ONE MAN'S HOLY GRAIL, ANOTHER'S HERESY

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Much of human history has been dominated by rules, defining boundaries of right and wrong, regulating everyday life and protecting the weak from the strong (and sometimes *vice versa*). These rules draw a relatively clear line between what is moral and what is immoral. Though the specifics of rules vary from society to society, there has always been a common need for a body or branch to interpret those rules and apply them to factual situations. The law is no different. It defines the boundaries of the legal and illegal, and regulates everything from birth to death and beyond.

It is commonly stated that the judiciary merely interprets and applies the law rather than make it. However, even in that act of interpretation and application, laws are coloured by the minds of judges deciding upon them. Furthermore, a gap in the law will inevitably be filled by the judiciary. Even rules which are supposedly well-established may fall prey to reinterpretation, overruling or modification. Try as they might to leave the law intact, the judiciary shapes it with every judgment they make. It is also necessary for the judiciary to interpret the law - as pointed out by the third element of A.V. Dicey's Rule of Law which states, 'General principles of the constitution (as for example the right to personal liberty, or the right of public meeting) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts'.[1]

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[1] AV Dicey, *Introduction to the Study of the Law of the Constitution* (8th edn, Liberty Fund Inc 1915).

However, judges are as human as the rest of mankind. They have their flaws, imperfections, prejudices and so on. Is it then right to base their decisions on value judgments and moral considerations? This paper sets out to establish that morality-based value judgments should not be the sole or substantial basis of judicial decisions.

Defining Morality

Derived from the Latin word *Moralitas* (manner, character, proper behaviour); the common understanding is that morality is a code of conduct, and a means by which the *correctness* or *wrongness* of something can be judged. The Stanford Encyclopaedia of Philosophy provides the following definition:

> The term 'morality' can be used either:
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> 1. [D]escriptively to refer to some codes of conduct put forward by a society or, some other group, such as a religion, or accepted by an individual for her own behaviour or
> 2. [N]ormatively to refer to a code of conduct that, given specified conditions, would be put forward by all rational persons.[2]

There are many sources of morality (descriptively speaking) and these codes are derived from religion, society or even the individual. Morality will always differ between societies, individuals, time and place. For a long time, slavery was not only considered natural, but it was also seen as the right of certain people to own slaves. Since the rise of natural rights and an understanding that all men are

[2] Gert Bernard, 'The Definition of Morality', The Stanford Encyclopaedia of Philosophy (Summer edn, 2009) <http://plato.stanford.edu/archives/sum2011/entries/morality-definition/> accessed on 17 July 2011.

equal, slavery has been institutionally abolished. Nietzsche articulated it best when he said:

> Whoever has overthrown an existing law of custom has always first been accounted a bad man: but when, as did happen, the law could not afterwards be reinstated and this fact was accepted, the predicate gradually changed; - history treats almost exclusively of these bad men who subsequently became good men![3]

Natural Law basically states that laws should be based on objective moral principles ascertained by the nature of the universe which can be determined through reason. Thus, Natural Law has always been identified with the idea that law must fit with morality. Aquinas is attributed with stating (in not so many words) the term *Lex Injusta Non Est Lex*, which, in English, means 'unjust law is not law at all'.

Indeed, Cicero, the Roman orator whose thoughts on law influenced much of medieval jurisprudence, stated that 'A legislature which said that theft or forgery of wills or adultery was lawful would no more be making law than what a band of robbers might pass in their assembly.'[4]

However, morality is too subjective a concept to be allowed free rein within the law. As can be seen from Cicero's words, even a band of robbers may have their own morality which may entail theft or forgery. Much of medieval Christian thought was of the opinion that the laws of man were impure and thus needed to be tempered by God's law.[5] This too has changed over time. Morality today would

[3] F Nietzsche, Daybreak: Thoughts on the Prejudices of Morality in Maudemarie Clark and Brian Leiter (eds), (CUP 1997) 18.

[4] MDA Freeman, *Introduction to Jurisprudence* (8th edn, Sweet & Maxwell 2008) 98.

[5] ibid 99.

perhaps lean towards allowing gay marriage, which in itself is prohibited by the Christian faith (and many others).[6]

The subjectivity of morality does not allow for there to be a universal moral principle, each opinion stepping upon the feet of another opinion. Yet, neither is without merit. This is one of the main failings of the theory of Natural law.

Refining Parameters – Links to Natural Law

It is not easy to attack the concept of morality in its entirety. Science and society have demonstrated that morality is an intrinsic part of the human psyche. Indeed, like the multi-headed Hydra of Greek mythology, morality comes from multiple directions: God or Religion, Society, and Individual morality. Each of these three facets, though well-intentioned, has led to much grief, uncertainty and injustice when applied to the law.

I would like to pre-emptively state that morality should not be seen as solely religious. While it is true that much of society's morality came as a result of religion, religion itself is not the sole source or definer of morality. A gradual shift away from religiously determined moral values can be seen.[7]

These three heads are the basis upon which this paper seeks to highlight the dangers of moralistic value judgments in judicial interpretation. Before proceeding, a small caveat must be stated, in that morality is no doubt valuable and, in exceptional cases, morality may be the only way to achieve justice.

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6 An example of this would be the recent legalisation of gay marriage in New York.

7 MHEC, 'Humanism: Why, What and What For, in 882 Words' <http://mhec.humanists.net/HUMNISM.HTM> accessed 24 July 2011.

Dangers of Dogma

Perhaps the clearest example of religious morality can be seen in the laws governing individual rights which are connected with religion. One such law was the offence of blasphemy. It is described as:

> The offence of speaking matter related to God, Jesus Christ, the Bible or the Book of Common Prayer, intended to wound the feelings of mankind or to excite contempt and hatred against the Church by law established, or to promote immorality.[8]

Its origins span as far back as the 16th century when blasphemy was a common law offence. A clear example was seen in the case of *Rex v Taylor*[9] in 1676 where Taylor was prosecuted for verbal attacks on the Christian faith. Sir Matthew Hale LCJ stated that:

> Such kinds of blasphemous words were not only an offence to God and religion, but a crime against the laws, State and Government, and therefore punishable in that Court… Christianity is parcel of the laws of England and therefore to reproach the Christian religion is to speak in subversion of the law.[10]

Indeed, up until as recently as 1977, prosecutions for blasphemy continued in the case of *Whitehouse v Lemon*[11] whereby a suit was brought by the Whitehouse against Gay News Ltd for the publication of James Kirkup's poem 'The Love That

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8 WJ Bryne, *A Dictionary of English Law* (Sweet & Maxwell 1923) 122.

9 [1829] NSWSupC 30.

10 Elliott Visconsi, 'The Invention of the Crime of Blasphemy: Rex v. Taylor (1676)' (2008) 103 Yale Department of English & Yale Law School Research Paper 30 <http://ssrn.com/abstract=1429506> accessed 24 July 2011.

11 [1979] 2 WLR 281.

Dares to Speak Its Name'. The poem describes a Roman centurion's homosexual love for Jesus Christ.

The esteemed Lord Scarman here stated that:

> I do not subscribe to the view that the common-law offence of blasphemous libel serves no useful purpose in modern law...The offence belongs to a group of criminal offences designed to safeguard the internal tranquillity of the kingdom.[12]

Here we find an intersection between law and religious morality. However, this convergence of law and religion arguably does more harm to modern society than good. I do not argue that morality is bad; I am of the opinion that it is an essential part of a harmonious society.

Freedom of religion is an important freedom, as noted by Hugh LaFollette that 'If a child is not taught any substantive beliefs, she comes to think that ideas and beliefs are largely irrelevant.'[13] I find myself agreeing with this statement. It is in the formative years that much of a child's attitude, even later as an adult, is formed. The ability to tolerate contradictory views and ideas is a cornerstone of a modern democratic society that must be upheld.

The philosopher, John Stuart Mill[14] also said as much. He was of the opinion that the freedom of thought and belief is essential because it is the best means of ascertaining the truth of anything. A society that quells all dissension and all contradictory thought will never be able to test the veracity of their own convictions. Indeed, Mill further states that suppressed views frequently turn out to

[12] ibid.
[13] Hugh LaFollette, 'Freedom of Religion and Children' (1989) 3 (1) PAQ 75.
[14] Fred Wilson, 'John Stuart Mill' (*The Stanford Encyclopaedia of Philosophy*, 2007) <http://plato.stanford.edu/entries/mill/> accessed 23 July 2011.

be true, or at the very least hold some elements of truth from which society may benefit. Even if these views were not true, the mere act of discussion and debate will demonstrate the strengths and weaknesses of a society's chosen beliefs. These truths, untested, inevitably fall into the realm of dead dogma rather than a living, growing system.[15]

With this in mind, how then can it be argued that blasphemy is a necessary offence? In fact, it cannot – even less so today - with the rise of secular humanism and values that place importance on universal values rather than merely religious (and therefore selective) values. If part of the purpose of the law is to ensure the development and prosperity of the society it governs, then clearly that society must be allowed to grow freely.

It is arguable that because religion and morality are inseparable (at least to some), religious morality must be taken into account in the law. This gives rise to a conflict: which religion is more right and hence, will prevail? Which faith deserves to be legally protected to the extent of criminal sanction? Indeed, even though blasphemy protected Christianity, it later evolved to only protecting the beliefs of the Anglican denomination.

This conflict is clearly a cause of friction in society. Evidence provided by the Methodist Church to the Select Committee on Religious Offences in England and Wales[16] stated that, 'In a multi-faith society, a law which protects only one faith is bound, in certain circumstances, to become a provocation to the others.'

Pursuant to that, the offence of blasphemy was abolished by Parliament in the *Criminal Justice and Immigration Act 2008*. Despite the centuries of argument

[13] LaFollette (n 13).
[16] Select Committee on Religious Offences in England and Wales (*Submission from the Methodist Church*, 5 July 2002) <http://www.publications.parliament.uk/pa/ld200203/ldselect/ldrelof/95/95w57.htm > accessed 25 July 2011.

that the very fabric of society relies on the upholding of religion, such enforcement has been removed with no ill effects. Indeed, it has been over three years since the passing of the statute and English society has not fallen apart. So the strongest justification for religious enforcement at law has crumbled. Parliament itself is moving towards greater separation of state and religion. To argue that religious morality is necessary in the law is folly.

60 Million People Can't Be Wrong…Can They?

"X amount of people can't be wrong!" is a claim we have all heard very so often. Here, I argue that in deciding a case, judges should not look merely at the morals of society. A case should be decided on its own merits regardless of a society's view on the matter. It must be stated that even though a judge's personal morality may be in line with society's general morality, we shall leave aside, for now, the discussion of a judge's personal morality.

We turn instead to the case of *Airedale NHS Trust v Bland*,[17] a case that has long been seen as the legalisation of passive euthanasia. Though many a law school assignment has been written on this case, I shall attempt to summarise as accurately as possible the issues in relation to the topic of this paper.

In *Bland*, the hospital treating a 21-year-old persistent vegetative state (hereinafter referred to as 'PVS') victim applied to the court for a declaration of the lawfulness of ceasing nourishment for the victim, Anthony Bland, which would lead to Anthony dying from starvation. It was a sad state. As noted by the House of Lords, the family lived in despair for years seeing Anthony's state. Doctors were at a loss and no one quite knew what to do: his brain stem remained intact, but no cortical activity was registered despite repeated attempts to illicit some reaction.

[17] [1993] All ER 821.

Nonetheless, nourishment was provided via an intravenous line and this sustained Anthony's life.

Part of the family's testimony was that having known Anthony in his healthy state, they knew that he would not have wanted to remain this way, or so they claimed. Whether this was true or not is irrelevant. What is relevant to the discussion is the court's disposition.

Reading from the judgment of Lord Mustill, it seems clear that the court had already made up its mind to allow the ceasing of life support – with the issues centered mainly on circumventing the *imperfect* law[18] at the time. It must be noted though, that there is no specific statement by their Lordships about having made their decision. We must read between the lines.

It is pointed out that moral debates are not for the court's consideration. It was rightly stated that such debates are policy concerns which are the purview of Parliament.

Lord Mustill states:

> Any necessary changes would have to take account of the whole of this area of law and morals, including…all issues commonly grouped under the heading of Euthanasia. The formulation of the necessary broad social and moral policy is an enterprise which the courts have neither the means nor in my opinion the right to perform. This can only be achieved by democratic process through the medium of Parliament.[19]

[18] ibid 893.
[19] ibid 888.

This is not the only instance where their Lordships acknowledge the fact that this is the domain of Parliament, yet the decision to uphold such a declaration was made. Lord Mustill, in contemplating the ramifications of a decision to uphold the declaration states that, 'The effect of the declaration…would be to create, through a binding precedent, a new common law exception to the offence of murder.'[20] They did in fact create a new common law exception, which is not in itself an issue as the courts have the power to decide on the cases brought before them. However, it is the fact that the decision, having already been made and now sought to be made legal, that I take issue with.

In seeking legal avenues for upholding the declaration, Lord Mustill goes through a number of possible defences. He discusses the State's interests in preserving life, different applications of the doctrine of causation and so on. But what was the purpose of having done so given the fact that His Lordship had stated that it was Parliament's decision? Why was there such dogged persistence to decide in favor of Anthony Bland's death? It seems that, at least in my humble opinion, Lord Mustill had decided to uphold the declaration.

Given that their Lordships' minds had already been made up, the question now turns to what it was that possibly swayed Lord Mustill to this decision. His Lordship's discussion of the ethical question, though brief, is telling, when His Lordship states: '…I still believe that the proposed conduct is ethically justified since the continued treatment of Anthony Bland can no longer serve to maintain that combination of manifold characteristics we call a personality.'[21]

He speaks of ethical justification and the best interests of the community, an issue which their Lordships took great consideration in:

[20] ibid.
[21] ibid 896.

> The large resources…now being devoted to Anthony Bland might in the opinion of many be more fruitfully employed in improving the condition of other patients, who if treated may have useful, healthy and enjoyable lives for years to come.[22]

It seems likely that it was an awareness of the public's views on this matter that possibly brought their Lordships to this decision.

At the time when the case was still current, polls and surveys consistently showed support for doctor-assisted euthanasia:

> Surveys of public opinion are notoriously fickle, but in this area they have been remarkably consistent, both over time and as between themselves. Although the precise numbers have varied somewhat, nationwide polls have been unanimous in showing a majority to be in favour of legalised voluntary euthanasia, with highly respected sources showing support as high as 82%.[23]

More statistics show a similar acceptance for euthanasia within the public, but it would serve no useful purpose to show these numbers.

Law is the primary concern of the judiciary, and, as the definer of boundaries within a society, the law must, arguably, take into account society's moral views. Yet, therein lies the danger; society's views on whether something is right or wrong may not necessarily be so. As such, it cannot be a basis of law. The law, as a social construct, is meant to govern all universally and therefore cannot be burdened by the views of some to the detriment of others.

[22] ibid 893.
[23] NatCen Social Research, *The British Social Attitudes Report* (1996).

A decade has passed since the case of *Bland*, and yet it remains a controversial issue and for good reason. Since then, there have been reported instances of patients with PVS who have awoken from their torpor. For example, Andrew Devine, a victim of the Hillsborough disaster who suffered from PVS, awoke just one year after Anthony Bland was put to death.[24] Indeed, medical advances have shown that certain drugs[25] have been able to produce positive results in PVS patients, even allowing them to converse with family.

Society is a composite of individuals. Just as individuals can be limited in their foresight of the future or be mistaken, so too can decisions based upon an opinion of the said composite of individuals. Who is to say that Anthony would have wanted to end his life? Only Anthony can say so with certainty. The law cannot be so uncertain especially if it is to govern everyone equally. Protection and punishment must be accorded to all without exception. What the said protection or punishment is must be for Parliament to determine, not the courts.

"I Am the Law"

As dangerous as religious and social morality is to the law as an institution, personal morality is more insidious an influence than the both of them. Personal morality is comprised of various factors such as upbringing, environment, religious beliefs and more. It is for this reason that morality can vary to such a startling degree between individuals.

Though a judge is an officer of the court and state, he remains an individual with his own personal convictions. But as mentioned above, the law must govern all

[24] Annabel Ferriman, 'Flicker of Hope from Brain Damage Victim Astonishes Doctors' *The Independent* (London, 27 March 1997) <http://www.independent.co.uk/news/flicker-of-hope-from-brain-damage-victim-astonishes-doctors-1275217.html > accessed 26 July 2011.

[25] Steve Boggan, 'Reborn' *The Guardian* (London, 12 September 2006) <http://www.guardian.co.uk/science/2006/sep/12/health.healthandwellbeing > accessed 26 July 2011.

equally and without exception. To judge based on one's own moral beliefs is nothing short of arbitrary. Arbitrary law is an anathema to justice, and undermines the very purpose of law itself. As Edmund Burke once said, 'Law and Arbitrary Power are at eternal enmity.'

In a case closer to home, the High Court of Kuala Terengganu decided that Mohd Ashraf Hafiz Abd Aziz, a man who underwent gender reassignment surgery in Thailand, would not be able to legally change his name and gender on his Identification Card. In arriving at the decision, High Court Judge Datuk Yazid Mustafa stated that the purpose of the sex-change procedure was not meant for an individual to change his or her gender but to allow the individual to feel comfortable with his or her body.[26] At the time, excerpts from other publications may show the motivations of Yang Arif in this case.

Datuk Mustafa told the Star Newspaper that, 'If the court allows a name change, we fear it might have an impact on society. It is a difficult decision.'[27] He further stated that Ashraf's application was dismissed on three grounds, namely chromosome count, genital organs during birth and internal organs,[28] hence affirming the grounds established in *Bellinger v Bellinger*.[29]

He also stated, 'After looking into this case from all angles and taking into consideration its implication to the society, the court rejected the application'.[30]

[26] A Azim Idris, 'Ashraf Fails in Bid to be "Aleesha Farhana"' *New Straits Times* (Kuala Lumpur, 19 July 2011) <http://www.nst.com.my/nst/articles/12ma/Article#ixzz1Tg1zo ugf> accessed 31 July 2011.

[27] 'Malaysia Court debates on Name after Sex-Change Operation' *Yahoo News* (19 August 2011) <http://www.boloji.com/index.cfm?md=Content&sd=NewsDetails&NewsID=283 25> accessed 31 July 2011.

[28] Bernama, 'Court Rejects Man's Bid to Have a Woman's Name' *Malaysian Digest* (Kuala Lumpur, 18 July 2011) <http://www.malaysiandigest.com/news/27451-court-rejects-mans-bid-to-have-a-womans-name.html> accessed 31 July 2011.

[29] [2003] UKHL 21.

[30] Bernama (n 28).

However, this begs the question: Which *angle* was the judge looking from? Perhaps Datuk Mustafa looked at its implications towards society, but in regards to that, was this truly a decision based on the law or did his own personal prejudices colour his judgment.

In every news report made, Yang Arif spoke more about *social implications* than any actual application of the law. In fact, an earlier case in 2005 had established a precedent on the matter.[31] In the case of *JG v Pengarah Jabatan Pendaftaran Negara*,[32] Johor High Court Judge Dato' James Foong stated that four factors should be considered when deciding such a matter: the chromosomal factor; gonadal factor (presence of testes or ovaries); genital factor (including internal sex organs), and; psychological factor.

Senior Federal Prosecutor Adha Abu Bakar argued that the female nature of the applicant was only external and not internal. Yang Arif further stated that no medical evidence was provided by the applicant, but this could not have been so. Why did the court omit to call the applicant to testify as to his/her own psychology? As far as is known, the applicant suffered no mental illness and nothing prevented the court from accepting his/her affidavit attesting to his/her mental state in so far as gender is concerned.

Furthermore, in regard to internal sexual organs, in the earlier case of *JG v Pengarah Jabatan Pendaftaran Negara*, it was unlikely that the internal sexual organs of the applicant in that case had been altered, yet his/her application was allowed by the High Court. So why does this discrepancy exist? A possible suggestion to the question could be that Datuk Mustafa's decision in this case was driven by a personal moral belief rather than the application of the law. Indeed, the transgender community, in suggesting an argument in support of the applicant's contention, cited Article 5(1) of the Federal Constitution. The Article reads:

[31] *JG v Pengarah Jabatan Pendaftaran Negara* [2005] 4 CLJ 710.
[32] ibid.

> Everyone has the right to the highest attainable standard of physical and mental health, without discrimination on the basis of sexual orientation or gender identity. Sexual and reproductive health is a fundamental aspect of this right.[33]

> Here, personal morality has cost the applicant not only his/her constitutional rights, but literally his/her life.[34]

Conclusion

Morality is not an inherently evil thing. For all the philosophical battering this paper has undertaken, morality is needed to temper the cold and clinical nature of the law. Indeed, it is the court's willingness to evolve with the changing times that has allowed the common law to attain such flexibility. It was through morality that, *inter alia*, slavery was abolished, wives could own equitable shares in the matrimonial home, and, the families of accident victims could claim for psychological harm. I do believe that morality must be present in the law, but its role and influence in the court must be minimized if the rule of law is to be truly upheld.

Morality is a wholly human concept that is so intrinsic to society that complete separation of one's logic from one's morality is nigh impossible. However, the role of judges necessitates that they be the better men and women. The very well-being of society and individual citizens hangs upon the decisions of these robed beings. It is with this great burden they are called upon to sacrifice their fallible humanity and attempt to achieve that which is godly.

[33] News Editor, 'Candlelight Vigil for Aleesha Farhana (1985-2011)' *Frida* (Singapore, 29 July 2011) <http://www.fridae.asia/newsfeatures/2011/07/29/11059.candlelight-vigil-for-aleesha-farhana-1985-2011-sat-jul-30?n=sec > accessed 31 July 2011.
[34] The applicant died of heart failure and severe depression on 30 July 2011.