

ORIGINAL ARTICLE

Human dignity in the light of the Constitution, human rights and bioethics

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*Manuscript received: September 2018**Manuscript accepted: October 2018**Version of record online: November 2018***Abstract**

Introduction: Human dignity, as coined by the Universal Declaration of Human Rights (UDHR / 1948), is an expression social solidarity, which should cement the relations between people. Human dignity is the foundation of all rights, such as freedom, equality, justice and peace in the world, and in Brazil, human dignity was deemed a fundamental pillar of the country's post-1988 constitutional order.

Objective: This article seeks to a deeper investigation about the social nature of human dignity and its definition over time.

Methods: This is an exploratory research meant to unpack the concepts of "human dignity", "bioethics", "human rights" and "constitution". After describing the conceptual evolution of human dignity and the facts relevant to its conceptual formation in world history - as a normative standard and a legal rule -, we address the Universal Declaration of Human Rights (UDHR/1948), the Declaration of Helsinki (DH/1964), the Universal Declaration on Bioethics and Human Rights (UDBHR/2005), and the definition adopted in the Constitution of the Federative Republic of Brazil (CFRB/1988). The study was carried out without temporal limitation, and included a review of referenced books, legal doctrines, as well as articles and books in the SciELO database.

Results and discussion: The findings ratify that human dignity is the foundation of all rights, including those of freedom, equality, justice and peace in the world, and must also guide the rights and duties of social regulation. Human dignity has changed from a criterion of power attributed to the social position of individuals to a value of the right to freedom, which now goes beyond the right of freedom and is the basis of modern constitutional democracy, which makes possible the realization of solidarity, as well as the duty and purpose of the state and the community. The will of the subject, of society, of the science and of the state, as well as the rules of domination and regulation, must have a limit on human dignity, and human dignity is not just fundamental right, in the sense of the Constitution, and must prevail over the exclusive will of science, the State and society. Therefore, in the making of power decisions and in realization of possible innovations of science involving human beings, human dignity demands the explicit consideration of respect and promotion of it.

Conclusion: Human dignity is enshrined in Brazilian constitutional law, as well as in bioethics and in human rights, and it constitutes all the fundamental rights of the human person. It is not merely a rule of autonomy and liberty, and it is an obligatory and non-derogable precept in the making of power decisions, a true main foundation of constitutional democracies.

Keywords: human dignity, bioethics, human rights, constitution.

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■ INTRODUCTION

Human dignity, as coined by the Universal Declaration of Human Rights (UDHR/1948)¹, is an expression social solidarity, which should cement the relations between people. Human dignity is the foundation of all rights, including those of freedom, equality, justice and peace in the world, and must also guide the rights and duties of social regulation. According to Dallari², the UDHR/1948 clearly reveals concern with the promotion and protection of human dignity and indicates the benefits and conditions to which every human being has a right to access.

Theorization on human dignity is based on the philosophy of Immanuel Kant, for whom the individual is an end in and of itself and cannot serve simply as a means for the will of others³. In Kant's work, the rules of freedom are based on the rule of autonomy, and freedom the only right innate to people, with which all legal and ethical norms are concerned. Kant also argues that law and ethics are customary rules. The difference is that legal rules require actions to be in conformity with duties external to the individual (a law imposes sanctions against unwanted conducts), while ethical rules require intent and action to be in conformity with ethical duties that are not external to the individual or that, if they are external, have been internalized by him or her. Ricardo Terra, having Kant as reference affirmed that "[t]he law is the limitation of the freedom of each one as a condition of their agreement with the freedom of all, while this is possible according to a universal law"⁴.

In Brazil, human dignity was deemed a fundamental pillar of the country's post-1988 constitutional order. It thus bears greater normative force than purely ethical rules and enjoys a constitutional and legislative protection (Article 1, III of the Constitution of the Federative Republic of Brazil CRFB/1988)⁵.

The contemporary consolidation of constitutional democracies, in which solidarity and social emancipation must prevail over domination, is a social evolution that has made it possible for human dignity to be sustained on basis other than just free will, as it happens in the case of the Brazilian Constitution (CRFB/1988).

Following this process, bioethics emerged in the second half of the twentieth century with the mission of creating a bridge to the future built on both the humanities and the health sciences. In 2005, the UNESCO unanimously adopted the Universal Declaration on Bioethics and Human Rights (UDBHR/2005)⁶ and, in the foreword of this Declaration, explicitly made bioethics a part of international human rights. It also recognized the interconnection between ethics and human rights in the field of bioethics and proclaimed the duty of its state-members to fully respect human dignity. According to Schwab⁷, since the fourth industrial revolution started, at the turn of the millennium, the fusion of technologies and integration of physical, digital and biological domains has become unprecedented and, more than ever, human dignity is the measure that should be used to set the boundaries of such interaction.

These transformations invite a deeper investigation about the social nature of human dignity and its definition over time. This article seeks to fill in such gap.

■ METHODS

This article is based on an exploratory research meant to unpack the concepts of "human dignity", "bioethics", "human rights" and "constitution".

After describing the conceptual evolution of human dignity and the facts relevant to its conceptual formation in world history – as a normative standard and a legal rule –, we address the Universal Declaration of the Human Rights (UDHR/1948), the Declaration of Helsinki (DH/1964), the Universal Declaration on Bioethics and Human Rights (UDBHR/2005), and the definition adopted in the Constitution of the Federative Republic of Brazil (CRFB/1988).

The study was carried out without temporal limitation, and included a review of referenced books, legal doctrines, international laws on human rights and bioethics, and in the Constitution of the Federative Republic of Brazil (CRFB/1988), as well as articles and books in the SciELO database.

■ RESULTS AND DISCUSSION

Basic theoretical foundations for the definition of human dignity

The term "human dignity", in its modern and jusnaturalist sense, in the context of constitutionalism, is expressed in the Federalist Papers of 1787 as an inherent value of human nature⁸. Kantian philosophy, in turn, offers the basis for legal positivism, a rational and voluntarist jusnaturalism, which constitutes modern legal dogmatic or juridical positivism⁹. The most significant juridical theory – in Brazil and abroad – still finds the foundation and in a way a conceptualization of human dignity in Kant³.

In summary, Kant argued that human dignity deserved protection for individual will to prevail. He also considered that human beings are an end in themselves, with an inherent value that cannot be priced.

Nowadays, beyond Kant, dignity is conceived as a right and a duty beyond any moral value. The legal definition of human dignity has gained a constitutional status, prevailing over other legal norms of modern states; a true pillar of the law and legal rules, on which all the other legal norms are based and find their source of validity.

Thus, human dignity goes from a moral value intrinsic to freedom/autonomy to right and a duty elevated with constitutional status, which is a cornerstone of constitutional democracies, and is no longer an expression of freedom alone. This evolution also makes it possible to place human dignity amidst duties of solidarity shared by the state and of the community.

The realization of solidarity in constitutional democracies can give concrete pre-eminence to human dignity in the tensions between regulation and domination,

so that the will of specific individuals, institutions and states will not be impinged upon anyone's physical and psychological integrity, health or personality. This theoretical shift has been in place since the Universal Declaration of Human Rights (UDHR/1948).

At the same time, while the dominant paradigms of knowledge-regulation and knowledge-emancipation during modernity and until World War II coexisted in dynamic equilibrium, time has come for a new post-modern critical theory or postmodernism of opposition in the social sciences, which could create a new, emancipatory common sense, wherein the primacy of the pillar of solidarity over pillar of regulation¹⁰ would be ensured, providing effective protection and promotion of human dignity.

Historical definition of human dignity

Human dignity has been theorized since ancient times. The roots of human dignity, in Greek Stoic thought and Christianity³, are based upon an intrinsic value of the human person. In Aristotle's thinking, the lord and the slave had different values and "dignities", in a true "natural slavery"¹¹. This ancient Roman concept, now classified as elitist and oppressive, was coined in order to meet the need for regulation/domination over other ethnicities at the time. The "*dignitas*" referred to the honour/merit of the social position of the ancient Roman.

After Rome, after the Middle Ages, human dignity was theorized in the sixteen-century jusnaturalism as the divine protection of the intrinsic rights of the Amerindians. The slaves did not have inherent values recognized, and were possessed "as if they were things" in slave law³. In the conquest of America by Spain, power trumped human dignity, with the ethical manipulation of the concept of the human person to enable the enslavement and extermination of the Indians: the political and economic interests of the Crown, which were not those of human dignity and solidarity, were imposed on the life and dignity of the Amerindians¹².

Thus, the slave system, originated in Greece, was assimilated by Romans. In the America of colonialism, slavery led to indigenous genocide. In the United States Constitution of 1787, slavery was not prohibited¹³. It was "the most extreme form of aggression against human dignity", and many who participated in the production of the constitutional text were and remained masters of slaves. This also occurred in Brazil, where a liberal slave system was maintained until the end of the nineteenth century, in which bourgeois freedoms and aristocratic enslavement coexisted.

Later, after World War II, the Universal declaration of Human Rights (UDHR/1948) set the modern standards of human dignity, which have been gradually declared in human rights texts and positive law in the legal systems of constitutional democracies, generating a legal infrastructure that is binding on state and social actions.

The concept of "*dignity*", adopted and consolidated historically, can be referred to as an intrinsic quality of human beings that distinguishes and qualifies them to be respected by the state and by society; makes human beings holders of rights and duties that ensure protection

against inhuman oppression; ensures the promotion of the minimum existential conditions for living healthily; and gives them the opportunity to freely and actively pursue happiness and enjoy their lives in the community³.

The formation and scope of Bioethics

Bioethics emerged in 1970 with an article by Van Rensselaer Potter entitled "Bioethics, the Science of Survival". Potter linked bioethics to the future and to survival, not limiting the new science to the medical sciences¹⁴, but consecrating its union with human rights within a concept of a new juridicity and solidarity, which has in human dignity a fundamental value, in a transdisciplinary synthesis that can enable the reconciliation of technique and humanization in a critical use of knowledge.

It is worth mentioning that the roots of bioethics are found in the Nuremberg Code¹⁵ of 1947, in which the principle of self-determination was coined as a defense of autonomy after the barbarities committed in the Second World War. The protection of human life and dignity was further shaped by the first revision of the Nuremberg Code in 1964¹⁶, in which the World Medical Association developed the so-called "Declaration of Helsinki" (DH/1964), with the primary mission of providing the medical community and patients with guidelines for research involving humans.

The Declaration proclaimed that a patient's health will be a physician's first consideration, and that any act or news that might weaken the human being can only be used for their benefit. In its most recent revision and consolidation of 2013¹⁷, (DH/1964) establishes in its eighth basic principle that the goal of medical research to generate knowledge can never take precedence over the rights and interests of research subjects.

It then describes in its ninth general principle that it is the duty of physicians involved in research to protect the life, health, dignity, integrity, right to self-determination, privacy and confidentiality of the research subjects' personal information. The statement further guarantees the access of research subjects to all technological advances in clinical studies, as well as the best existing medical techniques for research-related treatments¹⁸, during its course and even afterwards.

In Brazil, the Resolution 196 of the National Health Council was drafted in 1996, with broad popular participation, and represented a new dynamic for research involving human beings. The resolution has strong inspiration in bioethics and was coordinated by Prof. William Saad Hossne. It is not a deontological text, but it requires the analysis and critical reflection of the values involved in research, aiming protecting the dignity of human beings implicated in research projects¹⁹.

The Universal Declaration on Bioethics and Human Rights (UDBHR/2005), enacted at the General Conference of UNESCO⁶, is targeted at states and intends to guide the decisions and practices of individuals, groups, communities, institutions and enterprises, both public and private. This document echoes the concern raised in (DH/1964) and, in Article 15, includes the principle of sharing the benefits of scientific research and

its applications with society, especially with developing countries. One of the objectives of the declaration is to contribute to respect for human dignity and to protect human rights. It should be noted that Article 3 of the Declaration rules that the interests and well-being of the individual should prevail over the exclusive interest of science or society.

The State of purpose solidarist and human dignity after 1988

Modern, constitutional democracies were created within the notion of Hobbes and Rousseau laws ought to be respected, which in some cases led to arbitrariness and reprehensible state conduct²⁰. Examples are ancient slavery, the indigenous genocide in the European colonization of the Americas, and the liberal aristocratic slavery in the nineteenth century Brazil.

Kelsen was the state theorist who laid the foundations for the construction of constitutionalism in the twentieth century, within the notion of legal normativism and the hierarchy of constitutional norms. The political and ideological advancements of the Weimar Constitution¹³ consolidate the modern notion of the Constitution, giving it a new juridical meaning, given its socializing content with practical effects, which attributed to the state the role of guarantor of social rights in breach of the liberal bourgeois tradition. Also, Hans Kelsen's pure theory of law was the apogee of the rule of law that began in the nineteenth century and expressed the consolidation of bourgeois power in the face of the limitation of its political power experienced in the previous regime¹³.

It is understood that the legitimacy of state acts depends on their suitability for the purpose at hand. The idea of solidarity is intrinsic to the aims of the state and of society. This aim demonstrates the attitude of individuals in their reciprocal relations, as well as of states in relation to individuals, in which the life of the state can be summarized in the actions of preserving, ordering and assisting as the three great categories of functions that are appropriate to it.

The Constitution of the Federative Republic of Brazil (CRFB/1988) was produced with broad participation from society. It was inspired in the Portuguese Constitution of 1976, the programmatic Weimar Constitution of 1919, and the Mexican Constitution of 1917, as well as in the annexes of the 1966 UN declarations of rights. The (CRFB/1988) determined the protection of the democratic human rights, consolidated the Brazilian rule of law, and aligned itself with the goals of universal human rights, including bioethics.

The Citizens' Constitution traded a pure liberal-voluntarist-rational-deontological model for a model based on the social function of juridical relations, concerned with social and environmental justice and human dignity, which maintains intrinsic relations with the Kantian model of human rights and dignity²¹.

According to Dallari², the purposes and content of the Constitution cannot contradict fundamental rights in its conception of human dignity. They cannot include only rules of conduct and establish an arbitrary order, since the primary purpose of the Constitution is to protect

and promote human dignity. One cannot treat as a true constitution a law that, although denominated as such, only imposes rules of conduct and an arbitrary order, without protecting and promoting the dignity of all.

The legal conceptualization of human dignity can be broken down into four principles²¹: equality, physical and moral integrity, freedom and solidarity. Human dignity in the Brazilian constitutional context is a guarantee of metaphysical content based on a remote jusnaturalism, characterized in an ultimate protection of the person (personality) against attacks by the state on one's property and legal rights³. Hence, judicial decisions have placed the human dignity of prisoners above the state's duty to punish, especially in the event of overcrowding, of an inability by the state to quickly investigate and try suspects, or in the absence of a prison institution that ensures dignity to prisoners, situations in which, in order to promote the very cause of the state's existence, the freedom of the citizen should prevail²².

With regard to the practical and concrete effects of the legal effectiveness of the human dignity legislation in Brazilian constitutional law and in international human rights law, it is important to emphasize the constitutional possibility of demanding rights arising in Court; rights that not only should include the negative duties of the state for individuals to freely exercise civil and political rights, but should also include the guarantee and promotion of social, cultural and economic rights by the state, and their respect and adoption by individuals²³.

The effects demandable before the judiciary, without which the constitutional foundation of human dignity is considered violated, must include (as a minimum) free basic education, preventive health care and assistance for the homeless²³. The list of rights that guarantees effectiveness in relation to human dignity is the result of the prevalence of ideas of justice in a postmodern and a post-positivist approach in Brazilian law. Fundamental rights must be conceived and interpreted within a new constitutional hermeneutics, so as to guarantee the full dignity of all²¹.

The realization of human dignity requires an intense commitment on the part of the state and of society. The definition of this concept will always be a work in progress, and criticisms are raised against the work of judges in narrowing it down. Human dignity must be recognized, protected and promoted, but it can never be created, granted or withdrawn, since it is inherent to every human being³. Children and adolescents are also guaranteed absolute priority in the realization of the right to human dignity in the constitutional provision of Article 227⁵.

Human dignity, established in Brazil as the basis of the state, must be considered to be prevailing and with normative, effective force, and concrete realization by means of a better interpretation of the Constitution.

Dignity as a right, duty and moral value has become, throughout history, a prevailing normative element over other juridical norms of modern constitutional democracies, a true pillar of the law on which all legal norms are based, including content necessary for the validity of power decisions.

Thus, the evolution of human dignity has changed

from a criterion of power attributed to the social position of individuals to a value part of the right to freedom, which now goes beyond the right of freedom and is a basis of modern constitutional democracy, which makes possible the realization of solidarity as a duty and purpose of the state and the community.

The will of the subject, of society, of science and of the state, as well as the rules of domination and regulation, must have a limit on human dignity, and human dignity is not merely a fundamental right, in the sense of the Constitution.

In contemporary times, human dignity and human rights are two sides of the same coin. With the constitutional protection conferred in Article 1, III of the Constitution of the Federative Republic of Brazil, where there is disrespect for the promotion and protection of human dignity, there will be no efficacy and effectiveness of human rights, social, cultural and economic, side by side with civil freedoms and political rights.

Human dignity is the fruit of the struggles of human beings who, individually and collectively, have opposed the force of domination that denies emancipation, throughout history, and had consolidated it in declarations of rights, constitutions, and democratic legislation, as a supreme pillar of all rights. Such is the dignity that is enshrined in Brazilian constitutional law, as well as in bioethics and in human rights, and it constitutes all the fundamental rights of the human person.

After the barbarism of twentieth-century genocides, it is necessary to think about and develop solutions to avoid offences against human dignity, in the present and in the

future, in an assumption of responsibility and protection of the rights of the next generations of human beings, and the dignity to be protected and promoted above all other values and their basis, be those economic, military, legal, ethical or merely selfish. In the face of recent technological innovations, which include algorithms that machines learn without human intervention and that feed artificial intelligence of various kinds, it is also necessary to include the mantle of the protection of human dignity in the construction of controls and modulations of such innovations and promises on the part of science.

Thus, it is concluded that the dignity of human beings is not merely a rule of autonomy, and must prevail over the exclusive will of science, the state and society. The wills of subjects, the society and the state, and the rules of domination and regulation, find limits in human dignity. Constitutional law, human rights in the domestic and international order, as well as bioethics form a bridge to the future of humanity. Human dignity is, therefore, an obligatory and non-derogable precept in the making of power decisions and in the realization of possible innovations of science involving human beings, demanding the explicit consideration of respect and promotion of it.

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Resumo

Introdução: A dignidade humana, cunhada pela Declaração Universal dos Direitos Humanos (DUDH/1948), é uma expressão de solidariedade social, que deve cimentar as relações entre as pessoas. A dignidade humana é a base de todos os direitos, como liberdade, igualdade, justiça e paz no mundo, e no Brasil, a dignidade humana foi considerada um pilar fundamental da ordem constitucional pós-1988 do país.

Objetivo: Este artigo busca uma investigação mais profunda sobre a natureza social da dignidade humana e sua definição ao longo do tempo.

Método: Trata-se de uma pesquisa exploratória que visa revelar os conceitos de “dignidade humana”, “bioética”, “direitos humanos” e “constituição”. Após descrever a evolução conceitual da dignidade humana e os fatos relevantes para sua formação conceitual na história mundial - como padrão normativo e norma jurídica -, abordamos a Declaração Universal dos Direitos Humanos (DUDH/1948), a Declaração de Helsinque (DH/1964), a Declaração Universal sobre Bioética e Direitos Humanos (DUBDH/2005) e a definição adotada na Constituição da República Federativa do Brasil (CFRB/ 1988). O estudo foi realizado sem limitação temporal e incluiu uma revisão de livros referenciados, doutrinas jurídicas, bem como artigos e livros no banco de dados SciELO.

Resultados e Discussão: As conclusões ratificam que a dignidade humana é o fundamento de todos os direitos, incluindo os de liberdade, igualdade, justiça e paz no mundo, e deve também orientar os direitos e deveres da regulação social. A dignidade humana passou de um critério de poder atribuído à posição social dos indivíduos para um valor do direito à liberdade, que agora ultrapassa o direito à liberdade e é a base da democracia constitucional moderna, que possibilita a realização da solidariedade, bem como o dever e propósito do Estado e da comunidade. A vontade do sujeito, da sociedade, da ciência e do Estado, bem como as regras de dominação e regulação, devem ter um limite na dignidade humana, e essa não é apenas um direito fundamental no sentido da Constituição, devendo prevalecer sobre a vontade exclusiva da ciência, do Estado e da sociedade. Portanto, nas decisões de poder e na realização de possíveis inovações da ciência envolvendo seres humanos exige-se a consideração explícita do respeito e da promoção da dignidade humana.

Conclusão: A dignidade humana é ponto consagrado no direito constitucional brasileiro, assim como na bioética e nos direitos humanos e constitui todos os direitos fundamentais da pessoa humana. Não é apenas uma regra de autonomia e liberdade, trata-se de preceito obrigatório e inderrogável na tomada de decisões de poder, verdadeiro fundamento principal do Estado democrático de direito

Palavras-chave: dignidade humana, bioética, direitos humanos, constituição.

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