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Do our courts have no morals?

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The speech by Sir James Munby, President of the Family Division, on '[Law, Morality and Religion in the Family Courts](#)', given at the Family Law Annual conference on 29 October, was a headline writers' dream. Aggressive secularists seized on it as further proof that Christian influence on English law was not only a lame duck but in truth a dead parrot. Horrified conservatives protested that Munby was blind to the fact that he and his judicial colleagues now enforce a secularist morality underwritten by the religion of human rights.

In his speech, Munby did indeed denounce high Victorian Christian values, condemning the ways in which their reflections in law indulged fathers and victimised and stigmatised women. He also declared: 'Happily for us, the days are past when the business of judges was the enforcement of morals or religious belief' and rejoiced in the fact that judges no longer pretend 'to set themselves up as guardians of public morality'.

But further on in the speech Munby's position becomes more subtle. Judges have to 'assess matters by the standards of reasonable men and women in 2013', taking the customs of such people as they find them. They must recognise the starkly differing views which people hold (whether they are people of faith or of no faith at all) and must afford those views equal respect provided they are worthy of respect in a democratic society and not incompatible with human dignity. There are some things which are beyond the pale.

It's this proviso which indicates that the death of the enforcement of morality in family law has been greatly exaggerated. In 2013, reasonable men and women in Britain regard forced marriages, female genital mutilation and 'honour-based' domestic violence as so immoral that they ought to be and are illegal.

Nonetheless there has been a significant shift in judicial attitudes. At the turn of the twentieth century, judges in family law could use language which suggested that if something was immoral that was sufficient to make it illegal. At the beginning of the twenty-first century, the family courts tend to permit people to choose how to live their lives unless there is sufficient reason to intervene.

Munby's view that because something is immoral that is not sufficient reason to make it illegal is actually closer to the weight of Christian teaching than he might realise. The provision in the Jewish Law for divorce was a recognition from the start that the moral ideal cannot always be enforced. In the life of the early Church the place of the Law of Moses in Judaism is replaced by the work of the Holy Spirit. The concomitant of this is that what law can enforce will always fall short of perfection. In its wiser moments, the Church has insisted on the role of law in protecting the vulnerable and the power of example and of care to inspire people to virtue.

What is more, Munby's claim that it is no good wishing that people's customs were different, you have to take the people as you find them, echoes an observation made by no less a figure in the Christian tradition than Thomas Aquinas, more than 700 years ago. He said laws should be possible both according to nature and according to the customs of the country. Precisely because 'law is established for the collectivity of human beings, most of whom have imperfect virtue ... law does not prohibit every kind of vice, from which the virtuous abstain. Rather, law prohibits only the more serious kinds of vice, from which most persons can

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abstain, and especially those vices that inflict harm on others, without the prohibition of which human society could not be preserved.'

Well-framed laws both reflect and sustain common moral agreement about what is beyond the pale, what cannot be tolerated because it contradicts values that almost everyone regards as non-negotiable. In any plural society, in fact in any tolerant society, that common moral agreement is formed by what the liberal philosopher John Rawls called an overlapping consensus, i.e. an area where widely held but different views about what is clearly right and obviously and intolerably wrong converge.

Certain values derived from Christianity formed a significant part of the common moral agreement which underpinned English laws in the past but it would be a mistake for either Christianity's advocates or its critics to think that there was ever one definitive set of uniquely Christian values, not otherwise accessible to reason, which were perfectly reflected in English law in some golden or dark age in the past.

Christian theology recognises the idea that there can be common moral agreement between people of different faiths and none in the concept of natural law. Because human beings have been created by God to live in a world made by God in which God has revealed Himself, living God's way makes sense. There are cultural blind spots, which can have devastating consequences, but there is reason to hope that a level of common moral agreement sufficient to maintain a stable society might be arrived at.

Christianity is not a religion which places its faith in law. Law is not the means by which Christians seek salvation, either for themselves or for others. It is instead to be properly understood as a means of addressing those wrongs which are commonly recognised to be intolerable and of protecting those who need to be protected.

Despite the headlines, our courts do still have morals and they know it. Christians should affirm the recognition that in a tolerant society, it is only the intolerable that must be excluded. The pressing question is whether Christians will be committed and permitted to continue to participate in re-forging the common moral agreement which is necessary if laws are to be effective in regulating society.

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