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Begründet von

Karl Engisch, H. L. A. Hart, Hans Kelsen, Ulrich Klug, Sir Karl R. Popper

Herausgegeben von

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Werner Krawietz

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Allgemeine Rechts- und Staatslehre, Kommunikations-, Normen-
und Handlungstheorie, Soziologie und Philosophie des Rechts

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HUMAN DIGNITY VERSUS
PERSONAL AUTONOMY?

By Miguel Ángel Presno Linera, Oviedo

I. Approach

Article 10.1 of the Spanish Constitution (SC) of 1978 states that “The human dignity, the inviolable and inherent rights, the free development of the personality, the respect for the law and for the rights of others are the foundation of political order and social peace.” It also incorporates an explicit reference to both the dignity and the free personal development, but it does so in a clearly different way compared to the intangibility clause enshrined in Article 1.1 of the Basic Law for the Federal Republic of Germany: “Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.”¹

Neither agrees with the provisions of Article 3 of the Constitution of the Italian Republic: “All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinion, personal and social conditions. It is the duty of the Republic to remove obstacles of an economic or social nature which constrain the freedom and equality of citizens, thereby impeding the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country.”

In a Constitution chronologically and geographically close to the Spanish as the Portuguese Constitution, dignity is omnipresent: in which the Portuguese Republic is based (Art. 1), it is the foundation of the principle of equality (Ar-

¹ Among many others, see for instance the studies of *Hans Carl Nipperdey*, *Die Würde des Menschen*, Berlin 1954; *Franz L. Neumann/Hans Carl Nipperdey/Ulrich Scheuner*, *Die Grundrechte. Handbuch der Theorie und Praxis der Grundrechte*, Berlin 1954, vol. II, pp. 11 ff.; *Günter Dürig*, *Der Grundrechtsatz von der Menschenwürde*, in: *Archiv des öffentlichen Rechts* 81 (1956), pp. 117–157, and *Theodor Maunz/Günter Dürig* (eds.), *Grundgesetz, Kommentar*, I 8, arts 1–11, München 1958; *Konrad Hesse*, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 18th ed., Heidelberg 1991; *Peter Häberle*, *Erziehungsziele und Orientierungswerte im Verfassungsstaat*, Munich 1981, pp.16 ff., and *id.*, *Die Menschenwürde als Grundlage der staatlichen Gemeinschaft*; *Josef Isensee/Paul Kirchhof* (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Bd.1, Heidelberg 1987; *Ernst W. Böckenförde*, *Recht, Staat, Freiheit*, Frankfurt a. M. 1991; *Horst Dreier*, *Artikel 1 I*, in: *id.* (ed.), *Grundgesetz, Kommentar*, Bd. I, Tübingen 1996; *Klaus Stern/Michael Sachs*, *Das Staatsrecht der Bundesrepublik Deutschland*, München 2011.

article 13), it protects the individual against information that might undermine it and to the use of technology and scientific experimentation (art. 26), assisted procreation (art. 67) [...]. This text is a good example of the “rhetoric dignity”.

Even if the constitutional recognition would not have occurred in the Spanish Constitution, it would not undermine the effectiveness of the system of fundamental rights, as the absence does not diminish it, for example, as it happens in the American constitutional system. The fundamental rights are incorporated expressly in Title I which form the core of the SC and, therefore they condition and program all the constitutional structure: they have a specific meaning expressed in their scope and content, but also a sense in a relationship together with the Social and Democratic State of Law required by the fundamental regulation.

However, it would be “strange” not to mention the dignity, as it appears inevitably in the Constitutions adopted in Europe after World War II, and also incorporated, significantly, on the Charter of Fundamental Rights of the European Union that calls Chapter I “Dignity” and Article 1 states that “Human dignity is inviolable. It must be respected and protected.”

In any case, the normative virtuality of dignity and the free personal development must be assessed in each individual system of fundamental rights whenever, as in the Spanish, German, Portuguese or Italian, they have been legally formalized. The fact that they are part of the Constitutional regulatory framework requires to consider these “foundations of political order and social peace” but also to prevent its conversion into a “container” of valorative statements.

The Spanish Constitution has linked the dignity and the free personal development to the fundamental rights that structures the whole system. For this reason it is necessary to analyze them as part of a General Theory of fundamental rights where they will become more relevant insofar predominate rights structured as principles, i. e., as rules that impose a preferential protection of the behaviors generally and abstract described in constitutional legal statements against other behaviors that conflict within social relations.²

In the following pages we will first examine what are the legal concepts of dignity and free development of personality, considering that the Spanish Public Law has devoted special efforts to analyze the human dignity,³ but only a few efforts on the free development of the personality, nor the possible connection between the first and second.

² *Bastida et alii*, Teoría general de los derechos fundamentales en la Constitución española de 1978, Madrid 2004, p. 48.

³ See *Jesús González Pérez*, La dignidad de la persona, Madrid 1986; *Miguel Ángel Alegre Martínez*, La dignidad de la persona como fundamento del ordenamiento constitucional español, Universidad de León 1996; *Ignacio Gutiérrez Gutiérrez*, Dignidad de la persona y derechos fundamentales, Madrid 2006; *Ricardo Chueca* (ed.), Dignidad humana y derecho fundamental, Madrid 2015.

In a second part we will try to elucidate to what extent it is justified the use of human dignity as a limit on the extent of specific fundamental rights. This growing role of dignity notes with particular intensity in the early years of this century in the field of biomedicine but has been operating as a barrier to behavior that could be part of the object protected by fundamental rights of freedom.

II. Dignity and Free Personality Development as the “Foundation” of the Political Order and Social Peace

Returning to the text of Article 10.1 SC, and since the rule of law and the rights of others – understood as derivatives of the norms – are not just another way of referring to the general subjection to the Constitution and to the rest of the law system (section 9.1: Citizens and public Authorities are bound by the Constitution and all other legal provisions), the key point is clarify what those references bring to dignity and to free personality development.

The characterization of the dignity and the free development as the foundation of political order and social peace requires connecting them with the Constitution’s set of higher values on the legal system in which these political order and social peace are personified: freedom, justice, equality and political pluralism (art. 1.1).

If the values expressed on Article 1.1 are part of the entire constitutional order, dignity and the free development appear to be projected particularly strong in the system of fundamental constitutional rights, as they open the section reserved to them on the Constitution. Neither one nor the other are fundamental rights themselves, they are instruments included in the Constitution to achieve the task of specifying the fundamental rights that holds judicial bodies, especially, the Parliament.

Free development and human dignity would help us know, for example, if, as has happened in France and Belgium, you can limit by legislation the freedom of ideology and religion or the right to the own image, prohibiting the use of a garment as the *burka* considered demeaning to women, or whether it is constitutionally acceptable, as it has happened in Spain until 2005, that the enjoyment of a right such as marriage (art. 32) can be reserved for heterosexual unions, excluding homosexuals.

1. The Dignity of the Person as a Guarantee of “Equality for all”

The Spanish Constitutional Court (SCC) has come very often – and unnecessarily too often in some situations – to dignity when confronted with problems of discrimination. In several situations, it is enough the application of other constitutional provisions to solve the problem, for example, it is not necessary to invoke the dignity to conclude that it is unconstitutional the rescission of a worker’s contract for being pregnant (Judgment of the Constitutional

Court – JCC 166/1988, of 26 September 1988) or the payment of lower wages based on sex (JCC 141/1991, of 1 July), we are faced with discrimination on grounds of sex and therefore and expressly prohibited by Article 14 SC. Similarly, if a trial occurs without a minimum set of guarantees (JCC 199/2009, of 28 September), what is being broken it is not dignity of the person itself but the right to obtain effective protection from the judges and the courts in the exercise of their rights and legitimate interests.

Perhaps, where this unnecessary expansion of dignity is more evident is on the Judgment 236/2007, of November 7, 2007, which resolved the unconstitutionality appeal of the Parliament of Navarre that contests twelve points of article one of the Organic Law 8/2000 of 22 December, reforming Organic Law 4/2000 of 11 January on the rights and freedoms of foreigners in Spain and their integration in society. And this statement is striking because although dignity appears with a “resolutive” function it ends operating rather emphatically.⁴

Thus, limiting ourselves, as a significant example, to what was stated by the SCC on the right of assembly, it is argued that “the constitutional definition of the right to assembly laid down by our case law and its link to personal dignity deriving from international texts, imposes on legislature recognition of a minimum content of that right for the person as such irrespective of that person’s situation. In this regard we have already declared that the “exercise of the right to assembly and demonstration is part of those rights which, according to art. 10 of the fundamental regulation, are the basis of political order and social peace”, and therefore the “principle of freedom of which it is a manifestation requires that the restrictions established in this respect respond to cases deriving from the Constitution and that in each case it has been indubitably proven that the scope of constitutional freedom established has been transferred” (JCC 101/1985) (JCC 59/1990, of 29 March, 4). Organic legislature may fix specific conditions for exercising the right to assembly of foreigners without the corresponding authorization to remain or reside in Spain provided that part of the content thereof is safeguarded by the Constitution insofar that it pertains to all persons irrespective of their situation.

To conclude that the legal regulation which conditioned the exercise of the right of assembly to a residence permit or being resident in Spain was unconstitutional there was no need to link it to the right to dignity; in the case you want to connect it with some principle mentioned in Article 10.1, it seems more appropriate to link it to the free personal development as it is to safeguard the freedom to attend or not to act, which in turn, as recalled by the SCC itself, is related to freedom of expression.

What made the article declared unconstitutional was to prevent any exercise of the right to assemble by a group of people – those who do not have a staying or a residence permit –, forgetting that nor the Constitution has im-

⁴ I use “resolutive use” and “emphatic use” in the way they are used by *Javier Jiménez Campo*, Artículo 10.1, in: Casas Baamonde/Rodríguez Piñero (dirs.), *Comentarios a la Constitución española*, Madrid 2008, p. 178.

posed expressly this limit – what it aims is to exclude manifestations of armed people or violent attitudes –, nor it can be found in the Constitution another right or interest that justifies the exclusion of this group of people. The SCC himself has said that “the fundamental rights recognized by the Constitution can only yield to the limits that the Constitution itself expressly imposes, or before which in a mediate or indirect way can be inferred from it resulting justified by the need to preserve other rights or legally protected rights” (JCC 11/1981, of April 8, 7; 2/1982 of January 29, 5, *inter alia*).

The SCC justifies the appeal to dignity by resorting to the Universal Declaration of Human Rights and the main international treaties ratified by Spain which according to the Court “appear to link the right of assembly to dignity”. However, the Declaration expressly says nothing of dignity when it recognizes the right of assembly: “Everyone has the right to freedom of peaceful assembly and association.” (art. 20.1) Neither mentioned in the International Covenant on Civil and Political Rights (art. 21): “The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*order public*), the protection of public health or morals or the protection of the rights and freedoms of others”, nor in the European Convention of Human Rights: “Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.” (art. 11)

Therefore, we are faced with a case – yet another – on the use of dignity as a rhetorical instrument.

Different is, in my opinion, the use made of the dignity to prosecute the choices or the omissions of the public authorities as a result of which stands to specific people or groups of people in a position of inequality and injustice against other people, either in their individual capacity or as a member of a particular social group. When such a thing happens we are, as Jiménez Campos recalls, in a situation of *primary discrimination*.⁵

Dignity works here in the face of what Luigi Ferrajoli has called a “legal distinction of differences”: a particular identity assumed by a difference as a source of rights while the other is configured as a discriminatory and exclusionary status. Thus, equality is an amputated equality relating to a part of society that arbitrarily merges with full equality.

Dignity at work here versus what Ferrajoli Luigi has called a “legal distinction of differences”:⁶ a particular identity assumed by a difference as a source of rights while the other is configured as a discriminatory and exclusionary status. Thus, equality is an amputee on a part of society that arbitrarily merges with full equality.

⁵ *Jiménez Campo* (note 4), p. 182.

⁶ *Derechos y garantías. La ley del más débil*, Madrid 1999, pp. 73–96.

Such a thing happened in Spain, to name a first example, when, before the entry into force of the Criminal Code of 1995, deprivation to vote⁷ was used as punishment, either by a disqualification (Article 35), a special disqualification (Article 37) or suspension (Article 39). The first and third were ancillary to custodial sentences, while the second was a specific sanction.

The margin that the legislator has to set the right to vote does not enable him to take actions such as the deprivation of the right to vote and the legal imposition of a global constraint to all prisoners, regardless of the length of the sentence and irrespective of the nature and gravity of the offense and personal situation.⁸ By using Michael Walzer's categories, it would be unfair [nor worthy] a citizen located in a sphere can be abridged by relocating to other sphere, with regard to a different right,⁹ and the prisoner is on a sphere characterized by the restriction of personal freedom, in which there aren't those who have not committed crimes, but this difference of positions should not be transferred to the political sphere, at least the right to vote, because the latter is unwarranted.

The Supreme Court of Canada and the Supreme Court of South Africa arrived at the same conclusion; the first (*Sauvé c. Canada*, October 31, 2002) argues that a broad interpretation of the object is particularly important in the voting, without having to be limited by opposing collective interests. Fundamental democratic rights are not "a range of acceptable solutions" including the Legislator to choose at will, as the rights are not a matter of privilege or merit, but of belonging to the society, which is especially true in the right to vote, the cornerstone of democracy.¹⁰

The Supreme Court of South Africa stated (*August c Electoral Commission* of April 1, 1999.) that the right to vote imposes positive obligations on both the legislator and the government: "the achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood. The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts."¹¹

Returning to the Spanish law, and the idea of equality regardless of identity, it is noteworthy that in the Judgment 198/2012 of November 6, which ruled the appeal of unconstitutionality against the reform of the Civil Code of

⁷ To this question Miguel Ángel Presno Linera, *El derecho de voto*, Madrid 2003, pp. 142 ff.: also *id.*, *El derecho de voto. Un derecho político fundamental*, México 2012, pp. 47 ff.

⁸ The European Court of Human Rights have considered (*Hirst v. United Kingdom*, n° 2), that this decision exceeds the acceptable margin of appreciation, however high it is, and it is incompatible with Article 3 of the Protocol n. 1 of the European Convention on Human Rights. <http://cmiskp.echr.coe.int/>.

⁹ Spheres of Justice, New York 1983, p. 19.

¹⁰ <http://scc.lexum.umontreal.ca/en/2002/2002scc68/2002scc68.html>.

¹¹ <http://www.saflii.org/za/cases/ZACC/1999/3.pdf>.

July 2, 2005 – in essence, that "marriage shall have the same requirements and effects when both parties are the same or different sex" – does not appeal to dignity recognized in the Constitution more than at the end (11), assuming that the marriage between persons of the same sex "is a step in ensuring the dignity of the person (...)". However, the SCC had said that in the workplace homosexual orientation has been a historically entrenched dispute, which has placed homosexuals, both by the action of the public authorities and the social practice, in disadvantageous positions and contrary to the dignity of the person recognized in Article 10.1, by deep and seated prejudices set normatively and socially against this minority. Well, if a minority cannot be excluded of the equal protection in the workplace, by the fact of being a minority, either may not be excluded at the time of marriage, then, if so, and returning to Ferrajoli's words, equal access to marriage would be an amputated equality.

In summary, according to the criterion of constitutional interpretation which is human dignity, legislatively it cannot set the development of a right so that it excludes a person or group of persons on account of their identity.

2. Free Development as Guardianship of "Maximum Freedom"

The free development of personality is geared primarily to the completion of the "maximum" freedom of individuals as an expression of the values "freedom" and "pluralism". In such condition, it is a foundation of constitutional law that "allows citizens to carry out all activities not prohibited by law or whose exercise is not subordinated to certain conditions or requirements" (JCC 93/1992, 8). Therefore, it protects the development of the person depending on the individual himself and it does so mainly to deal with the limitations that the state or individuals seek to impose.

There is thus an external dimension of "agere licere" that empowers citizens to act on their own convictions and keep them against third parties (JCC 19/1985, 2; 120/1990, 10, and 137/1990, 8). This recognition protects personal self-determination through the exercise of powers that make these concrete manifestations of freedom. And this area of *agere licere* it is "with full immunity from coercion by the State or any social groups" (JCC 46/2001, 4, and in the same sense, the JCC 24/1982 of 13 May, and 166/1996, of 28 October).

Free personal development is therefore projected onto the fundamental rights whose object is a vital area;¹² i.e., the rights that let you choose what to do or which behavior to perform, but that choice must not be influenced by the use of public power. Thus, it protects the person against whom is intended to compel to exercise a fundamental right of this nature, e.g. by ensuring respect for their decision not to express their opinion, not to associate, not to manifest, ...

¹² Ignacio Villaverde, *Teoría general de los derechos fundamentales en la Constitución española de 1978*, Madrid 2004, pp. 105 ff.

Thus, in relation to the statutory mandatory partnerships affiliation, SCC recalls that “the use of this form of administrative action that is at the same time and above all, a form of social grouping created *ex lege*, cannot be converted in rule without altering the meaning of a social and democratic state of law based on the higher value of liberty (Art. 1.1 SC) and on the free development of the personality as the foundation to their political order (art. 10.1 SC).” (JCC 107/1996, of June 12, 4)

Moreover, the free development embedded in these fundamental rights entitles the holder to decide not only what not to do but also what to do in this vital field, specifying their behavior in space and time. As a result, only an express constitutional authorization may allow the limitation of that initial individual self-determination.

And free personal development as the foundation “of political order and social peace” plays an important role in interpreting whether a particular behavior fits the object protected by the fundamental right, which is not true simply because such conduct is not prohibited by the laws; we must ask whether what it claims the right holder is included in the statement of the constitutional right and that inquiry must take into account the ability to act according to their convictions.

To cite some examples, free personal development would be affected if it is to prevent or repress the cohabitation *more uxorio* or whether it is to impose the establishment, against the will of the components of the couple, a specific type of linkage not taken together by them (JCC 93/2013, of April 23, 8) and this is because “the possibility to choose between the status of married or single is intimately linked to the free development of personality (art. 10.1 Constitution)” (JCC 184/1990, of November 15, 3), however, the exercise of this right may not be limited by other constraints than the resultant rules of internal public order (JCC 51/2011, of April 14, 8).

In the same context, it was also admitted as part of the free personal development, the freedom of reproduction and the decision to continue or not an emotional relationship or cohabitation (JCC 215/1994 of July 14, 4, and 60/2010, of 7 October, 8 b) and has been linked freedom and pluralism “in correspondence with personal choice pluralism that exists in the Spanish society and the primacy of free development of personality (Article 10.1 SC), the Constitution not only protects the family that is by marriage – although it is specially protected (JCC 45/1989) – but also the family as a social reality, understood by that which is voluntarily constituted by the union, affective and stable, of a couple” (JCC 47/1993, of February 8, 3).

Regarding the physical and moral integrity, patient consent to any intervention is part of its power of self-determination and will to decide freely on legitimate therapeutic measures and treatments that may affect his integrity, choosing between different possibilities, consenting to or rejecting the practice.¹³ It thus protects the free-

¹³ On these issues, and regardless of that share what was presented, the model is forced to work *Ronald Dworkin*, *Life's Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom*, New York 1993; so is the work of *Stefano Rodotà*, *Il diritto di avere diritti*, Bari 2012, where it is spoken, among other things, personal self and the “revolution of dignity”; see also *his* earlier study *La vita e le regole. Tra diritto e non diritto*, Milano 2006. On patient consent and the right to dispose of end of life, and Sticking to the Spanish constitutional doctrine, *Francisco Bastida Freijedo*, *El derecho fundamental a la vida y la autonomía del paciente*, in: Miguel Ángel Presno Linera

dom to consent or refusal to treatment, a possibility that has been accepted by the European Court of Human Rights, ECHR, even if it could lead to a fatal outcome (ECHR Judgment of April 29, 2002, *Pretty v. United Kingdom*, § 63), and also by the Spanish SCC (JCC 154/2002, of July 18, 9).

Ideological and religious freedom also contains an “external dimension of *agere licere* that empowers citizens to act on their own convictions and keep them against third parties (JCC 19/1985, 2; 120/1990, 10 and 137/1990, 8)”.

At the field of labor, the conception of time off from work, not as such, but as time off to rest on availability to the employer, and the submission of the duty to work and perform not only to an objective verification during the compliance with the provision of service, but also during the rest time, does not result in any way consistent to the current configuration of our right to annual paid vacation that exists in our labor legislation, nor, more importantly, with the primacy of individual freedom and respect for private life guaranteed by the Constitution. To hold that the employer may have a right or a legitimate legal interest to the worker devoted exclusively to holiday break in order to recover their physical and mental energies to ... completion of the holiday season will be on full completion conditions, he must be devoted exclusively to regain strength, in his own good and in favor of the company, with the serious consequence that failure to do so will incur serious and culpable failure to comply which may lead to be validly dismissed for infringement of contractual good faith, means reducing the worker to a mere factor of production and deny, at the same extent, his freedom, during that period, to develop his own personality the way he deems more appropriate (JCC 192/2003, of October 27, 7).

The free development also operates when the fundamental rights do not establish, at first, which individual or collective behaviors are constitutionally permitted but under what circumstances they are banned, also in first instance, the use of public power: for example, the inviolability of the home and secrecy of communications require the State, unless otherwise provided in the EC, the duty not to enter homes and not to intervene on private communications. Thus, also oversee vital interests affected by the ban that embody the subjective dimension of law.

(coord.), *Autonomía personal, cuidados paliativos y derecho a la vida*, Oviedo 2011, pp. 53 ff.; *Francisco Bastida/Juan Antonio Xiol*, *Autonomía del paciente, responsabilidad patrimonial y derechos fundamentales*, Madrid 2012; *Ricardo Chueca Rodríguez*, *El marco constitucional del final de la propia vida*, in: *Revista Española de Derecho Constitucional* 85 (2009), pp. 99 ff.; *id.*, *El poder de disposición sobre el final de la vida*, in: *Autonomía personal, cuidados paliativos y derecho a la vida*, Oviedo 2011, pp. 79 ff.; on the cases of vital urgency see *Gonzalo Arruego Rodríguez*, *La naturaleza constitucional de la asistencia sanitaria no consentida y los denominados supuestos de “urgencia vital”*, in: *Revista Española de Derecho Constitucional* 82 (2008), pp. 53–82, and *id.*, *El rechazo y la interrupción del tratamiento de soporte vital en el derecho español*, in: *Revista para el Análisis del Derecho*, 2 (2009), http://www.indret.com/pdf/620_es.pdf; y *id.*, *Vida, integridad personal y nuevos escenarios de la biomedicina*, Granada 2011.

III. Is Human Dignity a Limit to Constitutional Free Development of the Personality?

It is becoming more common that the imposition of legal limits to conducts which in principle could rely on each one's life plan can be justified in order to protect the development of their own liberty. This limitation often intends to be protected by an alleged communal social vision of the dignity that transcends specific individuals.¹⁴

Thus, and to quote a well-known limitation of freedom with the aim to, it is said, protect the dignity of the person, the ban on wearing the *burka* has been justified in the apparent degradation of women that its use comprises.

The introduction of this legal ban in France – Law 1192/2010 of October 11, 2010 prohibiting concealment of the face in public spaces, which provides mandatory economic sanctions and civic courses –¹⁵ was, however, previously discouraged by the French Council of State in his “*Etude aux relative possibilités juridiques d’interdiction du port” du voile intégral*”,¹⁶ of March 25, 2010 to consider that the protection of personal freedom is an inherent element of the person and the European Court of Human Rights has taken this idea to protect, on the basis of the right to respect for private life, a principle of personal autonomy whereby everyone can live their lives according to their own convictions and decisions, including options involving physical or moral hazard and do not enjoy the approval of others. He concludes, therefore, that the basis for the protection of the dignity that invokes the French government to ban the full veil is legally questionable, especially in cases in which wear is the result of the free will of an adult.¹⁷

Finally, the European Court of Human Rights (ECHR Judgment *SAS v. France*, of July, 1, 2014) emphasised that respect for the conditions of “living together” was a legitimate aim for the measure at issue and that, particularly as the State had a lot of room for manoeuvre (“a wide margin of appreciation”) as regards this general pol-

¹⁴ Illustrative of this trend are the considerations of *Deryck Beyleveld/Roger Brownsword*, *Human dignity in bioethics and biolaw*, Oxford 2001, pp. 29 ff.

¹⁵ More severe is the Belgian law forbidding the use of the full veil in public spaces, from June 1, 2011, which provides for imprisonment; on these issues, see *Benito Aláez Corral*, *Símbolos religiosos y ejercicio de derechos fundamentales en los espacios públicos*, in: Paloma Requejo Rodríguez (coord.), *Derechos y espacio público*, Oviedo 2013, pp. 115 ff. In Spain, the Supreme Court sentence of February 14, 2013 annulled the municipal ban on the full Islamic veil imposed by the city of Lleida and stay on access to municipal facilities or spaces owned by the municipality; http://www.poderjudicial.es/cgpj/es/Poder_Judicial/Tribunal_Supremo/Noticias_Judiciales/ci.El_Tribunal_Supremo_anula_la_prohibicion_del_velo_integral_en_Lleida_los_ayuntamientos_carecen_de_competencias_para_limitar_un_derecho_fundamental.formato3; <http://www.conseil-etat.fr/fr/rapports-et-etudes/possibilites-juridiques-d-interdiction-du-port-du-voile-integral.html>.

¹⁶ <http://www.conseil-etat.fr/fr/rapports-et-etudes/possibilites-juridiques-d-interdiction-du-port-du-voile-integral.html>.

¹⁷ A similar case, although here the response of the French Council of State was different, it was the prohibition of the “dwarf tossing”, which was also endorsed by the Human Rights Committee of the United Nations (*Wackenheim v. France*, July 15, 2002); <http://www.equalrightstrust.org/ertdocumentbank/Microsoft%20Word%20-%20Manuel%20Wackenheim%20v.%20Fr.pdf>.

icy question on which there were significant differences of opinion, the ban imposed by the Law of 11 October 2010 did not breach the Convention.

The Court examined the applicant's complaints under Articles 8 and 9, with emphasis on the latter. While personal choices as to one's appearance related to the expression of an individual's personality, and thus fell within the notion of private life, the applicant had complained that she was prevented from wearing in public places clothing that she was required to wear by her religion, thus mainly raising an issue with regard to the freedom to manifest one's religion or beliefs.

The Court found that there had been a “continuing interference” with the exercise of the applicant's rights under Articles 8 and 9, as she was confronted with a dilemma: either she complied with the ban and thus refrained from dressing in accordance with her approach to religion, or she refused to comply and would face criminal sanctions. The Court further noted that the limitation in question was prescribed by the Law of 11 October 2010. The Court accepted that the interference pursued two of the legitimate aims listed in Articles 8 and 9: “public safety” and the “protection of the rights and freedoms of others”. As regards the aim of “public safety”, the Court noted that the legislature had sought, by passing the Law in question, to satisfy the need to identify individuals in order to prevent danger for the safety of persons and property and to combat identity fraud. It considered, however, that the ban was not “necessary in a democratic society” in order to fulfil that aim. In the Court's opinion, in view of its impact on the rights of women who wished to wear the full-face veil for religious reasons, a blanket ban on the wearing in public places of clothing designed to conceal one's face could be regarded as proportionate only in a context where there was a general threat to public safety.

The Court admitted that it might appear excessive, in view of the small number of women concerned, to opt for a blanket ban. It further noted that the ban had a significant negative impact on the situation of women who chose to wear the full-face veil for reasons related to their beliefs, and that many national and international human rights bodies regarded a blanket ban as disproportionate. The Court also stated that it was very concerned by indications that the debate which preceded the adoption of the Law of 11 October 2010 had been marked by certain Islamophobic remarks. It emphasised in this connection that a State which entered into a legislative process of this kind took the risk of contributing to the consolidation of the stereotypes which affected specific groups of people and of encouraging the expression of intolerance, when it had a duty, on the contrary, to promote tolerance. The Court reiterated that remarks which constituted a general, vehement attack on a religious or ethnic group were incompatible with the Convention's underlying values of tolerance, social peace and nondiscrimination and did not fall within the right to freedom of expression that it protected.

While the Court was aware that the disputed ban mainly affected certain Muslim women, it nevertheless noted that there was no restriction on the freedom to wear in public any item of clothing which did not have the effect of concealing the face and that the ban was not expressly based on the religious connotation of the clothing in question but solely on the fact that it concealed the face. In addition, the sanctions provided for by the Law were among the lightest that could have been envisaged: a fine of 150 euros maximum and the possible obligation to follow a citizenship course, in addition to or instead of the fine. Furthermore, as the question whether or not it should be permitted to wear the full-face veil in public places constituted a choice of society, France had a wide margin of appreciation. In such circumstances, the

Court had a duty to exercise a degree of restraint in its review of Convention compliance, since such review led it to assess a balance that had been struck by means of a democratic process within the society in question. In the Court's view, the lack of common ground between the member States of the Council of Europe as to the question of the wearing of the full-face veil in public places supported its finding that the State had a wide margin of appreciation. The ban complained of could therefore be regarded as proportionate to the aim pursued, namely the preservation of the conditions of "living together". The Court held that there had not been a violation of either Article 8 or Article 9 of the Convention.

Finally, the ban imposed by the Law of 11 October 2010 admittedly had specific negative effects on the situation of Muslim women who, for religious reasons, wished to wear the full-face veil in public. However, that measure had an objective and reasonable justification for the reasons previously indicated. There had not therefore been a violation of Article 14 taken together with Articles 8 or 9.

The Court was also of the view that no separate issue arose under Article 10 of the Convention, taken separately or together with Article 14¹⁸.

What is at stake is the limitation of a fundamental right, whether religious freedom or self-image. With regard to the first there is abundant case law of the European Court of Human Rights relating to religious freedom protected by Article 9 of the Convention and the wearing of the Islamic veil,¹⁹ and various European constitutional and supreme courts, as the German (BVerfGE 108, 282, 299), the Judicial Committee of the British House of Lords (*R (Shabina Begum) v. Head-teacher and Governors of Denbigh High School* [2006] UKHL 15) or the Italian State Council (Decision of the State Council of June 19, 2008), that corroborate this. Regarding the right to self-image including the possibility of external form of the human figure (JCC 170/1987, of October 30, and 84/2006 of March 27).

Apparently, a struggle arises between the desire to exercise a fundamental right and the loss of dignity that such behavior would imply for the person entitled. It is almost worth recalling that the area protected by the free development may not involve the recognition of another person's human dignity which operates as a "logical" or "immanent" limit. What we meant here is the protection of the individual's dignity on the exercise of its freedom.

¹⁸ <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145466>. You can see the arguments presented at the public hearing before the Grand Chamber of the ECHR in http://www.echr.coe.int/Pages/home.aspx?p=hearings&w=4383511_27112013&language=lang.

¹⁹ Thus Decisions ECHR of February 15, 2001 (*Dahlab v. Switzerland*), June 29, 2004 (*Leyla Sahin v. Turkey*), December 4, 2008 (*Kervanci v. France and Dogru v. France*), all relating to ban on wearing the Islamic veil. The judgment of the Spanish Supreme Court, on February 14, 2013 supports this idea by stating (8) of the "correct appreciation of the judgment [judgment] when he says that" using words of the European Court of Human Rights in Strasbourg by no *burka*, can be considered in part is motivated or inspired by a religion or belief act; and that "no rule on whether this act is in all cases the fulfillment of a religious duty, yes that is or may be a manifestation of a belief or ideology or religious conviction, and therefore a sign of such a character".

It should be remembered that democratic systems subject the restrictions of citizen's rights to limits, both formal – must be formally approved in precise legal standards rank-, and substantially – must be necessary to protect other property or constitutional rights and must respect the principle of proportionality.

Backwards of what has happened in Spain, these limitations of freedom have been established in a legal rule in France and Belgium, so we must consider whether the restriction will accommodate to the material limits once respected the formal constraints.

It has already been pointed out that the SC defines which behaviors are free in the legal system of fundamental rights. And it does so, not as a mere confirmation of the negative connection to the system (everything is permitted that is not prohibited), but by instance it reinforces that negative linkage, by two ways, prohibiting any limitation of freedom and empowering the right holder against third parties.

This means that you cannot force anyone to exercise a fundamental right because it extends the warranty to a negative freedom as the decision not to perform a behavior from those contained in the fundamental right in question. Thus it doesn't mean that the SC ensures a general freedom of action that covers any type of individual or collective behavior. The right holder's election is constrained by the definition of the law purpose contained on the constitutional statement and the right holder's actions deserves *ius* fundamental protection, not because of the fact that they are not prohibited by the laws, but because they fit the object of the fundamental constitutional right definition.

Moving backwards to the example given, the possibility of wear a *burka* takes place on the freedom of religious and/or the right to self-image. Can the dignity of women be invoked on the ban of the *burka*? In my opinion no. Although the social majority concluded that the use of this garment is harmful to women because it places to a position of inferiority or a submission to partner or to other people, that understanding cannot derive a rule with a criminal or administrative sanction banning adult and capable women to develop this behavior. In other words, whether or not is unworthy to wear the *burka* is to be evaluated by the adult women to whom the exercise of the fundamental freedom competes, and not by the social majority.²⁰

In this regard, it should be recalled the case *Riera Blume v. Spain*, October 14, 1999, where the ECHR condemned the restrictions on individual freedom for the purpose of "deprogramming" "From the undisputed account of the facts it appears that, in accordance with the judge's instructions, the applicants were transferred by Catalan

²⁰ In this line is the doctrine of the European Court of Human Rights in the case *K. A. and A. D. v. Belgium*, of February 17, 2005, concerning the criminalization of sado-masochistic sex between adults, "the power of each to lead your life as you see fit may also include the possibility of surrender to activities deemed physically or morally harmful or dangerous to his person". In other words, the notion of personal autonomy can be understood "within the meaning of the right to make choices concerning their own body" (*Pretty v. United Kingdom*, April 29, 2002).

police officers in official vehicles to a hotel about thirty kilometers away from Barcelona. There they were handed over to their families and taken to individual rooms under the supervision of people recruited for that purpose, one of whom remained permanently in each room, and they were not allowed to leave their rooms for the first three days. The windows of their rooms were firmly closed with wooden planks and the panes of glass had been taken out. While at the hotel the applicants were allegedly subjected to a “deprogramming” process by a psychologist and a psychiatrist at *Pro Juventud*'s request. On 29 and 30 June 1984, after being informed of their rights, they were questioned by C.T.R., the Assistant Director-General of Public Safety, aided by A.T.V., in the presence of a lawyer not appointed by the applicants. On 30 June 1984 the applicants left the hotel... Nor could the police officers be unaware that, in order to be able to derive benefit from the psychiatric assistance recommended by the investigating judge, the applicants were going to be under constant supervision. They thus did not fully comply with the judge's order, according to which the psychiatric assistance that would enable them to recover their psychological balance had to be provided on a voluntary basis as regards the persons of full age, which is what all the applicants were...²¹

A similar bill to the one adopted in France or Belgium, would not be taken in Spain in defense of dignity as the foundation of political order and social peace, if we understand, as proposed earlier, that the purpose of Article 10.1 is to prevent the exclusion of person or a group of persons because of their identity.

Indeed, such a law doesn't protect a woman who covers face and body considering her religion, because to perform that behavior is part of a right to religious freedom, as it also respects the women's decision of professing another religion or a decision to live excluded in a convent, without undermining or against ambulatory freedom or, in general, against personal dignity. That ban would fit more in the defense of a kind of “social dignity”, a collective morality, which is often identified with “public order”, which would be paradoxical, because in democratic systems that order is made precisely because of the fundamental rights and freedoms guaranteed by the Constitution.

In this erroneous identification between personal dignity and collective moral as a limit of individual freedom, the Constitutional Court went wrong when it held, for example, that “the interpretation of art. 24.2 of the Constitution ..., leads to the conclusion that the legislature can regulate the restriction of the right to a public trial for moral reasons” (JCC 62/1982, of 15 October, 2) and when it says that “to that racist message, already destructive, serves as an expressive vehicle a libidinous mood in words and gestures or attitudes of the characters may well be qualified, more than once, as pornographic, above the tolerable level for Spanish society today and devoid of any positive social values, whether aesthetic, historical, sociological, scientific, political or pedagogical, in an open enumeration” (JCC 176/1995, of 11 December, 5).

Morality is not a limit on fundamental rights; at least it is not in the Spanish Constitution, nor can it be in the lower standard even as recalled by Jiménez

²¹ <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58321>.

Campo,²² as long as they are in the tradition of the law (Articles 1255 and 1275 of the Civil Code, which provide, respectively, the moral limit of freedom of contract and the nullity of the contract when the cause is against law or morality).

There isn't a defense of the constitutionally protected dignity, in these cases, but a kind of “state paternalism” or in the case of protecting an alleged collective dominant social or moral dignity, a pure “legal moralism”²³ which sacrifices personal freedom as the price to pay for ensuring “collective dignity”²⁴, but without a constitutional basis. And when adopting – and we believe that the CE does – an approach to personal autonomy based on the choice, it seems strange that the person whose dignity is supposedly at stake cannot keep that power of choice.²⁵

An example of how legal moralism operates on jurisprudence is found in the criminalization of the voluntary incest between adult accepted by the German

²² Jiménez Campo (note 4), p. 188.

²³ The distinction between paternalism and moralism lies, according to *Liew Chin Ten*, in which 1) paternalism protects individuals who lack sufficient capacity to prevent harm, while moralism interfere with the will of the person even if not affected their ability; 2) is not relevant paternalism moral motivation of the person, while moralism is correct to the person who violates the accepted morality of society; 3) paternalism is intended to protect the people concerned that the measures apply; important for moralism rather than personal interests are general; Paternalism and Morality, in: *Ratio* 13 (1971), pp. 63–65.

²⁴ It's interesting what was said by the ECHR in the case *K. A. and A. D. v. Belgium* because although at first it was said that “not every sexual activity carried out behind closed doors falls necessarily within the scope of Article 8” (*Laskey, Jaggard and Brown v. United Kingdom*, February 19, 1997), in that case *K. A. and A. D.* proclaimed that “the right to have sex from the right to dispose of her body, an integral part of the notion of personal autonomy ... it follows that the criminal law cannot intervene in principle in the field of consensual sexual practices that rely on the discretion of individuals. It is necessary, therefore, that there was a “particularly serious reasons” to warrant, for the purposes of Article 8.2 of the Convention, the interference of the authorities in the area of sexuality [...] While a person can claim the right to exercise some sexual practices as freely as possible, the limit to be applied is that of respect for the will of the “victim” of such practices, the right to free choice as to the means of exercising their sexuality, should also be ensured. This means that practices are developed under conditions that allow such respect”; also see *Jean-Pierre Margenaud*, *Liberté sexuelle et droit de disposer de son corps*, in: *Droits*, 49 (2009), p. 23; *Edouard Dubout*, *Les nouvelles frontières des droits de l'homme et la définition du rôle du juge européen*, in: *Hennette-Vauchez/Sorel (dir.)*, *Les droits de l'homme ont-ils constitutionnalisés le monde?*, Brussels 2011, p. 41; *Philippe Frumer/Ignacio Villaverde*, *La renunciabilidad de los derechos fundamentales y libertades públicas*, Madrid 2013, pp. 54 ff.; very critical with the case *K. A. y A. D.* and the value ascribed to personal autonomy *Muriel Fabre-Magnan*, *Le sadisme n'est pas un droit de l'homme*, in: *Recueil Dalloz* (2005), p. 2975, and *Michel Levinet*, *La notion d'autonomie personnelle dans la jurisprudence de la Court européenne des droits de l'Homme*, in: *Droits* 49 (2009), 49, pp. 16 ff.

²⁵ *Christopher McCrudeen*, *Human dignity and judicial interpretation of human rights*, in: *European Journal of International Law*, v. 19, n. 4, p. 705.

Federal Constitutional Court (2 BvR 392/07 of 26 February 2008)²⁶ and, surprisingly if we consider the doctrine *K.A. and A.D. v. Belgium*, by the European Court of Human Rights (*Stübing v. Germany*, of April 12, 2012).²⁷

According to the ECHR, out of thirty-one Council of Europe Member States, sixteen States (Albania, Austria, Bosnia and Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, Greece, Iceland, Ireland, Liechtenstein, Macedonia, Moldova, San Marino and Slovakia) the performance of consensual sexual acts between adult siblings is considered a criminal offence, while in fifteen of them (Armenia, Azerbaijan, Belgium, Estonia, Georgia, Latvia, Lithuania, Luxembourg, Malta, Monaco, Montenegro, Portugal, Serbia, Slovenia and Ukraine) it is not punishable under criminal law.

It is significant that in their submissions to the ECHR in the *Stübing* case the German Government “did not contest that the applicant’s criminal conviction had interfered with his right to the enjoyment of his private and family life. They considered, however, that this interference had been justified under paragraph 2 of Article 8 as being necessary in a democratic society in the interest of the prevention of disorder and for the protection of morals”.

It also provides other arguments to justify Section 173 of the Penal Code:²⁸ “the risk for the family structure was primarily created by the inversion of social roles within the family, which existed independently of whether and how closely the family actually lived together. The report by the Max Planck Institute had confirmed that incestuous relationships were liable to deepen and exacerbate existing problematic socio-psychological relationships within a

²⁶ http://www.bundesverfassungsgericht.de/entscheidungen/rs20080226_2bvr039207.html.

²⁷ <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-110314>, <http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-110314>. Another disputed decision in Germany was the judgment of the Federal Court of Administrative Litigation in the case *Peep Show* (BverwGE 64, 274); to the Court that a woman voluntarily participate in an exhibition, as if it were a show, can be considered immoral by the legislator as a deviation of human dignity. http://www.jura.fu-berlin.de/studium/lehrplan/projekte/hauptstadtfaelle/faelle/grundrechte/peepshow/peepshow_loesungsvorschlag/index.html. See the critics from *Henning von Olshausen*, *Menschenwürde im Grundgesetz: Wertabsolutismus oder Selbstbestimmung?*, in: *NJW* (1982), pp. 2221 ff., 2224.

²⁸ Section 173 of the German Criminal Code reads as follows: Incest “(1) Whoever performs an act of sexual intercourse with a consanguine descendant shall be punished with imprisonment for no more than three years or a fine. (2) Whoever performs an act of sexual intercourse with a consanguine relative in an ascending line shall be punished with imprisonment for no more than two years or a fine; this shall also apply if the relationship as a relative has ceased to exist. Consanguine siblings who perform an act of sexual intercourse with each other shall be similarly punished. (3) Descendants and siblings shall not be punished pursuant to this provision if they were not yet eighteen years of age at the time of the act.” Section 153 of the Code of Criminal Procedure reads as follows: “(1) If a less serious criminal offence is the subject of the proceedings, the public prosecution office may dispense with prosecution with the consent of the ... court if the perpetrator’s guilt is considered to be minor and [if] there is no public interest in prosecution ... (2) If charges have already been preferred, the court, with the consent of the public prosecution office and the accused, may terminate the proceedings at any stage thereof subject to the requirements of subsection (1) ...”.

family. The damaging effect on the family structure would have a direct negative effect on society. The legislator had thus been entitled to assume that sexual intercourse between siblings, although consensual, created knock-on effects which damaged the family and society as a whole... Finally, *Section 173 of the Criminal Code had served to maintain the taboo against incest, which had cultural and historical roots and thus served to protect morals within society as a whole.*”

In this argument they mix considerations as the protection of the “weaker” person of the sexual familiar relation – paternalism – with arguments invoking the defense of collective moral – moralism. The government discourse was supported, in turn, on the previous foundation of the Federal Constitutional Court, which rejected the appeal of Mr. Stübing said that imposing criminal liability for incest was a suitable means of reflecting societal convictions. It was such considerations, in particular, which allowed criminal sanctions to be defined as a pressing social need and which justified interference with the rights protected in Article 8 of the Convention.

The Constitutional Court added that the design of the criminal provision had not exceeded what was necessary in a democratic society. The prohibition of sexual intercourse between consanguine siblings was not contrary to the protective goals of the legislature. This type of conduct endangered family structures in a different way than other conduct of a sexual nature, or sexual intercourse between step- or adoptive siblings. Likewise, the exclusion of minors from criminal liability was justified by the fact that these cases regularly involved difficult personal situations resulting from the development of those minors, which justified the decision to waive criminal proceedings.

Judge Hassemer attached a dissenting opinion and his arguments may well oppose the ECHR: Section 173 § 2 (2) of the Criminal Code was incompatible with the principle of proportionality. The provision did not pursue a legitimate aim. From the outset, considerations of eugenic aspects were not a valid objective for a criminal law provision. Likewise, neither the wording of the provision nor the statutory context indicated that the provision was aimed at protecting sexual self-determination. Lastly, the prohibition on sibling incest was not justified by the protection of marriage and the family, as it only prohibited the act of sexual intercourse, but did not prohibit any other sexual acts between siblings or sexual intercourse between siblings of the same sex or between relatives who were not blood-related. If the criminal provision were actually aimed at protecting the family from sexual acts, it would also extend to these acts that were likewise damaging to the family. The evidence seemed to indicate that the provision as set out did not protect any specific rights, but was solely aimed at moral conceptions. However, it was not a legitimate aim for a criminal provision to build or maintain common moral standards.

In a democratic constitutional order that proclaims freedom as superior value and ensures individual self-determination cannot beset voluntary incestuous relationship between two adults as a criminal or administrative reprehensible behavior: the sexual life of seniors with full volitional capacity is

part of the sphere of liberty protected by the right to privacy, which excludes a foreign, public or private intervention. In this regard, the ECHR held itself (*Dudgeon v. United Kingdom*, October 22, 1981) that life and sexual orientation are part of intimacy.

Given two people the capacity to act in the field of sexuality, there is no need to invoke a protection for the independent exercise of their own rights (in this course, sexual freedom is protected by privacy). Therefore, not fulfilled, at least in the Spanish case, and *ex-vi* Articles 39 and 49 SC, the assumption that protects the public powers -in this case the criminal Legislator- to protect underage or people with disabilities, limiting the exercise of their rights. If two adults united by family ties - e.g. two brothers - decide to have sex it does not undermine their individual dignity and even the authority's passivity to such practices puts them in a position of inequality and injustice respect of others.

However, in the *Stübing case*, the ECHR concluded that the above-mentioned aims, which had been expressly endorsed by the democratic legislator when reviewing the relevant legislation in the 1970s (see paragraph 46 above), appear not to be unreasonable. Furthermore, they are relevant in the instant case. Under these circumstances, the Court accepts that the applicant's criminal conviction corresponded to a pressing social need.

Having particular regard to the above considerations and to the careful consideration with which the Federal Constitutional Court approached the instant case, which is demonstrated by the thoroughness of the examination of the legal arguments put forward by the applicant and further highlighted by the fact that a detailed dissenting opinion was attached to the text of the decision, and to the wide margin of appreciation enjoyed by the State in the absence of a consensus within the Member States of the Council of Europe on the issue of criminal liability, the Court concludes that the domestic courts stayed within their margin of appreciation when convicting the applicant of incest.

In any case, the ECHR itself could have said that if it's possible to prove that the will of the "victim" was respected, criminalizing these behaviors will not be considered compatible with the right to privacy.

The prohibition of sexual behavior in the private sector also reached the U.S. system, where it has among the most unfortunate signs, endorsed by the Supreme Court in the case *Bowers v. Hardwick* (487 US 186)²⁹, where it was said that could not be said in any way that the Constitution protect homosexual relations in private and with full consent: "The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed".

This statement, from 1986, was rejected by the Court itself 17 years later in the case *Lawrence v. Texas* (123 S. Ct. 2472):³⁰ "*Bowers* was not correct when

²⁹ <http://www.law.cornell.edu/supremecourt/text/478/186>.

³⁰ <http://www.law.cornell.edu/supct/html/02-102.ZS.html>.

it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled. The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter." *Casey, supra*, at 847. The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.

Not without significance, that in this resolution the U.S. Supreme Court use in support of its argument, the case *Dudgeon v. United Kingdom*, October 22, 1981. In that case, and in subsequent *Norris v. Ireland*, October 26, 1988, *Modinos v. Cyprus*, April 22, 1993, and *A.D.T. v. United Kingdom*, July 31, 2000, the ECHR ruled that state interference in the development of privacy, based on the protection of community morality on sexuality, does not constitute a legitimate aim that covers the restriction of that right.

The latter, not the *Stübing case* is in our view the most appropriate doctrine of the rights recognized in the Convention and in the Spanish Constitution. While considered incest between adults as a crime, which has already been said that occurs in a number of European countries, is a clear example not limitation of personal freedom for the sake of protecting human dignity but pure legal moralism, which must be rejected as contrary to personal self-determination guaranteed in a democratic system.

IV. Personal Dignity and Waiver of Exercise of Fundamental Rights

In many cases it is considered that the dignity of the person would be injured as a result of a non-exercise of a fundamental right and therefore it invokes the principle of inalienability of the rights.³¹ This is not the place to address this issue in depth, but we should discuss some aspects of it.

First, it should be recalled, referring to the rights of freedom mentioned in the preceding pages, that the power to live the life that best fits one's convictions involves what pretending to be a waiver of rights is nothing more than

³¹ As is well known, this issue has been studied by the civilian doctrine of personality rights.

the exercise itself of the right: not express an opinion on a particular case, not go to a demonstration, not integrated into an associative entity ... are forms of exercise of these fundamental rights, which protect both the freedom to do something like not to.

Even the decision not to may have agreed with another or others, in which case the ECHR requires that it has to be expressly, clear and unambiguous (so, for example, *Zana v. Turkey*, November 25, 1997, § 70³²; *Richard v. France*, April 22, 1998, § 49³³; and *Schöps v. Alemania*, February 13, 2001, § 48³⁴). However, although it has been agreed not to exercise a right, that decision cannot be revoked later, but retroactively: thus, the authorization for another person to use our image can be revoked, but that doesn't legitimate to claim damages from the use of the image that was made while the authorization was in effect.

The ECHR said that the requirement that the will of the person has to be clearly expressed is a guarantee to avoid conflict with "human dignity" situations. In my opinion, ensuring the express and clear manifestation of the right holder is not the protection of dignity, but of his personal liberty, because such behavior is the result of free will and not under duress. In this line, in the aforementioned case *K.A. and A.D. v. Belgium*, the key, according to the ECHR, is to "respect the will of the victim" of such practices, the right to free choice as to the arrangements for the exercise of their sexuality, should also be ensured. This implies that the practices are carried out in conditions that allow such respect, ...". For *Tremblay v. France*, September 11, 2007, the ECHR "judges that the prostitution is incompatible with the rights and dignity of the human person when it is obliged to exercise"; precisely what type of protection it is if the person is not forced into prostitution, then what is at stake, in fact, is personal dignity and not freedom, at least in principle.

³² "Contrary to the Government's contention, the fact that the applicant raised procedural objections or wished to address the court in Kurdish, as he did at the hearing in the Aydın Assize Court, in no way signifies that he implicitly waived his right to defend himself and to appear before the Diyarbakır National Security Court. Waiver of the exercise of a right guaranteed by the Convention must be established in an unequivocal manner (see the *Colozza* judgment cited above, p. 14, § 28)."

³³ "It is, furthermore, highly unlikely that the applicant would have accepted a friendly settlement proposal that allowed the outcome of the proceedings to be delayed with impunity. The Court reiterates in this respect that under its settled case-law, the waiver of a right guaranteed by the Convention – in so far as such a waiver is permissible – must be established in an unequivocal manner... and requires minimum guarantees commensurate to its importance. Those requirements were not fulfilled in the present case."

³⁴ "As regards the Government's further argument that counsel had agreed to the review proceedings being held without prior access to the files, the Court recalls that for the waiver of a right guaranteed by the Convention to be given effect – if at all – it must be established in an unequivocal manner, a waiver of procedural rights requiring in addition minimum guarantees commensurate to its importance (see *Pfeifer and Plankl v. Austria*, judgment of 25 February 1992, Series A no. 227, pp. 16-17, § 37)."

Similarly to this, not going to a court in defense of a particular claim or not to participate as a voter in elections are also guaranteed by the right to judicial protection and the right to participate in public, except matters in regulations –the Brazilian case, for example– in which voting is compulsory, what in evidence is admissible, and not unworthy, that the way of acting when we are faced with is an important component of the rights legislative setting.

When "procedural or administrative transactions" (not bringing an action for which the penalty is reduced, the covenant of a judgment in accordance with the penalty sought by the accusations, ...) is not allowed to violate the dignity of the person or, in principle none of their fundamental rights provided that such actions are provided for in a statute and partnerships as expression of a conscious decision and freedom of the person concerned, which may be more advantageous to admit the commission of an administrative or criminal offense the consequences of holding an administrative or judicial proceedings against him.

Likewise, there is a right of injury, when the right holder does not react to an intrusion by a government or other private individual: for example, despite an illegal entry at home does not take any action against the intruder.

In none of these cases is the dignity affected, as its "passive" behavior (do not vote, not associated, not expressed, do not go to court, ...) does not put you in a position of inequality and injustice compared with other persons, either in their individual capacity or as a member of a particular social group. And when such an attitude is not acceptable –defense lawyer mandatory in certain processes– is because other assets are at stake and constitutional principles in defense of which the authorities themselves are involved. Not to jeopardize the dignity of the person who refuses to be defended in a criminal case but the structural principle of the rule of law itself.

Neither the dignity undermines its claim to relinquish ownership of fundamental rights as such is not something that can be drawn: the Constitution itself determines, for each right, what people corresponds its ownership (domestic or foreign natural persons and/or legal and private, major or minor, ...). It is the exceptional case of the renunciation of nationality and with it, the rights that are linked to it, but there's no injury to personal dignity.

In short, it seems very difficult to justify constitutionally the dignity of the person can be invoked as an argument that, having regard to the objective dimension of fundamental rights, enables the legislator to limit the decisions of a person with full legal capacity, the freedom to live is guaranteed to persons to live their lives according to their beliefs.

Now, to conclude, some examples: the duty imposed by the state, to go school, while a person is in the period of compulsory education, is not covered by the protection of his dignity, but in legal presumption that the person does not have sufficient volitional capacity and that education will precisely provide adequate training to be a free person; respect to the force-feeding of prisoners on hunger strike supported by the Spanish Constitutional Court (JCC

120/1990, of 27 June, and 137/1990, of 19 July), which was not imposed in Great Britain in a similar situation or even a special relationship as exists between the prison administration and prisoners justifies coercive measures that while trying to save the life and health of inmates, injured his freedom and autonomy, which allow you to take the supremacy decisions that best suit their convictions without causing harm to others.