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GENERAL ASPECTS ON BIOETHICS AND ITS RELATIONSHIP WITH THE LAW

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We have come to an historic moment, in which the topic of bioethics acquires relevance, but cannot be analyzed without a study at depth of the legal aspects related to this subject.

The word bioethics is translated literally as ethics of life. Ethics has to do with the behavior of the human being who is assumed as free and responsible for its destiny.

Bioethics is the part of ethics that studies the correctness or incorrectness of the actions performed in the field of biomedicine. Its principal area of study is medical ethics, because medicine normally implies a technical intervention in the human body, and all intervention with respect to man is marked by its maximum

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value; this maximum value determines the ends and the actions that must be pursued and fulfilled when acting on man.

This word is used, however, more specifically in relation to what it has to do with the technological advancements in the field of biology and medicine, advancements that provoke new questionings in the field of ethics. When man has in his hands the power to change the living beings and manipulate them genetically, he should ask himself which are the limits of his actions, what is good or bad, human or inhuman.

In the latter years, due to the ecological disasters provoked by human activity, the human being has discovered that it has a responsibility to the world and to the living beings that inhabit the earth, because he is the only being with the capacity not only to influence the environment but also to transform it radically.

Society is more and more conscious of the importance of the bioethics problems, which bring about an intrinsic complexity of topics, such as genetic manipulation, euthanasia, artificial reproduction, cloning and others. The action of certain scientific instances that, despising the transcendence of the human being, work outside any ethic consideration, has contributed to create social alarm, because it leads to a totally dehumanized world. This is why it becomes every day more and more necessary to apply a correct approach to the questions of bioethics as a firm basis to establish a fair and peaceful cohabitation in our society.

On the other hand, the moral challenges posed by scientific discoveries urgently demand the rigorous development of bioethics founded solidly on human dignity. This dignity is now under the attack of the diffusion of utilitarian criteria whose tragic consequence is the manipulation and instrumentalization of persons, placed at the service of a supposed scientific

advancement that is located above the ethical norms and that despises the treasure of the human life, which is always in itself inviolable, no matter which are the physical, social, cultural or economic conditions of the individual. This right is recognized legally in our Constitution of the Republic.

When we read the contemporary documents of medical ethics, we promptly discover that in the codes and declarations, respect is considered as one of the fundamental obligations of the doctor. It is in the Declaration of Geneva of 1948 where respect as a fundamental ethical attitude in medicine is mentioned for the first time. A more solemn presentation in society of respect could not have been chosen. The Declaration of Geneva is the cradle of the medical ethics of our days, it contains nine promises that translate to a modern language the clauses of the Hippocratic oath. Three of these new promises speak about respect and say:

"I will offer to my teachers the respect and the gratitude I owe them", "I will respect the secrets entrusted to me" and "I will maintain maximum respect to human life from the moment of its conception". As from its promulgation, the Declaration of Geneva, and with it the ethical meaning of respect, reached an acceptance of universal dimensions, that has been introduced in national codes of medical deontology and in the ethical directives issued by supranational organizations.

Reference to respect is not used in the sense of educated correctness, of maintaining the correctness dictated by urbanity; respect is something like the nervous system of the ethic organism. Moral life depends, in its abundance and in its quality, on the capacity to capture moral values. And this is only attained when our ethical sensibility is refined by respect. Respect appreciates the objective

values. Respect makes possible that the response to the ethical values can adopt the form of an intelligent subordination, not servile, but reasonable.

The Hippocratic doctor has the obligation to be an expert in perceiving human life, must also have in his spirit a visual acuteness that will permit him to discover human life under all its appearances, to perceive it both in the healthy as in the ailing person, in the aged as well as in the child, in the embryo less than in the adult in the summit of his plenitude. All of them are human lives, enjoyed by human beings, supremely and equally valuable. Whatever these human beings might lack in size, in intellectual richness, in beauty, in physical vigor, everything that they may lack, is substituted by the doctor with his knowledge and his art. Because, like Hippocrates said: "where there is love to art, there is love to man".

Respect enables to respond to the maximum value of each human life. The Hippocratic doctor devotes himself to the healing, preservation and rehabilitation of his patients, and when he can cure, to surgery, extremely important and demanding of a high professional level, for a palliative relief and consolation. It is also his duty to protect the personal values of the man weakened or disabled by illness. It is here where the function of substitution acquires its highest relieve. The weakest or the more defenseless the patient, the more punctual attention must be provided and the more competent and scientific must be the intervention of the doctor. In conclusion, the oath imprints firmly on the doctor the notion of inviolability of all human life.

The purpose of the present bioethics is not limited to the dialogical relationship doctor-patient, and comprises public health and social questions linked to bioethics, as well as the ethic-legal conflicts arising from

biogenetic research, in particular those developed as from the Human Genome Project, trying to put a limit to the ambiguities of techno-scientific progress with the finality of preserving the respect to life and to the dignity of the person.

As Roberto Adorno has clearly stated, "being a person" is the equivalent of "being dignified"; ontological dignity—which refers to its being—and ethical dignity—which concerns its actions—. And biotechnologies must not pierce such postulates, based on the value that must be recognized to man for the mere fact of his being a man.

The importance of human dignity is decisive for law and in more than one of its branches we find partial reasons that justify that importance. We find it in many international instruments, beginning with the 1948 Universal Declaration, which includes it in its preamble. Likewise, the preamble of the Civil and Political Rights Pact of December 15 1966, states that rights derive from the dignity inherent to the human person. Also, a reference appears in the preamble of the Economic, Social and Cultural Rights Pact of the same date. We also find a reference, among others, in the Declaration and Program of Action of Vienna, approved by the World Conference of Human Rights on June 25 1993 that categorically asserts that "all human rights have their origin in the dignity and the value of the human person".

In this context, the contribution of the philosophy of the right to debate acquires a special relevance because it is placed in the root of the problem that considers the human dignity as a fundamental of the public ethics of modernity, as a priority of the political and legal values and of the principles and of the rights deriving from these values. Modernity presents, from the idea of humanism, that is, from an idea of man as the center of the world and that is

distinguished from animals, traits that assume the mark of his dignity. And this man that is the center of the world, appears also as centered in the world, that is, he is a secularized, independent man, who decides for himself, who thinks and creates by himself, who communicates and converses with other men and who decides freely on his private morality.

Human dignity in modern times and also in this XXI century, appears with an intellectual context that starts from the transit to modernity, that has overcome historic vicissitudes and intellectual confrontations and that is located in what is called the process of humanization and of rationalization, that accompanies the person and society in the diverse processes of liberation that lead the former to legal age and the latter to an orderly organization that will contribute to the development of the dimensions of that dignity. The dignity of the individual and the dignity of humanity are two aspects of the same mentality, that of anthropocentrism and of laicism, two coordinates that frame the entire process. In such manner that moral autonomy and its kind, human dignity, are the basic duty of being from which the values and the rights that sustain democracy, that is, the political autonomy, emanate. Human dignity has a relevant, although pre-political and pre-legal position.

The jurist has a great responsibility in this matters because it is he who is mostly interpellated by the new dilemmas of bioethics, it is he who has the task to prepare norms that will permit regulating the new conflicts and, once these have been set forth, the task of giving them a correct and opportune solution.

Therefore, law has a fundamental role in bioethics. Ethics by itself is not sufficient to ensure respect to the person and the existence of human rights. But it should

be pointed out that not even the law has sufficient force if —as from the law— the necessary political power is not exerted in order to combat the threats represented by the new interests created.

Therefore, a more active role of law is essential, not to detain the development of the new biomedical technologies, but to orient, regulate and control it and, as the case may be, to prohibit certain practices that are contrary to the human dignity, to the fundamental liberties and to human rights.

From this viewpoint, Eduardo Luis Tinant sustains, it would be possible to determine the legal regulation of the bioethical problematic and the bioethical jurisprudence constituted by the complex of legal resolutions on bioethical conflicts.

In any event, it would be possible to consider the aspects related to the legal projections and applications of: normative or legal bioethics, legal or jurisprudential bioethics, doctrinal bioethics (legal bioethics). And in like manner, the aspects relative to public health and sanitary attention policies, as well as the governmental activity and the political-institutional organization, including hospital ethics committees: political and institutional bioethics (political bioethics).

Bioethics, as a compilation of knowledge and inter-disciplinary action, tries nowadays to respond to the diverse ethic dilemmas posed by the use of modern biomedical technologies in the ample spectrum of dignity and quality of life, physical, psychical and spiritual integrity of the individual, and the care and attention to his health. Values and rights undoubtedly constitutionally and bioethically deeprooted.

In this manner, the consideration of the bioethical problematic from the viewpoint

of law, has lead jurists not only to grant right of citizenship to "bio-laws" or "bio-juridical", but also to show concern because a marked juridicalization of bioethics could lead to the reduction to legal forms of essentially interdisciplinary phenomena, added to another reductionism in vogue: the medicalization of life, that is, the exaggerated participation of the doctor in the daily life of individuals.

We could say the same of the legal projections and applications of bioethics, as legal bioethics and judicial bioethics, vis-à-vis the growing intervention of the legislative and judicial organs in the prevention and resolution of bioethical-juridical problems. Legal and jurisprudential reception that can be observed particularly with respect to the informed consent of the patient and his opposition to a medical praxis within the frame of his rights in his relationship with the professional. This is because, as said before, the right to life and its corollary, the right to health, are at stake, but also other very personal rights that conform the freedom and the dignity of individuals.

This scenery is irradiated with the light of the bioethical principles of no maleficence or beneficence (basic and primary *opus* of the medical activity, such as not to damage the patient, and that precedes the obligation to promote his well being), autonomy (respect to self-determination — rational and free— of the individual) and justice (distributive justice, what the social body owes to its members, specifically in the assignment of resources for medical care — pharmacology).

The disputes derived from the doctor-patient relationship are of a prioritarily contractual nature if the sanitary center is private and fall within the orbit of commutative justice (what individuals owe each other) and, otherwise, of an extra-contractual nature when the hospital is public.

As Mainetti asserts, the double moral agenda of the doctor between the interests of the patient and the social interests, poses a conflict of professional obligations that places the theory of justice in the essence of bioethics vis-à-vis the present planetary political challenge of health systems.

Likewise, we must point out the three bioethical rules, inherent to the therapeutic relationship and to the clinic and scientific research: a) confidentiality (medical secret); b) obligation of the professional to be veracious (that does not prevent considering it prudent in cases of seriously incurable sick patients, to let them know step by step the reality of their ailment) and, c) free and informed consent (according to two basic imperatives: duly inform and obtain the free acceptance of the patient).

The free and informed consent constitutes a conquest of contemporary bioethics. After overcoming the medical paternalism —that rests on the principle of beneficence— an autonomist model has dominated that points towards revaluing the role of the patient and of the subject of experimentation in that relationship.

In this manner, the great topics and problems of bioethics normally acquire juridical relevance. A brief review allows us to determine:

A) Ethics in the principle and in the transmission of life: predictive medicine, pre-birth diagnosis, procreating, reproductive technologies, neonatology, assisted human procreation, artificial fecundation in the maternal womb ("GIFT" method), artificial aid to the natural act ("TOT" method), extra-corporal artificial fecundation, test tube insemination (*in vitro*) and embryo implant ("FIVET" method; the first positive experience was obtained in England on July 29 1978,

the date on which Louise Brown was born), cryo-preservation and embryo banks, subrogated maternity (hiring of uterus), human genetics, genetic manipulation, genetic engineering (direct intervention in the genetic programming of an individual whether in the molecular, cellular, individual or population aspect), mapping and sequence of the human genome, diversity of the human genome, genomics, genomic code, genetic patenting (possibility of patenting the genetic product). And we can nowadays hear of a specific genetic right.

It is not hard to represent the delicate ethical-juridical questions posed by all these topics. Man has now the power to control the genetic heredity, and this progress of molecular biology, added to the advancements of alternative biotechnology, cannot surpass the limits imposed by the human nature and its own dignity, and genetic engineering can be accepted exclusively with therapeutic purposes for the treatment of genetically transmitted illnesses.

Born at the end of the decade of the eighties, the Human Genome project has as an objective the description of a biologic book of the human being, that is, to constitute a genetic map of the human being. It is an attempt at a worldwide scale, to map and arrange in a sequence the complete human genome. The word "genome" implies the total of the sum of genes of an organism, that is, a structural, functional and evolutionary integrated system that obeys specific rules that constitute a genomic code.

The starting point of that route, the DNA (deoxyribonucleic acid) is the molecular base of the biological heredity of all living beings, basic genetic material (composed of chromosomes) found in the nucleus of all living cells of the human

being, except in red corpuscles. The sequence of DNA permits attacking human illnesses, fight against ecologic problems or study their evolution, while molecular biology tends to the knowledge of those genes that we all have in common, as well as those that are different in each person. After having discovered the re-combining DNA (confluence of three experimental systems of the new genetics) we catch a glimpse of the economic possibility of biotechnologies and the substantial modification of the laws on invention patents, propitiating the genetic patenting, to which effect it is adduced that the genes are chemical substances and hence susceptible of being patented, a procedure that, if extended to the entirety of the human being would deeply harm its dignity.

Precisely, the protection of the human genome has deserved the "Universal Declaration on the Human Genome and Human Rights", approved in the General Conference of the UNESCO in its 29th session of November 11 1997. The document discusses in 7 chapters, the human dignity, the right of the interested individuals, research works on the human genome, conditions in the exercise of the scientific activity, solidarity and international cooperation, or promotion of the principles of its declaration and explanation. Summing up, the Declaration of the UNESCO constitutes an important step towards orienting the behavior of the States and of the individuals in the defense of the human rights threatened by the new technologies of life.

- B) Psycho-behavioral or psycho-ethical medicine, originated in pharmacological therapies and psychotherapeutic drugs. Psycho-surgery and behavior control.

- C) Desiderative medicine (medicine of the desire or medical techno-science, traditionally restorative and more and more a re-builder of human nature). Perfecting medicine. Aesthetic surgery "Medicalization" of life.
- D) Change of sex or transsexualism, questions that pose delicate ethical-juridical problems, because in addition to the physical integrity, the moral and spiritual integrity of the individuals is at stake, that is, their strictly personal rights to honor, identity, intimacy and image.
- E) AIDS, acquired immunodeficiency syndrome. Fight against the AIDS. These initials, whose dimension, in addition to being biomedical (in their epidemiological, preventive and clinical-therapeutical aspects) is fundamentally human, legal and social, including the negative discrimination that the infection brings about and problems within the ambit of the right to a family, like adoption under such circumstances.
- F) Ethics at the end of life: prolongation of life and the rights of the so called terminal sick. The questions of assisted suicide and of euthanasia (direct action destined to provoke a merciful death) Intensive medicine, reanimation. Palliative medicine (medicine for comfort: when the sick cannot be cured, he must be taken care of). The conflict between "mistanasia" (abandonment of the moribund) *versus* "distanasia" (technological assault to agony). The right to die: "orthotanasia" (the right to die with dignity), to die humanly (the right to one's own agony). The right of the patient to live his illness. Rejection of a therapeutical bitter fight or a mutilating chirurgical intervention, such as the amputation of the limbs of the patient. The so called vegetative state (persistent or permanent) and the treatments for vital support. The
- problem of a peaceful death and the dignity of the moribund.
- G) Organs and tissue transplants (permutation medicine). Transplantology constitutes one of the bioethical topics with the greatest legal implications. After having legitimated the intrinsic morality of the super-contributive and altruistic act of the donation of organs and anatomic materials among individuals, both the procurement of organs and their ablation and implantation raises a series of aspects that the positive legislation and even the jurisprudential interpretation must attend to. That is: the determination of the moment of death and the consent of the donor and the selection of the receiver, among others, in the assumption of transplants of organs from cadavers; and the problem of the age of the donor, the kinship relation between the donor and the receiver and the need to have mental capacity, as well as the requisite of a legal authorization in the case of ablation and implantation of organs *in vivo*.
- In this point, the indissoluble tie between the principle of personal autonomy and human dignity, inherent to our constitutional philosophy, conjugates an analogous bioethical fundamental. Under these circumstances the judicial tutelage is necessary not only with respect to the right to life and its corollary the right to the preservation of health, but also to the domain over one's own body, also of a constitutional lineage. More so if, with his altruistic and solidary exercise, the donor of the organ satisfies the only possibility of survival of the receiver, making the most noble of human inclinations tangible: the donation through a personal sacrifice for the good of the fellow man.
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As Bidart Campos teaches, when values of a constitutional root are in question, the forms are serviceable for justice and must not act as obstacles. In fact, they are media that contain the legal norms for their achievement, according to the situational context in which the conflict was produced: we could say, they model normatively certain actual situations to satisfy social needs or urgencies or to solve human problems as they arise, in a given place and at a given time. Therefore, they are circumstantial. Although formulated in general terms — as Recasesn Siches says— the positive norms acquire sense only within the real situation in which they surged and to which they were destined.

H) Objection of conscience in the medical praxis. Alternative treatments. In particular, cases in which the patients belonging to the Jehovah's Witnesses refuse to receive an homologous blood transfusion on the basis of religious beliefs that reject it.

The different legislations must solve the new situations posed, leaving aside the fundamentalist and systematic discussion and the juridical abstractions. Rather, approaching each topic in the light of the definition of proposals for action that, in the first place, accept genetic engineering only with therapeutical ends and, second, do not impose duties of conscience to those who might reject the legal obligation according to their moral convictions.

To finalize, I would like to underline the following aspects that I consider important to mention:

We must be conscious of the fast progress of biology and medicine, of the imperious need to ensure respect to human rights and of the dangers that deviations from this progress might represent for the human

rights, asserting that it is the role of bioethics to clearly state the opinion on the consequences of all types of the scientific and technical advancements, to which effect we must take into consideration the following aspects:

1. Biosciences and their technologies must give service to the well being of humanity, to the sustainable development of all the countries, to world peace and to the protection and preservation of nature. This implies that developed countries must share the benefits of biosciences and of their technologies with the inhabitants of the less favored zones of the planet and to serve the well being of each human being.
2. An important task of bioethics, that constitutes a pluri-disciplinary activity, is to harmonize the use of biomedical sciences and their technologies with the human rights, with respect to the ethical values and principles proclaimed in the Human Rights Declarations of December 10 1948, the Universal Declaration of the UNESCO on the Human Genome and the Rights of Man of November 1997 and the Human Rights and Biomedicine Convention of Asturias of the European Council held on April 4 1997, as they constitute an important first step for the protection of the human being.
3. The teaching of bioethics must be incorporated in the educational system, having always as perspective the respect to life and to human rights.
4. All the members of society must receive general, adequate, clear and accessible information on the correct utilization of scientific advancements, biotechnologies and their products.
5. The specialized and public debate must be propitiated and encouraged in order

- to orient opinions, attitudes and proposals. The debate will imply in an interactive manner, the experts of the different disciplines and the citizens of different ambits, as well as the professionals of the communications media.
6. The inalterability of the right to life must be guaranteed and the justice and solidarity principles must be promoted. Likewise, the identity and specificity of the human being must be respected.
 7. Everyone has the right to the best possible medical assistance. The patient and his doctor must establish jointly the frame of the treatment. The patient must be adequately informed.
 8. The human genome is the patrimony of each individual and, hence, cannot be patented.
 9. The creation of human individuals genetically identical by cloning, must be prohibited. The utilization of trunk cells for therapeutical purposes must be permitted provided that obtaining these cells does not imply the destruction of embryos.
 10. Food products genetically transformed must evidence, according to the scientific knowledge of the moment, that they are not harmful for human health and for the nature, and will be prepared and offered in the market with the previous requisites of information, caution, safety and quality. Biotechnologies must be inspired in the principle of caution.
 11. The trade with human organs must be prohibited.
 12. In order to promote a universal language for bioethics, an effort must be made to harmonize and unify the concepts that at present have different terminologies. The agreement in this ambit is indispensable based on respect to socio-cultural identities.
- I conclude that bioethics must be at the service of man and not man at the service of bioethics, all of it focused at the right to life, health, physical integrity and respect to the dignity of the human being.

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