

## THE CONSTITUTIONAL DEBATE ON STEM CELL RESEARCH, HUMAN RIGHTS AND DIGNITY: THE LAW AND A RECENT COURT RULING IN BRAZIL

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**RESUMO:** Este artigo descreve a lei que autorizou pela primeira vez o uso de células-tronco embrionárias, no Brasil, para fins terapêuticos e científicos, e o como ela foi contestada como inconstitucional sob alegações de que violava a vida humana. Ambos caminhos são informados e descritos, quais sejam: a aprovação da lei, assim como as discussões e a decisão do tribunal que manteve a permissão legal para prosseguir a pesquisa científica. Ainda, esse estudo apresenta as posições controversas, favorecendo ou opondo as pesquisas no todo ou em parte, focando-se na dignidade humana, com uma análise detalhada do princípio da dignidade da pessoa humana na ordem jurídica brasileira. O contexto no qual o Supremo Tribunal Federal agiu é descrito ao final, e maiores informações sobre os votos dos ministros e a lei julgada e mantida estão anexados.

**PALAVRAS-CHAVE:** Pesquisas com células-tronco; Dignidade humana; Controle de Constitucionalidade.

**ABSTRACT:** This paper describes the law that first authorized the use of embryonic stem cells in Brazil for therapeutic and research purposes, and the way it was challenged as unconstitutional under allegations of violating human life. Both paths are informed and described, namely: the approval of the law, as well as the discussions and the court ruling that upheld the legal permission to carry scientific research. Also, this study presents the controversial stands, favoring or opposing the researches in whole or in part, focused on human dignity, with a detailed analysis of the human dignity principle in the Brazilian legal system. The context in which the Federal Supreme Court (the Brazilian constitutional court) acted is described at the end, and further information on the votes of the justices and the law reviewed and upheld is attached.

**KEYWORDS:** Stem cell research; Human dignity; Constitutional review.

**SUMÁRIO:** 1. Introdução; 2. Fundamentos legais para o uso de células-tronco embrionárias; 3. A lei é questionada como inconstitucional; 4. Dignidade humana como valor jurídico em meio ao debate; 4.1 Personalidade e direitos fundamentais. 4.2 Direitos fundamentais e justiça; 4.3 Como chegamos a esse ponto?; 4.4 Nossas origens; 4.5 A repersonalização;

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SUMMARY: 1. Introduction; 2. Legal grounds for the use of embryonic stem cells; 3. The law is challenged as unconstitutional; 4. Human dignity as a legal value amid the debate; 4.1 Personhood and fundamental rights. 4.2 Fundamental rights and justice; 4.3 How have we reached this point?; 4.4 On our origins; 4.5 The repersonalization; 5. The Brazilian Constitution and human dignity; 6. The role of the Brazilian Supreme Court in permitting the researches; 7. Conclusion; 8. References; Appendices.

## 1. INTRODUCTION

Human life and science are not merely words with a meaning for academic debate in countries like Brazil. Strictly speaking, they deal with one of the most complex issues of our times, giving grounds to passionate discussions on scientific development and freedom of research, as well as on the concrete conditions of society itself.

What has happened in Brazil, save the historical and cultural differences, does not seem to be an exception. On the one hand, we see the rise of such arguments as the defense of the secular State, the autonomy of science as the basis for bioethics, and reproduction rights. On the other hand, we face a myriad of arguments on, *inter alia*, the existence of human life prior to birth, the therapeutic use of embryonic stem cells, and the existence of human life in the embryo.

The aim of this study is to inform and examine a synthesis of the course these issues have recently taken in Brazil, both in the enactment of legal provisions and in the definition given by the Judiciary through the Federal Supreme Court in a recent ruling about the conformity of the law to the Constitution.

This paper will present the laws on embryonic stem cells, the arguments favoring and opposing the constitutional nature of the legal rule authorizing such scientific research, and the decision reached by the Brazilian Constitutional Court, which opened the doors to this new scientific horizon by a majority vote (in a voting decided by six to five votes).

As the explanations unfold, it will be noted that the same principle – that of the dignity of the human person – is present in such debate, either to deny the legal possibility and the ethics of research on embryonic stem cells, or to contend that it is from scientific freedom that therapies to fight the various pathologies that afflict the very dignity of life itself may originate.

Firstly, we see the allegations that ascertain the human dignity as part of the fundamentals of the Republic, as expressly set forth in the Brazilian Constitution (article 1 [item III]), and even as a fundamental human right (expressly mentioned in the introduction to article 5 of the Constitution) based on the inviolable right to life. Secondly, we see the social and technical function of researches, aiming to comply with the needs of government policies that implement the right to health, to physical integrity, and to the very dimension of living with dignity, as well as the freedom of scientific research, under provisions set forth in article 5, item IX, letter “d” in the Brazilian Constitution.

This is the course of our explanatory notes.

## 2. LEGAL GROUNDS FOR USING EMBRYONIC STEM CELLS

Let us first examine the legal grounds which gave rise for controversy regarding researches on embryonic stem cells in Brazil.

On 24 March 2005, president Luiz Inácio Lula da Silva enacted the Law No. 1105, which regulated the Federal Constitution, especially concerning “safety norms and control mechanisms for the construction, cultivation, production, handling, transport, transfer, importation, exportation, storage, research, trading, consumption, release in the environment and discharge of genetically modified organisms and their by-products.” The law came to be known as the Biosafety Law.

Prior to this 2005 law, there was a rule in Brazil banning genetic engineering of human germinal cells, and the production, storage or handling of human embryos to be used as available biological material was also forbidden. Actually, both the genetic engineering of human germinal cells and the *in vivo* interventions in human genetic material were treated as felony, subject to sentences of six to twenty years in prison<sup>1</sup>.

The wording of article 5 of the new law enacted in 2005 authorizes the research on embryonic stem cells, although the actual purpose of the bill submitted originally was to regulate activities dealing with genetically modified organisms. Nevertheless, the theme of production, storage or handling of human embryos was added to the main bill, even though this matter, strictly speaking, bears little or no connection to the issue of GMOs (genetically modified organisms).

After a lot of discussions, public hearings and controversies, the Legislative Power approved the bill on 4 March 2005, with 60 votes against and 352 in favor of the measure. The new law authorized the researches and defined the embryonic stem cells as “embryonic cells that are able to turn into any body tissue cell.”

Within the universal scope encompassed by the new law (including, but not limited to, biotechnology, genetically modified organisms, biosafety, and the precautionary principle), article 5 provided solely for the following permission: “It is permitted, for research and therapeutic purposes, to use human embryonic stem cells produced by *in vitro* fertilization and not employed in the procedure, subject to the following conditions: first - that the embryos are unviable; or, second - that the embryos have been frozen for no less than three years prior to the date of publication of this Law (i.e. 28 March 2005), or, if already frozen at the date of publication of this Law, after a three-year lapse of the freezing date.

The consent of parents and the approval by research ethics committees were conditions previously established by law for the development of projects by research institutions and health service providers.

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<sup>1</sup> Such was the wording of articles 8 and 13 of Law 8974 of 5 January 1995, revoked by the new legislation (Law 11105/2005). During the period between these two laws, Executive Order No. 2191-9 was issued on 23 August 2001, creating the Brazilian National Biosafety Technical Commission – CTNBio, a multidisciplinary body with collegiate powers, established for consulting purposes in the area of preparation, updating and implementation of the national policy on biosafety regarding genetically modified organisms, as well as human health protection.

From that date on, Brazil had a legal rule which encouraged scientific research on embryonic stem cells.

### **3. THE LAW IS CHALLENGED BY AN ALLEGATION OF UNCONSTITUTIONALITY**

Less than two months after the law had come into force, the Federal Prosecutor General of Brazil challenged the wording of article 5 in the new law as unconstitutional before the Federal Supreme Court by means of a Direct Action of Unconstitutionality (under docket number 3510).

The technical grounds for objecting to the researches were, in brief, the following:

- first: human life develops with, and as of, fertilization;
- second: the embryo is destroyed by the use of embryonic stem cells;
- third: current experiments show that adult stem cells may be used in an effective and safe manner;
- fourth: there are no records of results from embryonic stem cells.

The petition for banning the researches on embryonic stem cells was based on the constitutional principle of the inviolable right to life, and on the protection granted by the Brazilian Civil Code to the rights of the unborn child from conception. During the legal debate there was also a mention of article 4 of the American Convention on Human Rights - "Pact of San Jose, Costa Rica", of which Brazil is a signatory and which protects the right to life from the moment of conception, including the allegation that such protection already existed in the Roman Law, since the rights of the fetus were guaranteed, as seen in the "Digesto" of the Justinian Code<sup>2</sup>, from the moment of conception.

The action was filed and assigned for proceedings by the Federal Supreme Court on 31 May 2005. After several court procedures, a public hearing was scheduled within the Constitutional Court two years later, to hear persons endowed with known expertise and authority in the field, as well as entities of the civil society. Such hearing was set forth by the Brazilian Constitution for the Parliament, and was adopted by analogy by the Supreme Court.

Various entities and bodies of the Brazilian society participated in the debate and in the court procedures, such as the Brazilian Confederation of (Catholic) Bishops, the Institute of Bioethics, Human Rights and Gender, Brazil's Pro-Life Movement, besides obviously the Attorney General of Brazil, defending the confirmation of the law enacted by the President of the Republic.

The court session started on 5 March 2008 and ended on 29 May 2008, dismissing the direct action of unconstitutionality by majority of voices. The voices against the permission for researches were those of the Chief Justice (installed in office during the judgment) and of four other justices. The Reporting Justice and five other justices voted in favor of the permission. The result was achieved by simple majority, i.e., with six justices in favor and five justices against.

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<sup>2</sup> DIGESTA (D. 1.5.7.): "*Nasciturus pro iam nato habetur, quotiens de eius commodis agitur*".

#### 4. HUMAN DIGNITY AS A LEGAL VALUE AMID THE DEBATE

The dignity of the human person pervaded all moments of the debate, and this theme is undoubtedly the cornerstone of the whole legal system. As an example, when voting in favor of declaring the law unconstitutional as worded, justice Gilmar Mendes (installed as Chief Justice to replace justice Ellen Gracie) based his vote right from the beginning on the ethical, legal and moral issues of life and human dignity. To that extent, he further argued about the issues of abortion and euthanasia, stressing the role of the Constitutional Courts as “houses of the people”.

He stated, in brief, that “there is a vital element worthy of legal protection” even during the pre-birth stage, and that the Brazilian law was deficient “in the regulation of researches and, therefore, not compatible with the principle of proportionality in terms of prohibition of an insufficient protection.” Consequently, following such lines, the effective protection of Human Rights, of Fundamental Rights, and also of the so-called Personhood Rights would demand an integral and unified protection of such rights, with a focus on the human person dignity as the central point of the axiological radiation of human values.

In view of the contemporary concept of human dignity and the relationship between the Constitution and Civil Law, it could be affirmed that the Personhood Rights are actually Fundamental Rights.

Regarding this theme, both sides, attacking or defending the law that authorizes the researches, i. e., either seeking to declare it as unconstitutional or to uphold it as constitutional, ended up resorting to the same principle.

On the one hand, the parties defending the idea of declaring the law unconstitutional and opposing the researches tried to contend at the Supreme Court, albeit in vain, that from a legal point of view the right to life, as declared by article 5 of the Brazilian Constitution, is inviolable from the conception, and that this would further be warranted by article 4 of the new Brazilian Civil Code in force as of 2003, which protects the rights of the unborn child from the conception. They further alleged that, from a scientific point of view, there would be a possibility of rejection, giving rise to teratomas (embryonic tumors), of loss of control of embryonic cells, and that the treatment of genetic diseases could be made with adult stem cells. It was further argued that to open this door to researches would mean to transform human beings in experimental guinea pigs. They stated that the law at least lacked a provision for the creation of a properly regulated Central Ethics Committee.

On the other hand, the parties defending the constitutional nature of the law contended that a distinction should be made between an embryo and an unborn child: whereas the Civil Code rule protects a potential being in development inside the maternal womb (i.e., the unborn child), the embryo is neither a person nor an unborn child, since it is not yet implanted in the mother’s uterus and its birth is uncertain. It was further contended that the law did not authorize the researches unless the embryos represented surplus embryos from *in vitro* fertilization procedures, inviable or frozen for over three years. In addition, the law prohibited human cloning, both therapeutic and reproductive, further banning any embryo trading. As an example, we present the vote given by justice Cármen Lúcia Antunes Rocha.

Under the argument of the secular State based on the Brazilian Constitution, the justice affirmed that “the respect for the principle of dignity of the human person is ascertained by the constitutional ethics now in force.” She argued that it was a matter of living with dignity and that “there is no violation of the right to life when researches are permitted.” In her words, “In order to germinate, the grain has to die.” Between “human matter waste” and the use for research, the Supreme Court justice chose not to discharge the material, since the lack of research means the certitude of no results in science.

In view of the debate on such principle, and bearing in mind that the related circumstances must not be different – considering other countries with similar legal traditions and an analogous context as regards historical, cultural and economic features –, we shall now describe the legal value of said principle within the framework of the Brazilian legal system.

#### **4.1. Personhood and Fundamental Rights**

Not all of the fundamental rights are surely personhood rights. The personhood rights, according to Rabindranath Capelo de Souza, derive from the compound of psychosomatic and environmental facets that compose the human personhood<sup>3</sup>. The right to due process of law, for instance, is a fundamental right, but not a personhood right.

It is possible to state, along those lines, that the legal construction of Personhood Rights is a subset of the wider universe of Fundamental Rights and, as such, applicable both to relationship involving the State and to those between individuals<sup>4</sup>.

Furthermore, in the likelihood of direct and immediate enforcement of fundamental rights in the relationship between private individuals<sup>5</sup>, there is no question whatsoever of the absolute restriction that results from the split between Public Law and Private Law. In other words, not only Personhood Rights but also all the other Fundamental Rights are applicable to the relationship between private individuals.

It could not be otherwise. To impose an absolute restriction on the application of the principle of the human person dignity – endowed with constitutional status – according to Personhood Right restrictions defined by ordinary laws would imply contempt for the Constitution itself and an intolerable violation of the very dignity of human persons.

It must then be reaffirmed that, regardless of the existence or lack of provision for Personhood Rights other than in the Constitution itself, the dignity of the human person in the relationship between private individuals is protected by direct or indirect enforcement of the Fundamental Rights, and that this is a larger universe encompassing even the Personhood Rights themselves.<sup>6</sup>

<sup>3</sup> SOUZA, Rabindranath Capelo de. *O direito geral de personalidade*. Coimbra: Coimbra, 1995.

<sup>4</sup> CANOTILHO, J. J. Gomes. *Curso de direito constitucional*. 21st ed. São Paulo: Saraiva, 2000. p. 372.

<sup>5</sup> Without obviously excluding any related or consequential enforcement. In this sense, see UBILLOS, Juan Maria Bilbao. En que medida vinculan a los particulares los derechos fundamentales? In: SARLET, Ingo Wolfgang (coord.). *Constituição, direitos fundamentais e direito privado*. Porto Alegre: Livraria do Advogado, 2006. pp. 301-340.

<sup>6</sup> MORAES, M. C. B. Recusa à realização do exame de DNA na investigação de paternidade e direitos da personalidade [Refusal to consent to DNA paternity testing and personhood rights]. In: BARRETO, Vicente. *A nova família*. [The new family] Rio de Janeiro: Renovar, 1994. p. 174. Professor Maria Celina Bodin de

## 4.2. Fundamental Rights and Justice

The focus on the perception of fundamental human rights must be made through the lenses of the human person dignity, as a necessary goal within the core of the materially fundamental rights<sup>7</sup>.

Along this line of thinking, for professor Cármen Lúcia Antunes Rocha<sup>8</sup>, justice of the Federal Supreme Court of Brazil, who voted in favor of the researches in the judgment on the allegation of unconstitutionality, “dignity is a basic assumption for the idea of human justice, and the entitlement to dignity should require no further effort to deserve it, as it is inherent to life and, as such, a right that precedes the State.” The dignity of the human person is thus assured as a constitutional “super-principle”.

It is imperative that the State be committed to the dignity of the human person.

The theme concerns the guarantees of the Democratic State under the Rule of Law and the dignity of the human person, concretely conceived<sup>9</sup>, as stated by article 1 of the 1988 Federal Constitution.

It should be noted that the technical and scientific development has not been able, in countries like Brazil, to promote the inclusion of everyone in the modern society. On the contrary, a kind of social Darwinism is eliminating approximately 70% of the population in Brazil from such a goal. They are excluded from both consumption and basic access to the Social State range of benefits. The technological wave has been much more associated with the logic of the market and the globalization processes

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Moraes states, “In contrast to the strict identification and severing of personhood rights we have the notion of a human person —and thus of his/her personhood— considered as a unitary value, consequently giving rise to the acknowledgement by the legal system of a general protection clause that will definitely encompass the full protection of personhood, in all of its manifold manifestations, having the dignity of the human person as its confluence point, placed at the apex of the Federal Constitution of 1988.”

<sup>7</sup> On this matter, see: SARLET, I. W. *A eficácia dos direitos fundamentais*. Porto Alegre: Livraria do Advogado, 1998. p. 98.

<sup>8</sup> ROCHA, C. L. A. *O princípio da dignidade da pessoa humana e a exclusão social* [The principle of dignity of the human person and social exclusion]. Speech at the XVII Conference of the Brazilian Bar Association-OAB, 29 August to 02 September 1999.

<sup>9</sup> There are indeed scholars, and not a few of them, who reject the idea of dignity of the human person as an evident value, accepted by the legal system for having concrete applicability. On the contrary, some of the legal scholars ascertain that the concept of dignity of the human person would be too abstract. By refusing this view - distant from a transforming praxis - the current philosophy of Law brings an authoritative argument to provide grounds for the concrete and self-applicable nature of dignity of the human person. This is the recently disseminated paradigm of the concrete life of each subject. Under such perspective, life is no longer the first and most fundamental right to be protected by the legal system, and it rather becomes an essential condition for permitting the other rights. The concept of supremacy of the human life is thus developed, and the human life must necessarily be endowed with dignity in order to be understood as life. This paradigm imposes that life (existence) be thought of under a concrete aspect, i.e., the departing point of such model is life with concrete contents, since life is, by principle, also biological. Therefore, it can be ascertained that life will never be reduced to a mere abstraction, considering its concrete physical and biological substratum. Under this perspective, the new philosophical paradigm thus demonstrates the concrete foundations for dignity of the human person, burying the critics of its supposed abstract and intangible features. See: MATURANA, H.; VARELA, F. *A árvore do conhecimento: as bases biológicas da compreensão humana*. [The tree of knowledge: biological bases for human understanding] São Paulo: Palas Athena, 2001.

than with the promotion of human dignity. The conversion of living beings into genetic resources generates such perplexity.

#### 4.3. How have we reached this point?

The topics herein presented bear somehow a connection to the new economics of the information field. If culture and nature are commodities in the new digital world, filled with data bases, a dignified life must not simply exclude research and scientific progress.

The human person dignity is imperative from an ethical and existential point of view, and it is also, unequivocally, a constitutional principle and rule<sup>10</sup> perceived by the Brazilian legal system as the fundamentals of the Republic, pervading the whole rationality of the national legal system by its normative enforcement.

It regards, in thesis, the acknowledgement by Law of a dimension inherent to every human person and this acknowledgement precedes - as a logical and ethical principle - the legal system itself. In fact, the juridical system as desired in a theoretical plan by the abstract human creation contains in itself some "metajuridical" elements that are conditions of possibility for Law itself.

Nonetheless, the principle of human person dignity must address the protection of the concrete person, without reducing it to a "virtual subject"<sup>11</sup> considered in an abstract manner, reputed as a mere element of the juridical relationship or center of assessment<sup>12</sup>.

Under such concept, dignity is taken as an attribute referring to the human being when concretely considered. Another extremely relevant element is also inferred when reviewing the principle at issue: the dignity of the human person is an imperative that derives from an ethics of alterity.

This is, perhaps, how we got this far: we have forgotten that the dignity of the human person may be conceived under the double dimension of principle and value<sup>13</sup>.

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<sup>10</sup> On the double dimension of principles and rules inherent to the fundamental legal norms. ALEXY, Robert. *Teoría de los derechos fundamentales*. Madrid: Centro de Estudios Políticos y Constitucionales, 2002.

<sup>11</sup> According to Jussara MEIRELLES, "on the one hand, we have what we would call a codified person or a virtual subject; on the other hand, we have the real subject, the really human person, seen under the prism of its own nature and dignity, the "real people" person." (O ser e o ter na codificação civil brasileira: do sujeito virtual à clausura patrimonial [To be and to hold under the Brazilian Civil Code: from the virtual subject to the prison of assets]. In: FACHIN, Luiz Edson (coord.). *Repensando fundamentos do direito civil brasileiro contemporâneo*. Rio de Janeiro: Renovar, 1998. p. 91).

<sup>12</sup> SARLET, Ingo. *Dignidade da pessoa humana e direitos fundamentais na Constituição Federal de 1988* [Dignity of the human person and fundamental rights in the 1988 Federal Constitution]. Porto Alegre: Livraria do Advogado, 2001. p. 60. Along those lines, Ingo Sarlet designates the dignity of the human person as "an intrinsic and distinctive quality of each human being that entitles him/her to the same respect and consideration from the State and from the community, implying in this sense a set of fundamental rights and duties that secure the person from any and all acts of degrading and inhuman nature, and assure a minimum of existential conditions for a healthy life, in addition to providing for and fostering his/her active and co-responsible participation in the destinies of his/her own existence and in the life in communion with other human beings."

<sup>13</sup> According to ALEXY, the actual accomplishment of a principle is also the accomplishment of a value. In addition, both principles and values are subject to assessment, even though principles remain in the deontological domain and values in the axiological domain. (*Op. cit.*).



Its axiological dimension allows us to state that there is a *prima facie* prevalence of the dignity value that determines the accomplishment of rules, even though a formal *a priori* prevalence of the principle is not stated.

Paulo da Mota Pinto, a highly distinguished professor from Coimbra and a former member of the Constitutional Court of Portugal, notes the supremacy of the human person dignity as a value when ascertaining that “a true axiological imperative for any legal system derives from the assurance of human dignity, namely the acknowledgement of legal personhood for all human beings, followed by a provision of legal means (especially subjective rights) aimed at defending the refractions that are essential to the human personhood, as well as the need for protection of such rights by the State.”<sup>14</sup>

A notion that comes into view from said statement is that of the human person dignity as a general protection of personhood, with implications for the protection of the moral, physical and psychological integrity of the human person.

The inclusion of the human person dignity principle in the Constitution is not - and should not - be taken as mere rhetoric on the part of the constitutional legislator: it is a constitutional rule and, as such, a binding rule.

There is no doubt that, as the dignity of the human person is a value that precedes the Law and commands it – and is further a principle taken as the fundamentals of the Republic –, it ends up as a supreme value of the legal system. Consequently, it becomes a fundamental vector in the actual operation of legal precepts, both regarding Public Law and Private Law.

As the principle of the human person dignity is an unavoidable ethical and legal component to which the whole Law is subordinated, we must reexamine the precepts also under Civil Law, in view of preserving and promoting the human person dignity. The relationship between private individuals - including and mainly regarding the exercise of any technical, scientific or economic activity - is conditioned upon the assumption of respect for the other person, taken as a concrete subject and endowed with dignity.

Thus, the respect for the human person dignity is undoubtedly a necessary condition for the relationship between private individuals<sup>15</sup>. However, dignity refers to a concrete person and, rather than being taken as an atomized and abstract individual, the person is considered in a dimension of intersubjectivity.

#### **4.4. On our Origins**

In order to well position the debate within the Brazilian Supreme Court, we must now readdress one of the essential elements of this theme. It regards Kant's notion of moral autonomy, which is founded on the autonomy of will commanded by a pure practical reason and leads to a formula based upon the idea that the human

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<sup>14</sup> *Apud* SARLET, Ingo. *Op. cit.* p. 88.

<sup>15</sup> SARLET, Ingo. *Op. cit.* p. 46. The affirmation by Ingo Sarlet is quite accurate: “The dignity of the human person means both a limit and a duty for the government powers and, as we see it, for the whole community in general, touching each and every person, and said duplicity further points to a dimension that simultaneously defends and awards dignity.”

being must always be treated not only as a means but also as an end<sup>16</sup>. Even when treated as a means, it must simultaneously have an end in itself.

This widely known concept may be deemed as the core expression of the idea of the human person dignity in the modern thought. For Kant, it is the feasibility condition of the categorical imperative, which imposes an acting that could be risen rationally as a universal law<sup>17</sup>.

To treat the rational being as an end is a prior condition to support the universal possibility of commanding the individual's autonomy by practical reason. It should be immediately noted that Kant's moral theory is, in this aspect, close to what would later be deemed an ethics of alterity — even if the foundation, as well as the very manner of facing the coexistential dimension of humanity, may differ. Consequently, an act that denies the condition of an end in itself, either to the very person or to others, is not moral.

According to Kant, everything set as an end has either a price or a dignity. Whatever cannot be measured against other values and cannot have its price established has a dignity. In accordance with this thought, the human person has dignity<sup>18</sup>.

In opposition to the Greek philosophy heritage, modern reason ended up almost exclusively reduced to an instrumental reason, leading all knowledge to a scientific bias. The belief in the possibility to forecast and control all events reduces knowledge to a notion of science that considers subject and object as separate entities with an unavoidable division between them<sup>19</sup>.

The instrumental reason is linear, limiting itself to draw a direct relationship between means and ends. The market is ruled by such straight-line rationality and science responds to this order of ideas and praxis likewise.

Therefore, an adequate challenge deriving from the mutual symbiosis between market and scientific development is one of the easily assessable marks in the history of the market society development.

The claim to control and forecast, as supposedly assured by instrumental reason, represents the compass of modern times regulatory pillar, spreading to all fields of knowledge - including Law.

The concrete human being becomes a means for said stability, to the extent that the human being is not deemed the ultimate end: the end appears within the abstraction of the formal datum named “legal security”.

It is obviously undeniable that legal security carries a relevant value, even as a tool for the protection of personal dignity. The problem is in the inversion of values that converts security into a supreme principle, a corollary of the gap between *real* and *abstract* reached by the Law pattern built under the modern reason division.

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<sup>16</sup> KANT, Immanuel. *Fundamentos da metafísica dos costumes* [Foundations of the metaphysics of morals]. Rio de Janeiro: Ediouro.

<sup>17</sup> KANT, Immanuel. *Crítica da razão prática* [The critique of practical reason]. São Paulo: Martins Fontes, 2001.

<sup>18</sup> *Idem. Fundamentos, op. cit.*

<sup>19</sup> A split which is rejected by Kant.

#### 4.5. The Repersonalization

The human person dignity taken in its concrete dimensions - and not as an abstract being in a metaphysical place – finds its place in Civil Law in the so-called “repersonalization”<sup>20</sup>. In fact, it is possible to state that the centrality of the person in the 18th century Civil Law is only identified in the discourse that fomented the Liberal Utopia, the *leitmotiv* of modern Private Law development, as explained above.

Nevertheless, it has already been demonstrated how words and reasoning centered on a purely formal element finally culminated in a rationality that made the dignity of the person be surpassed by patrimonialism and conceptualism.

Thus, to “repersonalize” the Civil Law means, according to Tepedino<sup>21</sup>, to place the human person at the core of the preoccupations of Law. In a way, it means to readdress the idea that the human being is endowed with dignity and represents an end in itself. Nevertheless, the fundamentals here differ from the ideas defended by Kant. From the dialectics that deny the Kantian abstraction, we see the rise of a synthesis mandating the protection of the person by its condition of concreteness, of subject of necessities.

It does concern protecting the human person in its coexistential dimension, with its network of relationships that composes society itself. It is impossible to conceive the individual without the others, as the protection of human dignity is always interindividual, based on an ethics of alterity and never individualistic.<sup>22</sup>

The individual’s personhood rights are not based on abstract data of legal personality, but rather on personhood as something inherent to the concrete subject.

As explained above and as inferred from the words of Capello de Souza, it is a compound of psychosomatic and relationship facets, i.e., it comprises the physical and psychological elements, in conjunction with the relationship between said elements and the environment — and, above all, with other subjects.

This leads to the conclusion that, if the personhood rights are not granted by Positive Law, it is not necessary to typify each and every right so as to insert it within the “World of Law”. The contemporary view of the system in Law and of the normative construction methods show that there are not sufficient grounds to sustain the enforcement of Law through subsumption to rigid patterns of juridical relationships, depending on ready-made answers which fail to define the issue in each concrete case.

The personhood that is to be protected by Law is thus not merely an object created by the rule.

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<sup>20</sup> CARVALHO, Orlando de. *A teoria geral da relação jurídica*. Coimbra: Centelha, 1981.

<sup>21</sup> TEPEDINO, Gustavo. *Temas de direito civil*. Rio de Janeiro: Renovar, 2004.

<sup>22</sup> We must mention the significant reflection by Maria Celina Bodin de MORAES, who bound the dignity of the human person both to freedom and solidarity. (O conceito de dignidade humana: substrato axiológico e conteúdo normativo. In: SARLET, Ingo Wolfgang (coord.). *Constituição, direitos fundamentais e direito privado*. 2nd. ed. Porto Alegre: Livraria do Advogado, 2006. pp. 107-150).

A distinction must be made between personhood as a concrete datum and personhood as a generic attribute allowing anyone to be part of the juridical relationship as a subject of Law<sup>23</sup>.

The definition of personhood following the abstraction that characterized the 18th century legal positivism and reached the 20th century, culminating with Kelsen, is nothing more than the normative attribution or the attribution of a function by a normative order. In other words, the “ascension” to the condition of person would occur when the legal system “grants” said condition. Definitely, this is not the personhood that we are dealing with, the subject matter of the general protection herein detailed.

This is due to the fact that the human person dignity is not something born out of positive law, integrating a dimension that, as exposed, precedes Law itself.

Therefore, protection does not have its roots in the law, and it is unnecessary to list the rights that would be entitled to legal protection. Everything inherent to the personhood of the concrete subject is worthy of legal protection, since it concerns the human person dignity.

To direct the central focus of personhood general protection to the principle of the person dignity means to base those rights on the same principle that grounds the fundamental rights.

We thus see how it was possible for both the defenders and the challengers of the researches to resort to the same principle in order to reach completely opposite conclusions.

As the principle is based on the Constitution, it is meaningful to expose, albeit briefly, this aspect of the constitutional text.

## **5. THE BRAZILIAN CONSTITUTION AND HUMAN DIGNITY**

The 1988 Federal Constitution made Civil Law relinquish the patrimonialist stand inherited from the 19th century, especially from the Napoleonic Code, migrating to a concept under which the human development, as well as the person dignity when concretely considered, is privileged in the relationship between individuals, aiming at their emancipation.

The Constitution established the human person dignity as the basis of the Republic. Said option placed the person in the core of the legal system preoccupation in such a way that the whole system, guided by and based on the Constitution, is directed towards the protection of the person. The constitutional norms (comprising principles and rules) are centered on such perspective, and they thus confer a systematic unity to the whole legal system.

In opposition to the traditional and dogmatic Law, we see an inversion of the core concerns of the legal system, since the protection of the human person becomes the ultimate end of Law as its full development tool. The inversion of the concern *locus* must also take place in Civil Law. This is a necessary consequence in view of

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<sup>23</sup> MEIRELLES, Jussara. *Op. cit.*

the supremacy of the Constitution within the legal system. For this reason, the whole set of normative standards beneath constitutional level must adjust itself to the constitutional axiological pattern.

Within this framework and in light of the constitutional system, the patrimonial aspect, previously in the center of the spotlights, is now moved to the background. The real estate guided codification, a mark of the 1916 Civil Code, is no longer supported by the current Constitution<sup>24</sup>.

Wealth has been considered as an “attribute of personhood” by many authors. Two reflections must be taken into consideration under this perspective. Firstly, the personhood mentioned is the abstract personhood, i.e., the personhood given by the legal system, making someone qualified to be a subject of rights. This is not a concrete person, a person with needs, feelings, desires, abilities, but an abstract category person, not to be confused with the concrete human being. Secondly, the idea that wealth is an attribute of personhood leads to the idea that personhood and wealth are the same thing.

In this respect, we can see confusing concepts binding wealth to the person. However, this abstract person cannot be confused with the concrete human being. Even if we were to admit wealth as an attribute of personhood, we would be speaking of an abstract category, not the concrete human being. Wealth cannot thus be confused with the human person value, since the human person is not limited to one abstract category.

In this way, to privilege wealth - and contrary to what one could imagine with a superficial view of “attribute of personhood” - means to marginalize the constitutional value of the human person dignity. In the 1988 Constitution, the human person dignity acquires the status of an organizational cardinal principle within the legal system. Therefore, any positively defined or potential rule that collides with this principle, in whole or in part, is unconstitutional.

According to such ideas, any assessment of the constitutional or non constitutional nature of a statute, in view of the repersonalization mandated since 1988, must take into consideration the superiority of the human dignity protection over the patrimonial juridical relationship. By implication, this means that a statute - it must be stressed, both a positively ascertained or a proposed statute - will be deemed unconstitutional if it privileges a patrimonial view rather than a concept committed with the protection of the concrete human being.

Nevertheless, according to the Brazilian Constitution, the right to life is not an absolute and fundamental right. Here are some exceptions:

a) death penalty in case of declaration of war (article 5 item XLVII of the Constitution);

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<sup>24</sup> On this matter, Jussara MEIRELLES writes: “Therefore, it is not difficult to conclude that the person described by the Civil Code is not the person who lives, feels and walks in our days. The personal values, the desires, and the intent to have its dignity acknowledged are not reflected in the abstraction of a figure manufactured by the system as a person, as a subject of law.” (*Op. cit.*).

b) abortion as a means to save the life of the pregnant woman (a “necessary abortion”) or when the pregnancy results from rape (“humanitarian or therapeutic abortion”), under article 128 items I and II of the Brazilian Penal Code.

Within such framework, we must see how the Brazilian Constitutional Court examined the tension between right to life, a life with dignity and scientific research.

## **6. THE ROLE OF THE BRAZILIAN SUPREME COURT IN PERMITTING THE RESEARCHES**

It is precisely along this influx that the role of Brazilian Supreme Court is established in the Brazilian contemporary horizon and, consequently, that the nexus of these considerations is found. The area filled with said concepts may reduce the defense of the Constitution to the instrumental apparatus with which, without prejudice to its relevance, the definitely ascertained constitutional text is equipped. From our point of view, the protection also implies a proactive stand, reclaiming the duty to enforce rights and not only to maintain them.

Within the scenario of a Social Rule of Law, the higher courts are assured a *locus* of significant relevance. This is due to the fact that the higher courts activities are generally committed to the discussion of controversial points, connected with constitutional matters. In general, they are also called constitutional courts, even though they may, without naming it, implement such action.

This is the case of the Federal Supreme Court in the Brazilian legal system, as set forth in article 102 of the Federal Constitution.

This layout of higher courts as protectors of the Constitution, in spite of the important Roman and Germanic roots of the Brazilian law, is based on the Common Law system experience, more specifically on the example of the United States.

The role of defending the Constitution is not limited to the Supreme Court. In an indirect and general manner, each government and social body, including the citizens, is also in charge of such duty. However, the judgment rendering courts or trial courts may lack the duty of direct or immediate protection of the Constitution, even at the level of control of diffuse rights to ensure compliance with the Constitution. Nevertheless, all those relentlessly connected with the legal submission are primarily and above all bound by a duty of dispensing the law while observing the Constitution.

However, it is undeniable that the control has a much more direct feature when exerted by the Supreme Court, which holds a transcendent power in face of the State.

## **7. CONCLUSION**

Here is the path followed by a controversial law to the Federal Supreme Court. The Court comes to life as an abstract defender of the Constitution, and then becomes a concrete entity, as the historical and cultural features of its decisions are unveiled.

Under the Anglo-Saxon tradition this effect is even stronger, and it is in this context that we understand the visceral connection between the constitutional jurisdiction and the democratic principle, without dismissing the formative and historical reasoning process.

In addition to a healthy reflection, the normative texts must also curb the power of the State. Accordingly, the Higher Courts - usually known as constitutional courts - also hold this control function among their competencies, and they may be at the apex of the jurisdictional scale or a political body outside the three branches of the classical power division.

The Brazilian example plays by this rule, and it was influenced by the German constitutional and jurisdictional anatomy. After the 1988 Constitution and the consequent establishment of the Higher Court of Justice [Superior Tribunal de Justiça], the Federal Supreme Court [Supremo Tribunal Federal] strengthened its constitutional jurisdiction *locus*, as the ultimate “guardian of the Constitution”.

Such role was accomplished in the judgment analyzed, when the Federal Supreme Court fulfilled its constitutional mission. The legal examination of the constitutional nature of the law that authorizes the research has come to an end in Brazil. However, the debate has not ended, especially for two reasons. Firstly, only the future will show us the possible and final results obtained with scientific progress. Secondly, the discussion on life, its beginnings and its dignity will never cease.

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## **APPENDIX I**

### **SUMMARY OF THE JUDGMENT BY THE BRAZILIAN FEDERAL SUPREME COURT**

#### **INFORMATION**

The voting by the Brazilian Federal Supreme Court (Supremo Tribunal Federal - STF) on the Direct Action of Unconstitutionality No. 3510, filed to ask that article 5 of the Biosafety Law be declared unconstitutional, started on 05 March 2008. The article challenged deals with the use of embryonic stem cells in researches. The voting ended on 29 May 2008.

For six justices, i.e., for the majority of the court, article 5 of the Biosafety Law is not liable to amendment. The majority of votes were given by justice Carlos Ayres Britto, reporting on the matter, and by justices Ellen Gracie, Cármen Lúcia Antunes Rocha, Joaquim Barbosa, Marco Aurélio and Celso de Mello.

#### **VOTE BY THE REPORTING JUSTICE**

The first vote was given by the justice reporting on the proceedings, justice Carlos Ayres Britto, denying grounds to the action of unconstitutionality. He based his vote on provisions of the Federal Constitution that guarantee the right to life, health, family planning and scientific research. He also stressed the spirit of brotherhood stated by the Federal Constitution for society when he defended the use of embryonic stem cells in researches seeking the cure for diseases. He used as argument in favor of stem cell use in researches the fact that human life only starts after birth. For the STF justice, “human life is a phenomenon that takes place from birth to brain death. The embryo holds a vegetative life that precedes the brain.” The STF justice further tried to make a distinction between a frozen embryo and an embryo formed within the womb and the human person. For the reporting justice, a frozen embryo is unable to become a fetus or a human being, because it could not develop without being implanted in a feminine body. He voted in favor of the researches.

#### **THE VOTE BY THE CHIEF JUSTICE THEN IN OFFICE**

At the same time, justice Ellen Gracie, then acting as chief justice of the STF, advanced her vote and explained that she would follow the vote of the reporting justice Carlos Ayres Britto as she fully agreed with him. For her, the Biosafety Law shows no vice of unconstitutionality. “Neither the guarantee of human person dignity nor the guarantee of life inviolability can be ascribed to a pre-embryo since, as I believe, a pre-embryo not yet lodged in its natural development nest, the uterus, cannot be classified as a person.” She noted that the Brazilian legal system assigns the quality of person to a child born alive. “On the other hand, a pre-embryo does not conform to the condition of an unborn child, since an unborn child, as the name specifies, presupposes the possibility or likelihood of birth, and that does not happen with embryos that are proved unviable or destined to be discarded.” She stated, “I see no vice of unconstitutionality. In my belief, a pre-embryo not yet received by the uterus cannot be classified as a person.” She voted in favor of the researches.

#### **PRONOUNCEMENT BY THE FEDERAL PROSECUTOR**

The new Federal Prosecutor General, Antônio Fernando Barros e Silva de Souza, and the attorney for Brazil’s National Confederation of (Catholic) Bishops (CNBB) also expressed



their views, both arguing that the law was unconstitutional. For them, the Constitution guarantees the right to life, and the embryo is already a living being. Souza argued that: “There is sound scientific conviction that human life starts with fertilization, and article 5 of the Constitution guarantees the inviolability of human life.”

#### **ADJOURNMENT**

Following the vote of the reporting justice, justice Carlos Alberto Menezes Direito requested to examine in the matter of the Action for Unconstitutionality of the law in more detail, adjourning the judgment session.

#### **THE JUDGMENT SESSION IS RESUMED**

The voting session resumed on 29 May 2008, and justice Carlos Alberto Menezes Direito voted for the “partial unconstitutionality” of article 5 of the law. The justice contended that the article required changes, so as to determine that no researches would be allowed on the embryonic stem cells unless the cells were removed from the embryo without destroying it. He stated, “From the moment of fertilization, more precisely from the moment the sperm nucleus and the ovum nucleus are united, the embryo is already an individual, a representative of the human species, with the same genetic material of a fetus, a child, a grown-up, an old person.” For justice Menezes Direito “the embryonic stem cells are indeed a human life, and any destination that is different from human reproduction violates the right to life.” He voted against the researches.

#### **VOTE BY JUSTICE CÁRMEN LÚCIA ANTUNES ROCHA**

Next, Justice Cármem Lúcia voted in favor of the researches on embryonic stem cells. According to the justice, “Their use is a form of knowledge for life. This is the nature of the scientific research on embryonic stem cells, which seeks to extend life, and not to affront it. In addition to the fact that the research does not violate the right to life, it becomes a part of human existence because it is not life.” She mentioned scientific studies indicating that the researches on embryonic stem cells capable of differentiating into any human tissue cannot be replaced by other lines of research, as those using adult stem cells, and that the discarding of cells not yet implanted in the uterus generates only “genetic waste”. She voted in favor of the researches.

#### **VOTE BY JUSTICE RICARDO LEWANDOWSKI**

In general lines, justice Ricardo Lewandowski voted for the imposition of restrictions on stem cell researches, accepted the action partially, and requested that the article be amended so that researches would not be allowed unless using non viable embryos, without any possibility of spontaneous division. He was opposed to researches.

#### **VOTE BY JUSTICE EROS GRAU**

Justice Eros Grau proposed amendments to the Biosafety Law in order to restrict research. The purpose of the justice was to assure that the stem cells used in the researches be solely those obtained from ova without spontaneous division, that all researches on embryonic stem cells be subject to a prior authorization by the Ministry of Health, and that the ova used be solely those from *in vitro* fertilization, exclusively for human reproduction. In the general vote count, he opposed the researches, following the stand of justices Menezes de Direito and Ricardo Lewandowski.

#### **VOTE BY JUSTICE JOAQUIM BARBOSA**

Justice Joaquim Barbosa fully agreed with the reporting justice and voted accordingly. For him, to ban the researches on embryonic cells, in terms of the law, would mean “to close the eyes to scientific progress and to the benefits likely to derive therefrom.” He voted in favor of the researches.

#### **VOTE BY JUSTICE CESAR PELUSO**

For justice César Peluso the researches do not affront the right to life because the frozen embryos are not equivalent to persons. However, he emphasized the importance of strict inspection on the researches, pointing out the need for the proper legal tools for that purpose.

#### **VOTE BY JUSTICE MARCO AURÉLIO MELLO**

Justice Marco Aurélio Mello voted in favor of scientific researches on embryonic stem cells in Brazil. “This not about questioning whether a pregnant woman should remain physically connected, but rather to determine the destiny of fertilized ova that would certainly be destroyed, and whether they can and should be used in an attempt to seek the progress of mankind,” he affirmed. He fully agreed with the reporting justice and voted accordingly. He considered the wording of article 5 of the Biosafety Law, challenged by the Direction Action of Unconstitutionality, “consistent with the Federal Constitution, more specifically with articles 1 and 5 thereof, and with the principle of reasonability.” Article 1, item III, of the Constitution sets forth the fundamental right to dignity of the human person, and the introduction to article 5 foresees the inviolable right to life. He also cautioned against the risk of having the STF take the role of legislator, by imposing restrictions to a law that, according to him, had been supported by 96% of the senators and 85% of the federal deputies, which would indicate its “reasonability”. The justice also remarked that all positions on the supposed commencement of life were mere opinions, and he presented a list of constant discordant concepts throughout history, from ancient to modern times. For him, “the commencement of life does not presuppose just the fertilization, but also the viability of pregnancy, of the human gestation.” He even remarked that “to say that the Constitution protects the intrauterine life is prone to discussion, when considering [that the Constitution permits] the therapeutic abortion or the abortion of a child born out of rape.” And he concluded by saying that “the legal cause of action depends upon a live birth” and that to throw away the embryos discarded from human reproduction would be a selfish gesture and deep blindness, since they could be used to cure diseases.

#### **VOTE BY JUSTICE CELSO MELLO**

Justice Celso de Mello also voted in favor of the researches, as the law approved by the Congress gives the inviable embryos discarded “a nobler destination”. “All those embryos have one single destination: they are doomed to disposal as sanitary waste. Therefore, a nobler destination is assigned,” he affirmed. Regarding the statement that the law would contradict the right to life, he asserted: “An ovum or an embryo that cannot be implanted in a uterus does not have the potential to become a human being.” The justice voted in accordance with the reporting justice, i. e., the action should be dismissed. According to him, the State cannot be influenced by religion. “The enlightened vote tendered by the eminent justice Carlos Britto will allow millions of Brazilians who are now suffering and living on the margins of life to actually exercise a basic and inalienable right, namely the right to seek happiness and also the right to live with dignity, a right of which nobody, absolutely nobody, should be deprived.”

#### **VOTE BY JUSTICE GILMAR MENDES, THE NEW CHIEF JUSTICE**

The last vote was tendered by justice Gilmar Mendes (already installed in office as the new Chief Justice of the Federal Supreme Court). He expressed reservations about the legislation, deeming that the Brazilian norm has deficiencies. Justice Mendes asserted that it is “perplexing” to realize that this matter is ruled in Brazil by one single article of a statute. He further stated that the law fails to assign a central body to inspect the researches, under the Ministry of Health. His stand was aligned with the votes opposing the researches.

#### **FINAL VOTING RESULTS**

When the debates on the use of stem cells were completed, the norm of the debate was voted by 11 justices. Six of them dismissed the petition in the action of unconstitutionality of

Article 5 of the Biosafety Law - that on the use of embryonic stem cells in researches.

By a slight simple majority, in May 2008, the Brazilian Supreme Court ruled as follows: the researches on embryonic stem cells do not violate the right to life, nor the human person dignity.

## **APPENDIX II**

### **LAW 11105 OF 24 MARCH 2005**

Below stated is a part of the legal statute that regulates items II, IV and V of article 225, paragraph 1, of the Brazilian Federal Constitution, sets forth safety norms and inspection systems for activities involving genetically modified organisms and their by-products, creates the National Biosafety Council (Conselho Nacional de Biossegurança-CNBS), restructures the National Biosafety Technical Commission (Comissão Técnica Nacional de Biossegurança-CTNBio), sets forth provisions on the National Biosafety Policy (Política Nacional de Biossegurança-PNB, revokes Law 8974 of 5 January 1995 and the Executive Order 2191-9 of 23 August 2001, revokes articles 5, 6, 7, 8, 9, 10 and 16 of Law 10814 of 15 December 2003, and includes other general provisions.

“THE PRESIDENT OF THE REPUBLIC: Let it be known that the National Congress decrees and I sanction the following Law:

#### **CHAPTER I**

##### **PRELIMINARY AND GENERAL PROVISIONS**

Article 1 - This Law establishes safety norms and oversight systems for the construction, cultivation, production, handling, transport, transfer, importation, exportation, storage, research, trading, consumption, release in the environment and discharge of genetically modified organisms and their by-products, under the guidelines of incentive to the scientific progress in the area of biosafety and biotechnology, protection of life and protection of human, animal and plant health, and compliance with the principle of precaution for the environment protection.

(....)

Article 5 - It is permitted for research and therapeutic purposes to use human embryonic stem cells produced by *in vitro* fertilization and not employed in the concerning procedure, subject to the following conditions:

I - that the embryos are unviable; or

II - that the embryos have been frozen for no less than 3 (three) years prior to the date of publication of this Law or, if already frozen at the date of publication of this Law, after a three-year lapse of the freezing date.

Paragraph One. The consent of parents will be required in all cases.

Paragraph Two. Research institutions and health service providers carrying research or therapy on or with human embryonic stem cells must submit their projects to the respective research ethics committees for approval.

(....)

Article. 41 - This law comes into force on the date of its publication.

(....)

Brasília, 24 March 2005; 184th year of the Independence and 117th year of the Republic.

LUIZ INÁCIO LULA DA SILVA, President of Brazil.”