

沒有民主治理原則的 廣泛公眾支持：批判性回應

Broad Public Support without Principles of Democratic Governance: A Critical Reflection

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摘要 Abstract

新興的人類胚胎研究技術中，14 天限制是一個避免公眾爭議的政治決定。伊爾蒂斯 (Ana S. Iltis)、馬修斯 (Kirstin R.W. Matthews) 和洛伊 (Sam Lowe) 質疑國際幹細胞學會 (ISSCR) 2021 年新推的指引取消 14 天限制。這更改既未得到廣泛公眾支持，又未能顯示

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對人類胚胎研究各方觀點的尊重。故其政治合法性成疑。本評論反駁，新推的指引開設了若干會議和討論會，尊重各持分者的觀點。更重要的是，從儒家的賢能政治的觀點而言，廣泛公眾支持不等同於民主管治中的強共識，故伊爾蒂斯等人受限於民主原則，對廣泛公眾支持的定義過嚴。

1. Introduction

In “Emerging Human Embryo Research Technologies, the 14-day Rule, and the Special Status of the Embryo,” Ana S. Iltis, Kirstin R. W. Matthews, and Sam Lowe call into question the appropriateness of the 2021 ISSCR guidelines, which make new recommendations for human embryo and embryoid research. Two changes are proposed in the guidelines. First, concerning human embryos, the guidelines suggest reviewing human embryo research on a case-by-case basis, rather than imposing a strict date limit, and reexamining the 14-day limit on the *in vitro* culture of human embryos for embryo as well as embryoid research. Second, regarding embryoids, the guidelines remove the 14-day limit that was put in place on the basis of embryoids’ “organismal potential” at that stage of their development. Instead, without setting a time limit on cell culture, the guidelines propose organizing embryoids into two categories: non-integrated, which includes the *in vitro* culture of chimeric embryos and *in vitro* gametogenesis, procedures that do not involve fertilization or generation of embryos; and integrated, which includes *in vitro* culture of human embryos until 14 days after fertilization or primitive streak formation, and the transplantation of human cells into non-human embryos for gestation in a non-human or human uterus following mitochondrial replacement. Iltis and colleagues take a close look at the historical development of the guidelines in light of controversies in the US and the UK since 1978. Despite many unsettled disputes, the 14-day limit was established through a deliberative process involving public and stakeholder engagement. However, the 14-day limit was lifted in the 2021 guidelines without such public discussion and engagement.

In this regard, Iltis and colleagues show the self-contradictory nature, or at least inconsistency, of the 2021 guidelines. On the one hand, the new guidelines note that scientists have called for public engagement on the topic. On the other hand, the guidelines were themselves created in the absence of such public engagement. I agree with Iltis and colleagues that the guidelines may not achieve “broad

public support,” as emphasized in recommendation 2.2.2.1 of the 2021 guidelines, and as defined by Ilitis and colleagues. However, from a Confucian perspective, I doubt that the strong public consensus stipulated by Ilitis and colleagues will prove vital as long as the new guidelines are implemented in a transparent and responsible manner.

2. Summary

Ilitis and colleagues begin by elaborating on the historical background of the ISSCR guidelines issued in 2016. Taking into account many public hearings and discussions, both the US Department of Health, Education and Welfare and the UK Warnock Report recommended that human embryo research be permitted up to a 14-day limit. The 14-day rule was a political compromise made to show the public that there was a framework regulating the research (Ilitis et al. 2021: 22). Some countries, including the UK, Germany, and Japan, have passed the 14-day limit into law regardless of its theoretical limitations. However, other countries, such as the US, have encouraged scientists to form voluntary implicit agreements to honor the 14-day limit rather than banning human embryo research altogether or legally limiting such research to the first 14 days. Legal systems differ widely around the world, and some important but yet to be thematized philosophical questions are bypassed in law, such as whether embryos possess a special “potential” moral status and rights based on their developmental potential. Therefore, the ISSCR plays an important role as an ethical regulator of human embryo research.

In its 2021 guidelines, the ISSCR recommends that research involving human embryo culture beyond 14 days to promote human health and well-being should be allowed if it is permitted by local policies and regulations (ISSCR 2021: 13). In contrast, the use of genetic alteration for non-serious conditions or enhancement of body performance or features should be discouraged (ISSCR 2021: 41). Ilitis and colleagues note that “broad public support” is required to justify human embryo research under the revised recommendation. They argue that the idea of broad public support is sufficiently close to the idea of a consensus that the latter can help elucidate some of the possible interpretations of broad public support and under what circumstances it would be justifiable to claim that it exists (Ilitis et al. 2021: 14).

Despite discussing the importance of broad public support, the 2021 guidelines themselves do not seem to have such support. They were not developed with information sourced from direct public outreach and a public comment period, unlike the 2016 guidelines

(Iltis et al. 2021: 12 & 15). The principles of democratic governance posit that more public engagement and discussion is associated with greater transparency and less public controversy (Iltis et al. 2021: 13). In the spirit of these principles, the call for public discussion in the 2021 guidelines was made to garner support for increasing embryo research and reduce the likelihood of public discontent or controversy. However, the absence of public discussion of the formulation of these guidelines might ignite dispute or even violate the social and public good. Not only did the ISSCR have limited engagement with the public in the process of deciding to change the 14-day rule, but it has also presented no evidence that the new guidelines are supported by the majority of its members. Therefore, any claim to a consensus on the new guidelines, even among the scientists of the ISSCR, is suspect (Iltis et al. 2021: 15). With little public or stakeholder engagement, evidence of such a consensus is lacking (Iltis et al. 2021: 22).

Due to the “undemocratic” nature of the process of changing the 14-day limit, some questions and judgments about the moral status of human embryos remain unarticulated and unthematized. On the one hand, the ISSCR guidelines presume that embryos are not special and do not merit particular respect. On the other hand, the ISSCR offers no explanation of why the destruction of embryos for research purposes needs to be justified and why the number of embryos used must be minimized (Iltis et al. 2021: 20–21). As a result, there is no grounded moral justification for the replacement of the concept of “(developmental) potential” with two oversight categories—non-integrated (1B) and integrated (2) embryoids. Although most scholars and stakeholders would agree that embryos do not have full moral status (equivalent to that of a born human being), it is debatable whether human embryos have a special moral status. The special moral status of human embryos is highly relevant to embryo research at any developmental point or age, including before 14 days. However, without public engagement, this crucial question remains unanswered. The guidelines can neither grant actual protection to the embryo nor maintain public support for policies decided primarily on utilitarian grounds.

3. Critique

A fairly obvious objection can be made to the claim that broad public support is sufficiently similar to a strong consensus, and that a reasonably high level of agreement among the public, including those outside the elite group, is required. To make their argument, Iltis and colleagues use Trotter’s distinction between strong and weak consensuses. A strong consensus occurs when an opinion is shared

widely throughout an entire population. In contrast, a weak consensus is formed when “there is fundamental agreement among designated authorities but only passive acceptance (without concurrence) in those outside the elite group.” Public engagement and discussion are necessary to make a strong consensus possible. In the creation of its 2021 guidelines, the ISSCR fulfilled the requirement of a weak rather than a strong consensus, as it organized several meetings and events within the ISSCR but made no provisions for direct public outreach or a public comment period to inform the review and redrafting of the guidelines. However, according to Iltis and colleagues, a weak consensus is not enough, because it “hardly can be said to reflect societal or public consensus, yet invoking the term ‘consensus’ and at least appearing to include the public can confer a sense of moral authority and legitimacy on a group’s recommendations” (Iltis et al. 2021: 15). Only a strong consensus can maintain political legitimacy under the principles of democratic governance. Therefore, they argue that the ISSCR should invite all people, including those outside the ISSCR and even the human embryo research community, to discuss the change of rules and eventually reach a strong consensus.

However, as Joshua Cohen notes, the precise characterization of acceptable reasons and their appropriate weights vary in a pluralistic society. Thus, “even an ideal deliberative procedure will not, in general, produce consensus” (Cohen 2003: 22). Moreover, the requirement of public engagement and discussion is neither necessary nor sufficient for any claim to a strong consensus, nor even to a weak consensus. For example, the public may fail to reach an agreement even after plenty of public engagement and discussion. Besides, if we assume that a strong consensus is necessary to legitimize the guidelines, their legitimacy will remain in doubt if the public does not consent to them. In such a case, however, there might be widespread support for withdrawing the 14-day rule among bioethicists and some scientists. I do not deny that public engagement and discussion might be helpful in gaining public trust in science. However, it is not a must for the ISSCR to secure a strong consensus by organizing direct public outreach and a public comment period to provide recommendations that are shared widely throughout an entire population.

Iltis and colleagues might defend their position by noting that in the Fundamental Ethical Principles of the 2021 guidelines, the ISSCR states explicitly that the guidelines help to give the public and research funding organizations confidence that generally accepted ethical boundaries will not be crossed in either basic or clinical research. Thus, public engagement and discussion should not be limited to elites, and the scale on which they are carried out should be at least similar to that of the engagement and discussion that informed the 1979 US and 1984

UK reports. However, these conditions may seem somewhat unfair to the ISSCR. The 2021 guidelines did not introduce laws and regulations. As the ISSCR states clearly, “these guidelines do not supersede local laws and regulations” (ISSCR 2021: 3). The guidelines provide a set of practice guides to regulate research at all levels. Yet standards like these are considered “soft law” and thereby lack enforceability. Soft law is in opposition to hard law, with the essential difference between the two being the strength of their legal binding force. Hard law “refers to legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law”, whereas “[t]he realm of ‘soft law’ begins once legal arrangements are weakened along one or more of the dimensions of obligation, precision, and delegation”. Based on this distinction, I argue that the guidelines represent a set of informal agreements and rules without binding force. As a result, it is reasonable for the ISSCR to have involved the public less in the creation of the 2021 guidelines than in the formation of the 1979 US and 1984 UK reports.

More importantly, it is easy to overestimate the dependence of broad public support on principles of democratic governance. Confucian political meritocracy teaches us that there can be broad public support without commitment to these principles, such as popular sovereignty, political equality, and free discussion among equal citizens. Kongzi and Mengzi do not place confidence in public judgment on complex matters of policy and governance (Chan 2007). In Mengzi 1B7, although the author recommends that elites consult the public before executing exceptional promotions and demotions in high office, i.e., that they listen to public opinion, these elites still make the final decision. This, says Mengzi, is because not everybody is equipped by his education with an equal ability to make morally informed judgements (Bell 2016).

I argue that when the ISSCR makes note of “broad public support,” it attributes expertise to public judgment. In contrast, when Ilitis and colleagues call for a strong consensus, they attribute political authority to the public. The former is similar to the attribution made when public opinion is sampled or market research is carried out to evaluate public acceptance. In contrast, the latter is roughly equivalent to asking voters which rule should be changed and how it should be changed. This is the difference between being a consultant to decision-makers and being the decision-makers who finalize the rules. We should keep these two roles separate. In accordance with this distinction, the ISSCR can achieve broad public support for or a weak consensus on the common practice of bioethics by organizing some meetings and events that involve public engagement and discussion.

Moreover, emerging human embryo research technologies are very complex, involving concepts that are difficult to clarify and mechanisms that are hard to fully understand. The public might not have enough time to clarify the relevant technical terms and comprehend such sophisticated advanced technologies. Perhaps the new guidelines already somehow acknowledge the diverse views on human embryo research. They merely fail to fulfill the requirement of having been formulated through a strong consensus, which requires complex and prolonged procedures of negotiation and consultation.

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