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The Right of the Indigenous Peoples to their own Law

Abstract: The aim of this paper is to analyze an interesting case about the rights of the indigenous peoples to their own law. In this case, an Argentinean court had to solve a conflict originated in the hypothetical right of a member of the wichí community to have sexual intercourse with his concubine's daughter, based on an alleged indigenous custom. The paper tries to prove that the claim of the accused is unacceptable, because it affects the universality of some of the human rights present in the case.

1. Introduction

One of the most important cultural encounters in world history has occurred in Latin America. At its arrival in this continent, the European culture – mostly Spanish and Portuguese – was met by a variety of cultures with different degrees of development, which might be called "indigenous cultures".[2] This convergence was both tragic and fruitful. It was tragic because extremely serious violations of human rights occurred at the moment. However, it was also fruitful because – in spite of the clash – there was an intercultural encounter which resulted in a new identity, which was highly enriched by the contributions made by the various identities which melted into one.

1 I am grateful to Prof. Pilar Zambrano (Institute for Culture and Society, University of Navarra) for her invaluable recommendations on a first version of this paper, and to Juan José Galeano (Universidad Austral) for his help with the summary of the case that will be treated bellow.

2 The meaning of "indigenous" is hard to determine. The ILO (International Labour Organization) Convention N° 169 states in its first article that: "1. This Convention applies to: (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions. 2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply. 3. The use of the term peoples in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law". See Carbonell Sánchez, M., "La constitucionalización de los derechos indígenas en América Latina: una aproximación teórica", *Boletín Mexicano de Derecho Comparado* 108 (2003), 840–861, 842–846; see too, Sobero Martínez, Y., *Conflictos étnicos: el caso de los pueblos indígenas,* Universidad Complutense de Madrid (1998), 4–82 and 307–309.

In my opinion, there is a parallelism between the present debate over multiculturalism and universalism, which is now taking place in Europe, and the movement towards the full recognition of the rights of indigenous people, which is now taking place in Latin America. Going deep into the analysis of such bonds may result in mutual benefits.[3] Thus, one of the objectives of this paper is to test this thesis. To do so, in the next pages I will focus on one of the problems that the above mentioned movement faces: namely, to the wish of the indigenous people to live by their own laws.

It has been correctly pointed out that "one of the main historic reivindications of the indigenous peoples has been to gain acceptance of their own juridical system, that is to say, «a right to their own law». In most of the Latin American constitutional systems, this wish has been met in various degrees. However, some difficulties have arisen when trying to articulate the indigenous juridical sub-system with the national system. The tension has been specially intense in some cases which deal with indigenous rights and the human rights acknowledged by the constitutions, which affect all the people subject to the state system, whether they are indigenous or not".[4]

This problem highlights the need to achieve a good articulation between the universality of human rights and the respect for the cultural identity of the indigenous people. In practical terms, there are two clear problems: a) how to coordinate the original people's usage with the state juridical system; b) how to coordinate the need to acknowledge the cultural identity when applying first generation rights, with the need to accept the universality of second generation rights (bivalent societies).

2. An interesting case

Argentinean jurisprudence offers an interesting example of the first of the problems above mentioned. The case was originated in Salta, a province in northern Argentina. A member of the community "Misión Wichí" was accused of raping the nine-year-old daughter of his concubine. The mother of the victim reported the event and mentioned that her daughter became pregnant as a result of that event. Consequently, action was brought against the defendant, and he appealed the decision. The competent Court of Appeal denied the plea. Consequently, the defendant presented the case to the

3 The similarity of these processes has been acknowledged, at least implicitly, in several relevant works, See, for example, Citrin, J., Sears, D., Muste, C., Wong, C., "Multiculturalism in American Public Opinion", *British Journal of Political Science*, Vol. 31, No. 2 (Apr., 2001), 247–275; Martin E. Spencer, "Multiculturalism, «Political Correctness», and the Politics of Identity Multiculturalism", *Sociological Forum*, Vol. 9, No. 4, *Special Issue: Multiculturalism and Diversity*, (Dec., 1994), 547–567; Jane K. Cowan, "Culture and Rights after «Culture and Rights»", *American Anthropologist*, New Series, Vol. 108, No. 1 (Mar., 2006), 9–24; Charles R. Hale, "Activist Research v. Cultural Critique: Indigenous Land Rights and the Contradictions of Politically Engaged Anthropology", *Cultural Anthropology*, Vol. 21, No. 1 (Feb.,2006), 96–120; Jan Hoffman French, "Mestizaje and Law Making in Indigenous Identity Formation in Northeastern Brazil: «After the Conflict Came the History»", *American Anthropologist*, New Series, Vol. 106, No. 4 (Dec., 2004), 663–674; Dorothy L. Hodgson, "Precarious Alliances: The Cultural Politics and Structural Predicaments of the Indigenous Rights Movement in Tanzania", *American Anthropologist*, New Series, Vol. 104, No. 4 (Dec., 2002), 1086–1097.
See Cianciardo, J., "Para siempre, para todos. Los desafíos de la universalidad a sesenta años de 1948", *Persona y Derecho* 59 (2008), pp. 19–55; see too, from a different perspective, Peter Whiteley, "Do «Language Rights» Serve Indigenous Interests? Some Hopi and Other Queries", *American Anthropologist*, New Series, Vol. 105, No. 4, *Special Issue: Language Politics and Practices* (Dec., 2003), 712–722.

4 Carbonell Sánchez, M., "La constitucionalización de los derechos indígenas en América Latina (…)", *op. cit.*, 851.

Supreme Court of the Province of Salta. This court accepted the appeal and declared the bill of indictment to be null. The majority considered that the previous sentence had been arbitrary because "decisive proof" in relation to the cultural and ethnical identity of the defendant had been overlooked.[5] The Court said that, in this case, when the Judge produced the bill of indictment, the anthropological report had already been included in the case, thus it was obligatory for the Judge to specially have considered it. According to the Court, this report was used in a deficient manner, without taking into account certain important aspects such as the social acceptance brought about by the fact that a woman has had sexual intercourse as from her first menstrual period.[6]

The majority also considered that another proof had been overlooked. In their opinion, in the case file there was a statement made by prominent members of the indigenous community in which they expressed their perplexity at the possibility of considering the defendant's behavior criminal. According to the majority, these statements offered a new context to the case: how ancestral customs affected the relationship between the defendant and the victim.[7]

Then, the Court said that the decision to produce a bill of indictment against the defendant had been unreasonable because it had omitted taking into account a supposedly indigenous custom which approved early sexual intercourse.[8]

The majority of the Court based their decision on an interpretation of this article of the Argentine Constitution:

> "Section 75. Congress is empowered:
>
> 17. To recognize the ethnic and cultural pre-existence of indigenous peoples of Argentina. To guarantee respect for the identity and the right to bilingual and intercultural education; to recognize the legal capacity of their communities, and the community possession and ownership of the lands they traditionally occupy; and to regulate the granting of other lands adequate and sufficient for human development; none of them shall be sold, transmitted or subject to liens or attachments. To guarantee their participation in issues related to their natural resources and in other interests affecting them. The provinces may jointly exercise these powers".

However, Judge Cristina Garros Martínez filed a dissenting opinion. She described in detail the facts of the case. The Judge said that Ms. Teodora Tejerina, the victim's mother, had been threatened by the local tribal chief, who had said that if she denounced the rape, she would go to prison. As Ms. Tejerina was afraid her former partner would do the same to her other daughters, she presented the case to the head mistress of the school the victim attended. When facing first Judge that treated the case, Ms. Tejerina changed her statement. She said that she had been obliged by the head mistress to present the case, that she was not angry with her former partner and that she had not been threatened by the chief. Ms. Tejerina did not deny the crime; but she modified some aspects of denounce. The Judge concluded that the action taken by the public prosecutor was valid and it did not have any defects.

Then Judge Garros Martínez analyzed the different arguments present in the case, which I will expose below:

a) The Judge stated that the Argentine Constitution and the international human rights treaties should be interpreted in a harmonious manner.[9]

5 Supreme Court of Justice of Salta (Argentina), "R., J. F.", 11/29/2006, Majority, 3
6 *Idem*, 6
7 *Idem,* 7
8 *Ibidem*
9 *Idem,* 10

b) In the second place, the Judge invoked the ruling of the Argentine Supreme Court to state that constitutional rights are not absolute; that is to say, that constitutional rights have limits.[10] From this point of view, the Judge maintained the full application of the criminal law to the case. She said that the opposite solution would imply, on the one hand, to give the constitutional rights put forward by the defendant the condition of being absolute, and, on the other hand, not to take into account other constitutional rights (the rights of the girl) which have the same hierarchy, a criterion which is prohibited by the Constitution (according to the Supreme Court's interpretation).[11]

c) There is a "set of constitutional norms" which must be applied to the case, made up by several sections of the constitutional text and international treaties. Also, it is necessary to study the possible application of the ILO (International Labour Organization) Convention N° 169 (Indigenous and Tribal Peoples Convention). This convention has had constitutional hierarchy since 2000.[12]

d) According to Judge Garros Martínez, the defendant's interpretation of the case is contrary to the prevision established in article 8 of the ILO (International Labour Organization) Convention N° 169, which says:

> "Article 8
>
> 1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws.
> 2. These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognised human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle.
> 3. The application of paragraphs 1 and 2 of this Article shall not prevent members of these peoples from exercising the rights granted to all citizens and from assuming the corresponding duties".

In addition to that, Judge Garros Martínez argued that the position of the defendant is also contrary to article 9.1 of such convention, which says:

> "Article 9. 1. To the extent compatible with the national legal system and internationally recognised human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected".

The application of these articles must be done taking into account that the convention establishes in article 10.1:

> "Article 10. 1. In imposing penalties laid down by general law on members of these peoples account shall be taken of their economic, social and cultural characteristics".

e) Based on the principles "*pro homine*" and "*favor debilis*", the Judge maintained that the intention of applying the so called "customary law of the wichís peoples" is contrary to international law.[13] Namely, to articles 8 and 9 of the ILO (International Labour Organization) Convention N° 169 – above mentioned –, to articles 5 and 11 of the American Convention on Human Rights,[14] and to article 12 of the International

10 *Ibidem*
11 *Ibidem*
12 *Idem,* 11
13 *Idem,* 12
14 Article 5. Right to Humane Treatment. 1. Every person has the right to have his physical, mental, and moral integrity respected. 2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person. 3. Punishment shall not be extended to any person other than the criminal. 4. Accused persons shall, save in exceptional circumstances, be segregated from con-

Covenant on Economic, Social and Cultural Rights.[15]

f) The Judge also gave her opinion about "cultural relativism". According to her, this theory states that all cultural systems are intrinsically equal in terms of value and that their individual characteristics should be appraised and explained within their own system.[16] According to "cultural relativism", the activities developed by "western organizations" – such as UNICEF (United Nations International Children's Emergency Fund) or Amnesty International, which try to eliminate some practices of the indigenous people which are considered perverse or aberrant – cannot be justified, as they may be interpreted as a means to destroy the cultural heritage of certain peoples.[17] The Judge illustrated this argument through the example of clitoridectomy, also called female genital mutilation (FGM), and the practice that originated this case.[18]

The Judge said that indigenous women express a different opinion when they have the chance to do so, which is important in the context provided by this case. "It may be inferred that the concept of custom is quite flexible and that it is not necessarily identified with ancestral practices as opposed to new ones, but that it represents the behavior which is socially accepted by the community. Indigenous women expect justice to be administered according to customs, but they reject those practices which negatively affect them, thus the law should not protect and promote the development of each and every custom".[19]

To solve this dilemma between custom and juridical system, the Judge also resorted to some precedents of the Inter-American Court of Human Rights. This tribunal says, in one of the precedents mentioned by the Judge:

> "11. Cultural manifestations of the kind form, in their turn, the *substratum* of the juridical norms which ought to govern the relations of the community members *inter se* and with their goods. As timely recalled by the present Judgment of the Court, the Political Constitution in force of Nicaragua itself provides about the preservation and the development of the cultural identity (in the national unity), and the proper forms of social organization of the indigenous peoples, as well as the maintenance of the communal forms of property of their lands and the enjoyment, use and benefit of them (Article 5).
> 12. These forms of cultural manifestation and social self-organization have, in this way, materialized, with the passing of time, into juridical norms and into case-law, at both international and national levels. This is not the first time that the Inter-American Court has

victed persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons. 5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors. 6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners.

Article 11. Right to Privacy. 1. Everyone has the right to have his honor respected and his dignity recognized. 2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation. 3. Everyone has the right to the protection of the law against such interference or attacks.

15 Article 12. 1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child; (b) The improvement of all aspects of environmental and industrial hygiene; (c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases; (d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness.

16 Supreme Court of Justice of Salta (Argentina), "R., J. F.", 11/29/2006, Majority, cons. 13

17 *Ibidem*

18 *Ibidem*

19 *Ibidem*

> kept in mind the cultural practices of collectivities. In the case of *Aloeboetoe and Others versus Suriname* (Reparations, Judgment of 10.09.1993), the Court took into account, in the determination of the amount of reparations to the relatives of the victims, the customary law itself of the maroon community (the *saramacas*, – to which the victims belonged), where polygamy prevailed, so as to extend the amount of the reparations for damages to the several widows and their sons".[20]

At the same time, some Judges of the Court emphasized that:

> "Thus, at the same time that we affirm the importance of the attention due to cultural *diversity*, also for the recognition of the universality of human rights, we firmly discard the distortions of the so-called cultural «relativism»".[21]

Finally, the Judge concluded that according to the doctrine of the Inter-American Court of Human Rights and the principle that states that whenever cultural considerations conflict with human rights, the latter would prevail; namely in this case, the best interests of the child,[22] so the criminal law of the Argentinean juridical system should be applied to the case.[23]

3. In search for a solution

Undoubtedly, this is a very interesting case. I will now examine a few of the arguments presented by the majority, in order to criticize them. I will particularly focus on some aspects of this type of problem (called "the right to their own legal system"), which can contribute to its better solution.

3.1. The importance of understanding the circumstances

It is interesting to consider that there was a wichí indigenous group who criticized the way in which the situation was presented by the judges. In fact, this group presented a complaint at the Argentine *Instituto Nacional contra la Discriminación, la Xenofobia y el Racismo (Inadi).*[24] According to Octarina Zamora, chieftain of the wichí community at Honat Le les, Embarcación, Salta, Argentina, the sentence was disastrous. This woman says that it is not true that their culture accepts and promotes early sexual intercourse or incest, and that, based on their ignorance, the Court have made the discrimination already suffered by wichí women deeper.[25] This has shown that this practice is not widely accepted by all the wichís. In fact, there are many who oppose to it.

This type of cases always presents the difficulty of accurately determining which custom we are referring to, that is, of defining the custom. Thus, the first critique to be

20 Case "Comunidad Mayagna (Sumo) Awas Tingni vs. Nicaragua (Judgment of August 31, 2001). See also, case "Aloeboetoe y otros vs. Suriname – Reparaciones", CtIADH, Serie C., n. 15, Judgment of September 10, 1993, § 1–116; case "Bámaca Velásquez vs. Guatemala" (Judgment of November 21, 1999), Serie C, n. 70, p. 3–149, § 1–230.

21 Case "Comunidad Mayagna (Sumo) Awas Tingni vs. Nicaragua (Judgment of August 31, 2001)", JOINT SEPARATE OPINION OF JUDGES A.A. CANÇADO TRINDADE, M. PACHECO GÓMEZ AND A. ABREU BURELLI.

22 According to the Convention on the Rights of the Child, "Article 3. 1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration".

23 *Idem,* cons. 15

24 See *La Nación,* 1/24/2007.

25 *Ibidem*

made of the decision of the majority would be that they did not analyze deeply enough the complexity of the indigenous custom mentioned above.

3.2. Internal restrictions and external protections

To correctly understand the difficulties posed by this case, it may be useful to focus on the distinction proposed by Professor Will Kymlicka. According to him, there are internal restrictions and external protections to be taken into account when dealing with the rights of a cultural minority.[26] There are two different types of claim which a cultural group may put forward. The first would be the one made by a group against personal decisions taken by their own individual members. The second one would be that made by a minority group against the society in which it lies. Both the first and the second may be considered actions that protect the stability of national or ethnical communities from the instability which may come from different sources. The aim of the first type is to protect the group from the impact which may be caused by internal dissent (for instance, the decision of individual members not to observe traditional practices or customs), while the aim of the second type is to protect a group from the impact of external decisions (for instance, political and economic decisions made by the society to which the group belongs).[27] According to Kymlicka, internal restrictions must be rejected while the need to be protected against external actions must be accepted – as long as the equality of the groups is respected.[28]

From this viewpoint, the way in which this case has been interpreted by the majority of the Court presents a clear example of internal (and, consequently unacceptable) restriction. Even if we believed that the so called right of the male partner to sexually take advantage of the daughter of his wife were a wichí custom, the defense of such custom by the group would be a case of internal restriction, which would be unacceptable.

3.3. Conclusion: on the protection of dignity and human rights

The unacceptability of internal restrictions lies on the following argument. In the first place, a group (the wichís, in this case) cannot use one of its members as a means

26 Cfr. Kymlicka, W., *Multicultural Citizenship. A Liberal Theory of Minority Rights,* Oxford, Clarendon Press, 1996. According to Kymlicka, these two kinds of claims "get labeled as 'collective rights', but they raise very different issues. Internal restrictions involve *intra-group* relations – the ethnic or national group may seek the use of state power to restrict the liberty of its own members in the name of group solidarity. This raises the danger of individual oppression (…). External protections involve *inter-group* relations – that is, the ethnic or national group may seek to protect its distinct existence and identity by limiting the impact of the decisions of the larger society. This too raises certain dangers – not of individual oppression within a group, but of unfairness between groups. One group may be marginalized or segregated in the name of preserving another group's distinctiveness" (36).
See, also, Kymlicka, W., "Minority Rights in Political Philosophy and International Law" in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law*, Oxford University Press, 2010, 377–96, and "Derechos individuales y derechos de grupo en la democracia liberal", *Isegoría* 14 (1996), trad. de F. Colom, pp. 5–36; Contreras Peláez, F. J., "Derechos colectivos, libertad individual y mitología comunitarista en Will Kymlicka", in Ansuátegui Roig., F. J., *Una discusión sobre derechos colectivos*, Madrid, Dykinson – Universidad Carlos III, 2001; Pérez Luño, A., "Ciudadanía y definiciones", *Doxa* 25 (2002), 177–211. Another critique, in Walker, B., "Plural Cultures, Contested Territories: A Critique of Kymlicka", *Canadian Journal of Political Science / Revue canadienne de science politique*, Vol. 30, No. 2 (Jun., 1997), 211–234.

27 Kymlicka, W., *Multicultural Citizenship (…), op. cit.*, 35

28 *Idem,* 34–44 and *passim*

to defend its cultural identity. Similarly, all the traits of a given cultural identity are not the contents of the right to a cultural identity, but only those traits whose defense is compatible with the fact of considering each and every member of a group as an end in him/herself.

In the second place, we must bear in mind that the unconditioned respect which is inherent to the mere existence of a human being – considering a human being an end in him or herself – is a formal demand which is meaningless if it is not provided with a concrete content. Thus, it is necessary to resort to human rights to deeply understand what is meant by stating that certain internal dissent cannot be legitimately punished by a group. The internal dissents which are unacceptable are those which derive from the exercise of human rights.

In other words: the idea of dignity points out how a group should treat each of its members: as ends in themselves;[29] rights refer to and are based on a set of basic goods, which are connected to dignity, whose violation implies treating somebody as if he/she were something, as a means to obtain an end different from him or herself.[30]

A group may oppose to internal dissent only if such dissent does not frustrate the exercise of a human right. The problem is how to determine this point. To do so only on the grounds of autonomy would be impossible, because if this were true, any behavior – including, for example, an aberrant or perverse behavior – could be included under the category of human right.[31] Thus, the accused may argue that with his act, he is realizing his dimension of "friendship", in line with what his culture prescribes, or perhaps his dimension of "integrity or psychological and physical wellbeing". On the contrary, when human rights are associated to basic human goods, there are two consequences which may lead to reaching completely different solutions to solve problems similar to the one above presented:[32]

29 This poses two cuestions. On the one hand, why should someone with dignity be treated in this manner, and, on the other hand, what is to give dignity to someone?
Regarding the second question, see Spaemann, R., *Lo natural y lo racional. Ensayos de antropología*, trad. de D. Innerarity y J. Olmo, Madrid, Rialp, 1989, pp. 89–123. According to him, the coherence of the discourse of human rights depends on its pre-positive recognition. If a human right can be made null at any moment by those for whom such right is a source of obligation, it would not deserve being called a "right". This objection cannot be avoided by those who base dignity on autonomy. See, in this regard, Serna, P., "El derecho a la vida en el horizonte cultural europeo de fin de siglo", in Massini, C. I. y Serna, P. (eds.), *El derecho a la vida*, EUNSA, Pamplona, 1998, pp. 23–79; see also, Zambrano, P., *La disponibilidad de la propia vida en el liberalismo político. Análisis crítico a partir del pensamiento de John Rawls y Ronald Dworkin*, Ábaco de Rodolfo Depalma, Buenos Aires, 2005, *passim*; Massini, C. I. y Zambrano, P., "Vida humana, autonomía y el final de la existencia. ¿Existe un derecho a disponer de la propia vida?", in Borda, G., *La persona humana,* La Ley, Buenos Aires, 2001, 105–136. The reason is that autonomy cannot be based on itself. See Rivas, P., *Las ironías de la sociedad liberal,* México, UNAM, 2004, 1–33; Velarde, C., *Universalismo de derechos humanos. Análisis a la luz del debate anglosajón*, prólogo de J. A. Pastor Ridruejo, Madrid, Civitas, 2003, 95–107 and 121–122.

30 Regarding the concept of basic human good, see Finnis, J., *Natural Law and Natural Rights,* Oxford, O.U.P., 1978, *passim*; from this author *Aquinas. Moral, Political and Legal Theory,* Oxford, O.U.P., 1998, 132–180. See also Gómez–Lobo, A., *Los bienes humanos. Ética de la ley natural,* Santiago–Buenos Aires, Mediterráneo, 2006, passim; Pereira Sáez, Carolina, *La autoridad del derecho. Un diálogo con John M. Finnis*, Granada, Comares, 2008, *passim* y Massini, C. I., "Derechos y bienes humanos. Consideraciones valorativas a partir de las ideas de John Finnis", Mendoza, *pro manuscripto*.

31 See Limodio, G., "Una doctrina permanente", *El Derecho* 5/12/2008, 1–2.

32 See n. 134. Also Vigo, R., *El iusnaturalismo actual. De M. Villey a J. Finnis,* México, Fontamara, 2003, 105–148.

a) There are several ways, as many as there are cultures and people, to realize each human good;[33] b) There are certain behaviors which may prevent a person from realizing some human good. Opposition to dissent should not be accepted when it is about a topic which, in itself, involves the violation of a basic human good. A culture-related custom which, in itself, frustrates the exercise of some basic human good cannot be imposed on anyone. On the other hand, a group may have the right not to accept dissent if such dissent frustrates the exercise of some basic human good.

However, is it possible for a group to impose the way in which a basic human good should be realized? In my opinion, it is not. The principal reason is that one of the basic human goods is, precisely, the possibility to choose personal ways of realization (how to realize our human condition). In any case, it would be necessary to deeply study what this good is, a task which I will not deal with in this paper.[34]

Consequently, if the wichí community considered the acts of the accused to be a wichí custom, not only cannot they impose such custom on their members who express internal dissent, but it would also be legitimate for the State to punish it and to try to eradicate it.

On the one hand, the legitimacy of the state's action towards punishing the behaviors which frustrate the exercise of a human right is based on the positive dimension of this right. "The «positive» dimension of civil and political rights is being increasingly recognized internationally, for example, in the case law of the European Court of Human Rights. The differences between the two categories of rights are matters of degree, rather than substance: although all human rights generate positive as well as negative obligations, a larger number of social and economic rights create more substantial positive obligations".[35]

On the other hand, we should bear in mind that the human rights protect not only the exercise of something, but also the non-exercise of certain behaviors (which constitute their contents). This can be illustrated by the freedom of speech. This right involves the decision and the act of expressing oneself in a certain manner and the right not to do so. Likewise, if we focus on sexuality rather than on speech, we will conclude that the rights related to the former – that is to say, intimacy, private life and physical freedom – protect, under certain conditions, the decision to have and, specially, not to have sexual intercourse. On this basis, the intention of part of a group to prevent the dissent of those who do not approve of intercourse taking place between a girl and her mother's partner cannot be accepted because it uses a human right – and thus, a person – in order not to affect some aspects of their cultural identity.

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33 See John Finnis, *Aquinas (…), op. cit.*

34 See George, Robert, *Making Men Moral*, Oxford, Clarendon Press, 1993, *passim.*

35 Eva Brems, *Human Rights. Universality and Diversity,* The Hague, Kluwwer, 2001, 446. See too, Veli-Pekka Viljanen*,* Abstention or Involvement? The nature of State Obligations under Different Categories of Rights", in Krysztof Drezewichki, Catarina Krause and Alan Rosas (eds.), *Social Rights as Human Rights. A European Challenge,* Institute for Human Rights, Åbo Akademi University, 1994, 52–60.