

Protection of the Human Embryo: The Discourses of Pluralism

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Parties to this Convention shall see to it that the fundamental questions raised by the developments of biology and medicine are the subject of appropriate public discussion in the light, in particular, of relevant medical, social, economic, ethical and legal implications, and that their possible application is made the subject of appropriate consultation.¹

In response to this formal commitment to public consultation and debate, the Third Symposium on Bioethics of the Council of Europe had as its theme 'medically assisted procreation and the protection of the human embryo'. The symposium took place in Strasbourg, France, in December 1996. Themes within the programme were: medically assisted procreation; research on embryos in vitro; pre-implantation diagnosis; and scientific, philosophical and legal aspects of the nature and status of the embryo.

The Symposium brought together some 400 participants and specialists from the worlds of science, ethics and law, and representatives of Ministries of Justice and Health and non-governmental organisations from across Europe. It was to be the departure point for the preparation of a protocol on the protection of the human embryo. The protocol was to become part of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine. The Convention itself was adopted by the Committee of Ministers of the Council of Europe on 19 November 1996. It was intended that member States would become signatories to the Convention and formulate legislation and protocols in their own countries to ensure its observance. In the view of Monsieur Jacques Toubon, France's Minister of Justice, who opened the symposium, the Convention made a significant contribution to an 'ethical Europe'. This bioethics symposium was seen as an aspect of the 'harmonisation' work which is part of the brief of the Council of Europe.²

In New Zealand in June 1996 Labour MP Dianne Yates introduced a private member's Bill on Human Assisted Reproductive Technology. The three main features of the Bill are: the establishment of a licensing authority to regulate and ensure proper monitoring of services; the banning of the sale of body parts, blood, embryos, foetal tissue, fetuses and babies; and the establishment of a centrally kept record system, including access.³ On 23 April 1997, this Bill succeeded at its second reading in Parliament. It was supported by all parties. The Bill will now go to a Select Committee and the New Zealand public will have the opportunity to make submissions. The Minister of Health, Bill English, was reported as being particularly concerned that ethical issues be dealt with in more detail than in the Bill.⁴

The purpose of this paper is to encourage public discussion in New Zealand on some of the issues which arise from the rapidly developing reproductive technologies in relation to the protection of the human embryo. To focus on the embryo is to deflect attention from that which is often of immediate concern, a couple's infertility and their desire to have a child, to what is central to the application of these technologies. There is much debate about the status of the embryo and the protections it deserves at various stages of development because clear definitions of status would determine sanction or licence for what could then be done to and with it for whatever motive. The rapidly developing technologies point to endless possibilities. As both Monsieur Toubon and Mr English acknowledge, there are, however, fundamental ethical issues here. More than one contributor to the symposium papers stated such concerns:

The question that ethics attempts to answer is not simply 'what must we do?', but more fundamentally, 'what do we wish to become?' We are mainly responsible for our own evolution. Human evolution no longer proceeds as a result of

chance and natural selection but through our personal and collective choices. Thus what we wish to become reflects above all the image we have of ourselves.⁵

The Roles of Ethicist and Legislator

A question we might ask is 'how are we to make these "personal and collective" choices?' In New Zealand, the National Ethics Committee on Assisted Human Reproduction has de facto carried this burden more than once, in relation to surrogacy, same-sex parenting, and intergenerational gamete donation. In my view, these issues can properly be resolved only through a process which begins with wide consultation, and includes legislation on some aspects. A particular difficulty for decision-making based on consultation is the pluralistic make-up of our society in New Zealand. The diversity of views, values and beliefs evident at the symposium is present within New Zealand's new developing nation. The success of our reproductive technologies Bill at its second reading raises a question about the role of the legislator in relation to ethics. At the symposium, David Baird's view was that in the absence of ethical certainty we need to impose legal restraints on what is permissible and what is not. And the price of legal restraints is a lack of individual freedom.⁶

Embryos in Industry and Commerce

Rosanna Baraldi from Canada put an interesting new slant on the aspect of control and the scope of bioethics, particularly in relation to the human embryo. Ethical issues commonly debated have arisen from the relationship between the biomedical establishment and society. A primary concern for bioethicists and fertility specialists has been the appropriate application of technology to alleviate the distresses for couples caused by their infertility.

In New Zealand, there have been additional issues raised by the provision of fertility services mainly within the private health sector, issues such as equity and access. There are, however, additional major issues when we take into account industrial interests. Human embryos produced in vitro are now manipulated in the world's scientific laboratories and in the laboratories of the pharmaceutical and biotechnology industries. The commercial ideologies of private and free markets present a significant challenge to bioethicists.

Economic forces and the networks formed between the political sphere, public laboratories, private laboratories and the biomedical and scientific institutions, frequently reported in the American press, form the grey area of the reins of power. Although the expansionist, secretive approach of the industrial free market may be acceptable for the production of consumer goods, it is essential that industry's appropriation of the human embryo be put to public debate. We can only protect the human embryo, procreation and childbirth if the private sector is effectively subjected to the laws of ethics being discussed in the public arena.⁷

An example was discussed of how the interests of commerce and research can escape the controls imposed by legislation. The research involved animal embryo stem cell lines. It was thought the research could eventually open the way to the establishment of human embryo cell lines which could be stored in a frozen state. A proposed potential therapeutic use would be the preparation of large quantities of differentiated cells which could be used as grafts, replacing marrow grafts, for example. The establishment of human embryo stem cells, which can only be carried out from embryos in vitro, is impossible when a country's legislation forbids embryo research, such as is the case in Germany, or, as in France, which only allows studies that do not interfere with the embryo. However, research teams are able to obtain cell lines from foreign 'collections', some of which are available commercially. In the paper I am referring to, the paradoxical situation is mentioned where:

research or therapeutic applications [are] forbidden by law but [there occurs] the importation of cells which have been collected with no consideration for ethical rules, for example embryos conceived solely for the purposes of collecting cells or the payment of donors.⁸

Embryos in Research

In fact, there was some dissatisfaction expressed in discussion at the symposium with those countries where there are restrictions on embryo research. It was seriously suggested that if they were not willing to participate in such research, then they should not share the benefits of such research. I would like to add the point here that there is currently no restriction on embryo research in New Zealand, apart from the requirement of ethical review, which is not enforced by law. The National Ethics Committee for Assisted Human Reproduction, the appropriate body for giving such review, has not received any such requests. The Human Assisted Reproductive Technology Bill, in the Second Schedule, Part III, provides for licences for research and lists those purposes for which a licence may be granted.⁹

Defining the Status of the Embryo

The public pressure put on some participants at the symposium to review their stance on research on the human embryo raises some interesting questions in view of the respect for diversity of values and beliefs espoused as an ideal at the symposium and which I am proposing in this paper. Luis Archer from Portugal summed up the extreme views, both of which were strongly represented at the symposium.

For some, the dignity of the human being is acquired gradually only during the process which changes the egg into a completely formed individual. For them, the respect and protection due to the embryo before implantation are much less than those attributed to a fully developed human being. This therefore makes it ethically acceptable, under certain conditions, for surplus embryos to be eliminated, donated to infertile couples or be used for research of proven scientific importance...

For others...the ovum and the embryo already have the same dignity as a fully developed human being... A surplus embryo which is abandoned or given to another couple or submitted to research which is not for its own benefit is a serious affront to human dignity.¹⁰

Archer argued in support of what he called the ethical precautionary principle in the face of these irreconcilable views, and claimed it a serious offence to do anything against an entity about whose status there was such doubt. Interestingly, in New Zealand the Na-

tional Ethics Committee for Assisted Human Reproduction has been strongly criticised for applying the ethical precautionary principle when it reviewed non-commercial surrogacy using in vitro fertilisation and has been advised to reconsider its decision.^{11 & 12} This raises a question about the practical application of ethical debate in situations of irreducible controversy.

Further evidence of the 'conservative' view is clear in the term Professor Zbigniew Chlap from Poland used to describe human embryos, a term also used in one of the major presentations with some support from the assembled audience. He referred to them as 'the smallest of children'.¹³ This notion of continuity was also emphasised in the terminology used by Professor Ismene Androulidakis Dimitriadis from the University of Athens in Greece. She consistently referred to the embryo as the 'nasciturus' (the 'about to be born') who, at birth, would become the 'natus' (the 'having been born').¹⁴ Several of the presentations at the symposium focused on scientific and philosophical issues involved with the status of the human embryo and the point at which it should be attributed the status of a human being. There were those of the view proposed by Baroness Warnock in Britain in 1984, that the appearance of the primitive streak and the end of totipotentiality after the fourteenth day was a point before which the term pre-embryo could be applied and consequently at which research could justifiably commence.¹⁵

Applications of Research

Certainly, the therapeutic benefits resulting from research on the embryo in the form of gene therapy were presented very convincingly from a personal perspective. Dr Mark Hughes from the USA explained, with the help of slides, the benefits to a particular family who already had one child with an hereditary disease which involved, amongst other things, severe self-mutilation. Gene therapy offered the possibility of a second child without the inherited disorder and also without the moral compromise the parents believed they would make if they agreed to pre-implantation selection given the medical condition of their first child.¹⁶

Dr Therese Callus from the UK supported pre-implantation diagnosis

and selection on the basis of its potential to alleviate human suffering but recommended exploration of ethical issues and the need for regulation. She suggested as potential abuses situations where selection on the basis of a potential reduction in health-care costs, or on the basis of a desire to produce the sex favoured in a particular community could occur, thus encouraging in a society a tendency towards eugenics and an intolerance of certain characteristics perceived as undesirable.¹⁷ Someone used the term 'the tyranny of normality' in this regard.

Thus far in this paper, I have focused on the human embryo to emphasise the range of views that arose from the many diverse values and beliefs of peoples from many countries. Within this cultural and historical diversity discourses are located which shape and name the conceptualisations of the human embryo. I have pointed to the difficult task of a body such as the European Parliament to achieve any kind of 'harmonisation'. I have also asked questions about the best means of control in the face of rapidly developing technologies, if indeed we see a restraint of individual freedom as desirable. I turn briefly now to the papers presented on the last afternoon of the symposium, when there was a slot designated for the views of 'religious and secular' organisations, an interesting juxtaposition against the papers from the formally invited speakers which had been on the programme for the preceding two and a half days. Five formal papers were available. Several of the themes in these, however, underlay the earlier papers. These papers lacked definitiveness and individually illustrated the discursive approach I have followed in this paper.

Religious and Secular Voices

Dr Dalil Boubakeur made extensive reference to the Koran and concluded on the subject of the embryo in Islam that human life is a 'sacred gift from God' and that each human is a 'unique being to be respected from the first moments of his or her existence'. Embryos should be considered as 'a tangible, direct promise of human life, a human body in the making and, as soon as the receptors exist, a God-given soul'. Dr Boubakeur emphasised what he called the 'parenthood project' in any reproductive interventions.¹⁸

Professor Colombo, reporting on behalf of the Holy See's Permanent Mission to the Council of Europe, emphasised the sacredness and inviolability of human life which includes the initial phase which precedes birth. 'Every embryonic manipulation not directed "towards its healing, the improvement of its condition of health or its individual survival violates the respect due to the human person."¹⁹

Fr Nikolas Hatzinikolaou, reporting on behalf of the Greek Orthodox Church, claimed three rights of the embryo: the right to identity, the right to life, and the right to eternity. The birth of the soul begins at conception. 'As the struggle of a young child to reach adulthood and maturity should not be hindered, likewise and even more so, the agony and struggle of the embryo to host its soul should not be assaulted.'²⁰

Representation of the Jewish perspective on the nature and status of the human embryo was based on 'the five revealed books of the Torah and the commentaries on them by the authorities of the Talmudic tradition', and took the form of a number of reflections. Two general points were made: 'the pre-eminence of life and the dignity of the human individual'.²¹

In the position paper presented on behalf of the European Ecumenical Commission for Church and Society, acknowledgment was given to a plurality of positions. Three clusters of opinions were claimed in relation to the status of the embryo:

The human embryo is considered as a person to be, to such an extent that absolute protection is required.

At the other extreme one can find the position which equates the human embryo to human tissue, which implies that it may be used for research (under more or less strict conditions).

Between these two extremes, others try to take into account the development of the embryo . . . [and] would argue for an increasing protection of the human embryo during the pregnancy.²²

Two papers presented views which were largely from outside the European tradition, one by Dr Jiro Nudeshima of the Mitsubishi-Kasei Institute of Life Sciences in Tokyo and my own paper which I co-authored with Rauputiputi Smith. In Japan there is no legal or administrative regulation of practices associated with medically assisted procreation, al-

though these practices are widespread. Germ-line gene therapy is held by a moratorium set by the guidelines of the Ministry of Health in 1994 without public debate. Medically assisted procreation and protection of the human embryo were said not to be controversial topics in Japanese society generally.²³

Possibly the only major difference between the range of views I heard at the symposium and the range one might expect to find in New Zealand was about the question of the identity of the gamete donor. This was one of the themes briefly explored in our paper. Rauputiputi Smith explained that for Maori, Wai Tatea (sperm) represented lineage or Whakapapa, the concept of a continuity which embraces not only the gamete and but also the deceased person. Two implications of this are that sperm must be registered so that the children of the future can identify their Iwi, and on the death of the donor – it must be offered back to the family for disposal.²⁴ For Maori, there are attributes of personhood even at the gamete stage. Currently in New Zealand, fertility clinics keep identifying records of sperm donors, and the Human Assisted Reproductive Technology Bill provides for centralised records. Access by children in the future is something that needs to be ensured. By contrast, with the exception of Sweden (since 1984), Germany (since 1989), Austria (since 1992) and Switzerland (since 1992), European countries have decided that donors should remain anonymous. Arguments to support anonymity were given as:

protection of MAP [medically-assisted procreation] families, protection of the donor's interests, the interests of the child, the need to balance biological and psychosocial truth in filiation law, security of the filiation of MAP children and survival of MAP itself.²⁵

Widespread anonymity of the donor influences the relevance for New Zealand of international research reports about the effects of donor insemination on children born as the result of this practice.

I have referred in the title of this paper to the discourses of pluralism. Attendance at this symposium gave me a unique opportunity to read beyond the traditional texts available to academic inquiry and to experience other texts available through personal observation and participation. Notable

amongst these were the 'whispering in the hemi-circle'²⁶ and the formal protocol of the Parliamentary Chamber of the Palais de l'Europe, where the Symposium was held. The former communicated unspoken personal approbation and reaction; the latter the seriousness of the Council's intention to find common ground in diversity to protect humanity itself.

On the questions of consensus, control and the role of the legislator, I recommend the advice of Professor Wieslaw Lang from Copernic University, Poland:

Practical principled consensus on embryos is more needed in law than in morality. In a pluralist democratic society governed by law the conditions for reaching theoretical or practical consensus on the status of embryos are much better in legal than in moral discourse. The intrinsic features of law as a means of social control limit the field of controversies on the legal status of the embryo and facilitate the consensus. The consensus on the moral status of an embryo is not a necessary precondition for reaching consensus on [the] legal status of the embryo. The lack of consensus on the moral status of the embryo might be a constitutive assumption of its legal status. In an open and pluralist society a philosophical uncertainty of the moral status of the embryo must result in the restrainedly permissive legal regulations of the practice dealing with embryos.²⁷

Notes

- 1 Council of Europe Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine. Chapter X, Article 28. Strasbourg, 1996. p 8.
- 2 Jacques Toubon. Opening Address. Strasbourg, 1996.
- 3 Human Assisted Reproductive Technology Bill. NZ Government, Wellington, 1996.
- 4 Diane Yates, Labour MP. 'Dolly' Bill Passes 2nd Reading in Parliament. Media Statement. Wellington, 23 April, 1997.
- 5 Professor Bertrand Blanchet, Bishop of Rimouski, Canada. 'In vitro embryo research.' *Communications of the Participants*. Strasbourg, 1996. p 7.
- 6 Professor David Baird, University of Edinburgh: my note.
- 7 Rosanna Baraldi, Canada. 'Between family and industry: the divided bioethical future of the human embryo.' *Communications of the Participants*. Strasbourg, 1996. p 4.
- 8 Andre Boue, France. 'The ethical implication of collecting and using human

embryo stem cells.' *Communications of the Participants*. Strasbourg, 1996. p 10.

- 9 Human Assisted Reproductive Technology Bill, New Zealand Government, Wellington, 1996.
- 10 Luis Archer, Portugal. 'Consequences of the doubts on the status of embryo.' *Communications of the Participants*. Strasbourg, 1996.
- 11 Report of the Interim National Ethics Committee for Assisted Reproductive Technology, Ministry of Health, Wellington, 1994.
- 12 Second Opinion, National Advisory Committee on Health and Disability Services Ethics, Ministry of Health, Wellington, 1997.
- 13 Personal note
- 14 Professor Androulidakis Dimitriadis, Greece. 'Nature and status of the embryo - legal aspects continental law jurisdictions.' Presentation. Strasbourg, 1996.
- 15 Professor Pierre Cuet, France. 'An ethical status for the human embryo.' *Communications of the Participants*. Strasbourg, 1996.
- 16 Dr Mark Hughes, USA. 'Genetic Counselling'; my note.
- 17 Dr Therese Callus, UK. 'Pre-implantation diagnosis - Why the UK cannot continue with its laissez faire approach.' *Communications of the Participants*. Strasbourg, 1996. pp. 13-14.
- 18 Dr Dalil Boubakeur, France. 'The embryo in Islam.' Report. Strasbourg, 1996. pp. 5-6.
- 19 Cardinal Ratzinger Colombo, Italy. 'The nature and status of the human embryo.' Report. Strasbourg, 1996. p. 2.
- 20 Fr Nikolas Hatzinikolaou, Greece. 'Nature and status of the embryo: the Orthodox Christian approach.' Report on behalf of the Greek Orthodox Church, Strasbourg, 1996.
- 21 Dr B. Kanovitch, France. 'Jewish reflection about the nature and status of the human embryo.' Report on behalf of the Jewish religion. Strasbourg, 1996.
- 22 Professor Egbert Schroten. 'Nature and status of the embryo. Position of the EECSS.' Report on behalf of the European Ecumenical Commission for Church and Society, Strasbourg, 1996. 2. This is the body which enables Protestant, Anglican and Orthodox churches in the European Union member States and other European countries to relate to the institutions of the European Union and the Council of Europe.
- 23 Dr Jiro Nudeshima, Japan. 'Regulation issues of medically-assisted procreation in Japan.' *Communications of Participants*. Strasbourg, 1996. p. 59.
- 24 R. J. De Luca and Rauputiputi Smith, New Zealand. 'A bi-cultural perspective on the collection, storage, use and disposal of gametes.' *Communications of the Participants*. Strasbourg, 1996. p. 22.
- 25 Professor Olivier Guillod, Switzerland. 'Children born with the help of medically assisted procreation: anonymity of

donors or right of the child to know his origins.' Presentation. Strasbourg, 1996. p. 2.

- 26 This was how one of the symposium's chairpersons, Madame Lalumiere, described the spontaneous responses of the participants.
- 27 Professor Wieslaw Lang, Poland. 'The conditions for consensus on embryos in pluralist societies.' Presentation. Strasbourg, 1996. p. 12.

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- National Advisory Committee on Health and Disability Services Ethics. Second Opinion. Ministry of Health. Wellington, 1997.
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At the Centre

Irihapeti Ramsden is an associate staff member of the Bioethics Centre. So, everybody at the Centre was excited with the news that Irihapeti was recently elected to the International Association of Bioethics' Board of Directors. The IAB is the organisation that Alastair Campbell has had a great deal of involvement with (he is presently Vice-President). Readers that wish to get in touch with the IAB can contact its new executive office (The office at Monash University closed on May 30th) at:

Executive Office of the IAB
Center for Bioethics and Health Law
Utrecht University
PO Box 80105
3508 TC Utrecht
The Netherlands

Planning is underway for the next Summer Seminar 13-15 February of next year. A planning committee has been appointed for the Seminar's academic programme and other practical considerations. The intent is to focus on emerging issues for ethics in New Zealand. Fay McDonald has been appointed as the Administrator for the Summer Seminar. Fay has been involved with the Centre's activities for a number of years and will bring a range of skills to this position.

The Centre's Acting Director, Professor Gareth Jones, has been prominent in the media recently. He and Robyn Harris recently published an article in *Nature* magazine titled 'Contending for the Dead' (Vol 386 March 6). The article considers current issues surrounding the use and ownership of skeletal remains. Gareth

presented his analysis to a recent Centre seminar titled 'Who speaks for the Dead?' It is an issue which has attracted considerable media attention, so it was no surprise to see a colour photograph of Gareth in a recent issue of a national newspaper.

As readers of the Report will know there has been a major restructuring at Otago Medical School of the second and third years of the medical curriculum. One of the features of the new curriculum is its emphasis on the integration of material across traditional disciplines and a focus on problem based learning. 1997's second year class is the first to work with the new 'Patient Doctor and Society' module (the third year curriculum will begin in 1998). This module combines input from the Bioethics Centre, and the departments of Preventive and Social Medicine and Behavioural Science. As well as increased input from the Centre in this module we have also been involved more heavily with other areas of the second year curriculum. Bioethics staff have taken a number of initiatives in course design and development within the new curricula. One existing project has been the production of a video 'Living with Haemophilia', by Barbara Nicholas and Lynley Anderson, in collaboration with members of three families who have the condition. This has been used as a part of a two week module which develops students skills in integrating material learnt in a number of different ways and applying their knowledge to a clinical situation. Responses to the video have been very positive. Evaluation of its effectiveness in teaching is part of the ongoing departmental research into ethics education.