

THE LOWRY LECTURE

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The Rt Hon Sir Paul Girvan

By the Waters of Babylon
The interplay of religious and human rights

[1] A couple of years ago in Germany Oskar Groening, an Auschwitz clerk, was tried for crimes against humanity. Two matters in that trial stand out. Firstly, in the course of the trial one of the surviving victims Eva Kor expressed forgiveness of her Nazi persecutors and even went so far as to embrace the defendant. This act of unimaginable forgiveness was all the more poignant bearing in mind that she and her sister two little Rumanian Jewish girls were the victims of the evil Dr Mengele whose experiments on their bodies left Eva sterile and her sister Miriam permanently disabled. Her act of forgiveness was condemned by many other victims but Eva who died this summer strongly held the view that forgiveness was the only real therapy that could take a victim out of victimhood, a message that has an important significance for our own society. The second matter was a chilling piece of evidence in which the defendant graphically described watching an SS officer in Auschwitz mercilessly killing a little Jewish baby by hurling the baby against a wall. The report of that appalling scenario called to mind some biblical words which I have always found profoundly disturbing, words which are now never sung and which appear in square brackets in the Anglican psalter. Psalm 137 which is best known by the title '*By the waters of Babylon*' is a deeply moving text painting a picture of the Jewish exile in Babylon and one which brought solace and consolation to other exiles most particularly the Southern Slaves of America. Its poetic elegiac and comforting tone comes to a conclusion in these horrifying words

*"Of daughter of Babylon, doomed to destruction, happy is he who repays
you for what you have done to us - blessed is he who seizes your infants and
dashes them against the rocks."*

The scriptures of many religions on occasion contain dangerous and violent texts which have encouraged and inspired the abuse of human rights. It was often violent words to be found in the Old Testament which inspired the crimes against humanity of otherwise deeply religious people like Cromwell and Cortes. Believers in the modern and more enlightened age in which we live must grapple with the question of what is to be done with such texts. How do we deal with the messages that can be found in the sacred writings of many religions which run entirely contrary to the messages to be found in the better side of religions, words which can inspire terrible acts of violence and disregard of basic human rights? How can we ensure that the

followers of religions can freely follow their beliefs and practices without infringing the rights and freedoms of others?

[2] The Holocaust itself while the product of a perverted political system can trace its roots to religious anti-semitism prevalent through Europe for centuries based on the imposition on all members of the Jewish community of guilt for the killing of Christ. It was a guilt imposed by reason of both race and religion and a terrible form of stereotyping. We find a chilling foretaste of Kristallnacht and the Holocaust in the words of Martin Luther in the 16th century who said that the Jewish synagogues should be burned down and their homes destroyed and that the Jews rotten obstinacy deserved to be oppressed unendingly. It was not until Vatican II in the 1960s that the Catholic Church in the document *Nostra Aetate* made clear the error of the belief that the Jewish people carried the guilt of deicide. Sadly we see that the atavistic hatred of things Jewish has not gone away and remains alive and kicking.

[3] On the other hand deeply held and worthy religious commitment can bring out the very best in human beings. Maximilian Kolbe was a Polish priest arrested in February 1941 by the Gestapo for sheltering Jews in a monastery. He was incarcerated in Auschwitz concentration camp. When a fellow prisoner was wrongly believed to have escaped the Nazis selected ten others to be killed by starvation in reprisal for the alleged escape of the escapee who was in fact later found drowned in one of the latrines. One of those selected to die cried out "My wife, my children, I will never see them again." Father Kolbe stepped forward said "I am a Catholic priest. I wish to die for this man. Maximilian Kolbe who went to death cell 18 Two weeks later only four of the prisoners were alive. Maximilian alone was fully conscious. He was injected with phenol and died on 14 August. He was canonised by Pope John Paul II on 10 October 1982 in the presence of the man whose place he had taken.

[4] As that story shows good religion can inspire acts of great courage and humanity. It also shows how religious believers can fall victim to persecution because of their beliefs and actions. Stalin and Hitler rejected the idea of any divinely imposed moral restraints on human action. Anti-religion can produce even more terrible consequences than bad religion. It was the evils of totalitarianism which inspired and drove forward the search for a sound basis for the protection of human rights and led to the European Convention of Human Rights.

[5] The issue of the interplay between religion and human rights is a topical and burning issue. Throughout the world we see the problems which arise when religion and the religious viewpoint of many religionists clash with the rights of others who do not share the same viewpoints of others. Sometimes the clash of viewpoints can have fatal and tragic consequences. On other occasions, as compared to the dreadful outcomes we have heard about, disputes can arise which appear to some to be trivial and irrelevant in the great scheme of things but which to others appear to raise matters of burning import. By any rational analysis disputes about messages on cakes when set against the issues raised by the religiously inspired massacres we have seen in Paris, in London, New York, Manchester, Nice, Madrid, Sri Lanka and throughout the middle east and Africa appear of minor importance. We need to find a sense of proportion in deciding what is truly important in this field.

[6] Historically the concept of freedom of conscience and religion has been a matter of controversy. It proved to be one of the most controversial rights at the international level when attempts were made to create international measures for the protection of human rights. The Universal Declaration of Human Rights in 1948 was inspired by the need to lay a sound basis for human rights in the light of the world's experience of the abuse of human rights by totalitarianism. Article 18 sought to lay the basis for freedom of religion. It proved controversial with Muslim states which were concerned in particular with Christian missionaries and the concept of a right to change a religion. It is a concept inimical to strict Islam which regards apostasy as a capital crime. For Koranic teaching provides that an apostate merits exclusion and death

[7] We should not forget that for nineteen centuries many of the Christian churches in Europe rejected the notion of freedom of conscience and orchestrated wars of religion that cost millions of lives. In England non-conformism was at times a crime and regarded as a social evil for centuries. In Ireland the penal laws subjected Catholics and non-conformists to many disabilities and penalties. The churches came only slowly to accept freedom of conscience as a central human right. For centuries it was considered virtuous for bishops to invoke state force to compel heretics to return to the Church or to be handed over to the civil authorities for public execution if they did not recant. In 1832 Pope Gregory declared that the right to freedom of conscience was an insanity. Pius IX's Syllabus of Errors condemned as errors the belief that every man is free to embrace and profess the religion he considers to be true and the idea that a Catholic country should allow everyone the right to publicly worship in accordance with his own beliefs. By the time of Vatican II the position had radically changed. Pope John Paul II called the right to freedom of conscience the foundation of all human rights. In many forms of institutional religion for centuries sadly there was no place for the rights we now take for granted - the right to freedom of belief, the right to freedom of expression, the right to freedom of assembly, the right to respect for one's private and sexual life, the right not to be subjected to inhuman treatment or torture and the right not to be enslaved for we must not forget that for centuries the institutional Churches upheld the right to own and control slaves. In many countries and forms of religion still these rights do not exist.

[8] Article 18 of the Universal Declaration was the precursor of Article 9 of the European Convention of Human Rights and Liberties to which I now turn. It provides:

1. *Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom either alone or in community with others and in public or private, to manifest his religion or belief in worship, teaching, practice and observance.*
2. *Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety for the protection of public order, health or morals or for the protection of the rights and freedoms of others"*

[9] It is important to stress that article 9 is not limited in its effect to religious beliefs. It covers religious, political and philosophical beliefs. Article 9(1) confers an *absolute* right to hold particular beliefs and an absolute right to change religion. No state power can suppress the inner mind of man though it can by its actions and propaganda distort and manipulate that mind. While the right to hold a particular opinion including a religious opinion is absolute the right to freedom to *manifest* one's religion or beliefs is subject to limitation.

[10] In Young, James and Webster v United Kingdom [1982] 4 EHRR 38 not itself a case about a religious viewpoint but about an employee's opinion on quasi-political points the Strasbourg Court made a point which applies both to political and religious beliefs:

"Pluralism, tolerance and broadmindedness are the hallmarks of a democratic society ... Although individual interests must on occasion be subordinate to those of a group democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position."

[11] What Justice Albie Sachs said in the South African case of Christian Education of South Africa v Minister of Education (2001) 9 BHRC 53 merits repetition -

"How far can and must democracy go in allowing members of religious communities to define for themselves which laws they will obey and which not. Such a society can cohere only if all its participants accept that certain basic norms and standards are binding. Accordingly, believers cannot claim an automatic right to be exempted by their beliefs from the laws of the land. At the same time the state should wherever reasonably possible seek to avoid putting believers to extremely painful and intensely burdensome choices of either being true to their faith or else respectful of the law."

These are wise and thoughtful words from a man who suffered grievously for his principled stance against the particularly abhorrent Apartheid system which claimed a religious underpinning based on a bizarre interpretation of the biblical story of the Flood.

[12] Religions have multi-faceted consequences for believers and for wider society. In every religion there is a set of core beliefs, usually with a belief in a divine being or beings who controls or influences human life. The right to these core beliefs is absolutely protected. That is the easy part. We then come to the issue of limitations of the right of individuals to show these beliefs and live them out in other words their right to manifest their religion. Most religions have worshipping cultic practices and ceremonies. Most religions stress the importance of a community of believers to strengthen belief and provide mutual support. Most religions have moral teachings and principles to guide adherents. Most religions believe that they have found the true way of understanding existence and how to live in accordance with established

and correct moral principles. Many religions believe that there is an imperative to ensure that wider society sees the truth of their vision and understanding of existence. These potentially very positive features of religious belief and practice can become twisted into rigid orthodoxy, the persecution of non-believers and heretics, the attempt to impose a viewpoint on others and the attempt to impose on all a moral code inimical to the rights and interests of others. A sense of community can turn into exclusivity and sectarianism. A democratic and pluralist state self-evidently needs power to control the forces that can emerge when religions succumb to these negative forces.

[13] Munby LJ in the case of *Sulaiman* said that religion is not the business of government or the secular courts. The starting point of the law is an essentially agnostic view of religious beliefs and of a tolerant indulgence to religions and cultural diversity. It is not to weigh one religious viewpoint against another. The concept of tolerant indulgence may sound somewhat condescending. Perhaps we should say that the law recognises the right of individuals to believe and practice their religion insofar as such belief and practice do not infringe the rights and freedoms of others who do not share their views. The question of interference with the right to manifest one's religion has arisen in for example cases about corporal punishment in schools, the wearing of religiously imposed forms of attire in schools, the wearing and display of religious symbols and of course in the context of sexual identity and morality. I will mention two.

[13] In *R (Williamson) v Secretary of State* [2005] 2 All ER there was a challenge to the ban of corporal punishment of pupils brought by certain teachers and parents of Christian independent schools whose fundamental beliefs included a belief that part of the duty of education in the Christian context was that teachers should be able to stand in the place of parents and administer physical chastisement to children guilty of indiscipline. They contended that biblical sources justify and required that practice.

"He who spares the rod hates his son but he who loves him is diligent to discipline." Proverbs 13.24.

[13] The House of Lords accepted that the ban on corporal punishment did materially interfere with the claimant's rights under Article 9 and Article 2. That ban on corporal punishment was prescribed by law in clear terms. The House concluded that the legislation pursued a legitimate aim in that children were vulnerable and the aim of the legislation was to protect them and their well-being. Parliament was entitled to take the view that balancing the conflicting considerations all corporal punishment of children at schools was undesirable and unnecessary and that other means of discipline were available and preferable. In the House's view, the legislation did not create a disproportionate effect in its adverse impact on parents.

[14] While a person may have a religious belief there may be occasions when the belief is so intrinsically contrary to modern society's values that it falls outside the parameters of the intended protection of Article 9. Its manifestation will not be protected. Thus, to take extreme examples, the use of the stake to burn heretics, the drowning of witches, the burning of widows in accordance with ancient Hindu *suttee*

would not be lawful even as once was the case religious teaching prescribes such conduct. It is interesting to note that in India the British rulers were able, in fact, to modify some religious beliefs and practices intrinsically inimical to human rights (e.g. it outlawed *suttee* and the cult of the Thuggees). Thus religious views and practices can be and are influenced for the better by a culture of rights. Human rights law can be a dynamic for religious change and development. The Christianity of today is undoubtedly different from the Christianity of the middle ages. The values of many forms of modern Christianity are the values of the enlightenment even though the proponents of the Enlightenment were condemned as heretical by the religious establishment of the time.

[15] Begum v The Head Teacher and Governors of Denby High School [2006] 2 All ER 487 was the famous case of the Muslim girl and the *jilbab*. She came to believe that the permitted uniform in the school was not the appropriate uniform for a girl who had reached puberty. She challenged the school's refusal to permit her to wear the *Jilbab* and claimed that Article 9 was breached. The House of Lords concluded that what constituted interference to the right to manifest religion would depend on all the circumstances of the case including the extent to which in the circumstances the individual could reasonably expect to be at liberty to manifest her beliefs and practice. The claimant's family had chosen a school with a known uniform policy. She could change school to one where a *jilbab* could be worn. There thus had been interference with her ability to manifest her religious belief. What Begum makes clear is that freedom to manifest one's religion does not mean that one has that right at any time, in any place and in any manner.

[16] In recent years the question of the rights of those with a same sex orientation has raised particularly acute issues of conflict and dispute between those holding a particular religious viewpoint on the morality of same sex relations. We know, of course, that for many centuries male same sex acts were criminalised and Northern Ireland, following the perceived religious stance of the majority, maintained that approach long after many other countries decriminalised such acts. It was in the case of Dudgeon v United Kingdom that a successful challenge was made to the then law. It was argued by the state that the ban was a justified interference with the article 8 rights of the individual on the grounds of the protection of public morals. Strasbourg by a 15 to 4 majority decided that the Northern Ireland legislation could not be justified because in the court's view there was no pressing social need for the prohibition of homosexual acts between consenting adults. The court could not overlook the marked changes which had occurred in society. The Northern Ireland authorities had refrained from enforcing the law in respect of private homosexual acts between consenting males over the age of 21 years capable of valid consent. It is interesting to consider the dissenting judgment of the Irish judge Judge Walsh who expressed himself vigorously against the majority view.

“Sexual behaviour is determined more by cultural influences than by instinctive needs. The cultural trends and expectations can create drives mistakenly thought to be intrinsic instinctual urges. The legal arrangement and prescription set up to regulate sexual behaviour are

very important formative factors in the shaping of cultural and social institutions.”

He went on to point out that there was a strong religious ethos in Northern Ireland where in his words:

“ ... views on unnatural sexual practices do not differ materially from those which throughout history conditioned the moral ethos of the Jewish, Christian and Muslim cultures.”

[17] The majority decision of the court left entirely out of the equation any religious underpinning to the objections to same sex acts and the majority did not adopt any terminology such as that used by the minority whose references to unnatural and immoral practices follow the value judgments drawn from the Old Testament and Muslim texts. Judge Walsh, perhaps advisedly, did not refer to the religious passages underpinning the ethos for which he contended. One is in the Book of Leviticus Ch 20 v 13:

“If a man lies with a man as one lies with a woman both of them have done a detestable thing. They must be put to death: their blood will be upon their own heads.”

That passage finds a resonance in another part of Leviticus dealing with what came to be called witches:

“A man or woman who is a spiritualist or a medium among you must be put to death: you are to stone them and their blood will be on their heads.”

Here again we are back to the waters of Babylon.

[18] Those two passages tragically provided a religious underpinning for the subsequent killing of countless hapless individuals, often in the form of judicial murder and in circumstances of atrocious cruelty. We know a lot about the way in which alleged witches suffered over the centuries but in Middle Eastern countries there are still abhorrent penalties imposed on homosexuals - in the territory controlled by IS it is common place for homosexuals to be murdered. On occasion those accused of homosexuality have been hurled to their death from the tops of high buildings. In Iran 4000 homosexuals have been executed. The perpetrators doubtless find their moral justification in texts such as Leviticus.

[19] As we have seen all too clearly in recent times in Northern Ireland the controversy has not gone away. It is evidenced by the Anglican communion's internal conflict on the issue and by former Pope Benedict's statements. He said that same sex acts show in his words:

“ a tendency towards an intrinsic moral evil, and thus the inclination itself must be seen as an objective disorder.”

While Pope Francis takes a more nuanced approach to the issue the conservative Christian viewpoint does not radically differ from Pope Benedict's analysis.

[20] In Re Christian Institute [2007] NIQB 66 Weatherup J was presented with a challenge to the provisions of the Equality Act (Sexual Orientation) Regulations (Northern Ireland) 2006 provisions aimed to prevent discrimination on the grounds of sexual orientation. He quashed the harassment regulations because of lack of consultation. He accepted that issues did arise in relation to the possible interference with Christians freedoms in relation to their teaching on sexual morality. If a Christian were required against his conscience to do an act in the nature of promoting homosexuality then article 9 might well be interfered with. But he concluded that a challenge to the operation of individual regulations would be fact specific and should only be considered in the traditional fact specific way. Interestingly he referred to a Canadian case which held that under equivalent Canadian legislation a Christian objector could not be required to print material advertising publications and containing information by and about homosexuals if that conflicted with his core religious beliefs. He considered that this approach might provide a basis for the approach to some of the examples cited by the Christian organisations. Weatherup J's Solomon like judgment was hailed as a victory by both sides at the time. It was also prophetic in anticipating the issue which arose in the Lee v Ashers bakery case, the famous case of the cake. In that case the Court held that in fact there was no direct discrimination on the grounds of sexual orientation because the bakery was willing to supply the cake. What the bakery was not bound to do was to supply an iced message backing the political view in favour of same sex marriage. In other words the bakery's right to freedom of expression overrode the customer's demand for the provision of the iced message.

[21] Proponents of human rights in this field approach the question from a wholly different angle from that of Pope Benedict. They contend that much of the religious debate is based on stereotypical thinking. Stereotyping is a form of analysis incompatible with human rights standards. The fact that some homosexuals (and heterosexuals) lead promiscuous lifestyles marked by a lack of loving commitment cannot justify the inference that that is the inevitable consequence of their orientation. It is perfectly possible for persons with either orientation to lead lives of loving commitment within the context of their orientation as the civil partnership legislation shows. It is also perfectly possible for them to provide a loving and stable home life for children adopted or otherwise. If a same sex orientation is natural to some individuals and if they are able to lead lives of loving commitment in the context of that orientation then the question arises as to how or why that tendency of itself could of itself be said to lead to an intrinsic moral evil. If orthodox Christianity ultimately changes its stance and comes to accept the naturalness of the orientation in some persons and encourages and inspires all people, whether heterosexual or homosexual, to lead lives of responsible loving commitment within the context of their orientation that outcome will in no small measure be attributable to the humanising influence of human right law developments. In the case of Bull v Hall [2013] UKSC 73, the case involving the challenge to the refusal of by a Christian couple running a B and B to allow two men in a civil partnership to have a double

bedded room Lady Hale considered that Parliament had created the institution of civil partnership in order that same sex partners could enjoy the same legal rights as partners of the opposite sex. The rights and obligations entailed in both marriage and civil partnership exist both to recognise and encourage stable, committed long-term relationships. It was in her view very much in the public interest that intimate relationships be conducted in that way.

[22] Religious orthodoxies do gradually change with time, often as a result of increased knowledge and often as a result of the widespread acceptance in society of new norms. One can cite the acceptance now of the primacy of human rights and private conscience, the acceptance that Galileo was right, a rejection of the laws against usury, the rejection of the burning of heretics and witches and the rejection of anti-semitism. What were accepted for many years as fundamental principles have been rejected. Institutional Christianity eventually learnt the value of Enlightenment principles. Will it come to accept the concept of same sex marriage? Time will tell.

[23] In Bull the Supreme Court concluded that the relevant legislation did not contain a reasonable accommodation test that is to say a test whereby the courts should find a way of accommodating the conflicting moral stances of the parties. There would be nothing to prevent the state as part of the legal context of any particular rights to make express provision for an express reasonable accommodation test. Such a reasonable accommodation test may have been the kind of test contemplated by the proposal by the DUP to introduce a conscience clause into Northern Ireland legislation. That proposal appears to have become impossible of achievement in view of the presentation of a Petition of Concern by Sinn Fein. It is interesting to note, however, that the proposal is in line with the Religious Freedom Restoration Act 1993, an Act of Congress in the United States which enabled people to at least raise the issue of religious liberty as a possible defence in certain situations.

[24] One final case worth mentioning is Lautsi v Italy. Following the Concordat between Fascist Italy and the Vatican crucifixes must be displayed in classrooms in Italy. In Lautsi the parents of some Italian children challenged this display of a crucifix saying that it clashed with their convictions and violated the right of children not to profess the Catholic religion. The Grand Chamber held that there was no evidence of pupils being influenced by the mere display of the crucifix. The state's duty of neutrality had not been breached. It was not enough to constitute indoctrination. It did not interfere with parents' right to bring their children up in accordance with their beliefs. Judge Power, the Irish judge, in an interesting judgment considered the presence of the crucifix could serve a positive role in a truly pluralist education process befitting a multi-cultural society. The parents objecting should bear in mind that the crucifix was a symbol with which many of the children in the school could identify. It did not prevent the individual from following his own conscience. In a Canadian case involving religious education in Ontario state schools Lacorniere JA insisted that the state is under no duty to insulate children from cultural and religious differences. To be offended is the price of living in a pluralist

society. This must equally be true of those working in government offices containing photographs of the head of state.

[26] The culture of rights is neutral on many of the main issues of life and the Convention does not lay the basis for an individual's moral code of life. The Convention does not claim to set out to or state moral principles. Save in relation to the core and central human rights such as the right against torture and inhuman treatment, the Convention calls for balanced judgments on issues where there are differing views. It was intended to control the role of the state to interfere in the lives and freedoms of citizens. One of the dangers of the developments in human rights law is that people may view human rights law as in fact establishing the extent of the moral responsibility demanded of the individual in society and the individual may adopt an attitude of "everybody's philosophy is as right as anybody else and it does not really matter." While the principle "live and let live" is a good one the individual still has to work out how he or she should actually live. In exercising our freedoms and rights we must seek to bear in mind the sensibilities and sensitivities of others. As Strasbourg pointed out in *Eweida* the freedom to hold a particular religious belief is a vital element in the identity of the believer. While we are free to lampoon and make fun of the vital element of religious beliefs held by individuals, let us not forget that when we do so we are in a way attacking something at the core of their individuality and identity. The same thing goes when religious believers condemn and belittle those with a same sex orientation or those who in good faith propose liberalisation of the abortion laws. The poet Yeats had a good line "Tread carefully because you tread on my dreams". While, as we have seen, bad religion has much to answer for historically, not least it's often ruthless imposition of orthodoxy on non-believers, we should not fall into the trap ourselves of seeking to impose a new orthodoxy, liberal in name but illiberal in application.

[27] Let me leave with you a few questions to ponder. I throw out these questions without providing the answers which you should work out for yourselves. Should there be moral restraints on the exercise by us of our rights? How do we work out and formulate those moral restraints? Where a gay couple realise that their actions present a real moral dilemma to a person holding deeply held religious views do *they* have any moral obligation themselves towards that individual? Is it morally right to insist on their rights if to do so puts the other person in a profound moral dilemma? Have they a moral obligation to be sensitive to those having moral dilemmas? By the same token where a Christian providing a public service holds strict moral views against homosexuality has he a moral right to exclude a gay couple and thereby undermine their human rights and dignity? Should he leave it to God to sort out the moral question? Has the Christian a moral obligation to be sensitive and compassionate in the expression of his moral views? Were the Bulls morally justified in excluding the gay couple from a room with a double bed when they would not object to providing a room with single beds – the form of the beds in the room was unlikely to affect what they actually did in the room? Were the Bulls more concerned with appearing to make a point than in preventing what they considered would be immoral activity? Was it morally right to use limited public funds to pursue litigation in such a case as the cake case in a society where, for

example, elderly and infirm people are going without care and where the poor do not have the luxury of cakes to eat or if they do it is from a box in a food bank? Is that a proportionate and good use of limited resources? Would the principle of reasonable accommodation in this field provide a solution: who accommodates whom, who should blink first? What about turning the other cheek, walking the extra mile and forgiving seventy times seven.

[28] Cardinal Richelieu remarked "If you show me six lines of what a person has written I will have enough to hang him." I have greatly exceeded six lines for which I apologise. Thanks to the fact that we live in a country and in age in which human rights are protected I can at least take comfort in the knowledge that I cannot now be hanged for what I have said.