The right to physical self-determination [El derecho a la física autodeterminación]

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1. Physical self-determination and fourth generation rights

This paper aims to define the new right to physical self-determination and to briefly explain its scope and characteristics as a *fourth generation* right, both with respect to the Spanish legal system, as well as in international terms.

1.1. Rights' generations theory

Initially, the main problem to surface as regards the relationship between biotechnology and basic rights arose from the lack of a regulatory framework suited to regulating biotechnological innovations. Existing regulations provided partial, and, in the majority of the cases, unsatisfactory solutions to the new problems and new demands of a society that found itself surprised by a veritable avalanche of new technological advances in general, and biotechnological innovations in particular. At present, however, numerous laws are proving to be more receptive to these new problems. Indeed, some Constitutions have incorporated provisions concerning certain aspects of Biomedicine and/or Biotechnology, as is the case with the constitutions of Switzerland[1], Portugal[2], Hungary[3], Lithuania[4], Estonia[5] and Poland[6].

Writers such as Norberto Bobbio[7], Antonio Pérez Luño[8], Martínez de Pisón[9] and, specifically from the perspective of Constitutional Law, Remedio Sánchez Ferríz, have linked the need to draw up new legal provisions for aspects arising from the new technologies to the theory of *rights' generations*. The impact of technological advances in general, and biotechnological progress in particular, is currently so intense that the appearance of new rights can be defended as a direct result of these processes and of the effect they are having on human lives. If it has been possible to discuss the rights' generations theory by a sector of the doctrine and if it has, quite often, been passed over as a valid research instrument, the need to come up with a legal response to potentially disturbing new situations concerning the free exercise of basic rights, and the need to provide legally for new situations, means that this theory has become important, both theoretically, as well as practically, in contemporary societies.

At present, there is certain agreement as to the list of rights that are proper to a democratic society, though, it is also true that this catalogue of rights and freedoms has been formed up by way of the successive incorporation of rights; some of these rights came about as the result of popular demand, while others, are the fruit of the action of specific groups, or a specific élite. The historical appearance of rights endorses the theory of *rights' generations*[10] that enables the classification of these sequentially and in relation to a particular political, social and economic context, and

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lastly, with *Rule of Law* models. Each Rule of Law model identifies with a generation of rights, which it nourished ideologically, and which, in some cases, had a lot to do with overcoming the respective model of state. Consequently, in some way, the crisis of the *Liberal state* was the crisis of the system of rights recognised by same, while the voices of dissent raised against the current *Social state* are not a long way off from the protest concerning the content and efficacy of economic and social rights that are identified with the latter model of state.

Even so, the problem of articulating the theory of rights' generations lies in the lack of doctrinal agreement on two issues: a) the number of currently identifiable generations and, b) the content of each one of them. A widely accepted classification would distinguish *three generations of rights*[11]; the *first generation* would correspond to liberalism and would cover classic individual, civil and political rights; the *second generation* would include economic, social and cultural rights, while the *third generation* would be made up of the so-called solidarity rights.

Some time ago now, **R. Sánchez Ferriz**[12] qualified this classification by understanding the liberal state, liberalism, as really covering the first two generations, given that the rights that had been recognised before the burgeoning of the social state could not be included, without qualifications, in a single – and first – generation of rights. According to this thesis – to which I adhere and which I follow in this paper – the first two generations coincide, therefore, with the liberal state, while the third generation would cover the economic and social rights proper to the social state.

As to the existence of a fourth generation – something that I myself support unreservedly – there is no agreement, at least as to the possible contents of same. I harbour no doubts whatsoever as to the existence of a *fourth generation* of rights and believe, moreover, that it is now possible to come up with a specific content for it, though aforesaid content is not a closed issue given that this fourth generation of rights is currently open to the ongoing dynamics of the technological context in which we find ourselves[13]. The key difference between this *fourth generation* and the three preceding ones lies in the fact that this latest generation is not a reaction to a change of state structures which, as is the case with the other three, gave rise to a substantial change to the model of state or, at least, in the case of appearance of the second generation of rights, to a significant change to the principles that governed the liberal state. The model that upholds this *fourth generation* of rights does not substantially differ from the social state model that has become increasingly consolidated since the second half of the last century and which, with certain nuances, we can deem to be proper to a particular group of countries. We have, therefore, a new generation of rights, though not a new model of state, nor even a significant transformation of the principles that have served to form such a state model to date.

The *fourth generation* of rights is, on the one hand, a consequence of technological transformations, of new scientific knowledge and of its application to several areas of man's life. If the first three generations are the product of political evolution, the *fourth generation* of rights is the product of a scientific and technical evolution that has seen the same political values, principles and parameters survive in the organisation of the state. The new technological context that affects millions of human beings demands a reconsideration of the scope of those rights that have already been recognised and the definition of others *ex-novo* that respond to the needs of this new society, or what has been referred to as *the political demands of technoscience*[14].

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The rights' generations theory can also be identified in the area of International Law with a single, albeit important, nuance with respect to the *third generation of rights* – economic, social and welfare rights – the recognition and compulsory nature of which, as regards the state, is clearly less than that which has been consolidated for other groups of rights. All of the foregoing can be easily explained, given that the obligations arising from economic and welfare rights extraordinarily bind and commit national budgetary policies, which is why states are quite reluctant to subject themselves to international commitments. Private individual rights, and those associated with freedom, can be assumed by states with less budgetary impact, which has led to a greater, proportionate development of these within the scope of national actions[15].

As far as the recognition of fourth generation biotechnological rights is concerned, not only have these been acknowledged internationally, rather many of the first measures taken had their origin in international organisations and actions that have ended up coming together in an increasingly wider set of laws that have been made on a national scale. Globalisation and the integration of certain countries in different international organisations (United Nations, UNESCO, Council of Europe, European Union…) are contributing to the *universalisation* of these new rights[16].

1.2. Fourth generation biotechnological rights

Even though the existence of a fourth generation in rights has received increasingly widespread, albeit lukewarm, acceptance in recent years, agreement on determining its content has been fiercely contested. Suggestions range from those who see the fourth generation of rights as the generation of

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universal solidarity[17] to those who identify it exclusively with the *Internet* and its implications[18].

In my opinion, the *fourth generation of rights* is made up of *new* rights and by *redefined* rights, that is to say, by rights that have already been stated and provided for in law, but which have been modified with respect to their *essential content* as a result of the impact of technological advances. The content of this fourth generation of rights is added to the standard rights that are common to many countries, and in the case of the *redefined* rights, they modify the essential content that had become a specific right. These *new* fourth generation rights, and the *redefined* or *re-interpreted* ones can be grouped in three big blocks:

a) rights concerning the protection of the ecosystem and human heritage[19];
b) rights arising from new information and communications technologies, and
c) rights related to a new legal statute concerning human life.

All fourth generation rights are characterised by their relation to new technologies[20] in general, and biotechnologies in particular. Only the last of the three groups of rights[21] - those related to a new *legal statute concerning human life* – will be dealt with in this paper. Moreover, we will focus our attention exclusively on a particular right: the right to *physical self-determination*. Notwithstanding this necessary specificity, below we provide a list of all of the rights that go to make up this group:

1. The right to dignity
2. The right to life
   2.1. The abolition of the death penalty
   2.2. The beginning of human life: the pre-embryo, the embryo and the foetus
   2.3. The right not to be born
3. The right to physical self-determination[22]
   3.1. The right to human reproduction
   3.2. The right to sexual self-determination
   3.3. The right to self-determination with respect to medical treatments
      2.3.1. The right to medical treatments
      2.3.3. The right of choice between different medical treatments
      2.3.4. The right to refuse medical treatments
   3.4. The right to self-determination with respect to the participation in research and experimental processes
   3.5. The right to active and passive self-determination with respect to the donation of organs, tissues, fluids, cells or other human components
   3.6. The right to active and passive self-determination with respect to cloning
   3.7. The right to *consent* (informed consent)
   3.8. The right to manage one's own death:
      3.8.1. Assisted suicide
      3.8.2. Active and passive euthanasia
      3.8.3. Orthothanasia
      3.8.4. Dysthanasia
      3.8.5. Anticipated will
4. The right to physical integrity
5. The right to genetic identity
6. The right to psychological and moral integrity
7. The right to informed self-determination
   7.1. The right to information concerning physical, psychological and health conditions
   7.2. The right to genetic information
   7.3. The right to information prior to any operation and diagnostic, therapeutic, research or experimental action
   7.4. The right to information:
      7.4.1. True
      7.4.2. Complete
      7.4.3. Understandable
      7.4.4. Verifiable
      7.4.5 Responsible
   7.5. The right to self-determination and

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2. The right to physical self-determination

As I have pointed out above, the aim of this paper is to analyse only one of the new fourth generation rights: the *right to physical self-determination*. Nonetheless, even confining ourselves to this one alone it would be impossible to develop, in this short space, each and every one of the elements and characteristics of this new right in depth. Consequently, we will present a general overview of this right by way of indicating its most important characteristics.

Neither the Spanish Constitution, nor any other European constitutional text says anything concerning this right, though we can find references in many of them, and in the constitutions of other continents, to freedom and human rights. Likewise, international texts dealing with the protection of rights and liberties may refer, with a different implication, to freedom[23] though none of them form a scope, *agere licere*, as might constitute the right to physical self-determination in the sense that I wish to defend it in this paper. On the other hand, the right to freedom that has gradually been recognised internationally reveals itself, in general, to possess the same triple significance as that contained in European constitutionalism: firstly, freedom is recognised in the abstract (as a principle or basic value, quite often linked to human dignity); secondly, freedom is established as a guarantee against detentions and internments in non-voluntary hospital centres, thus recognising the right not to be deprived of physical freedom and finally, freedom is established by way of the recognition of particular *rights* (freedom of expression, religious freedom, freedom of assembly and association…)[24].

No doubt it is not an easy task to find a single and uniform constitutional basis for the *right to physical self-determination* in all countries due to the differences that prevail in different legal systems. Recognition of freedom is a common feature of current constitutionalism. Even though its interpretation and scope differs from one country to another, in my opinion, it constitutes the soundest basis for the new right to physical self-determination. Notwithstanding, the direct foundation with which freedom endows the right to physical self-determination, recognition of the right to physical integrity, of the right to personal dignity[25] and of the right to privacy provided for in large number of constitutions and international treaties, serve to guarantee a sound legal foundation for the right to physical self-determination, whether this be in general terms, or more specifically for some of the rights that form part of same.

As I have mentioned above, the right to physical self-determination is primarily founded on the constitutional and/or supranational recognition of personal freedom, which, in the Spanish case, is regarded as a basic right as provided for in Article 17.1, notwithstanding the multiple references to freedom as a value and as a principle, which are also to be found in the Constitution[26]. The foregoing, nonetheless, does not affect the fact that some of the specific and individualised rights that go to make up the *right to physical self-determination*[27] can also be grounded on other basic rights.

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In 1994 I had an opportunity to defend the existence of the *right to physical self-determination* with respect to one of its specific manifestations: the right to human reproduction[28]. By way of that work I defended the argument that human reproduction represents a field of individual freedom that is open to legal protection and that, in Spain, it has a constitutional basis in the personal freedom provided for by the 1978 Constitution, as established in Section 1 of Article 17 of same[29]. The right to physical self-determination, which I am now defending shares the same constitutional basis, given that the right to reproduction is nothing more than one of the areas of freedom covered by the right to physical self-determination.

The *right to physical self-determination* (RPS) covers a group of powers, of decision-making rights, that are protected by law, which enable the person to decide, choose and select what to do, or what not to do, with respect to all of those questions and situations that affect his or her physical reality, his or her bodily substratum. Self-determination is the power of each person to decide about his or her life, his or her values and principles, and is further the power of each individual to control his or her destiny. The struggle for freedom forms the basis of all social organisation. Indeed, the theory of the Rule of Law itself and, what is more, that of the democratic Constitutional State is founded on a single aim: ensuring individual freedom[30]. The safeguarding of this freedom has been articulated in current constitutionalism by virtue of the recognition of specific "freedoms", concrete rights of varying scope and nature to the extent of forming a group of rights and freedoms that aspire to protecting the individual in the extremely diverse, vital and social spaces in which he or she moves.

In the same way that laws have successively incorporated different rights in order to safeguard particular areas of individual freedom (freedom of assembly, educational and religious freedom,...), the *right to physical self-determination* also enables the guaranteeing of personal freedom, of the autonomy of the individual, with respect to all of those acts in which the physical reality of a person may be compromised. Recognition of this right enables the proper ordering of relations of the individual with the authorities, but also regulates the relations between the individual and other people, institutions and groups with which he or she must of necessity deal with respect to issues that may affect the options available as regards his or her physical life, or health. This right endows the subject with the power of decision over himself or herself, which not only falls into line with the individual's right to freedom, but also with the demands of dignity and the right to the free development of his or her personality, which form part of the *standard* laws of numerous countries. That all of the foregoing must be exercised in a context of respect for the rights of others, and by observing democratic values and principles, further serves to guarantee both the rights and freedoms in themselves. On the other hand, it is time-honoured doctrine in the field of basic human rights that all of these freedoms have limits that enable the compatibility of same with other rights and constitutionally protected principles. Indeed, the new *right to physical self-determination* must also be interpreted in the same way.

The importance of finding a constitutional foundation for the right to physical self-determination lies in the attribution of specific, stronger guarantees to constitutional rights with respect to others that could be provided for by laws of less hierarchical ranking. Such is the case with the Spanish Constitution, in which the rights covered in Section 1, Chapter II Title I (Article 15 to Article 29) are fully safeguarded, including the appeal for legal protection to the Constitutional Court,

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a guarantee that reflects the right to equality established in Article 14[31]. Nevertheless, recognition of the *right to physical self-determination* can encounter legal grounds by virtue of the principles inherent to each legal system. The references made below to basic rights – preferably to the Spanish legal system – do not preclude, as I have already pointed out, that other legal systems employ different arguments to recognise the same right.

Spanish doctrine has not greatly explored the possibility that the personal freedom established in the text of the Spanish Constitution could protect areas of personal decision as could be the case of the right to reproduction, or decisions as to the end of a person's life, though, there is no lack of people who are gradually beginning to defend the need that the individual have recognised an autonomy that will enable him or her to decide on his or her own biological reality. The most widespread interpretation of the recognition of personal freedom has been progressively associating this right with the prohibition to illegally arrest persons, and therefore, with the rights of the detainee, though it has also been applied to cases of the involuntary internment of individuals in health centres and hospitals. On the other hand, some recent sentences have revealed the reluctance of the Spanish Constitutional Court to accept the possibility that the essential content of the basic right to freedom pursuant to Article 17.1 of the Constitution covered any personal choice of the individual, and went so far as to deny that aforementioned Article 17.1 protects a sphere of personal self-determination of the individual[32].

Nevertheless, in addition to previous decisions we find an important group of sentences in which the High Court has recognised the existence of a sphere of personal self-determination which apply to the choices and interests of the individual and which serve to confirm the existence of a sphere of freedom of decision which does not coincide with the spheres of liberty established as specific constitutional *freedoms* (religious freedom, freedom of expression, etc.). Consequently, there is no unequivocal constitutional doctrine on this point, but rather a different Constitutional Court interpretation in accordance with the cases that have been submitted for its consideration and attending to the specific circumstances of each particular case. The foregoing enables us to defend the thesis of the constitutional basis for the *right to physical self-determination* in the Spanish legal system and, on the basis of aforesaid theory, its possible development in the legal systems of other countries.

As far as the constitutional doctrine is concerned that admits the endorsement of the right to physical self-determination, quite early on, in the SCC Sentence 53/1985 of 11th April, which settled the appeal of unconstitutionality against the decriminalisation of certain abortion situations, the Constitutional Court found that there is a *right to self-determination*, "… that is to say, the power of *responsible and conscious self-determination*", which "affects the right to the free development of the personality" established in Article 10.1 of the Spanish Constitution. In SCC Sentence 98/1986 of 10th July concerning the rights of the inmate in penal constitutions, the Constitutional Court held that "the loss of liberty does not impede, or hinder, the *self-determination of licit behaviour* and that this cannot be neglected in the light of the protection of freedom afforded by the Constitution", thus, the inmate can continue to exercise his or her freedom in all those spheres that lie beyond the limitations imposed by the sentence being served.

Similarly, on occasion of the SCC Sentence 341/1993 of 18th November, which settled the unconstitutionality appeal submitted against the Citizen Security Law, the dissenting vote of the Judge Carlos de la Vega Benayas affirms

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that the Spanish Constitution, as of the first paragraph of its Preamble, wishes to highlight the fact that freedom, understood as "the general freedom of action, or the general self-determining freedom of the individual" represents a "supreme value" of our legal system (Art. 1.1 of the Spanish Constitution) and that the basic right recognised in Article 17.1 of the Spanish Constitution, entails the right to *physical freedom*, which guarantees all of us "the absence of… arbitrarily, or illegally adopted disturbances" which "threaten the freedom of any person to organise, at any moment in time, within national boundaries, his or her individual and social life in accordance with his or her choices and convictions".

The High Court has also linked the existence of a sphere of self-determination to specific rights, thus, for example, with respect to the right to personal privacy (among others we may refer to SCC Sentences 143/1994 of 9th May and 99/2004 of 27th May), or with respect to religious freedom. As far as the latter issue is concerned, the Constitutional Court (by virtue of SCC Sentences 177/1996 of 11th November, 216/1999 of 29th November, 154/2002 of 18th July and 101/2004 of 2nd June) has reiterated the fact that religious and ideological freedom contain both inner and outer aspects. While the inner sphere of religious freedom guarantees an *intellectual self-determining* space, bound up with individual personality and human dignity, in the outer sphere the existence of another area of freedom, of *agere licere*, can also be recognised, which empowers the person to act in accordance with his or her convictions and to uphold them before third parties "with complete immunity from coercion either by the State, or by other social groups" (SCC Sentence 46/2001 of 15th February, and in the same sense, SCC Sentences 24/1982 of 13th May and 166/1996 of 28th October).

Perhaps, more clearly in SCC Sentence 154/2002, the Constitutional Court confirmed the existence of a sphere of physical self-determination on settling an appeal for legal protection brought by the parents of a minor, who had been found criminally guilty for the death of their child by them refusing permission for the minor, and further, failing to convince him, to receive a blood transfusion, on the grounds that the whole family, including the minor, were *Jehovah's Witnesses*[33]. The Constitutional Court clearly confirms the right to physical self-determination, even regardless of the exercise of religious freedom. It established that the decision of the minor was taken in the exercise of a "right to self-determination the object of which is – stated the Court – the bodily substratum – as distinct from the right to health, or to life – and which translates, within the constitutional framework as a basic right to physical integrity (Article 15 of the Spanish Constitution). Beyond the religious reasons behind the child's decision, and notwithstanding the particular significance of these (to the extent they are grounded in a public freedom recognised by the Constitution), what is of special interest is – as the Court continues - "the fact that, on the child opposing the third-party interference on his body, he was exercising his right to self-determination" with respect to his physical reality. In this case, the Spanish Constitutional Court grounded the right to physical self-determination on the right to *physical integrity* recognised in Article 15.1 of the Constitution.

Likewise, in SCC Sentence 215/1994 of 14th July, concerning the sterilisation of disabled persons suffering from severe mental handicap, the Constitutional Court considered whether or not the right to self-determination of disabled people that is recognised in Article 428 of the Spanish Penal Code[34], could be replaced by the express will of the legal representative of a disabled person with respect to his or her sterilisation. The Constitutional Court held in this case that the plea made by the legal representative in this

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case was a constitutionally valid measure. The most relevant aspect of this sentence is the recognition by the Constitutional Court of the existence of a *right of physical self-determination* of an individual to decide on actions concerning his or her body, which in the case of disabled persons, can be taken by their legal representatives.

Consequently, in different circumstances, the Constitutional Tribunal has progressively recognised spheres of free will, of self-determination, in relation to freedom, the right to physical integrity, the dignity of the person and other specific basic rights and freedoms, thus confirming a *right to physical self-determination* which has gradually carved out its place in the Spanish legal system, as well as in those of other nations, and in international law.

Moreover, as we have indicated above, the doctrine is becoming increasingly more receptive to recognising the need for personal self-determination to acquire a clear legal definition. In this sense, and in relation to the so-called right to death, it has been pointed out[35] that its legal regulation – even without it being considered to be a constitutional right – would not infringe upon the right to life recognised in Article 15 of the Spanish Constitution. Furthermore, it could, in certain circumstances, find a basis in the right to physical integrity that is recognised in the same constitutional provision or, more correctly in my opinion, in the recognition of the principle of personal, or individual[36], autonomy that enables the subject, as we have indicated above, to take decisions concerning his or her physical reality. The right to *physical self-determination* widens the material scope of this recognition of personal autonomy and establishes a sphere of freedom of decision that stretches over numerous areas, as has been indicated on dealing with the content of the right to physical self-determination that is integrated into a *new legal statute on human life*, which in turn, constitutes one of the groups of the fourth generation of rights to which we have referred above.

From what we have been saying it can be seen that the importance of defining the constitutional grounds of the right to physical self-determination lies in, on the one hand, managing to give it correct constitutional form, and on the other hand, as a result of the former, in making it open to protection by the legal system, as is the case with the other individual rights. Only in that way can we make some progress in guaranteeing personal freedom, something which must not represent – as on occasion is argued in order to restrict the self-determination of the person – a lack of solidarity, or an absence of responsibility, in the same way that the free exercise of the other constitutional rights does not tend towards arbitrariness and abuse and, in those cases where this might happen, the democratic rule of law needs to decide upon the relevant measures of legal correction.

On the other hand, International Human Rights Law and documents about Biomedicine and Bioethics have contributed to the consolidation of a *body of work* on personal freedom and the right to physical integrity in relation to biomedical actions, though it is also the case that the form adopted in the international texts is exclusively restricted to the recognition of the autonomy of the individual -frequently, the patient – to take or participate in a specific decision concerning an issue which directly affects him or her. There are a host of conceptual differences between this partial autonomy, restricted to the particular case which, in practice, has become "a duty to be consulted" and which is formally articulated by way of the concept of *informed consent*, and the group of powers that is covered by the *right to physical self-determination* as an individual public right. All rights of this nature cover a sphere of liberty,

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of agere licere, in favour of the individual which allows him or her not only to accept, or reject, a particular situation, but also affords the individual the power to freely *shape that sphere of autonomy*, without any interference from the state or from third parties, and with no more restrictions than those that may be put down to other individual rights, or which derive from the constitutional and legal system, or from international law. Within this sphere, the individual can do, or not do, adopt values, defend ideologies and religious creeds and act in accordance with same, and above all, he or she can decide on his or her interests and goods without any need to give reasons for such decisions, the only limits being those that correspond to the other basic rights, or those rights, that may exceptionally restrict the exercise of this right.

Recognition of the *duty to be consulted* and, where appropriate, the giving of consent, undoubtedly form part of the *right to physical self-determination*, though it would not be right to consider that the former exhausts the essential content of the right to physical self-determination. As we have propounded above, on listing the contents of fourth generation rights, the right to physical self-determination covers a range of powers that affect important spheres of individual decision, only one of which is concerned with informed consent. As regards the giving proper legal form to the right to physical self-determination, to a large extent, this depends on the freedom of the person to decide being real and effective in these spheres.

As we have stated, some aspects contained in the right to physical self-determination have been, and are currently being, addressed both by particular countries, as well as, internationally. In this sense, in addition to the quite respectable number of decisions, reports and documents made and drawn up by the Council of Europe, we must add the milestone reached with the approval of the *Convention on Human Rights and Biomedicine*, signed in Oviedo in 1997[37]. The Convention recognises the right to physical self-determination of all those whose powers are limited in no way (special rules have been laid down for other cases) with respect to treatments and research[38]. The scope of this freedom extends to those moments in which the person cannot pronounce his or her will, as long as this had been previously expressed. In this sense, Article 9 of the Convention states that *"The previously expressed desires of a patient will be taken into consideration with respect to a medical intervention who, during the course of the intervention, is unable to express his or her will"*. The text of the Convention must be seen as extremely positive, however, it does not recognise a right to the self-determination of the individual in general, rather what we have referred to above as a right to authorisation, or participation in a specific case.

For its part, the *International Declaration of Human Genetic Data*, approved by UNESCO on 16th October 2003, states in Article 3, which recognises the identity of the person, that "Each individual has a characteristic genetic make-up. Nevertheless, a person's identity should not be reduced to genetic characteristics, since it involves complex educational, environmental and personal factors and emotional, social, spiritual and cultural bonds with others and implies a dimension of freedom". In this case, the International Declaration timidly progresses towards recognition of the freedom of the person and, even though the text is extremely superficial, it allows us to interpret the attribution to the individual of a right to self-determination as regards his or her life. For its part, the *Universal Declaration on Bioethics and Human Rights* (UNESCO, 2005)[39], states in Article 5 (Autonomy and individual responsibility) that: "The autonomy of persons to make decisions, while taking responsibility for those decisions and respecting the autonomy of

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others, is to be respected. For persons who are not capable of exercising autonomy, special measures are to be taken to protect their rights and interests". The Universal Declaration consolidates the tendency to recognise the participation of the individual in the taking of decisions that affect him or her, albeit within an extraordinarily restricted framework, even classifying in this Declaration, on account of the assumption of responsibility that might arise from the particular case.

In addition, the *Charter of Fundamental Rights of the European Union* proclaimed at Nice in December 2000, which is currently included in Part II of the *European Constitution Project*, has proven to be sensitive to this problem by dedicating Article 3 to the physical integrity of the person, in Section 2. a) of which it establishes that within the framework of Medicine and Biology, *"the free and informed consent of the person concerned, according to the procedures laid down by law"* will be particularly respected. Freedom is taken to be of supreme importance in the European Constitution given the fact that it is established as a founding principle of European integration in the Preamble, as a value in Article 2 and in other specific cases throughout the Text, especially in Part II which deals with basic rights. Indeed, it is within this context that aforementioned Article 3 should be interpreted.

In Spain, several Health Law regulations had likewise regulated the physical self-determination of the patient by means of prior informed consent, however, it has been *Law 41/2000 of 14th November basically regulating the autonomy of the patient and of rights and duties concerning clinical information and documentation* which, insisting on the obligation to obtain the informed consent of the patient, establishes the need that this be preceded by accurate information in order to enable the individual to take a free decision.

"Recognition of the duty to be consulted and, where appropriate, the giving of consent, undoubtedly form part of the right to physical self-determination, though it would not be right to consider that the former exhausts the essential content of the right to physical self-determination"

In this sense, Article 2.2 of aforementioned Law 41/2002 establishes that: *"In general, all actions in the health area require the prior consent of patients and users. Aforesaid consent, which must be obtained after the patient has received proper information, will be given in writing in those situations provided for by law".*

Whatever the case, without doubt Sections 3 and 4 of aforementioned Article 2 are the provisions that most clearly confirm the autonomy of the patient, and in this sense, reveal an aspect of the right to physical self-determination, on establishing that *"3. The patient or the user has the fright to freely decide, after having received the proper information, between the clinical options available"*; and that *"4. All patients and users have the right to refuse treatment, except in the particular cases provided for by law. Any refusal to receive treatment must be given in written form".*

The right of everyone to physical self-determination is increasingly emerging in the field of biomedicine and biotechnology with greater clarity, thus enabling the individual to take those decisions that he or she deems opportune in relation to medical treatment, or specific health options, as well as affording the individual the power to refuse a particular treatment, thus assuming the consequences this decision might have, including the risk of death.

Nonetheless, the current situation still remains paradoxical, given that while important international agreements and internal regulations clearly recognise the right to physical self-determination, which is nothing more, as we have pointed out above, than the right to freely decide on aspects and affairs in which only the autonomy of the will can act, the constitutional texts seem to be anchored in an interpretation of the right to personal freedom as a criminal-procedural guarantee, an interpretation clearly surpassed in the sphere of International and Community Law, and even by internal laws and, in the social sphere, by the particular circumstances that daily affect biomedical and biotechnological research and applications. What is urgently needed is that the legally possible interpretation of the recognition of the right to *physical self-determination* be generalised, on constitutional grounds (primarily on the basis of personal freedom and, if necessary, on the right to the physical integrity and the dignity of the person and on the right to privacy) whenever this proves possible, in accordance with each legal system, or on legal or international grounds, by way of the declarations and agreements that have been drawn up concerning these issues. Whatever the case, the aim is to overcome the unnecessarily restrictive character of this right so that, as is legally proper, it can cover the freedom of choice and decision of persons with respect to physical self-determination.

3. The individual and the limits to the right of physical self-determination

As with every right to freedom, the *right to physical self-determination* requires that the person be in full possession of his or her faculties in order to be able to issue a judgement with complete guarantees both for himself or herself, as well as for any third party involved (particularly for the different biomedical operators that have to take part in these acts). Likewise, the expression of one's will must be made free from all coercions and threats, and in a personal, familial or social situation that does not decisively interfere with the will of the person in question. Though of course, it is true that complete neutrality is practically impossible to achieve, given that the individual will always be subject to, or affected by, a particular context, however, it is no less true that the Law can demand that these types of decisions satisfy exceptional conditions given the extraordinary nature of the subject matter in question. Both national

"As we have stated, some aspects contained in the right to physical self-determination have been, and are currently being, addressed both by particular countries, as well as, internationally"

laws, as well as international texts[40] provide for the need to articulate specific measures, protective measures, for those cases in which the subject cannot vouchsafe an opinion, or give his or her fully guaranteed consent, and moreover, when the individual is incapable of receiving information that directly affects him or her, and on which the taking of the pertinent decision depends. The *right to physical self-determination* represents the recognition of a wide range of personal autonomy with respect to extremely delicate matters that affect, as we have continually indicated in the course of this paper, the physical reality of the individual, thus the transmission of information prior to the obtaining, where appropriate, of the consent, or express will of the person in each particular case, must be done with all due caution and guarantees.

As far as minors or disabled persons are concerned, any decision must guarantee their well-being, and should be taken, where appropriate by their legal representative. Moreover, to the extent permitted by national laws, it should be possible to resort, in the event of doubt, or in cases of dispute, to the legal guarantee, by means of obtaining the relevant decision and/or authorisation. On the other hand, and particularly where minors are involved, we must not overlook the fact that some national laws grant certain validity to the expressions of their will, wherever the minor in question is sufficiently mature to express his or her opinion in a specific case, and in general, recognise the right of minors to be heard with respect to the issues that affect them[41]. Consequently, we cannot simply exclude, with no more ado, all minors as valid subjects of the *right to physical self-determination*, though extraordinary guarantees need to be put in place.

As far as disabled people are concerned, similar guarantees to those required for minors are essential. A much more complex issue affecting this area is the whether in this case, attention should also be paid to any opinion that the disabled person may be able to pronounce, as well as the assessment of this opinion, or whether the will of the legal representative must prevail. In such cases, the relevance, or not, of such an opinion will depend to a large extent on the disability in question, on the legal decision that had established the disability and, finally on the legal decision, should it prove necessary to settle the dispute in this way. Whatever the case, the principle of protection and well-being of the individual must prevail over any other criterion that may be put forward, as has been provided for in national law, in case law and in the international context.

On the other hand, as we have pointed out throughout the course of this paper, the *right to physical self-determination* aspires to becoming another right in the legal system, and its scope as a constitutional right, as a legal right, or as a right or principle of International Law will depend on this. Whatever the case, we are not proposing that a *right to physical self-determination* be absolute in its nature[42], something that is hardly compatible with the legal system of rights and freedoms in many countries, but rather a modulated right that is compatible with other rights and freedoms.

In Spain, the Constitutional Court has declared that there are no unlimited rights in our legal system. All rights have limits[43], a statement that has been repeated in numerous sentences handed down by aforesaid court. This idea of rights' limitation responds to the desire that the recognition of a right does not lead, *de facto*, to the abuse, or anti-social use of the right in question[44] and, moreover, enables the endorsement of the thesis that for it to be possible to exercise all recognised rights, no one of these can be unlimited. Doctrine, practically unanimously, and pursuant to constitutional jurisprudence, has defended the limited nature of rights, that

"The Convention on Human Rights and Biomedicine*, signed in Oviedo in 1997, recognises the right to physical self-determination of all those whose powers are limited in no way (special rules have been laid down for other cases) with respect to treatments and research"*

are not, therefore, absolute, but rather that they must be articulated in a system in which it is possible to exercise all of them, which is only feasible, as we have said above, when we accept that they can have limits.

As far as the aim of this paper is concerned, we find ourselves before a right that can be limited in accordance with the material scope of other rights and freedoms. It is precisely the so-called freedom rights - that is to say, those rights that allow the individual to act in a context of agere licere, those that define a sphere of personal autonomy - which are the ones that can most clearly curtail or limit their core content in order to safeguard other rights, goods and values. Indeed, the application of this theory is a lot more difficult with respect to other types of rights, which basically consist of *immunities*. It would be legally impossible to defend the existence of an *absolute freedom*, given that with such a recognition the status of all other rights would automatically become rather precarious in such a legal system. The absolute freedom of one person makes the exercise of the freedoms of others unfeasible. Nevertheless, what we could call the "limit of the limits" of any right must be no more than those that are strictly needed to make some rights compatible with others, in order to safeguard the persons and goods that are constitutionally protected[45], that will be adopted with the guarantees demanded by the legal system and that, as has been repeatedly indicated by the Spanish Constitutional Court, will not turn the right into something unfeasible, unrecognisable and useless with respect to ensuring freedom.

Notes

1 Articles 24, 118, 119, 119ª) and 120 of the Swiss Constitution.

2 Article 26.3 of the Portuguese Constitution.

3 Article 54.2 of the Hungarian Constitution reads: *"No person may be subjected to torture, cruel, inhuman or degrading treatment and it is especially prohibited to carry out medical or scientific experiments on persons without the consent of said persons ".*

4 Article 21 of the Lithuanian Constitution states:
1. The person shall be inviolable.
2. Human dignity shall be protected by law.
3. It shall be prohibited to torture, injure, degrade, or maltreat a person, as well as to establish such punishments.
4. No person may be subjected to scientific or medical testing without his or her knowledge thereof and consent thereto.

5 Article 18 of the Estonian Constitution states:
1. No one may be subjected to torture or to cruel or degrading treatment or punishment.
2. No one may be subjected to medical or scientific experiments without his or her freely given consent.

6 Article 39 of the Polish Constitution reads:
No one shall be subjected to scientific experimentation, including medical experimentation, without his voluntary consent.

7 BOBBIO, N.: *El tiempo de los derechos*, Ed. Sistema, Madrid, 1991;

8 PÉREZ LUÑO, A.E.: *Derechos Humanos, Estado de Derecho y Constitución*, 6ª ed., Madrid, 1999.

9 MARTÍNEZ DE PISÓN, J.: *Derechos Humanos: historia, fundamento y realidad*, Zaragoza, 1997.

10 BOBBIO, N.: *El tiempo de los derechos,* Ed. Sistema, Madrid, 1991; SANCHEZ FERRIZ, R.: *Estudio sobre las libertades*, 2ª ed. Tirant lo Blanch, Valencia, 1996 and "Generaciones de Derechos y evolución del Estado", in GOMEZ SANCHEZ, Y. (Coord.): *Los Derechos en Europa*, UNED, Madrid, 1997, Pg. 21 ff., Introducción al Régimen Constitucional Español, 3ª ed., Sanz and Torres, Madrid, 2003, and *Derecho Constitucional Europeo: derechos y libertades*, 1St Ed., Sanz and Torres, Madrid, 2005.

11 Pérez Luño, A.E, among other works: "Generaciones de Derechos", Diccionario Jurídico: Filosofía y Teoría del Derecho e Informática Jurídica. Granada. Comares. 2004. Pgs. 74-74; "Estado Constitucional y Generaciones de Derechos Humanos", Separata del Libro Liber Amicorum Héctor Fix-Zamudio. San José, Costa Rica. 1998. Pgs. 1241-1264. Martínez de Pisón, J.: *Derechos Humanos: Historia, fundamento y realidad*, 1997. GROS ESPIELL, H.: *Estudios sobre Derechos Humanos*, IIDH/Civitas, Madrid, 1988. FIZ-ZAMUDIO, H. Y VALENCIA CARMONA, S.: Derecho Constitucional Mexicano, Editorial Porrúa, 2001, Pg. 413 ff.

12 SÁNCHEZ FERRIZ, R.: *Estudio sobre las libertades*, ob. cit.

"The Universal Declaration on Bioethics and Human Rights *(UNESCO, 2005), states in Article 5 (Autonomy and individual responsibility) that: "The autonomy of persons to make decisions, while taking responsibility for those decisions and respecting the autonomy of others, is to be respected"*

13 L. FERRAJOLI refers to "new rights" and "latest generation rights", among others, in his work: "De la Carta de Derechos a la formación de una esfera pública europea", in *La constitucionalización de Europa*, UNAM, México, 2004, Pg. 84 and ff.

14 See Manuel Maceiras, "Tecnociencia y política de derechos humanos", in Graciano González (ed.): *Derechos Humanos: La condición humana en la sociedad tecnológica*. Madrid: Tecnos, 1999.

15 This lesser budgetary impact is most certainly due to a mistaken interpretation of public obligations with respect to the efficacy of rights, however this issue, given its extraordinary importance in current societies, goes beyond the subject matter of this paper.

16 Among others, the important work carried out by the Council of Europe can be cited, to which we owe the approval of the Convention on Human Rights and Biomedicine (1997), the European Union which has legislated on this issue and UNESCO, which has already approved three important Declarations, the Universal Declaration on the Genome and Human Rights (1997), the International Declaration of Human Genetic Data (2003) and the Universal Declaration on Bioethics and Human Rights (2005).

17 Donaire Sánchez, P.: "Los derechos humanos", in Revista telemática de Filosofía del Derecho RTFD, ISSN 1575-7382, D.L. M-32727-1998 (05/02/2006).

18 We are aware that other authors have already postulated a *fifth* generation and even a *sixth* one has been announced, however, in this paper, we wish to deal basically with the state of play in Spain, where, as is stated in the paper, doctrine as to the existence of a fourth generation of rights is still not unanimous.

19 A set of human rights conceived to ensure the survival of the planet and its resources in a manner *compatible* with human life would be included within the framework of the first group – rights concerning the ecosystem and human heritage. The relationship of this group of rights with biotechnology is manifested both in the wide, as well as in the restricted, sense of same, given that the rights included in this group refer both to human beings, as well as to other living organisms, though, in the last analysis, the protection of the latter exists as such according to the rights of the former.

20 As C.M. Romeo Casabona points out, biotechnology has an important and essential instrument in computer systems. Bioinformation – he adds – was decisive in bringing to fruition the mapping of the human genome; later processes are likewise based on bioinformation in order to process and store those molecules (biogenetic databases), not to mention other aspects. *Los genes y sus leyes*, Comares, Granada, 2003, Pg. 10.

21 I am unable here to delve any deeper into these three groups of fourth generation rights about which I have had the opportunity to deal with in previous papers. To this end the reader may consult: GÓMEZ SÁNCHEZ, Y.: *El derecho a la reproducción humana*, M. Pons, Madrid, 1994; "Estado Constitucional y Protección Internacional", in *Pasado Presente y Futuro de los Derechos Humanos*, CNDH/UNED, Madrid, 2003; *Derecho Constitucional Europeo: derechos y libertades*, Sanz y Torres, Madrid, 2005. *Biotecnología y derechos fundamentales, en* CONSTITUCIÓN Y DEMOCRACIA. 25 AÑOS DE CONSTITUCIÓN DEMOCRÁTICA EN ESPAÑA, Centro de Estudios Políticos y Constitucionales/Universidad del País Vasco, Vol. 1, Bilbao, 2005.

22 The specific contents of the right to self-determination given here are also preceded by the word "right" by virtue of which we wish to imply that they form part of the essential contents of this new right, though they allow for customisation, remaining and sharing the constitutional basis of all of them.

23 Preamble and Article 3 of the Universal Declaration of Human Rights; Preamble and Article 8 c) i, and Article 9 of the International Covenant on Civil and Political Rights; Preamble of the International Covenant on Economic, Social and Cultural Rights; Preamble to the Convention on the Elimination of All Forms of Discrimination Against Women; Preamble and Principle No. 2 of the Declaration of the Rights of the Child; Article 5 and Article 7 of the American Convention on Human Rights

24 Exceptionally, international documents refer to *individual freedom*, as is the case of the American Declaration of the Rights and Duties of Man, the Preamble to which reads: "…Rights and duties are interrelated in every social and political activity of man. While rights exalt individual liberty, duties express the dignity of that liberty". In a more common sense, we have Article 1 of the same text. The Preamble to the Charter of the Organisation of American States (OAS) expresses itself in like terms.

25 Article 10.1 of the Spanish Constitution states: "The dignity of the person, the inviolable rights inherent to said individual, the freedom to develop one's personality, respect for the law and for the rights of others form the basis of political order and of social peace". The Spanish Constitutional Court has linked the dignity of the person to his or her right to consciously self-determine his or her life. Something pronounced quite early on by the Spanish Constitutional Court (SCC) Sentence 53/1985 of 11th April. More recently, among others, the SCC 192/2003 on

"In Spain, the Law 41/2000 of 14th November insist on the obligation to obtain the informed consent of the patient, establishes the need that this be preceded by accurate information in order to enable the individual to take a free decision"

27th October held that dignity must be understood as the right of all people to a treatment that does not contradict his or her "condition as a rational, equal and free being, capable of determining his or her behaviour with respect to himself or herself and his or her environment, that is to say, conscious and responsible self-determining capacity with respect to his or her life, which would affect his or her right to the free development of his or her personality". On this point the reader might consult: Y. Gómez "La dignidad como fundamento de los derechos y su incidencia en el posible derecho a no-nacer ", in F. Mayor Zaragoza and C. Alonso Bedate (coord.): Gen-Ética, Ariel, Barcelona, 2003, Pgs. 161 and ff.

26 In this paper I am unable to delve into the arguments that enabled me to conclude at the time that the right to reproduction is grounded in freedom as a constitutional right, arguments which back up the right to physical self-determination, and to which I now refer.

27 As regards the essential contents of the rights, the reader might consult Y. Gómez: *Derecho Constitucional Europeo: derechos y libertades*, Chapter V, Sanz and Torres, Madrid, 2005.

28 GÓMEZ SÁNCHEZ, Y.: *El derecho a la reproducción humana*, op. cit.

29 Article 17.1 of the Spanish Constitution states: "Every individual has a right to freedom and security".

30 Inevitably, in this sense, reference must be made to Article 16 of the revolutionary Declaration of the Rights of Man and of the Citizen of 26th August, 1789, which laid down that *"Any society in which the guarantee of rights is not assured, or the separation of powers defined, has no Constitution"*.

31 This guarantee can also be applied to the conscientious objector to military service, as recognised in Article 30.2 of the Spanish Constitution, though this precept is no longer applicable since the abolition of compulsory military service in Spain.

32 Especially, SCC Sentences 89/1987 of 3rd June, 120/1990 of 27th June, 137/1990 of 19th July. Accordingly, in Sentence 89/1987 of 3rd June, the Constitutional Court understands that the expressions of freedom that are explicitly contained in the Constitution under this legal form are the only ones that can be said to be regarded as basic rights. In the content of the personal freedom established in Article 17.1 of the Constitution, the Constitutional Court holds that an "expression of the free self-determination of the person" does not exist; while, in several other sentences, it insists that the personal freedom provided for by Article 17.1 refers to *physical freedom*, freedom as opposed to arbitrary detention, conviction or committal, without it being possible to resort to this precept as implying general freedom of action of the individual, or, in other words, as the general self-determining freedom of the individual, given that this type of freedom can only be protected in the specific expressions of same that the Constitution affords the category of basic rights. SCC Sentences 120 and 137 refer to prisoners who are on strike and contain an argument extraordinarily linked to a specific case, which we believe cannot be extrapolated into a general theory on the freedom of decision of the person.

33 As is well known, *Jehovah's Witnesses* refuse blood transfusions even in life and death situations.

34 Article 428, which is cited, corresponds to the abrogated Penal Code. In the current Spanish Penal Code, which dates from 1995, the law concerning the possibility of sterilising mentally disabled persons is contained Article 156 which states that *"the sterilisation of a disabled person who is suffering from a severe mental disability is not punishable, when this action, taking into account the prevailing criterion of the best interests of the disabled person in question, has been ordered by the judge, either in the same disability procedure, or in a voluntary procedure, on the request of the legal representative of the disabled person, subsequent to the consultation of two specialists, the Ministry of Justice and upon examination of the disabled person."*

35 MORENO ANTÓN, M.: "Elección de la propia muerte y derecho: hacia el reconocimiento jurídico del derecho a morir", in *Revista de Derecho y Salud*, Vol. 12, No. 1 (January-June, 2004), Pg. 71.

36 Among others, PAREJO GÚZMAN, M.J.: *La Eutanasia ¿un derecho?*, Thomson/Aranzadi, Navarra, 2005, Pg. 254; MARCOS DEL CANO, A.M.: *La Eutanasia. Estudio filosófico-jurídico*, Marcial Pons, Madrid, 1999, Pg. 108.

37 Ratified by Spain on 23rd July 1999 (Official State Gazette of 20-10-99; corrected in the Official State Gazette of 11-11-99. Article 1 of the Convention states that "Parties to this Convention shall 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 application of biology and medicine. Each Party shall take in its internal law the necessary measures to give effect to the provisions of this Convention".

38 In Article 5 the Convention states that *"An intervention in the health field may only be carried out after the person concerned has given free and*

"In Spain, the Constitutional Court has declared that there are no unlimited rights in our legal system. All rights have limits, a statement that has been repeated in numerous sentences handed down by aforesaid court"

informed consent to it. This person shall beforehand be given appropriate information as to the purpose and nature of the intervention as well as on its consequences and risks. The person concerned may freely withdraw consent at any time".

39 Take note of how the title expresses the correlation between Bioethics and Human Rights, a fact that affords this text particularly fresh connotations in comparison to pervious documents.