

Legal Decision Making – A Christian Perspective

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Introduction

Since the days of my early days, I have maintained a clear-eyed opinion about Law and its functions; it has always been to me, the pivotal societal system keeping society in order – a body of rules which keeps human activity and behaviour within. The rule of Law ensured that we not only lived free, with individual rights, but also that we lived in a fair and just society, a society which would punish or censure those who broke the Law, and protect the vulnerable and marginalised. Such is the general perception of all reasonable men and women in society about what Law is and what it does.

The Criminal Law is the body of Law which determines whether certain behaviour constitutes a crime or not. The function of the Criminal Law is largely to set the parameters within which the Criminal Justice System operates. The function of the Criminal Law is largely to set the parameters within which the Criminal Justice System operates. The object of the Criminal Law is to ensure that individuals who commit a crime are punished – and that the individuals punished who for a crime are the individuals who are responsible for crime. ¹

Legal Decision-making is thus at the heart of the success or otherwise of the Criminal Law's operations. In my *Doctoral Thesis* ², I argue that Wrongful Convictions/Miscarriages of Justice occur when the Legal decision-making gets locked up in extremes (*Law's Universal nature/the Particularities of the Case*). Thus, Legal Decision-makers must avoid extremes in Legal decision-making so as to avoid Wrongful Convictions/Miscarriages of Justice.

Further to this, I argued that Legal decision-makers can best avoid extremes by engaging in *Middle decision making* – deciding in the Middle – where they have the benefits of both Law's Universal nature and the Particularities of the case, to help them reach the right conclusion. In order for them to be able to do this effectively, I argued, Legal Decision-makers must be prepared to abandon Traditional forms of thinking – they must be flexible and willing to allow the facts of the case to shape their Legal decision-making process – and they have to pay attention to the life story of the individual defendant and respond to it in their Legal Decision Making.

The purpose of this article then is to offer a Christian perspective on *Middle Decision Making* by taking keen note of Jesus' approach to the Law and Legal decision

¹ Molan, M. (2001), *Criminal Law*, London, Old Bailey Publishing.

² Laryea, E. (2016), *Wrongful Convictions/Miscarriages of Justice, Law as a System, and the Story of the Little Girl*, University of Southampton.

making. It will be shown in quasi-legal cases below, that Jesus conducts His Legal decision making process in a manner which avoids extremes by balancing the weight of the Law with the weight of the Particularities of the case. By this, we see that Jesus reaches the objectively right conclusion in each case.

There are lessons on offer for Judges from a discussion and study of how Jesus operates as a Legal decision-maker. The article will magnify those lessons as being lessons which can be applied within the Criminal Law, and more broadly, across all other areas of Law.

Jesus the Lion and the Lamb

The Bible describes Jesus as the son of God, whom God brought forth into the world, for the sole reason of delivering to mankind a better way of relating to God – a way that was based on Grace and Love – a very anti-nomian path.³

After Moses had led the Israelites out of slavery in Egypt, they crossed the Red Sea and made their way to the foot of Mount Sinai where God gave Moses the Ten Commandments. The Ten Commandments form the basic foundations of the Western Legal Systems and Western Law, especially Western Criminal Law – they form the basis of almost all the societal norms that have existed for thousands of years in Western society. The Ten Commandments were the very first set of clearly coded, comprehensive Laws which were adopted by human civilisation. God gave the Jewish people these Laws for the purposes of regulating their conduct and ensuring order and Justice in their society.⁴

From the point of its adoption, the Ten Commandments were enforced with strict observance. The keepers of this Law, and those who sat in Judgement in enforcing the Law among the Jewish people, were the Pharisees and Priests. The Pharisees enforced the Law and made judgements with such extreme rigidity, that the people suffered from the harshness of the Law and its inflexibility. It is not at all surprising then that the Law became nothing more than a burden on the people – those who sat in Judgement in applying the Law (Pharisees) applied it in its complete rigidity and complete harshness – they applied the Law in its fullness even in those cases where they were very much aware that the outcomes of such application were undesirable, unjust or wrongful. Jesus' mission on earth was to lessen the burden of the Law by mollifying its extremities and rigidities.

Though this was His mission, Jesus, the master of Love and Grace Himself understand the importance of rules - He understood that Love needed rules and rules needed Love, both depending on one another. He, the purveyor of Grace and Love recognised that Grace and Love would not work without rules. It is therefore no surprise then, that Jesus warns his followers not be under the illusion that He being a purveyor of grace and Love came to abolish the Law⁵.

Though His mission was to save man from the extreme harshness of the Law, Jesus states that He came to establish the Law, making it ever firmer. The notion of Jesus being both the purveyor of grace/Love and yet at the same time, being a strong

³ Holy Bible, The Four Gospels.

⁴ Holy Bible, The Book of Exodus, Chapters 19-24.

⁵ Holy Bible, Matthew's Gospel, Chapter 5, Verse 17

enforcer of rules is what is captured by the Bible's reference to Him as having a dual personality - the personality of both a Lion and a Lamb.

In many ways, the Lion and the Lamb are two directly opposite animals – they both represent two extremes. The Lion is a carnivore, a devourer of its prey's flesh – the Lamb on the other hand is a herbivore, not a devourer of flesh but rather an eater of pasture. The Lion is a self-reliant animal that is set in its ways – the Lamb on the other hand is not so self-reliant, it needs to be cared for consciously in order for it to survive. The Lion is a fierce, violent and harsh animal – the Lamb on the other hand is a gentle, non-violent animal who is sober at all times. For the purposes of this article, the 'Lion' represents the characteristics of Law and its Universal nature – harsh and rigid. The 'Lamb' on the other hand represents the characteristics of the Particularities of a given case – definite and mollifying. Jesus had both the characteristics of a Lion and a Lamb which served Him quite well in His Legal decision-making process.

It is in John's book of Revelations that we see the 'Lion and Lamb' reference. While imprisoned by the Roman Empire on the remote desert penal colony of Patmos, the Apostle John had a revelation of Jesus Christ which he describes in chapter five (5) of the book of Revelations. In verse 5 of that Chapter, he describes Jesus as a Lion; 'And one of the elders said to me; weep no more, behold, the Lion of the tribe of Judah, the root of David, has conquered, so that He can open the scroll and its seven seals.'⁶

In verse six of the same Chapter, John refers to Jesus as a Lamb: 'And between the throne and the four living creatures and among the elders I saw a Lamb standing as though it had been slain ...' Jesus being a Lion and at the same time a Lamb offers some confusion, a contradiction even, and perhaps a complexity in terms of our understanding of who Jesus is. Surely it would be much simpler and not all contradictory if He were one or the other – either a Lion or Lamb, either the Universal or Particular - very much like how Law prefers things to be; simple, predictable and certain. As *Zennon Bankowski* advises however, life is never that clear-cut, and it is never that clean a slate. It is always something of a mess but we must get a hold of it as it is and make something constructive of it. We have to confront ourselves as we are and live our life from the middle.⁷

To be in the middle is to be like Jesus – it is to have both extremes in hand – to be both the Lion and the Lamb – to have the capability both harsh and fierce but sober and gentle at the same time – and to navigate the tensions that exist between the extremes creatively by deciding in the middle. *Bankowski's* take on what deciding in the middle entails begins with a referral to the work of *Klaus Gunther*. *Gunther* draws a line of difference between the justification of norms/rules and their application. The justification for applying a norm/rule, he says, is arrived at

⁶ We know that John is referring to Jesus here because Jesus came from the tribe of Judah (Matthew 1:1-25) – and when John talks about the Lamb being slain, He is referring to the Son of God, who is Jesus (Isaiah 53:7)

⁷ Bankowski, Z. Davies, C. (2000) 'Living in and Out of Law'. In Oliver P, Scott S.D & Tadros V, *Faith in Law*, Oxford, Hart Publishing, pp.33-51

through the using of universal criteria. However, it is another matter altogether when it comes to applying that norm/rule which we have justified through the Universal.⁸

For *Gunther*, the problem seems to be that we justify the application of a norm/rule by universalistic means – we do not say that the rule should or should not apply because its application is justified or unjustified by the particularities of the case, we rather say that ‘the rule must apply because it is the rule and thus must be applied regardless’. We thus must pay heed to the particularities of the case. A transplanting *Gunther’s* thoughts into legal decision making leads to the conclusion that legal decision-makers have to do two things in deciding a case. First, they have to decide what the Law to be applied means, and then they have to decide whether or not the law applies in the particular case and how. For the first, the criteria is quite Universalistic – but for the second, since they have to do with the particularities of the case the criteria will be more Particular.

Bankowski says that the latter will be the case because a potential subject of the law could always ask of the rule, “why me”?⁹ This is what *Detmold* means when he says that Law is practical and its application must be practical therefore.¹⁰ Such is the meaning of occupying the middle and make legal decisions from the middle; it means to be both the Lion and Lamb – to be both harsh and gentle – to be both Universal and Particular – to have both extremes in hand so that Law can be smart, flexible and reasonable, being a Lion but also being a Lamb when the facts demand it – being rough but also having the ability to be gentle when the facts demand it – having both the Universal and Particular in hand and managing them both as the facts guide – all this so that we can be more ‘Universal’ than ‘Particular’ if we need to be, or more ‘Particular’ than ‘Universal’ if the facts demand.

Much of our experience of Jesus in the Scriptures is one of a man very much in the middle. We see Him occupying the middle and making judgements/decisions from the middle in many instances. There are many lessons that could be learned by taking a close look at Jesus’ decision making process and noting how he occupies the middle and makes decision from there.

In the scriptures, we see that Jesus engagement with a Legal decision-making process occurs mostly during His exchanges with the Pharisees. The Pharisees were followers of a certain order which existed mostly during the last two centuries of the Second Jewish Common Wealth i.e 152 BC-70 AD.¹¹ They were a group of people pledged to a strict observance of Levitical purity, to the avoidance of closer association with the impure ignorant boors, to the scrupulous payment of tithes and the regulations handed down by former generations including those that are not even recorded within the Laws of Moses.¹²

These are the sort of characteristics that the Pharisees were associated with in the Synoptic Gospels and the Acts of Apostles. They were strict keepers of the Law and were Formalistic and Universalistic in every sense of the word whenever they engaged in the task of applying the Law to a set of facts. They believed most

⁸ Gunther, K. (1993), *The Sense of Appropriateness*, Albany, State University of New York Press, pp15-23

⁹ *Ibid* 7, p.39

¹⁰ Detmold, M. (1989), Law as Practical Reason, *The Cambridge Law Journal*, Vol 48(03), pp.436-471

¹¹ Sanders, E. (1992), *Judaism*, London, SCM Press, pp.45-49

¹² Finkel, A. (1964), *The Pharisees and the Teacher of Nazareth*, Leiden, Brill Publishing, pp.2-3.

unequivocally, that the rules as stipulated in the Law of Moses and as handed down as tradition ought to be followed in every case without exceptions whatsoever.¹³ For them, the Law was the Law and therefore had to be applied and adhered to in all cases regardless of the facts/particularities of the case.

Though Jesus was Himself a man of the Law, declaring that He in no way came to do away with the Law, He most often disagreed with the Pharisees and with their very Formalist and Universalistic approach to applying the Law. Jesus was most often angered by their strict demand that the Law was the Law and that it should be followed/applied in all instances irrespective of the facts of the case.¹⁴

In Jesus' view, the Pharisees represent Universalistic keepers of the Law who are in perpetual pander towards Law's Universal nature whenever they were to apply the Law to facts. They would on all occasions, apply the Law even if its application was not justified by the facts, and they would do so even if the result of such an application would yield an injustice. With the exception of the money changers whom Jesus once drove from the temple in anger,¹⁵ the Pharisees are the only group of people that Jesus condemned vehemently.¹⁶

It is beneficial for us to take a closer look at Jesus' altercations and interactions with the Pharisees because therein lies the art of legal-decision making from the middle which Judges can draw lessons from. We find one of such interactions and altercations in Chapter 15 of Matthew's Gospel. After Jesus had walked on water, He crossed over to Gennesaret where people recognized Him and brought their sick to Him – the sick touched the edge of His cloak and were healed.

Jesus – A Man in the Middle at Gennesaret

Whiles at Gennesaret, the Pharisees (teachers, keepers and Universalistic appliers of the Law) came to Him from Jerusalem and asked; 'why do your disciples break the tradition (Law) of the elders? They don't wash their hands before they eat.' In a sharp and unequivocal reply to the Pharisees, Jesus asked why they (the Pharisees) break the command of God for the sake of their tradition. Jesus went on to say to them; 'God said honour your father and mother¹⁷ ... but you say that if anyone declares that what might have been used to help their father or mother is devoted to God, they are not to honour their father or mother with it ... you hypocrites.'¹⁸

Jesus' rebuke to the Pharisees in this instance was over their fixation with applying the Law in all instances irrespective of the facts. To the Pharisees, the keeping of tradition justified the application of a rule – their legal decision-making process in this regard was very much within the Universal – hence their charge of illegality on account that the disciples do not wash their hands, and their indirect suggestion therefore that he who does not wash his hands before eating breaks the Law.

¹³ The Pharisees were the Judges in those days.

¹⁴ MacArthur, J. (2008), *The Jesus you can't ignore*, Nashville, Thomas Nelson Publishing, pp.173-174

¹⁵ Matthew 21:12-13.

¹⁶ Jobling, M. *Jesus and the Brood of Vipers*, Milton Keynes, Treasure House Creative, pp.5-6.

¹⁷ Exodus 20:12, Deuteronomy 5:16

¹⁸ Matthew 15:1-7

Jesus' response to them is that of a legal-decision maker who decides in the middle. Jesus calls the Pharisees hypocrites because of their formalistic/Universalistic approach to rules. For Jesus, it is the facts of a particular case which should justify, or otherwise, the application of the rule – the facts of the case are what should determine whether a rule is applied or not.

What Judges can learn from Jesus in this instance is this: *deciding in the middle means placing a hold on applying the Law if necessary, and doing so because it is important for Law to be applied without rightful purpose, otherwise it produces wrongful convictions/miscarriages of justice; we simply need to ask whether the application of the rule is justified by the facts.*

This is why Jesus posits strongly that it would not be against the Law for one to help their father and mother with a resource that might have been devoted to God – the facts would not justify an application of the Jewish Law ('resources devoted to God shall not be used for any other purposes') in such a case seeing as the outcome would be undesired/unjust (the suffering of parents in need). Jesus is in this instance engaged in 'middle decision-making.' The application of the rule must be practical and with purpose – we must be able to suspend the rule if applying it is not warranted by the facts, and if its application is not practical or appropriate.

Jesus – A Man in the Middle At the Judge's Home

Another of Jesus' altercations with the Pharisees, where we see Him engage in legal decision making from the middle can be found in the account in Luke's Gospel¹⁹ where Jesus visits a Pharisee (keeper of the Law and a judge) at his home. The visit took place on the day of the Sabbath – and there were other Pharisees who were invited to this gathering. Whiles at the house of this Pharisee, Jesus noticed a man in the room (not a Pharisee) who was suffering from an abnormal swelling of his body. Jesus turned to the Pharisees (Judges) and other experts of the Law who were there and he asked them; 'is it lawful to heal on the Sabbath or not.'²⁰

Jewish Law at that time concerning the Sabbath was that it was a day of rest, and as such by Law, no work was done on the day of the Sabbath. Legalistically speaking, the act of 'healing' constituted 'work' under Jewish Law at the time. The act of healing would therefore be unlawful if it were done on the day of the Sabbath. The Pharisees were quiet when Jesus asked them whether it was lawful to heal on the Sabbath – but given their approach towards legal-decision making, Jesus knew the answer to the question even before he asked it – He knew their answer though they did not directly answer His question.

That is why after having healed the man, Jesus further asked them; 'if one of you has a child, or an ox that falls into a well on the Sabbath day, will you not immediately pull it out? To this the Pharisees gave no answer but the answer of course was a resounding 'yes we will'.

We see in this altercation that Jesus made a legal decision from the 'middle' – he decides to suspend the rule (you shall do no work on the Sabbath), because the facts

¹⁹ Luke Chapter 14

²⁰*Ibid.*, verse 3

did not justify its strict application in this case; is it just to hold that a man suffering from a long term illness should not receive help or healing because the Law states that no work shall be done on the day of the Sabbath? The answer must surely be a resounding no. To do that would be to apply the rule impractically and without purpose – to do that would result in an outcome which is unjust and unfair.

By asking the Pharisees the latter question - would you not pull your ox out of a well on the Sabbath - Jesus was teaching the Pharisees two things:

a) that they themselves would suffer unjustly and unfairly if they were on the receiving end of the Universalistic approach to legal decision making which they so preferred. Jesus' hope was that by making the Pharisees consider a scenario in which they were in the same position as the terminally ill man, the Pharisees would be realise the nature of the injustice and unfairness that their Universalistic approach to Legal decision-making generates.

b) Jesus was trying to teach the Pharisees about the best approach to adopt in making a legal decision; deciding in the middle – where we refrain from applying the rule for application's sake, and resist the impulse to say that the application of the rule is justified merely by the rule's existence and its ability to be applied to the facts on the basis of technicalities (Universal thought process). What we must do instead is to suspend the application of the rule because such an application of it is not warranted by the facts (particularities) of the case. As a judge Himself, what Jesus does in this case is to ask whether the particularities of the case justify an application of the rule. Clearly, Jesus chooses this approach because it leads Him to the most just conclusion possible.

Jesus – A Man in the Middle on the Sabbath

Let us consider yet another altercation that Jesus had with the Pharisees. Matthew's Gospel records Jesus walking through fields of grain on the Sabbath day with His disciples. As they walked, the disciples were hungry so they began to pick some grain to eat. When the Pharisees saw this, they said to Jesus; 'look, your disciples are doing what is unlawful on the Sabbath'.²¹ The Pharisees made this claim of illegality because the Law at that time was that nobody shall work on the Sabbath – picking grains in the field constitutes work and therefore Jesus and His disciples had broken the Law and had acted illegally.

Jesus' ultimate answer to the Pharisees' claim of illegality was a simple one; '*The Sabbath was made for man, not man for the Sabbath.*'²² Though simple and straightforward, Jesus' response is nonetheless profoundly important - it can reinterpreted and restated as this; *the Law was made for man and not man for the Law - rules were made for the benefit of men and not men for rules. Thus, we should be able to suspend the application of a rule if the facts do not justify its application i.e its application would produce injustice and unfairness.* Should we to apply a rule even if its application would mean that men would starve? The answer is a resounding no! This is what it means to make legal-decisions from the middle.

²¹ Matthew 12:2

²² Mark 2:27

As a middle legal-decision maker (Lion and the Lamb) Jesus teaches us that we ought to weigh every rule against the facts of the case and ask ourselves whether our applying the rule would create injustice and would be unfair to those it is applied to. Rules are there to serve us, so we must be able to bend them, suspend them and reshape if we have to in ensuring that they actually do serve us.

We must have the rule/universal in our right hand but also have reason/love/grace/the particular in our left hand and make legal decisions with both. The left ought to know what the right hand is doing, and if the facts of the case do not justify us applying our right hand to it, then we must hold it back and apply the left hand. And if the facts of the case warrants that we apply our right hand then we must apply it to the facts and hold back our left hand – the important thing is that we have both hands, not just one – we can apply our left hand without undermining the right hand, and vice versa – and we must do so by placing our legal minds in between these two hands (left/right) such that it links to the two and we can make legal decisions from there as Jesus demonstrates so brilliantly.

Lessons For Judges From The Lion and Lamb

The lessons drawn from Jesus' function as a Legal-decision maker can be applied by Judges within the Criminal Law, and more broadly, across all other areas of Law. In every single one of his altercations with the Pharisees we observe that Jesus, being a legal-decision maker in each instance, decides firmly in the middle. At Gennesaret, the Pharisees, being *Universalistic* in their application of the Law, did not recognise the *Particularity* of parents in need – but Jesus recognised it and would allow it to shape his Legal decision. Similarly, at the meeting in the Judge's home, the Pharisees did not recognise the particularity of a man suffering from illness – Jesus sees that particularity, and He would allow it to shape the trajectory of his Legal-decision making.

In the instance where Jesus walks the field of grain with His disciples, we see that the very *Universalistic* minded Pharisees do not recognise the *Particularity* of a group of people in hunger and want for food – Jesus, however, does recognise this particular and He allows it to shape His Legal Decision-making.

Judges often fall short in decision-making because very much like the Pharisees in Jesus' day, they are not paying enough attention to the particularities of the case. Judges must be able to see individual defendants as they are and treat as such – they must identify with the circumstances surrounding individual lives, they must feel the uniqueness of the stories of individual defendants - plugging themselves into the flow of the stories of individual actors and feeling its ups and downs – reaching out in a spirit of interest, where they are genuinely interested in the wholeness of an individual's life's story, not just a snapshot within that story where they may have committed possible wrong.

A legal-decision making process conducted in the *middle* ground serves to ensure and reaffirm the notion that the Law exists for the service of mankind, and not the other way around. Whenever the legal-decision making process is anchored within the *Universal* extreme, there is a loss of practicality and purpose in the application of the Law.

It is therefore no wonder that Jesus sounds a very stark warning to Judges and Teachers of the Law in Matthew's Gospel²³, where he says; '*woe to you teachers and keepers of the Law – be careful that you are not hypocrites by tending to the rigidity of Law, so much so that you forget and neglect the more important matters of the Law, which are justice, mercy and faithfulness. You should practice the latter and forget the former.*'

Jesus' warning is a call to all other Judges, to resist the impulse of tending to a formalistic/Universal application of the Law – it is a call for Judges to avoid the Universal extreme and what it represents. Instead, Jesus insists that Judges seek what He calls, the weightier matters of the Law i.e Justice, fairness, mercy and faithfulness.

Jesus teaches us that a good legal-decision making process involves us paying attention to the facts and paying attention to the particularities of the case. Engaging in Legal-decision making the way that Jesus does, provides Judges a safe boat with which to successfully navigate the waters of the void. The notion of allowing the facts to guide the finding a *mean* between extremes and locating the decision-making process at the middle ground aids in preventing an inappropriate, unwarranted, unpractical application of the Law.

Conclusion

In each of the instances discussed above where Jesus gives the Pharisees a good schooling on how to conduct legal-decision making, we see each time that He closes the gap between the rule and its application with the bridge of practical reason; He employs practical reason as a bridge. It is practical reason which leads him to suspend the application of a rule by saying that the Law was made for man and not man for the Law – it is practical reason which would lead Jesus to not apply a Law which would punish his followers for eating while hungry.

As per Jesus' example, Judges would be greatly helped if they cultivated a custom of flexibility and adaptability – where they are willing and able to change/abandon their traditional patterns and blocks of thought which have been formed in their many years of passing judgement, whenever they reach the realization that those traditional patterns and blocks of thought are not suited for the case in hand. They must reconstruct their *habitus* to fit the case - adopt a new culture of flexibility and adaptability which will bring with it, new and solutions which must not be excluded as they would be if a Judge is rooted in traditionally formed blocks and patterns of thought.

What is needed is for Judges to perceive cases with fresh thoughts. Every case is as unique as it is similar to other cases. Every case therefore requires and deserves a freshness of thought, especially where pre-formulated blocks and patterns of thought do not suffice. A Judge who develops such a culture will excel at striking the *mean* and deciding in the *middle ground*.

²³The Holy Bible, Matthew's Gospel, Chapter 23, Verse 23

Wittgenstein suggests that following a rule is not like the operations of a machine. Rather, it is a social practice – a process which must take account of the factors that bear upon individual social actors. Such socialization of rule application, as it is, requires of a Judge that he/she become a responsible thinking mind, self-reliant for his/her judgements – resisting with stern will, the tendency to see the human agent as a subject of representations – representations about the world outside and depictions of ends desired or feared. Judges must see the agent not primarily as the locus of representations, but as engaged in practices, as a social being who acts in and on a world.²⁴

A rule does not apply itself, it has to be applied by someone – and this may involve difficult and finely tuned judgements. Nonetheless, a person (Judge) of practical wisdom is marked out less by their ability to formulate rules, and more by their knowing how to act in applying of those rules in each particular situation.

All Judges must consider that Rules, as they are formulated, are in close interrelation with our *habitus*. Rules are not self-interpreting – without a sense of what they are about, and an affinity with their spirit, they remain mere words.

Very much like Jesus, the Lion and the Lamb, Judges must pay attention to the story of the subject individual, plug themselves into the flow of their stories and derive an understanding of these stories. Rules operate in our lives, and function only along with an inarticulate sense which is encoded in the body. Judges must employ a *habitus* which allows them to move to the *middle* and decide there – and if a Judge's *habitus* does not allow this, then such a Judge must reconstruct his/her *habitus*.

²⁴ Wittgenstein, L. (1973), *Philosophical Investigations*, Oxford Publishing, Oxford, p.193-194