ETHICS AND THE ROLE OF LAW

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I was once sitting knee-to-knee with a woolsack full of judges at the State Opening of Parliament, and I asked them how far they were concerned with ethical issues in their work. They said "not at all"; such issues were the task of jurisprudence, not of legal practitioners. But I believe that ethics are bound up with the actual practice of the law and I want to point to three ways in which they interact.

1. THE PROLIFERATION OF LAW REPRESENTS THE FAILURE OF MORALITY

The law can express morality, and the rule of law can represent the highest good in society. Law shapes, supports and furthers co-operation. But law is not a complete and self-sufficient means of controlling human behavour; it simply closes loop-holes in what is already agreed and understood in society. Modifying a saying of Burke, I would suggest that "the moral cohesion of society is inverse to the complexity of its law".

A good example of this is to be found in the Patronage (Benefices) Measure 1987. The previous system of ecclesiastical patronage operated reasonably well on gentlemen's agreements (as to consultation etc) and under pressures of necessity (e.g. where Parishes were difficult to fill). A few articulate Parishes, however, did have a choice and the new legislation results from dissatisfaction in those Parishes, leading to pressure for change; and also from pressure from "quite appalling holes" for patrons to advertise, in the belief that this technique would lead to difficult vacancies being filled. After only a few months, the system introduced by the new Measure is proving unworkable and wasteful. The problem is that it is rooted in distrust of those who operated the previous system.

Another example is the Warnock Report. It is clear that scientific research is difficult to subject to legal control, because the directions that it will take are by its nature unpredictable. But it is equally clear that there is an ethical dimension to such research. In the 1970s, long before any successful experiments in genetic research, the first discussion amongst scientists took place as to the ethics of such experiments. An early paper by Edwards identified many of the ethical issues. But as research progressed and the public became aware of it, anxieties rose. In 1978 the Medical Research Council set up an ethical committee, and guidelines were produced on a couple of pages of A5 paper. Financial sanctions, in terms of research funding, were used to enforce the guidelines and this proved perfectly effective. After the Warnock Report was published in 1985, the Medical Research Council and the Royal College of Obstetricians and Gynaecologists replaced this Committee by a voluntary licensing body. More recently, the government has made proposals for a statutory body, though these have not been implemented.

This represents an alternative way of recognising the need for control in a sensitive area – an authority and a code of practice, but no detailed legislation. There is reliance partly on professionals and partly on lay people. In my view this is the only model allowing sufficient flexibility to control a changing field of study

without artificial limits. If one does resort to law and it is unenforceable, or too blunt an instrument, this can be very difficult. I quote from Sir Thomas Taylor: "Beyond the sphere of legally enforceable duty, there is a vast range of behaviour in which the law should not intervene".

Obedience to the unenforceable is a part of living in a civilised society. But it does become more difficult in a pluralistic society such as the modern United Kingdom where there is a lack of consensus on many values. It is also difficult on the international plane, where matters affect the whole world and one cannot rely on "instinct to do the right thing". Examples might be taken from environmental issues, or genetic engineering. But the International Atomic Energy Agency appears to be a workable body.

A sad feature of the modern Church of England is the proliferation of legislation to cope with mistrust which should not exist in the first place. The legislation on the ordination of women has gone deep into the mire of detail, simply because the level of mistrust is so high.

2. JUST LAWS NEED AN ETHICAL BASIS

Law is about obligations, as well as commands. (Law should be obeyed because it is right, not simply because it originates from a recognised law giver). A pure command theory cannot cope with the existence of international law, where there is no sovereign law-giver and few sanctions exist.

The form of law may appear sufficient to give it authority (as in the Third German Reich), although the content of the law is abhorrent. This is another important point which the command theory would fail to recognise.

There have been discussions in the British Council of Churches about the Sanctuary movement. Should one advise Christians to break the law, on the grounds that they perceive British immigration laws to be unjust? There was a complete division on this point; the established churches said "the law is the law", while the free churches said "what matters are the individuals affected". I am glad to say that in this instance the legalists prevailed.

Some may attempt to quote ethically neutral laws, like those about property. While the detailed law may be ethically neutral, it ultimately relates back to the ethical principle that the holding of property is a social good. This leaves the question how ethical principles are to be discerned, and one may wonder what future there is in a natural law basis. What happens if a firm ethical foundation cannot be discerned?

Much law is based on practical reasonableness and can therefore take account of the diversity of ethical attitudes. There is no need to "read off" the law from natural ground rules. But one cannot use "practical reasonableness" to resolve ethical differences. Alastair MacIntyre, for instance, has spelt out the fundamental incompatibility of theories of justice based on desert and those based on equality.

The former ethic can lead to the concept that a certain piece of property is "mine" because I own it, the latter may lead to the conclusion that the property should be somebody else's, because they have the greater need. Our culture has no way of weighing the claims of these two arguments; "weighing moral claims" is an inappropriate and misleading concept in this situation.

Each of us operates within a separate received tradition as to what is just, what is rational. We share a worldwide concern on human rights, and attempt to bring together very diverse ideas on fundamental values on which society should be based. International law is not enough to support human rights, and certainly cannot take on board the "eschatological" view that humans have rights because of what they may yet become. Moral reasoning has pushed into new fields, with the idea that human rights represent hard-won insights into what is humanly achievable. The basic principle "treat a person like a human being, and you will get one" is qualified by attempts to say "*this* is how you treat a person like a human being".

3. THE LAW CANNOT HELP AFFECTING THE MORAL CLIMATE OF SOCIETY

This principle brings us straight into the area of the famous Hart/Devlin debate on the enforcement of morals.

I was listening once to Dr Garret FitzGerald, when he was Taoiseach of Ireland, discussing minority rights in the Republic, with reference to such areas as divorce and contraception, and pointing to the very different understanding of the role of law in Britain. The social teaching of the Roman Catholic Church is enshrined in the Republic's 1937 Constitution. There was then a consensus that the law *should* influence the moral climate of society. As a rule in England, by contrast, the law is not seen as offering a back-up to morality, and recent moves have been in the direction of liberty of the individual. In Ireland, moral harm is often seen as among the harms which should properly be prevented by legislation. To quote from pronouncements of the Roman Catholic Bishops' conference; "the environment for moral living should not be made more difficult"; "the law can make decent living more or less difficult for the young". While we might initially agree with this sort of approach as Christians, if we as Protestants look at the Republic of Ireland, we see what this can mean from the point of view of the minority, when the law enforces values which are not ours. Can the Irish problem be solved without Ireland deliberately becoming a more open and pluralistic society?

Returning to the UK, anybody sitting in Parliament when it is discussing family legislation, cannot fail to be aware of a tension between the sense that marriage and family are basic institutions in society, to be supported in the interests of stability in society, and the desire to remove difficult moral decisions from the courts and provide simple solutions to family problems. The latter tendency has prevailed in the fields of legitimacy, divorce and taxation. For example, when legislators have asked "What legal difference should marriage make? Should it have advantages over cohabitation?" an attempt has been made to find a practical answer by concentrating on the needs of children. This has been difficult because we do not really know enough about causal relationships between family problems and children's problems. Is it right or wrong that parents should stay together in misery for the sake of the children?

A final attempt has been made to resolve this dilemma by drawing a sharp distinction between public and private morality, or individual and collective morality. This is dangerous: what individuals are *must* depend upon the character of social institutions and vice versa. In the end, I conclude that despite the opinion of the Judges quoted in my opening words, the field of ethics and the practice of law are inseparable.