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Genetics and Constitutional Rights: an Evidence-Based Law Perspective

ABSTRACT

The impact of legal rules regulating the wide and diverse field of life sciences and aimed at the protection of constitutional rights is often perceived as an excessive burden unable to offer the most appropriate responses. There is, therefore, a convergence of opinions perceiving law as an **invasive and too rigid phenomenon**, producing inappropriate and scarcely functional responses, a formal and bureaucratic system of norms hindering the pursuit of scientific purposes and unable to protect and promote the rights of all the persons involved.

Today, the most difficult challenge is the individuation of a point of balance between an unbearable situation characterised by a legal void, leading to the risk of a re-expansion of the rule of the stronger and of forms of violence and prevarication, and a sclerotising law, insensible to the specific needs and dynamics of the scientific world.

These are questions typically concerning the **binomial power-liberty**, which since always involve and keep involving the logics of reasoning and the typical sensibilities of constitutional law.

Facing the need for a remodulation of a law respectful of its own limits but also able to avoid the onset of prevaricating positions of powers, the suggestion is to set the legal regulations (also) in the field of genetics starting from the features of genetics itself, assumed as forms of **evidence** serving as basis for the legal regulations and moving towards the direction pointed at by constitutional principles.

The coordinated reading of the orienting principles offered by the constitutional text and by the concrete characters of the subject to regulate consents to reach a configuration of a system of rules at the same time flexible and functional.

The three main characters which should necessarily guide the choices of those who create and apply law are bound in the very first place to the aspect of **uncertainty** which physiologically affect scientific processes. Within human genetics, the cyclic dynamics of acquisition and confutation are further complicated by the intrinsically predictive nature of genetic information, a factor which notably increments the degree of uncertainty which the lawyer shall face. The second characterising feature derives from the consideration that all the aspects bound to life sciences typically involve the deeper **moral conception** of each of us and, with it, the very same meaning of also anthropologically delicate concepts. In particular, the progresses of genetics questioned and blurred the boundary between categories that once very strongly divided, such as health and illness, which today depends also upon an all individual perception.

Finally, an unavoidable element is that of the specificity of the **concrete case**. The construction of legal rules, in a perspective of flexibility and opening, shall be aimed at a synthesis allowing to conciliate the multiform character of reality with the needs for certainty and foreseeability of law.

On such bases, we will bring some instances drew from national, international and European Union law, aimed at proving the points of strength and the criticalities of some legal regulations individuated both at a legislative and at a case law level.