

Turning **Morality** into Legitimate Law

What do penguins have to do with international law? More than you'd think. When Silja Vöneky from the Heidelberg-based Max Planck Institute for Comparative Public Law and International Law speaks about the benefit of declarations, she always likes to mention the Antarctic as an example of the extremely drawn-out process of reaching international agreements. Just recently, an Annex to

they are far less legally binding than a contract or agreement, nations find it easier to accept them, and they can be pushed through more quickly," says Vöneky, an expert in international law. She has been studying the democratic legitimization of ethical decisions in the field of biotechnology and modern medicine with her independent junior research group since 2006. Her work focuses on the difficult relationship between ethics, morality and law in view of the advances made in biotechnology and biomedicine at the national and international level.

Ethical decisions in the biotechnology sphere are at least as complicated as they are in the field of environmental protection. "What makes them especially difficult is that pluralistic societies are rarely able to reach common ground with regard to their political and legal views," says Vöneky, describing the crux of the problem relating to morality and the law. This research field does not have any established, universally accepted moral standards that could serve as a basis for legislation. The whole area is unknown territory – from a scientific and an ethical perspective. Vöneky argues that, at the social and legal level, there must first develop some kind of a shared ground for a possible consensus on the question of whether we should actually do the things that are now medically or technically possible.

And it can take time for such a shared ground to develop. As a result, bioethics is repeatedly pushed to its limits. The incredible speed at

which research is moving means that many legal rules that are agreed upon only after much wrangling become obsolete before they even make it to print. The MPI's international law expert mentions the cloning ban enshrined in Germany's Embryo Protection Act of 1990 to exemplify the problem. Some scholars argue that the Act's content could actually be construed so as to exclude from its scope those cloning techniques that use the "Dolly" method.

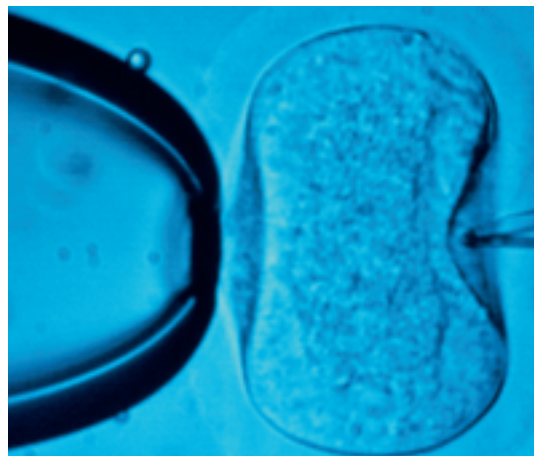
In addition, bioethical issues often get right down to fundamental values of a society, as, for instance, the value of life – specifically its beginning and its end. Attempts to translate such moral standards into some sort of binding legal form quickly encounter yet further constraints – nationally, but even more so at the international level. The latter, in particular, is due to the fact that the legally established ethical maxims of one country may not apply on the other side of its borders. What is allowed over here might be prohibited over there – and vice versa.

NO LAWS ON ETHICAL ISSUES

"This, in turn, raises the question of how different democracies deal with differences of opinion on ethical issues," comments Vöneky. "We look at procedural issues and consider how just and legitimate laws can be brought about in the field of bioethics in the national, European and international arena."

Miriam Clados from Vöneky's junior research group is currently writ-

*Artificial insemination, stem cell research and research into population genetics are just a few examples of research fields that raise fundamental ethical questions such as: Are we allowed to do this? A junior research group led by **SILJA VÖNEKY** at the **MAX PLANCK INSTITUTE FOR COMPARATIVE PUBLIC LAW AND INTERNATIONAL LAW** in Heidelberg is examining how well biomedical ethics and morality in biomedicine can be translated into legal regulations.*



Tricky in more than a technical sense: Artificial insemination also raises difficult ethical issues.

the Protocol of Environmental Protection of the Antarctic Treaty was negotiated – and it took 13 years alone for the State parties to even agree on the text. It will very likely take another eight years for the Annex to be ratified. Only then will it actually be binding.

In comparison, soft law declarations, such as those done and planned by UNESCO on the internationalization of bioethical standards, have certain advantages. "Because



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A visit from the German Federal Chancellor: Gerhard Schröder (back, second from left) attended the meeting of the National Ethics Council in June 2001.

ing her dissertation on the subject of bioethics in international law, examining in particular the question of whether human rights are a suitable instrument for coping with disagreement. “Strategies for managing disagreement” on an international level are also the subject of Cornelia Hagedorn’s dissertation. She compares legislative procedures in the field of biomedicine in Japan, the Netherlands and the United Kingdom.

Her work focuses on more than just legislation, looking also at the processes involved in managing differences of opinion. “Since opinions are split within and across political parties on such ethically sensitive issues as those in the area of bioethics, the parties find that they cannot raise their political profile through legislation,” according to Hagedorn. As she has noticed, “This, coupled with the actual and moral difficulty inherent in the decision-making processes, means that parliaments often try to avoid enacting legislation on ethical subjects altogether.” She cites the lack of a law on assisted suicide in Germany as an example. Cases like this are still dealt with under regular criminal law. Consequently, if a terminally ill patient asks his doctor to help him die, such a “termination of life on re-

quest” is treated in the same way as when a healthy person asks someone to kill him.

Besides avoiding the issue altogether, legislators have also resorted to other strategies when faced with the difficulties arising from attempts to reconcile different moral opinions. These include setting minimum standards under which regulations are made only for areas in which consensus can easily be achieved, enforcing a strict majority principle, and enacting specific procedural rules for dealing with these issues.

PLURALISM IN EMBRYO PROTECTION

Embryo protection – and specifically the protection of embryos created outside of the womb – is another example of the delicate relationship between ethics and the law, or of what happens when ethics and morality find their way into the wheels of justice. “The particular defenselessness and vulnerability of the embryos, on the one hand, and their special utility for research on the other, create ethical problems that are at once serious and difficult to resolve,” explains Vöneky. This is because human embryos created in test tubes can be used as a source of embryonic stem cells; certain em-

bryos might be singled out on the basis of their genetic material, and they can be subjected to cloning processes by means of embryo splitting or by transferring the cell nucleus in what scientists call the ‘Dolly’ method.

Working with another team, the head of the Heidelberg junior research group took the example of embryo protection standards across Europe to study the range of moral standards that exist at the European level. In this ethical discourse, too, she found that pluralism also flourishes beyond the national level. “Over the past 20 years, the European Union’s member states have enacted numerous regulations regarding the treatment of in vitro embryos. However, they all differ considerably in their substance.” Whereas the United Kingdom has liberal, research-friendly rules in place, German lawmakers have chosen to take a restrictive approach aimed at strong protection for embryos.

Such differing views stem from “frequently irreconcilable ethical premises, and point to the disappearance of value consensus in modern society,” Heidelberg-based junior researcher Jelena von Achenbach discovered. She is working on her dissertation under the supervision of Silja Vöneky and is examining the democratic legitimation of biomedical and human biotechnological legislation at the European Union level.

In Vöneky’s opinion, Europe’s basic laws could potentially provide an appropriate framework for protecting the embryos. This was also the result of one of the previous studies that she undertook together with fellow scientist Niels Petersen. The study specifically addressed the question of how the laws of the European Union could be used to protect in vitro embryos. According to their findings, the guarantee of human dignity and the right to life seem, at first glance, to be a good basis from which to derive regula-

tions and directives on the protection of in vitro embryos.

But a closer look shows that this is not true: although the guarantee of human dignity is recognized in the EU as a binding legal proposition, the protection it provides does not extend to the embryo in vitro, as their examination of European law found. They concluded that, “at the European level, embryo protection is more of a vulnerable plant than a strong tree.”

INTERNATIONAL LAW NEEDS CONSENSUS

The diversity of opinions and beliefs on matters of bioethics presents a major challenge for lawmakers. How can a democratic solution be achieved? This is another question that the research group from Heidelberg is examining. While the work is still ongoing, what is already clear is that there is no one-size-fits-all solution. In parliamentary systems at a national level, divisive issues that could block the legislative process can be overcome by means of the majority principle. But it seems that, in the area of bioethics, this is not enough to legitimize decisions.

“Things are even more complicated in international law,” says Vöneky, explaining that, “for a country to be bound by a convention, it needs to give its consent.” This means that the majority principle does not apply here – consensus must be reached instead. And achieving consensus is no easy task, as demonstrated by the European Biomedicine Convention. “Although the negotiations took place against a relatively homogeneous cultural background, it proved impossible to formulate detailed, substantive rules on predicative genetic testing and on embryo research.”

Where substantive standards cannot be formulated, Vöneky believes that the procedure for determining standards needs to be designed in a way that fosters agreement. “This

shifts the focus from the content of the decision to the decision-making mechanisms themselves. The aim is to ensure quality, not through the content, but through the procedure,” she says. And that is why she believes it is so important to have a precise knowledge of the processes involved in managing disagreement.

On the issue of legitimate law at the national level, the Heidelberg-based Max Planck researchers thus continuously study the role of national ethics councils. They assert that such councils could play a role in consensus building at the national level and beyond. However, the question remains as to whether obtaining the opinion of expert advisors on the content of laws diminishes the democratic legitimation of legislation. After all, the involvement of experts in the legislative process could clash with one of the key tenets of democracy: the sovereign decision-making powers of the citizens of a given country. Many see this as opening the doors to expertocracy.

Silja Vöneky does not share this view. In her research, she has studied the possibility of using national ethics councils as an integration factor. And she has found clear evidence that they could well be appropriate vehicles for democratically legitimized consensus building. In a democracy, decision-making ideally starts with the people of the country and passes over to the government bodies. It is therefore vital to secure a communication channel from society to the government.

“National ethics councils are in a very good position to do this as long as their members are independent and multi-disciplinary, and take the opportunity to encourage and objectify public debate,” says Vöneky, commenting on the result of her research. One member of her group, Stéphanie Dagron, is currently writing an article on this subject, shedding light on the national ethics council in the French legal system



Release from suffering or death on demand? The sleeping pill pentobarbital can be used as an active means of euthanasia.

and clarifying whether it fulfills similar functions in the democratic legitimation of bioethical legislation.

At the international level, too, national ethics councils could have a role to play in consensus building. They can cooperate with other national ethics councils and thus identify and formulate ethical principles, rules or even treaties, which would be accepted by the community of states and would have a chance of being recognized at the level of international law.

Silja Vöneky and her junior research group at the Max Planck Institute in Heidelberg have a total of five years to bring their research project to a conclusion. She and her fellow researchers have already discovered a great deal before the halfway point, and it will be interesting to see what else they uncover. At the end of the project, she wants to formulate a general theory for the legitimate management of ethical disagreement and the democratization of legal standards on ethics. If she succeeds, she will have done more than just make an important contribution to basic research in the humanistic sphere: she will have helped ethics and morality become legitimate laws – in a field that affects life itself.

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