

Opinion

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Law & Culture: Justice & Bioethics in the 21st Century

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T.S Eliot defined “culture” as not merely the sum of several activities, but “a way of life.”¹ For millennia, law – statute (made by parliaments) and common (made by courts) – has been part of our culture, notably in recent years in the determination of some of the most difficult ethical and moral issues of our times.

The following remarks are in three parts. First, I provide a very quick overview of the role of law from what might be described as the classical tradition. Secondly, I note some recent cases which touch on very challenging areas of life and death. Thirdly, I offer comment on the most recent High Court case which explored, and rejected, the always contested issue of “wrongful life.”

A. Law & Tradition

Murray Gleeson, Chief Justice of the High Court of Australia, began his extra-judicial 2000 *Boyer Lectures*, entitled *The Rule of Law and the Constitution*, by quoting another eminent judicial officer, Thomas More, former Lord Chancellor of England. Taken from Robert Bolt’s seminal play on the tumultuous events surrounding the demise of More’s career and life, *A Man for All Seasons*, Gleeson used the following text wherein More refers to the laws of England as a shelter:

This country’s planted thick with laws from coast to coast ... and if you cut them down ... d’you really think you could stand upright in the winds that would blow then? ²

Commenting on the text quoted, Gleeson observes with characteristic economy of expression: “The imagery of law as a windbreak carries an important idea. The law restrains and civilises power.”³

¹ *Notes on the Definition of Culture*, (London: Faber & Faber, 1948) p.41.

² The Hon Murray Gleeson AC, *The Rule of Law and the Constitution*, (Boyer Lectures 2000) (Sydney: ABC Books, 2000). See especially Chapter 1, “A Country Planted Thick with Laws” pp.1-19. More’s quote is from Act One.

³ *Ibid.* p.1. Gleeson CJ returns to his theme of the ‘civilising influence of the law’ in Lecture 4 where he notes: “The protection of the rights and freedoms of individuals and minority groups has always been an essential part of the role of the courts. The law, in its nature, is a constraint upon power. Whether the power is that of individuals or corporations or governments, the restriction on that power that comes from the law is a powerful civilising influence.” *The Rule of Law and the Constitution*, *op. cit.* pp.74-75. The Chief Justice could have here quoted further from Bolt’s play More’s later comment on the law, delivered near the conclusion of his cross-examination by the treacherous Cromwell. More says: “The law is a causeway upon which so long as he keeps to it a citizen may safely walk.” Act Two.

In the demanding area of bioethics, the law is less likely to be a civilising influence and perhaps more an arbiter between fiercely disputed approaches to human life. In recent years, for example, the regulation of cloning and stem cell research (adult and embryonic) has resulted in uniform legislation across Australia, at both a Commonwealth and State/Territory level. However, I would suggest that, at its highest, one would be hard-pressed to affirm that the regulatory regime now in place, which takes its lead from the *Prohibition of Cloning Act 2002* (Cth) and the *Research Involving Human Embryos Act 2002* (Cth), does little more than strike a compromise between the desires of one sector of the research community that sought (and still seeks) unbridled paths for its pursuits, and other sections of the wider community that sought (and still seeks) to prohibit destructive research on embryos. Such compromises might be termed a civilising influence – but only in a most minimal sense.

Query, too, if they conform to Cicero's observations regarding the objects of law as enacted by the State, namely that they should be just, conform to truth⁴, and, "It is agreed, of course, that laws were invented for the safety of citizens, the preservation of States, and the tranquillity and happiness of human life."⁵ Most would admit that the objects of laws, regulations and guidelines in the world of bioethics do not quite match these meta-objects of civilisation and culture!

Cicero (106-43 BC) describes in a number of places the responsibility of "the State" to care for its citizens, who constitute "the commonwealth", through the enactment of "just laws". In *De Legibus*, he says "Those who share Law must also share Justice; and those who share these are to be regarded as members of the same commonwealth. ...our whole discourse is intended to promote the firm foundation of States, the strengthening of cities, and the curing of the ills of peoples."⁶ In the fifth century AD, Augustine commented similarly and rather more pithily: "And so if justice is left out, what are kingdoms except great robber bands."⁷ Inherent in statements of this kind from Cicero to Augustine and beyond is the fundamental concept that the State has a responsibility to its citizens and the community they constitute akin to that of stewardship. This involves not only the duty to provide oversight of the community (so to speak), for example in the formulation and enactment of laws, but also to ensure that justice is the cornerstone of this broad stewardship and governance.⁸

⁴ "*iusti et veri*", *Laws* II.V.12.

⁵ *Laws* II.V.11.

⁶ Cicero, *Laws*, I.VII.23 & I.XIII.37.

⁷ *City of God*, Bk.IV Ch.4. The Latin reads: "Remota itaque iustitia quid sunt regna nisi magna latrocinia?" "Latrocinia – gangs of criminals" has the fundamental notion of a gang whose intent is on mercenary gain, by any means.

⁸ A more recent example of this understanding comes from Pope John Paul II who stands in this same tradition. A significant feature of the former Pope's reflections and discussion on building a civilisation of life and love centres on the pivotal role of law, as a tool of protection for all life, especially the weak and vulnerable, and as a guarantee of social co-existence in accordance with true justice (*Evangelium Vitae*, 71). In many addresses, the Pope insisted that law is meant to be 'spiritually liberating' precisely

I move to a consideration of some recent judicial decisions and how they might contribute – positively or negatively – to the civilising of power and the promotion of justice. Alas, as will be seen, these goals are rarely achieved.

B. Recent Cases

I will look firstly at three recent decisions of courts in the UK and the European Court of Human Rights.

1. *Vo v France* [2004] 2 FCR 577, is a tragic case on its facts and a deeply unsatisfactory result on its reasoning and conclusion. At its heart was a lamentable, and avoidable, case of mistaken identity involving two women, both surnamed “Vo”, both of whom were attending the same hospital in Lyon. One woman was attending to have a regular sixth-month antenatal check. The other woman was attending to have a contraceptive coil removed. When the second woman was called, disastrously, the first woman responded. To compound the appalling circumstances, the doctor proceeded with the attempted removal of the contraceptive coil without noticing, or checking, that the woman was in fact six months pregnant. The doctor pierced the amniotic sac causing a substantial loss of amniotic fluid. There were further blunders at the hospital and an immediate further operation was narrowly avoided. Unfortunately, because the amniotic fluid had not been replaced, it was decided on health grounds to end the pregnancy. The foetus was between 20 and 24 weeks gestation.

Mrs Vo lodged a criminal complaint for involuntary homicide of her unborn child. She also sought damages, under French law, for personal injury. The court determined that the case hinged on the legal status of the foetus. At first instance, the claims of Mrs Vo were dismissed on the basis that the non-viable foetus is not a human person for the purposes of the French Criminal Code. This decision was reversed by the Lyon Court of Appeal which held that the criminal charge of involuntary homicide could apply to a non-viable foetus. On further appeal, the first instance judgement was re-instated in a much criticised decision of the Court of Cassation.⁹ It was from that decision that the European Court of Human Rights heard Mrs Vo’s application which centred around her complaint that French

because it is intended, by God, to be based on the lofty ideals of justice and equity. *cf.* John Paul II’s Address to the Participants in the 9th “World Congress on Law”, 24th September 1979; Address to the participants in the Reunion of the Harvard Law School Alumni Association, 13th June 1998. Pope John Paul acknowledged that the purpose of civil law is different to and more limited in scope than the moral law. The real purpose of civil law, says John Paul II, is to guarantee an ordered social co-existence in true justice. It must ensure the respect and protection of basic fundamental rights, most especially the inviolable right to life (EV,71). There must be a necessary conformity of civil law with the moral law. Indeed, laws that are contrary to reason are unjust and are corruptions of law. Generally, see M. Rhonheimer, “Fundamental Rights, Moral law, and the Legal Defense of Life in a Constitutional Democracy,” (1998) 43 *The American Journal of Jurisprudence* 135-183.

⁹ See K. O’Donovan, “Taking a Neutral Stance on the Legal Protection of the Fetus,” (2006) 14 *Medical Law Review* 115-123.

law failed to provide protection to her unborn child in contravention of Article 2 of the European Convention on Human Rights. She also claimed that the same article required that there be an investigation into the wrongful taking of the life of her unborn child.

Unfortunately, the Court eschewed any consideration of the woman's rights as claimed and instead dealt with the matter starting with previous jurisprudence regarding the status of the foetus. By taking this course they avoided dealing directly with the woman's claims and instead sheltered behind the always contentious issue of the status of the unborn. This enabled them to say that, in accordance with previous decisions, the unborn child is not regarded as a "person" directly protected by Article 2 of the Convention. This in turn enabled the Court, in effect, to duck any difficult decisions regarding the woman's claims about her rights in relation to the protection of her unborn child. According to Chief Justice Gleeson's comments noted above, one would be hard-pressed to claim that this decision civilised power let alone dispensed justice, given that it denied any rights to the unborn child, and equally the rights of the woman and mother who had been savagely dealt with culminating in the negligent and unlawful death of her child.¹⁰

2. I next wish to treat of two cases in the UK. The first, *Re Z (an adult: capacity)* concerned a woman who was diagnosed with cerebella ataxia, which severely affected her motor functioning. She became increasingly disabled. Her condition was incurable, irreversible and terminal. She was 65 years old. She wished to commit suicide but acknowledged that she would need assistance to do so. She and her husband determined to travel to Switzerland where assisted suicide is lawful. Her husband notified the local authorities of their decision. Those authorities adjudged Mrs Z to be a 'vulnerable person' and that her husband would be committing an offence if he assisted her, as planned. In consequence they sought, and obtained, a temporary injunction to prevent the husband from removing Mrs Z from the jurisdiction of England and Wales. The Court refused to continue the injunction thereby clearing the way for Mr and Mrs Z to travel to Switzerland in order that Mrs Z could commit suicide. In the course of his judgment, Hedley J relied upon highly controversial remarks of Hoffman LJ in the infamous *Bland* litigation, to affirm that personal autonomy will, in this day and age, usually take precedence over both the right to life, and over the responsibility of the State and its agencies to intervene to uphold this right. As one commentator has observed: "... it may be argued that *Re Z* takes a step, albeit somewhat indirectly, towards a limited judicial tolerance of assisted suicide for a

¹⁰ For a recent Australian decision which upholds, to some degree, the sanctity of life of the unborn, see the NSW Court of Criminal Appeal judgment in *R v Iby* (2005) 154 A Crim R 55; [2005] NSWCCA 178 which concerned the conviction for manslaughter, and for driving in a dangerous manner causing death, a man who had driven a stolen car recklessly and which collided with a car driven by a woman who was 38 weeks pregnant. The woman's child was subsequently delivered in poor condition and died approximately two hours after delivery. The accused claimed that the child had not been born alive because the baby, (Matthew), had never breathed independently because of his being on life support. The appeals against the convictions were dismissed.

physically disabled and chronically ill patient who has made a legally competent decision to go abroad for the purpose of an assisted suicide.”¹¹

3. The second UK case in this section is *R (on the Application of Oliver Leslie Burke) v The General Medical Council* [2005] EWCA Civ. 1003. It involved Mr Burke’s concern that the General Medical Council’s (“the GMC”) Guidelines on the withdrawal of treatment were fundamentally inconsistent with a patient’s human right to be treated and for his wishes to be respected. Burke feared that under the Guidelines, doctors would be able to withdraw treatment which would have the effect, if not the actual intention, to end the life of someone who wished to live, notwithstanding the increasingly debilitating medical condition from which the person suffered.

At first instance, Munby J, in an extraordinarily long judgment, once again decided and advocated the importance of patient autonomy against all other principles in upholding Mr Burke’s claim. However, on appeal by the GMC, the Court of Appeal over-turned Munby J’s ruling and held that not only did the Guidelines not contradict the legal requirement that a doctor take reasonable steps to keep a competent patient alive if that was the patient’s wishes, but also they did not proscribe a doctor’s obligation to treat an incompetent patient in a manner that was in their best interests. Curiously or not, the Court of Appeal formally warned against selectively using Munby J’s judgment, saying that they were “unable to follow Munby J’s reasoning and fear that he may have lost the wood for the trees.” The import of the Court of Appeal’s decision will, however, need to be watched carefully.¹²

C. Wrongful Life in Australia

The final case for consideration is the very recent “wrongful life” decisions of the Australian High Court in *Harriton v Stephens* and *Waller v James; Waller v Hoolihan*.¹³ The three cases involved the High Court considering whether children born with severe disabilities would have been better off dead rather than living with disability. Through their legal representative, the children argued that because they had been so born and had lives of great handicap which required constant care and attention, the medical practitioners who had negligently allowed them to be born should pay for their life-long care. One child had been conceived naturally but whose mother had contracted rubella in the first trimester of her pregnancy. The pathology service failed to detect the rubella and the treating doctor, relying upon that advice, advised the mother accordingly. In the other case, the child was conceived through IVF. The child’s father knew that he had a genetic deficiency (AT3) which related to blood clotting. He was not screened for this deficiency by Sydney IVF and his child was born with it, together with a range of other very significant disabilities. Both

¹¹ P. de Cruz, “The Terminally Ill Adult Seeking Assisted Suicide Abroad: The Extent of the Duty Owed by a Local Authority,” (2005) 13 *Medical Law Review* 257-267 at p.266.

¹² For comment on this and related issues, see D. Gurnham, “Losing the Wood for the Trees: Burke and the Court of Appeal,” (2006) 13 *Medical Law Review* (advance access copy); J. Keown, “Restoring the sanctity of life and replacing the caricature: a reply to David Price,” (2006) 26 *Legal Studies* 109-119.

¹³ [2006] HCA 15; [2006] HCA 16, respectively; both dated 9th May 2006.

children claimed that they would have been better off dead rather than be born with their catastrophic disabilities.

The Court, by a 6-1 majority, rejected the children's claims. The leading judgment for the majority in the appeals was written by the newly appointed Justice Susan Crennan. Her basic argument was that Courts did not and ought not say that life with disability was without merit and that someone would be better off dead. Equally, and in conformity with long-accepted legal orthodoxy, she said that the law required there to be a comparator against which someone seeking damages could have their claim assessed. In this case, the only "comparator" was the state of "non-existence" which neither the law, nor theologians, nor philosophers could explain, or do so with sufficient clarity and precision so as to enable the law to assess damage.

The case has certainly drawn a 'line in the sand' about wrongful life claims in Australian jurisprudence.¹⁴ While it clearly and cogently affirms the value of all human life, regardless of disability, larger questions remain, as a matter of justice, such as the responsibility of society to assist in the just and equitable care of those with disability. Doubtless we will read and hear more about the ramifications of this case. Not least, the comments of Crennan J regarding persons with disabilities are to be welcomed. She said: "In the eyes of the common law of Australia all human beings are valuable in, and to, our community, irrespective of any disability or perceived imperfection. ... Alexia Harriton's ... disabilities are only one dimension of her humanity." There is certainly a civilising dimension in the learned Justice's remarks about how the community and its laws view people with disabilities.

¹⁴In a controversial case decided in 2003 by a bare majority of 4:3, *Cattanach v Melchior* (2003) 215 CLR 1, the High Court allowed a claim for damages in relation to a failed sterilisation which resulted in the birth of a healthy child. The Court held in that wrongful birth case that the negligent medical specialist should be held responsible for the costs of the birth of that child.