

## Foundation, concept, and characteristics of human rights<sup>1</sup>

### *Fundamento, noción y caracteres de los derechos humanos*

### *Fundamento, noção e características dos direitos humanos*

Armando Luis Blanco Guzmán\*

#### Abstract

Ensuring the human rights of each individual is the path to achieving the human rights of all. The importance of this, in the context of a democratic society, can be verified by observing how multilateral judicial systems have addressed the multiple cases in which States have been denounced as harmful agents. Unfortunately, individual violations of human rights, which continue to be tolerated as normal today, are the origin of what tends to increase in frequency and number of victims in the future, leading modern democratic States down a path where they distort and set aside their essential function of guaranteeing these rights for their population. Thus, this work seeks to clarify the foundation of this type of right, its notion and characteristics, so that the reader has a clear idea of its scope, as well as what will additionally serve as a tool to clearly identify when there is a transgression of these. In terms of human rights, it is necessary to claim and seek reparations in the courts, no matter how many times, as a society, we must reinforce the basics if there are still individuals in need and crying out for justice regarding their most basic rights.

**Keywords:** Human rights. Democracy. Rule of Law.

#### Resumen

*Asegurar el disfrute de los derechos humanos de todos es el camino para lograrlo con los derechos humanos de todos. La importancia de esto en el contexto de una sociedad democrática se evidencia al ver cómo los sistemas judiciales multilaterales han abordado los múltiples casos en los que los Estados fueron denunciados como agentes lesivos en sus sentencias. Desgraciadamente, las violaciones individuales de los derechos humanos, que hoy siguen siendo tolerados como normales, están en el origen de lo que en el futuro siempre tiende a aumentar en frecuencia y número de víctimas, llevando a los Estados democráticos modernos a un camino en el que se tergiversan y dejan de lado su función de garantes esenciales de estos derechos en favor de su población. Este trabajo busca aclarar el fundamento de este tipo de derechos, su noción y características, para que el lector tenga una idea clara de su alcance, lo que adicionalmente servirá como herramienta para identificar claramente cuando existe una transgresión de los mismos. En materia de derechos humanos, reivindicarlos y buscar reparación en los tribunales, no importa cuántas veces como sociedad debemos hacer valer lo básico si aún existen personas que necesitan y claman por justicia en sus derechos más elementales.*

**Palabras clave:** Derechos humanos. Democracia. Estado de derecho.

#### Resumo:

*Garantir o direito dos direitos humanos de cada um é o caminho para alcançá-lo com os direitos humanos de todos. A importância disso, no contexto de uma sociedade democrática, pode ser verificada ao ver como os sistemas judiciais multilaterais têm dado tratamento em seus julgamentos aos múltiplos casos em que os Estados têm sido denunciados como agentes nocivos da mesma. Infelizmente, nas violações individuais dos direitos humanos, que hoje continuam sendo tolerados como normais, estão a origem daquilo que no futuro tende sempre a aumentar em frequência e número de vítimas, conduzindo os Estados democráticos modernos a um caminho onde desvirtuam e põem à parte a sua função essencial de garantia destes direitos a favor da*

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\* Doctor en derecho. Profesor de postgrado de la Universidad Monteávila, Caracas, Venezuela.

Miembro de la Asociación Mundial de Justicia Constitucional. Orcid: <https://orcid.org/0009-0003-8318-1643> E-mail: [albg74@gmail.com](mailto:albg74@gmail.com)

*sua população. Assim, este trabalho procura clarificar o fundamento deste tipo de direito, a sua noção e características, para que o leitor tenha uma ideia clara do seu alcance, bem como o que servirá adicionalmente como uma ferramenta para identificar claramente quando existe uma transgressão destes. Em termos de direitos humanos, é necessário que reivindique-se e busque-se reparação nos tribunais, não importando quantas vezes, como sociedade, devemos reforçar o básico, se ainda houver indivíduos necessitando e clamando por justiça em seus direitos mais básicos.*

**Palavras-chave:** Direitos humanos. Democracia. Estado de Direito.

## 1 Introduction

As the Inter-American Court of Human Rights pointed out in its judgment No. 127, handed down on June 23, 2005, in the case of *Yatama v. Nicaragua*, democracy, juridicity and human rights have a triadic relationship in which each one complements each other and acquires meaning in terms of the others.

This is so, since legality is the normative framework according to which the democratic State is created and organized, which, as Rodríguez-Arana (2006, p. 207) argues, finds in human rights the very essence of the constitutional regime.

The foregoing is based on Article 1 of the American Convention on Human Rights, which establishes the following:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure the free and full exercise of those rights and freedoms to everyone subject to their jurisdiction, without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, economic position, birth or any other social condition.

On the basis of that article, Judgment No. 4 handed down by the Inter-American Court of Human Rights on July 29, 1988, in the case of *Velásquez Rodríguez v. Honduras*, stated that, from the provision transcribed, it follows that the first two obligations of the rule of law are to respect and guarantee the rights and freedoms recognized in the Convention as inviolable attributes of persons and as legitimate purposes of the exercise of power. which "implies the duty of the States Parties to organize the entire governmental apparatus and, in general, all the structures through which the exercise of public power is manifested, in such a way that they are capable of legally ensuring the free and full exercise of human rights."

Hence, Molas (1998, p. 47) states that we call the rule of law "only that which guarantees the full exercise of human rights", that is, that which recognizes and safeguards their validity through the obligatory, non-extendable and inalienable development of its powers.

From the above, it is evident that the issue of human rights is a matter of permanent

relevance for the legal world, for the social sciences and for the citizenry. Therefore, the purpose of this paper is to reflect on the foundation, concept and main characteristics of human rights.

## 2 Basis of human rights

As we stated in the introduction, human rights are the "fundamental guides of the Constitution" (Nieto, 1993) and this shows that they are not the result of positive law, but rather constitute the fundamental and informing ideas of the rule of law.

Thus, as he rightly points out (Combellas, 1990), they are "prior to the State", since they serve as "guides to the constituent power in its creative activity" (Bidart Campos, 1983, p. 277).

In other words, they are the foundations of the constitutional regime and owe their recognition to the overcoming of the absolutist forms of the State and with it, to the acceptance that individuals are not paternalistically subject to a State that has the power to recognize or not certain rights, but that each one enjoys independence in the realization of his or her destiny and consequently, of the freedom to occupy in society the place to which he can reach according to his aspirations and capacities.

In fact, abstracting from the historicist vision that relativizes human rights according to the historical moment, we can affirm that they respond to the transmutation of the absolute forms of the State (conceived as means of domination and therefore, as that which suits the strongest), towards a form that has respect for human dignity as its goal. being obliged to consider and protect the human being in his own values and in his autonomy, with which the individual should not be given impersonal treatment, even when this occurs based on good intentions.

This transmutation, although it does not have an absolute foundation, did find in natural law one of its first theoretical bases. This was stated by Zagrebelsky (García Figueroa, 2004, p. 236) when he argued that "human rights have a natural law filiation", according to which they are part of natural laws that have been granted by divine grace (eternal law of Thomas Aquinas) and therefore, should not be ignored by men.

However, the scientific development of the legal discipline and the intention of its operators to separate law from religion, gave rise to a modern vision, according to which rights do not have a supernatural origin, but an anthropological one. In fact, at present metaphysics is not used to respond to the origin of rights, but reference is made to the social and rational nature of man, to explain that rights are the result of experiences, analysis and, in general, of a social

paradigm that revolves everything humanly important around people and translates all that set of values into a series of principles-faculties. which are considered necessary for their well-being and which, consequently, become part of the open catalogue of human rights.

Haeberle (cited by García De Enterría, 1985, p.101), explains it as follows, "human rights do not necessarily imply the recognition of a natural right, but are based on the recognition of an open space that makes possible the development of ideas". Therefore, they are the expression of a <thinking of possibilities>, of a <thinking of alternatives> and therefore, they are a creation of the human intellect, a philosophical construct that responds to historical events, interests and technical transformations (among other factors), which have led to the recognition that there are faculties that are "essential for the development of people" (Bronfman, 1998, p. 17) and that therefore constitute the bases of the legal-political systems that advocate human dignity, among them, the constitutional State.

For this reason, Gozaini (1995, p. 17) affirms that human rights are "*supra-positive*", that is, they constitute the fundamental and informing ideas of the rule of law. Therefore, they are one of the fundamental legal principles that inform the rule of law.

### **3 Notion of human rights**

As Lösing (2005, p. 64) argues, human rights "are not a framework that can be defined with absolute exactness". Rather, they are an open clause where all those faculties necessary for the innocuous development of the personality have a place.

In other words, human rights are a guarantee of individual respect that, as García de Enterría (1985, p. 47) stated, "tend to ensure the free development of people" and therefore allow their self-determination.

Thus, human rights are the definition of a space that encompasses everything that one person can do without affecting another and, therefore, they are also conceived as the vehicles that allow innovation in our legal spheres and thus enable us to act according to our own criteria.

Hence, Aragón (2001) conceives them as "the set of public freedoms essential for the development of the person" and therefore, they are not a *numerus clausus* expression of the positive legal system, but a guarantee of the full development of the personality.

Indeed, human rights do not respond to a catalogue of situations prescribed in the legal system, but rather constitute an expansive and growing idea that encompasses "everything necessary for the development of a constitutional life" (Bronfman, 1998, p. 17).

That is, that "everyone lives according to their aspirations and capacities" (Molas, 1998), which guarantees the self-determination of the person and at the same time, the benefits that the State must guarantee, within the framework of social rights, to improve people's living conditions.

Certainly, human rights are not exhausted with the self-executive rights that derive from the principle of freedom, but extend to benefit rights which, as Brewer-Carias(1996, p. 43) states, are the result of the industrial revolution and with it, of the social crisis that required the administrative functions of the State to be increased. in order to give rise to a new category of rights designed to improve the material conditions of each person through the provision of universal services that are considered essential for all.

In other words, the need to guarantee a humanly dignified existence (Durante, 2005, p. 99) led the post-industrial revolution State to assume inalienable performance tasks that aim to ensure that all people, regardless of their economic position, have access to essential services and with this, can fully develop their aspirations and therefore, his personality.

Hence, Lasalle's affirmation (cited by Durante, 2005), according to which the birth of social rights freed human beings from misery and has served as an instrument of social transformation, since it imposed on the State the duty to develop a series of essential activities so that people have access to activities such as health or educational services (among others).

However, contrary to what primitive or revolutionary socialism advocates, the recognition of social rights does not undermine the rights of freedom, equality or property and therefore does not intend to transform the structure on which these rights are developed, since the expansive and progressive character that informs human rights, It implies that the recognition of new rights must not undermine those that have already been recognized.

In fact, the incorporation of social rights into the catalogue of human rights does not advocate the reduction of rights postulated by "Marxist collectivism" (Haouriou, 1927, p. 113), but the addition of benefit rights to the so-called rights of freedom, in order to promote well-being and improve people's living conditions.

In other words, social rights are not intended to lead the state toward primitive socialism, nor are they intended to transform the state into the owner of the means of production. Nor should they be seen as a promotion of egalitarianism (similarity of material conditions, to the detriment of the capacity and aspirations of each person), but as a guarantee of equality (equal rights, including benefits and therefore, equal opportunities for the development of the personality, according to the freedom of each person).

In other words, benefit rights are integrated into human rights without reducing them or

affecting the rights to freedom, equality and property, since in accordance with the principle of interdependence of human rights referred to above, there is no hierarchy among rights and therefore all must be protected and guaranteed equally.

If the industrial revolution and with it, the dizzying development that society has had, gave rise to the recognition of a series of benefit rights that imposed real obligations on the State, the current realities have given rise to the recognition of the so-called solidarity rights, that is, supra individual contexts that respond to the need to promote and raise people's standard of living within a broader context than the personal one.

These are rights that transcend the individual sphere of individuals and should therefore not be observed as particular or personal guarantees, but as rights that correspond to the entire population, considered as a whole. That is, as a series of principles that are not individualizable, but are designed for the well-being of society.

Peces Barba (1999, p. 188), refers to these rights as those that tend to "reduce the conditions of poverty, scarcity and, in general, the circumstances that hinder the exercise of the right to a constitutional life". This presupposes that the State must provide spaces conducive to the harmonious development of society and with it, the improvement of housing conditions, infrastructure, services, green areas, environment, etc.

In this context, third-generation rights are based on the idea of sustainable human progress that provides conditions of good living for people, but that, in the same way, guarantees that the use of natural resources is done in a responsible way with the environment and other species.

Hence, they tend to the consolidation of a habitat where human needs can be satisfied in a sustainable way.

## **4 Characteristics**

From the above, we can deduce as the first sign of human rights, their pre-existence to the legal-political organization of society, that is, as Combellas (1990) states, they are "prior to the State" since they guide the constituent power in its creative activity and consequently, constitute the guide on which a form of State is built that aims to protect them and guarantee their enjoyment.

In effect, human rights are the starting point of the entire organizational and functional structure of the constitutional State and therefore, in the words of Bidart Campos (1983, p. 277) they are a kind of "supreme and legitimizing instance of power". Hence, the master González

Pérez, quoting De Castro (1957, p. 45) conceives them as "the fundamental and informing ideas of the legal organization of the nation", which shows that they are also superior to it, since they are part of the "higher plane of legality" (Souza, 2001, p. 173) that guides the constitutional State.

Thirdly, there is their enunciative nature, that is, they cover all the dimensions of human endeavor; that is, they do not constitute an expression of positive law or, in other words, they do not owe their existence to the recognition made by the legal system of them. Rather, they are a guarantee of freedom, according to which each person is recognized equally as having the full capacity to self-determine his or her conduct and, consequently, to do whatever he or she pleases, provided that it does not adversely affect another legal sphere.

In this way, the enunciativity responds to the fact that fundamental rights are presented as an infinity of possibilities that are not foreseeable by the legislator and hence, that everything that is part of the free and innocuous development of the personality, must be considered a human right.

For this reason, theoretically it does not matter whether human rights are exhaustively provided for in the Constitution, since enunciativity does not presuppose the existence of a constitutional norm to give effect to a fundamental right.

Of course, the Fundamental Texts preserve what Gozaini (1995. p. 88) recognizes as a "legal tradition" that tries to give a normative foundation to what in fact exists, since in our social realities it is extremely difficult to guarantee rights, even having an exhaustive catalog of them, which is the case of fundamental rights, that is, of human rights expressly recognized in the Constitution.

Then, inextricably linked to enunciativeness, is the fourth fundamental feature of human rights, namely, the principle of progressivity, that is, the evolutionary aspect that informs fundamental rights and according to which their recognition, protection and treatment must tend to expand.

Thus, progressivity, together with enunciativeness, represents the overcoming of a static or immutable vision of rights, to advocate that public freedoms are by nature expansive and that consequently, they tend to expand and in no case to be reduced.

Indeed, the general theory of human rights advocates raising people's standard of living, which means promoting the expansion of public freedoms to the extent of the aspirations and capacities of each person and the development of society itself.

I think it is useful to explain the principle of progressivity through the example of a wall where each brick represents a fundamental right. The bricks of the lower part of the wall are

the rights of the first generation (to which reference will be made later) and on them, the bricks that represent the rights of the second generation have been erected and in turn, on these, those of the third and so on, expanding the rights and raising the conditions of life. Our wall grows with the addition of more bricks and the robustness of the whole depends on the integrity of each brick, as is the case with our legal spheres, where each of the rights that compose it must be safeguarded.

Fifthly, there is the principle of universality, according to which (according to a Western vision) even when human rights are not recognized by all States, they must be recognized by the rule of law as faculties common to all people and therefore, they must be safeguarded without discrimination and under conditions of equality.

Certainly, the theory of the universality of human rights does not ignore the fact that not all States guarantee the enjoyment and safeguarding of fundamental rights, since in accordance with the principle of self-determination of peoples, there are regressive political models that exercise sovereignty under the conditions described by Bodin (1959) and Maritain (cited by Bars, 1963, p. 52), that is, in absolutist conditions that consider rights as posterior and inferior to the State, since it is the State that grants or creates them in a gracious and discretionary manner in the terms of positive law.

Thus, in the light of these totalitarian forms of state, one might erroneously conclude that universality is not an essential or primary quality of fundamental rights, since they are not recognized everywhere. However, universality does not postulate that human rights are recognized by all States, but that for the constitutional State, all people equally enjoy the same fundamental rights.

In this way, it is presented as a theoretical element that has made the indiscriminate enjoyment of human rights viable and that even allows recourse to international jurisdiction when States violate them and then fail to protect or provide comprehensive reparation.

At the same time, it is a principle that has guided the evolution of discriminatory regimes towards models of a guarantee-based nature, where universality is recognized "as an effect of equality" (Wolff *apud*. Gettell, R., 1937), in that all people enjoy the same freedom of personality development as a cardinal and basic presupposition of a constitutional life.

As Bilbao (1997, p. 398) points out, universality is "one of the bases of the general theory of human rights", on which the balance of legal situations is postulated and hence its essentially relational character, according to which discrimination is not possible. That is, the differentiation that is based on a negative prejudice by virtue of which the members of a group are treated as beings who are no longer different but inferior (in certain aspects at least). The

reason for discrimination is more than unreasonable, it is odious, and in no way can it be accepted because it is humiliating for those who suffer from such marginalization.

Sixthly, human rights are inalienable, that is, proper insofar as they are an inherent part of the person and of the exercise of personality. For this reason, they are inalienable, both from the objective perspective, as essential elements of the legal system (which due to progressivity should not be ignored), as well as from the subjective perspective, according to which, regardless of whether they are not being effectively developed at a given time, they are always available to be exercised by the holder.

## 5 Conclusions

The above considerations present human rights as the *raison d'être* of the rule of law and, at the same time, as a guarantee of individual respect that, on the one hand, enables the development of the personality and, on the other, guarantees peaceful coexistence, since, as Molas (1998) argues, "everything that has not been prohibited can be done" because it does not constitute an act harmful to the rights of another person.

In such a way that they are the recognition that life is an open path to independence and that its future obeys the aspirations and capacities of each person, which, in the words of Castillo Alonzo (1932, p. 248), is equivalent to the idea of human sovereignty and lies in the capacity that each individual has to make his or her destiny.

Therefore, it is a concept that is linked to respect for the legal spheres and to the idea that each person lives according to his or her expectations, risks, benefits, "options and convictions" (judgment No. 329 issued by the Inter-American Court of Human Rights on November 30, 2016, in the case *I.V.\* v. Bolivia*).

Thus, human rights go hand in hand with the concept of "a dignified existence" (Judgment No. 63, handed down by the Inter-American Court of Human Rights on November 19, 1999, in the case of the "Street Children" (*Villagrán Morales et al.*) *v.* Guatemala, and with this, that each person can live according to his or her aspirations and capacities.

In addition, they imply the recognition of a series of benefits that the State must develop directly or indirectly in favor of the improvement of their living conditions and within an environment where there is a tendency to "reduce the conditions of poverty, scarcity and, in general, the circumstances that hinder the exercise of the right to a dignified life" (Peces Barba. 1999. p. 188).

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