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Susanna LobeZ: Hello, welcome again to another look at the law in your
I'm Susanna LobeZ.

wondered what's it like to be a Family Court Judge? This week, The Law
puts you on the Bench. First though, we ask the High Court's Justice
Michael Kirby, should law control science, and can it?

Genetic research is one of the most important developments for humanity and
presents tremendously interesting challenges to the law, says High Court
Justice Michael Kirby. So he was happy to accept the recent invitations to
join the International Bioethics Committee of UNESCO, and the Ethics
Committee of HUGO - the Human Genome Organisation.

Joining those organisations, Justice Kirby becomes a lawyer in a strange
land of science and genetic research, and the very frontiers of
human existence. Not a place where lawyers and judges and jurists
comfortably go. Law usually watches the path humanity takes, sees where the
troubles occur, and goes along behind patching up the potholes so the next
one doesn't fall in.

Last week, the second International Genome Summit took place in
Buenos Aires. They'll be working on the draft international convention dealing
with the Genome and Genome research. I caught up with Justice Kirby just
before he left to speak at the Summit.

Michael Kirby: So far as the human Genome project is concerned, it has
tremendous legal consequences, and therefore like it or lump it, lawyers
are got to become involved; it will present great challenges to our very
concepts of criminal law and criminal responsibility. It will present really
difficult problems for confidentiality and in terms of insurance and
employers' rights, so there are a whole range of legal questions not
intellectual property law consequences that lawyers are just going to have
to get involved in. And so far as the ethics are concerned, I think lawyers
have a skill in providing a structure for answering problems, and for
dealing up to problems, and admitting that problems exist.

There is just a bit of a tendency that I've noticed in science: so
exciting are the scientific developments, so wonderful from the
intellectual point of view, and so financially rewarding at the end of the
rainbow, that there's just a bit of a tendency to rush ahead and not to ask
the basic questions and present those basic questions to democratic
institutions and to people.

Susanna LobeZ: One of your predecessors here at the High Court, Justice

I believe it was Justice Windeyer, once said that the law marches
with medicine, but it's in the rear and it's limping a little. Are we not
with this attempt to regulate the science relating to the genetic
research, are we not saying now that the law is going to jump in front and
and regulate before all the problems happen?

Elmer Kirby: First of all, isn't that a wonderful passage from Justice
Windeyer - what a great Judge he was, he really was a wordsmith, and he was
a soldier and a distinguished soldier, so he built a simile based upon his
military experience. Sadly, the law still wanders at the end of the pack,
and there's no chance, absolutely no way that the law will rush in
and start regulating where the scientists fear to tread.

What is happening is that lawyers and the law are remaining silent, it's
too complicated. It's in the realm of science; it's gone beyond our
ordinary understanding. Lawyers basically feel a bit uncomfortable, by and
large, with science, and especially with this new science, which is so
complex and so difficult for the ordinary lay person to understand. But the
consequences are beginning to present themselves in our law. There was a
case recently in the Federal Court which was settled, relating to
intellectual property in genetically developed vaccines, I think, and that
is the sort of problem that's going to present itself, and we in the law
are to become aware of these problems, and aware of how we can answer them.
I don't think there's any way that we're going to impose disciplines
to prevent the development of scientific research. But perhaps we can help
by providing a framework within which that research happens at the pace, and
in the areas, that society approves.

For example, do we allow the use of the mixture of human and animal hybrids?
Is that something which is to be permitted? I think most people would say
certainly not. But unless the law has a voice on such a subject, then there
will be nothing to stop it, and the law, by saying nothing, is making a
decision.

Anna Lobez: You mentioned earlier that all this genetic research could
play a role in criminal law. What are some of the issues that you and the
others on these committees are thinking about?

Elmer Kirby: Well one of the fundamental assumptions of our criminal law,
that of intention on the part of the offender. That is to say, it is not
enough that the Prosecution proves the acts have occurred, it normally has
to prove that the acts were accompanied by the intention by the
offender to commit the acts, and thus, an antisocial intention is part of
the definition of crime. Now if it is established by genomic research that
intention goes with a genetic message that presents some people to
society as unable to control their acts, then we're striking, in a sense, at
one of the fundamental assumptions that people confuse whether or not to
punish antisocial conduct. Now we may nonetheless, say well we don't care
that, we're just going to continue to assume that you can control your
acts. But I believe that out of the research that is accompanying the Human
Genome Project, we will learn much more about the fundamental character of
human activity, and about the issue of intention, and whether some people in
some sense are not the products of the genetic messages laid down in the
genome before.

if that is so, we have to ask ourselves what consequence that has for assumptions of the criminal law, and do we change the criminal law or do we just turn a blind eye to it and say Well we don't care, we're just going along with people on the assumption that they can control their conduct, although perhaps we are told by science that they can't.

Anna Lobe: Well there's already been hints of that in certain cases in the United States, where defences such as "urban psychosis" have been run in cases where a teenager whose parents and family were very, very violent, who lived in a violent neighbourhood and who watches a lot of violent television. And it's said that those three factors really made it possible for her to be anything but violent.

Michael Kirby: Yes, I think that there are some -- I've read of a lot of unusual cases in the United States. But if we come back home, I sat in the Court of Criminal Appeal in New South Wales in the case of Champion, which was a case concerning the capacity of a person with intellectual disability to formulate the intent necessary and how Courts should cope with that particular problem, and was it relevant to the offence, which in that case as I recall it, was breaching the conditions of a bond, or was it relevant only at the point of punishment?

In the case of intellectual handicap, we have in a sense, a genetic disability, or a genetic condition which is presented, and the courts have developed principles for dealing with that. But perhaps short of that form of intellectual disability, we may find that there are a whole range of sequences of genetic conditions that affect human activity, and our better understanding of that will, I think, have profound consequences for criminal law.

Anna Lobe: Another area that you have raised in previous papers and previous speeches about this issue, is one of privacy. Now the law, of course, is struggling to protect privacy at the best of times, but when it can be an issue of employers or insurers conducting some kind of genetic investigation into the employee, or the potential employee, that does raise concerns, doesn't it?

Michael Kirby: Well these concerns - or at least some of them - were dealt with recently in a paper by Kevin O'Connor, the Federal Privacy Commissioner in Australia. And there is at least a danger that there'll be an underclass of people whose privacy is invaded because of genetic disabilities, and these are matters upon which it is appropriate for society to have a say.

Behind the problems of insurance companies and banks and employers and others wanting to get information that would be useful to them for their decisions, lay even more fundamental problems for privacy. For example, is the notion of privacy in the genetic area to be extended beyond the individual who is immediately concerned, to the individual's family, or to other relations? Is it, for example, relevant for a person who is genetically related to an individual, to have information on that individual's genetic condition for their own treatment? And at least in the case of genetic disorders, there's quite a lot of writing which suggests that old-fashioned notions of individual privacy have to give way to a sense

of family privacy in with the idea that people in the same genetic combinations have, or may have, an interest in each other's genetic conditions, and in tracing them and finding the patterns and discovering from the medical information of the one, what other consequences for the medical conditions, or potential medical conditions, of the other.

This is yet another example of the way in which basic concepts of individuality are in a sense, challenged by the new discoveries of genetic research.

Susanna Lobez: Certainly anyone facing parenthood starts to become very interested in genetic problems that might have been back in one's parents or one's grandparents, and of course if there was better information about those conditions, perhaps there is at least a case for the right to know about your genetic ancestry.

Michael Kirby: Yes, well in the past of course, we did it in a rather haphazard way. But for at least a century, we have been studying the genetic disorders as they appeared through families, and it's very important for us lawyers, or for ethicists, to keep your feet on the ground during this. There are 5,000 serious genetic disorders, and the research that is being done through HUGO, this co-operative venture of scientists and computerists in many countries of the world, is going to be overwhelmingly to the benefit of humanity. But then you get the cases on the periphery. For example, if you found that you had a genetic condition that was a proneness to obesity, is that something that you would want to say, Well I don't want to have an obese child; terminate that pregnancy. Or that a child is going to have a condition of breast cancer at some stage in their life, or go on to Alzheimer's or present as a homosexual, or with some disability that you don't want. Is that going to be enough to permit society to terminate on the amniocentesis as we do now in many cases in the instance of discovery of Down's Syndrome for example.

These are the sorts of problems that we presented.

Susanna Lobez: I understand at a recent session of the Legal Commission, the concept of the human Genome common heritage of humanity was the subject of discussion. How does that connect with the human genome in that work?

Michael Kirby: At one of the conferences that I attended on this, there was a very impassioned moment when a lawyer from Argentina got up and he said that the American scientists and companies are now acquiring intellectual property protections in respect of sections of the genome against the possibility that at some future stage they might find in their section, the markers that give the clue to Alzheimer's or the origins of baldness, and so on to which megabucks will be attached. And the point made by the Argentinian intervener was that this was a form of new colonialism, that in fact the human body and the genome didn't belong to big corporations, least of all in one particular country, they belonged to all of humanity and that we should develop international law and our domestic law in a way that respects the right of all humanity to have a say in what happens to the genome and to have a part in the medical developments that will attend it, and to reap some of the profits that will come from the medical research, including the profit of saving people's lives, and avoiding disease.

Susanna Lobez: So what will happen at this second International Summit here in Canberra this week?

Michael Kirby: Well to the credit of the scientists, they've covered the whole of the second day - it's a conference of two days - to cover ethical questions. And I've been asked by the Director General Professor Mayor, to present the international convention in its draft form, but I'll have to weave a very careful path on this to get some responses and reactions. I'm sure some of the scientists, what you've been saying earlier, that lawyers should keep their hands off this, and that in due course everything will work out well. But the ethical and legal problems, and it's as well that the scientists on the cutting edge understand that. The future of our species is a matter so important to be left to scientists, because at least theoretically we are standing at a moment in human history when it might be said that this is the moment when the human species, by its own intellectual capacity, has found the key to unlock the secrets of its own design, and found the way to change itself. They are already developing super pigs and cattle. Will be scientists who will suggest that there is a need for the super being, something qualitatively different from ourselves; will the advance of evolution because it came out of our intelligence, something we want to stop? It really is a big question and it's a question for all humanity and we have to try to answer it on a global level.

Susanna Lobez: High Court Justice Michael Kirby there, warning us where science takes us. You're with Radio National's Law Report. Susanna Lobez.

