Марина Медведєва, д. ю. н.
Київський національний університет імені Тараса Шевченка, Україна

ЕКОЕТИЧНІ ТА БІОЕТИЧНІ СТАНДАРТИ В МЕХАНІЗМІ МІЖНАРОДНОГО ЗАХИСТУ ПРАВ ЛЮДИНИ

Maryna Medvedieva, ScD in Law
Taras Shevchenko National University of Kyiv, Ukraine

ECOETHICAL AND BIOETHICAL STANDARDS IN THE MECHANISM OF INTERNATIONAL HUMAN RIGHTS PROTECTION

The article considers common and distinguishing features of the implementation of ecoethical and bioethical standards in human rights protection law-making. The author concludes that one of their most important common features is the possibility of limiting human rights through the balancing of interests (public interest and individual interest), implementing the concepts of "common heritage / concern / interest of the humankind", ensuring public order and public morals as well as the application of the precautionary principle. However, the mechanisms for implementing environmental and biomedical rights have their own distinguishing features determined by different factors stipulated by the author in this article.
Key words: International Law, ecoethical standards, bioethical standards, human rights protection.

Law is the art of the good and the just (*jus est ars boni et aequi*). Rules of law reflect conceptions of people of different ages about justice, good and evil. International legal rules are specific rules as they establish the rules of conduct for international relations' subjects by achieving consensus on the most important international issues, including ethical ones. Along with the pluralism of views on various ethical topics, international community is trying to elaborate some universal moral standards and fix them at the level of law. Among them are ecoethical and bioethical standards of human rights protection. Ecoethical standards are aimed at governing relations of "human being – society – environment" type, bioethical standards – of "human being – human being – society" type. Bioethical human rights standards are concentrated at micro level – the protection of an individual from interference into his inner world, while ecoethical standards are aimed at macro level – the protection of an individual from interference into his outer world, as well as the protection of other species or ecosystems from illegal interference into their outer world .We set a goal to compare the principles of environmental and biological ethics in the mechanism of international human rights protection.

Among the distinguishing features between the implementation of ecoethical and bioethical standards in human rights protection law-making, we have to note the following:

1). The emphasis is made on different categories of human rights. Case law of international courts on environmental rights mainly concerns such fundamental rights as the right to life, the right to respect for private and family life, the right to property, the right to access information, the right to a fair trial, the right to enjoy the culture, etc. In the European Court of Human Rights (hereinafter – the ECHR) case law the most applied is Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms (1950), which guarantees the right to respect for private and family life. The first occasion for recognition of Article 2's right to life in an environmental context came in the *Öneryildiz v. Turkey* (2004) case[1], but in most environmentally related cases the Court found violations of Article 8. In famous case of *Lopez Ostra v. Spain* (1994) the ECHR held: "Naturally, severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life

[1] Kravchenko, S., Bonine, J.E. (2012). Interpretation of human rights for the protection of the environment in the European Court of Human Rights. *Global Business and Development Law Journal, 25, 1,* 275-276.

adversely, without, however, seriously endangering their health"[1]. The UN Human Rights Committee adopted a number of decisions in the cases which mainly concerned the environmental rights of indigenous people (*Bernard Ominayak and the Lubicon Band v. Canada* (1984), *Sara et al. v. Finland* (1990), *Jouni E. Länsman et al. v. Finland* (1995)) and involved the violation of Article 27 of the International Covenant on Civil and Political Rights (1966), that deals with the rights of ethnic, religious and linguistic minorities, in particular the right to enjoy their own culture.

Regarding the violation of human rights in biomedical research and clinical practice, case law of international courts usually concerns such human rights as the right to life, the right to respect for human dignity, the right to freedom from torture and freedom from experiments without free consent, the right to an adequate standard of living, the right to respect for private and family life, the right to freedom from discrimination, the right to property, etc. Since most types of modern medical biotechnologies are based on using the embryonic cells and tissues (cloning, heritable genetic modifications, transplantation of embryonic stem cells), it is clear that in terms of bioethics and human rights the main question is at what point an embryo becomes a human being which can enjoy the right to life, liberty, integrity and respect for dignity. Due to the fact that defining the status of the human embryo in terms of ethics and biology is a challenging issue there is no univocal answer on the question whether human embryo is a human being or not in modern International Law. The only article on this issue is Article 18 of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine (1997) (hereinafter – the Oviedo Convention), which obliges states to provide adequate protection of the embryo in their national legislation and prohibits the creation of human embryos for the purpose of research. Article 6 of the International Covenant on Civil and Political Rights provides for the inalienable right of every person to life, but it does not recognize it as an absolute right, since no one shall be arbitrarily (!!!) deprived of his life. During the negotiations on the developing the Convenant a group of countries (Belgium, Brazil, El Salvador, Mexico and Morocco) proposed formulating Article 6 in such a way that human life is protected from the moment of conception, but the proposal was rejected by the majority of states[2]. The same relates to the process of agreeing the definition of a "child" under the Convention on the Rights of the Child (1989). Although the American Convention on Human Rights (1969) in Article 4 protects a human being from the conception, however, the Inter-American Commission on Human Rights in its judgment in the case *Baby Boy* (1981) stated that this protection could not be conceived as absolute, since the drafters did not want to discard the possibility of liberal legislation on abortion[3]. Thus, the developers of these international instruments did not intend to provide an equal protection to persons born and unborn. European case-law does not shed enough light on the problem as well: in the course of judging such cases as *Paton v. United Kingdom* (1980), *R.H. v. Norway* (1992), *Boso v. Italy* (2002), *Vo v. France* (2004), the European Court of Human Rights did not give a clear explanation as to whether the unborn baby (fetus) has the right to life in the sense of Article 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms, didn't stated clearly the right to abortion, and at the same time expressed support for national laws that allow voluntary abortion at early stages. The above said confirms the controversy of this ethical issue and the lack of a single clear legal position concerning it. To date, international legal acts simply bypass the problem, leaving its solution to states' national legislative and judicial authorities.

2). The degree of rights' codification. Human rights in the field of biomedicine are regulated by universal declarations and international agreements (the Oviedo Convention and its protocols, the UNESCO Universal Declaration on the Human Genome and Human Rights (1997), the UNESCO Universal Declaration on Bioethics and Human Rights (2005)) whereas the human right to a healthy environment is not codified in a single document which would clearly prescribe the content of this right, it subjects, means of judicial protection, the reasons for the restrictions, etc. The Stockholm Declaration on the Human Environment (1972) and the Rio Declaration on Environment and Development (1992) contain rather vague formulations in their Principles 1; international regional human rights treaties such as the San Salvador Protocol to the American Convention on Human Rights (1988) and the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters

[1] *Lopez Ostra v. Spain*, no. 16798/90, 9 December 1994, Series A-303-C.

[2] Petersen, N. (2005). The legal status of the human embryo in vitro: General human rights instruments. *Heidelberg Journal of International Law, 65,* 450.

[3] Petersen, N. (2005). The legal status of the human embryo in vitro: General human rights instruments. *Heidelberg Journal of International Law, 65,*454, 457.

(hereinafter – the Aarhus Convention) contain just one article devoted to the protection of the right to a safe environment. With regard to international instruments constituting the International Bill of Human Rights, we must admit that they don't provide environmental rights at all, since the international community recognized the existence and importance of environmental problems and the link between the environment and human rights only when the basic international human rights treaties had already been adopted.

3). The existence of a right *per se*. The right to a healthy environment, as enshrined in regional human rights treaties, universal and regional declarations, confirmed by the case law of international judicial institutions and doctrine, legislative and judicial practice of most states is a progressive achievement of international diplomacy; it is aimed not only at ensuring the individual rights of persons, but also, indirectly, – at protecting the environment, which is the "common concern", "common interest", "public value" or "public good". Some biomedical rights enshrined in the cited treaties of the Council of Europe, UNESCO universal declarations, confirmed by international jurisprudence and doctrine, such as the right to be free from any biomedical intervention without informed consent, the right to the donation of organs and tissues, the right to freedom from discrimination on grounds of genetic heritage, the right to a mental and physical integrity can also be deemed as a progressive achievement. However, some so called reproductive (somatic) "rights" such as the "right" to abortion, euthanasia, cloning, heritable genetic modification do not really contribute to the protection of human dignity and human life at all its stages, do not prevent possible abuses and violation of public morals, do not avoid the occurrence of negative and unexplored effects for the psychics and body of a human being, society and humanity. There are no such rights in international treaty law, therefore, there are no positive obligations of states to ensure them, and, hence, it will not be considered unlawful to restrict or prohibit such unethical acts. The relevant case law of international courts is rather controversial. For example, the ECHR case law witnesses that while judging the cases touching such complex bioethical issues the Court noted the lack of consensus in Europe and gave the resolution of these issues to the discretion of national legislation. The reference to national law is also contained in European treaties on biomedical rights. State practice is not uniform, it is heterogeneous, that is explained by the level of public awareness, the role of religion, the influence of political parties and social movements in each state. Therefore, it cannot evidence the existence of any international custom.

Among the common features between the implementation of ecoethical and bioethical standards in human rights protection law-making, we have to note the following:

1). Ensuring a balance of interests: the public interest against the individual interest or, in ethics terminology, holism v. individualism. In the cases considered by the ECHR where the individual right to private property conflicted with the environmental policy of a state or, vice versa, where the individual right to a healthy environment conflicted with economic public policy, the Court decided such conflicts by determining the level of ensuring by a state "a fair balance" between the interest of the economic well-being of society and the applicant's effective enjoyment of the right to respect for home and private and family life (the ECHR judgment in the case *Lopez Ostra v. Spain*, para. 58) or "a fair balance" between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights (the ECHR judgment in the case *Matos e Silva, Lda., BV others v. Portugal* (1996), paras. 86-93).

In the field of biomedicine there is also some "conflict" between various interests and rights, for example, between the right to health (through applying the achievements of modern medicine, including the use of embryonic stem cells) or the "right" of women to abortion, on the one hand, and the right of human embryo to life and human dignity, on the other. Article 2 of the Oviedo Convention provides: the interests and welfare of the human beings shall prevail over the sole interest of society or science. The same is envisaged in Article 3 of the Additional Protocol to Oviedo Convention concerning Biomedical Research (2005), Article 3 of the Additional Protocol to Oviedo Convention concerning Genetic Testing for Health Purposes (2008), Article 3 of the UNESCO Universal Declaration on Bioethics and Human Rights, and Article 10 of the UNESCO Universal Declaration on the Human Genome and Human Rights. In its judgments in the cases *Draon v. France* (2005) concerning the prenatal diagnosis, *Evans v. the United Kingdom* (2007) concerning fertilization *in vitro*, and *Dickson v. the United Kingdom* (2007) concerning fertilization *in vitro* of persons in prison, the ECHR noted the need to adhere to such a balance of interests.

2). The application of the concept of "common heritage / concern / interest of the humankind". These ethical conceptions are widely accepted by international treaty law and doctrine. Several international treaties refer to the conception that "the environment is a common concern of mankind", among them are the preambles of the Framework Convention on Climate Change (1992), the Convention

on Biological Diversity (1992), the Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (1994). The above mentioned conception differs from the concept "environment is the common interest of mankind", which has more anthropocentric orientation, as well as from the conception "common heritage of mankind", which has more legal than political nature and which is governed in detail by International Law.

The human genome is proclaimed the "heritage of humanity" in Article 1 of the UNESCO Universal Declaration on the Human Genome and Human Rights. The UNESCO Declaration on the Responsibilities of the Present Generations Towards Future Generations (1997) and the UNESCO Declaration on New Prospects for the Common Heritage of Mankind (1999) confirm the idea of preserving the global environment and the human genome primarily for human needs.

3). The application of the precautionary principle as one of the ethical principles. This principle is one of the principles of International Environmental Law. It is found in more than 20 multilateral environmental agreements, including those that are aimed at the protection of human health and is confirmed by the international courts' case law. The ECHR applied the precautionary principle in an environmental context for the first time in its judgment in the case *Tatar v. Romania* (2009) emphasizing the importance of "… the precautionary principle, according to which the absence of certainty with regard to current scientific and technical knowledge could not justify any delay on the part of the State in adopting effective and proportionate measures"[1]. The principle was also cited by the ECHR in its judgment in the case *Taskin v. Turkey* (2005).

With the rapid development of biology and medicine, as well as the introduction of scientific developments into the clinic, the need to apply the precautionary principle to the field of biomedicine became more than urgent[2], in order to prevent the occurrence of the unknown and unexplored risks to a human being and protect his rights to integrity and dignity. Given the existing risks for the individual and society owing to the use of genetic engineering technologies and the lack of sufficient scientific information about the consequences, International Law bans certain biotechnology activities, such as reproductive cloning or heritable genetic modifications (Additional protocol to the Oviedo Convention on the Prohibition of Cloning Human Beings, the UNESCO Universal Declaration on the Human Genome and Human Rights). In its Opinion No. 15 "Ethical aspects of human stem cell research and use" (2000) the European Group on Ethics in Science and New Technologies to the European Commission concluded that this sphere of human activity should be governed by the precautionary principle[3]. However, in May 2014 the European Commission "turned on the green light" for the financing of research using embryonic stem cells in order to implement the program "Horizon 2020".

4). Vague and abstract formulations of the legal rules in treaties due to the uncertainty of controversial ethical issues at the level of International Law. Such complex issues as the content and the need to recognize an individual right to a healthy environment (we mean a substantial right to a healthy environment as opposed to the procedural environmental rights), the status of the human embryo, the moments of beginning and cessation of life, etc. are given to national legal regulation. For example, the Parliamentary Assembly of the Council of Europe has repeatedly recommended that the Committee of Ministers develop a separate protocol to the Convention of 1950, which would ensure the protection of human right to a healthy and sustainable environment, but each time the divergent views of the representatives of the Committee of Ministers prevented the implementation of this decision. In the cases relating to environmental protection the ECHR grants to states wide "margin of appreciation", since, in his opinion, the problem of balancing the interests of individual rights' and public interests' protection is best solved at states' national laws (the cases *Taskin and others v. Turkey*, *Powell and Rayner v. the United Kingdom* (1990)).

The elaborating process of the Oviedo Convention demonstrates the difficulties states have in

[1] [Press Release issued by the Registrar of the European Court of Human Rights] *Tatar v. Romania*, no. 67021/01, Judgment of 27 January 2009, unreported.

[2] Seng, E. (2003). Human cloning: Reflections on the application of principles of international environmental and health law and their implications for the development of an international convention on human cloning. *Oregon Review of International Law, 5,* 114–138.

[3] *Ethical aspects of human stem cell research and use*, Opinion of the European Group on Ethics in Science and New Technologies to the European Commission No. 15, 14 November 2000, Brussels, 3.4.2003, SEC (2003) 441 <http://ec.europa.eu/research/conferences/2003/bioethics/pdf/sec2003-441report_en.pdf> (2015, March, 16).

reaching a compromise on the ethical issues in the field of biomedicine. While drafting the text of the Convention delegations of different countries mostly disputed on the need to provide a definition to "bioethics" and a "human being" as well as the meaning of the provisions of Articles 1, 6, 13, 17, 18 and 26 – that concern primarily the protection of persons not able to consent to biomedical research and modern medical biotechnologies. In its judgment in the case *Evans v. the United Kingdom* ECHR stated: "In conclusion, therefore, since the use of IVF treatment gives rise to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments, and since the questions raised by the case touch on areas where there is no clear common ground amongst the member States, the Court considers that the margin of appreciation to be afforded to the respondent State must be a wide one"[1]. The Court came to similar conclusions in its judgment in the case *SH and others v. Austria* (2011), which concerned the legality of some methods of fertilization *in vitro*.

"Right" to death is another difficult ethical issue that has no universal legal solution. The problem of euthanasia had been raised in the case law of the ECHR in respect of Article 2 (the right to life). The Court considered the question of euthanasia in the cases *Sanles Sanles v. Spain* (2000), *Pretty v. the United Kingdom* (2002), *Haas v. Switzerland* (2011), *Koch v. Germany* (2011). From the analysis of these judgments follow some conclusions: Article 2 of the European Convention do not contain the right to death, but at the same time the Court believes that states which have legalized euthanasia do not breach the right to life. The ECHR does not recognize the ban or decriminalization of euthanasia incompatible with the norms of the Convention. The "right" to death is not enshrined in any of the existing international human rights instruments, but at the level of national law there's a trend to legalize its various forms.

The history of drafting the UN Declaration on Human Cloning (2005) is perhaps the most striking example when ethical debate strongly influences the international law-making. The document's language remains so uncertain and ambiguous that scholars have expressed doubt about the univocal ban of human cloning, and this is despite the fact that it is the purpose of the Declaration. The Oviedo Convention and its protocols often refer to national law where the member states of the Council of Europe have not reached consensus on the ethical issues of biomedicine and human rights, for example, Article 18 of the Convention, Article 15 of the Additional Protocol on Genetic Testing for Health Purposes, Article 17 of the Additional Protocol concerning Transplantation of Organs and Tissues of Human Origin (2002). The ECHR judgment in the case *Open Door Counselling and Dublin Well Woman v. Ireland* (1992) said: "... the national authorities enjoy a wide margin of appreciation in matters of morals, particularly in an area such as the present which touches on matters of belief concerning the nature of human life. As the Court has observed before, it is not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals"[2].

5). The possibility of limiting human rights in order to ensure public order and protect morals in society. The grounds for legitimate restrictions of human rights are provided in Article 29 of the Universal Declaration of Human Rights (1948), Articles 4 of the International Covenant on Economic, Social and Cultural Rights and of the International Covenant on Civil and Political Rights, various articles of the Convention for the Protection of Human Rights and Fundamental Freedoms, including paragraph 2 of Article 8. For example, Article 8 of the 1950 Convention allows limitations to the right to private life in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. A similar list of grounds for limiting human rights is contained in Article 26 of the Oviedo Convention, but it does not include national security and morals. The Aarhus Convention contains in Article 4 its own list of grounds for limiting the right of access to environmental information, which includes, *inter alia*, the need to ensure confidentiality of the proceedings of public authorities; international relations, national defence or public security; the confidentiality of commercial and industrial information; intellectual property rights; the environment to which the information relates, such as the breeding sites of rare species, etc.

International Law also provides the possibility to ban the import of goods or patenting the inventions that are contrary to public order and morals. In this way International Law restricts the rights of individuals in favor of ethical standards, such as environmental protection or the protection of human dignity and integrity. Thus, Article XX of the GATT (1947) provides for the possibility of adoption or

[1] [Judgment of the European Court of Human Rights] *Evans v. the United Kingdom*, no. 6339/05, EHRR 2008.

[2] [Judgment of the European Court of Human Rights] *Open Door Counselling and Dublin Well Woman v. Ireland*, no. 14234/88, ECHR 1992.

enforcement by states measures necessary to protect public morals; to protect human, animal or plant life or health; to conserve exhaustible natural resources. In its report in the case *European Communities – Measures prohibiting the importation and marketing of seal products* (2014) the WTO Appellate Body, although having not recognized the EU ban on the import of seal products as justified according to the chapeau of this article, confirmed the WTO panel conclusion that "the EU seal regime" was necessary to protect public morals[1]. Article 27 of the TRIPS Agreement (1994) provides for the exceptions to the rules on patentability necessary to protect public order or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment. The European Patent Convention (2000) in Article 53 (b) envisages an obligation of states to refuse to grant patents for inventions contrary to public order or morality. There are some examples of cases where the European Patent Office has applied Article 53 (b) to justify its refusals to patenting of certain unethical inventions: *the Upjohn* case, *the University of Edinburgh's human embryo patent* case, as well as *the Wisconsin Alumni Research Foundation (WARF*) case[2].

Having analyzed international treaty and judicial practice we may conclude that the ethical roots of biomedical and environmental rights have much in common. One of the most important common features is the possibility of limiting human rights through the balancing of interests (public interest and individual interest), implementing the concepts of "common heritage / concern / interest of the humankind", ensuring public order and morals. However, the mechanisms for implementing environmental and biomedical rights have their own distinguishing features determined by different factors listed above.

Law must be the art of the good and the just, but to make law act in this capacity means that it needs actors who act in accordance with the principles of the good and the just. The answer to the question whether International Law will stand before the challenges of our time depends on the level of legal, religious, environmental, "biomedical" consciousness of each human being. Law and International Law in particular will contribute to the implementation of high moral values only when concrete people responsible for the adoption and implementation of concrete decisions will experience, in the words of Albert Schweitzer, "Reverence" not only for their own lives but also for the lives of other peoples and the lives of other living beings.

References

1. Kravchenko, S., Bonine J. E. (2012). Interpretation of human rights for the protection of the environment in the European Court of Human Rights. *Global Business and Development Law Journal, 25, 1,* 275-276.
2. *Lopez Ostra v. Spain*, no. 16798/90, 9 December 1994, Series A-303-C.
3. Petersen, N. (2005). The legal status of the human embryo in vitro: General human rights instruments. *Heidelberg Journal of International Law, 65,* 447-466.
4. [Press Release issued by the Registrar of the European Court of Human Rights] *Tatar v. Romania*, no. 67021/01, Judgment of 27 January 2009, unreported.
5. Seng, E. (2003). Human cloning: Reflections on the application of principles of international environmental and health law and their implications for the development of an international convention on human cloning. *Oregon Review of International Law, 5,* 114–138.
6. *Ethical aspects of human stem cell research and use*, Opinion of the European Group on Ethics in Science and New Technologies to the European Commission No. 15, 14 November 2000, Brussels, SEC (2003) 441 <http://ec.europa.eu/research/conferences/2003/bioethics/pdf/sec2003441report_en.pdf> (2015, March, 16).
7. [Judgment of the European Court of Human Rights] *Evans v. the United Kingdom*, no. 6339/05, EHRR 2008.
8. [Judgment of the European Court of Human Rights] *Open Door Counselling and Dublin Well Woman v. Ireland*, no. 14234/88, ECHR 1992.
9. *European Communities – Measures prohibiting the importation and marketing of seal products*, Reports of the Appellate Body, 22 May 2014. <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query= (@Symbol= %20wt/ds401/ab/r*%20not%20rw*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged= true#> (2015, January, 12).
10. Basheer, Sh., Purohit Sh., Reddy P. (2010). Patent exclusions that promote public health objectives <http://www.wipo.int/edocs/mdocs/scp/en/scp_15/scp_15_3-annex4.pdf> (2015, February, 13).

[1] *European Communities – Measures prohibiting the importation and marketing of seal products*, AB-2014-1, AB-2014-2, Reports of the Appellate Body, 22 May 2014 <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S006.aspx?Query=(@Symbol=%20wt/ds401/ab/r*%20not%20rw*)&Language=ENGLISH&Context=FomerScriptedSearch&languageUIChanged=true#> (2015, January, 12).

[2] Basheer, Sh., Purohit Sh., Reddy P. (2010). Patent exclusions that promote public health objectives <http://www.wipo.int/edocs/mdocs/scp/en/scp_15/scp_15_3-annex4.pdf> (2015, February, 13).