

30/CNECV/2000
OPINION on the ratification of the
CONVENTION FOR THE PROTECTION OF
HUMAN RIGHTS AND DIGNITY OF THE HUMAN BEING
WITH REGARD TO THE APPLICATION OF BIOLOGY AND
MEDICINE
(Convention on Human Rights and Biomedicine)

The emergence of new technologies has brought substantial alterations, on the one hand, to the ways health and disease are approached, to the physician-patient relationship and the ever-faster development of scientific research, and Medicine and Biology themselves, and, on the other hand, to the entire framework of human relations. These alterations have resulted in the emergence of new ethical issues.

Today, to speak of Human Rights without speaking of the protection due to the human being in face of the advances of biomedicine, and without bringing into a joint debate groups of individuals having a multidisciplinary training, severely diminishes its meaning.

The Convention on Human Rights and Biomedicine is therefore a crucial landmark in the universal history of Human Rights. For the first time it has been possible to gather into a consensual text general principles and specific stipulations relating to the protection of the human being against possible improper uses of Biology and Medicine. For the first time in the text of a Convention, there is an attempt to establish the just, yet difficult equilibrium between the rights and best interests of individuals, society, science and the human species. The awareness that human beings are owed respect not only as individuals but also as members of the human community or as members of society, and that a web of rights and duties is established among them that has distinct hierarchies ("The interests and welfare of the human being shall prevail over the sole interest of society or science" – Article 2 of this Convention) deserves our heartfelt applause.

We know that the path that led to the final wording of the Convention's text was strenuous, advancing through dissent and reversals.

We know that many of the more controversial questions (definition of human being, status of the embryo, research on embryos, research on human beings) failed to meet general agreement among the parties involved. Hence, there was an attempt to find compromise solutions, or at least ways to circumvent obstacles, such as deferring to the internal Law of each State the application of "the necessary measures to give effect to the provisions of this Convention" – which entails giving each State a margin of appreciation to apply (or not) specific stipulations of the Convention and define to whom they are applicable. Indeed, even though 21 countries (Portugal among them) signed the Convention on the 4th of April 1997 (with some more signing it at a later date),

only a few months ago was it possible to achieve ratification by a number of countries sufficient to bring it effectively into force (on the 1st of December 1999).

In general terms, the National Council of Ethics for the Life Sciences corroborates the ethical principles, as well as most of the concrete provisions, contained in the Convention.

Nevertheless, this Council is duty-bound to point out the specificities of some of those provisions, and the need to bring them into line with the laws in force in our country.

Indeed, in accordance with the second paragraph of Article 1 of the Convention, each State must issue legislation that will bring into effective execution the provisions of the Convention, or apply directly the latter's norms.

In fact, and in accordance with the Explanatory Report of the Convention, each State must heed the nature of each provision, that is to say, it must take into account that some of the norms, principally those that are clear, precise and unconditional, must be directly applicable in the internal juridical order of each of the States that ratified the Convention, namely those norms that enunciate individual rights— unlike those of more generic nature, which will require the adoption of a norm.

The Convention served to draw attention, besides, to some omissions in Portuguese Law relating to aspects well defined in the final text. In order to apply these, it may be necessary to reframe a few Portuguese legislative principles. One case in point is Article 18 of the Convention (research on embryos *in vitro*), which provides for its own applicability when national laws allow research on embryos *in vitro*.

The Portuguese internal juridical order already contained approximate counterparts to many of the norms set in the Convention (e.g. provisions ruling consent, scientific research, organ and tissue removal for transplantation purposes). Nonetheless, other norms in the Convention (e.g. some provisions relating to consent, the human genome, research on embryos, utilisation of parts of the human body) stand in need of ponderation in the revision of Portuguese internal legislation.

Actually, even in areas where the applicable juridical regulations are already in force (consent, scientific research, organ and tissue transplantation) it will be necessary to lay down a parallel with respect to both legal texts. In the concrete case of the removal of organs and tissues for transplantation, we draw particular attention to no. 20 of the Convention and to how it compares with the provisions of law no.12/93 of the 22nd of April – quite concretely concerning the protection of people who are not able to consent to organ removal. With the strengthening by the Convention of measures protecting people who do not have the capacity to consent, this Convention might bring in legal mechanisms more restrictive than those sanctioned by the law just mentioned, in line with

what the National Council of Ethics for the Life Sciences finds ethically preferable, as expressed in its Opinion 1/CNE/92.

The Convention on Human Rights and Biomedicine highlights some omissions in Portuguese legislation that need legal definition – such as rules on medically assisted reproduction, on the protection of embryos and people not able to give consent, on the use of parts of the human body, or rules on the human genome – while, on the other hand, it highlights the need for a genuine multidisciplinary debate on the matters considered in the Convention, a debate we should like to see extended to Portuguese society in general, and in particular to the several parties directly involved in the issues covered therein.

The National Council of Ethics for the Life Sciences considers important the ratification of the Convention on Human Rights and Biomedicine by the Portuguese State, drawing attention to the need for a speedy ratification of this Convention and of other international and regional instruments, given the increasing acceleration of the great questions now posed to all societies.

CONCLUSION

It is the opinion of the National Council of Ethics for the Life Sciences that the Portuguese State must ratify the Convention on Human Rights and Biomedicine.

Lisbon, the 1st of February, 2000

Luís Archer, Ph.D.