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Public Morals and the European Convention on Human Rights

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The protection of 'morals' appears frequently as a limitation on the exercise of fundamental rights, both in international covenants and in constitutional charters. The European Convention for the Protection of Human Rights is not an exception, and 'public morals' may be called upon to justify the restriction of several important rights granted by the Convention, such as freedom of expression or the right to respect for private and family life. To avoid arbitrary restrictions of these rights it is important to understand the meaning of this general clause. This article aims to suggest a reading of the 'public morals' clause that singles out its scope and its boundaries.

Keywords: public morals, European Convention on Human Rights (ECHR), personal autonomy, human dignity

1. Introduction

The instruments for the protection of fundamental rights and liberties, in both the national and international contexts, constantly feature the presence of dispositions which allow the limitation of such rights in order to safeguard certain interests. Among these interests frequently appears the protection of 'public morals'.

The idea of protecting 'morals' is hardly new: it comes from ancient Roman law, where the safeguard of 'good mores' (*boni mores*) – that is to say, a combination of traditions, customs and various unwritten rules – was held in high regard by Roman jurists,[1] to the point that a particular scholar has pointed out that 'the *boni mores* are the basis of the Roman legal system and life'.[2] During the Middle Ages and the Renaissance the concept of 'public morals' survived and, as a result of the influence of the Catholic Church, was frequently imbued with religious meanings. Even in the modern age and in the context of separation of the church and state, liberal states in the eighteenth and nineteenth centuries accepted the idea of the enforcement of a traditional moral code.[3]

This trend has endured up to contemporary times and current legal systems, at both the national and international levels, welcome a certain degree of legal enforcement of morals. Indeed, the phrase 'public morals', or similar expressions such as 'public morality' or 'good

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[1] On the concept of *boni mores* in Roman law see, for example, Biondo Biondi, *Il Diritto Romano Cristiano*, vol 1 (Giuffré 1952) 47 ff; Joseph Plescia, 'The Development of the Doctrine of Boni Mores in Roman Law' (1987) 34 *Revue Internationale des Droits de l'Antiquité* 265; Eloisa Baldacci, 'Buoni costumi. Diritto romano' in Elio Sgreccia and Antonio Tarantino (eds), *Enciclopedia di bioetica e scienza giuridica* (ESI 2009) 435.

[2] Biondi (n 1) 48 (author's translation).

[3] On the enforcement of morals and traditions in the liberal state of the nineteenth century see, for example, Lawrence M Friedman, *The Republic of Choice* (Harvard University Press 1990) 30 ff; William J Novak, *The People's Welfare* (University of North Carolina Press 1996) 149 ff.

mores', is present not only in many constitutional charters,[4] but also in several international covenants aimed at the protection of human rights, such as the International Covenant on Civil and Political Rights[5] and the Convention on the Rights of the Child.[6] Within the European Union, despite the fact that the Charter of Fundamental Rights of the European Union[7] makes no reference to public morals, Article 36 of the Treaty on the Functioning of the European Union[8] allows derogations from the ban on restrictions on imports and exports of goods between member states if justified on the ground of safeguarding 'public morality'.

The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[9] is no exception in this context: indeed, in the text the protection of morals is mentioned as a legitimate aim that justifies the restriction of some rights granted by the ECHR itself. More precisely, the 'morals' clause is referred to in Articles 6(1), 8(2), 9(2), 10(2) and 11(2), concerning respectively the right to a fair trial; the right to respect for private and family life; freedom of thought, conscience and religion; freedom of expression; and freedom of assembly and association. Moreover, the clause also appears in Article 2(3) of the Fourth Protocol to the Convention, concerning freedom of movement.[10]

The general clause under consideration, therefore, may be called upon to justify limitations on several fundamental rights. To avoid arbitrary restrictions to these rights, it is important to understand the meaning of the clause and to single out its scope and its boundaries.

[4] For example, within the countries of the European Union (EU) (therefore excluding those that adhere to the European Council, but not to the EU) I can mention: Constitution of the Netherlands (1815), art 7(3); Constitution of Luxembourg (1868), art 88; Constitution of Latvia (1922), art 116; Constitution of Ireland (1937), arts 40(6)(i) and 44(2)(2); Constitution of Italy (1948), arts 19 and 21(6); Basic Law of the Federal Republic of Germany (1949), art 2(1); Constitution of Denmark (1953), art 67; Constitution of Cyprus (1960), arts 15, 18(6), 19(3), 20(1), 21(3), 23(3), 25(2), 30(2), 87(3), 134(1) and 154; Constitution of Malta (1964), arts 38(2)(a), 39(4)(c)(ii), 40(3), 41(2)(a)(i), 42(2)(a)(i) and 44(3); Constitution of Greece (1975), arts 5(1), 13(2) and 93(2); Constitution of Portugal (1976), art 26; Constitution of Bulgaria (1991), arts 37(2)(e) and 41(1); Constitution of Romania (1991), arts 26(2), 30(7) and 53(1), in which it is worth noting the express reference to the protection of the 'morality' of minors (art 49(3)); Charter of Fundamental Rights and Basic Freedoms (1991), arts 16(4), 17(4) and 19(2), declared an integral part of the Constitution of the Czech Republic (1992), art 3; Constitution of the Slovak Republic (1992), arts 24(4), 26(4) and 28(2); Constitution of Estonia (1992), arts 23 (3), 26, 40(3), 45 and 47; Constitution of Lithuania (1992), arts 25(3), 26(4), 36(2) and 43; Constitution of Belgium (coordinated text of 1994), art 148(1); Constitution of Poland (1997), arts 31(3), 45(2) and 53(5).

[5] International Covenant on Civil and Political Rights (entered into force 23 March 1976) 999 UNTS 171. The Covenant mentions 'public morals' in arts 12(3), 14(1), 18(3), 19(3), 21 and 22(2).

[6] Convention on the Rights of the Child (entered into force 2 September 1990) 1577 UNTS 3.The expression 'public morals' is referred to in arts 10(2), 13(2)(b), 14(3) and 15(2).

[7] Charter of Fundamental Rights of the European Union [2012] OJ C 326/02.

[8] European Union, Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C 115/01.

[9] European Convention for the Protection of Human Rights and Fundamental Freedoms (entered into force 3 September 1953) 213 UNTS 222.

[10] Protocol No 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing Certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto (entered into force 2 May 1968) ETS 46, art 2(3), as amended by Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby (entered into force 11 May 1994) ETS 155.

2. THE JURISPRUDENCE OF THE 'PUBLIC MORALS' CLAUSE

Since there are no further specifications in the ECHR or in its protocols concerning the concept of public morals, it is to the jurisprudence of the European Court of Human Rights (ECtHR) that we must turn our attention. Unfortunately, to date the Court has not provided a definition of 'public morals'. In its leading decision in the *Handyside* case,[11] the Court held that 'it is not possible to find in the domestic law of the various contracting states a uniform European conception of morals'.[12] The Strasbourg judges applied the well known doctrine of the margin of appreciation[13] to the concept of 'public morals' and deemed the contracting states to be the most qualified to concretely determine its content, holding that:[14]

> [b]y reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the 'necessity' of a 'restriction' or 'penalty' intended to meet them.

This position has been confirmed in subsequent cases, in which it has also been made clear that the margin of appreciation granted to contracting states with regard to public morals is fairly broad.[15]

Even if the Court has refused to define public morals, it has acknowledged several times that state measures were aimed at protecting this interest. Nevertheless, once again it is difficult to find a common denominator among these cases, given their significant differences.

A first group of judgments concerns sexual morality. Among them we can find the leading cases on the subject of public morals: *Handyside v United Kingdom*, with regard to obscenity, and *Dudgeon v United Kingdom*, which concerned homosexual practices.[16] More recent cases include *Alekseyev v Russia*,[17] which involved freedom of assembly: following a demonstration in support of equality for homosexuals, the state attempted to justify restriction of the right granted by Article 11 ECHR by appealing to the protection of public

[11] *Handyside v United Kingdom*, App no 5493/72, ECtHR, 7 December 1976.
[12] ibid para 48.
[13] The margin of appreciation is the discretion that a judicial body (in this case the European Court of Human Rights) acknowledges the member states have in assessing the prerequisites to apply certain measures. On the margin of appreciation doctrine see Howard Charles Yourow, *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Kluwer 1996) and Yutaka Arai-Takahashi, *The Margin of Appreciation Theory and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia 2002); for Italian doctrine see Rosario Sapienza, 'Sul margine d'apprezzamento statale nel sistema della Convenzione europea dei diritti dell'uomo' (1991) 74 *Rivista di diritto internazionale* 571.
[14] *Handyside* (n 11) para 48.
[15] See, for example, *Müller and Others v Switzerland*, App no 10737/84, ECtHR, 24 May 1988, para 35; *Open Door and Dublin Well Woman v Ireland*, App no 14235/88, ECtHR, 29 October 1992, para 68; *Otto Preminger Institut v Austria*, App no 13470/87, ECtHR, 20 September 1994, para 50; *Wingrove v United Kingdom*, App no 17419/90, ECtHR, 25 November 1996, para 58; *Perrin v United Kingdom*, App no 5446/03, ECtHR, 18 October 2005; *Akdaş v Turkey*, App no 41056/04, ECtHR, 16 February 2010, para 27.
[16] *Dudgeon v United Kingdom*, App no 7525/76, ECtHR, 22 October 1981.
[17] *Alekseyev v Russia*, App nos 4916/07, 25924/08 and 14599/09, ECtHR, 21 October 2010.

morals,[18] and the Court ruled the state measures to be unlawful because they were not 'necessary in a democratic society'. Then there is the ruling in *Stubing v Germany*,[19] in which the Court deemed the prohibition of incestuous relationships between brother and sister not to be in violation of Article 8 of the Convention. In addition to these cases, however, we can find several decisions which link public morals with state measures that do not directly involve erotic matter. With regard to freedom of expression, for example, in *Open Door and Dublin Well Woman v Ireland*, the Court held that restrictions against organisations whose object was to provide advice and assistance on termination of pregnancy did pursue the aim of protecting public morals, being 'based on profound moral values concerning the nature of life'.[20]

Again, public morals appear in conjunction with other interests as a justification for limiting individual rights in cases concerning religious speech, such as *IA v Turkey*[21] and *Aydin Tatlav v Turkey*,[22] both of which focused on books which expressed the authors' views on a religion, which the authorities found blasphemous. They appear, again, in cases regarding hate speech, such as *Gündüz v Turkey*[23] and *Erbakan v Turkey*,[24] in which state authorities considered the content of some public speeches to be an incitement to hatred and hostility based on religious and racial grounds. Even more recently, the public morals clause has featured prominently in the Grand Chamber decision in *Mouvement Raëlien Suisse v Switzerland*, which concerned a ban on a poster which advocated beliefs that local authorities considered to be in violation of public morals and the rights of others.[25] The public morals clause probably reached its widest extension in *Friend and Others v United Kingdom*,[26] in which the Court affirmed[27] that a ban on hunting represents a state measure aimed at the protection of morals mentioned in Article 11 of the Convention, as

> [t]he Court further finds that the measures served the legitimate aim of the 'protection of … morals', in the sense that they were designed to eliminate the hunting and killing of animals for sport in a manner which the legislature judged to cause suffering and to be morally and ethically objectionable.

Despite the uncertainty that surrounds the extension of the public morals clause and its definition, over the years the Court has on several occasions considered whether state measures aimed at

[18] ibid para 59.
[19] *Stübing v Germany*, App no 43547/08, ECtHR, 12 April 2012.
[20] *Open Door* (n 15) para 63. It is likely, however, that in this case the Court fell back on the 'public morals' clause in order not to link state measures with the 'protection of rights of others' clause and not to address the issue of whether the foetus can be qualified as an 'other' deserving protection. Indeed, the judges admitted that, having relied on the 'public morals clause', 'it is not necessary in the light of this conclusion to decide whether the term 'others' under Article 10 para 2 extends to the unborn'.
[21] *IA v Turkey*, App no 42571/98, ECtHR, 13 September 2005, para 22.
[22] *Aydin Tatlav v Turkey*, App no 50692/99, ECtHR, 2 May 2006, para 21.
[23] *Gündüz v Turkey*, App no 35071/97, ECtHR, 4 December 2012, para 28.
[24] *Erbakan v Turkey*, App no 59405/00, ECtHR, 6 July 2006, para 46.
[25] *Mouvement Raëlien Suisse v Switzerland*, App no 16354/06, ECtHR, 13 July 2012, especially para 72, which upholds *Mouvement Raëlien Suisse v Switzerland*, App no 16354/06, ECtHR, 13 January 2011.
[26] *Friend v United Kingdom*, App nos 16072/06 and 27809/08, ECtHR, 24 November 2009.
[27] ibid para 50.

protecting this interest were compatible with the ECHR. Starting with the *Dudgeon* case, the Strasbourg judges have ruled some state restrictions that were intended to safeguard ethical values to be in violation of the Convention. It should be noted, however, that the Court has never declared that a measure claimed by the state to be for the protection of public morals has violated the Convention because it did not pursue a 'legitimate aim' (or, in other words, that the concept of public morals envisioned by the state was wrong): this would have been impossible without providing a clear definition of 'public morals'. Rather, whenever the judges have declared a state restriction to be unlawful, this has been arrived at by examining the concept of 'necessity in a democratic society'. This is a critical aspect of the Court's jurisprudence in the area of public morals.

The Court's reluctance to define 'public morals' and to determine whether state measures may be justified in terms of 'public morals' arises from the peculiar use the Court has made of the doctrine of the margin of appreciation. This doctrine allows the interpreter some flexibility in determining the field of application of certain provisions, which could turn out to be important in an international context where there might be significant differences among local situations which concern member states of an international organisation and where a judicial body needs to take these differences properly into account.

3. CRITIQUE OF THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS

There is a point worth noting. By holding that '[b]y reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them',[28] the Court acknowledges that states have a margin of appreciation concerning both the definition of public morals ('the exact content of these requirements') *and* the 'necessity' of the measures themselves in order to protect public morals. As noted by van Dijk, there is a distinction between the '*determination of facts*' – that is to say, the activity of 'answering the question of whether and in what way precisely the facts took place and what are the exact contents and meaning of national law' – and the '*determination of [the] question of laws*', regarding 'the assessment whether the facts as they have ultimately been established in the Strasbourg proceedings constitute a violation of the Convention'. The Court should grant the states a margin of appreciation on the *determination of facts*, but not on the *determination of [the] question of laws*, as on the latter the Court should judge on the grounds of an autonomous interpretation.[29]

There is a significant difference between discretion in defining a legal concept and discretion in determining whether some facts may be included in the scope of an already defined concept. I take the view that the states should retain the latter, but not the former. Defining a legal concept

[28] *Handyside* (n 11) para 48.
[29] See Pieter van Dijk and Godefridus JH van Hoof, *Theory and Practice of the European Convention on Human Rights* (Kluwer Law and Taxation 1990) 585 ff.

mentioned by an international treaty requires an explanation of its meaning and its scope; it should thus be clear that this operation cannot be left entirely to those who are subject to that treaty – that is, to the contracting states.[30] They certainly have the power to interpret legal concepts in the first instance, as does any actor, but the ultimate definition of this legal concept should remain with the Court, which has the power of binding interpretation of the treaty, in the same way as in national legal systems the interpretation of the provisions contained in constitutional instruments should remain with constitutional tribunals (or other bodies with the power of interpretation of the instrument) and not to individuals or to the government itself.[31] This conclusion is true even for general clauses – such as the public morals clause – which grant more discretion to the interpreter, in order to ensure that their application is more flexible and can be adapted to different times and places. The states should have some discretion in assessing whether, in their societies, concrete situations and forms of conduct clash with public morals, but their discretion cannot concern the very *definition* of the phrase: otherwise states could expand or restrict the field of application of the concept to their liking.[32]

The definition of a concept by the Court of Strasbourg has an important function: it narrows the interests that underlie the concept itself and that deserve protection under the Convention, making it viable to scrutinise state legislation that clashes with them. If these concepts are expressed by general clauses that allow the limitation of rights granted by the ECHR, the Court should facilitate as clear an understanding as possible of the interests that underlie these general clauses and devise common standards of judgment concerning them.[33] If the Court fails to do so, it allows states to determine the interests that justify the restriction of fundamental rights protected by the Convention, which may endanger the effectiveness of the Convention itself as a means of safeguarding individual rights.[34]

[30] ibid 585. See also Eyal Benvenisti, 'Margin of Appreciation, Consensus, and Universal Standards' (1998–99) 31 *New York University Journal of International Law & Politics* 852, regarding the necessity that the court should set universal standards of judgment for member states.

[31] See Antonio Ruggeri and Antonino Spadaro, *Lineamenti di giustizia costituzionale* (4th edn, Giappichelli 2009) 9 ff.

[32] On the distinction between the definition of a general clause and the inclusion of cases within the scope of an (already defined) general clause see, for example, under Italian doctrine, Federico Pedrini, 'Clausole generali e Costituzione. Una (prima) mappa concettuale' [2009] *Forum di Quaderni Costituzionali*, 19 November 2009, para 5, http://www.forumcostituzionale.it/site/images/stories/pdf/documenti_forum/paper/0151_pedrini.pdf.

[33] On occasions the members of the Court themselves have held that the Court should envisage common standards concerning the extension of ECHR rights and their limitations: see, for example, Judge Zekia's concurring opinion in *The Sunday Times v United Kingdom*, App no 6538/74, ECtHR, 26 April 1979, Pt 2: 'Whenever it considers it reasonable and feasible, this Court should work out a uniform international European standard for the enjoyment of the rights and freedoms included in the Convention. This could be done gradually when the occasion arises and after giving the appropriate full consideration to national legal systems.'

[34] See Clovis C Morrison, 'Margin of Appreciation in Human Rights Law' (1973) 6 *Revue des droits de l'homme* 263, 285–86; van Dijk and van Hoof (n 29) 601, who write: 'Indeed, also in our view Article 19, which reflects the structure of the European Convention, leaves room for no other conclusion that in the final analysis only the Stasbourg organs are competent to conduct the weighing of interests involved in the Convention. Leaving this task to the national authorities is eventually going to undermine the Convention's entire structure. Granting the extreme latitude inherent in the above-mentioned wide version of the margin of appreciation doctrine – and exemplified by the Irish Government's claim in the Norris case – would reduce the Strasbourg supervisory machinery to a mechanism for rubberstamping almost anything a Government wants.'

Certainly, the Court does exercise a control in the form of considering the 'necessity' of the measure 'in a democratic society'. Even if the Strasbourg judges have not declared state provisions to be in contravention of the ECHR because they did not pursue a legitimate aim – that is to say because they did not pursue correctly defined public morals – the judges have not been shy in declaring the same provisions to be in violation of the Convention on the ground that they were not 'necessary in a democratic society'. This has given rise to significant lines of judgment, such as that concerning homosexual activities performed in private, inaugurated by *Dudgeon*. I am convinced, however, that this kind of scrutiny cannot make up for the Court's decision not to provide a definition of public morals, and therefore to refrain from ascertaining whether the state measures really pursued a legitimate aim.

In the first place, we should keep in mind that the expression employed by the Convention with regard to limiting individual rights is 'necessary in a democratic society *in the interests of*' national security, public safety, or '*for the protection of*' health and morals, and so on. That is to say, the ECHR singles out specific interests that are conveyed by the various general clauses contained in the single provisions. Not every measure that is 'necessary in a democratic society' is acceptable, but only those directed at safeguarding the specific interests mentioned in the Convention. Unfortunately, if the Court grants states a wide margin of appreciation as to the definition of these general clauses, and refuses to circumscribe the interests that states may pursue, the scrutiny is not targeted at the 'necessity in a democratic society for' the protection of a specific interest, but at the 'necessity' of a measure in itself – that is to say, it becomes an assessment of how much the measure is considered socially desirable at that moment.[35]

Secondly, the focus on the 'necessary in a democratic society' parameter has forced the Court to employ debatable arguments in its rulings, even when it has decided to declare a state restriction to be incompatible with the Convention. Let us consider, for example, the *Dudgeon* case.[36] *Dudgeon* is a landmark case that, although not recent, gave rise to a line of judgments regarding homosexual activities performed in private by consenting adults;[37] the Court has never departed from the conclusions reached in *Dudgeon* and therefore this ruling is still relevant today. The case concerned the English law that prohibited sexual practices between consenting adults of the same sex,[38] which the applicant claimed to be a violation of his right to private life protected by Article 8 ECHR. The Court upheld the complaint. The arguments employed by the judges follow the scheme established in the *Handyside* decision (although the result of the examination

[35] Remember the 'pressing social need' formula employed by the Court on several occasions (eg *Handyside* (n 11) para 48) to assess the 'necessity in a democratic society' of a state measure which restricts a right.

[36] On *Dudgeon* (n 16) see, for example, Giorgio Repetto, 'I diritti all'identità sessuale e il ruolo della morale pubblica' in Alberto Vespaziani (ed), *Diritti fondamentali europei. Casi e problemi di diritto costituzionale comparato* (Giappichelli 2008) 105.

[37] See *Norris v Ireland*, App no 10581/83, ECtHR, 26 October 1988; *Modinos v Cyprus*, App no 15070/89, ECtHR, 22 April 1993; *ADT v United Kingdom*, App no 35765/97, ECtHR, 31 July 2000. Among decisions and reports of the European Commission of Human Rights see *Norris v Ireland* (1985) 44 DR 132; *Modinos v Cyprus* (1990) 67 DR 295; *Marangos v Cyprus*, App no 31106/96 (Commission Decision, 20 May 1997).

[38] Offences against the Person Act (1861), ss 61 and 62, and Criminal Law Amendment Act (1885), s 11. These provisions have since been repealed.

is the opposite): the Court considered whether the state measures interfered with the applicant's right to private life;[39] once this interference was established, the Court proceeded to verify whether the restrictions pursued a legitimate aim.[40] The judges conceded that the English legislation was aimed at protecting, among other interests,[41] public morals – in the words of the Court, the 'moral ethos or moral standards of a society as a whole',[42] having been enacted in the nineteenth century 'in order to enforce the then prevailing conception of sexual morality'.[43] The state measure therefore pursued a legitimate aim.

The Court then proceeded to assess whether the restriction was 'necessary in a democratic society'. Despite the margin of appreciation to which states are entitled in this field, the Court was not ready to admit that they were allowed to curtail individual liberties at will. The limits of state discretion in this matter should be seen, in the words of the judges, 'in the context of Northern Irish society',[44] where there was 'a strong body of opposition stemming from a genuine and sincere conviction shared by a large number of responsible members of the Northern Irish community that a change in the law would be seriously damaging to the moral fabric of society'.[45] It is here that the arguments of the Court become insidious. The judges, indeed, held that this conviction, whether right or wrong, was 'relevant for the purposes of Article 8(2)',[46] that is to say that it should be taken into account in balancing public interests with the right to private life.

The outcome of the balancing test was favourable to the applicant because the Court acknowledged that at the time of the decision there was a 'better understanding' and an 'increased tolerance' of homosexual behaviour; hence no 'pressing social need' for the state measures could be claimed in order to maintain them.[47] In other words, this means that if the Court ultimately declared the English law to be incompatible with Article 8 of the Convention, as it did, it was not because it is unacceptable that a fundamental individual right is limited only because there is a sentiment of intolerance towards one of the ways in which this right is exercised, but merely because this intolerance had decreased over time and it no longer represented the majoritarian view.[48]

I believe that this line of reasoning is dangerous. Saying that a state measure is unlawful because there is now a better understanding of and a greater tolerance for a certain form of

[39] *Dudgeon* (n 16) paras 40–41.
[40] ibid paras 42–46.
[41] The Court indeed held that the legislation was viable to protect also the 'rights of others' and, more precisely, the position of the weakest members of society, who could be offended by homosexual practices – see *Dudgeon* (n 16) para 47: 'The Court recognises that one of the purposes of the legislation is to afford safeguards for vulnerable members of the society, such as the young, against the consequences of homosexual practices.'
[42] ibid para 47.
[43] ibid para 46.
[44] ibid para 56.
[45] ibid para 57.
[46] ibid para 57.
[47] ibid paras 60–61.
[48] ibid para 60. As for the tolerance displayed by the authorities in Northern Ireland, the Court stressed that 'no evidence has been adduced to show that this has been injurious to moral standards in Northern Ireland or that there has been any public demand for strict enforcement of the law'.

behaviour than in the past is tantamount to saying that a person might perform an action not because he or she has a right to do so, but because today his fellow citizens graciously allow him to do so. It is very much the same as saying that the exercise of a right depends on the opinions of the majority: it is quite evident that this line of reasoning might endanger the protection of the rights of minorities, which, according to scholars such as Eyal Benvenisti, is also an objective of a supranational judicial body such as the European Court of Human Rights.[49] It is true that academic opinion is not unanimous on this point, and some authors have stressed the 'counter-majoritarian difficulty' with regard to the role of the Court.[50] However, I find some of Benvenisti's arguments compelling, particularly when he points out that 'one of the main justifications for an international system for the protection of human rights lies in the opportunity it provides for promoting the interests of minorities'; this is because '[t]his system is an external device to ameliorate some of the deficiencies of the democratic system. Such external mechanisms are not susceptible to the concerns of domestic governments as much as internal decision-makers are'.[51] Therefore, even without espousing a radically counter-majoritarian view of the Court's role,[52] I would agree that a line of reasoning (such as that advanced by the British government in *Dudgeon*) which pays lip service to the will of the majority would deprive the Convention of much of its efficacy.

It would have been different had the Court tried to define public morals and made clear, for example, that this concept cannot be interpreted as mere moral bias against unpopular practices; that it cannot include 'prejudice, rationalizations, matters of personal aversion or taste, arbitrary stands, and the like'.[53] In that case the 'strong body of opposition' to homosexual practices would have had no weight in the balancing process with the right to private life, no matter how 'genuine and sincere' were the convictions on which the opposition was grounded. It would have been different again if the Court had stated, for example, that public morals are 'public' also in the sense that they cannot concern purely private conduct – that is, conduct that takes place between consenting adults and is harmless to third parties.[54] In this case, as the English law targeted such

[49] See Benvenisti (n 30) 850.

[50] For an overview of the problem, see Steven Wheatley, 'Minorities under the ECHR and the Construction of a "Democratic Society"' [2007] *Public Law* 770.

[51] Benvenisti (n 30) 850.

[52] On the idea of a counter-majoritarian role of the ECtHR, see Susanna Mancini, 'The Crucifix Rage: Supranational Constitutionalism Bumps against the Counter-Majoritarian Difficulty' (2010) 6 *European Constitutional Law Review* 6, commenting on the *Lautsi* ruling (*Lautsi v Italy*, App no 30814/06, ECtHR, 3 November 2009; the ruling was followed by a Grand Chamber decision: *Lautsi and Others v Italy*, App no 30814/06, ECtHR, 18 March 2011.

[53] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press 1978) 248.

[54] This clarification has been provided, for example, by the Italian Constitutional Court with regard to obscenity. The Court indeed affirmed that 'it is not possible to attribute that offensive attitude [of the good mores] to acts or objects which, albeit provided with an obscene character in themselves, do not go beyond the private sphere and do not represent a means of communication towards an indeterminate number of people, or else they are aimed at reaching the other parties with such methods and precautions, which grant the necessary privacy and reasonably prevent the danger of the offence to non-consenting third parties or to the community as a whole': Constitutional Court, No 368 (9 July 1992), [1992] *Giurisprudenza costituzionale* 2935; *Considerato in diritto* [*Conclusions of Law*], para 2 (author's translation). See also Constitutional Court, No 9 (4 February 1965), [1965] *Giurisprudenza costituzionale* 61; *Considerato in diritto*, para 5, where we read that '[t]he moral law lives within individual

types of behaviour, it could not be justified by appealing to the public morals clause. The state measure would have been declared to be in violation of the Convention not because it was no longer 'necessary in a democratic society' as a result of society's increased tolerance of the homosexual phenomenon, but because it did not pursue a legitimate aim and it therefore unduly restricted an individual right granted by the Convention.

Of course, it is not easy to devise common standards of public morals that might be acceptable to all member states of the Council of Europe: the significant differences between them may represent a great obstacle to this task and the Court may wish to avoid 'rebellions' to an excessively innovative jurisprudence. We must not ignore the fact that the Strasbourg Court is still an international judicial body which needs the cooperation of states in order to give execution to its judgments.

These difficulties do not imply that the Court should give up its attempts to define public morals. They merely remind us that the Court should try to anchor this concept to a standard that is widely shared among member states in order to avoid at some point the risk of arbitrariness in establishing the boundaries of this general clause and to ensure a broader acceptance of the definition. In the last instance, the possibility of implementating the Court's jurisprudence on public morals (as well as the jurisprudence on similar concepts) is grounded on this standard, and on the legal arguments employed by the Court. If the standard of judgment on which the decision is grounded is a value or a legal principle that is shared by states, and if the arguments put forward by the Court are convincing, member states are more likely to respect the Court's rulings even if they are unfavourable to them. Moreover, the motivations behind the Court's decisions might exert a similar influence on national courts, and especially on constitutional tribunals, which in turn may lead to a constructive dialogue between the courts and to the establishment of a common jurisprudence on the protection of human rights.[55] The recognition of a value that is shared among states is therefore crucial in order to ensure the success of an interpretive operation on the concept of public morals and of its implementation within the member states.

4. Human Dignity as a Common Standard for Public Morals

What is this common standard to which the public morals clause may be linked? I think here we might take into account the valuable suggestion of the Italian Constitutional Court, which, in a sentence given at the beginning of the third millennium,[56] connected the concept of public morals

conscience and, if it is understood in this way, it cannot be disciplined by the law. Whenever the law mentions morality, it refers to public morality, that is to say those rules of coexistence and of conduct, which need to be observed in a civilized society'.

[55] On the 'dialogue' between national and European courts (including the ECtHR) about human rights protection see, for example, under Italian doctrine, the contributions contained in Sergio Panunzio (ed), *I diritti fondamentali e le Corti in Europa* (Jovene 2005); Roberto Cosio and Raffaele Foglia (eds), *Il diritto europeo nel dialogo delle Corti* (Giuffré 2013). On the broader idea of a 'global community of transnational adjudication' in general see, for example, Anne-Marie Slaughter, 'A Global Community of Courts' (2003) 44 *Harvard International Law Journal* 191.

[56] Constitutional Court, No 293 (11 July 2000), [2000] *Giurisprudenza costituzionale* 2239.

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with that of 'human dignity'. More precisely the Italian Court, in assessing the constitutionality of an old law concerning 'impressing or scary publications, liable to upset the common sense of morality',[57] made clear that this notion (the 'common sense of morality') encompasses 'not only what is common to different moralities of our time, but also what is common to the plurality of ethical conceptions that coexist in contemporary society', and that 'this minimal concept is nothing but the concept of human dignity'.[58] Thus '[o]nly when the threshold of civil community's attention is negatively struck, and offended, by the publication of writings or images with disturbing or gruesome details, harmful to any human being's dignity, and thus discernible by the entire community, follows the law's reaction'.[59]

The Italian Constitutional Court, in other words, expresses its conviction that in our modern pluralistic society it is possible to find general agreement or some sort of an overlapping consensus[60] on the concept of human dignity and that the notion of public morals, aimed at protecting ethical values that ought to be shared by the community as a whole, should therefore encompass human dignity.

In my opinion, there are many clues as to the presence of this agreement on the concept of human dignity as a common value among different countries. For a start, dignity is a concept in the constitutional law of the vast majority of member states of the Council of Europe, and is sometimes also referred to in constitutional charters,[61] as in the case, for example, of Italy[62] and Germany.[63] Moreover, it is possible to consider the international treaties which refer to

[57] Law No 47 of 8 February 1948, art 15.

[58] Constitutional Court, No 293 (n 56) 2244; *Considerato in diritto*, para 3.

[59] ibid para 3. This link between 'dignity' and 'public morality' has a precedent in the jurisprudence of the Canadian Supreme Court concerning obscenity: see *R v Butler* [1992] 1 SCR 452; the majority opinion, drafted by Justice Sopinka, sustains the limitation on freedom of expression granted by the Canadian Charter of Rights and Freedoms, s 2, by means of a ban on obscene publications, when the targeted materials display the participants in a 'degrading or dehumanizing' way. In the judgment it is stated that '[t]he avoidance of harm caused to society through attitudinal changes certainly qualifies as a fundamental conception of morality. It is well grounded, since the harm takes the form of violations of the principles of human equality and dignity'. The decision of the Canadian Supreme Court is examined briefly by Christopher Nowlin, 'The Protection of Morals under the European Convention for the Protection of Human Rights and Fundamental Freedoms' (2002) 24 *Human Rights Quarterly* 264, 276 ff.

[60] I borrow this concept from John Rawls' works (John Rawls, 'The Idea of an Overlapping Consensus' (1987) 7 *Oxford Journal of Legal Studies* 1; John Rawls, *A Theory of Justice* (revised edn, Oxford University Press 1999) 340; and John Rawls, *Political Liberalism* (Columbia University Press 1993) 133 ff). However, Rawls' idea of an overlapping consensus on a conception of justice is quite complex, as it involves a deep consensus on a conception of justice as opposed to a mere constitutional consensus on some procedural constitutional principles (such as that proposed by Kurt Baier: see Kurt Baier, 'Justice and the Aims of Political Philosophy' (1989) 99 *Ethics* 771). I call upon the concept of overlapping consensus to a simpler extent, in its meaning of an agreement on a notion, that of human dignity, which can be accepted by all (reasonable) forces in a pluralistic society.

[61] For a survey of world constitutions which contain references to human dignity see Christopher McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19 *European Journal of International Law* 655, 664–65, 672–73.

[62] In the Italian Constitution human dignity is mentioned in arts 3(1) ('All citizens possess equal social dignity'), 41(2) ('[private entrepreneurship] cannot contravene social utility or endanger public safety, or liberty, or human dignity') and 36(1) ('The worker is entitled to a salary proportional to the quantity and quality of his work, and in any case sufficient to grant him and his family a free and dignified life').

[63] Human dignity plays a very important role in the Basic Law for the Federal Republic of Germany (*Grundgesetz für die Bundesrepublik Deutschland*), in which it is stated (art 1(1)) that '[h]uman dignity shall be inviolable. To respect and protect it shall be the duty of all state authority' ('*Die Würde des Menschen ist unantastbar. Sie zu*

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human dignity,[64] the most relevant among which is probably the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations in 1948,[65] or the International Covenant on Civil and Political Rights, adopted by the UN General Assembly in 1966.[66] More recently, it is important to mention the Charter of Fundamental Rights of the European Union,[67] which, since the Lisbon Treaty, is binding on EU institutions and member states in their implementation of EU law. In the Preamble to the Charter we read: 'Conscious of its spiritual and moral heritage, the Union is founded on the indivisible, universal values of human dignity, freedom, equality and solidarity'; the entire Title I of the Charter is entitled 'Dignity', and Article 1 (entitled 'Human dignity') reads: 'Human dignity is inviolable. It must be respected and protected.'[68]

I consider the focus on human dignity to be a viable solution also in the context of the ECHR. It is recognised that human dignity, albeit not mentioned in the normative part of the Convention, is indirectly referred to in its Preamble, where it cites the UN Universal Declaration of Human Rights,[69] and is directly referred to in the Preamble to the Thirteenth Additional Protocol to the Convention.[70] More importantly, the Court has mentioned human dignity on several occasions in its decisions and has repeatedly affirmed that 'the very essence of the Convention is

achten und zu schützen ist Verpflichtung aller staatlichen Gewalt'). It is therefore held among scholars that human dignity is not only the basis of the fundamental rights listed in the Basic Law, but is also the central value of the constitutional order itself: see, for example, Edward J Eberle, 'Human Dignity, Privacy, and Personality in German and American Constitutional Law' (1997) 4 *Utah Law Review*, 963, 971–73.

[64] For a survey of international texts and conventions which include references to human dignity see McCrudden (n 61) 665 ff.

[65] Universal Declaration of Human Rights, GA Res 217A (III), UN Doc A/810 (1948) 71. The Preamble reads: 'Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world … Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom'. The Declaration refers to 'dignity' in arts 1, 22, 23 n (3).

[66] n 5 above. The Preamble reads: 'The States Parties to the present Covenant, Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, Recognizing that these rights derive from the *inherent dignity of the human person* …' (emphasis added), while art 10(1) states: 'All persons deprived of their liberty shall be treated with humanity and with respect for the *inherent dignity of the human person*' (emphasis added).

[67] n 7 above.

[68] On the Charter of Fundamental Rights of the European Union see, for example, Giorgio Resta, 'La disponibilità dei diritti e i limiti della dignità (note a margine della Carta dei diritti)' (2002) 6 *Rivista di diritto civile* 801; Francesco Sacco, 'Note sulla dignità umana nel "diritto costituzionale europeo"' in Sergio Panunzio (ed), *I diritti fondamentali e le Corti in Europa* (Jovene 2005) 585; Fabrizio Politi, 'Il rispetto della dignità umana nell'ordinamento europeo' in Stelio Mangiameli (ed), *L'ordinamento europeo. I principi dell'Unione* (Giuffré 2006) 43; Mario Di Ciommo, *Dignità umana e Stato costituzionale. La dignità umana nel costituzionalismo europeo, nella Costituzione italiana e nelle giurisprudenze europee* (Passigli 2010) 201 ff.

[69] See ECHR (n 9) Preamble, paras 1–3: 'The governments' signatory hereto, being members of the Council of Europe, Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10th December 1948; Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared.'

[70] The Preamble to the Protocol reads: 'The member States of the Council of Europe signatory hereto, Convinced that everyone's right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings.'

respect for human dignity and human freedom'.[71] From this perspective, I see no difficulty in employing this concept in order to interpret the provisions of the Convention, including the 'public morals' clause.

I need to make clear that this operation does not imply an identification of the concept of 'public morals' with the concept of human dignity: the two notions remain distinct and autonomous, as might be proved by the fact that the ECHR employs the two expressions in different parts of its text.[72] What I am holding here is that the concept of human dignity, in its capacity as an interpretive principle of the whole Convention, may provide clues in helping to understand the content of the public morals clause.

Establishing the precise content of human dignity itself, however, is all but simple; thus it may seem that making use of this notion in order to interpret a general clause such as the public morals clause is a way to shift problems to another stage of the analysis, rather than a way to resolve them once and for all. Providing an unchallengeable definition of human dignity, indeed, is probably impossible, but I am convinced that it is possible to single out at least two aspects, or dimensions,[73] of the concept that have sufficient philosophical and normative grounds to be employed for our purposes.[74] It may be sufficient here to say that these two dimensions in my opinion are that of (i) autonomy and of (ii) respect for other persons. The first dimension may help us to understand the boundaries of public morals – that is to say, what this notion cannot encompass, what public morals *cannot be*. The second dimension may provide some content to the general clause, and help us to understand what is really protected by public morals.

4.1. THE FIRST DIMENSION OF DIGNITY: PERSONAL AUTONOMY

The first dimension concerns personal autonomy. According to Joseph Raz:[75]

[71] See *Pretty v United Kingdom*, App no 2346/02, ECtHR, 29 April 2002, para 65; see also *Christine Goodwin v United Kingdom*, App no 28957/95, ECtHR, 11 July 2002, para 90; and *Jehovah's Witnesses of Moscow and Others v Russia*, App no 302/02, ECtHR, 10 June 2010, para 135. For a survey of the cases in which the Commission and the Court mentioned 'human dignity' see Di Ciommo (n 68) 233 ff.

[72] Human dignity, as I have already pointed out, is referred to in the Preamble to the ECHR and appears in the Preamble to the 13th Additional Protocol to the Convention, while the expression 'public morals' is present among the operative provisions of the Convention.

[73] I borrow the expression 'dimension of dignity' from Ronald Dworkin, *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press 2006).

[74] For a more thorough analysis, and for further references on the concept of 'human dignity' see, for example, Roberto Perrone, 'Il concetto di "*public morals*" nella giurisprudenza della Corte europea dei diritti umani: spunti per l'elaborazione di una "moralità pubblica" europea – Parte I' (2013) 1 *Diritti umani e diritto internazionale* 31, and Roberto Perrone, 'Il concetto di "*public morals*" nella giurisprudenza della Corte europea dei diritti umani: spunti per l'elaborazione di una "moralità pubblica" europea – Parte II' (2013) 2 *Diritti umani e diritto internazionale* 265.

[75] Among the many suggested by the doctrine, see the definition of personal autonomy suggested by Joseph Raz, *The Morality of Freedom* (Oxford University Press 1988) 369, according to whom the concept 'transcends the conceptual point that personal well-being is partly determined by success in willingly endorsed pursuits and holds the free choice of goals and relations as an essential ingredient of individual well-being'. For a discussion of various aspects of personal autonomy see Joel Feinberg, *The Moral Limits of the Criminal Law, Vol 3: Harm to Self* (Oxford University Press 1989) 27 ff.

> The ruling idea behind the ideal of personal autonomy is that people should make their own lives. The autonomous person is (part) author of his own life. The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives.

Personal autonomy, or self-determination, is the freedom of the individual to determine the course of his or her existence, making one's own life choices.[76] Self-determination is a fundamental component of human dignity,[77] and denying the individual the right to determine how to live his or her life, which goals to choose and which values to adhere to is tantamount to a violation of personal dignity. A legal system which prevents adult individuals of sound mind to perform choices regarding the most relevant aspects of their existence – such as their family life, their sexual preferences, their religious or philosophical convictions, and so on (and unless, of course, those choices negatively affect the lives of other people) – does not respect the value of human dignity.[78]

Like human dignity itself, personal autonomy is not explicitly mentioned in the ECHR. The Court, however, has acknowledged the importance of personal autonomy, affirming in *Pretty* that 'although no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees'.[79] In this case, the concept

[76] Sometimes the theorisation of personal autonomy in the sense just specified is credited to Immanuel Kant, *Metaphisics of Morals* (first published 1797, Cambridge University Press 1996), as held, for example, by David Feldman, 'Human Dignity as a Legal Value – Part I' [1999] *Public Law* 685; and by Teresa Pasquino, *Autodeterminazione e dignità della morte* (Cedam 2009) 42–43. It has been observed, however, that Kant's *moral autonomy* is a concept that differs from *personal autonomy* and that in Kantian theory 'authorship reduced itself to a vanishing point as it allowed only one set of principles which people can rationally legislate and they are the same for all. Nobody can escape their rule simply by being irrational and refusing to accept them. Personal autonomy, by contrast, is essentially about the freedom of persons to choose their own lives': Raz (n 75) 370. See also Feinberg (n 75) 35 ff. According to some (see, for example, Robert S Taylor, 'Kantian Personal Autonomy' (2005) 33 *Political Theory* 602) the step towards a more relativistic vision of autonomy (or, according to a certain terminology, 'personal autonomy' in the proper sense) is to be ascribed to Romantic liberalism, and namely to John Stuart Mill's 'free development of individuality': see John Stuart Mill, *On Liberty* (first published 1859, Pearson Longman 2007). But see also the concept of 'self-government' envisioned by Richard Price, *Observations on the Nature of Civil Liberty, the Principles of Government, and the Justice and Policy of the War with America* (first published 1776) 9, http://www.oll.libertyfund.org; see also Wilhelm von Humboldt, *The Limits of State Action* (first published 1792, Cambridge University Press 1969) 16–21.

[77] See, for example, Andrew Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press 2006) 545–46, who singles out four aspects which constitute respect for human dignity; among them there is 'the assurance of the possibility for individual choice and the conditions for "each individual's self-fulfilment", autonomy, or self-realization'. Under Italian doctrine see, for example, Pasquino (n 76) 50 ff; and Giorgio Resta, 'La dignità' in Stefano Rodotà and Paolo Zatti (eds), *Trattato di biodiritto: Ambito e fonti del biodiritto* (Giuffré 2010) 288 ff.

[78] Dworkin (n 73) 35 ff and 85; but see also his position in Dworkin (n 53) 391 ff, regarding the idea that the state should treat people with 'equal concern and respect' and that individual liberties should not be restricted because the majority thinks some individuals are entitled to less concern because of their life choices. On this issue see also George Letsas, *A Theory of Interpretation of the European Convention on Human Rights* (Oxford University Press 2007) 110, 121–22 ff.

[79] *Pretty* (n 71) para 61.

of self-determination is related to Article 8 of the Convention, but in subsequent decisions the Court has held that it must guide the interpretation of all rights granted by the Convention.[80] This principle is reaffirmed in the recent decision in *Jehovah's Witnesses of Moscow and Others v Russia*, in which we also find an express link between human dignity and personal autonomy.[81] From the same perspective, however, we could also bear in mind some dissenting opinions of Strasbourg judges, such as that expressed by Judge Martens in the *Cossey* case, in which he affirmed that '[h]uman dignity and human freedom imply that a man should be free to shape himself and his fate in the way that he deems best fits his personality';[82] or Judge van Dijk's opinion in the *Sheffield and Horsham* case that '[t]he right to self-determination has not been separately and expressly included in the Convention, but is at the basis of several of the rights laid down therein, especially the right to liberty under Article 5 and the right to respect for private life under Article 8'. Moreover, it is a vital element of the 'inherent dignity' which, according to the Preamble to the Universal Declaration of Human Rights, constitutes the foundation of freedom, justice and peace in the world.[83]

I suggest, therefore, that we can be reassured that human dignity, in its first dimension of personal autonomy, is a value protected by the ECHR and it may be used in the interpretation of its provisions. As for the public morals clause, I hold that it cannot be interpreted in a sense that allows states to prohibit harmless conduct performed by capable and consenting adults.[84] In other words, a reading of the public morals clause that allows member states (or at least their majorities) to restrict the liberties granted by the Convention by prohibiting actions that do not directly involve, damage or endanger third parties, and that are performed by fully capable individuals, is not compatible with the ECHR. There is an *external boundary* to public morals, which is the *private sphere of the individual*. Whenever the state invades this sphere, it cannot invoke public morals as a justification for its intervention. In other words, the concept of public morals, if correctly interpreted, involves only conduct that encompasses an element of *publicity*.[85]

[80] See *Sørensen and Rasmussen v Denmark*, App nos 52562/99 and 52620/99, ECtHR, 11 January 2006, para 54, where we read that 'the notion of personal autonomy is an important principle underlying the interpretation of the Convention guarantees'; the Court confirmed this statement in *Vördur Olafsson v Iceland*, App no 20161/06, ECtHR, 27 April 2010, para 46; both cases concerned freedom of assembly granted by art 11 ECHR. On this issue see Nelleke R Koffeman, '(The Right to) Personal Autonomy in the Case Law of the European Court of Human Rights' (2010) 5, https://openaccess.leidenuniv.nl/handle/1887/15890.

[81] *Jehovah's Witnesses of Moscow v Russia* (n 71) para 135, in which the judges affirm that 'the very essence of the Convention is respect for human dignity and human freedom and the notions of self-determination and personal autonomy are important principles underlying the interpretation of its guarantees'.

[82] *Cossey v United Kingdom*, App no 10843/84, ECtHR, 27 September 1990, dissenting opinion of Judge Martens, para 2(7); the case concerned the position of transsexuals under the British legal system.

[83] *Sheffield and Horsham v United Kingdom*, App nos 22885/93 and 23390/94, ECtHR, 30 July 1998, separate opinion of Judge van Dijk, para 5.

[84] It is to be noted that even liberal theorists allow some forms of paternalism when the individual is not of sound mind: see, for example, Feinberg (n 75) 12 ff, who makes clear that when the person is not able to consent freely and capably to a certain type of conduct, it is incorrect to talk of 'paternalism' (even of 'soft paternalism') in the event of prohibition of that conduct.

[85] From this perspective, the adjective 'public' in the phrase 'public morals' does not simply mean that the morals are 'of the community', as opposed to being of an individual nature, but also that they are not private and somehow affect the community by involving the public sphere. Of course, it is not easy to draw a precise line between the

This line of reasoning is influential in our discourse about public morals and the ECHR. Indeed, if the Court had taken this stance, it would have been clearer in several cases that state measures could not be justified by invoking the public morals clause. Let us consider once again the *Dudgeon* case. English law prohibited homosexual conduct per se, regardless of the fact that it was performed in private between consenting adults. Instead of accepting a public morals rationale for this measure and declaring it to be incompatible with the Convention on the ground that there was no longer a 'pressing social need' for it (which is a controversial solution for the reasons we singled out above), the Court could have acknowledged that the English legislation could not be justified under the public morals clause at all, as public morals – if correctly interpreted – cannot concern private, harmless behaviour. In other words, the state measure was unlawful not because it was not 'necessary in a democratic society', but because it did not pursue a legitimate aim.

I believe this argument must be applied every time the Court needs to assess a restriction of individual rights, the rationale for which is nothing but the antipathy of the majority towards unpopular types of conduct that express free life choices for individuals and that cause no harm to neighbours or to the community as a whole. On the other hand, this dimension of dignity would still leave room for a prohibition on actions that encompass elements of publicity, because they are performed in public places or because they affect third parties: to assess the legitimacy of restrictions of these types of conduct, the second dimension of human dignity comes into play.

4.2. The Second Dimension of Human Dignity: The Relational Claim

If the first dimension of dignity clarifies the boundaries of public morals, the second dimension helps us to understand the content of this general clause. Since the end of the Second World War, the notion of human dignity has acquired a normative character.[86] I have already referred to the several international covenants and constitutions that acknowledge and mandate the idea that human beings have an intrinsic dignity[87] simply because they are members of the human race,

'public' and 'private' sphere, and the issue would obviously need more in-depth analyis. In my opinion, however, the word 'private' here encompasses two aspects: one objective, one subjective. The objective aspect concerns the spatial dimension of the conduct; it includes only actions performed in a place in which the actor can decide who is allowed to enter and witnessing these actions is blocked to all non-consenting people. The subjective dimension concerns the parties involved in the conduct, which remains 'private' only until unwilling people are forced to take part in it, to assist with it, or to suffer its consequences.

[86] See Sacco (n 68) 585 ff.

[87] This position has ancient roots, dating back to Stoic philosophy, and it was advocated in the Roman world by Marcus Tullius Cicero in his treatise *De Officiis*, in which the expression 'dignity' is used for the first time. The idea of an intrinsic human dignity was taken up during the Middle Ages by Christian philosophers, who saw the distinguishing feature of man in the fact that he is created in God's image and in his capacity of reason and free will; the idea was greatly emphasised later during the Renaissance period by authors such as Giannozzo Manetti and Pico della Mirandola. It is the philosopher Immanuel Kant, however, who is the major contributor to the concept of human dignity in the history of ideas. In fact, some even consider him to be 'the father of the modern concept of human dignity': see Giovanni Bognetti, 'The Concept of Human Dignity in European and US Constitutionalism' in Georg Nolte (ed), *European and US Constitutionalism* (Cambridge University Press 2005) 89. For a brief, yet accurate, analysis of Kantian thought regarding human dignity see Umberto

regardless of social status, beliefs, nationality, and so on. This idea, which was born as a philosophical tenet, is now a legal principle accepted by the generality of liberal-democratic legal systems.[88] If, as we have seen, there is a 'moral ethos of a society as a whole' which encompasses moral values shared by the populations of all member states, and if this 'European public morality' is but a common denominator among the various moralities followed by diverse communities, this idea of intrinsic human dignity is most certainly one of those shared values.[89]

How should we understand dignity in this context? I hold that dignity here has a relational aspect.[90] Respecting human dignity does not simply mean leaving people alone in making their life choices and not disturbing them provided they do not bother us. Human dignity also tells us how we should treat our neighbours; what is the treatment they are entitled to because they are fellow human beings. I hold that it is this *respect*, this claim of fair treatment, that provides content to the second dimension of dignity and that, in turn, enlightens the concept of public morals. Indeed, it has been affirmed:[91]

> The principle of dignity in its relational aspect presupposes the existence or the formation of a social conscience directed at not turning the unavoidable social differences into causes of exclusion; it mandates that not only the legal system, but also the social context calls for relationships inspired by a natural duty of reciprocal respect. The acknowledgement of equal dignity of each person, therefore, is grounded on tolerance, on the observance of rules of coexistence, on the acceptance of diversity and on the multicultural principle.

Now, I believe that every form of conduct that degrades individuals, demeans them, makes them objects of contempt, scorn or derision, is clearly incompatible with this idea of dignity, which indeed permeates the Convention and shines through several of its provisions (for example, Article 3, which prohibits torture and inhumane and degrading treatment; Article 4, which proscribes slavery and forced labour).

Vincenti, *Diritti e dignità umana* (Laterza 2009) 27 ff. For an overview of the concept of human dignity in the history of philosophic thought see Sacco (n 68) 585 ff, and McCrudden (n 61) 656 ff.

[88] See, for example, Giancarlo Rolla, 'Dignità' in Marcello Flores, Tania Groppi and Riccardo Pisillo Mazzeschi (eds), *Dizionario dei diritti umani* (Utet 2007) 305: 'We can affirm that the constitutional principle of respect for human persons is the anthropological premise of the democratic and social state, as it affirms, in relationships within society and between society and the state, a culture inspired by rules of coexistence grounded on reciprocal tolerance and respect' (author's translation). In the jurisprudence of the ECtHR see, for example, *Erbakan v Turkey* (n 24) para 56, where we read that 'la Cour souligne que la tolérance et le respect de l'égale dignité de tous les êtres humains constituent le fondement d'une société démocratique et pluraliste'; or *Gündüz v Turkey* (n 23) para 40, where the statement is confirmed.

[89] See, for example, Peter Häberle, 'La dignità umana come fondamento della comunità statale' in Peter Häberle, *Cultura dei diritti e diritti della cultura nello spazio costituzionale europeo* (Giuffré 2003) 1; Hasso Hofmann, 'La promessa della dignità umana' (1999) 76 *Rivista internazionale di filosofia del diritto* 620.

[90] See, for example, McCrudden (n 61) 679, who includes the 'relational claim' among the elements that form the 'minimum core' of the concept of human dignity, on which there seems to be a certain consensus among interpreters; see also Rolla (n 88) 306, according to whom 'the constitutional acknowledgement of dignity needs to be considered also under the relational aspect. In that dimension it is not sufficient that people are treated with dignity; it is also necessary that all of them are treated with equal dignity and respect' (author's translation).

[91] See Rolla (n 88) 306 (author's translation).

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As a common value shared by the member states of the Council of Europe, this concept of dignity could really be considered one of the constituents of a European public morality. It follows that every form of conduct that violates this dimension of dignity could be forbidden by invoking the public morals clause. We can think of several examples relating to freedom of speech, and it is possible to consider forms of expression that are intolerable on grounds of racism, religious or sexual discrimination;[92] or one may consider vocal support for the vindication of grave crimes against humanity (for example, genocide, as in the case of some – not all – forms of Holocaust denial), or of violence against the person. In all of these cases, an ethical value is offended *in the public sphere* (we have seen that, in the private sphere, there is no room for state intervention in the name of safeguarding *public* morals), and this ethical value – human dignity – is not a sectarian value, but is one on which our democratic societies are grounded. This gives the state a right to prohibit these forms of conduct by invoking the public morals clause. The protection of public morals is the protection of a (necessarily) public space in which human dignity, in its relational dimension, is granted and safeguarded.

5. CONCLUSION

In this article I briefly examined the jurisprudence of the European Court of Human Rights relating to the public morals clause of the ECHR and proceeded to a critical analysis of the tenets established by the Court over the years. I stressed the necessity for the Court to devise a definition of public morals, in order to deny states an unlimited discretion in curtailing rights protected by the Convention. I also pointed out that, in my opinion, this definition should be grounded on a common value that is shared among member states of the Council of Europe. I suggested that this common value might be the concept of human dignity, in its two dimensions of personal autonomy and respect towards other people. I held that while the first dimension can provide external boundaries to the notion of public morals, and explain to us how this phrase should not be interpreted, the second dimension can provide content to the public morals clause and help us find a meaning to it.

I am fully aware that the solution I have sketched in this article is still far from complete, and that several other aspects could be examined further. I firmly believe, however, that on the issue of public morals and the ECHR there might be room for the Court to reconsider its traditional position and abandon its deference to the contracting states with regard to defining public morals. It is my hope that the guideposts I have suggested here might be an indication for further discussion of this topic.

[92] We can therefore agree with the Court in *Erbakan v Turkey* (n 24) and *Gündüz v Turkey* (n 23) when it recognised that the state measures against hate speech were aimed also at protecting 'public morals'.

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