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The Moral Limits of Law: A Reflection for the Opening of the Legal Year

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In a nation where few go to church, and in a world troubled by religious claims to guide the state, a Christian church service to open the legal year might seem quaint to the kind; anachronistic to the progressive; and provocative to others. So today, I want to argue for its importance – even for those who have no belief in God.

The significance of the church service lies in the ritual connection that it provides to the pre-modern traditions of thought, where the deepest roots of the common law lie. It invites us to attend to those roots. As with any good gardening, if we attend well to the roots, we nurture the vitality of the plant. The same is true of the common law itself because the precedent set by the past is not a mute object, only to be animated by historians; but is a living voice in the courtrooms of the present.

The thought that this pre-modern past might be the teacher of the present has, for a long-time, been greeted with condescension – that one is regressing to the world's intellectual childhood – to a period full of myths, superstitions and simplicities that we modern adults should have grown out of.

But I think this view is changing. An indication of this change is the rise to prominence of figures such as Michael Sandel, Martha Nussbaum and Amartya Sen - people from intellectually respectable neighbourhoods, who have not just pointed out the fatal flaws of modern conceptions of justice – be they utilitarian, Rawlsian, subjectivist or positivist; but also pointed us back to the conceptual richness of our deeper past.

So, in the spirit of that change, I want to raise just one notion from the common law's foundation – the idea that there are inherent moral limits to law.

The reading from the Gospel of Mark contains the famous passage ‘Render to Caesar the things that are Caesar’s, and to God the things that are God’s’. It is one of the founding passages for the pre-modern doctrine of ‘two kingdoms’ – a doctrine of political thought, which has taken many forms across time and denominational divides, but which, at its essence, maintains that there is a proper scope for secular authority, but also a limit to it.

Three hundred years later, in marking what those limits might be, St Augustine would say ‘a law that was unjust wouldn’t seem to be law’ (*De Libero Arbitrio*, Book I v, 11).

And Thomas Aquinas, a thousand years later, with characteristically greater precision and subtlety, held that unjust law was ‘not a law *simpliciter*, but rather a sort of perversion of law’ (*Summa Theologiae*, Books I-II q95, a2c). That Thomist perspective deeply informed the world of thought out of which the common law grew. And so it is no surprise to find Sir William Blackstone, in his famous commentary of the late 18th century, write ‘no human laws are of any validity, if contrary to this [referring to the natural law]. . . Nay, if any human law should allow or enjoin us to commit [murder, demonstrably forbidden by the natural law] we are bound to transgress that human law’ (*Commentaries on the Laws of England*, Introduction, Section 2; Finnis, *Natural Law and Natural Rights*, Ch 12).

In our time, this notion has surfaced again. Perhaps its most notable contemporary formulation was in Justice (later Lord) Cooke’s much-noted observation in *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 that, ‘I do not think that literal compulsion, by torture, for instance, would be within the lawful powers of Parliament. Some common law rights presumably lie so deep that even Parliament could not over-ride them’.

Views like Cooke’s have been given short shrift in modern times. John Austin, one of the founders of legal positivism, speaks for the majority when he writes ‘to say that human laws which conflict with the divine law are not binding, that is to say, they are not laws, is to talk stark nonsense’.

If the notion that there *are* moral limits to sovereignty is not ‘stark nonsense’ but is to be taken as a potentially vital notion in a world that still knows tyranny – of which we have so recently been reminded – indeed, even democratic governments have yielded to the temptation to transgress taboos such as torture with the justification of ‘the greater good’ – we might helpfully begin by returning to Aquinas and his idea that an unjust law is ‘not a law *simpliciter*’ – not straightforwardly.

What is important about Aquinas’s observation is that it recognises the multivalent nature of law. Certainly, law possesses those features the great positivists have taken pains to map; and so an unjust law is, in some important

respects, still a law. However, what the great pre-modern moral tradition suggests is that the obligation of law - which is a feature of what makes a law a law – is not ultimately grounded in the threat of force – present and practically compelling though that may be – but in an ethical obligation. Or, put another way, the obligation to obey the law is part of our ethical obligation to pursue the common good.

The finest statement of this case is made by the great contemporary Oxford jurisprudential philosopher John Finnis (Finnis, *Natural Law and Natural Rights*).

In Finnis' scheme, the obligation to obey a law is ultimately founded on the idea that a great many worthwhile things in life – from the provision of health care to higher education – things which, when taken together, we call the common good – can only be pursued when we cooperate with one another. Large groups can't achieve consensus about what to pursue or how to pursue it. Reason compels us to accept some form of authority to make those judgements. What makes it authority is that we accept those judgements – even about the things on which we disagree – as the reasonable price of pursuing any substantive form of the common good.

However, and here is the catch – if that authority requires acts such as torture that do not advance the common good – if it requires acts that thwart the worthwhile things in life - then reason no longer *prima facie* compels obedience to that authority.

I say *prima facie* because there may be situations where conformity to the law may still be required to prevent weakening of the whole edifice of law itself – thereby imperilling the entire common good.

Nevertheless, without a reasonable basis for obligation, the law is missing an essential feature – and is, therefore, not straightforwardly law.

What does this mean in practice?

First, we should recognise – in time, perhaps in the Preamble of our Constitution – that our institutions of government – including the Parliament and its laws, and the courts – are not only positivist creations of the political will of the people; but are institutions, whose most basic ethical foundations are not changeable by acts of political or public will.

We should recognise that the ultimate guarantor of government for the common good is not the rule of law *simpliciter*; but the rule of law, only when we understand it in its fullest pre-modern sense.

Second, any charter should recognise that there are some rights which are not created by the Parliament but are recognised by the Parliament as identifying the inherent limits of its sovereignty – a recognition of the moral boundaries of the very concept of government itself. They might include the right not to be

tortured, be put to death, or deliberately treated in inhumane or degrading ways.

Third, that the courts, even in the absence of a charter, should be prepared to interpret the law so as to say that, while an unjust law may have the form of a law, it has no force or obligation upon those subject to it nor upon those directed to enforce it.

In closing, I hope that these reflections have not just been the sketch of an argument for the moral limits of law, but have suggested that an engagement between religion and public life might be important. Important, not simply for what it might offer to significant contemporary discussions; but because we live in a time when we face a vital choice about how we deal with religion. The temptation, in a world with extremisms of many faiths, is to harden a division between the state and religion; it is to seek to privatise religion and seal it off from public life - to argue, however implicitly, that religion belongs to an earlier, darker age before a time of scientific and philosophical enlightenment.

I hope today I have hinted at the possibility of a rigour that would put paid to such objections – because I believe that the path of hermetic separation will only lead to greater extremism, social division and insecurity.

The alternative is to recognise the proper place of religion in public life – to make it mainstream, not marginal. Because it is at the darkness of the uncontested margins that extremism grows, I think there can be no better symbol for the place of religion in public life than having a church service to mark the beginning of the legal year.