Autonomy, rights, and the exercise of liberties: an analysis of *Dulgheriu v. the London Borough of Ealing* on the Tripartite Theory of Existential Private Autonomy

Sthéfano Bruno Santos Divino, Yasmin Silveira Martins*

AUTONOMY, RIGHTS, AND THE EXERCISE OF LIBERTIES: AN ANALYSIS OF DULGHERIU V. THE LONDON BOROUGH OF EALING ON THE TRIPARTITE THEORY OF EXISTENTIAL PRIVATE AUTONOMY

ABSTRACT: This paper analyzes the conflict between (1) the Right to respect for private and family life and (2) Freedom of thought, conscience and religion [articles 8 and 9 of European Convention on Human Rights (ECHR)] in the case *Dulgheriu v. The London Borough of Ealing*. In the first section, we make a brief description of the case. In the second section, we show the arguments used by the Court to rule this situation. In the third section, we verify the compatibility of the U.K. Court of Appeal's decision with the ethical and juridical precepts. In the end, we concluded that autonomy has a public sphere that has to be respected. For this, the deductive and investigative methods will be used.

KEYWORDS: Abortion; freedom of choice; freedom of religion; Human Rights; privacy

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1. Introduction

This article analyzes the conflict of civil liberties in *Dulgheriu v. The London Borough of Ealing*, judged by the United Kingdom Court of Appeal, from the perspective of the tripartite theory of existential private autonomy and cognitive liberty. The case brings us the conflict between London's Ealing district and a Christian anti-abortion group, Good Counsel Network (GCN), about a Protection Space Public Order (PSPO) imposed by the district around a health clinic of family planning services, the Marie Stopes UK West London Center. The PSPO was applied due to a series of anti-abortion protests by the GCN group at the clinic's door, to excessively expose users of the site and create a climate of tension in the community. Such activities were limited by the Ealing district, which imposed a security zone around 100 meters from the clinic, preventing protests from being made there. The judicial discussion, among other issues, was based on the conflict between the rights of

* *Sthéfano Bruno Santos Divino: professor of Civil law, Universidade Federal de Lavras – UFLA. Mail: sthefanoadv@hotmail.com; Yasmin Silveira Martins, law student, Universidade Federal de Lavras – UFLA. Mail: yasminmartins17@hotmail.com.*

freedom of expression, religion, and association of the GCN group and other activists and the right of privacy of users of the clinic, represented by the Ealing.
In the first section, a brief description of the case is made. In the first section, we make a brief description of the case. In the second section, we show the arguments used by the Court to rule this situation. In the third section, we verify the compatibility of the decision of the U.K. Court of Appeal with the ethical and juridical precepts. In the end, it is concluded that autonomy, with her roots, has a public sphere that has to be respected. For this, the deductive and investigative methods will be used.
Based on the tripartite theory of existential private autonomy, acts of autonomy can be divided into three types: I) acts of personal effectiveness, II) acts of interpersonal effectiveness and III) acts of social effectiveness, and only the last two can come to suffer some limitation, because they cause an impact in third parties, whether determined people or an indeterminate collective, respectively. Acts of personal effectiveness are those that only influence the private sphere of its holder, and it is not possible to establish any limitation of this autonomy, precisely because they do not pose a threat or cause damage to the personal sphere of third parties.
Concerning the theory of cognitive freedom, it is based on three pillars: privacy, autonomy, and choice, and it can be used both to prevent abuse by others and to grant the individual the freedom to self-determine his sphere.
In this sense, we will analyze the case *Dulgheriu v. The London Borough of Ealing* from the perspective of these theories. We analyze the compatibility of the arguments used on the grounds of the decision handed down by the Court of Appeal with the types of individual acts from the tripartite theory of existential autonomy and the concept of cognitive liberty. For this, the deductive and investigative methods will be used.

2. *Dulgheriu v. The London Borough of Ealing*

This section will briefly address the facts of *Dulgheriu v. The London Borough of Ealing*. This is the judgment of an appeal analyzed by the United Kingdom Court of Appeal[1], which manifested itself by confirming the sentence handed down by a judge, allowing the imposition of a security zone in the vicinity of Marie Stopes UKWest London Center, a family planning services clinic (including abortion)[2].
The case begins with the implantation of a Public Space Protection Order (PSPO) by the district of Ealing allowing the creation of a security zone in the vicinity of the Marie Stopes UKWest London Center (100 meters from its entrance) so that manifestations activists should be banned within the space of this security zone, and protesters should develop their activities beyond the space covered by the PSPO.
This protective action was necessary since pro-life activists (especially the Christian anti-abortion group Good Counsel Network (GCN)) met daily or weekly at the door of the Marie Stopes UKWest London Center to dissuade users of services of the clinic from affecting the abortion. The activists took advantage of the most diverse forms of approach, such as: showing realistic dolls of fetuses and their

[1] United Kingdom, *Court of Appeal, Judgement nº C1/2018/1699*. London, 21 Aug. 2019. Last access (29/02/2020)
[2] Global Freedom of Expression, *Columbia University (ed). Dulgheriu v. The London Borough of Ealing.* In: https://globalfreedomofexpression.columbia.edu/cases/dulgheriu-v-the-london-borough-of-ealing/. Last access (29/02/2020).

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developmental stages; calling the women who entered the clinic "mothers"; following the users to deliver pamphlets; insinuating that they would go to hell; holding prayer vigils at the door of the place; taking pictures and even making it impossible for these people to enter the clinic.

Due to these events, pro-choice activists from the Sister Supporter group also began to develop protests in the same place against anti-abortion groups, which naturally caused constant tension in the surroundings and, especially, for those who went to the clinic. Thus, after a failed attempt at compromise with opposing groups of protesters, the Ealing started to draft a project to create an Order for the Protection of Public Spaces (PSPO) around the Marie Stopes UKWest London Center. It was intended to prevent any demonstration related to abortion from being held in a place protected by the Order.

The implementation of the project developed by the district was founded on a report (called the Murphy report). The report was prepared based on popular consultations with the local community. There was evidence that such events had a detrimental impact on the quality of life of people in the community. Also, 83.2% of those interviewed agreed to establish a safety zone in the vicinity of the clinic. Therefore, the report moved towards recommending the implementation of a PSPO.

The possibility for Ealing to prepare a PSPO is based on the Anti-Social Behavior, Crime and Policing Act (2014). This act allows such action since two conditions are met: i) the activities carried out within the public place in question have or could have adverse effects on the quality of life of people in the locality and ii) the effect or probable effect of the activities is continuous, which would make the activities unreasonable and, consequently, justify the restrictions imposed by the PSPO. Thus, the measure was created, and demonstrations and protests were prohibited within the scope of the security zone.

First, the Christian anti-abortion group GCN applied for the Queen's Bench Division of the High Court to annul the PSPO. The justifications were as follows: I) the Ealing district did not present sufficient and satisfactory evidence to prove that the activities carried out by the group negatively impacted those in the locality, II) the ban given by the PSPO was more invasive than reasonable to deal with the allegations presented and III) the ban contained in the PSPO violated articles 9 (freedom of thought and religion), 10 (freedom of expression), 11 (freedom of assembly) and 14 (prohibition of discrimination) of the European Convention on Human Rights (ECHR).

Among the arguments against the implementation of the PSPO was that the Anti-Social Behavior, Crime and Policing Act 2014 demanded that the activities to be prohibited harmed the quality of life of those in the locality and, therefore, could not include a transitional group of people who would eventually visit the clinic. Nevertheless, the judge rejected this argument, as such an approach would deprive the local power to limit/reduce the losses suffered by a transitory population. Furthermore, based on the evidence presented by Ealing, he concluded that the district had justifiable reasons for using PSPO. Finally, he also argued that the measure was proportionate, given that the group of pro-life protesters violated Article 8 of the ECHR, which ensures the right to privacy and respect for family life. Therefore, there would be a rational link between the objective of such rights and the PSPO.

Faced with the failure in its application for annulment, the GCN group appealed to the UK Court of Appeal with six arguments. First, the judge made a mistake in including the occasional visitors who go to the clinic to perform an abortion in the concept of «those in the locality», because the term defines

who should be harmed to justify the imposition of a PSPO. Second, the judge did not adopt a merit-based approach to justify the imposition of the PSPO. Third, the judge made a mistake in understanding that the rights of clinic visitors (Article 8 of the ECHR) were being violated. Fourth, the judge gave little weight to the petitioners' rights (Article 9 of the ECHR). Fifth, the judge did not sufficiently consider whether the terms of the PSPO could have been less restrictive. And sixth, as it is a democratic society, the judge had little thought about the interference that a PSPO would cause in the appellants' rights, protected by Articles 10 and 11 of the ECHR.

That said, the UK Court of Appeal upheld the first ruling on the validity of the PSPO by understanding that evidence of the damaging impact of protests by pro-life groups was sufficient and by considering that women's reproductive choices are highly sensitive issues and personal (Article 8 of the ECHR), in addition to being a women's right to access medical advice and abortion procedures under UK law. Therefore, after analyzing the case, the Court found that the limitation of the freedoms of religion, expression, and assembly of anti-abortion protesters was proportional and reasonable, maintaining the PSPO.

The arguments used by the Court of Appeal will be better presented and developed in the next section, where the arguments of the decision will be discussed in detail.

3. Decision overview

In this section, the arguments used by the appellants (GCN) and the understanding of the Court of Appeal in the judgment under analysis will be addressed[3].

1st Argument – the definition of «those in the locality»

As already mentioned, the Ealing could create a PSPO's as long as some criteria were met, according to the Antisocial Behavior, Crime and Policing Act (2014). They are I) the manifestations held within the public place have or could have adverse effects on the quality of life of people in the locality and; II) the effect or probable effect of the manifestations is continuous, which would make the activities unreasonable and, consequently, justify the restrictions imposed by the PSPO.

In this sense, the applicants questioned the fact that the term "those in the locality" was used to protect the interests of transient and occasional visitors to the clinic. Moreover, the term should be limited to defending only those who are part of the local community. Thus, those who visit the clinic once or twice would not be included. Also, the appellants argued that the local authority's administrative power to develop a PSPO should be intended only to protect the local community from continuing and persistent anti-social behavior.

However, the Court rejected this argument and stressed that no legislation uses the term community anymore. Even in the Anti-Social Behavior, Crime and Policing Act, the Community Protection Order's expression was changed to Public Space Protection Order to increase its scope. The Court has rightly pointed out that the gap of the expression those in the locality must be interpreted together with the notion of an interested person, a term that defines who can contest the validity of a PSPO and, its concept is nothing more than a person who lives, works or visits the restricted area. Thus, if mere

[3] United Kingdom, *op. cit*.

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visitors from a given protected area are legitimate to contest a PSPO, there would be no need to talk about limiting the concept of those in the locality to residents of the local community only, given that if visitors are legitimate to contest the PSPO must fulfill the scope of those protected by the act. The Court's understanding is to expand the concept rather than the limitation. However, the Court understands that it will depend on the specific circumstances of the case and the location to establish itself to whom the term in question extends, in which case the inclusion of visiting persons is understood as compatible.

Furthermore, a PSPO aims to prevent individuals/groups from engaging in anti-social behavior in a public place, which has a vast concept (including anywhere that the population has access, whether paid or not, which is obvious includes any district). Therefore, your visitors could be covered by the expression of those in the locality.

The appellants also claimed that it would be improbable that a person who visits the clinic just a few times could suffer from detrimental effects on their quality of life due to the group's activities. However, the previous trial's evidence was the exact opposite, showing that some of the people who visited Marie Stopes UK West London Center suffered considerable psychological and emotional damage due to the conduct of GCN activists. It was also shown that some women canceled their appointments to the clinic because of the group's activities, causing a delay in their counseling. These delays caused harm to these people, especially women who came to the clinic for consultations related to the abortion procedure and family members and supporters who accompanied them.

Therefore, this appellants' first argument was rejected by the Court of Appeal.

2nd argument – failure to carry out a "merit-based" approach

It was part of the appellants' claim that the judge did not rule on whether the PSPO was a reasonable intervention in their rights (Articles 9, 10, and 11 of the ECHR). GCN representatives argued that the magistrate was based on the assessment made by Earling district itself, mainly as he used excerpts from the district's Murphy report to substantiate his decision to maintain the PSPO.

However, the Court also rejected this argument. The previous judge analyzed other cases that developed a proportionality test in which conflicting rights existed and considered his approach satisfactory, given that he agreed with the decisions of the most recent authorities on the matter. Besides, it was pointed out by the Court that the judge presented a rational connection between the need for PSPO and the protection of the rights of clinic users. This is because, with the establishment of the security zone, preventing protests in the delimited space, the possibility of women entering and leaving the place without being excessively exposed due to their personal decisions was guaranteed. Therefore, it should not be said that the judge relied solely on the Murphy report, developed by the Ealing, but on his own convictions.

3rd Argument - Application of Article 8 of the European Court of Human Rights (ECHR)

The judge who ruled the case before the Court found that Article 8 of the ECHR, which ensures the right to privacy and respect for family life, was violated by the anti-abortion group GCN activities. However, they argued that there was no violation. It was also alleged that none of the cases used by the judge as a precedent to support his understanding should be considered, as there is no real possibility

of establishing a comparison between them and the case in question. Besides, among other points, it was raised by the applicants that the group's activities were carried out on a public road and, because the clinic is also in a public place, and its access would be through this same means, users would have only a mere expectation of privacy. Finally, it was argued that users of the clinic's services could not expect third parties not to be involved in the activities performed there since abortion is a controversial topic in society. In this sense, they understood that what should be expected was precisely the involvement of activists in a place that provides such a procedure.

However, this argument was entirely rejected by the Court. They argued that the decision to have or have not abortion is sensitive and too personal, in addition to being conduct permitted by the laws of the United Kingdom. Therefore, there would be no doubt that this decision is included in the idea of private life.

Lady Hale, in the Re Northern Ireland's Human Rights Commission's application for judicial review, said: «[f]or many women, becoming pregnant is an expression of their autonomy, the fulfilment of a deep-felt desire. But for those women who become pregnant, or who are obliged to carry a pregnancy to term, against their will there can be few greater invasions of their autonomy and bodily integrity»[4].

The Court's understanding was that the case under review, concerning people visiting the clinic, should be viewed as the exercise of a right to have abortion counseling and procedures available, since the laws of the country guarantee, as guaranteed by art. 8 of the European Convention of Human Rights it is not, of course, a specific right to abort. However, the full effectiveness of article 8 will only occur through protection and respect for each individual's autonomy. Thus, there is no right without a reasonable expectation of privacy together.

Furthermore, as raised by the Ealing district, there is no other way to access the clinic than through a public space, just like any other place. Therefore, such an argument to justify the violation of privacy caused by the applicants (GCN) is unavoidable. Especially because anti-abortion activists forcefully invaded the private sphere of clinic visitors due to their approach, such as: being strategically allocated at the entrance/exit of the clinic, giving the users no other option than to confront them face to face; trying to persuade users, claiming that their conduct was morally wrong; display photographs of fetuses at different stages of pregnancy; praying aloud outside the clinic to blame those who entered the place; try to take (or pretend to take) pictures of those who enter the clinic; among other forms of approach that have already been mentioned in the previous section.

Such conduct demonstrates that there has been a clear overcoming of the limits of privacy and personal autonomy of users of the Marie Stopes UK West London Center even because it is not expected that issues of such an intimate nature will receive such publicity.

The Court further argued that the conclusion of the violation of the act under analysis was more evident as there were people who suffered considerable emotional and psychological damage due to the conduct of the GCN group (in addition to other women who chose to postpone/cancel their consultations. , postponing treatments and procedures, running the risk of further damage).

[4] United Kingdom, *op. cit*. 16.

4th Argument – the right of appellants according to Article 9 of the European Court of Human Rights (ECHR)

The argument made by the appellants is that the judge did not give the real weight and underestimated the rights of these and other pro-life protesters, making it impossible for them to express their religion and belief when trying to persuade women to perform abortions. However, the Court briefly rejected this argument, because the judge made it clear that he did not disagree that there was interference in the appellants' rights, and it was not evident at any time that he (the judge) underestimated those rights. Even so, the core is that more weight could not have been attributed to the group's rights, based on the weighting exercise.

5th and 6th Arguments - a PSPO with less restrictive terms and relative importance of appellants' rights, under articles 10 and 11

The applicants argued in this last point that the PSPO was a disproportionate act and that it violated their rights too much (Articles 10 and 11 of the ECHR). They further claimed that there was no reasonable basis for justifying such an intervention, defining their activities as nothing more than handing out pamphlets, offering to talk, and holding up posters.

However, the Court pointed out that such an argument would not fit, given that the activities were not merely interventions at the clinic's door, but activities that generated severe emotional and psychological damage in several women. Therefore, a PSPO was necessary to promote a balance between conflicting rights, as it is clear that users of the clinic would also have the right to have their privacy and autonomy respected, which was not happening before the implementation of the protective act.

It is impossible to consider the PSPO to be an extreme measure that prevents applicants from exercising their rights. The security zone imposed by the PSPO establishes only space over which it is not possible to develop protests and demonstrations. However, beyond this defined area, there is the designated area, space where activists' activity is free. Thus, there was a clear proportionality when dealing with the situation in question, since the security zone came to protect users' right to privacy (article 8) and the area designated to ensure that the applicants and other protesters could exercise their freedom of expression and freedom of assembly and association (Articles 10 and 11 of the ECHR).

Furthermore, the Murphy report was carefully thought, with the broad consultation of the local community and its residents, through various means of participation, of letters to the internet, allowing as many people as possible to submit their opinions, which were mostly favorable to the imposition of the restriction brought by the PSPO.

Finally, the Court further noted that, according to its understanding of the case under analysis, the judge was right to conclude that the affected women's rights outweighed those of the appellants and other anti-abortion protesters, agreeing that the terms of the PSPO were proportional.

Therefore, these arguments were also rejected, and, in the end, the appeal was dismissed, maintaining PSPO to regulate the Marie Stopes UK West London Center's surroundings, located in London's Ealing district.

Now, we will address our critical considerations of this case in the next section.

4. Autonomy, rights and the exercise of liberties: the tripartite theory of existential private autonomy

This section aims to discuss the arguments used by the U. K. Court, taking into account the current theoretical development linked to the idea of autonomy. For this, we make a conceptual delimitation of the terms under analysis.

First, there is a distinction between autonomy e self-determination. «Con il principio di autodeterminazione si intende indicare la libertà di scelta, [...] mentre con il principio di autonomia si intende indicare la capacità di darsi una regola quanto all'azione»[5]. In this way, autonomy can be understood as something broader, something capable of including the notion of self-determination, which in principle is restricted to something more specific/intern.

The aim of the present work is not to try to demonstrate the conceptual or epistemological differentiation between terminologies. It is preferred to work with autonomy as the person's ability to choose and outline her choices according to her will. Therefore, this is intended to avoid conceptual categorizations that avoid the solution of the problem posed: the conflict between 1) the Right to respect for private and family life and (2) Freedom of thought, conscience, and religion.

A first challenge can be seen when dealing with two relations that are opposite. How to deal with the idea of autonomy, which is primarily internal and linked to the individual's mental and psychological aspects, in the face of the exercise of freedoms aimed at the exercise of rights related to religion, which are usually externalized? How should the State act to resolve this conflict? We will discuss this under the tripartite theory of existential private autonomy and Cognitive Liberty[6].

First, in the tripartite theory of existential private autonomy, acts of autonomy will be classified into (I) acts of personal effectiveness; (II) acts of interpersonal effectiveness; and (III) acts of social effectiveness.

«Acts of autonomy of personal effectiveness are those resulting from the exercise of a personal situation whose realization of existential interests implies significant consequences only for the legal sphere of their holder. This is a situation that does not produce direct and immediate legal effects that cause injury or threat of injury to third parties' legal spheres, not admitting the incidence of elements that limit the autonomy»[7]. An example can be seen in the person's choice of whether or not to get a tattoo. This act tends to be expressed only in the sphere of its owner.

«Acts of autonomy of interpersonal effectiveness are a consequence of the exercise of a personal situation that generates repercussions in legal spheres distinct from the holder of the situation, reaching people who did not practice the act of autonomy. These people need to be individually identified and must prove the situation of being affected by the direct and immediate effects of the act of autonomy that caused an injury (or that present a real risk of injury to their rights). Therefore, it is a situation that generates concrete conflict between the realization of existential interests in different legal spheres»[8].

[5] C. VIGNA, *Vita umana e autodeterminazione*. *Una questione molto disputata*, in *BioLaw Journal – Rivista di BioDiritto*, 2, 2017, 205 ss.

[6] T. D. V. DE CASTRO, *Bons Costumes no Direito Civil brasileiro*, São Paulo, 2017.

[7] ID., *A função da cláusula de bons costumes no Direito Civil e a teoria tríplice da autonomia privada existencial*, in *Revista Brasileira de Direito Civil – RBDCilvil*, 14, 2017, 99-125.

[8] *Ivi,* 103.

In this case, no matter how much the person exercises a choice that refers to acts of autonomy, the results transcend her sphere and usually reach third parties linked to that act. It is the case of a divorced couple who try to influence the choice of children to affect the ex-partner or the child itself.
«In acts of autonomy of social effectiveness, the realization of existential interests results from the exercise of a personal situation that presents direct and immediate legal effects that generate or may generate injury to the rights of an undetermined number of people. These are consequences that offer a real risk of offending persons' rights not necessarily identified or that effectively cause damage to those persons. In such cases, given the negative legal repercussions for the community, it is necessary to consider the need to limit, also in the abstract, the existential autonomy of the holder to guarantee fundamental rights that can be harmed by the exercise of an individual interest, which can be done through the incidence of the general clause of good morals or employing a specific law that forbids conduct that can be classified as socially effective». A clear example is a legal and ethical prohibition of some countries (as in Brazil) to the commercialization of body parts. If such conduct were authorized, it would appear that people in situations of poverty and vulnerability could be harmed when they market their organs. Furthermore, this conduct can cause harm to the community, as the legalization of this conduct could reduce the altruistic conduct of organ donations to extreme levels. Another example is the prohibition of smoking in closed places, considering that tobacco use can result in risks to an undetermined number of people.
First, deciding to abort in one of the modalities of the tripartite theory of existential private autonomy must be framed. The analysis is limited solely to the will of the person who wishes to carry out this practice. Observation is vital: here, the fetus is not seen as a subject of law. As much as there are ethical implications and discussions about this practice, the fetus, in this case, is just a developing being. Thus, any decision that falls on a fetus will, as a rule, affect only the ethical and moral aspect of the person who made it[9]. Are there direct and immediate legal effects that affect the community, which make it possible to affirm an injury or real risk of injury to the community and give rise to a confrontation with the public interest in preserving society's interests? The answer is no. In this way, the simple act of abortion can be classified as the autonomy of personal effectiveness.
In another way, the activist's conduct must be framed in the modalities of the tripartite theory of existential private autonomy too. It was demonstrated in the judgment, through the analysis previously performed, that the conduct of the activists went beyond the mere exercise of Freedom of thought, conscience, and religion. «Between 85% and 90% of respondents supported the imposition of the proposed prohibitions in the safe zone. A clear majority said that their quality of life had been detrimentally affected either "extremely" or "very much"»[10].
The act of the activists fits into the autonomy of interpersonal effectiveness or acts of autonomy of social effectiveness? Some steps must be taken.
«[1] Do the direct and immediate effects of the act of autonomy generate injury or a real risk of injury to the legal sphere other than that of the holder of the situation? If not, this is an act of autonomy of personal effectiveness, and the investigation should be closed here. If the answer is yes, the injury's

[9] «The decision of a woman whether or not to have an abortion is an intensely personal and sensitive matter». United Kingdom, *op. cit.*
[10] *Ibid.*

legal status will be investigated in the next stage; [2] Does the injury that can be caused by the act of autonomy reach the interest of others who enjoy legal status capable of limiting the interests of the holder of the existential situation? If not, the investigation ends here, forming the act of autonomy of personal effectiveness. If the answer is yes, it is followed by verification of the legal spheres affected; [3] Can people and their legal spheres affected by the effects of the act of autonomy be concretely identified and individualized? If so, the investigation is closed, and the act of autonomy of interpersonal effectiveness remains configured, which gives rise to the particular limitation of the act of autonomy, primarily through the incidence of the clause of good morals and the weighting of the opposing interests – which presupposes the judicial resolution of the conflict. If the answer is no, the final stage of the investigation continues; [4] Does existential autonomy cause direct and immediate effects for an indefinite number of people, generating injury or real risk of injury to the community? If it has been possible to go through all the previous stages and get to this point, answering in the affirmative to the last question formulated, it is an act of autonomy of social effectiveness, whose limitation can be made more broadly. In this type of activity, in addition to the restriction of autonomy made in the judicial sphere, on the occasion of the actual conflict, it is possible to apply other instruments limiting autonomy in the abstract, which can also be done through a specific legislative initiative to prohibit the conduct, in addition to admitting the incidence of the general clause of good customs»[11].

The answer to the problem must take into account the meaning of those in the locality. For the Court, «in addition to residents, it will depend on the precise local circumstances whether or not it extends to others»[12]. The core argument is «that conclusion is further reinforced by the evidence that some of those who have visited the Centre have been left with significant emotional and psychological damage by the conduct of GCN and others protesting outside the Centre immediately before and immediately after visiting the Centre, and evidence that those activities have led some women to cancel their appointment at the clinic, delaying advice and treatment, with consequential potential physical harm to themselves»[13]. As there is a possibility of delimiting who is suffering any damage from the activists' conduct, it is believed that their conduct falls within the act of autonomy of interpersonal effectiveness.

The main difference from the act of autonomy of interpersonal effectiveness to the act of autonomy of social effectiveness lies in the higher power of the State to act in the last one. In acts of autonomy of social effectiveness, there is a public interest in restricting the autonomy of a private individual because of the risk that her conduct brings to society. If we take into account the activists' practices, the community that was being affected was the one included in the concept of those in the locality. In other words, only a defined number of people who frequented that region could claim any damage to the activists.

Thus, the demonstrators' intrusions in the private sphere deserve to be punished by the State. The creation of the security area, if viewed in terms of the theory under analysis, constitutes a legal form of protection of individual rights in the face of the arbitrary exercise of activists' rights. They were

[11] T.D.V. DE CASTRO, *A função da cláusula de bons costumes no Direito Civil e a teoria tríplice da autonomia privada existencial,* cit., 110-111.

[12] United Kingdom, *op. cit.*

[13] Global Freedom of Expression, *op. cit.*

invading the privacy and the freedom of choice of those in the clinic. Seeing that situation, the State decided to stop that behavior to guarantee the health and the rights of those in the locality.

However, the theory of acts of autonomy is not the only one who can rule this situation. Cognitive Liberty must be taken into account. «Cognitive Liberty is the right to control one's mind: the basic brick of personal freedom. In the last decade, this concept became a slogan in support of various civil rights struggles: among the others, the claims against non-voluntary interference and forced psychiatry or for the decriminalization of psychoactive substances»[14]. The Cognitive Liberty[15] is tied in the notion of neurotechnology and the internal sphere of persona. In this work, we will draw more attention to the second notion (the individual sphere).

The idea of cognitive is the capability of an individual to organizes the information he receives using a mental process to collect and select information using his senses[16]. However, the concept of Cognitive Liberty is something more complex. There are multidimensional features that fulfill the principles of mental states regulated by the law. Three of them get highlights: privacy, autonomy, and choice[17].

Privacy is the content of our thoughts that must remain private until one decides to share them. Autonomy, in the Cognitive Liberty spectrum, is something like the freedom to control one's consciousness and electrochemical thought processes. This is because it is the necessary ontological substrate for just about every other freedom. Furthermore, the choice is that the capabilities of the human mind should not be limited. «Until one person directly damages others, governments should not prohibit cognitive enhancement or the realization of any other mental state[18]»[19].

[14] P. SOMMAGGIO, M. MAZZOCCA, A. GEROLA, F. FERRO, *Cognitive liberty. A first step towards a human neuro-rights declaration*, in *BioLaw Journal – Rivista di BioDiritto*, 3, 2017, 32 ss.

[15] This is a term designed, on the one hand, to expand the traditional notion of "liberty of thought" and, on the other hand, to push legal systems of democratic societies to integrate such a right into their constitutions; P. SOMMAGGIO, M. MAZZOCCA, A. GEROLA, F. FERRO, *op. cit.*, 32; W. SENTENTIA, *Freedom by design: Transhumanist values and cognitive liberty*, in M. MORE, N. VITA-MORE, *The Transhumanist Reader: Classical and Contemporary Essays on the Science, Technology and Philosophy of the Human future. Chichester*, 2013, 356-357.

The concept of cognitive freedom is traditionally tied to the discussion of interventions using technological tools to interfere and manipulate people's cognitive processes. However, we want to show that this concept may be applied in this discussion without harming other rights, like freedom of expression. In a way, it is not intended to prohibit the exercise of freedom of expression. We are trying to demonstrate that the harmful thing is the excessive exercise of freedom of expression to the point of influencing and negatively affecting personal acts. In other words, freedom of expression is guaranteed until its results may affect the construction of the self of others.

[16] N. BOSTROM and R. ROACHE, *Smart Policy: Cognitive Enhancement in the Public Interest*, in *Contemporary Readings in Law and Social Justice*, 2, 1, 2010, 68-84.

[17] J.C. BUBLITZ, *My Mind is Mine?! Cognitive Liberty as a Legal Concept*, in E. HILDT, A. FRANCKE, *Cognitive Enhancement,* New York, 2013, 233-264.

[18] D. DEGRAZIA, *Moral enhancement, freedom, and what we (should) value in moral behavior*, in *Journal of Medical Ethics*, 40, 6, 2014, 367.

[19] P. SOMMAGGIO, M. MAZZOCCA, A. GEROLA, F. FERRO, *op. cit.*, 33.; J.C. BUBLITZ, *Cognitive Liberty or the International Human Right to Freedom of Thought*, in J. CLAUSEN, N. LEVY, *Springer Handbook of Neuroethics, Dordrech*, 2015, 1309-1333.

For P. Sommaggio, M. Mazzocca, A. Gerola, F. Ferro, the Cognitive Liberty has two formulations: the positive and the negative[20]. «We think this concept may be the "negative" formulation of Cognitive Liberty: a defensive concept against "mental" abuses from third parties like police, medical agencies, commercial entities, or, indeed anyone, but the owner's mind»[21]. On the other hand, the positive formulation of Cognitive Liberty is tied to the notion of the exercise of human rights[22]. It grants the freedom to self-determine one's inner sphere. The subject acts as an active person in the political scenario, looking to recognize being a human. When this is applied to the European Convention on Human Rights, we have some considerations.

First, when the article 8 of ECHR says «everyone has the right to respect for his private and family life, his home and his correspondence» we can see a wall, a negative sphere of the individual growth for the maintenance of subject's life. Here, privacy is related (but not only) with a negative notion of their exercise. We can choose what comes in and what comes out of our life[23]. If we apply this reasoning to the case under analysis in conjunction with the tripartite theory of existential private autonomy, we will see that interference and limitations in private life are only allowed when the acts of individuals eventually cause damage to third parties and damage to the community. If there are no social or interpersonal results, the individual must be taken alone in their space[24].

The actions of the people attending the clinic can be considered nearly private[25] and of a personal nature. As they do not affect any third parties outside that relationship, they do not deserve any intervention, whether from the State or any other group that intends to stop that conduct.

Second, the article 9 of ECHR says «everyone has the right to freedom of thought, conscience and, religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice, and observance». It is possible to verify the existence of conduct and actions, in their positive sense, to exercise this right. The individual must take an active position to exercise his right. However, there is a limit. This action cannot be indiscriminate. If they focus only on the private sphere of his owner, without harm third parties, we are talking about an act of autonomy of personal effectiveness. However, if we analyze the case taking into account the conduct of the activists, we find that the exercise of their right transcends their patrimonial sphere and leaves the orbit of Cognitive Liberty, affecting the rights of third parties outside the scope of Article 9. When this happens, the individual who has his sphere violated must seek the State to stop this harassment. This is why the Ealing did the

[20] «Negative rights are those rights that impose obligations on governments and others citizens to refrain from interfering with the rights bearer». R. H. BLANK, *Cognitive Enhancement: Social and Public Policy Issues*, London, 2016, 52.

[21] P. SOMMAGGIO, M. MAZZOCCA, A. GEROLA, F. Ferro, *op. cit.*, 34.

[22] «requirements whose object is to protect urgent individual interests against predictable dangerous ("standard treats") to which they are vulnerable under typical circumstance of life in a modern world order composed of states» C. R. BEITZ, *The idea of human rights*, New York, 2009, 109.

[23] S. RODOTÀ, *A vida na sociedade da vigilância*, São Paulo, 2008.

[24] Almost the same conception of the right to be alone of Warren and Brandeis. S. D. WARREN, L. D. BRANDEIS, *The Right to be alone*, in *Harvard Law Review*, 4, 5, 1890.

[25] For a libertarian point of view Cf. J. GIORDANO, *Neuroethical issues in neurogenetic and neuro-transplantation technology: The need for pragmatism and preparedness in practice and policy*, in *Studies in Ethics, Law, and Technology*, 4, 3, 2010.

Public Spaces Protection Order (PSPO) in 2018. Although the activists were exercising their right to freedom of religion, the results were moving out of their private sphere and drastically affecting the locality's decisions.

Thus, it is verified as a result of the present work compatibility between under the tripartite theory of existential private autonomy and the Cognitive Liberty. Although often left out by national legislation, the subjective aspect gains relevance when correlated to human rights. Both the tripartite theory of existential private autonomy and Cognitive Liberty are instruments that can be used to solve possible conflicts such as the one under analysis. The participation of the State and private individuals in private life should only happen when acts of this nature are classified as interpersonal or social. If classified as interpersonal, it should be checked whether it causes damage to identifiable third parties. If so, the conduct must be impeded by the State or by the individual who practices it. If not, it is considered an act of a personal nature, and there should be no interference under penalty of violating Cognitive Liberty. In the same sense, the reasoning is applied to acts of a social nature. The difference here focuses on the impossibility of determining the subjects who are being harmed. Therefore, it is up to the State to verify such conduct through its legitimates (prosecutor's office) to make the individual cease his conduct to guarantee social peace.

5. Final Considerations

The case under analysis demonstrates a rich argumentative possibility. The conflict of rights of an existential character is visible. On the one hand, freedom of expression, assembly, and association. On the other, the right to privacy. One of the means used to satisfy this situation was the adoption of the tripartite theory of existential private autonomy.

In this sense, we demonstrated that when a given individual act does not transcend the personal sphere of the person who exercises it, any legal or third-party acts can be considered illegal. As protection is directed towards something intrinsically individual, where the practical repercussions are directed only at the subject, his decisions must be respected under penalty of violation of his privacy. Family planning is the responsibility of any parents who wish to have a child or not. If at that moment, the desire is contrary, your decision, when legitimized by the legal system, must be respected.

It was found that acts aimed at the practice of abortion can be classified as acts of autonomy of personal effectiveness. This, therefore, every decision tends to fall on the sphere of the individual who practices such an act. On the contrary, the demonstrators' actions were causing damage to third parties. The exercise of freedom of expression, assembly, and association went beyond his sphere and reached those in the locality. This brought enormous discontent to British society, as their conduct, in this case, could be classified as an act of autonomy of interpersonal effectiveness.

As we can define who are involved and injured, it is easy to draw objective parameters to prevent these actions from causing these adverse effects. That is why the Court of Appeal ruled that the PSPO's security area was legitimate since the exercise of protesters' rights was restricted only in that area. If they wanted to exercise them elsewhere, there would not impede doing so.

This right decision took into account the vulnerability status and Cognitive Liberty of those involved in abortion processes. Therefore, patients have the right to build their own lives through their personal

choices. Moreover, besides, the protesters must respect and recognize that the actions taken by the people who attend the clinic are part of the recognition of the human being as a persona and a significant step towards living in a society capable of respecting the decisions of others.

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