



POSITIVATION OF FUNDAMENTAL RIGHTS FROM THE IDEA OF HUMAN DIGNITY

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ABSTRACT

The objective was to demonstrate that positivization of Fundamental Rights is based on the idea of Human Dignity, in this way, Human Dignity is the essence of Fundamental Rights. For the development of the article the Inductive Method was used. The research was bibliographical and documentary. The idea of Human Dignity is present in the evolution of human thought as an ideal of coexistence. The article was divided into three items. The first presents the idea of Human Dignity, the second presents considerations on Fundamental Rights and the third relates Human Dignity to Fundamental Rights. It has been shown that Human Dignity is a condition of human existence. In the Science of Law it characterizes the human condition, which is why Dignity is a basic element in positivization. With the development of Constitutionalism, Human Dignity becomes the logical basis of Rights. There is no way to think of Fundamental Rights without the idea of Dignity. In this way, Dignity presents itself as a measure of Fundamental Rights and the violation of a fundamental right is directly linked to the offense against Human Dignity. In this way, the implementation of Fundamental Rights is the guarantee of the realization of Human Dignity.

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INTRODUCTION

From Human Dignity we conceive and delineate the Fundamental Rights in a certain State. In this way, Human Dignity is an essential condition, *conditio sine qua non* of Fundamental Rights. The idea of Human Dignity is present as an ideal in the evolution of mankind's thinking. The rationalization of the idea is a result of the thought of the seventeenth and eighteenth centuries which, in addition to rationalizing it, also laicized it. With the positivization of Law and the development of Constitutionalism, Human Dignity becomes a highlight and a source for the foundation of Rights that are becoming positive in these constitutional contexts. The Fundamental Rights, with the positivization, are directly related to the context of man's performance. In Brazil, for example, in all seven constitutions they are present. In certain constitutions with more vigor than in others. In this way, it turns out that Fundamental Rights represent the achievements and responses of societies in their time and space. In this context, Human Dignity and Fundamental Rights intertwine. Just as Fundamental Rights guarantee the fulfillment of Human

Dignity, on the other hand, Fundamental Rights are the representation of the contents of Dignity. According to the context of representation of Rights, one can see the respect or treatment given to Dignity. The article is divided into three items. The first characterizes Human Dignity, the second which presents considerations on Fundamental Rights and the third relates the two themes. The aim is to demonstrate that Human Dignity is the fundamental foundation of Fundamental Rights, that is, the condition or action that is fundamental, essential or essential to the formulation of Fundamental Rights. For the development of the article, the Inductive Method was used with bibliographical and documentary research.

Considerations on Human Dignity: It is possible to affirm that the idea of Human Dignity accompanies the evolution of the thought of humanity, but it is certain that it is present in the evolution of Western thought. As an example, it is observed in Cicero, in arguing that the Dignity of man was the result of "his highest position in the hierarchy of nature, since it is the only rational being among animals." (Sarlet, 2015, 35). With Christian / Catholic thinking, the idea of Dignity related man to God. Since man is created in the image and likeness of the Creator. This in itself conferred superiority on the other

beings. Man, being the image and likeness of the Creator, is endowed with a value that was intrinsic to him. This value can not be quantified or reduced. Human Dignity is intrinsic and is not the result of a norm that determines it, as for example the Right to Property. Dignity precedes the norm. Dignity is an innate characteristic, "ingrained and confused with the very nature of the human being." (Silva, 2009, p. 38). The thought of seventeenth and eighteenth centuries transformed the conception of Human Dignity into a process of rationalization and secularization. The religious elements were removed from the idea of Dignity. The notion of "equality of all men in Dignity and freedom" was founded (Sarlet, 2015, p. 37). Man is in himself, different from things that are in relation to something. The quotation makes the object replaceable, has a value, a price. The human being does not. With the positivation of the Right and development of Constitutionalism, strongly marked at the beginning of the twentieth century, Human Dignity came to assume a prominent position, as a value and as a principle. It became the basis for the creation of the Constitutions, since these are to guarantee social rights and promote the well-being of nationals. Also, with the State of Social Welfare, the idea of Dignity is associated with equality and justice. For example, the rights granted to citizens, such as Education and Health, are observed. The discourse that "all are equal before the law", present in various constitutional charters, including all Brazilian ones since 1824 (article 179, XIII), is surpassed by an ideal of no more formal equality, but material. The State is called upon to enable its citizens to live a more dignified life as well as to "recognize that the factual inequalities between citizens prevent equal application of law among those considered equal." (Abreu, 2011, p. 38).

Of fundamental rights

Highlights: Fundamental Rights are directly related to the human condition (Arendt, 2007, p.15ss.) and that with the positivation came to receive this name and were constitutionally foreseen in the legal order of some State. It is known that these Rights were built, thought and conquered in the history of the Society and had as their foundation and motive the social, political, economic and ethical aspects. Based on Perez Luño (2005, p.46-47), Ferrari (2011, 529) and Canotilho (2003, p.393), it is understood that the Fundamental Rights are the recognized and positivized rights in the sphere of positive constitutional law. In this way, they are subject to the constitutionality control of that State and are related in the legal system according to its hierarchy and importance. Consequently, they are constitutionalised (Mazzuoli, 2014, p. 23). It is emphasized that considerations on the material and formal nature of fundamental rights will not be discussed. Rights are born and developed according to time and space, and not all are born at the same time, as Bobbio (1992, p.6) affirms, "rights are not born all at once. They are born when they should or can be born. "In this way, each Society, each State creates and affirms its Rights in response to the specific Society's demands. In this way, since Rights arise in time and space, it is possible that it disappears at a certain historical moment in a certain State that has positivized it. (Silva, 2015, p.183). The Fundamental Rights have the characteristic of the generality which it understands that reaches to all who are or are involved by that ordering. In the way that the idea of universality cannot be affirmed, it is also understood that the Fundamental Rights cannot be considered as absolutes, that is, that there are no restrictions.

For if they were, they would be limiting, or "no state or social objective could prevail over them, which would have absolute priority over any collective interest." (Mendes, Coelho e Branco, 2000, p.120.) The simple fact that we have more than one Fundamental Right already places a limit and eliminates the possibility of being absolute, in this way, a fundamental right suffers limitations in the face of other Fundamental Rights, since, "other Fundamental Rights, like other values based may limit them. " (Mendes, Coelho e Branco, 2000, p.121). In this way the characteristic of being an absolute Right is dissolved before another right that competes with him. In this same vein, the idea of inalienability also ceases to be absolute, since certain Fundamental Rights can be made available.

Fundamental Rights: concept created in Constitutionalism:

The idea of constitutionalism as it is understood today finds its origins in modern revolutions, but it is possible to affirm that some notions present in the concept of constitutionalism were already understood and applied from antiquity. Within the considered the birthplace of Democracy, Athens, there was a government of laws and not of men. There was active participation of citizens in the most diverse subjects of public order. Rome, when it instituted the Republic, also shaped its administration in laws, as well as possessed certain division of powers between the institutions. Disagreements about time do not solve the problem and do not define the concepts, so it does not compare, but existence is admitted. Not from constitutionalism in the mold of today, but from ideas that are now in place. What is observed is that the adoption of fundamental laws to politically organize the Nation, as well as declare the rights of individuals, is a trademark of modern constitutionalism, the context of the transition period between the absolutist monarchy and the Liberal State of Law. (Carvalho, 2011, p.215). This process was influenced by the European and North American movements, which already delimited the constitutional ideals at the end of the seventeenth century, "by the idea of separation of the Powers, guarantee of citizens' rights and belief in representative democracy." (Carvalho, 2011, p.216). Important in this context is to analyze constitutionalism as a movement, as Canotilho (2003, p.51) affirms "[...] has several roots located in time horizons diachronic and in historical geographic and cultural differentiated spaces. In strict terms, there is no constitutionalism but several constitutionalisms."

Constitutionalism has become essential for the characterization of Fundamental Rights, since these need to be positivized. Are fundamental rights a concept created in constitutionalism? It is observed that since the Declaration of American Independence, which considered all men equal and defended the right to life, liberty and happiness, the idea of Fundamental Rights is present. They are there predicted, positive in the history of a State. In 1791, the American Constitution underwent ten amendments, which established absolute freedom of expression, open trials and jury, prohibition of cruel punishments, and the right of the common citizen to carry arms, as we can see, these rights, thus constitutional are present only in the Modern State. In Brazilian constitutional history (Campanhole e Campanhole, 1992), since the imperial constitution of 1824 it is possible to affirm that they are present in the so-called First Generation Rights, because we find freedom, despite the official religion, there was freedom of belief. Political and civil rights had freedom, individual security and property as a basis. In this historical context it

cannot be said that Human Dignity was present, because as it is known the time there was slavery and in that way, a part of the population had no freedom and was on the margins of many rights. Political rights were not universal, but for a specific portion of society and women did not have the right to vote. A priori when observing this historical context, one can think how such a reality would be possible but one must remember Bobbio when he affirms that "rights are not born together", soon they are results of conquests, of fights. That is why we can not deny the importance of the rights provided for in that context. This reality shows that even nowadays, what can be the fullness of Rights has not yet been completed. It may be that for that historical moment was a great achievement, because it was a constitutional Charter granted and a historical moment in which prevailed the will of a single ruler. As Bonavides and Andrade (2006, p.105) affirm, "[...] the Constitution showed two unconstrained faces: that of liberalism, and that of absolutism..." It should be stressed that this constitution ensured in Article 179, XXXIII the free primary education to all citizens.

The constitution of 1891 influenced by the North American of 1789 and its republican and federative model marked the passage of the constitutional monarchy. In this Constitution there were advances regarding political rights, it was also assured to resident aliens, the inviolability of the right to life, freedom, individual security and property. There was regression regarding the instruction that in the previous constitution was gratuitous. In this case nothing was guaranteed about education. Freedom of belief was respected and the state became legally secular. Habeas corpus was established as a guarantee of the fundamental right of freedom of movement. The Constitution of 1934 is the result of the end of the so-called first republic that had like colonelism and the "coffee policy with milk". At the international level, the end of World War I, the creation of the Mexican Constitution in 1917 and the German Constitution of 1919 became models for the new constitutions of States. The framework of this Constitution was the promotion of social, cultural and economic rights. These social rights came to affirm material equality. They ensure the right to work, health and housing. Conditions are necessary for a decent life. In terms of political rights advances were presented with the vote for greats over 18 years, including women. In addition to Habeas Corpus, which was already planned in 1891, the writ of mandamus is another express guarantee. It comes to protect certain and undeniable right against unlawful or unconstitutional acts of authority. According to Pilau (2003, p.119), the right to social security, health care for the worker and the pregnant woman, weekly rest and the right to annual leave were also highlighted. Cultural rights are promoted, primary education is free and compulsory.

The 1937 Constitution in relation to rights, on the one hand affirmed them, but on the other restricted (Pilau, 2003, p.122). Comparing the Constitutions it is observed that there were more losses than gains. Reality that is justified by the situation in which it was created, that is, daughter of an authoritarian regime, Estado Novo. Important for the history to verify a context of these, because it confirms that the Rights are results of achievements. They are not donations. With the end of the second war and the resignation of Getúlio Vargas, a new constitution was made and was enacted in 1946. It brought back the values of freedom (de jure and de facto) lost with the dictatorship of Estado Novo. The end of the war has

contributed to transformations in most of the constitutions of the countries involved. There was no other concern than the resumption of the democratic model and the defense of the rights promoted in previous letters. Innovations were brought, unrestricted access to the Jurisdiction was ensured whenever there was an injury to the individual right of the citizen. Political representation is guaranteed through political parties, plurality of parties and Fundamental Rights; primary education is compulsory and free. There is an incentive to make the country's economy focused on democratic values and promoting the worker development (Pilau, 2003, p.134). With the military coup in 1964 the rights foreseen in the constitution of 1946 were disregarded until the realization of a new constitution in 1967. It lived under a dictatorship and the Rights were left aside, or rather, the Constitution was left aside. In 1967 the Military Regime was concretized. Suspension of constitutional rights was allowed. What can be said is that the direct were presented formally but were not respected. They were right, but they were not. The rights with the Constitution were disrespected and handed over to arbitrariness. The power was the Executive. To an unsuspecting man who searches for a simple comparison of constitutional texts, he will note that the 1967 Constitution brought advances in the field of human rights. But these advances were in Law, not de facto. For in fact what happened in political, social and legal reality was the denial of all the rights that the Constitution preached. With the end of the military regime and the implementation of the Constitution of 1988, it is observed historically that the Brazilian Society has evolved and built a constitution really citizen, to paraphrase Ulisses Guimarães. It marks great advances, closing the cycle of the three dimensions of Rights: freedom, equality and solidarity. Emphasizing with regard solidarity, the issue of protecting the environment aiming to adapt and enable the integral promotion of human development. The search for the realization of Fundamental Rights is not an easy task, but the Society has been working with successes and failures in the search for the realization of what is most appropriate for human development. This reality can be contemplated by the brief portrait of the constitutions brought here. In historical moments there have been advances, then setbacks, new advances and thus the legal movement of the Brazilian State is being built. As Bonavides and Andrade (2004, 488), affirm, Brazilian constitutional history is marked by contradictions and difficulties in moving from the legal level to the reality of social relations. Each constitutional creation was a response to the political, economic, social and legal situation of the time. By the time, who made it, he was certainly confident that it would be the best that could be done.

Human Dignity and Fundamental Rights: It is observed that Human Dignity and Fundamental Rights are intertwined in a relation of double implication. On the one hand Human Dignity requires Fundamental Rights for its guarantee and effectiveness, on the other, it is the Fundamental Rights that represent the contents and, therefore, delimit the Dignity. The relationship between Human Dignity and Fundamental Rights is a direct relationship, Human Dignity without Fundamental Rights is not guaranteed and, on the other hand, Fundamental Rights are the externalization of the protection of Human Dignity. It should be emphasized that one can not confuse Human Dignity, which is a foundation, with a fundamental right (Sarlet, 2015, p.118). The fact remains that it is the foundation of Fundamental Rights.

In this context it is impossible to admit that the Fundamental Rights are devoid of any content that is not based on Dignity. This is justified because the Fundamental Rights are effective in the protection and guarantee of Dignity. One can not think of Fundamental Rights without Dignity content. The realization of Fundamental Rights is a response to the need to achieve Dignity. The realization of Fundamental Rights results in the protection of Human Dignity. Thus, the relationship that is established is so close that in the realization of Fundamental Rights, Human Dignity is effective and, therefore, non-fulfillment of Fundamental Rights, implies the non-fulfillment of Human Dignity. Fundamental Rights such as life, equality and freedom have a close relationship with Dignity. Moreover, there is no way to speak of these rights except in full. That is, the life to be considered as such needs to be dignified, otherwise it will be discussed the existential minimums, which are characterized by being "minimal", that is, it begins to establish the extent to which conditions can be reduced of life, or what limit can be established to consider life as human, and as such, dignified. The same reasoning can be established for freedom and equality. Is there "half" freedom? Or, are there "more equal equals"? That is, freedom and equality, they are in full. That is, conditions must be established not only doctrinally or legally, but materially. Thus a dignified life requires some material conditions, such as food, housing and work. Freedom also has material attributes such as the religious, sexual, and thought question, and any attempt to restrict any of these freedoms hurts Human Dignity. Likewise, - a statement that "all are equal before the law" is not enough. It is therefore true that a Dignity presents itself as a measure of Fundamental Rights, and likewise, the violation of a fundamental right is directly linked to the offense against Human Dignity.

Conclusion

The objective was to demonstrate that the positivation of Fundamental Rights starts from the idea of Human Dignity, in this way, Human Dignity is the essence of Fundamental Rights, or that the condition or action that is fundamental, indispensable, essential or essential for formulation and consequent affirmation of Fundamental Rights is the idea of Human Dignity. It has been shown that Human Dignity is present as an idea throughout human history, but its conceptualization and formulation is recent. Human Dignity is a condition of the existence of being as human. It represents the essence of what characterizes the human being in the juridical-social order. Therefore, it is the essential and fundamental element when it comes to legislative positives. The dignity of man must first be considered when establishing rights. Human Dignity imposes limits on the actions of any organism and any form of political or social organization. With the positivation of the Right and the development of Constitutionalism, Human Dignity became the foundation of

the Rights that are becoming positive in these constitutional contexts, varying from country or culture, according to the Rights incorporated in their laws. Human Dignity and Fundamental Rights intertwine. Just as the Fundamental Rights guarantee the fulfillment of Human Dignity, on the other hand, Fundamental Rights are the representation of the contents of Dignity. That is, all Fundamental Rights are provided with content of Dignity. One cannot think of Fundamental Rights without Dignity content. The Fundamental Rights respond to the need to implement Dignity as a foundation. The realization of Fundamental Rights implies, as a consequence, the protection of Human Dignity. It is presented as a measure of Fundamental Rights and the violation of a fundamental right is directly linked to the offense against Human Dignity.

REFERENCES

- Abreu, P. M. 2011. *Estado e Democracia*. v. 3. São Paulo: Conceito Editorial.
- Arendt, H. 2007. *A condição humana*. 10 ed. Rio de Janeiro: Forense universitária.
- Bobbio, N. 1992. *A era dos direitos*. 11 ed. São Paulo: Campus.
- Bonavides, P; Andrade, P. de. 2004. *História Constitucional do Brasil*. 5 ed. Brasília: Editora OAB.
- Campanhole, A.; Campanhole, H. 1992. *Constituições do Brasil*. 10 ed. São Paulo: Atlas.
- Canotilho, J. J. G. 2003. *Direito Constitucional e Teoria da Constituição*. 7 ed. Coimbra: Almedina.
- Carvalho, K. G. 2006. *Direito constitucional: teoria do Estado e da Constituição: direito constitucional positivo*. 12 ed. Belo Horizonte: Del Rey.
- Ferrari, R. M. M. N. 2001. *Direito Constitucional*. São Paulo: RT.
- Mazzuoli, V. O. 2014. *Curso de Diretos Humanos*. Rio de Janeiro: Forense.
- Mendes, G.; Coelho, I. M.; Branco, P. G. G. 2000. *Hermenêutica Constitucional e Direitos Fundamentais*. Brasília: Brasília Jurídica.
- Perez-Luño, A. E. 1995. *Derechos Humanos*. Estado de Derecho y Constitución. 5 ed. Madrid: Tecnos..
- Pilau, N. C. 2003. *Teoria Constitucional moderna-contemporânea e a positivação dos direitos humanos nas constituições brasileiras*. Porto Alegre: Livraria do Advogado.
- Sarlet, I. W. 2015. *Dignidade (da Pessoa) Humana e Direitos Fundamentais na Constituição de 1988*. 10 ed. Porto Alegre: Livraria do Advogado.
- Silva, J. A. 2009. *Comentário contextual à Constituição*. 4 ed. São Paulo: Malheiros.
- Silva, J. A. 2015 *Curso de Direito Constitucional Positivo*. 38 ed. São Paulo: Malheiros.
