Reasonableness in Biolaw: The Criminal Law Perspective

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1 Reasonableness and Legislative Discretion in Framing Criminal Law in Matters of Bioethics: Limits and Peculiarities

There is an extra layer of justification to deal with in continental criminal law when choosing the principle of reasonableness as a guide by which to explore biolaw. Indeed, as concerns Italy in particular, the tradition is for the Constitutional Court to exercise much self-restraint in its use of the test of reasonableness in matters of criminal law, enveloping this test in a cascade of accompanying cautions and caveats. Such caution is owed to the constitutional principle expressed in the formula _nullum crimen sine lege_ (Article 25, second paragraph, of the Italian Constitution), whereby the power to establish criminal penalties vests exclusively in Parliament. According to this principle, criminal offences can be defined and regulated only by statutory laws created by Parliament. The constitutional foundation of Parliament’s monopoly on criminal law makes it all the more peremptory for the Constitutional Court not to challenge in any way the discretionary evaluations carried out by Parliament when criminal laws are in question (Insolera 2006, 326ff.; Manes 2005, 218ff.; Palazzo 1998, 371ff.). However, the trend in the Constitutional Court’s case law is showing a growing use of reasonableness in testing the legitimacy of criminal laws: the evolution of reasonableness as way by which to counterbalance the discretionary power of Parliament has contributed to widening the margins within which the Constitutional Court can review legislature’s choices in the area of criminal law.¹

In this context, bioethics offers an interesting perspective precisely on account of the wide discretion available to lawmaker in framing criminal statutory provisions on bioethics: the large role that value judgments play in biolaw offers a vantage point from which to observe both the limits and the potential of the reasonableness test in constitutional adjudication.

Then, too, it is worth underscoring the significance of discussing reasonableness in relation to biolaw—especially in relation to the _criminal_ regulation of

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1 Italian Constitutional Court, decision 409/1989.
bioethical subject matter—in that reasonableness is a “context-sensitive” notion (MacCormick 2003, 529), or a “notion à contenu variable” (Perelman and Vender Elst 1984), for it gets specified in different ways depending on context. As far as criminal subject matter is concerned, reasonableness inclines to combine with the different constitutional principles that underpin criminal law. This can be considered the distinguishing feature of the idea of reasonableness in criminal law: on the model of reasonableness used in criminal law, reasonableness gets shaped in different ways depending on the constitutional principles of criminal law it combines with, and which in turn help to shape the dialectic between criminal law and the Constitution (Manes 2007, 751). In what follows, we will illustrate the different manifestations of criminal reasonableness by drawing on what is already a rich store of statutory and case law on bioethics. Our particular focus will be on the biolegal issues involving the beginning and end of human life.

2 Different Criteria on Which Reasonableness in Criminal Law Is Based When Regulating Bioethical Subject Matter

Reasonableness comes to bear on different questions in criminal law. For example: What guidelines should the lawmaker use in framing criminal laws? Which limits does the Constitutional Court have in evaluating the reasonableness of criminal provisions? How to weigh the good or interest being protected by criminal law? Is the punishment established by statutes commensurate with such an interest? And how to go about setting out the kinds of behaviour that count as crimes? In each of these areas there is need to work out standards or criteria to which to anchor the judgment of reasonableness. Three such standards are worth mentioning in this regard. First, the reasonable-person standard, used sometimes with respect to the physician (“professional standard”) and sometimes with respect to the patient (in which case we have the “reasonable-patient standard,” or verständiger Patient, in German) (Dolgin and Shepher 2005, 59). In the second place, the empirical-statistical criterion traceable to the rule of id quod plerumque accidit (“that which generally happens”).2 Finally, the best-practice standards established by the leges artis specific to a trade or profession depending on the case at hand.

The first of these criteria is mainly used in English-speaking areas in rendering judgments in civil malpractice or medical liability cases, but it may also be applied in criminal law as a basis on which to assess what would count as a “reasonable member of the medical profession,” in which use the standard can contribute to blocking out the idea of a model professional, here a physician having the best skills and knowledge available to date. It can be observed, with regard to the two other criteria just mentioned, that they are subject to an inescapable margin of uncertainty

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