

Developments

Bioethics, Biolaw, Biopolitics: Conference Report on a Contextualization

By *Lena Groth**

In contrast to other legal systems, interdisciplinarity of German jurisprudence lags behind; interdisciplinary approaches to legal theory and regulation are not as common in Germany as, for example, in the US with its various, well-established “Law and...” approaches.¹ However, the following report draws attention to important interdisciplinary developments in one of the most challenging legal areas – *biolaw*.

On November 22 and 23, 2012, the conference “Bioethics, Biolaw, Biopolitics: A Contextualization” was held in Hamburg. In a workshop atmosphere, scholars of law, philosophy and the political and social sciences discussed the interplay between bioethics, biopolitics and the emerging area of biolaw. Supported by the Fritz Thyssen Foundation, Professor Dr. Marion Albers, professor for public law at the University of Hamburg,² hosted the conference which took place in three parts: first, a general discussion of contents and contexts of bioethics, biolaw, biopolitics and their connectivity; second, a discussion of particular topics offering deeper insights into specific contexts, including legitimation; and third, an outlook on opportunities for future interdisciplinary work.

Introducing the topic, Albers mentioned the recently established Hamburg Center for Bio-Governance. It is designed to enable researchers from various disciplines to communicate and exchange information on a permanent and long-lasting basis in order to enhance the process of mutual learning and progress. The term “biolaw” raises new questions and challenges for the law and for legal scholars as the limits of the scientific discipline are

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¹For example, the field of Law and Economy is just emerging in Germany; see Martin Gelter and Kristoffel Grechenig, *The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinism*, 31 HASTINGS INT’L & COMP. L. REV. 295, 328 (2008). On the institutional background hindering interdisciplinarity, see Susanne Lepsius, *Taking the Institutional Context Seriously. A Comment on James Gordley*, 56 AM. J. COM. L. 655, 662 (2008). For a comparison of the relationship between Law and Social Sciences in Germany and in the US, see Oliver Lepsius, *Sozialwissenschaften im Verfassungsrecht – Amerika als Vorbild?*, 60 JURISTENZEITUNG 1, 12 (2005).

² Professor Marion Albers holds the Chair for Public Law, Information and Communication Law, Health Law and Theory of Law at the University of Hamburg.

reached. While the term was originally used as a correlate to the term “bioethics”, the use subsequently shifted to distinguishing biolaw from bioethics. Some lawyers try to seize every opportunity to answer bio-related questions within the legal categories of proportionality and to marginalize the role of bioethics. To the contrary, *Albers* recommends that legal scholars learn attentively from bioethics and vice versa. Consequently, she called for implementing the ability to learn and to adapt into the law, and she concluded that interdisciplinarity means both autonomy and openness simultaneously.

What is bioethics and what does it offer to law and politics? In the first part of the conference, this question was posed to PD Dr. Johann S. Ach, Medical School of the University of Münster. As a “bioethicist” he claims that the term biopolitics is used too frequently. He posited that bioethics is applied ethics. Furthermore, he emphasized that differentiation is necessary within bioethics, especially between the academic discipline, the public discourse and clinical bioethics. A “good” decision can only be characterized with regard to the respective activity. Concerning the academic discipline which is involved with critical analysis and reconstruction, Ach holds the view that bioethicists do have ethical expertise but that they cannot claim moral expertise. Regarding public discourse, he urges a shift from managing consensus to managing dissent. He pointed to major differences between bioethics and biopolitics such as impartiality; theory-relatedness and the analytical function of bioethics in contrast to partiality; requirements of compromise; and the need for action on the side of biopolitics. Thus, the answer to the question of what bioethics has to offer to law and politics differs depending on the different activities of bioethics within which different expertise is available. Provocatively, Ach confronted the rationality pursued by bioethics with a privilege of irrationality enjoyed by politics. During the conference, this comment evoked several discussions. He further asked how much irrationality bioethics should tolerate. Finally, he stressed the importance of autonomy for bioethics in the academic field and the importance of reflecting on its own competences and its theoretical and methodical repertoire, whereas the task of bioethics within ethics committees is yet to be clarified and controlled.

Providing a legal perspective, Professor Dr. Stefan Huster, University of Bochum, presented his thesis on whether bioethics and biolaw are symbiotic or conflicting. Especially with questions concerning human existence, there is permanent dissent in modern societal pluralism (up to moral pluralism) that stems from the religious and ideological pluralism and is therefore hardly receptive to compromise. According to Huster, the perspective should shift to the question of how and how detailed the state should regulate moral issues, remembering the neutrality of the state. Legally, whether the state’s duty of neutrality differs with regard to active prohibitions on the one hand and the passive refusal of protection or government benefits on the other hand is important. A political and jurisprudential discussion on regulation should deal with the foundation and range of public powers of the state and relate them to bioethical problems. However, from the perspective of moral philosophy, such a discussion could merely provide a moral minimum,

whereas a coexisting form of bioethics that does not focus on legal regulation could provide the respective moral norms, mirroring the societal pluralism.

These ethical and legal contributions were followed by the presentation of Professor Dr. Ulrich Willems, University of Münster, who focused on biopolitics and the political perspective on the bioethical controversies. He, too, began by pointing out the decline of traditions accompanying the emerged moral pluralism, dissent and conflicts in highly sensitive issues. These are the main challenges of biopolitics along with problematic dynamics of biopolitical value conflicts and with the limitations of political institutions and processes. The value conflicts are characterized by black and white options, dissent on fairness rules and intensified difficulties with majority decisions which hit the defeated minority severely due to the sensitivity of the issues, leading to polarization. The latter is obvious in the US, but far less distinct in Canada, which *Willems* traces back to differences in the respective political systems. While in the US the parties are relatively weak and interest groups, including single-issue groups, exercise strong power, the room for an interest group to maneuver is smaller in Canada. Plus, religious groups are larger and more moderate in Canada. *Willems* calls for pluralism in political structures. He does not see much success with existing institutions and procedures to overcome value conflicts, except for a single abortion case before the Federal Constitutional Court of Germany³ which recognized the defeated opinions so that identities are not called into question. He finally described normative plurality as challenging and opposed the liberal theory (as often supported in the US) to the pluralistic theory. Political pluralism holds that no political proceedings or means exist to decide metaphysical issues. Fundamental principles of political pluralism are the reversibility and temporariness of political answers – both are of critical importance in biopolitics.

The contribution from Professor Dr. Silke Schicktanz, University of Göttingen, provided the perspective of social and cultural sciences on biopolitics and bioethics. After prior speakers had insisted on the dominance of their respective disciplines in bioethical issues, this presentation pled for interdisciplinarity, accompanied by a sociological view on the particular sciences and by a reflexive view of science itself. The current disciplinary pluralism concerning bioethics leads to a clash of approaches. Philosophers deem their core competence endangered. High specialization of particular disciplines can be traced back to the work intensity of interdisciplinary communication. Schicktanz critically countered naïve empiricism and naïve use of social theories in bioethics. Politics is understood to be a systematic part of ethics. An explicit separation of roles should replace the discontent of experts regarding allegedly irrational political proceedings. In an outlook on alternatives, she suggested to counter the narrowing of bioethics by perception of others and to take epistemically marginalized groups (e.g. patients) into account more intensively instead of merely anticipating their perspective formally. The principle of

³ With reference to BVerfGE 88, 203 – *Schwangerschaftsabbruch II* (28 May 1993).

impartiality would be essential as a moral point of view in the practical discourse. Finally, instead of protectionism concerning particular disciplines, a certain self-ironization would be necessary so that the disciplines could get together systematically along a self-critical line. Especially the question as to whether impartiality should at all be a virtue of a bioethicist dominated the discussion of this presentation.

The second part of the conference focused on more particular topics, starting with possibilities for universalization of fundamental values in bioethics and biopolitics. Professor Dr. Stefan Beck, Institute for European Ethnology at the Humboldt University of Berlin, addressed the example of in vitro fertilization in Germany, Turkey and Great Britain. Referring to a study on medical tourism he described bio-medical mobility. Well established cultural borders are being crossed along with state borders, thereby creating norm conflicts which can be attributed to globalization and transnational regulation. Normative orders used to be connected to natural groups, up to methodological nationalism and ethnocentric sociological theories. Beck called for a shift from biopolitics to the analysis of bio-policies via a dense comparison of practices. With regard to pragmatic regimes, he referred to frames of values offering orientation, to de-economization and to the connections between altruism and exploitation. One example dealt with recipients of donated gametes who attach importance to the voluntary nature of the donation. Another example dealt with biological and social relatives, especially in connection with family secrets concerning biological origin. Here, a trend towards increasing openness in handling such situations can be observed. According to Beck, as far as bioethically relevant cross-border regulation is desirable, it is impossible, and as far as it is possible, it is undesirable. He expressed a general warning about fundamental values and about culture. The attempt to universalize values conflicts with the self-description of modern societies as culture-relative. Rather than defining fundamental values, it is critical to regulate pragmatic regimes and to organize legitimacy conflicts discursively. Science would have the function to moderate by making legitimacy conflicts transparent and discussible.

Subsequently, Professor Dr. Ulrich M. Gassner, University of Augsburg, resumed the legal discussion with his contribution on structures of thought and argumentation with regard to knowledge, uncertainty and nescience in biolaw. Having described the semantics of knowledge-based society and risk society he demonstrated developments from residual risk to basic risk accompanied by the politicization of nescience. Nescience could be control-oriented, complexity-oriented or case-oriented. The pluralization of the perceptions of knowledge causes imprecise distinctions between knowledge conflicts and value conflicts. Knowledge conflicts tend to mutate into value conflicts, which can be observed in the biopolitical discourse which turned out to be more policy based than science based. Regarding structures of thought and argumentation in biolaw, Gassner concluded that knowledge conflicts are treated as value conflicts while the environment for this treatment is nescience. Beyond the usual argument structures, bioethical structures of argumentation could be characterized by ethically affected discussions about

fundamental rights. Gassner criticizes that the individual spiritual welfare is given priority over discourse. An “expertocracy” could not prove itself against the “tyranny of bioethical values”. In the end, he directed attention toward questions concerning a right to nescience. During the ensuing debate, opinions differed as to whether the transformation of knowledge conflicts into value conflicts is wise or whether the law switches to values too quickly so that there is rather a need for conversion of questions on value into questions on uncertainty.

Thereafter, Professor Dr. Renate Martinsen, University of Duisburg-Essen, presented her contribution to the concept of legitimacy and legitimizing mechanisms in biopolitics from a political science perspective. Her opening thesis: The state should utilize political discourses as a resource for legitimacy as there is a need for a new constructivist formation of discursive political forums. Referring to elements of deliberation theory, she explained that legitimacy comprises both a normative claim to legitimacy directed at accepting values and an empirical belief in legitimacy directed at accepting decisions. The latter could be regarded as a constructivist element. There is a crisis of legitimacy because expertise and the state’s capacity for action (both outwards and inwards) reach their limits. However, discourses of different forms offer legitimation reserves. Here, social prerequisites of legitimation are of central importance. In the classical understanding, discourses produce procedurally instructed dissent and the incentive of deliberative political forums is often an impeding obstacle to decision-making. Paradoxically, skepticism about discourse goes along with appeals for discourse. In order to explain the attractiveness of discourses for politics, Martinsen proposes a post-classical interpretation. Discursive mechanisms following certain procedures would have the potential to enable decisions by subordinating them to certain rules. They could support the “pluralistic relativization of norm perspectives”. This would require the separation of the discursive mechanisms from the procedures of political decision-making. With such polycontextuality, a valuable baseline could be created, not by mutual understanding but rather by unfolding a productivity of various misunderstandings. Discursive effects include the legitimation of discursive results in the view of other parties. Increased legitimization, thus, occurs on the output side although the actors themselves are not legitimized. But legitimization of democratic processes is generated multidimensionally. In her outlook, Martinsen indicated that interdisciplinarity and empirical studies are essential.

The conference closed by addressing opportunities for future interdisciplinary work in areas concerned with bioethical questions. Professor Dr. Heiner Fangerau, University of Ulm, Institute for History, Theory and Ethics of Medicine, reported on how to connect bioethics, biolaw and biopolitics in interdisciplinary networks. His core aim is to develop a universal science of the living. The methodology of interdisciplinary cooperation should be refined and, ultimately, become transdisciplinary. It would be characterized by exceeding the limitations on scientific disciplines and the limitations on institutions which often do not represent scientific needs. “Bio” would be the boundary object which derives from the fact that particular disciplines reach their respective limitations. Fangerau suggests that an

analysis of networks of different densities depending on the degree of the relationships could serve as a heuristic instrument to identify so-called brokers and central persons within the network. As an example, he portrayed the interconnectedness of scientific proponents of eugenics in the twenties of the past century and showed that network concepts could enable evaluation of interdisciplinary research attempts.

The concluding contribution by the philosopher Professor Dr. Petra Gehring, Technical University of Darmstadt, dealt with the question of how and in what way ethics could have a political function. She understands the term "bioethics" broadly. Field-specific ethics could not automatically be qualified as applied ethics. They often merely contain a moral for a certain profession without any comprehensive approach which would make it applied ethics. Only with an academic ambition – particular and interdisciplinary research, consultation to politics, law-making, public discourse – could bioethics become applied ethics. Further, there is a special connection with the political system, such as the interlinking in health politics and legal politics. This could be assessed positively in terms of democratization, transparency and scientific responsibility, or rather negatively in terms of production of ideology and a generation of bought expertise. Gehring summarized that applied ethics, especially bioethics, transform genuinely political problems into discourse formats which are at the same time close to science and to the general public. Differences in expertise play a significant role. Bioethics would even have the political function that ethics replace politics in a narrow sense, especially by virtue of elements of soft decision-making.

Altogether, the conference enabled a detailed examination of the dimensions and contents of bioethics, biolaw and biopolitics as well as of their connections with each other. The various perspectives of the particular disciplines and the attempts of systematization clarified the respective contexts of the terms and the contributions during the discussions were intensive and fruitful. A conference volume will be published. Despite many familiar and many revealed dissents, there was consensus among the participants that bioethics, biolaw and biopolitics lead to a multitude of new challenges and require interdisciplinary approaches.