



THE EUROPEAN CONVENTION ON BIOMEDICINE AND HUMAN RIGHTS: A PRAGMATIC AMBITION⁽¹⁾

*LA CONVENTION EUROPÉENNE SUR LA BIOMÉDECINE
ET LES DROITS DE L'HOMME : UNE AMBITION PRAGMATIQUE*

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ABSTRACT

What the European Convention on Biomedicine and Human Rights declares is very clear. While “bearing in mind (among others) the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10 December 1948 (and...) the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950”, it also proclaims that man is “conscious of the accelerating developments in biology and medicine”. Therefore, it establishes a duality of time between the Human Rights principles, which are universal, and developments in biology and medicine which are dependent on the course of time and its acceleration.

Experience is part of this race of time and this is experience which guided the elaboration of the European Convention on Biomedicine and Human Rights and this guidance involved two steps. The first one concerned the experience acquired by the Council of Europe in the field of medical and health ethics while the second one attempted to harmonize legislations in the area of reproductive technologies and human genetics. However, moving from step one to step two revealed a great change in the approach of ethics, outing it from the medical community to incorporate it into a public debate related to Human Rights and social transformations.

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(1) Colloque Thessalonique.

KEYWORDS

Council of Europe, Biomedicine convention, European Convention on Human Rights, European Court of Human Rights, Dynamic of convergences.

RÉSUMÉ

Ce que dit la Convention européenne sur la biomédecine et les droits de l'homme est très clair. Tout « en gardant à l'esprit (entre autres) la Déclaration universelle des droits de l'homme proclamée par l'Assemblée générale des Nations Unies le 10 décembre 1948 (et...) la Convention de sauvegarde des droits de l'homme et des libertés fondamentales du 4 novembre 1950 », elle proclame également que l'homme est « conscient des développements accélérés en biologie et en médecine ». Elle établit ainsi une dualité de temps entre les principes des droits de l'homme, qui sont universels, et les développements en biologie et en médecine, qui dépendent du cours du temps et de son accélération. L'expérience fait partie de cette course du temps et c'est l'expérience encore qui a guidé l'élaboration de la Convention européenne sur la biomédecine et les droits de l'homme et cette orientation a comporté deux étapes. La première a concerné l'expérience acquise par le Conseil de l'Europe dans le domaine de l'éthique médicale et sanitaire tandis que la seconde visait à harmoniser les législations dans le domaine des technologies de la reproduction et de la génétique humaine. Cependant, le passage de la première à la seconde étape a révélé un grand changement dans l'approche de l'éthique, en la faisant sortir de son appartenance à la communauté médicale pour l'intégrer dans un débat public sur les droits de l'homme et les transformations sociales.



MOTS-CLÉS

Conseil de l'Europe, Convention sur la biomédecine, Convention européenne des droits de l'homme, Cour européenne des droits de l'homme, dynamique de convergences.

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INTRODUCTION

The first verses of the Iliad are clear: the Muse is going to tell us a story from its right beginning but this story has only one explanation: the accomplishment of the will of Zeus(2). Thus are face to face the divine time, mythical, and the human time, based on experience (2)(3).

What the European Convention on Biomedicine and Human Rights declares is also very clear. While "bearing in mind (among others) the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10 December 1948 (and...) the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950", it also proclaims that man is "conscious of the accelerating developments in biology and medicine"(3)(4). Therefore, it establishes a duality of time between the Human Rights principles, which are universal, and developments in biology and medicine which are dependent on the course of time and its acceleration.

By borrowing from the domain of the divine the universal and robbing it the knowledge, our humanity is now in charge to reconcile the two faces of time.

As the ancient gods, we have to do it in creating a Human order that should balance the various forces that lead the world. But, contrary to the conception of the ancient gods, we now consider that human activity is part of a history and that this is from our history that we may contribute to our future.

To get on the road to this future – I remind that the famous book by Rensselaer van Potter at the beginning of the modern era of bioethics is titled "Bioethics:bridge

to the future"(5) – experience is certainly what may help humans who, unlike the gods, do not foresee their future because "men are disabused only by experience"(6).

This is precisely experience which guided the elaboration of the European Convention on Biomedicine and Human Rights and this guidance involved two steps. The first one concerned the experience acquired by the Council of Europe in the field of medical and health ethics(7) and the second one the attempt by the Council to harmonize legislations in the area of reproductive technologies and human genetics(8). However, moving from step one to step two revealed a great change in the approach of ethics, outing ethics from the medical community to incorporate it into a public debate related to Human Rights and social transformations.

When the Recommendation on human reproductive technologies and embryo research elaborated by the Council of Europe could not be adopted in 1987 as a consequence of such debate in which the Holy See took a major part(9), it became obvious that the Council of Europe should adopt another strategy to keep its role in promoting the harmonization process in this field(10). Paradoxically, the idea to substitute the elaboration of a convention to a series of recommendations appeared more flexible and more realistic in the sense it offered the opportunity to promote a set of common principles while leaving a margin of autonomy to Member States in implementing them in their jurisdiction (I). The second idea was that letting time to time in a legal process inspired by the model of the European Convention on Human Rights would create a dynamics for the development of a fourth generation of Human Rights (II).

I. A COMMON REFERENCE OF PRINCIPLES AND A LARGE AUTONOMY TO IMPLEMENT THEM

One could say that the more the social constraints are strong, the less it is necessary to affirm legal principles.

(2) Homer, The Iliad, Book I, lines 1-5 (translated by Stanley Lombardo and published by Hackett Publishing. © 1997).

(3) P. Vidal-Naquet, Temps des dieux et temps des hommes. Essai sur quelques aspects de l'expérience temporelle chez les Grecs, Revue de l'histoire des religions, Année 1960, Volume 157, Numéro 1, pp. 55-80. http://www.persee.fr/doc/thr_0035-1423_1960_num_157_1_8998 et H-Ch. Puech, Temps, histoire et mythe dans le christianisme des premiers siècles, Proceedings of the 7th Congress of the history of religions, Amsterdam, 1951, p 34.

(4) The European Convention on Biomedicine and Human Rights, Preamble, <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007cf98>

(5) Van Rensselaer Potter, Bioethics:bridge to the future, Prentice Hall, 1971.

(6) « Les hommes ne se détrompent que par l'expérience », Malesherbes, Pensées et maximes, Capelle, 1802.

(7) Agnès Leclerc, Le Conseil de l'Europe et la protection de la santé, Actualité et dossier en santé publique, n°9, décembre 1994, p.12.

(8) Council of Europe, Human Artificial Procreation, Strasbourg, 1989.

(9) Holy See, Congregation for the doctrine of the faith, Instruction dignitas personae on certain bioethical questions, City of Vatican, 1987.

(10) The European Convention on Biomedicine and Human Rights, Explanatory Report, Drafting of a convention, paragraph 4. <https://rm.coe.int/16800ccde5>



It means that a strong collective integration of certain social values gives its strength to a “non-entitlement” approach when, on the contrary, the necessary protection of heterogeneous individual demands leads in a pluralistic society to the affirmation of principles for the safeguard of individual liberties.

But what happens when it is the technique that opens up new possibilities for individual choices concerning sexuality, procreation, genetic identity, duration and quality of life, time and way of dying?

Can “technology law” help the individual to choose? Conversely, will these new laws not bring out a bio-power that will replace the old medical paternalism? And, can a politically liberal State deny to its citizens the extension of fundamental rights in this field? Are not we all equal in law because we are all different!

The question becomes more complex when this State is also a State that guarantees, including financially, and sometimes provides equal access to the most advanced medical services? Since financing cannot be unlimited, to what “model” should we refer regarding the access to medically assisted procreation, for example, and to what point is the cost for society of these techniques acceptable? Can then “technical standards” help to answer these questions better than universal principles? The Convention precisely chose to combine both of them to promote a balanced choice between individual rights and the interest of the community.

A. The convention and the proclamation of universal principles

The European Convention on Biomedicine and Human Rights gives, at the regional level, universal visibility to the principles of bioethics(11).

These universal rights in bioethics can be organized as follows(12):

1. The principles borrowed from the ECHR

We may quote the following principles:

- * Human dignity
- * The right to life

(11) Roberto Andorno, *The Oviedo Convention: A European Legal Framework at the Intersection of Human Rights and Health Law*, January 2005, *Journal of International Biotechnology Law* 2(4):133-143; E Salako, ‘The Council of Europe Convention on Human Rights and Biomedicine: a New Look at International Biomedical Law and Ethics’ (2007) 27 *Medicine and Law* 339 ff.

(12) Johan Brännmark, *Respect for Persons in Bioethics: Towards a Human Rights-Based Account*, *J. Hum Rights Rev* (2017) 18: 171. In this paper, it is argued that human rights offer a potentially fruitful approach to understanding the notion of Respect for Persons in bioethics.

- * The principle of non-discrimination
- * The protection of the integrity of the person
- * The respect for autonomy
- * The respect for private and family life
- * The right of information

The fact that both the ECHR and the Oviedo Convention contemplate all these basic rights and a wider set of shared entitlements inherent in the dignity of human beings confirms the existence of an intimate connection between the two treaties. This is their “*noyau dur*”(13).

2. The principles specific to biomedicine

a) Some may be considered as corollaries to the principles enshrined in the ECHR

- This is the case with informed consent (of persons undergoing medical treatment, to organ removal or scientific research) and protection of persons who are not in a position to express their consent. Both derive from the respect of autonomy.

- This is also the case with reproductive rights, the right to know one’s origins and medical confidentiality which are the corollaries of the right to privacy.

- Finally, the prohibition of financial gain of the human body is a consequence of the respect of human dignity.

b) But other rights are of a different nature

- This concerns the specific protection granted by the ECBHR to the embryo, which is not considered as a person in the interpretation of the right to life proclaimed by the ECHR.

- In the same category, we should also mentioned the ECBHR provisions related to the interventions on the human genome and the non-selection of sex. They not only protect the individual but also future generations and the human species.

B. The implementation: The role of the margin of appreciation left to Member States(14)

a) The analysis of the case-law of the European Court of Human Rights(15) reveals that the Court leaves a

(13) Francesco Seatzu, *The Experience of the European Court of Human Rights with the European Convention on Human Rights and Biomedicine*, *Utrecht Journal of International and European Law*. 31(81), p.5–16.

(14) *The Inflation of the Margin of Appreciation by the European Court of Human Rights* Jan Kratochvíl**Netherlands Quarterly of Human Rights*, Vol. 29/3, 324–357, 2011 <http://www.corteidh.or.cr/tablas/r26992.pdf>

(15) European Court of Human Rights, *Research Report, Bioethics and*

wide margin of appreciation to States on all sensitive issues in the field of bioethics.

For example, with regard to medically assisted procreation, the Court ruled that, "since the use of *in vitro* fertilization has aroused and continues to give rise to delicate questions of a moral and ethical nature... and the issues raised in this case concern areas where there is not yet a clear commonality of opinion among the Member States, the Court considers that the respondent State should be given a wide margin of appreciation." (16). But the recognition of this margin of appreciation does not mean that the Court does not exercise a control on Member States.

b) The limits of the notion of margin of appreciation - The Court considers that "the choices made by the legislator in this regard are not outside [his] control. It is incumbent upon it to carefully examine the arguments that the legislator has taken into account in arriving at the solutions it has adopted and to determine whether a balance has been struck between the interests of the State and those of the individuals directly affected by the solutions in question" (17).

- In reality, this control depends on the variability that the concept of margin of appreciation takes because, on the one hand, the Court is sometimes guided by considerations of expediency and, on the other hand, the link between the scope of the margin and the existence of a common denominator is not always determinative. This is so in *B v. France* (18), where, citing strong legal differences between the laws of the Member States on transsexualism, the Court nevertheless considered that the violation alleged against France exceeded the acceptable threshold.

It thus appears that there is a real difficulty in being able to apprehend with some certainty the criteria laid down by the Court to evaluate the notion of the margin of appreciation and to monitor its application. And this

difficulty appears all the more important as one touches on the recognition of founding moral principles of a possible European public order.

Nevertheless, the fact that the ECBHR, although it does not have a judicial review mechanism, was inspired in its drafting by the text of the ECHR plays an important role in the dynamics of convergences which has developed since the entry into force of the Convention, and even before (19).

II. A DYNAMICS OF CONVERGENCES

What does it mean?

The 1970s-1980s saw the emergence in Europe of new biomedical techniques (organ transplantation, medically assisted procreation, genetic engineering) at the same time as profound changes in the doctor-patient relationship (recognition of patients' rights, increasing the role of human trials), resulting in different policy making approaches in European countries.

The wish to give Europe a dimension that takes into account what affects the citizens and the concern to avoid that, as for abortion, the liberal countries do not become a place of attractiveness for the populations of the more conservative countries were at the origin of a dynamic of convergences driven by the work of the Council of Europe in the field of biomedicine.

This dynamic is characterized by a double influence: it has created a normative pedagogy and has given support to extend the jurisprudence of the ECtHR.

A. A normative pedagogy

As the first instrument fully devoted to Bioethics and Human Rights, the ECBHR had significant effects on the development of such legislation both at international and domestic levels. We will concentrate here only on the international level.

1. *The influence of the ECBHR on the EU Charter of fundamental rights*

Adopted by the Lisbon Treaty of 17 Dec. 2007, the amended Charter (The first Charter was proclaimed in Nice in 2000) is since 1st December 2009 a binding text – it has the same legal value as the European Union treaties – concerned by the protection of Human

the case -law of the Court, Strasbourg, 2009, updated 2012 and 2016.
http://www.echr.coe.int/Documents/Research_report_bioethics_ENG.pdf
 See also: Jean-Paul Costa, The Oviedo Convention and the Case Law of the European Court of Human Rights, Strasbourg 3 Nov. 2009,
https://www.coe.int/t/dg3/healthbioethic/Activities/10th_Anniversary/Costa_en.pdf and the proceedings of the seminar "Bioethics and the case law of the court", the Council of Europe: Insight and Foresight, Strasbourg, 5 December 2016.
<https://www.coe.int/en/web/bioethics/-/international-case-law-in-bioethics-insight-and-foresight-2>

(16) ECtHR, case of X, Y and Z v. The United Kingdom (75/1995/581/667) 22 April 1997, § 44.

(17) ECtHR, Grand Chamber, case of S.H and others v. Austria (application no. 57813/00), 3 November 2011, § 97.

(18) ECtHR, case of B. v. France (application 13343/87), 25 March 1992.

(19) ECtHR, Grand Chamber, case of Evans v the United Kingdom (application 6339/05), 10 April 2007, § 40.
 Le Royaume-uni n'a en effet ni signé ni ratifié la Convention.



Rights(20). Although its scope is broader, the provisions related to bioethics found their roots in the ECBHR.

- Specifically, article 3.2 (right to the integrity of the person) is clearly derived from the ECBHR when it states that:

“In the fields of medicine and biology, the following must be respected in particular: the free and informed consent of the person concerned, according to the procedures laid down by law, the prohibition of eugenic practices, in particular those aiming at the selection of persons, the prohibition on making the human body and its parts as such a source of financial gain, the prohibition of the reproductive cloning of human beings”.

- Moreover, recognising this link with the EC Human Rights protection system, article 52 (3) has been written as such: “In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention”. It means that when interpreted on grounds of violation of the ECHR, the ECBHR provisions shall have the same meaning and scope within the EU system.

And the 2012 Action Plan on Human Rights and Democracy confirmed that the EU will continue its engagement with “the invaluable Human Rights work of the Council of Europe”(21).

2. The influence of the ECBHR on UNESCO Universal Declaration on Bioethics and Human Rights(22)

- This 2005 Declaration has also benefited of the work of the Council of Europe. It is in December 1992, during a joint meeting with the Council of Europe, that Federico Mayor, UNESCO Director General, announced the creation of the International Bioethics Committee which elaborated the Declaration.

- Although having a broader scope and no binding force, the UDBHR is also and even more than the ECBHR a pedagogical instrument because it serves as a model for many countries to guide them on writing legislation in the field of biomedicine and gives to new

set up national bioethics committees an encouragement for a strong public debate(23).

So, we may say that the ECBHR, as other Council of Europe Human Rights instruments, plays a positive role in the elaboration of other international texts. It is an incitement for international organisations to tackle with bioethics issues in respect of local context but suggesting them some possibilities for common legal harmonisation.

B. A support to extend the jurisprudence of the ECtHR

The development of case law has been made possible by a drafting of the ECBHR broadly inspired from the wording of the ECHR.

1. The filiation with the ECHR

To affirm the link between bio-law and human rights law is to be in historical, political and juridical continuity and to proclaim that what concerns the integrity of the body and the respect of the person is a matter of fundamental rights. It is also to put an end to the practise that only physicians could regulate the medical activity. But, the task is not easy because States have little enthusiasm to legislate on topics whose main actors are doctors and health institutions that have already developed standards from their professional practices. And when public health (organ transplants), law (parentage of children born as a result of medically assisted procreation techniques) or morality (surrogacy) place them in front of their responsibilities, they often prefer to treat only the question at stake(24). To overcome this reluctance was indeed one of the major reasons for which lawyers proposed to link the emerging bio-law with the Human Rights law. It was a choice to include it in a broader system of norms, constituted as a general theory with its principles, language and mechanisms and in capacity to create a dynamic of interpretation. This is why the filiation with Human Rights is obvious to anyone who reads the Oviedo Convention because he sees it as a mimicry of thought and writing.

(20) Sionaidh Douglas-Scott, The European Union and Human Rights after the Treaty of Lisbon, Human Rights Law Review, Volume 11, Issue 4, 1 December 2011, Pages 645–682.

(21) Council of the European Union, EU Strategic Framework and Action Plan on Human Rights and Democracy, 2012. https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf

(22) UNESCO, Universal Declaration on Bioethics and Human Rights, 19 October 2005, http://portal.unesco.org/en/ev.php-URL_ID=31058&URL_DO=DO_TOPIC&URL_SECTION=201.html

(23) Roberto Andorno, Global bioethics at UNESCO: in defence of the Universal Declaration on Bioethics and Human Rights, J. Med. Ethics, 2007 Mar; 33(3): 150–154.

(24) Marek Safjan, Bioethics – what is the law we need? Society, 7 Oct. 2009. <http://liberteworld.com/2009/10/07/bioethics-what-is-the-law-we-need/> Read also Cinzia Piciocchi, Bioethics and Law: Between Values and Rules, Indiana Journal of Global Legal Studies, Volume 12 | Issue 2, Summer 2005, <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?referer=https://www.google.fr/&httpsredir=1&article=1306&context=ijgls>

a) Mimicry of thought

- The obviousness is apparent from the reading of the title ("Convention for the Protection of Human Rights and Human Dignity with regard to the Applications of Biology and Medicine") and the Preamble to the Oviedo Convention, which refers to international human rights texts and expresses the resolution of the signatories "to take, in the field of the applications of biology and medicine, the measures necessary to guarantee the dignity of the human being and the fundamental rights and freedoms of the person"(25). If necessary, the content of the Convention is clear as to its purpose which is to "protect the dignity and identity of all human beings and guarantee everyone, without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the applications of biology and medicine"(art.1) and as to the primacy of the human being (art.2).

- This is, of course, a political choice since it was decided by the Committee of Ministers of the Council of Europe under the impetus of its Parliamentary Assembly(26). But this choice was not dictated by ideology but by pragmatism since it allowed to stick to general principles and to leave time for the formation of consensus on more concrete and difficult questions. This is the meaning of the notion of "framework convention".

b) Mimicry of wording

- As the Explanatory Report mentions, "the expression" Human Rights "refers to the principles enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, which guarantee their protection. Not only the philosophy of both texts, but also many ethical principles and legal concepts are common. Thus, the ECBHR develops some of the principles contained in the European Convention on Human Rights. For example, the notion of human being has been used because of its general character. The concept of dignity of the human being, also underlined, designates the essential value to maintain. It constitutes the foundation of most of the values defended by this Convention"(27).

- The main provisions also illustrate this orientation based on the implementation of the principles of human rights. An example of convergence in the drafting of

both texts is the right to information in medical matters provided for in article 10 of the Oviedo Convention. The same applies to the prohibition of discrimination on the grounds of genetic heritage(28).

This two-parent filiation, however, would have had only superficial effects without the role of and support by the ECtHR which developed its case law having in mind to give some effectivity to the ECBHR.

2. The ECtHR case law

a) An abundant jurisprudence

- In its updated research report (October 2016) "Bioethics and the case law of the court"(29), the Council of Europe mentioned nearly 120 examples of cases in which bioethics issues have been raised since 1993 and this tendency accelerates with time (2 cases in 2005 and 15 in 2015). We are quite far from the situation we analysed at the end of the 1980's in our own report for the Steering Committee on Human Rights elaborated in 1990 and published in 1994(30).

- The diversity of subjects is also very broad. It covers consent to medical examination or treatment, among others HIV and serious illnesses, reproductive rights (including prenatal diagnosis, abortion, medically assisted procreation and surrogacy, sterilization), trans gender issues, genetics (fingerprints, cellular and DNA samples), right to know one's biological identity, organ transplants, euthanasia and assisted suicide.

The cases cited raise important and often highly sensitive issues under Articles 2, 3, 5, 6 – and most often Article 8 – of the European Convention on Human Rights and 28 Member States have faced at least one case.

b) Cases where the Oviedo convention has been quoted

- The above mentioned report noted that 16 cases explicitly quoted the Oviedo convention. Early in May 2001, the Cyprus v. Turkey, no. 25781/94, judgment of 10 May 2001(31) did it but only in the partly dissenting opinion of Judge Marcus-Helmond who wrote that: "With the rapid evolution of biomedical techniques, new threats to human dignity may arise. The Convention on Human Rights and Biomedicine, signed at Oviedo in

(25) The European Convention on Biomedicine and Human Rights, Explanatory Report, Drafting of a convention, see note (3), paragraph 11-15.

(26) Idem, para.4-6.

(27) Ibidem, para.9.

(28) Para.7.

(29) Respectively para.63-70 and 74-77.

(30) Christian Byk, Medical and Biological Progress and the European Convention on Human Rights, Council of Europe 1994.

(31) ECtHR - Cyprus v. Turkey, application no. 25781/94, 10 May 2001.



1997, seeks to cover some of those dangers. However, to date only a limited number of States have signed it. Moreover, this Convention only affords the European Court of Human Rights consultative jurisdiction. In order this 'fourth generation of human rights' to be taken into account so that human dignity is protected against possible abuse by scientific progress, the Court could issue a reminder that under Article 2 of the European Convention on Human Rights the States undertook to protect everyone's right to life by law. The right to life may of course be interpreted in many different ways, but it undoubtedly includes the freedom to seek to enjoy the best physically available medical treatment.”(32)

- **The first decision of the court to mention the Oviedo Convention** is the *Glass v. the United Kingdom* judgement (no. 61827/00, § 58) of 9th March 2004(33) but it only referred it in its paragraph on “relevant international material”. It is only with its *Vo v. France* judgment that the Court used for the first time the Oviedo convention as a tool to interpret the ECHR, especially when the court wrote, regarding the right to life of an embryo, that “The Oviedo Convention on Human Rights and Biomedicine, indeed, is careful not to give a definition of the term “everyone”, and its explanatory report indicates that, in the absence of a unanimous agreement on the definition, the Member States decided to allow domestic law to provide clarification for the purposes of the application of that Convention (see paragraph 36 above). The same is true of the Additional Protocol on the Prohibition of Cloning Human Beings and the Additional Protocol on Biomedical Research, which do not define the concept of “human being”(34). Finally, references to the work of the Steering Committee on Bioethics of the Council of Europe are also mentioned in 8 decisions from 2004 till 2015.

(32) *Idem*, Partly dissenting opinion of judge Marcus-Helmons, paragraph 221 of the judgment.

(33) ECtHR, *Glass v. the United Kingdom*, application no. 61827/00, 9th March 2004, § 58.

(34) ECtHR, *Vo v. France*, application no. 53924/00, 8th July 2004, paragraph 84.

CONCLUSION

What can we deduce from this analysis regarding the application of the Oviedo Convention? Theoretically, according to article 32 of the ECHR, the Court can only examine violations of the ECHR itself but in practise since the 1990s, the ECtHR has acknowledged that public international law rules can be used as supportive evidence in order to extend the applicability of the ECHR's articles(35). To what extent this view may mean that the Court is applying the Oviedo convention? It seems that initially in several judgements, “the Court attempted to lay the foundation for the application of the Oviedo Convention as a source of obligations for States Parties to the Oviedo Convention itself”. However, in 2015, as F. Seatzu mentioned, “the ECtHR appears to have moved...to a less radical position in which the Oviedo Convention seems to be enforced exclusively in two cases. The first example is when the content of the provisions of the Oviedo Convention coincides with rights expressly protected by the ECHR, for instance in the case of the right to life. The second instance is that the Oviedo Convention may help to elucidate or to better understand the ECHR”.

Therefore, we can say that “the Oviedo Convention is used as an interpretative tool to specify and expand the scope of the provisions of ECHR, consistently with the unwritten rule that reference should be made to the source that provides the higher standards of protection of human health”(36).

Let me then conclude by quoting Stanislas Leczynski, the last king of Poland:

“Reason needs experience but experience is useless without Reason”(37). ■

(35) ECtHR, *Gustafsson v Sweden*, application no. 15573/89, 13 Oct. 1997.

(36) Francesco Seatzu and Simona Fanni, “The Experience of the European Court of Human Rights with the European Convention on Human Rights and Biomedicine” (2015) 31(81) *Utrecht Journal of International and European Law* 5.

(37) Stanislas Leszczynski, *Le philosophe bienfaisant* (1764).