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International protection and limits of the right to self-determination for the biotechnological strengthening of one's own person

In international human rights law there is no specific norm protecting the will of the individual to the spontaneous utilisation of bio-technologies to the strengthening of one's own person. Its relevance, though, may be assumed from the "open" structure that characterises the international instrument of human rights protection and that makes them variously permeable to the emersion of interests or values unexpressed in the text of each single treaty because however included within the purposes and principles which uphold them. As a paradigm, and not only for the characters of this seminar, the analysis shall be focused on the European Convention of Human Rights. This instrument have a prominent position within the general human rights landscape, especially for the role of the European Court of Human Rights with its work of autonomous interpretation – in a perspective evolving according to the new needs for protection. The capacity of the European Judge to "read" such social dynamics and to rationalise it within the normative framework of the Convention making it effective explains the extraordinary request of "access" to protection, updating its scope also overruling – if necessary – its precedent decisions.

To develop such an approach, the Court "dialogues" both with national legal systems and with other international normative sources. In both cases, the work of "fertilisation" of the conventional text takes place within the ECHR, without the incisive character of such evolution necessarily depending upon the convergence of the two "indicators". To formalise such a normative data, it may be useful to recall the determination of State members to integrate the conventional instrument with other instrument in which the human rights protection is expanded. A manifestation of this, precisely in the field of our interest, is the Oviedo Convention of 1997 on the protection of human rights and the dignity of human person in the field of biomedicine, which has been followed by three additional Protocols (1998, 2002, 2005). The result is an "Oviedo system" interacting under different aspects with ECHR channelling the meaning of its dispositions into an evolutionary key.

In such a framework of "principles" one should place the right of self-determination of the human being: such articulation is not the object of any conventional prescription, but it may be derived from a combined reading of articles 2 and 8 of ECHR, other than being punctually codified in the "Oviedo system". The protection of the right to self-determination implies the opportunity of choices that may not be unlimited inasmuch as the individual shall in any case measure with the overall framework of values protected by the "Oviedo system" and from the ECHR itself. There are, instead, wide margins of choice on how to "qualify" one's own life, or one's own personal identity. In this sense, it is fundamental that art. 8 of ECHR developed up to the point to protect the right to transsexualism, initially denied and then absorbed within the scope of protection. It remains, though, to establish whether the ECHR and the "Oviedo system" limit such a process of self-determination. The prohibition of human cloning is implied by the 1998 Protocol. Seemingly, from such a prohibition does not entail the prohibition for a researcher to realise a sensing automat, that is to say, a robot which is not a mere artefact but it itself the maker of its own will. This is a subject still alien to international law, also because it implies an unprecedented defining perspective, since such a creature may not certainly be included within the category of the human being, albeit having body tissues and cellular-composed organs coming of human origin or modelled on the human nature. Lacking specific prohibition in the ECHR, States are free in this regard, although such freedom is conditioned by their obligations to protect the human person and his integrity, as we will see later. Back to the perspective typical of art. 8 of ECHR, there is no relevant difference between self-determination of the individual to modify his sex for reasons which may not properly be defined as pathologic and an analogous form of self-determination aiming at creating irreversible

conditions of strengthening of one's own person through bio-technological help. In both cases, the support of technology upholds simple individual choices not supported by considerations of pathologic necessity. Thus, in the abstract, the principle of art. 8 is capable to include also the second type of choices.

The problem is to assess the compliance of such a possible expansion of the sphere of self-determination of private life with the overall system of value underlying the ECHR safeguards. The limits posed by the ECHR mainly concern, so far, the right of the individual to invoke his own right to private life authorising or requesting bio-technological manipulations having an irreversible impact on DNA with reflections which may potentially concern the whole human race. In such a case, the sphere of self-determination of the interested person, fully informed on the operation and its consequences, which makes him aware of the choice to take (art. 5 Oviedo), shall be respected. More generally, the bio-medical interventions shall be respectful of the human integrity (art. 15 Oviedo, art. 1 Protocol 2002), of the general interest of human race (art. 2 Oviedo, art. 3 Protocol 2005) also to protect the rights of future generations (Preamble Oviedo). These proclamations uphold a precautionary principle aimed at preserving the genetic identity and integrity of the human being in an inter-generational perspective. The balancing between such principle and the individual expectations to the affirmation of one's own personality (autonomy principle) should be shaped in the sense that the former cedes before the latter only when the inter-generational dimension is attenuated or absent. Such a principle does not preclude one and all research, experimentation and the practical application of bio-technological innovations on the human body, but mandates a punctual and constant verification so to avoid the exposition – based on actual knowledge – of the human race itself to the risk of unpredictable harmful consequences. But the "Oviedo system" represents also an almost physiological development of principles underlying the ECHR and, in particular, its art. 8. Under such a perspective, the conventional instruments pursue a higher protection of human dignity within the same self-determination process in the bio-technological field and therefore preclude manipulation authorised by the person himself when they may radically alter his human connotations.