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INFORMATION ON COOPERATION BETWEEN THE CARDINAL STEFAN WYSZYŃSKI UNIVERSITY IN WARSAW AND THE UNIVERSITY OF THE WEST OF SANTA CATARINA FROM BRAZIL

In February 2015 the Cardinal Stefan Wyszyński University in Warsaw (hereinafter: UKSW) signed an agreement on cooperation with the University of the West of Santa Catarina (hereinafter: UNOESC) from Brazil. This is a private academic institution with a decentralized structure, currently composed of 5 *campi* situated in cities of the west part of Santa Catarina, namely: Chapecó, Joaçaba, Videira, Xanxerê and São Miguel do Oeste, as well as of units in 5 other cities. Its academic community is constituted by approximately 900 academic staff and 21000 students. The UNOESC runs courses of different levels, including *cursos de graduação*, *mestrados*, and doctoral studies[1].

The UKSW-UNOESC agreement has a general scope, which covers different fields of science and it allows to develop cooperative initiatives by various faculties and units of both partners. However all current actions taken within a framework of the agreement concentrate on human rights and its protection on international and national level. They are carried out by the Institute of International Law, European Union and International Relations,

[1] Consult information available at: http://www.unoesc.edu.br/unoesc/sobre

Faculty of Law and Administration, to a large extent, but not exclusively, by the Department of Human Rights Protection and International Humanitarian Law (from the UKSW side) and Centre for Excellence in Law (from the UNOESC). In fact the initiative of developing inter-university cooperation originated first in the will to share knowledge and experience on human rights challenges and solutions, taking into account historical and current dilemmas faced by Poland and Brazil and the European and Latin American regions. Such substantive scope of international cooperation fits in the priority directions of research and teaching established by the Mission and Strategy of the UKSW[2] and implements goals of the UNOESC, which tends to create a research network on human rights among various Latin American (e.g. Brazilian, Mexican, Chilean) and European (e.g. Polish, Czech, Italian) academic institutions.

Since conclusion of the UKSW-UNOESC agreement on cooperation to this date several joint initiatives within its framework have already been taken. This includes, firstly, visiting lectures in Brazil and Poland. Secondly, joint research projects are carried out. They materialize in the form of publications and conferences. Both, universities undertook to organize joint international conferences and seminars. In October 2016 the UNOESC organized Spring International Seminar on *Human Dignity and Serious Violations of Human Rights*, in which the UKSW academics took actively part, presenting papers and serving as panelists. As a result of this conference a joint monography was published[3].

The third, presently implemented, important field of the cooperation consists of exchange and dissemination of research results through publication in scientific periodicals of each of the partner institutions. The UNOESC publishes the *Espaço Jurídico Journal of Law* (EJJL). In the latest issues of this journal several articles of the UKSW academic staf can already be found. The current issue of the *Polski Przegląd Stosunków Międzynarodowych*

[2] "The Cardinal Stefan Wyszyński University Mission and Strategy for the years 2014–2020" adopted by the Senate of the UKSW on 20.3.2014, available at: http://www.uksw.edu.pl/images/dokumenty/misja/zal_do_u_32_14.pdf (text in Polish).

[3] See: N. L. X. Baez, E. Karska, A. P. Cobos Campos (eds.), *Human Dignity and Human Rights Serious Violations*, Qualis, Florianopolis 2016.

is the first step taken in order to share research of the UNOESC academics with Polish recipients.

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THE CONSTITUTIVE INSTRUMENTS OF THE INTERNATIONALIZATION OF HUMAN RIGHTS

Keywords: the United Nations, the United Nations Charter, the International Court of Justice, the Universal Declaration of Human Rights.

1. On 26 April 1945, the United Nations (UN) founding convention was held in San Francisco[2]. As a result of its deliberations, the United Nations Charter (UN Charter) gained its final form[3].

The UN Charter is generally considered a special treaty. Being a treaty that constitutes the UN[4], it is perceived both as "the fundamental anchoring

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[2] Originally 46 states participated in it, with four more joining later. Poland was not among these states. Only after the establishment of the Provisional Government of National Unity was Poland allowed to participate in the United Nations as a primary member.

[3] The shape of the UN and its rules of procedure were, in principle, determined at a working conference in the summer of 1944, in Dumbarton Oaks, attended by representatives of the then-four great powers: the Soviet Union, the United States, the United Kingdom and China. Cf. T. Łoś-Nowak, *Organizacje w stosunkach międzynarodowych*, Wydawnictwo UWr, Wrocław 1997, pp. 82–83.

[4] It entered into force on 24 October 1945. This day is now celebrated globally as United Nations Day. The United Nations General Assembly first gathered in London on 10 January 1946.

of the obligations of the States in the sphere of international law, and as such is recognized as an international quasi-constitution"[5]. Meanwhile, the human rights clauses contained in the UN Charter set the stage in the process of institutionalizing human rights within international law[6] and, consequently, establishing a new branch of international law, i.e. international human rights law[7]. These provisions are contained in the Preamble as well as in the six subsequent Articles of the Charter.

In the Preamble, the UN Member States declared their readiness to reaffirm faith "in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small", and further determined they would "promote social progress and better standards of life in larger freedom". The above provisions, as one of the foundations of the axiology of modern international law, were adopted under certain historical conditions, whose specifics were rendered exceptionally aptly by John P. Humphrey, who stated that:

> „The traumatic experiences through which the world had just passed, including the studied violation of basic rights by the government of one of the most civilized countries, provided the catalyst to revolutionize traditional concepts of the relation of international law to individuals. The Second World War and the events preceding it set forces in motion that radically changed the content and very nature of international law. Traditional international law, *ius inter gentes*, which had governed only the relations of states, was to become a new kind of legal order for which the old name was no longer appropriate. International law became world law"[8].

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[5] T. Jasudowicz, *Kodyfikacja międzynarodowej ochrony praw człowieka,* [in:] B. Gronowska, T. Jasudowicz, M. Balcerzak, M. Lubiszewski, R. Mizerski (eds.), *Prawa człowieka i ich ochrona,* Wydawnictwo TNOiK, Toruń 2005, p. 49.

[6] Cf. generally D.W. Bowell, *The Law of International Institutions*, Manchester University Press, Manchester 1982; E. Lauterpacht (ed.), *International Law, Being the Collected of Hersch Lauterpacht*, Vol. 3, Cambridge University Press, Cambridge 1977, pp. 145–220.

[7] Cf. N. Rodley, *International Human Rights Law,* [in:] M. D. Evans (ed.), *International Law*, Oxford University Press, Oxford 2014, p. 789; M. O'Boyle, M. Lafferty, *General Principles and Constitutions as Sources of Human Rights Law*, [in:] D. Shelton (ed.), *The Oxford Handbook of International Human Rights Law*, Oxford University Press, Oxford 2013, p. 195; D. Shelton, *Introduction,* [in:] D. Shelton (ed.), *The Oxford Handbook of International Human Rights Law,* Oxford University Press, Oxford 2013, p. 1.

[8] J. P. Humphrey, *The International Bill of Rights: Scope and Implementation*, „William & Mary Law Review" 17 (1976), p. 527.

In the dramatic experience with Nazi totalitarianism, there is an answer to why the States recognized the need for a common response in terms of universal human rights in light of "Nazism, which revealed the horror that could arise from the positivist understanding of the law in which man does not mean anything"[9]. It seems that only in such special circumstances was such a reaction of states possible[10]. International law had been then defined as the law governing exclusively relations between nations-states[11]. Hersch Lauterpacht clearly argued that "the orthodox positivist doctrine states explicitly that only states are subjects of international law"[12]. Individuals were considered more as objects, rather than subjects of that law, to the extent that states had no direct obligations toward them under international law since those commitments were obligations to the states whose citizens those individuals were[13].

The following human rights clauses of the Charter are contained in Art. 1, which defines the goals to be achieved by the international community through the UN. Among these purposes is to bring about international cooperation in developing and promoting respect for human rights and fundamental freedoms for all, without distinction as to race, sex, language, or religion (Art. 1(3) of the UN Charter)[14]. Thus, the promotion of respect for

[9] J. J. Shestack, *The Jurisprudence of Human Rights,* [in:] T. Meron (ed.), *Human Rights in International Law Legal and Policy*, Oxford University Press, Oxford 1984, p. 86.

[10] „the high rank of human rights in the UN Charter is not only the success of the US diplomacy, but also the evidence of the growing influence of civil society on global issues" – M. A. Glendon, *A World Made New. Eleanor Roosevelt and the Universal Declaration of Human Rights*, New York 2001, p. 10. The San Francisco Conference was attended – as consultants and observers – by more than 40 non-governmental organizations, mostly from the United States. They had a big impact on support in "the issue of human rights". Cf. W. Osiatyński, *Prawa człowieka i ich granice,* Wydawnictwo Znak, Krakw 2011, p. 44. Also mentioned by J. P. Humphrey, *The International Bill of Rights,* pp. 527–528. Similarly N. Rodley, op.cit., p. 786.

[11] Cf. W. Góralczyk's remarks in: *Prawo międzynarodowe publiczne w zarysie*, PWN Warszawa 1989, p. 8. What stands out here is the inclusion of the "protection of human groups and human rights" in the issue of "state population".

[12] E. Lauterpacht (ed.), op.cit., p. 489. Similarly, albeit slighly milder: C. Mik, *Charakter, struktura i zakres zobowiązań z Europejskiej Konwencji Praw Człowieka*, „Państwo i Prawo" (1992), Issue 4, p. 5.

[13] L. Oppenheim, *International Law: A Treaties,* Vol. 1, Longmans, London 1912, p. 362,

[14] The words "based on respect for the principle of equality and self-determination of nations" in Art. 1(2) and "in promoting and encouraging respect for human rights

human rights was placed among the purposes whose, as Roman Kwiecień puts it, "can be interpreted as the highest value of the international legal order"[15].

The open question, however, is whether the purpose in question is of the same value as the maintenance of international peace and security, or whether it expresses a fundamental, absolute value, although the highest value is the "universal peace" provided for in Art. 1(2) of the UN Charter[16]. It seems, none the less, that it is more accurate to speak in this case of the organic and thus unbreakable unity of the UN purposes, the reason for which the denial of human dignity and freedom anywhere is a threat to peace and security everywhere[17]. This understanding of the UN purposes is also urged by the judge of the International Court of Justice (I.C.J.), Kōtarō Tanaka, who noted that "the repeated references in the Charter to fundamental rights and freedoms (...) appear to be one of its differences in relation to the pact of the League of Nations, in which the close link between peace and respect for human rights was not as strongly emphasized as in the Charter of the United Nations"[18].

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and for fundamental freedoms for all without distinction as to race, sex, language, or religion" were not provided for in the Dumbarton Oaks Files, but they were introduced in San Francisco.

[15] R. Kwiecień, *Między zakazem używania siły zbrojnej a nakazem poszanowania praw człowieka. W poszukiwaniu głównych wartości współczesnego prawa międzynarodowego*, [in:] E. Karska (ed.), *Globalne problemy ochrony praw człowieka*, Wydawnictwo UKSW, Warszawa 2015, p. 73.

[16] R. Kwiecień, op.cit., p. 73 et seq.; T. Jasudowicz, *Zakaz użycia lub groźby użycia siły „w jakikolwiek inny sposób niezgodny z celami Narodów Zjednoczonych"*, [in:] T. Jasudowicz, M. Balcerzak, J. Kapelańska-Pręgowska (eds.), *Współczesne problemy praw człowieka i międzynarodowego prawa humanitarnego*, Wydawnictwo TNOiK, Toruń 2009, p. 115 et seq.

[17] In a similar vein, T. Jasudowicz, *W poszukiwaniu podstawowych wartości międzynarodowego porządku prawnego. Polemika z poglądami prof. Romana Kwietnia*, [in:] E. Karska (ed.), *Globalne problemy*, pp. 78–85. Regarding the doctrine's position on the complex relationship between the principles of the UN Charter mentioned in Art. 2 see Z. Resich's remarks and the visibility of the principle of non-interference. Id. *Międzynarodowa ochrona praw człowieka*, PWN, Warszawa 1981, pp. 32–36.

[18] Cf. Dissenting opinion the I.C.J. judge Kōtarō Tanaka to the judgment of the J.C.J. ruled in *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa),* dated 18 July 1966, p. 289, I.C.J. Reports 1966, p. 6.

The above references to human rights should be read as undermining the concept of individual rights as the laws of sovereign states[19]. With that being said, neither the provisions of the Preamble nor Art. 1 of the UN Charter were developed into a catalog of concrete human rights and freedoms[20]. In fact, the UN Charter indicates only two rights, i.e. the right to self-determination of peoples[21] and the prohibition of discrimination[22].

On the other hand, the human rights clauses contained in the Preamble and Art. 1(3) of the UN Charter were developed in the specific competence of the UN principal bodies, namely the UN General Assembly (UN GA) and the UN Economic and Social Council (ECOSOC), as well as in the Member States' commitment to joint or separate action (Art. 56 of the UN Charter) in the implementation of the tasks and objectives set out in Art. 55 of the UN Charter.

As far as the UN bodies are concerned, in the light of the UN GA Charter, the UN are entitled to initiate studies and recommendations in order to "achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion" (Art. 13(1) (b) of the UN Charter). Similar powers were entrusted to the ECOSOC, allowing it, among other things, to "make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamen-

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[19] M. S. McDougal, G. Bebr, *Human Rights in the United Nations,* "American Journal of International Law" 58 (1964), pp. 603–641.

[20] For these reasons the UN Charter is not recognized as a benchmark for specific cases. In the view of the UN Commission on Human Rights whose human rights clauses are abstract principles that are difficult to apply in specific cases, which in effect prevents (adequate) response to allegations of infringement. Cf. P.E. Jacob, A. L. Atherton, *The Dynamics of International Organization*, Dorsey Press, Homewood 1965, p. 579.

[21] Cf. Preamble and Art. 1(2) of the UN Charter.

[22] See also Art. 73 Chapter XI: Declaration regarding non-self-governing territories and Art. 76 Chapter XII: International Trusteeship System. For more, see P. G. Lauren, *First Principles of Racial Equality: History and the Politics and Diplomacy of Human Rights Provisions in the United Nations Charter*, "Human Rights Quarterly" 5 (1983); A. Cassese, *The General Assembly: Historical Perspective 1945–1989*, [in:] P. Alston (ed.), *The United Nations and Human Rights: A Critical Appraisal*, Oxford University Press, Oxford 2004, p. 25.

tal freedoms for all"[23]. It may further prepare convention designs and convene international conferences on matters falling within its competence[24]. The ECOSOC may also take appropriate measures so to receive regular reports from specialized organizations. Apart, it may conclude agreements with the UN Member States and the specialized organizations to receive reports on the measures taken to implement its own recommendations, or those of the UN GA falling within its competence. Art. 68 of the UN Charter, meanwhile, authorizes the ECOSOC to appoint, *inter alia*, human rights "commissions"[25], with the most notable examples being the UN Commission on Human Rights[26], the UN Commission on the Status of Women[27] and the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities[28].

It should be borne in mind, however, that although the UN Charter has made the UN bodies responsible for promoting human rights and fundamental freedoms, it has given them relatively small powers in terms of the ability to enforce and respect its purposes and principles[29]. While it is true that all Member States have undertaken to pursue joint and independent actions, including the Organization, to achieve the objectives set out in Art. 55 of the UN Charter[30], and therefore also for the universal respect and pres-

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[23] Cf. Art. 62(2) of the UN Charter.

[24] Cf. Art. 62(3) and (4) of the UN Charter, respectively.

[25] It determines that the ECOSOC will set up commissions in the economic and social sphere and commissions that promote human rights, as well as any other commissions that may be required to fulfill its functions.

[26] Founded in 1946. However, pursuant to Resolution 60/251 of 3 April 2006, the UN GA appointed the Human Rights Council in its place.

[27] Founded in 1946.

[28] Founded in 1974 as an auxiliary body of the Commission on Human Rights

[29] As aptly noted by Zbigniew M. Klepacki „According to the Charter, the UN does not become a transnational organization or a supranational government. The Charter also emphasizes that the United Nations has no right to intervene in the affairs of other nations because the Charter proclaims the principle of non-interference" – Z.M. Klepacki, *Organizacja Narodów Zjednoczonych 1945–1985*, Wydawnictwo Ciechanowskie Towarzystwo Naukowe, Ciechanów 1988, p. 78.

[30] Art. 55 of the UN Charter states that „With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: a. higher standards of living, full employment, and conditions of economic and social progress and development; b. solutions of inter-

ervation of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion[31], the literature has questioned whether the human rights clauses of the UN Charter, including the provisions of Art. 56, have legally binding commitments for the states. Manley O. Hudson, for instance, believed that "the Charter was limited to the definition of an action program for the United Nations, for the implementation of which the Members are obliged to cooperate"[32]. He then stated that:

> „the interpretation in the light of which the relevant provisions of the Charter would impose on the Members of the United Nations the legally binding obligation to respect human rights and freedoms may act towards the disintegration of the Charter"[33].

A similar position is shared by Hans Kelsen, who expresses the following view:

> „The Charter does not impose upon the Members a strict obligation to grant to their subjects the rights and freedoms mentioned in the Preamble or in the text of the Charter. The language used by the Charter in this respect does not allow the interpretation that the Members are under legal obligations regarding the rights and freedoms of their subjects"[34].

On the other hand, Lauterpacht argued that all Member States are legally obliged to act in accordance with the objectives of the UN Charter, and that these Members are legally obliged not only to encourage and promote the respect for human rights envisaged in the Charter but also to respect them.

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national economic, social, health, and related problems; and international cultural and educational cooperation; and c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".

[31] The significance of the provisions of the UN Charter for the international security of human rights was noted, among others, by: C. Ovey, R. C. A. White, F. G. Jacobs (ed.), *Jacobs and White, The European Convention on Human Rights*, Oxford University Press, Oxford 2006, p. 1.

[32] M. O. Hudson, *Integrity of International Instruments*, "American Journal of International Law" 42 (1948), pp. 105–107.

[33] Ibidem

[34] H. Kalsen, *Law of the United Nations. A Critical Analysis of Its Fundamental Problems*, The Lawbook Exchange, New York 1950, pp. 29–30.

All the more so since the provisions of Art. 56 of the UN Charter expressly contained the root of the legal obligation[35]. He stated that:

> „Due to its purposes, the UN program is the heir to all great historical human rights movements (including the British, French and American revolutions and the events that they initiated), permanent elements inherent in the traditions of natural law and natural laws, and most religions and philosophies existing in the world, as well as the interconnections between the simple respect for human dignity and all other individual and community values"[36].

It can be emphasized here that Art. 56 of the UN Charter states, *expressis verbis*, that all UN Members *pledge* (French: *s'engagent*/Russian: обязуются) to take joint and independent action in co-operation with the Organization to achieve the objectives set out in Art. 55 of the UN Charter, which covers – *inter alia* – universal respect for and observance of human rights and fundamental freedoms for all. In a certain way, each Member State is obliged to respect human and fundamental rights, not only of its own citizens, but of all people. According to Ian Brownlie, the provisions in question „as treaty provisions applicable to the Organization and its Members, these rules are of particular significance"[37].

It seems, therefore, that Art. 55 and Art. 56 of the UN Charter binds Member States to respect and observe human rights and fundamental freedoms for all[38]. This view finds support in the interpretation of these provisions offered by the I.C.J. It is because in the advisory opinion on *Namibia* of 1971, the I.C.J. stated that:

> „the former mandated power has pledged to respect and observe, in an area of international status, human rights and fundamental freedoms of all without distinction as to race. Establishing and enforcing differences, exclusions, restric-

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[35] H. Lauterpacht, *Sovereignty and Human Rights*, [in:] E. Lauterpacht (ed.), op.cit., pp. 47–49, p. 417.

[36] As cited in M. S. McDougal, G. Bebr, op.cit., p. 604.

[37] I. Brownlie, *Principles of Public International Law* Oxford University Press, Oxford 1973, p. 553.

[38] Also T. Jasudowicz, *Prawa człowieka w Karcie Narodów Zjednoczonych*, [in:] B. Gronowska, T. Jasudowicz, M. Balcerzak, M. Lubiszewski, R. Mizerski (eds.), op.cit., pp. 47–52.

tions and limitations solely on the basis of race, skin color, national or ethnic origin, which are a denial of fundamental human rights, is a gross violation of the purposes and principles of the Charter"[39].

Although the above findings referred to the obligations of South Africa as a country having a mandate to manage the then territory of South-West Africa, it is stressed in the literature that there is no reason to limit them to this particular situation[40]. According to Egon Schwelb, the I.C.J.'s opinion states that the UN Charter requires all States to comply with at least the basic human rights catalog to which it refers, albeit without indicating them exhaustively[41].

As aptly noted by Thomas Buergenthal, one of the most important implications of the inclusion of human rights clauses in the UN Charter was their internationalization[42]. This is related to the issue of redefinition of the principle of sovereignty of states[43]. Until now, international law was created by states but also with states in mind. The post-war process of redefinition of the sovereignty principle is of course broader and not limited to issues related to human rights[44], but the international legal order has ceased to

[39] Cf. I. C. J. advisory opinion on *Legal Consequences for States of the Continued Presence of South Africa in* Namibia (South West Africa) *notwithstanding Security Council Resolution 276 (1970)* of 21 June 1971 r. item. 76, I. C. J. Reports 1971, p. 16, item. 57; Also I. Brownlie, *Principles of International Law*, Oxford University Press, Oxford 1990, p. 569; E. Schwelb, *The International Court of Justice and Human Rights Clauses*, „American Journal of International Law" 66 (1972), p. 337.

[40] M. N. Shaw, *Prawo międzynarodowe*, Wydawnictwo Książka i Wiedza, Warszawa 2008, p. 172; O. De Schutter, *International Human Rights Law*, Cambridge University Press, Cambridge 2014 [2nd ed.] p. 49.

[41] E. Schwelb, *The International Court of Justice,* pp. 348–349; in this spirit, the provisions of the Vienna Declaration and the Program of Action of the World Conference on Human Rights in Vienna in 1993 (cf. item. 4 of the Preamble).

[42] T. Buergenthal, *International Human Rights*, St. Paul, Minnesota USA 1988, p. 21.

[43] For more on the relationship between state sovereignty and human rights, see: F. Capotorti, *Human Rights: the Hard Road Towards Universality*, [in:] R. St. J. Mac Donald, D. M. Johnston (eds.), *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory*, Martinus Nijhoff, Dordrecht–Bostron–Lancaster 1986, pp. 977–1000.

[44] Cf. L. Wildhaber, *Sovereignty and International Law*, [in:] R. St. J. MacDonald, D.M, Johnston, *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory*, Martinus Nijhoff, Dordrecht 1986, p. 442 et seq.

be exclusively focused on the principle of sovereignty[45]. It was not so much about the incapacitation of the state, but rather about the obligation to take human rights into account in national law and practice, and to consistently submit this area for international supervision, even if in the least[46].

It can therefore be said, as Anne Peters points out, there is a need to humanize the idea of sovereignty of states, as a result of which „the conflict between state sovereignty and human rights cannot be resolved on a balanced basis where sovereignty is faced against human rights on equal terms, but rather it should be resolved on the basis of a presumption for humanism"[47]. Obviously, this does not change the fact that states still are the „primary actors in international relations and international law and still perform central functions"[48].

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[45] C. Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law*, „Recueil des Cours, Collected Courses" (1999), Vol. 281, pp. 161–162.

[46] C. Mik, *Charakter*, p. 6. E.g. According to John Rawls, human rights should be understood as a class or category of law that limits the internal autonomy of the state. Human rights violations are considered as justification for external intervention – J. Rawls, *Prawo ludów,* Fundacja Aletheia,Warszawa 2001, p. 117. Joseph Raz, meanwhile, writes that „Sovereignty does not justify state action but protects the state against external interference. The violation of human rights makes [the state] lose this right" – J. Raz, *Human Rights without Foundations,* „Oxford Legal Studies Research Paper" 14 (2007), p. 10.

[47] A. Peters, *Humanity as the A and Ω of Sovereignty*, "European Journal of International Law" 20 (2009), p. 514 „State sovereignty is not only – as in the meanwhile canonical view – limited by human rights, but is from the outset determined and qualified by humanity, and has a legal value only to the extent that it respects human rights, interests, and needs. It has thus been humanized. Consequently, conflicts between state sovereignty and human rights should not be approached in a balancing process in which the former is played off against the latter on an equal footing, but should be tackled on the basis of a presumption in favour of humanity". In similar spirit, B. Mielnik, *Udział pozapaństwowych podmiotów w rozwoju prawa międzynarodowego*, [in:] J. Kolasa, A. Kozłowski (eds.), *Rozwój prawa międzynarodowego – jedność czy fragmentacja?*, Wydawnictwo UWr, Wrocław 2007, pp. 62–63.

[48] V. Engström, *Who is Responsible for Corporate Human Rights Violations* ?, Institute for Human Rights, Turku 2002, p. 14.

2. Closing the conference in San Francisco, the US President Harry Truman noted that:

> „We have good reasons to expect the framing of an international bill of rights, acceptable to all nations involved…The Charter is dedicated to the achievement and observance of human rights and fundamental freedoms. Unless we can attain those objectives for all men and women everywhere – without regard to race, language, or religion – we cannot have permanent peace and security"[49].

Thus, he pointed out explicitly the next stage of the institutionalization of human rights in international law, i.e. the UN work on a document that would contain the catalog of basic human rights[50]. Works on this catalog were conducted at the forum of the Commission on Human Rights[51]. Initially, it was assumed that it would be included in a treaty legally binding the Member States[52], but ultimately it was abandoned and, as we know today, the declaration adopted by the UN GA resolution was accepted instead[53]. That project was submitted to the General Assembly via the ECOSOC[54] at the Paris meeting that lasted from 21 September to 12 December 1948.

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[49] As cited in A. H. Robertson, J. G. Merrills, *Human rights in the World*: *An introduction to the study of the international protection of human rights*, Manchester University Press, Manchester 1972, p. 25.

[50] During the conference, delegations from Chile, Cuba, Mexico and Panama requested the adoption of the "Declaration on the Essential Rights of Man". Nevertheless, it was considered that this would require a detailed analysis, for which there was then simply no time. Cf. information on the progress of the works on: http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf (access: 4.6.2017).

[51] It was founded under Art. 68 of the UN Charter, although the article does not mention such mandate.

[52] Z. Resich, describing the first stage of the works, highlights that „In 1946, the ECOSOC founded the Preparatory Commission for Human Rights and called for the analysis of the already existing human rights projects. In this way, the projects of Panamá, Chile, Cuba, the American Federation of Labor and the projects by H. Lauterpacht and M. Alvarez were accounted for. (…) The result of the work was a raw material, which was merely a moral foundation. It was later adapted to the needs of the modern world and processed by lawyers. At that time the Commission on Human Rights was constituted, which, at its first session chaired by F. D. Roosevelt, appointed the Sub-Commission to prepare a draft human rights project. See Z. Resich, op.cit., p. 37; J. Machowski, *Prawa człowieka,* Wydawnictwo Książka i Wiedza, Warszawa 1968, p. 45.

[53] Cf. General Assembly resolution 217 A (III) adopted in Paris on 10 December 1948; the original text of the Declaration available on: www.ohchr.org (access: 1.6.2017).

[54] ECOSOC Resolution VII/151 of 26 Aug 1948.

The General Assembly voted on the Declaration on 10 December 1948, announcing it "a common standard to be achieved by all peoples and all nations". In this way, the Universal Declaration of Human Rights (the Declaration/UDHR) was adopted in an exceptionally short time[55]. 48 Members voted for it, with 0 votes against and 8 abstained. In the statement after the vote the President of the General Assembly expressed that its acceptance

> „by a big majority without any direct opposition was a remarkable achievement (...) it was a step forward in a great evolutionary process. It was the first occasion on which the organized community of nations had made a declaration of human rights and fundamental freedoms. That document was backed by the authority of the body of opinion of the United Nations as a whole and millions of people, men, women and children all over the world, would turn to it for help, guidance and inspiration"[56].

The Declaration was formulated according to the UN Charter, confirming that "the Member States, in cooperation with the UN, have pledge to ensure universal respect for human rights and fundamental freedoms"[57]. This reflects the spirit of the Charter by specifying what was already included in the Charter as one of the main purposes of the UN[58]. The Declaration also develops the provisions of the Charter and defines the substantive content of human rights[59]. However, while working on the Declaration, all efforts were made to maintain a compromise in the sphere of ideology, which found expression in the omission of the philosophical and theoretical justification of human rights, and thus the identification of their non-normative sources. This pragmatism was necessary in this case since, as described by Jacques Maritain:

> „It is possible, though certainly not easy, to establish the various rights that a person has in his or her personal and social existence. It would be in vain, ho-

[55] Also noted by Olivier De Schutter. The Commission on Human Rights, responsible for preparing the text of the Declaration, adopted it already at its third session held between 24 May to 18 June 1948 – O. De Schutter, op.cit., p. 15.

[56] See *United Nations Action in the Field of Human Rights*, New York, UN, doc. ST/HR/2/Rev.1, 1980 and Rev.2, 1982, item. 10.

[57] Cf. Sec. 6 of the Preamble to the UDHR.

[58] Cf. Remarks regarding Art. 1(2) and (3) of the UN Charter

[59] Cf. P. N. Drost, *Human Rights as Legal Rights*, Leyden 1965, p. 33.

wever, to seek for them a universally accepted rationale. Striving for it would expose us to the risk of arbitrary dogmatism or stigmatization among the invincible differences"[60].

With that being said, this was not an empty compromise as it brought about a document that contains „a wealth of values and ideas" and, as such, is a synthesis of the various traditions, values and needs, many of which had never before been expressed in the language of law[61]. Paul Gordon Lauren is right when he writes that the idea of human rights has a long and rich history, and that its roots do not extend to a specific single geographic region, country, age, or even to a particular form of government or the legal system. Over the centuries, this idea has stemmed from many places, societies, religious and secular traditions, culture[62]. Furthermore, the lack of a doctrinal justification that would be acceptable to all the "United Nations" at the same time does not mean that the human rights listed in the UDHR were completely devoid of justification. It seems the justification was, simply, human being[63].

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[60] As noted by Jacques Maritain „At one of the meetings of the French National Committee of UNESCO, the representatives of opposing ideologies came to an agreement on a preliminary list of rights. Yes, they replied, we agree, provided that we are not asked: why. *Why* reopens the discussion" – J. Maritain, *Człowiek i państwo*, Wydawnictwo Znak, Kraków 1993, pp. 83–84.

[61] Cf. remarks by Wiktor Osiatyński, who in the context of the UDHR points to a broad coalition of Christians, Marxists, Socialists and Social Democrats, backed up by American New Deal supporters, as well as think tanks and intellectuals – W. Osiatyński, op.cit., pp. 54–57.

[62] P. G. Lauren, *The foundation of justice and human rights in early legal texts and thoughts*, [in:] D. Shelton (ed.), *The Oxford Handbook of International Human Rights Law*, Oxford University Press, Oxford 2013, p. 163. Similarly stated by Roman Kuźniar, who says that „The development of the concept of human rights has been discontinuous. Different themes appeared in different eras. Characteristic for other areas of social thought, the phenomenon of accumulation of knowledge in the sphere of human rights did not occur. Hence, the road corresponding to other areas of law – i.e. from idealization, through positivisation, to implementation – In the case of human rights was exceptionally long and complex" – R. Kuźniar, *Prawa człowieka: prawo, instytucje, stosunki międzynarodowe*, Wydawnictwo Naukowe "Scholar". Warszawa 2008, p. 19.

[63] Cf. M. Piechowiak, *Problemy aksjologicznej legitymizacji uniwersalnego systemu ochrony praw człowieka*, [in:] E. Karska (ed.), op.cit., p. 100.

In the light of the provisions of the Declaration, a person is entitled to enjoy the human civil and political rights[64], as well as the economic, social and cultural rights[65]. Thus, the Declaration is not only the first universal international document containing the catalog of human rights and freedoms, but it is also the first such complex document, as acknowledged already in the UN Charter by its integral approach to human rights and freedoms[66]. On the other hand, this openness to human rights and freedoms was significantly limited[67] as the catalog in question derived principally from the provisions of the then constitutions of the UN Member States[68]. It was therefore drafted so as to correspond to the constitutional guarantees of that time and as such was to be regarded as expressing the common principles of all the national laws of the Member States of the United Nations. As Humphrey reports

> "[the draft project] may have not included all possible rights, (...) but it contained the political and civil rights of the first generation that could be found in the revolutionary declarations of Great Britain, France and the United States of the 17th and 18th century. (...) It also contained second-generation economic and social rights which could be found in the constitutions of the late 19th and early 20th century, such as those of Sweden, Norway, the Soviet Union and some Latin American countries (...) Each draft of the article was endowed with a comprehensive annotation detailing the relationship with the [human] rights documents that were then binding for the UN Member States, already [then] in the number of fifty-five and counting"[69].

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[64] Cf. Art. 3 – 21 of the Declaration.

[65] Cf. Art. 22 – 27 of the Declaration. See also A. Michalska, *Podstawowe prawa człowieka w prawie wewnętrznym a Pakty Praw Człowieka,* Wydawnictwo Prawnicze, Warszawa 1976, p. 173 et seq.

[66] Cf. T. Jasudowicz, *Zasady ogólne prawa międzynarodowego praw człowieka*, [in:] B. Gronowska, T. Jasudowicz, M. Balcerzak, M. Lubiszewski, R. Mizerski (eds.), op.cit., pp. 181–183.

[67] Cf. S. Greer, *The European Convention on Human Rights: Achievements, Problems and Prospects*, Cambridge University Press, Cambridge 2006, p. 10; Also M. A. Glendon, *Knowing the Universal Declaration of Human Rights*, "Notre Dame Law Review" 73 (1998), p. 1176.

[68] O. De Schutter, op.cit., p. 31; when the Declaration was being drafted, only 58 states formed part of the United Nations.

[69] As cited in M. A. Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, Randon Hause Trade Paperback, New York 2001, pp. 57–58.

Additionally, the Declaration was not intended to establish a law that would bind the Member States, but rather to indicate an ideal to which "every individual and every social body (...) should aspire"[70]. It was therefore not prepared to impose legally binding obligations on the Member States. This was clearly confirmed by the chair of the Commission on Human Rights, Eleanor Roosevelt, who noted that:

> "In giving our approval to the declaration today, it is a primary importance that we keep clearly in mind the basic character of the document. It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or legal obligation. It is a declaration of basic principles of human rights and freedoms to be stamped with approval of the General Assembly by formal vote of its members and to serve as a common standard of achievement for all peoples of all nations"[71].

Consequently, the Member States decided not to set up a mechanism for monitoring compliance with the obligations arising from it[72]. The "strength" of impact of the Declaration on the UN Member States was therefore significantly limited[73]. Hence, it is justified to recognize the concerns of Harold J. Laski that warn against the Universal Declaration becoming the next Brigand-Kellogg Pact[74], "introduced with the enthusiasm second only to the disregard of its signatories"[75].

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[70] See. The Preamble to the UDHR.

[71] E. Roosvelt, Chairman of the Human Rights Commission, *Statement to the General Assembly* (9 Dec.1948), [in:] Department of Sate Bulletin (19 Dec. 1948), p. 751.

[72] See J. P. Humphrey, *The Right of Petition in the United Nations* "Human Rights Journal" 4 (1971), p. 463; H. Lauterpacht, *The International Bill of the Rights of the Man,* Columbia University Press, New York 1945 (reprinted in 1968), pp. 221–251; criticism of the UN to this lack: pp. 286–292, p. 337, pp. 375–377.

[73] A.W.B. Simpson, *Hersch Lauterpacht and the Genesis of the Age of Human Rights,* "Law Quarterly Review" (2004), Vol. 120, pp. 74–79.

[74] Cf. *General treaty for renunciation of war as an instrument of national policy*, which was signed in Paris, in 1928; States parties renounced war as a national policy instrument. Finally, 62 countries have been parties to this Pact, including Japan and Italy. Nevertheless, in practice it did not fulfill its main purpose, because the states did not abandon the war: in 1931 Japan invaded Manchuria and in 1935 Italy occupied Ethiopia.

[75] Cited after: E. H. Carr, J. Maritain, *Human rights: comments and interpretations; a symposium edited by UNESCO,* Imprint A, Wingate, London 1949, pp. 85–86.

These circumstances contributed to the emergence of serious controversy over the legal nature of the Declaration[76]. Once could point to opinions according to which the UDHR could not be considered a legally binding instrument. That view was shared, for example, by Joseph Gabriel Starke, who believed "the Declaration could not and did not seek to be more than a manifesto, a statement of ideals, a pioneering instrument"[77]. Consequently, "the Declaration is not a legally binding instrument, either directly or indirectly"[78]. Moses Moskowitz expressed it similarly, emphasizing however that it was "the first human rights manifesto ever to emerge from discussion at the international conference table"[79]. Zbigniew Resich, meanwhile, wrote in 1981 that:

> "there is a consistent view in the literature that the Declaration is only of moral significance, given it is not an international agreement; it has not been either signed or ratified. Nor can it be considered a genuine interpretation of the provisions of the Charter on human rights, or a codification of the universally accepted juridical principles professed by civilized nations"[80].

In view of the research conducted, it appears that Resich's position may be considered as singular. What is more, the doctrine recognizes a specific attempt – contrary to the explicit intent of the authors of the UDHR – to justify the legally binding character of the Declaration[81]. It is important in this respect to factor in time and common practice. And so, in the opinion of Louis B. Sohn:

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[76] Cf. S. Greer, op.cit., p. 10; J. Symonides, *Powszechna Deklaracja Praw Człowieka (po 60 latach od jej przyjęcia)*, „Państwo i Prawo" (2008), Issue 12, pp. 3–16.

[77] J. G. Starke, *Introduction to International Law*, Butterworths, Oxford–Waltham––Massachusetts 1989 [10th ed.], p. 364.

[78] L. Oppenheim, *International Law,* H. Lauterpacht (ed.), Vol. I, Longman, London 1956, p. 740.

[79] M. Moskowitz, *The politics and Dynamics of Human Rights*, New York 1968, p. 102.

[80] Z. Resich, op.cit., p. 40.

[81] Moreover, already in 1968, the International Conference on Human Rights, held in Tehran from 22 April to 13 May 1968, pointed out that "the Universal Declaration of Human Rights expresses the common understanding by peoples of the world of the inalienable and inviolable rights of all human family members and constitutes a commitment for all members of the international community". See *Proclamation of Tehran, Final Act of the International Conference on Human Rights*) of 13 May 1968, Tehran, U.N. Doc. A/CONF.32/41 (1968), § 2.

„Today the declaration not only constitutes an authoritative interpretation of the Charter obligations but also a binding instrument in its own right, representing the consensus of the international community on the human rights which each of its members must respect, promote and observe”[82].

Humphrey shared the same view, stating the following:

„in the more than a quarter of a century since its adoption (…) The Declaration has been invoked so many times both within and without the United Nations that lawyers now are saying that, whatever the intention of its authors may have been, the Declaration is now part of the customary law of nations and therefore is binding on all states. The Declaration has become what some nations wished it to be in 1948: The universally accepted interpretation and definition of the human rights left undefined by the Charter”[83].

The above thought is elaborated on by Buergenthal who rightly points out to the process of transforming the Declaration from a non-binding recommendation into a normative instrument[84]. According to Richard B. Lillich, it is now possible to argue convincingly that an important part of the Declaration, which was originally not intended to impose international legal obligations, has become a part of international customary law that has bound all states over the past years[85]. What is more, he does not doubt that many of the human rights listed in the Declaration not only reflect customary international law but also belong to *jus cogens*[86]. On the other hand, the

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[82] L. B. Sohn, *The Human Rights Law of the Charter,* “Texsas International Law Journal” 12 (1977), p. 133; idem, *The New International Law Protection of the Rights of Individuals rather than States* “American University Law Review” 32 (1982–1983), stating that the Declaration “has become a basic component of international customary law, binding on all states, not only members of the UN”. See also M. Mc Doughal, H. Lasswell, L. Chen, *Human Rights and World Public Order: The Basic Policies of an International Law of Human Dignity*, Yale University Press, New Haven, 1980, p. 274.

[83] J.P. Humphrey, *The International Bill of Rights,* p. 529. Similarly, idem, *The Universal Declaration of Human Rights: Its History, Impact and Judicial Character,* [in:] B. G. Ramcharan (ed.), *Human Rights: Thirty Years After the Universal Declaration*, Martinus Nijhoff, Hague 1979, p. 33.

[84] T. Buergenthal, op.cit., p. 60.

[85] R. B. Lillich, *Global Protection of Human Rights*, [in:] T. Merton (ed.), *Human Rights in International Law: Legal and Policy Issues*, Oxford University Press, Oxford 1984, p. 116.

[86] Ibidem, p. 118.

I.C.J. judge Muhammad Ammoun, in a separate opinion to the ruling in *Namibia*, expressed the view that:

> "Although the affirmations of the Declaration are not binding *qua* international convention within the meaning of Art. 38, paragraph 1(a) of the Statute of the Court, they can bind States on the basis of custom within the meaning of paragraph 1(b) of the same Article, whether because they constituted a codification of customary law (...) or because they have acquired the force of custom through a general practice accepted as law, in the word of Art. 38, paragraph 1(b), of the Statue"[87].

Then again, the I.C.J. itself has yet to state, *expressis verbis*, that the Declaration, as such, taking into account all its articles, should be regarded as customary international law, despite the fact the Hague repeatedly cited its provisions, though always with reference to a specific law and not always presenting the Declaration as its source. For instance, with reference to the ban on arrest or detention on the basis of arbitrary decisions[88], the I.C.J ruled that wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights[89].

3. Irrespective of these controversies, it is difficult to deny the crucial role played by the UN Charter and the Declaration in the process of establishing a regime for the international protection of human rights and its fur-

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[87] Dissenting opinion of judge M. Ammoun to the advisory opinion of the I.C.J. on *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (*South West Africa*) *notwithstanding Security Council Resolution 276 (1970)* of 21 June 1971, item. 76, I.C.J. Reports 1971, p. 16.

[88] See. Art. 9 of the UDHR.

[89] See the I.C.J. ruling in *Case Concerning United States Diplomatic and Consular Staff in Tehran. (United States of America v. Iran*) of 24 May 1980, item. 91, I.C.J. Reports 1980, p. 3 "Wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights".

ther development[90]. These documents have laid the foundations for many legally binding instruments, including both international human rights pacts and regional human rights treaties[91]. Already in 1948, the 9th International Conference of American States was convened in Bogota, and the result of its work was, among others, the adoption of the Charter of the Organization of American States[92] and the adoption of the American Declaration on the Rights and Duties of Man[93]. These documents were adopted in April 1948, which means the declaration in question was the first international human rights instrument of general application[94].

The Universal Declaration of Human Rights also inspired the activities in Europe[95] that resulted in the founding of the Council of Europe (CoE)[96], whose statute explicitly stated that it was open only to the democratic states that adopted the principle of the rule of law on the basis of their constitution

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[90] For more cf. R. Wieruszewski, *ONZ-owski system ochrony praw człowieka*, [in:] B. Banaszak (ed.), *System ochrony praw człowieka*, Wolters Kluwer Polska, Kraków 2005, pp. 60–61.

[91] E. Schwelb, *The Influence of the Universal Declaration of Human Rights on International and National Law*, "American Society of International Law Proceedings" 53 (1959), p. 217.

[92] The OAS Charter was adopted on 30 April 1948 and became binding on 13 December 1951; the text of the Charter is available online: https://treaties.un.org/doc/Publication/UNTS/Volume%20119/volume-119-I-1609-English.pdf (access: 4.6.2017).

[93] The text of this Declaration is available online: http://www.cidh.oas.org/Basicos/English/Basic2.american%20Declaration.htm (access: 4.6. 2017).

[94] Cf. C. McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, "European Journal of International Law" 19 (2008), pp. 655–724.

[95] It should be stressed, however, that the work on the European system of human rights protection raised serious concerns. For example, in his memoirs, Pierre-Henri Teitgen pointed out that in opposition to him – the advocate of that system and the establishment of the European Court – was, among others, the French Nobel Peace Prize laureate, participant of the work – within the Commission on Human Rights – on the UDHR, R. Cassin, who "was openly opposed to it because he considered it unlikely that any other regional institution could function effectively without referring to the Universal Declaration of Human Rights" – P. H. Teitgen, *Faites entrer le témoin suivant 1940––1958: de la Résistance* à la *Ve République*, Ouest France, Rennes, 1988, p. 489.

[96] The Statute of the CoE was adopted in London on 5 May 1949 (*European Treaty Series* (ETS) No. 1. 10 European states were parties to it and they were: the Kingdom of Belgium, the Kingdom of Denmark, the French Republic, the Irish Republic, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Kingdom of Norway, the Kingdom of Sweden and the United Kingdom of Great Britain and Northern Ireland; the Statute entered into force on 3 August 1949.

and the principle of the protection of human rights and fundamental freedoms[97]. As known, one of the most important treaties of the CoE is the Convention for the Protection of Human Rights and Fundamental Freedoms, designed originally as a legally binding instrument of a collective guarantee of human rights and fundamental freedoms[98], enhanced by a mechanism to ensure that the arising obligations are respected by the states[99].

In view of the analysis, it seems reasonable in the light of which the UN Charter and the Universal Declaration of Human Rights have sparked a postwar process, to which Louis Henkin refers to as the process of the internationalization of human rights, and therefore "transformation of the ideas of constitutional rights [guaranteed in certain states] into a universal idea", functioning in the sphere of international politics and international law[100].

It must be emphasized that although the UN Charter has played a constitutive role in the internationalization of human rights, the Universal Declaration of Human Rights is a universal milestone in this process[101]. Its special significance was highlighted in the 1968 Proclamation of Tehran, undertaken at the conclusion of the International Conference on Human Rights

[97] It is necessary to call attention to the provisions of art. Art. 3 and Art. 8 of the Statute of CoE, which are seen as unique in the history of international organizations. Cf. C. Ovey, R.C.A. White, F.G. Jacobs (ed.), op.cit., p. 4.

[98] Council of Europe, *Preparatory Work on Article 1 of the European Convention on Human Rights*, Strasburg 1977, p. 68: http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-ART1-COUR(77)9-EN1290551.PDF, (access: 1.6. 2017).

[99] A. Z. Drzemczewski, *The Prevention of Human Rights Violations: Monitoring Mechanisms of the Council of Europe*, „International Studies in Human Rights" 67 (2001), pp. 158–163; For reference on the following issues see: T. Novitz, *Remedies for Violation of Social Rights within the Council of Europe: the Significant Absence of a Court*, [in:] C. Klipatrick, T. Novitz, P. Skidmore (eds.), *The Future of Remedies in Europe*, Oxford University Press, Oxford 2000, pp. 231–251; just as in J. G. Merrills, *The Development of International Law by the European Court on Human Rights*, Manchester University Press, Manchester 1995, p. 2.

[100] See L. Henkin, *The Age of Rights*, Columbia University Press, New York 1990, pp. 13–20.

[101] R. Y. Jennings, A. D. Watts (eds.), *Oppenheim's International Law: Volume 1 Peace*, Oxford University Press, London 1992, p. 1001; M. M. Whitman, *Digest of International Law,* Vol. 5, Washington 1965, p. 237; J.P. Humphrey, *The Universal Declaration on Human Rights*, [in:] B.G. Ramcharan (ed.), *Human Rights: Thirty Years after The Universal Declaration*, Martinus Nijhoff, The Hague 1979, p. 21.

and stating that it constitutes "an obligation for the Members of the international community"[102]. The Vienna Declaration and Programme of Action, adopted at the 1993 World Conference on Human Rights, in turn, stressed that the Declaration "is the source of inspiration and has been the basis for the United Nations in making advances in standard setting as contained in the existing international human rights instruments"[103].

It has been referred to on many occasions, and its importance to international human rights law can hardly be stressed enough.

Abstract

The article deals with some aspects of the process of the internationalization of human rights. The analysis essentially covers the question of two international documents: the United Nations Charter (UN Charter) and the Universal Declaration of Human Rights (the Declaration). The article underlines that the UN Charter is generally considered a special treaty. Being a treaty that constitutes the UN, it is perceived both as the fundamental anchoring of the obligations of the States in the sphere of international law, and as such is recognized as an international quasi-constitution. Meanwhile, the human rights clauses contained in the UN Charter set the stage in the process of institutionalizing human rights within international law and, consequently, establishing a new branch of international law, i.e. international human rights law.

The greater part of the article is dedicated to the Universal Declaration of Human Rights as a universal milestone in the process of internationalization of human rights. The article refers to debates on its philosophical roots, and above all its legal nature.

The article highlights the evolution of doctrine and international jurisprudence in the latter area. At the same time, it shows a specific search – contrary to the *explicit* intent of the authors – to justify the legally binding nature of the Declaration.

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[102] *Proclamation of Tehran, Final Act of the International Conference on Human Rights*) z 13.05.1968 r., Tehran, U.N. Doc. A/CONF.32/41 (1968), § 2 „The Universal Declaration of Human Rights states a common understanding of the people of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community".

[103] *The Vienna Declaration and Programme of Action*, adopted at the World Conference on Human Rights in Vienna, 1993, as cited in R. Kuźniar, op.cit., p. 438.

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ADVANCE STATEMENTS AND RUTH MACKLIN´S USELESS CONCEPT OF HUMAN DIGNITY[3]

Keywords: Human dignity, Advance Statements, Ruth Macklin

1. Introduction

There are situations where death is the outcome of the natural process of living. In other ones, the abbreviation of life can occur due to a phy-

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sical trauma, a cardiorespiratory arrest or an incurable disease. There are patients who suffer bedridden in vegetative state for years. In many cases, one diagnoses the disease when there is not hope of recovery anymore, already near end-of-life, when death is inevitable and imminent and treatments and therapies can both offer better quality of life, or just increases the time survival, postponing death.

In order to valuate persons' autonomy and self-determination in decision-making regarding his health, Advance Statements aim previously register the provisions of last will where they express their desires about the necessary therapies in future time, the effects of which directly affect the entire provider team of care and patients' relatives, beyond the merely bilateral relationship between doctor and patient. This theme brings to discussion other ethical dilemmas as the practice of euthanasia, orthothanasia and assisted suicide and the clash on dying with dignity.

Regarding to human dignity, the American doctor Ruth Macklin[4] rejects the thesis that dignity has practical use, but only respect for personal autonomy. According to her, the calls around dignity are merely meaningless reformulations of other concepts, or mere slogans that do not add anything to the understanding of the subject. At this point, this brief writing intends to analyze the concepts and dimensions previously discussed on human dignity so, then, check from philosophical, bioethical, biomedical and legal considerations, the usefulness of human dignity for medical practice through Advance Statements.

2. Philosophical, medical-ethical and legal approaches of human dignity

In the Western thought, in terms of ontological dimension of human dignity, the greatest exponent in the theme of human dignity was Immanuel Kant. his opinion is that rational human beings should be treated as an end in themselves and not as a means to something else. The distinction between persons and things lies in the fact that things are irrational beings, are me-

[4] R. Macklin, *Dignity is a useless concept*, "British Medical Journal" 327 (2003), pp. 1419–1420.

ans and have relative value. People are rational beings, so they are goals in themselves. People do not have price as irrational beings or things[5].

According to the Kantian practical imperative if a person is thinking of taking her own life, she must first ask herself whether that action considers the idea of humanity as an end in itself, therefore, by making use of her own person to escape from a difficult situation, she would be using herself as an instrument. Man is an end in itself and not merely a means to something else[6].

In *The Metaphysics of Morals*, Kant says that freedom is the only birthright (what he calls original because it belongs to human beings), it is broad and understood as the "independence of being constrained by other persons' will", symbolizing the possible coexistence with others' freedom as a universal law[7].

Kant's view is that the most important limit to autonomy, that is, to freedom, refers to human dignity. The Kantian foundation for human dignity focuses on autonomy and self-determination of persons. Autonomy, an abstract concept, has the role of enhancing human being towards self-determination of conduct, going without its effective implementation. Dignity must belong even to the ones deprived of absolute capacity with physical or mental disabilities[8].

Etymologically, autonomy means "legislating for oneself". Because dignity is due to freedom and autonomy, it is the object of moral duty. Autonomy, freedom and dignity form an unbroken triad[9]. Autonomy is the foundation of human dignity of every rational being[10]. Kant's dignity is understood as an inalienable attribute of human being able to prevent him from being

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[5] I. Kant, *Fundamentação da metafísica dos costumes*, Barcarolla, São Paulo 2009, p. 241.

[6] Ibidem, p. 245.

[7] I. Kant, *Metafísica dos costumes*, EDIPRO, São Paulo 2003, p. 83.

[8] I. W. Sarlet, *As dimensões da dignidade da pessoa humana: construindo uma compreensão jurídico-constitucional necessária e possível*, [in:] idem (ed.), *Dimensões de dignidade: ensaios de filosofia do direito e direito constitucional*, Editora do Advogado, Porto Alegre 2005, pp. 21–22.

[9] B. Maurer, *Notas sobre o respeito da dignidade da pessoa humana... ou pequena fuga incompleta em torno de um tema central*, [in:] I. W. Sarlet (ed.), op.cit., p. 76.

[10] E. Kant, *Fundamentação*, p. 269.

used as a thing. Dignity materializes in the individual by force of his ability to self-determination and rationality[11].

Among the immanent philosophers, dignity was presented as an absolute, prior and transcendental attribute. Kant and Emmanuel Levinas think that freedom, autonomy and rationality are due to human beings by force of their dignity. The first one understood dignity as the manifestation of human magnitude, while the second one sought to demonstrate that dignity declares itself in human weakness[12].

Levinas' ethics[13] was influenced by phenomenology and tried to develop a "phenomenology of sociality" from the face of the Other who is dying ordering the Same (Me) not to act indifferently nor let the Other alone. So the responsibility for the Other's life is an unlimited answer of otherness, even if it is only to say, "here I am". According to the philosopher[14], the same is called to responsibility. The essence of the ontological being is not enough for configurating dignity. Human subject is not a supreme being of nature or a simple definition. He cannot be reduced to self-awareness. Levinas[15] supports his thesis on the idea that responsibility precedes freedom, on the possibility of joint existence of the Same's freedom with the Other's freedom. For José André da Costa[16], the Other's dignity is respected when he or she is recognized as a person in his or her Otherness.

For Levinas[17], suffering is a "psychological content" in which consciousness does not mean acceptability. Suffering does not come from excessive degree of a feeling, nor is the result of an excessive amount of sensitivity, however, suffering is a "too much", carved "in a sensorial content, penetrates as suffering in the dimensions of sense where it seems to open up

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[11] J. Reckziegel, M. C. Cereser Pezzela, *O papel da sociedade tecnocientífica e os riscos decorrentes das pesquisas médicas com seres humanos*, "Revista Direitos e Garantias Fundamentais" 14 (2013), No. 2, p. 114.

[12] B. Maurer, op.cit., p. 66.

[13] E. Lévinas, *Entre nós: ensaios sobre a alteridade*, Vozes, Petrópolis 2004, p. 217.

[14] E. Lévinas, *Otherwise than being or beyond essence,* Duquesne University Press, Pittsburgh–Pennsylvania 2006, pp. 18–19.

[15] E. Lévinas, *Otherwise*, p. 123.

[16] J. A. da Costa, Ética e política em Lévinas: *um estudo sobre alteridade, responsabilidade e justiça no contexto geopolítico contemporâneo.* Thesis (Doctorate in Philosophy), Pontifícia Universidade Católica do Rio Grande do Sul, Porto Alegre 2011, p. 18.

[17] E. Lévinas, *Entre nós*, p. 164.

or engraft". Pain, in turn, in the same time it "disorders the order" it is "the disordering itself". Suffering is passivity, a quality that is not only the opposite of activity, but it is much more passive than the actual receptor activity of the senses, overcoming the perception itself. Suffering also demonstrates vulnerability that overcomes both receptivity and experience. "Suffering is a pure undergoing". Suffering is the evil (pain). Pain is also an evil, pain is the damage itself.

Intrinsically speaking, suffering is a useless phenomenon, that is, "for nothing" – see the experiences of persistent and intractable pain in medical reports of patients with neuralgia, lumbago and malignant tumors. These are called "pain-diseases", where pain becomes the main phenomenon experienced by patients and may lead to worsening of the condition, raising the "evil cruelty" if they are also abandoned and feel distressed. Retarded beings that already have narrowing in their relationships, fit into the group of those who feel "pure pain" within the category of "pains-diseases". In these cases, the "pure pain" in them manifested, is projected on the Same, raising an ethical medication problem – when "the evil of suffering", passive, powerless, abandoned and alone, is assumed and when patients are not integrated, their plea for help and healing, is manifested through a "groan", a "cry", a "complaint", "a sigh", a plea for analgesia and the urgent elimination of pain seems to be more emerging that "a request for consolation or postponement of death" in a relationship of ethical, medical, fundamental and self-willed otherness. Medicine, in these conjectures, with its technique and technology does not act only as "will to power"[18].

In fact, Kant's and Levinas's doctrines were endorsed in the priority of ethics of life as an expression of human dignity, showing at this point, the rescue of Kantian thought by Levinasian thought. Levinas, however, turned away from Kantianism to defend responsibility for the Other, away from the suffering representation given by Kant. This one claimed that human rationality ("what") is a peculiar trait of the human being able to provide him resemblance to God. Levinas worried about the other ("who"), arguing that

[18] E. Lévinas, *Entre nós*, pp. 130–131.

the other is not limited to elements such as reason or language. Otherness is not based on property[19].

In the context of medical bioethics, opinions differ, predominating, however, the fundamentals and philosophical concepts on the issue of dignity. Macklin[20] rejects the thesis of the utility of dignity. For the ethicist, dignity is a useless concept meaning only respect for people in their autonomy and the appeals about dignity, according to the main examples, are merely indefinite restatements of other concepts or mere slogans that do not add to the understanding of the subject. With regard to medicine and biology, there are few references to the subject in the declarations of human rights. Among them, the Council of Europe Convention on Human Rights and Dignity, whose content approaches dignity just as respect for people in the context of informed and voluntary consent and the indispensable need of preventing abuse, discrimination and the need of protecting confidentiality.

In the opinion of Macklin[21], the questions about the process of dying, understood as the "right to die with dignity", especially the willingness to forgo medical treatments that only extend life, emerged in the 1970s, which led to the recognition of the right of patients perform Advance Directives that ultimately resulted in the California Natural Death Act, in 1976. In this document, person's dignity and privacy were recognized with the right of an adult to draw up in writing the directives of medical activity, especially the refusal of life sustaining procedures in the event of terminal illness. The meaning of dignity, according to Macklin, is nothing more than respect for autonomy. Therefore, it does not make sense the criticism of certain ethicists that dignity of the dead would be violated through academic conduct to allow the training procedures on cadavers for medical students. That's because, according to her, disregarding the family interest for the deceased, respect, in this case, are for the desires of the living ones. Thus, the elimination of the concept would not harm the content at all.

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[19] D. Perpich, *The ethics of Emmanuel Lévinas*, Stanford University Press, Stanford California 2008, pp. 153–4.

[20] R. Macklin, op.cit., p. 1419.

[21] Ibidem, pp. 1419–1420.

For Adam Schulman[22], in turn, human dignity has a flexible, malleable concept of indeterminate application on bioethics. The explanation is partly because of the differences in their origins dating back to classical antiquity when the Greeks (dignus) and the Romans (dignitas) considered dignity as something rare and unusual in the athletic and musical performance, in the heroism in war, and in the altruism of people who made sacrifices for their children, elderly and neighbors affected by some misfortune or tragedy. The Stoics believed that the attribute of dignity belonged to all human beings because of their rationality whose function was to provide peace of mind. Poverty, oppression and disease should not prevent to live with dignity. The Biblical religion professed that man is the image and the likeness of God, that's why the inalienability and the inherence of human dignity. Kant's moral philosophy, based on stoicism, tried to universalize human dignity due to his rational autonomy. Respect for dignity was understood as the prohibition of manipulating people as means, objects and instruments.

Schulman[23] defends the existence of dignity as humanity because, since Thomas Hobbes and John Locke to the American founders, by politician and prudential reasons, once asserted that dignity belongs to all human beings. The foundation of dignity, for him, must include the promotion of tolerance, freedom, peace and equality and, in the space of medical ethics, respect for others, as well as confidentiality, voluntary and informed consent, and the position against abuse and discrimination. In face of man's manipulation of power over nature through biotechnology, existence of dignity towards humanity cannot be denied.

Timothy Caufield end Audrey Chapman[24] state that the stalemate around dignity is due to its vagueness and conceptual poverty. The major complications are observed in plural societies where a diversity of groups and communities express their concept of dignity carved and guided by their religious values, cultural understandings and worldviews. They warn that the dignity model presented in documents dealing with controversial scientific

[22] A. Schulman, *Bioethics and the question of human dignity*, [in:] *Human dignity and bioethics: Essays Commissioned by the President's Council on Bioethics*, President's Council On Bioethics, Washington-D.C. 2008, pp. 6–12.

[23] A. Schulman, op.cit., pp. 15–17.

[24] T. Caulfield, A. Chapman, *Human dignity as a criterion for science policy*, "PLoS Medicine" 2 (2005), No. 8, pp. 736–7.

issues such as the human genome and stem cell researches emphasizes the right of individuals to make autonomous choices dealing with human dignity as a means of empowerment. Instead, the best way would be to interpret it as a means of restriction that is gaining space in science policy. In other cases, such as the commercialisation of human tissues, human cloning and for those who oppose the researches on stem cells, or seek to limit researches on human embryos, dignity reflects a moral or social position, in the sense that these activities are contrary to the public morality or the collective good. Although there is a common idea that dignity is inherent to the human being, these documents reflect that it depends on values and experience of individuals within their societies. Moreover, in pluralistic societies, the problem would be to reach a consensus on dignity since a univocal foundation of dignity has not even been reached, whether secular or faith-based. Much more complicated would be reach a consensus on what it relates and get a universal idea, that's because there are private opinions that may not represent majority.

Roger Brownsword[25] reflects on the transformation of bioethics in face of the debate between utilitarians and human rights defenders. Bioethics, however, gathers these sides at a third point, the "dignitarian alliance". It is not possible to support human rights in the principle of respect for dignity, as well as, it is not possible to use the discourse of human dignity to portray this new alliance, considering the unifying value of the protection of human dignity in the relationship. There are two deontologies on human dignity in bioethics: a) autonomy as empowerment, supported in individual autonomy; b) autonomy as restriction. None of the two sides offers enough grounds to sustain human dignity.

In the case of "death with dignity" as autonomy as empowerment as autonomy as restriction advocate for respect for human dignity. Dignity as empowerment is strongly related to the wisdom of the modern human rights. It appears in various human rights charters such as the Universal Declaration of Human Rights of 1948, claiming to be an inherent and inal-

[25] R. Brownsword, *Bioethics today, bioethics tomorrow: stem cell research and the dignitarian alliance*, "Notre Dame J Law Ethics Public Policy" 17 (2003), No. 1, pp. 18–20.

ienable right of the human beings equally and universally. This is however not a convincing affirmative for all human beings[26].

Leaving aside the arguments used by each movement in the defense of its town thesis, the respect for human dignity appears as the convergent element. Human dignity as empowerment protects autonomy in decision making stressing that this is the only way to exercise dignity. Autonomous agents may override their decisions to the point to control a space, a country. On the other hand, the community guided by dignity as restraint respects a set of values protected by the notion of human dignity. If a particular group simulate the understanding of dignity of the other group, there would be some degree of correlation between these groups so their models might be accepted and implemented in each group. It is important to emphasize that the basic beliefs about human dignity are different for both bioethical communities. The idea is that there is a match between both practical perspectives and that the practical Bioethics is able to manage arrangements[27].

Hans Jonas[28] criticizes the control of human behavior through medical science that artificially replaces human action. In his opinion, there is no question about the benefits, for example, of the use of medical equipment in order to draw painful symptoms out of the mentally ill, but these techniques must not be used as a form of social manipulation, affecting the rights and human dignity. Whenever human practice, when dealing with human problems, is replaced by impersonal mechanisms, something of the dignity of the person is also suppressed and the agent`s responsibilities are transferred to "programmed systems of behaviour". The benefits of the "human enterprise" of social control should be evaluated axiologically, in face of the sacrifice of deprivation of individual autonomy.

The process of dying has its own dignity and it is a human right to permit its normal course[29]. The right to die is different from suicide, because that one is related to the patient in mortal state and vulnerable to modern medicine materialized in death delaying techniques [30].

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[26] Ibidem, p. 20.

[27] Ibidem, pp. 31–32.

[28] H. Jonas, *El principio de responsabilidad: ensayo de una ética para la civilización tecnológica*, Editorial Herder, Barcelona 1995, p. 53.

[29] Ibidem, pp. 155–156.

[30] Ibidem, p. 160.

By the legal and constitutional perspective, Ingo Wolfgang Sarlet[31] conceptualizes human dignity as an intrinsic, differentiated and recognized attribute of every human being able to make him worthy of respect and consideration by community and state. The human being must be protected against acts of degradation and inhumane conducts and has guaranteed the minimum existential conditions for a healthy life. Moreover, it takes feasibility and promotion of own and responsible participation in the ways of his existential life in communion with other human beings reigning mutual respect. Dignity is a value (a principle) subjected to balancing and relativism, besides being irreplaceable. For the author[32], dignity attracts and requires the protection of all fundamental rights.

The principiological conception of human dignity as principle-rule qualifies it to be submitted to certain relativism, preserved, however, the essential core that is intangible. For Kant, this core is untouchable representing the not objectification or person instrumentation. Dignity cannot be offended even in order to protect other person's dignity (torture, for example). It takes tolerance in multicultural societies, since to dignity can be attributed disparate concepts producing mixed results. The conceptual opening of dignity is associated with relationships and communicative actions involving historical and cultural aspects[33].

Robert Alexy[34], based on the German Constitution, argues that due to the fact human dignity is partly principle and partly rule and that dignity attracts a broad group of precedences ensuring to the principle of dignity a high degree of security against other principles, it conveys the impression of being an absolute principle. The German Federal Constitutional Court appraises human dignity as the "nuclear sphere of privacy setting, absolutely protected." In relevant concrete situations, there is not prevalence of human dignity over other standards, but only it is investigated the possible violation of that one. However, due to the conceptual opening of dignity, its

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[31] I. W. Sarlet. *Dignidade da pessoa humana e direitos fundamentais na Constituição Federal de 1988*, Livraria do Advogado Editora Ltda., Porto Alegre 2009 [7th ed.], pp. 67–83.

[32] Ibidem, p. 94.

[33] Ibidem, pp. 148–151.

[34] R. Alexy, *Teoria dos direitos fundamentais*, Malheiros Editores Ltda., São Paulo 2008, pp. 111–114.

definition depends on the circumstances of the case so that it needs balancing. From the preponderance of the principle of human dignity over other principles results the product, the rule content that is absolute.

Such as occurred with the "life", the national legislator did not present a definition of dignity in the context of domestic law, but merely attributing to it the quality of foundation, a constitutional principle.

3. Avance statements

In brief summary, the North American model of Advance Directive is a way of an interested person to leave registered in advance her will translated into the choice of treatments or therapies she wants to submit herself in the future when sick, that`s it, leave her own consent to refuse, withdraw or accept procedures of health in a future time. Directives are composed of the Advance Statements (Living Will) and the Health Care Power of Attorney. The first dictates the guidelines concerning to medical interventions while the second concerns the election of a future caregiver (representative) of the interested person's interests when unable to validly express her consent[35].

In Brazil, there is no specific legislation on the theme, except for the infralegal rule, the Resolution 1995/2012, Art.2, § 1 and § 2, by The Federal Council of Medicine predicting that, to patients unable to communicate, or who cannot express freely and independently their will, it is assured that doctors must consider Advance Directives when deciding about treatment and care, complying with information reported by the patient's legal representative, in case previously designated, unless Directives are not in accordance with the requirements prescribed in the Medical Ethics Code. The Resolution, thus, does not necessarily require that the representative's desires are met, but they must be taken into consideration.

Doctrinally, Advance Statements are seen as a kind of unilateral, free, *inter vivos*, informal, main, very personal and subject to nullities, legal transaction. In the structural basis of the system of legal facts are the require-

[35] A. M. Godinho, *Diretivas antecipadas de vontade: testamento vital, mandato duradouro e sua admissibilidade no ordenamento jurídico brasileiro*, "Revista do Instituto do Direito Brasileiro" 1 (2012), No. 2, pp. 945–978.

ments of existence. Will must be manifested and not just restricted to the inner world. The statement is the mechanism that expresses will, revealing it. Personal will may be expressed explicitly through speech or writing, miming, signals and gestures (case of deaf-mutes). Tacit will is revealed by individual behavior and, in the case of contracts, it is only tacit if law does not require the express way. The presumed form of will must follow the legal commandment[36].

In addition, according to the Brazilian Civil Code, one of the requirements of validity of the legal transaction is the spontaneous and free expression of will. The vices of consent are in the category of the relative nullities, as well as transaction carried out by relatively incapable, as the ones over 16 and under 18 years old, the habitual drunkards, the lavish ones, the addicted to toxic substances, and individuals who cannot express their will due to a transient or permanent cause, without proper assistance[37].

In the face of absence of any consent or expression of will, there is no legal transaction. However, existing consent, but tarnished by vice, the transaction is voidable. The express consent, made by absolutely incapable, is cause of void transaction, besides existing[38].

In the field of absolute nullities, there is offense to the rules of public policy affecting the validity plan, embodied on the Art.166, item I, of the Brazilian Civil Code, if transaction is concluded by totally unable not represented, in accordance with Art.3 of the Civil Code, as it is the case of children and adolescents under 16 years without representation of parents, tutor or curator. Since the Statute on Persons with Disabilities entered into force, persons with mental disabilities and the sick ones also figure among the fully capable, leaving absolutely unable just the ones under 16 years old. The interest of the legislator was to insert those without discernment to the practice of civilian life and those with reduced discernment[39]

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[36] C. R. Gonçalves, *Direito civil brasileiro,* Vol. 1, *Parte geral*, Saraiva, São Paulo 2012, pp. 333–334.

[37] *Código Civil: Lei 10406, de 10 de janeiro de 2002*, [in:] *Vade Mecum*, obra coletiva da Editora Saraiva com a colaboração de L. R. Curia, L. Céspedes e F. Dias da Rocha, Saraiva, São Paulo 2016 [21th ed.], p. 876.

[38] C. R. Gonçalves, op.cit., p. 455.

[39] *Código Civil: Lei 10406, de 10 de janeiro de 2002*, pp. 875–6, p. 937; *Estatuto da pessoa com deficiência: lei brasileira de inclusão n. 13146, de 06 de julho de 2015*, [in:] *Vade*

According to item II of the Art.166, unlawful object generates absolute nullity of the legal transaction for violation of the law system and the ethical standards, as well as the impossibility of achievement and physical performance (how to cure incurable disease) or legal of the object[40], and the indeterminacy (which may be indeterminable) of this one. Thus, there is the legal impossibility of Advance Statements, and Advance Directives, if its object permits the practice of euthanasia that is considered homicide, according to the Art.121 of the Brazilian Penal Code, assisted suicide, adjusted to the Art.122 of the same Penal rule[41] and the Art.15 of the Civil Code. It is illegal because it also includes prohibition on the Art.41 of the Medical Ethics Code[42]. In terms of the legal framework of orthothanasia, although it is not expressly provisioned, not even by the medical ethics rules, it is possible to seek shelter on the item III of the Art.1 of the Federal Constitution of 1988[43], which deals with the principle of human dignity, in addition to the Resolutions number 1805/2006[44] and number 1995/2012[45] and the sole para-

Mecum, p. 5028. While the declaration of will is a requisite for existence of legal transaction, capacity is a validity element.

[40] C. R. Gonçalves, op.cit., pp. 342–343 instructs that the legal impossibility of the object is related to what is prohibited by law. Since the unlawfulness has greater scope involving moral issues and principles.

[41] *Decreto-lei n. 3914 de 09 de dezembro de 1941*, [in:] *Vade Mecum*, pp. 2504–2508.

[42] *Código de Ética Médica: Resolu*ção do CFM n. 1931/*2009*, [in:] G. V. França, *Direito médico*, Forense, Rio de Janeiro 2013, p. 584.

[43] *Constituição da República Federativa do Brasil*, [in:] *Vade Mecum*, p. 167.

[44] The Resolution number 1805/2006 allows doctors to restrict or suspend treatments that extend the survival time of end-of-life patients with serious and incurable illness, without, however, fail to provide the necessary care to minimize pain and suffering, respecting patient's will or of his legal representative (Art.1º). Patients should be provided with all assistance, covering physical, social, psychological and spiritual well-being, receiving hospital discharge when they prefer. The Resolution protects patients' right to information as well as his legal representative about the respective therapies (Art.1º, § 1º). The patient's declaration must be registered in the patient's records (Art.1º, § 2º) – Conselho Federal de Medicina, *Resolução number 1805/2006*, http://www.portalmedico.org.br/resolucoes/cfm/2007/111_2007.htm/ (access: 6.07.2015).

[45] Through the Resolution number 1995/2012, the Federal Council of Medicine rules on the need to enhance the patient's autonomy in its interface with Advance Directives, in the face of technological tools limited to prolong terminal patients' life and suffering, from "disproportionate measures", without producing any benefits or prospects to improve health – Conselho Federal de Medicina, *Resolução n. 1.995/2012*, Dis-

graph of the Art.41 of the Medical Ethics Code, all of them formally drawn up in the Federal Council of Medicine.

To be effective, Advance Statements depend on the condition of permanent and irreversible inability caused by the interested person's future disease that is an uncertain event according to the Art.121 of the Civil Code, and, taking the line of the Brazilian medical ethics, the individual must be in terminal stage of his illness (Resolution 1805), otherwise he would be offending morality, although the Resolution 1995/2012 has extended this possibility, without clarifying the depth of Directives, leaving that role to the legislator[46]. The condition, in this case, is not an accidental or secondary element to the legal business, but it takes part of it. It is a kind of self-imposed limitation of will.

The Art.12 of the Statute on Persons with Disabilities, in Brazil, determines the indispensability of the advance, free and informed consent, if the disabled person needs a procedure, treatment, hospitalization, or undergoes to scientific research. The single paragraph ensures participation as much as possible to the disabled under guardianship in the process of collection of consent. There will be waiver of consent if the disabled person is at risk of death in an emergency situation respected her interests and legal regulations[47].

The sole paragraph of the Art.41 of the Brazilian Medical Ethics Code, in force since April 2010, disciplines that patients' will must be taken into account, and, when it is not possible to obtain it, it will be made through legal representative. In the same chapter, the Federal Council of Medicine prohibits useless and obstinate therapies (dysthanasia) and guides doctors to apply palliative care for terminally ill patients or stricken with incurable disease[48]. For the time being, the formalization of Advance Directives is linked to the condition of age of majority (eighteen years old), provided with full capacity.

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põe sobre as diretivas antecipadas de vontade dos pacientes, http://www.portalmedico.org.br/resolucoes/CFM/2012/1995_2012.pdf/ (access: 6.07.2015).

[46] *Código Civil: Lei 10406, de 10 de janeiro de 2002*, [in:] *Vade Mecum*, p. 925.

[47] *Estatuto da pessoa com deficiência: lei brasileira de inclusão n. 13146, de 06 de julho de 2015*, [in:] *Vade Mecum*, pp. 5028–5030.

[48] *Código de Ética Médica: Resolução do CFM n. 1931/ 2009*, p. 584; Revista Anoreg/SP, *Cartório hoje: serviços de cartório na internet* (2012), No. 3, pp. 24–9.

Advance Directives are a way to guarantee that end-of-life patients have protected their moral and religious convictions establishing itself as a demonstration, in concrete, of the constitutional principle of human dignity. The process of dying with dignity is a subjective right of the patient that can be achieved by recording his wishes in the form of Advance Directives. Medicine, imbued with the spirit of preservation of life, cannot be used obstinately by doctors, in the Kantian sense, not to turn patients as a means. On the other hand, it is imperative some legislative regulation in order to protect the health professional from future accountability processes.

Human dignity, in the doctor-patient relationship, involves the alleviation of pain and suffering, respect for patients and for their autonomy in decision-making about where they prefer to die, adequate information about their illness and risks resulting from interventions, access to therapies and treatments that can mitigate their distress, possibility to renounce, suspend and withdraw therapeutic techniques, not abandoning patients and respect for their beliefs[49]. It is shown, therefore, the importance and practical use of human dignity, against Macklin's thought.

4. Final considerations

The scope of this paper intended to demonstrate Advance Statements are an instrument on which the concerned person expresses her wishes related to health care treatments, able to measure and validate her constitutional right to die with dignity. Therefore, the study approached human dignity by philosophical, medical ethics and legal perspectives. Advance Statements are able to materialize human dignity of terminally ill patients, in such a way that dignity is revealed useful, abstract and concrete, carrying out patients' will provisions.

From the viewpoint of medical ethics, through pain and suffering attenuation and suffering, respect for patients and for their autonomy in decision-making about where they prefer to die, adequate information about their

[49] J. Reckziegel, B. D. Bauermann Coninck, *Entre a vida e a morte: revisitando a morte digna em pacientes terminais*, [in:] C. Magnus de Marco, R. Zanatta Caon Kravetz (eds.), *Série Diálogos sobre Direito e Justiça: coletânea de artigos, Fundação Universidade do Oeste de Santa Catarina*, Vol. 1, Ed. Unoesc, Joaçaba 2015, p. 23.

illness and risks resulting from interventions, access to therapies and treatments that can alleviate their distress, the possibility of foregoing or suspend treatments, the conduct of not abandoning patients, respect for their particular beliefs, dignity is useful, contrary to what advocate Macklin.

Abstract

This paper aims to demonstrate the importance and usefulness of human dignity from the perspective of achieving of Advance Statements as a manifestation of the concerned person able to make gaugeable and valid in particular his intention to exercise the constitutional right to die with dignity and, from that, submits an objection to the thesis of human dignity held by Ruth Macklin. For this purpose, in the first topic, human dignity will be explored under the philosophical approach, from the perspective of medical ethics and its foundation in the Brazilian legal system. The second topic will demonstrate the Advance Statements as an instrument of materialisation of human dignity, specifically for patients in end-of-life stage. This writing will be directed according to the deductive method of qualitative approach, starting from general notions of human dignity, passing through the perspective of medical ethics and the study of Advance Statements, to present, finally, an answer to Ruth Macklin. The results confirmed the effectiveness of human dignity in face of inevitable death of terminally ill patients by formalizing of Advance Statements, proving, thus, the actual usefulness and relevance of human dignity. In the doctor-patient relationship, human dignity involves pain and suffering mitigation, respect for patients and for their autonomy in decision-making about where and they prefer stay in the last days before dying, right information about their illness and risks due to medical and health care interventions, access to therapies and treatments in order to mitigate their distress, offer the possibility to renounce, suspend and withdraw therapeutic techniques, not abandoning patients and respect for their beliefs.

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THE CONSTITUTIONAL PRINCIPLES OF HUMAN DIGNITY, FREEDOM AND EQUALITY AS FUNDAMENTS OF HORIZONTAL EFFICACY OF THE FUNDAMENTAL RIGHTS

Keywords: Fundamental Rights, Fundaments, Equality, Freedom, Human Dignity

1. Description of the key cultural and historical processes that marked the construction of the common sense of the representation of the fundamental social rights in Brazil

The emergence of a social system in Brazil occurred between 1930 and 1945, with the change of an agricultural economy to an industrial-urban one, encouraging state intervention to guarantee the rights to health, education, social security, job security, housing and so on. To be noted

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that in this process of construction of Fundamental Rights in Brazil, the social rights had their inclusion in the positive law even before the guarantees of civil and political rights, confirming the strong influence of two sociocultural movements, slavery and colonialism.

From 1946, with the promulgation of the Constitution of 46, as well as through the creation of the Brazilian industry and the major incentive for national industrialization, gained strength grassroots movements, especially the trade union and students. However, in the 1970s and 1980s, with the installation of the military dictatorship, again disempowering the civil and political rights, the social rights were granted as a compensation for the loss of civil and political rights and the excessive control of freedom and ideas from the government.

In the late 1980s, with the end of the military rule and the democratization of the country, the civil and political rights returned to evidence. These rights had special attention with the promulgation of the Constitution of 1988. A number of other social rights were strengthened, for example, social security, health (with the creation of the National Health System) and social assistance (with the advent the Organic Law of Social assistance).

Allied to all this we see as strong influences in the formation of Brazilian conceptual framework of Fundamental Rights, the "colonels", cronyism and despotism, which left popular accommodation heritage and a political bargaining culture where few hold political power through financial strength, obtaining support by haggling and buying votes.

In this context, and in the pursuit of realization of human rights, there is the need to study and widely disseminate the rights and duties of all citizens, in particular the fundamental rights, as these are the most expensive and necessary to all because of their essentiality in ensuring human dignity, which is the same considered as the foundation of those.

2. The vertical efficacy of the fundamental rights

In relations between the state and individuals, to have the fundamental rights as fundamental in protecting the individual against arbitrariness of government. Without proper guarantee these fundamental rights, the individual is totally vulnerable and likely to suffer from abuses of power, being

at the mercy of the state, subject to social abandonment and suffering from a lack of basic resources essential to a dignified life violence. However, this efficiency is not easy to achieve, there are many variables that must be considered, such as the political will of governments and the lack of competent bodies to ensure its implementation.

As a result of the historical construction of human rights, there is the Universal Declaration of Human Rights, adopted on 10 December 1948, the United Nations General Assembly, without, however, practical means to enforce the implementation of the rights contained therein. As can be seen from the jurist Dalmo de Abreu Dallari:

> "The big problem, still unsolved, is achieving effectiveness of standards of Rights. Proclaimed as legal, previous standards to the States, they should be applied independently of their inclusion in states' rights by legislative formalization. However, the absence of a body that can impose their effective implementation or to impose sanctions in case of failure, often the very States that signed the Declaration act against their standards, without which nothing can be done"[3].

Even in the wake of Dallari, the lesson is that the States, in an attempt to realize the rights proclaimed in the Universal Declaration of Human Rights, gradually adopt the practice to include in their chapter constitutions on the rights and guarantees. Brazil adopted this practice, and its Federal Constitution enacted in 1988, by enshrining rights and guarantees, giving this Constitution the nickname "The Citizen Constitution"[4].

Given the difficulty in ensuring the effectiveness of the fundamental rights standards, duly enshrined in law declarations and constitutions of the states, it is necessary a brief examination of the meaning given to the term efficiency in Brazilian constitutional doctrine. As says the teacher and judge Ingo Wolfgang Sarlet, the term effectiveness encompasses a "multiple range of issues subject to questioning and analysis, although this is confined

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[3] D. de A. Dallari, *Elementos de teoria geral de* Estado, Saraiva, São Paulo 2011, [30th ed.], p. 211.

[4] Ibidem.

to the constitutional right and is, moreover, neuralgic point for the study of the Constitution"[5].

Says the Brazilian Federal Constitution, in Article 5. § 1. that: "The provisions defining fundamental rights and guarantees are immediately applicable"[6].

This is the normative principle that should be deeply analyzed in the search for the meaning of the effectiveness of fundamental rights, since it is the main weapon given to fundamental rights defenders.

In the study of the meaning of effectiveness, we find some similarity between efficiency and effectiveness. In this sense, it is urgent to differentiate the two concepts, efficiency and effectiveness, to get the results that are proposed this test. Again, we find in the lessons of Professor Sarlet the answer to the question made. In this sense, Sarlet gives masterly lesson demonstrating that the Brazilian doctrine, shows a distinction between the concepts of validity and effectiveness, stating that:

> "The term is the quality standard that is legally exist (after regular promulgation and publication), making it mandatory compliance in such a way that the term is true assumption of effectiveness, in that only the current standard may come to be effective"[7].

Assuming that the rules relating to fundamental rights have their undeniable force in Brazil, once properly meet enshrined in the body of the Constitution in force, step to examine its effectiveness itself.

Contemporary Brazilian constitutional doctrine, as in Sarlet[8], Dirley da Cunha Júnior[9], Virgílio Afonso da Silva[10] and José Afonso da Silva[11], distin-

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[5] I. W. Sarlet, *Dignidade da pessoa humana e direitos fundamentais na Constituição Federal de 1988*, Livraria do Advogado Editora, Porto Alegre 2011 [9th ed.], p. 235.

[6] *Constituição da República Federativa do Brasil*, DF. Senado Federal, Brasília 2011, p. 1

[7] I. W. Sarlet, op.cit., p. 236.

[8] Ibidem.

[9] D. da Cunha Júnior, *Curso de Direito Constitucional*, Editora jusPODIVM, Salvador 2011 [5th ed.], p. 157.

[10] V. A. da Silva, *Direitos Fundamentais: conteúdo essencial, restrições e eficácia*, Malheiros Editores LTDA, São Paulo 2011, p. 212.

[11] J. A. da Silva, *Curso de Direito Constitucional Positivo*, Malheiros Editores, São Paulo 2000 [17th ed.], pp. 101–102.

guishes between the full effectiveness standards, such as those enshrining political rights and civil liberties, and the rules of limited effectiveness, those enshrining social rights. This is proved by the way it makes up its effectiveness. The full effectiveness of standards is not necessary for its execution, nothing but the abstention of the state and the ordinary legislator. Once enacted the norm, it immediately produces the desired effects without any state intervention required, except, of course, in cases of violation of these rules when it will need state intervention for its guarantee. In the case of limited effectiveness standards, state intervention is essential to its effectiveness, since, because they are social rights, their realization depends on a state action, without which the effectiveness of the standard does not produce complete. In this sense, the lesson of V. A. da Silva:

> "Full effectiveness would have the rules, since the promulgation of the constitution and that already gather all the elements necessary to produce all the desired effects. Of limited effectiveness, in contrast, would be those rules that depend on any further regulation to complete their effectiveness"[12].

Once established that effectiveness is the ability to produce legal and factual effects, and that term is presupposed for this same effectiveness and means the legal existence of the standard, has put the importance of determining what the fundamentals of vertical efficiency with regard to realization of fundamental rights in relations between the state and individuals. In the wake of the lessons of the teacher Adriana Zawada Melo, is "the guarantee that contemporary states seek to offer every individual to take your life in accordance with human dignity, fundamental human rights find their explanation and his inspiration"[13].

[12] V. S. da Silva, op.cit., p. 254.

[13] A. Z. Melo, *A dignidade da pessoa humana como fundamento da efi cácia horizontal dos direitos fundamentais,* [in:] D. Gozzo (ed.), *Informação e direitos fundamentais: a efi cácia horizontal das normas constitucionais*, Saraiva, São Paulo 2012, p. 16.

3. The constitutionalization of the civil law

Once settled the issue of vertical effectiveness of fundamental rights standards and placing the dignity of the human person as the foundation of vertical effectiveness of fundamental rights, it adds up necessary to look at a recent phenomenon of the doctrine of fundamental rights, namely the constitutionalization of the civil law.

The post-World War II international scene, brought a number of innovations in the field of international law, in particular with regard to the issue of international treaties and conventions on the subject of fundamental rights and guarantees. The issue is gaining more relevance in Western legal systems to the point of various constitutions have included in their texts a unique chapter to regulate fundamental rights and guarantees.

Among the various socio-political consequences of this scenario are the various innovations in constitutional law, in particular the theory that there is intense dialogue and irradiation of the norms, values and constitutional principles in Private Law, a phenomenon that has been called the constitutionalization of law.

This constitutionalization of law gives new dimensions to the relationship between the constitutional normative instruments and other infra – constitutional legislation, to the point of affirming that the Constitution irradiates values and assumptions in order to change postulates once considered sedimented, such as private autonomy, held dear to scholars of civil law. This radiation then generates several conflicts between the branches of Constitutional Law and Private Law, specifically regarding the effectiveness of fundamental rights.

We see the lesson of Professors Riva Sobrado de Freitas and Alexandre Clemente Shimizu, about the implication of this new understanding of the influence of the Constitutional Law on Civil Law:

> "Under this new perspective and parallel to its dissemination, we note overcoming the idea that the fundamental rights only if it would render the protection of citizens in the face of the state, they as essential values of the signed memorandum, come to be understood as "postulates social ", which express a set of values, which provides the source of inspiration, drive and guidance for linking

> both the legislative process and the acts of public administration and also of all jurisdiction"[14].

In this paper, the term constitutionalization of law is used and understood in its broadest sense. It could be said that this expression should be understood as a phenomenon where the legal system of a given country functions under a Constitution endowed with supremacy, though this definition is non-specific and does not address all the senses affects this novel phenomenon.

What we want to demonstrate to the affirmation of a constitutionalization of civil law is the fact that there is a strong reflection of the "expansive effect that the constitutional requirements have acquired over the past 50 years. Such diffusion focuses on the material and axiological content of the constitutional provisions, which reflects intense normative force for the entire legal system"[15].

Thus, we can see a large impregnation of the legal system by constitutional standards, expanding the irradiation of the Constitution to all spheres and branches of modern law. This effect is particularly noticeable in the systems of Western countries, gaining strength in the post-war period with the proclamation of the declaration of fundamental rights and the movement for the protection and promotion of human dignity.

An important effect of the constitutionalization of civil law, particularly for the development of this work is the linkage of interpersonal relations to the fundamental rights. This is due to the overcoming of the liberal view, for which the fundamental human rights shall take effect only in relations where the state is a part and the citizen is at the other end. This new vision is relevant, especially in the view presented by Freitas and Clemente, in the lesson described below:

> "It is clear, finally overcoming the liberal view, in which the fundamental rights should only take effect in the relationship between state and citizens. This limited design, following the constitutionalization phenomenon, recognized that

[14] A. S. Clemente, R. S. de Freitas, *A incidência dos Direitos Fundamentais nas relações privadas*, [in:] N. L. X Baez et al. (ed.), *Dimensões Materiais e Eficáciais dos Direitos Fundamentais*, Conceito Editorial, São Paulo 2010, pp. 69–70.

[15] Ibidem, p. 71.

> in today's society is not always the state the greatest corrupter of Fundamental Rights, for this post, it is often occupied by individuals, especially those endowed with some social or economic power"[16].

Therefore, it is imperative to conclude that the constitutionalization of civil law culminates by bringing new ways of implementation of fundamental rights in interpersonal relations, going beyond the citizen to the state protection, allowing individuals to evoke such rights for their protection in their relations with the State and other citizens.

4. Theories about the applicability of the fundamental rights to private relationships

The acceptance of linking the special relationship to fundamental rights is the first step faced by scholars who, from there, then pass, the task of developing theories and propose models for the application of fundamental rights in interpersonal relations.

Below, follow the three most important theories about the effects of fundamental rights in relations between individuals: Theory of direct application or immediate effect; Theory applicability or indirectly mediate efficacy and; Theory of inapplicability or *State Action.*

4.1. The theory of direct application or immediate effect

This theory is the most accepted among Brazilian scholars, and has been understood, even by the Supreme Court as the most appropriate to our national law. As we noted in the words of Freitas and Clemente:

> "It is submitted that this theory, as stated elsewhere, is certainly the one with more supporters in the Brazilian doctrine, it seems appropriate to mention the main theses developed between us, which consider national law (imbued with a social-democratic constitutional paradigm), which imposes, in a way, a unique model that aims to meet the individualized needs of our society"[17].

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[16] Ibidem, p. 75.
[17] Ibidem, p. 84.

The theory of direct application or immediate effectiveness has its origins in Germany and was initially developed by Hans Carl Nipperdey in the mid-50s, and seeks to argue that no direct linkage of Fundamental Rights in both aspects of social relationships, whether between individuals and the State is in conflicts between individuals.

In direct application of fundamental rights, the particular conflict can evoke such rights without the need to find any "bridges" or "gateway" originated in Private Law, since to this theory Fundamental Rights are considered as subjective rights of individuals in the development of their relations. This means affirming the real possibility for individuals to assert fundamental rights against other individuals.

Freitas and Clemente teach towards the Theory of Direct Applicability require weighting rights when their use in a specific case, as shown below:

> "It is worth noting also that the supporters of this theory do not not ignore the existence of specific in its application and, therefore, before a case, recognize the need for balance between the fundamental right and the private autonomy of individuals involved in the relationship"[18].

So, applying this theory to the case makes necessary using the weighting or balancing of rights, in other words to say it should be applied to the situation the factual balancing between the conflicting rights. This is to say that the greater the restriction to the right, the greater must be the importance of realization of other rights as opposed to that limited.

When deciding on proceedings, the judge should assign value and importance of satisfaction to discuss rights and judge which one is more relevant to society by providing the most important accomplishment and achievement at the expense of other rights which will have its limited effectiveness. Thus, for this theory, Fundamental Rights can be applied directly in interpersonal relations, using the balancing of rights when there are conflicts between them, just as they are in relations between the state and the individual.

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[18] Ibidem, p. 82.

4.2. Theory of indirect applicability of mediate effectiveness

This theory about the effects of fundamental rights in interpersonal relations is an intermediate construction between theory that denies the binding, also called the State Action, and one that says the direct and immediate effect, treated the topic above.

It has its beginnings in Germany, being its precursor Günter Durig, and is being adopted today, predominantly in that country, especially by the German Constitutional Court.

Its scope of the search for balance between private autonomy on the one hand, and fundamental rights on the other. This is due to this theory recognize a general right of freedom, in response to an attempt to avoid domination of private law by the constitutional law.

Thus, this thesis draw up an effective model of fundamental rights in private relations which allows the binding occurs through the intermediation of norms and principles peculiar to private law in the form of general provisions and indeterminate concepts. That is, so there is linkage of fundamental rights in private relationships, the theory Effectiveness mediately, demand the existence of "bridges" between the public law and private in the form of general clauses or indeterminate concepts.

In the words of Freitas and Clemente:

> "In this vein, the Fundamental Rights represent an objective order of values, or even a system of values, causing their radiating effects are felt in all branches of law. In private law, these values (ie, Fundamental Rights) step into the private sphere through the general clauses and indeterminate concepts"[19].

4.3. The theory of inapplicability or the theory of State Action

Being predominantly accepted in the United States, this thesis has its basis in liberal view. This theory denies primarily linking the special relationship to fundamental rights. However, a closer study of the concepts and application of this theory reveals a contradiction between the theoretical and the

[19] Ibidem, p. 79.

practical. It is an apparent denial of the link, but that case law, is revealed as effectiveness of Fundamental Rights in interpersonal relations, as will be shown below.

Because of its apparent denial of the binding, the Theory of State Action found a loophole to apply the fundamental rights in relations between individuals. This device is to give the state responsibility for acts of private order, or even make the assimilation of these through acts of public policy. Through this legal fiction, the scholars of the Theory of State Action can solve, albeit unsystematic way, equating the dilemma of knowing when a private action has possibility to compare or even be transformed into public action.

According to the lesson Freitas and Clement, we see that:

> "Despite the Theory of *State Action* wants to deny (although apparently) the binding of Fundamental Rights, the judicial work of the Supreme US Court ends up finding, one way or another, a conformation that private action, transforming it in public, ensuring thereby that preserves a rifled constitutional right"[20].

Thus, we see that even if there is apparent linking negative for those who deny such a possibility, the courts find ways to remedy the violation of fundamental rights in private relationships, forcing the conclusion that such rights are of utmost importance to the full realization of democracy and the protection of the democratic rule of law.

5. The principle of human dignity

based on the achievement of fundamental rights in the relations between state and individual as well as in relations between individuals, remains conceptualize human dignity, in order to situate it between the grounds of the effectiveness of those rights.

Through the study of fundamental rights and, in particular, of the historical process of conquest and acquisition of those rights, we stumbled on the concept of equality under the law. However, this legal equality must be understood in a different light than the simple definition of the word, there-

[20] Ibidem, p. 77.

fore, manifests itself in a very peculiar way, intrinsically linked to the notion of dignity.

By stating that all are equal before the law, you must have in mind that not all people are in fact equal in many ways. So, for the right to equality, the right to differences arises. Therefore, in this strict sense, the concept of equality must allow the recognition of differences, such as those related to gender, race, age, etc. Only then can we speak of an effective equality and promoting a radical protection and guarantee of rights. Thus, equality, considered in the light of human dignity, guarantees every human being the order of nature itself and grant you the rights to subject status. Then, if it enters under the law of minorities.

In this sense, the right of minorities lends itself to protect portions or vulnerable groups in society, reducing inequalities among citizens. For this perspective, the right of minorities focuses its activities on the human person, as a subject of law, considered in its peculiarities and vulnerabilities and use of formal equality concepts, abstract and general and material equality, concrete and specific, therefore, considers the right to equality and the right to difference, showing the two-dimensional character of justice as redistribution and recognition of identities.

Consolidates, so the two-dimensional character of justice, making necessary an equality that acknowledges differences and a difference that does not produce, or reproduce inequalities. According to Nancy Fraser:

> "The recognition of identities is not limited only to the distribution because the **status** is not due simply in terms of social classes. At the same time, the distribution cannot be reduced to the recognition of identities because access to resources does not result simply in **status** function"[21].

Indeed, the guarantee of rights is not the result of simple assignment of rights subject *status,* state intervention is necessary, as guarantor entity, in the implementation of established standards and is, ultimately, to give the citizen their dignity.

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[21] N. Fraser, *Redistribución, reconocimiento y participación: hacia un concepto integrado de la justicia*, UNESCO, Paris 2000–2001, pp. 55–56.

Doctrinally conceptualize dignity is not an easy task. Being relatively recent development, because only after the Second World War, went beyond the sphere of philosophy and today is imbricated in the legal systems and political discourse without any possibility of return. It is also difficult to specify the concept of human dignity under cover itself other concepts such as "human person" and "dignity". This idea of human dignity is inextricably linked to the concepts of freedom and equality, both older development than that.

For several years the concept of human dignity was closer to philosophy, and therefore owned status value and not standard. For this reason, it is that one can understand the absence of the legal systems that emerged from the French Revolution, as these orders gave greater importance to formal equality and positivism has always prioritized the norm at the expense of other paradigms. After the Second World War, with all the barbarism that characterized, and in the twentieth century is that the dignity of the human person shall be recognized and enshrined as a fundamental principle, as taught by Melo[22].

For the purpose it is intended for this work, I chose to simplify the discussion of the concept of the human person. I chose to adopt this notion in its broadest possible sense, which is covering all people without distinction of their legal status or citizenship[23]. Even because the very use of the term "human being", rather than the customary "citizen", accustomed word to the liberal conception of constitution, already shows us the legislator's intention to expand the scale of its application as opposed to the concept of limitation citizenship[24].

Human dignity, therefore, should be understood as the fundamental principle of fundamental rights, although not exhausted these rights their legal content.

The historic building of the modern concept of human dignity goes through several times. One can, with some certainty, say that Christianity is the precursor of the dignity of idea inherent to all men, as among its postulates there is a strong determination that all men were created in the im-

[22] A. Z. Melo, op.cit., p. 16.
[23] Ibidem, p. 17.
[24] D. da Cunha Júnior, op.cit., p. 543.

age and likeness of God himself and therefore are deserving the same treatment must love each other.

It should also be credited to the enlightenment the historical construction of the doctrinal concept of human dignity. Among many others, and as taught by Norberto Bobbio[25], Immanuel Kant, whose work is still cited in discussions on the subject, is brave exponent of this concept, especially when he said that man must be an end in itself. In the wake of Kant's teachings, we have Sarlet, stating that:

> "Yet this perspective, it has been pointed out – rightly, in our experience – to the fact that the performance of social functions in general is linked to a mutual subjection, in such a way that the dignity of the human person, understood as seal human exploitation in principle prohibits the complete and egoistic available on the other, in the sense that if you are using another person only as a means to achieve a particular purpose, in such a way that decisive criterion for identifying a violation of dignity becomes (in many situations, it is proper to add) the objective of the conduct, I mean, the intention to instrumentalize (objectify) the person"[26].

Thus, in seeking to conceptualize dignity, we came across some ideas that are akin, and, among them, the impossibility of instrumentalization of human beings[27]. As explained above, the exploitation of one person by another, violates the dignity of the exploited and makes us consider that the dignity of notion is closely linked to the notions of equality and freedom.

Take as an example the fact that someone who subjugated the other, become linked to the interests of this and be used as a means for achieving purposes other than their own, you will find yourself deprived of their freedom and cannot be considered on equal footing with respect to the one that overwhelmed him. There will be, in this case, a flagrant violation of the principle of human dignity, since without the right to self-determination and deprived of their right to formal equality and material, one man leaves his condition of human being, and will identify themselves with the instrument concept, object used to obtain particular purpose.

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[25] N. Bobbio, *A era dos direitos*, trans. C. N. Coutinho, Elsevier, Rio de Janeiro 2004 [10th ed.], p. 48.

[26] I. W. Sarlet, op.cit., p. 63.

[27] N. Bobbio, op.cit., p. 49.

It is necessary to consider the possibility of subjection of one person by another is due to the will of those who are subject, but, even so, should this unequal situation be understood as an exception to the characterization of the violation of human dignity. In this case, the very willingness to subject itself can be the result of an uneven material or financial, even the result of a weak and conformist mental condition that states that such a circumstance is socially acceptable. This condition can even be invoked by the operator as excluding the possibility of guilt, in the event of a possible criminal responsibility for the act.

However, the dignity of the human person, being inherent in the human condition, cannot be dismissed or waived, precisely because its characteristic of being intrinsic to the human person, and due to the mere condition of being a person. In this view, once again, we turn to the teachings of the teacher Sarlet to state that:

> "dignity as an intrinsic quality of the human person, an indispensable and inalienable constituting element that qualifies the human being as such, and it cannot be highlighted in such a way that it cannot entertain the possibility of a particular person hold a claim to be granted dignity"[28].

Therefore, dignity cannot be granted to anyone by state administrative act, and not through legislative or judicial process. Clearly the dignity exists not only where it is recognized by the legal system, but its existence is due solely to the existence of person, human being. In the presence of the human being there is the dignity of the human person. So, being the law of a democratic state the guarantor of rights for excellence, should the government protects it whenever there are violations of dignity or imminent danger of such.

6. The principles of freedom and equality as fundaments of the efficacy of the fundamental rights

In a brief study of the Constitution of the Federative Republic of Brazil, we found several devices that point to the correlation between human digni-

[28] I. W. Sarlet, op.cit., p. 52.

ty, equality and freedom. Art. 1, section III of the Constitution establishes as one of the foundations of our Federal Republic, the dignity of the human person, which can also be considered as the foundation of freedom, equality and other fundamental rights.

This is observed in the following constitutional provisions: Art. 5, *caput* and item I, where you see this equality; Art, 3, III, where the Constitution is committed to the reduction of inequalities, and the abhorrence of discrimination, in that Art. 3, IV; beyond the literal linking of the Brazilian state with the search for social welfare and social justice, as seen in Art. 170 and 193.

In order to clarify the relationship between human dignity, equality, freedom and the horizontal effect of fundamental rights, I turn to examine, albeit briefly these correlations. For the purposes of this study, this brief analysis is restricted to the study of these concepts and their correlations within the law.

Being an old construction, the freedom and equality concepts are objects of study since antiquity, reassembled to ancient Greece their first doctrinal records, culminating in winning attention at the time the statements of eighteenth century rights and constitutionalism in the early days. On the other hand, the concept of human dignity, is the beginning of his doctrinaire treatment from the Middle Ages, climbing precedence under constitutional law in the contemporary era[29].

Arduous task is to conceptualize equality, as to be open to a large number of evaluative criteria, it has been and is subject to the content variations throughout history since, as the ideological movements alternate their conceptualization to the world of law, also undergoes changes often significant.

Under the specific perspective of the law, it can be stated with reasonable safety and Melo teaches[30], the intimate connection between equality and justice, not only with regard to social justice, but also in the context of commutative and distributive justice. In essence, this close relationship is often the fruit that is questioned activity to do justice when it is understood as the set of action which is due to each. This is what teaches Melo, citing Lopes:

[29] A. Z. Melo, op.cit., p. 23.
[30] Ibidem.

> "The theory of justice always begins with the issue of equality. So much so that the pursuit of formal rule of justice often ends in the formulation of the following proposition: «Justice is an action principle that the beings of the same class must be treated the same way»"[31].

According to this understanding, all citizens must obtain from the state, the same treatment is in the administrative, legislative or judicial. The state has a duty to provide everyone with the same measure of care and protection. This obligation arises from the law itself. The rule, which states that all are equal before the law, saying the State that it must provide to all beings within its jurisdiction one equal treatment in law enforcement. As is clear from the lesson of Robert Alexy:

> "In detail, the duty of equality in law enforcement has a complicated structure, for example where it requires the development of related rules to the case, either for the accurate determination of vague concepts, open ambiguous and evaluatively, either for the exercise of discretion. At its core, however, this duty is simple. It requires that all legal standard to be applied to *all* cases which are covered by their factual support, and *any* case that is not, which means nothing more to say that legal rules must be met. (emphasis added)"[32].

Professor Cunha Júnior, elucidates the issue of equality before the law as follows:

> "The right to equality is the right of everyone to be treated equally in that are equal and unequally the extent that desigualem either to the law (*formal equality*), either to the opportunity of access to the goods of life (*material equality*), because all people are born free and *equal* in dignity and rights. The demand for equality stems from the constitutional principle of equality, which is a basic tenet of democracy because it means that everyone deserves the same opportunities, closed with any kind of privilege and persecution. The first screen prohibited unequal treatment to the same people and the same as the unequal people"[33].

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[31] Ibidem, p. 23.

[32] R. Alexy, *Teoria dos Direitos Fundamentais*, trans. V. A. da Silva, Malheiros Editores LTDA, São Paulo 2011 [2nd ed.], p. 394.

[33] D. da Cunha Júnior, op.cit., p. 676.

As teaches Cunha Júnior, equality manifests itself in two forms: the formal equality and equality material. Formal equality, for teaching purposes, can be subdivided into equality in law and equality before the law, understood as the development of standards that do not contain distinction that is not authorized by the Constitution, preventing the legislature from creating rules that may break the isonomic order; and that the application of the law equally to all, even if you create inequality, preventing law enforcement is made according to discriminatory criteria or privilege. Have material equality must be understood as the application of the law to the case, taking into account the subjects of rights in their peculiarities and subjectivities, in order to provide an administrative action or judicial assistance with equity in the specific case[34].

In other words, in consideration of the concept of equality in the development and application of the law, it must be taken into account that there are two types of discrimination: those opposing and those favoring the set of values, principles and rights enshrined in the Constitution parents. Being sealed the opposed and should be promoted by the latter to be effective measures delivery of justice with equity, and mainly because they are enshrined in the Constitution itself, as necessary standards and mechanisms.

This is a masterful lesson from Flávia Piovesan when she states that are essential for the implementation of the right to equality, combating discrimination and promoting equality:

> "In contemporary perspective, the realization of the right to equality implies the implementation of these two strategies, which cannot be separated, that is, today combating discrimination becomes insufficient if there are no measures aimed at promoting equality. In turn, the promotion of equality by itself, it is insufficient if there are no anti-discrimination policies"[35].

So we have that equality is the fundamental principle in the realization of fundamental human rights, and is inextricably linked to the dignity of the human person when understood as assumption of realization of justice.

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[34] Ibidem, pp. 543–544.

[35] F. Piovesan, *Temas de Direitos Humanos*, Saraiva, São Paulo 2010, p. 243.

In turn, the concept of freedom, is the beginning of his theoretical construction dating back to ancient Greece, and also presents multifaceted and affected by various ideological fluctuations in historical times. Aiming to achieve the purposes for which it is proposed this test is restricted, the brief analysis that will make the concept of freedom, the scope of the law.

It is from the nineteenth century that the legal meaning of freedom begins to dissociate and establish its independence from the philosophical meaning of that freedom. This is due to the fact that it is at that time that began to be enshrined civil liberties and fundamental rights. Today, freedom is enshrined as a fundamental human right, and the example of equality, in the words of Melo, it can be considered "as a value, as a principle and as a rule. In terms of meaning, freedom is increasingly rich, and you can better understand it from a global vision of two great 'rating blocks' positive freedom and negative freedom"[36].

Continues Melo to teach:

> "The first covers everything that relates to the classic autonomy of the will, and the second concerns the possibility of the individual to act without interference or obstacles, whether opposed by the State or by individuals. In addition to this classification, one can still distinguish between real freedom, represented by the absence of obstacles to personal someone to do something, and formal freedom, which translates in legal freedom, ie in the absence of legal obstacles to individual action. In the area of legal freedom should be mentioned political freedom, which simultaneously identifies with the possibility of democratic participation"[37].

Thus, we must understand that freedom in its various forms of expression, it follows that the citizens should have guaranteed their right to free determination of his will, to no impediment to act in accordance with the law, active participation in the political decisions of their parents. However, all forms of freedom of expression also bring in its wake the limitation of that freedom when exercised in society.

This is due to the fact that for that exercise their right to freedom for all citizens, it is necessary to impose limits on this same right, in an attempt to

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[36] A. Z. Melo, op.cit., p. 28.
[37] Ibidem.

ensure equal social life. Paradoxically, for all to enjoy, simultaneously, the freedoms won, mister there are restrictions on the exercise of individual freedom in order to guarantee human dignity. To these restrictions, we call responsibility.

Thus, freedom can be legally understood as the ability of human beings to determine their will freely, even to refrain from acting, jealous of their liability for each act or omission her before their fellow citizens and to society generally, represented by the state coercive apparatus.

Finally, as appears from the above, freedom and equality are founded on human dignity. And when enshrined this right, the legislature aims to prevent the abuse of power, whether by an individual, group of individuals or the state itself.

Being denied the link between these values, norms, principles, remains conclude that if dignity is indeed the ultimate foundation of these values as it is for the fundamental rights and should serve to support its practical and doctrinal aspects, always bringing their interactions with the concepts of equality and freedom.

7. The horizontal efficacy of the fundamental rights

It is in the pursuit of social equality and the evaluative increase accumulated for human rights in the early twentieth century that gave birth to differentiate between vertical effectiveness (already addressed before) of the horizontal effect of fundamental rights (to be treated in this topic).

Established that there are differences between the vertical and the horizontal effectiveness of fundamental rights is not simply divide between public and private freedoms and name those as vertical as horizontal effectiveness and these effectively.

Understanding proposed here is to highlight the difference between the two efficiency levels, vertical and horizontal, of fundamental rights, since they are binding on all, in different ways, according to the ball and relationships on which encompass both in the public or private aspect.

Likewise, the teachings of Melo and Costa Júnior: “When it comes in vertical and horizontal efficacies, is intended to allude to the distinction be-

tween the effectiveness of the fundamental rights of the Government and the effectiveness of fundamental rights in relations between individuals"[38].

Still based on the teachings of Melo, one can adduce:

> "In his classic feature, the theory of horizontal effect of fundamental rights advocates that those rights are not enforceable only against the state and its agents, which would sense when its historical appearance, but also within the private relations, directly (effectiveness or immediate relevance) or through state act intermedeie this application (mediate efficacy or relevance)"[39].

Thus, the effectiveness of fundamental rights is an institute that all links and under its aegis all, Brazilians and foreigners during their stay in the country, should guide their conduct, without infringing the principle and constitutional rule. So even in relations between individuals, they should be considered with priority, fundamental rights.

Given that fundamental rights have as its theoretical basis and main ground the dignity of the human person must, likewise, be understanding that these rights are also applied in relations between individuals. However, there is some resistance from the private law doctrine to accept any limitations, even if derived from the Constitution, the freedom of choice or, ultimately, freedom and equality.

In response to the resistance of the scholars of private law the opposition limits the freedom of choice as a result of the horizontal effect of fundamental rights, I invoke the lesson pf Melo:

> "One can easily sustain the horizontal effect of fundamental rights as a mere consequence of the constitutional treatment of various institutes of private law and/or as a result of the principle of constitutional supremacy, in the sense that the constitutional requirements are norms of higher hierarchy, which must always prevail and that permanently radiate a parametric and shaping effect to any legal, public and private land"[40].

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[38] A. de O. Costa Junior, A. Z. Melo, *Eficácia vertical e horizontal dos direitos fundamentais*, „Revista Mestrado em Direito" 7 (2007), No. 1, p. 262.

[39] A. Z. Melo, op.cit., pp. 31–32.

[40] Ibidem, p. 32.

Undeniable, as it turns out, the effectiveness of fundamental rights, either in verticality or horizontality of human relations, either by nature of constitutional rule and the consequent primacy in national law, either by its main foundation in the dignity of the human person. It is held later this horizontal effect of fundamental rights by virtue of its main foundation in the dignity of the human person, in its correlation with the concepts of equality and freedom.

Taking as a definition of dignity, Aline Albuquerque S. de Oliveira teaches:

> "It is the value that is revealed in every person just because exist, which means that the dignity is immeasurable and static. Human people do not lose or gain dignity, as there is no way to measure it or upgrade it. The inherent dignity intrinsic to being, is not assigned, but a given limiting human activity and concomitantly liberating"[41].

Finally, it remains to admit the need for recognition of human dignity as a basic and defining element of the human condition and cannot therefore be dissociated from human existence, denied, granted, waived, destitute or relegated to the *status* of secondary attribute.

For all the foregoing, there is a fact that the dignity of the human person is the last and main foundation of the effectiveness of fundamental rights in the public sphere (relations between state and private) and the private sphere (relations between individuals).

Conclusions

Considered the concepts of equality, liberty and human dignity in its historic construction, one sees a clear link between them. It should be noted that the first two, although oldest legal-philosophical constructions that the latter, are mainly a plea and therefore are seen as subsidiary to the dignity of the human person in his capacity of human rights fundaments.

Throughout history, the dignity of the human person has to take precedence as the foundation of fundamental rights, especially because of their

[41] A. A. S. de Oliveira, *Bioética e Direitos Humanos*, Edições Loyola, São Paulo 2011, p. 90.

positive on normative instruments, constitutions and bills of rights, making it, in contemporary law, the fundamental principle of the fundamental human rights.

The insertion of human dignity in the constitutional texts can also be identified as a decisive factor for its ground condition in the effectiveness of fundamental rights in the vertical level, that is, in relations between the state and individuals.

The search for the expansion of the scope of this effectiveness by linking of individuals is what gave rise to the theory of horizontal effect of fundamental rights, just as the vertical efficiency, has its main foundation in the dignity of the human person.

Thus, it is recognized the foundational character of the human dignity to the horizontal effect of the fundamental rights. This is a result of the supremacy of constitutional norms, the intertwining of the dignity, equality and freedom and decision to prioritize certain basic values of national law.

Abstract

This paper aims to examine the constitutional principles of freedom and equality as fundaments of the efficacy of the human dignity. As a method, it uses the literature and Brazilian contemporary constitutional doctrine review. It also aims to study their correlations and relevance for the fundamental rights study. For that purpose, it shows the historical construction of the concept of human dignity, finding the points of intersection between human dignity, freedom and equality, and in a synthetic way to reach the contemporary conception of dignity as the foundation of human rights. The problem here is treated from the perspective of contemporary law, especially in its constitutional meaning, demonstrating that the constitutional principles of freedom and equality are the foundations for human dignity and for the effectiveness of fundamental rights in relations between the state and individuals, as it should also be in the relations between individuals or a horizontal effect.

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ABORTION: A LOOK INTO THE PERSPECTIVE OF PRIVACY RIGHTS AND DECISION-MAKING AUTONOMY

Keywords: Abortion, Privacy, Decision, Autonomy, Self-determination, Right to own body

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Introduction

The main focus of the study is the controversy over abortion, an extremely important and conflicting subject, from a juridical, moral, ethical and philosophical point of view.

However, there is no scope to bring up the recurrent discussion on the right to life of the unborn *versus* the right to freedom of the pregnant woman. What is needed, therefore, is a fundamental investigation on what the defense arguments are based on the practice of abortion. These arguments are primarily related to the right to privacy and the right to self-determination of the body which in itself is purposely pleonastic in terms of autonomy in decision-making.

The study is justified, and, the theme on which it is based is extremely contemporary and timeless; presenting the controversy in the human mind since time immemorial. In addition, the problem involves moral, ethical, philosophical and legal guidelines, as well as religious, medical, sociocultural and political aspects. Therefore, the debate on the subject is always necessary and elucidates important issues, especially when starting from a specific perspective of analysis, as is the case of the study, which seeks to understand the problem of abortion from the viewpoint of right to privacy and right to self-determination of one's own body, based on decision-making autonomy.

The problem of the study is based on the questioning made from the pro-abortion arguments, such as their bases and their importance.

The objective generally, is to study the ideals that justify abortion. Specifically, to visualize the hypotheses in which it is allowed in the legal order of the country, to establish the intrinsic and sacred ideals related to the development in human life, to analyze the right to privacy and the decision-making autonomy when confronting the subject, And finally, to provide an overview of the difficulty of defining what is, in fact, right, or wrong, and, consequently, the difficulty of positioning the issues related to the theme.

To do so, the study will be systematized so that, first, a brief evaluation will be made generally on the subject (abortion), then the analysis will delve into Brazilian law and the conjectures in which abortion is allowed. Fur-

thermore, it will analyze the values of decision-making autonomy and the right to privacy, and, finally, the concept of a "good life" from the Habermasian point of view, as well as the difficulty of positioning on the subject from the social point of view.

It should be pointed out that, as mentioned elsewhere, it is not the purpose of this study to present the conflict between the right to life and the right to autonomy, nor is it favorable to choose one of these fundamental rights over another, but is the argument used by a great majority of women who fervently fight for the right to abort, a right based on decision-making autonomy, the right to privacy and the right to own body as part of human individuality. What is intended, then, is to reflect on the importance of the right to privacy and the right to self-determination on one's own body in terms of decision-making autonomy, and not to contrast those rights with the right to life, or to position oneself in relation to abortion contraceptive.

Regarding the methodological aspect, the research is based on technical, rational and systematic procedures, with the intention of scientific foundation, as well as providing logical base for research. Finally, it is a research of exploratory-explanatory, qualitative bibliographical collection, in which the deductive method is used, and in which one has the intention of starting from hypotheses to explore and to describe the subject of discourse, revealing the possible solutions to the argument presented, without however, exhausting the theme.

Abortion: initial significant considerations

Matters strictly involving personal decisions almost always generate contradictions and conflicting opinions, especially from a moral point of view. Resolutions involving women's rights as part of the human population has always been stigmatized and is historically viewed as more vulnerable, therefore generating even more polemics, despite the fact that what is needed is the feasibility of some of the rights. Abortion may present the greatest, or one of the greatest controversies as it pertains to such decisions.

However, abortion or the process of abortion can be characterized as the interruption of the natural process of gestation, in which, for Reinaldo Pereira e Silva, the prenatal death of intrauterine human life occurs[4].

According to Maria Helena Diniz, the term "abortion" comes from the Latin word *abortus*, coming from *aboriri*, which means to die, to perish, and has been used to indicate the interruption of the gestation process, before natural time. Although this might be spontaneous or not, it however leads to the expulsion of the fruit of conception[5].

According to Diniz, in the northern part of Brazil, the opinion of obstetricians there is that there is a distinction between abortion and premature delivery, which is the interruption of pregnancy during the first six months of intrauterine life, taking into account the possible immaturity of the fetus[6]. On the other hand, preterm birth occurs after the sixth month of gestation, if the product of conception persists alive.

There are several ways of classifying abortion. In relation to the cause of it, it can be divided into spontaneous and instigated. Well, as far as natural or spontaneous abortion is concerned, there is nothing conflictive, at least in the moral, ethical, and primarily juridical spheres. On the other hand, when discussing the possibility of termination of pregnancy by the woman's desire not to undergo the pregnancy process, the discussion is large and indeed conflictive.

Moreover, in relation to the legal scope, there is some divergence regarding the conceptualization of abortion. Some understand it as the premature, violent and intentionally forced expulsion of the fetus, regardless of viability, age or even regular training, not considering the hypothesis that there is abortion without the product of conception being expelled, which may be absorbed by the fetus. In this case, the body of a pregnant woman undergoes a process of mummification. Others, however, relate abortion to feticide because they cover the destruction of gestation only at the moment when the product of conception reaches the fetal period. Finally, some others evaluate abortion as the interruption of pregnancy, whether or not it is

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[4] R. P. Silva, *Introdução ao biodireito: investigações político-jurídicas sobre o estatuto da concepção humana,* São Paulo: LTr, 2002, p. 255.

[5] M. H. Diniz, *O Estado Atual do Biodireito*, Saraiva, São Paulo 2001, p. 31.

[6] Ibidem.

ejected from conception, before maturity, covering the period corresponding to the conception until the beginning of delivery, according to Diniz[7]. As a rule, the viability of the fetus is not taken into account for the conceptualization of abortion. In principle, the chronological criterion is inapplicable.

Opinions, regardless of the sphere of argument are extremely divergent, ranging from extremely liberal and pro-abortion opinions, regardless of the situation, to those more conservative, where, on the other hand, abortion is not justified in any situation. Among these two conceptions, there are still several others, according to Ronald Dworkin[8].

For the author, people's opinions do not have two single variants, one conservative and one liberal. Conservatives and liberals alike have degrees of opinion ranging from the most extreme to the moderate, and there are also differences of opinion that cannot be found in the conservative-liberal spectrum. An example of this, for Dworkin, is the view that a late abortion is worse than a preterm abortion, since such a view cannot be clearly identified as more liberal, or more conservative[9].

Moreover, on the discussion of opposing and favorable arguments to the practice of abortion, José Roque Junges reiterates that in a pluralistic and democratic society, the way to influence the search for solutions to certain problems is precisely through dialogue and participation in convincing arguments[10].

According to the author, many times the groups organized to fight against abortion are made up of members who do not care about changing the social structures of society that cause abortion. Thus, the defense of human life from fertilization can be hypocritical if it does not worry about the social stigma that the future child will receive, that is, when it is not aborted in the womb. The social stigma typifies a condition of life with lack of social dignity, and the question of abortion permeates this broader perspective. Still, Junges argues that abortion-friendly groups also do not struggle for

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[7] Ibidem.

[8] R. Dworkin, *Domínio da Vida: aborto, eutanásia e liberdades individuais*, trad. J. L. Camargo, Martins Fontes, São Paulo 2003, p. 41.

[9] Iidem, p. 42.

[10] J. R. Junges, *Bioética: perspectivas e desafios*, Unisinos, São Leopoldo 1999, p. 131.

change, proposing that to be the solution, when one does not have the courage to go deeper into the issue[11].

However, Sueli Gandolfi Dallari explains that abortion is a typical case where the positions on the ethical foundation are irreconcilable. According to the author, in addition, the positions frequently placed do not define all cultures in all epochs of the history of the humanity. Nowadays, with the predominance of Christian culture, there is a strong position that life should be protected and protected by states, usually from conception – which in no way makes opposing ideals less strong[12].

So, the struggle for female empowerment[13] and the consequent decriminalization of abortion continues with increasingly significant proportions. In addition, September 28 was set aside as the Day of Fight for the Decriminalization of Abortion in Latin America and the Caribbean, or Latin American and Caribbean Day for the Legalization of Abortion. The definition of such date occurred at the 5th Latin American and Caribbean Feminist Meeting held in Argentina in 1990, according to information from the Brazilian Institute of Criminal Sciences[14].

The struggle for the decriminalization of abortion is grounded on the fact that this would protect the life and liberty of women, and that punishing the practice would not prevent new abortions from happening, but would impel their realization clandestinely and insecurely, so that the right to abortion would be a public health issue. It should be noted that Latin American and Caribbean women seek the realization of the right to interrupt gestation, if they so wish, through the strong argument that the criminalization of abortion causes women to seek this type of service clandestinely, which has led many of them to suffer very serious consequences, death being the worst of them. In Latin American and Caribbean countries, with few excep-

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[11] Ibidem, p. 132.

[12] S. G. Dallari, *Aborto – Um Problema Ético da Saúde Pública*, "Revista Bioética, Brasília" 2 (1994), No. 1, p. 1.

[13] On the issues of gender, feminism, and the struggle for women's rights, Judith Butler, an American philosopher and author of truly critical works on the subject, stands out.

[14] *Dia Latino-Americano pela Legalização do Aborto na América Latina e Caribe – 28 de Setembro*. São Paulo: IBCCRIM, 2010. p. 1.

tions[15] abortion is not legalized (or is only in specific situations). The legislation of Brazil is still quite conservative in relation to the subject that will be discussed below.

Therefore, considering the points of view and analyzing their arguments in depth, it is essential to bring to the discussion concrete ideals, unnecessary prejudices and pre-judgments that are absolutely unnecessary.

Nonetheless, it is important to note that, despite the extremely controversial subject, there are currently hypotheses where abortion is admitted and accepted by the Brazilian legal system, although controversial.

3. The legality of the interruption of pregnancy in national law: abortion in case of risk of death for the pregnant woman and in case of rape and therapeutic advancement of childbirth in fetal anencephaly

The issue of allowing or legalizing abortion was, and is, an extremely controversial issue. The discussion permeates medical ethics and enters specifically in the legal sphere, before the very discussion about the autonomy of the pregnant woman as part of her right to privacy.

On the subject, Dworkin argues that it is as a result of the latency of the population that the discussion is based on a moral and metaphysical question – whether even a newly fertilized embryo is already a human creature with rights and interests[16]. In fact, there is the involvement of an entire ethical sphere in the discussion, as well as the biological aspect of when life begins.

Uadi Lammêgo Bulos argues that the constitutional text protects all life forms, that is, both the external (intrauterine) life expectancy and its effective (extrauterine) consummation, in two aspects: birthright and right to live or survive[17]. For this reason, in Brazilian moral law, abortion, in general, is considered a crime.

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[15] Among the countries that have legalized abortion in Latin America are Uruguay, which recently decriminalized the practice in the first 12 (twelve) weeks of a Latin American decision in 2012. Gestation, under some conditions.

[16] R. Dworkin, op.cit., p. 41.

[17] U. L. Bulos, *Constituição federal anotada*, Saraiva, São Paulo 2008 [8th. ed.], p. 113.

In spite of this, there are currently hypotheses in which the practice is legalized, with the exclusion of crime, as in the case of the possibility of death of the pregnant woman, and in the case of rape. After the recent decision of the Supreme Court, in cases of fetal gestation with anencephaly, there is the possibility of therapeutic anticipation of delivery.

Regarding abortion in the case of the possibility of death of the pregnant woman, the Penal Code recommends in its Art. 128, item I, that abortion practiced by a physician is not punished if there is no other way to save the life of the pregnant woman. Also, in case of rape, abortion is admitted according to Art. 128, item II, of the same Penal Code, which establishes that if the pregnancy results from rape and abortion is preceded by consent of the pregnant woman or, when incapable, of her legal representative, there is no punishment.

Also, as discussed elsewhere, therapeutic anticipation of delivery is currently permitted when the developing fetus has anencephaly. This position is based on the decision of the Federal Supreme Court, in regard to the Arrangement of Non-compliance with Basic Precept (ADPF 54, judged in April 2012). In this judgment typified in Art. 124, 126 and 128, items I and II, of the Criminal Code, the Court acknowledged the right to therapeutic anticipation of labor in the case of gestation of anencephalic fetuses, since it was decided that the interpretation according to which the interruption of gestation of the anencephalic fetus is conducted.

Although the case cannot be termed abortion, because the anencephalic fetus is missing from the expectation of extrauterine life, it is perceived that it denotes the incessant search for the protection of the most basic rights of women who experience this delicate situation.

According to the Minister Marco Aurélio Mendes de Farias Mello, the case's rapporteur, the hypothesis is clearly a therapeutic anticipation of childbirth, to the detriment of the term "abortion", since in view of the unviable survival of the fetus in the postpartum period, one cannot speak in greater protection of this, than to the dignity and freedom of choice of the mother, or of the parents. It should be noted that this asserted freedom corresponds precisely with the decision-making autonomy of the pregnant woman, even more so in a case as crucial as this, in which, in fact, the suffer-

ing in carrying forward a pregnancy in which is considered the non-viability of life of the newborn can hurt the rights of the woman herself.

Even the judgment of the Arrangement of Precedence of Fundamental Precept explained that women's right to sexual and reproductive freedom, their right to health, both physically and psychologically, and their right to self-determination were recognized.

The rapporteur clarified that the right to life was not an absolute right, and even mentioned in his vote that the rights of women should not be annihilated for the protection of the rights of the fetus, especially in this case where it is known that there is the impossibility of extrauterine life. That is, it would impose too great a sacrifice on the woman to cause her to carry on a gestation, where the result would be the death of the fetus. Such maintenance would run counter to basic rights, as already mentioned, harming women's personal dignity, as well as their right to privacy, self-determination, their sexual and reproductive rights, and even their right to health.

At the same time, maintaining gestation would restrict the woman's right to psychophysical integrity, imposing on her an unreasonable restriction of her right to self-determination, causing her to live in a kind of imprisonment deprived of her own body.

Note that it has been decided that the safety of a fetus, which will not survive outside the womb, and even if it does, will be for very little time[18] cannot and should not be preserved at any cost, to the detriment of the most basic rights of women.

Thus, finally, it is accepted that abortion as a gender issue is still analyzed as a crime in the legal order of the country. However, in some specific situations, there is exclusion of crime, denoting that in the confrontation of some rights, especially of the pregnant woman, to the detriment of the pure and unique protection of the life of the fetus – without going into exactly the theories of the beginning of human life and personality – the rights of the latter may prevail, or, at least, in the weighing of interests, be taken into ac-

[18] As regards the action in question, several authorities in the subject were heard in a public hearing in order to better understand the anomaly, and, therefore, to discern on the subject with greater base and exempt manner. According to experts, anencephaly is completely incompatible with extrauterine life. In fact, cases where extra-uterine survival of the anencephalic baby was believed to have been clarified by *experts*. Diagnostic errors were undeniably the trigger for such beliefs.

count. The same occurs with regard to the therapeutic anticipation of delivery, in the case of pregnancy of an anencephalic fetus.

However, to achieve the prerogative of abortion, even in specific situations, some obstacles must be overcome, obstacles that have been instilled in the human mind since the earliest times. This is the case of the belief in the inviolability of intrauterine human life, because of its sacredness, as can be seen below.

4. Sacrality and the intrinsic value attributed to intrauterine human life and the discussion about abortion

Human life is, without a shadow of doubt, the most heavily protected value in legal terms, and likewise in relation to moral issues. Because of this fact, when talking about abortion, the controversy is always great.

There is, however, one who strongly argues that the question of the moral prohibition of abortion does not necessarily lie in the question of whether or not the fetus is human life, in the sense of being already a person, but in the protection of intrinsic value and of this life itself.

From his turn, Dworkin believes that people consider it to be intrinsically regrettable that human life initiated has a premature end. Concerning the idea of sacredness, the author asserts that in principle, something is intrinsically important if its value is independent of what people appreciate or need. Then the life of the fetus would be of intrinsic value whether or not it had instrumental or personal value[19].

When he speaks of the sanctity of human life, Dworkin reports that this is partly seen because it is believed that man is made in the image and likeness of God[20]. Yet the idea that each individual human life is inviolable is rooted in two bases of sacredness, namely, natural creation and human creation.

Similarly, Junges explains that, in the sacral conception, life is owned by God, and the human being is its mere administrator, and it is conceived as something untouchable[21].

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[19] R. Dworkin, op.cit., p. 96.
[20] Ibidem, p. 96.
[21] J. R. Junges, op.cit., p. 113.

Edison Tetsuzo Namba, emphasized, as well that life granted by divinity, or even by the intrinsic finality of nature, would have a sacred status and, in this way, could not be willing, even if it were the expressed will of its holder[22].

In addition, Dworkin argues that even conservatives consider that abortion is possible for the sake of the mother's life, and that there is a controversy, since these same people almost always consider it impossible for a person to kill someone to save the life of another[23]. Would that exactly not be likened to the role of the doctor? For the author, the more exceptions allowed, the more clearly the conservative opposition to abortion does not assume that the fetus is a person endowed with the right to life.

On the other hand, liberal conceptions do not stem simply from the denial that the fetus has the right to life as a person.

A paradigmatic liberal position rejects the view that abortion is morally problematic, but it is morally justified for a number of important reasons. Also, a woman's concern for her own interests is taken as justification for abortion when the consequences of the child's gestation and birth are serious. In addition, the other component of the liberal conception is political opinion, in the sense that the State should not intervene, nor to prevent abortions that are not morally permissible.

Dworkin mentions that in the Western world, even with a separate church and state, the discussion of abortion almost always has the character of conflict between religious sects. Religious practitioners tend to have a strongly conservative view of the subject. Both the ideas of the more conservative religious and those of the more liberal, who support abortions and exceptional conditions, are not based on the fact that the fetus is a person, but the fact that any human life has intrinsic and sacred value[24].

For many centuries, the author claims, it was believed that the church's traditional conception that abortion might be condemned for insulting the sanctity of life, even if the fetus had no soul, would be able to sustain opposition to premature abortion. There is also a debate between historians and philosophers of religion to know what would have triggered the change of

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[22] E. T. Namba, *Manual de bioética e biodireito*, Atlas, São Paulo 2009, p. 53.
[23] R. Dworkin, op.cit., p. 43.
[24] Ibidem, p. 48.

thought that the fetus would be endowed with soul some time after conception for the thought of immediate animation. Dworkin adds that practicing Catholics, if they truly believed that the fetus is a person with a right to life from conception, could not accept the exceptions they accept for the most part[25].

See, quoting a research by sociologist Carol Gilligan, a professor at Harvard University, the author argues that, even with uncertainties, no woman who intended to abort cast doubt on the question of whether the fetus was a person or not. They also questioned their responsibilities in the sense that it was wrong to have a child they could not properly care for.

He describes the author as a description of what most people view as the moral defect of abortion. To make an abortion is to belittle the inviolability/sanctity of human life, configuring a moral defect, unless the intrinsic worth of other lives were neglected in the decision against practice[26].

Finally, Dworkin cites a decision of the European Court of Human Rights, which led to the assumption that the fetus is not a person with its own rights and interests, and that the laws that regulate and prohibit abortion are justified Only on the basis of the fact that its realization is considered as a risk to the value inherent in human life[27].

The case, in summary, concerns the trial that decided to ban the disclosure of abortion clinics in Ireland through counseling services on abortion issues, because such disclosure would hurt freedom of expression and information. There was a proportionality test between abortions that could be avoided and it was decided that the number would be too small to violate the rights to expression and information. For the author, it remains clear that the proportionality test presupposes that laws prohibiting abortion are not intended to prohibit a murder, but to allow one to perceive the inherent value of life[28].

It should be noted that, under this argument, it is clear that rejection of abortion is not a matter of the fetus being a person endowed with rights and prerogatives from conception, but by the fact that initiated human life is sa-

[25] Ibidem, p. 65.
[26] Ibidem, p. 83.
[27] Ibidem, pp. 92–93.
[28] Ibidem.

cred, and has intrinsic value, and cannot be violated under penalty of violating the sacred.

Thus, as explained above, the still sacralized perception of human life initiated is an argument for those who condemn the practice of abortion in any and all situations. Despite this, the right to privacy, and the decision-making autonomy of the pregnant woman, serve as a scope for her defense, as analyzed below.

5. The right to privacy and decisional autonomy as pro-abortion arguments

The right to privacy is a right of the personality, insofar as the personality rights seek to regulate the protection of the proper attributes to the individualization of a person, seeking the protection of intimate aspects of the individual, or aspects originated from their interaction or projection in society. The protection of the personal psychic sphere, thus, would be contemplated in the roll of these rights. Likewise, the protection of the attributes of the physical body, such as the right to one's own body or to separate parts of it, is also included in the proper rights of the personality, as explored by Carlos Alberto Bittar[29].

In this way, it is often difficult to defend abortion by defending the recognition of women's identity, in the sense that there is a possibility that the abortion will preserve the pregnant woman's right to privacy and consequent decision-making autonomy rights inherent in the personal dignity of individuals, as stated.

This decision-making autonomy designates the individual as the center of his process, determining a sphere of self-determination in which she (in this case, woman) must exercise her concrete identity, making her own choices, even without having to justify herself, According to Jean L. Cohen[30]. In this way, according to Hannah Arendt, rights of this nature attribute to

[29] C. A. Bittar, *Os direitos da personalidade*, Forense Universitária, Rio de Janeiro 1989, p. 69.

[30] J. L. Cohen, *Repensando a privacidade: autonomia, identidade e a controvérsia sobre o aborto*, "Revista Brasileira de Ciência Política" 7 (2012), p. 185.

the individual a "legal persona", which serves as a "shield of protection" for his personal identity[31].

According to Paulo Otero, personal identity aims to guarantee what identifies the person as a singular and irreducible individual, possessing an absolute dimension, which makes each being unique and expresses the individuality of the physical and psychic personality and also a relative dimension, so that each human being, besides its singularity, has the identity defined, in parallel, by the "history" in which its existence is inserted[32].

In the meantime, Cohen reports that women have the right to be treated as individuals, and not subject to any kind of restriction in view of the sex to which they belong, nor can they be placed in inferior positions, despite the juridical order of the country[33]. Only after the advent of the Federal Constitution of 1988, the woman was treated as a "head of the family", according to Maria Garcia[34].

According to Cohen, both the protection of the voice in the public sphere and the protection of privacy in the intimate sphere are crucial in avoiding exclusion or leveling or even homogenization in a democratization project[35].

Thus, the privacy in question is one that assures individuals of their decision-making autonomy as it relates to personal concerns.

According to Cohen, the principle that individual rights of privacy, which protect decision-making autonomy, is compatible with the recognition of the inter-subjective character belonging to the processes of formation of personal identity, and awareness of historical and contextual sources of values[36].

In the same vein, personal privacy rights ensure domains of decision-making autonomy for all individuals, not generating a voluntary conception of the individual in any way. Thus, when the issue of autonomy appears in court decisions, it is not necessary to impose on them a voluntarist ideal of

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[31] H. Arendt, *Origens do Totalitarismo*, trad. R. Raposo, Companhia das Letras, São Paulo 1989, p. 126.

[32] P. Otero, *Personalidade e identidade pessoal e genética do ser humano : um perfil constitucional da bioética*, Almedina, Coimbra 1999, pp. 63–64.

[33] J. L. Cohen, op.cit., p. 165.

[34] M. Garcia, *O aborto e a condição feminina: nem le galização, nem criminalização, educação e apoio social – o Estatuto da Mulhe*, [in:] M. Garcia, J. C. Gamba, Z. C. Montal (eds.), *Biodireito constitucional: questões atuai*, Elsevier, Rio de Janeiro 2010, p. 423.

[35] J. L. Cohen, op.cit., p. 169.

[36] Ibidem, p. 183.

person. The attribution of decision autonomy to an individual simply militates against state paternalism.

Yet, the identity of the individual is not formed solely by group values. For Cohen, in different societies the rights to privacy play important roles in protecting individuals' capacities for training, maintenance, and presentation to others of a coherent, authentic and distinct self-concept[37].

Thus, the new rights of privacy also protect identity in the face of leveling in the name of a vague idea of community or the conception of the majority about the common good. They protect individual differences in the face of the "norm" adopted by the society or group to which the individual belongs. In short, not only the right to be left alone, but the right of self-determination – the decision-making autonomy – Is protected by the right to privacy.

In addition, to enjoy a right to privacy that guarantees decision-making autonomy means not being forced to show the reasons why ethical choices are made, or even to submit to reasons or judgments of the group.

Regarding abortion, Cohen points out that all people are embodied individuals, that is, people are their bodies, the person's body is not extrinsic to what he is, and therefore, it is part of his personal dignity. Identities and individualities are intrinsically implicated with bodies and what is made of them, since the body is the mode of being of the person in the world[38]. Thus, in the question of abortion, what seems to be on the agenda is the identity and individuality of the woman, something intimate and worthy of protection. Hence, women who advocate abortion refer so much to the issue of having a right to one's own body.

At this very point, Riva Sobrado de Freitas and Narciso Leonardo Xavier Baez emphasized the importance of the term embodiment, which is significant in the sense of the body itself as the substratum of personal identity. As with the other dimensions of privacy, the integrity of the body is essential for the understanding of decision-making autonomy, and consequently, for the formation of one's own identity[39].

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[37] Ibidem, p. 188.

[38] Ibidem.

[39] R. S. Freitas, N. L. X. Baez, *Privacidade e o direito de morrer com dignidade*, "Revista de Ciências Jurídicas Pensar" 19 (2014), No. 1, p. 251.

In this way, imposing a woman to bear an unwanted gestation, in this perspective, would impose on her an identity, the identity of a pregnant woman and a mother, while bodily integrity, physically and emotionally, is at risk in the laws that criminalize the abortion, as well as the inviolability of the personality. The experience of pregnancy is a change in the personification of the woman and, consequently, in her identity and feeling of individuality, which pervade much the question of the corporal change.

In this case, bodily integrity is imperative for the identity of the individual, and deserves to be protected as such by the rights to privacy, only to be disregarded by an even greater state interest. However, there seems to be something more serious that involves the psychological integrity of the woman, since to impose on her the continuation of an unwanted gestation would be extremely invasive, causing several of her most elementary rights to be mitigated.

Cohen relates that questions concerning procreation are fundamental, since they involve the identity of the woman, her processes of self-assertion, and her own understanding of herself[40]. The question of the inviolability of the personality by the control of the body itself is indispensable to any notion of freedom. To consider the right to abortion as a right to privacy is to recognize the difference between women, letting each one define this difference.

Moreover, the best argument for the application of the constitutional right to privacy to abortion points to the physical and psychological costs of unwanted pregnancies, according to Dworkin[41].

The author proclaims that feminists do not claim that the fetus is a person with moral rights of his own, but they report that he is a creature of moral importance. They emphasize the responsibility of the pregnant woman to make a decision that only she, and nobody better than she, can take.

On abortion and the right to privacy, it is very important to highlight the *Roe versus Wade* case[42], American precedent of 1973, which recognized the right to abortion based on the right of privacy of the woman as an in-

[40] J. L. Cohen, op.cit., p. 198.

[41] R. Dworkin, op.cit., pp. 143–144.

[42] In relation to international cases on the subject, which has a repercussion beyond the national legal order, it is also worth examining the case 2141, known worldwide as the *Baby Boy* case, appreciated by the Inter-American Commission on Human Rights (IACHR), which resulted in Resolution 23/81 of March 6, 1981.

dividual, considering that the pregnant woman and only her as an individual can make the decision to carry a pregnancy forward, or not, according to Dworkin[43]. It should be noted that in the case in question it was decided that the pregnant woman has the specific constitutional right to privacy in issues related to procreation, including abortion, provided she and her doctor choose to perform it.

According to Silva, with the ruling of the case in question, the US Supreme Court recognized the right to abortion based on the 14th *Right of Privacy*, so that in the first trimester of gestation, there is freedom for abortion without any state intervention, in the second trimester of gestation, this freedom may be limited by state regulations, and finally, in the third trimester of gestation, the state can veto the freedom to abortion. Thus, the Supreme Court assured the federal states of the possibility of establishing restrictions on abortion, in a progressive relation to the gestation period, justifying the protection of the fetus from the possibility of autonomous existence[44].

In this way, finally, by analyzing the question in the light of women's right to self-determination, it can be said that it is up to them to look at themselves, to reflect on their own conceptions and to decide, based on their right to privacy, willingness to continue, or not, with gestation.

It should be noted, however, that at no time do these arguments seek to defend abortion as a contraceptive method, but rather seek to place under consideration the importance of bodily and psychic integrity, for the integrity of the personality as a whole. There is serious concern to ensure that women are not confined solely to their womb.

6. The concept of "good life" weighted in Habermas: abortion and the difficulty of positioning under the social point of view

Apart from the right to self-determination of one's own body and the right to privacy, all individuals have, and deserve to have respect over their right to personal identity as a right inherent in the human personality. As already

[43] R. Dworkin, op.cit., p. 141.
[44] R. P. Silva, op.cit., pp. 256–257.

pointed out, the imposition of a gestation would be the imposition of a new identity on the woman, against her will, which could have devastating consequences.

Jürgen Habermas, in his brilliant scholarly work *The Future of Human Nature*, constantly mentions the right to personal identity when he relates his concern for each person's right to self-understanding[45].

In the work in question, the Habermasian thought enters into extremely controversial questions, linked, above all, to eugenics. The philosopher demonstrates his concern with the way people understand each other in the environment in which they live, hence the interpretation that the right to personal identity is so important[46].

By speaking of identity, Habermas states that when it comes to identity as a being of the species, several conceptions compete with each other. The naturalistic representations of man, verified in the language of physics, neurology, or evolutionary biology, concur with the classical conceptions of man exteriorized by religion and metaphysics. Yet, although they are at a higher level of generalization, reflections on the ethics of the species share with the ethical-existential reflections of the individual as well as with the ethical-political sphere of the nations with reference to a particular interpretation of life context. In the same way, in this case, cognitive research to know how human beings should understand themselves as exemplars of the human species, from the knowledge of relevant anthropological facts, joins the reflection that evaluates how each one intends to understand[47].

It should be noted that self-understanding, repeatedly used in the Habermasian work, refers to the very construction of the identity of each individual, a process that is already impregnated with mishaps, such as the case of the imposition of an identity against one's wish, or which one is not ready to take[48].

In fact, for Habermas, to perceive oneself worthy is something that goes through the construction of the personal identity of each subject, that is, the

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[45] J. Habermas, *O futuro da natureza humana: a caminho de uma eugenia liberal?*, trad. K. Jannini, Marins Fontes, São Paulo 2010, p. 32.

[46] Ibidem, p. 1.

[47] Ibidem, pp. 1–2.

[48] Ibidem, pp. 46–47.

way the individual sees himself, or analyzes himself from the inside to the outside, which is a primary condition to ensure his personal dignity is preserved, to the extent that his self-understanding becomes a parameter for that same dignity[49].

Injured, then, the subject's right to self-understanding, consequently his personal dignity would indeed be hurt, because the way one perceives himself as a human being is part of his dignity, and his perception as an individual possessor of this same dignity.

Well, this point is made clear that, following the same reasoning, Jürgen Habermas also sought to reflect, in philosophical terms, the difficulty of conceptualizing the good life. Habermas defends the idea that post-metaphysical thought needs to be moderated when it comes to taking definitive positions on good or unsuccessful life[50].

On this point, when Habermas questions whether there are post-metaphysical answers to the question about correct life, he reports that even today, practical philosophy does not totally renounce normative reflections[51]. However, in its entirety, it is limited to questions about justice, according to the author. It strives especially to elucidate the moral point of view that people adopt to judge norms and actions, whenever it constitutes what is of equal interest of each and equally good for all .

He argues that moral theory and ethics seem to be guided by questions concerning "what I should do" and "what we should do".

However, today's theories of justice and morality go their own way, different from that of ethics, taken in the classic sense of a correct doctrine of life.

In matters of greater relevance, Habermas reports, thus, that philosophy moves to a higher plane, analyzing only the formal properties of the processes of self-understanding, without, however, adopting a position on the content itself[52].

In the same way, according to Charles Feldhaus, philosophy does not have the function of studying what constitutes the correct life for contem-

[49] Ibidem, p. 50.
[50] Ibidem, p. 13.
[51] Ibidem, p. 5.
[52] Ibidem.

porary pluralistic societies. It does not consist, as it has already been, in a set of practical advice about what would be a good and happy life[53].

Based on this assumption, one can perceive the difficulty of taking positions, from the social point of view, on controversial subjects by nature, as is the case of abortion, since a consensus has not yet been built on what is or is not right.

Furthermore, Habermas mentions issues related to intrauterine human life and the controversy over what is right or wrong for one or all[54]. It makes clear that one in no way doubts the intrinsic value of life before birth, whether it is called "sacred", or deny such a sacralization of what constitutes an end in itself. However, the normative substance of the need to protect pre-personal life does not find a rationally acceptable expression for all citizens, neither in the objective language of empiricism nor in religion.

Thus, the concept of right or wrong in terms of strictly personal choices, or, as Habermas puts it, the concept of "good life" or "right life" seems far from peaceful[55]. The difficulty extends even further with regard to abortion and the possibility of a minimally peaceful solution, first with respect to moral issues, and then, and especially, in terms of legislation.

For this reason, and on the basis of valid discussion on the subject, it is controversial to take a position that is minimally peaceful about the problem from the social point of view. What is uncontroversial is the necessary protection of the rights inherent to women as the ultimate end to their own personal dignity.

7. Conclusion

The theme in which the study is based is controversial and has generated clashes and divergent opinions long ago. Issues related to abortion constan-

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[53] C. Feldhaus, *O Futuro da Natureza Humana de Jürgen Habermas: Um comentário*, „Revista Internacional de Filosofia da Moral" 4 (2005), No. 3, p. 309.

[54] J. Habermas, op.cit., p. 46. It should be noted that Jürgen Habermas makes specific reference to liberal eugenics and a possible future construction of "perfect" human beings, hence his concern with intrauterine human life. However, it is possible to denote with exactitude its explication as it relates to the intrinsic value and to the "sacralization" of life still in formation (intrauterine).

[55] Ibidem, p. 1.

tly spark heated discussions, and arguments that are favorable and contrary to practice are well-founded.

In the present research, a specific verification of the agenda was sought, that is, the assessment turned to the analysis of pro-abortion arguments, related mainly to decision-making autonomy (and the consequent right to self-determination of one's own body), right to privacy and the right to a woman's personal identity.

It should be reiterated that the present study does not have the bioethical analysis of the theories of the beginning of human life, nor does it question the mitigation or un-mitigation of the right to life in the hypothesis of a possible abortion, or even to delve into the dispute of right to life *versus* freedom of the pregnant woman. What was sought, however, was to permeate especially the area of argumentation concerning ideals favorable to abortion, so that one can reflect critically on the subject.

Thus, what was perceived was that ideals promoting abortion, based on rights such as decision-making autonomy, the right to self-determination, and the right to one's own body, are extremely plausible, and even if one does not agree with them, It may be overlooked that they are strong and that they protect a part of the population that is sometimes marginalized and historically considered to be more vulnerable (women), and that, therefore, deserves specialized protection. The material equality sought is in mind, although such vulnerability is questionable from the point of view of feminism itself.

And speaking of these ideals, it must be pointed out that the first of them, the decision autonomy, emphasizes each individual as the center of his own process, so that each person can make his choices, even without having to justify them, based on his Right to privacy, as was reiterated throughout the text. It is precisely this privacy that assures individuals the autonomy of decision.

The right to privacy also protects the identity to the degree that it distances decisions that go against the conceptions of each being, and in the case of pregnancy, it would be very invasive to impose the identity of a pregnant woman and a mother, to a woman who does not want it. This is according to the arguments put forward by advocates of abortion practice. Iden-

tity came in the study also under the right to self-understanding, where the Habermasian thought was emphasized.

In this vein, the identity of the person is intrinsically linked to his body, from the moment that the body is one of the expressions of form of life of the individual. Thus, the importance of the right to one's own body for individuality and human identity is a recurrent reference to the right to one's own body by the defenders of the right to abortion.

In this way, maternity, from the point of view of nature, must be a decision, not a levy.

Therefore, what can be deduced is that, although there is some repulsion about abortion, due to religious, metaphysical, moral and ethical issues, as well as legal issues, one cannot turn a blind eye to the rights explained in this article, which serve as a basis for the defense of the right to abortion, because, to disregard such prerogatives would be to disregard the struggle waged by women for centuries, and their right to discern, and decide, based on their autonomous experience and what to do in the face of peculiar situations pertaining personal nature.

Abstract

The study aims to investigate the right to privacy, decision-making autonomy and, profoundly, self-determination of the body as pro-abortion arguments. For that, an exploratory-explanatory, qualitative bibliographic research was carried out, using the deductive method. In relation to the results achieved, it is appreciated that, in fact, the arguments favorable to the practice deserve to be respected, since they are based on extremely important and solidly grounded rights. It follows, therefore, that there is extreme consistency in the justifications for abortion, and it must be taken into account, even though the arguments contrary to the practice deserve extreme respect.

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