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Disciplinary Brief

GOD'S MORAL ORDER AND THE LIMITS OF POSITIVE LAW

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In the Theology Brief on Order, Professor Nigel Biggar made a comparison between God's Moral Order and Human Order. On the one hand, God's moral order is a "divinely created order of values, and the moral principles and rules that it generates." It is a guide to human behaviour, and provides "a framework for human choices and dignifies them with moral significance." Biggar stated that God's moral order is one of "ordered freedom" -- it is created for our liberation and salvation, for basic human good and abundant life. As the Bible says, "the truth will set you free" (John 8:32), I believe there is an inherent freedom in God's moral law. God's law is not repressive but enables us to live in peace and be free from the slavery of sin. Further, God's law is both private and communal, but unlike certain human law, the communal duties will not harm the individual's intrinsic value. God's law respects each person's value and dignity as made in the image of God, making each person whole. God's moral law is summarized as "love your God with all your heart, mind, soul and strength" and "love your neighbour as yourself" (Mark 12:30-31).

Human order, on the other hand, be it social, political or economic, may have different roles, objectives, limits and biases. It may or may not pursue the same end and purpose as God's moral law. It may adopt or allow debatable means to achieve a good objective. Human order may pursue utilitarians or community good at the expense of individual rights. Moreover, human order may not necessarily be compatible with freedom. In Biggar's words, it is subject to "sinful corruption and distortion." (p.2) Compared to divine order, "human order might be found morally wanting." God's moral law and human order may have overlapping values but they can also differ significantly.

From my experience and observation in the discipline of law, I identify several issues in comparing God's moral law versus positive law for discussion.

The Limits of Human Legal Orders

The first issue is the limits of human legal order to realize God's moral goods. Legal order is a specific aspect of human order. It includes the rules and norms issued by the legislature on the people, as well as administrative regulations and judicial decisions. Law can govern, confer power and rights, impose duties

and obligations, or restrict rights and freedom. Law can also determine how law is made, changed and adjudicated. [1] In democratic societies, law is the result of democratic deliberation, agreement and compromises in the legislature. In authoritarian states, law is primarily the manifestation of the sovereign will, which may or may not incorporate the views of the public.

In a free and open society, law is generally founded on some universal moral norms. For example, the law of contract is based on the principles of trust, fairness and equality. Criminal law is founded on the principles of just deserts, punishment of wrongs and rehabilitation of wrongdoers. The principle of the rule of law requires law to be clear, predictable, applied equally, non-arbitrary and to protect fundamental rights. [2] However, no matter how well drafted human law is , there may still be gaps, inadequacies, or areas which need to be updated so that the law in line with social change. Even if the moral values of a legal system on which legal rules are built generally reflect God’s moral law, the human legal order will not be a full and complete representation of God’s morality without distortion and flaws. Human law is like a shadow of God’s perfect moral law. Further, the legal system is administered by flawed human beings. And, there are areas of our lives not falling within the spheres governed by human law. Therefore, people who fully obey human law can find themselves failing to meet God’s moral requirements or acting in contravention to God’s moral law.

The Limits of Positive Law on Private and Family Life

In section 10 of the Brief on Theology, Biggar stated that prohibiting all immorality by law would intrude too much into the private lives of citizens and impose too much social control. I agree. Whereas God’s morality is complete and all-encompassing, only some moral values are best achieved by legal order; others are best advanced by alternative human orders, including social, cultural or economic orders, often by a combination of these. Fundamentally the issue is: what order--legal, social, political, economic or cultural--is more suitable to shape human behaviour to achieve the good in a particular circumstance?

Differences between Western and Traditional Asian Cultures on Order and Freedom

Under traditional British common law culture, law should not interfere into the private lives of citizens. Common law traditions, founded in Britain and extended to most former British colonies, prioritize individualism and liberty. Sir John Laws argued that the common law presumption of liberty includes three propositions: "For the individual citizen, everything which is not forbidden is allowed; but for public bodies, and notably government, everything which is not allowed is forbidden." [3] Second, “every intrusion by the state upon the freedom of the individual stands in need of objective justification.” The third proposition is the principle of minimal interference. As Sir John Laws puts it, the non-utilitarian, “Kantian ethic of justice is a vital building block in the edifice of the common law.”

Biggar pointed out in his Brief that there is a difference between Western and traditional Asian culture on

order and freedom. Whereas Western culture leans towards liberty, traditional Asian culture prefers order and the “subjection of the individual to the requirements of the community.” Order leads to stability, from which there is “peaceful opportunity to plan and build a prosperous material life”. It can be argued that traditional Asian legal cultures derived from Confucian values often prefer a utilitarian viewpoint for the benefit of the community as a whole, instead of prioritizing individual rights and freedom; though nowadays, many Asian countries are not quite so traditional as they once were, as many have embraced modern values in free and democratic societies.

Illustrative Examples

1. Filial Piety Law

One example to illustrate traditional Confucian values and the limit of positive law is Mainland China’s elder protection law, [4] which requires adult children to financially support their aging parents and pay regular visits to them. Here the traditional Confucian value of filial piety is written down as positive law. While it is not uncommon for both Asian and Western countries to impose obligations on adult children to provide financial support to their parents, China’s law is special by imposing a legal duty on adult children to care for the emotional needs of aging parents by paying visits to them.

The rationale behind the law is to protect the rights of elderly parents, to shape and encourage the moral behaviour of loyalty, care and respect by adult children towards their parents, and to alleviate the government financial burden on providing welfare to the elderly. [5]

This law is controversial as people disagree on whether it is desirable to use law to resolve moral and family issues. While for some adult children, the crystallization of filial piety into law may serve as an encouragement and place positive pressure on them to give more care and emotional support to their aging parents, for others the law may create more tension and may damage family harmony when adult children are forced by law to visit their parents unwillingly. This is particularly so if the parent-adult children relationship had already been tense. There may be a sense of coercion, disingenuity and unpleasantness when God’s commandment of “honour your father and mother” and the traditional Confucian value of filial piety are written as positive law backed by fine and imprisonment. Care and visits to elderly parents should be motivated by love and respect, rather than fear of punishment. Some argue that education and positive promotion are more effective ways to foster the virtue of filial piety.

There is also the practical difficulty with enforcement of such law. Chinese societies are averse to bringing matters to the court. Traditionally people value harmony, and only treat litigation as the last resort. This is especially so for disputes within the family. There is family shame attached if the matter is made public in open court. The reputation of the family will be damaged by the legal dispute.

From a macro societal perspective, caring for the elderly parents raises a number of broader issues including social welfare in a rapidly aging society, China’s previous one child policy, challenges created by

migrant workers living in cities in visiting far away elderly parents living in rural areas, and the withering traditional values of filial piety in modern society.

Compared to God’s law, which governs both the heart and behaviour, there is a limit to the capability of positive law to solve a moral problem without going too deeply into underlying relational and social issues. Human law alone may be inapt to achieve God’s morality.

2. The Neighbour Principle in Tort Law

In the British common law, one famous example of transposition of the Bible teaching to positive law is the Neighbour Principle in the tort of negligence, an area of law that imposes legal liability on persons who carelessly cause harm to another person or damage to his property. The neighbour principle is derived from Jesus’ teaching of “love thy neighbour” and expressed in the famous case of *Donoghue v Stevenson* [6] in 1932, in which Lord Akin stated that:

> “The principle is that one must take reasonable care to avoid acts or omissions that could reasonably be foreseen as likely to injure one’s neighbour. A neighbour was identified as someone who was so closely and directly affected by the act that one ought to have them in contemplation as being so affected when directing one’s mind to the acts or omissions in question.”

This principle is the foundation of modern tort law of negligence in the common law world. Basically one is required to “do no harm” to one’s neighbour by taking reasonable care, and in case of breach, one is liable to pay compensation. The principle governs all types of relationships where a person has a duty of care to the other, including producers and consumers, premise occupiers and visitors, employers and employees, etc. The principle continued to develop and expand after *Donoghue v Stevenson* and has become the building block of modern tort law of negligence.

Why is the neighbour principle so grounded whereas the filial piety law is controversial, when both commands are derived from the Bible? First of all, the Neighbour Principle is a “do no harm” principle, a much attenuated version of Jesus’ commandment of “love your neighbour as yourself”. It operates within the existing legal framework, and the duty is one of respect and protection only, i.e. not to injure a person or make him or her suffer a loss. It is based on monetary compensation for the harm done, which is clearly a lower standard than that of God’s moral law. God’s commandment of “love they neighbour” is founded on grace and compassion, which is not the standard that tort law aims to achieve.

From the above two examples, we can see that regardless of legal culture and tradition, there are inevitable gaps between human law and God’s moral law, be it in the purpose of the law, the formulation, the depth, the sphere of governance, the content, the administration, the effects and impacts of the law. The limits of positive law to achieve God’s moral ideals need to be acknowledged by Christians to avoid disappointments and over reliance on positive law to advance Christian moral principles.

Beyond the Limit

The Lord has already shown us what us good, “to act justly and to love mercy and to walk humbly with your God” (Micah 6:8). In creating and administering human legal order, Christians should walk with God and rely on God for wisdom to do justice. Biggar stated in section 8 that moral judgment requires reasoning, creativity and re-imagination. It is not a mechanical application but a process of critical reflection. It is therefore compatible with freedom. Though human order will invariably fall short of divine moral order, Christians can and should continue to use their creativity and re-imagination to strive towards better attainment of divine morality in human orders of all kinds, not only through formal law.

Endnotes

[1] Hart, H.L.A. (1961) The Concept of Law. 2nd Edition, Oxford University Press.

[2] Bingham, Thomas (2011). The rule of law. Penguin Books.

[3] Laws, Sir John (2017). The Rule of Law: The Presumption of Liberty and Justice, Judicial Review, 22:4, 365-373.

[4] Law of the People’s Republic of China on Protection of the Rights and Interests of the Elderly (2013).

[5] Bu, Qingxiu (2021). To Legislate Filial Piety: Is the Elderly Rights Law a Panacea?, Statute Law Review, 42: 2, 219–240.

[6] *Donoghue v Stevenson* [1932] AC 562.

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