

INTERNATIONAL LAW AND LIFE SCIENCES:

A New Battlefield of Power or a New Temple for Justice and Peace?

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How can international law contribute to our reflection on Bioethics, Power and Injustice?

The search for social legitimacy is certainly one way and probably the most common one because a Power, which is not supported by the Rule of Law, is always a source of injustice.

A second reason lies in the capacity of the Law to organise Society. And at the international level organising Society would mean facilitating the dialogue between international actors, preventing the conflicts and helping to solve them.

The last, but not the least, function of the Law is also to draw a line, a border, which distinguishes a world submitted to the rule of the law from a world « without law ». So the Romans divided the World between the Roman world, governed by the universality of Roman Law, and what was outside this empire, « out law », the domain of the Barbarians. So was also divided Latin America: on the East Coast and till the Rio de la Plata, the Portuguese rule, nearly every where else the Spanish rule. The former Indian rules as the Indians themselves were destroyed by their conquerors. In this approach, we may say that the Law is contributing to a political and cultural (re) construction of the world and even to the domination over countries and their populations. The Law assists the colonial power in presenting an image of moral and cultural supremacy.

Taking into account these experiences, the Power resulting from the development of the new biomedical technologies, which is mainly in the hands of the physicians and the scientists, but also the Power deriving from the industrial applications of biotechnology, should be considered globally for their social impact on Law. In particular, we should examine the capacity of the Law both to organise the social diversity, acknowledging in some way the subordination of rules to fundamental principles, and to serve as a common system of references such as the Roman law or the Civil Law did. In doing so, we will have a special interest for the contribution of the legal system in being a counterweight to existing power and for promoting individual and common justice.

However our approach will be modest because in the young history of Bioethics, « Biolaw » is not yet a system and we can even wonder if it would ever be (II). The only certitude we may have 30 years after the invention of the word Bioethics is that the roots of « Biolaw » have grown and expanded into a broad system of ramifications. It is our task and ambition to bring in it some clarification by identifying the pillars of « international Biolaw » (I).

I the construction of the Temple and the pillars of « international Biolaw »

As time goes, the idea is that the Temple should be a common house, relying on principles, visible for the benefit of the different practices concerned and letting each of us the possibility to bring a contribution to an ever expanded construction.

1) From professional standards to a global approach:

a) For long ethical issues in biomedicine have only been the physicians' concern and were addressed essentially through the guidelines of the different international professional bodies. One of the most topical example of this activity is the respected Helsinki Declaration adopted by the World Medical Association and concerning biomedical research on human beings (1).

The role of such standards remains an essential instrument to up date the knowledge that professionals should have of the good practice. The debate that may occur along their elaboration is also a way to give more transparency to the process and to take into account the views of the public as shows the recent redrafting of the Helsinki Declaration (2).

b) Although major human rights violations accomplished with the support of physicians (torture political prisoners in dictatorship, forced psychiatric treatments) as well as patients' claim for more individual rights regarding their medical choices have changed the view of professional organisations making them more concerned with a human rights approach of biomedical issues, the bioethics movement has slightly moved the normative process from the professional arena to the arena of international governmental organisations(3). At the regional level, the Council of Europe has developed a bioethics normative program since the early 1980's(4) and the European Union began considering bioethical normative issues some year's later (5). Internationally, UNESCO took the lead of the normative process in 1992 and has now been joined in this activity by other UN organisations such as WHO, FAO and WIPO (6).

2) From technical standards to principlism:

- a) Originally international standards were conceived as a mean to give better rationality and efficiency to the medical and scientific practice in the new areas of bio-technological development. This was the perspective according which the European norms on organ transplants and blood transfusion were adopted by the Council of Europe ad hoc committees of experts from the 1970's(7). This was also the approach of the remarkable work accomplished by OECD to define safety standards in the field of biotechnology (laboratory confinement protection, industry large-scale production and GMO release into the environment) in the mid 1980's(8).
- b) This initial period lasted as far as the new techniques were perceived only for their medical applications. But once they became regarded also for their potential social consequences, for example the effects of reproductive techniques on family organisation (9) or the change that GMO may bring on our food or environment, the role of international law changed. It is now considered that international law should bring some answers to fundamental issues: how far human cloning or human embryo research may be used? What rights are those of an individual who participates in a biomedical research? Do reproductive choices encompass the right for every single person to benefit from the new reproductive technologies? What should we authorise in term of GMO's applications?

3) From biomedical issues to biotechnological ones:

- a) Historically, while the bio-medical revolution dates back to the 1960's with the possibility of major surgery operations --they benefited from the experience and the drugs developed during the Second World War-- and the beginning of organ transplants, the biotechnology revolution came later on from the 1980's and mainly at that time with industrial concern (how to produce safely GMO's on a large scale basis). This explains that, with the exception of biosafety, international biolaw essentially focussed at its beginning on the human medical applications: organ transplants, reproductive technologies...
The Human Rights approach that was chosen to give a conceptual support to international biolaw, such as in the European Convention on Biomedicine and Human Rights and the Universal Declaration on the Human Genome, largely contributed to reinforce the idea that biomedical issues when they dealt with fundamental values did only concerned the biomedical field (10).
- b) The rapid emergence of the biotechnology industry and the public concern raised by the consequences of GMO's release into the environment as well as the fear that biodiversity and food may be controlled by major bio-industrials have reversed the tendency. The biotechnological perspective is clearly part of international biolaw since the 1990's(11). But what is significant here is the difference in the interests expressed for such legislation at the international level.
While industrial countries have elaborated those legislations in the perspective to give an impetus to their own industry and products in a global market, including the possibility to protect biotechnological inventions round over the world, developing countries have called for a protection of biodiversity which could allow them to keep some control on their natural ressources. They also claim for limited industrial rights in order to have access to the new technologies and to the derived products such as new drugs. Therefore international biolaw in the field of biotechnology appears as being part of the North-South conflict on international trade and is often viewed as a demonstration of a new economic imperialism (12).

4) From co-operation to institutionalisation and conflictualisation:

- a) The institutionalisation of biolaw means that the normative process, which is now under way, has produced new institutions. Ethics committees have expanded outside national boundary (13). At the regional level while the European Group of Ethics of the European Union, created in 1992, is acting as a consultative body, the Council of Europe Steering Committee on Bioethics is working as a legislative drafting committee. It is the same with UNESCO International Bioethics Committee. Therefore governmental co-operation is left to its traditional ways; mostly focusing on the new legal constraints that may derived from the normative process. This attitude may sometimes result in a negative or conflictual approach to international biolaw. In 1987, the Committee of Ministers of the Council of Europe rejected a draft recommendation on human artificial procreation (14) because one country did disagree on the proposed principles on embryo research. In 2003, within the United-Nations group of countries, supported by the United-States and the Holy See, strongly opposed a German-French initiative to ban human reproductive cloning, advocating for a global prohibition of both reproductive and therapeutically human cloning (15). To prevent or limit such risks, UNESCO has created in 1998 an Intergovernmental Bioethics Commission, which is supposed to encourage a dialogue with the IBC but also to facilitate political co-operation in this area. Inter-agencies co-operation is also a difficult task, even within the United-Nations systems shows the late setting up in 2002 of a UN inter agencies co-ordinating group and the attitude taken by WHO regarding the global normative process in bioethics promoted by UNESCO (16). If international bioethics committees are promoting dialogue, it seems that governmental or inter-agencies co-operation is sometimes creating misunderstandings and potential conflicts.
- b) Other bodies, such as judicial or quasi-judicial instances, do also contribute to this process during the enforcement period. If we may regret that the new instruments of international biolaw, such as the Oviedo convention, do not institute judicial enforcement mechanisms, the European Court of Human Rights and the Court of Justice of the European Community have already ruled biomedical and biotechnological cases on the basis of existing instruments (17). We should also mention panels of dispute existing for example within the World Trade Organisation (18). All these bodies have the particular task to solve conflictual cases and to give life to the new international instruments by interpreting their provisions in the global context of international law. They are in some way a good example of the flexibility that should be a major characteristic of international biolaw. However such flexibility is faced to « natural » limits which result from the difficulties to resolve conflicts of systems, for example protecting industrial rights in biotechnology versus protecting biodiversity (19).

Consequently, the Temple is far from being achieved and some would certainly wonder if it would ever be. The diversity of architects taking part in the construction makes it at risk. But we can also imagine that, as the cathedrals of the past gathered a broad range of craftsmen and were built over decades and sometimes centuries using different styles, those people will constitute a community entirely devoted to bring solidity and cohesion to their work.

Indeed, what we need is not a fully achieved construction but the perspective of an on-going elaboration, which incorporates in the structures of the founding, pillars the contribution of future generations. In doing so the Temple of international biolaw may well remind us the « *sagrada familia* », the famous Unachieved piece of architecture by Gaudi.

II The contribution of biolaw to international law and public order

An « ambiguous necessity » is what may best characterise the contribution of biolaw to international law. It is a necessity because the biomedical and biotechnological applications have expanded so globally that the limits of national boundaries have become nonsense. Furthermore those applications have raised issues that question the idea we may have of what is a human being, what lies under the notion of human species and how far we consider and respect our environment.

But the concept of biolaw is also an ambiguous one. On the one hand, it proclaims values and fundamental rights, which should impose a world-wide respect. May our definition of life and death differ in Paris from what it is in Bombay or Burundi? On the other hand, the principles that found bioethics—multidisciplinarity, pluralism, and respect of the cultural diversity—seem to deny this search of universality.

Before the hope that biolaw could contribute to « a civilised globalisation » (20) may be achieved, there is a risk that it may endanger the existing core principles that bring today some visibility to the idea of universality and common human heritage.

A The risk

We should be clear. The risk does not consist in the co-existence of various cultural practices that biolaw may encourage. It lies in the divorce it may create between the human rights movement and the idea of scientific progress. It lies also in the political instrumentalisation of bioethics and biolaw when those concepts are used with the only intention to serve as an ideological tool against globalisation (21).

1) The divorce between the progress of science and human rights :

a) The philosophy of the Enlightenment associated the progress of science and knowledge with the progress of freedom and human rights. Both were regarded as the daughters of the goddess rationality. Today, since the development of nuclear energy, the technosciences, especially in the field of biomedicine and biotechnology, are often considered as the cause of major risks both for the individuals, the human species and their environment. Life and nature, some people believe, are put at risk by our technical development (22).

Consequently, the extension of the protection of human rights in the field of biomedicine appears in many areas as social constraints imposed on scientific research. It is obviously the case regarding embryo and stem cells research but it is also the case with the existing regulations on human or animal research. Could we imagine that an ethics committee would accept today the experiences of Pasteur?

b) The fear of science is a social reality but should not be overvalued. First, it is not the symbol of a new obscurantism but merely the recognition that our societies cannot function any more without the support of advanced technologies simply because our energy, transport, communication, information, exchange as well as industry, agriculture, medicine and finance will not work without this assistance.

Second, it means that any new technology needs to be socially accepted. Of course it is easier to welcome the technologies that extend your life expectancy than those which may transform your food or environment. But a « cultural appropriation » is not impossible. It is long time that the English have made the « Bordeaux » one of their favourite beverage and more recently the French have become one of the Whisky's best friends. Finally, this fear helps us to be less naive towards the idea of scientific progress. We have become aware that any scientific progress brings advantages and side effects and that it is our responsibility to balance both before making our choices. This is the practical reason of acknowledging new rights for the benefit of the human species or the environment. We have simply realised that our industrial activities have long term effects and that we should progress cautiously in order to minimise the technical risk and to prevent the occurrence of irreversible damage (23).

Probably a more important risk lies in the instrumentalisation of international biolaw by political ideology.

2) The political instrumentalisation of biolaw :

Some concepts, such as the concept of human dignity, may convey a « moral majority » attitude. International instruments such as the European convention on biomedicine and human rights, express sometimes mistrust towards scientific applications.

a) If the notion of human dignity is the founding value, the source of all principles in biolaw, and if the individual liberty rules the philosophy of human rights, how those 2 concepts may work together?

We may see a continuity between the two concepts: the individual liberty being the operative key that will guarantee the protection of the human dignity. If we consider however that this protection may imply in some circumstances that the will of the individual will not be respected, then there is a risk that a dogmatic attitude will prevail on our liberty. We all remind the social and political meaning of the prohibition to commit suicide. Will the prohibitions imposed on the basis of human dignity in the area of biomedicine lead to a new moral control on the individuals? (24) Some legislations already limit the access to medically assisted technologies for the only benefit of married and infertile couples although the sociology of the family is quite different in their own society, including a large number of children born in non married or single families.

b) A paradox of the present social legitimisation of new biomedical technologies is that they seem to have a counterpart which is a global mistrust towards some technologies. The gene technology is a good example of this attitude. The Oviedo convention contains a series of absolute prohibitions :

Germ line gene therapy, the use of genetic technique for sex selection or the application of cloning to human reproduction. But the issue of embryo research may also be quoted. By focusing on those issues and bringing an implicit moral condemnation on practices qualified as contrary to human dignity, the international biolaw is indeed the instrument of a political compromise between a liberal view, which considers that the progress of science is always a moral progress, and a conservative ideology which sees a moral risk in each progress of the human knowledge. Proclaiming for the first time in the history of human rights « the right not to know » as a fundamental right of the individual is a very sad evidence of the influence of this ideology.

However the existing and coming instruments of international biolaw are able to generate a dynamic process, giving a great role to individual actors, and consequently there is also the hope that international biolaw would be a contribute element in the elaboration of a new international public order.

B The hope

The « hope » created by this global bioethics phenomenon consists in a kind of legal constructivism. International biolaw is indeed generating a social consciousness about Bioethics, which favours as a second step positive actions.

1) From consciousness to appropriation :

Globalisation is too often considered as a perverse way for developed countries to maintain an economic and cultural domination over developing countries. Although this appears to be more complex as some emergent countries are finding their ways in the global economy, the Bioethics movement shows that there is a great diversity in the social and cultural approach of bioethical issues. Progressively bioethics is being appropriated regionally or locally.

a) In Europe, the appropriation was dual.

First « European Bioethics » had to distinguish itself from American Bioethics. A different perception of the relationship between science and society as well as a greater role of the public authorities may well explained that the European could develop quite rapidly their own approach (25). But as a second step, the European approach had to take into account the plurality of cultures existing regionally. In particular, the new Eastern and Central European countries had to be included in the European approach of Bioethics (26). Both the Council of Europe and the European Union contributed in supporting the networking of those countries in order to allow local researchers to participate in common European projects.

b) Outside Europe a regional appropriation of bioethics issues largely developed in Latin America since the adoption in 1994 of the Pan-American Health Organisation Regional program and culminated in 2002 with the inaugural address of Pr V. Garrafa at World Congress of Bioethics (27). An important effort was also made at the turn of the century to convene Asian countries to discuss together bioethical issues and Japan has paid an important role in sponsoring regional meetings of this type (28). Finally it is the task of international organisations such as WHO and UNESCO to support regional activities in Bioethics. While Islamic countries are slightly coming to be involved in the process (29), it seems that, although very necessary, this task is much more difficult to accomplish for African countries (30).

2) Positive action :

What international biolaw may bring in term of positive action?

My feeling is that it generates a social and political debate on how far the principles proclaimed by the law may be used to influence and modify existing public policies.

a) The international public debate

People often think that proclaiming fundamental principles is more symbolic than it is effective. In some way, it is right. Social rights, such as the right to health care, usually imply that positive actions have to be accomplished to allow the benefactors to really enjoy their right. Others, such as the freedom of researcher fully effective when they benefit from appropriate means (finance, staff, organisation...)

But the recognition of fundamental rights is nonetheless a strong support for members of the society and all the actors concerned to ask for enforcement measures that will give concrete applications to those principles.

Indeed, it would be a great mistake to believe that in democratic societies problems find their solutions once a law is passed. The law is just part of the democratic process which means that the law can be used to argue

In a context of social conflicts the law is then one of the political tools-we may hope an important one-that convey the political debate. Fighting for a proper or a better implementation of fundamental principles will also remind us that it is our collective responsibility to go further or not in this way.

b) Influencing public policies

International biolaw is also the illustration that the international arena represents today more than the only sphere of States' interest. It is the interest of all individuals and the humanity which is also considered. Furthermore, environmental aspects are not neglected and some kind of interest towards future generation is also expressed in international biolaw. Of course, the present influence of international biolaw may still seem very limited or ineffective and supporting the democratic principles can serve as a new mean to perpetuate the domination of a country over other populations. However real progress have been made: non consenting human research is universally unacceptable today while Pasteur could publicly request to use prisoners for this purpose at the end of the XIXth century(31). And non-respecting the principles governing human rights, the life science area and related biotechnology is a factor of great injustice which put at risk the very fragile organisation of our world. It exacerbates conflicts and makes peace a far-reaching enterprise.

Notes

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- (16) Letter of 30 march 2004 addressed by WHO ethics division director to Unesco ethics division director (Towards a Declaration on universal norms on Bioethics,Extraordinary session of IBC,Paris,27-29 april,2004, Written contributions,p23).
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