

11 MORALITY AND PUBLIC POLICY

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Malta's first so-called "test-tube baby" was born at a private clinic on 15th December 1991, thirteen years after the birth of Louise Brown, the culmination of years of pioneering research by Robert Edwards and Patrick Steptoe. The news of the first successful human artificial fertilisation was given with much satisfaction and pride by a local medical team on 30th May at the Medical School during a lecture on infertility. A video of an ultrasound scan showing a healthy nine-week-old fetus in the womb of its 28-year-old mother after the embryo was produced *in vitro* was shown to the audience. At the same conference it was announced that another fetus, produced by Intra-Tubal Insemination technique (ITI) was several months old.

The publicity given to the first successful human fertilisation raised widespread public discussions, particularly on the local media, on the complex ethical, social and legal issues related to artificial human procreation. Shortly after this breakthrough in local medical history, a parliamentary question urged the National Bioethics Consultative Committee to issue ethical guidelines and called for a legal framework. Though this event caught the attention of the general public, artificial insemination has been taking place in Malta, as elsewhere, for a long time. An article published in one of the leading daily papers announced that the number of Maltese married couples who are having children using donated ova or sperm is increasing.

Nobody contests the fact that human artificial reproduction is not just a matter of science and technology. Because these techniques have primarily been developed to assist infertile couples in their strong desire to become parents, they have become part of our

social reality, and as such, they require the intervention of the political authorities and of the legislator, since an uncontrolled application of such techniques could lead to unforeseeable and damaging consequences for civil society. Daniel Callahan rightly comments that “the moral problems of biomedical ethics are beginning to transcend the narrow context of medicine itself. They are raising fundamental questions about how we ought, to organise our society and think about our life together”.

Today, neither private citizens nor scientists tend to contest the right of public authority to intervene in the techniques to overcome infertility and to review reproductive technologies according to certain values and fundamental moral principles. Nevertheless, two questions are usually raised: When should this intervention occur? On what principles should such interventions be based?

That the intervention of public authority must be inspired by rational principles which regulate the relationship between civil law and moral law is highlighted by the French National Consultative Committee on Ethics, in its report entitled *From Ethics to Law*, as follows:

Concerning the practice of reproductive medicine, it is often said that it is too early to legislate. State law should not interfere, but the responsibility to take decisions should be left to the professional ethics of physicians and scientists. This way of thinking does not take into account that many scientists require legislation for those issues that are not simply professional matters. It ignores the fact that the National Committee on ethics suggested that some regulations should be promulgated ... (p.13)

Then, the report raises the following important question, “How can we not legislate when human artificial procreation places filiation law in question, or when the existence of some fundamental social principles are at risk?” (p. 14) It is therefore the task of civil law to ensure the common good of people through the promotion of public morality.

The Law and Morals Debate

A serious discussion on the relationship between law and morality should commence by avoiding three possible misconceptions. It is sometimes assumed that people seek to ban everything that they regard as immoral. This position, which is often called the *Moral Majority* or the *Moral Right*, is untenable because not every action considered as immoral should necessarily be considered as a criminal act. The opposite is the so-called *Immoral Minority*. It is sometimes assumed that certain people would never ban anything, however immoral, and would prefer to let everyone 'do their own thing'. This position is false because law and public policy must never be regarded as amoral, or indifferent to moral concerns and criticism. Then there are those who argue that the law has nothing to do with morality. This positivist position can easily be argued to be false because many areas of the law in fact reveal moral values beneath their dry exterior.

The question of whether law ought to enforce morality has been an issue of philosophical debate for some time. John Stuart Mill's assertion that the only justification for limiting a person's liberty is to prevent harm to another was the starting point of the Hart-Devlin debate. Lord Devlin, a British judge, disputed the Wolfenden Report's assertion, namely, that "no act of immorality should be made a criminal offense unless it is accompanied by some other feature such as indecency, corruption or exploitation". He argued that society is a "community of ideas" including ideas about morality, that "without shared ideas on politics, morals, and ethics no society can exist". Legislation against immorality is not only permissible but also essential to prevent the disintegration of society. The criminal law exists for the protection of society, not for the protection of the individual.

Lord Devlin suggested four guidelines, all of which are principles of restraint in the way society should use the law to enforce morals:

- i) nothing should be punished by the law that does not lie beyond the limits of tolerance;

- ii) the extent to which society will tolerate (not approve) departures from moral standards varies from generation to generation;
- iii) as far as possible privacy should be respected;
- iv) the law is concerned with the minimum and not with a maximum standard of behaviour.

The American professor H.L. Hart contested Devlin's relatively simple argument. While Hart conceded that some shared morality is essential to the existence of society, he questioned Devlin's conclusion that a change in society's morality would lead to the destruction of society. Hart asserted that society should protect individual differences in morality because it can profit from them. Society, according to Hart, does not require the enforcement of a uniform morality, as Devlin suggested.

In place of Devlin's justification for the full enforcement of morality, Hart developed his own argument for the partial enforcement of morality based on the distinction he drew between immorality which affronts public decency and that which merely distressed others simply because they know that immoral acts are taking place. In Hart's view, society may, for example, outlaw the public expression of prostitution, because it is considered as an affront to public decency, while it would not be justified to outlaw purely private manifestations of this type of behaviour

Thus, both Devlin and Hart argue from different perspectives that law ought to enforce morality. Whereas Hart's focus is on the individual, Devlin's focus is on society. In Devlin's perspective, society ought to legislate on reproductive technologies in order to safeguard public morality. However, only those techniques against which there is a real moral feeling of reprobation should be outlawed. This moral feeling must be so strong that society regards them as an offence. For Devlin, morality is not the product of reason, but is the result either of a divine command or of feelings.

Hart's argument differs from that of Devlin. He maintains that society should never outlaw those techniques of reproductive technology which do not affront public decency. Each individual should be allowed to follow its own private convictions even though others might be distressed when they learn about such practice. This is not a good ground for forbidding it. Moral disapproval of certain reproductive techniques should not lead automatically to legal action.

The debate on law and morals has not been exhausted by the solutions proposed by Lord Devlin and Professor Hart. Since the sixties the debate shifted to relationship between law and religious ethics. To what extent may any religious group inject its beliefs into the formulation of civil laws, without violating the religious freedom of those who do not share those beliefs? Is the right to religious liberty predicated on the assumption that believers are refrained from imposing their beliefs on others by law? Does this mean that religious beliefs are *de facto* excluded from legislative action? Are such beliefs simply private matters without implication for the larger society?

It is inevitable to raise these questions for the following reasons. On the one hand, many Maltese believe that our country is still Catholic and that Catholic values must shape public policy and law. On the other hand, many see any intrusion of religious values into civil life as an assault on individual freedoms and therefore as politically retrogressive and lethal to any genuine conception of freedom in a secular society. In between, there are growing numbers of believers and non-believers who respect the values of religion but who are convinced that people should be free to make their own decisions about euthanasia, abortion or reproductive technologies. What role should religious values play in public choices? Should religious belief influence public policy?

Religious Values and Public Policy

The debate on the proper relation of religious values to public

policy has focused on three perspectives. The first is a liberal democratic stance with secularist implications. John Rawls represents this position in a moderate form. Richard Rorty pushes it to radically secularist conclusions. The second endorses the fundamental presuppositions of liberal democratic theory while seeking to provide greater public space for religion. This is the position developed by Kent Greenawald. The third offers both a philosophical and theological critique of standard liberal democratic theory and seeks to justify a much greater public role for religious convictions. This position is defended by Michael Perry.

a) Liberal theories with secularist implications

The term liberalism refers to a political tradition that developed in the 17th and 18th century in response to the religious and moral pluralism of the emerging world. It affirms human freedom and equality as the central values in public life. Because the citizens of pluralistic societies hold different convictions about God and ultimate moral purposes in human life, if we are to treat them as equals we must protect the freedom of all to hold these convictions. In public life, therefore, theological and metaphysical beliefs cannot be invoked as normative for the way society is organised. To do so would be to violate the freedom and equality of at least some citizens. This has crucial implications for the relationship of religion and politics.

John Rawls calls toleration as a *modus vivendi*. But later on Rawls maintains that a more stable basis for ordering pluralistic society was discovered. He calls this an “overlapping consensus” on a “reasonable political conception of justice” for a pluralistic society.

Rorty is considered more radical than Rawls in affirming that the only criteria of morality are culturally embedded. For Rorty, there are no trans-cultural norms of morality at all, for there is no transcendental knowledge at all. The difference between acceptable and unacceptable behaviour is not determined by

appealing to some universal rational norm. Rather, the distinction between the moral and the immoral is a “relatively local and ethnocentric” matter. Morality is simply what we do and immorality is what we do not do. The appeal to morality is an appeal to a sense of identity that is “overlapping and shared” with other persons who make up the “we” of a particular community. It has no other basis. For this reason, Rorty maintains that notions such as transcendent human dignity and human rights cannot be invoked to stand outside these traditions. Such transcendental norms simply do not exist. Rorty’s liberal perspective attacks the notion of human dignity invoked to defend the sanctity-of-life of the human pre-embryo. He also rejects the notion of the integrity of marriage usually invoked against third party involvement in assisted procreation.

b) The liberal theory supportive of religion

Kent Greenawald, professor at Columbia University Law School, addressed the problem Rawls grappled with in a way that is more promising. His book, *Religious Convictions and Political Choice*, is a reflection of the deep tension in liberal democratic societies towards the role of religion in political life. He characterises the tension in the following way.

First, government is legitimated by the consent of the governed and by its protection of basic human rights. These rights are natural rights and therefore can be understood in non-religious terms. Second, this secular foundation for government implies that government should not seek to promote religious truth, nor should sponsor any religious organisation. Third, for many people religious convictions do in fact have important bearing on ethical choices, including ethical choices about laws and public policies. Fourth, it is a central tenet of liberal democracy that people are free to develop their own values and, at least within limits, styles of life; they are free to express their views not only about political questions but about other human concerns.

The tension Greenawald addresses is that between the principle that government has a secular purpose and a secular warrant and the principle that citizens are free to seek to influence public policy in the light of their own values. When these values are religious the potential for a conflict of principles is real.

How, then is one to deal with this tension? Greenawald agrees with Rawls partially but not completely on this question. Like Rawls, he maintains that the justification of law and public policy must rest on public reason, or in Greenawald's terminology, on "the shared premises and publicly accessible reasons" that prevail in society. Justification must reflect those canons of rationality that are in fact widely shared within society in question. Nevertheless, Greenawald is also convinced that "publicly accessible reasons" do not settle a number of important moral questions relevant to public policy that are hotly debated today, such as the abortion question and issues related to assisted human procreation.

In order to answer these questions, some vision of what it means to be a human person and what value to attribute to non-human beings must be invoked. Such vision must at least contain the sort of metaphysical or religious elements that Rawls wants to exclude from his concept of political justice. Greenawald admits the inability of reason to resolve these questions. Thus public officials cannot be blamed on liberal grounds if they turn to religious convictions for guidance in these areas. They have no other choice.

Nevertheless, Greenawald maintains that citizens who rely on religious convictions to reach their own conclusions on such matters should not appeal to these religious convictions in advocating these conclusions in the public forum. They may rightly discuss policy questions in religious terms with those who share their faith, but they should not do so when engaged in political advocacy in a pluralistic society. Public discourse about political issues with those who do not share religious premises should be cast in other than religious terms.

c) Religion and the limits of liberal theory

In his 1983 book, *Morality, Politics and Law*, Michael Perry, who is a Professor of Law at Northwestern University, maintains that faith and reason are allies, not adversaries. But his views are far from those of Catholics who think that moral principles governing public life are easily known by all persons of good will. Perry takes the historicity and exploratory nature of all human knowledge with deep seriousness. But it is precisely because he does so that he grants much more importance than does Greenawald to the public role of particular traditions, including religious traditions.

For Perry, people - including religious believers - should not enter the public arena simply to negotiate about how best to secure their own privately chosen interests. Democratic citizens should not approach the public arena with this type of argument: "I want X". Rather, they ought to approach the public arena with proposals in this form: "X would be good for the community to which I belong". It is good for a conversation and argument to consider all possible proposals. Perry wants to encourage and open up public space for people to propose visions of what would be good for the larger community. They should be able to do so also when proposals are premised on religious convictions that are particularistic and distinctive.

So Perry challenges the predominant liberal view that conversation and argument about a comprehensive vision of the good life must be fruitless in a pluralistic society. According to Perry, politics is not about instrumental adjustment to competing private interests, but conversation and argument about "competing conceptions of human good, ... questions of how human beings, individually and collectively, should live their lives".

Whereas Rawls argues that such questions are too important to be subjected to the heart of politics, Perry does the opposite. Questions of human good are too fundamental, and the answers

to them too determinative of one's politics, to be marginalised or privatised. In this way, Perry challenges the fundamental presupposition of most versions of liberal politics today, namely, the idea that politics can be neutral about competing conceptions of what authentic human existence is all about. Such neutrality cuts liberal thought off from some of the richest religious resources for thinking about the human. Thus, for both theological and political reasons, religious discourse deserves to be a free participant in the public exchange of a pluralistic society.

It does make sense, according to Perry, to invoke religious ethical arguments in public debates on assisted human procreation. It is not true that the participation of a religious community in the formulation of public policy on reproductive technology would in any way compromise the freedom of others. On the contrary, religious belief ought to be invoked in discussions on assisted human procreation because it is a valid source of inspiration on many fundamental issues touching on human life, sexuality and the family.

***Donum Vitae* and Public Policy**

Perry's perspective on the role of religious belief in public policy is in line with the position defended by the *Instruction on Respect for Human Life in its Origin and on the Dignity of Procreation (Donum Vitae)*. Moral values, especially religious ones, *Donum Vitae* declares, should influence future legislation. The Church's document rightly maintains that these new techniques may be so damaging to society that "recourse to the conscience of each individual and to the self-regulation of researchers cannot be sufficient for ensuring respect for personal rights and public order". In Chapter III of the Instruction which deals with "Moral and Civil Law", the Catholic Church is urged to advocate as much as possible the inclusion of these moral values in all nations' civil law.

According to *Donum Vitae*, “the new technological possibilities which have opened up in the field of biomedicine require the intervention of the political authorities and of the legislator, since an uncontrolled application of such techniques could lead to unforeseeable and damaging consequences for civil society”. The Congregation for the Doctrine of Faith suggests relevant principles which must guide appropriate legislation and regulations. These are: “a) every human being’s right to life and physical integrity from the moment of conception until death; b) the rights of the family and of marriage as an institution and, in this area, the child’s right to be conceived, brought into the world and brought up by his parents”. Though the Instruction admits that sometimes certain procedures in assisted human procreation may be tolerated in order to avoid a greater evil, these two fundamental principles must never be compromised.

The Ethical Considerations relating to Human Reproductive Technology approved by Malta’s Bioethics Consultative Committee is quite clear on the first moral principle defended by the Instruction, namely, the respect of human life from the moment of conception. A consensus has been reached on the respect of embryonic human life: Article one of the ethical considerations states that “since human life exists from the moment of conception, it deserves the respect that is due to a human being at all stages of development”. Moreover, the report of Malta’s Bioethics Consultative Committee maintains that the law should never tolerate that human beings, even at their embryonic stage, be treated as objects of experimentation, be mutilated or destroyed with the excuse that they are superfluous or incapable of development normally. Furthermore, the ethical guidelines of the Malta’s Bioethics Committee prohibit the creation of spare embryos. In fact, article 11 states that “only a minimum number of ova strictly necessary to optimise the success of procreation should be fertilised *in vitro*. All of the fertilised ova are to be transferred to the woman from whom the ova were removed”. Storage of embryos for future use is therefore prohibited. The ethical guidelines forbid also the donation of embryos to another couple.

Third Party Involvement

The report of Malta's Bioethics Consultative Committee fails to reach a consensus on the issue of third party involvement in assisted human procreation. Should the law ban the use of gametes foreign to the party involved to save the institution of marriage and the family? This question has been the most controversial issue in the drafting of ethical guidelines.

Malta's Bioethics Committee followed the pattern of argument adopted by the Italian Bioethics Committee. In its ethical guidelines submitted to the government, the Italian Bioethics Committee includes views both in favour and against third party involvement. Eventually, a draft law endorsing third party involvement was outvoted during its first reading at the Italian parliament. An opinion poll carried out recently in Italy revealed that the majority of people is against third party involvement. Moreover, the Portuguese Bioethics Committee took a clearer position against heterologous artificial reproduction. The committee unanimously rejected reproduction using donors. Objections against heterologous artificial procreation are based in relation to the donor, to the receiving couple and to the unborn child. Furthermore, the 1989 Resolution of the European Parliament on fertilisation *in vitro* and *in vivo* considered also all forms of heterologous reproduction to be undesirable.

On the one hand, the first position endorsed in the ethical considerations presented by the Bioethics Consultative Committee defends as ethically acceptable the donation of gametes under a number of conditions. On the other hand, the second position maintains that the donation of third party gametes is significantly different from other morally lawful practices such as blood or organ donation. Donation of third party gametes changes the significance and value of marriage and the family as the proper context for human procreation and may prejudice seriously the chances of the child to develop a healthy sense of self-identity.

The latter position is in agreement with *Donum Vitae* which affirms that: a) it is through the secure and recognised relationship to his own parents that a child can discover his own identity; b) that the parents find in their child a completion of their reciprocal self-giving; c) that the vitality and stability of society require that children come into the world within a family, and d) that the family be firmly based on marriage. The use of external gametes is contrary to the dignity of the spouses, to the vocation proper to parents, and to the child's right to be conceived and brought into the world in marriage and from marriage.

The Jesuit moral theologian Richard McCormick was the only member of the Ethics Committee of the American Fertility Society who objected to third party involvement because donation of gametes touches on some very basic human values: marriage and the family, parenting, genealogy and self-identity of the child. The American Fertility Society's report, *Ethical Considerations of the New Reproductive Technologies*, released in September 1986, expressed McCormick's dissent in the following words:

"One member of the committee argued that the use of third parties – whether by sperm donation, donor ovum, or surrogate womb – was ethically inappropriate. First, it seems violative of the marriage covenant wherein exclusive, ... Secondly, by premeditation in contrast to adoption – it brings into the world a child with no bond of origin to one or both marital partners, thus blurring the child's genealogy and potentially compromising the child's self-identity. These considerations suggest that the use of third parties to overcome sterility is not for the good of persons integrally and adequately considered. Such risks to basic values outweigh, in a prudential calculus, individual procreative desires or needs. In summary, when calculus involves individual benefit versus institutional risk of harm, the latter should take precedence."

Moreover, Karl Rahner also faults the anonymity of the donor which represents a refusal of responsibility as father and is an

infringement of the rights of the child. It should be remembered that when Sweden passed legislation giving children conceived by AID the right (at eighteen years of age) to know the identity of their genetic fathers, donor insemination came to a virtual standstill. The same seems to be happening in parts of Australia. Obviously, donors want neither recognition nor responsibility.

Richard McCormick raises two key issues related to third party involvement: a) Does third party involvement (via donation of gametes or surrogate gestation) infringe on conjugal exclusivity? b) Does having a jointly raised child justify such infringement? His answer is yes to the first, no to the second. According to McCormick, the notion of conjugal exclusivity includes the genetic, gestational and rearing dimensions of parenthood. Separating these dimensions (except through rescue, as in adoption) too easily contains a subtle diminishment of some aspects of the human person.

To insist that marital exclusivity ought to include the genetic, gestational and rearing components can be argued in the following way: any relaxation in this exclusivity will be a source of harm to the marriage and to the prospective child. For instance, the use of donor semen means that there is a genetic asymmetry in the relationship of husband and wife to the child, with possible damaging psychological effects. It should also be asked whether the child should know about the method of its birth. If so, how much information should the child have – only that which is deemed to be health-related data or all the other biological information about its heritage that most of us value? Whose interests, whose preferences, whose needs count here? The child may well have serious identity problems at a later time. Does such a possibility have to be seriously considered by those who want to undertake unusual reproductive methods? The interests and well-being of the baby-to-be-made seem to be the last issues considered, and sometimes seem not to be considered at all.

Feasibility of Law on AID

McCormick believes that party involvement is probably not feasible for prohibition by public policy. Morality and public policy are distinct but related. Although morality is indispensable for public policy, it is not sufficient, for policy-makers must also consider a policy's feasibility. Thus, in legislation it is necessary to take into account "the good that is possible and feasible in a particular society at a particular time." Often McCormick related "feasibility" to "realistic" and "sound".

Feasibility is "that quality whereby a proposed course of action is not merely possible but practicable, adaptable, depending on the circumstances, cultural ways, attitudes, traditions of a people." McCormick argued that it would not be possible to ban IVF with donor gametes or AID – even though he contends that it is not ethically justifiable – because of a lack of broad consensus and difficulties of compliance and enforcement. These examples suggest some important standards of feasibility: consensus, compliance and enforcement. "Sometimes morality can be translated into public policy, sometimes not".

Donor Anonymity

Those who argue that AID is ethically acceptable contend that it should be legally permissible under certain conditions. The report of our Bioethics Committee endorses arguments both in favour and against heterologous artificial procreation. The list of conditions to regulate AID, in case it would be legally permissible, includes donor anonymity. This position is not in line with the policy adopted by many European countries that have taken a clear stand against donor anonymity. The child's right to know its biological origin must be respected.

According to a report published by the Danish Council of Ethics, *Assisted Reproduction – A Report*, some members expressed reservation regarding the use of donor sperm. They emphasize that regard to the best interests of the child means ascribing importance to the fact that the complicated formative process may engender identity problems for the child. In some cases, discovering that the man with whom the child is living, is not its genetic father may prove to be a problem for the child. It is further stressed that donation may create dissension in the family and in the relationships between the man and the woman, since one of them is a genetic parent to the child, while the other is not. The one who has not supplied genetic material to the child may eventually feel “left out”, and problems can arise in allocating responsibility for – and commitment to the child. One of the reasons why, despite these reservations, these members were unwilling to recommend a ban on the use of donor sperm is that such a ban is difficult to enforce.

Denmark’s Bioethics Committee feels that donor anonymity must be abolished altogether. Ethically speaking, abolishing donor anonymity can be justified by arguing that, in consenting to donate material for the creation of a child, a donor assumes a responsibility; not in the sense that the person in question can be ordered to assume legal, parental custody of – or provide for – the child concerned, but in the sense that the person concerned must acknowledge his or her instrumentality in bringing a child into the world. That responsibility entails being prepared for the possibility of having one’s identity revealed to the child in question at a given point in time. By the same token the recipient of the donated sperm or egg must assume responsibility and admit that this is how the child was created. The responsibility entails consenting at a specific point in time to give the child the option of getting information about its genetic parents.

Some of the members of Denmark’s Bioethics Committee feel, furthermore, that an important objective in assisted procreation is

to encourage openness in the family regarding the making of the child. The parents should not be supported in the fallacy that the child actually is genetically their own when the truth is different. If donor anonymity is abolished, then according to the majority of members, the parents will presumably be more inclined to face up the truth, both in relation to the child and in relation to themselves.

In Sweden it has been provided by statute that, on reaching sufficient maturity, a child engendered by donor insemination has the right to obtain information about the donor. The social authority is obliged, at the request of the child, to assist in procuring such information. The explanatory memorandum of the Swedish report states that the regulation has taken on board the experience gained from adoption, where children from studies are known to benefit from receiving information about their genetic origins, provided that information comes from people who like them and respect them. Mention is also made of the fact that secrecy entraps the parents in a life-long lie. If the child wishes to have contact with the donor, this takes place through the hospital or clinic where insemination was carried out.

Germany does not admit donor anonymity. In Austria, also, the sperm donor does not have the right to anonymity. From the age of 14, a child born by the use of donor sperm can ask for information on the donor's identity. Fertility clinics are under an obligation to keep records showing the donor's name, place, and date of birth, nationality, address and so on. Moreover, Canada also proposed that records must be kept enabling the donor to be linked with the resulting child, ensuring that the donor or children can be contacted in any contingency of severe medical necessity.

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