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Fundamental Social Rights and *Existenzminimum*[*]

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While *fundamental individual rights* are unquestionably taken as *subjective rights*, the same does not happen with *fundamental social rights*. If they are subjective rights, they are *justiciable*. The main argument *in favor* of this understanding is based on *liberty*. The main argument *against* is the so called *formal argument*. In relation to the *pro* argument, liberty can be either *juridical* or *factual*. *Juridical* liberty has no value without *factual* liberty, because the right to liberty is only put into practice if one has the factual preconditions for its exercise. The argument *against* is that their *justiciability* displaces the *competence* of the elaboration of *public politics* from *Legislative* and *Executive* to *Judiciary Power*, what violates the principles of *separation of powers* and *democracy*. Nevertheless they are *subjective rights* indeed, but special ones: they are *prima facie* subjective rights. There is only one subjective right that is *a priori* considered *definitive*: the right to *Existenzminimum*.[1] Its *content* is not settled, but it is quite unequivocal that the rights to *simple* housing, *fundamental* education and *minimum level* of medical assistance are part of it. *Existenzminimum* is then related to the minimum necessary for *factual liberty*. Against the *justiciability* of fundamental social rights, there are also arguments related to *juridification* of *politics*, *administrative discretion* and the *possible reserve clause*. The *counter-arguments* refer to *original* and exceptional competence, necessary objective *proof* of state's *economical incapability*, prohibition of State's *will*, principles of *legality* and of *non-obviation of Judiciary jurisdiction*, *Existenzminimun* guarantee.

Keywords: subjective rights, justiciability, dignity, liberty, formal principles, competence

1. Fundamental Social Rights and Human Dignity

Fundamental rights are the *positivation* of *human rights* (which have a moral character) in the national Law. Such *juridicization* is the result of secular *political struggles*. According to Robert Alexy,[2] the moral constructions and claims from which the positivation of human rights result go back to the Classical Antiquity with, for example, Seneca texts, stoic who preached the *cosmopolitism*—everyone is the manifestation of a *universal* spirit. In turn, the ideas of *dignity* and *equality* were developed by *Christian theology* (Genesis, New Testament, and especially Paul), until the 18th century *Enlightenment*, when finally it has got to its peak with the *Declaration of the Rights of Man and Citizen*.

While *fundamental individual and political rights* were consensually understood as *subjective rights* since the first moment of their positivation, the same did not happen with *fundamental social rights*, which appeared after those ones, only in 19th century. Until today, it is still polemical if fundamental social rights may be identified as real *subjective rights* or mere *objective* norms. As subjective rights, they are *judicially demandable*,

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that means they are *justiciable*.[3] As objective norms, they are in an orientation directed to *Legislative and Executive Powers* for the elaboration and implementation of *State's goals* or its *political programs*.

According to Alexy, fundamental social rights are "rights of the individual before the State, to something that the individual, if had enough means and if there were sufficient offer in market, could also have from particulars" (Alexy 1994, 454): right to health, education, work, and housing—all of them substantially guided by the idea of *human dignity*.[4]

Dignity is a *semantically open* concept, i.e., a concept whose definition does not present a high accuracy level, but only joins a non-exhaustive group of related characteristics. Alexy states that the concept of dignity goes beyond the generic formula according to which the human being can not be transformed into an object (Alexy 1994, 322). There are a lot of subjective rights related to it: *life, liberty, equality, physical integrity, privacy* rights, and many others.[5] Because of this, Alexy synthesizes the wealth of adjectives and nouns related to the concept of dignity which, although exuberant, do not formulate a definition, due to the randomness of their choice, saying that dignity can be expressed by a *joint of concrete conditions*, which must be present for its assurance. It is certain that the content of this joint is not unanimous, but it is not completely *different* either. There is convergence of many aspects, so that for many times the differences are related only to the *weight* given to some conditions of the same joint.

2. Fundamental Social Rights: Prima Facie Subjective Rights and Human Dignity

There are arguments *in favor of* and *against* the consideration of fundamental social rights as *subjective rights*. The main *pro* argument is based on *liberty*. The main argument *against* this understanding is the so called *formal argument*, even though there is also the *substantial* one (Alexy 1994, 458-465).

Liberty can be either *juridical* (right to do or not something) or *factual* (the concrete possibility of choosing among the allowed alternatives). According to this argument, *juridical* liberty does not have any value without *factual* liberty. The German Constitutional Court (*Bundesverfassungsgericht*) states that "the right of liberty would have no value without the factual preconditions for its exercise".[6] Material and intellectual goods are then preconditions for selfdetermination. Though, factual liberty is not a *matter of everything-or-nothing*, but a matter of *degree*.

The *formal* argument against the definition of fundamental social rights as subjective rights is that they dislocate the *competence* of the establishment of social policies from *Legislative Power* to the *Judiciary one*. This causes a judicial determination of the budget plans, which is incompatible with Constitution.

The *substantial* argument against this understanding refers to the *material* principles: *juridical liberty of the third party*,[7] the *other social rights*[8] and the *collective interests*.[9]

Nevertheless, according to Alexy, fundamental social rights are *subjective rights* indeed and this is today pacific understanding of the *Bundesverfassungsgericht*. The author develops his thought based on his *theory of principles*, considering fundamental social rights as *prima facie subjective rights*. Thus, their norms have a *surplus content* or an *ideal* one.

3. Fundamental Social Rights: Positive Rights under Principle Structure

Fundamental rights are presented under the *principle* structure.[10] Their *mandatory* characteristic is stipulated by the *biding clause* in Constitution (art. 1, paragraph 3), which denies their *programmatic* character, stating that they are *immediately in force*.[11]

According to a detailed and rigorous conceptual specification, Alexy (1994) classifies fundamental social rights as *rights to something*, as *positive rights*. Their *positive action* can be either *factual* or *normative*. On one hand, they are *absolute* rights, because they oblige the *generality* of the society members. On the other hand, they are *general*, because they do not need *acquisitive deed*. They are *universal* from the *holder*'s point of view, because they are *rights before everybody*. From the *logical* point of view, they are *abstract* rights, i.e., rights that are determined only in the *concrete situation*.

Fundamental social rights have a *wide range*, once they are frequently identified through the interpretation of juridical norms *conjunctions*, in which they are *explicitly* or *implicitly* presented. The understanding that there is a fundamental right only if there is a *correspondent normative provision* about it is an extreme *positivist* vision of Law, that promotes the *literal* or *genetic* interpretation rather than the *systematic* one, which is broader and more complex. In German theory and case law, the *integral* and *wide* comprehension of constitutional text is dominant.[12] This is the kind of interpretation required by the high *semantic openness* that not only fundamental social rights, but *all* fundamental rights have, due to their high *value density* (they rule the values socially taken as *essential*).

Many times, the recognition of fundamental social rights happens through a *counterfactual argumentation*: if the *non-recognition* of a juridical position leads to an *irreconcilable consequence* with the *constitutional order*, such juridical position must be *recognized*. Thereby, the *criterion* for the *correction* of the *justification* of a fundamental social right *adscription* to another *positive* right is the demonstration that the *denial* of this adscription is wrong, because it contradicts the juridical system as a whole (Arango 2000, 45-46). This is possible through a *correct constitutional foundation*.

Alexy's *theory of legal argumentation* focuses on precisely the *correction* in the justification of the value judgments that integrate juridical norms and the juridical discourse. So it delineates *forms* and *rules* to be complied, which act as *objective criteria*, *procedures* to achieve the *maximum rationalization* of *juridical discourse*.[13]

4. *Existenzminimum* as Definitive Subjective Right

There is a *core* of rights, which appear *a priori* as *definitive*. It stems from the *totality* of fundamental social rights. The set of these rights form exactly the *Existenzminimum*.[14] As a joint of definitive rights, the *Existenzminimum* is *justiciable*, i.e., its *immediate compliance* is demanded from *public power*.

If its content is not pacific even in Germany yet, which was one of the first countries to create this concept, it is for sure controversial in Brazil.[15] Alexy understands that it is compounded by the right to *simple housing, fundamental education* and a minimum level of *medical assistance* (Alexy 1994, 466). It is certain that the *content* of the *Existenzminimum* varies according to the cultural, local, economical, and historical context—the richer the country is, the broader the *Existenzminimum* is.[16]

It is a concept oriented by the idea of *factual equality*. *Juridical liberty* is empirically enabled based on it. Nevertheless, it is difficult to define precisely in relation to which *aspects* this factual equality must exist. The recourse to *historical comparisons* and also comparisons with the reality of *other countries* is necessary. Its content is always related to the *present* conditions, guided by the *effectively existing life level*, once the equality principle appears as *means* to assure human dignity.

Indeed, everything turns to be a matter of *pondering*, indispensable in cases that involve fundamental rights.[17]

The assertion of the *Existenzminimum* and its consideration as a *definitive subjective right* are established nowadays in German case law. The Constitutional Court relates it to the principles of *human dignity*, *free development of personality*, *equality*, *Social State* and right to *life* and to *physical integrity*. Although sparse references to the *Existenzminimum* had already been done in the 1990's, its precise determination was done by the decision BVerfGE (125, 175, on February 9th, 2010).

In Brazil, the first reference to it was done by the Constitutional Court (Supremo Tribunal Federal) in 2004 (ADPF 45/DF, 2004).[18] From then on, the use of *Existenzminimum* notion in Brazilian constitutional case law is increasingly present. Only between 2004 and 2008, there was a growth of more than 300% in relation to its assertion and protection.[19]

This first decision related to *Existenzminimum* stated the necessity of its preservation "in favor of individual's integrity and intangibility." The new Brazilian constitutional hermeneutics began to assure *immediate effectiveness* to *all* fundamental rights. They are considered "full effectiveness norms".

Brazilian Constitutional Court considers that there must be protection against "situations that threaten the *Existenzminimum*," because without it, *human dignity* is "mere utopia" (AI 583594/SC, 2009).

The insurance of "human dignity conditions", which is presented as a "central constitutional goal" (AI 583594/SC, 2009), means not only to assure the protection of fundamental individual rights, but also the "minimum material conditions of existence" (ADPF 45/DF, 2004). Thus, *Existenzminimum* appears as the "joint of fundamental rights without which human dignity is confiscated" (AI 684829/SP, 2008).

State's omission in complying with fundamental social rights which are part of the *Existenzminimum* constitutes an "illicit conduct," whose consequence is the judicial establishment of deadlines for the State's provision through "imposition of daily fines."[20]

5. Fundamental Social Rights: Justiciability and *Existenzminimum*

5.1. Arguments Against

Here comes the polemic questioning about the judicial decisions which order state's compliance with fundamental rights—especially the social ones. The argument is that these decisions would be *improper* due to these main reasons:

(1) This situation would configure a *politics' juridicization*, since *Judiciary Power* would be determining the acts of the *other powers*, what would assail the *principle of separation of powers*;

(2) The *principle of democracy* would be affected too, because the political decisions' *legitimacy* belongs to *Legislative* and *Executive Powers*, compounded by *popular representatives*;

(3) *Public power* has *administrative discretion*, which would be taken away by Judiciary Power acts;

(4) The recourse to the *possible reserve clause* is suitable, when the effectiveness of fundamental social rights is *financially unviable* for the State, due to their high costs.

5.2. German Constitutional Court Case Law and Alexy's Thought

Both German and Brazilian Constitutional Courts consider and answer these arguments *in the same way*. Once the *concept* and the *demand* of *Existenzminimum* are older in Germany, the position of German Judiciary Power is more consolidated in this respect.

These are some German Constitutional Court positions:

(1) Indeed, *Legislative Power* has the *original* competence to decide about the *limits* of social assistance, *how* it can and must be done, according to the existing *means* of the State and its *other* equally important *obligations*;

(2) Nevertheless, when the question is about the assurance of the *minimal conditions* for a *dignified existence*, *Judiciary Power* is competent, because this is duty of the "*public community*" of which it takes part.

Alexy (1994) analyzes the arguments *in favor* and *against* the *justiciability* of fundamental social rights and its implications. He states that:

(1) Fundamental social rights are so important that their *assurance* cannot be left to the decision of a *simple parliamentary majority*;

(2) There is no *previous* determination of which fundamental social rights are *definitive*;

(3) This determination is a matter of *pondering* among principles—on one hand, there is the *principle of factual liberty*, on the other hand, the *formal principles of democracy* and *separation of powers*, besides the *material principles* of *third party's juridical liberty,* of *other's fundamental social rights* and of *collective interests*.

5.3. Brazilian Constitutional Court Case Law

Brazilian Constitutional Court (1988) has stated that:

(1) Fundamental social rights are *justiciable*. Since the decision of 2004, *Judiciary Power* is asserted as competent to decide claims related to the non-compliance with fundamental social rights;

(2) These rights are not only a matter of *social politics* derived from programmatic and non-imperative norms, subordinated to *Executive Power*. They have *immediate effectiveness*;

(3) They are *subjective rights* really, not mere objective norms, which oblige the State only *objectively*, that means, they justify *duties*, but do not grant *rights*;

(4) They represent an *inalienable constitutional prerogative*, which is not subordinated, during its concretization process, to reasons of pure governmental pragmatism;

(5) Even though the prerogative to *formulate* and *execute public policies* is *primarily* of *Legislative* and *Executive Powers*, if the public bodies primarily competent do not comply with the *political-juridical charges* mandatorily imposed to them, coming to compromise, with their *omission*, the *effectiveness* of fundamental social rights, *Judiciary Power* is *exceptionally* competent to determine the implementation of public policies especially if they are defined by *Constitution* itself;[21]

(6) The simple allegation of the *State financial incapacity* followed by the recourse to the *possible reserve clause* is not enough for the non-compliance with fundamental social rights. The referred material limitation must be *objectively demonstrated*. Otherwise, the public power behavior is *illicit*. After all, taking the *rights* seriously means taking the *shortage* seriously. State shortage must be articulated with the "allocation choices" of public spending. However, *reasonability of the demanded pretension* is necessary;

(7) *Judiciary Power* is competent to determine the compliance with fundamental social rights:

(7.1) In case of State's *abusive behavior*, such as *State's inertia*, *unreasonable procedure* or procedure with clear intention to *neutralize the effectiveness* of fundamental social rights;

(7.2) In case of *State's arbitrariness* towards the compliance with fundamental social rights, extrapolating the legal *discretion power*;

(7.3) On the basis of the fact that the *conformation liberty* of *Legislative* and *Executive Powers* is not *absolute*, but has a *relative* character;

(8) There is the necessity of harmony of the *public administration* acts with the *principles of legality* and *of non-obviation of judicial control*. Public power is subordinated to a *legally biding* constitutional mandate, which represents a factor of political-administrative *discretion limitation*;

(9) *Judiciary Power interference* in *public administration* does not necessarily imply offense to the *principle of separation of powers*, because the *Legal State* is subjected to *jurisdiction*. Due to the *high biding degree* of public power to the satisfaction of fundamental social rights by virtue of its *essential* character, it is possible that *Judiciary Power*, if State is in default, determine it to implement *public policies constitutionally provided*. After all, *public spending* with *public policies* is subordinated to the administrator's *convenience judgment and opportunity*, but not to his *arbitrariness*;

(10) The conception of *Existenzminimum* prevails over the *possible reserve clause* one (ADPF 45/DF, 2004; AI 658491/GO, 2011; RE 667745/SC, 2012);

(11) The necessity of satisfaction of the *minimal conditions* for a *dignified existence*, i.e., of the *Existenzminimum* is untouchable. Thus, the establishment of *priority aims* is due. The discussion about which other project might receive investment must be related only to the *remaining resources*.

In virtue of all these positions, Brazilian Constitutional Court considers that there is really a *political dimension* (ADPF 45/DF, 2004) in *constitutional jurisdiction*, which ultimately controls the subordination of all State acts to the Constitution. Constitution is precisely the materialization of the encounter between *Politics* and *Law*. The observing and compliance with fundamental rights are exactly the result of the public power subordination to constitutional norms.[22]

6. Fundamental Social Rights: Clear Inferences

In short, two conclusions are clear in relation to fundamental social rights:

(1) All *subjective rights* are *justiciable*. They are *prima facie* rights that become *definitive* in the concrete case. Alexy emphasizes this understanding by stating that "*non-justiciable* fundamental rights are a *lie*."[23] He adds that the justification specifically of fundamental social rights is to promote to those who were not *lucky* to be born in a family with reasonable economic situation, the *access* to similar opportunities and material goods;

(2) The *effectiveness* of fundamental social rights depends on the way the *individual* is seen by the society to which he belongs: if as a *legal subject* or as a juridical order *object* (Arango 2000, 29-30; 50-55). Increasingly, the countries, in the search of *democracy*—which always develops as a *process* and therefore it is built by forward and backward, consider the individual as a *holder of subjective rights* and progressively no longer as an *object of public interest* to be treated by State's *social assistance service*, in such a way that *public security* and *social order* are ensured. In other words, individuals are always seen as *disturbing objects*. Individuals are not endowed with a *value on their own*, but a *social problem* to be solved. Briefly, to respect individual's fundamental rights means to *take the individual seriously*.

Notes

1. "*Existential minimum*."

2.*Vorlesung* "Staatsrecht II," Christian-Albrechts Universität zu Kiel, April 5th, 2012.

3. Language is recognized as a *cultural manifestation* of the society, reflecting its *ethos*. This ethos is in constant formation and modification. So, the language is necessarily flexible, adaptable, and passive of enrichment according to the growth of the complexity of its intersubjective relations. The creation and posterior demanding of concretization of fundamental social rights are examples of this social transformation. The development of language vocabulary makes the social transformation clear. The arising of the terms "justiciability," "justiciable," and "juridicization" is an illustration of this process.

4. See also ALEXY, Robert. Grundrechte. *Enzyklopädie Philosophie*–hg. V.H.J.Sandkühler. Hamburg: Feliz Meiner Verlag, Bd. 1, 1999. ALEXY, Robert. *A theory of constitutional rights postscript.* Oxford: Oxford University Press, 2010.

5. These rights are mostly fundamental *individual* rights. This makes clear the close relation among all fundamental rights, what demands the vision of their *indivisibility*.

6. BVerfGE 33,303.

7. Fundamental social rights would *collide* with *liberty* rights, because they are highly expensive, so the State can only accomplish them with a huge *taxation* on those who are not demanding them, that is, the *property owners*.

8. *Everyone* demanding the *equal* exercise (in the same degree) of fundamental social rights turns unfeasible the rights themselves, because the State cannot bear the costs of the requirement of the exercise of fundamental social rights by everybody in the same measures, as high as possible, that is, with the highest patterns of education, health, housing, and work.

9. There would be a preponderance of the *individual's* subjective rights—especially if many individuals demand the exercise of fundamental social rights—to the detriment of the whole society's interests, of the collective good.

10. See BOROWISK, Martin. *Grundrechte als Prinzipien*. 2nd ed. Baden-Baden: Nomos, 2007. ALEXY, Robert. *Recht, Vernunft, Diskurs: Studien zur Rechtsphilosophie*. Frankfurt am Main: Suhrkamp, 1995.

11. "The following rights [fundamental rights] bind Legislative, Executive and Judiciary Powers as immediately applicable right" (Alexy 1995, 264-267).

12. The *classic-liberal* interpretation of fundamental rights identifies them only with *liberty*, i.e., *negative rights*, from which results a marked limitation of their content.

13. See ALEXY, Robert. *Theorie der juristischen Argumentation.* 7th ed. Frankfurt am Main: Suhrkamp, 2012. ALEXY, Robert. *Teoría del discurso y derechos constitutionales*. México: Distribuciones Fontamara, 2005.

14. A fundamental social right only becomes a *definitive* right when the *factual liberty principle* has a *heavier weight* than the *colliding principles*. The understanding in Germany and in Brazil is that, among all fundamental social rights, only the *Existenzminimum* is immediately justiciable, because it is not *prima facie* right, but a definitive one.

15. See TORRES, Ricardo Lobo. *Direito ao mínimo existencial*. Rio de Janeiro: Renovar, 2012.

16. For example, "fundamental education" considered by Alexy as one of the rights that compound the *Existenzminimum* includes high school and technical education, what clearly does not correspond to Brazilian reality.

17. See ALEXY, Robert. *Derechos sociales y ponderación.* Madri: Fundación Coloquio Jurídico Europeo, 2007. ARANGO, Rodolfo. Basic Social Rights, Constitutional Justice and Democracy. Ratio Juris, Vol. 16, 2003.

18. Minister Celso de Mello was the rapporteur.

19. Until last year, there were more than 80 decisions directly referred to *Existenzminimum*.

20. According to art. 644 and 645/CPC, Brazilian Code of Civil Procedure.

21. The identification of *omissions* or *State actions* that violate fundamental social rights corresponds to the determination of what is *legally due* and what is only *legally acceptable*. The *border* between both hypothesis is markedly *fluid*, depending on the *conditions* and *circumstances* of the concrete case, as all the situations that involve fundamental rights.

22. Nowadays in Germany, the *Existenzminimum* concept transcends the *juridical sphere* and it is an idea that guides the *Executive Power* measure called *Hartz IV*, a program created in 2005, whose aim is the support to the *unemployed*. However, its sense goes beyond, once it seeks the stipulation of the due *values* to each specific concrete case, in order to ensure the *minimal material conditions* necessary to the assurance of *human dignity*. That is, the pecuniary amount corresponds to the *Existenzminimum*. The amount of 382€ is monthly due to the *individual*, added to the financial cover for *proper housing* and *health care*. In Brazil, there is a similar government program called "Bolsa-Família" since 2004. It is also guided by the idea of *human dignity* and ensures the minimum benefit of R$ 70,00 (about US$ 29,80) to the individual.

23. *Vorlesung* "Staatsrecht II," Christian-Albrechts Universität zu Kiel, April 5th, 2012.

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