

## BIOPOLITICS - LEGAL DIMENSIONS

### [Haim Klugman](#)

Senior Advisor to the Minister of Justice  
Israel

In the seminal paper on Biopolitics, Dr. Vlavianos-Arvanitis very perceptively pointed out that with "accelerated and high degree of specialisation, with escalating technology, scientists expedite discoveries but also disorder increases... In order to harness this trend, biopolitics can provide a model for the improvement of the quality of life."

I would like to examine this subject through its legal aspects in three particular areas:

### **1. Consumer Protection**

This theme of protecting the individual's quality of life in the face of the rampant development of technology and modernisation has of course been at the base of the consumer protection movement for several decades. It grew out of the recognition that particularly since World War II, the explosive growth in the consumer industries has produced consumer goods, the quality of which only an engineer could assess; contracts bloated with printed terms that few judges could confidently explain; business schemes and merchandising techniques that not even the most fertile minds of the past could have envisaged.

In effect what has been lost in this new consumer age is the ability of a significant proportion of the population to protect itself against the increasing number of risks - physical and commercial - which have been created. And the legislatures of progressive governments everywhere have been called upon to protect the basic rights of the consumer - the essential elements of man's quality of life as a consumer.

In the field of consumer protection - like other fields of biopolitics - what began as legislative intervention at the national level, grew through informal international co-operation to efforts of a formalised, international character.

#### *a) The Right to Safety*

A basic right of consumer protection - and of reasonably quality of life - is the right that demands goods and products offered in the marketplace possess minimum standards of quality and safety.

For some decades now, progressive nations have enacted safety and standards legislation designed to establish National Standards Institutes and to introduce a process for raising the quality and safety standards of goods, and to prohibit the introduction into the marketplace of goods that don't meet minimal standards.

In the development of such standards over the years, scientists greatly benefited from fruitful international co-operation. This co-operation reflected not only a desire for uniformity in this area, but also the desire to permit every consumer to benefit from the highest and most progressive standards available anywhere.

Today, of course, the international co-operation in the field of safety is carried on in many spheres - and it is not surprising that in its 1985 Resolution and Consumer Protection, the General Assembly specifically calls upon governments to "adopt" or encourage the adoption of appropriate measures, including legal systems, safety regulations, national or international standards, voluntary standards and the maintenance of safety records to ensure that products are safe for either intended or normally foreseeable use."

#### *b) Manufacturers' Liability*

Another area on product safety, in which we look for the right of the individual to fair treatment, is that of manufacturer's liability. In a case where an individual is injured by a defective product, it is fair to leave him with the responsibility of proving fault on the part of the manufacturer - a manufacturer who is often a large corporation, and the sole possessor of the information necessary to discover the source of the problem?

Israel was one of the first countries to amid its previous law - by means of the Defective Products Law of 1980 - to provide that a manufacturer is liable, to a certain maximum amount, for any personal injury coursed by defectively manufactured products, and without the need for the victim to prove fault on the part of the manufacturer.

On this subject again, Israel benefited from a very helpful exchange of information and ideas with the many countries of the world that were concurrently reviewing their own law of manufacturer's liability, as well as the important research efforts of the European Community and of the

United Nations.

Since 1985, the international co-operation in this field has reached such heights as the European Community's Council Directive, which directs its members to introduce strict manufacturer's liability for defective products. By way of an aside, I might say that the 1985 European Directive is similar to the Israeli initiative of 1980. Here too, then, national legislation and eventual international co-operation has helped to protect the individual - the "bios" - from one of the most obvious dangers of rapid technological advance.

*c) The Right to Honest and Fair Dealing*

When we think of biopolitics we, perhaps, do not always think of the economic dangers and distortions that have appeared in the wake of rapid modernisation - the danger to a reasonable quality of life caused by objectionable trade practices. But the truth is as we have already described, that modernity and expansion have faced the individual with false and misleading advertising, fraudulent trade practices, and "boiler-plate" contracts fraught with unfair, one-sided terms.

In the area of honest dealing, most national legislatures of course have attempted to introduce legal solutions, which have over the years found their way into international conventions and United Nations Resolutions. The previously mentioned General Assembly Resolution of April 1985 on Consumer Protection makes express mention of these issues.

But it is in the area of fair dealing that the problems are perhaps most vexing. In the 1960's, most progressive countries, became acutely aware of the fact that in the era of mass production and mass merchandising, the classic bilateral contracts has been replaced by the pre-printed "boiler-plate", standard contracts, replete with terms that purported unfairly to deny the individual consumer his individual rights.

There has been a virtual explosion of new national laws which attempt to deal specifically with the phenomenon of the standard-form contract, and often to provide review authority not only in the ordinary courts of the land, but also in special tribunals, which would be empowered to review standard-contract forms even before they entered the marketplace. Co-operative efforts and research have rapidly led to innovative methods of protecting individuals from unfair, mass-produced contract terms. This issue has reached the agendas of many international organs and bodies.

Once again, the race towards modernity and mass production has been forced to pause, and consider the extent to which the individual has been properly considered and protected.

## **2. Biotechnology**

There can be no more controversial subject in the field of developing new technologies than those relating to biotechnology, and what has come to be known as genetic engineering. The spectre of future medical scientists being able to design a new Einstein, or manufacture a child to its parents exact specifications, or diagnose - and eliminate - any illness or defect in a fetus long before it leaves its mother's womb continues to fascinate both the scientific and the lay community.

But in our fascination with the human engineering potentials of this burgeoning new technology, we tend to forget its enormous economic promises. In addition to its important applications in the medical and pharmaceutical sectors, there are the contributions in the field of plant agriculture, where the transplant of genes into plant cells and other new techniques, have enormous implications for altering plant characteristics - enhancing resistance to diseases and pests and adverse soil conditions, colour, size, yield, etc., or similar results may be obtained through development of new biopesticides and bio-fertilisers; in the veterinary field, livestock may be improved by injections of biologically synthesised hormones and growth promotants or by new fertilisation techniques. Other areas of interest are extraction and recovery of metals, micro-biological degradation of wastes for the protection of the environment and production of energy, food production and processing, and manufacture of speciality chemicals.

As the enormous commercial potential of biotechnology has been realised, so has the enormity of investments in these fields risen. Not surprisingly, research and development companies have demanded the same legal rights of economic exploitation and exclusivity that the law permits with respect to other new developments. But what we are really talking about is the development of new applications for living matter. Should these be subjected to the same legal rules? Should life be patentable? Many countries are already struggling with these very issues.

I need hardly repeat the larger ethical questions in biotechnology. What are the permissible limits to experimental research in this field, especially when it relates to human genetic engineering? And who is to set these limits: the scientist, the politician? In that area, I would say, that the individual has not yet been properly considered and protected.

Needless to say, there can be no more cogent example of - in the words of our President - a necessary link between technological progress and ethical values. International leadership and guidance is particularly vital here for there can be no better example of potential for enormous human progress raising vexing questions of ethical values.

### 3. Computers and the law of privacy

Needless to say, the issue of protecting the individual in the face of the ever-growing and all-encompassing advance of computer and information technology, is one of the most perplexing issues of our time. Even when private data banks are appropriately regulated, and clear rules are established with respect to the flow of information, special problems arise with respect to "official" government data banks; and the need to find an appropriate balance between protecting the confidentiality of personal information and providing access to government data for research and statistical purposes is one of the most common problems in the field.

Computer systems now store information about the daily activities of almost every person, including things such as the phone numbers you dial and the details of every check you write. Information about the state of your health, your education and employment history, your insurance and financial transactions, and much more, is stored and can be retrieved in a fraction of a second. Moreover, computers can "talk" to each other and compare and compile information about you found in separate data systems.

While the development of privacy legislation began slowly in the 1970's, and often focused on such subjects as wiretapping, the more recent developments very much reflect the electronic data development. By 1986, national legislation existed in Austria, Canada, Denmark, the Federal Republic of Germany, France, Hungary, Iceland, Israel, Luxembourg, Norway, Sweden and the United Kingdom.

National legislation is itself a slow procedure. In the international field, the process is still slower. The Council of Europe began its discussions about privacy and computers as early as the end of the 1960's, yet not until September 1980 was a Council of Europe Convention drawn up. At the same time, the OECD passed its Guidelines concerning transborder flows of personal data. These two international law products have more or less the same contents - the object of ensuring the protection of the individual rights of the gathering and use of electronic data. The Israel law of 1981 on this subject fully conforms to the requirements of the European Convention.

The three subjects mentioned above are only examples. It is possible, of course, to give additional examples, such as legislation regarding nuclear accidents, legislation which will enforce absolute liability for damage caused in such accidents, without the need to deal with the question of fault.

### 4. International Co-Operation

In an international world, the cherished dream should be that legislation with relation to transborder matters could be developed by an international organisation and adapted domestically. This, however, seems to be impossible in a world with 159 sovereign states, but it should not be. Most of these countries have a lot in common: they are all moving into an era when society is increasingly sensitive to the problems of quality of life. Traditional legislation in so many countries needs to be modified: we are all in the same boat. This is both a challenge and an opportunity. Instead of bringing with us to the international forum contributions to the debate which are local variants of laws built upon more or less the same thousand-year-old traditions and philosophies, we could be more constructive. We could set up an international legal forecast institution, which could recommend or advise member countries what ought to be done.

In conclusion, I think we can all agree that additional legislation at the international level is urgently needed to harness and monitor, on an ongoing basis, the dangers inherent in the rapid technological developments of our age. Such legislations must indeed set out a code of action for every case where "bios" is threatened by disasters in the environmental or health fields, or, indeed, wherever there is an unacceptable infringement on the quality of life as a consequence of technological advance and modernisation. Let us hope that this increased co-ordination and respect for quality of life can indeed ensure the survival of man.

---

**Haim Klugman**, Esq., director general of the Ministry of Justice and Chief Judge of the Disciplinary Tribunal of the Israel Broadcasting Authority, has been chairman of the Interministerial Committee for Ecology, the Government Lawyers Association, and a member of the Central Committee of the Israel Bar Association.