HUMAN DIGNITY, PATERNALISM, AND RELIGIOUS SYMBOLS*

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1. The Use of Religious Symbols: Coercion or Choice?

1.1. Western countries are today characterized by cultural diversity, stemming not only but also from migration. In a broad sense, cultural diversity encompasses religious diversity. Conflicts between dimensions of freedom of religion and other fundamental rights and/or constitutional principles, from equality and human dignity to neutrality and separation between Church and State (whose scope remains, somehow, uncertain), arise frequently.

The case law of the European Court of Human Rights (ECHR) provides several examples of cases concerning issues arising from the use

* Este artigo tem por base as comunicações em inglês que a Benedita Mac Crorie e eu preparámos em conjunto entre 2016 e 2017 para apresentar em seminários internacionais e que depois convertemos em artigo com vista à sua publicação. É a última versão desse texto (julho de 2021) – cujos aspetos formais estávamos precisamente a ultimar para a sua submissão a uma revista, que infelizmente já não veio a ocorrer – que agora se publica, com as adaptações mínimas necessárias ao respeito pelas regras de estilo deste *Liber Amicorum.* Que este diálogo, alimentado ao longo dos anos, possa contribuir para outros diálogos académicos e para a discussão científica em torno dos temas, como o da proteção jurídica da dignidade da pessoa humana, que a Benedita Mac Crorie sempre acarinhou.
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of religious symbols in public places[1], among which the well-known *Leyla Şahin v. Turkey* (2005)[2] and, more recently, cases concerning religious attire worn by women partially or totally covering the face such as *S.A.S. v. France* (2014)[3] and *Belcacemi and others v. Belgium* (2017)[4]. These last cases concerned France and Belgium, whose constitutional jurisdictions had previously ruled on laws interdicting the use of clothing fully or substantially hiding the face in public places, the French *Conseil Constitutionnel* in 2010[5] and the Belgian *Cour Constitutionelle* in 2012[6].

The prohibition of use of religious attire by adult women - namely headscarves, *hijabs, niqabs* or *burqas* – is generally grounded on a wide range of reasons (not completely independent from each other). These reasons encompass, among others, the protection of public order and collective security (the use of veils covering the face may difficult or preclude the possibility to identify its user), the State's duty to protect a certain conception of "living together" ("*vivre ensemble*"[7]), the safeguard of religious neutrality and "*laicité*" in specific places such as public schools, the need to safeguard gender equality and the protection of adult women's autonomy and dignity. In this article, we suggest that this last type of arguments can lead to paternalistic measures, problematic from the point of view of autonomy and religious freedom (encompassing decisions on the use of religious clothing).

1.2. Underlying this discussion is the question of whether the State should interfere in the manifestation of religious beliefs by its citizens (or, more generally, by people submitted to its laws, even if not citizens), namely

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[1] For ECHR case law overview on religious symbols and clothing, encompassing different religions and different domains, from school to court or workplaces, ECHR, *Religious Symbols and Clothing* (Dec. 2018), available at http://www.echr.coe.int/Documents/FS_Religious_Symbols_ENG.pdf

[2] ECHR, *Leyla Şahin v. Turkey,* App. No. 44774/98 (Nov. 10, 2005), available at http://hudoc.echr.coe.int/. On the jurisprudence of the ECHR about muslim religion, among others, Patrícia Jerónimo, *Intolerância religiosa e minorias islâmicas na Europa: a censura do "Islão visível" - os minaretes e o véu - e a jurisprudência conivente do Tribunal Europeu dos Direitos do Homem* (Jan. 08, 2013) available at http://hdl.handle.net/1822/22352

[3] ECHR, *S.A.S. v. France,* App. No. 43835/11 (Jun. 26, 2014), available at http://hudoc.echr.coe.int/.

[4] ECHR, *Belcacemi and others v. Belgium,* App. No. 37798/13 (Jul. 11, 2017), available at http://hudoc.echr.coe.int/.

[5] Conseil Constitutionnel (CC), *Décision n° 2010-613 DC du 7 octobre 2010*, on the *Loi interdisant la dissimulation du visage dans l'espace public*, available at http://www.conseil-constitutionnel.fr

[6] Cour Constitutionnel Belge (CCB), *Arrêt n° 145/2012* (Dec. 06, 2012), available at http://www.const-court.be/public/f/2012/2012-145f.pdf

[7] ECHR, *S.A.S. v. France,* App. No. 43835/11, and CCB, *Arrêt n° 145/2012* (Dec. 06, 2012).

through the action of legislators approving acts concerning the use of religious symbols in public places or through the action of courts deciding disputes concerning them.

Even if we sustain that a State must not endorse a specific religion or must, at least, create effective conditions for free exercise of religion (which encompasses the respect for non-believers), it seems difficult to affirm that States are, from a factual point of view, completely neutral when it comes to religion and/or, more broadly, to culture[8]. The existence of Sunday closing rules in non-confessional States or the adoption of "official languages" serve as examples[9].

The conception of State neutrality[10], born in the liberal tradition, is complex and widely discussed. We suggest that State's attitude towards culture should be *impartiality* in the sense of an obligation of "inclusion of reasons" in the argumentative process leading to a decision, not *prima facie* discriminating against some of those reasons[11]. Following Carens and Parekh, the State does not have to be culturally neutral or indifferent, but equitative, giving all "cultural voices" the possibility to participate in a "common dialogue"[12].

The State must respect cultures and religious communities, not strictly by their intrinsic value, but mostly as a way of respecting dimensions that give meaning to the lives of the individuals and are, therefore, protected through individual rights such as the right to self-determination, the right to cultural identity and religious freedom. This recognition of the value of

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[8] Discussing the issue of State neutrality, Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights,* Oxford, Oxford University Press, 1995.

[9] As it is the case of Portugal, see Luísa Neto, "*De die ad diem:* os dias úteis ou a utilidade dos dias. Comentário ao Acórdão do TCAN (1ª secção) de 8.2.2007, P.1394/06.OBEPRT", *Cadernos de Justiça Administrativa*, 74, 2009, pp. 37 ff. Other examples can be found in Rossella Bottoni, Rinaldo Cristofori and Silvio Ferrari (eds.), *Religious Rules, State Law, and Normative Pluralism - A Comparative Overview*, Springer, 2016.

[10] The relationship between religion and State, which offers different models not explored in this paper, is relevant to the broad conception of State neutrality, itself a contested concept of liberal origin. There are different understandings and meanings of political neutrality, focusing on the outcomes of State action or on the reasons underlying the action (which can be understood as neutrality of intent or justificatory neutrality), as discussed by János Kis, *State Neutrality, in* Michel Rosenfeld and András Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law*, Oxford University Press, 2012, pp. 319 ff.

[11] Anabela Costa Leão, *Constituição e interculturalidade – da diferença à referência,* 2013, pp. 199-211 [PhD thesis presented in 2013 to Faculty of Law of the New University of Lisbon, approved in 2014]

[12] Bhikhu Parekh, *Repensando el multiculturalismo,* Ediciones Istmo, 2005, p. 330. Translation by the authors.

cultural belonging in the process of identity shaping can also justify policies aiming at justice and equality among cultural groups (namely, compensating minority groups for inequalities)[13].

One of the most controversial issues concerning the defense of multicultural approaches is whether the defense of the respect for cultural traditions, many of which patriarchal, help perpetuating the situation of discrimination and disrespect for women's rights[14], turning the State into a *de facto* accomplice of gender inequality even though establishing equality as a basic legal principle. Also, as feminist literature shows, power dynamics inside the groups must not be forgotten, namely those concerning minorities within the groups ("internal minorities") or – using a perhaps more accurate terminology – *vulnerable groups* or *vulnerable members* inside the groups, among which are women[15].

The respect for cultural groups shall not mean that State's interference in the face of certain cultural practices is always forbidden. In some cases, it is not only admitted but truly imposed to safeguard the basic rights (such as autonomy or physical integrity) of the group members affected by the cultural practices at stake (for example, women or children) or to achieve fundamental principles of the community considered to be non-negotiable, such as gender equality, human dignity, or principles imposed by the "democratic State based in the rule of Law"[16].

Respect for human dignity, autonomy and development of personality all ground the *prima facie* respect for manifestations of cultural and religious identities. However, limits can be placed on the right to express one's cultural and religious identity to safeguard rights of others, fundamental principles of the community and even to protect the individual from itself, even though

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[13] On this, see for all the defense of differenced cultural rights sustained by Will Kymlicka, *Multicultural Citizenship..., op. cit.*

[14] See, for an example, Leti Volpp, "Feminism vs. Multiculturalism", *Critical Law Review,* 101, 5, 2001, pp. 1181 ff. and Susan Möller Okin, "Is multiculturalism bad for women?", *Boston Review*, 1997, available at http://new.bostonreview.net/BR22.5/okin.html

[15] On this, see Ayelet Shachar, "Feminism and multiculturalism: mapping the terrain"*, in* Anthony Simon Laden and David Owen (eds.), *Multiculturalism and Political Theory,*Cambridge University Press, 2007, pp. 115 ff. and "Religion, State, and the Problem of Gender: Reimagining Citizenship and Governance in Diverse Societies", *McGill Law Journal*, 50, 2005, pp. 49 ff.

[16] On this, generally, Anabela Costa Leão, *Constituição..., op. cit., passim.*

this last possibility is more problematic (see below 2)[17]. This renders the determination of limits and criteria governing State intervention crucial.

1.3. Although aiming to safeguard the autonomy of individuals, it can be discussed whether many of the bans on the use of religious symbols in public spaces are based on paternalistic grounds, because the use of these symbols may reflect, many times, a deliberate choice[18]. These bans can appear, therefore, to be hardly compatible with autonomy itself, given the fact that autonomy should include the possibility of adopting a behavior that appears in the eyes of others as an option (a free exercise of choice) for inequality or exclusion.

Autonomy is a highly contested concept[19]. In the words of Catriona Mackenzie, "[i]n liberal democratic societies, the principle of respect for personal autonomy is widely accepted – in theory, if not always in practice – as a fundamental normative principle, the importance of which is enshrined in a number of legal and political rights. Put simply, to respect autonomy is to respect each person's entitlement and authority to lead a self-determining life. To lead a self-determining life is to be able to make important decisions about one's life and to act on the basis of one's deeply held values and commitments free from undue interference and domination by others. The presumption is that most adult citizens have the capacity and the right to exercise this authority, even if they do not always exercise it as wisely as they might."[20]

Catriona Mackenzie suggests two different concepts of autonomy, a liberal or more precisely libertarian understanding, and a relational

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[17] The case law of the ECHR on religious freedom and cultural identity and admissible restrictions provides for several examples, as demonstrated among others by Eva Brems, "Human Rights as a framework for negotiating/protecting cultural differences – an exploration of the case-law of the European Court of Human Rights", *in* Marie-Claire Foblets, Jean François Gaudreault-Desbiens and Alison Dundes Renteln (eds.), *Cultural Diversity and the Law. State Responses from around the world,* Bruylant, 2010, pp. 663 ff.

[18] For the purposes of this paper, we do not dwell on the question whether religion is a matter of choice or chance. We assume that there is an element of choice in religious practice, based on autonomy considerations. For a brief discussion, see Lucy Vickers, "ECJ headscarf series (2): the role of choice; and the margin of appreciation", *Strasbourg Observers*, Sept. 08, 2016, available at https://strasbourgobservers.com/2016/09/08/blog-series-the-role-of-choice-and-the-margin-of-appreciation/

[19] For a critical discussion, see Catriona Mackenzie, "Feminist innovation in philosophy: relational autonomy and social justice", *Women's Justice International Forum*, 2018, available at https://doi.org/10.1016/j.wsif.2018.05.003, and Jill Marshall, *Personal Freedom through Human Rights Law? Autonomy, Identity and Integrity under the European Convention on Human Rights,* Martinus Nijhoff Publishers, 2009, pp. 57-68. See also *infra,* at 2.

[20] Catriona Mackenzie, "Feminist innovation...", *op. cit.,* p. 3.

understanding[21]. The first emphasizes negative freedom, the second takes into account "relational and social constitution of individual identity" and phenomena of social oppression, inequality and power relations[22]. According to the author, "a multidimensional analysis of the concept of autonomy is helpful for teasing apart the variable impacts of social oppression and inequality on autonomy" [23]. Her concept of autonomy involves "three conceptually distinct, but causally interdependent dimensions or axes: self-determination, self-governance, and self-authorization" [24]. Conditions for self-governance or "agency" can be particularly relevant considering the aim of this paper.

As feminist literature on adaptive preferences or oppressive socialization shows, recognizing the relevance of culture and communities can render problematic from the point of view of preserving self-determination and autonomy conditions of women in patriarchal societies[25]. Highlighting the context where choices take place seems crucial to contest the abstract, individualistic and invulnerable liberal subject[26], in the sense that people are produced, not just limited, by contexts. However, it seems also crucial not to exclude the idea that people preserve some control over their lives and are, therefore, autonomous[27]. Recognizing the value of cultural belonging shall not mean sacrificing individual cultural self-ascription dimensions and personal experiences of culture[28]. Otherwise, we may fail to *recognize* women in their dignity as well[29].

1.4. All the cases listed above concern equality of sexes and rights and dignity of women and the legitimacy of public authorities to protect

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[21] Catriona Mackenzie, "Feminist innovation...", *op. cit.,* pp. 3-4.

[22] Catriona Mackenzie, "Feminist innovation...", *op. cit.,* pp. 3-4.

[23] Catriona Mackenzie, "Feminist innovation...", *op. cit.,* p. 4.

[24] Catriona Mackenzie, "Feminist innovation...", *op. cit.,* p. 4.

[25] For a discussion of this topic, Jill Marshall, *Personal Freedom..., op. cit.,* pp. 57 ff.

[26] For a critique of the liberal subject from a vulnerability perspective, Martha Albertson Fineman, "The Vulnerable Subject: Anchoring Equality in the Human Condition", *Yale Journal of Law & Feminism*, 20, 1, 2008, pp. 1 ff.

[27] See Jill Marshall, *Personal Freedom..., op. cit.*

[28] On this, see Seyla Benhabib, *Las reivindicaciones de la cultura*, Katz, 2006, p. 216, and Sarah Song, "Majority norms, multiculturalism and gender equality", *American Political Science Review*, 99, 4, 2005, pp. 473 ff.

[29] Jill Marshall, "S.A.S. *v France*: *Burqa* Bans and the Control or Empowerment of Identities", *Human Rights Law Review*, 15, 2015, pp. 377 ff., mainly p. 389.

those values through the interference on religious beliefs, encompassing religious attire.

In the *Leyla Şahin* case, the ECHR found that the Istanbul University regulations restricting the right to wear the Islamic headscarf and the measures adopted in accordance had interfered with the applicant's religious freedom, namely her right to manifest her religion, protected by Article 9 of the European Convention of Human Rights (hereinafter, Convention). However, the Strasbourg Court also noted that Article 9 "does not protect every act motivated or inspired by a religion or belief" and considered those restrictions an interference "prescribed by law", which pursued a legitimate aim and was "necessary in a democratic society" within the meaning of Article 9/2 of the Convention. The State was recognized a margin of appreciation, given the diversity of approaches of national authorities to the relationship between State and religions, especially when it comes to regulating the wearing of religious symbols in educational institutions, and a reasonable relationship of proportionality between the measures and the aims was found.

In the words of the Court, in universities "where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women are being taught and applied in practice, it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire, including, as in the present case, the Islamic headscarf, to be worn"[30].

However, considerations about the autonomy of the applicant and her human dignity played no role in the reasoning of the Court. The dissenting opinion of Judge Tulkens in the *Leyla Şahin* case (see § 11 and

[30] *Leyla Şahin v. Turkey,* App. No. 44774/98 at para. 116. Also in *Dahlab v. Switzerland*, App. No. 42393/98 (Feb. 15, 2001), available at http://hudoc.echr.coe.int/, the Court expressed as follows: "The Court accepts that it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children. The applicant's pupils were aged between four and eight, an age at which children wonder about many things and are also more easily influenced than older pupils. In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which, as the Federal Court noted, is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils".

12) is very expressive, namely when she affirms, on the use of the headscarf by Leyla, a young university student, that she fails to see "how the principle of sexual equality can justify prohibiting a woman from following a practice which, in the absence of proof to the contrary, she must be taken to have freely adopted. Equality and non-discrimination are subjective rights which must remain under the control of those who are entitled to benefit from them"[31].

The issue arose again in *S.A.S v. France*, a case with many third-party interveners, in which a French Muslim woman argued that her rights under the Convention – specifically, her freedom of religion (Article 9), freedom of expression (Article 10) and right to respect to private life (Article 8), taken separately and in conjunction with Article 14 – were being violated by the French ban on the use of religious clothing imposed by the Law of 11 October 2010 prohibiting the concealment of one's face in public places. According to the applicant, "she is a devout Muslim, and she wears the *burqa* and *niqab* in accordance with her religious faith, culture and personal convictions" and "neither her husband nor any other member of her family put pressure on her to dress in this manner"[32]. She added that she wore the *niqab* in public or private places, not systematically but according to her feelings, and that she would agree to uncover the face for identity checks[33]. She sustained "that the Government's assertion that for women to cover their faces was incompatible with the principle of gender equality was simplistic" once the veil could denote "emancipation, self-assertion and participation". The ban exceeded the possibility of restrictions allowed by Article 9 /2 of the Convention and was not "necessary in a democratic society", resting in an inappropriate understanding of female autonomy and gender equality[34].

Among other grounds, the French Government argued that considering that "women, solely on the ground that they were women, must conceal their faces in public places, amounted to denying them the right to exist as individuals and to reserving the expression of their individuality to the private

[31] *Leyla Şahin v. Turkey,* App. No. 44774/98 (Nov. 10, 2005), Dissenting Opinion by Judge Tulkens at para. 12. Referring to *Dahlab* and *Leyla Şahin* cases, Eva Brems, "Human Rights...", *op. cit.,* at p. 720, discusses the concern of the Court with the protection of individuals from the freely chosen impact of their own religion or culture.

[32] ECHR, *S.A.S. v. France,* App. No. 43835/11 at para. 11.

[33] *Id.* at para. 12-13.

[34] *Id.* at para. 76-80.

family space or to an exclusively female space" and that "it was a matter of respect for human dignity, since the women who wore such clothing were therefore 'effaced' from public space. In the Government's view, whether such 'effacement' was desired or suffered, it was necessarily dehumanizing and could hardly be regarded as consistent with human dignity"[35].

The Court examined the application under articles 8 and 9, but with emphasis on the second[36]. The Court noticed that "personal choices as to an individual's desired appearance, whether in public or in private places, relate to the expression of his or her personality and thus fall within the notion of private life"[37], therefore recognizing that personal identity dimensions protected by Article 8 were at stake[38], and also that the case concerned clothing that the practice of the appellant's religion required her to wear, raising an issue with regard to the freedom to manifest one's religion or beliefs[39].

The Strasbourg Court found no violation of Articles 8 and 9 of the Convention[40]. Even if aware of the need to submit the prohibition to a proportionality test[41] – considering, namely, that the Government failed to prove the existence of considerable risks to public safety arising from the concealing of the face, especially when confronted with the negative impact on the rights of women who wish to fully cover their faces[42] – the Strasbourg Court considered that the margin of appreciation enjoyed by the State in this case allowed it to impose bans on the full concealing of the face in public. The Court stated they could be regarded as "necessary in a democratic society" and proportionate to the aim pursued, "namely the preservation of the conditions of 'living together' as an element of the "protection of the rights and freedoms of others"[43].

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[35] *Id.* mainly at para. 82.

[36] *Id.* at para. 109.

[37] *Id.* at para. 107.

[38] Jill Marshall, "S.A.S. *v France*...", *op. cit.,* pp. 380-381.

[39] ECHR, *S.A.S. v. France,* App. No. 43835/11, at para. 108.

[40] *Id.* at para. 106 onwards.

[41] As noticed by Saïla Quald Chaib and Lourdes Peroni, "S.A.S. v. France: Missed Opportunity to Do Full Justice to Women Wearing a Face Veil", *Strasbourg Observers* (Jul.03, 2014) available at https://strasbourgobservers.com/2014/07/03/s-a-s-v-france-missed-opportunity-to-do-full-justice-to-women-wearing-a-face-veil/

[42] ECHR, *S.A.S. v. France,* App. No. 43835/11, at para. 119.

[43] *Id.* at para. 159.

The Court took also the view that gender equality and dignity (*of others*) could not be invoked by States to justify the blanket ban on a practice endorsed and defended by women such as the applicant[44]. According to the Court, the use of religious attire is expression of cultural diversity, which contributes to pluralism inherent to democracies, and could not be seen as seeking to express "a form of contempt against those they encounter or otherwise to offend against the dignity of others" [45]. As noticed by Jill Marshall, even though there is no elaboration on the topic, the ECHR "seems to accept a version of gender equality that enables each woman equally to have the freedom to develop her personality or identify as she sees fit"[46].

More recently, in *Belcacemi and Oussar v. Belgium* (2017) concerning Belgian laws criminalizing the use of clothing full or substantially concealing the face in public, the Strasbourg Court maintained the approach adopted in *S. A. S*. It recognized the Belgian State a wide margin of appreciation to determine the conditions of "living together" and found no violation of Articles 8 and 9 of the Convention. The issue of gender equality was not discussed by the Court.

At this point, it is worth taking a close look at the Belgian and French discussions concerning the use of religious symbols in public. The Belgian and French Constitutional jurisdictions also faced the question of the use of religious symbols as a matter of choice and not of coercion, in cases in which covering the face was at stake.

In the words of the Belgian *Cour Constitutionnel* concerning the dignity of women, the fundamental values of a democratic society preclude the imposition on women by families or communities of an obligation to conceal their face against their will, depriving them of self-determination[47]. The Court conceded that the wearing of the full-face veil may correspond to the expression of religious choice, but added[48]: "[e]ven where the wearing of the full-face veil is the result of a deliberate choice on the part of the woman,

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[44] *Id*. at para. 119.

[45] *Id*. at para. 120.

[46] Jill Marshall, "S.A.S. *v France...", op. cit., p.* 384.

[47] CCB, *Arrêt n° 145/2012*, at B. 22-23.

[48] *Id*. at B. 23. We use the translation of the decision provided in *S.A.S. v. France, cit.,* para. 42.

the principle of gender equality, which the legislature has rightly regarded as a fundamental value of democratic society, justifies the opposition by the State, in the public sphere, to the manifestation of a religious conviction by conduct that cannot be reconciled with this principle of gender equality. As the court has noted in point B.21, the wearing of a full-face veil deprives women – to whom this requirement is solely applicable – of a fundamental element of their individuality, which is indispensable for living in society and for the establishment of social contacts".

As for the discussion in France, it is worth mentioning the *Étude* of the *Conseil d'État* of 2010 on the legal grounds for a general prohibition on the use of full veil[49]. The *Conseil d'État* considered that the reasons provided were fragile and that the ban would violate several fundamental rights and freedoms, such as individual freedom, personal freedom, right to privacy, freedom of expression and freedom to manifest one's beliefs, notably religious, and prohibition of discrimination. It underlined also that the fundamental principles of protection of human dignity and equality of men and women, whether taken separately or in combination, were not readily applicable in this area, giving a very fragile support in the case of persons who have deliberately chosen to wear the full veil. In the words of the *Conseil d'État*, "the assessment of what does or does not detract from the dignity of the person is, at least potentially, comparatively subjective, as shown by the fact that the wearing of the full veil is in most cases voluntary"[50].

In that decision, the *Conseil* also explored the possibility of grounding the ban on the "public policy clause", understood in a *positive* way. In this sense, public policy is not meant to be a limit to the abusive exercise of rights, but a "minimum requirement for the reciprocal demands and essential guarantees of life in society", among which the safeguard of pluralism and the principle of equality between men and women, likely to be imposed even in the absence of any evidence of coercion in the use of a face-covering

[49] Conseil d'État, *Study of possible legal grounds for banning the full veil* (2010), p. 27 ff., available at http://www.conseil-etat.fr

[50] *Id.* at 21 ff.

veil[51]. However, the *Conseil* considered this a risky solution given the current state of the law.

Later that year, the *Conseil Constitutionnel*, appreciating the law establishing the general ban of concealing the face in public space, did not consider it unconstitutional, as it pursued legitimate aims passing the proportionality test[52]. Among the reasons pointed by the legislator was the assumption that every woman concealing the face, whether on her own will or not, was placed in a situation of exclusion and inferiority incompatible with the constitutional principles of liberty and equality.

The use of religious attire falls within the scope of protection of freedom of religion. It is assumed that the control of measures which interfere with fundamental rights must not only establish whether the aims are legitimate but also whether the means are appropriate, using proportionality tests[53]. Circumstances such as the specific situation of the women involved, the nature of the space where restrictions take place (here emerging the difficult question of determining what are private or public places) and the type of religious attire at stake (namely whether it partially or fully covers the face or the head, allowing or not for recognition) must be considered in the proportionality analysis[54]. Also, the meaning ascribed to the use of religious symbols such as the veil varies, favoring the use of criteria based on individual self-understanding of the meaning of religious practices[55]. This suggests the importance of contextual approaches.

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[51] According to the *Conseil*, at p. 30 of the mentioned *Report*, "Such a conception, if formalised, would thus provide an unprecedentedly "positive" definition of public policy: it would no longer be a mere rampart against abuse arising from the unrestrained exercise of freedoms but the basis of the fundamental conditions that guarantee their free exercise. It would therefore reflect a basic right and proceed from the principle of equal membership of society for all. It would thus constitute the one possible ground for justifying a prohibition of concealment of the face for the purpose of preventing personal recognition".

[52] CC, *Décision n° 2010-613 DC, (Oct. 7, 2010).* See also the *Commentaire* on the decision in *Les Cahiers du Conseil Constitutionnel*, Cahier 30, available at http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/2010613DCccc_613dc.pdf

[53] On this principle, originally from Germany but whose implementation is expanding, even though its interpretation varies, Moshe Cohen-Eliya and Iddo Porat, *Proportionality and constitutional culture*, Cambridge University Press, 2013.

[54] See Anabela Costa Leão, *Constituição..., op. cit.,* pp. 360 ff.

[55] See Anabela Costa Leão, *Constituição..., op. cit.*, p. 372.

Being a well-established principle of human and fundamental rights law[56], gender equality principle qualifies as a legitimate aim, originating protection and promotion duties for States and public powers. However, even if measures designed to ensure equality between women and men are considered admissible and necessary from the point of view of constitutional and international Law, a general ban on the use of a headscarf fully or partially covering the face and the establishment of sanctions (namely, penal sanctions) for women using it, seems highly debatable from a proportionality point of view[57]. The *necessity* of a general ban on religious attire to promote gender equality seems controversial, given the existence of less restrictive measures from the point of view of religious self-determination. Before that, the very *adequacy* of such measures is debatable, given the possibility of reinforcing social exclusion of these women and lead to a double victimization[58]. In the words of Cécile Laborde, "[i]t is, at best, hazardous to seek to promote individual autonomy directly through legal coercion"[59].

Measures aimed at determining whether or not there has been coercion forcing the use of religious attire may be legitimate to ensure freedom to decide. However, replacing those measures by an abstract and general assumption of incapacity to express free consent seems problematic on various grounds[60].

In particular, restrictions based in general abstract assumptions of danger to community values need to be scrutinized on proportionality grounds. This issue was precisely addressed in 2015 by the Federal Constitutional

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[56] Among other instruments, at universal level, it results from Article 3 of the International Covenant on Civil and Political Rights (United Nations, 1966), Article 3 of the International Covenant on Economic, Social and Cultural Rights (United Nations, 1966), Convention on the Elimination of All Forms of Discrimination against Women (United Nations, 1979). At regional level, see Article 14 and Protocol 12 to the European Convention on Human Rights, Convention on Preventing and Combating Violence against Women and Domestic Violence (Council of Europe, 2011), Article 23 of the Charter of Fundamental Rights of the European Union.

[57] As defended in Anabela Costa Leão, *Constituição..., op. cit.,* p. 371-2. Also, dissenting opinion of Françoise Tulkens in ECHR, *Leyla Şahin vs. Turkey,* App. No. 44774.

[58] Anabela Costa Leão, *Constituição..., op. cit.,* p.372.

[59] Cécile Laborde, "State paternalism and religious dress code", *International Journal of Constitutional Law*, 10, 2, 2012, pp. 398 ff., p. 408.

[60] As defended in Anabela Costa Leão, *Constituição..., op. cit.,* p. 372. Jill Marshall, "S.A.S. *v France*...", *op. cit.,* at p. 388 writes "Legally banning a woman from exercising a choice she says she freely makes as an adult does not respect her as an equal and does not give her recognition as a person capable of making her own choices as an adult. Such bans exclude, judge, disrespect, and thus do not safeguard her identity or personality rights".

Court of Germany on the decision concerning the prohibition of use of Islamic headscarves by interdenominational State school teacher: "it is wrong to assume that the mere wearing of an Islamic headscarf or another head covering indicating affiliation with a belief is in itself already conduct that would readily create the impression among pupils or parents, [that] the person wearing it advocates against human dignity, the principle of equal treatment under Art. 3 GG, fundamental freedoms or the free democratic basic order. This generalization is impermissible"[61].

2. Paternalism and Protection of the Individual from Himself

2.1. It is accepted that the State may reasonably limit the exercise of rights when it aims to safeguard the public interest or third parties. The same cannot be said, however, when the basis of the restriction is the defense of the individual from himself[62].

The question to be posed is, therefore, if it is legitimate, in a plural society, for the State to limit the freedom of its citizens, protecting their fundamental rights against their own will, when they do not harm others or the community as a whole. Is the legal system entitled to protect the individual "against the risk of misuse of his freedom"[63]? Are the bans on the use of religious attire legitimate, when they aim to protect women who use them because they chose to do so?

The idea of defending an individual from himself is closely linked with State paternalism[64], insofar we understand the term paternalism as "the withdrawal or reduction of the individual's freedom of choice in order to ensure the protection of a person or category of persons from acts contrary to their

[61] Bundesverfassungsgericht [BVerfG, Jan. 27, 2015, Case No. 1 BvR 471/10, paras. 1-31, available at http://www.bverfg.de/e/rs20150127_1bvr047110en.html

[62] Carlos S. Nino, *The Ethics of Human Rights*, Clarendon Press, 1991, pp. 131-132.

[63] Olivier de Schutter and Julie Ringelheim "La renonciation aux droits fondamentaux. La libre disposition du soi el le règne de l'échange", *in* Hugues Dumont, François Ost and Sébastien Van Drooghenbroeck (coord.), La *Responsabilité, face cachè des droits de l'Homme*, Bruyllant, 2005, pp. 441 ff., p. 446. Translation by the authors.

[64] When the State acts paternalistically towards its citizens we can speak of state paternalism, or legal paternalism. Kai Möller, *Paternalismus und Persönlichkeitsrech*, Duncker & Humblot, 2005, p. 11.

own interests"[65]. When the State acts paternalistically towards its citizens we can speak of state paternalism or legal paternalism. State paternalism can be distinguished from other restrictive state measures for a particular feature: the "specific purpose of the restriction". Paternalist measures intend to protect the individuals against possible "bad choices" that they can make and not to defend third parties or public interests[66]. According to this perspective, the State can prohibit or impose certain behaviors, where that prohibition or imposition is essential to avoid harm (physical, psychological or economic)[67]. However, it may also be a purpose of such measures to prohibit certain actions that are considered "intrinsically immoral"[68].

Paternalism is, first of all, questionable from a fundamental rights perspective because it may undermine the autonomy protected by those rights, since it only allows autonomy to be exercised when it promotes the individual's own good[69]. It is, therefore, relevant to analyze whether there are "ethically defensible" types of legal paternalism[70].

2.2. We should, first of all, distinguish between "weak" and "strong" paternalism: the "weak" paternalist defends the legitimacy of the State's interference with the means that agents choose for the accomplishment of their goals, when the means they elect put in question those same goals. On the

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[65] Fabrizio Cosentino, "Il paternalismo del legislatore nelle norme di limitazione dell'autonomia dei privati", *Quadrimestre*, 1, 1993, pp. 119 ff., p. 120. Translation by the authors.

[66] Kai Möller, *Paternalismus..., op. cit.,* pp. 11-12.

[67] Ernesto Garzón Valdés, "Kann Rechtspaternalismus ethisch gerechtfertigt werden?", *Rechtstheorie*, 18, 1987, pp. 273 ff., pp. 273-274. According to the Author, that is the case of drug sale or consumption bans, interdiction of persons with disabilities, alcoholics or drug addicts, the mandatory use of helmets or seat belts, the prohibition of swimming in unguarded beaches and the laws that prohibit certain luck games.

[68] Examples of moral paternalism are the prohibition of homosexuality among adults, sex-shows or sadomasochistic sexual activities. On this, see Ernesto Garzón Valdés, "Kann Rechtspaternalismus …", *op. cit.*, pp. 274 and 275. On the prohibition of homosexual relationships, see U. S. Supreme Court, *Lawrence v. Texas,* 539 U.S. 558 (2003), which overturned the decision of *Bowers v. Hardwick,* 478 U.S. 186 (1986), in which the Court considered that laws prohibiting sodomy were not unconstitutional, since it was considered an immoral practice. On the prohibition of sadomasochistic activities, see ECHR, *Laskey, Jaggard and Brown v. UK,* App. No. 21627/93; 21628/93; 21974/93 (Feb. 19, 1997), available at http://hudoc.echr.coe.int and *K.A. and A.D. v. Belgium*, App. No. 42758/98; 45558/99 (Feb. 17, 2005), available at http://hudoc.echr.coe.int. While in the first case the Court considered that the State authorities acted within their margin of appreciation for health protection (although there was no irreversible and serious harm at stake), the second decision recognized that the right to have sex, even violently, is protected by Article 8 of the Convention.

[69] Joel Feinberg, *Harm to Self. The Moral Limits of the Criminal Law*, Oxford University Press, 1986, p. 58.

[70] On this, see Ernesto Garzón Valdés, "Kann Rechtspaternalismus ...", *op. cit.,* pp. 273 - 289.

other hand, a "strong" paternalist questions the ends themselves and considers legitimate the State's interference in order to prevent people from achieving what are considered to be irrational or mistaken ends[71].

According to this distinction, for example Kai Möller can be considered a "weak" paternalist. This Author, following John Kleinig's perspective[72], argues that paternalistic measures can be justified when they aim to safeguard the integrity of the individual. The author advocates what he calls "the integrity solution" which is (in his perspective) not to be confused with the different variants of the theory of values. In the "integrity solution" the individual's conceptions govern state action, since freedom of choice is not restricted in order to preserve objective values, but taking into account the subjective priorities of the individual[73]. According to him, when the purpose of the lawmaker is to ensure the integrity of the individual, we are no longer facing an illegitimate freedom restriction. Paternalism should be "more acceptable the more the individual concerned, through his decisions, is in contradiction with his own integrity"[74].

However, he also holds that the State doesn't have the right to protect the individual from himself, arguing that he does so in order to preserve his integrity, when it is enough to warn him about the dangerous nature of his behavior. Consequently, paternalistic measures are not to be accepted when it suffices to inform the individual in order to safeguard his integrity[75]. Moreover, protection against paternalism should be all the more intense as more relevant to the personality the behavior in question is[76].

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[71] Gerald Dworkin, "Paternalism", *in* Eduard N. Zalta (ed.), *The Stanford Encyclopedia of Philosophy*, Spring 2017 Edition, available at https://plato.stanford.edu/entries/paternalism/

[72] John Kleinig, *Paternalism*, Manchester University Press, 1983.

[73] Kai Möller, *Paternalismus..., op. cit.,* pp. 179- 183 and 197- 199, who exemplifies his position with the imposition of seat belt use. Similarly, Reinhard Singer, "Vertragsfreiheit, Grundrechte und Schutz des Menschen vor sich selbst", *Juristen Zeitung*, 23, 1995, pp.1133 ff., p. 1140, defends that it is doubtful to invoke self-determination to challenge the imposition of the use of seat belts or helmets because what is at stake is the psychological inability of many drivers or motorcyclists to foresee the dangers of their actions, which legitimizes the restriction.

[74] Kai Möller, *Paternalismus..., op. cit.,* pp. 185 and 187. Carlos S. Nino, *The Ethics of Human Rights*, *op. cit.,* p. 148, defends that the autonomy principle leaves some room for legitimate paternalism. There is only a prohibition of imposing sacrifices to individuals without their consent when they don't take any advantage of it.

[75] Kai Möller, *Paternalismus..., op. cit.,* pp. 190 and 191.

[76] Kai Möller, *Paternalismus..., op. cit.,* pp. 186 and 187.

For Kai Möller this perspective leads to solutions that are above suspicion since it doesn't impose a system of values with which the individual might not agree. This paternalism is not intended to impose values on individuals regardless of their acquiescence, but rather seeks to protect their "integrity", taking into account the choices they would make if they could anticipate the consequences of their actions. On the other hand, it assures "a greater protection at a relatively low price, i.e., the use of coercion in cases where the individual negligently acts in opposition to his own values"[77].

Even this weaker form of paternalism has been criticized for its assumption that it is possible to know what people really want, regardless of what they choose. Although people sometimes make mistakes or do things that they later regret, it is not possible to know their real intentions, lacking therefore the basis for paternalistic legislation. "For more convenient and tempting it is to derive from our own experience what others want or should want, we simply don't have access to their desires and beliefs". It is therefore not possible to "implement the people's real preferences", since we cannot know what these are[78].

Anyway, the ban on the use of religious attire is not an example of weak paternalism, since the reasoning that justifies these measures is not the protection of women's "integrity", taking into account the choices they would make if they could anticipate the consequences of their actions. These bans are justified in order to prevent women from following (what are considered to be) irrational or mistaken ends. Here we are in the presence of strong paternalism, which disrespects individual rights and unduly restricts freedom of choice.

But more than that, this kind of paternalism can also be considered "moral paternalism", that is, the imposition by public authorities of certain moral standards allegedly in the interest of the person, regardless of whether this is or is not in accordance with her convictions. "Moral paternalism" is present when the State imposes moral views in the interest of the person

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[77] Kai Möller, *Paternalismus..., op. cit.*, p. 212.

[78] Claire A. Hill, *Anti-anti-anti-paternalism*, *2 NYU Journal of Law & Liberty*, 2, 2007, pp. 444 ff., p. 445 and 448, available at http://ssrn.com/abstract=956153.

concerned, that she doesn't share[79]. And these kinds of issues are the ones where most of all the individual should be able to decide for himself.

We believe, however, that paternalistic measures may be legitimate in extreme situations, if future self-determination of the individuals is at stake[80]. Since autonomy is a central value in our legal system and State has the responsibility to create autonomy conditions, it seems legitimate to require "that individuals abandon the freedom or the right to waive permanently autonomy itself"[81]. Therefore, the right holder should not be able to consent to an intervention that compromises his ability to self-determine freely in the future. However, that doesn't seem to be the case of the situations we are analyzing.

On the other hand, the Anglo-Saxon doctrine has established a distinction between "hard" and "soft" paternalism. "Hard" paternalism advocates that it is legitimate to protect competent individuals against their will whilst "soft" paternalism only admits the protection of the individual from himself when his decision is not voluntary[82]. For this perspective, paternalist measures are considered justified when rights or interests of minors, persons with disabilities or who are in a position of weakness or disfavor are at stake[83]. In these cases, the State is legitimized to take certain paternalistic measures that in any other circumstances he could not. However, when establishing these measures public powers necessarily have to comply with the requirements of the principle of proportionality[84]. What determines, for "soft" paternalism, the legitimacy of paternalistic measures is the existence or absence of true self-determination.

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[79] Kai Möller, *Paternalismus..., op. cit.,* pp. 189 and 203.

[80] Jorge Reis Novais, "Renúncia a direitos fundamentais", *in* Jorge Miranda (org.), *Perspectivas Constitucionais – Nos 20 Anos da Constituição,* pp. 263 ff., p. 318. Peter De Marneffe, "Avoiding Paternalism", *Philosophy & Public Affairs*, 34, 1, 2006, pp. 68 ff., p. 81, defends that personal autonomy presupposes control over one's own life as a whole. Slavery contracts are the typical case where individuals lose their future self-determination. On this, see, David Archard, "Freedom not to be free: the case of the slavery contract in J. S. Mill's *On Liberty*", *The Philosophical Quarterly*, 40, 160, 1990, pp. 453 ff., pp. 461-462.

[81] Jessica Wilen Berg, "Understanding waiver", *Houston Law Review*, 40, 2003, pp. 281 ff., pp. 290-291, available at http://papers.ssrn.com/sol3/papers.cfm?Abstract_id=614522

[82] Kai Möller, *Paternalismus..., op. cit.,* pp. 16 and 17. On this, see also Joel Feinberg, *Harm to Self..., op. cit.,* pp.12 ff. and Gerald Dworkin, "Paternalism".

[83] Jorge Reis Novais *As Restrições aos Direitos Fundamentais não Expressamente Autorizadas pela Constituição*, Coimbra Editora, 2003, p. 450, note 785.

[84] Christian Hillgruber, *Der Schutz des Menschen vor sich selbst*, Verlag Franz Vahlen, 1992, pp. 121-122.

Although, as we have seen, the legislator or the courts sometimes presume the lack of self-determination in the use of religious attire, this assumption is in itself paternalistic. In the situations we referred, the women that opposed to the bans were adults and affirmed that they were not coerced to do so.

So, the duty to protect the individual from himself only exists in extreme situations or when he is not in a position to take care of himself. Besides these situations an imposed protection is not to be admitted, since that protection implies a serious violation "of the presumption of freedom deriving from the human dignity principle"[85].

1.3. Following this reasoning, we think that the possibility to make (what for the majority are considered to be bad decisions) is included in the individual's life project, a project that must be freely chosen according to his personal beliefs, since in "plural societies" it is not "desirable an absolute standardization of individual behavior"[86]. "A democratic and plural society must recognize 'a right to make mistakes, to make bad decisions and to take risks,' without which "the whole idea of self-determination would lose its meaning"[87].

The human dignity principle is very often invoked to justify this sort of paternalistic public policies. This principle is used as a "knock out"[88] argument or as a "conversation stopper"[89] which means that once a violation of dignity is invoked, it is no longer necessary to search for more arguments[90]. It is in this sense that some authors refer to an "inflationary use" of the

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[85] Carla Amado Gomes, "Estado Social e concretização de direitos fundamentais na era tecnológica: algumas verdades inconvenientes", *Scientia Iuridica*, LXLL, 315, 2008, pp. 409 ff., p. 423. Translation by the authors. Jean-Philippe Feldman, "Faut-il protéger l'homme contre lui-même? La dignité, l'individu et la personne humaine", *Droits,* 48, 2009, pp. 87 ff., p. 99.

[86] Helena Pereira de Melo, "A Igualdade de Oportunidades para Quem Opta pela 'Estrada do Tabaco'", *in* Rui Nunes, Miguel Ricou and Cristina Nunes (org.), *Dependências Individuais e Valores Sociais*, 2004, pp. 157 ff., p. 163. Translation by the authors.

[87] Joel Feinberg, *Harm to Self..., op. cit.,* p. 62.

[88] Hans Jörg Sandkühler, "Menschenwürde und die Transformation moralischer Rechte in positives Recht", *in* Hans Jörg Sandkühler (org.), *Menschenwürde. Philosophische, theologische und juristische Analysen,* 2007, pp. 57 ff., p. 62.

[89] Armin G. Wildfeuer, "Menschenwürde – Leerformel oder unverzichtbarer Gedanke?", *in* Manfred Nicht and Armin G. Wildfeuer (eds.), *Person - Menschenwürde - Menschenrechte im Disput*, 2002, pp. 19 ff., p. 29.

[90] Hans Jörg Sandkühler, "Menschenwürde...", *op. cit.,* p. 62.

principle[91], and, on the other hand, in order to avoid its trivialization, it has been defended a more "contained" use[92], resisting to the "siren call" of dignity[93].

On the basis of the protection of the individual against himself lies a dignity conception as a principle that expresses the recognition of individual freedom but can also justify restrictions on the exercise of individual freedoms[94]. One of the reasons for the State to compel its citizens to have a certain behavior in conformity with dignity is the assumption that he knows better than them what affects their dignity[95].

We referred previously that the French Government in the *S.A.S.* case, stated that "it was a matter of respect for human dignity, since the women who wore such clothing were therefore 'effaced' from public space. In the Government's view, whether such 'effacement' was desired or suffered, it was necessarily dehumanizing and could hardly be regarded as consistent with human dignity".

Therefore, it considered that irrespective of the use being voluntary or involuntary, it should anyway be forbidden, considering that it implies a human dignity violation. We do not, however, agree with this interpretation of the human dignity principle, since we think that the voluntariness or involuntariness of the use is a fundamental element to assess if the principle has been breached.

In fact, the way human dignity is applied in similar situations may vary significantly and it is possible to find it on "both sides of the argument", "founding opposite conclusions"[96]. The main difficulties in determining the meaning of the human dignity principle result from the "lack of agreement about what makes human life good both for individuals and for societies"[97].

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[91] On the "inflationary use" of the human dignity principle, see Paul Tiedemann, "Vom inflationären Gebrauch der Menschenwürde in der Rechtsprechung des Bundesverfassungsgerichts", *DöV*, 15, 2009, pp. 606. ff.; also Pedro Serna, "La dignidad humana en la Constitución Europea", *Persona y Derecho* 52, 2005, pp. 13 ff., pp. 41 and 42.

[92] Jorge Reis Novais, *A Dignidade da Pessoa Humana*, *Vol. II (Dignidade e Inconstitucionalidade),* Coimbra Editora, 2016, pp. 65 ss.

[93] Susanne Baer, "Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism", *University of Toronto Law Journal*, 59, 2009, pp. 417 ff., p. 420.

[94] Jean-Philippe Feldman, "Faut-il protéger...", *op. cit.,* p. 88 and 89.

[95] Kai Fischer, *Die Zulässigkeit aufgedrängten staatlichen Schutzes vor Selbstschädigung*, Peter Lang, 1997, p. 192.

[96] Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights", *The European Journal of International Law,* 19, 4, 2008, pp. 655 ff., pp. 698-701.

[97] David Feldman, "Human Dignity as a Legal Value – Part II", *Public Law,* 2000, pp. 61 ff., p.75.

So, the content of the principle will differ whether we adopt a more "liberal-individualist notion", according to which dignity can be invoked against violations from third parties but cannot, in principle, serve to set limits to the individual's autonomy, or a more "paternalistic notion"[98], that considers its use legitimate in order to justify limitations to that same autonomy[99].

As already stated, we believe that the individual should be allowed to determine the meaning and content of his dignity, as long as his future self-determination is not at stake, because otherwise it "smacks of paternalism"[100]. Following this, dignity should not be understood as an objective value, that can be opposed to the individual's own will, but rather as "subjectively protected liberty"[101].

This means that, when we are assessing whether there has been a dignity violation, we must consider the particular circumstances of the case[102], and the fact that the individual agrees with a certain practice must be taken into account in that assessment. That doesn't mean that the dignity principle is relative and can be balanced with other rights or public goods. The principle itself is absolute, in the sense that it cannot be outweighed by other rights or public goods that may conflict with it, but the determination of its violation cannot fail to take into account the circumstances of the case, *i.e.,* presupposes a balancing process[103].

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[98] Distinguishing between a "liberal-individualist notion" and a "paternalistic notion" of dignity, see David Feldman, "Human Dignity...", *op. cit.,* p. 73. Giorgio Resta, "La disponibilitá dei diritti fondamentali e i limiti della dignità (Note a margine della Carta dei Diritti)", *Rivista di Diritto Civile,* 6, 2002, pp. 801 ff., p. 833*,* establishes a similar distinction between a "procedural/subjective model" and a "substantial/objective model" of dignity. Also acknowledging two different approaches to the concept: dignity as "empowerment" and dignity as "constraint", see Deryck Beyleveld and Roger Brownsword, *Human Dignity in Bioethics and Biolaw*, Oxford University Press, 2001, p. 1. See also Stéphanie Hennette-Vauchez, "When Ambivalent Principles Prevail. Leads for Explaining Western Legal Orders' Infatuation with the Human Dignity Principle", *EUI Working Paper Law nr. 2007/37*, p.3, available at =1&isAllowed=y, who distinguishes dignity as a "ground for rights" or a ground "for obligations of the individual". The Author also refers to a third meaning, that derives from the ancient *dignitas:* dignity as a feature of the exercise of a public function. On this, see Stéphanie Hennette-Vauchez and Charlotte Girard, *La Dignité de la Personne Humaine. Recherche sur un Processus de Juridicisation*, Presses Universitaires de France, 2005, pp. 24-33. Finally, Paolo G. Carozza, "Human dignity in Constitutional Adjudication", *in* Tom Ginsburg and Rosalind Dixon (coord.), *Research Handbook in Comparative Constitutional Law,* 2011, pp. 460 ff., establishes a distinction between "autonomy-protecting and autonomy- limiting strands of human dignity analysis".

[99] Giorgio Resta, "La disponibilitá...", *op. cit.,* pp. 833-834, also footnote 80.

[100] Christopher McCrudden, "Human Dignity...", *op. cit.,* p. 705.

[101] Kai Möller, *Paternalismus..., op. cit.,* p. 124. Translation by the authors.

[102] Jorge Reis Novais, "Renúncia...", *op. cit.,* pp. 327-328.

[103] Benedita Mac Crorie, *Os limites da renúncia a direitos fundamentais nas relações entre particulares*, Almedina, 2013, pp. 243-245. On this, see also Jorge Reis Novais, *A Dignidade..., op. cit.,* pp. 144-151.

So, it must be the individual himself who determines what is more or less worthy for him. A "paternalist approach", that transfers to the state "the final decision about what people should or should not cherish in life", regardless of their will, converts rights into duties[104]. Only an understanding of the human dignity principle as the basis for autonomous decision is in accordance with a plural state, which embraces a diversity of ways of living.

Therefore, in a non-paternalist state, based on the human dignity principle, the protection of the individual from himself (excluding the exceptions we already referred to) should not be considered a legitimate ground for fundamental rights restriction[105].

3. Conclusions

The use of religious attire falls within the scope of protection of freedom of religion. The control of measures which interfere with fundamental rights must not only determine whether the aims are legitimate but also whether the means are appropriate, using proportionality tests.

Although aiming to safeguard the autonomy of individuals, many of the bans imposed on the use of religious symbols in public spaces seem to be based on paternalistic grounds.

Since the use of these symbols may reflect, many times, a deliberate choice, these bans seem, therefore, hardly compatible with autonomy itself, once autonomy should include the possibility of adopting a behavior that appears in the eyes of others as an option (a free exercise of choice) for inequality or exclusion.

Finally, the human dignity principle shall not be used as the basis of freedom restrictions, being, on the contrary, the fundament of liberty.

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[104] Luísa Neto, "O Direito Fundamental à Disposição sobre o Próprio Corpo", *Revista da Faculdade de Direito da Universidade do Porto*, I, 2004, pp. 221 ff., p. 226.

[105] Nuno Manuel Pinto Oliveira, "Inconstitucionalidade do Artigo 6º da Lei sobre a Colheita e Transplante de Órgãos e Tecidos de Origem Humana", *Scientia Iuridica*, 286-288, 2000, pp. 249 ff., pp. 260-261.