

JAUNIUS GUMBIS, VYTAUTE BACIANSKAITE
& JURGITA RANDAKEVICIUTE
(University of Vilnius, Lithuania)

Do Human Rights Guarantee Autonomy?

I. INTRODUCTION

The Universal Declaration of Human Rights, ratified in 1948 after World War II, laid the foundation of international human rights law. It was the first universal statement on the basic principles of inalienable human rights, and created a common standard of achievement for all people and all nations. The principles laid down in the Universal Declaration are echoed in the laws of more than 90 countries around the world. A number of mechanisms have been established to monitor, promote, protect and develop human rights. However, for many people around the world the protection of human rights remains an unfulfilled promise. While it seems that human rights have triumphed globally, no other historical period has witnessed greater violations of these rights. The Universal Declaration of Human Rights has become a major tool for legitimating the post-World War II order both nationally and internationally, but is this document adequate and coherent for addressing the complexities of contemporary life?

Ubi societas, ibi Jus. Law is supposed to have a function of control, to maintain a particular order in the community established on certain grounds, and also to guarantee the protection of human rights. Does it mean that a person has only those rights that have been enacted? In the context of the 60th anniversary of Universal Declaration of Human Rights, this idea seems no longer to be valid. Law is not a divine instrument to universalize social values. An individual possesses a more extensive range of rights than any written legal act could encompass. The fact that a person has rights has nothing to do with enacting these rights in legal documents. Does a person have rights even if they are not enacted?

An essential part of contemporary human rights is the concept of personal autonomy. Every person has to have autonomy so that he/she can feel free to make decisions. A person who feels free to make decisions will feel secure and happy. The human being is understood to be an essentially independent and individually developing entity. Of course, we cannot underestimate the role of society. Because the individual's life is not isolated and always influenced by many external factors, the intrinsic need to attain happiness and harmony often collides with obstacles. The individual often encounters the power of state control.

Restrictions, rules and authorized interference into the individual's privacy make the issue of autonomy particularly important. To survive as an individual, the person agrees to accept certain limitations upon his or her freedom to act.

Each state is internationally obliged to guarantee basic human rights by all legitimate means (legislation, law enforcement, etc.). Among these fundamental rights is the right to life, from which all the other human rights derive. The right to life encompasses the right to private life and privacy. The right to private life is one of the essential areas of law derived from moral rules and the basic understanding of human life itself. The right to private life or the right to have an autonomous area of life can be described using different terms, for example, a «right to choose» or «a right to freedom». There is no particular list of activities defining the limits of private life (i.e., privacy), which is an area of freedom. The content of the right to private life (the right to personal autonomy) is hard to define and identify in most cases.

Can a human being be autonomously free only in a «me-me» (self-centered) relationship? It is important to consider the contemporary standards of life in different societies irrespective of their development level. There are many effective regulators, other than laws, that prescribe the rules and norms of behavior that govern the exercise of rights and freedoms. For example, reputation, social standing, or perceived authority, may substantially affect autonomy and private life itself. There are not only laws, public order and traditions that inform the view of personality and his/her spheres of behavior. *Raison d'être* of an individual's autonomy originates from a nature of human being *ipso facto*.

The purpose of this article is not to identify what rights and freedoms we as human beings possess, but to provoke a discussion and dispel the primitivism of the discourse concerning universal human rights and freedoms in the context of the 60th anniversary of the Universal Declaration of Human Rights.

2. PERSONAL AUTONOMY AS THE FOUNDATION OF HUMAN RIGHTS

«December 10 marks the 60th anniversary of The Universal Declaration of Human Rights, a single short document of 30 articles that has probably had more impact on mankind than any other document in modern history»,

declared The United Nations High Commissioner for Human Rights, Navi Pillay. The Declaration was envisioned and adopted in response to the failures of the League of Nations and the atrocities of World War II. Many believed that a third world war was imminent. Lessons and insights after the Nuremberg process resulted in the recognition of a new status for individuals. The international community presented this declaration to the world as a helpful guide for societies

in transition. It became a common standard of achievement for all people and all nations.¹

In the sixty years that have passed since The Universal Declaration of Human Rights and Freedoms was agreed, this document has promoted the creation of a global institutional mechanism comprised of legislative, monitoring, educative, and other multifunctional bodies. The system itself serves as specified and intrinsically dynamic virtues, written mediators, moral guidelines for humanity.

«Tens of millions of people around the world are still unaware that they have rights that they can demand, and that their governments are accountable to them, and to a wide-ranging body of rights-based national and international law. Despite all our efforts over the past 60 years, this anniversary will pass many people by, and it is essential that we keep up the momentum, thereby enabling more and more people to stand up and claim their rights»,

stated the High Human Rights Commissioner.²

Human rights and freedoms have been defined in different terms and dimensions, by different schools and cultures. In other words, countless criteria are involved in delineating the content of rights universally or *ad hoc*. Despite this variety of approaches based on different theories, most definitions refer to the individual's personality and his/her abilities to exercise certain rights and freedoms in particular situations. Human rights are not just a doctrine formulated in documents. They rest on a common disposition towards other people and a set of convictions about what people are like. It is only up to personal discretion (autonomy) and compatible public good as to how extensively and productively a human being can fulfill his/her preferences pursuing maximum happiness. As all authentic forms of rights and liberties, autonomy itself can also be characterized as the unity of differentiated types and degrees of internal and external factors for a given individual at a given time and upon particular circumstances.

There are several definitions of autonomy. The term *autonomy* originates from ancient Greek. It consists of two words: *autos* (his/her own) and *nomos* (rule). This term describes a person's ability to make his or her own rules in life and to make decisions independently. The idea that people must be free to shape their own lives is central to most accounts of autonomy.

In general, autonomy means that a subject is the best expert on his/her interests. It is the reason why this subject should be able to make his/her own laws, particular rules of conduct or follow the values that are acceptable to him/her in practice. In general, any action or act can be described as autonomous only if the agent gives preference to this action, and this decision is independent and corresponds with his/her plan of action. In other words, we can talk about autonomy only when the freedom to choose and to make ethical decisions is

¹ Shale Horowitz & Albrecht Schnabel (ed.): *Human Rights and Societies in Transition: Causes, Consequences, Responses*, United Nations University Press, Tokyo, 2004, p. 30.

² United Nations, available on-line at www.un.org [accessed 15.05.2009].

guaranteed. «Autonomy [...] is the acknowledgement of a person's right to hold views, to make choices and to take actions based on personal values and beliefs».³

If the state were to interfere in matters of personal morality, it would be treating the plans and values of some as superior to those of others.⁴ This applies also to other members of society: no member of the society has the right to violate someone's personal autonomy without a reasonable basis. This reasonable basis is the autonomy of another person, another member of society. In the sphere of personal autonomy, a person has rights and only one duty: not to violate the autonomy of other individuals.

Most commonly, autonomy can be understood as «the right to be left alone» and as a right to control certain kinds of information about oneself.⁵ In its maximal form it entails complete rationality, self-control, knowledge of relevant facts, and other demanding conditions internal to the agent, as well as freedom and recourses to act.⁶

The composition of alternative behavior exceptionally depends on a witting and willing process of reasoning. Some theories declare subordination between autonomy and privacy. The latter is considered to be a precondition to exercise autonomy. Legal philosophy also acknowledges that the definition of privacy may be substituted by the term «freedom». This recognition leads us to assert an intrinsic, inalienable freedom to autonomy, which, if legitimized, is enshrined as the right to private life.

Autonomy as freedom of choice creates a dichotomy of possible behaviors. An outrageous, publically unjust, stupid, or abnormal act may invoke subsequent disgust and distrust. If a person acts in compliance with set conditions and regulations, he/she will avoid an undesirable reaction, even if the act committed is not in any way exceptional either socially or morally. The significance of the positive effect on a person (acting agent) may not be substantial compared to the harm he/she may inflict on others and him-/herself. Active interference to protect third persons is generally seen as a normal phenomenon excluding the same adequate actions towards the agent. However, it is important to note that prohibition of intervention on all autonomous behavior carries no moral authority.

The absolutist's dilemma is that if one defines autonomy so that it always deserves respect, no one is truly autonomous; and if one defines it so that everyone is autonomous, it does not always deserve respect.⁷ However, it is important that autonomy be practicable in a way that gives every individual an «effective sense of justice», which entails the recognition

³ *Ibid.*

⁴ Micheline R. Ishay: (comp.): *The Human Rights Reader: Major Political Essays, Speeches, and Documents from Ancient Times to the Present* (2nd ed.), Routledge, New York, NY, 2007, p. 407.

⁵ Elizabeth Neill: *Rites of Privacy and the Privacy Trade: On the Limits of Protection for the Self*, McGill-Queen's University press, Montreal, 2001, p. 25.

⁶ John Kultgen: *Autonomy and Intervention: Parentalism in the Caring Life*, Oxford University Press, Oxford, 1995, p. 89.

⁷ *Ibid.*

«that other human beings are agents like yourself, with projects and values of their own –projects and values that may impose limits on the things that you want to do in pursuit of your own projects and values–.»⁸

This means that personal autonomy requires every person to treat others in the same way that he/she would want to be treated. This ethical or moral maxim is common to many cultural traditions. Ethical conduct, in this case, treats persons as equals, for the ultimate moral imperative to treat others in the way one would oneself want to be treated presupposes that we are, in some sense, equals.⁹

The conditions necessary for autonomy can be divided into two categories: internal and external. An autonomous individual must know what he/she wants to achieve, but he/she must also live in a favorable environment that provides means and resources to facilitate the realization of one's potential.

There are also other ideas on the issue of personal autonomy, equality and freedom. If a person's options in life are seriously limited by constant suffering or by severe physical disability, his/her autonomy is correspondingly limited. Again, if one lives in grinding poverty and has to devote his/her whole life to scraping by a mere subsistence, autonomy will be severely impaired because of limited options in life. Some writers regard such limitations upon the individual's autonomy as constraining freedom no less than legal prohibitions deliberately imposed by other people. Others prefer to describe them as limits to what people are *able* to do rather than what they are *free* to do.¹⁰ For example, if a person wants to travel to South America but the plane ticket is too expensive for him/her, does it mean that he/she is not free to do that? Or if a person does not have enough money? All these conditions comprise external facilities. Different dimensions come together to define the resources of autonomy: opportunities to act, expression of ego, beliefs, preferences, logical calculation, rationality. This set of conditions is by no means exhaustive, but may vary according to a given situation and personality. It must be stressed that absolute autonomy may only be practicable as far as it has a positive effect. Such effects may be diverse, either positive or negative. Autonomy is a matter of type and degree, not something that some individuals possess while others lack completely.¹¹ There is a question of whether it is possible to enhance the degree of autonomy by interfering in other peoples lives to facilitate other options and choices.

Basic human rights are the rights necessary for the development and exercise of autonomy.¹² Human dignity is essential in developing human rights. In

⁸ Alan Apperley: «Liberalism, Autonomy and Stability», *British Journal of Political Science* No. 30/2 (2000), pp. 291-311.

⁹ D.A. J. Richards: «Rights and Autonomy», *Ethics* No. 92/1 (1981), pp. 3-20.

¹⁰ Peter Jones: *Rights*, Palgrave-Macmillan, London, 1995.

¹¹ John Kultgen: *Autonomy and Intervention...*, cit., p. 90.

¹² William J. Talbott: *Which Rights Should Be Universal?*, Oxford University Press, Oxford, 2005, p. 113.

other words, denial of the individual as the master of his/her own life is the consequence of gross human rights violation in all societies. Dignity lies in interdependence with privacy. Privacy is a freedom which may be legitimized through the natural rights affirmed in a nation, state or international community. Autonomy derives from privacy in terms of a privileged condition firstly guaranteeing a minimum capacity of behavior, physical welfare sustenance, and a balancing of core needs and rights. Such privacy, irrespective of the legal right to private life, builds the framework for personhood –the foundation of autonomy.

The innately private nature of a human being dictates the necessity to observe the sense of privacy which guarantees a potentially wider range of rights and freedoms. This can be illustrated by a comparison of basic physical and psychological rights.

«We desire food because we need food, though we do not necessarily have it. Some might say that we desire privacy and autonomy because we need them, though we do not necessarily have them. I say we desire privacy and autonomy because we “have” them, in the sense that it is in our natures to be private and autonomous, and that, indeed, we do not necessarily need them, in the sense of needing more than we innately have. Although we innately have the degree of privacy and autonomy required for personal identity to subsist, we nonetheless both need and desire to maintain these innate properties.»¹³

3. PERSONAL AUTONOMY AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

The first article of Universal Declaration of Human Rights states:

«All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.»

This phrase reveals that on the basic level human rights may be understood as a model of relationship between two individuals. The basis for human rights was established in The Universal Declaration of Human Rights with the recognition of individual persons possessing special worth and dignity precisely as individuals.

Basically, human rights are morally superior to society and state, and under the control of individuals, who hold them and may exercise them against the state in extreme cases. Personal autonomy and human rights are highly connected and cannot exist without one another. This reflects not only the equality of all individuals but also their autonomy, their right to have and pursue interests and goals different from those of the state and its rulers.

Autonomy, in this sense is fundamental to the idea of human rights, is a complex supposition about the capacities, developed or undeveloped, of persons,

¹³ *Ibid.*, p. 18.

which enable them to act or want to act in a particular way. Autonomy requires the ability to reason, make, and carry out simple plans on the basis of one's desires.¹⁴ Such capacities enable persons to call their life their own, self-critically reflecting on and revising, in terms of arguments and evidence to which rational assent is given, which desires will be pursued and which disowned, which capacities cultivated and which left unexplored, with what or with whom in one's history one will identify, or in what theory of ends or aspirations one will center one's self-esteem, one's integrity, in a life well lived.¹⁵

In order to treat an individual with concern and respect, the individual must first be recognized as a moral and legal person. This in turn requires certain basic personal rights. Rights to recognition before the law to nationality (The Universal Declaration of Human Rights, Articles 6, 15) are prerequisites to political treatment as a person. In a different vein, the right to life, as well as rights to protection against slavery, torture, and other inhuman or degrading treatment (Articles 3, 4, 5), are essential to recognition and respect as a person. There are three values: that individual human beings are important; that individuals are to count equally in terms of «whatever features makes us worth counting»; and that individuals are agents. Agents are «creatures who are capable of conceiving and of trying to bring to fruition projects and values». To be an agent is to be autonomous in the minimal sense. These three core values, however, are not of equal standing for it is clear that agency –autonomy is more fundamental than the others.¹⁶

The idea of human rights embodies a normative perspective of respect for such capacities. Autonomy may be perceived not as isolation but in terms of a supportive social environment of critical dialogue and reciprocity. Society may accept responsibility for defects in autonomy which it has unjustly fostered and to which, in the balance of considerations of justice, it must give appropriate weight.¹⁷

In 1947, when the General Assembly of the United Nations was getting ready to vote for the adoption of the Declaration, the Association of American Anthropologists appealed with a statement to the commission that was preparing the project of the text of the declaration. This statement was full of the spirit of cultural relativism and against the declaration. The Association of American Anthropologists was trying to prove that respect for the rights of an individual means respect for cultural differences, because an individual realizes himself/herself as a person through his/her culture and there is no methodology which could be used to quantifiably estimate one culture or another. Standards and values exist only in the culture of their origin, and any attempt to formulate the postulates which come from the faith and moral codes of one culture and apply them to the

¹⁴ *Ibid.*, p. 113.

¹⁵ D.A. J. Richards: «Rights and Autonomy», cit.

¹⁶ Alan Apperley: «Liberalism, Autonomy and Stability», cit.

¹⁷ D.A. J. Richards: «Rights and Autonomy», cit.

entire global society is doubtful.¹⁸ That is why we need personal autonomy. Society is gaining in density and, for this reason, a person needs a sphere of his/her life where he/she would not be controlled and could have the opportunity to take any actions he/she pleases under the condition that it would not affect anyone else.

«Zone of privacy is a zone of freedom»,¹⁹ which is why the right to private life is one of the essential spheres of law derived from moral rules. Still, the right to private life or, in other words, the right to have an autonomous sphere of life can be described using different terms, for example, *a right to choose*, or *a right to freedom*. The concept of private life is quite far-reaching. It also includes the right to keep information about one's personal life outside of the public sphere in certain circumstances. This is why the content of the right to private life (the right to personal autonomy) is sometimes hard to define. It would be much easier if it were possible to determine the sphere of the private life. Society would avoid many contradictions between public interest and the autonomous sphere of a person. As in the case of *Niemietz v. Germany*, the European Court of Human Rights pointed out:

«The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of "private life". However, it would be too restrictive to limit the notion to an "inner circle" in which the individual may live his own personal life as he chooses and to exclude therefore, entirely the outside world not encompassed within that circle. Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings.»²⁰

4. INVENTING NEW HUMAN RIGHTS

As advanced technologies transform our daily lives, increasingly severe limitations impose themselves upon all humankind and affect law. The evolution of law during the past century reveals a change in the legal force of many different forms of legal documents. For instance, all legal systems generally confirm that both written and unwritten law has always existed in parallel. Even sixty years ago, legislation itself was not so intensive. Daily life was mostly regulated by unwritten rules, by the observation of customs, social standards and traditions. For example, signed forms of contracts were not as common as nowadays, when individuals underwrite the vast majority of their legal actions. The same situation can also be found in the field of lawmaking. There is now an expressed need to regulate as many spheres of human life as possible, including communication, internet access, education, marriage, and travel.

¹⁸ L. Xiaorong: «Postmodernizmas ir universalios žmogaus teisės [Postmodernism and Universal Human Rights]», *Šiaures Atenai* (2005), p. 739.

¹⁹ Eric Heinze: *Sexual Orientation: A Human Right. An Essay on International Human Rights Law*. Martinus Nijhoff Publishers, Leiden, 1995.

²⁰ *Niemietz v. Germany*, Appl. No. 13710/88, § 23, ECHR 1992-II.

Discussion is now widespread about reinventing human rights. If we agree on the assumption that all human rights derive equally from the status of autonomy in compliance with dynamic social prerogatives, new regulation does not mean new human rights. Nevertheless, the reinterpretation of human rights by each new generation is always positive and necessary.

As the United Nations High Commissioner for Human Rights, Navi Pillay claimed,

«The Universal Declaration wisely chose not to rank rights. On the contrary, it recognized the equal status of political and civil rights with economic, social and cultural rights, and underlined that all rights are inextricably linked [...] Violations of a set of rights reverberate on other rights and enfeeble them all.»

The United Nations Secretary-General Ban Ki-moon noted that recent food emergencies, the degradation of the natural environment, the current financial crisis and the unrest that they engender all underscore that those who are at the frontlines of hardship are also likely to be the victims of the ripple effects of human rights violations. All these statements illustrate the imminent development of human conditions and dynamic nature. This situation requires flexible law and mechanism of control.

The (re)invention of human rights is grounded in new assumptions about individual autonomy. Before they can possess human rights, people first have to be perceived as separate individuals capable of exercising independent judgments.

To be autonomous, a person must be recognized as legitimately separate and secure in his/her separation, but have human rights. Personhood must be appreciated in some more expressive model. Human rights depend on both self-possession and on the recognition that all others are equally self-possessing. An ambiguous notion of the status of others illustrates the incomplete and uncertain matrix of relations, often open to a discriminative display of mutual respect and equality.

On the other hand, there are situations when it is essential to intervene in the person's private life to avoid harm and protect the rights of other people. In 2005, The European Court of Human Rights investigated the case of *K.A. and A.D. v. Belgium*,²¹ which raised the issue of the extent to which acts of sadomasochism ought to be protected by the right to respect for private life. The issue that had to be determined was whether interference with the applicants' right to respect for his private life was «necessary in a democratic society». The right to engage in sexual relations is derived from the right of autonomy over one's own body, an integral part of the notion of personal autonomy, which could be construed in the sense of the right to make choices about one's own body. It followed that the criminal law could not in principle be applied in the case of consensual sexual practices, which were a matter of individual free will. Accordingly, there had to be

²¹ *K.A. and A.D. v. Belgium*. Application No. 42758/98, 45558/99.

«particularly serious reasons» for the interference of public authorities in matters of sexuality to be justified for the purposes of Article 8 (right to respect for private life) of the Convention. However, in the case mentioned sexual practices were not carried out with the person's free will. For this reason, the European Court of Human Rights decided that the government institutions of Belgium that took action to stop these activities and punish the person responsible for harming other people did not violate the right to private life because these institutions were acting in accordance with the public interest.

The main question that arises is who is entitled to fill the gap between the control spheres of two equally autonomous individuals. An extensive catalog of rights and freedoms is not the solution. A plethora of newly bestowed rights would burden people with volume and complexity of information without necessarily precluding new *ad hoc* situations. The individual is challenged to evolve additional capacities, skills, experience, enhance knowledge and specialization. Enactment of new rights is not effective. The trends of modern life cannot be predicted for 60 years onwards. Invention of new human rights *per se* is not a solution. On the other hand, overall social development is inseparable from human rights. The latter are complement to self-tendencies. Because of intense global integration, development and human rights are becoming different, logically distinct, but operationally and conceptually linked issues. Prior to this, human rights had possessed autonomy and *power* in certain fields (marginal groups of people, self determination, etc.). The processes of the social change are simultaneously rights-based and economically grounded, and should be conceived in such terms, including human rights as a constituent part.²² According to the Nobel Prize winner Amartya Sen, social development is the expansion of capabilities or substantive human freedoms,

«The capacity to lead the kind of life [a person] has reason to value [...] [D]espite unprecedented increases in overall opulence, the contemporary world denies elementary freedoms to vast numbers –perhaps even the majority– of people.»

Autonomous people can invoke the lack of universal human rights assistance as the primary weakness of a state. If a person is not able to embrace his/her life activity and pursue satisfying results because of vagueness and lack of legal instruments, such an individual is free to act in compliance with minimum public expectations and extensive personal preferences. Promoting and protecting the right to autonomy (or autonomy as freedom *per se*) entails change and modernization in democracy, strengthening of the state and society with self-sustaining purposeful members. If state policy is not aligned with human rights, it progressively loses stability, human resources and self-control. Any state or regime cannot forbear vindication of rights and freedoms because of lack of legal base and practice.

²² Peter Uvin: *Human Rights and Development*, Kumarian Press, Sterling, Va., 2004, p. 122.

Anniversaries provide an appropriate opportunity to take stock and, where necessary, remind ourselves of why we stick to the commitments we make. As Andrew Fagan points out,²³ too often the *raison d'être* of any collective human venture can be lost amidst the sheer banality of daily doing what we do and pursuing the goals we have become accustomed to. For this reason, the 60th anniversary of The Universal Declaration of Human Rights is a good occasion to reconsider why we need the conception of human rights. The main question is why should anyone care for the human rights of someone else and why should someone else care for the human rights of others. If the decision would be that global community really needs human rights, what should be the best ways of guaranteeing and protecting human rights? In his article, Fagan argues that the cornerstone of human rights must be a concern for human suffering. This is probably main answer to the question of why we need human rights: by caring and protecting the rights of others we have more chances that our rights will be protected as well. This is how we avoid suffering. Moreover, since we have the whole mechanism of guaranteeing human rights in enacted declarations and we have a system of institutions that should protect human rights, we have more guarantees that no one will violate our rights.

On the other hand, Andrew Fagan argues that suffering is not alien to the human condition or to the development of humanity as a concept.²⁴ Looking back upon human history we see many examples where the law intervenes in the private life of a human being. Sometimes laws fail to conform the future life standards and legislators are forced to enact laws to solve major issues of present life and contemporary needs, which requires retroactive correction in certain circumstances. For example, before the civil rights movement in the United States, the southern states had laws which created different legal rights according to whether the person was black or white, thereby violating the natural law tenet of equality. Accordingly, as the positive law violated the principles of natural law, the legally correct action was to disobey the unjust positive law. Millions of people protested violating these unjust laws of racial segregation. One of the first acts of civil disobedience was when Rosa Parks, a black woman, defied the segregation laws of Alabama requiring blacks to sit at the back of the bus by sitting in the front of the bus. She violated a positive law, but not the natural law.

Many philosophers would likely agree that suffering is one of the most important characteristics of every human being and is the engine of development in global society. So, why do we need human rights that protect human beings from suffering if this process is so beneficial? Setting aside the question of the basis and form of the so-called natural rights, which span several centuries of mostly European thought, we must acknowledge that the modern human rights movement

²³ Andrew Fagan: «Back to Basics: Human Rights and the Suffering Imperative», *Essex Human Rights Review* No. 5/1 (2008), available on-line at <http://projects.essex.ac.uk/ehrr/V5N1/Fagan.pdf> [accessed 10.12.2010].

²⁴ *Ibid.*

was fundamentally motivated, amongst other things, as a response to the Holocaust, that hideous icon of human suffering for post-war generations. The Universal Declaration of Human Rights must be understood, in part, as an historical doctrine motivated by something that defied discussion and interpretation but simply was fundamentally and utterly wrong.²⁵ The aim of the Universal Declaration of Human Rights was to restore respect for humanity and human dignity. That much is true. The Declaration declares a vision of how the world ought to be, recognizing that «inherent dignity and [...] equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace». On the other hand, human suffering and discrimination continues largely and has not been significantly reduced. Moreover, at a fundamental level, human rights are stuck in an intractable bind between being at once broad and progressive, and specific and narrow. Under such circumstances, personal autonomy is extremely important. Since we cannot regulate everything or enact all pertinent rights in one document, personal autonomy may act as a usefully flexible standard for delineating human rights.

Human rights, as conceived in the Universal Declaration of Human Rights on the idealistic point of view, belong exclusively to the individual. In considering personal autonomy, it is very important aspect to understand how the individual is modeled in the Universal Declaration of Human Rights, what is the idealistic vision of an autonomous person.

«The individual is modeled on a Kantian autonomous subject, theoretically free of gender or class. The focus of the Declaration upon this subject reflects “the hopes and idealism of a world released from the grip of World War II”, promoting the rights of the individual in the wake of a horrifying genocide and the spread of ideology.»²⁶

Of course, we should not look at the positive law as the primary source of human rights. Human rights and justice derive from the conscience of every individual, from their perception of the limits of freedom. It is this understanding that is subsequently enacted by authorities and recognized as official law. Society gives the authorities only the function of caretaker and protector of these rights and freedoms.

The same can be said of the Universal Declaration of Human Rights. Everyone would agree that this document is a powerful tool for the protection of individual rights. But in the course of protecting these rights, one should not forget the concept and the importance of personal autonomy. The Declaration cannot interfere in personal autonomy but draws a definitive normative line between what

²⁵ *Ibid.*

²⁶ «Interpreting the Universal Declaration of Human Rights for a New Generation, International Human Rights Law Reflective Essay, Student: 213332», available on-line at www.humanrights.unimelb.edu.au/download.cfm?DownloadFile=0585786D-9632-AF86-D1E13630A064F44A [accessed 05-05-2009].

constitutes the fundamental conditions for right and wrong in the primarily public sphere.

«In other words, the Universal Declaration of Human Rights regulates human rights in the sphere where the rights of individuals collide. This sphere can be called *public life*. However, in his/her private life, in the autonomous sphere, a person is absolutely free to act in any way he/she wishes. Basically, human rights protect the ability of individuals to meet their basic needs and live autonomous lives. To live a minimally good life one must be able to hope and dream, to pursue one's goals and carry out projects, to live life on one's own terms.»²⁷

It is important to understand that the Universal Declaration of Human Rights cannot regulate everything and guarantee all the rights that all individuals need. In addition to fundamental human rights, such as the right to life, the right to freedom, and the right to private life, individuals need a variety of different rights never to be enacted in any legal document and guaranteed globally. Humans are too different and it is impossible to foresee what rights will be needed after a further 60 years. That is why human rights need the concept of personal autonomy –a sphere of life where a person would be able to plan his/her actions and realize those particular rights–. «Some people do not need the things that would let them occupy [...] social roles and others need things that they do not need to occupy these roles (especially if they hope to occupy other roles).»²⁸ N. Hassoun provides us with an example of a monk who may not need to have children or be a worker, but meanwhile would need religious freedom. On the other hand, if this monk were to leave his monastery, he should have the opportunity to have a job and children.

Modern human rights-based claims to individual autonomy arise primarily not out of opposition to community but from the desires of modern persons to use intellectual and technological innovations to supplement their continued traditional ties with genetically and geographically based communities.²⁹

5. THE UNIVERSALITY OF CONTEMPORARY HUMAN RIGHTS

«We cannot speak of universal rights if there is no universal nature to which such rights attach. In turn, we cannot speak of universal human nature if there is no single end for human beings.»³⁰

²⁷ *Ibid.*

²⁸ Nicole Hassoun: «Human Rights, Needs, and Autonomy», *Proceedings for the 3rd International Conference on Philosophy*, AITNER, Athens, 2008. p. 9

²⁹ Thomas M. Frank: «Are Human Rights Universal», *Foreign Affairs* No. 80/1 (2001).

³⁰ Janet Holl Madigan: *Truth, Politics, and Universal Human Rights*, Palgrave Macmillan, Basingstoke, 2007, p. 139.

Most human rights enshrined in the Declaration have become *erga omnes* obligations and have now a direct effect over everyone. The two-element theory requires a rule to satisfy precise requirements to be recognized as an international customary rule. On the other hand, universal human rights instruments are based on the assumption that they reflect universally accepted norms of behavior.³¹ There is a difference between universalism in standard setting and universalism in implementation. Analyses of annual reports, complex supervisory apparatus, and increasing international codification clearly demonstrate that there is no universal implementation of human rights. To determine the universal character of human rights one should first admit that various criteria could be applied. The substantial element is agreement among all human beings worldwide on the meaning of human rights. The conference of Asian governments in Bangkok (1993) is noteworthy for its unambiguous statements on the universal character of human rights. «As human rights are of universal concern and are universal in value, the advocacy of human rights cannot be considered to be an encroachment upon national sovereignty». This revolutionary statement reflects the salience of human rights as a major force prevailing over cultural and political-ideological relativism. As Aristotle wrote, on the distinction between natural justice and legal justice, «the natural is that which has the same validity everywhere and does not depend upon acceptance».³² On the variety of issues in human rights, scholars frequently invoke I. Kant's moral philosophy and «his attempts to identify principles of reasoning that can be applied equally to all rational persons, irrespective of their specific desires or partial interests».³³

Its solidity highly emphasizes prominence in contemporary philosophical justifications of human rights. Foremost amongst these are the ideals of equality and the moral autonomy of rational human beings. Kant bestows upon contemporary human rights theory the ideal of a potentially universal community of rational individuals autonomously determining the moral principles for securing the conditions for equality and autonomy. He provides a means for justifying human rights as the basic conditions for self-determination grounded within the process of independent reasoning. If we accept that natural human rights exist without any precondition or mandatory legal justification, there is no need to receive common verification worldwide. Hence remains the problematic issue of establishing legal instruments and mechanisms of control.

On the question of private life, we should heed the necessity to reflect the cultural environment of particular society. For example, in a South African murder case, a Zulu man killed a woman he believed to be an evil witch after she had

³¹ Peter R. Baehr: *Human Rights: Universality in Practice*, Palgrave Macmillan, Basingstoke, 1999.

³² *Nicomachean Ethics*, 189. See Rhona Burger: *Aristotle's Dialogue with Socrates: On the Nicomachean Ethics*, University Of Chicago Press, Chicago, Il, 2009.

³³ The internet encyclopedia of philosophy [interactive] [accessed 15-05-2009]. <<http://www.utm.edu/research/iep/h/hum-rts.htm>>.

threatened to kill him with witchcraft. In his defense, he claimed that as a Zulu he genuinely believed that she would kill him with magic if he did not kill her first. Unfortunately for the defendant, the white judge rejected the individual belief of the Zulu man and imposed the dominant law based on the morality of the dominant white South African society stating in his opinion that

«The common law of South Africa in regard to murder and self-defense reflects the thinking of western civilization. Hence, in considering the unlawfulness of the appellant's conduct, his benighted belief in the blight of witchcraft cannot be regarded as reasonable. To hold otherwise would be to plunge the law backward into the dark ages.»

Defining the culturally diverse conceptions of human rights, the main streams of philosophy emerged from western and non-western views of human dignity. Modern emphasis on the individual versus community does not ignore the importance of common standards. Apparently, it is a struggle of implementation and interpretation. The postwar flourishing of human rights has featured two dynamic elements: globalization and individualization. A backlash has emerged against both. Globalization has been achieved by drafting basic codes of protection and, to the extent possible in a decentralized world, by monitoring and promoting compliance. Inevitably, this scrutiny has come into conflict with notions of state sovereignty. When the Commission of Experts overseeing compliance with the International Covenant on Civil and Political Rights found Jamaica to have violated the treaty through its administration of the death penalty, Jamaica responded by withdrawing from the International Covenant on Civil and Political Rights provision that allows individuals to make complaints to the commission. Jamaica's defense in that case was typical: respect our culture, our unique problems. When it comes to the treatment of our own people, we want sovereignty, not globalism.

The fact that the protection of individual rights is based on western ideas does not mean such ideas must be adopted by others and developed into norms that have universal validity.³⁴ What brought about the transformation to personal autonomy in religion, speech, and employment as well as equal legal rights for the races and sexes? Although these recent developments occurred first in the West, they were caused not by some inherent cultural factor but by changes occurring, at different rates, everywhere: universal education, industrialization, urbanization, the rise of a middle class, advances in transportation and communications, and the spread of new information technology. These changes were driven by scientific developments capable of affecting equally any society. It is these trends, and not some historical or social determinant, that –almost as a byproduct– generated the move to global human rights.³⁵ Human rights are a legitimate concern of the whole international community and governments cannot individually control the protection and promotion of human rights.

³⁴ William J. Talbott: *Which Rights Should Be Universal?*, cit., 233.

³⁵ Thomas M. Frank: «Are Human Rights Universal», cit., p. 191-204.

Promoting diversity and collaboration, respect to sovereignty and enhancement of human rights, the General Assembly of the United Nations adopted a resolution (A/RES/62/171) proclaiming the International Year of Human Rights Learning 2008-2009. In order to overcome cultural and regional particularities, the United Nations called upon all members to promote human rights education and learning on the local, national, international levels. Such means as education, World Program for Human Rights Education, active participation of non-governmental organizations strengthen the idea of universalism and the status of the individual as a key actor. A person identifies him-/herself as a holder of human rights and freedoms. For instance, every person belonging to a national minority has the right to freely choose to be treated or not to be treated as such, as stated in Article 3 of the Framework Convention for the Protection of National Minorities. A human being decides autonomously whether to enjoy certain rights and freedoms collectively or individually. He/she is the initiator and legislator or interpreter of the exact contents of a specific right. The problem of culture and the conception of personal autonomy truly exists. A variety of cultures have aspects that do not conform to the concept of personal autonomy and the Universal Declaration of Human Rights. Those who promote the concept of personal autonomy should not underestimate the value of culture. However, it is important to remember that «cultural diversity should be celebrated only if those enjoying their cultural attributes are doing so voluntarily».³⁶

This is the essence of competent autonomy and autocracy in private life. Laws can only respond to the temporality of a particular context of human rights popular and acceptable in a given society at given time. Such legislative practice is condemned to always be defective. An individual, as a living being is in a state of constant and unpredictable change, as is the environment wherein he/she acts. It is not the human being who has to limit his/her growth capacity restricted by the jurisdiction of enacted positive laws. Efforts to detect each right and adjust it to the current achievements of science, medicine and education by creating an exhaustive *catalogue* of rights rejects the evolution of universality. Moreover, it contravenes the fundamental and undisputable principle of human rights: dynamism.

If there is an agreement on universal human rights and freedoms, there also is a hidden necessity to universalize the interpretation of each right adequately, overriding cultural diversity, political disunity and existing precedents. Otherwise, autonomous individuals will exist attached on culture, religion, or the state they belong to. Homogeneity in practice, constant review of universality and expedient application of every adopted right and freedom strengthen dialogue and positive interdependence on the local, regional, international levels.

³⁶ Thomas M. Frank: «Are Human Rights Universal», cit.

6. CONCLUSIONS

The Universal Declaration of Human Rights reflects the common experiences and realities of 1948. In response to the global uncertainties of the post-War period, the Declaration was supposed to be a permanent and universal guarantee of some core rights. Nevertheless, this act contains a completely different understanding of the individual comparing to the situation of 21st century. During the last 60 years many things have changed: we have untraditional marriages, a different understanding of privacy, family, etc. This evolution results in a more complicated and varied integration of human beings in the processes of life. In the twenty-first century, the individual is facing new challenges and problems. These issues necessitate a specific definition of the context of human rights and freedoms. The Universal Declaration of Human Rights is no longer appropriate and coherent to nowadays sophistication and standards of life. It is time to assess contemporary values and the dimension of rights and freedoms contained in the Declaration.

Personal freedom itself is the core postulate in the context of human rights. Every human being is inherently free to choose how extensively he/she wants to enjoy rights. No authority or institution has the power to interfere as a regulator of the ego –the autonomous person–. Freedom derives from behavior and consciousness of the human being. The supremacy of freedom is the ultimate regulator of our times. On the other hand, there are many common factors that constantly influence the individual, such as reputation, public opinion, etc.

Autonomy constitutes a prerequisite for proper implementation of human rights. The stronger personal autonomy is, the more advanced and productive a human being may strive to become. An autonomous person is the best self-advisor on compliance to his/her expertise and life style. Rights embedded in a legal document are not sufficient to guarantee and protect a modern individual. The international community and domestic institutions have to create a mechanism that would provide the individual the proper legal conditions to exercise his/her own rights in accordance with existing social values.

Personal autonomy is fundamental for the development and implementation of human rights. The improvement of human rights is impossible without the adequate growth of human dignity. If we depreciate a particular individual as the initiator of one's conduct, we create a causal relationship between gross violations of human rights in the community and infringement of the right to private life.

Only the enactment of human rights law in international legal documents does not guarantee universality of human rights. It requires common recognition of human nature to achieve the acceptance of human rights and freedoms.