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CON LAW II LECTURE SUMMARIES

"CONSTITUTIONAL LAW II: FUNDAMENTAL RIGHTS & FREEDOMS"

ENGLISH SPEAKING GROUP ("AR")

LESSONS 1-7

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GENERAL PART

LESSON 1: THE PROCESS OF DEFENCE OF HUMAN RIGHTS

1. INTRODUCTORY REMARKS & CONCEPTUAL CLARIFICATIONS

Since the aftermath of World War II, when the Universal Declaration of Human Rights was drafted and supranational and regional organisations were created to maintain peace and restore the respect for human dignity (the Council of Europe and the European Union being the most relevant in our case) human rights discourse has taken a central place in the international area. Human rights have a strong moral undertone as they are the inspiration and a source of activism around the globe, but also because they have acquired legal status and force since the second half of the 20th century.

Human rights constitute, since their origin, the essential nucleus of contemporary legal cultures and systems; and are understood as the fundamental pillar on which international, regional, and national systems, organisations, and institutions are built. As such, human rights are recognised, protected, and safeguarded. Any analysis must inexorably take into consideration the phenomena of *internationalisation* (and, of course, *Europeanisation*) of human rights, and subsequently, the *constitutionalisation* of international and European law in human rights protection.

While the development of human rights practice, as a whole, has been successful, there is still much confusion about the concept itself, which explains the vast catalogue of related concepts we find either attached or used as equivalents to the notion of human rights: natural rights; inalienable rights; civil rights; public rights; individual rights; subjective rights; public freedoms; fundamental rights; etc. Nevertheless, we could oversimplify at least two expressions frequently used as equivalents: human rights v. fundamental rights. The first is mainly reserved to designate human rights recognised at an international level, and the second, to designate human rights at a national level (although there are exceptions, such as the Fundamental Rights Charter of the EU).

In the Spanish constitutional order this becomes a little more complicated given the lack of systematisation in our Magna Carta: only a few rights are catalogued as 'fundamental' in its Part I, although there are other equally fundamental rights enshrined in other parts of the constitution. For example, as regards other civil and political rights, the fundamental right to property (practically one of the first rights recognised in history),

the right to elect and be elected, or the right to free justice, are outside the section reserved for fundamental rights. As regards socio-economic rights, the labour right to collective bargaining is contemplated as a right (but not fundamental), and the right to health in general, or to healthy working conditions, are mere principles governing socio-economic policies. Regardless of the terminology and legal categorisation used by legislative, judicial, and academic sources, one thing is clear: human dignity is the foundation of human rights. In this regard:

- If human rights are rights of the human being; and
- If human dignity is that which is innate, inherent, and intrinsic to the human being

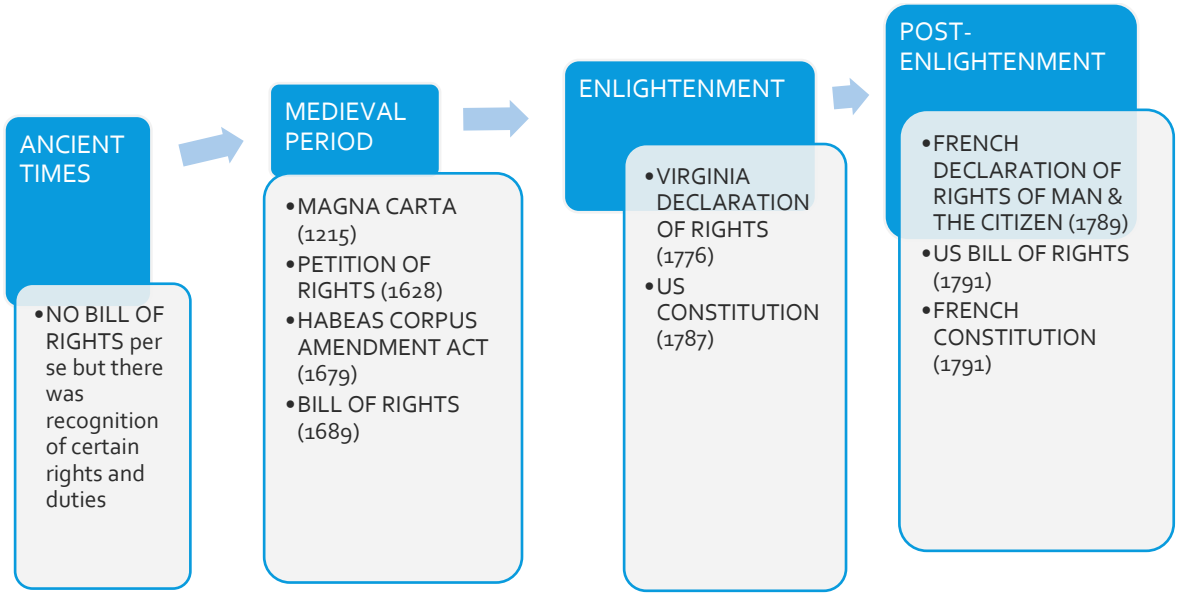
Then human dignity is a prerequisite for the respect of human rights.

The notions of human dignity and human rights tend to go hand-in-hand in human rights instruments. At an international level, the Universal Declaration of Human Rights, for example, establishes in its Preamble: "*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".* At a European level, the Treaty of the European Union establishes, both in its Preamble, as well as in its Article relating to the values and objectives, that: *"The Union is founded on the values of* ***respect for human dignity****, freedom, democracy, equality, the rule of law and* ***respect for human rights****, including the rights of persons belonging to minorities […] The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law,* ***the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity****, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law".*

Similarly, the Charter of Fundamental Rights of the European Union not only establishes in its Preamble that the rights enshrined therein are '*founded on the indivisible, universal values of human dignity'* and that it is created as a necessary instrument to *'strengthen the protection of fundamental rights'*, but also provides, as the first article of this European Bill of Rights, the right to human dignity. Lastly, at the national level, the Spanish Constitution (SC) provides, in its art. 10.1 that: *'the dignity of the person, the inviolable rights which are inherent, the free development of the personality, the respect for the law and for the rights of others are the foundation of political order and social peace'.*

2. FIRST DOCUMENTS AND PETITIONS OF RIGHTS

The most prominent which we will study are:



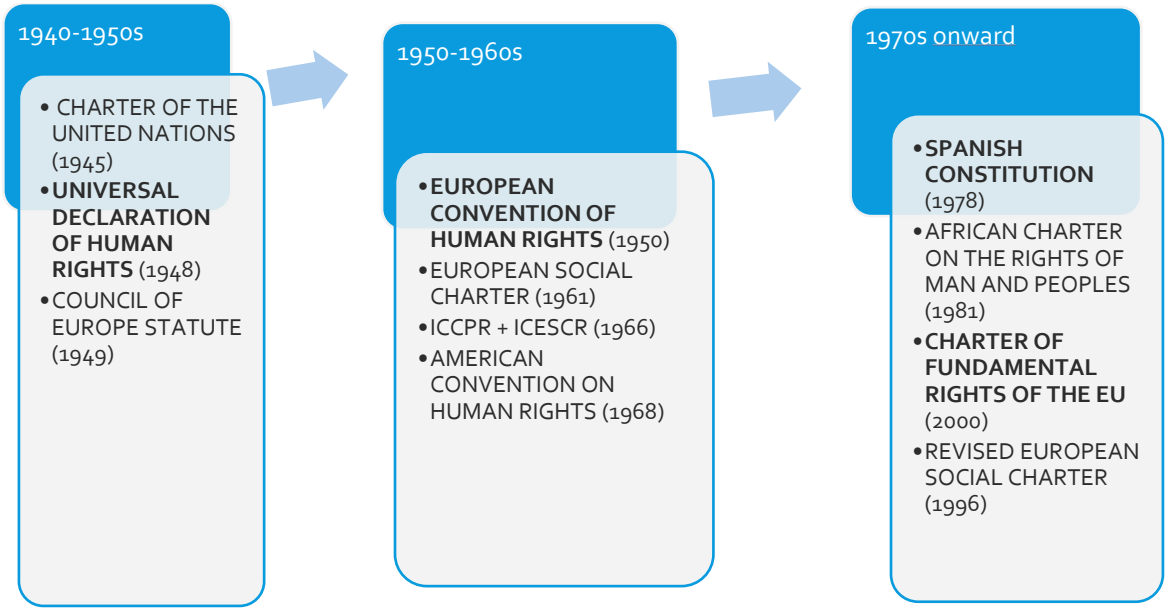
3. THE EVOLUTION IN THE PROCESS OF RECOGNITION OF HUMAN RIGHTS.

The struggle to limit political power is as old as the history of humankind; however, it is not really until the Middle Ages that limits to political power would be reflected via normative commitments. Thus, in the 12th century Spain, with the Magna Carta for the Kingdom of León (1188) and in the early 13th century England, with the Magna Carta (1215), the growing power of kings was prevented from being arbitrarily used against their subjects, through the recognition of a series of civil and political rights in favour of the latter.

In the late 17th century, the English philosopher John Locke argued in favour of restricting royal power, defending religious tolerance, and the protection of the natural right to property. French political philosophers of the 18th century, such as Montesquieu and Rousseau, defended the division of the state's functions in order to limit power. During the same period, German philosopher Immanuel Kant made the case for bestowing rights to all rational beings, in recognition of their natural dignity.

On the political front, liberal revolutions during the late 18th century also bolstered the cause of the protection of individual rights. Thus, after the success of various revolutions, the trend known as the '**positivisation**' of human rights was started, which peeked when

full generalisation of human rights was achieved – rights for all, regardless of class, creed or colour (this was the case of the civil rights movements in the United States in the 1960s, for example). The true process of **conceptualisation** of human rights, hence, came as a result of their internationalisation post-WWII:



Let's just point out that, historically, it was the awareness of the universal vulnerability of humankind vis-à-vis the horrors of war, rather than a shared rationality, that elevated human rights to an international dimension. In sum, the early 19th century brought about a positivist approach based on the reception & recognition of rights as per the constitutional text, while the late 19th century brought about a more rational and liberal approach. The 20th century, after the devastating effects of the world wars, brought a growing conviction and concern on the necessary and effective protection of human dignity and human rights from a natural law theory approach.

A short summary of said evolution has also become the most common classification of rights, based on a time criteria: the so-called '**generations of rights**'. The different generations of rights have come slowly in waves, as per international and national developments in human rights protections system: first came the recognition of civil and political rights; then socio-economic and cultural rights; then environmental and other solidarity rights; and recently, we have seen a new wave of rights as a response to the rise of digital technologies.

As I have argued recently, I do not share the generational categorisation of human rights, given that this inevitably implies a hierarchical understanding of their value, or what could be called the 'rights compartmentalisation paradox'. We must try to avoid its immediate consequence: the conversion of chronological priorities to axiological priorities, or, in other words, discrimination and preferential treatment between rights on grounds of the date of their recognition. We often see this paradox between first- and second-generation rights. For example, the right to vote is never questioned, nor are cuts in its cost ever proposed, whereas the right to healthcare and education are constantly being reduced, even though elections have an immense economic cost.

According to the Danish Institute of Human Rights:

> *"Although all human beings are now defined as being equal, their equality is relative, since some are more equal than others. The non-existent human rights of the American slaves are a salient example of this. Women's exclusion from voting is also indicative of the room for improvement in the first generation. Second-generation human rights are born out of the principles of the first generation, but are influenced largely by wider societal progress. With migration from rural to urban areas, the need arises for a welfare safety net in the event of sickness or unemployment. In this struggle, the emergent labour movement takes the lead. The movement campaigns for states to assume responsibility for safeguarding the people's basic economic and social rights. The struggle is won, and the rights are gradually enacted in the statues of the majority of European countries in the late 1800s".*

This is why the emphasis should be on the inalienability of human rights as part of human dignity, their universality, indivisibility, and interdependence. In this last case, many human rights cannot exist without the effective protection of other rights. For instance, the right to life (technically, a first-generation right) cannot be truly fulfilled and safeguarded without an adequate protection of the right to health (technically, a second-generation right) and the right to a healthy environment (technically, a third-generation right). Hopefully this shows the unconvincing nature of the generational approach to human rights.

Nevertheless, it is important to note that their materialisation and realisation as historical categories in specific or temporarily determined contexts remains undisputed, and it is a good teaching tool to remember their evolution and process of recognition.

4. THE UNIVERSALISATION OF RIGHTS AND FREEDOMS

The UDHR proclaimed the global recognition of fundamental human rights principles and standards 70 years ago and declared these rights to be universal, indivisible, interdependent, and inter-related. One of its main drafters was René Cassin, who proposed the adjective 'universal' instead of 'international', to underline the 'universal vocation' of the declaration. Most, if not all, human rights instruments that followed have travelled the same path.

The idea of rights as an integrating or unifying force is not a stranger to political and constitutional theory. Indeed, the development of a fundamental rights system has been a key element for the very consolidation of political communities, and even supranational organisations (e.g. the European Union). It seems difficult to imagine a consolidated political unit without the presence of a basic common bill of rights for all those who are embedded in it. In this regard, let´s remember that in the European Union, the adoption and entry into force of the Lisbon Treaty, amending the constitutive treaties and recognising the binding nature of the Charter of Fundamental Rights of the European Union (CFREU, hereinafter), was a milestone in the European integration process: creating a European Bill of Rights and making the European Union more constitutional in nature. Let us also remember that the Spanish constitution is divided into a fundamental legislative part (affirming values and principles, as well as establishing and organising institutional structures of the legal order,) and a dogmatic part – our own Spanish Bill of Rights (whereby rights and freedoms are recognised and protected).

Indeed, the biggest achievement of the UDHR, apart from being the source of inspiration for the development of human rights protection around the globe, has been the internationalisation and universalisation of human rights.

A summary of the above can be found in the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993: *"Recognising and affirming that all human rights derive from the dignity and worth inherent in the human person, and that the human person is the central subject of human rights and fundamental freedoms, and consequently should be the principal beneficiary and should participate*

actively in the realisation of these rights and freedoms […] All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis".

As regards the Spanish constitutional order, not only is human dignity the cornerstone of all fundamental rights and liberties, and the foundation of the political order and social peace, as per Article 10.1 SC, but the interpretation of all rights set therein are to be interpreted in conformity with international and European humans rights instruments and their monitoring and interpretative bodies, as per Article 10.2 SC. This, in turn, has transformed Article 10 as both the starting point of an analysis fundamental rights and also the core of its interpretation, as we will see in subsequent lessons.

LESSON 2. FUNDAMENTAL RIGHTS AND PUBLIC FREEDOMS WITHIN THE SPANISH CONSTITUTION

1. THE CONCEPT OF FUNDAMENTAL RIGHTS AND ITS MAIN FEATURES

1.1. The nature and concept of 'fundamental' rights

It is said that a political community whose constitutive text does not establish a separation of powers, or does not guarantee fundamental rights, does not truly have a constitution. This represents the material understanding of the constitutional text: usually divided into a fundamental legislative part (safeguarding the principle of separation of powers) and a dogmatic part (safeguarding human dignity by positivising fundamental rights).

For many authors, fundamental rights constitute the essential core of the so-called 'constitutional state of law', and as we will see, fundamental rights are public power mandates and limits to national sovereignty or appreciation. In other words, they legitimatise the state but also limit its action. Some other authors have preferred to separate their double character between subjective and objective dimensions. There is also something to be said about the subjective nature of fundamental rights, understood as the power conferred to the individual to set a legal norm in motion for their own benefit. As our Constitutional Court has stated:

> *"Fundamental rights are subjective rights, as the rights of people not only as citizens in a strict sense, but also as a guarantee and legal status of freedom in any area of life. But at the same time, they are essential elements of an objective order of the national community, insofar as it is configured as a framework which aims at just and peaceful human coexistence, historically embodied in the rule of law and, later, in the social and democratic State of Law according to our Constitution's formula [...][As regards the first aspect] This double nature of the fundamental rights developed by the doctrine is reflected in Article 10.1 of the Constitution according to which the dignity of the person, the inviolable rights that are inherent in the free development of the person, the respect for the Law and the rights of others are the basis of political order and social peace. Parallel statements are found in comparative law and internationally [...] As regards the second aspect, fundamental rights, as essential elements of an objective system, give its basic contents to said*

system, allowing it to become a social democratic state, […][fundamental rights] concerns the state as a whole. In this function, fundamental rights are not affected by the federal, regional, or regional structure of the state. It can be said that fundamental rights, since they establish a unitary constitutional legal status for all Spaniards and are equally decisive for a constitutional democratic order at all levels, are unifying elements, especially when the task of guaranteeing this unification, in accordance with article 155 of the Constitution, is the responsibility of the state. Fundamental rights are, therefore, a common heritage of citizens, individually and collectively, that constitute the legal system whose validity applies to all equally. They establish, as it were, a direct link between individuals and the state and act as the basis of political unity without any mediation", (CCJ 25/1981).

Taking a theoretical approach, fundamental rights can be considered those recognised in a constitution, whereas human rights are established in an international agreement: for this theoretical reason, Title I of the Spanish Constitution refers to 'fundamental rights', whereas we refer to the Universal Declaration of 'human rights'. Nevertheless, this distinction has no practical relevance, provided that the same facts can be defended by invoking the same right both before national and international instances.

1.2. Location and classification of fundamental rights

Getting deep into the specific position and understanding of the notion of fundamental rights in the Spanish Constitution, it is important to state that this constitutional text, adopted in 1978, is the first in its history to gather a list of rights under the heading 'Fundamental Rights and Duties' (Part -*Título*- I) headed by the aforementioned art. 10 and includes the following:

- **Chapter 1: 'Spaniards and Aliens'** tackling nationality matters (arts. 11-13)
- **Chapter 2: 'Rights and Liberties'** with the equality clause (Art. 14) and divided into two subparts (called divisions):
    - Division 1 on 'Fundamental Rights and Public Liberties'
        - Art. 15 recognising the right to life and physical and moral integrity
        - Art. 16 recognising freedom of thought, religion, and worship
        - Art. 17 recognising right to freedom and security
        - Art. 18 recognising the right to honour, image, reputation, private life, secrecy of communications, and privacy
        - Art. 19 recognising freedom of residence and movement

- Art. 20 recognising informational freedoms such as the freedom of expression, speech, communication, access to information and free artistic creation, personal conscience, and professional secrecy
- Art. 21 recognising freedom of assembly and the right to demonstrate
- Art. 22 recognising freedom of association
- Art. 23 recognising participation rights of citizens such as the right to vote and be elected
- Art. 24 recognising due process rights such as the right to justice, defence rights, the presumption of innocence, and the right of appeal
- Art. 25 recognising the principle of legality in criminal matters
- Art. 27 recognising the right (and obligation) to education, freedom of teaching, and rights of parents to decide on moral instruction
- Art. 28 recognising the right to freely join trade unions and the right to strike
- Art. 29 recognising the right to petition

- Division 2 on 'Rights and Duties of Citizens'
  Division 2 establishes other rights, albeit not specifically as 'fundamental'

  - Art. 30 establishing duties relating to national defence
  - Art. 31 establishing tax duties and public expenditure
  - Art. 32 establishing the right to freely marry
  - Art. 33 establishing the right to private property and its social function and compulsory acquisition
  - Art. 34 establishing the right to set up foundations
  - Art. 35 establishing the right and duty to work and other industrial rights
  - Art. 36 establishing duties relating to professional associations
  - Art. 37 establishing the right to collective bargaining
  - Art. 38 establishing freedom to conduct a business

It is also important to note that most socio-economic and cultural rights are not found in Division 1 relating to fundamental rights and freedoms, and not even in the Division 2, relating to other rights and duties, but in **Chapter 3 as 'Principles Governing Economic and Social Policy'**:

- Art. 39 recognising the right to family life and the rights of children
- Art. 40 recognising the right to just and healthy working conditions
- Art. 41 recognising the right to social security
- Art. 42 recognising the rights of migrants
- Art. 43 recognising the right to health protection
- Art. 44 recognising the right to access to culture and knowledge
- Art. 45 recognising the right to a healthy environment
- Art. 46 recognising the right to maintain national heritage
- Art. 47 recognising the right to decent housing
- Art. 48 recognising the rights of young people
- Art. 49 recognising the rights of disabled persons
- Art. 50 recognising the rights of the elderly
- Art. 51 recognising the rights of consumers
- Art. 52 recognising the interests of professional organisations

1.3 The sources of fundamental rights

- Formal source: constitutional reserve

As we all know, the sources of law in the Spanish legal system are norms, customs, and the general principles of law (Art. 1.1 Spanish Civil Code); however, fundamental rights go beyond legislative will and cannot depend upon customs or general principles that change over time. Hence, the only possible source of fundamental rights is the constitution, as the supreme legal standard that applies to all, regardless of federal or regional state structures or organisations. This unitary and unifying constitutional legal status of fundamental rights is given by the instrument that constituted the social democratic state of law through which they are recognised and safeguarded. Cruz Villalón eloquently sums it up: *'fundamental rights remain unaffected by territorial configurations of power as they configure a uniform national standard'.*

Although we tend to think of constitutional reserves to mean just the national constitutive text, we have to remember that art. 10.2 SC makes a constitutional interpretative remission to other international sources in fundamental rights matters for inspiration – and as a gateway to further protect existing rights and the recognition of new rights via hermeneutic means. As Diez-Picazo explains: *'art. 10.2*

does not allow for the introduction of new fundamental rights stricto sensu, however, it does allow for a privileged and generous method of their interpretation'.

- Material source: human dignity

Going beyond the mere constitutive text, we find another source of fundamental rights which has also been mentioned in the previous lesson: the dignity of people. In this regard, art. 10.1 of the Spanish constitution, reflecting human dignity as a fundamental value principle and source of political and social order, permeates itself through all the fundamental rights recognised within it. Fundamental rights become the *'normative translation of human dignity'* (CCJ 113/1995) and human dignity as *'the minimum invulnerable standard that every catalogue of fundamental rights must safeguard,'* (CCJ 57/1994).

1.4. Entitlement and conditions for the enjoyment of fundamental rights and freedoms

At a first glance, it might sound odd to talk about who has, or is entitled to, fundamental rights after praising the value of individuals and their inherent and inalienable possession of rights. However, when speaking of entitlement or ownership, we need to take a number of considerations into account: individual v. collective ownership; legal personality vs. legal capacity rights; and limitations of rights based on nationality or residential status.

-Individual vs. collective rights

Our own constitution establishes a number of subjects entitled to rights by referring to them as 'everyone', 'all', 'all persons', 'all Spaniards', 'citizens', which causes uncertainty. When speaking of the rights of the person, we tend to only think of **physical or natural persons or individuals**. In addition, as shown in the catalogue of rights and freedoms in the SC, there are also rights for **legal entities**, as private (i.e., business entity or non-governmental organisation) or public (i.e., government) organisations.

Also, **collective rights** are evidently rights that individuals exercise as a group: this is clearly seen in the case of the right to demonstrate, freedom of assembly, right to

petition, due process rights, or rights related to participation in public affairs. Lastly, there is a slight controversy given that some describe the protection of regional cultures, traditions, languages, and institutions, and the right to self-government of nationalities and regions (Art. 2 SC), as a fundamental right of these regions and call them collective rights, given that its owner is a collective entity. However, the Constitutional Court has denied said collective right, classifying it instead as a protected interest, and stating that this case is not the same as collectives or groups without personality – such as the Jewish people (CCJ 241/1991).

-Legal personality vs. legal capacity rights

Going back to the notion of legal personality (conferred to everyone for simply being born), we must remember that this differs from the notion of legal capacity which refers to the authority given by law and on the basis of a certain status under law to engage in particular activities. With this in mind, we can understand the problems that arise with legal capacity rights and those who are deemed unable or unsuitable to exercise them: in particular, minors and people with disabilities. Obviously, both minors and people with disabilities have the same rights as adults, but for justified reasons they find their exercise of rights has certain conditions.

In case of the former, full legal capacity is granted at the age of 18 (Art. 12 SC). Although this does not necessarily mean that a person needs to be an adult to exercise all their rights, it does mean that to fully exercise fundamental rights a person must have full legal capacity, and this age varies for some fundamental rights. In cases where there is no legal capacity, we find that parents or legal guardians, who tend to have the legal authority to make decisions for them and in their best interests (CCJ 158/2009), are conferred the exercise of some of their fundamental rights.

People with disabilities, even if over the age of 18, can find certain manifestations of their exercise are limited and subject to consent from their legal guardians, or whoever has been entrusted with their tutelage (CCJ 215/1994).

-Limitation of rights based on nationality or residential status

To fully exercise fundamental rights and freedom in Spain one needs to hold Spanish nationality (Art. 11 SC) and aliens enjoy the same rights and freedoms under the terms laid down by international treaties and the law (Art. 13 SC). Although the Spanish Constitutional Court, inspired by the judgments of the European Court of Human Rights, has highlighted that foreigners cannot be deprived of their basic rights and that they (like everyone) have essential fundamental rights and freedoms linked with their human dignity (CCJ 99/1985), there are exceptions and limitations to the exercise of those rights that are not directly related to the personal sphere. Although when we will look at each fundamental right and freedom individually, we will make reference to which rights can be fully exercised by which persons, it is important to summarise the Spanish Constitutional Court doctrine on a classification of rights based on who can exercise them (CCJ 107/1984).

2. THE EFFECTIVENESS OF FUNDAMENTAL RIGHTS

The SC is the supreme norm of the legal order and fundamental rights therein constitute its essential core and become objective elements of its configuration, binding all public powers (Art. 53.1 SC) and is directly invoked before the judicial power. This is known as the **direct vertical effect** of fundamental rights, and is formed by the active subject (the individual) who calls upon the protection of said rights, and the passive subject (the state), who must ensure said protection. However, the question arises as to whether fundamental rights can also be directly invoked against other individuals. This is also known as **direct horizontal effect** or *drittwirkung*: the effectiveness of fundamental rights in private relations or third-party effectiveness. In fact, art. 9.1 SC establishes that citizens and public authorities are bound by the constitution and all other legal provisions.

In the case of Spain, this has led to constitutional jurisprudence to resolve doubts regarding the extension of the horizontal direct effect of fundamental rights, and how it is used. Following the German understanding, our Constitutional Court has decided that fundamental rights violations attributed to an individual do not allow for the remission of an *amparo* appeal, but instead must be focused on the judicial decision that has not redressed said violation. In other words, in Spain we have an **indirect horizontal effect** whereby fundamental rights violations *'that can be produced by relations among private*

actors, are not remediated by judges as those in charge of their restoration[…] the Constitutional Court has already ruled in favour of amparo appeals against judicial decisions concerning fundamental rights violation matters between individuals', (CCJ 18/1984).

This is of course easier to understand with practical examples. The notion of horizontal effects of fundamental rights is clearly seen in the socio-laboral realm: employers and employee organisations negotiate and agree collective agreements, and/or employees accept the terms and conditions of a contract provided by an employer. However, party autonomy is sometimes not respected, and sometimes circumstances, in the framework of a labour relation, arise that endanger and infringe the fundamental rights of workers and individuals. When this occurs, workers can directly invoke their fundamental rights before the courts, and even take their case to the Constitutional Court via *amparo*; however, these *amparo* appeals are not launched against the employer specifically, but against the last judicial decision that did not guarantee (rule in favour of) the worker's rights.

3. THE INTERPRETATION OF FUNDAMENTAL RIGHTS

Before we look at the particular interpretive methods of fundamental rights, it is important to remember basic notions of legal interpretation, understood as examining the meaning of a norm, its determination, content, and scope so as to measure the precise extent and possibility of its application to a specific case. The Spanish Civil Code provides for interpretative criteria of legal norms in art. 3:

- literal (or grammatical) interpretation based on the accurate meaning of the words
- historical interpretation based on the precise socio-economic-political reality at the moment in which they were created
- contextual or systematic interpretation based on the drafting background of how the norm was created
- intentional (or teleological) interpretation based on the spirit or purpose that the norm intended to have

Of course, to this we must add other complementary criteria for legal norm interpretation: the informative character of the general principles of law Art. 1.4 CC); the complementary function of jurisprudence Art. 1.6 CC); equity Art. 3.2 CC); and legal analogy Art. 4.1 CC) understood as the use of the same general principle for cases, where there is no legal precedent, of similar subject-matter or conflict.

However, for fundamental rights interpretation, there are slightly different criteria to be used. Let us remember that interpretation of fundamental rights also means the legal interpretation of those legal norms whereby these rights are recognised and developed. This not only includes the Spanish constitution but, by the legislative protection (or legal reserve) granted towards them by art. 81.1 SC, in other words, the interpretation of the provisions of a fundamental legislative act (*ley orgánica*) that develops its content and scope. Interpretation of fundamental rights and freedom mainly arises when they clash with each other or with other constitutionally protected interests. Against this backdrop, courts (and specifically and ultimately the Constitutional Court) must carry out a **balancing test**: an assessment of which opposing rights, interests, or policies are assigned a degree or level of importance, and the ruling of the court is determined by which is considered greater. This balancing test is carried out by considering a number of elements:

-Interpretation in conformity with international human rights standards

First and foremost, we should once again remind ourselves of the content of art. 10.2 SC, whereby the public powers in charge of interpreting fundamental rights must do so in accordance with international and European human rights instruments, standards, and compromises ratified by Spain. This **constitutional remission of direct applicability and consistent interpretation of human rights standards** beyond the constitutional text includes a wide international range of texts.

-Interpretation in conformity with the essential content of the fundamental right

Fundamental rights have an essential core or content, which can be equated to peeling an onion: *"the outer layer is the fundamental right as a whole, without its value being diminished in any way; the next layer comprises a justified interference with this right, followed by an unjustified interference. Even closer to the inside of the onion is a particularly serious interference with a fundamental right. Finally, the* ***heart of the onion constitutes the core – or the essence […] sometimes referred to as the minimum, essential, or absolute core of a right – and represents the untouchable core or inner circle of a fundamental right that cannot be diminished, restricted or interfered with****. An interference with the essence of a fundamental right makes the right lose its value for society and, consequently, for the right-holders",* (Maja Brkan, 2018).

Hence, secondly, we find that identification of each right´s essential content is necessary to be able to carry out a balancing test, for, even if one right prevails over the other, neither can ever brush away the minimum core that makes the right recognisable, and without which it loses its distinctiveness (recognisability criteria). The Spanish Constitutional Court has established another complementary criteria to identify said concept known as the legally protected interests criteria which boils down to the part of the content of the right that is absolutely necessary for the legally-protected interest that gave rise to the right and which enables it to have real and concrete effectiveness (CCJ 11/1981).

Therefore, the essential content is unique to each right and must be specified on a case-by-case interpretative basis. It is also worth mentioning a doctrinal proposal/approach that focuses on a temporal conception of the essential content of a fundamental right*: "a right's essential content is not a fragment or internal nucleus, but what persists with the passing of time, what remains distinguishable although not always identical to its original essence […] it is what remains with the passage of time, and its determination, therefore, is not the examination of an unshakable archetype",* (Jimenez Campo, 1999). In other words, he proposes a dynamic (instead of static) understanding of the essential content of fundamental rights.

-Interpretation in conformity with *favour libertatis* principles

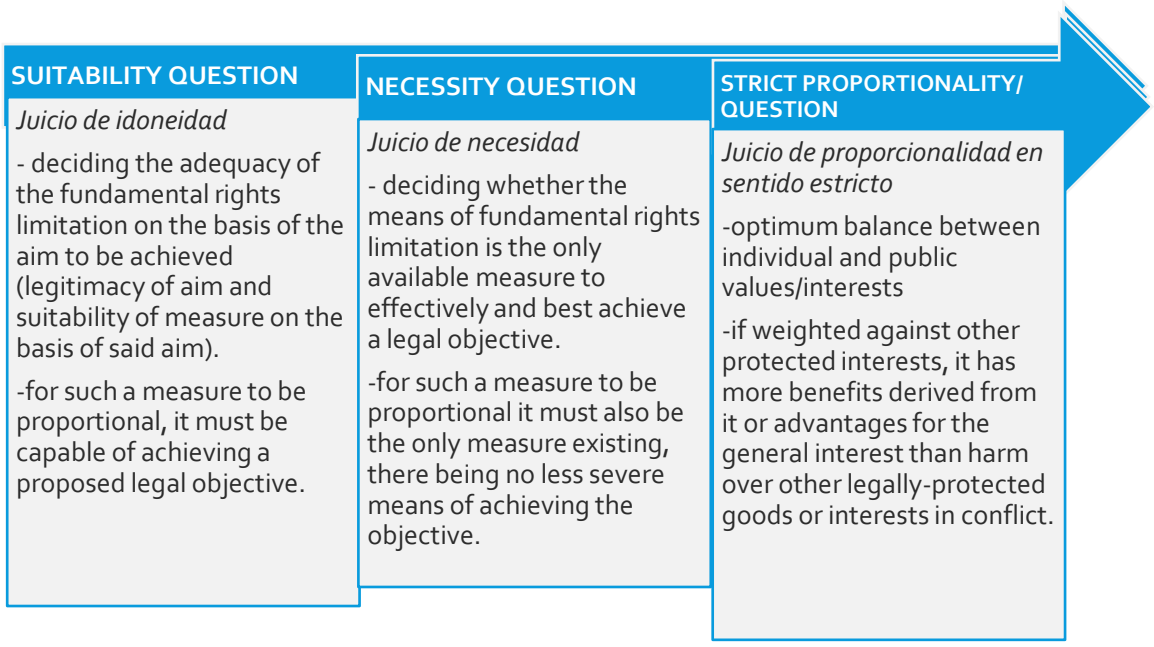
Thirdly, we should place special emphasis on the expansive force of fundamental rights. It is well-known that when it comes to interpreting fundamental rights, the interpretation that endows the right with most feasibility and enforceability must always prevail (confirmed by CCJ 69/1984 and 34/1989). This is commonly known as the *favor libertatis* principle, or the **principle of the most favourable interpretation**. The result of the foregoing is also the **principle of restrictive interpretation** under which any limitation established by the legislative power on a fundamental right must be interpreted narrowly.

-Interpretation in conformity with the principle of proportionality

Fourthly, when interpreting and balancing rights, respect for the principle of proportionality must also be respected. This concept is used as a logical method of interpretation and criterion of fairness and justice when deciding on the correct

balance between the nature and means of restriction of a fundamental right. Indeed, if each fundamental right has an essential core that cannot be dismissed, and limitations of which must be limited or narrow, the proportionality principle aims at ensuring that said limits fulfil their function without arbitrarily discarding the axiological component of the constitutional order.

In addition to this, another starting point of proportionality principle analysis is the axiom that there are no absolute rights, and therefore no absolute limitations on said rights (CCJ 78/1995). Proportionality has always been pursued by the Spanish Constitutional Court: *'the constitutionality of any measure that restricts fundamental rights remains to be determined by strict compliance with the principle of proportionality'*, (CCJ 14/2003). This basically implies that there are some requirements that must be met to be able to examine the proportionality of a rights' restriction: it must be laid down by law; it must aim at achieving a constitutionally-legitimate goal; and be suitable and adequate to achieve this goal (CCJ 169/2001). To this end, the proportionality test has implies a three-part step (CCJ 207/1996):



Some scholars prefer to speak of the stages of the principle of proportionality: *"First, the policy interfering with the right must pursue a legitimate goal (legitimate goal stage). Second, there must be a rational connection between the policy and the achievement of the goal; in other words, the law must be a suitable means of achieving the goal at least to a small extent (rational connection or suitability stage). Third, the law must be necessary in that*

there is no less intrusive but equally effective alternative (necessity stage). Fourth and finally, the law must not impose a disproportionate burden on the right-holder (balancing stage; proportionality in the strict sense)", (Kai Möller, 2012). Related to this last stage of the proportionality principle, although not the same, we find the strict scrutiny test, usually seen in equality and indirect discrimination cases, whereby distinctions are only justified if they are necessary to promote a compelling government interest. We will see this further in Lesson 5.

4. THE RESTRICTIONS TO FUNDAMENTAL RIGHTS

As we have mentioned before, the idea of total freedom or liberty is non-existent and, to that point, there are no absolute rights. The fact that the individual is part of a whole (human beings as members of society) automatically entails the impossibility of absolute or unconditional freedom of action for there is a higher need to coexist within the social order, clearly set down by the constitutional text of each political community.

If we understand restrictions or limitations to fundamental rights as any legal action that entails or makes possible a restriction of the faculties that, as subjective rights, constitute the content of fundamental rights, recognised in the any text or bill of rights (in our case, the Spanish constitution), we could also say that a fundamental right limit is a constitutionally-recognised reduction imposed to it via the exclusion of certain circumstances outside its scope of protection (CCJ STC 58/1998). Indeed, every right has limits, whether they are directly or indirectly imposed by the constitution, for they all look to protect and preserve not only other equally fundamental rights, but also other constitutionally-protected goods and interests: *'rights move within a perimeter whose limits comprise of other rights, general interests, and criminal norms'*, (CCJ 2/1982).

Let us remember that art. 53.1 SC establishes that: *'only by an act which in any case must respect their essential content, could the exercise of such rights and freedoms be regulated'*. With all that said, we can then classify them into the following:

- **INTERNAL RESTRICTIONS:** also called 'intrinsic' limits understood as those stemming from the very content of the fundamental right, specifically from its essential core/content, making it perfectly recognisable as such and none other. In other words, it is part of the content of a right without which it loses its peculiarity, making it an inescapably necessary part of the right to allow its holder its minimum exercise (CCJ 11/1981).

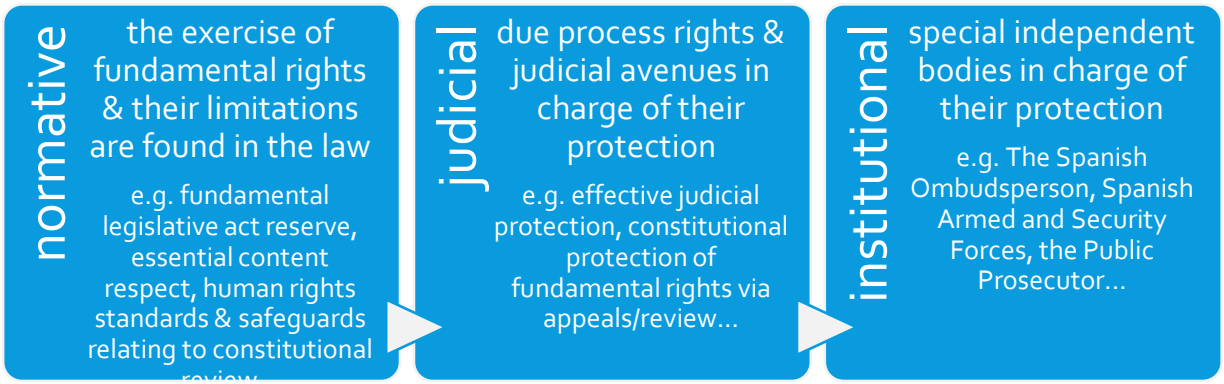
- **EXTERNAL RESTRICTIONS:** those imposed by the constitutional order. This is usually the constitution itself, however, extrapolating from arts. 53 and 81 SC, it could also be any fundamental legislative act given that they are the legal norms that develop said fundamental rights.

Once again we stress the importance of the principle of proportionality as the CCJ 120/1990 has established: *"A tal fin, como ya ha reiterado en diversas ocasiones este Tribunal, conviene tener presente, de una parte, que sólo ante los límites que la propia Constitución expresamente imponga al definir cada derecho o ante los que de manera mediata o indirecta de la misma se infieran al resultar justificados por la necesidad de preservar otros derechos constitucionalmente protegidos, puedan ceder los derechos fundamentales (SSTC 11/1981, fundamento jurídico 7.º; 2/1982, fundamento jurídico5.º, 110/1984, fundamento jurídico 5.º), y de otra que, en todo caso, las limitaciones que se establezcan no pueden obstruir el derecho «más allá de lo razonable» (STC 53/1986, fundamento jurídico 3.º), de modo que todo acto o resolución que limite derechos fundamentales ha de asegurar que las medidas limitadoras sean «necesarias para conseguir el fin perseguido» (SSTC 62/1982, fundamento jurídico 5.º; 13/1985,fundamento jurídico 2.º) y ha de atender a la «proporcionalidad entre el sacrificio del derecho y la situación en que se halla aquel a quien se le impone» (STC 37/1989,fundamento jurídico 7.º) y, en todo caso, respetar su cometido esencial (SSTC11/1981, fundamento jurídico 10; 196/1987. fundamentos jurídicos 4.º, 5.º y 6.º; 197/1987, fundamento jurídico 11), si tal derecho aún puede ejercerse".*

LESSON 3. GENERAL GUARANTEES FOR THE PROTECTION OF FUNDAMENTAL RIGHTS

1. THE GENERAL GUARANTEES FOR THE PROTECTION OF RIGHTS

Rights are said to be only as effective as their guarantees, and hence, the effectiveness of fundamental rights depends on the establishment of mechanisms of protection. Some argue that the extensiveness of the guarantees provided by a constitutional order shows the level of sincerity that said order has on wanting to protect fundamental rights. We have already touched upon a few general guarantees of fundamental rights in the previous lesson (**essential content of rights** and their **direct effect** or applicability). Comparative law shows us that different national constitutions have very diverse ways of showing their constitutional sincerity, and we could classify them as normative, judicial, and institutional guarantees.



In this chapter we will only focus on the normative guarantees understood in the broadest sense as those material guarantees normatively-established (particularly in the constitutional text) and institutional guarantees, given that the judicial guarantees will be exhaustively explained in a separate chapter in conjunction with judicial process rights.

1.1. Normative Guarantees

- **Fundamental legislative act reserve**

First and foremost, we must remember that the law, although a source of the legal system, *per se* is not a source of fundamental rights protection as fundamental rights exist prior to the creation of a legislative power and said power cannot regulate or develop them with absolute freedom. However, it is true that the law plays an

important role in guaranteeing fundamental rights protection as it is the role of the legislator to precisely define the objective and subjective elements of each right and establish legitimate and proportional limitations to it so as to make it compatible with other rights and legally-protected interests. Secondly, we must also remember a possible classification of fundamental rights based on their guarantees: (a) fundamental rights with maximum level of guarantees, (b) fundamental rights with strong levels of guarantees and (c) fundamental rights with lower level of guarantees.

Returning to the role of law, the legal or normative configuration of fundamental rights is reserved to the law (through ordinary and fundamental legislative acts depending on its function). This legal configuration is established in arts. 53.1 and 81 SC.

- Constitutional review protection reserve

It is also interesting to touch upon what has been called constitutional entrenchment, or eternity/unamendability clauses, understood as total, formal-procedural, or material-substantial limits to constitutional review, and constituting a way to protect those fundamental and essential rights, values, and principles, that are considered immutable. One way to limit the aforementioned amending power can be looked at from the lens of explicit or implicit limits to the constitutional review procedure, or even from the lens of a hard constitutional amendment procedure, as is the case of Spain. Looking at the Spanish experience, there are two constitutional review procedures for amending the Spanish *Magna Carta*, set out in Article 168: a partial review or a total revision of the constitution. Both procedures confirm the possibility of amending the constitution, but also show the rigidity of the constitutional review procedure. The second procedure is the so-called specially qualified procedure (*procedimiento agravado*).

This procedure requires a four-step process: (1) proposed reform to be approved by a two-thirds majority of each house (by both Congress of Deputies and Senate); (2) The Spanish parliament (both houses will then be dissolved); (3) A newly-elected parliament must then ratify the decision and proceed to examine the new constitutional text, which must be passed, once again, by a two-thirds majority of the members of each houses; (4) and once passed at the legislative level, be submitted to ratification by referendum.

This procedure incidentally corroborates the supposed unchangeable nature of certain structures, principles, and rights enshrined in the Spanish Constitution. These, according to Article 168.1, are those *'affecting the Preliminary Part, Chapter II, Division 1 of Part I; or Part II'*. In principle, this would include the aforementioned **fundamental rights and freedoms enshrined in articles 14 to 29 and 30.2 of the Spanish Constitution, which are those that require drafting and development through a fundamental legislative act; these acts also enjoy enhanced protection through the *amparo* appeal in case of alleged violation *('Chapter Two, Division 1 of Part I')***. Also included would be principles, values, and political-constitutional structures, essential and peculiar to Spain, such as the following: the established political form in a parliamentary monarchy; the unity of the Spanish territory; political pluralism; respect for the constitution by public authorities; the regional state structure; among many others (enshrined in Articles 1 to 9 constituting part of the *'Preliminary Part'*) and the regulation and functions of the Spanish Crown (Articles 56 to 65 located in *'Part II'* of the constitutional text).

Thus, although there is no explicit mention within the Spanish constitution that certain rights, values, principles and distinctive constitutional features or structures are essential to that state, they are subject to an amendment procedure that, although *de iure* does not prevent their constitutional reconsideration or revision, *de facto* makes it very difficult. The adoption of a specially qualified procedure of constitutional amendment is established, in the Spanish constitutional order, as a general and functional governing principle with respect to the preservation or maintenance of the written constitution, and specifically the fundamental rights it recognises and protects. This specially qualified constitutional review procedure is the guardian of the constitution and the content of its most essential rights, but also one of its generic (albeit exceptional) guarantees.

- Public administration duties as guarantees

Art. 9.2 SC establishes that: *"It is the responsibility of the public authorities to promote conditions ensuring that freedom and equality of individuals and of the groups to which they belong are real and effective, to remove the obstacles preventing or hindering their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life"*.

1.2. Institutional guarantees

Speaking of the obligations of the public administration, there are specific institutions of protection in this realm, also called alternative or specialised mechanisms of fundamental rights protection. Numerous specific bodies and structures protect fundamental rights, with the main aim of guaranteeing their effective protection. These 'alternative' or specialised mechanisms are essential (although less-known) instruments of fundamental rights protection. We will briefly look at a few in the following sections.

2. PARTICULAR FOCUS ON THE INSTITUTIONAL PROTECTION OF RIGHTS

2.1. Spanish ombudsperson (SO)

This institution is constitutionally recognised as High Commissioner of the Spanish Parliament. The SO is responsible for guaranteeing fundamental rights and public liberties by supervising the activity of public administration in Spain (Art. 54 SC & Art. 1 of Fundamental Legislative Act 3/1981 on the Spanish Ombudsperson). The SO is elected by members of the Spanish Parliament with a majority of 3/5, for a five-year period, with the possibility of re-election. Requirements include possession of Spanish nationality and full legal capacity (of legal age and in full use of their civil and political rights). Appointment are made by the Joint Congress-Senate Commission for Relations with the Ombudsman, who propose the candidates to the plenary, for their election in a period of no less than 10 days. The plenary of the Congress must vote an approval (3/5), and this must be ratified by the Senate (3/5) within a maximum period of 20 days.

While it is true that, generally, the SO is known to be the guarantor of those rights, principles, and behaviours relating to good administration, its protection extends to any constitutionally recognised right or principle in the exercise of executive or administrative action. The SO is entitled to initiate and continue *ex officio* or at the request of a party: *"any investigation leading to the clarification of the acts and resolutions of the public administration and its agents, in relation to citizens, in light of what is provided in article 103.1 SC, and the respect due to the rights proclaimed in its Part I* (Art. 9.1 Fundamental Legislative Act 3/1981). This refers to when there is a violation of the fundamental rights recognised in arts. 10-30.2 SC, which undoubtedly include the generally accepted restricted notion

of 'fundamental rights', as well as constitutionally-recognised rights and elements of their configuration.

In this way, we summarise the guarantees offered by the SO, as a result of his action, in the complaints and/or investigations carried out, at the request of a party or *ex officio*, respectively, and culminating in what the SO commonly calls 'resolutions'. These are generally divided into five types: recommendations to modify the interpretation or content of a rule; suggestions for concrete action that affects an individual or community; reminders or friendly notices about compliance with a legal requirement; warnings about the existence of an improvable factual situation; or requests for appeal of unconstitutionality or *amparo* before the TC and initiated *habeas corpus* proceedings.

The SO does not have punitive functions, but does have influence in the administrative sector: recommendations to the authorities and officials to amend or withdraw acts and decisions that led to the complaints he/she investigates are included in annual reports to the Spanish parliament (and who can make their own enquiries).

2.2. Public Prosecutor's Office

The Public Prosecutor has traditionally played a crucial role in our legal system, in both criminal and non-criminal matters. This institutional guarantee is established in art. 124 SC:

> *"1. The Office of Public Prosecutor, without prejudice to functions entrusted to other bodies, has the task of promoting the operation of justice in the defence of the rule of law, of citizens' rights, and of the public interest as safeguarded by the law, whether ex officio or at the request of interested parties, as well as that of protecting the independence of the courts and securing before them the satisfaction of social interest. 2. The Office of Public Prosecutor shall discharge its duties through its own bodies in accordance with the principles of unity of operation and hierarchical subordination, subject in all cases to the principles of the rule of law and of impartiality. 3. The fundamental legislative statute of the Office of the Public Prosecutor shall be laid down by law. 4. The State's Public Prosecutor shall be appointed by the King on the Government's proposal after consultation with the General Council of the Judicial Power".*

Hence, this institution fulfils an essential task in the welfare state and rule of law by fostering justice and the defence of fundamental rights and social interests. Defending law within the scope of the different jurisdictional orders, he or she contributes, in their role as a procedural party, to the protection of the due process of law of especially vulnerable groups. When defending the different fundamental rights, the Public Prosecutor is qualified to bring an application for protection of fundamental rights before the constitutional court and he is a required party in the application for protection of fundamental rights before ordinary courts. Appointment of the head of the Public Prosecutor´s Office (the State Public Prosecutor) is made by the King, on the basis of the government´s proposal after taking into consideration the General Council of the Judiciary Power for a mandate of four years.

Ordinary Act 50/1981 regulates the status of the Public Prosecutor and establishes a number of functions that includes, among others: ensuring that the jurisdictional function is exercised effectively in accordance with the laws and in the terms indicated therein; exercising, where appropriate, the relevant actions, ensuring respect for constitutional institutions and fundamental rights and public freedoms with whatever actions their defence demands; exercising criminal and civil actions arising from criminal offences; intervening in proceedings when vulnerable persons such as children are involved; intervening in *amparo* proceedings, as well as in the matters of unconstitutionality in the cases and form provided for in the Fundamental Legislative Act of the Constitutional Court; and submitting constitutionality protection appeals (Art. 3).

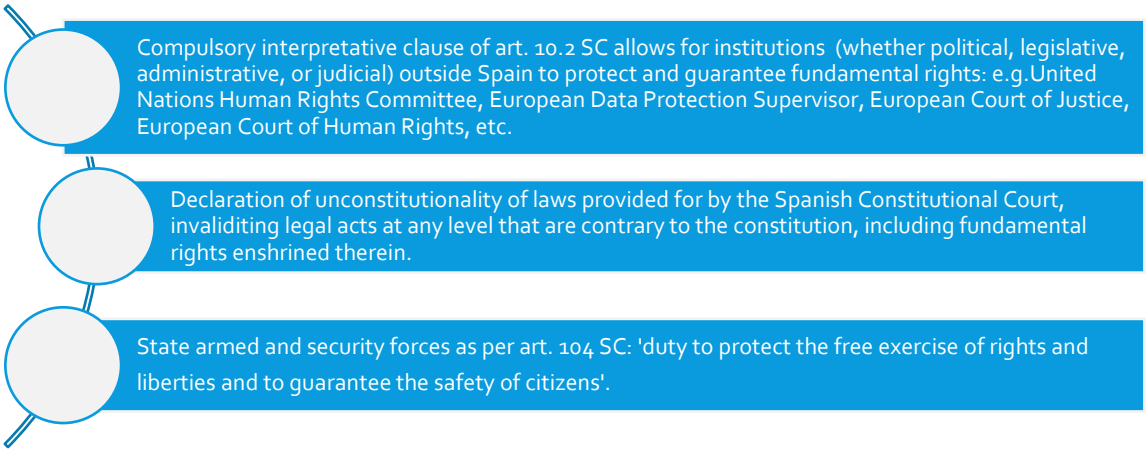
2.3. Independent protection agencies

To name a couple, the Spanish Data Protection Agency (SDPA) is the independent data protection authority at the state level, with its own legal personality and full public and private capacity. The agency acts with full independence in the exercise of its functions for guaranteeing informational and digital rights. The institutionalisation of independent bodies that supervise the control of the processing of personal data became necessary for the legal system, and is an extremely functional and effective guarantee mechanism. In sum, the SDPA is responsible for supervising the application of the Fundamental Legislative Act on Data Protection and Digital Rights Guarantees of 2018 and the General European Data Protection Regulation (directly applicable, legally-binding in its entirety and with direct effect in Spain) as well as the performance of the functions and powers attributed to it by other laws or rules of Spanish and European Union law regarding data

protection and digital guarantees. This entails the assignment of functions of various kinds: informative, consultative, soft law, research, foreign action, punitive, etc. Thus, as the most important administrative guarantor of the fundamental right to data protection and other similar rights, and in the context of the collection, use, and dissemination of personal data, it has played a decisive role as an institutional guarantee of the Spanish constitutional order, becoming a specific guarantee of the rights contained in arts. 18 and 20 SC.

The Electoral Administration is responsible for guaranteeing transparency, objectivity, and the principle of equality in the electoral process and represents a specific guarantee of the rights contained in art. 23 SC (CCJ 154/1988).

3. OTHER INSTITUTIONAL GUARANTEES



4. SUSPENSION AND DEROGATION OF FUNDAMENTAL RIGHTS

Despite the privileged place individual and collective fundamental rights occupy in the constitutional order, the constitution provides that, in certain situations or when certain circumstances concur, they may be legitimately suspended. This suspension can only be justified by the need to defend and preserve the rule of law and fundamental rights. This paradox means that the rule of law suspends the exercise of rights to guarantee its own subsistence. The suspension of rights should always be considered as a last resort to deal with circumstances which are so serious that they cannot be faced by other means or the ordinary powers of the state.

The state can use its exceptional powers to suspend fundamental rights in exceptional cases. Let us remember the numerous terrorist attacks around the globe: the 'original' ones in 2001 in the US; 2004 in Spain; 2005 in London; and the most recent in 2015 in Paris, 2016 in Brussels, Nice, and Berlin; and in 2017 in Manchester and Barcelona. The state has taken action because of these, and the many similar events, that have occurred. The suspension and derogation of fundamental rights is established in the beginning of Division (*Capítulo*) 5, differentiating between general suspension of rights and suspension of specific rights. The main purpose that the constituent power pursued with the inclusion, in art. 55 SC, of a type of exception law was (and still is) to avoid that in the face of exceptional and serious situations, a lack of constitutional regulation would determine that the exceptional threatening facts would prevail over the law.

Art. 55 SC reads:

> *"1. The rights recognised in sections 17 and 18, subsections 2 and 3; sections 19 and 20, subsection 1, paragraphs a) and d), and subsection 5; sections 21 and 28, subsection 2; and section 37, subsection 2, may be suspended when a state of emergency or siege (martial law) is declared under the terms provided in the Constitution. Subsection 3 of section 17 is exempt from the foregoing provisions in the event of the declaration of a state of emergency. 2. A fundamental legislative act may determine the manner and the circumstances in which, on an individual basis and with the necessary participation of the courts and proper parliamentary control, the rights recognised in section 17, subsection 2, and 18, subsections 2 and 3, may be suspended for specific persons in connection with investigations of the activities of armed bands or terrorist groups. Unwarranted or abusive use of the powers recognised in the foregoing fundamental legislative act shall give rise to criminal liability as a violation of the rights and freedoms recognised by the laws".*

It regulates two forms/avenues of fundamental rights suspension, requiring the use of a fundamental legislative act for both individual and collective suspensions. The suspension of rights does not generally mean a suppression of rights, but this exceptional and alternative legal order may significantly weaken their scope and exercise.

- **General suspension** (Art. 55.1 SC): enables the legislator to suspend a large number of rights by regulating the states of alarm, emergency, and siege.
    - Regulated by Fundamental Legislative Act 4/1981 on the states of alarm, emergency and siege + Art. 169 SC: prohibition of constitutional review during states of alarm, emergency, and siege (meaning the constitution cannot be amended).*-*

- **Individual suspension** (Art. 55.2 SC): for specific persons in connection with the investigation of armed bands or terrorist groups; commonly known as *anti-terrorist legislation.*
    - The Constitutional Court has understood that: 'terrorist group' means "*a type of organised criminality in stable and permanent armed groups whose aim or outcome is to terrorise society and obtain a social impact due to significant impact on the security of citizens and to attack the foundations of a democratic society*", (CCJ 199/1987).

    - Suspension is applicable to those individuals who have connections to police investigations carried out for the prosecution of crimes committed by individuals linked to terrorist organisations or armed groups.
    - Fundamental Legislative Acts 3 and 4/1988 regarding the criminal code and reforms in the Criminal Procedural Act establish that suspension cannot be for longer than is absolutely necessary and must always be justified.

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	EXCEPTIONAL CIRCUNSTANCES	DECLARATION	DURATION	EXTENSION	FUNDAMENTAL RIGHTS SUSPENDED
ALARM	-when there are catastrophes, public calamities, or natural disasters -when there are health crises -when there is a curtailment or shortage of essential community services due to strikes or labour disputes	Governmental decree (CoM) rendering account to Congress	Max. 15 days	Yes. Unestablished period	No suspension of rights, but they may be affected/limited E.g.: Limits on freedom of movement, right to property, right to privacy, and inviolability of the home
EMERGENCY	-when the free exercise of rights and freedoms of citizens are seriously altered -when the normal functioning of democratic institutions and essential public services are seriously altered -when any other aspect of public order is seriously altered	Governmental decree with prior congressional authorisation (simple majority)	Max. 30 days	Yes. Max of 30 more days	Suspension of those rights established in art. 55.1 SC -Arts. 17, 18.2, 18.3, 19, 20.1(a) and (d), 20.5, 21, 22, 28.2 and 37.2 SC -With temporal or formal requirements (maximum amount of days of suspension). Eg: suspension of the right to liberty or freedom of movement (including precautionary detentions) cannot be longer than 10 days, or to suspend the right to the inviolability of the home. Authority must provide a formal warrant and allow the presence of witnesses.
SIEGE	-when political and social chaos occurring during war or periods of civil unrest: threat of insurrection or an act of force against the sovereignty or independence of Spain or the territorial integrity and constitutional order	Absolute majority in Congress approving government proposal	Undetermined but should only last a few days	Unestablished	-Arts. 17, **17.3***, 18.2, 18.3, 19, 20.1(a) and (d), 20.5, 21, 28.2 and 37.2 SC -

LESSON 4: JUDICIAL GUARANTEES FOR THE PROTECTION OF FUNDAMENTAL RIGHTS

1. INTRODUCTORY REMARKS ON JURISDICTIONAL GUARANTEES OF FUNDAMENTAL RIGHTS

Constitutional guarantees can provide real protection for fundamental rights. It now seems commonly accepted that courts are responsible for safeguarding the rights of the person. After all, ordinary judicial bodies are the closest to citizens. Our constitution accepts this general approach, making an important distinction in the aforementioned classification of rights according to their level of protection. Art. 53.2 provides:

> *"Any citizen may assert a claim to protect the freedoms and rights recognised in Section 14 and in Division 1 of Chapter 2, by means of a preferential and summary procedure before the ordinary courts and, when appropriate, by lodging an individual appeal for protection (recurso de amparo) to the Constitutional Court. This latter procedure shall be applicable to conscientious objection as recognised in Section 30".*

2. SPECIAL PROCEDURES FOR JUDICIAL PROTECTION OF FUNDAMENTAL RIGHTS

Ordinary courts should be the body to guarantee fundamental rights as they are the closest level to the average citizen. There are specific regulations for specific subject matters (fundamental legislative acts exist to develop specific rights and freedoms: e.g. *habeas corpus,* public assembly, electoral system, and privacy) and disciplines of law (civil, criminal, administrative and social jurisdictions) and so the rights pertaining to each are guaranteed by the respective jurisdiction.

This legal remedy development, established in Art. 53.2 SC, was first regulated by the 'old' (already repealed) Act 62/1978 of 26 December on judicial protection of fundamental rights of persons, but nowadays this appeal is regulated by the procedural law for each jurisdictional order: *Ley de Enjuiciamiento Civil* (civil procedural code); *Ley de Enjuiciamiento Criminal* (criminal procedural code); *Ley de la Jurisdicción Contencioso-Administrativa* (administrative procedural code); and *Ley de Procedimiento Laboral* (labour procedural code).

In this regard, there are **two main internal (national) procedures for the protection of fundamental rights in Spain,** and for both cases, the rights that can be alleged are those recognised in arts. 14 to 29 & 30.2 SC, and the remaining rights can be invoked by way of 'connection' to one of these rights (known as the *theory of connected rights*).

- **Preferential and summary procedure before ordinary courts**

- **Individual appeal (*amparo* appeal) before the Spanish Constitutional Court**

3. APPEAL BEFORE THE SPANISH CONSTITUTIONAL COURT (*AMPARO*)

The appeal can be considered a special or exceptional jurisdictional guarantee for the protection of fundamental rights *(amparo)*, with the aim or restoring rights and freedoms to their optimal state of exercise. Through this procedure the Spanish Constitutional Court plays a double role: the subjective role of guaranteeing fundamental rights and the objective role of playing the supreme interpreter of the constitutional order (Art. 1.1 Fundamental Legislative Act 2/1979). This double role, or the dual nature, of the Spanish Constitutional Court was confirmed in CCJ 1/1981 – but has been questioned with the subsequent reforms it has undergone: specifically, the reform relating to its procedure of admissibility, which significantly reduced the possibility of a fundamental rights violation being eligible for reviews by this court.

The *amparo* appeal is not an ordinary procedural instrument, but has an extraordinary and subsidiary nature: limited to fundamental rights violations of arts. 14-30.2 SC in so far as such violations have special constitutional relevance, and an *amparo* appeal can only be invoked once all internal remedies are exhausted (confirmed by CCJ 130/2006). The basic conditions to lodge an *amparo* appeal are:

- **Who**? any individual or entity representing collective interests with a legitimate interest, the Ombudsperson, and the Public Prosecutor's Office.

- **What**?
  - Against what? Violations of rights attributable to a public power (legislative, executive and judicial)**

** In case of violations of fundamental rights attributable to individuals or legal entities, let us remember that there is indirect direct effect via the judicial decision that does not decide in favour of the contested violation of rights.

- For what? *Material scope*: To invoke Articles 14 to 30 of the Spanish Constitution (other constitutional provisions on fundamental rights can also be invoked, not independently, but in connection with the fundamentals rights formally included within the scope of the *amparo* appeal.

- **When**? When all previous judicial remedies are exhausted and up to 30 days from the communication of the judicial decision concluding the ordinary judicial procedure as per Fundamental Legislative Act 6/2007 on the Constitutional Court ***.

- **How**? By internet at: https://www.tribunalconstitucional.es/es/sede-electronica/Paginas/default.aspx

In other words, the requirements for an *amparo* appeal to be deemed admissible are:

1) Infringement of a fundamental right or freedom considered as 'fundamental' by the Spanish Constitution.
2) The judicial remedies must first have been exhausted.
3) The infringement of the fundamental right or freedom must be invoked as soon as possible, after the appellant has knowledge thereof (previous denunciation is needed to give the administration possibility to restore right/freedom infringed and only when this fails to happen can the *amparo* be lodged)
4) The justification of the "special constitutional relevance" of the legal issue. The special relevance implies the burden to specifically justify that such relevance is present in his case. It is necessary that he distinguish the justification of the special relevance from the arguments that prove that the right has been violated. The Constitutional Court has summarised the importance and relevance of this substantive requirement for admission of the *amparo* appeal in CCJ 155/2009.

***There are other deadlines depending on the type of act/decision that is object of/originates the *amparo* appeal (as it is not always a matter of judicial decision).

4. INTERNATIONAL PROTECTION OF RIGHTS

Fundamental rights enjoy international jurisdictional guarantees through human rights treaties, agreements, and jurisprudence emanated from their interpretation. Let us remember that art. 10.2 SC obliges Spanish courts to interpret rights and freedoms of the SC in conformity with human rights treaties and agreements ratified by Spain. In addition to this, we may say that if all the national appeals have not granted fundamental rights protection, a person can still seek protection via other normative, institutional, and especially, judicial mechanisms beyond the national jurisdiction.

- **In the framework of the United Nations: focus on the Committee of Human Rights** (International Covenant on Civil and Political Rights).

- **In the framework of the Council of Europe: focus on the European Court of Human Rights** (European Convention on Human Rights) and on the European Committee of Social Rights (European Social Charter).

- **In the framework of the European Union: focus on the Charter of Fundamental Rights.** Remember that the charter applies to the European institutions, subject to the principle of subsidiarity, and may under no circumstances extend the powers and tasks conferred on them by the treaties. The principles of the charter also apply to member states (to central, regional, and local authorities) when they are implementing European Union law. The Court of Justice has already confirmed the duty of member states to respect fundamental rights (see, for example, the judgment in Case C-292/97) and it is the supreme interpreter of EU law when doubts arise through the preliminary ruling procedure (via the reference/request for a preliminary ruling whereby judicial bodies can ask questions for consideration). Let us remember that, in contrast to the case of the complaint lodged before ECtHR, the reference for a preliminary ruling lodged before the CJEU is NOT an appeal.

SPECIAL PART

LESSON 5: DUE PROCESS RIGHTS

1. BASIC CONTENT OF DUE PROCESS RIGHTS

The right to DUE PROCESS OF LAW has also been called the RIGHT TO JUSTICE or the RIGHT TO A FAIR TRIAL. The Spanish Constitution references 'justice' in a number of its provisions, creating different yet complementary meanings:

- high value (Art. 1.1),
- fundamental right (Art. 24),
- public authority of the state (Title VI), basic state function (Art. 117),
- essential public service – which is free in case of a lack or insufficiency of resources (Art. 119), like public education (which is also free at primary and secondary school levels),
- category of civil servants (judges, who form a single body – Art. 122),
- the so-called *management of the administration of justice* (also Art. 122) including material resources (seats of the courts, judicial buildings, etc.) and human resources (administrative staff assisting judges).

Art. 24 SC enshrines the right to due process of law (for some, '*derecho a la jurisdicción*'):

> *"1. All persons have the right to obtain effective protection from the judges and the courts in the exercise of their rights and legitimate interests, and in no case may there be a lack of defence. 2. Likewise, all have the right to the ordinary judge predetermined by law; to defence and assistance by a lawyer; to be informed of the charges brought against them; to a public trial without undue delays and with full guarantees; to the use of evidence appropriate to their defence; not to make self-incriminating statements; not to plead themselves guilty; and to be presumed innocent. The law shall specify the cases in which, for reasons of family relationship or professional secrecy, it shall not be compulsory to make statements regarding allegedly criminal offences".*

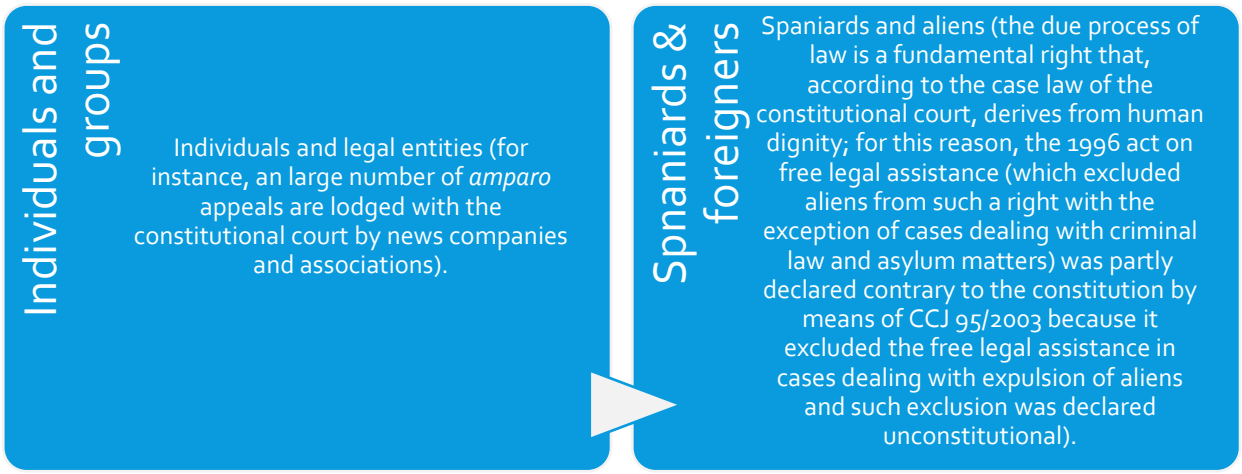
The effects of the right to due *process* is applicable to any type of process. Perhaps, this, along with the sub-rights that it guarantees, and the aforementioned connection between *drittwirkung* and judicial decisions, may be the reason why art. 24 SC is the most invoked right before the constitutional court. There are two doctrinal positions regarding the

nature of the right to due process: those that do not consider it a right, but a judicial/jurisdictional guarantee of all other rights (making it an instrumental right), and those that confer the right its own character as it can be directly invoked without the need of other rights being violated (making it a substantive right). Given its enshrinement in the main international bills of rights (and specifically, within the scope of the CoE and EU legally-binding instruments such as the ECHR and CFREU) as a fundamental/ human right on its own, we prefer to think of it as a subjective right, although it is true that most violations of fundamental rights in Spain entail infringement on due process rights.

Moreover, although the constitutional provision makes special emphasis on the criminal procedure, it binds all public authorities, especially the judiciary, in all sectors and proceedings. In fact, a number of rights derive from this all-encompassing right (in no particular order):

- right of access to justice
- right to an effective remedy
- right to a decision on the merits
- right to a reasoned decision (decision based on legal reasoning)
- right to non-arbitrary procedures
- right to a legally established impartial judge
- right not to suffer a lack of defence
- right to the presumption of innocence and right against self-incrimination

Those who are entitled to this right (also called *holders* or *beneficiaries*) are:



We will specifically focus on certain aspects of the right to a fair trial or due process of law (*tutela judicial efectiva*) in the following sections (each specific right will be highlighted in red), although there are doctrinal discrepancies on how to classify such rights. For example, some observers, following CCJ 26/1983, prefer to divide them into three major rights (the right to freely access justice, the right to obtain a judgment, and the right to have that judgment enforced), while others prefer to use this as a chronological tool to classify them (rights relating to the access of justice, rights relating to the course of the proceedings, and rights relating to the end of the proceedings).

2. ACCESS TO THE JUDICIAL SYSTEM

The first logical step for guaranteeing the right to a fair trial is to have a trial. Hence, the right to due process includes the **right to have access to the competent jurisdiction**: since it is a fundamental right whose enjoyment does not allow any discrimination (on any ground), and no economic or linguistic barriers can be introduced. This right entails being able to choose the appropriate procedural-judicial materials, instruments, and procedures available for the protection of fundamental rights and, in cases of dismissals (non-admissibility of petition), the reasons must be legally established and the explanation must be reasonable.

3. RIGHTS IN THE COURSE & DEVELOPMENT OF THE PROCEEDINGS.

3.1. Right to an impartial judge pre-established by law

The right and judicial guarantee established in art. 24.2 SC *'right to the ordinary judge predetermined by law'*. The Spanish Constitutional Court has clarified early on what this means exactly in CCJ 47/1983 (later confirmed in CCJ 282/1993): *"it requires that the judicial body has been previously created by the legal norm, that has invested it with competence and jurisdiction prior to the fact that initiated the judicial process and that its fundamental legislative and procedural regime does not allow it to be classified as a special body. It also requires that the composition be determined by law and that, in each case, the legally established procedure is followed"*. This is one way to maintain the impartiality of judges (as per Art. 117 SC) given that only those judges previously determined and established prior to the litigation, via solid and merit-based procedures, can be objective.

Indeed, the rule of law in a democratic state (as per the separation of powers and the notion of fairness and justice) requires judicial independence; not only of the other branches of the state, but of the parties involved in the proceedings and the external pressures that may come from lobbying groups or society as a whole. Hence, the judge must maintain an attitude of detachment and objectiveness with regards to the dispute in the proceedings. This way we see that the concepts of 'independence' and 'impartiality' are closely linked and, depending on the circumstances, may require joint examination.

3.2. Right to a defence (prohibition against lack of defence)

Art. 24.1 SC finishes off with '*in no case may there be a lack of defence*'. The content of this right can be summarised in having the opportunity, as party to the proceedings, to defend one´s own position in the legal process and this includes a number of aspects:

- Right to have adequate time and facilities for the preparation of a defence
- Right to communicate with the legal counsel of one´s own choosing
- Right to not be deprived of *locus standi* (right or capacity to bring an action or to appear in a court)
- Right to be provided with an interpreter
- Right to be informed of the status of the proceedings
- Right to the use appropriate and relevant evidence*

3.3. Right to free legal assistance and aid

To ensure the most effective defence, the SC also provides the parties with the right to be assisted by a lawyer, or as it calls it the right *'to defence and assistance by a lawyer'*. Art. 199 SC establishes that those who cannot afford a lawyer will be provided with a lawyer free of charge. An important law that develops this right is Act 1/1996 on free legal assistance which recognised this right:

> *"In order to remove the obstacles that prevent the most unprotected citizens from accessing effective judicial protection under equal conditions, this Act operates a remarkable transformation in the material content of the right to free legal assistance, configuring it more broadly. In fact, in the face of the benefits so far collected by the Civil Procedure Law, the new system sets up a more complete, and therefore more guaranteed, right to the equality of the parties in the process, eliminating excessive burdens that are nothing but practical denials of justice. Thus, to the benefits already enshrined in our*

legal system as typical of the ***right to free legal assistance, the Act adds new benefits such as counselling and guidance prior to the initiation of the legal procedure (which may in many cases avoid such expensive litigation), expert assistance,*** *and a substantial reduction of the cost to obtain deeds and notarised documents and those documents issued by the public registries, which the parties to the proceedings may need".*

This right is recognised for everybody, regardless of civil status or nationality. In addition, it is important to cite Law 42/2015 which amended part of the civil procedural code and the law on free legal assistance to include as beneficiaries: those without the economic means to litigate; especially vulnerable groups regardless of their income (gender violence victims, victims of terrorism, victims of human trafficking, victims of serious crimes, minors, disabled persons, etc.). This ensures minimal opportunities of equality (equal arms) between litigants. A right directly related to this one is the right (and subsequent obligation) of professional secrecy (*attorney-client privilege*). Hence, the full right would be the right to a free and trusted lawyer.

3.4. Right to a public trial

The right to be judged in a public trial is one of the essential elements of the rule of law and the right to a fair trial; in opposition to secret proceedings. Public access is recognised in art. 24.2 SC (right *'to a public trial without undue delays and with full guarantees'* and 120.1 SC which regulates *'judicial proceedings shall be public, with the exceptions specified in the laws on procedure'*. This right also has a double nature/objective:

- It contributes to ensuring fair non-arbitrary proceedings
- It helps to inform the public about judicial activity in real time.

There are, of course, exceptions to the publicity of proceedings, especially in criminal proceedings, and so as to protect constitutionally protected interests and rights (such as child protection, safety of victims, the right to privacy, national security, and other public interests).

4. RIGHTS IN THE TERMINATION OF THE PROCEEDINGS

4.1. The right to a well-founded/reasoned decision on the merits

This does not entail the right to obtain a judicial decision in favour of the applicant, but a decision that has legal reasoning (a decision based on law). It is enough for the legal reasoning to be relevant, proportionate, and consistent with the contested legal conflict.

This decision could be a judgment (on the merits – *sentencia, sobre el fondo*) or any other kind of judicial decision (e.g. an 'order' on the admissibility – *auto* – or 'decisions' on other procedural aspects – *providencias*), but this decision must be always well-founded or reasoned, which is obviously not the same as just obtaining a favourable decision. The legal reasoning (*motivación*) implies the requirement for judicial decisions to give the grounds or reasons leading to the court's conclusion (Art. 120. 3 SC). When a court gives a decision on the merits it must therefore rule on all the submissions presented by the parties, otherwise the judgment will be flawed and unable to give an adequate statement of the grounds (*incongruencia omisiva*). When a court rules on questions not submitted by the parties, there is likewise a violation of the due process of law (*incongruencia extra petita*).

The ECtHR has reiterated that the right to a fair trial, and specifically the right to a reasoned judgment: *"cannot be understood as requiring a detailed answer to every argument (see the Van de Hurk v. the Netherlands judgment of 19 April 1994, Series A no. 288, p. 20, para. 61). The extent to which this duty to give reasons may vary according to the nature of the decision. It is moreover necessary to consider, inter alia, the diversity of the submissions that a litigant may bring before the courts and the differences existing in the contracting states with regard to statutory provisions, customary rules, legal opinion, and the presentation and drafting of judgments. That is why the question as to whether a court has failed to fulfil the obligation to state reasons, deriving from Article 6 (Art. 6) of the Convention, can only be determined in the light of the circumstances of the case"*, (ECtHR Case of Ruiz Torja v. Spain, 9 December 1994).

4.2. The right to an effective remedy (appeal)

The right to an effective remedy includes the right to a review of the judgment, in certain cases (where it is legally provided for) the right to a second hearing and the right to appeal said decisions. Of course, independently from this, we must include the already-explained judicial guarantees for the protection of fundamental rights (right to ordinary appeals and the extraordinary *amparo* appeal).

4.3. The right to the execution/enforcement of judicial decisions

The right to execution or enforcement of judicial decisions is one of the main functions conferred to the judiciary in Art. 117, paragraph 3 of the Spanish constitution (*"The exercise of judicial authority in any kind of action, both in ruling and having judgments executed, is vested exclusively in the courts and tribunals laid down by the law, in accordance with the rules of jurisdiction and procedure which may be established therein"*). It is not only a right but a guarantee of the rule of law: obligation to comply with judgment and respect its effectiveness.

4.4. The right to a speedy proceeding and decision without undue delays

Although there is no right to strictly respect deadlines, there is a right to decide a case in a reasonable amount of time. The test to carry out this appreciation is a difficult one: taking into consideration the complexity of the case, and the behaviour of the parties during trial, due diligence of the judge, and other force majeure elements. Because undue delays constitute an irregularity of the administration/management of justice, which is under state liability (Art. 121 SC), there is the possibility of financial compensation.

5. THE CONSTITUTIONAL GUARANTEES OF CRIMINAL PROCEEDINGS

The criminal case has special features as its consequences are more serious than in other proceedings: the right in jeopardy is the right to liberty or personal freedom. This has justified the SC providing specific safeguards for those persons involved in these types of proceedings. The specific due process/fair trial rights in the context of criminal proceedings are very briefly outlined below.

- **The right to be informed of the charges (right to be informed of the accusation/indictment)**
  - Art. 24.2 SC: right *'to be informed of the charges brought against them'*
  - Derived from the so-called accusatory principle
  - Includes both the factual information considered punishable, also known as the constituent elements of criminal offence (facts of case) and the

information regarding the legal classification given to such facts (criminal definition, known in Spanish as *tipo penal*).
    - This must be given in detail, in language the accused understands, and promptly
    - CCJ 34/2009

- **Right to oral, concentrated and public proceedings**
    - Art. 120.2 SC *'Proceedings shall be predominantly oral, especially in criminal cases'*
    - Obligation to exam evidence in trial stage (publicly) and not before
    - Oral proceedings (post-investigation phase)
    - Public access principle connects with the fundamental right to communicate and receive information (in this way society is informed about potential criminal risks and the legality of the process is ensured under watchful eyes)
    - Again, exceptions to the publicity of proceedings, especially in criminal proceedings, exist to protect constitutionally protected interests and rights (such as child protection, safety for victims, the right to privacy, private lives of the parties, national security, and other public interests). This is understandable, especially taking into consideration the current role and excesses of the media. See, for example, CCJ 56 and 57/2004.

- **Presumption of innocence and right against self-incrimination**

    - **Right to be presumed innocent until proven guilty** according to the law as per art. 24.2 SC. CCJ 105/1988 has established two consequences of this right:
        - Burden of proof against innocence is placed on the person or public authority that accuses.
        - To find a person guilty, there must be sufficient and reasoned legally obtained evidence against them

    - **Right against self-incrimination** as per art. 24.2 SC
        - Right not to plead guilty, nor make self-incriminating statements
        - The complete silence of the accused is never enough to convict

1. EQUALITY BEFORE THE LAW, WITHIN THE LAW, AND IN THE APPLICATION OF LAW

1.1. Origins and legal framework

The origins of the Spanish equality clause stem from the first petitions and bills of rights already covered in Lesson 1: among which, it is interesting to cite the 1776 Virginia Declaration and the 1789 French Declaration which put special emphasis on the principle of equality before the law (albeit, judged from today´s perspective, it was unacceptably reserved for white men). Equality is not now conceived solely as a formal principle, but as a constitutional value, objective, and, most importantly of all, as an individual right. This is true at both international, regional, and national levels.

The history of human rights in the 20th and 21st centuries has been described as an open process towards non-discrimination. The recognition of social rights and the understanding that certain people or groups, for various reasons, face difficulties in achieving actual equality, has allowed for such development, especially within Europe.

Within the Spanish Constitution, Articles 1.1, 9.2, 14, 139.1 and 149.1(1) have to be considered.

- Art. 1.1: '***Spain*** *is hereby established as a social and democratic* ***state, subject to*** *the rule of law, which advocates freedom, justice,* ***equality,*** *and political pluralism as highest values of its legal system'*
- Art. 9.2: *'It is the* ***responsibility of the public authorities to promote*** *conditions ensuring that freedom and* ***equality of individuals and of the groups to which they belong*** *are real and effective, to remove the obstacles preventing or hindering their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life'*
- Art. 14: *'****Spaniards*** *are* ***equal before the law*** *and* ***may not in any way be discriminated against*** *on account of birth, race, sex, religion, opinion, or any other personal or social condition or circumstance'.*
- Art. 139.1: *'All Spaniards have the* ***same rights and obligations*** *in any part of the* ***state territory****'*

- Art. 149.1(1): *'The **state** shall have exclusive **competence** over the following matters: regulation of **basic conditions guaranteeing the equality of all Spaniards** in the exercise of their rights and in the fulfilment of their constitutional duties'.*

Although Article 14 of the Spanish constitution refers to 'Spaniards' no discrimination can be established (as a general rule) against aliens. Obviously, all national legal orders establish some differences of treatment in favour of their nationals (or the citizens of the European Union in our particular case) when regulating the rights to vote and be elected (for example, European citizens enjoy these political rights only in municipal and European elections, but they are excluded from general and regional elections, as we have seen) or in cases of more controversial rights, such as the right to healthcare or social assistance (if we remember, these are technically principles that govern social policy), where there is more margin for the state to make differentiations.

In this context, we cannot interpret *contrario sensu* the word 'Spaniards' in Articles 19 (freedom of movement), and 29 (right to petition) of the Spanish constitution, according to a meaning that leads to the exclusion of aliens. Also, it is necessary to carry out a complementary systematic and logical interpretation in this area (otherwise, there would be a contradiction between Articles 14 and 30 for military service, or between Articles 14 (general rule) and 57 (*lex specialis*) for succession to the Crown), among others.

1.2. Nature

Equality in the Spanish legal order has a tripartite nature: as a value; as a principle; and as a fundamental right. To justify this last characteristic we must remark that it is included in the division related to 'Rights and freedoms' of Part I ('On fundamental rights and duties') of the SC, it has been conferred special legislative and judicial protection via the extraordinary guarantee provided for in art. 53.2 SC, and it is considered a human right in the most important bills of rights ratified by Spain (which obliges public authorities to take them into consideration as per 10.2 SC).

Given that the principle of equality binds all public authorities (at all levels and jurisdictions), and given its status as a fundamental right as per art. 14 SC, it is not surprising that it also needs special legislative and judicial protection for its full exercise. The first of which is achieved via its development through fundamental legislative acts, and the second via the maximum guarantee of the *amparo* appeal before the Constitutional Court. As regards the former, it is important to note the Fundamental

Legislative Act 3/2007 on the effective equality between women and men. In contrast, Act 13/2005 that recognised same-sex marriage (Art. 32, which is technically outside the VIP 'fundamental rights' subdivision) and modified pertinent provisions in the Spanish Civil Code, was not done through these means.

The right to equality has a linking function or nature, as its violation may give rise to the violation of other fundamental rights. For example, using the case referenced above, inequality/discrimination on grounds of sexual orientation may give rise to the violation of the right to privacy, right to family life (Art. 18), and right to freely marry (Art. 32), etc. Or, for example, discrimination based on religious beliefs may violate freedom of religion (Art. 16), personal liberty (Art. 17), secrecy of communications or privacy (Art. 18), if police investigations are conducted on the basis of racial/religious profiling.

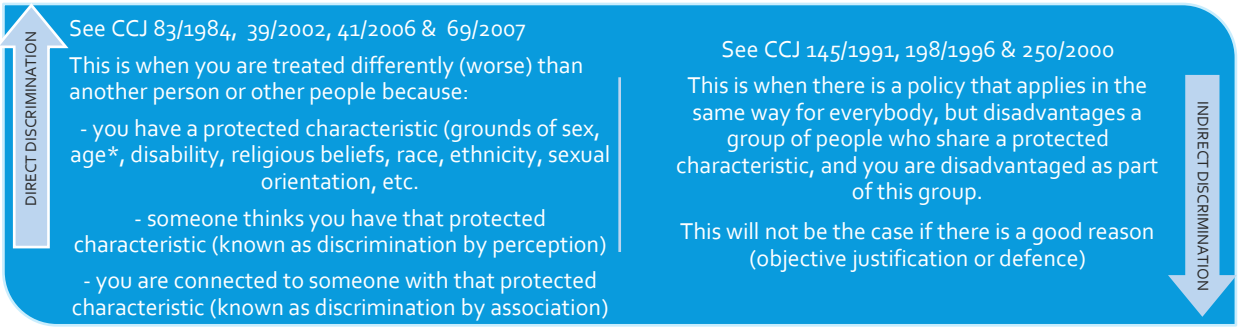
2. EQUALITY, DISCRIMINATION AND DIFFERENTIAL TREATMENT

Equality and non-discrimination are two sides of the same coin. This means that depending on which concept of equality we choose to adopt, our conception of discrimination might also change. For example, if our concept of equality only encompasses equal treatment, we would think that while we treat everybody exactly the same, no discrimination takes place. However, if we believe that equality comprises elements of equal outcomes for persons, despite their differences, we would want to make sure that a person with special needs receives the means to reach that outcome, even if that involves spending more resources than for another person (special needs education, or accessibility, is a good example for this kind of non-discrimination, usually called equality of opportunities).

Although there is a general commitment to ensure effective legal equality, and everybody is equal in rights as they are equal in dignity, it is obvious that not all persons are equal in reality (different socio-economic statuses, various physical and mental impairments, different places of residence, different family and personal situations, etc.). What the SC requires is FORMAL EQUALITY, but that is not enough; hence, given the obligation of public authorities to ensure SUBSTANTIVE EQUALITY, we must interpret this principle or right in the most favourable way. Nevertheless, our constitutional text does sometimes differentiate and discriminate against for objective justified reasons: art. 31.1 SC establishes a tax system of progressive taxation whereby those that earn more, pay more to the system (which evidently means a difference in treatment, but it is not considered

discriminatory). We have to, indeed, discern between differentiation and discrimination as they do not always go hand in hand. The Spanish Constitutional Court has helped present objective elements of differentiation (CCJ 86/1985 & 155/1998), therefore not constituting discrimination.

As regards discrimination, the Constitutional Court has made it clear that *'what is prohibited is a different treatment of equal situations'* (CCJ 26/1984 & 209/1988). Hence, the notion of discrimination refers to an unjustified and unfair differentiation, based on features or social circumstances of specific persons or groups that significantly impairs them, or creates a disadvantage. The Constitutional Court has confirmed that art. 14 SC prohibits only differences in treatment that are not legally justified because they are not proportionate (CCJ 19/1982). Discrimination can be targeted to a specific collective, causing damage directly to the group as a whole and, indirectly, to the people who integrate it, therefore turning an individual case into a collective issue. This type of situation of social power among groups causes unjust treatment not simply because of belonging to a specific group, but because said group is in a subordinate position, or at a disadvantage, in comparison to others. There are, in fact, two types of discrimination: **direct** and **indirect discrimination**.



In fact, and as an example, on the specific case of sex discrimination, the aforementioned Spanish Equality Act provides a definition of indirect discrimination:

> *"the situation where a* ***provision or criterion or practice, that appears to be neutral, would put persons of one*** *sex* ***at a particular disadvantage compared with persons of the opposite*** *sex, unless that provision, criterion, or practice is objectively justified in response to a legitimate aim and the means of achieving that aim are necessary and appropriate".*

In sum, *"the principle of equality prohibits comparable situations from being treated differently and different situations from being treated in the same way, unless the treatment is objectively*

justified. This implies that where two categories are treated differently, the first issue is whether the categories involved are similar or not. In the case where they are not, there is nothing wrong with treating them differently. However, where they are different, the question is whether the difference is justified or not", (Serra Cristobal, 2015).

The grounds for discrimination are a *numerus apertus* **(open-ended) list of protected grounds**. Some are explicitly recognised (as their discrimination is considered especially serious and have been conferred a heightened degree of protection – also called *suspicious grounds of discrimination*) but they are still mere examples of many that are left with the undetermined notion of 'other' grounds, conditions, or circumstances for future interpretation to recognise as it deems appropriate with changing times (this has been the case of interesting examples worldwide such as discrimination based on gender identity, genetic composition, weight, language, civil status, and social background).

Speaking of discrimination grounds, there is another concept to clarify. A middle ground between direct and indirect discrimination.

- **Hidden or covert discriminations:** Measures that, although not directly seen as discriminatory at first, conceal the true (hidden) objective of discriminating against on a protected (suspicious) ground, and effectively creates said discrimination. For example, a salary reduction for part-time contracts affects a protected ground (sex) as the majority of part-time jobs are held by women, primarily due to their inescapable work-family balance (*conciliación familiar*).

It is important to note that the European case-law (ECtHR, ECSR and CJEU) has significantly influenced the interpretation of the equality principle, also known in European instruments as the principle of non-discrimination, or the prohibition of discrimination, especially with respect to social and work-related rights.

3. THE CROSS-CUTTING CHARACTER OF THE PRINCIPLE OF EQUALITY

Since equality constitutes a high value or a general principle of the legal order (whose main characteristic is that of being mainstream or cross-cutting (*tranversalidad*), a general law did not exist until recently in this field. In other words, we could only find very specific regulation in state legislation (let's consider the co-official use of Spanish languages in the framework of administrative procedures according to the Act 30/1992, repealed by the current *Act 39/2015, 1 October, on the Common Administrative Procedure of*

Public Administrations), as well as in regional legislation (for example, when regulating the specific electoral system of each Spanish regional state). Nevertheless, a type of general 'code of equality' introducing the above mentioned 'mainstreaming' was approved by the recent *Fundamental Legislative Act 3/2007 of 22 March, for the effective equality of women and men*. This act, among other outstanding aspects, introduces electoral parity (minimum 40% of every gender on the electoral lists). This electoral parity was declared constitutional by the Constitutional Court (CCJ 12/2008 & 13/2009)

In another controversial field, the Constitutional Court (CCJ 59/2008) confirmed the constitutionality of Article 153.1 of the Criminal Code (amendment introduced by Law 1/2004, of 28 December, on Measures of Integral Protection against Gender Violence), according to which the aggression inflicted by a man on a woman in a family must be sanctioned with a more severe punishment in comparison with the same situation, but with reserved roles (where the active subject is a woman and the victim is a man in a conjugal relationship or analogous position).

With all the above in mind, we can say, as regards equality in the Spanish constitutional system, due to it cross-cutting nature (regardless of the legal or socials aspects or sectors):

A) *It is an essential constitutional value* (Art 1.1 SC)

B) *There is legal and formal equality* (Art. 14 of the Spanish Constitution): identical treatment.

C) *There is real and effective equality* – also known as *material*, *substantial*, or *compensatory* equality – (Art. 9.2 SC): different, but not discriminatory treatment.

D) *There is political or supra-regional equality* (Arts. 139.1 and 149.1.(1) SC: equality of the basic positions of all Spaniards in any part of Spain.

4. POSITIVE DISCRIMINATION, AFFIRMATIVE ACTIONS & OTHER RELATED CONCEPTS

The promotion of conditions ensuring equality and the removal of obstacles that the SC obliges public authorities to pursue, as a constitutional aim, means achieving equality of opportunity for particular groups of people. This has been given different names in different nations. Regardless of linguistic choices, such measures attempt to increase the participation and accessibility for groups whose particularities make them victims of discrimination (race, gender, disability…) and who tend to be underrepresented in fighting against said discrimination. Hence, we could define **positive discrimination** (as the more general term) as measures for reducing discrimination against those who have been historically excluded or those who, given their vulnerable state, find themselves unable to achieve substantial equality. In this regard, we define the following sub-concepts:

- **Affirmative action:** favourable (justified) treatment to a group that is disadvantaged from the outset so as to achieve equal opportunities without the majority suffering direct damage/consequences (e.g. economic aid working mothers so they can afford childcare).
- **Reverse discrimination:** the aim is to also compensate a disadvantaged group but this favourable (justified) treatment to achieve equal opportunities affects the majority group as it limits its access (e.g. quotas for disabled persons in access to public employment or education – one position or grant reserved for a disabled person is one position or grant less for the able-bodied). It is interesting to note that in the US system, for example, this definition actually also corresponds to the concept of affirmative action.

It is also important to mention that it is possible to be discriminated against on multiple grounds, **multiple discrimination**, which can be simply defined as discrimination against an individual on the basis of more than one protected grounds. The aforementioned Spanish Equality Act alludes to this type of discrimination. The European Institute for Gender Equality offers a more developed definition: *"Any combination of forms of discrimination against persons on the grounds of sex, racial or ethnic origin, religion or belief, disability, age, sexual orientation, gender identity or other characteristics, and discrimination suffered by those who have, or who are perceived to have, those characteristics,"* and considers it an *"overarching, neutral notion for all instances of discrimination on several discriminatory grounds,'* differentiating between *'additive discrimination, where discrimination takes place on the basis of several grounds operating separately'* and *'intersectional discrimination, where two or more grounds interact in such a way that they are inextricable'".*

On another note, it is important to allude to the protection of the principle of equality through the guarantees put in place, both institutional (the ombudsperson, the administration itself, the security forces, the legislator - bills drafted by the government must contain a 'gender impact assessment', etc.), and judicial (special remedy for the protection of fundamental rights before the Constitutional Court or before the ordinary jurisdictions – *recurso de amparo constitucional* and *recurso de amparo ordinario* – as well as before international bodies – European Court of Human Rights, European Committee of Social Rights, and the European Court of Justice).

LESSON 7: THE RIGHTS OF THE PERSONAL SPHERE

1. LIFE AND PHYSICAL AND MORAL INTEGRITY

1.1. Right to life

The right to life is recognised in art. 15 SC and it establishes that: *'everyone has the right to life'*. Evidently, the holders or beneficiaries of the right to life are all human beings or individuals, but not legal entities (even if sometimes we tend to speak of the 'life' of a company/undertaking in civil and commercial matters, especially in terms of its functioning and its terms of mergers, acquisitions, and bankruptcy procedures). When we speak of people we, of course, include nationals and aliens. In this regard, the right to life becomes the *logical prius* of human dignity and the enjoyment of fundamental rights; without it, neither could exist (CCJ 53/1985) and it is the role of public authorities to strengthen these fundamental rights (CCJ 120/1990).

There are controversial cases with respect to the right to life if we consider actions that end or affect life, such as the death penalty, abortion, genetic engineering, euthanasia and hunger strikes.

- Death penalty

The last part of art. 15 SC states that: *'The death penalty is hereby abolished, except as provided for by military criminal law in times of war'*. This seems inconceivable in current times and seems to contradict European human rights instruments, given that Protocol 13 of the ECHR abolishes death penalty in all circumstances, and art. 2 of the CFREU establishes that: '*no one shall be condemned to the death penalty, or executed*'. However, in practice death penalty has been prohibited, even in times of war, following Fundamental Legislative Act 11/1995.

- Abortion

As it relates to ownership of fundamental rights, the term 'everyone' has given the Constitutional Court some headaches. The right to life of the *nasciturus* (conceived-not-yet-born-child) would mean attributing it a legal personality (instead of after birth as the Civil Code states) and making abortions unconstitutional. Back when this conflict first arose, in the mid-1980s with the decriminalisation of abortion in three cases (rape,

danger to mother's life, and danger to child's life) and with the refusal of the Constitutional Court (CCJ 53/1985) to give the *nasciturus* a fundamental right (instead it conferred a special protection by granting the status of a legally-protected interest). Given its status as fundamental right, these practical situations had to be developed via a fundamental legislative act.

There have been a number of legislative enactments, the last of which was the Fundamental Legislative Act 2/2010 on sexual and reproductive health and the voluntary termination of pregnancy, which introduced the freedom to terminate the unborn child during the first 14 weeks of pregnancy and decriminalisation of termination of pregnancy up to 22 weeks in cases of health risks for the mother or unborn child. An appeal on unconstitutionality was made to the Spanish Constitutional Court on these term-based and circumstanced-based conditions; over eight years later we are still awaiting its interpretation/final conclusion although the effectiveness of this part of the law has not been suspended.

Given the lack of Spanish constitutional jurisprudence on the matter, it is worthwhile citing some European cases. The ECHR does not recognise a right to abortion, nor does the jurisprudence of its court; however, the ECtHR has referred to the margin of appreciation (discretion) of each member state and has limited itself to assess the conditions of abortion practiced under national law on the basis of other fundamental rights in its convention. For example, in the case of **R.R. v. Poland, 26 May 2011** a pregnant mother-of-two was warned that she could potentially be carrying a child suffering from genetic abnormalities, but was deliberately denied timely access to the genetic tests by doctors opposed to abortion. Six weeks elapsed between the first ultrasound scan indicating the possibility that the foetus might be deformed and the results of the amniocentesis, too late for her to make an informed decision as to whether to continue the pregnancy or to ask for a legal abortion, as the legal time limit had by then expired. Her child was born with 'Turner syndrome' (which is characterised by slowed or little growth, cardiac defects, a thick neck, and infertility). She argued that bringing up and educating a disabled child had been damaging to herself and her other two children due to time & economic difficulties and because her husband left her after the birth of the child. The ECtHR found a violation of Article 3 (prohibition of inhuman and degrading treatment) of the convention as the applicant, who was in a very vulnerable position, had been humiliated and 'shabbily' treated, the determination of whether she should have had access to genetic tests, as recommended

by doctors, being marred by procrastination, confusion, and a lack of proper counselling and information.

The court also found a violation of Article 8 (right to respect for private and family life) of the convention because Polish law did not include any effective mechanisms which would have enabled the applicant to have access to the available diagnostic services and to take, in the light of their results, an informed decision as to whether or not to seek an abortion. Given that Polish domestic law allowed for abortion in cases of foetal malformation, there had to be an adequate legal and procedural framework to guarantee that relevant, full, and reliable information on the health of the foetus be made available to pregnant women. The court did not agree with the Polish government that providing access to prenatal genetic tests was in effect providing access to abortion. Women sought access to such tests for many reasons. In addition, states were obliged to organise their health services to ensure that the effective exercise of the freedom of conscience of health professionals in a professional context did not prevent patients from obtaining access to services to which they were legally entitled.

- Human genetic engineering

This issue is also connected with life if we define it as the direct manipulation of and person´s genome using biotechnology. Genetic engineering is not only a tool for assisted reproduction (which again deals with similar problems as those inherent in abortion with embryo selection) but also for disease prevention. What is not allowed in the Spanish legal order is the manipulation of genes so as to alter human genome for purposes other than the elimination or reduction of defects or illnesses. This along with Ordinary Act 14/2006 on assisted human reproduction clinically-indicated and scientifically-accredited techniques seem compatible with art. 3 of the CFREU: *"In the fields of medicine and biology, the following must be respected in particular: […] the prohibition of eugenic practices, in particular those aiming at the selection of persons, the prohibition on making the human body and its parts as such a source of financial gain, the prohibition of the reproductive cloning of human beings".*

- Euthanasia or assisted suicide

The right to end your life is not recognised as a subjective alienable (renounceable) right (CCJ 120/1990 & 154/2002) and although the help of others in the killing of oneself

is punishable by law, the act of killing oneself has no legal consequence. In cases where, as a consequence of a disability or health-related problems, a person wants to end their life and asks others for help, we are speaking of the practice of euthanasia or assisted suicide. Some have considered this to be part of the right to die with dignity, while others have spoken on the potential dangers of starting to use human vulnerability and frailty to decide on a good or justified time to die.

There are technically three types of euthanasia

- **Active**: a person directly and deliberately causes a patient´s death (prohibited in Spain).
- **Passive**: when the withdrawal of treatment or artificial means results in the death of a person (allowed in Spain). This may well include the so-called practice of palliative means, which can be legally stipulated in a living will (as regulated in Ordinary Act 41/2002 regulating patient autonomy and health-related information. A person, who wishes not to be in pain, can ask for palliative sedation and hospice (palliative) care, to interrupt procedures and treatments which are causing them pain, even if that shortens their life.
- **Assisted suicide:** when a person intentionally helps another commit suicide by providing the means necessary for them to die (prohibited in Spain)

-Hunger strike:

CCJ 120/1990: *"fundamental right to life, as the objective basis of the system, obliges public authorities "the duty to adopt necessary measures to protect those constitutionally-protected goods such as life and physical integrity, against attacks without having to consider the will/consent the holders of said good […] the active role of life protection that corresponds to the State in the field of special restraint relations, as with prisoners, to the extent that they are people who are in the State's custody therefore becoming legally bound to protect and preserve said life".*

1.2. Right to physical and moral integrity

Although this is mainly studied as part of criminal law (via the classification of offences relating to violations of these rights), art. 15 SC also establishes that everyone has the right to '*physical and moral integrity, and under no circumstances may be subjected to torture or to*

inhuman or degrading punishment or treatment'. Much like the right to life, the right to the integrity of the person implies a negative conception (the extent of the integrity is assessed as far as there are no acts violating it). We must also understand that this is not only a right that exists in the criminal law sphere, but also in the bio-medical sphere, and as of recently, in labour law (with conducts related to workplace violence and mobbing).

Hence, we could re-categorise the right to physical integrity (also called bodily integrity) and the right to moral integrity as the right to personal integrity. It could be defined as the preservation, without detriment of the integrity of the body and mind. This would mean excluding the penalties, procedures, and treatments that result in the intentional deprivation or disqualification of any part of the human body, any part of the faculties of the mind or spirit. The protection of this right extends not only to the prohibition of conducts that leave the person permanently damaged, but also to those that, independently of their purpose, constitute cruel, inhuman, or degrading treatments. Of course, some medical practices are not considered violations of this right (e.g. transplants, removal-based surgeries, stem-cell research, etc.), while others could be so considered (e.g. health consequence due to lack of informed consent).

We must include as violations of these rights various practices such as torture (as the most severe form), inhuman and degrading treatments (lesser degrees of torture), because even if they have no a physical materialisation in physical suffering and humiliation, it is enough for the right to moral integrity to be violated.

Special protection of moral and physical integrity against domestic violence:

- Act 27/2003, order of protection for victims of domestic violence,
- Act 1/2004, measures against gender violence.

In the case of a hunger strike, can the public system force somebody to eat? This inevitably concerns the availability of life itself, but also the right to physical and moral integrity (with subsequent state obligations to protect them). Does a person really have the freedom to decide to threaten their own life or body? The Spanish Constitutional Court had to deal with this hard-hitting question in CCJ 120/1990 when prisoners from a terrorist organisations went on a 'hunger strike until death' to rebel against changes in prison conditions that made it mandatory to provide medical assistance to prisoners who went on a hunger strike when their life was considered in danger. In this case the forced feeding via intubation was not considered a violation of the right to physical integrity, nor a practice of torture or inhuman or degrading treatment because *"in itself, it is not*

ordered to inflict physical or psychological illnesses or to cause damage to the integrity of those who are subjected to them, but to avoid, as long as medically possible, the irreversible effects of voluntary starvation, serving, where appropriate, palliative or lenitive of their harmful to the body and brain".

2. FREEDOM OF THOUGHT ('IDEOLOGY') AND RELIGION

Art. 16 SC recognises that: *"Freedom of ideology, religion and worship is guaranteed, to individuals and communities with no other restriction on their expression than may be necessary to maintain public order as protected by law"*, and that *"no one may be compelled to make statements regarding his or her ideology, religion, or beliefs".*

Ideological and religious freedom can be understood in terms of what one preaches (expressing own world views, morals, or religious beliefs) or what one manifests through way of life, gestures, or behaviour (e.g. wearing a hijab, a crucifix, or refusing medical treatment on grounds of religious beliefs).

Religious freedom corresponds to a more transcendent and collective aspect of ideological freedom. Religious freedom has been regulated by Fundamental Legislative Act 7/1980 of 5 July, on religious freedom, and has been developed by a multitude of royal decrees and other ordinary acts. As regards the fundamental legislative act, a few aspects should be highlighted. Because this right is both an individual and a collective right (as both individuals and legal entities are beneficiaries or holders of these rights): the limits to these rights is the guarantee of legally protected interests, specifically public order. The Constitutional Court has adhered to a strict interpretation of the public order clause, which will only be invoked when a certain danger to public safety, health, or morality is clearly portrayed (CCJ 46/2001).

In addition to the ideological, religious, and cult liberties, although freedom of conscience is not expressly included, it is considered to be included as one more aspect of those, from which the question of whether conscientious objection should be included is opened. Conscientious objection is configured as the power to oppose, for ideological reasons, the fulfilment of duties established in a general way by the order. The constitution refers to this objection with respect to military service (Art. 30.2 SC) and the so-called 'conscience clause' of journalists (Art. 20.1 d) SC), but the doctrine of the Constitutional Court has also recognised the objection of doctors and health personnel in relation to the voluntary termination of pregnancy (CCJ 53/1985), and for pharmacists (CCJ 145/2015), and for

practices related to assisted reproduction (CCJ 116/1999). Conscientious objection is not generally admitted, however, nor is refusing, for example, to be part of local election monitoring teams, or the so-called 'tax duty objection'.

However, the most dramatic cases of conflict between rights are those in which ideological or religious beliefs are in contradiction with other fundamental rights, particularly with the right to life, where a balance needs to be found to make them compatible, or, in cases of a true clash, such rights need to be weighed and interpreted on the principle of proportionality (among other concepts).

3. HONOUR, PRIVACY AND OWN IMAGE

Although they are all recognised in art. 18.1 SC, they are three distinct and independent rights: *"there are three autonomous and substantive rights, although closely linked to each other, such as personality rights, derived from human dignity and aimed at the protection of the moral heritage of people*", (CCJ 14/2003). However, regardless of their independence, they may find themselves being violated simultaneously, especially through the exercise of the freedom of expression and the right to information (e.g. news outlets, newspapers or sharing information in social media). This is why balancing these conflicting fundamental rights is a daily task of civil courts and the Spanish Constitutional Court.

3.1. Right to honour

The right to honour is recognised in art. 18.1 SC and indirectly recognised in art. 20.4 SC. Obviously honour is quite an abstract and relative concept as it is intrinsically linked to a particular perceived quality of worthiness, respect, social standing, and therefore directly related to notions of reputation and fame. What is honourable, who has honour, or what threatens our honour, will vary from person to person. Honour has a personality-based nature as the maximum reflection of our moral and personal patrimony (CCJ 46/2002).

Of course, it is easy to understand the many threats our honour faces in light of our existence in a community. We could try to define honour as the 'personal dignity reflected in what people feel or think about us or how they consider us to be', (SCJ of 10-12-2008). In fact, this fundamental right has two dimensions: external in terms of fame, prestige or

esteem that others have about us (CCJ 223/1992); and internal in terms of self-esteem or how we perceive ourselves (CCJ 85/1992).

Like most personal rights, and as a 'fundamental right' conferred with special legislative protection via a fundamental legislative act, honour has been legally developed via Fundamental Legislative Act 1/1982 on civil protection, right to honour, privacy, and image. In its art. 7 we find what type of threats the right to honour can face which would cause its violation: "imputation of facts or manifestation of value judgments through actions or expressions that in any way injure the dignity of the person, undermining their fame or threatening against their self-esteem".

Dissemination or disclosure of offensive information is not a requirement for the violation to take place if the offence is serious enough, which means that whenever there are insulting, defamatory, or vexatious expressions (CCJ 216/2006), and that these can happen in the context of the workplace (SCJ 30-10-2008). Also, the right to honour can be violated by a single extreme offence, or by continued lesser offences systematically elongated in time.

3.2. Right to privacy

This right is directly recognised in art. 18.1 SC and indirectly recognised in arts. 18.4 and 20.4 SC. This fundamental right only applies to individuals and is NOT recognised for legal entities (CCJ 257/1985). This right has also been developed by Fundamental Legislative Act 1/1982 on civil protection, right to honour, privacy and own image, and states which are illegitimate interferences with this right. We must differentiate aspects of privacy, as this term is used interchangeably with other similar terms and other fundamental rights and legal translations are not always the best.

- Privacy as 'intimidad' (personal privacy)

Understood as the most reserved sphere of the person (CCJ 231/1988), and considered to be intrinsically linked to personal development and dignity (CCJ 127/2003). As part of the core of dignity and the free development of the personality, it becomes the right to exclude others from invading said sphere (whether such interference comes from the knowledge of personal information, or whether it comes from the illicit dissemination of said information (CCJ 142/1993). It includes spiritual, intimate/sexual, corporal privacy (CCJ 110/1984, 231/1988 & 197/1991), and even genetic privacy.

There are various conceptions of personal privacy:

- Sphere theory: human person as a centre of activities/spheres around which he develops. Said activities are of varied nature (public, private, intimate) and as the circle gets smaller, the more that core privacy needs to be protected.
- Mosaic theory: a human is not defined by a single piece of private information about him/her, but is the recompilation of many single pieces of private information that make the puzzle or mosaic complete.

These theories help us understand the many layers of privacy: it could be in terms of the body (whether in relation to body searches, sexual harassment, or the use of genetic information), it could also be in terms of private or intimate behaviour (whether regarding religious customs, personal preferences, or personality habits/quirks), in terms of direct or indirect personal information. The Spanish Constitutional Court has stated that: "*right to privacy is linked to the most reserved sphere of the person, to the personal sphere that they want to always preserve from the eyes of others, or from which they wish remains hidden from others because it belongs to their most private sphere* (CCJ 151/1997) or even as a '*right to an inaccessible core of confidentiality*' or to be left alone, and even recognised for those that are most exposed to the public (STC 134/1999).

However, as with most rights, there are justified exceptions to interfering with this right.

- Privacy as 'vida privada y familiar'

Privacy, as the right to be left alone (having a particular private sphere unknown to others) has both a personal and a relational component (who I wish to spend my time with, and what I do with them should be none of anyone´s business). Hence, the right to privacy, must also protect the most obvious relationships that an individual has – including family life and family-based information (CCJ 197/1991). Privacy, according to the constitutional precept itself, is recognised not only for the individual considered in isolation, but also for the family nucleus (CCJ 231/1988), and extends even to the home, for example, when it relates to external threats (noises or smells) that illegitimately enter the home as a private space (CCJ 199/2001 & 16/2004).

3.3. Right to own image

This safeguards external projection of self-image from unwanted use or interference (CCJ 156/2001), or in other words, the right to determine which graphic information generated by one´s physical traits can have a public dimension (CCJ 81/2001 & 139/2001). This right is also developed by Fundamental Legislative Act 1/1982 which allows for the renouncement of this right (contrary to the other personality-based rights).

Other interesting aspects to highlight are:

- Own image includes physical image, voice, name, and other defining features that are inherent and characteristic to that person. It is, essentially, the power to freely decide on the use of the photographs, images, caricatures, recordings, filming, etc. that enables individuals to decide which part of themselves they wish to show to others.
- Hidden cameras that record own images in the context of journalism, or for profit, are not allowed (CCJ 12/2012).
- Recording and use of own image is allowed without consent when in public spaces, and for police investigation.

4. INVIOLABILITY OF THE HOME.

Art. 18.2 SC: *'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'.* Much like the right to privacy, the right to the inviolability of the home protects its sanctity. The notion of home has been defined by the Spanish Constitutional Court as: '*a space in which the individual lives without being necessarily subject to customs and social conventions and exercises his/her most intimate freedoms*', (CCJ 22/1984). This right is recognised for both individuals and legal entities and covers a much wider scope than the notion of home/domicile in civil or tax matters

- Individuals
    - Dwellings, second homes (beach house / 'la casa del pueblo'), caravans/RVs, hotel rooms, private offices (CCJ 10/2002).
    - ~~Jail cell~~ (CCJ 11/2006).
    - ~~Closed spaces such as warehouses, commercial or local offices, factories~~ (CCJ 171/1989).
- Legal entities (CCJ 137/1985 & 69/1999)

- Home for an undertaking/institution/organisation is the space where its main activities are carried out.
- Business premises where the main documents are kept.

For the violation of this right to be admitted, physical penetration is not necessary; even interferences carried out through visual or auditory devices are understood as infringement of this right (CCJ 22/1984).

The SC indicates three situations in which home entry and seizure is admitted:

- with consent of the holder: not necessarily the legal owner but any person that resides in the home (CCJ 22/2003).
- with judicial order (warrant): legally reasoned and proportional/limited in scope depending on the purposes of said violation (CCJ 139/1999).
- in cases of flagrant crime (confirmed in CCJ 341/1993 & 94/1996).

To these we must add another, that although not constitutionally considered in this provision is equally admissible, given its characteristics: the situation of urgent need, such as that which occurs in cases of catastrophe, imminent ruin, or other similar situations to avoid imminent damage and serious threat for people or things (recognised both in Fundamental Legislative Act of 2015 on Citizen Security Protection & in cases of state of alarm, emergency, & siege (Art. 55 SC).

5. SECRECY OF COMMUNICATIONS

Art. 18.3 SC establishes that: *'Secrecy of communications is guaranteed, particularly regarding postal, telegraphic, and telephonic communications, except in the event of a court order*'. It is no longer just an individual right and guarantee of individual freedom, but a collective cultural, scientific, and technological development of humankind (CCJ 132/2002). It is different from the right to privacy and the right to data protection, although closely connected to them.

- Protects against public and private interferences (CCJ 114/1984).
- Violation occurs not only with the interception of communications, but also with the extraction and unlawful knowledge of its content and the identity of its interlocutors (CCJ 123/2002, 56/2003, 230/2007).

- Although the constitutional provision only mentions postal, telegraphic, or telephone communications, we have to interpret this provision in a teleological way (114/1984) and in the most favourable and general way, so as to include new forms of communications such as SMS, web chats, apps, online platforms, and other newer information technologies (CCJ 104/2006).
- Telephone interceptions only for the persecution of serious crimes (CCJ 32/1994, 14/2001 & 202/2001) and in any case with a judicial warrant.

6. PROTECTION AGAINST USE OF DATA PROCESSING

6.1. Introductory remarks and relevant instruments

The accelerated pace of information and communication technologies has marked and radically changed the scale and manner in which data is exchanged and used, thus transforming the economy and society. Technological advances and, more specifically, digitalisation, have created a new socio-digital reality and has favoured the storage, processing, and massive transmission of information. Among the main elements of the digital age worth highlighting are: the disappearance of distance between space-time in both creation and diffusion of contents; developments of search engines; and the rise of information freedoms as a direct consequence of the widened threshold of public tolerance regarding online privacy invasion.

A globalised, digitalised, and increasingly advanced world, brings diverse problems due to the complexity and infinity of the possibilities it offers. The importance that technological development has acquired is undeniable, but the massive storage, processing, and dissemination of information presents a potential risk for individual fundamental rights. This new digital reality poses real problems with respect to the protection of fundamental rights, such as the right to honour, the right to a private and family life, the right to privacy, the right to own image, the right to data protection, and, more generally, it can take its toll on free development of the personality and human dignity. It is easy to understand growing concerns for the potential use of information available on the internet, at a time of rapid technological and human development, in which the free and direct access to the web is an almost inescapable reality and in which there is a massive use of its contents. Hence, the approach of the legislative and the judiciary to extend protection and guarantee mechanisms. However, new threats generated by this new ever-changing reality pose constant challenges on how to

effectively regulate data protection. In this regard, Spain has experienced decades of progress in regulatory development of digitalisation, in general, and data protection, in particular, reflected both in its legislation and case law, and this is substantially thanks to advancements at the European level.

Respect for private life and its values is deeply rooted in civil law traditions and is, in a way, inseparable from the existence of liberty and dignity. The content of linked and already-recognised fundamental rights (such as the right to honour, private life, personal privacy, own image, etc.) did indeed serve as justification for the legal positioning and enshrinement of the right to data protection as a fundamental right competing with other rights, freedoms, and interests. The right to the protection of personal data has been explicitly recognised as a fundamental right at a European Union level, established in art. 8 of the CFREU and its nature and scope has been interpreted by the Court of Justice of the European Union (CJEU), and indirectly recognised in art. 8 of the ECHR by the ECtHR as an intrinsic part of the right to respect of the private life.

Relevant international and European instruments that have played a role in the recognition and interpretation of the right to data protection in Spain are, among others:

- OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data of 1980.
- Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108) of 1981 and its recent modernisation of 2018 (Convention 108+): it remains the only legally binding international instrument on data protection; and secondly, it constitutes a key step in the development of substantive law, since it alludes to the relationship between the processing of personal data and constitutionally protected concepts, such as private life, and although no definition is given, it also lays down criteria and principles ensuring a high level of protection for personal data.
- Art. 16 TFEU gives new general legislative competence to regulate data protection matters at the EU level.
- Art. 8 CFREU: not only expressly recognises a right to the protection of personal data (first paragraph), but also refers to key data protection principles (second paragraph) and guarantees their application via an independent regulatory authority (paragraph 3).
- Directive 95/46/EC (Data Protection Directive) most important and legally binding *de minimis* norm until 2016.

- Current General Data Protection Regulation 2016/679 (GDPR, hereinafter) repeals, updates, and replaces the Data Protection Directive

The coming into force of the GDPR entailed a total reform of the outdated content of Fundamental Legislative Act 15/1999 on the protection of data – and which can now be found in Fundamental Legislative Act 3/2018 on data protection and digital guarantees ('Spanish Data Protection Act', from now on).

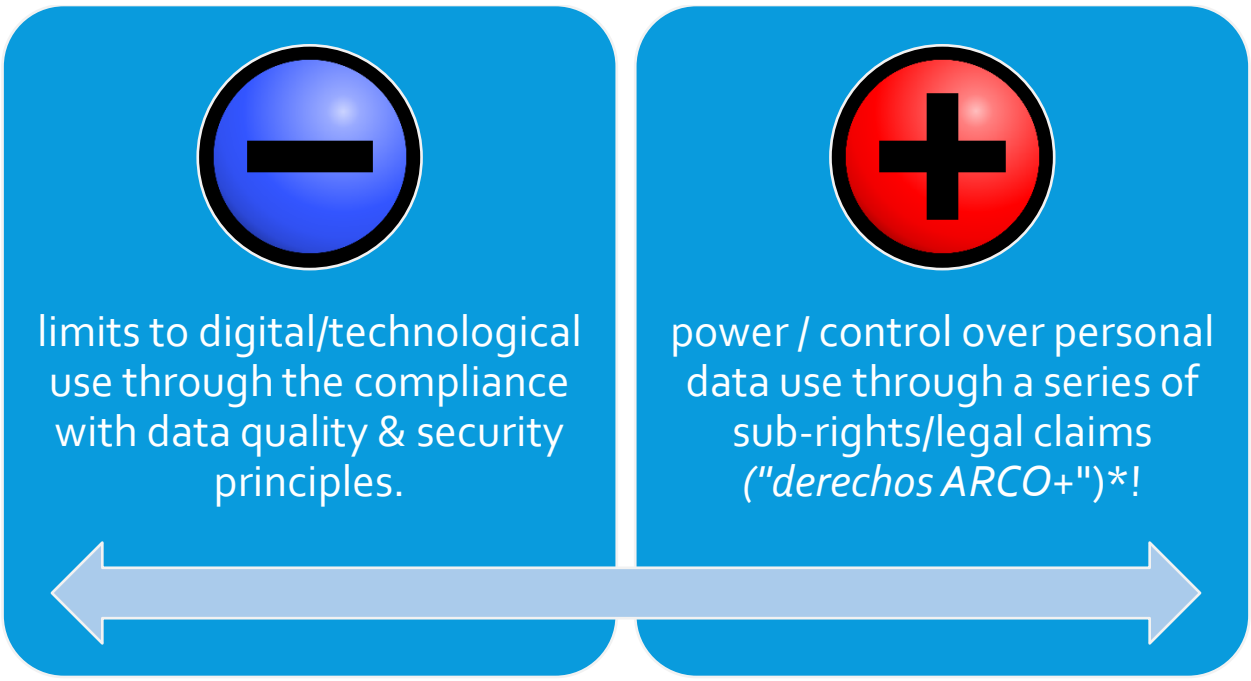
6.2. Data protection in Spain

- Initial recognition

The right to data protection has been enshrined in the SC since its adoption, however it is not expressly recognised as such. Art. 18.4 SC establishes that: *'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'*. Given the vague nature of this constitutional provision, the Spanish fundamental rights system first clarified and guaranteed this right via jurisprudential interpretation. The Spanish constitutional has considered this right to restrict the use of data processing to protect people as a new constitutional guarantee, and as an emerging and independent right to have control over personal data (CCJ 254/1993), in other words, the right to decide what data is shared, used, or stored by whom, when, where and why. The right to data protection in Spain has also been called *libertad informática* (CCJ 202/1999), the right to informational self-determination (Murillo de la Cueva, 1993 & 1999) and the right to informational privacy (*intimidad informática*) although data protection and privacy are technically two distinct and independent rights (CCJ 11/1998), and data protection goes beyond privacy (CCJ 292/200), although they are interconnected given the indivisibility of rights. In the case of the Valencian Region, there is a specific law that guarantees the protection of minors with respect to digital technologies: Act 12/2008 on the integral protection of young children and adolescents.

- Essential content

The essential content of this right was first defined in CCJ 290/2000 and 292/2000, and has been subsequently clarified in a negative and positive dimension.



- Important definitions

- Personal data: *"any information relating to an identified or identifiable individual ('data subject'); an identifiable individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that individual"*, (Art. 4.1 GDPR).

- Data processing: *"any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction"*, (Art. 4.2 GDPR).

- Special categories of personal data (sensitive data): *"personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of*

uniquely identifying an individual, data concerning health or data concerning an individuals's sex life or sexual orientation", (Art. 9.1 GDPR).

- Legitimacy/lawfulness of data processing

When at least one of the following is present/applies:

- the data subject has given consent to the processing of his or her personal data for one or more specific purposes;
- processing is necessary for the performance of a contract to which the data subject is party, or in order to take steps prior to entering into a contract (at the request of the data subject);
- processing is necessary for compliance with a legal obligation to which the controller is subject;*
- processing is necessary to protect the vital interests of the data subject, or of another individual;
- processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;*[3]
- processing is necessary for the purposes of the legitimate interests pursued by the controller, or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require personal data protection, in particular where the data subject is a child.

* This could be cases relating to the investigation/persecution or conviction of crimes. However, we must also take into consideration that there is a special instrument that regulates data protection in the context of police and judicial investigations: EU Directive 2016/680 on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection, or prosecution of criminal offences, or the execution of criminal penalties, and on the free movement of such data. Among other things, the directive establishes that member states shall provide for processing to be lawful only if and to the extent that processing is necessary for the performance of a task carried out by a competent authority for the aforementioned purposes, and the objectives or processing, and particular purposes must be specified. As regards sensitive personal data, processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying an individual, data concerning health, or data concerning an individual's sex life or sexual orientation, is only allowed where it is strictly necessary, subject to appropriate safeguards for the rights and freedoms of the data subject, and only where it has been authorised by EU or Spanish law (so as to protect the vital interests of the data subject or third persons; or where such processing relates to data which are manifestly made public by the data subject).

- Nuances & novelties of the Spanish Data Protection Act of 2018

The GDPR is generally and directly applicable in Spain, without need for transposition (national implementing measure). However, given the major legislative reform that had to take place so as to conform with EU legislation, the Spanish legislator decided to draft and adopt a new Fundamental Legislative Act 3/2018 on data protection and digital guarantees. Although there is considerable direct remission/referral to the European regulation, this act included a number of interesting novelties, such as:

- right to a digital will and right of the deceased person to be forgotten (Art. 3)
- minors' consent legal from 14 years, and change from 'parents' to 'holders of *patria potestas* or guardianship,' (Art. 7)
- specified rights such as the right to digital education (Art. 83), the right to web neutrality (Art. 80), the right to be forgotten (Art. 90), and the right to digital shutdown in the context of work (Art. 88)
- inclusion of a DPO (Art. 34-38)
- more severe penalties for unlawful data processing or security breaches (arts. 70-78)

6.3. Most recent constitutional developments:

- The right to be forgotten

The right to be forgotten (also called the right to erasure or the right to delete), as part of the positive content of the fundamental right to data protection is defined as the right to obtain from the controller the prompt erasure of personal data concerning him or her. The controller must erase personal data without undue delay where one of the following grounds applies: (a) the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed; (b) the data subject withdraws consent on which the processing is based on contract-based obligations and where there is no other legal ground for the processing; (c) the data subject objects to the processing and there are no overriding legitimate grounds for the processing; (d) the personal data have been unlawfully processed; (e) the personal data have to be erased for compliance with a legal obligation in EU or member state law to which the controller is subject; (f) the personal data have been collected in relation to the offer of information society services (Art. 17 GDPR).

This right has been recognised in Spain at the ordinary judicial level (Provincial and National Courts as well as the Supreme Court) since the *Google Spain* case of 2014 whereby the CJEU included, as the right to be forgotten, the right to de-list links to browsing search results based on a generalised name search when the information is obsolete, irrelevant, or no longer relevant due to the passing of time. However, as far as its Spanish constitutional confirmation, this did not happen until 2018. The Spanish Constitutional Court with CCJ 58/2018:

- directly connects the right to be forgotten with the fundamental right to data protection, interpreting it as one of its main facets, and therefore also as an autonomous and fundamental right intrinsically inherent to personal freedom, personal development, and human dignity, and necessary for the protection of other personal rights;
- reminds that de-linking information (deleting links) does not erase the information contained therein (it is not censorship as the original source still exists and is accessible) but just makes it a little harder to find/automatically access via a generalised search on Google;
- makes a balancing test with other conflicting rights (such as freedom of expression and right to information) by stating that informational freedoms will only triumph when there is true public and social interest in knowing the personal data shared;

- Other interesting cases

- data protection and the processing of information relating to political opinion/ideology? CCJ 76/2019.
- illegal occupation (squatters – *ocupas*) of the dwelling and data protection? CCJ 32/2019.
- electronic monitoring in the workplace, data protection, and dismissals? CCJ 39/2016.
- data protection in police/judicial matters? CCJ 135/2014.

7. FREEDOM OF RESIDENCE AND MOVEMENT

These are recognised in art. 19 SC: *"Spaniards have the right to freely choose their place of residence, and to freely move about within the national territory. Likewise, they have the right to freely enter and leave Spain subject to the conditions to be laid down by law. This right may not be restricted for political or ideological reasons"*. In fact, the Spanish Constitutional Court has recognised FOUR distinct rights as part of art. 19 SC (CCJ 72/2002):

- right to freely choose place of residence
- right to freely move about in Spain
- right to freely enter Spain
- right to freely exit/leave Spain

From a literal interpretation of this constitutional provision, we would assume that only those holding Spanish nationality have the fundamental **freedom to move** where they wish within Spain (CCJ 53/2002), and subsequent obligation of public authorities not to restrict or impede said freedom (Art. 139.2 SC & CCJ 8/1986). However, non-Spaniards have this freedom with nuances as per international, European, and national provisions and, everyone can have this freedom limited under certain circumstances.

The Spanish Constitutional Court has recognised a limited freedom of movement of non-Europeans (CCJ 94/1993 & 242/1994). The current regulation of the freedom of movement of foreigners is found in art. 5 of Fundamental Legislative Act 4/2000 on the rights and freedoms of foreigners in Spain and their social integration (which has been extensively modified and updated in the last decade – R.D. 1162/2009 being especially important) and equates both freedom of movement and of residence at the same level as Spaniards as long as the contrary is not established in national law and international treaties. The CCJ 259/2007 and 256/2007 brought about a legal change whereby only in exceptional circumstances, for reasons of public security and interest, and always with proportionality, limits can be imposed on this right, including the use of *'alejamiento de fronteras o núcleos de población concretados singularmente'*. In addition, rejection of or administrative impediments to foreigners with regards the entry into the Spanish territory does not violate the freedom of residence (CCJ 72/2005).

As regards **freedom to choose residence**, there are a few aspects to highlight:

- European citizens have special requirements to be able to freely reside in Spanish territory – although they are easily complied with and once done are once indefinitely valid: after three months in Spain, a national from another EU member state may be required to register residence with the relevant authority (often the town hall or local police station), and be issued with a registration certificate. For this all that EU citizens need is a valid identity card or passport and in case of **:
    - Employees / postings: certificate of employment or confirmation of recruitment from an employer
    - Self-employed: proof of status as self-employed
    - Pensioners: proof of comprehensive health insurance or proof of means of support without needing income support: resources may come from any source
    - Students: proof of enrolment at an approved educational establishment, health insurance and declaration of sufficient resources

  Also, special provisions for family members (as per the European right to family reunification).

- For foreigners:* special case with asylum seekers as per Act 12/2009: those having been recognised under this international protection have the right to not be returned to their home country (part of freedom of movement) and to obtain authorisation to live and work in Spain (freedom of residence).

8. RIGHT TO MARRY

It is recognised in art. 32 SC: *"1. A man and woman have the right to marry with full legal equality. 2. The law shall make provision for the forms of marriage, the age and capacity for concluding it, the rights and duties of the spouses, the grounds for separation and dissolution, and their effects".*

The inner framework of the origin, dissolution and other aspects related to marriage are regulated in the Spanish Civil Code – which recognises a free choice type of marriage and

** https://europa.eu/youreurope/citizens/residence/documents-formalities/registering-residence/spain/index_en.htm
*For foreigners: you will touch upon this in the 4th academic year, but in case of curiosity, see:
http://www.interior.gob.es/web/servicios-al-ciudadano/extranjeria/regimen-general/entrada-requisitos-y-condiciones
http://www.interior.gob.es/web/servicios-al-ciudadano/extranjeria/regimen-general/estancia
http://www.interior.gob.es/web/servicios-al-ciudadano/extranjeria/regimen-general/residencia-temporal &
http://www.interior.gob.es/web/servicios-al-ciudadano/extranjeria/regimen-general/centro-de-internamiento-de-extranjeros

agreements with the main religious federations recognised in Spain. The constitutional provision, nevertheless, expressly recognises full equality of spouses in the private relationship product called a marriage (confirmed by CCJ 45/1989 & 159/1989).

Also, the Spanish legal order recognises:

- the right to marriage of same-sex couples as per Act 13/2005 on same-sex marriage in Spain (confirmed by CCJ 198/2012) and the right to divorce
- the differentiation between marriage (whether religious or civil) and *de facto* unions (CCJ 184/1990, 214/1994 & 92/2013) has recognised the legitimacy & some protection of *de facto* relationships or *more uxorio* cohabitation (CCJ 92/2013) as reflections of personal freedom and autonomy.