

Lawyers and the Future of UK Bioethics

Bioethics is a hot topic. Few weeks go by without a headline concerning the implications of emerging scientific possibilities, health service controversies, or moral dilemmas around death and dying. The study and resolution of these problems form part of the field of bioethics. While in some countries the discipline has been dominated by philosophers, in the UK lawyers have played a pivotal role. One commentator has argued that Professor Sir Ian Kennedy, then at the Law School of King's College London 'virtually invented the field in the United Kingdom'. Certainly, his Reith Lectures in 1980, later published as *The Unmasking of Medicine* (1983), mark the beginning of highly visible public discussions of the issues which became increasingly matters for society to determine whereas they had previously been seen as internal matters of professional ethics. While early medical legislation displayed such a degree of trust in the profession that no sanctions were included in the Human Tissue Act of 1961, now it is subject to extensive regulation. The Human Tissue Act of 2004 begins by listing no less than nine activities which constitute crimes unless authorised by an appropriate consent and goes on to subject transplantation and other medical practices to a strict licensing regime under a statutory regulator.

The reform of this legislation illustrates one of the ways in which lawyers have led the transformation of bioethics from a professional matter to a highly regulated area of life. The 2004 Act was prompted by a major inquiry into the retention of organs at Liverpool's Alder Hey hospital. Chaired by Michael Redfern QC, it drew attention to the need for reform. Other examples of lawyers having a major impact in the area of health services include the many inquiries led by Sir Ian Kennedy, including most significantly that into children's heart surgery at the Bristol Royal Infirmary, which led to a transformation of NHS culture partly consolidated by the NHS Reform and Health Care Professions Act 2002. Major change is expected as a result of the inquiry currently being undertaken into failures of care in Mid-Staffordshire, under the chairmanship of Robert Francis QC. The NHS would be a very different place were it not for the work of lawyers.

The leadership of lawyers has not been restricted to inquiries into scandals. Although bioethics flourished as a public enterprise after Kennedy's Reith Lectures, the UK declined to take up his recommendation for a national bioethics commission on the US model. Nevertheless, a number of specific authorities were created to take work in this area forward and in many of them the contribution of lawyers was highly influential. When the Warnock Committee inquired into Human Fertilisation and Embryology in the early 1980s, the only legal members were the Vice-President of the Immigration Advisory Services ('of whom we saw little, because we understood he was helping his clients in court', Warnock *Nature and Mortality* (2004) p 84) and an Edinburgh solicitor (who was not mentioned at all in Warnock's memoir of the discussions). It would be highly unlikely that any such committee would be set up today without a specialist in medical or health care law. Subsequent official inquiries into bioethical issues in reproduction have been headed by lawyers - Professor Margot Brazier of Manchester University (surrogacy) and Professor Sheila Maclean of the University of Glasgow (posthumous use of gametes). Alexander McCall Smith, now famous for his No

1 Ladies Detective stories played his part too; as Professor of Medical Law at the University of Edinburgh and the first Vice-Chairman of the Human Genetics Commission.

Lawyers can therefore be proud of the contribution their discipline has made to UK Bioethics, but in the future, they will need to be involved in a different ways. Under the current Coalition Government, the practice of bioethics is seeing a different kind of heat. In the glow of the 'bonfire of the quangos', choices need to be made about the future shape of bioethical governance. Lawyers will need to consider how to continue to influence thinking in new structures. Amongst the organisations scheduled to be disbanded are the Human Genetics Commission (to cease functioning at the end of March this year) and the Human Fertilisation and Embryology Authority, whose demise has been announced (although a spirited rear-guard action may yet save it). These organisations have been led by lawyers for substantial periods of their existence. Those with Oxford connections include two college principals: Baroness Helena Kennedy QC, who chaired the Human Genetics Commission from 1998-2007, and Baroness Ruth Deech who was chair of the Human Fertilisation and Embryology Authority from 1994-2002.

In the new world of public bioethics, three main options would seem to present themselves for consideration. The first can be described as a personalisation of bioethics. In this model, the focus is on whether it is legitimate for the state, through the law, to regulate bioethics at all. Perhaps the law should retreat from this area of our lives. There may be reasons to protect 'vulnerable' patients against exploitation by commercial interests – as some argue are the key characteristics of assisted reproduction services or cosmetic surgery – but these are not bioethical concerns (about the appropriate use of scientific techniques) but consumer law matters. This raises a contemporary version of the famous debate between two eminent lawyers – Oxford Professor of Jurisprudence, HLA Hart and the Law Lord, Patrick Devlin (who graduated from Cambridge) -over the enforcement of morals. Some liberal views of the role of law might lead us to suppose that much of the subject area of bioethics is a private matter and not the legitimate province of jurisprudence. The majority report of the Select Committee of the House of Commons on Science and Technology on *Human Reproductive Technologies and the Law* (2004-5) seems to adopt this stance. Those who believe that bioethics is morally charged and a place in which the conflicts of values in modern society are being thrashed out, need to explain the justifications for regulating bioethical issues through the law (and, as a by-product, thereby secure the dominant role of lawyers in the field).

A second model for the future of bioethics in the UK would be to drive it through Parliamentary processes. Some areas of bioethics, in particular abortion and euthanasia, regularly appear before legislators in the form of private members bills, although they rarely reach the statute book. More importantly for the development of bioethics policy are the committee inquiries. These both provide parliamentarians with an opportunity to set out policy proposals independently from Government and also enable members of the public and pressure groups (often comprising or assisted by lawyers) to contribute their views. The volumes of evidence to the House of Lords Select Committee on Medical Ethics (1993-4) provide a fascinating snapshot of views on the ethics of death and dying following the decision in *Airedale NHS Trust v Bland* [1993]. In the 2004-5 Session, the issue of Assisted Dying was thoroughly explored under the chairmanship of another lawyer, Lord Mackay of Clashfern and, again, the two volumes of evidence record the state of public debates over the issues. A standing Parliamentary Committee on Bioethics might be the way forward, and health care lawyers would have a good claim to take up roles as specialist advisors to such a committee. This

approach has the advantage of a secure constitutional legitimacy in a democratic society but is prone to political pressures and the power of lobbyists.

In a third model, the bioethics of the future will be led by what David Cameron has described as the 'Big Society'. This might be seen as the 'privatisation' of the enterprise of bioethics. Under this approach, bioethics remains of public importance rather than a matter of personal choice, but the opinion leaders are no longer sponsored by the state or part of its machinery of governance. A prominent illustration of this can be seen in the Commission on Assisted Dying, whose report was published in January 2012. The 'commission' in this case was not given by Government but by two private individuals, Bernard Lewis (founder of the River Island shopping chain) and Terry Pratchett (the celebrated author), both of whom were said to be in favour of liberalising the law to permit assisted suicide. The Commission was once again chaired by a lawyer, Lord Falconer. This development raises some new questions about legitimacy in public bioethics. Should we be suspicious of privately funded commissions because we fear that the views of funders will have disproportionately influenced the conclusions? Do public and transparent processes provide sufficient reassurance? Does the legitimacy of the reports of such commissions depend on those who choose to submit evidence? If so, have they inadvertently been seduced into strengthening the prospects of legal change by lending their authority to a private enterprise?

This non-governmental option is less new than might appear. For many years prior to the domination of UK bioethics by Government sponsored commissions, work had been co-ordinated by health professional bodies such as the British Medical Association and the various Royal Colleges. Religious groups have also made some distinguished contributions, including the (now disbanded) Board for Social Responsibility of the Church of England. Questions about these groups' legitimacy were obscured by the social authority that they already held, but in the culturally pluralist society in which UK bioethics must now function they need to be addressed. This is a challenge for the nearest the UK has to a standing commission – the Nuffield Council on Bioethics. This non-governmental body is funded by the Nuffield Foundation, the Wellcome Trust and the Medical Research Council and fiercely asserts its independence. The dominance of law is apparent in this body too - three of its five chairs have been lawyers. There is something of a paradox about the fact that despite the fact that UK governments have declined to institutionalise bioethics through a national commission in the way that many nations have now done, the impact of lawyers has been so significant. Law and bioethics have been knit closely together in the UK over the past thirty years but lawyers will need to adapt to the new structures if they are to retain their influence.

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