A Role for Law in Matters of Morality

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In this article, the author examines whether there exists a role for law in moral matters. She first traces the interrelation of law, religion and morality through ancient times, Hebraic law and ancient Greek law until the decline in the influence of religious doctrine during the Renaissance. She then examines the *Wolfenden Report* and the ensuing Hart-Devlin debates about whether legal prohibitions were justified when society's morality was threatened. The author then applies Hart's and Devlin's arguments to reproductive and genetic technologies, and highlights the need for a distinction between activities involving truly public interests and those which are private in nature. She favours a public interest approach to reproductive and genetic technologies because of the far-reaching impact of the technologies and because of the law's role in maintaining public order. According to the author, a critical, multidisciplinary analysis of the present and future uses of the technologies is a necessary prelude to any legislation in the area.

Dans cet article, l'auteure se demande si le droit a vraiment un rôle à jouer dans des questions d'ordre moral. Elle décrit d'abord l'interrelation qui a existé entre le droit, la religion et la moralité à travers l'Antiquité, le droit hébraïque et le droit grec et ce, jusqu'à la Renaissance, époque où la doctrine religieuse vit son influence diminuer. Elle examine ensuite le *Rapport Wolfenden* ainsi que les débats subséquents qui opposèrent Hart et Devlin quant à savoir s'il était juste de poser des interdictions de nature juridique afin de protéger la moralité publique. L'auteure applique les arguments développés par Hart et Devlin aux technologies de reproduction et de génétique, et elle souligne la nécessité de faire la distinction entre les activités touchant à des intérêts véritablement publies et celles touchant plutôt à des intérêts de nature privée. Elle considère plus opportun d'adopter une approche dite d'intérêt public en ce qui concerne les technologies de génétique et de reproduction étant donné l'impact de ces technologies ainsi que le rôle que doit assurer le droit quant au maintien de l'ordre public. Selon l'auteure, une analyse multidisciplinaire critique des usages présents et futurs de ces technologies constitue un prélude nécessaire à l'adoption de toute législation dans ce domaine.

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Synopsis

Introduction

It has been written that "in all communities that reach a certain stage of development there springs up a social machinery which we call law. ... In each society there is an interaction between the abstract rules, the institutional machinery existing for their application, and the life of the people."[1] In few areas of modern life is the challenge to find a balanced relationship between these three elements more crucial than with respect to technology in the field of human reproduction and genetics. In this field, new developments and experiments build seamlessly one upon the other, and are increasingly integrated into health care systems and normalized in the public consciousness. These human reproductive and genetic technologies and practices, so complex and powerful that they challenge the very integrity and definition of the human person, prosper virtually unregulated by the law and are largely absent from the broader public agenda. In the meantime, the very speed and synergy of their development steadily narrow our legal and public policy options.

I. Historical Context

Throughout history, law has played an important role in the definition and protection of certain relationships, systems and institutions and in the control of individual and collective human behaviour. Through the use of normative and prescriptive rules, supported by varying degrees of sanctions, law has been used to create a climate of social order, the usual justification of which has been that it benefits members of society.

In ancient times, morality[2] and religion were synonymous. Both the lawmakers and the laws they declared were considered divinely inspired and directed. These three elements — law, religion and morality — were interrelated.[3] Opposition was not tolerated and the laws were respected because they were thought to be divinely inspired.

Hebraic law supported this equation of law and morality, yet differentiated between laws that were divinely inspired and other rules which were merely man-made and therefore of a lesser stature in terms of importance and sanction.[4]

The Greeks introduced the view that rationalism was to be preferred to moral mysticism; reason gave humans the ability to share in and understand the rational

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[1] G.W. Paton, *A Textbook of Jurisprudence* (Oxford: Clarendon Press, 1964) at 8.

[2] *Webster's* defines morality as "the character of being in accord with the principles or standards of right conduct" (*Webster's New World Dictionary, College Edition* (Toronto: Nelson, Foster & Scott, 1966)).

[3] D. Lloyd, *The Idea of Law* (London: Penguin Books, 1972) at 46-47.

[4] "... for the only true law was that which embodies the decree of God's will and any other man-made decrees were not to rank as law at all" (*ibid.* at 50).

and physical nature of the universe. The Greeks believed that human law was autonomous and separate from the law of God and accepted the possibility of the existence of laws that were both legal and immoral. They held, however, that there was a moral duty to obey the law. As such, even a bad law had to be obeyed unless and until it was altered or abolished. According to one author,

> [t]o this approach is owed much of the modern belief in scientific laws and in the possibility of a rational philosophy which can elucidate the ultimate principles of the physical structure of the world and of moral order governing human conduct, and also the relation of human beings to one another and to the universe. Such a belief in human reason in the moral sphere entails the idea of a moral law of a rational kind whose imperative character derives from the fact that man's reason must necessarily accept the rational solution as the moral and true one. For the universe being itself ordered rationally, reason requires the acceptance of rules which stand the test of rationality.[5]

The decline in the influence of religious doctrine that accompanied the Renaissance's new emphasis on the study of science and humanism broke the link between the physical and the divine, so important in natural law theories. The previous equation of law and morality was replaced by a new empiricism which adopted a search for knowledge based on observation and experiment. These methods, used regularly in the area of pure science, were to be applied to other fields including philosophy and law. This marked a major break with the past[6] and supported a way of thinking and acting that still dominates law today.

II. Law's Domain in Issues of Morality

While the modern consensus claims that law and morality are neither strictly dependent on nor equivalent to one another, they must nonetheless interact to achieve positive social ends. Over the years, the debate has continued about the legitimate domain of the law in matters of morality. Some would restrict law's reach by creating a sphere of moral behaviour within which decisions must be left to the individual conscience.[7] Such a view would prevent law from intervening in moral matters except to the extent that the society found it necessary to protect the public interest.

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[5] *Ibid.* at 52.

[6] Until the eighteenth century no clear line was drawn between the physical laws which dealt with propositions about the world, and which could be refuted by empirical evidence showing their non-applicability, and normative rules laying down standards of human conduct. ... [T]he theological background of natural law, which interpreted both physical and moral laws as traceable to God's will, effectively blurred this distinction, for if either could be attributed to an act of divine volition there was no difference in kind between them (*ibid.* at 96).

[7] This could occur, for example, with respect to issues of freedom of thought or religious belief.

III. Public vs. Private Spheres of Morality: The *Wolfenden Report*[8]

As part of our identification of the appropriate role of law in moral matters, it is important to distinguish between public and private spheres of morality. Almost forty years ago, the publication of the *Wolfenden Report* in England touched off a public debate about the role of law in these two spheres of morality. In the public discussions following the *Report*'s publication, two quite different approaches to law's place in addressing issues of morality emerged and were captured by the well-known Hart-Devlin debates.

The *Wolfenden Report* itself proposed that the provision making it an offence to have consensual homosexual relations in private be removed from the statute books, on the basis that "it is not the duty of the law to concern itself with immorality as such."[9] In so doing, the *Report* proposed the creation of a sphere of private morality where even acts judged by society (as interpreted in that *Report*) to be immoral could be performed in private without fear of sanction.

In his response to the *Wolfenden Report,* Lord Patrick Devlin defended society's right to pass judgment on all matters of morality, but especially on what he described as "society's constitutive morality".[10] Devlin proposed a public morality that, in certain situations, would override matters of personal or private judgment. He argued that because an attack on "society's constitutive morality" would threaten society with disintegration, such acts could not be free from public scrutiny and sanction on the basis that they were purely private acts. In Devlin's view, homosexual acts were a threat to society's morality. In short, he maintained that legal intervention was essential to ensure both individual and collective survival, and to prevent social disintegration due to a loss of social cohesion.[11]

Professor Herbert Hart, in his response to Lord Devlin's position,[12] agreed that a true threat to the cohesion of society by the erosion of one of its dominant moralities would indeed justify legal prohibition. He qualified this view, however, by requiring that such a threat be more than a mere challenge to society's code of conduct. He attacked Lord Devlin's thesis that homosexuality threatened society with disintegration, insisting that it amounted to the view that moral pluralism threatened the public order. He argued that empirical evidence must be presented to demonstrate how, and in what way, a true threat to social cohesion resulted from the acts

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[8] U.K., *Report of the Committee on Homosexual Offenses and Prostitution*, Cmd 247 (London: H.M.S.O., 1957) (Chair: Sir John Wolfenden) [hereinafter *Wolfenden Report*].

[9] *Ibid.* at 62.

[10] P. Devlin, *The Enforcement of Morals* (London: Oxford University Press, 1965).

[11] See R.P. George, "Social Cohesion and the Legal Enforcement of Morals: A Reconsideration of the Hart-Devlin Debate" (1990) 35 Am. J. Jur. 15 at 18.

[12] H.L.A. Hart, *Law, Liberty and Morality* (Stanford: Stanford University Press, 1971).

or practices involved, before the law could be called upon to intervene on society's behalf. Without such empirical evidence, the law had no place in matters of morality.

IV. The Question of Technology and Reproduction

The issues raised in this now-famous debate on law and morality are equally relevant to the discussion of the role of law in the regulation of technology in the area of human reproduction and human genetics.

In the first place, both Lord Devlin and Professor Hart agree that acts or practices that might seem private can have consequences requiring action by the larger community. Their differences are about evidence, not about principle. Therefore, the debate suggests that the law not become involved until it is demonstrated that the behaviour or practices in question (in this case, the area of reproductive and genetic technologies and related practices) present a challenge to society's sense of cohesion and significant interests.

In addition, the Hart-Devlin debate suggests that the real issue is the determination of which societal interests are significant enough to warrant legal intervention to regulate scientific or medical activity. That suggestion implies that some scientific and medical activity should be beyond the reach of the law.

Therefore, with respect to issues involving human reproduction and human genetics, it is important to distinguish between activities that involve truly *public* interests and those that might be considered merely private in nature. Those public interests could include the integrity of the individual; respect for all human life; the equality of women and other historically vulnerable groups like the physically and mentally disabled; the autonomy of the individual and the individual's right to privacy, which includes the right to know and to protect one's genetic heritage. Recognition of these types of public interest claims, in certain circumstances, would allow us to focus on threats of a fundamental nature. This would prevent the inevitable disrespect for the law which would result from its involvement in less significant societal matters. Such an approach would also allow us to respect individual choices and to directly focus our attention on the more important issues.

V. The Case of Reproductive and Genetic Technologies

Many proponents and users of reproductive and genetic technologies and related practices argue that their use and development of the technologies are merely enhancements of otherwise purely private reproductive acts. They argue that they should not be subject to legal regulation and should be considered solely medical interventions, the use of which would be determined exclusively by personal choice. Under this reasoning, the practices involved in reproductive intervention

would be classified as mere technological tools to help individuals who might otherwise be unable to reproduce or have "healthy" children.

There are two fundamental reasons why such a narrow approach to the role of law in the area of technology and human reproduction is insufficient as a basis for public policy formulation and decision-making. First, it is impossible to argue convincingly that the use and development of reproductive and genetic technologies is merely a matter of private moral conduct. Certain classes of person are more likely to take part in, benefit from or be harmed by these technologies and practices, yet their impact inevitably extends beyond the users and providers to the community as a whole. For example, consider Western society's attitude toward people born with physical disabilities. In Canada and other countries, public policy rejects any assumption that disability means inferiority, and deliberately accords equal worth to each individual. Discrimination is thus prohibited after an individual is born.

Practices such as pre-natal and pre-implantation diagnosis create the possibility of discrimination before birth, and that very possibility could erode public support for the principle of equality. Again, practices like embryo research and genetic engineering, made possible by the use of reproductive tcchnologies, make it possible to deny all legal status to some human life, at the embryonic and early embryonic stages of development. These, then, are cases where, although the reproductive decision may be an individual and private one, the consequences of that decision are not.

The second justification of a role for law in this sphere is the public acceptance of a role for law in maintaining and enhancing public order and in protecting society's membcrs from real or potential harm. Threats to a society's integrity should not be limited to those involving only the actual physical integrity of its members. More subtle threats can prove equally dangerous to a community's cohesiveness and stability. To the extent that our society's significant interests, values, institutions and norms are challenged or threatened by human reproductive technologies and practices, there is a need for control and regulation in order to ensure that their use and development enhances, rather than diminishes, the security and well-being of all of society's members. In the end, it is the potential for abuse that requires the involvement of the law in the regulation of technology in the field of human reproduction and human genetics.

Conclusion

The use and development of human reproductive and genetic technologies and related practices have profound repercussions for individual autonomy and human rights because they significantly affect society's basic institutions, morality and sense of social cohesion. Their use and development transcend the realm of private reproductive decision-making, and move the technologies into the public realm where they become the legitimate concern of the law.

However, as the issues raised include matters of reproductive choices and decision-making, it is important to balance the understandable desires of some members of the community to use these technologies to overcome infertility, or disease and genetic anomaly in their offspring, with the interest of society to protect its members. The law, as the expression of public policy, is the instrument of that balance.

Significant new questions face society as a result of the use and development of technology in the field of human reproduction and genetics. For example, if it becomes possible to clone humans, should it be permitted? If permitted, should it be regulated? Should cross-species fertilization between humans and higher primates be allowed merely because it is possible? Medical technology already allows the use of animal organs for such procedures as heart and liver transplants in humans. Should the decisions involved in these kinds of situations be left to the doctors and scientists involved? If not, how should the public interest be expressed, and by whom?

The issues looming in 1995 are ones that few foresaw a decade ago. Science and medicine will continue to use technology to push back frontiers and the challenge for public policy is to maintain a dynamic balance between what is possible and what is in the public interest.

This requires a broad and multidisciplinary approach that can identify the interests which are both significant to the larger society and are threatened by the use and development of technology in the field of human reproduction and genetics. This approach must be the basis of any proposed framework to regulate these technologies. Determining such an approach is clearly a complex undertaking.

First, it is necessary to define the significant societal interests at stake. Second, we must examine how these interests are threatened by the use and development of reproductive and genetic technologies and practices. Third, we must study the ways in which the law can intervene to protect these interests.

In Canada, account must also be taken of any implications for the guarantees set out in the *Canadian Charter of Rights and Freedoms*[13] and relevant federal[14] and provincial[15] human rights legislation.[16]

The basis of this broad approach must be an enlarged concept of societal harm, which goes beyond a preoccupation with mere physical security to include what one author refers to as a "substantive vision of human flourishing."[17] The notion of harm, broadly defined as such, would reflect a more accurate view of human life as more than a mere exercise in physical survival. It would also allow for the protection of those most vulnerable to any abuses that might result from the use and development of technology in the field of human reproduction and genetics, such as women, the physically and mentally handicapped, the disempowered and the poor.

Furthermore, such a notion of harm makes it easier to demonstrate that the use and development of technology in the field of human reproduction and genetics have a serious impact on society that extends beyond the couple or individual seeking to use them as a means to reproduce and to control the health outcome of their offspring. It also allows for a more comprehensive diseussion of the publie policy and legal initiatives that can best balance the competing interests involved in these matters.

The applieation of such a harm principle to the use and development of these technologies would extend the measurement criteria for the costs and benefits of these technologies and practices beyond the narrow medical or scientific considerations now applied. The new standard would provide a reliable basis upon which to distinguish between questions of technique, which are properly the preserve of medicine and science, and questions that touch the broader fabric of society. This is important specifically because it establishes the larger community intercst, and asserts the principle that many of the issues raised by the use and development of

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[13] Part I of the *Constitution Act*, 1982, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[14] *Canadian Human Rights Act*, R.S.C. 1985, c. H-6, s. 3.

[15] *Human Rights Act*, S.B.C. 1984, c. 22, ss. 1, 8(2), paras. 3(1)(a), 4(a), 4(b), 5(1)(a), 8(1)(a), 9(a), 9(b); *Individual's Rights Protection Act*, S.A. 1991, c. 1-2, s. 2; *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1, s. 2, Part II; *The Human Rights Code*, C.C.S.M., c. H175, enacted by S.M. 1987, c. 45, s. 9(2); *Human Rights Code*, R.S.O. 1990, c. H.19, s. 1; *Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12, s. 10; *Human Rights Code*, R.S.N.B. 1973, c. H-11; *Human Rights Act*, R.S.N.S. 1989, c. 214, s. 5; *Human Rights Act*, R.S.P.E.I. 1988, c. H-12, para. 1(1)(d); *The Human Rights Code, 1988*, S.N. 1988, c. 62, para. 19(a); *Fair Practices Ordinance*, R.S.N.W.T. 1974, c. F-2, s. 3.

[16] For instance, do pre-natal and pre-implantation sex selection respect the guarantees of gender equality and of protection against discrimination based on physical or mental handicap as set out in these *Acts* and in the *Charter*?

[17] For an excellent discussion of this concept, see R. Hittinger, "The Hart-Devlin Debate Revisited"(1990) 35 Am. J. Jur. 47 at 49.

technology in the field of human reproduction and genetics reach far beyond questions of management or science.

When balancing the pros and cons of these technologies and practices, then, we must support a philosophy of utility that goes beyond the technical to a higher plane of "utility in the largest sense, grounded on the permanent interests of a man [*sic*] as a progressive being."[18] As was eloquently stated by one of the speakers at an international symposium on the Social and Economic Teaching of the World Council of Churches:

> The 'facts of the case' as seen from the limited and limiting (although reasonable and authentic) perspective of the sciences, physical, biological and social, do not state all there is to be said about the human situation and need never have the last word about the possibilities of a situation from the human point of view.[19]

These, then, are some of the reasons why it is essential to choose a broad definition of the notion of individual and collective harm to allow us to raise all of the difficult questions about the costs and benefits such technologies and practices present to society. The broad understanding of harm will help ensure that all those affected by the use and development of technology in the sensitive field of human reproduction and genetics will have the opportunity to be heard and the legitimacy to exert real influence on public decisionmaking. This is important because, as part of the legislative process, we must both assess the benefits which groups, such as the infertile, for example, could receive from the use and development of these technologies, and contrast them with the threat that they pose to other groups and individuals within society.

Are there, for instance, some technologies or related practices in use, or proposed, in the field of human reproduction, such as the cloning of humans, the cross-fertilization of species, the use of pre-natal and pre-implantation diagnosis to eliminate female or other embryos or fetuses for reasons of gender or disability or the development of genetic engineering to alter human embryos in the laboratory, that must never be explored? What makes their use or development fatal to the integrity of the individual and to the cohesion of society as a whole? What are the specific societal and individual interests under attack, and are they fundamental to social cohesion and human integrity? If we find that the use and development of one or more of these technologies and practices threaten or negate a fundamental societal interest, are there any circumstances under which their use would be morally permissible? If so, what are these circumstances? If a positive or beneficial use can be found, can it be severed from other immoral or socially threatening elements?

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[18] *Ibid.* at 51, quoting J.S. Mill, *On Liberty and Considerations on Representative Government*, ed. by R.B. McCallum (Oxford: Basil Blackwell, 1946) at 9.

[19] D.E. Jenkins, "The Concept of the Human" in R.H. Preston, ed., *Technology and Social Justice* (London: SCM Press, 1971) 205 at 219.

If the answer to the above questions is yes, are we satisfied that sufficient legal safeguards exist, or are possible, to protect both individuals and society from the broadly defined harm that comes from the use of such technologies in any context? What criteria should be relevant in making these decisions? And finally, perhaps the most controversial and fundamental question of all — who decides?

Such an approach makes it clear that, as a prelude to regulation of technology in the field of human reproduction and genetics, we must undertake a critical analysis of the present and future uses of individual technologies and practices, alone and in concert with other related developments, technologies and practices.

This may ultimately prove the most difficult of the tasks before us, for it will require the cooperation of all interested groups and individuals. Those who propose and practise these technologies, for instance, must be willing to share their knowledge with a wide range of professionals and laypersons if the latter are to participate in the decision-making process in a meaningful and democratic fashion. This will inevitably require doctors, geneticists and scientists to cede a measure of their present exclusive control over the reproductive and human research agendas. The success of an approach based on collective and consensual decision-making depends on this sort of change in our ways of thinking and doing. My own personal experiences as a member of a Royal Commission charged with examining these very issues make me less than optimistic that such an openness can be achieved.

In the end, only an approach which allows for informed and meaningful public involvement will earn society's trust in the evolving technology and its human goals.

Failure to engage in this kind of debate may lead to a situation where the public discussion of the fundamental issues involved would stagnate at the level of slogans, as in the case of the abortion debate. We must now find new processes and contexts for the resolution of issues which profoundly affect society. Otherwise, we will be faced with *ad hoc* public policy and legislation in an area of extreme importance to the integrity and freedom of both society and the individual, and we will also risk losing the potential benefits offered by the enlightened use of many of these technologies.