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Hard cases and the law

By Mark Barrell

This *File* primarily uses assisted suicide to illustrate the issues generated by 'hard cases' and 'law making' but the same principles will apply to many other issues too, such as abortion, embryo research, fertility treatments, same sex marriage, religious liberty and the freedom of conscience.

The need for law

The law sometimes gets a bad name, but that should not be the case if it is used wisely for the benefit of society. At its very heart the law should be about the ruling authorities providing the boundaries within which human society can flourish. Justice is properly served when all are enabled to live in an orderly way where the state 'encourage[s] what is good for society and restrain[s] what harms it – the true meaning of the rule of law'.[1] Without the rule of law and a commitment to justice we face the possibility of tyranny. With the 800th anniversary of the Magna Carta in 2015 we have been reminded of the need to make even kings and nobles subject to the rule of law.

The law should be just

What society needs from the law, to help it flourish, are rules which constrain that which is wrong and can harm society, but promote that which is good. These then need to be applied and upheld on the basis that all persons are equal before the law. The justice system should provide appropriate punishment for transgressors who do not abide by the law whilst protecting those who are likely to be harmed by lawbreakers. Everyone wants justice to be done and to be seen to be done.

So when is injustice most likely to take place? Gary Haugen, a former UN Director of Investigations on the Rwanda Genocide and now CEO of the International Justice Mission, put it succinctly: '*Injustice occurs when power is misused to take from others what God has given them; namely their life, dignity, liberty, and the fruits of their love and labour*'.[2] Justice must therefore ensure that the power of the strong does not abuse those who are weak.

How is law made in the UK?

In the UK there is no one place or document where all the law is to be found, and there is no written constitution. Our law is governed by statute, most commonly by Acts of Parliament passed by the Legislature, or by the Executive through statutory instruments. In addition, common law is developed incrementally as a result of judicial decisions in the senior courts, through the application of precedent, judgment and judicial review. Finally, European Union law and the European Convention of Human Rights are also binding.

Statute

For new law to be made by the Legislature it must start life as a bill in Parliament. Bills are debated in both the House of Lords and House of Commons and are also scrutinised by committees before being either rejected or approved (and eventually receiving Royal Assent). During the period of the Coalition government (2010 to 2015) 121 bills were passed into law.[3]

Bills are primarily introduced by the Executive, often on the basis of stated aims in manifestos before election, and the majority are set out each year in the Queen's Speech. A notable recent exception was the Same Sex Marriage Bill that did not feature in manifestos or the Queen's Speech. A small number of bills are introduced by individual MPs as private members bills (PMBs). These can frequently be driven by controversial issues that are promoted by particular lobby groups. Time constraints and Parliamentary protocol mean that PMBs are less likely to make it to statute: two notable ones that did were the Abortion Act 1967 and the Adoption Act 1964.

Common law and the judiciary

Judges spend the majority of their time hearing cases and making decisions based on the facts of the case presented before them to which they then apply statute law and the precedents of previous judgments. The result is known as case law. Decisions that are made in the higher courts (the Court of Appeal and the Supreme Court) become binding precedents that must be followed in subsequent cases (the principle of *stare decisis* – 'to stand by decisions'). In this way incremental development occurs in how law is applied until the statute law is changed by Parliament.

In recent years, judges have also been able to determine if the administrative actions of public authorities are lawful, through a process of judicial review. This checks that the process has been lawful in the way that a public body came to a decision.

The problem of hard cases

It is difficult, if not impossible, for law to be drafted in such a way as to provide for every situation. When heart-rending cases arise, there is a natural desire to 'fix' or amend the law to cater specifically for those in difficult situations. In such 'hard' cases, judge-made law (case law through the courts) will be more likely to offer a strained interpretation of the law (or even bend the law) in order to avoid or ameliorate the hard effect of a rigid application of the law in an individual, tragic case. Judicial activism of this kind is prone to being swayed by sympathy for the specific facts of the case, or even by the moral outlook of the judge, rather than guided by what is actually good for society in general. Similarly, legislators (Parliament) can be directly influenced by public opinion, pressure groups or by the media, being persuaded to 'move with the times'. Laws made under these circumstances run the risk of failing to consider overall, long term consequences.

The maxim 'hard cases make bad law' therefore takes as its starting point the premise that an extreme situation (which

will naturally arouse sympathy) is ultimately a poor basis for the making of a general law that should cover a far wider range of less extreme cases. In other words, a general law is better drafted for the average circumstance as this will be more common, rather than for the extreme situation. This idea was first set out in the judgment of the 1842 English case Winterbottom v Wright by Judge Rolfe: '*This is one of those unfortunate cases... in which, it is, no doubt, a hardship upon the plaintiff to be without a remedy, but by that consideration we ought not to be influenced. Hard cases, it has frequently been observed, are apt to introduce bad law*.' [4]

What place mercy?

It was two years after this judgment that a graphic example of the maxim was powerfully displayed in 1884 in the case of Dudley and Stephens. Having had to abandon their ship, these two men argued that it had been necessary for them to eat the cabin boy in order to avoid death during the period before rescue arrived. It was a *cause célèbre* with the public and media. The court did not agree with the defence's assertion and the men were convicted of murder. [5] The law had to be upheld, but it was afterwards that mercy was offered, the sentence commuted, and they served only six months. The court was unprepared to bend the law to offer help to someone suffering individual hardship. The law relating to murder needed to be upheld, as any revision would be detrimental to wider society. What *was* available was discretion as to the punishment given, and mercy shown.

Great cases make bad law too

In the United States, Oliver Wendell Holmes Jr, in 1904, used the maxim in a judgment, stating that: '*Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their importance... but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment*.' [6]

In a place where judicial activism is more prevalent, through the Supreme Court of the United States, the 'great cases by virtue of their national importance, interest, or other extreme circumstance, make for poor bases upon which to construct a general law…creating laws poorly suited for far less publicly tantalising but far more common situations.' [7] It follows therefore that law is better drafted under the influence of the 'average' case rather than the 'exceptional' one and we should be wary of using the more extreme cases either to generate case law or to shape statute.

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Is it always true?

It is right to say that the use of the adage is not always helpful and whilst it remains frequently quoted it can sometimes be used inappropriately. This point was made by the legal scholar, Glanville Williams, in 1957. Despite reservations, he maintained that: '*What is certain is that cases in which the moral indignation of the judge is aroused frequently make bad law*.' [8]

What is true is that tough cases should make us think carefully about what the law currently does, and whether there are things to learn, and if necessary persuade us to reshape the law. But just because the law has to address tough situations does not mean that it needs to be reframed by them, especially where key foundations of society need to be upheld: for example, in the protection of vulnerable people. Changing the law to enable those in tragic circumstances to be helped to kill themselves is likely to lead, in turn, to the legalising of euthanasia that would put vulnerable people at risk of exploitation and abuse by those who have an emotional or financial interest in their deaths.

It is important therefore to consider carefully what really is at the heart of the call for change.

A case in point

The media has in the recent past highlighted tragic cases where patients with long term degenerative neurological conditions have been refused 'the right to die'. Take for example the appeals brought by three men, Tony Nicklinson, Paul Lamb and 'Martin' in the Supreme Court. There is of course huge sympathy for the men involved and the court, in its judgment, highlighted the issues they faced, describing the appellants as men, 'each of whom was suffering such a distressing and undignified life that he had long wished to end it, but could not do so himself because of his acute physical incapacity'. As a result Lamb, supported by Nicklinson, asked that: 'the law should permit him to seek assistance in killing himself in this country and, if it does not, it should be changed so as to enable him to do so'. Martin sought clearer guidance 'with regard to prosecuting those from whom he would like advice and assistance in connection with killing himself'. [9]

Yet do their particular and hard circumstances mean that, because of a natural desire to 'show compassion' for them, the law should be changed to enable the killing of another human being? Where a person of sound mind intentionally kills another human being the law calls it murder. The argument put forward is that, on the grounds of compassion for these hard cases, the law should be changed to reflect a positive attitude to 'mercy killing'.

But do those very difficult situations really provide the best backdrop for the introduction of new legislation? Would such a law truly be compassionate or would such 'hard cases make bad law'? If they do, then the law of unintended consequences will prevail and we are likely to get more than we bargained for, as can be seen in those countries where the law has already been changed.

Isn't everybody doing it?

There are now a number of places around the world where assisted suicide has been legalised, including a few countries in Europe, most notably the Netherlands, who became the first to legalise this, and Belgium, a country where the law specifically provides for euthanasia, with no mention of assisted suicide, although in practice, these coexist. Belgium has now become the first to legalise the practice of euthanasia for children of any age, and the Netherlands allows it for children as young as twelve and separately for disabled babies under the Groningen Protocol.

In 1984, the Supreme Court in the Netherlands established a set of criteria that should be followed for a physician to cause the death of a person by euthanasia without fear of prosecution. From 1984 to 2002 a series of legal decisions led to a widening application of euthanasia for the hard cases, including people living with chronic

depression (mental pain) to children who were born with disabilities. This led in 2001 to the Dutch Parliament officially legalising euthanasia and it coming into effect in April 2002. In the same year Belgium's law came into effect permitting euthanasia for those in a 'medically hopeless' situation – the 'hard' cases.

Both these countries now give us clear demonstrations of what happens when the law is changed – even when it is done in the name of compassion. In Belgium the rate of euthanasia increased eightfold between 2003 and 2013, [10] whilst in the Netherlands 4,829 people received euthanasia in 2013, over three times more than when then law was introduced. [11] The effect of the legal change has been a significant shift towards killing – and as the practice has normalised, so cultural attitudes have shifted. Euthanasia is now so prevalent in Belgium that around one in every 60 deaths of patients euthanised under GP care is of someone who has *not* requested euthanasia. [12] A culture of death develops that numbs the response to these figures.

Releasing the floodgates

The brief overview above shows that what might have been promoted as 'progress' and as 'compassion' for those who are suffering has, through legislation, allowed the idea of killing oneself (or being killed by others) to be normalised and increase dramatically whilst not protecting vulnerable people.

Opponents of European 'human rights' legislation have argued that the courts have become a tool for reflecting the views of the age, rather than carefully interpreting the laws made by elected legislators. In the UK, the Supreme Court has been pushed on the assisted suicide front in the Nicklinson case, referred to above. Whilst their Lordships intimated that they might be prepared to extend the law, Lord Neuburger said that before doing so 'we should accord Parliament the opportunity of considering whether to amend section 2 [of the Suicide Act] so as to enable Applicants, and quite possibly others, to be assisted in ending their lives'. [13] What Lord Neuberger has overlooked is that Parliament has considered this issue several times and his words might now be considered a judicial 'threat of activism', motivated by the hard cases, without consideration for the long term consequences. If case law cannot deal with the nuances of every matter, then only Parliament should consider whether further legislation is required.

That means that Parliament needs to understand fully what is in place now and face the fact that the examples of the Netherlands and Belgium continue to demonstrate that a change to the law is extremely unlikely to protect those who are most likely to be vulnerable – and importantly, if a change is made what message is being given to society about its attitude towards people and the intentional taking of life.

'Don't fix what ain't broke'

Historically, British law has established clear principles and held the line on them, whilst allowing for some discretion to temper justice with mercy in their application by prosecutors and judges, such as whether or not to bring a case to court and what sentencing tariff to apply. In the UK today, the law still forbids the premeditated, intentional killing of another, whether it is done in the name of compassion or necessity. However, the Director of Public Prosections' discretion to prosecute and the judges' discretion when it comes to tariff, following a conviction, remain. This means in practice that the penalties that the law holds in reserve act as a powerful deterrent to law-breaking, ensuring that very few cases come to court and that sentences are lenient.

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Why is retaining the current law best for society?

This is a justice issue and for Christians the issue of justice is rooted in the nature and character of God – he is just. God is described as 'the Rock – his works are perfect and all his ways are just. A faithful God who does no wrong, upright and just is he.' [14]

As a just God, he gave a model law to show his concern for justice and the rule of his Law, [15] ordaining a legal system with judges for the benefit of society [16] and requiring that even kings and authorities should be under the rule of law. [17] Central to that law was the Decalogue, or Ten Commandments. These were written in stone as a permanent reminder of that which was most important, including the command forbidding murder. [18] But the Jewish Talmud tells us that there are 613 commandments in the Torah; 248 Positive Commandments (dos) and 365 Negative Commandments (do nots) by which the society of ancient Israel was to be regulated. [19] Many of these were in the form of 'case law', applying the principles of the Decalogue in specific situations. Those responsible for the dispensing of the law were to do so without partiality – and vulnerable and weak people were to be protected and provided with equal access to justice. [20]

But this just God who demands judgment and punishment for wrongdoing is also a merciful God who does not repay us according to that which our sins deserve. [21]

God provided for fallen humans, whether Jews or Gentiles, laws to regulate society – a system of justice to put right wrongs, tempered with mercy for those who would admit their wrongs, until he would finally and comprehensively deal with the problem of evil through Jesus Christ. Millennia later that pattern remains with those who are now in authority, as God's agents for righteousness and justice in the world, to encourage good and restrain evil. [22] Law is therefore essential, both to prescribe boundaries for a just society and then to enforce them without prejudice or partiality.

To that end the Christian desire is to uphold that which is good – life, dignity and the protection of vulnerable persons – and not to allow injustice to take place as a result of failing to defend those values. However hard the cases may be, changing the law to violate an absolute moral principle (such as in allowing assisted suicide) is not justice in a biblical sense.

A battle for hearts and minds

Charles Moore, a journalist, commenting on the Debbie Purdy case in August 2009, summed up well the strategies being used to move the legal 'goalposts' (The Purdy case involved a woman with multiple sclerosis seeking legal assurance that her husband would not be prosecuted should he accompany her to Switzerland to commit suicide at the Dignitas facility.) In Moore's

article 'How judges are using hard cases to make bad law', he wrote:

'Miss Purdy is part of a political argument. Her case has been advanced by the pressure group Dignity in Dying (formerly the Voluntary Euthanasia Society). Much better for their cause to have an individual, fighting a 'personal battle', than the dry, general arguments required in legislation. The pictures of a woman with a probably terminal illness put opponents on the back foot. This is a propaganda war.' [23]

We are fickle human beings, swayed by public opinion and by the media. It has therefore to remain the responsibility of the law – those making it, applying it and upholding it – to provide strong and firm foundations upon which society can flourish, and to protect those who are poor and vulnerable. It is equally important when tough and difficult issues arise that everyone, and especially our elected Parliament, should seek to understand the facts, recognising the cultural effects and engage in a reasoned, informed debate about what is truly best for society. Given the wider issues and values at stake, greater consideration and thought must be given to what the real and long term effects a change to the law would make, especially when exceptional cases are being highlighted by pressure groups that seek to influence public opinion in order to move the goal posts.

Hard cases should certainly prompt reflection, and remain subject to prosecutorial and judicial discretion, but do not necessarily imply that the law needs to be changed. What might appear at first sight as a needed change, to benefit those facing a particular set of difficult circumstances, will more often than not have longer term unintended and negative consequences for society in general. Hard cases are indeed hard, but jettisoning fundamental principles of protecting the life and liberty of each individual, especially vulnerable ones – the young, the infirm and incapable – is not the answer. Providing a 'suffering presence' [24] (Stanley Hauerwas' definition of compassion) and, crucially, introducing people to a God who walks with them and a hope that cannot fail – these are the 'answers' that, as God's people, we can embody.

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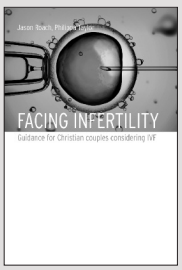

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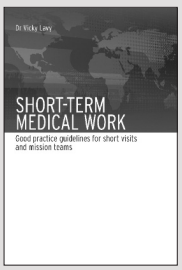

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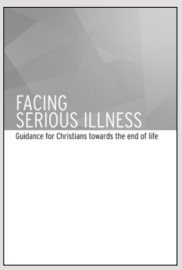

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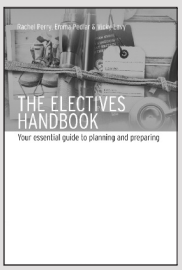

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