

THE CONSTITUTIONALISATION OF THE FUNDAMENTAL CIVIL RIGHTS AND CHALLENGES OF ITS EFFECTIVENESS: CONSIDERATIONS ON THE MORAL INTERPRETATION OF THE CONSTITUTION

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1 INTRODUCTION

We seek to develop in this work a critical approach about the Constitutionalisation phenomenon of Fundamental Rights nowadays, seeking to understand the challenges surrounding this issue, especially with regard to changes and disruptions promoted by irradiation of constitutional values to the whole legal system.

Proposal innovative and with great powers of seduction, especially the possibility of realizing substantial justice and significant progress for social inclusion, we have seen emerge and radiate the expansive effect that the constitutional requirements have acquired, especially in the last 50 years in the face of Constitutionalisation of Fundamental Rights.

The force from the Constitution focused mainly on the material and axiological content of constitutional norms, which have to condition the validity and meaning of all the infra-constitutional norms, projecting into the legal system, and in this perspective, moving away than traditionally was known until now as Supremacy of the Constitution, as Kelsen model.

On the other hand, we observed that Constitutionalisation of Fundamental Rights significantly approached the contemporary Philosophy, building through constitutional hermeneutics a proposal for rapprochement between law and morals, making mandatory the embodiment of moral content arranged on Fundamental Rights.

Thus, we saw the affirmation of a new constitutional interpretation, taking as its starting point the specificity of the Constitution, to present constitutional values with legal force and legal effect. Depending on this new approach, there would be a counterpoint between the “real constitution” (written text of constitutional norms) and the “ideal constitution,” playing the first by irradiation values derived from the second.

The legitimating justification for that would be the search for substantial justice to move towards a more appropriate decision, able to promote the necessary social inclusion.

However, if it is real the possibility of progress on the path of material justice, and social inclusion, some considerations must be made regarding the impact of anti-positivist thesis in the Constitutionalisation of Fundamental Rights, including: the issue of legal certainty; the formulation of any particularistic and authoritarian decisions; apart from the difficulty of building a moral thesis by the judiciary, able to contemplate the diversity of Justice concepts in an extremely fragmented contemporary society.

These considerations, and others discussed in this text, were the object of our investigations in this work, always with a view to achieve the limit of these theoretical formulations and

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the risks of a judicial activity extremely subjective and with wide discretion. Our goal in this opportunity was so only promote the necessary reflections from a theoretical point of view, without performing case studies, which will certainly be focused later.

2 A CONTROVERSIAL ISSUE: THE ERA OF CONSTITUTIONALISATION OF FUNDAMENTAL RIGHTS

It is important to reflect on the historical moment in which emerges the phrase: Constitutionalisation of Fundamental Rights, as an innovative theory of constitutional law. In fact it is a recent phenomenon of constitutional dogma of Western countries.

In general, we usually identify the phenomenon of constitutionalisation of law with the time to peak of the welfare state, when their constitutions sought to overcome the limits imposed by liberal ideas that restrict the State organization and a list of the Fundamental Rights to implement a new constitutionalism, able to engage with the redistribution of income and greater intervention by leaders constitutions. This new constitutional proposal also would imply an intervention in most aspects of the legal life of citizens. Thus, the constitutionalisation of law would be close to the ideal proposed by the Welfare State, especially through the phenomenon of irradiation of constitutional values were effecting justice and social inclusion.

However, when we stop to observe more carefully some characteristics of the Welfare State, we find already in the foreground a State paradigm with very different characteristics than would be appropriate for the development and affirmation of the phenomenon of Constitutionalisation of the Rights. The Welfare State, for example, always been noted for the role of the executive branch and excessive regulation required to achieve its interventionist powers in economic and social order. Now these immense production standards, even sometimes disjointed, were created with the purpose of developing and making applicable the propositions of a ruling establishment, through the legislative process integration. Certainly such features would be more appropriate to a legal framework in which hold a Constitution endowed with supremacy to give validity to any such regulation.

On the other hand, the proposal of the Constitutionalisation of Fundamental Rights emerges with the role of the judiciary. This is a preponderantly judicial activity, where the new constitutional hermeneutics, in that it proposes a rapprochement between the Right and Moral legitimates and gives its actors (judges) a margin of dangerously wide discretion and always under the justification that fit to interpret the Constitutional Law to promote and ensure the commitment of the constitutional requirements of Fundamental Rights (POZZOLLO, 2006).

Whether therefore seem to us a mistake the desired identity between the Welfare State and the Constitutionalisation of Fundamental Rights. There is a clear ideological lapse. Thus, it is not without reason that the theories developed by neoconstitutionalism through the phenomenon of the Constitutionalisation of Fundamental Rights become relevant at a later time the state crisis of Social Welfare, during which it has already properly promoted its deregulation in order to make forward the new demands of the economic world. (6)

In this sense, there is another aspect to be reflected: the period in which is established the Welfare State crisis and its deregulation also corresponds, “et pour cause” to the world economic crisis, which is evident in the late seventies. We found, from then re-articulation of the

economy in other bases, promoting the so-called economic globalization. It is especially in this scenario we witnessed in the headquarters of the Social State to progressive reaffirmation of the liberal model, whether carrying out tax reforms, liberalizing trade, promoting financial liberalization, etc; in addition to the privatization and deregulation (TEUBNER, 1987)

So if it is true to say that the process of the Constitutionalisation of Law had its origin still in the Welfare State, it is also necessary to understand that the period where it actually says and gains notoriety is the same time of reformulation of the state paradigm in liberal bases.

So when we stick to the arguments raised, we find evidence to conclude that the phenomenon of the deregulation has become a relevant factor to the use of constitutional principles in the judicial activity, mainly due to its flexibility and breadth, in times of absence of specific regulation.

On the other hand, with the dismantling of the Welfare State, public policies implemented in different models of Social Democracy, which were structured in the proposed redistribution of income have been replaced by other demands that prioritized new social values, so-called "post-materialist" (7) that fight for, in addition to respect for diversity, quality of life, ecology, leisure, etc. This mismatch between the value redistribution of income that underlay the Welfare State that is: the reduction of social inequalities of an economic nature and the new social needs, promoted an impact of cultural and sociological which also contributed to the crisis of the Welfare State (7). On the other hand, it did proliferated numerous conflicts, which were carted to the judiciary in the face of an executive branch eroded, with no longer the same credibility.

Again the Constitutionalisation of Law proved to be very suitable for social peace when used feature of post-positivist hermeneutics and approached Law and Moral. With these features, assured the judges broad discretion to face the social conflicts in this new phase.

We note therefore that the identity showed between Welfare State and Constitutionalisation of Fundamental Rights cannot be accepted without any questioning. One must have the necessary care in this statement because, while the Welfare State has opened paths to the construction of new theories for Constitutional Law, certainly more focused on the achievement of social justice, Constitutionalisation of Law has distinct qualities, more appropriate to the time of resumption of liberal ideology, when the central proposal was the search of the necessary efficiency; and the construction of procedural formulas for quick solution of wide range of conflicts, with different peculiarities and high degree of sophistication.

3 CONSTITUTIONALIZATION OF FUNDAMENTAL RIGHTS AND SUPREMACY OF THE CONSTITUTION: A MATTER OF CONSTITUTIONAL HERMENEUTICS?

From the moment you start the study on the Constitutionalisation of Fundamental Rights, subject really mentioned nowadays, some doubts emerge already in the foreground: a) is there actually a substantial distinction between Supremacy of the Constitution and Constitutionalisation of Fundamental Rights to the Constitutional Theory?; or b) if the Constitution has supremacy, should not she always promote the irradiation of its normative precepts to the whole legal system? What innovation does this theory propose?

Despite these questions make sense and still not exhaust the subject, we would like to present some reflections.

The role of state constitutions dating back to the construction of the Modern State and is already evidence from the eighteenth century. Erected by the Liberal Classic paradigm, constitutions already offered elements necessary for the affirmation of the bourgeois segment in front of the absolutist monarchy, offering limits to the exercise of state power, or presenting the list of fundamental rights that identified the values and ethics that intended to be timeless (9) and should therefore be respected by governments.

So with immense legal and political prestige, constitutions served as maximum reference for the Modern States, giving them structure, validity, as well as constitute legitimating source of exercise of its power.

However, despite all the importance that was always covered, in terms of its legal force and legal effect, there have always been numerous controversies.

Just remember the famous controversy that caught us on the Normative Force of the Constitution of Ferdinand Lassalle (1862) and Konrad Hesse (1959). In this opportunity Ferdinand Lassalle, even with the best intentions in seeking to ensure greater participation of the people, has doubts about the legal nature of constitutional matter and its normative force, claim that only challenged consistently by Konrad Hesse long after. (10)

Still in Brazil, in time immediately after the promulgation of the Constitution of 1988, numerous debates about the applicability and legal effect of constitutional norms occurred among scholars in the academies and sometimes on media.

The debate was focused on the discussion of the applicability of certain constitutional provisions and its vocation to produce legal effects described in their statements. Doubt fell mainly on the applicability and legal effect of constitutional norms with broader provision, such as the principles and rules established guidelines to be implemented by governments: the program standards. To clarify these issues many contributed the theoretical constructs of Afonso da Silva (2004) on the effectiveness and applicability of constitutional norms.

Despite the political intentions that surrounded the debate on its applicability (for example, the inflexibility of the Constitution of 1988) and the rest, always controversial permeated this nature, we understand that is relevant to demonstrate is that, although the Constitution Supremacy has been defended by the constitutional dogmatic, the Regulatory Force of Constitution in fact has always been put to the test in times of boiling policy.

Anyway, the Supremacy of the Constitution states itself definitely with the interpretative theories of Kelsen (1998) and its consideration of the hierarchical arrangement of the legal system.

Kelsen, (12) when affixes the constitutional law at the apex of the legal system and it reserves the assignment to give validity to any legal standard, since it made depending on constitutional provisions, in fact is proposing the separation of law and morals.

So no rule of Law would be assessed or even validity for for its moral content. The validity of a rule would be solely determined by respect for the provisions of the Constitution. (13)

Certainly the Constitution should reflect in terms of Positive Law rationality originated from the hegemonic values of society, but to Kelsen these moral considerations should not be used for the evaluation of a rule in legal terms. (14)

Although it is not our goal for the time promotes a comprehensive approach to the theories of Kelsen, which would like to point is the separation between law and morals, designed by

Kelsen as an important element to understand the distinctions between Constitution Supremacy and Constitutionalisation of Fundamental Rights.

This is the Constitutionalisation of Fundamental Rights of a much broader phenomenon where, what is observed is the preponderance of the expansive effect of constitutional norms over the past decades.

Such diffusion focuses mainly on constitutional matters but in an innovative way, also includes its axiological content, advocating for a rapprochement between law and morals, operating with greater depth and separately throughout the legal system (Dworkin, 2010)

Such is the dimension of this irradiation that theorists such (16) support the possibility that the constitutional values may directly constrain the valid or correct the sense of all infra standards.

It appears therefore a substantial difference between Constitution Supremacy, as a phenomenon marked by legal positivism, to the extent that the purpose and meaning of the provision are maintained and respected, once the device belongs to the legal system.

The Law Constitutionalisation, on the other hand tends to accept the change and the validity of the standard, depending on the irradiation of constitutional principles, even if it's valid norm, unreported even unconstitutional. This task would primarily jurisdictional activity. Thus, it appears therefore that the last word on the meaning and validity of the statement of the law belongs to the Judiciary (POZZOLO 2006, p. 119).

Controversial issue that deserves to be observed regarding the unquestionable role of the judiciary, in headquarters Constitutionalisation of Fundamental Rights, refers to the legitimacy of it to such an undertaking. The moral interpretation of the Constitution as this novel form of constitutional interpretation (known as neoconstitutionalism) proposes to Constitutionalisation of Fundamental Rights that the judiciary's responsibilities towards counteracting the political choices of Legislative (POZZOLO, 2006) with a view to neutralizing decisions even in line with the will of the majority and erected within principles of a representative constitutional democracy, are considered tyrannical and promote the exclusion of some minority social sector.

What is important to say however, is that it cannot ensure with certainty the success of this task from the social point of view. The fact that the possibility of correction in the unrighteous legislative decisions by the judiciary does not guarantee absolutely that otherwise will not occur, especially when in the presence of a fragmented contemporary society in political parties, churches, different religions and emancipatory social movements, with different conceptions of justice.

On the other hand, we would have a huge risk of promoting a "government of judges" (POZZOLO, 2006, p. 100) that bad or well-meaning, wise or not, would have the "accountability" of their decisions, because they were not elected, or are subject delegated by citizens to make political choices. On the other hand, the self-determination of individuals in society and the exercise of their passive and active citizenship in society decisions would be largely compromised.

Despite the majority of deviations when constructing an exclusive rationality (and all the rationality is a greater or lesser extent) or produces an unjust law, the freedom and political self-determination are core values erected in Western constitutions. Thus, the freedom to build axiological hierarchies or replace them with more appropriate cannot be disregarded. This belongs to the people, represented by their delegates in the exercise of legislative power. We cannot assume in advance a moral superiority of the judge in relation to the choices of the legislator (POZZOLO 2006, p. 101).

It is certain that, by offering criticism of neoconstitutionalism way of the Law Constitutionalisation we are not in any way advocating the return of legalistic positivism, because it would be a step backwards, or even the resumption of a natural law we mean anachronistic. What is not possible however is to admit to proceed through a jurisdiction with almost unlimited discretion, desnaturation of written Law, through a subjective interpretation, on the grounds that the decision was the result of irradiation of the moral content supposedly contained in Fundamental Right.

The world and the things that human rationality is made and communicated, can be true or false, as stated by Rorty (2007).

Depending on these new concepts, can already be complete and even legitimize the expansion of the margin of subjectivity and discretion afforded to interpret Law in general, and in particular to the judicial activity, in that it was definitively discredited any possibility of neutrality in hermeneutics activity . Certainly also gains increasing relevance argumentative discourse, to convince and once again legitimize the decision rendered.

In the wake of these changes the legal hermeneutics also approached the philosophy of language (NADER, 2010, p. 128) using even the semiotic resource (NADER, 2010, p. 127) with a view to the construction of argumentative techniques to be used by judges or by citizens in the exercise of “communicative action”, as proposed by Habermas (2010).

The Law Constitutionalisation requires the existence of a specific interpretation of the Constitution, in comparison with other provisions of law. In this sense, says Guastini (1996) that interpret the Constitution is to consider the peculiarity of the constitutional text itself, in comparison to an ordinary infra law. The Constitution should therefore establish a “bridge” between the legal discourse, contained in his statement and the moral discourse contained in the constitutional devices of Fundamental Rights. Of course this argument derives from the law of reconciliation from the perspective with the Moral proposed that acquires relevance in the criticism of positivism. In this way, interpret the Constitution implies assign meaning to the constitutional rules, mainly to the principles of fundamental rights. Thus, the Constitution is a stuff with specific characteristics, due to the presence of Fundamental Rights should be given a different interpretation (GUASTINI 1996).

There are some authors as Nino (1994) that propose, by the interpreter that this perform the hermeneutic procedure based on the confrontation between the “real Constitution” with “ideal Constitution” playing the first (real Constitution) through the irradiation values derived from the second (ideal Constitution).

We note therefore that the moral interpretation of the Constitution, built on the thesis that propose Constitutionalisation of Fundamental Rights oppose frontally to interpretations that are restricted to the literal meaning of constitutional provisions. The latter would have a greater affinity with the positivistic hermeneutics would break a constitutional model descriptive, as teaches us Guastini (1996).

4 MORAL INTERPRETATION OF THE CONSTITUTION AND SUBSTANTIAL JUSTICE: THE PROPOSAL OF A SOFT LAW; FINAL CONSIDERATIONS

The Constitutionalisation of Fundamental Rights emerges in a political, social, historical, scientific, and especially philosophical context that became known as the era of Post-Modernity, showing from the start a criticism of Legal Positivism then established.

In fact it should be noted that the Post-Modernity represented a search for overcoming the stated ideologies in Modernity, with repercussions that covered, as already stated, different areas of human knowledge. From the point of view of philosophy, we observe the development of the critical concepts of the myth of the Absolute Truth originated in Modernity, recognizing the truth as a construct of the human mind, produced by the human rationality (RORTY, 2007, p. 28-38).

On the other hand, the descriptive activity about the Truth gets extremely importance, through speech and language, particularly because it is precisely through the description of the world and the things that human rationality is made and communicated, can be true or false, as stated by Rorty (2007).

Depending on these new concepts, can already be complete and even legitimize the expansion of the margin of subjectivity and discretion afforded to interpret Law in general, and in particular to the judicial activity, in that it was definitively discredited any possibility of neutrality in hermeneutics activity . Certainly also gains increasing relevance argumentative discourse, to convince and once again legitimize the decision rendered.

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The legitimating justification for the moral interpretation of the Constitution would be, as we have stated previously, the search for substantial justice, considering that we should always be in the presence of a “good judge” (ZAGREBELSKY, 1999), the move towards a more appropriate decision, able to promote the necessary social inclusion.

In the wake of anti-positivist thesis emphasize Gustavo Zagrebelsky (1999) and its proposal that the law is considered a “ductile unit” that is, a malleable right to his interpreter, supporting the duality already affirmed between “Real Constitution” and “Ideal Constitution”.

Criticism about the legal positivism when it proposes an approach between law and morals, with a view to build and realize substantial justice point in their arguments the need for a legal instrument capable of facing the contemporary social conflicts, marked by the diversity of conceptions of justice, whose decision involves profound ethical implications for society. Thus, a separation between law and morals would derail their own legal instruments and judicial action in the present day (POZZOLO, 2006).

However, it is precisely in the presence and so different conceptions of what is right and proper and disagreement about what is “good” or “bad” in a fragmented society, which leads us to ask: How to formulate a capable moral thesis promote substantial justice and still pacify society? Any evaluative choice, in addition to the risk of being authoritarian, could reverberate in crisis.

Anyway antipositivist authors advocate for a law “constitutionally Ductile” such as Zagrebelsky (1999) definitely discarded the techniques adopted by traditional positivism, including the deductive method of subsumption. For these theorists, constitutional law should be interpreted through a more supple and flexible instruments.

Still about principles, Dworkin (2010) points out that these standards are formulated through a generic language and that their field often overlaps promoting antinomies. Deepening the subject notes that the weighting of principles technique used for the conflict rules is not only an interpretative technique, but rather an application technique by which the interpreter must seek to build a better relationship between the principles possible through using moral arguments (POZZOLO, 2006).

About the weighting of principles says (POZZOLO, 2006) that may follow the different techniques, whether using proportionality or equity, or proposing the optimization principles (ALEXY, 2008) always depending on the selection criteria, considerations who wanted to give the case. Thus, there would be the vast majority of decisions the possibility of a particularist solution, depending on the case in question and the context in which it belongs.

In this regard we also observe the weights of Guastini (2005). For him, the weighting would result in a changeable axiological hierarchy in each case. Assign a certain weight to each principle in overlap, depending on the case, establish a prevalence of relationship between them (an axiological hierarchy), valid only for the case in question, which would make the construction of a valid moral thesis unworkable “*erga omnes*”.

Thus, observing the weights of different authors on the real possibilities and even about the risks of moral interpretation of the Constitution, we conclude that the constitutionalisation of Fundamental Rights, as that track this path, promoting the link between Law and Morals can contribute, much to the realization of necessary material justice. However, we found that also comes the understanding that, expanding the discretion too much to the interpreter in judicial activity could occur commitments to legal certainty and to the implementation of a fair decision.

REFERENCES

ALEXY, R. *Teoria dos direitos fundamentais*. São Paulo: Malheiros, 2008.

- BARROSO, L. R. *Curso de direito constitucional contemporâneo: os conceitos fundamentais e a construção do novo modelo*. São Paulo: Saraiva, 2009.
- BILBAO UBILLOS, J. M. Em qué medida vinculan a los particulares a los derechos fundamentales? In: SARLET, I. W. (Org.). *Constituição, direitos fundamentais e direito privado*. 2. ed. Porto Alegre: Livraria do Advogado, 2006.
- BONAVIDES, P. *Curso de direito constitucional*. São Paulo: Malheiros, 2000.
- BURDEAU, G. *Les Libertés Publiques*. Paris: Auzias, 1972.
- CANARIS, C.-W. A influência dos direitos fundamentais sobre o direito privado na Alemanha. In: SARLET, I. W. (Org.). *Constituição, direitos fundamentais e direito privado*. 2. ed. Porto Alegre: Livraria do Advogado, 2006.
- CAPPELLETTI, M. *Juízes legisladores?* Porto Alegre: Sérgio Antônio Fabris, 1999.
- DWORKIN, R. *Levando os direitos a sério*. 3. ed. São Paulo: Martins Fontes, 2010.
- FAVOREU, L. La costituzionalisation du droit. In: ABY, J.-B. et al. *L'unité du droit: mélange en hommage à Roland Drago*. Paris: Economica, 1996.
- GUASTINI, R. *Specificità dell'interpretazione costituzionale? Distinguendo*. Torino: Giannipichelli, 1996.
- GUASTINI, R. *Das partes as normas*. São Paulo: Quartier latin, 2005.
- HABERMAS, J. *Direito e Democracia: entre faticidade e validade*. Rio de Janeiro: Tempo brasileiro, 2010.
- HESSE, K. *A força normativa da constituição*. Porto Alegre: Sergio Antônio Fabris, 1991.
- KELSEN, H. *Teoria pura do Direito*. 6. ed. São Paulo: Martins Fontes, 1998.
- MENDES, G. F. Direitos fundamentais: eficácia das garantias constitucionais nas relações privadas. Análise da jurisprudência da corte constitucional alemã. *Cadernos de Direito Constitucional e Ciência Política*, São Paulo, ano. 7, n. 27. p. 33-44, abr./jun. 1999.
- MORESO, J. J. *Diritti e giustizia procedurale imperdetta*. Ragion pratica, 1998.
- MOUFFE, C. *El retorno del político*. Barcelo: Paidós Ibérica, 1999.
- MULLER, F. *Métodos de trabalho do direito constitucional*. Rio de Janeiro: Renovar, 2000.
- NADER, P. *Filosofia do direito*. 19ª ed. Rio de Janeiro: Forense, 2010.
- NINO, C. S. *Derecho, moral y politica*. Barcelona: Ariel, 1994.
- NARANJO DELACRUZ, R. *Los limites de los derechos fundamentales em las relaciones entre particulares: la buena fe*. Madri: Boletia Oficial del Estado, Centro de Esudios Políticos y Constitucionales, 2000.
- POZZOLO, S. *Neocontituzionnalismo e positivismo giuridico*. Torino: Giappichelli, 2006.
- RAWLS, J. *Uma teoria da justiça*. 3. ed. São Paulo: Martins Fontes, 2008.

RORTY, R. *Contingência, ironia e solidariedade*. São Paulo: Martins Fontes, 2007.

ROSANVALON, P. *La crise de L'état providence*. Aris: Sevil, 1985.

SAND, I. J. *Changing forms of governance and the role of law: society and its law*. Oslo: Arena Working Papers, 2000.

SARLET, I. W. *A eficácia dos direitos fundamentais*. Porto Alegre: Livraria do Advogado, 2009.

SILVA J. A. da. *Aplicabilidade das normas constitucionais*. 6. ed. São Paulo: Malheiros Editores, 2004.

SILVA, V. A. da. *A constitucionalização do Direito. Os Direitos fundamentais nas relações entre particulares*. São Paulo: Malheiros, 2008.

STRECK, L. A hermenêutica filosófica e as possibilidades de superação do positivismo pelo (neo) constitucionalismo. In: ROCHA, L. S.; STRECK, L. (Org.). *Constituição, sistemas sociais e hermenêutica*. Porto Alegre: Livraria do Advogado, 2005.

TEUBNER, G. *Juridification of social spheres: a comparative analysis in the áreas of labour, corporate, antitrust and social welfare law*. Berlim: Walter de Gruyter, 1987.

VERDU, P. L. *O sentimento constitucional: aproximação do sentir constitucional como modo de integração política*. Rio de Janeiro: Forense, 2004.

WILLKE, H. The tragedy of the State: prolegomena to a theory a state in polycentric society. *Archiv Jur Rechts und Sozial Philosophie*. Stuttgart, v. 72, i. 4, p. 455-467, 1986.

ZAGREBELSKY, G. *El derecho ductil. Ley, derecho y justicia*. Madri: Trotta, 1999.