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Good News for Law?

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This article seeks to direct our attention away from more familiar instances of current Christian engagement with law to consider broader underlying trends. Modern law is characterised by the breakdown of older distinctions between democracy and rights, government and civil society, the sovereign nation-state and other levels of legal authority, and law and ethics. There is a characteristic Christian theology of law which should lead us to be concerned about the postmodernism, legalism, statism and imperialism implicit in these developments. Christian engagement with law has never been more necessary, for the gospel of Jesus Christ is indeed good news for law as well.

Introduction

The publication of *Good News for the Public Square* is a good opportunity to reflect on the ways in which Christianity is good news for law.[1] For law – that is, the secular or civil law – is becoming increasingly important in the public life of developed liberal democracies such as the United Kingdom. There are many possible reasons for this, but to my mind one of the most compelling is contained in an observation of the German social theorist Jürgen Habermas. He once said this: 'Legal norms are what is left from a crumbled cement of society: if all other mechanisms of social integration are exhausted, law yet provides some means for keeping together complex and centrifugal societies that would otherwise fall into pieces'.[2]

Habermas's point is that late modernity (at least in our part of the world) is characterised by the collapse of forms of commonality such as a common ethnicity, religion or culture, and that in its place we have latched on to law as the only authoritative and unifying force left to us. Here I reflect on the nature of this law we have latched onto and exalted in our public life, and what Christians concerned for the moral ecology of our societies might want to say in response to it. That is an impossibly broad agenda – but it is offered as an alternative to the rather narrow range of issues Christians engaging with law and politics have tended to focus on. There is a danger here that the pressing political issues of the day distract our attention from slower shifts in the tectonic plates of the law, which may prove more significant, and more dangerous, over time.

For there is no doubt that the law around us is changing. It is not easy to put our finger on exactly what is going on. Among legal scholars we find new terms such as 'juridification', 'neo-medievalism' and 'super-complexity'. 'Juridification' identifies the way law is colonising areas of social life and human interaction which were previously left unregulated.[3] 'Neo-medievalism' refers to the way in which different law-making sources compete and interact with each other;[4] there is no longer a single coherent hierarchy of norms within a sovereign nation-state. Add to this a range of new regulatory fields created by new medical and information technologies and new tools such as 'soft law' and sectoral informal law-making and the legal world soon becomes 'super-complex'.[5]

The new super-complexity of law can be understood in terms of the breakdown of a series of familiar distinctions: we are seeing around us the breakdown of the distinction between democracy and rights, between government and civil society, between national sovereignty and trans-national law, and finally, between law and ethics.

Deliberative democracy

The first trend is a breakdown of the distinction between democracy and rights. It is a trite observation that for a democracy to function over time, majorities cannot be permitted to do just anything. There is such a thing as the tyranny of the majority. The idea of fundamental, human or constitutional rights is the attempt to state the boundaries or the framework within which democratic majorities may legitimately govern. People may not be tortured or enslaved, there must be due process of law, freedom of expression, association and religion must be guaranteed, privacy, the home and family life secure, and so on. In the aftermath of WWII, western liberal

democracies increasingly amended their constitutions to secure such fundamental rights through judicial process even against the incursions of the democratically-mandated legislature. The United States and Germany were early examples. In the UK we have had a Human Rights Act operative since 2000.

The point is not simply that the outer boundaries of state action are judicially protected. Rather, the idea of constitutional rights itself has broadened to encompass ever wider fields of state action. And as the scope of rights has expanded, so too have the justifications for limiting the enjoyment of rights. So judges are rapidly becoming the guardians of the balance of abstract public and private interests inherent in vast swathes of law. This means that there is a breakdown of the distinction between democracy and rights. Instead of lawmaking taking place on the basis of a wide range of policy and pragmatic reasons within an assumed framework of basic *civil and political* rights, *legal* rights are becoming the overarching mode of public discourse, with judges, lawyers and politicians becoming equal partners in complex deliberative processes ('democratic dialogue') through which law and public decision-taking is continually contested and modified.[6]

The regulatory state

The second trend to observe is the breakdown of the distinction between government and civil society, and its replacement with new and hybrid modes of regulation. We can call this the movement from government to *governance*. Briefly, the rise of the welfare state from the late nineteenth century onwards was predicated on a clear public-private divide. There was the private sphere of civil society in which individuals and companies were free to compete to pursue private ends, largely left alone by the state. By contrast, the public sphere was organised hierarchically and could be directed to the pursuit of public ends as determined by political leaders at the apex of a series of governmental departments. Hayek argued that we think about law in terms of two basic types: (1) civil society structured by the more-or-less spontaneous 'natural' order of freely interacting persons expressed in the principles of private law, most fundamentally the law of contract; (2) the 'artificial' hierarchical order of the state which uses public law as a means to collective ends.[7]

Both of these models suffer from serious weaknesses: the private sphere from the abuse of dominant market positions and a lack of concern for distributive justice; the public sphere from inefficiency and insensitivity to human diversity and choice. The politics and law of the 'third way', which has been with us for a generation now, seeks to combine the advantages of both.[8] The free market is reconceived as one mode of regulation among many and the private sector subjected to increasing forms of regulation in an attempt to harness individual self-interest to agreed social goods. By the same token, the public sector is opened up to the 'discipline of the market' through devices such as compulsory competitive tendering and contracting-out. The effect of this 'third way' is to blur the boundaries between government and civil society, both being replaced with a new all-embracing hybrid form: the regulatory state.[9]

Trans-national law

The third trend to observe is the collapse of national sovereignty and its replacement with multi-level governance.[10] The collapse is both inward and outward. Inwardly, states which were strongly unitary are creating more powerful lower, regional, levels of government. The processes of Scottish, Welsh and Northern Irish devolution are not yet complete, and this sort of regionalism is not restricted to the United Kingdom. But outwardly, too, intra-governmental arrangements are becoming more powerful, and more independent, so that we can talk of supra-national governance. Of course, the European Union is the most obvious instance of this, but we see also the growing significance of other international bodies such as the World Bank, the International Monetary Fund, the GATT institutions and many other expressions of global capitalism. This means that the image of the sovereign nation-state, with – in the context of the United Kingdom – Westminster Parliament as the legally untrammelled supreme law-making body within it, is now deeply misleading. Rather, there are multiple locations of law–making authority in the world which interlock and interact with each other.

Legalistic ethics

Finally, and most fundamentally of all, I would suggest that we are seeing a breakdown in the distinction between law and ethics. The longer we inhabit this super-complex web of law, the harder it is to think about law *either* as a relatively neutral framework for the pursuit of private ends *or* as a tool to achieve democratically-agreed public goods. Rather, law becomes the medium in which we think about the good. And because law by its nature draws lines, sets boundaries, allocates power, this has the effect of reinforcing ethical positions which are based on the

power of the individual to control his or her own life. We can put this in another way as the reversal of a liberal trajectory. Liberalism, as a broad political creed increasingly characteristic of Christian majority countries from the late seventeenth century onwards, depends on a clear distinction between civil law and human virtue. We stopped looking to law to secure the true worship of God, and the inculcation of virtuous patterns living or the extirpation of all forms of vice. Liberal law depends on a distinctive combination of two strong commitments: both to a personally committed religious and ethical position and also to the refusal to use secular law to enforce those commitments.[11] It was this combination that generated civil liberty – the freedoms of belief, expression and association.

But liberalism in this broad political sense is at risk of consuming itself by becoming a matter of personal ethic. No-one has expressed this idea more clearly than the late Ronald Dworkin. Dworkin argues that modern law is best seen as rooted in two principles: 'The first is a principle of self-respect. Each person must take his own life seriously: he must accept that it is a matter of importance that his life be a successful performance rather than a wasted opportunity. The second is a principle of authenticity. Each person has a special, personal responsibility for identifying what counts as success in his own life: he has a personal responsibility to create that life through a coherent narrative or style that he himself endorses. Together the two principles offer a conception of human dignity: dignity requires self-respect and authenticity'.[12] Here we find a fully ethicised notion of liberal law founded on a conception of human dignity which emphasises post-modern values of self-respect and individual authenticity. This preferred ideology has the capacity to reverse the liberal trajectory by justifying new restrictions on the civil liberties of individuals and groups who adopt a different ethical foundation.[13]

A Christian perspective

There are, of course, enormous dangers in trying to derive a Christian legal and political programme; we so easily baptise our prejudices in our desire to give them added potency. Yet there are broad concerns and values reflected both in Scripture and in the two-millennia long tradition of the Church's social and political engagement. It is both possible and necessary to engage in careful and responsible readings of Scripture, in which theologians and lawyers collaborate to fuse the horizons of the past and present.[14]

From the creation and fall narratives we get the idea that we humans are made to rule and to judge, to know good from evil, we get the possibility of a humane social order consonant with nature, in other words the idea of 'natural law', with life a supreme value within it, and proportionality the measure of its justice. We also get the idea that we humans are fundamentally idolatrous; our perception of good and evil is perverted. We are sorely tempted to compensate for our deep-rooted ideological vulnerability by institutionalising our idolatry, building cities, empires and systems hostile to God and ultimately abusive, harmful and self-destructive.

From Ancient Israel and its law we get the values of liberty and self-determination of a people, we get the idea of a nation formed by covenant, by mutual promise, in which rulers are limited in their power, and in which there is fair access to the resources for productive work. This is a society with both the freedom and the duty to work for oneself and one's family. The prophets cried out against the idolatry and oppression which followed from neglect of Israel's law. The worship of false gods of money, sex and power is coupled in their experience with systematic neglect for the vulnerable: the widow, the orphan, the alien and the poor. It is these who are to be the object of special concern since they are close to the heart of God.

The wisdom literature teaches us the complexity of the human condition and the polyvalence of human law. We are offered a rich spirituality of law which manages to affirm simultaneously the validity of a natural order of justice, the reality of human oppression and injustice and our longing for perfection and fulfilment, for a just and gentle king.

Jesus came as that King, preaching an ethic of personal and corporate transformation, rejecting legalism and offering a purposive reading of the law which emphasises heart-felt loving obedience. This is an attitude which makes law possible, makes law humane and makes law restrained. In the Acts and the epistles we see both the legitimate authority and the oppressive corruption of human law and human rule. Civil disobedience may be necessary as a matter of personal conviction and confession, but liberty is not merely individual but also corporate. The church too, claims a jurisdiction and a sphere of authority. If we are citizens of heaven and ambassadors of Christ, the church is our embassy, representing the heavenly country in an alien and suspicious domain. The book

of Revelation warns us against an intolerant imperialism which for all its wealth persecutes the saints and trades in the bodies and souls of men.

Four areas of concern

Against this background, we can identify four areas of concern with the developments in law just sketched. We should be concerned about the impact of *postmodernism* on law. At just the time that the environmental crisis is teaching us the urgent need to live in harmony with the natural world, we are starting to assume in our family and medical ethics that human nature and human relations are infinitely malleable. There will be a cost. We should be concerned about *legalism*. The turn to law as a repository of all our collective moral values is deeply implausible. We need to recover a public discourse of virtue: of love, of patience, of faithfulness, of self-control, of relationality, against which there is no law. We should be concerned about *statism*. The growth of the regulatory state makes it hard to conceive of church as an independent sphere of ordered freedom, the epitome of civil society independent from government. And it makes it hard to tolerate instances of individual conscience outside the purely private domain. And we should be concerned about *imperialism*. The human desire to build a world kingdom other than the kingdom of God is suspect, yet we seem to be inexorably building a global regulatory empire based on an inadequate economic and ethical model.

In short, we are finding ourselves in a monstrous sticky web of law[15] which manages both to tie our hands in increasing areas of life while at the same time lulling us into a false sense of empowerment by its talk of individual authenticity and self-respect. At times, John's lurid image of Babylon fits only too well. And that is why Jesus' message of release for the captive (Luke 4: 18) is good news, even for law.

For further reading

Robert F. Cochrane Jr. and David Van Drunen (eds.), *Law and the Bible: justice, mercy and legal institutions* (Apollos, 2013)
Timothy Laurence (ed.), *Good News for the Public Square* (Lawyers' Christian Fellowship, 2014)
David McIlroy, *A Biblical View of Law and Justice* (Paternoster, 2004)
Nick Spencer, *Freedom and Order: History, Politics and the English Bible* (Hodder & Staughton, 2011)
John Witte, Jr. and Frank S. Alexander (eds.), *Christianity and Law: an introduction* (Cambridge University Press, 2008).

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[1] This paper is a revised version of a speech made at the launch of *Good News for the Public Square* hosted by Lawyers' Christian Fellowship (www.lawcf.org) and held at the London Institute for Contemporary Christianity on 2 June 2014. Thanks to LCF for permission to print the speech.

[2] Jürgen Habermas, 'Between Facts and Norms: an author's reflections' (1999) 76 *Denver Law Review*, 937.

[3] See G. Teubner, 'Juridification: Concepts, Aspects, Limits, Solutions' in Robert Baldwin et al. (eds.) *A Reader on Regulation* (Oxford University Press, 1998).

[4] See, e.g., the use made of this concept by Jan Zielonka, *Europe as Empire: The Nature of the Enlarged European Union* (Oxford University Press, 2006).

[5] John Bell, 'Legal Education' in Peter Cane and Mark Tushnet (eds.), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2003).

[6] Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* tr. William Rehg (MIT Press, 1996).

[7] Friedrich von Hayek, *Law, Legislation and Liberty* (Routledge, 1982).

[8] Anthony Giddens, *The Third Way* (Polity Press, 1998).

[9] Dawn Oliver, Tony Prosser and Richard Rawlings (eds.), *The Regulatory State*, (Oxford University Press, 2010).

[10] See, e.g., Ian Bache and Matthew Flinders, *Multi-level Governance* (Oxford University Press, 2005). H. Patrick Glenn, 'A Trans-national Concept of Law' in Peter Cane and Mark Tushnet (eds.), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2003) has argued for a shift in focus in legal education from national to trans-national law as a result.

[11] It is a matter for considerable debate whether *all* areas of law can be reconstructed on this basis. For a recent reflection on the de-Christianisation of family law see Sir James Munby, 'Law, morality and religion in the family courts' (2014) 16 *Ecclesiastical Law Journal* 131.

[12] Ronald Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011), 203-4.

[13] See, for example, the potential of the public sector equality duty in this respect: Julian Rivers, 'Promoting Religious Equality' (2012) 1 *Oxford Journal of Law and Religion* 386.

[14] For a recent superb addition to the growing literature, see Robert F. Cochrane Jr. and David Van Drunen (eds.), *Law and the Bible: justice, mercy and legal institutions* (Apollos, 2013).

[15] The metaphor is an old one: Anacharsis famously said of Solon's laws, 'Written laws are like spiders' webs; they will catch, it is true, the weak and poor, but would be torn in pieces by the rich and powerful'. Christians from Martin Luther to Martin Luther King, Jr. have agreed.