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Moral Expertise and Democratic Legitimacy*

Abstract: In modern democracies, moral experts play an increasingly important role in law-making. Apart from the question of which competences characterize moral experts, their influence on the legitimacy of democratic procedures must be discussed. On the one hand, the contribution of moral experts promises to improve the quality of decision-making. On the other hand, however, moral experts cannot claim to represent the will of the people. In this essay, at first a concept of the moral expert will be sketched which does without the assumption of a privileged access to 'moral truths'. Then a procedural understanding of democratic legitimacy without epistemic components will be defended. Finally there will be a distinction between the purely consultative and the quasi-legislative tasks of ethics committees. Whereas counselling by moral experts does not influence the legitimacy of democratic procedures, giving them quasi-legislative functions is connected to risks in this respect.

1. Introduction

Both in Germany and in other modern democracies, an increasing demand for moral expertise can be observed. Ethics committees are increasingly asked for their advice both in the context of law-making and the implementation of laws. The growing political significance of the expertise provided by moral philosophers raises two questions. Firstly, it must be discussed in how far ideas of expertise as they are known from the natural sciences can be applied to the field of morality. In particular it must be decided which specific skills the relevant philosopher has in comparison to other people contributing to normative controversies. Secondly, the role of moral experts in political decision-making must be critically analyzed. In this context we must ask in which way the inclusion of ethics committees or other commissions affect the legitimacy of democratic procedures.

In the here presented article I will most of all discuss the latter question. I will shortly deal with the concept of the moral expert only in the following section, to get a point of reference for further analysis (2). Then I will sketch the most important conditions democratic procedures must meet to be considered legitimate. For this purpose, I will base my considerations on distinguishing the legitimacy and the quality of decision-making processes from each other (3). By the next step I will have a closer look at the role moral experts may

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play with passing and implementing laws. Starting out from differentiating between consultative and quasi-legislative functions, I will ask about possible consequences for the legitimacy of democratic procedures (4). As a conclusion, I will then shortly sum up the results of the analysis.

2. What, If at All, Do Moral Philosophers Know Better?

The idea of the moral expert to which I will refer in the following can be characterized as being negative at first sight. An expert in the field of morality may not claim to be able to decide authoritatively about normative questions. He/she does not have any privileged insights into ‘moral truths’ which are different from those of ordinary people. Fundamental meta-ethical objections make us doubt the existence and recognizability of moral facts. Already John Mackie (1981, 40–9) formulated two crucial objections so called Moral Realism is confronted with. On the one hand, he states, ‘moral facts’ must be entities which are fundamentally different from everything else in the world. Accordingly, identifying them would have to be based on a specific capability which is different from all other known ways of gaining insight (argument from queerness). On the other hand, he says, we all know that those values as being predominant for the various societies and cultures are considerably different from each other. The existence of very different normative convictions at least strongly indicates the non-existence of ‘moral truths’ (argument from relativity).¹

Furthermore, no model which makes a claim to truth will be able to meet the expectations which are in practice connected to ethical counselling. E.g. those moral experts giving their opinion on a new medical technology will often come to different conclusions. If they judge differently on a normative question, there results an irreconcilable confrontation of contradicting claims to truth. Other people participating in the debate have no possibility to decide about which claim to truth is justified. In so far, morality experts referring to higher insights are little helpful for decision-making. If they want to be heard, they must explain their positions and answer critical questions. Thus, after all they are subject to the same demands placed on reason-giving as they are valid also for other participants in the debate. They are not forced to give up in principle on their claims to truth, however in the context of practical work in a commission they must ‘bracket them out’ if they want to influence decision-making.

However, moral expertise need not necessarily be understood as a higher kind of knowledge which is inaccessible to the ordinary citizen. Rightly so, Dieter Birnbacher (2012, 241f.) writes: “[...] If ethical expertise is less seen as some kind of superior *knowledge* but as some kind of superior *skill*, a good case can indeed be made for the possibility of ethical expertise.”² The specific skills

¹ On this see in more detail the contribution by Jones and Schroeter (2012, 221–227) in this edition.

² Birnbacher distinguishes between (allegedly) moral expertise claiming to know the truth and ethical expertise based on competences as listed in the following. For the here presented essay I did not adopt this differentiation; instead I use the terms ‘moral’ and ‘ethical’ as synonyms.

which make a moral expert can basically be summed up by four aspects. First, moral philosophers have dealt in detail with the analysis of moral questions in a variety of contexts. Thus, usually they have developed a particular ‘power of judgment’, i.e. they are particularly capable of identifying the normatively relevant aspects of a matter. Second, they are familiar with the most important positions of moral philosophy as they have been supported both in the historical and the contemporary debate. Thus they may reach back to a broad range of theoretical concepts and arguments which they may apply to the respective field of problems. Third, moral philosophers—at least in the ideal case—have a theoretically distanced attitude towards normative questions. Accordingly, they will try to avoid any emotional concernment or taking of sides of individual parties involved in the matter they are supposed to judge on. Finally, usually moral philosophers feel obliged to fundamental standards of rational argumentation. E.g. they will not simply refer to ‘tradition’ or the ‘nature of things’ but will attempt to give clear, criticisable reasons for their positions.

The above sketched skills allow experts to fulfil important tasks on behalf of those counselling committees they participate in. They are capable of identifying the normatively relevant aspects of a field of problems and to inform about the leading moral theories. Furthermore, they are capable of classifying and rationalising positions supported in public debates or in the course of debates in the committee. Accordingly, they are able to uncover the theoretical background assumptions of stated arguments and make clear their implications for judging on other situations. Apart from informing about available arguments and clarifying the positions supported, however, experts are free to judge personally on the problems under debate (see Birnbacher 2012, 240–241). In this context, they must give reasons why certain arguments shall have more weight and why objections to them shall be considered insufficient. In the ideal case, however, experts should change their role in a transparent way, i.e. it should be obvious for other members of the committee if they simply refer to moral expert knowledge or make their own judgment.

3. Democratic Legitimacy

Parliamentary decision-making in democratic states may be judged on in two ways which must be carefully distinguished. *Firstly*, it is possible to judge on the legitimacy or illegitimacy of legal regulations which are the result of decision-making. In democratic states, the will of the people must be considered the decisive source of legitimation, from which all legally binding decision-making must be derived. Accordingly, e.g. Art. 20 Sect. 2 of the German constitution (Basic Law) stipulates: “All state power emanates from the people.” However, in modern mass societies obviously it is neither always possible to ask the people directly nor do they have a unitary will. Thus, parliamentary decision-making must happen by way of elected representatives on the basis of majority decisions. However, providing the majority with the authority to make binding decisions against the will of the minority is connected to considerable risks. On the one

hand, fundamental interests of individuals may be sacrificed for the benefit of the greater number, on the other hand groups being permanently in the minority may systematically be disadvantaged. To work against such possibilities of abuse, the competences of the majority must be topically restricted. Thus, the constitutions of modern democracies withdraw a canon of individual rights and liberties—which may vary in the individual case—from the power of the majority.

Starting out from the previous considerations, the legitimacy of parliamentary decision-making cannot depend on the agreement of each individual citizen. Rather, what counts is that those procedural rules are kept by way of which modern democracies try to adjust the idea of the people's sovereignty to the conditions of mass society. Thus, what may be considered legitimate are decisions made by the majority of elected representatives according to their competences as they are determined by the constitution. A parliamentary decision is illegitimate if e.g. some MPs have been excluded from voting or if it comes along with a violation of basic liberties.³

Secondly, decisions made in modern democracies can be judged on according to quality criteria. In some cases the qualitative judgement may refer to the content of the legal measures passed by the parliament. However, for this an objective criterion is needed which allows for distinguishing 'correct' from 'wrong' regulation. Thus, e.g. the legal determination of an emission limit may be called 'correct' if it actually rules out health hazards. However, often legislative initiatives do not (or not only) serve for defining technological standards, rather the citizens' values and goals are in the focus. Accordingly, e.g. in the field of social legislation it is primarily about the different preferences and normative convictions the voters have regarding welfare state institutions.

The quality of legal measures which raise moral questions cannot be judged on according to the criterion of topical correctness. If one believes the idea of 'moral truths' to be wrong, it looks plausible to grant that there may possibly be reasonable disagreement (see Rawls 1998, 127–34). As then it is not possible to give clear solutions which must be considered 'correct', the content of a legal regulation cannot decide about its quality. The quality of a decision must quite essentially be explained by the way in which it was made. Of particular importance in this context is the expertise of those contributing to the decision and their readiness to impartially discuss the relevant normative arguments. Thus, procedural aspects are essential for the quality of parliamentary decisions.

Although the criteria of 'legitimacy' and 'quality' have in common that they are procedure-oriented, nevertheless they may lead to different judgements on democratic decisions. E.g. abiding by the parliamentary procedures stipulated by democratic constitutions does not guarantee the MPs' expertise. In so far decisions which meet the above sketched legitimacy standards may be characterized by a high degree of incompetence. However, criticizing a legal regulation as being improper does not imply objecting its democratic legitimacy. Indeed, the

³ The here sketched concept is meant to explain the understanding of political legitimacy modern democracies are based on. It does not claim to give reasons for individual obligations of obedience to the law; on this see in more detail Dietrich 2008.

degree of satisfaction among the population may decline dramatically if incompetent decisions become frequent or concern important questions. But the typical reaction to insufficient quality is public demands for amendments or—in the extreme case—for the government to step down. If parliamentary decisions have been made in accordance with the rules, usually their validity is not doubted.⁴

On the other hand, decisions showing a legitimacy deficit may be in accordance with basic quality demands. E.g. it may be that some MPs are excluded from decision-making, or a non-authorized body is illegally granted a say. Nevertheless, such decisions may be characterized by a high degree of expertise and by reflectedly considering all relevant arguments. Who raises objections against the legitimacy of a decision may still believe that the respective regulation is topically adequate. In this context, usually the dimensions of quality and legitimacy are not offset against each other. An irregular law will not lose its legitimacy deficit even if it is characterized by a high degree of quality.

The above explained understanding of legitimacy is fundamentally different from epistemic justifications of democracy. Epistemic conceptions judge on mechanisms of decision-making exclusively or predominantly by considering their suitability as ‘truth trackers’. From the point of view of their supporters a democracy is legitimate because the majority procedures practiced there are the best guarantee to achieve correct results (see Cohen 1986; Estlund 1997).⁵ Epistemic conceptions are problematic in so far as they are only capable of providing a contingent justification of democracy. Basically it may be imagined that in political fields requiring special knowledge decisions made by experts prove to be superior. If pure expert procedures lead to better results, they will have to be recognized as legitimate, although they cannot claim to represent the will of the people. Furthermore, epistemic conceptions assume the availability of procedure-independent criteria of right or wrong. However, much legislation is connected to normative questions which cannot be answered according to objective standards.

4. Two Functions of Moral Experts

Basically we may distinguish two ways in which moral experts could influence the passing and implementing of democratic laws. In the following I will at first discuss bodies which have a purely counselling function in the process of political decision-making. Then—by the example of a revision of Germany’s embryo protection law—I will discuss moral experts having quasi-legislative functions.

Regarding the first variant, a look at the standing orders of the German Bundestag is worthwhile, which offers two possibilities to consult experts in the context of decision-making processes. On the one hand, experts appointed by the respective parliamentary committee may be consulted on a particular mat-

⁴ By referring to the helpful taxonomy developed by Fabienne Peter (2007; 2008, 56–74), the here expressed understanding may be called a ‘purely proceduralist conception of democratic legitimacy’.

⁵ A classical point of reference is provided by Condorcet’s Jury theorem; for an analysis in the context of modern democracies see List/Goodin 2001.

ter during public hearings. If the discussed matter shows ethical implications, also moral philosophers or moral theologians may be asked for their advice. In such cases it is the task of the experts to point out moral problems to the decision-makers and to present normative arguments in favour of or against the options under discussion. On the other hand, the German Bundestag may establish Enquete Commissions “to prepare decision-making about extensive and significant matters”.⁶ Enquete Commissions work over several years and are supposed to present a final report until the end of a legislative term which may serve as a basis for the parliamentary debate. Apart from members of the Bundestag factions, also external experts are appointed to an Enquete Commission. If normative-ethical questions are in the focus of the Commission’s work, usually also philosophers or theologians are included which have particular moral expertise in the field under discussion.

In tendency, consulting moral experts improves the quality of decision-making in the context of democratic law-making procedures. As explained in the previous section, statements by experts may in several ways contribute to getting a deeper understanding of the problem. They may make decision-makers aware of important normative aspects, point out to possible incongruities of popular positions and present more detailed arguments in favour of or against suggested regulations. In practice, however, the possibilities to improve quality as provided by counselling procedures are not always used in the best way. Often there is a tendency to ask those experts for their advice who are expected to confirm one’s own preconceived opinion. Furthermore, those experts who are asked for their opinion on debated questions or are appointed to counselling bodies do not always represent the variety of moral positions.⁷ Starting out from the definition given in the previous section, the inclusion or non-inclusion of counselling procedures is of no legitimacy relevance. Although in terms of quality we may criticise that moral experts are not consulted, this does not question the legitimacy of a democratic decision.

One example of entrusting an ethics committee with a quasi-legislative task is the amendment of the German law on embryo protection passed on July 7th, 2011. In newly added §3a, Sect. 2 on preimplantation diagnostics reads as follows:

“If, due to the genetic disposition of the woman providing the ovum or of the man providing the sperm cell or of both of them there is a high risk for their offspring to develop a grave inherited disease, it is no illegal action if, for the purpose of pregnancy and with the written consent of the woman providing the egg cell, embryonic cells are tested for the danger of developing this disease according to the

⁶ The establishment of Enquete Commissions (Enquete-Kommissionen) is regulated in §56 of the standing orders of the German Bundestag, public hearings are regulated in §70.

⁷ One example are the Enquete Commission on law and ethics of modern medicine (2000–2002) as well as the follow-up Enquete Commission on ethics and law of modern medicine (2003–2005) where moral theologians and philosophers being close to the official opinion of the Church were overrepresented.

generally recognized state of the art of medical science and technique in vitro before the intrauterine transfer.”⁸

Then in Sect. 3.2 it continues:

“Preimplantation diagnostic according to Section 2 is legal only after an interdisciplinary ethics committee established at the officially approved centres for preimplantation diagnostics has evaluated the conditions set by Section 2 and has stated its approval.”⁹

Those ethics committees as being supposed to be established at officially approved medical centres for preimplantation diagnostics are not given the task of counselling the legislature when it comes to deciding a norm. Rather, their moral expertise is meant to become important in the context of each individual case of referring to §3a of the Law on Embryo Protection. The ethics committees take over a quasi-legislative function in so far as the legislature has consciously defined the term ‘grave hereditary disease’ only vaguely. To decide in each individual case if the conditions of Sect. 2 are met, they must determine if the diagnosed hereditary disease may be considered ‘grave’. Thus, they specify the legal norm in a way which significantly affects its implementation. By classifying a hereditary disease as being ‘grave’ or ‘not grave’ they decide about the legality of preimplantation diagnostic.¹⁰

By transferring quasi-legislative functions to ethics committees one intends to do justice to the particular challenges of the matter under regulation. In the field of preimplantation diagnostics new methods of the early recognition of genetic defects are offered in short order. Furthermore, constantly new ways of treating those hereditary diseases are offered which can be recognized by help of preimplantation diagnostics. Thus, it may be that a specification of the term ‘grave disease’ by the legal norm is not according to the dynamics of further medical developments (see Birnbacher 2010, 435–7). E.g. a list of hereditary diseases, to which the law refers explicitly, would have to be constantly evaluated and revised. Entrusting non-legal bodies with decision-making in individual cases offers the advantage of flexible reaction to new possibilities of diagnosis and treatment.

⁸ In the German original this passage reads as follows: “Besteht auf Grund der genetischen Disposition der Frau, von der die Eizelle stammt, oder des Mannes, von dem die Samenzelle stammt, oder von beiden für deren Nachkommen das hohe Risiko einer schwerwiegenden Erbkrankheit, handelt nicht rechtswidrig, wer zur Herbeiführung einer Schwangerschaft mit schriftlicher Einwilligung der Frau, von der die Eizelle stammt, nach dem allgemein anerkannten Stand der medizinischen Wissenschaft und Technik Zellen des Embryos in vitro vor dem intrauterinen Transfer auf die Gefahr dieser Krankheit untersuchen lässt.”

⁹ In the German original this passage reads as follows: “Eine Präimplantationsdiagnostik nach Absatz 2 darf nur, nachdem eine interdisziplinär zusammengesetzte Ethikkommission an den zugelassenen Zentren für Präimplantationsdiagnostik die Einhaltung der Voraussetzungen des Absatzes 2 geprüft und eine zustimmende Bewertung abgegeben hat, vorgenommen werden.”

¹⁰ The classification of a hereditary disease cannot exclusively be based on medical information but must necessarily include ethical judgements. In particular, the expected suffering of the future individual and the parents must be weighed against the goal of avoiding negative selection.

Due to the above discussed particularities of the matter under regulation, in terms of quality it may appear advisable not to restrict the role of the moral expert to counselling during the law-making process. Regarding each individual case, it may be that better results are achieved if ethics committees are included in the implementation of laws.¹¹ More difficult to answer is the question of how a transfer of quasi-legislative tasks will affect the legitimacy of decision-making. As explained in the previous section, in democratic states the will of the people must be considered the only source of legitimacy. A decision is legitimate if it is in accordance with the rules of proceeding which, under the conditions of modern mass societies, guarantee that the will of the people is represented.

The transfer of quasi-legislative tasks looks problematic in so far as non-parliamentary bodies are not immediately authorized by the voters. The members of ethics committees do not represent the people but function as experts contributing their respective expertise. On the other hand, however, ethics committees entrusted with decision-making competences by the legislature may refer to indirect authorization. As demonstrated by the above given example, they act on the basis of laws passed by the ‘representatives of the will of the people’. Furthermore, usually the constitutions of democratic states grant the parliament the possibility to delegate norm setting competences. E.g. in Germany, according to Art. 80, Sect. 1 of the constitution, a Federal Minister or the governments of the Federal States may be empowered to make decrees.¹²

However, it is doubtful to which extent the legislature is authorized to delegate norm setting competences to ethics committees. If the actual content of legal norms is very often determined by moral (or other) experts, there is the danger that democracy will be ‘undermined’. Then, important parts of law-making would be left to bodies of experts which could neither be appointed by the citizens nor be held responsible. The fact that basically the transfer of quasi-legislative functions on ethics committees can be revised is not sufficient to dispel the above mentioned concerns. To be sure, by way of amendments the parliament is able to withdraw transferred competences. However, as long as ethics committees are entitled to make decisions, they will create legal facts which cannot easily be corrected. Both in terms of democracy theory and of constitutional law it is not sufficiently clear where the limits must be drawn when it comes to legitimately transferring quasi-legislative functions to ethics committees.

Furthermore, the inclusion of moral experts into the implementation of laws raises two more problems which shall be shortly sketched in the following. On the one hand, laws providing that ethics committees decide about individual

¹¹ According to the draft bill of the Federal Health Minister on preimplantation diagnosis from July 11th, 2012, each ethics committee consists of eight members. According to §4, these are “four experts from the medical discipline, one expert each from the disciplines of ethics and law, as well as two representatives each of patients and of nation-wide self-help organisations of chronically ill and disabled people.” (<http://www.bmg.bund.de/gesundheitsystem/gesundheitsziele/fragen-und-antworten-pidv.html>, accessed at December 4th, 2012)

¹² Furthermore, according to Art. 23 and 24 of the German constitution, there is the possibility to transfer sovereignty rights to the European Union or other international institutions.

cases are necessarily less clear. For the citizen, the content of a legal norm is not completely obvious if the specification of important terms, such as ‘grave hereditary disease’, is made subject to the decision of a committee. Indeed they do not run the risk of violating a law in so far as the ethics committee decides prior to the act. Nevertheless, the function of providing orientation a law is supposed to have for the citizen is negatively affected by this lack of clarity. On the other hand, the consistency of law may be affected if, as it is the case with preimplantation diagnostics, a law allows for or even requires the establishment of several ethics committees. As a consequence, Committee A may classify a certain hereditary disease as ‘grave’, while Committee B classifies it as ‘not grave’. Then there is the danger of a kind of committee tourism, with genetically prone couples always appealing to that medical centre whose ethics committee has in the past decided in favour of their matter (see Hübner/Pühler 2011, 795).

4. Conclusion

The considerations above started out from distinguishing two ways in which moral experts may exert political influence. If they have an exclusively consultative function, they are of no relevance for the legitimacy of parliamentary decisions. The transfer of quasi-legislative tasks to ethics committees on the other hand may negatively affect the legitimacy of democratic laws. Basically the transfer of norm setting competences does not contradict the procedural ideal modern democracies are based on. If, however, bodies of experts are very extensively empowered to decide about the contents and specification of laws, the principle of representative democracy is in danger. Furthermore, the transfer of quasi-legislative tasks to ethics committees may negatively affect the clarity and consistency of law. Thus, the advantages to be achieved in terms of quality must always be weighed against the above mentioned problems.

Bibliography

- Birnbacher, D. (2010), Pathologien an der Nahtstelle von Recht und Ethik in der Biomedizin, in: *Archiv für Recht und Sozialphilosophie* 96, 435–448
- (2012), Can There Be Such a Thing as Ethical Expertise?, in *Analyse & Kritik* 34, 237–249
- Cohen, J. (1996), An Epistemic Conception of Democracy, in: *Ethics* 97, 26–38
- Dietrich, F. (2008), Consent, Obligation, and Legitimacy, in: Kühnelt, J. (ed.), *Political Legitimization without Morality?*, Berlin–New York, 59–70
- Estlund, D. (1997), Beyond Fairness and Deliberation: The Epistemic Dimension of Democratic Authority, in: Bohman, J./W. Rehg (eds.), *Deliberative Democracy. Essays on Reason and Politics*, Massachusetts, 173–204
- Jones, K./F. Schroeter (2012), Moral Expertise, in: *Analyse & Kritik* 34, 217–230
- Hübner, M./W. Pühler (2011), Die neuen Regelungen zur Präimplantationsdiagnostik —wesentliche Fragen bleiben offen, in: *Medizinrecht* 29, 789–796

- List, C./R. E. Goodin (2001), Epistemic Democracy: Generalizing the Condorcet Jury Theorem, in: *The Journal of Political Philosophy* 9, 277–306
- Mackie, J. L. (1981), *Ethik. Die Erfindung des moralisch Richtigen und Falschen*, Stuttgart
- Peter, F. (2007), Democratic Legitimacy and Proceduralist Social Epistemology, in: *Philosophy, Politics, and Economics* 6, 329–353
- (2008), *Democratic Legitimacy*, New York
- Rawls, J. (1998), *Politischer Liberalismus*, Frankfurt