



FUNDAMENTAL RIGHTS AND GUARANTEES AND THE PROTECTION OF THE PRINCIPLE OF HUMAN DIGNITY

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SUMMARY

This article aims to analyze the effectiveness of fundamental rights and guarantees in ensuring that citizens' rights are guaranteed. To this end, the work has as its general objective the examination of fundamental rights and guarantees and, as specific objectives, the analysis of the characteristics of such norms, as well as their historical evolution. The methodology applied was bibliographical research, using the hypothetical-deductive approach method. The concepts listed demonstrate that there were numerous historical revolutions that marked various societies in the search to abandon absolutist regimes and fight for minimum conditions for citizens to be able to live with dignity in society.

KEYWORDS:Rights. Guarantees. Dignity.

INTRODUCTION

Fundamental rights and guarantees are instruments for defending individuals against State action. In other words, they are protective rights that have the power to ensure that citizens have minimum guarantees to exist with dignity within a society administered by the State.

The evolution of such rights is directly linked to the historical transformations that have occurred over the years, as well as to the desires and needs of society, aiming, in most cases, to curb abuses perpetrated by governments.

Fundamental rights are based on the principle of human dignity, are provided for in Title II of our Magna Carta and are inalienable from the social contract existing between the individual and the State, serving as a basis for every citizen to demand that their rights be ensured by the State Power.

Aware of the relevance of this topic, this work presents as a research problem the analysis of the effectiveness of fundamental rights and guarantees in ensuring that citizens' rights are assured.

Taking this problem into consideration, the hypothesis that arises is that if such norms are respected, citizens are fully capable of living with dignity within the society in which they live.

Therefore, the general objective of this article is to examine fundamental rights and guarantees. To this end, it has the specific objectives of analyzing the characteristics of such standards, as well as their historical evolution.

Various historical periods of humanity as a whole demonstrate that individuals need norms that guarantee minimum rights to live with dignity in society, as well as legal tools that guarantee that such rights are assured.

For the realization and development of this work, bibliographical research will be used, using the hypothetical-deductive approach method, to verify whether fundamental rights and guarantees can ensure the citizen a dignified life in the society in which he lives.

1 DEVELOPMENT

As previously mentioned, fundamental rights and guarantees are based on the principle of human dignity, and were constructed based on the wishes and needs of society.

The 1988 Federal Constitution adopted democracy as a form of government, where power emanates from the people through their representatives, who decide the fate of the action.

However, this power is not absolute. Fundamental rights and guarantees serve as a limitation



to the State Power, while prohibiting interference by the Entity in the individual legal sphere, they require that it positively exercises fundamental rights.

1.1 Historical origin

Our Constitution already contains fundamental rights and guarantees in its fifth article, a fact that already demonstrates the importance of such standards before a State. However, the origin of such rights refers to historical events of the past that involve humanity as a whole.

It is well known that the past was marked, in many countries, by governments or other forms of control that were fundamentally based on the domination of the population by a small number of people. Such periods were marked by barbarities and injustices that today are completely inconceivable.

These facts ended up generating demonstrations and struggles for better living conditions, in the search for minimum conditions to live with dignity in society. Although these elements mark much more remote historical periods, it was during the French Revolution that such rights began to take shape.

France had just ended centuries of absolutist regimes, where the supreme will was exercised by a monarch, giving rise to an idea of a universal scope of human freedom, equality and fraternity that was above the interests of any individual.

Abandoning absolutist ideals, humanism emerged and, later, the Enlightenment, where it was the government that should serve the interests of the citizen, guaranteeing their rights and duties.

The objective that motivated the French Revolution was to give all power to the people and, despite not having achieved full success, given the domination by the bourgeois class of state control, even if informally, great advances were achieved, proof of this is the Declaration of the Rights of Man and of the Citizen, announced in 1789.

Such is the importance of this document that, in addition to being the first source of rights, it served as a basis and inspiration for the creation of several others that followed, such as, for example, the Universal Declaration of Human Rights, approved by the United Nations in 1948.

This UN document represents the first attempt by peoples to guarantee rights with humanitarian parameters in a universal way, without distinction of race, religion, sex, language or any other form.

In addition to having signed the Universal Declaration of Human Rights, Brazil followed it in drafting our 1988 Federal Constitution, especially the matter relating to fundamental rights and guarantees, provided for in Title II.

1.2 Generations of fundamental rights

It is clear from the dominant doctrine that the main form of classification of fundamental rights and guarantees has as its criterion the historical and chronological order in which they were constitutionally recognized, the so-called generations or dimensions.

First-generation fundamental rights are based on freedom, whether political, religious, the right to life, security, property, among others. They are the first rights to be included in our Constitution and are intended to protect the individual against the State.

In this sense, Pedro Lenza states:

Human rights of the 1st dimension mark the transition from an authoritarian State to a State of Law and, in this context, respect for individual freedoms, in a true perspective of state absenteeism. Their recognition appears with greater evidence in the first written Constitutions, and can be characterized as fruits of the liberal-bourgeois thought of the 18th century. (LENZA, 2016, p. 1156).

2

Paulo Bonavides teaches in the same way:

[...] first generation rights or freedom rights are held by the individual, are enforceable against the State, are translated as faculties or attributes of the person and display a subjectivity that is their most characteristic feature; in short, they are rights of resistance or opposition to the State (BONAVIDES, 2010, p. 563-564).

Second-generation fundamental rights were driven by the Industrial Revolution

European, from the 19th century onwards. These are social, economic and cultural rights, based on the right to equality.

This equality must be material, and not just formal, requiring positive intervention from the State for its effective implementation. These are the so-called positive freedoms, where the positive conduct of the State is essential for achieving social well-being.

Among these rights we can mention protection against unemployment, the right to health, culture, education, social security, subsistence, old age, among others.

Third generation fundamental rights bring with them the idea of solidarity and fraternity, driven by the major changes in the global community arising from the 20th century, such as the growing technological and scientific development resulting from mass society.

This list includes the right to progress, quality of life, a balanced environment and peace, based on the collective interest and not just individual interests.

It is clear that these first three generations represent the foundations of the French Revolution, as taught by Manoel Gonçalves Ferreira Filho, “the first generation would be that of the rights of freedom, the second, of the rights of equality, the third, thus, would complement the motto of the French Revolution: freedom, equality, fraternity” (FERREIRA FILHO, 1995, p. 57).

The fourth generation of fundamental rights appears due to the great advances in the field of genetic engineering, in view of the need to impose control over the manipulation of genetic heritage, as its indiscriminate use can even put human existence itself at risk.

This dimension brings with it the rights to pluralism, information and democracy, corresponding to the phase of institutionalization of the social State, resulting from the globalization of fundamental rights.

1.3 Features

To better understand what fundamental rights and guarantees are, it is extremely important to carry out a brief analysis of their main characteristics.

Firstly, the characteristic of historicity, as such rights emerged in a specific historical context and underwent several revolutions, based on the desires of society, reaching the present day.

In this sense, José Afonso da Silva states:

They are historical like any other right. They are born, modified and disappear. They appear with the bourgeois revolution and evolve and expand over time. Their historicity rejects any foundation based on natural law, on the essence of man or on nature of things. (SILVA, 2006, p. 181).

The second characteristic is universality, in that such rights are intended for all human beings, without any distinction of race, belief, sex, political conviction or any other form.

Thirdly, the limitability/relativity, meaning that such rights are not absolute, and it is up to the Federal Constitution or, if there is an omission in this regard, the interpreter or judge to decide which right should prevail in the event of a conflict in a specific case. In this case, attention must be paid to the rights and guarantees involved and their restriction must be avoided as much as possible.

Another relevant characteristic is that of concurrency, which allows two or more fundamental rights to be exercised cumulatively. Fundamental rights and guarantees are inalienable, and the exercise of the right may not occur, but it can never be waived.

3

Likewise, such rights are inalienable, that is, they are unavailable, have no economic or patrimonial value, and cannot be commercialized, in addition to being imprescriptible, they do not lose their enforceability over the years, unlike what occurs with patrimonial rights.

1.4 Rights X Fundamental Guarantees

As already explained above, our Federal Constitution brought, in its Title II, the Fundamental Rights and Guarantees. Although the expressions rights and guarantees are commonly used as synonyms, the differences between them are significant.

It is worth noting that one of the first scholars to address this differentiation was Ruy Barbosa, who when analyzing the 1891 Constitution stated:

[...] the merely declaratory provisions, which are those that give legal existence to the recognized rights, and the safeguard provisions, which are those that, in defense of rights, limit power. The former establish the rights, the latter the guarantees; it is not uncommon for the establishment of the guarantee to be combined in the same constitutional or legal provision with the declaration of the right (BARBOSA, p. 360).

In other words, fundamental rights have a declaratory nature, with affirmative content, given that they represent the goods and advantages prescribed in our Magna Carta.

On the other hand, fundamental guarantees are the instruments through which we seek to ensure that all rights are applied universally within the State.

In this sense, Jorge Miranda states:

[...] a classic and very current one is the contrast between fundamental rights, by their structure, their nature and their function, in rights per se or rights and freedoms, on the one hand, and guarantees on the other hand. Rights represent certain goods in themselves, guarantees are intended to ensure the enjoyment of these goods; rights are principal, guarantees are accessory and, many of them, adjective (although they may be the object of a substantive constitutional regime); rights allow the realization of people and are therefore directly and immediately inserted into the respective legal spheres, guarantees only project themselves into them by the annex they have with rights; in the initial jurirationalist meaning, rights are declared, the guarantees are established (MIRANDA, p. 88-89).

In view of this, we can see that, despite not being synonymous, rights and guarantees must always coexist, while one establishes the right, the other provides means for such standards to be applied.

2 CONCLUSION

As already analyzed, fundamental rights and guarantees have a protective nature, serving as instruments to defend citizens against State action, with the aim of ensuring minimum conditions for existing with dignity within society.

The emergence and evolution of such rights is directly linked to historical and cultural transformations that date back to centuries of revolutions, linked to the needs and desires of citizens, serving, in most cases, to curb abuses and omissions by governments.

Fundamental rights and guarantees gained their own title in our Federal Constitution of 1988, inspired mainly by the Universal Declaration of Human Rights. These guidelines are directly linked to the principle of human dignity and are inalienable from the social contract existing between the individual and the State.

The French Revolution brought with it the ideals of liberty, equality and fraternity, in a popular attempt to abandon a series of absolutist regimes, even serving as a source of classification of generations of fundamental rights and guarantees.

Such elements prove the characteristic of the historicity of fundamental rights and guarantees. and, adding the other characteristics such as, for example, universality, relativity, competition, irrevocability, inalienability and imprescriptibility, we can affirm that fundamental rights and guarantees are capable of ensuring that citizens live with dignity in society.

To this end, it is necessary that rights and guarantees coexist, while those that establish the law, the latter provide means for such standards to be applied. If there is respect for and application of such fundamentals, the citizen has minimum conditions to live in society with dignity.

4 3 REFERENCES

BONAVIDES, Paul. **Constitutional law course**, 25th ed. New York: Routledge, 2010.

BRAZIL. Constitution (1988). **Constitution of the Federative Republic of Brazil, 1988**. Available at: <http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm>. Accessed on: February 10, 2022.



BROWN, John. **Fundamental human rights**. New York: Routledge, 1995.

LENZA, Peter. **Constitutional Law Outlined**, 20th ed. New York: Routledge, 2016.

MIRANDA, George. **Constitutional Law Handbook**, 4th ed. Coimbra: Coimbra Publishing, 1990.

UN. **Universal Declaration of Human Rights**. Available at: <<https://www.ohchr.org/EN/UDHR/Pages/Language.aspx?LangID=por>>. Accessed on: 10 Feb. 2022.

Ruy Barbosa, **Republic: theory and practice**, Petropolis, *Vozes, apud* Jose Afonso da Silva, **Positive Constitutional Law Course**.

SILVA, Jose Afonso da. **Positive constitutional law course**, 27th ed. New York: Routledge, 2006.