***Nicklinson* and the Ethics of the Legal System**

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**I. Introduction**

The judgments of both Lord Huxtable and Lord Coggon provide us with a number of rich and interesting issues to explore. Indeed it is not possible, in a commentary this short, to truly explore all of the concerns which are raised by these two judgments either separately or combined with the original judgments of the Supreme Court in the case. Instead, I wish to highlight some themes I think are crucial to understanding the difference in opinion between the two.

Perhaps the most crucial distinction between the two judgments is one that neither of the judges expressly state but is implicit in the way they address the various issues before them. Since this is a case which has an impact upon the whole of society, both Lord Huxtable and Lord Coggon spend a considerable amount of time with ethics on a macro level. By this, I mean that both Lord Huxtable and Lord Coggon are concerned about the ethics of the system as a whole. They are concerned with the role that society plays in the decision as well as the proper role of the courts, Parliament and other societal actors. This is to be expected in a case of the importance that Nicklinson has. Crucially, though, they address these issues in significantly different ways.

**II. The Ethics of the System at Large**

Lord Huxtable, if I understand his position correctly, sees societal ethics as distinct. These societal ethics are not, then, individual ethics scaled up but separate principles which are predominately at play in a group context. In particular, he references consistency, clarity and justice as fundamental principles required of a legal system (See paragraphs [3] and [6]). For example, he claims that clarity is ‘necessary in order to ensure law’s proper functioning as law’. ([5]). He further specifies that law must be ‘both clear and just’. ([8]). He even notes that the court has sometimes ‘found’ actions to be criminal if they offend justice (although, in reality, courts in such cases are creating rather than finding anything). ([11]). He sees these as institutional requirements which the system must provide in order to be an ethical one, irrespective of the instantiation of those principles in individual cases. This does not mean, of course, that those principles do not apply in individual cases. Nothing that Lord Huxtable says prohibits the claim that, for example, individual decisions ought to be consistent or clear. He does, however, appear to claim that a system’s coherence, clarity and justice do not depend on individual cases. A system might, for instance, be just overall even if it is not so in a particular case.

This is why Lord Huxtable cites Lon Fuller as an important influence. For Fuller, the institution of law is vital because it is necessary for the provision of good order. As a consequence, there are distinct and separate moral principles which are relevant and necessary for the functioning of law. Lord Huxtable does not use Fuller’s complete list of eight principles, but he does reference at least three which do have complements in the ones described by Fuller.

The one principle which does not correspond to Fuller’s list of eight (or at least not directly), however, is the most important. That is the principle of compromise. Lord Huxtable is particularly concerned about the law’s ability to maintain a middle ground, especially on issues of moral dispute. For Lord Huxtable, since the question of assisted dying is one which is subject to legitimate moral debate, the most valid thing for the Court to do is to avoid forcing a decision on one party or the other ([13]-[15]). It must maintain a morally neutral stance which prioritises neither view of the assisted dying debate. Parliament, should they wish to grasp the nettle, is entitled to do so; the courts are not. So, while Lord Huxtable insists that ‘we are alert to the moral dimensions of the case at hand’ he immediately then goes on to note that ‘we find the morals of the matter are murky and muddled.’ ([15]). As a consequence, since the morals are unclear and the courts are not designed to deal specifically with these sorts of moral cases, then the best the court can do is to maintain a studied neutrality and seek a resolution which does not put the views of one side above the other. In the case of assisted dying, this means a position where the current prohibition maintains its symbolic force even if, in particular cases, very little happens to people who might decide to die. This, Lord Huxtable argues, allows us to continue to express our adherence to the general principle of the sanctity of life, while still allowing needed flexibility in cases in which it might be appropriate (however those are designated). ([17]). He does think that there are ways in which the courts can help to further clarify this compromise but his general concern is with the maintenance of that compromise.

Lord Coggon, in his typically blunt style, disagrees with both larger points about the role of ethics in law and the benefits of compromise in this situation. First, it appears that Lord Coggon’s position is that, at least for the principles relevant to this case, the principles that are relevant for the social system (including the courts) are merely the aggregate of the principles which exist in an individual case. He does not ever explicitly set out this position. However, nowhere in his judgment does Lord Coggon make reference to the same overarching system-wide principles that Lord Huxtable does. Instead, his concern is with whether there is an ‘unjustified interference with the appellants’ rights’ ([16]). Moreover, he states that ‘if there is an interference with Mr Lamb’s freedom to have assistance in ending his life… its justification is founded on the protection of health and of the rights and freedoms of others.’ ([11]). In other words, the rights of others might provide a justifiable reason to prevent someone from doing something but he does not specify any case where the interests of the system as a whole (except as an aggregate of those individual interests) can do so. This is all consistent with Lord Coggon’s concern that ‘too easily may a specific answer be given on the basis of too general a principle’ ([10]). It is the specific, then, and not the general (as it with Lord Huxtable) that forms the basis of Lord Coggon’s decision. Thus, while it is conceivably possible (although extremely implausible) within Lord Huxtable’s view to have a system which was just even if no case within that system satisfied the requirements of justice, it is not possible for Lord Coggon. In order for a system to be just, the decisions within it must also be just. Neither, of course, would hold that each and every case must be just in order for the system to be. Such a view would be difficult if not impossible to implement since general rules, no matter what they are, invariably throw up bad results. However, Lord Coggon takes the position that those individual decisions are how we evaluate whether the system overall is just. To that extent, an unjust decision in an individual case becomes a system-wide failure and it is the purview of state actors, including the judiciary, to make sure that does not happen.

**III. Compromise and Ethics**

This distinction between the views of Lord Huxtable and Lord Coggon on the ethical grounding of the legal system at large is of crucial importance because of the compromise position which Lord Huxtable takes. Lord Coggon, on the other hand, does not believe that compromise is a just ethical conclusion and this would appear to be at least partially because of his view about the ethics of the system generally. Compromises in general are not problematic but in the context of ethics they can be quite tricky things. Since good compromises generally involve both sides getting a bit of what they want while neither side gets all of what it wants, this is likely to cause problems within the ethical principles which underline our decision-making. In order to demonstrate this, it is perhaps better to start with a comparative example of a simple compromise. Let us suppose that I and a friend wish to go see a movie. I want to see a big-budget action film but my friend wants to see a character-driven drama. Let us further presume neither of us can convince the other to our view and there is no film which fits both of our criteria (a big-budget action-filled character drama?). We might then in that case decide upon a compromise. I may wish to see the action film because I am particularly interested in mindless fun; my friend might want to see the character drama because of its high-quality acting. We might then settle upon a third movie – a comedy, say - which had some mindless fun (but not perhaps as much as the action movie) but also had good acting (but not as good as the character drama). Neither of us, then, gets entirely what we want, but we get enough of what we want to agree.

Ethical principles do not work in quite the same way as movie characteristics. Principles might be mutually exclusive. More importantly, it may be hard to compromise one’s moral principles while still professing to adhere to them. If I agree to compromise my principles, then I am either agreeing to the application of moral principles which I do not think appropriate or I am agreeing to the application of my own moral principles becomes limited in cases where I do think they apply. I am subsuming my principles, in such a case, to the greater good (whatever we might mean by that). I would be saying something like ‘I do not think that principle is a valid one at least in this case (otherwise, I would use it) but I agree to its application nevertheless’ or ‘I think my principle is valid in this case, but I agree not to apply it.’ The act of compromise, then, seems to defeat the very idea of the principle in the first place.

This is not a problem for Lord Huxtable since, for him, the compromise happens at a macro-level and thus no individual decision must be compromised in this way. For Lord Coggon, however, the institutional compromise would have to involve individual compromises and thus he is against it. That is why Lord Coggon thinks the court would ‘shirk its responsibility’ if it attempted to pretend to ‘moral neutrality’ ([1]). As a consequence, he believes that the decision that needs to be made is the defensible one in individual cases which will mean the decision of the system as a whole is appropriate. Lord Coggon would find it morally abhorrent if an individual’s case failed because it had to be sacrificed to save the overall system through a compromise. He further stresses that this is a duty that falls to all of the actors within the system. For him, it then applies as equally to the courts as it does to Parliament. He does not accept the argument presented by Lord Huxtable (and others in the case in the Supreme Court) that this is a decision best left to Parliament or other more democratically-elected actors to determine. If the decision at the individual level is incorrect, then it ought to be changed. Doing so can only make the system as a whole better.

**IV. Ethics in an Individual Case**

Notice, though, that this is a deep structural difference between the positions of the two judges. Lord Coggon could have raised objections to the application of the rule that Lord Huxtable suggests. He could, for example, have contested what is meant by legitimate moral dispute or whether this case was an example of such a dispute. Further, he could have queried whether the two suggested clarifications from Lord Huxtable would really provide the ethical gains Lord Huxtable asserts that they will provide. Lord Coggon’s dispute, however, is not with the application of the rules in the way that Lord Huxtable recommends. Instead, it is with the rules he suggests. Lord Huxtable argues that there is such a thing as a system-ethic which is a macro-level ethical guide which is distinct and separate from the ethical principles which might guide decisions in specific cases. He, consequently, prioritises the collective decisions over the individual ones. Lord Coggon, on the other hand, sees macro-level ethical decisions as the aggregation of individual cases and dependent upon them. He therefore prioritises the individual decisions since they form the foundation and precursors to whatever macro-level ethics a system has.

Lord Coggon’s objections, however, are not just with Lord Huxtable. Instead, he puts particular focus on the use of ethics in these individual cases. He derides Lord Sumption (and by extension, any who hold similar views) for the position that ethical principles are broad, abstract monoliths ([9] – [10]). These, Lord Coggon states, do not provide any practical benefit. They do not provide any reason sufficient to justify one decision over another. They do not provide any reason sufficient to convince someone that their position is incorrect. What they are instead are crude, clumsy soundbites that we fling at each other but which have little actual impact in our decisions. As he indicates, ‘high-sounding but inapplicable principle neither helps the resolution of the immediate case, nor the sound development of law’ ([10]). Instead, what Lord Coggon would prefer is that we have more specific, targeted principles which apply in particular instances which can better justify and explain the decisions we make. He therefore urges us instead of looking to a broad, unspecific principle like ‘an absolutist moral concern about the sanctity of life, or indeed an “expressivist” concern about the message that the law should be seen to send about the value of human life’ ([11]), we should look to more specific ideas like the protection of the health, rights and freedoms of others ([10]). This, according to Lord Coggon, is more useful because it is one which can be subject to evidentiary proof, evaluation and (possibly most importantly) argument. It is a principle we can see whether it actually does apply and, if so, how. It is not a mere buzzword to be applied haphazardly in defence of a decision we have already made. It is instead a principle which can help up make these sorts of difficult decisions.

The end result of Lord Coggon’s views is an expansion of the powers of the court to make these sorts of ethical decisions. He objects to the view, presented in the decision of the Supreme Court among others, that this is not an appropriate case for the courts to decide. He does not believe that judges should not be trusted, either by themselves or others, to reach a decision in these sorts of cases. Indeed, he sees it as being part of a ‘functioning, democratic system’ for judges to engage in these cases even if there is ‘moral controversy and ethical disagreement’ ([7]). These are real cases involving real people with real issues and Lord Coggon argues that the resolution of these sorts of cases is not beyond the power of the courts. If the power exercised by the courts under Lord Coggon’s position is greater than that under Lord Huxtable’s, he also requires more from the judges making these decisions. They are required to engage more specifically with ethical principles and do so in a way which is more useful and provides greater support for the arguments they wish to provide. It would not be possible, under Lord Coggon’s view, to simply provide the broad, unreflexive, ethical claims which have long plagued the decisions of the courts. He wants courts to do ethics, but wants those ethics to be more robust and pragmatic. This would require judges to not only engage with these ethical views more systematically but also for them to engage with ethics generally at a deeper level than they currently do. It would be difficult for a judge to act as Lord Coggon wants without at least attempting to gain an expertise in ethical language and argumentation. Lord Huxtable does not require such a commitment from judges. A judge taking Lord Huxtable’s view would merely need to understand the general societal compromise which was at issue. They need only understand the general ethical duties that the system requires such as consistency, compromise, clarity, and justice. So, while the gains for the judiciary might be modest under Lord Huxtable’s views, so are the requirements.

**V. Conclusion**

In conclusion, the decisions of Lords Huxtable and Coggon in *Nicklinson* are not merely about what ought to happen in cases such as those of Mr Nicklinson or Mr Lamb. These individual decisions are, of course, important. However, it is more important as to how the system is structured to determine those sorts of cases and who has the ultimate authority to decide. Lord Huxtable would rely on Parliament, the democratic process and compromise to reach decisions. Lord Coggon sees no bar to the courts involvement and urges them to explore the rights, duties and specific ethical principles which might be involved in each case. The strengths of these views will depend on some crucial factors, not least what kind of judge the reader envisages. While I have my own personal views and they align more with the position of Lord Coggon than Lord Huxtable, that does not mean all readers will feel the same. The views of both are worthy of our attention and consideration.