Chapter 5

THE PROBLEM OF LIMITS OF LAW IN BIOETHICAL ISSUES

SILVANA CASTIGNONE
Genoa, Italy

1. INTRODUCTION

Scientific and technical progress has led to changes, unimaginable up to a few years ago, in our way of being and in our confrontation with reality, including that of our own body; (changes which, perhaps, we still have difficulty in understanding completely). Genetic manipulation has permitted us to modify the human biological structure and, in part, psychological structure too. The sexual frontiers are becoming less defined; the phenomenon of trans-sexuality is just one example. Assisted reproduction has multiplied the parental figure and if, at one time, the Latin maxim “mater semper certa, pater incertus” had significance, paradoxically the opposite is now almost becoming true, with the donation of the oocyte and use of surrogate mothers.

The frontiers between life and death, too, have become more uncertain and confused, and definitions of “death” have multiplied. These and other situations are causing a crisis not only in traditional morality but also in the legal field where there is increasing difficulty in finding concepts and legal categories to apply to the constantly expanding new realities.

The problem of legal limits in biomedicine and biotechnology can be viewed from at least two angles. The first one involves asking ourselves if these activities can be disciplined by law, and what limits can be imposed. The second questions the internal limits of the legal system, the inadequacy of its categories and its concepts, and the necessity of formulating new ones.
2. MORAL AND LEGAL ATTITUDES IN BIOETHICS

On examining the first question, we can see immediately that the relationship between the law on the one hand and biomedicine and biotechnology on the other feels the full effect of the different attitudes and moral principles that all these new scientific discoveries and activities provoke. Generally speaking we can distinguish two main attitudes: refusal and acceptance. Both attitudes include and produce convictions and precepts that are moral and subsequently also juridical, and that vary to a great extent from each other.

2.1 Attitudes of refusal

Total or partial refusal offers at least two different positions as motives. On one side, there is refusal due to fear of the transformation in progress and of the possible consequences.

We could call this a consequentialist form of refusal: transgenic products are a danger to health, genetic manipulation will lead to an Orwellian society, the destruction of nature is inevitable, and so on. In other words, there is a predominant fear of what the modifications introduced by science might lead to.

Then there is the second type of refusal, and I would say that it is the form with a major influence not only on public opinion but also on the cultural and philosophical world. This form justifies its opposition to much biotechnology by considerations of the ontological nature of humankind. We could call this a deontological attitude of refusal. Human activities are not carried out in an ontological void: valid ethical standards that derive from the natural order exist and are easily recognisable, and these standards must be respected. This position is tied, more or less directly, to options of a metaphysical and religious type, within a ‘jusnaturalistic’ horizon and