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Reflections on Sir James Munby's lecture given at the Law Society's 2013 Family Law Annual Conference

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Reflections on Sir James Munby's lecture given at the Law Society's Family Law Annual Conference on 29th October 2013: **'The sacred and the secular: religion, culture and the family courts'**

1. In his address to the Law Society Sir James Munby, President of the Family Division (referred to here as 'Munby', with no disrespect), reveals some of the attitudes of the judiciary to its tasks. This is welcome. His address was designed to address the place of religion in family law, and we should not assume that his views apply equally to other areas of law. Even within this remit, his opinions illustrate the difficulties inherent in applying notions of diversity and neutrality to matters of morality and law. We should not blame only the judges for this. We live in a philosophically and morally diffuse society, and we can expect our judges to reflect this.
2. Munby refers to the decline of Christian authority in legal judgments and as an influence on English law. In the past judges were not reticent in acknowledging the Christian basis of the nation's laws. They did not shrink from expressing the view that infidelity and homosexuality are wrong. In this they reflected the views of society at large. Munby notes that much traditional morality is now at odds with the current views of society. Society and its values have changed, and the law has followed, as a result of the decline in the influence of Christianity. This has been charted by the sociologist Callum Brown in his book *The Death of Christian Britain*.
3. Although judges have to administer the law, they should have a coherent idea of what they are doing, and Munby should be applauded for attempting to articulate this. He says that the law should reflect changes in public attitudes. He is right that we live in "ever-changing times". However, a judge's worldview need not only reflect the times in which he or she lives. There should be some principles which endure, regardless of time and place. Human rights theory acknowledges the universality of human nature – what is right is right everywhere. And it follows that there should also be principles that survive changing times. Otherwise we would be in thrall to modernity and chronological snobbery. If a determination of what is acceptable is based only upon popular sentiment, this can lead to demagoguery and intolerance.
4. The courts decide matters of law as well as fact. The judges' perception of the value systems that underlie the law matter. Laws inevitably reflect some principles. Even regulatory laws (such as parking restrictions) should be enacted for the common good. And a principle of the common good is moral in character. A particular principle in relation to behaviour is a rule which its proponents believe should invite, or command, general acceptance. A standard of action which exists outside its particular instances is, to that extent, transcendent. It needs to have a source, or at least a rationale. There are necessarily principles embodied in the law, whether or not we agree with them. If there are no consistent principles, the application of the law can be uncertain and may be irrational.

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5. The nature of law (whether physical, moral or governmental) requires consistency. Society may reflect, as Munby says, “morally a plural structure”, but the law should be rational. Even if, as Sartre said, we are “condemned to freedom”, we are also (as Professor Christopher Coker observed) “condemned to consistency”. Unless we believe that law is only the arbitrary function of a secular power, then some principles must underlie law. For judges, at least, there needs to remain a notion of objective truth and reason, and this should have some basis. There are limits to language (as Wittgenstein explained), but language refers to something, not just to itself, as some post-modern thinkers believe. For Christians, the existence of principles of law suggests a source of that law, and ultimately a law giver, that lie above human authority. This notion is not exclusively Christian, and was familiar to Plato and Cicero.

6. Munby believes that law is distinct from personal morality and that it is not the business of the law to opine about private morality. While law and morality are different in character -- morality finds expression in internal recognition and the *mores* of society and law in external enforcement -- the connection between them is closer than Munby allows. The nature of governmental law is that it is based upon some principle designed to benefit those subject to it. The Christian principle is that law is for the restraint of evil and the encouragement of good -- for the benefit of all. There is no clear dividing line between public and private morality. The poet John Donne reminded us that “No man is an island” and seemingly private behaviour can be public in its effects. For example, education, the views of opinion formers, the media and culture generally have encouraged increased freedom in personal behaviour. The law has normalised what would in the past have been regarded as moral failure. One of the results of this freedom has been increased family breakdown. This has contributed to children sensing rejection. Rejection has led to disaffection and the children do badly at school, leaving school unsuited to employment. And so many turn to crime.

7. Munby correctly acknowledges that people of different faiths have different views in relation to a number of issues. He is right to say that these views must be respected. In saying that any choice between those views is a matter for Parliament and not the judges, he recognises that different faith perspectives cannot all be reflected in the law. But judges interpret the law and they will inevitably bring assumptions to that interpretation. Judges will make choices and those choices matter.

8. To the extent that Munby’s views reflect a philosophical framework, they are a blend of libertarianism and utilitarianism. He quotes J. S. Mill with approval in saying that the law should only intervene where there is harm. But without a coherent view of what constitutes a flourishing life for individuals and the common good of society, this leaves many questions unanswered. He acknowledges that the law must nevertheless intervene in the case of certain practices which are “beyond the pale”. Most people would agree with the instances that he cites, such as forced marriages, female genital mutilation and “honour-based” domestic violence.

9. Apart from the cases that he says are ‘beyond the pale’, Munby says that it is not for judges to choose between different religions. He quotes with approval a European case which states that: “The State’s duty of neutrality and impartiality ... is incompatible with any power on the State’s part to assess the legitimacy of religious beliefs.” A difficulty with this view is that religions are different in their effects. It is possible to confuse free will with relativism, but they are not the same. People need to decide their beliefs for themselves and the law should not intervene to force belief. But not all beliefs are of equal value and not all beliefs should, or can, be equally valued by approval in law. If all religions are

of equal value, then the law can only arbitrate between competing beliefs, since they may conflict. In practice, this may be impossible. And because the secular worldview is not a religion, though it is a belief, law makers and judges may believe that they are being neutral in favouring a secular view.

10. In espousing secular neutrality, Munby assumes a utilitarian outlook. The difficulty here is that utilitarianism tends not to articulate adequately what constitutes the “good”. As mentioned above, the question as to what constitutes a flourishing life for individuals and society is unanswered. In the Christian view, the ability of flawed humanity to achieve notions of the good is based upon unrealistic assumptions about human nature and the human condition. Personal imperfection (what Christians call sin) crouches at the door and mars our best endeavours. Human beings cannot predict the future, nor can they always evaluate it when it occurs. The Christian perspective is that human beings require the guidance of the creator God to know the truth, and they need His help to enact it in their lives and in society at large.
11. Munby rightly observes that he and his colleagues “sit as secular judges serving a multi-cultural community of many faiths, sworn to do justice ‘to all manner of people’.” He believes that the law should be neutral in relation religious belief because we live “in a secular State, not a theocracy”. This is an unhelpful dichotomy. There are historical and pragmatic reasons for recognising that Christian principles have in the past shaped our laws. Shared values are essential to the functioning of a society, particularly where mutual dependence is underpinned by a welfare system. People may be unwilling to contribute to a state that supports those that do not share some common values.
12. Christian theology is reflected in the British constitution and many laws. Democratic freedoms are based upon the free will given by God in relation to belief. (These do not apply in many parts of the world.) The principle of the separation of powers and functions reflect a Protestant understanding of flawed humanity and the likely failure of utopian and absolutist tendencies in government. The respect for human life reflects the Christian belief in the creation of humankind in the image of God. And some laws in force today still reflect specific biblical principles. Many of those people who, over the last seventy years or so, have come to Britain have done so because they wish to live in a country which embodies Christian principles of freedom of belief, law and accountability.
13. It should be common ground that the purpose of laws is to regulate society and do justice. Justice involves fairly giving people what they have a right to expect in the light of an understanding of human nature and the common good. For the Christian, justice must be based upon truth (see Isaiah 59.14). Though human beings see many things (in the words of the King James Bible) “through glass, darkly”, they have been give reason and also, in the Christian view, revelation. While some secular philosophy may reflect particular strands of human aspiration (which may conflict), Christian theology provides a basis for a more comprehensive understanding of human nature. Christian thinking can illuminate the potential for both degradation and grandeur in the human spirit.
14. Munby notes that Article 9 of the European Convention for the Protection of Human Rights protects only religious philosophies which are not “incompatible with human dignity”. However, as Professor Julian Rivers has observed, this notion of human “dignity” may have far reaching implications. Although not the subject of Munby’s address, a variety of Christian opinions, particularly in relation to gender and the family, might be said to offend against a person’s sense of dignity, so these expressions of opinion can then be regarded as unacceptable. Some are already unlawful in certain contexts (as Christian street preachers have found), and more may become so in the future.

15. We may reflect upon the limits of the law. Good laws do not make people good, and regulation may be inadequate even in its own terms. However, laws can restrain evil and encourage good. Bad law, based upon untruth can have devastating effects. For example, Nazi race laws, which led to the Holocaust, were based upon a wrong philosophy of racial superiority and the mixing of races. And the law which has led to the death of millions of unborn children in the UK is (in the Christian view) based upon an imperfect understanding of the humanity of those babies.

16. Christians represent a minority in the nation. However, many people would say that they subscribe to some Christian values, though this may not be underpinned by any metaphysical belief. Christianity is both immanent and transcendent. Christians believe that there is a spiritual dimension, which not all will embrace. But Christian theology encompasses a view of human nature that makes sense of the human condition as it is actually experienced. In the Christian perspective, God's prescriptions are good for all people everywhere because He created humankind. Christians need to demonstrate this to a society that does not share all their beliefs. While, as the experience of Britain from 1740 to 1850 illustrates, the greatest changes in society can occur when people embrace faith, it is the role of Christians to be a prophetic voice in witnessing to the loving character of God in His guidance for the good of all mankind.

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