

# RIGHT TO DEVELOPMENT IN THE BRAZILIAN CONSTITUTIONAL SYSTEM

## DIREITO AO DESENVOLVIMENTO NO SISTEMA CONSTITUCIONAL BRASILEIRO

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**Abstract:** The presented article discusses the fundamental right to development, a theme with great social and scientific relevance in the context of the pandemic. Without the intention of going through every single corner of the topic, we aim to examine, throughout the present study, the following topics: concept and origins of development in the international plan; the nuances of law of development in the Brazilian constitutional plan; and, finally, the integral theory of the protection of the fundamental human rights as an instrument of implementation of the right to development.

**Keywords:** Fundamental human rights; Brazilian constitutional system; Right to development; integral theory of protection of the fundamental human rights

**Resumo:** O artigo apresentado discute o direito fundamental ao desenvolvimento, tema de grande relevância social e científica no contexto da pandemia. Sem a intenção de percorrer todos os cantos do tema, pretendemos examinar, ao longo do presente estudo, os seguintes tópicos: conceito e origens do desenvolvimento no plano internacional; as nuances do direito do desenvolvimento no plano constitucional brasileiro; e, finalmente, a teoria integral da proteção dos direitos humanos fundamentais como instrumento de implementação do direito ao desenvolvimento.

**Palavras-Chave:** Direitos humanos fundamentais; Sistema constitucional brasileiro; Direito ao desenvolvimento; teoria integral da proteção dos direitos humanos fundamentais.

### 1. RIGHT TO DEVELOPMENT: CONCEPTS AND ORIGINS

According to Amartya Sen (2000, p. 17), development can be conceived as a process of expansion of the freedoms, which implies the removal of social obstacles that compromise a dignified existence

Therefore, development appears as a central question of humanity, the true converging core of the main theories and social movements, resulting in reflexes in the conceptions of the democratic regime, citizenship and fundamental human rights in the global, regional and local contexts.

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According to Flávia Piovesan (2010, p. 100), the contemporary conception of human rights is related to the processes of universalization and internationalization of those ethical topics as expressions of the fight for dignity and justice.

As such, it was not different from the historical statement of the right to development, created in 1972 by Keba M'Baye (1972, p. 505) during a conference of the Human Rights Course, professed at the International Institute of Human Rights, in Strasbourg.

According to Phillip Dann (2010, p. 83), those who suffer or have less benefits deserve help from those who have more benefits, which implies an ample range of actions: guarantee of consistency of macroeconomic public policies; raise of productivity; good governance practices; preservation of solid democratic institutions; combat against corruption; and mutual responsibility between nations.

Furthermore, important documents and international organizations state the importance of such rights. In 1977, the Human Rights Commission of the United Nations mentioned the right to development in the plan of international cooperation; in 1978, at UNESCO, the right to development was inserted in the text of the International Declaration about race and racial prejudice; in 1981, the African Charter on Human and People's Rights, approved during the 18th Conference of Heads of State and Government, in Kenya, referred clearly the right to development.

Afterwards, in 1986, the United Nations approved the Declaration on the Right to Development, which, in its premises, states the concept of development as an economic, social, cultural and political process which focuses on the constant improvement of well-being for the whole population and every single person based on their active, free and significant participation on the development and the fair distribution of benefits.

Such an international instrument established that the human being is a central subject of development who must be an active participant and a beneficiary of the right to development as an inalienable, indivisible and interdependent right, placing the human being as an active participant and beneficiary of their process of construction. This international document imposed to the State its duty of formulating national policies adequate for the development, reaffirming the free and active participation of every person in the equal distribution of resulting benefits.

As such, the solidary and cooperative basis to guarantee the development were launched, with a proposition of a new international order based on the sovereign

equality, interdependency, mutual interest and cooperation between the international subjects. These are the origins of the primary responsibility of the States to create conditions to fulfill the right to development, and the duty to eliminate the obstacles for development resulting from the lack of attention to the civil, political, economic, social and cultural rights.

Another important element is the Declaration of Human Rights in Vienna, in 1993, which affirms that every human right is universal, interdependent and related, and that the international community must treat human rights globally, fairly and equally, aiming for the creation of a plural, solidary and integral environment that allows a dignified existence.

Moreover, in 2000, the UN General Assembly adopted the Millenium Declaration with a task of adhering to a worldwide project to reduce extreme poverty in its every single form by completing the following objectives: reducing poverty and hunger in the world; guaranteeing primary education for everyone, promoting equality between men and women; reducing child mortality; improving health for mothers; combating illnesses; securing environmental sustainability and participate in a worldwide partnership for development.

So, the global crisis reinforced the primary need of maintaining solidarity bonds between nations, creating an atmosphere that could allow the expansion of civil achievements for the development of countries and establishing cooperative tasks in order to build a global order of equal development.

After all, the right to development, present in a series of international pacts, which are indivisibly connected, is recognized in a multilevel and in an inter constitutional way in different juridical documents, based on solidarity between national and in the cooperative progress of the States.

## **2. RIGHT TO DEVELOPMENT IN THE BRAZILIAN CONSTITUTIONAL SYSTEM**

Right to development is the result of a new generation of rights that claim its complete protection in a solidary regime. It is identified as the right to solidarity or third generation or dimension right.

According to Dirley da Cunha Junior (2014, p. 483), the third dimension rights contain powers of collective or diffuse titularity attributed generically to every social formation, fomenting the principle of solidarity or fraternity.

As such, the right to development takes an undeniable transindividual character, representing the unifying milestone of the present fundamental rights and other human and convergent comunitary rights for its open and integral system of protection.

In the Brazilian federal Constitution from 1988, development presents different connotations, which allows the interaction with other constitutional norms in a plural environment, full of normative possibilities.

The referred Constitution comprehends, basically, the following parts: Constitutional preamble, Fixed Constitutional Devices (1st to 250th articles) and Transitory Constitutional Devices (ADCT - 1st to 98th articles). Its non-codified structure, integrating part of the inter constitutionality block, is divided in: Due Constitutional Tools (according to the 5th article, 2nd §) which are the fundamental rights resulting from the regime and the principles adopted by the Brazilian federal Constitution, or the international treaties in which the Federative Republic of Brazil is a part of, except the International Treaties of Human Rights incorporated in the form of the 5th article, 3rd §, which constitute the equivalent Constitutional Devices or equivalent fundamental rights. According to the referred 5th article, 3rd §, the treaties and international conventions about human rights that get approved, in each National Congress House, in two turns, by three fifths of the votes of their respective members, will be equivalent to constitutional amendments.

The right to development is already referred in the Brazilian constitutional preamble when it prescribes the institution of a Democratic State, destined to assure the full exercise of the social and individual rights, freedom, security, well-being, development, equality and justice as supreme values of a fraternal, plural and free of prejudice society based on social harmony, in both internal and international contexts, which a pacific solution for problems.

Furthermore, the 3rd article of the Brazilian federal Constitution, 1988, establishes, among the fundamental goals of the Federative Republic of Brazil, one of guaranteeing national development. That is a fundamental programmatic norm, binded to the public powers (with an important international systemic function, with a commitment to the duties of protection and of guaranteeing the existential progress while having positive interventions in the public, judicial, law, economic and administrative processes) and subjectively (regarding rights and duties of solidarity).

As such, the fundamental right to development results from the fundamental goal established in the 3rd article, II of the Brazilian Constitution, making the

constitutional device multifunctional. So, it fulfills a double systemic function: it is a transindividual fundamental right - with every possible consequence from the insertion of the fundamental rights in an integral theory of protection - and it also appears as a fundamental public policy - a control parameter for every State action to promote development.

Such a fundamental goal grows in normative dimension and interconstititutional importance when it reinforces its protection on an international level as an expression of common human need.

This way, the constitutional legal operator from 1988, 4th article, establishes structural principles of international relationships, defending the principle of cooperation between people for the progress of humanity. Progress and cooperation are indissociable to guarantee the prevalence of fundamental human rights and the formation of solidarity bonds between people and nations.

The same constitutional device (4th article) contains the international and community guidelines, with the integrative opening of the fundamental rights (5th article, 2nd §) in the international and community regime of protection of progress and the human existential development. This results in the materialization of an inter institutional and integral system of protection of the existential progress of the human being.

### **3.THE INTEGRAL THEORY OF PROTECTION OF THE FUNDAMENTAL HUMAN RIGHTS AS AN INSTRUMENT OF IMPLEMENTATION OF THE RIGHT TO DEVELOPMENT**

According to Flávia Piovesan (2010, p. 106), one of the weakest fragilities of the international system of human rights is composed by the difficulties of elevating rights, including the challenge of implementing the right to development.

As such, it is convenient to adopt a theory of integral protection of human dignity and fundamental human rights, focusing on the necessity of promoting a systemic, institutional and multilevel organization for the care for the fundamental human rights.

Such rights have axiologic contents and, in every case, equal deontologic hierarchy, being institutionally protected by diverse jurisdictions (constitutional, international and community).

The different jurisdictions - internal, international and community - establish heuristic justification to overlap the other jurisdictions. They are lost in the useless

debate about monism versus dualism, looking for an inadequate protagonist that should reside in the human being and their integral protection.

On the contrary, the integral theory of the protection of the fundamental human rights establishes the open and diatopic hermeneutic dialogue between the internal, international and community orders, in the institutional contexts of a true inter constitutional jurisdiction.

In an integral theory of protection, with an expansion of the constitutional jurisdiction of the transindividual rights for the community and international domains, there is the analysis of the protection, restrictions, content and efficiency of the fundamental right to development, demanding, necessarily, a new solidarity paradigm.

The instrumental guarantees of protection of the rights, present in the inter constitutional system, are usable in its ample universe of application. It is possible to apply the control of conventionality present in the international jurisdiction in the internal context of each country. The internal jurisdiction of integral protection of the human, fundamental and community rights, in front of the 5th article, 2nd § (opening clause), combined with the 102nd article, III (diffuse control), both from the Brazilian federal Constitution, allows the Brazilian magistrates to have the diffuse control of the conventionality.

Another relevant aspect of the integral theory is the establishment of the initial standard of protection or previous delimitation of the essential content. The intangible core of the human, fundamental and community rights must be identified and immediately protected at the judicial level before any decision. If the protection of the essential content is kept, the determination of the protection, content and efficiency contexts will undergo a democratic and cooperative process of State decision, guided by transparent pondering processes.

The integral theory of protection, with inserted rights in a multilevel structural complexity of inter constitutionality, adds relevance to the model of solidary State intervention, in which the goal is the complete development with the sharing of tasks and responsibilities largely from the State and, in the opposite side, binded to transnational companies and the private section based on its transindividual duty of promoting social, cultural and economic developments for the society.

According to Daniel Sarmento (2003, p. 220), the theory of integral protection is receptive to the theory of direct and immediate efficiency of the fundamental rights in the private relationships - direct horizontal efficiency. This idea was defended, initially,

in Germany by Carl Nipperdey, since the 50's, and he justifies his statements based on the confirmation that the dangers that may harm the fundamental rights in the modern world do not come solely from the State, but also from the social and third parties in general.

The theory of horizontal efficiency, immediate or indirect, of the fundamental rights was developed in the German school by Günther Dürig (1956, p. 157), as the intermediate construction between the one that simply negates the binding of private individuals to the fundamental rights, and the one that defends the direct incidence of those rights in the private sphere.

Discussing the theme, Claus Wilhelm Canaris (2006, p. 28) defends the immediate nature of the binding of the legislator of private right to the fundamental rights and the normative efficiency they have as a prohibition of intervention and imperative of tutelage. He questions the idea of immediate efficiency related to third parties, but states that there is an immediate binding of the legislator of private rights to the fundamental rights. The author states that one should only mention immediate efficiency related to third parties if the fundamental rights are directed immediately against individuals of private rights.

We understand that the recipients of the norms of the fundamental rights are, not only the State and its organs, but also the individuals of private rights, even when the fundamental norm is not directed immediately to the latter, but is resultant from the inter constitutional system of protection and is reasonable, adequate, necessary and proportional in the strict sense to its interprivate application to better protect the injured or harmed legal good in a juridical relation between individuals.

In the Brazilian context, the construction of a free, fair and solidary society demands a set of conformity tasks directed to ensure the social dignity of the citizen through the equality of opportunities. Social and distributive justice, reinforced by the bonds of solidarity, through the mutual support between social, governmental and individual institutions allows the equality of chances (which guarantees the initial conditions of freedom - through public policies that make the essential content of the fundamental rights intangible, especially in social vulnerable contexts); the equality of results (which guarantees the conditions of the well-being in the collective existential progress - with the duty of transindividual protection - pondering the individual protection in front of the colectivity and global distribution of resources) and the social

equality (which guarantees the conditions of active participation in the development - through the intensification of social solidarity bonds).

With this diapason, the model of cooperative federal action in the country confers to the federal entities a new inter constitutional competence to protect the fundamental human rights, with the reduction of inequality and the fulfillment of the transindividual right to development, From the duty of integral protection of the local and regional communities in the inter constitutional order results the obligation of promoting legal and institutional-federal symmetry, empowering the efficiency of the fundamental human rights.

Hence the creation of the federal direct correspondent of active participation and representation in the inter constitutional context, promoting a relationship of external federal inter constitutionality - dialogue of integral protection between the community Constitution, federal Constitution, International Treaties of Human Rights, organic laws and Constitution of federal entities. The relation between the Brazilian federal Constitution, Constitution of States/Federal District and organic laws of the cities is kept - internal federal inter constitutionality.

#### **4. CONCLUSION**

Development can be conceived as a process of expansion of substantive freedom, which implies the removal of the social obstacles that compromise a dignified existence. It is a central question of the humanity, a true conversion core of the main theories and social movements, producing reflexes in the conceptions of a democratic regime, the citizenship and human rights in the global, regional and local contexts in the scenario of the new social normality, created by the sanitary crisis of coronavirus.

The right to development was affirmed in important international documents and organisms. In 1977, the Commission of Human Rights of the United Nations mentioned the right to development on its plan of international cooperation; in 1978, the right to development was inserted in the text of the International Declaration about race and racial prejudice; in the year of 1981, the African Chart on Human and People's Rights, approved during the 18th Conference of Heads of State and Government, in Kenya, referred openly to the right to development.

Afterwards, in 1986, the United Nations approved the Declaration on the right to development, which concepts the development as an economic, social, cultural and political process that aims for the constant improvement of the well-being for the whole

population and for every individual based on their active, free and significant participation on the development and fair distribution of the resulting benefits.

In the year of 2000, the UN General Assembly adopted the Declaration of the Millenium, with a commitment of adhering to a worldwide project of reducing extreme poverty in every single form.

The fundamental right to development is the result of the new generation of rights that claims its integral protection in a solidary regime. It is identified as a right to solidarity or third generation/dimension right and it has an undeniable transindividual character representing the unifying milestone of the present fundamental rights and other human and communitary rights for its open and integral system of protection.

In the Brazilian federal Constitution, 1988, the development presents different connotations, which allows it to dialogue with other constitutional norms in a plural environment, full of normative possibilities.

Development is referred in the Brazilian constitutional preamble from 1988, prescribing the institution of a democratic State that must ensure the exercise of social and individual rights, freedom, security, well-being, development, equality and justice as supreme values of a fraternal, plural and free of prejudice society, founded in the social harmony, in the internal and international ordems, with pacific solution for controversies.

Furthermore, the 3rd article of the Brazilian federal Constitution, 1988, establishes, among the fundamental goals of the Federative Republic of Brazil, the goal of national development. This is a programmatic fundamental norm, with bonds to the public powers (with important systemic function and duties of protection and insurance of the existential progress, while promoting positive interventions in the political, judicial, law, economic and administrative processes) and to the society (regarding rights and duties of solidarity).

By inserting the international and communitary guidelines in the same constitutional device (4th article), presented in the integral opening of the fundamental rights (5th article, 2nd §), in the communitary and international regime of protection of progress and the human existential development, our constitutional order built the multilevel inter constitutionalism (international, communitary and constitutional).

As such, the challenge of the implementation of rights and the systematic theory of integral protection must be allied. The integral constitutionalism or integral theory of protection arises from the need of promoting fundamental human rights. In an integral

theory of protection, in front of an expansion of the constitutional jurisdiction of transindividual rights for the comunitary and international domains, the analysis of the protection, restrictions, content and efficiency of the fundamental right to development demands a new solidarity paradigm.

Another relevant aspect in the integral theory is the establishment of the initial standard of protection on precious delimitation of the essential content. The intangible core of the human, fundamental and communitary rights must be identified and protected in the judicial, legislative or administrative levels before any decision. With the protection of the essential content, the determination of protection, content and efficiency will undergo a democratic and cooperative process of State decision guided by transparent processes of ponderation.

The integral theory of protection, with inserted rights in a structural multilevel complexity of inter constitutionality adds relevance to the model of solidary State intervention, looking for the complete development with the sharing of tasks and responsibility for the State, opposing the bond of transnational companies and the internal private sector due to its transindividual task of promoting social, cultural and economic development for the society.

The social and distributive justices, empowered by the bonds of solidarity, through the mutual support between the social and governmental institutions and the individuals, promotes the equality of chances (which guarantees the initial conditions of freedom - with public policies that make the essential content of the fundamental rights intangible, especially in social vulnerable contexts); the equality of results (which guarantees the conditions of social well-being in the collective existential progress - with the duty of transindividual protection - pondering the individual protection in front of the collectivity and the global distribution of resources) and the solidarity equality (which guarantees the conditions of active participation in development - with the intensification of social solidarity bonds).

The model of cooperative federalism gives a new inter constitutional competence to the federal entities for the protection of federal constitutional rights like the reduction of regional inequalities and the transindividual right to sustainable development. The duty of integral protection for the local and regional communities in the inter constitutional orders results in the obligation of promoting legal and institutional-federal symmetry, with the optimal efficiency of fundamental human rights.

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