



## **PUBLIC MORAL AND JUDGES**

*La moral pública y los jueces*

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## ABSTRACT

The present work will analyze the moral grounds for the application of sanctions for behaviors that alter and injure the public order. This essay will study the paper of the judges, when they judge and value those facts, under the principle of damage.

**Keywords:** public morality, freedom, individual autonomy, the principle of damage, judges.

## RESUMEN

El presente trabajo analizará los fundamentos morales para la aplicación de sanciones por conductas que alteran y lesionan el orden público. Este ensayo estudiará el papel de los jueces, cuando juzgan y valoran esos hechos, bajo el principio del daño.

**Palabras clave:** moralidad pública, libertad, autonomía individual, principio de daño, jueces.

## INTRODUCTION

The way people conduct themselves in a society depends on several factors such as custom, common values, religion, law, etc. But the best way to establish parameters of "proper" behavior is consensus and dialogue.

In this way, the topics that define what is "right" will always carry a moral burden and will therefore be susceptible to criticism and opinion.<sup>1</sup>

There is a wide range of topics that have been studied in the field of legal deontology, such as prostitution, pornography, racism, freedom of expression, abortion, euthanasia, among others.<sup>2</sup>

In general, these matters can be seen as an innocuous form of individual freedom, in which each person can freely dispose of and enjoy his or her rights. In this way, the right to exercise, express, and communicate to others our thoughts, ideas, or feelings is what reaffirms the dignity and worth of every person as a member of society, and what enables the individual to develop his

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<sup>1</sup> *Cfr*, Perry, Michael J., *Constitutional rights, moral controversy and the Supreme Court*, Ed. Cambridge, USA, 2009.

<sup>2</sup> *Cfr*, Dworkin, Ronald, *Freedom's law*, Ed. Harvard University Press, Cambridge, 1996. Panichas, George, *Sex, morality and the law*, Ed. Routledge, Great Britain, 1997.



or her full potential.<sup>3</sup> The motivations of each subject, so he performs these acts can have several sources such as social conventionalism, pleasure, the need for expression, etc.<sup>4</sup>

The behaviors have their support based on the subjective, and on the understanding that it is done by personal conviction.<sup>5</sup> Such behavior, therefore, has a negative impact if the other members of the community consider that such behaviour does not reflect a common value. Under this assumption, society determines a set of general obligations, so that values and/or principles that promote conservation and social unity are guaranteed and protected.

However, although the norms have the character of abstract, general and impersonal, they do not always reflect the whole society, so there are always subjects that show their disagreement.<sup>6</sup> Here lies the counterpoint: the issue of public morality (morality) and that determines mainly, the values that unite a social group.<sup>7</sup>

These guidelines of conduct stipulate, indicate and qualify that it is good, correct or fair;<sup>8</sup> and that in case of failure to comply with these points, that individual should be punished, in order to inhibit the repetition of such conduct, considered as harmful.<sup>9</sup>

This work will seek to find out how and why individual conduct that violates public order and morality can or should be tolerated or sanctioned; in what cases and when conduct should be prohibited; and finally, what the assessment and decision of the judge should be when considering a matter related to individual autonomy and respect for norms. To begin this booklet, the topic of public morality will be analyzed.<sup>10</sup>

Therefore, it will be presented how it has been defined. In this section, we will observe how norms should reflect society (in the context of a democratic system).<sup>11</sup>

This may result in the imposition of general rules, which give rise to power, obligation or prohibition; it is argued that a sanction should be introduced so that such conduct is not repeated and the conduct of individuals in society is controlled.<sup>12</sup> In the next section, the concept of freedom and individual autonomy will be presented.

<sup>3</sup> Faúndez Ledesma, Héctor, *Los límites de la libertad de expresión*, Ed. UNAM, México, 2004, p.45.

<sup>4</sup> Vid, Tedford, Thomas L., *Freedom of speech in the United States*, Ed. Strata, USA, 2009, pp.153 y 223.

<sup>5</sup> Rawls, John, *Liberalism political*, Ed. Harvard University Press, Cambridge, 1996, pp.54-66.

<sup>6</sup> Hart, H.L.A., *Law, liberty and morality*, Ed. Vintage, USA, 1963, p.3.

<sup>7</sup> Cfr, Joyce, Richard, *The evolution of morality*, The MIT press, USA, 2006.

<sup>8</sup> Vid, Mackie, J.L., *Ethics. Inventing the right and wrong*, Ed. Penguin, USA, 1990, pp.42-102.

<sup>9</sup> Tocqueville, Alexis, *La democracia en América*, Ed. FCE, México, 1957, pp.246 y ss.

<sup>10</sup> Bickel, Alexander M., *The least dangerous branch*, Ed. Yale University press, USA, 1986, pp.23-33, 58-59 y 199.

<sup>11</sup> Tocqueville, Alexis, *La democracia en América*, Ed. FCE, México, 1957, pp.246 y ss.

<sup>12</sup> Garzón, Valdés Ernesto, "Algo más sobre la relación entre derecho y moral", Rodolfo Vázquez, *Derecho y moral*, op. cit., p.152.

For what we will analyze, if certain public acts based on freedom are a form of pleasure, an artistic representation, political manifestation, etc. and on the other hand, if such conduct should be repressed and, if allowed, what would be its limits; Here two other fundamental points for social coexistence, tolerance and pluralism are born.<sup>13</sup>

Finally, it will examine the role that the judge must play in judging behavior contrary to public morality. But what happens, if such conduct is protected by a higher standard, such as freedom of expression. In such cases, the judge must weigh the facts and rights in order to deliberate and decide whether to punish such conduct or to protect that right.<sup>14</sup> Or if authority should have some tolerance for certain behaviors; this to try to get some subjects to achieve their goals under certain standards and not the absolute imposition of a majority group.<sup>15</sup>

This work will expose the edges that surround this discussion, with the aim of not producing a liberal or normative result, or placing judges as executioners of individual autonomy or as censors and protectors of public morality; but with the objective, that each reader has the opportunity and the elements to know, value and elucidate the exposed topic.

## **PUBLIC MORALITY**

The Black's Law dictionary defines public morality as: "1. A set of general moral ideals or beliefs of a society. 2. Ideals or actions of an individual that extend and affect others. The moral law is comprised of a collection of principles that define good or bad conduct; or a standard, by which an action must conform to be right or virtuous".<sup>16</sup>

The purpose of morality is to find a set of principles that are justly acceptable to the community, that have practical applications and consequences for a given society.<sup>17 18</sup>

It is essential to note that no problem can be dealt with universally, as the circumstances surrounding each issue are particular, within a historical, political, social or economic context. So

<sup>13</sup> Posner, Richard, *How judges think*, Ed. Harvard University Press, USA, 2008, p.175.

<sup>14</sup> *Idem*.

<sup>15</sup> Fallon, Richard Jr., *The dynamic constitution*, Ed. Cambridge University Press, USA, 2004, p.1.

<sup>16</sup> Ed. West, USA, 2009, p.1100.

<sup>17</sup> Mackie, J.L., *op. cit.*, pp.105-193.

<sup>18</sup> Rawls, John, *Political liberalism*, *op. cit.*, pp.8, 28, 72, 89 y 95-96. "*The outcome of reflective thought and reasoned judgment, the ideals, principles, and standards that specify our basic rights and liberties, and effectively guide and moderate the political power to which we are subject. This is the outer limit of our freedom*". *Idem*, p.222, 242, 384 y 388.



it becomes of vital importance the socio-political conditions, which differ in each case, place, moment or circumstance.<sup>19</sup>

Then, from a certain historical context, the values, principles, and objectives that must govern a State must be created and/or selected. So the standard (ideally) is the product of a community in a given context.

Norms are cultural creations through which men seek to preserve relevant community principles or with a hierarchy explained in the context itself (depending on the time and space in question). With this we must place each issue in each context, in order to understand the scenario of each society.<sup>20</sup>

For the purposes of this work, I propose to place as a scenario a stable democratic constitutional State, in which Human Rights (HR) are recognized, that allows the representation and participation of the people in public affairs; that the functions of all organs of the State are well defined, so that they do not abuse power, and the State does not have any unlimited discretion to decide which measures are appropriate to preserve the public order.<sup>21</sup>

From this representative democratic context, the legislators will elaborate the norms that will lead to the purpose of that society, generating an ideal of public conduct for all inhabitants.<sup>22</sup> "This form of knowledge that constructs a simplified representation of the world and its processes, a representation that generally starts from certain assumptions about reality, which cannot be demonstrated, which remain virtually unchanged over an important period of time".<sup>23</sup>

On this basis of imposing the ideology of a certain political group in power, the behaviors that people can perform are determined.<sup>24</sup> This conduct encompasses any set of external acts and omissions of a living being.<sup>25</sup>

Politics provides various kinds of mechanisms to pave the way from indecision to action. These mechanisms rarely involve the dispassionate use of pure reason to practical decisions. Indeed, democratic politics contains fully institutionalized procedures, such as majority voting, for reaching decisions when reason has failed to determine a course of action.<sup>26</sup> This can only mean that politics,

<sup>19</sup> Nohlen, Dieter, *El contexto hace la diferencia: reformas institucionales y el enfoque histórico-empírico*, Ed. UNAM, México, 2003, pp.191 y 196.

<sup>20</sup> Hinde, Robert A., *Why good is good. The sources of morality*, Ed. Routledge, USA, 2002, pp.45-150.

<sup>21</sup> Faúndez Ledesma, Héctor, op. cit., p.591.

<sup>22</sup> De los Campos, Hugo, <http://ciberconta.unizar.es/leccion/sociodic/tododic.pdf>

<sup>23</sup> Vid, Windlesham, Lord, *Politics, punishment and populism*, Ed. Oxford University Press, USA, 1998, pp.100-147.

<sup>24</sup> Ackerman, Bruce, *We the people. Foundations*, Ed. Harvard University Press, USA, 1991, p.224.

<sup>25</sup> Schoeck, Helmut, *Diccionario de sociología*, Ed. Herder, Barcelona, 1981, p.134.

<sup>26</sup> Scruton, Roger, *The Palgrave Macmillan Dictionary of Political Thought*, USA, 2007, p.452.

with its unchanging accompaniment, the use of power, comes into play when reason has come to an end.<sup>27</sup> With this idea, the idea of public order is constituted with which the collective interest will prevail over the individual interest.<sup>28</sup>

The above will allow to produce an engineering work, which will be aimed at socialization; this with the objective of a community teaching "to discover their new members, the norms, values and beliefs that they themselves keep in the depths of their being, as a sign of their individuality, and that invariably coincide with the norms, values and beliefs that the community in which they live professes".<sup>29</sup> So it must also be stipulated, which behaviors will be contrary to moral values, that affect or harm the community.<sup>30</sup>

But these rules have a democratic origin, which is based not on a simple imposition;<sup>31</sup> but they originate from the delegation of some people, who will represent them and with them, a consensus is reached to identify and achieve the elements for achieving its objectives.<sup>32</sup>

"The sources that make possible the authority of the norms are only two: one, the acceptance of the rule as a pattern of conduct in a given community, but not simply as a guideline to follow but as a mandatory practice... The other source of authority is precisely the fundamental secondary rule, because from there derive its validity under the rules that have been drawn up according to legislative procedures".<sup>33</sup>

The legislative work will have to infer which principles and values will contain the normativity.<sup>34</sup> "What is morally right, what must be sought and defended, what the human spirit must aspire to".<sup>35</sup>

"The word norm is not understood here as that medium or modal perception that is formed when some groups of people face an ambiguous situation together. At first, these groups encounter divergent interpretations of this situation, which gradually becomes clearer, so that in this process of convergence a rule is finally obtained, that is, a genuine convergence of perceptions of the mean (or modal perceptions), opinions, or actions of members of the racial group. The concept of norm is more common to mean a standard or criterion by which to judge the character or conduct of an individual, of any function or expression of social life.

<sup>27</sup> Williams, Melissa and Waldron, Jeremy, *Toleration and its limits*, Ed. New York University press, New York, 2008, p.369.

<sup>28</sup> Faúndez Ledesma, Héctor, op. cit., pp.568, 592 y 594.

<sup>29</sup> De los Campos, Hugo, <http://ciberconta.unizar.es/leccion/sociodic/tododic.pdf> Vid, Fetner, Gerald, *Ordered liberty*, Borzoi books, USA, 1983, p.32.

<sup>30</sup> Gallino, Luciano, *Diccionario de sociología*, Ed. Siglo XXI, México, p.594.

<sup>31</sup> Raz, Joseph, op. cit., pp.193-216.

<sup>32</sup> Jefferson Powell, H., op. cit., p.110. Fetner, Gerald, op. cit., p.144.

<sup>33</sup> Salmerón, Fernando, "Sobre moral y derecho", Rodolfo Vázquez, *Derecho y moral*, op.cit., p.97. Barnett, Randy, *Restoring the lost constitution*, Ed.Princeton University Press, USA, 2004.

<sup>34</sup> Hart, H.L.A., op. cit., p.6.

<sup>35</sup> De los Campos, Hugo, <http://ciberconta.unizar.es/leccion/sociodic/tododic.pdf>

In turn, social norms specifically indicate how the individual or group should behave in the most varied situations, the prescription of how an individual or a social group should or should not think, feel or act in certain situations. Such norms take the practical form of a series or set of rules on any aspect of human social behaviour. There are, therefore, political, legal, religious, scientific, etc., norms that form a very broad continuum, to indicate that certain forms of conduct are permitted, recommended, absolutely required, disapproved, or positively and categorically prohibited. Any deviation from the rule is usually followed by some sanction or award".<sup>36</sup>

So it has become necessary to create rules, first for the survival of society;<sup>37</sup> secondly, to meet its demands; and thirdly, for there to be legal mechanisms for the struggle for power between the different political groups<sup>38</sup>

"In short, the normative order has developed as part of human society; because it has helped it to satisfy fundamental social needs, thus allowing society and, therefore, the human species to survive. Only through an elaborate system of moral obligations can the individual and thus society survive. On the other hand, human society depends on how each member of it fulfills its tasks, while the other members fulfill the remaining ones. Each must have the guarantee that others fulfill their tasks, while he fulfills his own. It is the social norms that control the individual to fulfill what the group expects of him. The social order is based on these norms".<sup>39</sup>

The role of the legislator will be to translate into laws, the moral values of the community; with this, certain guidelines of control for society are elaborated.<sup>40</sup>

"The social control of a society or a group only aspires to the regular observance of those rules of behavior that are in accordance with current morals. Societies can judge and control almost all the behavior of their members according to the laws of a morals dogmatically declared as obligatory. However, as a general rule, the morality of a society extends only to some of the possible forms of behavior".<sup>41</sup>

Every organized society has the right to protect the prevailing moral values, and to defend itself against expressions that offend the feelings of the community.<sup>42</sup> With the above, patterns of conduct that determine regularities and uniformities in social behavior are structured.<sup>43</sup>

The worst thing that can happen for a behavior scheme can be accepted as behavior in the respective culture is that an Individual defrauds the behavior expectations of a fairly large number

<sup>36</sup> Franco Demarchi, Aldo Ellena, *Diccionario de sociología*, Ed. Paulinas, Madrid, 1986, p.1174.

<sup>37</sup> Bickel, Alexander, op. cit., p.38. Garland, David, *La cultura del control*, Gedisa, España, 2001, pp.71-106.

<sup>38</sup> Kojéve, Alexandre, *La noción de autoridad*, Ed. Nueva visión, Buenos Aires, 2005, p.36. Linz, Juan J., *Problems of democratic transition and consolidation*, Ed. The Johns Hopkins University, USA, 1996, p.5.

<sup>39</sup> Franco Demarchi, Aldo Ellena, op. cit., p.1174.

<sup>40</sup> Hart, H.L.A., op. cit., pp.14 y 20.

<sup>41</sup> Schoeck, Helmut, *Diccionario de sociología*, Ed. Herder, Barcelona, 1981, p.474.

<sup>42</sup> Faúndez Ledesma, Héctor, op. cit., p.599.

<sup>43</sup> Hart, H.L.A., op. cit., p.71.

of people.<sup>44</sup> Thus, when legislators prohibit certain conduct through a legal provision, "it is saying that such action is in a way, and on some basis, reprehensible or liable to disapproval".<sup>45</sup>

In addition, it is necessary that this behavior be rejected by the majority of society, "it must provoke a real feeling of reprobation, of disgust".<sup>46</sup> The punishment thus becomes "an expressive and symbolic act, expressing an attitude of serious disapproval of what the person punished has done on the grounds that he or she is considered guilty of doing so".<sup>47</sup> No doubt, every society has the right to use its laws as an act of self-defense for its integrity and survival.<sup>48</sup> From the past, it follows that all human behavior is reduced, therefore, to a set of conditioned reflexes.

It must be considered, that several scholars (Alexy, Dworkin, MacIntyre, Nagel, Sandel, Taylor and others) try to tie morality with law and "...opens up the possibility of replacing morality as a norm of life -in the sense of the ultimate criterion of conduct-, thus reducing spaces of freedom for individuals, in order to pass them over to the law".<sup>49</sup> But it does not mean blind obedience.<sup>50</sup> "The only purpose by which power may, with full right, be exercised over a member of the civilized community against his will, is to prevent it from harming others".<sup>51</sup>

For the same reason, the norms must have "an objectivist conception of the norm seems to be an adequate means to grant to the will of the giver of the norm something like an unobjectionable legitimation and with it the desired pressure".

Failure to comply with the rules will therefore result in the offender, a punishment approved by the society:<sup>52</sup> "The moral justification of the punishment depends, ultimately, on the harmful character of the action that is repressed".<sup>53</sup>

With the imposition of the sanction, personal conduct is uprooted and inhibited, limiting its social performance.<sup>54</sup> "acts as a deterrent directly against what is believed to be right, or at least as a coercive force against one doing something, which in principle seems morally acceptable, and perhaps preferable in some context".<sup>55</sup>

<sup>44</sup>[http://www.law.yale.edu/documents/pdf/Comella\\_Do\\_Constitutional\\_Rights\\_Bind\\_Private\\_Individuals.pdf](http://www.law.yale.edu/documents/pdf/Comella_Do_Constitutional_Rights_Bind_Private_Individuals.pdf)

<sup>45</sup> MacCormick, Neil, "En contra de la ausencia de fundamento moral", Rodolfo Vázquez, *Derecho y moral*, op.cit., p.174. Hart, H.L.A, op. cit., pp.55-59.

<sup>46</sup> Malem, Jorge, op. cit., p.63.

<sup>47</sup> MacCormick, Neil, op. cit., p.173. Fallon, Richard Jr., op. cit., p.39.

<sup>48</sup> Raz, Joseph, *The morality of freedom*, Ed. Oxford University Press, New York, 1988, pp.23-99.

<sup>49</sup> Salmerón, Fernando, op. cit., p.83. Faúndez Ledesma, Héctor, op. cit., p.599.

<sup>50</sup> Garzón, Valdés Ernesto, op. cit., p.157.

<sup>51</sup> Malem, Jorge, op. cit., p.61.

<sup>52</sup> Bulygin, Eugenio, "¿Hay vinculación necesaria entre derecho y moral?", Rodolfo Vázquez, *Derecho y moral*, op. cit., pp.228, 229 y 231.

<sup>53</sup> Kojéve, Alexandre, op. cit., p.38. Bickel, Alexander M., op. cit., pp.69-70, y 236.

<sup>54</sup> Malem, Jorge, op. cit., p.72. *Vid.*, [http://www.uns.edu.ar/programa/ediciones/edicion1/07\\_edicion1.pdf](http://www.uns.edu.ar/programa/ediciones/edicion1/07_edicion1.pdf)

<sup>55</sup> MacCormick, Neil, op. cit., p.166.



Thus, public morality has become the most frequently invoked circumstance to curtail freedoms.<sup>56</sup> Public morality must therefore be valued to its fair extent, without being used as a vehicle for imposing prejudices and feelings.<sup>57</sup>

The fundamental thing is that when a legal norm is created, modified or reformed, it is thought that it has a just purpose, that it contains a spirit of justice; it determines what is right; that it is valid and accepted, because its value is supported and generated by the general will.<sup>58</sup>

Returning to our main theme, we must discern why some behaviors are prohibited. The a priori answer would be that there is a rule that prohibits and punishes it. This behavior is disapproved, because the majority of society does not believe that behavior reflects the social values that unite it, so the subject who transgresses that moral value should be punished. Here is born the imposition of conduct in public places, because it is not of interest to society, what each person does in their privacy. But what does affect or harm society, must be rebuked as a sign of disgust.

It is the coincidence between norms and members of society that allows ideal coexistence.<sup>59</sup> But if the regulation is violated (supposedly), the person must be subjected to be judged, by a legal operator, who will determine if the security was violated, a good or an interest of society.<sup>60</sup>

This means that it is not enough to produce harmful behaviour, and that punishment is contemplated.<sup>61</sup> But there must be an individual who judges, if such behavior is contrary to social norms and customs, to be able to restore order or defend any abuse.<sup>62</sup>

But in what way judges can or should express the disapproval of society; although "it is true that they express the condemnation of the State in the face of acts that the State law characterizes as crimes; and an attitude of condemnation or disapproval is per se a moral attitude".<sup>63</sup>

With this framework, we can see what are the values that interest him to protect that community. However, laws do not always reflect individuality. It is autonomy that allows us to choose. We do this from deciding what goals each person plans, what tastes they have, the personal determination of how they will live, etc. All this from their individual freedom and autonomy.

<sup>56</sup> Faúndez Ledesma, Héctor, op. cit., p.598.

<sup>57</sup> Ídem, pp.599, 601, 605 y 606.

<sup>58</sup> Fiss, Owen, *Libertad de expresión y estructura social*, Ed. Fontamara, México, 2004, p.59.

<sup>59</sup> Salazar, Pedro, "Justicia constitucional y democracia", en Vázquez, Rodolfo, *Corte, jueces y política*, Ed. Fontamara, México, 2007, p.39.

<sup>60</sup> Larmore, Charles, *The autonomy of morality*, Ed. Cambridge University Press, USA, 2008.

<sup>61</sup> Cragg, Wesley, *The practice of punishment*, Ed. Routledge, London, 1992, pp.115-137.

<sup>62</sup> Ackerman, Bruce, op. cit., p.283.

<sup>63</sup> MacCormick, Neil, op. cit., p.175.

## FREEDOM AND INDIVIDUAL AUTONOMY

One of the most accepted and used concepts on the subject of freedom, is that of Isaiah Berlin.<sup>64</sup> This author classifies freedom as negative and positive: the notion of negative freedom is that which is given by the imposition of another person; with this limitation their illusions are frustrated.<sup>65</sup> In this space, there is no regulation that governs social relations; as in slavery or economic poverty. On the contrary, positive freedom allows us to be masters of our destiny, the principle of autonomy is developed. Here is the sense of freedom based on value and in the sense of normativity.<sup>66</sup>

Orderly freedom allows certain political and moral conduct to be conducted freely, on the basis of laws issued by the legislative domain of the States.<sup>67</sup> So freedom is not a series of isolated points exposed in terms of freedom (expression, press and religion and so on). This is a rational continuity which, broadly speaking, includes a freedom from all arbitrary impositions and attempts to restrict it.<sup>68</sup>

The tradition of freedom of expression constitutes about this world view when it reduces freedom of expression to autonomy, and defines autonomy to mean the absence of governmental interference.<sup>69</sup>

Personal autonomy is defined as: "The philosophical legal principle that gives individuals an area of freedom, within which they can regulate their own interests; allowing them to create binding relations between themselves that must be recognized and sanctioned in the rules of law".<sup>70</sup>

In law theory, discussions about autonomy frequently arise in the context of debates about the imposition of morality through legislation, where those who believe that autonomy is a fundamental value demand that the actions of the State do not restrict the range of lifestyles available to citizens.<sup>71</sup>

<sup>64</sup> Berlin, Isaiah, *Four essays on liberty*, Ed. Oxford University Press, England, 1969, pp.118-172.

<sup>65</sup> *Vid*, Rothbard, Murray N., *The ethics of liberty*, Ed. New York University press, USA, 1998, pp.201 y ss.

<sup>66</sup> *Cfr*, Dworkin, Ronald, *Freedom's law*, pp.214-216. Faúndez Ledesma, Héctor, op. cit., p.753.

<sup>67</sup> Fetner, Gerald, op. cit., p.73.

<sup>68</sup> Fallon, Richard Jr., op. cit., p.138.

<sup>69</sup> Fiss, Owen, op. cit., pp.29 y 51. Raz, Joseph, op. cit., pp.369-429.

<sup>70</sup> Cornejo, Certtucha, Francisco, Voz "Autonomía de la voluntad", *Diccionario Jurídico Mexicano*, Tomo I Ed. UNAM, México, 1982, pp.239-240.

<sup>71</sup> Bix, Brian H., *Diccionario de teoría jurídica*, Ed. UNAM, México, 2009, p.22.

However, it is not only a matter of selecting a life project.<sup>72</sup> This decision must be made on the basis of social coexistence, which is governed by legal norms.<sup>73</sup> If we have a liberal democratic system, we will give priority to enhancing individual freedoms.<sup>74</sup> "In the part that concerns him merely, his independence is legal, absolute. On himself, on his body and spirit, the individual is sovereign".<sup>75</sup> The problem is to define the limits to these freedoms:<sup>76</sup> "Freedom not only makes it possible for us to give ourselves our own law, but it also makes it possible for us to be able to fulfill it or break it".<sup>77</sup>

This determination indicates the guidelines for individual conduct. But the problem occurs when the subject does not feel identified with the norm.<sup>78</sup> Here your reasoning will show you that these impositions are based on prejudices that do not accord with your free will. But let's look at the concept of prejudice, to understand the schism between freedom and imposition.

"Qualifying to designate any judgment, about a thing, that has been issued without respecting in its formulation, the rules of sound judgment (which are none other than those dictated by modern science). It therefore refers either to judgements that have been made without respect for any rule, or to judgements that arise from the application of rules of knowledge other than sound judgement".<sup>79</sup>

The purpose of prejudice is to consider explicitly, whether a person or social group is the object of it, is due only to the really negative characteristics of that person or group. This is a tautological, self-realization statement: the negative characteristics of others lead to the development of a negative prejudice, so that, if a group is subject to prejudice, its characteristics are necessarily negative.<sup>80</sup>

Then, it is observed that the social conditions imposed by the majority serve as social control,<sup>81</sup> that it is given from the assumption, that the subject did not behave according to the internalized moral codes.<sup>82</sup>

<sup>72</sup> Fetner, Gerald, *op. cit.*, p.134. *Vid*, Gargarella, Roberto, "El carácter igualitario del republicanismo", en *Isegoria*, No.33, 2005, pp.175-189.

<sup>73</sup> Posner, Eric, *Law and social norms*, Ed. Harvard University Press, USA, 2002, pp.203-224.

<sup>74</sup> Fallon, Richard Jr., *op. cit.*, p.33.

<sup>75</sup> Malem, Jorge, *op. cit.*, p.60.

<sup>76</sup> De los Campos, Hugo, *Diccionario de Sociología*, <http://ciberconta.unizar.es/leccion/sociodic/tododic.pdf>

<sup>77</sup> Muguera, Javier, "El tribunal de la conciencia y la conciencia del tribunal", Rodolfo Vázquez, *Derecho y moral*, *op. cit.*, p.185.

<sup>78</sup> Fiss, Owen, *op. cit.*, p.84.

<sup>79</sup> [http://enciclopedia\\_universal.esacademic.com/19830](http://enciclopedia_universal.esacademic.com/19830), Consulted 22 october of 2012.

<sup>80</sup> Franco Demarchi, Aldo Ellena, *op. cit.*, p.1364.

<sup>81</sup> *Vid*, Melossi, Dario, *El Estado del control social*, Ed. Siglo XXI, México, 1982, pp.160-191 y 231-255.

<sup>82</sup> Gallino, Luciano, *Diccionario de sociología*, Ed. Siglo XXI, México, p.594.

Here another theme is born in our conflict, that of the Tolerance that must have the other elements of society before a behavior that must be rebuked. Morality applies the general form of tolerance as a relationship between motives for action for disapproval, and it reasons to refrain from expressing or interpreting that disapproval.

Thus, we have on the one hand the freedom of thought that labels some impositions as social conditioning, and on the other hand, the control that must be exercised over all the members of a community, for a peaceful coexistence. So the right medium is Tolerance.

"Tolerance means renunciation in the prevention of some evils, justified by the risk that if they cannot force it would be worse. The tolerance of dissidents is therefore accepted as a necessary evil, when it is not possible to suppress dissent, that is, a lesser evil when the cost of repression would lead to an excess. It is clear that in this case, the concept of tolerance is a preparatory stage to the principle of freedom: tolerance of adjustment, in fact, a space of immunity in the decisions of individuals, but it is qualified as a revocable and irrevocable concession of the law".<sup>83</sup>

It should be clarified that Tolerance "contains a relativistic and historicist component of liberal thought. Its nature is pluralistic and leads to the recognition of contrasting positions, within a system of problems disciplined by the rules of the game".<sup>84</sup>

Tolerance is respect for the ideas, beliefs or practices of others when they are different or contrary to one's own.<sup>85</sup> Tolerance must be reconciled with the duty to form character for the better, and to promote the progress of moral understanding by changing critical arguments with those with whom one disagrees. So it must be understood as the act or practice of permitting something, not totally approved; or as the act or practice of permitting something in a way that does not hinder coexistence, which allows opinions and beliefs (in particular in religious matters), which differ from the prevailing rules.<sup>86</sup>

Likewise, tolerance is recognized as the degree to which we rationally accept things that we personally disapprove of. This certainly describes the practice of tolerance, not virtue. Even when a given act of tolerance can be described without controversy (which is not always), the kind of disapproval of a given actor, and the motivations she has for acting on it, can vary. In this way, tolerance becomes the positive act of non-interference, with the obligation of the other despite the negative response of someone.<sup>87</sup>

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<sup>83</sup> *Ídem.*

<sup>84</sup> Bobbio, Norberto, *Dicionário de política*, Ed. UnB, 11ª. Edición, Brasil, 1983, pp.1245-47.

<sup>85</sup> Real Academia de la Lengua Española.

<sup>86</sup> *Black's Law*, Ed. West, USA, 2009, p.1625.

<sup>87</sup> Williams, Melissa and Waldron, Jeremy, op. cit., p.224.

This is a unilateral act of one person towards the other, an act that must be considered a value, a virtue or a principle.<sup>88</sup>

Tolerance then consists of a long list that distinguishes and allows: "compromise, peace or coexistence, indifference, skepticism, recognition, acceptance, indulgence, liberality, patience, endurance, forgiveness, charity, respect, pluralism, and more".<sup>89</sup>

A person may act tolerantly in relation to his or her beliefs, even though those may not be objectively true, or may be objectively false, just as someone may act rationally in relation to false beliefs.<sup>90</sup>

Tolerance becomes a relevant issue, when societies were monolithic communities of faith and value. These themes created different sects and parties, causing individuals and families to live separately from the other communities, and later coexisting in a single social and political environment.<sup>91</sup> Tolerance allows the direction of diversity, which seeks coexistence; this serves as the relationship between people in the face of diversity. It is at this point that the clash of the individual with the general: prejudices and Tolerance occurs:

"The reasons that seem to justify differences in prejudices can be summarized in some essential points: a) each individual, during the socialization process, suffers a differentiated exposure to cultural norms, which translates into differences in the individual structures of prejudice; b) in any complex social system there are various cultural subsystems, each of which has its own specific normative model, which is concretized, in differentiated models of prejudice; c) the pressure for conformity with cultural norms is not absolutely rigid, as it allows for a range of acceptable behaviours, which allow for the manifestation of individual differences; ; d) within the same cultural system or subsystem, individual differences may be due to various needs and personality traits and/or to the various functions that prejudice performs in relation to individual psychic needs. Among the psychic functions that prejudice plays on the individual, we can cite, by way of example, the justification of a pathological hostility, the rationalization of desires and behaviors culturally disapproved to realize aspirations culturally acceptable, the substitution satisfaction of repressed desires, the protection of feelings of self-esteem, the defense against threats to self-esteem, the justification to be able to obtain a higher social status or the rationalization of the conditions of inferiority. As for personality traits, they can be summarized in the various individual situations of insecurity and anxiety and in the various ways of coping with them".<sup>92</sup>

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<sup>88</sup> Ídem., p.316.

<sup>89</sup> Ídem, p.180.

<sup>90</sup> Ídem, p.380.

<sup>91</sup> Ídem, pp.24 y 321.

<sup>92</sup> Franco Demarchi, Aldo Ellena, *op. cit.*, p.1360.

Returning to our subject, under these canons, we can clarify that although everyone has the right to criticize the imposed rules and to elaborate a set of principles of action, it must be recognized that they should only govern their personal acts, without harming others.<sup>93</sup> So now, you have to expose and justify why you should repress certain personal expressions. With this topic we will begin our next section: the role of judges in the protection of public morality and judicial protection of individual freedoms

## **THE PRINCIPLE OF DAMAGE AS AN INSTRUMENT TO SANCTION MATTERS OF PUBLIC ORDER**

The judges are responsible for restoring the altered order, and imposing the sanction in case of a violation of the regulations.<sup>94</sup> This at first glance does not seem so complicated; however, there are cases that not only try to frame conduct with a legal type, to be able to punish the offender.<sup>95</sup> There are issues in which fundamental rights must be weighed against legal norms, and one that must be assessed with something more than laws:<sup>96</sup>

"Tragic cases pose problems of conscience to judges and courts, how tragic is the conflict between law and conscience, between law and justice, between being legal or legal and the duty to be political or moral".<sup>97</sup>

What is an obligation and duty of the courts is "to decide according to what they consider best and most morally just".<sup>98</sup> But does the judge have the power to find the moral sense of a rule or must they act mechanically?<sup>99</sup> Thus, to qualify a fact within moral tolerance there must be some reason, belief, or behavior that is considered socially wrong.<sup>100</sup>

It is necessary to remember that "in morality there are no rules that establish authorities and procedures whose purpose is the creation, modification or suppression of moral norms".<sup>101</sup>

<sup>93</sup> Faúndez Ledesma, Héctor, op. cit., p.608.

<sup>94</sup> Fallon, Richard Jr., op. cit., p.198.

<sup>95</sup> Posner, Richard, op. cit., p.5.

<sup>96</sup> Fetner, Gerald, op. cit., p.69.

<sup>97</sup> Muguerza, Javier, op. cit., p.201.

<sup>98</sup> Fetner, Gerald, op. cit., p.82.

<sup>99</sup> Jefferson Powell, H., *Constitutional conscience*, Ed. Chicago University Press, USA, 2008, p.3.

<sup>100</sup> Williams, Melissa and Waldron, Jeremy, op. cit., p.394.

<sup>101</sup> Malem, Jorge, op. cit., p.71.

Therefore, when a norm containing moral value is violated,<sup>102</sup> a judge must consider and weigh it on the basis of the principle of harm.<sup>103</sup>

The damage test refers to a specific balance sheet to be carried out when applying to a specific case, an exception based on the public interest.<sup>104</sup>

The elements that the judge must consider to analyze and recognize if there was a damage, are the following:<sup>105</sup>

1. Confusion of the laws with paternalistic foundations and with this it is constituted, the supposed justification of laws that repress any immorality.

2. It confuses the legitimacy of the repression of indecency with the alleged justification of the repression of immoral actions carried out in private.

3. It does not provide any evidence as to why people should be influenced but shared morally by state imposition of an evil.<sup>106</sup>

Thus, the principle of damage "presupposes both a prior determination of which private interests are to be protected and a conception of the public good".<sup>107</sup>

By doing so, it legitimizes for itself "the legal requirement of a fundamental moral value: that of protecting people from harm intentionally inflicted by others".<sup>108</sup>

On the other hand, and no less importantly, judges must exercise their functions under the principles of impartiality and objectivity.<sup>109</sup>

Isabel Trujillo values, in the first instance, impartiality from the legal point of view: "Impartiality has traditionally been configured as a structural characteristic of law. It is situated within the judgment of authority and constitutes an internal criterion of articulation, connected with a demand for justice in relation to the subjects involved".<sup>110</sup>

This author explains that there are two primary concepts of impartiality: "The first has to do with the objectivity of the trial and considers impartial those who judge objectively, without

<sup>102</sup> Kojève, Alexandre, op. cit., pp.47 y 48.

<sup>103</sup> La doctrina considera que el daño es "la violación de los intereses de la persona; el perjuicio en algo en lo que tiene verdadero interés". MacCormick, Neil, op. cit., p.167.

<sup>104</sup> López Ayllón, *Democracia y derecho a la información*, TEPJF, México, 2005, p.249.

<sup>105</sup> Bickel, Alexander M., op. cit., pp.36 y 173.

<sup>106</sup> Malem, Jorge, op. cit., pp.69 y 70. Hart, H.L.A., op. cit., pp.81-83.

<sup>107</sup> Malem, Jorge, op. cit., p.75. Faúndez Ledesma, Héctor, op. cit., pp.582, 584 y 585.

<sup>108</sup> MacCormick, Neil, op. cit., pp.170 y 171.

<sup>109</sup> Bickel, Alexander M., op. cit., pp.50 y 55. Cfr, Soeharno, Jonathan, *The integrity of the judge*, Ed. Ashgate, England, 2009.

<sup>110</sup> Trujillo, Isabel, *Imparcialidad*, Ed. UNAM, México, 2007, p.2. Faúndez Ledesma, Héctor, op. cit., p.685.

prejudices or distortions; the second has to do with balance when opposing interests are confronted, emphasizing a collateral sense of impartiality: the absence of favoritism or partisanship".<sup>111</sup>

Ronald Dworkin considers objectivity to be the sufficient and full quality of the interpretation of the law and the verification of the facts verified by the parties, cleared as far as humanly possible of any hint of subjectivity or relativity that might hinder the judge's function, in spite of the imparting of justice.<sup>112</sup>

But not only are these principles of judicial action sufficient, but the judge must administer and correlate the facts with the corresponding regulations.<sup>113</sup> This rational act will enable the judge to apply logical and reasonable rules in a concrete manner. But this extension of the use of reasonableness "is limited by the requirement of impartiality, which excludes the possibility of asserting individual group positional advantages in moral argumentation".<sup>114</sup>

The judge will be able to interpret the rules according to an established framework and mitigate legal uncertainties or loopholes,<sup>115</sup> "it seems appropriate to describe that experience as an attempt to recognize something awaiting recognition, rather than as a deliberate choice".<sup>116</sup> The rules are imposed by the legislator and only the correct application of them is expected.<sup>117</sup>

But a judge may question whether a rule is just or should only be accepted because of its democratic origin and, above all, a judge must or may question the legitimacy of the rule. In some cases, the duty to apply a rule contrary to their beliefs may be repugnant to the judge. Here there is a clash between the law and its convictions. It is under these situations that their skill and objectivity in interpreting and employing the norm is put to the test.

The consequence will be the recognition that in interpreting the rules of law in some cases, a natural articulation will have to be worked out or generated, which in some way seems to go beyond it, but it is not exactly a legislative impersonation or an act of normative creation.<sup>118</sup>

"The concept of discretion, in its ordinary sense, alludes to the possibility of making decisions within an area opened by patterns established by a particular authority. It can only be sensible or wise, in a context that is not sufficiently clear, but also the capacity, in a precise context, of a higher authority whose decisions cannot be reviewed by another authority".<sup>119</sup>

<sup>111</sup> *Ídem*, p.3. *Vid.* Saldaña Serrano, Javier, *Virtudes del juzgador*, Ed. SCJN, México, 2007, pp.48-51.

<sup>112</sup> Dworkin, Ronald, *Los Derechos en serio*, Ed. Ariel, 1990, pp.154 y ss. Posner, Richard, *op. cit.*, p.89.

<sup>113</sup> Jefferson Powell, H., *op. cit.*, pp.10 y 11.

<sup>114</sup> *Ídem*, p.50.

<sup>115</sup> Posner, Richard, *op. cit.*, pp.8 y 11.

<sup>116</sup> Salmerón, Fernando, *op. cit.*, p.93.

<sup>117</sup> Fetner, Gerald, *op. cit.*, pp.71 y 73.

<sup>118</sup> Muguerza, Javier, *op. cit.*, pp.203 y 208.

<sup>119</sup> Salmerón, Fernando, *op. cit.*, pp.102 y 109.



It is opportune to return to the main issue, how the judge should sanction the conduct that violated the norm.

The first stage of this process will be to formally charge the subject and present the evidence of charge and defense, to assess if this act was committed, under what situation and why it was carried out. Later, the judge will analyze if in this behavior there was an immorality or a grievance against society. With these elements, the judge must decide whether to punish and, with it, to qualify such improper conduct.<sup>120</sup>

This legal decision can be made by the judge from three perspectives: liberal (permissive), public morality (punitive) and tolerance (determining the rules for exercising this behavior). However, what happens if the defendant argues that his conduct produced it as a form of individual freedom (art, expression, politics, labor, etc.).

First, from the liberal point of view, goods worthy of protection must be determined. The State must remain neutral with respect to particular conceptions of the "good".<sup>121</sup> The function of law would be to create the necessary conditions for the flowering of the individual. The important thing is to reject the absolutism of freedom. The judge must weigh the inalienable rights against the general norms that allow the peaceful coexistence of the community.<sup>122</sup> Let's look at the defendant's arguments for violating the rules.

The Declaration of the Rights of Man and of the Citizen states that "The law can only prohibit actions harmful to society"; therefore we must assess whether such conduct actually caused harm to the community, for this has the elements of the principle of harm (cited above).

Another principle that this individual can invoke in his actions is that of his individual autonomy and inviolability of the person; with this, it would be "possible to give a complete rational foundation of human rights within a framework of a moral discourse".<sup>123</sup>

Second, if the judge considers that the defendant should be punished, because his conduct infringed an offence against society.<sup>124</sup> On the one hand, judges should ignore their moral opinions, rather, they should show tolerance for ideas incompatible with them. On the other hand, the court should not tolerate violations of the law, even if the judge personally felt that he could tolerate the offensive act.<sup>125</sup>

<sup>120</sup> Posner, Richard, *op. cit.*, pp.85-86 y 88.

<sup>121</sup> Dworkin, Ronald, *Freedom's law*, *op. cit.*, p.238. Jefferson Powell, H., *op. cit.*, p.27.

<sup>122</sup> Hart, H.L.A., *op. cit.*, p.48. Bickel, Alexander M., *op. cit.*, pp.205-206.

<sup>123</sup> Garzón Valdés, Ernesto, "Derecho y moral", Rodolfo Vázquez, *Derecho y moral*, *op. cit.* p.49.

<sup>124</sup> Jefferson Powell, H., *op. cit.*, p.83.

<sup>125</sup> Williams, Melissa and Waldron, Jeremy, *op. cit.*, p.179.

If the defendant's defense alleges freedom of expression as the source of his or her conduct, but the judge does not consider it relevant, he or she may sanction it on the basis of evidence of public interest.<sup>126</sup>

The purpose of freedom is not individual self-realization, but rather the preservation of democracy and the right of a people, as a people, to decide what kind of life it wants to live.<sup>127</sup>

Here individual arguments cannot be about the public interest. "The argument is weakened in the case of purely offensive conduct, but at least it can be said that the most serious forms of offensive public manifestation inhibit the freedom to attend to their affairs in public places of commonly sensitive people".<sup>128</sup>

The third judicial scenario is to build a sentence that allows the defendant to carry out such conduct, without harming the rest of the community.<sup>129</sup> So you can mark or mark special places and specific times, warning the population.<sup>130</sup> With this resolution, both positions and interests are balanced "... From the liberal perspective it is a line in which goods protected by collective institutions and individual rights are crossed".<sup>131</sup>

Here, tolerance is a virtue that directs the ruling power in making such accommodations precisely when constitutional neutrality and universality do not require this.<sup>132</sup> Tolerance must be used as a standard and a means to judge, where the boundaries of common life are found.

In this way, tolerance describes the path by which different but morally "reasonable" concepts are mutually accepted, within the framework of a just society.<sup>133</sup>

Another possible way to resolve these kinds of issues is based on the previous cases.<sup>134</sup> With this, the judge will seek an outside opinion and will decide in accordance with the judgments issued by his peers.<sup>135</sup>

The role of the authorities was not to remove the causes of tension by eliminating pluralism, but to ensure that each of those groups acted in a tolerant manner with others.<sup>136</sup>

<sup>126</sup> Ídem, p.336. *Vid*, Fiss, Owen, *op. cit.*, pp.23 y 52. Ackerman, Bruce, *op. cit.*, p.234.

<sup>127</sup> López Ayllón, *op. cit.*, p.249.

<sup>128</sup> MacCormick, Neil, *op. cit.*, p.168.

<sup>129</sup> Posner, Richard, *op. cit.*, pp.81-82 y 93-121. Jefferson Powell, H., *op. cit.*, pp.93 y 96.

<sup>130</sup> *Vid*, Faúndez Ledesma, Héctor, *op. cit.*, pp.594 y 595.

<sup>131</sup> Salmerón, Fernando, *op. cit.*, p.90.

<sup>132</sup> Williams, Melissa and Waldron, Jeremy, *op. cit.*, pp.223 y 347.

<sup>133</sup> Ídem, pp.177 y 415.

<sup>134</sup> *Cfr*, Gerhardt, Michael J., *The power of precedent*, Ed. Oxford University Press, New York, 2008.

<sup>135</sup> Posner, Richard, *op. cit.*, pp.144, 154, 183 y 184.

<sup>136</sup> Faúndez Ledesma, Héctor, *op. cit.*, p.572.

However, any decision made by a judge in such cases will have political consequences.<sup>137</sup> The important thing is not to obstruct the free development of individuals and the achievement of happiness (without harming anyone, because their rights are not over those of others, but must coexist); but on the other hand, they must govern norms that allow and strengthen "social cohesion or solidarity depends on certain common moral precepts that can constitute a moral consensus".<sup>138</sup>

At present, judges are called upon to play a decisive role in democracy, since they are the guarantors of fundamental rights and to give constitutional and legal continuity to the acts of public authorities.<sup>139</sup> To conclude this monograph a set of conclusions will be presented, summarizing the edges of the topic addressed.

## CONCLUSIONS

1. This work maintains the impossibility of decoupling law and morality, because there is a symbiotic relationship between both.<sup>140</sup> This is exemplified by the fact that the norms come from a general acceptance or a social custom, which materializes in laws that have a general character; therefore, all subjects must obey them (positivate majority impositions).

"The basis is the claim of correction. This only has a defining character for the legal system as a whole, based on the fact that its qualifier character becomes obvious if the legal system is seen as a system of procedures, from the point of view of a participant"<sup>141</sup>

This connection between law, moral standards and principles of justice, can be in its statement "as arbitrary or as necessary, as the connection made by some jurists between law and punishment".<sup>142</sup>

2. Public morality may prevail over individual freedom only when it is necessary to prevent or remove offensive expressions which infringe upon the rights of others. But, putting individual freedom and public morality on the balance does not mean that we have to lean in favor of morality; this is a process that a democratic society must undertake with

<sup>137</sup> Jefferson Powell, H., *op. cit.*, pp.47, 52 y 53.

<sup>138</sup> MacCormick, Neil, *op. cit.*, p.180.

<sup>139</sup> Orozco Henríquez, Jesús, "Judicialización de la política y legitimidad judicial", en Vázquez, Rodolfo, *Corte, jueves y política*, *op. cit.*, p.39.

<sup>140</sup> Alexy, Robert, *op. cit.*, pp.115 y 116.

<sup>141</sup> Ídem, pp.133 y 150

<sup>142</sup> Salmerón, Fernando, *op. cit.*, p.86.

particular care and, The courts must therefore exercise great caution in weighing up these legal assets.<sup>143</sup>

3. The imposition of prescriptive types of conduct does not really determine the conduct; rather the individual may assess, adjust, adopt or discard them, and may create a descriptive system of conduct,

"True moral values are those that are realized in the free and free decisions of people, who act consciously according to principles to which they voluntarily submit. True moral virtue is not constituted by an apparent conformity to patterns of conduct externally imposed and backed by the threats of legal punishment. It is constituted by the free self-verification with models of conduct and values internally accepted and by decisions motivated by this self-verification".<sup>144</sup>

The effect in setting standards is to set limits on our choice, but it does not determine our choice.<sup>145</sup>

4. From a liberal standpoint, "the State must confine itself to designing institutions that facilitate the individual pursuit of these life plans and the satisfaction of the ideals of virtue that each sustains and preventing mutual interference in the course of such persecution".<sup>146</sup> However, freedom and autonomy must be controlled; they are not goods that can be fully enjoyed.

"... is essential to ensure a balance between an increasingly ubiquitous State and individuals increasingly dependent on the legal forms of organisation of the society to which they belong. The existence or non-existence of such a balance will reveal the distances between democratic regimes in which the individual finds the space for the constitution of his own life plan as determined by the autonomy of his own conscience and only within the limits in which it does not affect the equal rights of others".<sup>147</sup>

5. Individual freedoms must not give rise to moral debauchery; there are values and principles that enable the unity and cohesion of society. Failure to respect values leads to pollution and erosion of society.<sup>148</sup>
6. One of the principles which the State must respect is that of individual autonomy; in the sense of producing beings capable of adopting personal evaluations with respect to the duty of obedience to the laws.

<sup>143</sup> Faúndez Ledesma, Héctor, op. cit., pp.607 y 750.

<sup>144</sup> MacCormick, Neil, op. cit., p.165.

<sup>145</sup> Vid, Nino, Carlos S., "El principio de autonomía de la persona", en *Ética y Derechos Humanos*, Ed. Astrea, Buenos Aires, 1989, pp.199-236.

<sup>146</sup> Vid, Nino, Carlos S., "El principio de autonomía de la persona", en *Ética y Derechos Humanos*, Ed. Astrea, Buenos Aires, 1989, pp.199-236.

<sup>147</sup> Bazterrica, Gustavo M., *La ley*, agosto 29 de 1986, t. 1986-D, p.547.

<sup>148</sup> Malem, Jorge, op. cit., p.72.

7. Individual weighting allows us to infer whether the rules are good, correct, just, whether they symbolize personal values, etc. The point is to discern, whether that normativity represents me and/or whether it should be accepted plainly, even if it does not agree with my identity.

So there will always be people dissatisfied with the impositions made by others (even if it is democratically). As Professor Ernesto Garzón Valdés states: "Not every principle or moral judgment is a juridical norm, but every juridical norm that has a role of operative reason in practical reasoning is a special moral reasoning".<sup>149</sup>

But the subject who feels aggrieved by these normative impositions must accept and recognize that legitimate laws contain intrinsically social moral values; so if he wishes to coexist in the same society he must behave in accordance with them, and in case of failure to ensure compliance, must abide by the (previously established) sanction; in order that the conduct be punished and that order be restored and, on the other hand, ensure the cohesion of a community: "no society can maintain its cohesion unless it has a legal structure that dogmatically establishes what it considers fair".<sup>150</sup>

8. In a pluralistic society, dissent must be allowed; freedom must be exercised responsibly, without harming others.<sup>151</sup> In the framework of pluralism, tolerance is an attitude of individuals (or groups) towards each other, exercised over their attempt to achieve their objectives, rather than a norm of state action or a constitutional principle.<sup>152</sup> There must be elements of mutual help and common loyalty, leading us to seek each other, which together will serve to create and maintain care structures for matters of common concern and care.<sup>153</sup>
9. The role of the judge is fundamental to establishing limits and preserving freedom, so that no abuse occurs;<sup>154</sup> and on the other hand, the judge must understand, reason, and apply the rule in an impartial and objective manner.<sup>155</sup>
10. Democratic prospects depend on improving the moral character of individuals through change. Only our interests can be limited by the harm that can be caused, which allows for the coercion of the State; but society should not cultivate a culture of excessive

<sup>149</sup> Garzón Valdés, Ernesto, "Derecho y moral", Rodolfo Vázquez, *Derecho y moral*, op. cit., p.25.

<sup>150</sup> *Ibidem*, p.146.

<sup>151</sup> Vid, Scanlon, T.M., *The difficulty of tolerance*, Ed. Cambridge University Press, USA, 2008.

<sup>152</sup> Williams, Melissa and Waldron, Jeremy, op. cit., pp.23 y 179.

<sup>153</sup> Bobbio, Norberto, *El tiempo de los derechos*, Ed. Sistema, Madrid, 1990, pp.243-256.

<sup>154</sup> Bickel, Alexander M., op. cit., p.264.

<sup>155</sup> Jefferson Powell, H., op. cit., p.121. Fetner, Gerald, op. cit., p.3.

permissiveness towards groups that undervalue the equality and freedom of all its members.<sup>156</sup>

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<sup>156</sup> Williams, Melissa and Waldron, Jeremy, op. cit., p.18.



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