Religions, bioethics and biolaw

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Introduction

Considering the influence of Christianity in the European history of sciences, biology plays an important role because as life is God’s creation, biology is then the study of the work of God.

With the beginning of modern biology in the eighteenth century, scientists developed theories based on experimentation and progressively escaped from the control that the Church maintained on science to defend the biblical dogma about human creation. But it is only in the second part of the twentieth century that the Catholic Church developed the idea of complementarity between religion and science. In a 1948 conference the Jesuit Michel Riquet expressed this idea by stating that ‘as far as the life and dignity of the human person are not at stake, the Church leaves science free to use its own laws and methods’ (Riquet 1948). Today, the role of religions with regard to science and biology has changed, at least in Western countries. It is no more to impose dogmatic views on what is scientifically demonstrated. It is to believe that the knowledge deriving from modern biology raise new ethical issues to which morals and religions, not science, may reply.

But when the Church says that ‘scientific research should be in harmony with imprescriptible human values’ (Pontificia Academia Pro Vita 1997), this approach implies that religious dogmas have been transposed into the concept of imprescriptible human values which refers in Western societies to human rights.

We are then moving to the societal sphere with the following questioning: if it is necessary to keep this activity in harmony with ‘imprescriptible human values’, how can we proceed to normalise in this way the scientific work? And prior to that, what do religions share in common with the bioethics movement which was set up to organise and institutionalise the ethical debate related to the progress of science and biology?

What religions, bioethics and biolaw share in common

The idea of complementarity could be a good way to explain the new relationship between religions, science and society because what we are sharing in common would be our interest to exercise with responsibility our freedom for the benefit of mankind. Therefore, bioethics may be
considered as an appropriate methodology to develop a constructive dialogue between the different stakeholders of this debate.

I am not so sure that the present reality of the bioethics discussion is exactly as such. We can agree that the old confrontation between religious dogmas and scientific principles and methodology might be replaced by the idea that there is a long-standing role of religions in the history of civilisation and science which might have inspired the founding principles of bioethics. But, we should not neglect that, on one hand, the emergence of bioethics is a way for contemporary societies to build or reinforce their autonomy towards religious dogmas and institutions while, on the other hand, it might be a good opportunity for religions to make their voice louder and influence the normative process which regulates the use of new technologies.

How bioethics met religion

To be provocative, we may say that bioethics did not meet religion but that it was used by religion to approach globally the human being when confronted to the new practice of biomedicine. And this attitude does not directly reflect the old controversy about who gets the power on man between science and religion but it refers (Doucet 1996) to the difficulties for practical ethics to reach what the human existence is.

The long-standing role of religion in the history of science and medicine

Since the seventeenth century, modern sciences so strongly shaped the values and the organisation of Western societies that its role can be compared to the impact of Christianity on post-Roman time. But, once this statement is made, what can we say about the relationship between these two societal revolutions?

Did religion support the emergence and development of science or were these two societal movements – religion and science – fighting along history?

The question is not new and has raised different theories. One assumes that the two movements are conflicting, science dealing with testable facts questioning religious dogmas while religion is deserting reason for faith. The second one considers that science and religion are complementary, each of them addressing its own domain. On the one hand, God is useless to assist scientists in demonstrating hypothesis but, on the other hand, scientists have not to be arrogant by thinking science could satisfy all human needs. Finally, a third theory believes that some religious values may have been influential on the emergence of scientific activity (Puritan values in seventeenth-century England, for example) and the interaction between religion and science might have helped religion to get rid of unnecessary and obsolete dogma. In this view, this reciprocal influence is considered beneficial both for religion and science.

Examined in a historical context, these theories cannot be used to classify the relationship between religion and science in clear categories taking into account either the chronology or the different scientific theories. The reality is more complex: religious actors were not always and at all times obscurantist while scientists might have been good religious believers and even professed that God was the origin of what they discovered. Supposed conflicts between religion and science might have revealed conflicts between different scientific or even religious views.

Consequently, to portray the relations between Science and Religion as a continuous retreat of religious dogma before cumulative and infallible Science is to overlook the fine structure of scientific controversy, in which religious interests certainly intruded, but often in subtle rather than overtly obstructive ways’ (Brooke 1991: 6).
Regarding the relationship between medicine, health and religion, John Williams reminded us that ‘during most of human history, the causes of health and illness were understood not in a scientific empirical fashion, but spiritually’ (1997: 10). Illnesses were attributed to magical practices, God’s will or the action of one god or demon on a specific disease. For these reasons, health care was considered as a religious practice whose origin man can also find in Christianity. The mission of caring for the sick then occupied an important place in the church’s moral teaching and a large number of religious institutions were devoted to this purpose. With the Middle Ages, the Catholic Church began regarding medicine as a subject for theological reflection. During the seventeenth and eighteenth centuries, casuistry was extensively used to exemplify moral issues. Nevertheless, the scientific revolution of the nineteenth and twentieth centuries weakened this relationship although churches kept an important role in the management of health care institutions and in using their doctrines to establish the ethics of medical practices.

Indeed, scientific discoveries have always been controversial when they force us to review our perception of the world, especially when this new knowledge impacts on religious values. It opens room for debate when society is not ready to do so. In some way, contemporary Bioethics is not far away from the previous seventeenth to eighteenth centuries relationship between religion and science.

Religion and the recent emergence of bioethics

Although the word bioethics was created by a German protestant minister, Fritz Jahr, in 1927 (Sass 2007), the United States might be viewed as the ‘eldest daughter of Bioethics’. The reasons for this origin may be summed up as follows. The Americans lived in the heart of the biomedical revolution when they learned in the 1960s that unethical human experimentations were practiced on black people, prisoners, children and handicapped persons. And this occurred at a time – the war in Vietnam – where the establishment was highly challenged by intellectuals and the new generation. It developed then a climate conductive to question the paternalistic approach of medicine and, in the context of the development of civil rights, to discuss ethical issues with the idea to acknowledge the right to autonomy of the patient.

Till the birth of bioethics, only the medical profession and Catholic moral theologians expressed interest in the field of medical ethics while other religious denominations as well as philosophers stayed silent. With the first biomedical scandals, things changed and while bioethics rose up in the 1970s, traditional moral discourse, including those of theologians, could not anymore guide alone the ‘progress of medicine’. This resulted from the fact that we no longer had in common a unanimous religious tradition nor what replaced it since the age of enlightenment, the belief in the universality of the moral law enshrined in the heart of human nature.

To accomplish this enterprise of dialogue with all stakeholders, a trans-discipline developed, bioethics, with its own centres and ‘Pilgrim Fathers’. If, during its first step, most of them were theologians pursuing what they already accomplished in the pastoral care of health, they however developed their centres outside the academic and church dominance to facilitate a dialogue between medicine, biology and human values. This is the real meaning of the concept of bioethics as suggested by R. van Potter, ‘a bridge to the future’ (Potter 1971).

Protestant theologians have been in the heart of this movement by putting on the agenda what will become the recurrent themes of bioethics and especially the concept of autonomy.

1 Gospel of Matthew 9, 35; 10, 1.
In 1954, Joseph Fletcher, in his book *Morals and Medicine* (1954) inaugurated this problematic and established the patient as a real subject facing the doctor. On the same line, Paul Ramsey’s book, *The Patient as a Person* (2002), might be considered as one of the most influential works of the 1970s. We shall also mention J. F. Childress, who was in 1979 with the philosopher T. Beauchamp, at the origin of principlism (2013), and Leroy Walters who edited the *Annual Bibliography of Bioethics*.

Opposing the reaffirmation by Paul VI of the traditional position of the Catholic Church on birth control, Catholic theologians also early engaged in ecumenical and pluralist approach of bioethics. This led to the foundation of the Hastings Center in 1969 by Daniel Callahan and of the Kennedy Institute of Ethics by André Hellegers, a Catholic gynaecologist, at Georgetown University in 1971.

Regarding Jewish bioethics, we should certainly mention rabbi Immanuel Jakobovits. Exploring the relationship between medical ethics and *halakha*, the Jewish law, he wrote a comprehensive volume, *Jewish Medical Ethics* (1967) in light of Catholic medical ethics, with which he often compares Jewish ethics.

### Religion as a source of (less) inspiration for bioethics and biolaw?

Having been for centuries under the dominance of moral theology, with the birth of bioethics medical morals fell in the scope of philosophers. ‘This philosophical turn has changed the whole complexion of medical ethics.’ If the values concerned might be the same, they are viewed differently. ‘A strongly utilitarian, pragmatic and eclectic bias has replaced the previous deontologic character of medical ethical discourse’ (Pellegrino, Langan and Harvey 1989: 2). Another characteristic in this change is that the most traditional moral issues in the field of medicine and health care are today also important public policy questions. This explained that we moved from bioethics to biolaw.

### The philosophical turn

There is a close relationship between the dilemmas raised by the biomedical technologies and moral theology. The interest of theology for bioethics is explained because theology performs a function of interpretation of reality and that it is its duty to give a specific meaning, according to the divine Scriptures and the dogmas of the religions to the fundamental issues raised by the growth of the life sciences.

Among these issues, the most important are questions of ontological nature, like life, reproduction and death, and therefore refer to an essential element of the tradition of religions.

Due to his membership in a community of faith, the theologian has also to contribute to reply to the following question ‘how to act with responsibility?’

Finally, the concern that the theologian has to others will bring it to denounce the different reductionisms lurking in biomedical sciences. Sometimes he will challenge the individualism exacerbating our societies and sometimes he will discuss the meaning of the technocracy.

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2 Leroy Walters, *Annual Bibliography of Bioethics*, Kennedy Institute of Ethics, Georgetown University.

Religions, bioethics and biolaw

If theology may bring its experience in evaluating the dilemmas of the new biomedical technologies, however, there might be a risk, in our modern society, for the theologian to join his voice to the reflection on bioethics? (Müller 1999)

**Bioethics and the transformation of moral theology**

Born from the breakup of traditional ethics, bioethics constitutes a new approach to the decision and the action rather than a new discipline. Bioethics thus puts forward two essential characteristics: dialogue between disciplines and pluralism of opinions.

D. Callahan explained already in 1973 the impossible qualities of the bioethicist implied by the necessity of this dialogue: ‘sociological knowledge of medical and biological communities, psychological knowledge of the needs faced by researchers and clinicians, patients and doctors, as well as the various pressures they suffer; historical knowledge; scientific training; knowledge of methods of ethical analysis in philosophy and theology’ (Byk 2014).

D. Roy, another founding father of bioethics, did not hesitate to assert that the dialogue is the method of working in (bio) ethics because the ‘(bio) ethics is based on living persons and not universal principles’ (1979: 93). In other words, the virtue of bioethics is to show that dogmatic discourse or even the persuasive speeches are no longer sufficient. The challenge is to force the philosophical and religious morals to leave the sphere of metaphysical discourse to tell what to do now in concrete situations.

Theology is questioned because the method of dialogue is inseparable from the substance of the decision field traditionally reserved for the moralist. Entering dialogue in the field of bioethics, theology is then on an equal footing with other disciplines. Thus, the secular nature of the concept of bioethics excludes the autonomy of the role of theology.

**From bioethics to biolaw**

The second step of the development of bioethics (from the mid-1970s to the end of the 1980s) was significantly the one of philosophers and lawyers instead of the one of theologians and ethicists (Doucet 1996).

This was the time for the elaboration of the four fundamental principles of bioethics: autonomy, beneficence, non-maleficence and justice.

During this step ethics and law became related because the primacy of autonomy and individualism led to a rejection of medical paternalism implying two ancillary principles: the informed consent and the right to know. Consequently, professional organisations wrote new guidelines to incorporate these principles and the judges referred to them in their case law.

This evolution is easily intelligible. As individualism supposes to respect individual choices and then focuses on individual rights, the role of the judicial system is to safeguard them. Moral values are transformed into legal principles which are themselves confronted to cases.

What characterises this change consists in two elements. First bioethics has often expanded as a procedural ethics. On the one hand, the concept of ethics committee is in every mouth and is considered as the (best) mean to tackle with biomedical issues.

On the other hand, (new) regulations are considered to be the appropriate answers to solve ethical issues.

The second point is that bioethics emerged clearly as a non-religious field.

Bioethics has been purposely elaborated outside the religious sphere to allow Catholic theologians to disagree with the doctrine of the Church and to facilitate a multidisciplinary dialogue between different religious views which implied that they have to get rid of their
specificities. For Tristram H. Engelhardt (1991), bioethics is a secular tradition that aims at giving replies that do not refer to any peculiar tradition but in a perspective opened to rational individuals. Bioethics is ‘the great daughter of the Enlightenment’. It is certainly why the protestant theologian James Gustavson replied to the question ‘what is an ethicist?’ saying that an ethicist is a theologian without the professional capacities to be a moral philosopher (1978).

Regarding Europe, the same deduction is made possible by different reasons.

Global data are showing that, although the number of Christians is increasing, mainly in Africa and Asia, this number is decreasing in Europe (Center for the Study of Global Christianity 2013).

But significant points demonstrate an attempt to give back a certain influence to religion in the public debate on bioethics.

For example, in France, the Catholic Church has made since the beginning of the 2000s bioethics a flag to define and mediatise its identity and, by 2009, the Church was highly involved in the public debate that took place before reviewing the French bioethics legislation. There was no fear from the Church to fight against governmental proposals at the political level, especially regarding embryo research. The Catholic Church even proposed to other denominations to adopt on some ethical issues ecumenical statements.

This attitude can be regarded as a conservative counterpart to balance the strong social critics by the Church of modern consumerist and neoliberal society. It is also the result of the appointment of new bishops by Popes John Paul II and Benedict XVI. But this strategy revealed less success with the campaign against marriage for same-sex couples in 2013 when the leadership of the movement was taken over by uncontrolled activist groups.

At the European level, we should mention the influence of Christian theologians in the leadership of the EU Group of advisers for the ethics of new technologies. For the mandate 2011–2016, five members on 15 are theologians, among them a woman consecrated to God has been chosen to be the French member and three more are professors in a Catholic university.

However, this attempt should not be understood as a means to transfer back the bioethical issues under the dominance of religious doctrine. It is merely for religions a way to assert and mediatise their identity and to have some interaction on a discussion which is now essentially solved in terms of public policy making and normative production.

**Religion, biolaw and the elaboration of legal norms**

First, if we consider that bioethics is essentially a matter of moral attitude in a specific area of dilemmas, we will certainly give more influence to theological and moral discussions. But if we consider that bioethics is a global phenomenon that is also challenging social relationship and the organisation of society, we will attach more importance to those religions that do not distinguish in their practice religious law and the law of the City.

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4 In 2011, the Cardinal Archbishop of Paris and then president of the conference of bishops urged before the vote members of Parliament not to accept research and new possibilities of prenatal diagnosis. In 2012, he proceeded in the same way to fight against the bill which allowed same-sex people to marry.

5 For example, this was the case in 2007 between Pope Benedict XVI and Chrysostomos II, head of the Greek Orthodox Church of Cyprus: [http://www.ecumenism.net/2007/06/declaration_commune_de_chrysostomos_ii_et_benoit_xvi.htm](http://www.ecumenism.net/2007/06/declaration_commune_de_chrysostomos_ii_et_benoit_xvi.htm).

Second, since the time of modernity, the influence of religion has considerably declined, although this influence cannot be totally neglected in all issues regarding what is human life and family.

It results from these remarks that the influence of religion on the law-making process in the field of bioethics reveals a great diversity of situations depending on the different religious traditions. This is true for what constitutes the landscape of actors and their methodologies. This is also true regarding the impact of religion on authorities producing the norms.

The actors and their methodologies

Can we say that traditional religious authorities can be regarded as the religious actors in the field of bioethics or did the bioethics movement let new religious experts or activists appear?

This questioning also reflects in the methodologies used to maintain the influence of religion on elaborating norms.

Who are the religious voices?

First of all, what are we meaning by the expression ‘religious voices?’

It refers to those voices that officially represent religious authorities but it should also be extended to bioethics centres based on religious grounds.

But what about other potential sources of religious influence? Should we not consider that the importance of religious health care institutions as well as the social role of religious communities could, at least indirectly, influence the elaboration of norms in bioethics?

Religious doctrine

Authorities

Most areas of the world and religions have now appropriated bioethical issues. But the interest of religions in bioethics is not the same for each religion and everywhere. Regarding the sources of the doctrine, in the Catholic Church, the pope is acting as the ultimate source of official doctrine while in other Christian Churches as well as in Islam and Judaism, there is a great diversity of doctrinal authorities, although some of them can either have stronger moral authority (for example al-Azhar University for Sunni Islam) or play a role in ‘harmonising’ doctrinal views (the Ecumenical Councils, for example). However, numerous documents have been issued by official religious authorities.

Catholicism

Due to its particular interest for caring and its specific organisation, the Catholic doctrine has been highly developed in bioethics.7

7 Since that time, we may quote the following documents: Address to the First International Congress on the Histopathology of the Nervous System, Pope Pius XII (13 September 1952); Humanae vitae (Of Human Life), Pope Paul VI (25 July 1968); Redemptor Hominis (The Redeemer of Man), Pope John Paul II (4 March 1979); Declaration on Euthanasia, Congregation for the Doctrine of the Faith (5 May 1980); Donum vitae (The Gift of Life), Congregation for the Doctrine of the Faith (22 February 1987);
The role of theologians should not be neglected. Concerning Europe, we shall particularly mention Karl Rahner (1904–1984). His views in a bioethical perspective are very helpful to assist the Catholic doctrine to go on with the idea of dialogue in this field (El Haiby 2009). Bernard Haring (1912–1998) is in the same perspective. His approach to morality rests on the freedom of the person’s conscience that acknowledges God as basis of value (Haring 1973). Finally, the Jesuit Patrick Verspieren wrote intensively on bioethics and medical ethics. Of course, in the Catholic Church we should not confuse the role of theologians, individually more open to dialogue, with the role played by the Magisterium of the Church which means either the pope or the Congregation for the doctrine of the faith and also some official Vatican academies (Academy for life, Pontifical universities).

**Protestantism**

Protestantism is characterised by a great diversity of views and the absence of an official doctrine in the field of bioethics. In principle, following the expression *eclesia reformata semper reformanda*, Protestant churches are deemed to be more open to reviewing the tradition in the light of new scientific development. The Protestant approach, influenced by Anglo Saxon philosophical ethics, is also more pragmatic and utilitarian oriented and therefore broadly supported the concept of autonomy and other principles of biomedical ethics (Schroten 2001).

**Islam**

It is only recently, with the emergence of modern science and biology, that Islamic theology and philosophy had to face bioethical issues. But the *Fiqh*, the Islamic jurisprudence, as a methodology using analogy and deduction allows elaborating judgments on cases raised by the progress in medicine and science. Since 1977 an Islamic Fiqh Council has been established in relation with the Muslim World League and in 1981 the Organization for Islamic Cooperation created the International Islamic Fiqh Academy whose aim is to ‘study contemporary problems from the Shari’a point of view and to try to find the solutions in conformity with Shari’a through an authentic interpretation of its content’. In Europe, we may also quote the European Council for Fatwa and Research which is an independent Islamic organisation consisting of a group of scholars. Although there is no universal and central doctrinal authority in Islam, those institutions might work, with other national religious authorities and with national ethics committees when they exist, as references in the Islamic world.

Veritatis splendor (The Splendor of Truth), Pope John Paul II (6 August 1993); Evangelium vitae (The Gospel of Life), Pope John Paul II (25 March 1995); Fides et ratio (Faith and Reason), Pope John Paul II (14 September 1998); Dignitas personae (Instruction on Certain Bioethical Questions), Congregation for the Doctrine of the Faith (20 June 2008); Address to an International Conference on Organ Donation, Pope John Paul II (29 August 2009). These documents can be consulted at ‘Catholic Resources in Bioethics’ by the National Catholic Bioethics Center http://www.ncbcenter.org/page.aspx?pid=1192

8 The following websites can be consulted among others: http://www.centresetvres.com/enseignant/verspieren-patrick; http://www.cairn.info/publications-de-Verspieren-Patrick—11299.htm

9 Atighetchi 2007. See also as a resource center the website of the Islamic Bioethics Project at Georgetown University in Qatar: http://www.library.georgetown.edu/islamicbioethics/en/institutions

10 See http://www.berkleycenter.georgetown.edu/resources/organizations/islamic-fiqh-academy
Judaism

Till recently, no specific approach existed to medical issues in Jewish law. Although the Jewish tradition is supporting a great number of the ethical principles that are commonly accepted, it focuses on the following points: the primacy of human life, the importance of the role of the physician in the decision-making process, the respect of the patient and his dignity and the role of medical confidentiality.

Also, we have to remember that the Jewish law (Halakha which means ‘to walk with, to progress’) is evolving and takes into account the development of medicine and science (Dorff 2003).

Bioethics centres

The birth of the bioethics movement was influenced by the idea that the bioethics discourse should be something different from the moral discourse and, by the way, implied ‘forums of discussion’ (the bioethics centres) founded on new methodological principles: dialogue based on multidisciplinarism and pluralism and a case related approach for the benefit of the persons concerned.

So, during the first period of the development of bioethics, centres such as the Hastings Centre in the US, have been created by the ‘Pilgrim Fathers’ of bioethics as independent institutions from churches and their traditional doctrines.

With the involvement of all disciplines in the bioethics field, the number of centres expanded geographically and bioethics institutions were progressively integrated either in health care institutions or in academic bodies. Due to this evolution, these ‘new institutions’ have partly lost their specificity. They still promoted bioethics but, they opened the way for a struggle of influence of all stakeholders.

Then, to maintain their capacity of influence, churches supported some of those centres.

Socio-political influence

Direct influence is clearly expressed by the opinions delivered by churches on the ethical issues that come to discussion in the public arena. It might be well or less accepted according to the acknowledged role of religions in state affairs.

For example, when we raise in France the question ‘what weights the Catholic Church when it publicly opposes legislative biolaw?’, the reply that comes is that the Church did not succeed in promoting its views. But a deeper assessment of the relationship between the Catholic Church and the political and normative approach of the bioethics discussion will reveal more complexity. 35 per cent of all public debates during the pre-legislative process were organised by Churches and among them 95 per cent by the Catholic Church. Furthermore, when we look at the adopted legislative provisions, some of them have been written using the words and arguments of the Catholic Church. It shows that in some way, the public opinion may be regarded as supportive of Church values to set limits to a liberal approach to the use of biomedical techniques. This is the case with surrogate motherhood. This means that in a society in search of meaning, an instance capable of producing values and standards as the Church is not totally out of play (Turner 2003a).

At the European level on the one hand, the European Union has been attributed no responsibility as regards religions but could not ignore the role that religions have played in the European construction. On the other hand, although religions have in general no distinctive role
in the institutions in charge of bioethics in Europe, these religious organisations participate in the European institutions specialised in this field.

Concerning the United Nations, there is an important lobby of religious NGOs whose aim is to fight against sexual and reproductive health and rights policies. Among them are Catholic and Mormon or Evangelical American organisations but also the Vatican and Islamic organisations. The role of the Vatican is particularly notable through the international status of the Holy See as a permanent observer at the UN. Having diplomatic relations with nearly all the Islamic States which are members of the Organization of Islamic Conference, it facilitates some objective convergence and even tactical alliance on issues concerning family and the role of women. Obviously, religion and politics intersect but ‘even though the religious and the political are hard to disentangle, these groups cannot be properly understood or dealt with if reduced to a conservative political movement in religious guise … It represents a reaction by conservative factions within each religious community to modern social and theological change’ (Norwegian Agency for Development and Cooperation 2013: 2).

Behind this secular role of religious bodies, religions also promoted different methodological approaches to be used in the field of bioethics to actively maintain their influence.

**What are the methodologies used?**

We should consider methodological approaches as well as tactical attitudes. Both may be different regarding countries and circumstances.

**Methodological approaches**

When the theologians dominated bioethics, they referred to their own traditions to elaborate norms in response to ethical issues. ‘In contrast moral philosophers and bioethicists dismayed by the “sectarian,” “tradition bound” contributions of theologians drew upon secular, philosophical, moral frameworks supposed to lift them above the fray of competing traditions of religious ethics’ (Turner 2004: 202).

With the secularisation of bioethics different methodologies were proposed to be used as a framework for moral reasoning. However, they just gave an illusion that reaching common morality was possible while avoiding recognising that the existence of a pluralistic society conferred an ‘ethnocentric and local character (to) their normative presumptions’ (Turner 2004: 203).

**The illusion of a common morality**

Bioethics favoured models of moral deliberation with the presumption that they would reach a commonly accepted ethics.

The principlist model (a system based on the four moral principles of Autonomy, Beneficence, Non-maleficence and Justice) was promoted as a normative framework that was supposed to be acceptable to individuals from different religious and philosophical backgrounds. But also, its rhetoric and concept was supposed to be applied both to clinical ethics and policy making.

Casuistry is characterised as a critique of principle- or rule-based reasoning. It is used to resolve moral problems by extracting theoretical rules from particular instances and applying
these rules to new instances. Although casuists acknowledge the plurality of religious traditions and that understandings of morality can shift over time, they seem to believe that reasonable persons shall recognise that ‘practical wisdom’ is singular and not plural.

As Leigh Turner stressed, these two models ‘place excessive emphasis upon the notion of “common morality”.’ They exaggerate the stability and orderliness of morality in multicultural, multifaith societies (Turner 2004: 205). And this criticism could be true for the other models of deliberation used in bioethics (see Smith Iltis 2000) such as intuitionist frameworks and cost–benefit analysis.

The necessity to coexist with religious traditions

As a consequence of the failure of ‘classical bioethical methodologies’ to consider the diversity of other normative traditions, including religions, we may deduce that the claimed emancipation of bioethics from religion is partly illusory. It is not possible to totally exclude the influence of religions in their historical context. To this regard we should remember the words of Dr Rowan Williams, Archbishop of Canterbury, during a visit to the European institutions: ‘the virtues we associate with the European identity, the virtues of political liberalism . . . will survive best if they are seen as the outgrowth of the historic European tensions about sovereignty, absolutism and the integrity of local communities that were focused sharply by Christian church and its theology.’ Consequently, he suggested that ‘a mature European politics will not keep religious communities in the private sphere but will take another route, seeking for effective partnership’.

Can we share this view in the field of bioethics and conclude that ‘stable policies and social practices emerge when different traditions find mutually intelligible resolutions’ (Turner 2004: 201)?

Anyway it is not possible to come back to the supremacy of one religious tradition because it will signify an ongoing conflict between religious opinions, viewed as reactionary and which failed to admit the narrowness of the moral channels within which they were swimming, and political liberalism.

To minimise this risk, it is necessary for the different stakeholders to imagine appropriate tactical ways to assist them in the construction of bioethics.

The tactical approach, Churches and the new European bioethical institutions

Considering the role of religions in the field of European bioethics may facilitate the analysis of the complexity of the European approach to bioethical issues because it invites us to pay attention to what characterises the most public attitude. First is a trend to develop the institutional approach in order to encourage the emergence of a public forum to find some common values. Second comes the paradox that emerges from this quest and demonstrates the gap existing between this search and the application of those values to individual cases.

It seems that religious institutions have been acknowledged again with a central role in the European political arena while the values supported by religions have been left to individual choices or secularised in the concept of human rights principles.

We will look at European bioethics to determine in which way these remarks may apply to this new global social phenomenon.

The institutions which draw the bioethics landscape in Europe have to be viewed through the following paradox. They necessarily perform the role of religious institutions but they have
also tempted to replace the religious institutions in their role of expressing common social views on controversial ethical issues.

Two questions should then be raised to understand the reality of this contribution.

**Who represents religions and churches in the European institutions?**

Although some types of organisations approach bioethics issues at the European level for other religions than Christianity (the European Council for Fatwa and Research adopted in 2000 a fatwa on organ donation) (Ghaly 2012) none of them have direct access to the European bioethics institutions. Two reasons explain this unsatisfactory situation: the difficulty for European institutions to find partners that might be fully representative and a lower capacity for the non-Christian religions, when organised at the European level, to define bioethics issues as a priority. For these reasons and others related to the way the European Union, for example, has organised its global relationship with Islamic organisations, these relations may be qualified as ‘late and symbolic’ (Massignon 2007).

Concerning the contribution of the Catholic and Reformed churches, we should underline the following points. In the European Union, they do not contribute directly in the work of the European Group on Ethics in Science and New Technologies (EGE), which has been set up in 1991 to advise the European institutions, although in 2005 the renewal of the Group by the president of the Commission led to the nomination of seven members on 15 with background in theology and/or religious (academic) affiliation. In 2014, the proportion of members with some religious affiliation is even higher (eight members). Globally, this situation merely reflects the political orientation in the European Parliament and not simply a revival of influence of religious views.

The Catholic and Reformed Churches offer their contributions through the two main institutions which respectively represent them at the EU level: the Commission of the Bishops’ Conferences of the European Community (COMECE) and the Conference of European Churches (CEC-KEK). The COMECE has set up the Bioethics Reflection Group to provide advice while the CEC has established in 1999 a Working Group on Bioethics within the Church and Society Commission.

Within the Council of Europe, both Catholic and Protestant churches participate in the work of the European Committee on Bioethics working since 1983 (under different denominations) on harmonising European regulations. Both religions are observers but with a different status. The Catholic Church is a permanent observer in the Organisation and is represented as a State, through the Holy See, in all committees, including the Committee of ministers, while the CEC is only an observer in the Committee on Bioethics (DH-BIO) since 1997. This difference has some consequence on the representation of the two religions. The CEC is assuming the same role in the Council of Europe than in the EU while the situation is different for the Catholic Church which is represented in the Committee on Bioethics by an observer directly appointed by the Holy See.

**How religions and churches influence the elaboration of biolaw**

Let us take the examples of European institutions and of European case law.

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12 Parkin and Carrera 2010: 46.
European bioethics institutions

Direct influence

Since 1990 both COMECE\(^{13}\) and CEC\(^{14}\) have produced a series of contributions in relation to the topics currently discussed in the European institutions.

But ‘direct’ influence has a stronger meaning in the Council of Europe where, due to its political status, the Holy See may convince some Member States to veto recommendations proposed for adoption by the Committee of Ministers.\(^{15}\)

Indirect influence

Indirect influence should not be neglected as it gives religions the possibility of having their views supported by people who do not officially represent them.

Since the creation of the European Bioethics Committee, it has been suggested to Member States that they should appoint multidisciplinary delegations including ethicists. For a few countries, those ethicists are theologians. Moreover, the joining of new Member States in the 1990s has reinforced the importance of the group of States which shares the view that religious opinions should be taken into account.

Regarding membership in the EGE, we already mentioned the controversy which burst out when, in 2005, the President of the European Commission appointed a group of members that were obviously pro-life people.

Different objectives

The objectives of the Catholic and Reformed churches deeply differ in their contribution to the European bioethics debate.

The contribution of the CEC is in conformity with the following statement of the Working Group on Ethics: ‘the approach taken in our churches is to allow and encourage open dialogue, guided in the Holy Spirit by the wisdom of the Bible and the traditions of the church. The task of the churches is to help believers to take their responsibility – both individually and as a community of faith.’\(^{16}\) But the important role of Evangelical churches is slightly bringing some change in the approach of Protestant churches, making them closer to the views of the Catholic Church.

Regarding the Catholic Church, the objective is clearly to influence international organisations, States and the communities concerned to adopt practices and regulations in conformity with the ethical principles promoted by the doctrine of the Church.

The attitude of the Catholic Church is nevertheless not the same in the two European organisations. The COMECE can only act as a lobby while the Holy See in the Council of Europe may develop a strategy of ‘rapports de force’ to prevent the adoption of principles.

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13 See the documents elaborated by the COMECE in the field of Bioethics: www.comece.eu/site/en/publications/otherpublications/article/3338.html
14 For CEC-KEK’s works on Bioethics, see http://csc.ceceurope.org/index.php?id=842
15 We may quote three specific examples: the 1982 draft text on artificial insemination, the 1985 Recommendation on the duties of physicians towards patients and the 1987 draft Recommendation on reproductive technologies and related embryo research.
16 Commission of European Churches, Church and Society Committee, www.cec.kek.org
that would heavily fight its doctrine. This strategy is not only defensive as it could appear during the 1980s when the Holy See succeeded in stopping the adoption of different texts.17

It is also an active strategy trying to influence the work of the European Bioethics Committee. It benefits from the support of some Member States (e.g. Croatia, Ireland, Malta, Poland, the Slovak Republic) whose bioethics policy is very close to the opinions developed by the Catholic Church.

European institutions leave limited space to religions in the process which leads to the elaboration of European policy in the field of bioethics. However religions – essentially the Catholic and Reformed churches – are influential contributors in the pluralistic and multidisciplinary discussions that have been initiated by European institutions.

If the churches behave mainly as experts, religious values, through a secularisation process, have often served as the basis of the development of the philosophy of human rights. As a consequence, the human rights approach has in some way inherited this religious cultural background.

This does not mean that the principles that governed European bioethics, as incorporated in the European Convention on Biomedicine and Human Rights, have the same objectives and priorities than those promoted by religions. For the religions, the principle of autonomy is certainly viewed as giving too much importance to the individuals while the same religions deplore a too restrictive interpretation of the respect due to human life. Therefore, the jurisprudence of the European courts is particularly interesting to let us know how the different principles and interests involved are balanced.

**European case law**

**The jurisprudence of the European Court of Human Rights**

Bioethics today plays a substantial role in the development of the case law of the ECHR (Council of Europe/European Court of Human Rights 2012). In some fields, such as the protection of privacy and family life including the right of marriage, the Court is extensively protecting the concept of autonomy while in some fields, such as the beginning of life, reproductive technologies and assisted suicide and euthanasia, the Court adopted a less directive approach leaving to Member States a great margin of appreciation.18

An emblematic example of the application of the notion of margin of appreciation can be found in a 2011 ruling by the Court Great Chamber:

The Court reiterates that a number of factors must be taken into account when determining the breadth of the margin of appreciation . . . Where a particularly important facet of an individual’s existence or identity is at stake, the margin allowed to the State will normally be restricted . . . Where, however, there is no consensus within the member States of the Council of Europe . . ., particularly where the case raises sensitive moral or ethical issues, the margin will be wider . . . By reason of their direct and continuous contact with the vital

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17 See supra note 13.

18 The term ‘margin of appreciation’ refers to the space for manoeuvre that the Strasbourg organs are willing to grant national authorities, in fulfilling their obligations under the European Convention. Cf. Council of Europe, ‘The margin of appreciation’, http://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp; Kratochvil 2011
forces of their countries, the State authorities are, in principle, in a better position than the international judge to give an opinion, not only on the ‘exact content of the requirements of morals’ in their country, but also on the necessity of a restriction intended to meet them.\textsuperscript{19}

Through this notion, the Court is indirectly but knowingly giving weight to ‘the vital forces of the countries’ which certainly includes churches and religious supported institutions. This gives conceptual facilities for Member States to interpret the Convention according to national moral traditions. As shown by the S and H decision of the Court, the ‘European Consensus’ standard is playing a key role in the field of bioethics to give a wider or narrower character to the application of the margin of appreciation. We can even wonder if this role is not too important and if its application has moved from a dynamic criterion, facilitating the evolution of the interpretation of the Convention, into a conservative one, imposing a change in most national legislations before bringing out a new interpretation of the Convention (Byk 2012).

This is the clear result of the 2011 ruling by the Great Chamber, although the Court in its decision is not in principle closing the door to any control.\textsuperscript{20}

Leaving to national authorities a wide margin of appreciation is a careful way for the Court to elude deciding on fundamental issues such as the recognition of reasonable accommodations between religious beliefs and professional duties or telling what should be protected under the Convention, the equality of rights for same-sex couples or a general clause of conscience.

Looking at the jurisprudence of the Court of Justice of the European Union in the Brüstle case concerning patent on embryo, we discover a different approach.

**The jurisprudence of the Court of Justice of the European Union and the Brüstle case**

This decision\textsuperscript{21} is particularly important because, although elaborated for the application of patent law, it chose to give an extensive uniform European definition of what is a human embryo:

> any human ovum after fertilisation, any non-fertilised human ovum into which the cell nucleus from a mature human cell has been transplanted and any non-fertilised human ovum whose division and further development have been stimulated by parthenogenesis constitute a ‘human embryo’ within the meaning of Article 6(2)(c) of the Directive.\textsuperscript{22}

The reasoning of the Court, globally following the opinion of the advocate general,\textsuperscript{23} is supposed to be based on scientific facts\textsuperscript{24} but when the Court deduced from the biological continuity of human life what is covered under the notion of human, it simply blurred the line between what might be a biological definition and a legal one. In doing so, the judges merely adopted the point of view of the Catholic Church in her fight against abortion and embryo research (Plomer forthcoming 2014: 12). Of course, the Court could find support in several points of the Directive.

\textsuperscript{19} ECtHR, S and H. v. Austria, Application no. 57813/00, Great Chamber 3 November 2011.
\textsuperscript{20} Id., para. 97.
\textsuperscript{21} CJEU, Brüstle v. Greenpeace, C34/10, Great Chamber 18 October 2011.
\textsuperscript{22} Id., para. 38.
\textsuperscript{23} See www.ieb-eib.org/fr/pdf/brustle-c-greenpeace-avis-avocat-general.pdf
\textsuperscript{24} Id., para. 84.
Recital 16 in the preamble to the Directive emphasises that ‘patent law must be applied so as to respect the fundamental principles safeguarding the dignity and integrity of the person’. Article 5(1) provides that the human body at the various stages of its formation and development cannot constitute a patentable invention while additional security is offered by article 6, which lists as contrary to ‘ordre public’ or morality, and therefore excluded from patentability, uses of human embryos for industrial or commercial purposes. Finally, recital 38 in the preamble to the Directive states that this list is not exhaustive and that all processes the use of which offends against human dignity are also excluded from patentability. 25

Having reiterated these points, the Court could conclude that ‘the context and aim of the Directive thus show that the European Union legislature intended to exclude any possibility of patentability where respect for human dignity could thereby be affected. It follows that the concept of “human embryo” within the meaning of Article 6(2)(c) of the Directive must be understood in a wide sense’. 26

And contrary to the jurisprudence of the ECHR on issues involving human life, the ‘need for a uniform application of European Union law and the principle of equality requiring that the terms of a provision of European Union law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an independent and uniform interpretation throughout the European Union’ 27 imposed that the Court should elaborate such definition giving no margin of appreciation to Member States.

To clarify this ruling, let us come back to the short history of the normative process in the field of patenting (human) genes. While researchers, mostly in Europe, worried about the possibility of maintaining a free access to knowledge, the heritage of the eugenics theories enforcement during WWII facilitated a rainbow coalition between Christian Democrats and the Green Party in European Parliament who pressed for the inclusion of specific moral prohibitions on the biotechnological patents in the Directive (98/44/EC of 6 July 1998). This inclusion is also the evidence that the issue ‘became entwined with a Christian Catholic agenda to safeguard human embryonic life and protect (God given) human life from genetic manipulation’ (Plomer forthcoming 2014: 12).

This jurisprudence is fully illustrative of the emergence of ethical issues in patent law. For long, we learned that patents were neutral because an invention could be used in both ways: for example, a knife can be helpful in murdering someone or in cutting a piece of meat. The possibility to patent life, including human life, has changed this approach leading to the integration of ethics, grounded on moral humanistic arguments mostly derived from the Judeo-Christian tradition, in patent law.

Conclusion

Having expelled religion from the practice of medicine and science and further considered that physicians and scientists could not decide alone on ethical questions, our world is facing a crucial issue. How can we include ethical values in our law without importing the religious background which nourishes the old discussion between what should be morally permissible or prohibited?

26 Id., para. 34.
27 Id., para. 25.
It is not easy not to drift towards certain form of legal fundamentalism when using concepts such as human dignity or the sanctity of human life on which the human rights law is widely grounded. Obviously in Western countries the Catholic Church, joined by other Christian and non-Christian faiths, has decided to enter into resistance against potential moral risks and to influence, by any means, the process of adopting harmonised legislations in this field. However, if we consider that the Catholic Church has historically served as a ‘model’ of universalism, we may understand the paramount importance of this fight against a new secularised universalism that concern the essence of human life.

The battle of bioethics is also a battle to define the Western (European) ‘identity’. If there is no doubt that religious values are deeply rooted in our cultural heritage, the question is to know who can decide today – the Churches or the whole Community – how we should use and transform this heritage.

For all these reasons, we wish to conclude that the activities of religions and churches in the bioethical debate are oscillating, depending if they represent the majority or minorities, between the discretion or arrogance of the sphere of influence and the transparency of the sphere of conflicting situation.

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