The Convention: a reference at international level

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The Council of Europe’s Convention on Human Rights and Biomedicine was the first supranational Treaty of its type. The Convention differs significantly from other pre-existing international declarations which had addressed a relatively narrow range of issues that concern medicine, science, human rights and ethics – such as the Nuremberg Code covering human experimentation and the World Medical Association’s Declaration of Helsinki which deals with research using human subjects. Rather than focusing on discrete areas, the Convention’s much broader aim was to provide a template for the ethical conduct of healthcare delivery and scientific progress including, but not limited to, research on human subjects, firmly rooted in the concept of human dignity and building on the traditions of human rights. Indeed, the Convention was influential in the considerations of the International Bioethics Committee of UNESCO when drafting its own Universal Declaration on Bioethics and Human Rights. It has been described as being ‘one of the most important bioethics texts from the point of view of international policy and law….’, and the additional protocols published subsequently flesh out the central messages of various parts of the Convention.

The urgency with which international bodies have address issues in biomedicine and bio-law over the last 20 years or so is a reflection of the rapidly expanding ethical – and legal – issues raised by medical practice and scientific advance, as well as a growing awareness of the need for some universalisable underpinning principles which can serve to guide individuals and states. As Andorno has said, ‘[a]s science becomes increasingly globalized, a coherent and effective response to the new challenges raised by science should also be global.’

However, generating such a response and gathering widespread support for it is no easy task. It is inevitable that the states involved in agreeing on any ‘coherent and effective response’ will have different values and perhaps even divergent interests. Like all such Conventions, therefore, the Council of Europe’s Convention ‘is….the result of a series of ‘political’ as well as ethical

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compromises resulting from long and difficult discussions and negotiations.\footnote{Hottois, \textit{loc cit}, at p. 144} It might be thought that basing its approach on human rights and human rights law would facilitate the Convention’s success, since there is – in theory at least – some consensus over certain fundamental principles that emerge from human rights analysis. We can all agree on the value, for example, of the right to life. However, the difficulty of agreeing appropriate norms even against the backdrop of human rights should not be underestimated, and like other international instruments before it, the Biomedicine Convention has been seen by some as falling short of its aspirations.\footnote{See, for example, Mori, M., Neri, D., ‘Perils and Deficiencies of the European Convention on Human Rights and Biomedicine’, 	extit{Journal of Medicine and Philosophy} 2001, Vol. 26, No. 3, 323-333} Perhaps this is inevitable for four main reasons that I will briefly explore.

First, is the language in which the instrument is couched. For example, the Convention places the concept of ‘human dignity’ at the centre of its concerns. But this is a notoriously slippery concept that arguably offers little clarification as to the scope of the Convention’s remit.\footnote{for discussion, see Cutas, D-E, ‘Looking for the Meaning of Dignity in the Bioethics Convention and the Cloning Protocol’, 	extit{Health Care Analysis} Vol. 13, No. 4, December 2005, 303-313} It has, for example, been said that:

“Dignity” is not a magic word that can simply be invoked to solve bioethical dilemmas. We should explain the reasons for considering that a given practice is in accordance or not with the principle of human dignity.\footnote{Andorno, R., ‘Biomedicine and international human rights law: in search of a global consensus’, 	extit{Bulletin of the World Health Organization} 2002, 80 (12), 959-963, at p. 960}

This explanation, some argue is lacking in the Convention and the deliberations on it leaving central questions unexplored. On the one hand, it has been said that ‘[t]he human being the convention is designed to protect remains undefined, which displays the concurrent contemporary quests for defining a human being through its rationality, its mere being or the quality of life that it enjoys.’\footnote{Reuter, L., ‘Human is What is Born of a Human: Personhood, Rationality, and an European Convention’, 	extit{Journal of Medicine and Philosophy}, 2000, Vol. 25, No. 2, 181 –194, at p. 183} While this criticism might legitimately be laid at the door of the Convention, it must be said that article 18 does at least attempt to explain the entities that are covered, and - unusually - seems to extend the concept of human dignity to the embryo of the human species, for example by prohibiting the deliberate creation of embryos for research. This effort at clarification is said to have led the United Kingdom to decline to ratify the Convention as its national law permits this and would therefore be incompatible with the Convention. On the other hand, however, just what human dignity means is left relatively unexplored. Of course, it may be that we all intuitively understand what is meant by human dignity, but the fact is that we may also disagree both on what it means and who or what it should cover, as the example of the human embryos shows only too clearly. While the respect for the human embryo that is explicit in article 18 may resonate in
many jurisdictions, the Council of Europe’s own Court of Human Rights has declined to attribute status to it, at least when its speculative interests come into conflict with the rights of existing persons.\(^{12}\)

Second, it has been argued that the Convention ‘does not adequately distinguish between fundamental rights and merely social ‘rights’, or between what is obligatory for any rights-based democracy on the one hand and what is considered additionally desirable within its more civilized manifestations on the other.’\(^{13}\) In its efforts to be both general (such as its utilisation of the concept of human dignity) and specific (prohibition on the creation of embryos for research) the Convention mixes fundamental rights with those which are more culturally determined and seems to give them both the same level of authority, risking the elevation of the cultural to the same level as the fundamental.

Third, it has been suggested that the Convention relies too heavily on the precautionary principle or fear of the development of a so-called ‘slippery slope’. Thus, it could be said that the underpinning understanding of the Convention is of the advancement of science and biomedicine as a potential threat rather than a likely benefit. While this may be a view shared by many members of the public, and has a certain historical resonance, it can also result in consequences that have been described as ‘opposite to ethics’.\(^{14}\) One example of this has been said to be the tightening of controls on research and development in human research which, according to one author ‘may delay or prevent discoveries or inventions which could help to cure or alleviate suffering persons.’\(^{15}\) If so, then this illustrates a clear tension between the interests of individuals and societies; a tension that the Convention might realistically be expected to resolve (or at least clarify) rather than one that it seems to create.

Finally, the Convention is (in theory, if not in practice) unable to set universal standards – which was the aim of the UNESCO Declaration – because by definition it is Euro-centric. While this may reduce the need to have concern for cultural diversity, it does not obviate it. It is necessary only to look at the way in which different member states of the Council of Europe deal with matters of reproductive liberty or end of life decision-making to see just how diverse this apparently homogenous group of nations (and groups within nations) actually is. It has been said that the Convention is, therefore, essentially ambiguous – ‘it is universalistic but, in the first place, European.’\(^{16}\)

In fact, as I have suggested it is not even truly European in scope, as the member states of the Council of Europe may have very divergent views as to some (or many) of its tenets. The level of agreement that was achieved

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\(^{12}\) see, for example, the case of *Vo v France* (2005) 10 EHRR 12


\(^{14}\) Hottois, *loc cit*, at p. 144

\(^{15}\) *Id*

\(^{16}\) Hottois, *loc cit*, at p. 139.
arguably, permitted an important outcome – the Convention itself – but not necessarily the important follow-up – signature and ratification by all member states. From the point of view of the Council of Europe and the citizens of its member states, this is important, even if, as has been suggested, a number of states which have not ratified the Convention nonetheless already have standards in their own law that effectively match those of the Convention. Unlike some other international declarations, the Convention, once signed and ratified, becomes a legal instrument with much more force than many other international agreements, thereby permitting individual challenge to state legislation.

Conclusion

What has gone before might appear a bit negative, but in fact it is the kind of criticism that could be levelled at virtually any international or supranational treaty or convention. The truth may be that too much is expected of this and other conventions. It is clear that setting ‘common standards in the biomedical field’ is by no means easy. Although some believe that it is nonetheless possible because ‘some basic principles transcend cultural diversity…’ identifying and agreeing upon just what these principles are is another matter entirely.

But this is both to be expected and difficult to avoid. In producing the first Convention of its type with a focus on bioethics and biomedicine, the Council of Europe is to be congratulated. We should bear in mind that the purpose of this Convention is not to solve detailed ethical problems, but rather to promulgate principles upon which most, if not all, European member states can agree. Where it has flaws, I would argue, they lie in two main areas. First, it is not only communitarian philosophers who struggle with the concept of human dignity; even if we all feel that we could somehow attempt to define it, it is likely that we would come up with different explanations. Perhaps the way forward would be to ditch this concept in favour of a reference to agreed international human rights. Second, those articles in the main Convention that drift from the general to the more specific are potentially problematic. Similar problems have arisen at national level also. For example, the original United Kingdom legislation that addressed assisted reproduction – the Human Fertilisation and Embryology Act 1990 – has been broadly commended for its essentially non-directive but principle-based approach to state regulation in this area. Where the statute was essentially centred on general principles it has arguably been highly effective. However, those sections that were more specific (for example that which outlawed human cloning by a specific method) raised issues of interpretation that subsequently required legal action

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19 id
In other words, the best legal or quasi-legal instruments might well, in this area at least, best avoid the temptation ‘to provide a precise and definitive answer to the most intricate questions posed by medicine…’.

Whether or not it is open to criticism, the Council of Europe’s Convention is widely used and debated. Even in the academic world, the Convention is routinely referred to, critiqued and analysed to within an inch of its life. The fact that it is open to critique or even criticism is arguably a sign not that it has failed, but rather that it is a worthy and important instrument. None of the criticisms levelled at it here or elsewhere is fatal to the values enshrined in the Convention nor to its value and influence, whether or not it has direct force in all Council of Europe member states.

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20 R (on the application of Quintavalle) v Secretary of State for Health [2003] 2 WLR 692.