MELBOURNE CATHOLIC LAWYERS ASSOCIATION

MELBOURNE, 18 JUNE 2004

RIGHTS AND VALUES

MURRAY GLEESON

My remarks to you this evening will take the form of a Case Note. The case is not a decision of the High Court, or any other Australian Court, and the point at issue is not one that is likely to arise for judicial decision in Australia. The lines of argument involved, however, reflect developments of a kind which affect modern legal thinking in Australia and in all mature legal systems.

The case is *Odièvre v France*, a decision of the European Court of Human Rights, given on 13 February 2003. Seventeen members of the Court sat, and the decision was by a majority of ten to seven.

The case arose out of a challenge to a French law on the ground that it was inconsistent with the European Convention on Human Rights.

The French law under challenge permits the mother of a child put up for adoption to elect to preserve her anonymity, thus making it impossible for the child, in the future, to discover the mother's identity. (There appears to be a requirement, in an appropriate case, to supply certain information that may be essential for health purposes, but that was irrelevant.) The French law, in that respect, while not unique, is unusual in Europe. It reflects custom in France dating back at least to the seventeenth century. St Vincent de Paul introduced a practice by which churches or hospitals were equipped with a device, placed on an exterior wall, known as a "tour". A mother could place an infant in the "tour", and ring a bell. The device would be rotated so that the infant was brought within the building, and the mother would remain unknown. In some countries, in Europe and elsewhere, "baby boxes" are used for a similar purpose. The original object was to discourage abortion, and infanticide. In modern circumstances, a right to legal anonymity also enables a mother to obtain medical treatment, and assistance during childbirth, without there being a need to create a record of her identity.

The European Convention on Human Rights asserts a right to life, and a right to privacy. The French Government maintained that its law was in aid of both of those rights: the mother's right to privacy, and the child's right to life. The Convention also asserts a right to respect for family life. The challenge to the French law

involved a contention that to deprive a child of the knowledge of the identity of his or her natural mother offended that right, and prevented the complete personal development and fulfilment of a child.

It is no part of my purpose to express a preference for the reasoning of either the majority or the minority. My purpose is to indicate, by reference to the decision, the kinds of issues that may be at stake in human rights jurisprudence, with which all courts in the early 21st century are becoming increasingly familiar.

There are two notable features of commonly accepted civil and political rights: first, rights are rarely absolute; secondly, some rights may conflict with other rights. In countries which apply the death penalty, even the right to life is not absolute. Leaving the right to life to one side, however, almost all rights are qualified to the extent that they may, in certain circumstances, yield to some overriding necessity. Whether rights are declared in a Convention, a Constitution, or an Act of Parliament, most modern instruments contain some qualification by reference to the need for reasonable regulation of conduct in a democratic society. Furthermore, rights may be inconsistent. The most obvious examples of both of these propositions are the right to privacy and the right of free speech. Neither right is absolute, and one person's interest in privacy is very likely to collide with another person's interest in free speech. Reconciling these potentially conflicting interests is one of the

challenges facing contemporary law in Australia, the United Kingdom, and all modern societies. Some vocal advocates of the right of free speech are taciturn about the right of privacy.

To return to *Odièvre*, the majority in the European Court took the view that the mother's interest in retaining her privacy was not merely for her personal benefit. The object of discouraging abortion and infanticide, and of facilitating medical assistance during childbirth, was also in aid of the right to life. At the least, it was said, the French Parliament could take the view, consistently with France's Convention obligations, that these rights should prevail over the rights or interests of the child in knowing his or her family origins. The minority judges took the view that the French law, to be consistent with the Convention, should have established some procedure to enable the conflicting interests to be weighed, on a case-by-case basis, having regard to individual circumstances. (Interestingly, they said that, in order to be fair, such a procedure should be adversarial. Those were all judges with a civil law background. The adversarial system gets better press in Europe than Australians are sometimes led to believe.)

Courts are often required to "balance" competing interests. The scales of justices are a powerful image in the law. Discretionary decisions by courts commonly involve weighing the benefits and detriments of a potential outcome. But this is usually done on the assumption that the interests or considerations to be weighed are in

some way reasonably commensurate. A set of scales can tell you that an ounce of silver has the same weight as an ounce of sand. The scales cannot tell you whether an ounce of silver is more valuable than an ounce of sand; you need some other standard of measurement for that purpose.

If two rights, neither of which is absolute, conflict, and a court is required to decide, by a process of "balancing", which is to prevail, and to what extent, what is the intellectual process by which that task is to be accomplished? Since it is of the essence of judicial decision-making that reasons are given for a decision, so that the parties and the public may know that the procedure is rational, the intellectual process has to be able to survive scrutiny. To say, in a particular case, or generally, that one right or interest outweighs another right or interest is to announce a result. What information does it convey as to the process of reasoning by which that result is reached? How can the result be contested? If it is wrong, how can it be shown to be wrong? How is such a conclusion either verifiable or falsifiable? If it is neither verifiable nor falsifiable, what is its claim to be regarded as a process of reasoning? Is it not simply an expression of choice, or an exercise of power? Is it a judicial, or a legislative, function that is being performed?

Many contemporary Australian lawyers, although well aware of the issues thrown up by modern human rights jurisprudence, have forgotten that we have our own history of attempting to resolve

such issues in relation to a constitutional provision, that, for a large part of the 20th century, was given a rights-based interpretation. That rights-based interpretation was later abandoned by the High Court, apparently with general approval, but it persists in one respect. Section 92 of the Constitution provides that trade, commerce and intercourse between the States shall be absolutely free. The guaranteed freedom of intercourse is still regarded as creating individual or human rights. But they are not absolute. A prisoner in a Victorian jail cannot complain that his constitutional right to travel to South Australia is being infringed. Although freedom of movement between States is declared to be absolute, it is subject to reasonable and necessary regulation. Freedom does not mean licence. In the days when freedom of trade and commerce was regarded as a constitutionally guaranteed individual right, the High Court had to reconcile that "absolute" freedom with lawful restrictions of various kinds. How did it relate to schemes regulating the marketing of primary products? How did it relate to a requirement that users of heavy vehicles pay a road tax to meet the cost of road maintenance and repair? One thing was clear: "absolutely free" was not to be taken literally. As Oliver Wendell Holmes Jnr said about another freedom, whatever freedom of speech means, it does not mean that a man can go into a crowded theatre and call out "fire" for his own amusement.

When rights conflict, a decision as to which is to prevail, and to what extent, can only be justified rationally by reference to some

value external to the "balancing" process. Of course, it may not have to be justified rationally. If an exercise of legislative power is involved, an outcome may be justified democratically, by weight of numbers operating through the political process. The decision may be an exercise of power rather than judgment. A judicial decision, on the other hand, must be justified by a process of reasoning.

To describe something as a "right" may itself require justification. It is a commonplace feature of political and legal debate that advocates of various interests seek to characterise those interests as rights, thereby staking a claim for weight or recognition that may be contestable. By calling an interest a right, you may trump another interest. If there is a contest, then, again, it can only be resolved rationally (as distinct from resolution by power or weight of numbers) by reference to some value.

Professor Anderson, a famous teacher of philosophy at Sydney University, used to amuse himself with the paradox that two people can only have a sensible argument if they are already largely in agreement. In a multicultural, multi-value, society, this is an important point. A Catholic can have an argument about transsubstantiation with an Anglican; but not with an atheist. Christians who have a common understanding of Holy Orders sometimes argue amongst themselves about the ordination of women as priests. How could they have such an argument with someone who does not believe in religion or in priesthood? For such

a person, the starting point of the entire discussion is nonsense. To someone who does not believe in the concept of priesthood, the question is whether women should be permitted to engage in social work. There can be no rational argument about that. Argument depends upon shared values. And a judgment can only explain a judicial choice between competing interests if it justifies the choice by reference to values that are shared by the reader of the judgment.

In the past, religion provided many of the common values by reference to which conflicts of rights or interest were resolved. In the future, what will take its place? Our law still reflects many Christian values. If and when these are challenged, how is the challenge resolved?

Weighing or balancing competing interests or considerations is a familiar part of the process of judgment. We all do it, in a variety of ways, on a daily basis. Courts do it all the time. The work of courts, however, is different from most everyday tasks of judgment in one respect. If I have to decide for myself whether I will give priority to one commitment over another, for example, I may only have to explain and justify that decision to myself. If I have to justify it to someone else, I may need to resort to some value that I share with the person to whom I am trying to justify my decision. Giving more weight to one consideration than to another can only be justified by either an express or an implied appeal to some standard external to the decision-maker. A judgment that says: "These are

the considerations in favour of course A; those are the considerations in favour of course B; I will take course B" does not explain or justify the decision. It gives no reason for preferring B to A. That is the essential difference between the legislative and the judicial process.

The development of human rights jurisprudence, as the case of *Odièvre v France* illustrates, forces judges to weigh conflicting interests by reference to values. Sometimes judges will start with some external instrument, such as a Constitution, or a Bill of Rights, that identifies certain kinds of interest as rights. If that is so, they are provided with at least one value to begin with. They may still have to decide how to weigh it against another right. Sometimes they may have to decide for themselves whether an interest is to be regarded as a right.

We live in a pluralist society. By definition, that means that there is competition, not only when it comes to applying values, but also in identifying values. Everybody is aware that our society is rights-conscious. A rights-conscious society must also be values-conscious. If it is not, then we have no way of identifying those interests that are rights, or of resolving conflicts between them. Rights cannot work without values.

Perhaps an important part of the work of your new Association will be to participate in the developments that will inevitably take

place concerning these issues. I congratulate all those whose initiative created this Association, and wish you well.