

I. Introduction

As a result of this congress, we have had to look at human cloning from a new perspective. Usually, consideration of this issue centres on whether it should be banned or not. The predominant view is that it should indeed be prohibited, although there is no shortage of dissenting voices. One of the arguments used by a minority against prohibition is that if science is capable of carrying out human cloning, sooner or later it will take place. Against this argument, we could resort to Leon Kass's statement of 20 years ago: «Among men of sensitivity, the capacity to clone a human being would never be a sufficient reason for doing so. In fact, among men of sensitivity there would be no human cloning».¹ Let us suppose however, that mankind is insensitive and that human cloning has become a reality. How should the Law approach this new situation?

The Spanish legal system, embracing the majority opinion, bans human cloning. Law 35/1988 on assisted reproduction made provision for its penalisation by an administrative sanction in article 20.2.B, sub-sections k and l. The 1995 Spanish Penal Code, in its additional clause n.º 3, amended this law by eliminating, among others, sub-sections k and l. In their place it established, in article 161.2, that those guilty of creating identical human beings by cloning or other methods with eugenic purposes would be punishable by prison sentences of between one and five years and special disqualification from public office or employment for between six and ten years.

It would seem necessary then to examine the penal implications that might arise from cloning and also the problems of paternity which would be likely to appear. My paper will not concern these issues. Other papers presented at this congress will, no doubt, dwell more extensively on them. My paper will concern another area. We have just supposed that human cloning has already taken place. Let us now imagine that the Spanish legislator, faced with a *fait accompli*, chooses to set aside the views of the international community and decides that certain cases of

1. See George H. HIEFFER, *Bioética*, Editorial Alhambra, Madrid, 1983, p. 224.

human cloning should be permitted. Could this legislator draft a law which would permit cloning and yet not be deemed to be unconstitutional?

1. *Cloning and unconstitutionality*

Human cloning is always argued to be an infringement of human dignity. Article 10.1 of the Spanish Constitution established that human dignity, the inviolable rights inherent to all humans, the free development of the personality, respect for the law and for the rights of others are at the foundations of political order and social harmony. Would a law permitting human cloning be in conflict with article 10.1 and other precepts of the Spanish Constitution?

In the Spanish legal system, as in other European systems, the Constitution is not only a charter which guarantees rights and liberties, it is also the bedrock which serves as the foundation of all other laws. The constitutional rules are considered to set inviolable boundaries to the activity of the ordinary legislator. A law which clashes with the Constitution is invalid, and once judged to be invalid it cannot be incorporated into the body of state laws. However, for a law to be deemed invalid by our legal system, this judgement must be emitted by a competent legal body. In our system, this competent body is the Spanish Constitutional Court. For the purpose of determining the constitutionality of a law, two types of appeal can be made to the Constitutional Court: the direct appeal, known as «appeal on the grounds of unconstitutionality», and the indirect or «incidental» appeal, known as «question of unconstitutionality».² And indeed, an appeal on the grounds of unconstitutionality was lodged against Law 35/1988 on assisted reproduction. This appeal, made by 63 Members of Parliament on 24 February 1989, was on the basis that the law infringed articles 10, 15, 18, 32, 39 and 81 of the Spanish Constitution. The Constitutional Court has still not announced its decision.

But philosophers of law tend to have the same attitude to the Constitution as Protestants do to the Bible: we hold that any citizen has the right to his own interpretation of the Constitution. Of course, the Constitutional Court is a privileged interpreter of the Constitution, but this does not mean it is infallible. We do not share the more Catholic outlook, which assigns exclusive competence to certain religious bodies with regard to the interpretation of sacred texts.³ We all have a right to form our own opinion as to the interpretation made of the Constitution by the Constitutional Court.

While we may accept that the Constitution is sacred, we do so on a provisional basis. It is important that there be free discussion among the citizens as to the meaning of the Constitution.

2. An appeal on the grounds of unconstitutionality must be lodged within three months of publication of the law and can be done by the President of the Government, the ombudsman, 50 Members of Parliament, 50 Members of the Senate, the Governments of the Autonomous Regions and, in certain cases, the Parliaments of the Autonomous Regions (article 162.1 CE). Constitutionality can also be questioned by the judiciary, when it is considered that a law applicable to a given case and on which the decision could depend, may be unconstitutional (article 163 CE).

3. See José Juan MORESO, *La indeterminación del Derecho y la interpretación de la Constitución*, Editorial Centro de Estudios Constitucionales, Madrid, 1997, pp. 232 and following.

An open society made up of constitutional interpreters means that old texts can be adapted to the emerging demands of our plural society. Therefore, I propose that we initiate a dialogue on whether legislation permissive on human cloning would in fact be in conflict with our Constitution. Put differently: human cloning is at present illegal but would legislation that permitted it in certain circumstances necessarily be unconstitutional?

2. *Types of cloning*

The terms in which I propose to view the matter include one element which is of great importance and cannot be over-emphasised: not all human cloning is the same. Under the general label of «human cloning» we find a vast range of different cases and circumstances which I feel necessary to examine carefully. Classifications are by nature arbitrary, but I believe we must draw clear distinctions between the following cases:

2.1 Cloning by somatic cell nuclear transfer. By this is meant the production of an individual human being who is identical to another, by transferring from the nucleus of a somatic cell of an existing human being to an enucleated human egg with the intention of creating a child. This is perhaps the case which is normally meant when talking about cloning. The reasons underlying the desire to have a cloned descendant can vary. In KASS's «laundry list» we find a number of them:

- a. To replicate individuals of great genius or beauty, to improve the species or to make life more agreeable.
- b. To replicate healthy individuals to avoid the risk of hereditary illnesses contained in the randomness of sexual recombination.
- c. To facilitate the birth of large numbers of individuals with the same (genetic) inheritance for scientific studies on the relative importance of innate versus environmental factors in humans.
- d. To enable sterile couples to have a child.
- e. To produce identical subjects for special uses in war and peace.⁴

2.2 Cloning by embryo-splitting as a support technique for assisted reproduction. In this case, the aim is to obtain pre-implantation embryos from other already formed embryos, and to store them in case the woman cannot provide further oocytes or finds it difficult to do so.

As can be seen from this list, there is a wide range of different types of cloning even though they all share the same generic label. In my view they are all deserving of different treatment in our constitutional debate. Is human dignity affected to the same measure in all the cases

4. See Hans JONAS, *Técnica, Medicina y Ética*, Paidós, Barcelona, 1997, pp. 123 and following.

outlined above? To answer this question, we must firstly decide what we mean by human dignity and secondly, we must examine how it could be affected in each of the cases just mentioned.⁵

II. The scope of the expression «human dignity» in legal and philosophical thought

Jurists have been forced to delimit the meaning of this expression since it appears in a number of especially important legal texts. The German Constitution of 1949, in its first article, expressly states that human dignity is sacrosanct and that all the State's power must be employed to protect and respect it. This Constitution was one of those which served as a model for the Spanish Constitution of 1978, so it is not surprising that in it human dignity also occupies pride of place. Similarly, the Constitution of Andorra of 1993, which in turn was influenced by the Spanish Constitution, proclaims in article 4 that human dignity is sacrosanct. The preamble to the Universal Declaration of Human Rights in 1948, declares liberty, justice and peace in the world to be based on recognition of the intrinsic, equal and unalienable rights of all members of the human race. In its preamble, the International Pact on Civil and Political Rights of 1966 states that the rights it defends derive from the inherent dignity of the human being. In the Agreement on Human Rights and Biomedicine of 1996, the parties to the Agreement declare, in article 1, that they undertake to protect the dignity and identity of all human beings. And finally, the White Paper to the Universal Declaration on the Human Genome and Human Rights of 1966 sets out in article 2 that all human beings have the right to have their dignity and rights respected independently of their genetic characteristics.

The concept of human dignity also occupies a central position in the context of the «aggiornamento» (modernisation) of the Catholic Church initiated by Pope John XXIII, enshrined in the 1993 Encyclical «Peace on Earth». In the *Gaudium et Spes* Constitution of the Vatican Council of 1965, during the pontificate of Paul V, there are also ample references to human dignity.⁶

1. Different conceptions of human dignity

Nevertheless, despite the frequent use of the expression, its material content has still not been clearly defined. This lack of definition, more than an obstacle, is in fact one of its advantages since it allows use of the term by different ideologies.⁷ The concept of human dignity draws on a

5. The importance of distinguishing between different cases and avoiding global condemnation of cloning in all circumstances is argued by Diego GRACIA in the article *Las lecciones de «Dolly»*, published in EL PERIODICO on 1 Abril, 1997.

6. See Miguel Ángel ALEGRE, *La dignidad de la persona como fundamento del ordenamiento constitucional español*, Universidad de León, León, 1996, pp. 22 and following.

7. Taking the discussion on the constitutionality or otherwise of the law of assisted reproduction as a reference, we can see that human dignity figures prominently as a basic argument both among defenders and opponents of the law's constitutionality.

number of different cultural traditions. Of the various world views that have made a contribution to the notion, three, to my understanding, are especially worthy of attention, the Christian, the Marxist and the liberal conceptions.

1.1 The Christian conception

In the Christian tradition, the pre-eminence of the value of «human dignity» derives fundamentally from the theory of man made in the image of God and thus possessing a special dignity. In this way, it seems right for things to be «instrumentalised» or exploited, as they are in the service of man and, at the same time, it does not permit one human essence to suppress another by exploiting it as a means to an end. The individual person cannot be seen as exchangeable or replaceable since the soul is the essence of the human individual. Humans are fundamentally equal since they are all sons of God and they have been created in his image and likeness. In the words of Kierkegaard, Man has a characteristic which other beings do not possess: in that each individual has been created in the image of God, the singular is above the general.

The problem with this conception is twofold: firstly, one must be a believer to share it; secondly, even if one is a believer the concept cannot be used as an argument to achieve ethical consensus in our plural society.

1.2 The Marxist conception

Bloch's work offers us an attempt at recognition of human dignity in the framework of Marxist theory. For Marxism Man is not a fixed generic being with immutable qualities, but rather he is a product of existing social relations. From this it is deduced that he is unavoidably subject to change and transformation. In the traditional societies the dominated class in economic terms is made up of the crushed and the oppressed, and in legal terms, the humiliated and offended. The only glimmer of a permanent quality in man is a tendency to overcome these situations of humiliation and to hold his head up high and it is this, precisely, which constitutes human dignity.⁸ Human dignity, in Bloch's view, means the effort «to hold one's head up high», which in other words, is Man's effort to establish non-alienated relations.

Again the problem with this approach is that it is closely linked to a philosophy which is not shared by the majority of society, and it is only truly meaningful when read in the context of this theoretical framework.

1.3 The liberal conception

The liberal conception of human dignity links it to a common idea in ethical thought in the Kantian tradition, namely, that Man is an end in himself, a subject and an object.

According to Kant, «in the natural system Man (*homo phaenomenon*, *animal rationale*) is an animal of little importance, and being, like the other animals, a product of the earth, he has a

8. See Ernst BLOCH, *Derecho natural y dignidad humana*, Aguilar, Madrid, 1980, pp. 156 and following.

common price (...) Now, Man considered as a person, that is, as a being with a practical-moral power of reason is above all pricing; because as such (*homo noumenon*) he cannot be valued only as a means for the ends of others, or even for his own ends, but as an end in himself, that is, he possesses a *dignity* (an absolute internal value), thanks to which he inspires *respect* towards himself among all the other rational beings of the world; he can be measured against any other member of this class and be valued on an equal footing.⁹ If Man, according to Kant, exists as an end in himself and not just as a means for whatever purposes of an external will, then we can formulate the following supreme practical principle: «act in such a way that you always use humanity, both in your own person and in the person of all others, as an end at the same time and never solely as a means».¹⁰

This approach is the one which most often serves as a basis for determining the meaning of the expression «human dignity». It has the advantage that it can be shared by both believers and non-believers. The ethical convictions of the present-day societies which developed under the influence of the Enlightenment have been strongly marked by Kant's thought, although it had to compete with a powerful adversary in the form of utilitarianism. However, whereas believers may find in Kant's ethics a rational justification for their fundamental convictions, they would be hard put to subscribe to the values of utilitarianism.

2. *Rationality as a prerequisite for human dignity*

Spiegelberg has pointed out that the expression «human dignity» is relatively recent in origin and is in fact no older than 200 years. Although many authors associate it with the Renaissance writer Pico della Mirandola and his work «*De dignitate hominis*»¹¹, the phrase «dignity of man» did not become common until the Enlightenment.¹² The word «dignity» has a number of meanings and can be interpreted with a high degree of flexibility, and the expression «human dignity» normally makes references to the minimum level of quality that every human being possesses by virtue of being human. It cannot be won or lost and it is equal for all.¹³

9. See Immanuel KANT, *The Metaphysics of Morals*, Tecnos, Madrid, pp. 298 and following. In this section, in which he speaks of the duties of Man to himself, considered exclusively as a moral being, he says that to lie «is rejection and, in a way, destruction of Man's own dignity. A man who does not himself believe what he says to another (even if only a merely ideal person) has a much lower value than a mere thing; because since the thing is real and given, someone else may make use of it to derive some benefit; but communication of one's own thoughts to another by means of words which (intentionally) convey the opposite of what the speaker thinks, is opposed to the natural end of communication of thoughts, and as such, it is to renounce personality and to be a mere appearance of man, not man himself.» See *op. cit.*, pp. 291 and following.

10. See *Fundamentación de la Metafísica de las costumbres*, 5.ª ed., Espasa-Calpe, Madrid, 1977, p. 84.

11. As can be seen in a recent article by Ignacio Sotelo, entitled *De la dignidad*, published in *El País* on 21 October, 1997.

12. See Herbert SPIEGELBERG, *Human Dignity: A Challenge to Contemporary Philosophy*, in Rubin GOTESKY / Ervin LASZLO, *Human Dignity, This Century and the Next*, Gordon and Breach, New-York, 1970, p. 42.

13. The Constitutional Court in its decision 276/1982, of 24 May, ruled that all persons have equal dignity.

However, it is not clear what the exact qualities that it entails are. Consequently, a number of authors have pointed out that it is easier to agree on the actions that breach human dignity than, the concept of human dignity itself.¹⁴ This is also true with regard to the concept in the question of cloning. We do not know exactly what we mean by human dignity; nevertheless there seems to be world-wide agreement that cloning violates it in some way. However, another source of difficulty is that there is no consensus as to who determines what a violation of human dignity is. We could perhaps defend a simple proposal: that every individual person should decide exactly what constitutes a violation of his or her dignity. The majority of scholars however, consider that the concept of human dignity must go beyond what every individual person considers harmful and that we must construct a less subjective notion of the concept, if it is to be truly useful in the legislative contexts it normally appears in.¹⁵

Determining the meaning of the expression demands that we specify the qualities in every human being which render him or her worthy of this special consideration. This special *status* of the human being as opposed to all other living beings - this human dignity, derives principally from the fact that he is a rational being.¹⁶ In certain approaches to ethics, the fact that Man is a rational being is what determines that he can be considered a moral being whereas animals cannot, since they are not rational beings.¹⁷

However, if we do not assign a moral dimension to animals because they are not rational beings, we could, based on the same criteria, refuse to assign a moral dimension to those human beings who are not rational: in which case for example, killing a baby or a senile old person would not constitute infringement of any moral law. Contractualism has lied to recognise moral rights for all human beings including those who are not completely rational, but not for animals. The argument is that if we only recognise the rights of rational beings (adult humans) it would be dangerous and would lead to abuses in that there are no precise limits between a baby and an adult, between an unintelligent adult and a mentally handicapped person and between a senile old person and another old person who is not senile.¹⁸

Given that there is a clear dividing line, in terms of external appearance, between human beings and animals but not necessarily between human beings and other human beings, it would appear to be more prudent for the welfare of rational beings to determine that moral rights are possessed by the simple fact of belonging to the class of human beings. Were the dividing line to be drawn in terms of intelligence, problems would be encountered when distinguishing among human beings,

14. See René MARCIC, *Rechtsphilosophie*, Verlag Rombach, Freiburg, 1969, p. 263.

15. See Miguel ANGEL ALEGRE, *La dignidad...cit.*, pp. 26 and following.

16. See Miguel ANGEL ALEGRE, *La dignidad...cit.*, p. 18; Regino MATEO PARDO, «La «dignidad de la persona humana» y su significación en la Constitución española de 1978 a través de la Jurisprudencia del Tribunal Constitucional» in *Escritos Jurídicos en Memoria de Luis Mateo Rodríguez*, t. I, Universidad de Cantabria, 1993; p. 345 also mentions rationality as one of the specific dimensions of the human being.

17. See Peter CARRUTHERS, *La cuestión de los animales*, Cambridge University Press, Great Britain, 1995, p. 130.

18. See Peter CARRUTHERS, *La cuestión de los animales, cit.*, p. 134.

and between human beings and animals: a chimpanzee can be more intelligent than a mentally handicapped human being. The defining physical features of human beings serve as a relatively safe basis for the delimitation of rights. The argument of *the slippery slope* says that if we deny some humans their rights on the basis of deficient rationality, it could lead to a situation in which the moral rights of certain people would be denied even though they are entitled to them as moral beings. Therefore it is preferable to accept the thesis that all human beings have moral rights.¹⁹

If human dignity is based on our rationality, then it is necessary to examine what this means rather more deeply. A rational being is an individual who holds beliefs and acts on the basis of these beliefs in order to fulfil his desires. This definition of a rational being is one which would oblige us to consider the possibility of considering certain animals as rational beings, since some forms of animal behaviour would indeed seem to conform to this model of rational behaviour. To avoid reaching this situation, it has been said that for one to hold beliefs it is necessary to first have the concept of belief, and to possess this it is necessary to have a language.²⁰

This argument has its opponents. We will not examine it in any great depth since it has been pointed out, and correctly so, that being a rational being means something more than holding beliefs and acting on the basis of these beliefs in order to satisfy desires. What really characterises a rational being, from the perspective of Contractual ethics, is that he is capable of agreeing on norms that will serve to guide his future actions. Thus, a rational being is one who can mentally represent states of events that are not purely immediate and can make a rational choice among them.²¹ In other words, a rational being is one that can not only satisfy his most immediate desires, but who can also plan for the long term.

Planning then, is one of the characteristics of rationality. But part and parcel of the concept of planning is awareness that the same set of objectives can be achieved by a number of different means, some of which may be more effective than others. Planning also includes the need to take the beliefs and desires of others into account and to proceed according to a general set of rules which are acceptable to all. While some forms of animal behaviour could be interpreted as planning, nevertheless they are not strictly speaking planned since all members of the same species seem to do it innately.²²

The qualities required then for a rational being are the capacity to make long-term plans, to represent various sets of social norms or rules and to foresee the probable consequences of the application of these norms.²³ The process of becoming a rational being is a gradual one from

19. See Peter CARRUTHERS, *La cuestión de los animales... cit.*, pp. 135 and following.

20. See Peter CARRUTHERS, *La cuestión de los animales... cit.*, pp. 150 and following. The discussion here is whether language is necessary to hold a belief. What is not questioned is that the capability to speak a complete natural language is sufficient condition for consideration as a rational being.

21. See Peter CARRUTHERS, *La cuestión de los animales... cit.*, p. 158.

22. See Peter CARRUTHERS, *La cuestión de los animales... cit.*, pp. 159 and following.

23. See Peter CARRUTHERS, *La cuestión de los animales... cit.*, p. 169.

childhood to adulthood. However, as we have said, granting rights in proportion to the level of rationality, while theoretically possible, could lead to abuses. For this reason, we set up a wide protective perimeter enclosing all human beings.

Any moral principle which wishes to offer a stable and straightforward frame of reference for the majority of people must assign direct moral rights to all human beings. Drawing distinctions between human beings could have disastrous psychological consequences from the moral point of view. Any norm which denied the mentally handicapped or the old a moral dimension would be completely against our natural feelings of compassion for our fellow human beings, and perhaps this natural feeling would be weakened in the long term. This could have a negative effect on our concern for the suffering of rational beings.²⁴ If it is rationality which determines human dignity, it is not to be wondered at that NINO should say that the principle of human dignity states that «men should be treated in accordance with their decisions, intentions or manifestations of consent» (...) «men should be treated in accordance with these manifestations of will in that they constitute their plan of life, whatever this may be (which does not occur in cases of so-called vices of will)».²⁵

For NINO human dignity is infringed «not only when our decisions are seen as equivalent to illnesses, but also when the same thing happens with our beliefs and the opinions through which we manifest them. When someone considers us to be in need of treatment and does not see us as on the same level as his own beliefs and decisions, —such as the very beliefs and decisions which lead to his adopting this attitude to us— we perceive we are not being treated as equals since we are being denied the moral *status* which distinguishes both he and us from the other living creatures which inhabit the world».²⁶

DWORKIN links dignity with recognition of critical interests. We humans have, in common with all beings with sensory capacity, experiential interests. It is these that lead us to search for what we find attractive and pleasant and to seek to avoid suffering and pain. Critical interests, specific to Man, are thought to be linked to the deepest convictions that we hold with regard to the model of life we consider most valuable. The right of a person to be treated with dignity is basically the right that others should recognise the distinctive importance of his own life path.²⁷

Rational beings are possessors of a special dignity and for that reason they should be respected. Protecting all beings which are human in appearance is a more effective way of guaranteeing the rights of all rational beings. On the other hand, there is little consensus on whether this protection should extend to the human foetus and embryo. It would not seem likely that non-protection of the foetus and embryo would have a significant effect on infringement of the rights of a rational being. We will now turn to this old problem of the initial stages of human life from the perspective of the Constitution.

24. See Peter CARRUTHERS, *La cuestión de los animales... cit.*, p. 194.

25. See Carlos Santiago NINO, *Ética y Derechos humanos*, Ariel, Barcelona, 1989, p. 287.

26. See Carlos Santiago NINO, *Ética... cit.*, p. 289.

27. See Ronald DWORKIN, *El dominio de la vida*, Ariel, Barcelona, 1994, pp. 305 and following.

III. Human dignity in the Constitution

The provisions of the Spanish Constitution with regard to the meaning and functions of human dignity were based on the work of the German constitutionalists. Indeed, this is not surprising since it was the Fundamental Law of Bonn which served as the model for the Spanish Constitution of 1978. In both the German and Spanish Constitutions human dignity is a basic principle underlying the entire legal and political system. Other principles were also enshrined in the Constitution, but the predominant consensus is that human dignity takes pride of place.²⁸

1. *Human dignity and fundamental rights*

For DÜRIG, human dignity expresses a material specification which is independent of space and time, which consists of considering every individual person as possessing an impersonal spirit which permits him to adopt personal decisions with regard to himself, his conscience and the structure of the world which surrounds him. According to DÜRIG, the basis of human dignity in the Constitution means that a person who is the possessor of a fundamental right cannot be treated as an object of state activity. The possessor of a fundamental right is treated like an object when he is prevented from exercising this right through the establishment of a series of preconditions which he cannot possibly fulfil, no matter how hard he tries.²⁹

Linking human dignity to the exercise of fundamental rights leads to the claim that there is a certain correspondence between both concepts. Indeed, the actual material content or meaning of these rights could be seen as identical to that of human dignity. Along these lines, the German Constitutional Court has expressly accepted that human dignity is a fundamental right. Nevertheless, another sector of legal doctrine holds that human dignity is not a fundamental right. This claim is based on article 1 itself, paragraph 3 of which establishes that the «*following* fundamental rights are binding for the public power. Human dignity is not a fundamental right since it is referred to before the word *following*».³⁰

The interpretation of the phrase «*dignity of the person*» by the Spanish Constitutional Court is similar in general terms to DÜRIG's reading. According to the Constitutional Court, dignity is a spiritual and moral value which is inherent to the person, and which is manifested especially in conscious and responsible self-determination in life itself and which brings with it an aim to receive respect from others.³¹ However, the Spanish Constitution, by stating that inherent to dignity there are several inviolable rights, stirs up the same debate as in the German case. It is a matter of determining whether human dignity in itself is a right or whether it is a value which

28. See Miguel Ángel ALEGRE, *La dignidad de la persona... cit.*, p. 42.

29. See Juan Carlos GAVARA, *Derechos fundamentales y desarrollo legislativo. La garantía de los Derechos fundamentales en la Ley Fundamental de Bonn*, Centro de Estudios Constitucionales, Madrid, 1994, p. 218.

30. See Juan Carlos GAVARA, *Derechos fundamentales... cit.*, p. 220.

31. See Constitutional Court decision STC 53/1985, FJ 8.º

serves as the basis for rights. Spanish doctrine seems to have clearly opted for the view that human dignity is not a right, but rather it is the basis underlying all rights. The Constitution draws a clear distinction between dignity and rights as separate entities.³²

Much debate also surrounds the issue of the rights that are inherent to human dignity. Spanish doctrine normally tends to identify those rights as the fundamental rights of section 1 of the second Chapter of Volume 1. That is, the only rights which are inherent to the person are those set out in articles 15 to 29 (and also article 30 which refers to the right to conscientious objection). These rights are specially protected in the Constitution through its provisions for appeal on the grounds of unconstitutionality to the Constitutional Court.

There are, nevertheless, scholars who point out that this association is overly strict and that it should be extended to all the content of Volume 1, since article 10 presides over and is the heading for all of Volume 1. Therefore, the inviolable rights of the person are not just the fundamental rights», which can be safeguarded through an appeal on the grounds of unconstitutionality,³³ rather, we would have to consider not only the so-called political rights» as inviolable, but also economic, social and cultural rights. This interpretation is borne out by the Universal Declaration of 1948 which sets out in article 22 that every person, as a member of society, has the right to (...) satisfy his or her economic, social and cultural rights, indispensable to his or her dignity and to freely develop his or her personality». This wider conception leads ALEGRE to hold that the inviolable rights inherent to the person as consequent on human dignity are those the infringement of which is an attack on personality or against personal development.³⁴

It is possible to defend a broader conception of the rights which are inherent to human dignity and which extends beyond fundamental rights. Nevertheless, it must be borne in mind that only the infringement of a fundamental right is entitled to the special protection accorded by the possibility of an appeal against unconstitutionality. Therefore, since in our catalogue of fundamental rights there is no direct reference to the right to dignity, the Constitutional Court has rejected many appeals which did not cite a specific infringement of fundamental rights but rather a generic offence to personal dignity.³⁵ Furthermore, the Constitutional Court also sets out that not all restrictions of these fundamental rights necessarily involve an infringement of human dignity.³⁶

32. See Miguel Ángel ALEGRE, *La dignidad de la persona... cit.*, pp. 81, 118.

33. See Miguel Ángel ALEGRE, *La dignidad de la persona... cit.*, p. 45.

34. See Miguel Ángel ALEGRE, *La dignidad de la persona... cit.*, p. 51.

35. See Constitutional Court decision STC 64/1986, 21 May, which expressly states that article 10.1 cannot serve as the basis for an autonomous appeal in accordance with article 53 of the Constitution. To lodge an appeal, it must be specified which of the rights set out in article 10.1 is alleged to have been infringed.

36. Constitutional Court decision STC 120/1990, 27 May, which justifies the restriction of freedom of movement and other associated freedoms of prisoners. This decision declared the constitutionality of the decision to force-feed GRAPO prisoners who were on a hunger strike.

With regard to determining the rights which are inherent to the dignity of the person, there are a number of options: a) only some of the fundamental rights set out in Section 1 of Chapter II in Volume I ; b) all the fundamental rights of Section 1 of Chapter II of Volume I, although restrictions may be established as to their exercise in some cases; c) all the fundamental rights set out in Volume I. The Constitutional Court's position is not clear since different decisions have linked different rights to the concept of dignity.

Decision 53/85, handed down on April 11, on an appeal on the grounds of unconstitutionality against the Law of Voluntary Interruption of Pregnancy, is especially significant in this matter. It declares the right to life, the right to free development of the personality, the rights to physical and moral safety, freedom of thought and belief, the right to honour, personal and family integrity and good name, to be all indissolubly linked to human dignity. These rights which are inherent to the person are not necessarily linked to one's status as a citizen, rather they would be the natural entitlement of all human beings. Therefore, they are held both by Spaniards and foreigners. Decision 99/85, emitted on October 30, added another right to all those mentioned above: the right of all persons to receive legal protection. This sentence seems to take the view that the rights which are inherent to human dignity are the fundamental rights of the liberal tradition.

However, in other sentences the Constitutional Court links the concept of personal dignity with other non-fundamental rights. Thus, decision 113/89, read on June 22, established that the limits that should be set to the rights of the creditor to seize certain assets of a debtor deriving from a firm sentence, are based on the concept of respect for human dignity. Rights to property and wealth may not be exercised if this leads to depriving the debtor of the wherewithal to continue his own personal life, including such rights as the protection of his family, the maintenance of his health and the right to a dignified and adequate dwelling, all of which are enshrined in the Constitution (articles, 39, 41, 43 and 47). These social rights serve as complements to the political rights as rights which are also intrinsic to human dignity.

2. *The person as entitled to the rights which are inherent to dignity*

In so far as we are dealing with the dignity of the person and the rights which are inherent to this dignity, we must face the matter of defining what we mean by person. In our legal codes, the most explicit reference to the concept of person is found in article 29 of the Spanish Civil Code, which establishes that birth determines personality. Certain sectors of legal doctrine consider that this private rule cannot be brought to bear on the interpretation of the provisions of the Constitution. Private law is subordinated to the Constitution, and the Constitution, they hold, does not support a conception which would construe dignity as being acquired from the moment of birth. The person, they claim, is possessor of human dignity from the *beginning of his or her life*, and birth is not the beginning of a life, rather it is a phase in a life which has begun earlier.³⁷ The concept of person as set out in the Constitution, they argue, is based on the fact that all

37. See Miguel Ángel ALEGRE, *La dignidad de la persona... cit.*, pp. 49, 88 and following.

human beings are entitled to human rights, and as such they are persons in the legal sense. This legal category of person cannot be denied to any human being. Every member of *homo sapiens* has rights, every human being is a person. The notion put forward in the Spanish Civil Code is obsolete and outdated and should only be maintained in its present form in the area of inheritance law.³⁸

However, if we accept that birth is a decisive moment with regard to personality, then the *nasciturus* cannot be seen as entitled to the rights which are inherent to human dignity. The Spanish Constitutional Court, in decision 53/1985, bears out this view. It understands life to be a process which begins with gestation, and it holds that, at this stage —gestation— life is deserving of legal protection since it is a precondition for its later life outside the mother's womb. Nevertheless, the sentence accepts that this continuum called life is subject to qualitative changes which are both somatic and physical in nature, and which are reflected in the public and private legal status of the living being. As a result, it does not recognise the *nasciturus* as possessing the right to life. The life of the unborn child is a protected value, in that according to article 15, human life is a supreme value, but entitlement to the right to life is determined by birth. According to GÓMEZ SÁNCHEZ, the following conclusions can be drawn from this decision:

- a) The *nasciturus* is not entitled to the right to life, but it is entitled to legal protection under the terms of article 15 of the Constitution.
- b) Life is a process lasting from gestation to death. However, in this process there are periods which are especially important: birth and the time when the *nasciturus* becomes capable of life outside the womb. The time of implantation is also considered of special importance.
- c) The Court does not draw a distinction between the phases of pre-embryo, embryo, and foetus in the pre-birth process, as was done by the Law on assisted reproduction techniques.
- d) The State is positively obliged to protect life through the application of penalties, though these can be omitted in certain cases.³⁹

This decision has been the object of severe criticism from those who consider that the Constitutional rulings, which are superior to Private Law, involve a concept of person which includes the *nasciturus*. They hold that the Court should also have included it in its interpretation of person and not remained trapped in the concept of person as derived from Private Law. The step backwards which this sentence represents is evaluated by OLLERO in the following terms:

38. See A. L. MARTÍN PUJALTE, «Hacia un concepto constitucional de persona», *Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol*, no. 11-12, Valencia, 1995, pp. 150 and following.

39. See Yolanda GÓMEZ SÁNCHEZ, *El Derecho a la reproducción humana*, Marcial Pons, Ediciones Jurídicas S.A., Madrid, 1994, pp. 38, 66.

«The abolition of slavery marked a milestone in the history of humanity, precisely because it seemed to put an end to the possibility that a human being could be treated as an object. The continued existence, albeit covertly, of torture and the overt apology for abortion are today a source of frustration to progress in this terrain (...). When efforts are made to consolidate our acceptance that there are human beings who are not persons, this is a retrograde dynamic which is reactionary in nature. Humanity is sacrificed by means of categorisations that were originally conceived for its defence, and ends up once again susceptible to treatment as an object. In the same era in which we boast of having achieved universal recognition of the fact that all human beings are born with equal rights, we silently accept drastic discrimination against the unborn, who are not even allowed possession of rights».⁴⁰

The Spanish Constitutional Court decision, the provisions of Private law and the systematic interpretation of the Constitution enable us to sustain the view that the *nasciturus* does not hold any of the fundamental rights recognised by the Constitution. If it does not enjoy the right to life, which is intended as an absolute, non-gradable right, then it will not have rights to physical and moral integrity or honour, and so on. Despite the criticisms levelled against it, this approach is compatible with the thesis that human beings possess a special dignity. The dignity of the person is based on his rationality and means that he must be treated in accordance with his decisions, intentions or declarations of consent. Empirically we can say that not all persons possess the same degree of rationality, but taking these differences into account could lead to cases of infringement of the dignity of rational adult beings. It is therefore considered preferable to attribute the same dignity to all human beings. In so far as all possess the same dignity, they possess the same rights. There is however, one feature which must be shared by all those granted this dignity: they must have human form.

This is how the Spanish Civil Code determines personality. Birth determines the possession of personality: fetuses born with human form and living for 24 hours outside the mother's womb are considered as persons. It is not purely arbitrary that the specific moment in time and the characteristics should be such important features. These are relatively simple and objective in nature and through them the Law establishes a clear dividing line between the non-born and the born for the purpose of the special protection afforded to the latter.

Is it reasonable that the Law should recognise this difference? Would it not be more useful to see all human life as equal independently of its specific stage of development? It would seem reasonable that the Law should establish the difference between those who are actually born and those who are conceived but never actually born, since by doing so they are reaffirming something which is widely accepted: the idea that the value of life varies according to the specific stage of development is widely accepted in our society. Indeed, this unequal valuation has been a constant feature throughout the history of religious and philosophical ideas, and similarly in the History of Law and Comparative Law. In Criminal Law the penalty for killing the unborn

40. See Andrés OLLERO TASSARA, *Derecho a la vida y derecho a la muerte*, Rialp-Universidad de Navarra, 1994, p. 23.

and the born is different, whereas killing a child receives the same punishment as killing an adult. If the life of each of these were considered to be equal, then the legislator could not permit abortion within any time limits and the laws which punish abortion less severely than homicide would have to be considered unconstitutional.

3. The legal protection of human life

The abortion debate has always been the area that has most clearly reflected the range of ideological and political positions with respect to the value of human life.⁴¹ Constitutional debate as to the scope of article 15 has made it clear that the word «all» does not necessarily include the embryo or foetus. However, it has also demonstrated that the life of the *nasciturus* also has a certain value. As has been pointed out by the Spanish Constitutional Court, human life in its formative stages is afforded constitutional protection since it is recognised as a legal value. The problems arise when we turn to the matter of determining the exact nature of this legal asset.

ARROYO ZAPATERO holds that the legal value worthy of protection is not an individual legal value, attributed to the *nasciturus* itself or the mother, rather it is a common value of all the community. Society places a value on the conceived life in that the embryo and the foetus constitute a preliminary stage prior to full life, life as a full person. Society therefore recognises in the *nasciturus* a future member, a potential reflection of itself.⁴² ARROYO ZAPATERO sees the basis of the protection of the human life in its pre-birth stage as lying in the concept of human dignity. However, this is not to say that the *nasciturus* possesses «human dignity», instead that the idea of human dignity held by society leads the legislator to protect the unborn life.⁴³ While the unborn human life may be a legal value, set out in the Constitution as derived from the concept of human dignity, it may nevertheless, clash with other legal values which are directly based on fundamental rights. Therefore, it is necessary to find a solution to this potential conflict. In the issue of abortion, the rights which contend with the life of the *nasciturus* are life, privacy, freedom and the woman's right to choose. The Spanish legislator solved this conflict by introducing conditions on when abortion can take place into the Criminal Code. Other systems have opted for the stipulation of time scales.

If we admit that the dividing line between before and after birth is important, it is not then incoherent to establish qualitative differences during the process of development stretching from fertilisation of the oocyte to birth. This is, of course, one of the arguments for the decriminalisation

41. On the subject of abortion see Santiago MIR PUIG (coord.) *La despenalización del aborto*, Servicio de Publicaciones de la Universidad Autónoma de Barcelona, Bellaterra 1983.

42. See Luis ARROYO ZAPATERO, «*Prohibición del aborto y Constitución*», in S. MIR PUIG (coord.) *La despenalización... cit.*, pp. 71 and following.

43. See Luis ARROYO ZAPATERO, «*Prohibición...*» cit., p. 72.

of abortion carried out within the first three months of pregnancy. However, it does not mean that human life is valueless for these first three months; rather it means that having weighed up the value of human life at this stage of development and the possible rights of the woman which may enter into conflict with it, the legislator opted for a simple solution so as to avoid a situation in which undoubted possessors of rights could be treated as non-rational beings.

The abortion debate is of particular interest to the cloning issue, since cloning directly affects the same protected legal value: the life of the as yet unborn but already conceived human being. In so far as it is considered a legal value worthy of protection, the legislator is obliged to establish a system of rules with a view to protecting this life in the process of development. Until recently, the protection was afforded solely by Criminal Law which punished abortion. At present, due to the scientific advances made in the field of assisted reproduction, the legislator has been obliged to regulate the first stages of development of human life. This legislation sets out to resolve the conflict between the developing human life and other rights, such as the right of procreation, the right to health, the freedom of scientific research, and so on.

IV. Human dignity and cloning

From what we have outlined, it can be seen that the dignity of the person and the inviolable rights which are inherent to the person are applicable only to persons in the strict sense of the word. Human life at the stage prior to birth does not possess rights; it is a protected legal value. Therefore, the State must establish rules for this purpose. This is what Criminal Law does, in that it punishes abortion, as does the Civil Code and the Law on techniques of assisted reproduction.

However, the unborn human life is not of the same rank as the life of those who have been born and whose rights are recognised by the Constitution. One of these rights conferred by the Spanish Constitution is the right to procreation. Although this right is not expressly recognised, there is relative consensus that it can be deduced from a number of constitutional provisions.⁴⁴ Another right, that of freedom of scientific research is expressly recognised by the Spanish Constitution (article 20). These are the rights which may enter into conflict with the protection of the unborn life.

44. According to GÓMEZ SÁNCHEZ «the right to procreation is, therefore, a reality in our Constitution, although its mere existence does not determine its range of application (...) If we base the right to procreation on freedom as a value (article 1.1) and a fundamental right (article 17.1), and on human dignity (article 10.1), and if we link it to the right to personal and family privacy (article 18), on respect for private life (article 8 of the Agreement of Rome) and on the right to have a family (article 12 of the Agreement of Rome), we must accept that this right to procreation is not absolute, just as those from which it derives are not absolute». See Yolanda GÓMEZ SÁNCHEZ, *El derecho a la reproducción humana...* cit., p. 59.

1. *The right to procreation and assisted reproduction*

We know that when assisted reproduction techniques are employed to exercise the right to procreation, certain human lives are sacrificed, for not all viable embryos are implanted and, although surplus embryos are frozen, sooner or later they will be destroyed. Similarly, to arrive at the present level of effectiveness of these techniques many embryos have been sacrificed over the years. This harm done to what is considered a legal value is seen as necessary to fulfil certain rights which the Constitution confers on persons in the strict sense.

It is precisely this damage to the unborn which leads certain sectors of doctrinal thought to argue that the right to procreation is not limitless and that, while it may be part of the content of the right to freedom, since it is a direct manifestation of the physical autonomy of the person, nevertheless it does not necessarily give the person freedom to use absolutely any reproductive technique. In this view, in so far as the techniques of artificial reproduction involve the destruction of surplus embryos, they are in breach of the protection afforded human life and are not justified by the right to procreation. The claim is also made that assisted reproduction is not in fact «human» reproduction, since it is carried out by artificial means. Human reproduction cannot be a simple matter of merely producing human beings since the human being is *something more*, and respect for dignity and integrity must take precedence over all other considerations.⁴⁵

Human reproduction then, cannot be put on an equal footing with a process which simply produces human beings. This, however, is what many of the opponents of assisted reproduction tend to do. They consider it inevitable that the use of these techniques will lead irrevocably to a situation in which human reproduction is another flourishing industry in our capitalist society or the first step toward Huxley's vision of a Brave New World. In order to gain an accurate view of the nature of assisted reproduction we must conceptualise procreation as a fundamental right. The possessor of a fundamental right is always an individual person. As GÓMEZ SÁNCHEZ points out, under no circumstances can «human beings be generated through assisted reproduction techniques without the compliance or petition of a woman, or a couple (...).»⁴⁶ No public or private entity could simply go about producing human beings. There are bodies which carry out research into human procreation; these however, are only tolerated in that they are necessary if the possessors of the right to procreation are to be enabled to exercise it. Since the right to procreation is a fundamental right, these entities could not produce human beings without the co-operation of a possessor of this right to have children. And if they cannot do so at present with the existing techniques, then they would be less capable of doing it in the case of cloning.

It is true that the use of these techniques involves the sacrifice of embryos, in other words, of human life. However, it is a matter of deciding to which we attribute a higher value: whether to human life in the first stages of development or to the right to procreation. While in the question

45. See Miguel Angel ALEGRE, *La dignidad humana... cit.*, pp. 95, 96.

46. See Yolanda GÓMEZ SÁNCHEZ, *El Derecho a la reproducción humana... cit.*, p. 61.

of abortion, the conflict is resolved by giving preference to the rights of the mother, in this case it would be reasonable to attribute more weight to the right to procreation than to the loss of human life. To me it seems more accurate to talk of human life rather than human beings or persons, as the detractors of these techniques tend to do. Human life in its earliest stages of development is substantially different to the form it later takes, both from the quantitative and the qualitative point of view. To call the cells resulting from the fertilisation of an oocyte by a sperm a «person» is to stretch the scope of the term excessively.

2. *The right to procreation and cloning*

The techniques of assisted reproduction must then be seen as a necessary instrument enabling certain citizens to exercise their right to procreation. In this light, we accept that human life in its earliest stages is placed at the service of this right. But we also know that in certain cases the techniques we employ nowadays are insufficient to guarantee success. Some women have low ovulation capacity, despite hormonal stimulation, and cannot produce the necessary oocytes to have a child. In such cases a solution would be to clone embryos and store them in case initial attempts at implantation were unsuccessful. Why do we not oppose this technique which serves as a back-up to assisted reproduction?⁴⁷

2.1 Cloning as an infringement of individuality, integrity and the right of the new human being not to know

The most common response is that this technique is an infringement of human dignity. The human dignity of the person who seeks the use of the technique cannot be infringed, since it is precisely the woman's human dignity, to which the right to procreation is inherent, that justifies the use of cloning in this case. Therefore, we must presume that the dignity which is infringed is that of the cloned embryo. What does this infringement consist of? It has been said that this infringement lies in the fact that the new being is exploited. This is the idea reflected in the Protocol to the Convention on Human Rights and Biomedicine which banned the cloning of human beings. In the legal reasoning of this text, reference is made to article 1 of the Agreement, which sets out that «Parties to the present Convention shall, protect the dignity and identity of all human beings and guarantee everyone without discrimination, respect for their integrity and other rights and fundamental freedoms with regard to the application of biology and medicine». Given that the exploitation of humans through the deliberate creation of genetically identical human beings is considered to be an infringement of human dignity, article 1 of the Protocol bans any action with the objective of creating a human being who is genetically identical to another, whether dead or live.

47. A reading of the cloning bill in the United States shows that this type of cloning is not banned. What is banned is «(1) to implant or attempt to implant the product of somatic cell nuclear transfer into a woman's uterus».

However, we cannot ignore that all assisted reproduction techniques can be seen as exploitation of the embryos in order to satisfy someone's desire to have a child. It is for this reason that it has been necessary to determine more specifically how dignity is infringed. The cloned embryo's dignity is infringed because it is deprived of its genetic individuality, being, as it is, a replica of another human being already in existence.

I do not believe that we can simply claim that genetic individuality is an integral part of human dignity and leave it at that. Through natural reproduction, individuals are sometimes born who share the same genetic identity (monozygotic twins), and I do not believe that anyone is prepared to claim that this involves an infringement or loss of human dignity. What is however, inherent to human dignity is that an individual can take decisions with respect to him or herself and the world in which he lives, and others will respect this level of self-determination. This possibility is basically conditioned by such external factors as education, economics and politics. Genetic uniqueness is undoubtedly important, but the empirical experience that we have of genetically identical individuals who have been born after natural reproduction processes should enable us to assess the importance of cultural factors in the development of individual characteristics and identity.

We can even go further and say that human cloning need not even condition the genetic individuality of future children. Let us imagine that four embryos are obtained —A, B, C, D,— all four are split giving rise to a further four —A' B' C' D'. The original A, B, C and D are implanted and after gestation, A is born. In a later implantation, B' C' D' are implanted and one of them goes on to be born. In this case, cloning the embryos would not involve any sharing of genetic identity on the part of the future child. However, if this were to happen, it would not necessarily suppose a disadvantage. As GRACIA has pointed out «there are aspects in which monozygotic twins benefit: for example, in cases of organ transplants they can interchange organs without any difficulty. Having a monozygotic sibling may lead to some disadvantages, but nevertheless there are also advantages».⁴⁸

Nuclear transfer cloning of human beings poses more problems than the previous case in that, it is claimed, it is not only an infringement of genetic individuality but it is also a case of depriving the hypothetical being of genetic integrity, since he would not have the double genetic load coming from both the father and the mother. However, we must differentiate between the importance of genetic integrity for a given individual, and its importance for the survival of the human species as a whole.

It would not appear to be reasonable to prohibit a specific action because of the risk that it could have disastrous consequences if it became widespread. Many forms of behaviour would lead to horrendous consequences if everyone insisted on carrying them out. What would happen if everyone decided that the only work they would accept was the growing of potatoes? There can be no grounds for banning potato growing on the basis that it could have negative effects in certain situations. History shows that humans do not necessarily behave similarly when this

48. See Diego GRACIA, *Las lecciones de «Dolly»*, cit.

behaviour is the result of a free decision. The argument that cloning should be banned because, if carried out on a massive scale, it would jeopardise genetic variation, which is essential for the survival of our species, is not acceptable. If this is the main argument underlying calls for a ban on cloning, then first we would need evidence that reproduction involving the cloning of somatic cells was likely to become widespread in society. In short, a ban on cloning as an offence against a collective value is not acceptable at present. The legislator should only take such action when this risk or danger is palpably real or present.

Let us turn now to the reasons underlying this prohibition as an offence against an individual. The biological fact of genetic integrity does not, in itself, seem to be a sufficient argument in the case of a given individual. More worthy of attention is the argument put forward by JONAS. According to this author, specific damage is perpetrated against the cloned individual: «The simple, unprecedented fact is that the hypothetical clone knows or thinks he knows too much about himself. Both this self-knowledge and the knowledge of the clone by others would have a paralysing effect on the spontaneity of the clone's development process, and the knowledge held by others would also have a pre-determining effect on how they would treat him».⁴⁹ The author goes on: «It is all the same whether the supposed knowledge is true or false (and there are good reasons for supposing it to be essentially false, *per se*): it is pernicious in its effects on the development of the clone's identity. Because what is truly significant is that the clone thinks—in fact he must think—that he is not in fact what he «is» objectively, in the real sense of being. In other words, the product of cloning has been robbed in advance of his freedom, for freedom can only prosper under the shelter of ignorance. To deprive a future human being of this freedom is an unforgivable crime, and we must not let it ever be committed, not even one single time»⁵⁰.

According to JONAS, what we should condemn about cloning is that the future being will know too much about himself and others will also know much about him. Although what is «known» about the clone may not necessarily be true, if we accept that social phenomena have a bearing on the construction of personal identity, then that false knowledge constitutes an obstacle preventing the individual from developing his own personality. The freedom which is necessary for the construction of a genuine personal identity requires the protection of a new right: the right to ignorance. Whereas in the past a lack of knowledge was the source of concern, now we are faced with the emergence of a new problem, in the form of the excessive knowledge which can be harmful for freedom. In the light of this, JONAS proposes a new moral maxim which could be formulated as follows: «we can never deny the right to the ignorance which is a prerequisite for freedom;» or in other words, «respect the right of every human life to find his own way and to be a surprise to himself».⁵¹

49. See Hans JONAS, *Técnica, Medicina y Ética...* cit., p. 127.

50. See Hans JONAS, *Técnica, Medicina y Ética...* cit., p. 128.

51. See Hans JONAS, *Técnica, Medicina y Ética...* cit., pp. 129 and following.

JONAS is aware of the argument that the clone does not necessarily have to know his origin. If this were the case, the obstacles to the construction of individual identity would not exist. Nevertheless, he sustains that such a conspiracy of silence could scarcely be maintained in the long term, the secret would sooner or later be disclosed and the clone would find out for himself. Why? Because, if the purpose of cloning is to reproduce individuals with outstanding qualities, sooner or later the copy will establish the link with a socially visible original.⁵²

However, if this is the main objection to cloning, the cloning of embryos does not infringe in this area. Once again, JONAS accounts for this. Although twins share the same genotype, they are strictly simultaneous. Since neither of them precedes the other, neither of them is living a life already lived, neither of them has been deprived of the right to develop his potential *ex novo*. They know nothing of their future life and nor do others. At the outset, there exists total uncertainty with regard to how they will develop. Just as in the case of other human beings, the potential of their personalities will only be known as it unfolds and develops.⁵³

Therefore, the ultimate reasons for a ban cannot include embryo division techniques. Furthermore, the implantation of an embryo which is identical to another which only survived for a few days should not cause any problems in this respect either. There is no question of a theft of freedom, since there is no certainty as to the nature of the individual's future development. The right to procreation would, in these cases, have clear precedence over other claims in that the exploitation of the new human being would not be different to that carried out in other techniques of assisted reproduction.⁵⁴

In nuclear transfer cloning of cells from an already existing individual, JONES is explicit with regard to the infringement of human dignity, which, he claims, lies in the fact that the new being is less free than others to lay his own life plans. This approach forgets, however, that nuclear transfer cloning could be used to enable other individuals to exercise their right to procreation. From the list put forward by KASS, I would draw attention to cases b and d. In case b, we saw that one of the reasons could be to replicate healthy individuals to avoid the risk of hereditary diseases contained in the randomness of sexual recombination. Case d was the use of cloning as a possible method to allow a sterile couple to have a child.

Against these cases it could be claimed that the right to procreation can also be exercised through mechanisms that do not infringe anyone's dignity. In case b the most suitable technique would be gene therapy, whereas in d, gametes external to the couple could be employed, or the couple could simply have recourse to adoption without any further ado. There is no doubt that these techniques would be the optimum solution for many. However, we must ask ourselves

52. See Hans JONAS, *Técnica, Medicina y Ética...* cit., pp. 128 and following.

53. See Hans JONAS, *Técnica, Medicina y Ética...* cit., pp. 126 and following.

54. This type of cloning is not found especially objectionable by Romeo Casabona. See Carlos ROMEO CASABONA, «Límites jurídicos a la investigación y a sus consecuencias? El paradigma de la clonación» in *Revista de Derecho y Genoma Humano*, n.º 6, Bilbao, 1997, p. 34.

whether in a plural society, we can expect people who find themselves in one of the above-mentioned cases to reject the use of cloning techniques on the grounds of the harm it may cause to the freedom of the new being. To phrase it differently, if we weigh up, on the one hand, a person's right to procreation, and on the other, the infringement of the freedom of their future offspring, should the balance necessarily read in favour of the future being's freedom, on the basis of the right to ignorance?

In order to provide a definite answer, we must assess the importance of the two rights involved. Undoubtedly, the right not to know plays an important role in the formation of one's identity. It is this identity which plans and executes the life-plans which serve to define the human being as a moral being and therefore as entitled to certain rights once born. However, the right to procreation does not seem to be to be any less a right. Although it may not be explicitly set out in the Constitution, it is important in terms of the construction of a life-plan.

A plural society is undoubtedly characterised by the fact that life models can vary widely. However, underlying all these different ways of living, there is a basic difference as regards the importance attached to reproduction. For the majority of individuals, what still confers meaning to their existence is the formation of a family unit based on biological reproduction. It is from the basis of this vision of the world, that individual existence, in the majority of cases, draws its meaning. As a result, sterility is seen as a trauma. For other individuals, however, their life-plan does not necessarily include reproduction in any important sense.

To the latter, the right to procreation will seem to bear little weight. It will only seem important in negative terms. That is, having the right to procreation is important only in so far as it serves to prevent the State from obliging people to have children. However, for the majority of citizens biological reproduction is a fundamental ingredient of their lives in the long term. Indeed, for many it is the only aspect of life which is worth struggling and making sacrifices for. For these people, the right to procreation must include the possibility of resorting to all available means enabling positive exercise of this right. Nowadays, thanks to advances in our knowledge of reproduction, sterility can be overcome by a range of highly effective methods. The limits which the State may impose on the use of these methods is a matter which requires careful attention.

If we take this right and the people who wish to exercise it seriously, then the legislator should only prohibit those techniques which tend to facilitate the exercise of this right at the cost of infringing other rights or legally protected values. However, the extent to which these protected values are affected must be the object of rigorous examination. It is not sufficient to merely produce generic formulas. When attempting to specify the extent of the harm caused by cloning to the future clone it is said that his right to ignorance is infringed and this affects his freedom. This is one of JONAS's formulas: «every human life has the right to make its own way and to be a surprise for itself». However, I propose that we should view the conflict in another light. If a sterile couple has a child through the use of cloning, what they are doing is in fact making it possible for someone to be a surprise for himself. And a couple who makes use of cloning

techniques so as to avoid disease is trying to ensure that the future being will not receive an unpleasant surprise in the future, which could have been foreseen.⁵⁵

It is quite clear that the clone will know more about himself than is normally the case. He will know the illnesses that have affected his progenitor, his or her intellectual and physical skills, the ambitions which were satisfied and the frustrations, the nature of family relationships, and so on. However, the clone himself will be in another context, will receive other stimuli and as a result of this, and more importantly, of what he knows of his progenitor, will be able to construct a life-plan which will set out to avoid repeating the frustrations experienced by another whom he knows. Perhaps freedom does need a certain ignorance, but nevertheless it can be favoured by knowledge. Knowing oneself is, precisely, one of the elements which allow one to construct life-plans with satisfactory outcomes.

V. Conclusions

If we accept that human cloning affects human dignity, then a law permitting it could be judged to be in breach of the Constitution and could therefore be the object of an appeal on the ground of unconstitutionality.

However, the considerations outlined in section IV allow to argue that cloning does not necessarily constitute an unjustifiable attack on human dignity, as it might appear at first sight. Firstly, we must distinguish between cases of embryo splitting and the nuclear transfer of somatic cells.

The former case does not pose a number of the problems generally attributed to cloning: a lack of genetic integrity, or excessive knowledge of future development of the clone. There still remains the objection on the grounds of genetic individuality, but this cannot be considered to constitute an infringement of human dignity, since it also exists in the case of monozygotic twins born as a result of natural reproduction.

The second group may pose more serious problems: the lack of genetic integrity, excessive knowledge of oneself and a lack of individuality. However, these objections are also relative. Lack of genetic integrity is more a problem for the species in general than for an individual. Increased knowledge of oneself can only be considered excessive if we believe that ignorance is preferable to knowledge and that an ignorant person is freer than one who knows. Sharing the same genes with another person also occurs in monozygotic twins.

From all of this, we can conclude that there is little basis for claiming that cloning necessarily constitutes an outright infringement of the clone's human dignity. On the contrary, there is little need to argue that cloning an already living person against his or her will would of course be an infringement of fundamental rights. This however would also be the case in any other kind of imposition concerning procreation.

55. Against this case, see Carlos ROMEO CASABONA, *¿Límites a la investigación...?*, cit., pp. 34 and following.

On the other hand, the fact that it may not be easy to demonstrate the unconstitutionality of cloning in terms of its being an infringement of human dignity, does not mean that it is desirable in all situations. Indeed, the vast majority of opinions put forward to date as regards cloning reject it unreservedly.⁵⁶ There must be some foundation behind such overwhelming rejection. Perhaps it can be found, in part, in a deep-lying fear of changing the course of nature and moving into uncharted territory. «Playing God» in the field of human reproduction frightens us. This fear also lies at the root of our misgivings about other techniques such as choosing the sex of future offspring.

Nevertheless, it is difficult to oppose the possibility of conscious human intervention in reproduction mechanisms through the modification of the «natural channels». If we abandon fundamentalism, many of us will admit that assisted reproduction has opened up an avenue of hope for many people afflicted with sterility problems. And here we find another very important right: the right to procreation. This right can clash with our misgivings about cloning. When this happens, acceptance of certain agreed and carefully limited forms of cloning may not be absolutely unreasonable. The value of human dignity, on which the protection of unborn human life is founded, is not infringed in any essential sense by the use of these techniques, when they are conditioned by the responsible exercise of the right to procreation.

Procreative autonomy, according to DWORKIN, occupies a central position in our western democratic political culture. If the basic foundation of this culture is human dignity, then human dignity includes the idea that people have the right and indeed the responsibility to challenge fundamental questions as to the meaning and value of their own lives, in the light of their own beliefs and convictions.⁵⁷ A democratic culture demands that procreation should become an especially protected individual right.

References

ALEGRE MARTÍNEZ, Miguel Angel, *La dignidad de la persona como fundamento del ordenamiento constitucional*, Universidad de León, León 1966.

ARROYO ZAPATERO, Luis, «Prohibición del aborto y Constitución», in Santiago MIR PUIG (coord.), *La despenalización del aborto*, Servicio de Publicaciones de la Universidad Autónoma de Barcelona, Bellaterra, 1983.

BLOCH, Ernst, *Derecho natural y dignidad humana*, Aguilar, Madrid, 1980.

CARRUTHERS, Peter, *La cuestión de los animales*, Cambridge University Press, Great Britain, 1995.

56. For an open position on cloning see Javier SADABA / José Luis VELÁZQUEZ, *Hombres a la carta. Los dilemas de la bioética*, Ediciones Temas de Hoy, S.A. Madrid, 1998, p. 84.

57. See Ronald DWORKIN, *El dominio de la vida... cit.*, pp. 217 and following.

- DWORKIN, Ronald, *El dominio de la vida. Una discusión acerca del aborto, la eutanasia y la libertad individual*, Ariel, Barcelona, 1994.
- GAVARA, Juan Carlos, *Derechos fundamentales y desarrollo legislativo. La garantía de los derechos fundamentales en la Ley Fundamental de Bonn*, Centro de Estudios Constitucionales, Madrid 1994.
- GÓMEZ SÁNCHEZ, Yolanda, *El Derecho a la reproducción humana*, Marcial Pons / Universidad Complutense de Madrid, Madrid, 1994.
- GRACIA, Diego, *Las lecciones de «Dolly»*, in «El Periódico», 1 April, 1997.
- JONAS, Hans, *Técnica, Medicina y Ética. Sobre la práctica del principio de responsabilidad*, Paidós, Barcelona, 1997.
- KANT, Immanuel, *Fundamentación de la Metafísica de las Costumbres*, 5.ª ed., Espasa-Calpe, Madrid, 1977. *La Metafísica de las Costumbres*, Tecnos, Madrid, 1989.
- KIEFFER, George H., *Bioética*, Editorial Alhambra, Madrid, 1983.
- MARCIC, René, *Rechtsphilosophie*, Verlag Rombach, Freiburg, 1969.
- MATEO PARDO, Regino, «La “dignidad de la persona humana” y su significación en la Constitución española de 1978 a través de la Jurisprudencia del Tribunal Constitucional», in *Escritos Jurídicos en Memoria de Luis Mateo Rodríguez*, t. I. Universidad de Cantabria, 1993.
- MORESO, José Juan, *La indeterminación del Derecho y la interpretación de la Constitución*, Editorial Centro de Estudios Constitucionales, Madrid, 1997.
- NINO, Carlos Santiago, *Ética y Derechos Humanos*, Ariel, Barcelona, 1989.
- OLLERO TASSARA, Andrés, *Derecho a la vida y derecho a la muerte*, Rialp / Universidad de Navarra, 1994.
- ROMEO CASABONA, Carlos, «¿Límites jurídicos a la investigación y sus consecuencias? El paradigma de la clonación», *Revista de Derecho y Genoma Humano*, n.º 6, Bilbao, 1997, pp. 21-39.
- SADABA, Javier / VELÁZQUEZ, José Luis, *Hombres a la carta. Los dilemas de la Bioética*, Ediciones Temas de Hoy, S.A., Madrid, 1998.
- SOTELO, Ignacio, *De la dignidad*, in «El País», 21 October, 1997.
- SPIELBERG, Herbert, «*Human Dignity: A Challenge to Contemporary Philosophy*», in Rubin GOTESKY / Ervin LASZLO, *Human Dignity, This Century and the Next*, Gordon and Breach, New-York, 1970.