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 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 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 legitimation of ethical decisions in the field of biotechnol-ogy 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 writing a study on how different democracies deal with artificial insemination, stem cell research and research into population genetics. 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.
FOCUS

During 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 a description, 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 to heret 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 request” 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 opions. 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 wheel 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 emb- byros 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 ethically diverse, 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. This means that the majority principle, contentious in international law, is applied 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.

Such differing views stem from “frequently irreconcilable ethical premises, and point to the disappear- ance of value consensus in modern society,” Heidelberg-based junior research group member Silja Vöneky and is examining the democratic legitimation of biomedic- al and human biotechnological legis- lation at the European Union level.

In Vöneky’s opinion, Europe’s hac- sic laws could potentially provide an appropriate framework for protecting the embryos. This was also the result of recent studies that she undertook together with fel- low scientist Niels Petersen. The study specifically addressed the question of how the laws of the Eu- ropean Union could be used to pro- tect in vitro embryos. According to their findings, the guarantee of hu- man 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 protec- tion 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 a moral nature remains as to whether obtaining the opinion of expert advisors on the content of laws diminishes the dem- ocratic legitimation of legislation. After all, the involvement of experts in the legislative process could clash with one of the key tenets of democ- racy: the sovereign decision-making power 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 eth- ics councils as an integration factor. “Things are even more compli- cated in international law,” says Vöneky, explaining that, “for a country to be bound by a conven- tion, it needs to give its consent.” This means that the majority prin- ciple 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 to this very good position 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 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.”

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