

LAW, MORALITY AND RELIGION IN THE FAMILY COURTS

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Only a little over a century ago, in 1905, a judge in a family case could confidently opine that the function of the judges was “to promote virtue and morality and to discourage vice and immorality.”¹ So the purpose of the law was the enforcement of morals. And that morality was, of course, Christian. In 1910, the Divisional Court had to consider² whether a landlord was entitled to recover the unpaid rent on a flat let to a woman who was the mistress of the man who actually paid the rent. The decision was that the rent was not recoverable. There was evidence that the woman was in fact a prostitute and using the flat for purposes of prostitution, but that was not the basis of the decision. Darling J described her as “an immoral woman, being the kept mistress of a certain man” and the rent paid by him as “the price of her immorality”. He continued:

“I do not think that it makes any difference whether the defendant is a common prostitute or whether she is merely the mistress of one man, if the house is let to her for the purpose of committing the sin of fornication there. That fornication is sinful and immoral is clear. The Litany speaks of “fornication and all other deadly sin,” and the Litany is contained in the Book of Common Prayer which is in use in the Church of England under the authority of an Act of Parliament.”

If this is thought to be the voice of a different age, it is sobering to recall just how long this view retained its vigour. I recall appearing before Megarry J in 1974 in what we would now call a TOLATA claim. He refused to allow my opponent to amend his pleadings to set up an express agreement between the man and the woman as to the shares in which their home was to be held. They were a most respectable middle-aged couple but they were unmarried. The contract he said, and I have never forgotten his

¹ *Constantinidi v Constantinidi and Lance* [1905] P 253, 278, per Stirling LJ.

² *Upfill v Wright* [1911] 1 KB 506.

words, was “tainted with vice and immorality.” My opponent and I quickly settled the case. Soon after, in 1977, this was consigned to history, when it was finally established that unmarried co-habitation is no longer regarded as an immoral purpose.³

Before coming to a discussion of how the law has moved on, it may be useful to consider how these principles were applied by our ancestors in the context of family law.

Victorian family law was founded on three great pillars.

First, it went without saying that the basis of the family was a marriage that was Christian, or if not Christian, then its secular or other religious equivalent.

Secondly, the relationship of the husband and the wife within that marriage was fundamentally unequal.

Thirdly, the relationship of parent and child was in large measure left to the unregulated control of the father.

The corollary of the second and third of these fundamental principles, when taken in combination, was, of course, that the mother’s rights in relation to her children were precarious. In striking contrast with the position of the errant father, moral failings were enough to separate a mother forever from her child.

The high Victorian approach is wonderfully if appallingly exemplified by *Re Besant* in 1878,⁴ where it was held that the publication by the mother, the redoubtable Annie Besant, of a book condemned by a jury as an obscene libel was, in itself, sufficient grounds for removing her 7-year-old daughter from her custody. The obscene libel which had these terrible consequences for both the mother and her child was nothing worse than a treatise on contraceptive methods. There was nothing at all that we

³ *Heglibiston Establishment v Heyman* (1977) 36 P&CR 351.

⁴ *In re Besant* (1878) 11 ChD 508. See *R v Bradlaugh (Charles) and Besant (Annie)* (1877) 2 QBD 569, (1878) 3 QB 607.

would find obscene in the book; it simply described and recommended methods of birth control.

The most striking application of this approach was the practice, almost universally adopted, of denying an adulterous wife not merely custody of, but even access to her children. As Sir Cresswell Cresswell said in 1862,⁵ it would “have a salutary effect in the interests of public morality that it should be known that a woman, if found guilty of adultery, will forfeit, as far as this Court is concerned, all right to the custody of, or access to her children”.

Standing back from the detail three features of the Victorian approach are striking. First, enthusiastic adherence to the view that the function of the judges was to promote virtue and discourage vice and immorality, secondly, a very narrow view of sexual morality, and, thirdly, the dominant influence wielded by the Christian churches.

Happily for us, the days are past when the business of the judges was the enforcement of morals or religious belief. That was a battle fought out in the nineteenth century between John Stuart Mill and Sir James Fitzjames Stephen (Stephen J) and in the middle of the last century between Professor Herbert Hart and Sir Patrick Devlin (Devlin J). The philosophers had the better of the argument, and rightly so.

The controversy began with Mill’s *On Liberty*, published in 1859. In a famous passage he set out the classic libertarian argument:

“... the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection ... the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.”

⁵ *Seddon v Seddon and Doyle* (1862) 2 Sw&Tr 640, 641, 642.

Stephen's riposte to this was *Liberty, Equality, Fraternity*, published in 1873. He held that "restraints on immorality are the main safeguards of society against influences which might be fatal to it." He saw the purpose of the law, both criminal and civil, as "promoting virtue and preventing vice". The criminal law, he said,⁶ "is in the nature of a persecution of the grosser forms of vice."

The debate was reignited by the publication in 1957 of the Report of the Committee on Homosexual Offence and Prostitution (the Wolfenden Committee), which defined the function of the criminal law as being:⁷

"to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others ... It is not, in our view, the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes we have outlined."

This time the debate began with the judges. In 1957 Lord Denning, speaking in a debate in the House of Lords on the Wolfenden Report, denounced homosexual acts as "unnatural vice" which "strikes at the integrity of the human race." Posing the question "Is this conduct so wrongful and so harmful that, in the opinion of Parliament, it should be publicly condemned and, in proper cases, punished?" his answer was emphatic: "I would say that the answer is, Yes; the law should condemn this evil for the evil it is". In 1959 Sir Patrick Devlin delivered his justly celebrated Maccabaeian Lecture, *The Enforcement of Morals*, also attacking the thesis propounded by Wolfenden. His language, if less colourful than Stephen's, was to much the same effect. He held⁸ that "an established morality is as necessary as good government to the welfare of society", that societies "disintegrate ... when no common morality is observed", and accordingly that "The suppression of vice is as much the law's business as the suppression of subversive activities; it is no more possible to define a sphere of private morality than it is to define one of private

⁶ Ibid, 15, 146, 149.

⁷ Cmnd 247, paras 13-14.

⁸ Devlin, *The Enforcement of Morals* (Oxford University Press, 1965) 13-14, 15, 17.

subversive activity.” The criminal law could properly be used to proscribe any immorality to which the man on the Clapham omnibus would react with “intolerance, indignation, and disgust.” His adversary, Professor Herbert Hart, took much the same position as Mill. The debate raged for some time. It died away without any definitive conclusion, but time has shown that Hart had had much the better of the argument.

A poet famously suggested that ‘Sexual intercourse began / In nineteen sixty-three’. That caustic comment, which Larkin mordantly related to what he called ‘the end of the Chatterley ban’, conceals an important truth. The simple fact is that in so many matters sexual the modern world – our world – is a world which has come into being during the lifetime of many of us alive today. It is a development of the 1960s.

To the Victorians, homosexuality and adultery (though only, of course, if committed by a wife) were naturally beyond the pale. And so, too, as we have seen was mere fornication. But the narrow Victorian view of human sexuality went deeper. One has only to look at the Bradlaugh-Besant litigation in the 1870s to see a society which in such matters was almost unimaginably different from ours. For those who have grown up in the modern world it is hard to comprehend the immense gulf which separates our world from theirs.

The moment at which the world changed can, in fact, be identified even more closely than Larkin suggested. The last hurrah of the ancien regime was not so much the failed prosecution of Penguin Books Limited in 1960 for publishing D H Lawrence’s *Lady Chatterley’s Lover* but rather the famous – or infamous – decision in 1961 of the House of Lords in *Shaw v Director of Public Prosecutions*, for it marked the end, even if not recognised at the time, both of the ancien regime in matters sexual and of the pretension of the judges to set themselves up as guardians of public morality.

The defendant published a booklet which contained the names, addresses and telephone numbers of prostitutes, photographs of nude female figures and, in some cases, details of willingness to indulge in what were described as various perverse practices. He was convicted of various offences, including conspiracy to corrupt public morals.

Upholding the convictions, Viscount Simonds⁹ made wide claims for the role of the judges in the enforcement of morality. In what Professor Hart crushingly described¹⁰ as ‘A fine specimen of English judicial rhetoric in the baroque manner’, this distinguished chancery judge and former Lord Chancellor said this:

“In the sphere of criminal law I entertain no doubt that there remains in the courts of law a residual power to enforce the supreme and fundamental purpose of the law, to conserve not only the safety and order but also the moral welfare of the State, and that it is their duty to guard it against attacks which may be the more insidious because they are novel and unprepared for ... there is in [the] court a residual power, where no statute has yet intervened to supersede the common law, to superintend those offences which are prejudicial to the public welfare. Such occasions will be rare, for Parliament has not been slow to legislate when attention has been sufficiently aroused. But gaps remain and will always remain since no one can foresee every way in which the wickedness of man may disrupt the order of society ... Let it be supposed that at some future, perhaps, early, date homosexual practices between adult consenting males are no longer a crime. Would it not be an offence if even without obscenity, such practices were publicly advocated and encouraged by pamphlet and advertisement? Or must we wait until Parliament finds time to deal with such conduct?”

These judicial assertions were, no doubt, in part a response to the report of the Wolfenden Committee. So too, a little earlier, was Sir Patrick Devlin’s Maccabaeian Lecture. But they were no more than the dying fulminations of an age which, viewed even from the perspective of little over 50 years, now seems almost as remote from us as Nineveh or Babylon. All that Viscount Simonds feared very soon came to pass.

Six years later, in 1967, the world changed. In June Parliament enacted the National Health Service (Family Planning) Act 1967, sweeping away the remaining institutional restraints on the provision of contraception for social rather than purely medical reasons and the remaining distinction between the provision under the NHS

⁹ [1962] AC 220, 267.

¹⁰ Hart, *Law, Liberty and Morality* (Oxford University Press, 1963), 10.

of contraceptives to the married and the unmarried, in July the Sexual Offences Act 1967, decriminalising homosexuality, and in October the Abortion Act 1967, legalising abortion. The ready availability of the contraceptive pill, both commercially and legally, removed the fear of unwanted pregnancy. The legalisation of abortion removed the fear of the consequences of contraceptive failure. Sex was now something to be enjoyed, if one wished, for purposes having nothing to do with procreation. And sex between consenting adults of the same sex was no longer criminal. A fundamental link – the connection between sex and procreation – had been irretrievably broken. We are surely in a world that neither of my mid-Victorian predecessors Sir James Wilde and Sir James Hannen could ever have contemplated.

Looking back on what has happened in recent years, the lesson for us is clear: we need to recognise that, whether we like it or not, we live in ever-changing times. And we need to ensure that our law – and in particular our family law – remains adequate to deal with our modern society

Judges are no longer *custos morum* of the people, and if they are they have to take the people's customs as they find them, not as they or others might wish them to be. Once upon a time the perceived function of the judges was to promote virtue and discourage vice and immorality. I doubt one would now hear that from the judicial Bench. Today, surely, the judicial task is to assess matters by the standards of reasonable men and women in 2013 – not, I would add, by the standards of their parents in 1970 – and having regard to the ever changing nature of our world: changes in our understanding of the natural world, technological changes, changes in social standards and, perhaps most important of all, changes in social attitudes.

As Hart pointed out,¹¹ both Stephen and Devlin assumed a society marked by a very high degree of homogeneity in moral outlook and where the content of this homogeneous social morality could be easily known. He suggested that neither of them had envisaged the possibility that society is, and on one view had already by the 1960s become, morally a plural structure. Be that as it may, it can hardly be disputed that the last few years have marked the disappearance in an increasingly secular and

¹¹ Hart, *The Morality of the Criminal Law* (Oxford University Press, 1964), 39–41.

pluralistic society of what until comparatively recently was in large measure a commonly accepted package of moral, ethical and religious values.

All of this poses enormous challenges for the law, as indeed for society at large. Many of these changes have given rise to profound misgivings in some quarters. We live in a society which, on many of the medical, social, ethical and religious topics that the courts increasingly have to grapple with, no longer either thinks or speaks with one voice. These are topics on which men and woman of different faiths or no faith at all hold starkly differing views. All of those views are entitled to the greatest respect but it is not for a judge to choose between them. The law must adapt itself to these realities but that is a task for Parliament.

So what of the court's approach to religion?

If, in 1910, Darling J seems to have treated the Book of Common Prayer as being part of the law, in 1917 in *Bowman v Secular Society Ltd*¹² the House of Lords decisively rejected the proposition that 'Christianity is part of the law of England'. But the dominating influence of the Christian churches, and especially of the Church of England, survived for a long time.

In recent years we have witnessed enormous changes in the social and religious life of our country. A century ago, a judge could pray in aid the Church of England's Book of Common Prayer as an appropriate statement of the public policy to be applied by the courts. Today we live in a largely secular society which, insofar as it remains religious at all, is now increasingly diverse in religious affiliation.

At the same time as the judges have – rightly – abandoned their pretensions to be the guardians of public morality Christian clerics have, by and large, moderated their claims to speak as the defining voices of morality and of the law of marriage and the family.

¹² [1917] AC 406.

We live, or strive to live, in a tolerant society increasingly alive to the need to guard against the tyranny which majority opinion may impose on those who, for whatever reason, comprise a small, weak, unpopular or voiceless minority. Although historically this country is part of the Christian west and, although it has an established church which is Christian, we sit as secular judges serving a multi-cultural community of many faiths, sworn to do justice ‘to all manner of people’. We live in this country in a democratic and pluralistic society, in a secular State not a theocracy.

Religion – whatever the particular believer’s faith – is not the business of government or of the secular courts, though the courts will, of course, pay every respect to the individual’s or family’s religious principles. Article 9 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 demands no less. The starting point of the common law is thus respect for an individual’s religious principles, coupled with an essentially neutral view of religious beliefs and a benevolent tolerance of cultural and religious diversity. A secular judge must be wary of straying across the well-recognised divide between church and State. It is not for a judge to weigh one religion against another. The court recognises no religious distinctions and, generally speaking, passes no judgment on religious beliefs or on the tenets, doctrines or rules of any particular section of society. All are entitled to equal respect, so long as they are “legally and socially acceptable” and not “immoral or socially obnoxious” or “pernicious.”¹³

The Strasbourg jurisprudence is to the same effect. The protection of Article 9 is qualified in two ways. In the first place, the Convention protects only religions and philosophies which are “worthy of respect in a “democratic society” and are not incompatible with human dignity.”¹⁴ Secondly, whilst religious belief and thought are, subject to that overriding qualification, given absolute protection by Article 9(1), the “manifestation” of one’s religion in “worship, teaching, practice and observance” is subject to the qualifications referred to in Article 9(2).

¹³ Purchas LJ in *Re R (A Minor) (Residence: Religion)* [1993] 2 FLR 163, 171, Scarman LJ in *Re T (Minors) (Custody: Religious Upbringing)* (1981) 2 FLR 239, 244, and Latey J in *Re B and G (Minors) (Custody)* [1985] FLR 134, 157, referring to scientology.

¹⁴ *Campbell and Cosans v United Kingdom (No 2) (Application No 7511/76)* (1982) 4 EHRR 293, para 36.

The Convention forbids the State to determine the validity of religious beliefs and in that respect imposes on the State a duty of what the Strasbourg court has called neutrality and impartiality:¹⁵ “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.”

Within limits the law – our family law – will tolerate things which society as a whole may find undesirable. A child’s best interests have to be assessed by reference to general community standards, making due allowance for the entitlement of people, within the limits of what is permissible in accordance with those standards, to entertain very divergent views about the religious, moral, social and secular objectives they wish to pursue for themselves and for their children.

That said, reliance upon religious belief, however conscientious the belief and however ancient and respectable the religion, can never of itself immunise the believer from the reach of the secular law.

Where precisely the limits are to be drawn is often a matter of controversy. There is no ‘bright-line’ test that the law can set. The infinite variety of the human condition precludes arbitrary definition.

Some things are nevertheless beyond the pale: forced marriages (always to be distinguished of course from arranged marriages to which the parties consent), female genital mutilation and so-called, if grotesquely misnamed, ‘honour-based’ domestic violence.

Some aspects of even mainstream religious belief may fall foul of public policy. A recent striking example is the case¹⁶ where the Court of Appeal held on grounds of public policy that a ‘marriage’ valid under both Sharia law and the *lex loci celebrationis*, despite the manifest incapacity of one of the parties, was not entitled to recognition in English law.

¹⁵ *Moscow Branch of the Salvation Army v Russia (Application No 72881/01)* (2006) 44 EHRR 912, para 58.

¹⁶ *Westminster City Council v C and Others* [2008] EWCA Civ 198, [2009] Fam 11.

Some manifestations of religious practice may be regulated if contrary to a child's welfare. Although a parent's views and wishes as to the child's religious upbringing are of great importance, and will always be seriously regarded by the court, they will be given effect to by the court only if and so far as and in such manner as is in accordance with the child's best interests. In matters of religion, as in all other aspects of a child's upbringing, the interests of the child are the paramount consideration.

There are many examples of the working out of these principles in the family courts. Sometimes, as in the cases involving blood transfusions for the children of Jehovah's Witnesses, the issue is literally one of life or death (using those words in the secular sense). The tenets and faith of Jehovah's Witnesses will not prevent the court ordering a child to receive a blood transfusion, even though both the parents and the child vehemently object. But the clash between a parent's religious beliefs and a child's welfare may arise in many other contexts. Often issues of this kind arise following the breakdown of the parental relationship in a situation where the parents have different religious beliefs or follow different religious observances.

You would not thank me for a mere catalogue of cases. Let me finish with the powerful words of that great judge, Lord Scarman. He was speaking in 1975 but his words still ring true today:

“We live in a tolerant society. There is no reason at all why the mother should not espouse the beliefs and practice of Jehovah's Witnesses ... It is as reasonable on the part of the mother that she should wish to teach her children the beliefs and practice of the Jehovah's Witnesses as it is reasonable on the part of the father that they should not be taught those practices and beliefs. It is not for this court, in society as at present constituted, to pass any judgment on the beliefs of the mother or on the beliefs of the father. It is sufficient for this court that it should recognize that each is entitled to his or her own beliefs and way of life, and that the two opposing ways of life considered in this case are both socially acceptable and certainly consistent with a decent and respectable life ... it does not follow that, because one parent's way of life is more acceptable to most of us, it is contrary to the welfare of the children that they

should adopt the way of life of the other parent that is acceptable only to a minority, and a tiny minority at that.”

The contrast with Lords Devlin and Simonds, it might be thought, could hardly be greater.