

The Law, Politics and Morality

*The Right. Hon. Lord Hailsham of Marylebone**

The object of this article is to explore some of the difficulties involved in the complex relationship between morality, politics, the law, and, where and if it is relevant, religion. The answer proposed is that the question depends on a correct analysis of the nature of each of these interrelated but conceptually different intellectual and philosophical disciplines.

There are all too many people who talk as if it is only necessary to establish that conduct of a particular kind is either morally a duty or morally wrong in order to be able to assert that either action by the Government or the law to encourage, discourage, prohibit, or enforce such conduct more than usually with a criminal sanction behind it, is not only permissible but necessary. I believe this belief to be both misguided and demonstrably false.

On the other side of the fence there are just as many reputable characters who suggest that morality, law and political action by governments have very little or perhaps even nothing in common with the result that no one of these disciplines of thought and action ought to have any influence on decision making in any of the other spheres. Whilst I have more sympathy with the second view than the first, I believe it to be equally demonstrably false and quite as dangerous if it be allowed to become a guide to conduct or policy.

In both cases the error lies, partly at least, in a false analysis of the subject. But the subject is also confused by a tendency on the part of those on either side of the controversy who seek to argue from first principles to neglect the fact that to found a valid conclusion all syllogisms require a minor premise as well as a major, and that the conclusion must logically flow, according to the modes of the syllogism, as a correct synthesis inferred from both. Admittedly I do not believe in the Aristotelian basis or technical phraseology of this proposition, but as a mental corrective to muddled thinking I find it invaluable. It is also a good discipline for the clergy and hierarchy at least of my own denomination, and perhaps of others, to reflect that, whilst their first principles in morality (where they have any) may be impeccable, as judges and analysts of disputed questions of fact (which has to inform their minor premises) their credentials and qualifications are at least open to question.

*KG, Chancellor of the University of Buckingham.

It is, I believe, rather easier to demolish the case of those who seek to exclude moral issues from politics and law than for those who seek to affirm a one for one correspondence. As the late Professor H. A. Prichard divined at least as long ago as 1905 the history of Western moral and political philosophy has very largely proceeded on the demonstrably false basis of seeking to define the requirements of law and political authority in terms other than those of the categories of value judgments to which they are properly applicable. Thus the sophist Thrasymachus at the beginning of Plato's Republic, Austin the Liberal writer on jurisprudence in the nineteenth century, and the late Adolf Hitler in the twentieth, all founded law on a positivist basis by saying respectively that Law is the interest of the stronger, the command of the ruler, or "*das is Recht was der Führer gefällt.*" I do not find legal positivism either in that form or in the more sophisticated language of Professor Hart who, I believe, propounds the view that law is what the Courts will decide, at all attractive. The first three at least confuse all law with its relatively minor component, criminal law, and, in defiance of Montesquieu, confuse the executive and legislative branches of Government. All four make the error of seeking a purely formal definition of the subject without reference to its purpose or content.

More attractive, but equally fallacious, both in its original and in its more modern forms, is the specious doctrine of utilitarianism, which seeks to find the justification for law and policy in terms of the greatest happiness of the greatest number or the common good or the interest of the majority. This at least makes some effort to establish some criterion of what law ought to be as distinct from what it is, and to set up a bench mark to distinguish good laws and good policies from bad. The *Alternative Service Book* of the Church of England rather fatuously embraces this philosophical heresy by enjoining us all to pray that we may seek the common good rather than any particular interest.

But, apart from the fact that the philosophical concept of a good which is at the same time good and common to an entire community and all embracing can be an *ignis fatuus*, the whole utilitarian concept breaks down when one reflects that both individuals and minorities have rights as well as duties, and that one at least of the functions of law is to protect these against the rest of the world, the weak against the strong, the less numerous minorities against the more numerous majorities, the poor against the rich, the vulnerable rich against depredation by the poor and even occasionally the individual against the rest of the world. Numbers do not necessarily enter into it, and, so far as the common good is concerned, one of the functions of law in a civilised society is to protect the interests of the individual against the state. Attempts to explain law or policy in terms of anything else except justice (which is indefinable) or virtue (which is equally indefinable) have thus failed, and, I believe, in principle are bound to fail.

Is there anything to be said on the other side? Is law or its policy simply concerned with morality and nothing else? Is there, as some would seem to suppose, a one for one correspondence between the one and the other?

Clearly this is not so. Some law, and criminal law in particular, has some secondary concern with states of mind (*mens rea* as it is called in the jargon as distinct from external acts, the *actus reus* as lawyers have illiterately labelled it). But in the main this is the exception rather than the rule. Law is primarily concerned with conduct rather than states of mind, and in particular with conduct considered to have socially desirable or undesirable consequences. In particular law is primarily concerned with past conduct, with situations which have arisen and come up for decision even when one is constrained to admit that one of the objects of legal policy must be to encourage socially desirable conduct and discourage its opposite. Despite the late Lord Atkin's reference to the lawyer's question in the Good Samaritan parable, there is no law which says that thou shalt love thy neighbour as thyself. In *Donoghue v. Stevenson*¹ the more modest proposition achieved by Atkin's judgment was that if a manufacturer was so negligent as to put a snail in a bottle of ginger beer he might be just as liable in damages to the ultimate purchaser as the retailer of the same bottle caught by the provisions of the Sale of Goods Act in so far as these involve a warranty of quality.

Nevertheless, though one may reject the general positivist thesis that law is what the Courts will decide, one may readily embrace the theory, which is not positivist, that law is concerned exclusively with that body of doctrine which the Courts must apply and with the matters which are brought before the Courts to which they are bound to apply it and the methodology or procedure they adopt to set about their business. The qualification is that the body of doctrine itself is to be seen as a coherent whole and cannot be defined except in terms of a set of moral values which can neither be argued away nor defined out of existence, but nevertheless are not to be supposed to correspond on a one for one basis with the precepts laid down for the individual conscience by, say, the Ten Commandments or either of the Two Great Commandments said to constitute the Golden Rule. This is because Courts are concerned with the practical questions of enforceability, the existing body of doctrine established, in the case of common law by precedent, in the case of statute law by the words on the Statute book; whereas morality is concerned with the exercise of what we choose to believe is our free will.

So far, I have endeavoured to show that morality and law, though interconnected, have no one for one correspondence with one another. But there are now two other interconnected components to this quadrilateral, the policy of Governments and the legislation of Parliaments. Despite Montesquieu and the valiant, though partly unsuccessful, attempts on the part of the Founding Fathers of the American Constitution to separate the two entirely, in countries, like our own, equipped with a fully developed Cabinet system, these two arms of government are inextricably intertwined, even though in theory they remain conceptually distinct.

1. [1932] A.C. 562.

It would, I think, be morally repugnant even to suggest that the policy of Government or the enactments of the legislature can or should be wholly disconnected from moral imperatives or prohibitions. But I would at least claim that it is equally absurd to argue that there could be a one for one correspondence between the actions of Government (internationally or internally) or legislatures and the private morality of individuals. In part, of course, what I have already said about the relationship between law as administered in the Courts and private morality applies equally in this sphere. There is a fundamental philosophical distinction between what is imposed voluntarily as the result of the dictates of conscience and the exercise of free will from within and what is imposed externally by the implied threat of physical coercion or sanctions by the will of third parties, in this case political authority. It is this which explains much of the debate which has occurred over a wide range of subjects between Ministers, prelates and priests on the one hand and practising politicians on the other. It is also at the root of much debate within Parliament between the rival political factions there represented. It is quite one thing for a preacher to ask his congregation to put their hands in their own pockets and contribute more generously to Christian Aid, the Church of England Children's Society, the friends of the local hospital or the repair of the heating apparatus in the Church. But, although some or all of these may be entitled to some support from public funds, quite different moral and practical considerations arise when a debate takes place as to whether and to what extent each or any is to be supported by contributions from taxes, public borrowing, or local rates under threat that if the component of such taxes is not paid, the tax or ratepayer will be sold up or put in gaol. Still less is it appropriate to employ the language of "generosity" or "meanness" to officials or Ministers whose duty it is to spend not their own but other people's money.

There is another factor, also of a practical nature which politicians have to take into account, and that is the relationship between the global total of public monies they expend, and the national capacity to generate new wealth upon which ultimately all public expenditure has to draw. Clearly this is not simply a question of quantity. A new road may actually assist the generation of new wealth. The same is not true, at least over the same time scale, of money spent on transporting grain by air to Ethiopia, or a good many other, even when wholly laudable, ways of spending public money.

The difference is even more stark when one enters the field of international relations. Subject to treaty and convention (in which I include the Charter of the United Nations) international law is still based on the sovereign independence of international legal persons, that is states, primarily as regards their internal affairs, and, to a limited extent, even as regards their international obligations, and there are no more determined upholders of this principle than the members of the Eastern bloc and the Chinese Peoples' Republic. The demand for independence of former colonial territories against their former imperial sovereigns was based on precisely the same theories.

Now it so happens that the great majority of the human race live under regimes morally, socially or politically repugnant to the morality of others. A system of "sanctions", economic or overtly military, designed to prevent the outbreak of aggressive war with an apparatus for invoking them was instituted by the Charter of the United Nations, and with good reason after the outbreak of two world wars and the failure to prevent the second after the failure of the milk and water regime of the old League. But a habit has grown up of States or groups of states (often themselves not beyond reproach) imposing unilaterally or demanding the imposition by others of "sanctions" of doubtful efficacy against regimes the internal or external policies of which they disapprove. I myself doubt the efficacy of most such measures, but I question still more strongly the principle of selectivity either of the proposed victims or the proposed authors of such sanctions, and the morality or legality of the basis for their imposing them. I may be right about this, or wrong. I do not pretend that the argument is an easy one or that there are not considerations to be weighed on both sides. But this is irrelevant for my present purpose. My present purpose is simply to claim it as obvious that the kind of considerations, ethical, or practical, to be weighed on either side are not identical either with the dictates of private morality on the individual conscience, or with the considerations which should weigh with governments or Parliaments in the determination of their internal policies or their domestic legislation, and that both differ in principle from the sort of policy considerations which should weigh with states or groups of states which constitute the international community.

Hitherto I have spoken of a quadrilateral, consisting of private morality, the law as administered by a system of courts, the public policies of Governments, and legislatures, in relation both to their own peoples, and to other members of the international community of which they are part. The moral I have sought to draw is that, though ethical considerations and morality are not to be divorced from any of these, their application to the different fields to which I have referred is in each case quite different, and any attempt to apply a one for one correspondence between any two of them is doomed from the start to failure.

I now come to the fifth, and all pervasive element, namely religion or the absence of it. This is a much more difficult discussion and for two reasons. The first is that, if one believes, as I personally do, in "natural law", a most difficult and controversial idea, both its constraints and imperatives are as apparent to an intelligent and sensitive agnostic or a theist as they may be to a devout and practising Christian. The second is that religion is not primarily about morality at all, but about the private and public worship of God, or gods, whether Jehovah, Apollo, Kali, Shiva, Priapus, Cloacina, Hathor or whatever. Nonetheless no religion has been able wholly to distance itself from some aspects of morality. Old Father Zeus, who was really a horrible old reprobate who killed or castrated his father, turned himself into a bull or a swan to satisfy his sexual inclinations, and played a wholly irresponsible part in the siege of Troy, none the less protected suppliants, and punished breakers of oaths, and those who abused the laws of

hospitality. As pagan religion developed, more and more reflective pagans came to think in terms of religious sanctions behind moral laws, and this has happened all over the world in apparently disconnected religious cultures. But, of course, as a Christian, I am primarily concerned with the monotheistic religion attributed to Abraham, and still embodied in the three world religions of Judaism, Islam, and Christianity, the peoples of the Book as the Moslems call them. To them at least religion is all pervasive, and all absorbing, and all three lay down different, but closely related, moral codes designed as a pattern for human life, and for every human society to a greater or less extent a pattern of social behaviour, and even jurisprudence. It is of these that I mostly refer when I talk about the relationship between religion and my quadrilateral of private morality, law as administered in the courts, the policy of governments, and Parliamentary legislation. It is indeed against the professional casuists and clergy of established Churches, synagogues, mosques, and the like that I direct my criticisms. The most serious of these is their fundamental and all too common error of identifying themselves and other members of their cloth with the religious community itself in which they, with an important but, nonetheless, very highly specialised, function of their own, are numerically an extremely insignificant minority. There is no gainsaying the fact that most Christians, Moslems, and Jews are what one would describe as laymen and not pastors, priests, rabbis, Ayatollahs or whatever, and though no one in a free society would deny the legal right of these specialists of limited function to express their own opinions (however foolish or perverse) on whatever subject they choose, the idea that they have some special access to infallibility in areas of which they have no special access to truth, such as those in which their laymen have and they have not specialised experience, is too ridiculous to merit serious consideration. To begin with, it ignores the simple proposition with which I began, that in order to found a credible opinion on any contentious matter, it is necessary to make a correct analysis of the practical and factual basis in order to form a reliable minor premise. In the second place, I wish that, in practice, they would understand that their primary function is to carry out their specialised duties, and contentious activities and opinions, especially when intemperately expressed may actually interfere with these. It is generally accepted that Royal persons, judges, civil servants, and officers in the armed forces must put some professional restraint on their right of self expression and curb their tongues and actions in order to perform their several functions in society. Might one not also plead for a certain degree of self discipline in the same direction on the part of religious dignitaries if they are to maintain the loyalty and coherence of their various flocks? There is, I believe, a sound philosophical and historical reason for expressing this hope. The religions of the Book have aptly been described as the salt in the dish, and the leaven in the lump of dough. It may, and should, be all pervasive, but, being all pervasive, it performs a similar function in the separate parts of the same whole. In a primitive state of society it may be difficult to discern whether a Moses was Commander in Chief of the Armed Forces, Prime Minister, Archbishop of

Canterbury (or even Pope or Ayatollah), Lord Chief Justice, Chancellor of the Exchequer or even, for a period, leader of the Opposition. Indeed there were phases in the career of Moses when he appeared to occupy each one of these several posts. In a more sophisticated political, social, economic, and religious community it may be that these several functions are better performed by different sets of people. However this may be, I hope to have established that, though ethical and moral considerations can never be disconnected from policy, domestic or international, law or legislation the relationship between each and all the others differs both as to the principles involved and as to the facts, and that the functions of those concerned with each to some extent disentitle them from claiming to speak with authority on the specialised functions of the other.