



*Privacidad: entre bioderechos y deseos*

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biorights and desires*

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## **Abstract**

The article examines the evolution in the jurisprudential construction of the right to privacy, particularly the extension of its scope of protection to include the effective protection of one's own personal development.

In particular, it examines this evolution in the case law of the ECtHR and its impact on Spanish constitutional jurisprudence. The article suggests some problems to which this broad understanding of privacy may give rise. The confusion between desires and rights and the devaluation of the latter as a legal category are fundamental aspects of the analysis.

*Keywords:* Privacy. Biorights. Personal Autodetermination.

## **Resumen**

El artículo examina la evolución en la construcción jurisprudencial del derecho a la intimidad, particularmente, la ampliación de su ámbito de protección, hasta comprender el desarrollo efectivo de la propia personalidad.

En particular, se examina esta evolución en la jurisprudencia del TEDH y su impacto en la jurisprudencia constitucional española. El artículo sugiere algunos problemas a los que puede dar lugar esta comprensión amplia de la intimidad. la confusión entre deseos y derechos y la devaluación de estos últimos como categoría jurídica son aspectos fundamentales del análisis.

*Palabras clave:* Privacidad. Bioderechos. Autodeterminación personal.

## 1. The right to privacy and the biolaw

### 1.A. Privacy as right to self-fulfillment

NOT SO MANY YEARS AGO, the link between privacy and biolaw was by no means an obvious connection within the context of the European legal culture.

For the latter, privacy was undoubtedly a fundamental right, failing within the so-called “first generation” rights. It was, therefore, a genuine expression of the exercise of freedom of the “modern”, according to Constant<sup>1</sup>. Privacy protected the exercise of a negative idea of freedom<sup>2</sup> that conferred a citizen, rather than a power to act in the public sphere, a capacity to prevent the illegitimate interference of others in his or her private life (as far as “political liberty” in negative sense “is simply the area within which a man can act unobstructed by others”<sup>3</sup>).

Meanwhile, biolaw was conceived as something fundamentally linked to the right to life and to its relationship with new technologies, both in the field of reproduction and in terms of health care in the early and final stages of human life<sup>4</sup>.

The link between privacy and the challenges and issues that give meaning to the existence of biolaw did not seem too explicit, not to say that it was frankly difficult to establish.

But the world of law is essentially dynamic one. It can create new meanings for already existing concepts, in order to make them suitable for dealing with new issues, or to satisfy new sensitivities regarding the need to protect certain legal assets. This feature of legal historicity (even more so, the creative character of legal practice) was to some extent blurred in the normative vision of law that had been prevalent for so long in continental Europe, but is easily identifiable in the American legal tradition<sup>5</sup>.

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<sup>1</sup> Constant, Benjamin, “De la Liberté des Anciens comparée à celle des Modernes”, *Ecrits politiques*, 1849, Paris, Gallimard, 1997, p. 594.

<sup>2</sup> Berlin, Isaiah, “Two concepts of liberty”, *Four Essays on Liberty*, (1969) Oxford, Oxford University Press.

<sup>3</sup> *Ibid.* 15-16.

<sup>4</sup> See D’Agostino, Francesco, “Dalla Bioetica alla Biogiuridica”, *Persona y Derecho*, 24, 1991, pp. 9-22. Ollero, Andrés, “Bioética, bioderecho, biopolítica”, *Bioderecho, entre la vida y la muerte*, Cizur Menor, Aranzadi, 2006, p. 23; Aparisi Miralles, Ángela, “Bioética, bioderecho, biojurídica (Reflexiones desde la Filosofía del Derecho)”, *Anuario de Filosofía del Derecho*, 24, 2007, pp. 63-84. Jonsen, Albert R, *The Birth of Bioethics*, New York-Oxford, Oxford University Press, 1998, p. 14 ff.

<sup>5</sup> Suffice it to recall the well-known “Law in Books and Law in Action” Pound, Roscoe, “Law in Books and Law in Action”, *American Law Journal Review*, 1910, 44, p. 12. Cfr. Halperin, Jean-Louis, “Law in Books and Law

According to Ollero, the existence of law is a “becoming”. Law creation is a process in which the ideas or preconceptions about fairness and play an unusually key role<sup>6</sup>.

In general, it could be said that privacy is no longer considered a negative freedom but a true positive freedom. Privacy is no longer a “being free from” but a “being free to”<sup>7</sup>.

This development has not only broadened its scope of protection, which is the subject of this paper, but has also substantially modified the idea of the kind of power that the right to privacy confers to the citizens. This means that even within its “classic” scope of protection, privacy has come to mean a positive power: that of determining which parts of our lives we wish to keep “hidden from others”<sup>8</sup>.

On the European continent, it can be said that this new line of legal interpretation of the concept of privacy has been led by the European Court of Human Rights (hereinafter ECHR), which has played a crucial role in the expansion of the idea of privacy, and consequently, of the set of conduct protected by the right to private life.

Among the new profiles that the ECHR has added to its configuration of the right to privacy, this paper focuses on its connection with personal self-determination. Thus, privacy protects the development of the personal life project (which our constitutional text calls “free development of the personality”, article 10 of Spanish Constitution)<sup>9</sup>.

To be entitled to privacy does not only mean having the possibility of preventing others from interfering in a particular sphere of my existence which I have the right to keep from their sights. The new feature is that privacy includes a positive power of control over one’s own “personal life project” or “free development of personality”. Let us see how it works.

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in Action: a Problem of Legal Change”, *Me. L. Rev.* 2011, p. 45. Available at: <https://digitalcommons.maine.edu/mlr/vol64/iss1/4>

<sup>6</sup> Ollero, Andrés, “El papel de la personalidad del juez en la determinación del derecho. Derecho, historicidad y lenguaje en Arthur Kaufmann” In *VVAA., Libro Homenaje al Profesor Dr. D. Eduardo Font Serna*, Madrid, Ministerio de Justicia, I, 2004, p. 413 ff; Ollero, Andrés, *El Derecho en Teoría. Perplejidades jurídicas para crédulos*. Pamplona, Thompson Aranzadi, 2007 p. 218 ff.

<sup>7</sup> It is also a strongly individualistic right. However, new challenges, such as those arising from the need for personal data protection, call into question this “individualistic” character of the right to privacy. Costelo, Roisin Á, “Genetic Data and the right to Privacy: towards a Relational Theory of Privacy?”, *Human Rights Law Review*, 22, 2022, pp. 1-23.

<sup>8</sup> See Ollero, Andrés, *De la protección de la intimidad al poder de control sobre los datos personales. Exigencias jurídico-naturales e historicidad en la jurisprudencia constitucional*, Madrid, Real Academia de Ciencias Morales y Políticas, 2008. Available at <http://www.racmip.es/publicaciones/discursos.cfm>

<sup>9</sup> Official translation of Spanish Constitution available on Boletín Oficial del Estado, <https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf>

The ECHR case-law on the concept of privacy is based on the wording of article 8 of the Rome Convention, which reads as follows:

*Right to respect for private and family life*

1. *Everyone has the right to respect for his private and family life, his home and his correspondence.*

2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*

As it should be noted, Article 8 does not explicitly link privacy with the positive legal protection of the free development of one's own life project. However, the ECHR case-law has already undertaken this line of interpretation, particularly in relation to cases involving bio-legal issues (access to assisted human reproduction, voluntary termination of pregnancy, medically assisted suicide, etc.), which are considered as closely related to personal development or to personal projects.

Therefore, instead of being legally under Article 2 (right to life), they are considered as belonging to the scope of protection of the right to "private and family life" (Article 8).

In order to formulate the interpretation of the content of the right to privacy, the ECHR relies, to a great extent, on the U.S. Supreme Court's doctrine.

Although the U.S. Constitution does not expressly recognize the right to privacy, the Supreme Court case-law has not only acknowledged it, but has also established some areas of this right as constitutionally guaranteed. Even long before the explicit inclusion of privacy in the constitutional doctrine, the right "to be left alone" was conceived as a true fundamental right in the words of Judge Louis Brandeis. In the classic article "The right to privacy" published in the 1890 Harvard Law Review, Brandeis and Samuel Warren, define the protection of privacy as the foundation of individual freedom in Modernity. And they go one step further: privacy is represented to us, right from the start, not only linked to the protection of the personal or family sphere, but also to the idea of comprehensive personal development, to the protection of our feelings, our emotions, our thoughts...:"the intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lays in physical things. Thoughts, emotions, and sensations demanded legal recognition, and the beautiful capacity for growth which characterizes the common law

enabled the judges to afford the requisite protection, without the interposition of the legislature”<sup>10</sup>.

Years later, important issues that materially used to belong to the sphere protected by the right to life began to be raised in terms of the right to privacy. Thus, for example, *Griswold v. Connecticut*, which addresses the right to access and use contraceptive methods<sup>11</sup>; *Roe v. Wade*, with regard to the right to abortion<sup>12</sup>; *Quinlan*, with regard to the right to refuse medical treatment in certain situations<sup>13</sup>.

The adoption of privacy as perspective of analysis and resolution of this kind of conflicts is due to the fact that the idea of privacy allows us to explore these issues in light of the right to make our own decisions in the context of a personal life project, a space where we have the right to be “left alone”, and in which the State assumes a positive responsibility to ensure the non-interference.

The conceptual link between privacy and self-fulfillment thus becomes the key to understanding the contemporary relevance of the right to privacy in bio-legal matters.

This same evolution (from the right to life to the right to privacy) is reproduced, years later, on the European continent by the case-law of the ECHR. It could be called, in terms of the Rome Convention, the transition from Article 2 (right to life) to Article 8 (right to respect for private and family life) as a perspective of bio-legal disputes analysis.

The Court has stated, at least since 2002 (*Pretty v. U.K.*), that “privacy” is a broad term which does not allow an exhaustive definition, since “it covers the physical and psychological integrity of a person. It can sometimes embrace aspects of an individual’s physical and social identity. Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8”.

In the same judgment, the Court connects privacy and self-fulfillment: “*Article 8 also protects a right to personal development*, and the right to establish and develop relationships with other human beings and the outside world”<sup>14</sup>.

The central point is that the conversion of personal development into a human right (privacy) significantly broadens the range of conduct or decisions that can be considered constitutionally protected. In fact, as Marina Wheeler has pointed out,

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<sup>10</sup> Brandeis, Louis; Warren, Samuel, “The right to privacy”, *Harvard Law Review*, 4, (5), 1890, pp. 193-220, 195.

<sup>11</sup> *Griswold v. Connecticut*, 381, US 479 (1965).

<sup>12</sup> *Roe v. Wade*, 410 US, 113 (1973).

<sup>13</sup> *In re Quinlan* 70 N.J. 10; 355 A.2d 647 (1976).

<sup>14</sup> *Pretty v. United Kingdom*, 29/07/2002, Application n° 2346/02, (our emphasis).

this speech on individual autonomy “has taken the ambit of Article 8 beyond that which the domestic courts are willing to recognize”<sup>15</sup>.

For example, the hypothetical right to die is no longer seen as another dimension of the right to life (which would include both the protection of life and the capacity to dispose of it, as stressed in *Pretty*), but as a claim that falls within the scope of the right to private and family life, since it would be a decision that must be taken in privacy, without legitimate interferences from either the State or third parties<sup>16</sup>.

Similarly, when it comes to issues related to assisted human reproduction, the discussion no longer revolves around the content of the right to life or the duty to protect the legal good represented by embryos whose viability is at stake in this type of process. The discussion focuses on the projects of potential parents, their desire to be parents and how to determine to what extent such wishes should become a legal claim protected by Article 8.

In this way, the right to privacy has an ever-larger scope, to the point where it allows some judges to state that this right constitutes “the least defined and most unruly of the rights enshrined in the Convention”<sup>17</sup>. As Javier Borrego pointed out, Article 8 has become a “ring road” that allows us to avoid the explicit approach to the problem of content and scope of protection of other fundamental rights, such as the right to life, as follows:

“Big cities have roads or highways (the peripheries) that permit them to be contoured, without having to enter the city center. The peripheral method is to use light-mindedly Article 8, the right to privacy, as a peripheral way in order to transit (examine) and decide cases, avoiding the difficulty of getting to the heart of the matter, and examining the real rights affected in the claim”<sup>18</sup>. As with the rights to life, to die, to have a child, to marry a person of the same sex ...

As Ollero pointed out, the fundamental question is removed from the debate, that is, “whether dignity can be identified with autonomy or whether the former sets limits which the latter cannot deviate from”<sup>19</sup>.

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<sup>15</sup> Wheeler, Marina, *The unruly article 8*, 2008, Text online at 1 Crown Office Row. Icor.com. <http://www.preview2.1cor.enstar.net/1155/records/1186/mw%20talk.pdf>

<sup>16</sup> ECHR, *Gross v. Switzerland*. 14/05/2013 (Application 67810/10). The same perspective is assumed by the Spanish legislator in the recent Organic Law 3/2021, on the Regulation of Euthanasia. BOE-A-2021-4628. Vid, Explanatory Statement of the Law.

<sup>17</sup> *Wright v. Secretary of State for Health*, EWHC, 2886 (2006).

<sup>18</sup> Borrego Borrego, Javier, “Problemas de frivolidad en el Tribunal Europeo de Derechos Humanos”, Kugler, Maurice; Contreras, Francisco J, *¿Democracia sin religión? El derecho de los cristianos a influir en la sociedad*. Madrid, Stella Maris, 2014, pp. 241-253, p. 244 (our translation).

<sup>19</sup> Ollero, Andrés, “El impacto del artículo 8 del Convenio de Roma”, *Sobre la protección de la vida privada en la jurisprudencia del Tribunal de Estrasburgo*, Madrid, Aedos, 2016, p. 174 (our translation).

1. B. Particular reference to the case-law of the Spanish *Tribunal Constitucional* (TC):

We have just referred to the progressive breadth of the scope of conducts which fall within the right to privacy, and how this extension of the content of the right is not in line with the doctrine of national courts<sup>20</sup>.

This is exactly what happened in the case of Spain. The right to privacy is enshrined in our Constitution in Article 18, as follows:

“1. The right to honour, to personal and family privacy and to the own image is guaranteed.

2. The home is inviolable. No entry or search may be made without the consent of the householder or a legal warrant, except in cases of flagrante delicto.

3. Secrecy of communications is guaranteed, particularly regarding postal, telegraphic and telephonic communications, except in the event of a court order.

4. The law shall restrict the use of data processing in order to guarantee the honour and personal and family privacy of citizens and the full exercise of their rights”<sup>21</sup>.

It should be noted that the Spanish Constitution refers to “personal and family privacy” and not to “private and family life”, as the Rome Convention does.

It was a repeated doctrine of our TC that the right to privacy and the right to private and family life were different rights, whose scopes did not coincide entirely.

Intimacy was understood as something linked to the area of life that people “wish to keep hidden from others because it belongs to their most private sphere”<sup>22</sup>. So much so that the right to an inaccessible nucleus of privacy is recognized even for those most exposed to the public<sup>23</sup>, since it is a requirement related to dignity and the free development of the personality (Article 10.1 of the Spanish Constitution).

Freedom of information, employment<sup>24</sup>, the domain of special subjection relations, such as prisons<sup>25</sup>... were considered areas where privacy must be effectively protected.. Also, since the famous ruling of the ECHR in the López Ostra case<sup>26</sup>, the protection of privacy has been linked to the interference not only of other

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<sup>20</sup> Gómez Montoro, Ángel, “Vida privada y autonomía personal o una interpretación *passé-partout* del art. 8 CEDH”, en VVAA, *La Constitución Política de España*, Centro de Estudios Políticos y Constitucionales, Madrid, 2016, p. 619.

<sup>21</sup> Official translation available on Boletín Oficial del Estado, <https://www.boe.es/legislacion/documentos/ConstitucionINGLES.pdf>

<sup>22</sup> STC 151/1997, 29 September.

<sup>23</sup> STC 134/1999, 1 July.

<sup>24</sup> STC 186/2000, 10 July and, STC 98/2000, 10 April.

<sup>25</sup> STC 204/2000, 24 July and STC 218/2002, 25 November.

<sup>26</sup> López Ostra v. Spain, Application 41/1993, 09/12/1994.



people, but also of noise, smell or any other aggression that can be understood as a violation of environmental protection. Since the Preysler case, the TC begins to recognize a positive power of self-determination in the right to privacy<sup>27</sup>.

But even so, as previously mentioned, the scope of legal protection provided by article 18 had not been considered comparable to the aforementioned Article 8 of the Rome Convention up to Nerea case<sup>28</sup> which acknowledges the right of one mother (Nerea) to incinerate the remains of the legally aborted fetus, in a secular ceremony with her partner. In this case, the TC considers that the scope of article 18 of Spanish constitution and article 8 of European Convention on Human Rights are coincident.

The three dissenting opinions of the judgement underline that with this decision the Court makes a substantial shift in its interpretation of the right to privacy. The signatory judges (Pérez de los Cobos, Ollero Tassara and Roca Trías) agree that the areas protected by Article 8 of the Convention and article 8 of the Spanish Constitution have never been considered totally overlapping<sup>29</sup>.

Thus, “the interpretative criterion prescribed in article 10.2 of the Spanish Constitution cannot lead to the integration of the content of the right to privacy ex art. 18.1 of the Spanish Constitution by means of an automatic and indiscriminate translation of the doctrine established by the European Court of Human Rights in relation with the right to respect for private and family life referred to in article 8.1 of the Rome Convention”<sup>30</sup>.

Article 10.2 of Spanish Constitution (*The principles relating to the fundamental rights and liberties recognised by the Constitution shall be interpreted in conformity with the Universal Declaration of Human Rights and the international treaties and agreements thereon ratified by Spain*) cannot be used to create *new* fundamental rights which do not exist in the constitutional text, such as the right to family life. Nor does it “require that the different types of rights contained in each legal text be transposed exactly into national law”<sup>31</sup>.

According to Judge Roca Trías, the ECHR doctrine about the right to personal and family life would fit better into Article 10 in our constitutional conceptual map, particularly within the concept of “free development of personality”. In her support, she mentions the background of the Court’s doctrine: “The “right to family life” derived from Articles 8.1 ECHR and 7 of the Charter of Fundamental

<sup>27</sup> STC 115/2000, 10/05/2000.

<sup>28</sup> STC 11/2016; 1 February.

<sup>29</sup> Dissenting Opinion of Francisco Pérez de los Cobos, relying on the judgment of the Court in cases SSTC 236/2007, FJ 11; 60/2010, FJ 8 and STC 186/2013, FJ 7.

<sup>30</sup> Ibid.

<sup>31</sup> Dissenting Opinion of Roca Trías, parag. 3.

Rights of the European Union is not one of the dimensions covered by the right to family privacy ex Article 18.1 SC and its protection, within our constitutional system, is found in the principles of our Constitution which guarantee the free development of the personality (art. 10.1 SC). They ensure the social, economic and legal protection of the family (art. 39.1 SC) and children (art. 39.4 SC), the effectiveness of which, as mentioned in art. 53.2 SC, cannot be required through the appeal for constitutional protection, without prejudice to the fact that its recognition, respect and protection will inform judicial practice (art. 53.3 SC) (STC 183/2013)<sup>32</sup>.

In other words, until 2016, the Spanish TC understood that the right to privacy recognized in Article 18 of our Constitution could not be interpreted as a claim that could shelter and provide legal protection to “personal development”.

However, in order to legally protect this idea of personal self-determination, it was necessary to appeal to Article 10 of our Constitution, which expressly refers to the concept of “free development of the personality”. Neither dignity nor the free development of personality (both contained in Article 10) are considered fundamental rights in the strict sense.

Repetitively (and, in a paradigmatic way, in the ruling of the constitutional action against the first assisted human reproduction law<sup>33</sup>), our TC has denied the category of fundamental right to the constitutional principles contained in Article 10 of the Constitution.

This does not mean that the free development of the personality is not an essential part of our legal system. As Gabaldón pointed out<sup>34</sup>, this is a constitutional principle (STC 120/1990) that embodies the higher value of freedom (art. 1.1 of the Spanish Constitution), the general principle that inspires the individual’s autonomy to choose between the various life options according to his own interests and preferences (STC 132/1989). Insofar as it is a constitutional principle, the free development of the personality is binding on public authorities (Article 9.3. SC) and must be taken into account in the development of the rights, duties and freedoms proclaimed in Title I of the Spanish Constitution.

But even so, the free development of the personality lacked expansive force to create fundamental rights not recognized in the Constitution itself<sup>35</sup>.

<sup>32</sup> Ibid. Our translation.

<sup>33</sup> STC 116/1999, 17 June.

<sup>34</sup> Gabaldón, José, “Libre desarrollo de la personalidad y derecho a la vida”, *Persona y Derecho*, 44, 2001, pp. 133-172.

<sup>35</sup> Cfr. Espinar Vicente, José M, “Consideraciones en torno al libre desarrollo de la personalidad desde un planteamiento social”, García San Miguel, Luis, *El libre desarrollo de la personalidad (artículo 10 de la Constitución española)*. Madrid, Universidad de Alcalá, 1998. De Verda, Jose R, “La incidencia del principio constitucional

This line of interpretation seems to be interrupted by the judgment in the Nerea case, in which the TC affirms the identity of the spheres of protection of Articles 8 ECHR and 18 EC. However, neither can it be said that this interpretative shift has been consolidated or will be consolidated in the near future.

It is worth mentioning that the TC has again pronounced itself on the principle of free personality and its link with privacy in the judgment that resolved the question of constitutionality raised in relation to Law 7/2003, regarding whether trans minors can request a change in the mention of their name and sex in the civil registry.

The issue was resolved by judgment 199/2019, affirming the unconstitutionality of article 3 of the aforementioned law, which did not recognize the ability to make such a request to minors.

What is relevant is that the TC did not cite on any occasion the Nerea case, nor did it particularly echo its doctrine for the resolution of the case, returning to the “classic” conception of privacy that we have summarily described.

It will be necessary to await future rulings of our Constitutional Court to determine the final direction of this interpretative question.

## 2. Selffulfilment: basic bioright or desire turned into legal claim?

AFTER THIS BRIEF PRESENTATION, a new question arises: could the understanding of the free development of the personality (self-fulfillment) as a human right involve turning the mere wishes into legal claims? Does this mean granting constitutional protection to any volition or desire that constitutes an essential part of citizen's vital projects?

Let's review the caselaw of the ECHR in search of answers. On August 28<sup>th</sup>, 2012 the Second Section of the European Court of Human Rights delivered the long-awaited judgment in the case of *Costa and Pavan v. Italy*<sup>36</sup>.

Having a healthy child, not suffering from cystic fibrosis that his parents could transmit to him, was an essential part of the family's project of Costa Pavan couple. The legal ban on preimplantation diagnoses was considered by the couple as a violation of their right to family life. The Court concluded that this claim constituted a legal requirement under Article 8: *‘the desire of the applicants to have a child who would not be a sufferer of the genetic defect that they carried and to*

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de libre desarrollo de la personalidad en la configuración del matrimonio”, *Revista boliviana de derecho*, 17, 2014, pp. 10-31.

<sup>36</sup> Application no. 54270/10, lodged with the European Court on 20 September 2010.

resort to medically assisted procreation and PGD' is protected by the right to a private and family life in the ECHR and not only (indirectly) by Article 12 of the Oviedo Convention<sup>37</sup>.

A year later, Mrs. Gross's case raised the issue of the legal status of the decision to die. Mrs. Gross did not suffer from any significant pathology, and therefore, her request to be given a prescription for a lethal dose of pentobarbital sodium was declined according to the medical guidelines regulating the right to medically assisted suicide in Switzerland. The Court considered *that the applicant's wish to be provided with a dose of sodium pentobarbital allowing her to end her life falls within the scope of her right to respect for her private life under Article 8 of the Convention*<sup>38</sup>.

Paradiso and Campanelli are an Italian couple that resorted to a surrogacy agreement in Russia, considered by Italy to be null and void. The new-born baby had no biological link with the applicants, and being the contract null and void, the Italian State considered that there was no valid reason for the establishment of parentage. The child was placed under guardianship and given up for adoption. Paradiso and Campanelli alleged a violation of their right to privacy by the Italian authorities due to the non-determination of parentage in their favor.

In the first instance, the Court held that their desire to become parents was an essential element of their life project, and it therefore considered the claim to determine parentage worthy of legal protection, because the claim of the potential parents was protected as part of their right to privacy.

But the Grand Chamber's final conclusion corrected this approach by stating that: "the public interests at stake weigh heavily in the balance, while comparatively less weight is to be attached to *the applicants' interest in their personal development* by continuing their relationship with the child"<sup>39</sup>.

As it should be noted, personal development is considered as an element of the right to privacy, and therefore all the claims whose effective fulfillment must be achieved in order to satisfy this legally protected life project become potential rights.

But what does "legal protection" mean in this context? And how far should the legal guarantee for the development of personal projects be extended?

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<sup>37</sup> ECHR, *Costa Pavan v. Italy*, 28/08/2012 (Application 54270/10), parag. 50.

<sup>38</sup> ECHR, *Gross v. Switzerland*, 14/05/2013 (Application 67810/10), parag. 60 (our emphasis). See also ECHR, *Gross v. Switzerland*, Grand Chamber, 30/09/2014 (Application 67810/10), where the Court holds that "by reason of the applicant's abuse of the right of application within the meaning of Article 35 § 3(a) of the Convention, the application is inadmissible".

<sup>39</sup> ECHR, *Paradiso y Campanelli v. Italy*, Grand Chamber, 24/01/2017 (Application 25358/12). Conclusion, Parag. 215 (our emphasis).

In order to address these questions, it is useful to appeal to a classic distinction in the theory of law, which makes the difference between liberty rights and claim rights<sup>40</sup>.

Liberty right concept has to do with the performance of conduct for which explicit permission is necessary. To be in possession of such a freedom does not imply that others have the obligation to collaborate in the attainment of the desire that drives those who exercise a liberty right.

On the other hand, being in possession of a claim right implies that others are not authorized to prevent you from doing what you wish to do, and it can even be said that they assume a positive obligation to act in order to make the achievement of the claim possible.

From my point of view, the recent case-law directions that we have voiced so far point to an understanding of privacy that is closer to claim right than to liberty right.

Let me mention one more ECHR decision. In the case of *Hass v. Switzerland*, the Court addresses the issue of the existence of a “right to decide by what means and at what point his or her life will end”, within the scope of Article 8 from the point of view of whether there is “a *positive obligation on the State* to take the necessary measures to permit a dignified suicide”<sup>41</sup>.

From this perspective, the ECHR considers that the recognition of a “right to die” is unfeasible; since it considers that no European State can assume the obligation to guarantee the death of its citizens.

I think the Court observation helps us to understand the difference that we have tried to show before: It is not so much a question of not providing any legal protection for the claims related to the realization of one’s own life project, but properly discerning what the legal consequences are in order to consider all these claims as genuine legal claims (and, incidentally, how to discriminate between them?).

### 3. Privacy as bioright and human rights theory: some remarks on the problem of the theoretical foundation of human rights

AS WE HAVE SEEN SO FAR, the ECHR case-law considers personal self-determination as a basic human right, protected under Article 8. The Spanish TC seems to have

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<sup>40</sup> See Hohfeld, Wesley N, *Fundamental Legal Conceptions*. New Haven, Yale University Press, 1919; Finnis, John, *Natural Law and Natural Rights*, New York/Oxford, Clarendon Press, 1980, p. 199. For an analysis of the distinction between liberties and claims in the scope of Biolaw, see also May, William E, “The difference between a ‘right’ and a ‘liberty’ and the significance of this difference in debates over public policy on abortion and euthanasia”, 2002. Available at <http://www.christendom-awake.org/pages/may/rights.html>.

<sup>41</sup> ECHR, *Hass v. Switzerland*, 20/01/2011, (Application 31322/07), parag. 51 & 53. Our emphasis.

opened up the possibility of conceiving any conduct or claim protected under Article 8 of the Rome Convention as liable to fall within the scope of protection of Article 18 of the Spanish Constitution.

From my point of view, the assumption of this thesis of privacy as self-fulfillment and of self-fulfillment as a claim right, invite us to rethink the whole conception of human rights. If privacy, thus understood, is a human right, then, what are human rights?

The final reason for the profound theoretical impact of these new profiles of privacy lies in the fact that privacy become the capacity to act according to one's own will, of which the personal life project is expressive, with no other limits than not causing harm to third parties.

Privacy would become the right to act in accordance with the law. But in our legal culture there is no right to do what is not illegal. We can do everything that is not forbidden, but we have no right to do it. We cannot demand that the State or a third party be positively involved in the achievement of our claims, unless they have the status of a subjective right.

However, the progressive recognition of privacy as a claim right, taken to the extreme, would lead us to affirm that a human right is something that is not prohibited, does not harm third parties and is intensely desired by its holder.

This conception raises the issue of the impossibility of conceptually limiting the notion of subjective right, and, logically, the issue of the progressive devaluation of this concept. Virtually, any claim that does not constitute a crime or a legally prohibited conduct can be considered as a right if somebody decides that carrying it out is central to his or her personal life project.

Perhaps the time has come to recall that autonomy and civil liability principles are not the essence of legal logic. The latter has more to do with giving to each individual his due than with respect for the autonomy of the will. Certainly the "no harm" and the autonomy principles correspond to the logic of the market, but the position that theses wishes may hold in the market cannot be reproduced in the legal sphere.

Firstly, because, as long as law is involved, the idea of the common good must come into play. This implies that, for a claim to be legal and constitute a right, it must have a positive impact on the common good. This positive impact can be assessed to the extent that rights are based on public reasons.

As we have seen from the aforementioned examples, we rather contemplate the affirmation of certain wishes and their categorization as "belonging to private life". Desire and human will replace reason when justifying the existence of rights. This deprives the very notion of subjective right of any rationality, and prevents any

distinction between the different claims that might be made. Why protect some claims and no others if they can all be brought back to “private life”?

Also, the notion of subjective right is devoid of intelligibility. We cannot fully understand the notion of subjective right if we link it to a desire and disconnect it from the discourse in which it had been making sense, that is, from the normative sense of an essentially social human nature<sup>42</sup>.

Perhaps now is the time to reflect on the anthropological and cultural causes behind this shift in the conception of a category as absolutely central to the theory of law as that of human rights<sup>43</sup>. What place do our volitions and desires have in our own self-understanding, in our understanding of the reality which surrounds us and in our relationships with our equals? Are we determined to restructure reality and turn our desires into rights with the sole aim of satisfying them at all costs?

It is impossible, conceptually, and practically, to give legal cover to every human desire.

Then, what desires and from whom would obtain the protection of law?

As Zanuso wrote, if we identify law with legal protection of desire, there is no possibility of biolaw. It will only remain the irresponsible acting of the strongest<sup>44</sup>.

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<sup>42</sup> See Puppinc, Grégor, “Objection de conscience et droits de l’homme. Essai d’analyse systématique”, *Société, droit et religion* 2016/1, 6:209-275. DOI 10.3917/sdr.006.0209: “l’autonomie individuelle en revanche ne requiert pas la preuve de sa rationalité, et accepte une part d’arbitraire produisant des «choix» individuels que la société n’a pas à interroger”, p. 250.

<sup>43</sup> According to Sarthea, this misunderstanding of the category of right also concerns the idea of an objective order of Law: “estamos colocando en el corazón mismo del sistema legal una bomba de relojería: cada vez que un individuo, en el nombre de su privacidad, pida protección para un interés arbitrario, no sería posible oponerle exigencias de coherencia y de justificación racional de su pretensión, con excepción del caso en que su pretensión ponga en peligro la libertad de otros análogamente reconocidos y protegidos por el ordenamiento”. Sarthea, Claudio, “Aventuras y desventuras del derecho a la privacidad”, Santos, Jose A. Albert, Marta. Hermida, Cristina, *Bioética y Nuevos Derechos*, Granada, Comares, 2015, p. 193.

<sup>44</sup> Zanuso, Francesca, “Prefazione”. In Zanuso, Francesca (ed) *Diritto e Desiderio. Riflessioni bioguidiche*. Franco Angelo, Milano, 2015.

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