BIOETHICS AND LAW: BETWEEN VALUES AND RULES.

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1. Introduction.

The scientific progress of the last thirty years has opened up new horizons in many different fields: reproduction (see for example the *in vitro* fertilization, cloning techniques, etc.), organs transplants, sexuality, and so on.

This incredible scientific progress led to a main social consequence: facts turned into choices. What in the past simply happened, now becomes a possibility whose choice is up to individuals. The boundaries of existence, its beginning and its end, are less precise, making more and more room for individuals' choice. For example, parents may know if their children carry genetic defects and, as a consequence, they can choose if to bring them into the world or not and if the embryos are the result of an *in vitro* fertilisation, they may even select which ones to implant.

Besides, the end of life is no more totally beyond individuals' control, since scientific progress prolongs the last part of our existence. In many cases, death does not simply happen: it becomes a process in which choice and, as a consequence, the will of individuals play a crucial role.

These are only two examples, which nevertheless highlight the legal consequence of this change: dealing with choice is undoubtedly more difficult than regulating facts.

At a first sight, the reaction of many legal frameworks to this incredibly fast scientific progress has been an absolute freedom. Many fields have been characterized by no rules or at least by the stratification of an inconsistent regulation. It may be wrong to describe this phenomenon as a conscious choice of the legal systems: at least in a first phase, it was the result of a shock. It was the shock of individuals in front of the possibility to make choices with regard to their own existence, the shock of societies in front of the opening up of new horizons. It was the shock of political frameworks, which had to deal with ethical dilemmas and with the uncontrollable quickness of new scientific discoveries. Finally, it was the shock of lawyers, due to the fact that the scientific progress changed the basis of their "work-tools".

Not only the legal rules had to face the role of individuals' choice in front of the basic aspects of human existence (reproduction, sexuality, etc.), but they had more of all to face also the cultural aspects, which stay behind those choices.

When freedom started to resemble anarchy the need for rules emerged, but it clashed with a reflection about the role of law, especially with regard to ethical pluralism.

Back to the law meant also to have second thoughts on role of the law itself.

The adoption of regulations in the fields of biomedicine and bioethics has met many obstacles. For example, rules need a (at least) minimum level of consensus and they

need also time to be approved and it is extremely difficult to comply with both these needs.

The reflection on these problems has led to a new legal branch, which is called "biolaw".[1] Its foundations lay in part on the debate about the role of the law in front of bioethics and, more generally, about the role of the law itself.

This paper tries to understand the main features of this debate.

2. The basis of law are falling down: the fading away of the "biological paradigm".

If it is true that in the actual scientific framework facts become possibilities, it may be useful to give some example. The incredible scientific advancements of the last years have posed two main problems: on the one hand individuals were facing the difficulty of making choice while, on the other hand, legal systems had to debate on facts turning into possibilities and on the changing of the biological reality many legal rules were based on.

The emerging new features of the boundaries of human life are the main effect of this aspect. The biological reality of existence changed its face from its very beginning: in the past birth was described with certainty by a series of facts, which may be defined as the "biological paradigm".[2] In other words, the beginning of existence was described by an indefectible biological reality, which was based on a series of facts: a sexual relation, between male and female, whose gametes gave rise to fertilisation. This was not an option; these were the facts the legal regulations of parental relations were simply based on. Again, the recent scientific progress turned these facts into options. The first "attack" to the "biological paradigm" came from assisted reproduction technology and a possible outcome of the fading away of the paradigm emerged: the lack of protection for some subjects, basically the children.

This was highlighted by some cases arising in the Italian as well in the French legal systems, with regard to the disownment of paternity. In both these legal systems, the idea of a children conceived with the intervention of a third subject outside the wedlock was unavoidably identified with adultery. Consequently, the father might act for the disownment of paternity. Otherwise, with the *in vitro* fertilisation, if a donor intervenes, the biological parents may even never meet and the presence of a third person outside the wedlock does not coincide with adultery at all.

Both the French and Italian legal systems had to face many cases of fathers who had previously consented to the donor insemination but had than changed their mind, acting for the disownment of paternity. At first, the courts simply applied the existing laws

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[1] The Italian «biodiritto» is translated in English as «biolaw», in French as «bio-droit» and in Spanish as «biojurídica» see L. PALAZZANI, *Introduzione alla biogiuridica*, Torino, 2002, p. 54.

[2] See for example B.L. WILDER, *Assisted Reproduction Technology: Trends and Suggestions for the Developing Law*, in 18 *J. Am. Acad. Matrimonial Law*, (2002), p. 177: «I have suggested elsewhere, and do so again here, that we abandon use of the biological paradigm to establish the parent-child relationship, in favor of a legally significant acts paradigm. That is not to say that biological relationships are irrelevant in the determination of parental and child rights, but it is to say that such relationships should be thought of as evidence of certain legally significant acts that, among others, establish the parent-child relationship, as opposed to being dispositive per se, with the occasional (and in the area of ART law, increasingly frequent) exception.»

giving priority to the "biological paradigm", but in cases like these the assumptions were completely different. In many circumstances this strict application of the law granted the success of the disownment of paternity.

Both the legal systems adopted laws explicitly forbidding this kind of action. In 1994, the French *loi de bioéthique* n. 94-653 provided a precise procedure for donor insemination.[3] On the one side, it excluded every link between the "biological father" and the child conceived with donor insemination *(*art. 311-19[4]) and, on the other side, it provided a precise procedure to consent to this kind of technique (art. 311-20[5]). In 2004, the recent (and questioned) Italian law on assisted procreation expressly prohibited donor insemination.[6] In addition, even if this provision is infringed, it expressly provides that parents cannot disclaim the paternity (or maternity) of the child.[7]

However, both the French and the Italian courts had already outlined new features of the "biological paradigm" before the law intervened. For example, in 1998 a decision of the Italian Constitutional Court stated that in the case of donor insemination it was not possible to act for the disownment of paternity. According to the Court, the legal discipline of this action was based on grounds completely unrelated to the factual situation of this particular kind of *in vitro* fertilization.[8]

A famous decision of a French court goes even further, claiming clearly that biological reality has changed and that there is another element to be considered in the field of

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[3] *Loi* n. 94-653, 29 juillet 1994 (*loi de bioéthique*).

[4] «Art. 311-19. – En cas de procréation médicalement assistée avec tiers donneur, aucun lien de filiation ne peut être établi entre l'auteur du don et l'enfant issu de la procréation. Aucune action en responsabilité ne peut être exercée à l'encontre du donneur.»

[5] «Art. 311-20 – Les époux ou les concubins qui, pour procréer, recourent à une assistance médicale nécessitant l'intervention d'un tiers donneur, doivent préalablement donner, dans des conditions garantissant le secret, leur consentement au juge ou au notaire, qui les informe des conséquences de leur acte au regard de la filiation. Le consentement donné à une procréation médicalement assistée interdit toute action en contestation de filiation ou en réclamation d'état à moins qu'il ne soit soutenu que l'enfant n'est pas issu de la procréation médicalement assistée ou que le consentement a été privé d'effet. Le consentement est privé d'effet en cas de décès, de dépôt d'une requête en divorce ou en séparation de corps ou de cessation de la communauté de vie, survenant avant la réalisation de la procréation médicalement assistée. Il est également privé d'effet lorsque l'homme ou la femme le révoque, par écrit et avant la réalisation de la procréation médicalement assistée, auprès du médecin chargé de mettre en oeuvre cette assistance. Celui qui, après avoir consenti à l'assistance médicale à la procréation, ne reconnaît pas l'enfant qui en est issu engage sa responsabilité envers la mère et envers l'enfant. En outre, est judiciairement déclarée la paternité hors mariage de celui qui, après avoir consenti à l'assistance médicale à la procréation, ne reconnaît pas l'enfant qui en est issu. (…).»

[6] See law n. 40/2004 in *G.U.* n. 45 24 February 2004, art.4: «Accesso alle tecniche: (…) 3. È vietato il ricorso a tecniche di procreazione medicalmente assistita di tipo eterologo.»

[7] Art. 9: «Divieto del disconoscimento della paternità e dell'anonimato della madre: 1. Qualora si ricorra a tecniche di procreazione medicalmente assistita di tipo eterologo in violazione del divieto di cui all'articolo 4, comma 3, il coniuge o il convivente il cui consenso è ricavabile da atti concludenti non può esercitare l'azione di disconoscimento della paternità nei casi previsti dall'articolo 235, primo comma, numeri 1) e 2), del codice civile, né l'impugnazione di cui all'articolo 263 dello stesso codice. 2. La madre del nato a seguito dell'applicazione di tecniche di procreazione medicalmente assistita non può dichiarare la volontà di non essere nominata, ai sensi dell'articolo 30, comma 1, del regolamento di cui al decreto del Presidente della Repubblica 3 novembre 2000, n. 396. 3. In caso di applicazione di tecniche di tipo eterologo in violazione del divieto di cui all'articolo 4, comma 3, il donatore di gameti non acquisisce alcuna relazione giuridica parentale con il nato e non può far valere nei suoi confronti alcun diritto né essere titolare di obblighi.»

[8] See decision n. 347/1998 of the Italian Constitutional Court.

reproduction: the will of parents. In other words, the court is aware of the importance of the choice of parents (in this case the choice to conceive a child with the intervention of a third donor) and gives it legal relevance.[9]

Similar problems will come out in the future, as the other elements of the "biological paradigm" are fading away as well. For example, the recent development of the cloning techniques allows reproduction without fertilisation: even the participation of a man and of a woman is virtually no more necessary. By now, all these possibilities are hypothetical, since it seems that no one of these techniques has been applied to human beings.[10]

Nevertheless, some recent British cases showed the weakness of the legal rules, which are still based on the idea that fertilisation cannot be disregarded in the legal definition of the beginning of life. For example, the 1990 *Human Fertilisation and Embryology Act* (regulating assisted reproduction in Great Britain) was based on the assumption that human beings originate from a process of fertilization. In 2001 this *Act* was modified, in order to allow the so-called therapeutic cloning, i.e. the cloning of human embryos only for therapeutic purposes. The lawsuit of a prolife alliance drew the attention to the fact that, being such the law, the British legal system virtually allowed also the so-called reproductive cloning of human beings. The Courts had to claim an extensive interpretation of the *Human Fertilisation and Embryology Act* in order to affirm the prohibition of this technique[11] and a law rapidly followed, explicitly banning reproductive cloning.[12] Like in the French and Italian case, the courts and the law directed their efforts towards the same objective: to fill in the legal gaps in front of scientific progress.

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[9] *Tribunal de Grande Instance* Bobigny, 18 janv. 1990, in *D.* 1990, (*note* C. SAUJOT), p. 333: «La recherche de la vérité biologique dans un tel cas conduit à une impasse et à une solution contraire à l'intérêt de l'enfant, et ce dans la mesure où la volonté des parents s'est superposée sciemment, et grâce aux techniques scientifiques, au jeu de la filiation légitime tel qu'envisagé par le système légal. Il faut admettre, sdans ces conditions, que, dans le droti actuel, la volonté des parents piusse jouer un role positif à coté de l'effet de la loi, et en tirer des conséquences.». See also *Trib. Grande inst.* Paris, 19 *févr.* 1985, in *D.* 1986, 223 (*note* E. PAILLET) and *D.* 1986., IR, 59 (*obs.* D. HUET-WEILLER), p. 334.

[10] Scientists are rather sceptical with regard to *Raelians'* announce about the birth of a cloned child, see for example *Annuncio-choc dagli Usa "Nata Eva, prima bimba clonata"*, in *La Repubblica*, 27 December 2002.

[11] A. PLOMER, *Beyond the HFE Act 1990: The Regulation of Stem Cell Research in the UK*, in *Medical Law Review*, 2002, p. 135. *R. (on the application of "Quintavalle") v. Secretary of State for Health* [2001] 4 All E.R. 1013; K. LIDDEL, *Purposive interpretation and the march of genetic technology*, in *The Cambridge Law Journal* , 2003, 62, 3, p. 563. *R. (on the application of "Quintavalle") v. Secretary of State for Health* [2002] 2 All E.R. 625 and in *Medical Law Review*, 2003, p. 209 ss.

[11] Cfr. *R. (on the application of Quintavalle) v. Secretary of State for Health* [2003], *UKHL* 13: «While it is impermissible to ask what Parliament would have done if the facts had been before it, there is one important question which may permissibly be asked: it is whether Parliament, faced with the taxing task of enacting a legislative solution to the difficult religious, moral and scientific issues mentioned above, could rationally have intended to leave live human embryos created by CNR outside the scope of regulation had it known of them as a scientific possibility. There is only one possible answer to this question and it is negative.»; see also D. MORGAN, M. FORD, *Cell Phoney: Human Cloning After Quintavalle*, in http://jme.bmjjournals.com/cgi/data/28/1/DC1/32.

[12] *Human Reproductive Cloning Act* 2001 (c. 23): «(1) A person who place in a woman a human embryo which has been created otherwise than by fertilisation is guilty of an offence. (2) A person who is guilty of the offence is liable on conviction on indictment to imprisonment for a term not exceeding 10 years or a fine or both.»

It is clear that the first outcome of the fading away of the "biological paradigm" was the emerging of the basic role of the courts. All the three cases mentioned above prove this fact true: the Italian, French, and British judicial decisions anticipated some solutions, which were eventually granted by the law.[13]

The importance of the Courts comes out of common law as well as of civil law legal systems. However, this is still a kind of "emergency scenario", where the legal systems try to follow the scientific progress in an everlasting challenge the law seems to loose every time.

3. The need for rules. Law…and pluralism?

When the scientific progress became not only a hypothetical matter of discussion in the legal frameworks, emphasizing serious problems for lawyers, it became a topic of a wide debate. It was clear that it was not possible to leave a deep reflection on ethics, law and science aside: interdisciplinarity was necessary.

The main outcome of this was the beginning of a new branch of law: biolaw (a neologism, which appeared also in other languages).[14] It originated also from a deep consideration of the relation between law and bioethics, which for some aspects is an example of the role of the law by itself.

Many different models are proposed but they have some common grounds, so that three groups may be singled out.

The first group includes models that are differently named as, for example, the private approach[15], the use of social non-regulatory tools[16] or the factual-sociological model[17]. These definitions describe a certain attitude of law towards bioethics and they share at least two main features. On the one hand, they all describe the role of law as being minor: it only records social behaviours, without imposing any rule. In other words, law corresponds with what happens: social action. On the other hand, and as a consequence, the private-individual sphere plays a fundamental role in the regulation of these topics: individual conscience and self-regulation standards (e.g. standards of the medical profession) are the main sources of rules.

Going to the "extremes", the attitude of law in this category may be described as Hil («Highly Inappropriate Legislation»), which means that law is not the suitable mean to regulate (and solve) ethical dilemmas.[18]

Going from end to end, there is a second group, which includes different approaches as well: the formalistic model[19], the legal regulation model[20] and also the prohibition

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[13] See also M. BOLADERAS, *The Interaction Between Law, Science and Society*, in A. SANTOSUOSSO, G. GENNARI. S. GARAGNA, M. ZUCCOTTI, C.A. REDI (eds.), *Science, Law, and the Courts in Europe*, Pavia, 2004, p. 95 ff.

[14] See *supra* note 1 and also A. BOMPIANI, A. LORETI BEGHÈ, L. MARINI, *Bioetica e diritti dell'uomo nella prospettiva del diritti internazionale comunitario*, Torino, 2001, p. 20.

[15] See L. NIELSEN, *Dalla bioetica alla biolegislazione*, in C.M. MAZZONI, *Una norma giuridica per la bioetica*, Bologna, 1998,

[16] See M. GARRISON, C.E. SCHNEIDER, *The Law of Bioethics: Individual Autonomy and Social Regulation*, New York, 2002.

[17] See G.BRAIBANT, *Diritto e bioetica*, in S. RODOTÀ, *Questioni di bioetica*, 1993, Bari.

[18] See L. NIELSEN, *cit.* note 15, p. 50.

model[21]. According to these models the law plays a fundamental role, as it must regulate every single aspect of bioethical matters. Nevertheless, the law is not important for what concerns the choice of the ethical and cultural grounds of the legal rules, as it just takes note of the political decisions.

Anyway, the mention of prohibition (in the "prohibition model") gets the idea of the main purpose of law according to these approaches: it must impose "the" (right) ethical solution, complying with a sole ethical approach and sanctioning every departure from it.

In between these two groups, there are some intermediate models, differently named (as, for example, the liberal model), but they all share the idea o a "weak law". A "weak law" protects (and impose the protection of) some very basic rights; otherwise it provides the procedures to be followed by individuals when they make their choices without imposing an ethical content, which is determined by individuals themselves. The law does not adhere to "the" ethical choice, but it is consistent with different attitudes.

Every one of these models lays itself open to criticism.

According to the first group, the rules come out of a private-individual sphere; therefore an "ethical anarchy" might be the consequence of this model. The second group faces (and solves) both these features, as the role of law cannot be disregarded at all: the democratic and representative debate would bring rules back to democracy. Yet, it may be said that it would solve the democratic deficit, producing a pluralistic deficit at the same time. Singling out "the" ethical rules, the legal systems leave out every possibility of dialogue with "ethical diversity".

On the contrary, pluralism would be guaranteed by the liberal models of the third group, which describe law as a «public boundary among different private ethics».[22]

Even this model has laid itself open to criticism, as it may be said that the legal systems can not let existential choices up to individuals and that the law should clearly point out which choices are "ethically right". Otherwise, many Countries have passed from a legal *vacuum*, to the prohibition model. For example, this will be the case of the United States' legal system, with regard to the regulation of human cloning. If the *Human Cloning Prohibition Act* will be approved, it will ban every scientific application of this technique, even with regard to its possible therapeutic applications (the "therapeutic cloning").[23] This means that even patients who would find ethically acceptable to be cured with therapies involving the cloning of human embryos (basically with regard to stem cells) will have to renounce to what is sometimes their only "therapeutic hope".

If the law imposes a sole ethical vision, it might not reflect social changes. The legal regulation euthanasia, which is considered as a crime by the majority of legal systems, is a clear example. The sanctity of life is the value protected by the laws sanctioning euthanasia as a crime (generally considered as murder). Nevertheless, there has been a kind of reaction by the courts, which voiced the ethical positions not represented by the

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[19] See G.BRAIBANT, *cit.* note 17 and L. PALAZZANI, *cit.* note 1, p. 64.
[20] See M. GARRISON, C.E. SCHNEIDER, *cit.* note 16, p. 23.
[21] See L. NIELSEN, *op. cit.* note 15, p. 57.
[22] L. PALAZZANI, *op. cit.* note 1, p. 61.
[23] *Human Cloning Prohibition Act*, 2001, H.R. 2505, 107th Congr. 1sr sess. (2001).

law. In Canada, for example, many doctors who have assisted their terminally ill patients in committing suicide have not been charged with murder (as provided by the law). Many of them were condemned for "administering a noxious substance" and «probation rather than jail sentences have been the norm».[24]

The most astonishing case came out of the Italian legal system in 2002, when a court acquitted a man who had practised euthanasia on his dying wife. The decision was based on the claimed lack of evidence that the woman was still alive, although she was surely alive an hour before. This was a clear an *escamotage* to strengthen the idea that the behaviour of this man was something different from a homicide.[25]

Somehow, the Canadian and Italian courts voiced a different ethical position, not considered by the law.

There is another possible risk of the prohibition model: the distance between the principles it tries to impose and a different social perception turns into a distance between rules and facts. For example, a recent Italian survey among doctors resuscitator revealed that 4% of them had practiced active euthanasia with their patients. No one of them spoke with the relatives of the person involved nor did they ask for the advice of their colleagues being, as they were, aware that they were committing a crime.[26]

If the purpose of the law is the protection of the sanctity of human life, sometimes the prohibition model seems to reach a different outcome.

It may be objected that "the" ethical choice is unavoidable, since the law needs a(n even minimum) level of consensus.

In some fields it seems possible to reach a point of contact: as seen above, the refusal of cloning as a mean of reproducing human beings is an example. Otherwise, in some other fields the consensus simply does not exist and the consequence may be a legal *vacuum*. For example, the Italian legal system was not able to provide a regulation of assisted reproduction, till 2004 when a law was adopted. The impossibility of reaching a point of contact had a paradoxical outcome: no rules, an absolute freedom and an "*in vitro* tourism" which attracted in Italy many couples desiring to conceive a child from all over Europe.[27]

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[24] See «*Compassionate Homicide' Threatens Vulnerable»,* in http: // www.redemptorists.com / ethics / articles.htm: «However, in most of those cases conviction has been handed down not on the basis of killing another human being, but as assisting a desired suicide or in response to a reduced charge of administering a noxious substance (e.g., potassium chloride which, at least in one case of a person very close to death, could not be proven to have killed the patient despite the fact that PCl would be given for no other reason). Probation rather than jail sentences have been the norm.»

[25] See *Corte di assise d'appello* Milano, *sent.* 24 *aprile-aprile* 21 giugno 2002 n. 23/02, in *Guida al diritto* (Il Sole 24 Ore) 19 October 2002, n. 40, p. 47 ss.

[26] Cfr. M. DE BAC, *Il 4% dei rianimatori pratica l'iniezione letale*, in *Il Corriere della Sera,* 12 November 2002 and also A. FREGONARA in *La Stampa*, 15 November 2002.

[27] See R. WATSON, *Focus: Brussels Which "Europe" should deal with ethical issues?*, in *British Medical Journal*, 5 February 1994, 308:362.

4. «Moral strangers»[28] and cultural communities are searching for a common rule.

The need for a dialogue among different cultures is not a demand coming out only of the relation between law and bioethics. It is a wider problem which regards the role of law by itself, dealing on the one hand with democracy and, on the other hand, with the role of pluralism.

In the first paragraph, we have underlined a first phase of the relation between law and bioethics, the "*legal vacuum*" which generated the need for rules. Going back to the law, many legal systems opted for the prohibition model, facing the new biological basis of a different scientific reality but strengthening a sole ethical vision: "the" State ethical choice all the citizens had to adhere to.

The recent Italian law on assisted reproduction gives a clear example. The Italian legal system has passed from a *laissez-faire* framework[29] to a prohibitive model of law.

The law adheres to a sole ethical choice, which is clearly aimed at affirming the idea that assisted reproduction must be considered as a last chance, something not desirable. For example, it is possible to ask for assisted reproduction techniques only in case of infertility but not to select embryos in order avoid the transmission of genetic diseases. Moreover, doctors must propose adoption as a possible alternative.

We still do not know how this law will be possibly interpreted; yet there has been only one judicial decision which has been widely criticized.[30] Anyway, we don't have to wait for judicial interpretation of this law to foresee some possible outcomes. For example, some rules will simply not be enforced, as their symbolic value has been privileged in spite of their effectiveness. This will be the case of the rule providing that the consent of parents in the assisted reproduction techniques can be repealed only until fertilisation process begins. As (luckily) the constitutional Italian legal system does not provide that an embryo may be placed in a woman without her consent, this rule will not be effective. The distance between legal rules and "legal facts" emerged also in other prohibition models like, for example, in the field of euthanasia, where the importance of the courts emerged sometimes to detriment of the certainty of law. The role of the courts, if considered in the more general framework, is not a solution, it is a sign of something that simply is going wrong.[31] The Courts acknowledge an idea of «substantive justice»[32] but it must be reminded that legal scholars have widely speculated about an important feature of law in these fields: law must be possible to adhere to and this is not likely to happen if its symbolic value prevails on its applicability.[33]

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[28] See H.T. ENGELHARDT, *The Foundation of Bioethics*, Oxford, 1986 and the Italian translation H.T. ENGELHARDT, *Manuale di bioetica*, Milano, 1999.

[29] See S. GOLDBECK-WOOD, *Europe is divided on embryo regulations*, in *British Medical Journal*, 31 August 1996, 313:512.

[30] See Tribunale Catania, sez. prima Civile, Ord. 3 maggio 2004, in http: // www.filodiritto.com / notizieaggiornamenti / 10maggio2004 /.

[31] See S. RODOTÀ, *Modelli culturali e orizzonti della bioetica*, in S. RODOTÀ, *Questioni di bioetica*, 1993, Bari, p. 430.

[32] About the idea of «substantive justice» and the rule of law, see V. JACKSON, M. TUSHNET, *Comparative Constitutional Law*, New York, 1999, p.337.

[33] See P. ZATTI, *Verso un diritto per la bioetica*, in C.M. MAZZONI, *Una norma giuridica per la bioetica*, Bologna, 1998, p. 72: «Il diritto necessario dev'essere anche diritto utile (vale a dire efficace e non controproducente) e in questo senso diritto possibile: un diritto cioè che supera una valutazione di

In the prohibition model the law strengthens (than imposes) a sole ethical position, while other moral communities will perceive rules as an impositions, as they will not have the possibility to understand (even not to share) the ethical resons that stay behind those rules. Also health care professional might share this sense of exclusion. For example, the choices of doctors according to "science and conscience" is not valued in the Italian law on assisted reproduction, and in some cases it will be difficult for them even to understand what the law requires them to do. Again: if the law provides that parents can revoke their consent only until fertilization occurred, what happens if a mother changes her mind before implantation but after fertilization? On the one hand the doctor cannot force a woman to do something she does consent to but, on the other hand, he cannot freeze nor destroy human embryos.[34]

The HIL approach would solve this last problem, as there is much scope for self-regulating standards, but it renounces to every idea of common ethical grounds and everyone is free to build its own private personal ethic.

Besides, there is another important aspect to be considered: this model does not protect third parties, like children in the case of assisted reproduction.

In the field of biolaw, the idea of a "weak law" seems to be the best way to go through this impasse. The critics to this "intermediate" model are based on the idea that if the law just establishes the boundaries among different private ethics, it would renounce to a minimum ethical standard *tout court*. Nevertheless, the dialogue among different ethical conception does not mean that ethics is not considered at all, as there may be a minimum level beyond which individuals share only the freedom of their choice.

The search for common rules for different communities in the field of biolaw is peculiar, as existential choices are at stake. It may nevertheless be interesting to notice how similar problems come out of the debate about the coexistence of different cultural communities. Heterogeneity is an undeniable fact in contemporary social contexts and in this changing scenario, many legal scholars look at the concept of a "personal federalism", which goes back to the 19th century, being based on the idea that territorial communities share a common legal ground, while in some fields they are regulated by the cultural rules of their group. Personal criteria preside over the participation to these second kinds of communities and a certain culture is the distinguishing mark of every group.[35]

Modern revisions of these theories focus on the concept of citizenship, particularly referring to "multicultural citizenship"[36] and it is extremely interesting to see how similar concepts emerge in the field of biolaw. Some scholars speak in fact in terms of "bioethic citizenship" as a common link among different moral communities, which share some basic values being free to choose among different moral opportunities the

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fattibilità sotto il punto di vista dell'efficacia pratica della norma e del suo *enforcement*. Una norma giuridica possibile è quella che ha elevate *chances* di obbedienza spontanea e che può esser applicata coattivamente ai casi di obbedienza.».

[34] See art. 14: «Limiti all'applicazione delle tecniche sugli embrioni: 1. È vietata la crioconservazione e la soppressione di embrioni, fermo restando quanto previsto dalla legge 22 maggio 1978, n. 194. (…).»

[35] See K. RENNER, *Das Selbstbestimmungsrecht der Nationen in besonderer Anwendung auf Österreich*, Leipzig-Wien 1918 and S. PIERRÉ-CAPS, *La Multination*, Paris, 1995, Y. PLASSERAUD, *L'identité*, Paris, 2000.

[36] See for example KYMLICKA, *Multicultural citizenship*, Oxford, 1995.

biomedical progress offers to citizens.[37] Moreover, like personal federalism is the best instrument for different cultures to coexist, the idea of «functional biomedical federalism» comes out as well.[38] Both concepts are intended to give a suitable ideal place for pluralism in the field of different communities' own cultures (cultural communities) or in the field of their ethical choices (moral communities) as well. An ideal place where the protection of some basic rights easily combines with the freedom of choice and «moral strangers» can hold a dialogue.

These ideas try to reconcile moral pluralism and the protection of some inviolable rights in an unceasing search for common grounds.

Different moral communities may reach a minimum level of consensus about what must be considered unethical. Beyond that minimum level, every "group" may have different opinion about what is or not an ethical choice. In this scenario, the role of the law would be "weak", as it would provide the procedure to be followed in order to make choices. The law would only focus on the criteria to be used in order to evaluate if a choice has been autonomous, or without coercion, etc.

This would avoid the sense of exclusion of some moral communities reinforcing, on the contrary, a sense of common identity. Most of all, the idea of personal federalism, as applied in the field of bioethics, would be a turning point for some legal system as the Italian one, as it would require a "cultural revolution", in order to make the "prevailing culture" understanding that times are changed.

[37] See P. MARTELLI, *Bioetica, pluralismo morale e futuro della cittadinanza*, in S. RODOTÀ, *Questioni di bioetica*, 1993, Bari, p. 5.
[38] See P. MARTELLI, *ibidem*, p. 15.