presumed to have done it under his coercion and she was entitled to be acquitted. The reason for that rule was because the husband was entitled to benefit of clergy and she was not. If husband and wife were charged with stealing, the husband, if he could read, was entitled to benefit of clergy and could not be sentenced to death. In order to show that he could read, all that he had to do was to repeat the first verse of the 51st Psalm, 'Have mercy upon me, O God, according to thy loving kindness: according unto the multitude of thy tender mercies, blot out my transgressions'. He often managed to repeat this, at any rate with the aid of a compassionate prompter: and so escaped the death penalty. But his wife, who was charged with him, could not claim benefit of clergy, however well she could read, and however well she knew the psalms. Women could not in those days be clergy, any more than they can in ours. So she was liable to be sentenced to death whereas he could not be. In order to overcome this injustice, the judges invented the presumption that she was coerced by her husband, and thus she was let off altogether. The benefit of clergy was extended to women in 1692, so that there was no longer any reason for the presumption, but the presumption remained in our law until 1925, although the reason for it had disappeared 230 years before. Nowadays if a woman commits a felony in the presence of her husband, she is just as guilty as he, unless she proves that she was in fact coerced by him. The lesson to be learned from this is that we ought always to be ready to inquire into the reason for our rules, and not to keep them in existence after the reason for them has disappeared—unless of course there is some new reason to justify them.

The warning of Our Lord about keeping to the letter is also of great value today. St Paul in his Second Epistle to the Corinthians, iii. 6, puts it as you know succinctly, 'the letter killeth, but the spirit giveth life'. This precept needs especially to be remembered in the interpretation of statutes. In the days when the Bible was first put into English the Judges laid down rules which were undoubtedly influenced by the Bible teaching. The statutes were to be interpreted not only according to the language used but also with regard to the mischief which Parliament sought to remedy, so as to give 'force and life' to the intention of the legislature. Those words were taken clearly from the epistle 'the spirit giveth life'. But in the nineteenth century that broad view was supplanted by a rule which Baron Parke described as a golden rule. He said that statutes, and indeed all documents, were to be interpreted according to the grammatical and ordinary sense of the words. Even if the grammatical meaning gave rise to unjust results which Parliament could never have intended, the Courts said that the grammatical meaning must prevail. The Judges used to fold their hands and blame the legislature. There has been a welcome change in our own time. Judges are not so prone as they were to insist on the literal interpretation of the statutes. They look for the just solution.

This shows how the failings of the Jews in regard to the Mosaic law are failings which are apt to react in modern communities. But now let me come to the more fundamental teaching of Our Lord. He himself points the way to a new approach. In answer to a certain lawyer who asked him, 'Master, what shall I do to inherit eternal life?'<sup>1</sup> He said unto him, 'What is written in the law? How readest thou?' And he answering said, 'Thou shalt love the Lord thy God with all thy heart, and with all thy soul, and with all thy strength, and with all thy mind, and thy neighbour as thyself'. And He said unto him, 'Thou hast answered right: this do and thou shalt live'. This is the teaching of the Gospel of Christ. It is the Gospel of Love—love towards God, and love towards your neighbour. This is a precept of religion, not of morals, nor of law. But it is not unrelated to them. In social organisation, love finds its primary expression through justice. As William Temple said,<sup>2</sup> 'It is axiomatic that love should be the predominant Christian impulse, and that the primary form of love in social organization is justice'. The two—love and justice—are interdependent. As Dr Bell has said,

<sup>1</sup> Luke x. 25-28.

<sup>2</sup> *Christianity and the Social Order*, p. 55.

Justice and Order are in effect the necessary groundwork on which love is to build'.

Here we see the point at which religion and law meet. The aim of the law is to see that the truth is observed and justice is done between man and man, and, I may add, between man and the State. But what is truth? and what is justice? On these two cardinal questions religion and law meet. The spirit of truth and justice is not something you can see. It is not temporal but eternal. How does man know what is truth or justice? It is not the product of his intellect, but of his spirit. Take the sort of question which a lawyer is asked every day. A man who is about to give evidence says: 'If I am asked such and such a question, what shall I say?' The lawyer's answer is: 'You must tell the truth, whether it hurts your case or not.' I have been asked that question by a man charged with murder. My answer was the same, 'You must tell the truth whatever the consequences'. Again a man in a civil case may have kept a diary or notes which hurt his case. He frequently says: 'Why should I show these to the other side? They are my own private documents.' The lawyer's answer is: 'Although these documents may hurt your case you must not keep them back: everything must be put before the Court to enable it to do justice.' Those answers of the lawyer are plainly right. The principle underlying them will not be disputed by any person who has the right spirit within him. But a practising lawyer only too frequently comes across persons who do not regard those principles, persons who do not reveal the truth to their lawyer but go into the witness-box and say anything which they think will help them to win their case, whether it is true or not; persons who keep back documents which they think hurt them, and so forth. Such persons tell any lie or use any circumvention in order to gain their own ends. That is sheer wickedness. They have not the right spirit within them.

How then is the right spirit created in man? That is the province of religion. The law is concerned with directing what acts should or should not be done. Religion, or rather the Christian religion, is concerned with the creation of a spirit out of which right acts will naturally flow. Law and religion are, therefore, closely connected, but religion fulfils the highest function. Religion concerns the spirit in man whereby he is able to recognise what is truth and what is justice: whereas law is only the application, however imperfectly, of truth and justice in our everyday affairs.

From this it follows that lawyers should be men of religion: and speaking generally that has always been the case in this country. It is the

reason why the common law of England is so great. The law has been moulded for centuries by Judges who have been brought up in the Christian faith. The precepts of religion, consciously or unconsciously, have been their guide in their administration of justice. Let me illustrate this from different branches of the law: and firstly Constitutional Law. The primary principle of Christian ethics is respect for every person as a person. If each man and woman is a child of God, whom God loves and for whom Christ died, there is a worth in each absolutely independent of the State. The State exists for the citizen, not the citizen for the State. The Christian Church has always insisted that the State has no ultimate and omnipotent authority of its own but derives its authority from God. St Paul in his Epistle to the Romans xiii. 1 made this clear. 'There is no power but of God: the powers that be are ordained by God.' This is the great principle, which has had great influence in our constitutional law. It has been the shield under which our forefathers resisted oppression. To quote St Paul again—the Ruler of the State was the 'Minister of God for Good', and so long as he fulfilled his high trust it was not right to resist him: but if he forsook it and sought absolute power, then resistance was justified. A celebrated instance occurred when James I claimed the right to rule in England as an absolute sovereign. He claimed that he could judge whatever cause he pleased in his own person, free from all risks of prohibition or appeal. He was fortified by the authority of Archbishop Bancroft who said: 'This is clear in divinity: such authority doubtless belongs to the King by the word of God in the Scriptures.' The King summoned all the Judges and said to them: 'I have often heard the boast that your English law was founded upon reason. If that be so, why have not I and others reason as well as you the judges?' Lord Chief Justice Coke replied: 'True it is, please your Majesty, that God has endowed your Majesty with excellent science as well as great gifts of nature: but your Majesty will allow me to say, with all reverence, that you are not learned in the laws of this realm of England. . . . which law is an art which requires long study and experience before that a man can attain to the cognizance of it. The law is the golden metwand and measure to try the causes of your Majesty's subjects, and it is by the law that your Majesty is protected in safety and peace.' King James, in a great rage, said: 'Then I am to be under the law—which is treason to affirm.' The Chief Justice replied: 'Thus wrote Bracton, "The King is not under any man, *save under God and the law*".' James nevertheless was said to have tried his hand at trying a case as a judge: but he was so much perplexed when he had

heard both sides that he gave it up in despair. 'I could get on very well hearing one side only', he said, 'but when both sides had been heard, upon my word I know not which is right.'

These words of Bracton, quoted by Coke, 'The King is under God and the law', epitomise in one sentence the great contribution made by the common lawyers to the constitution of England. They insisted that the King was under God and the law. Right, not might, was supreme. In insisting upon this, they were really insisting on the Christian principles. In the distracted world of today we need them more than ever. Under the totalitarian system the State itself is supreme. The rulers are not under God and the law. They are a law unto themselves. All law, all courts are simply part of the State machine. The freedom of the individual, as we know it, no longer exists. It is against this terrible despotism, this overwhelming domination of human life, that Christianity protests with all the energy at its command.

Let me now revert to the individual. The Christian religion emphasises the responsibility of each individual before God. It taught the difference between sin and righteousness. It gave hope to the sinner who repented. 'There is joy in the presence of God over one sinner that repenteth.'<sup>1</sup> This emphasis on the individual responsibility had great influence on the development of our criminal law. In early days, the tribe was answerable for the individual. If a man killed a member of another tribe, it used to result in a blood feud, when vengeance was taken, not against the individual, but against the tribe as a whole. The first step to remedy this state of affairs was when money compensation was taken in lieu of blood retribution. A striking passage in King Alfred's Dooms attributes this reform to the authority of the Church: 'After the English had received the faith of Christ, they ordained that, out of the mercy which Christ had taught, secular lords might, without sin, take for every misdeed the money compensation which they ordained.' This money payment took the place of private vengeance. But the liability of any person who injured or killed another was an absolute liability. Even if the act was accidental or in self-defence, it had to be paid for. And the thing itself which caused the death or injury was itself guilty and had to be given up as deodand. There was no inquiry as to moral responsibility at all. That came at a later stage and was due to the teaching of the Church which looked primarily at the state of mind of the individual offender. The requirement of a guilty mind—the *mens rea*—was first stated by St Augustine who said that you are not guilty

<sup>1</sup> Luke xv. 10.

of perjury unless you have a guilty mind. This found its place in the laws of Henry I when it was laid down as law that *Actus non facit reum nisi mens sit rea*, that is, there is no guilt unless there is a guilty mind. That has been the rule of English law from that time to this. In order that an act should be punishable, it must be morally blameworthy. It must be a sin. We must be careful today that this principle is not whittled away. In many of the regulations to which we have had to submit in recent years, much is punishable even though there is no guilty mind at all. In the form of punishment too, the teaching of the Church has had much effect. It never regarded any individual as beyond repentance, and held that he might be redeemed and saved from his sins. It set its face against any form of punishment which was merely an expression of vengeance, and it introduced imprisonment which gave the offender opportunity to consider his situation and reform. So also in regard to the insane, if a man was insane when he committed a crime, he could not be punished, because he could not be said to have had a guilty mind. If he became insane after he committed a crime, he could not be executed, because that deprived him of the opportunity of making peace with his God before his death.

Parallel to its influence on criminal law, so also was the influence of religion on the law of torts or wrongs. At one time the mere fact of doing damage was held to import liability, even though there was no fault on the part of the one who did it. This still survives in some forms of the action for trespass, as for instance cattle trespass. The teaching of the Church has been in favour of some degree of moral blame before imputing liability. A striking example occurred in 1932. In a judgment of great importance in the law, Lord Atkin took the Christian precept as the underlying basis of his decision in these words: "The rule that you are to love your neighbour becomes in law you must not injure your neighbour: and the lawyer's question, "Who is my neighbour?" receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

Turning now from the law of torts to the law of contract, the influence of the Church was immense: because the Church Courts assumed jurisdiction in matters of conscience. Originally in English



law a promise was not enforceable unless it was hedged about with the formality of a seal. But the teaching of the Church was in favour of rejecting formalities and insisting on good faith.

The just man is 'he that sweareth not his neighbour and disappointeth him not, though it were to his own hindrance'.<sup>1</sup> If a man made a promise and did not keep it, the ecclesiastical courts would punish him for his breach of faith. A Christian could pledge his hope of salvation in order to secure a debt and he was subject to ecclesiastical censures if he did not pay. In the fifteenth century the procedure of the Church Courts was even adopted by craftsmen to enforce trade union regulations. 'The smiths made a confederacy supported by an oath, with the object they said, of putting down night work, but really of preventing any but members of their own organisation from working at the trade (a closed shop) and summoned the blacklegs before the ecclesiastical court. They forbade anyone to work between sunset and sunrise and brought an offending journeyman before the Archdeacon with the result that, after being three times warned, he was expelled from the Church and excommunicated until he had sworn to keep the ordinance.' This power of the ecclesiastical courts made them formidable rivals of the courts of common law. In order to meet it, the Chancellor gradually assumed jurisdiction in cases of breaches of contract. In 1468 complaint was made before the Chancellor for breach of a parole promise. The defendant argued that the plaintiff had no remedy save in the Church Courts. He said that if the plaintiff had taken the trouble to obtain the defendant's promise under seal, he could have sued in the courts of common law, and it was 'his folly not to have a deed'. But the Chancellor dismissed the suggestion with the observation *Deus est procurator fatuorum*—God is the protector of the foolish. Faced with this rival jurisdiction of the Church, the Chancellor and the common law courts gradually developed a theory of contract themselves. But they required the formality of consideration. Even this formality is now under attack. As recently as 1937 the Law Revision Committee reported in favour of abolishing the doctrine of consideration which is the last remaining formality in the law of contract.

I have yet to mention another field of law in which religion has had a great influence. It is in respect of marriage. For centuries the law as to marriage in this country was administered by the Church in its own ecclesiastical courts. Those courts affirmed Our Lord's principle. The standard of marriage was a life-long and indissoluble union for better

<sup>1</sup> Psalm xv. 5.

or for worse, of one man with one woman to the exclusion of all others on either side so long as both should live. Divorce was not allowed so as to give the right to remarry. This principle was in marked contrast to other legal systems such as the Jewish laws or the Roman law which always permitted divorce to a greater or lesser extent. This principle of indissolubility of marriage has had a profound influence on the social life of this country. The well-being of all requires that children should, so far as possible, be brought up by their own parents as members of one family, with all the give and take that family life demands and also with the security that it affords. The institution of marriage is the legal foundation of this family life. The principle of indissolubility was the guiding force which cemented it. It involved hardship in many cases. It bound innocent men and women to faithless partners. It gave the stigma of illegitimacy to innocent children. But the Church considered that these were hardships which had to be borne for the sake of principle. During the last ninety years the state has abandoned the principle. Divorce has been allowed for grave causes prescribed by law, but the consequences that were foreseen by the Church, and of which its leaders gave warning, have followed. Undeserving cases have slipped through. Collusion has not been detected. The result is that people have come to regard divorce as a matter which can be arranged between the parties. Every thinking person is profoundly disturbed by the prevalence of divorce and its grave effect on the family unity and the national character.

I have no time to tell you more. I have endeavoured to indicate to you some of the principal points on which religion has influenced the law. The subject is a big one. It would require much research to cover it properly. But even from this tentative discourse it has surely emerged that if the law is to fulfil its purpose—which is to see that justice is done between man and man, and between man and the State—it must be administered by men who have the right spirit within them, the spirit of truth and justice which cannot be taught, but can only be known, and which is the product of true religion.

We lawyers must always try to walk worthy of the vocation where-with we are called. We must strive to show in our lives and in our example a true sense of Christian values. This fellowship—this Christian fellowship—is witness to this great endeavour. It is the leaven which enlightens the whole.