

# THE INDIVIDUAL AND SOCIAL RIGHTS OF TRANSEXUALS: AN ANALYSIS FROM THE FOLLOWING OF FUNDAMENTAL RIGHTS AND THEIR CONCRETION

OS DIREITOS INDIVIDUAIS E SOCIAIS DOS TRANSEXUAIS: UMA ANÁLISE SOB A ÓTICA DOS DIREITOS FUNDAMENTAIS E SUA CONCREÇÃO

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## ABSTRACT

This article aims to verify the legal and juridical regulation of the rights granted to transsexuals, with an emphasis on personality rights. The research is justified in view of the changes that have occurred with regard to gender relations, surgeries of sexual reassignment or transgenitalization, as well as changes in psychological and legal concepts regarding transsexuality, at the same time that transsexuals are still they suffer prejudices and even difficulties when it comes to personality rights such as name, use of public spaces, among others. The deductive method is used, and the research was guided by books, scientific articles, legal doctrine, legislation and jurisprudence. It emerged from the research that the rights of the transsexual are related to several personality rights and fundamental rights from every moment and decision that he makes, manifesting himself in the face of society in a multifaceted way, depending on the concrete situation that requires protection.

**Keywords:** Transsexuality. Genre. Personality. Fundamental rights. Public policy.

## RESUMO

*O presente artigo tem como objetivo verificar a regulamentação legal e jurídica dos direitos conferidos aos transexuais, com ênfase nos direitos da personalidade. A pesquisa se justifica tendo em vista as mudanças que ocorreram no que se refere às relações de gênero, cirurgias de redesignação sexual ou transgenitalização, bem como mudanças nas concepções psicológicas e jurídicas no que se refere à transexualidade, ao mesmo tempo em que os transexuais ainda sofrem preconceitos e mesmo dificuldades quando se trata dos direitos de personalidade como nome, uso de espaços públicos, dentre outros. O método utilizado é o dedutivo, sendo que a pesquisa se orientou por livros, artigos científicos, doutrina jurídica, legislação e jurisprudência. Da pesquisa resultou que os direitos do transexual relaciona-se com diversos direitos da personalidade e direitos fundamentais a partir de cada momento e decisão que ele tome, manifestando-se em face da sociedade de forma multifacetada, dependendo da situação concreta que exija proteção.*

**Palavras-chave:** Direitos da Personalidade. Direitos Fundamentais. Gênero. Políticas públicas. Transexualidade.....

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## 1. INTRODUCTION

The fundamental rights represent individual guarantees that, in general, safeguard the citizen from state interference in particular life. Therefore, those rights constitute important mechanisms for the defense of justice, freedom and equality.

Because of this, this article aims to verify the fundamental legislation corresponding to the transsexual public, as well as its effectiveness in society through public policies of implementation.

Therefore, the research occurred through bibliographic, legislative, jurisprudential and online collection information. In this sense, we chose to divide the work into three topics.

The first will deal with fundamental rights. To this end, it sought to make conceptualizations, definitions of dimensions of rights, specification of fundamental rights and, finally, characteristics of fundamental rights. The relationship in this topic about the right to sexuality will be in the context of individual freedoms, in particular, sexual freedom.

The second topic concerns the right of personality in order to address the conceptualization of the legal term, the origin of those rights, the category or specification thereof. The connection between personality rights and the right to sexuality, in general, concerns the honor, image and privacy of the individual.

Finally, the last section will deal specifically with the transgender community. Thus, it will try to conceptualize the theme, in order to make necessary distinctions on the subject, addressing the characteristics of the rights of this community, the delimitation about the legal nature of the same, and, finally, the way this right is protected, referencing jurisprudence and public policies.

## 2. FUNDAMENTAL RIGHTS AND THEIR CONSTITUENT ELEMENTS

The fundamental rights contained in the Federal Constitution of 1988 (CF/1988), Title II- Of fundamental rights and guarantees, Chapter I- Of individual and collective rights and duties, have the competence, according to Canotilho (1993, p. 541), in a legal-objective plan to prohibit the “interference of these in the individual legal sphere”; in the legal-subjective bias, it has the function of “positively exercising fundamental guarantees” and, in addition, has the competence to “demand omissions from the public authorities, in order to avoid harmful aggression stems from them”.

There are several fundamental rights provided for in Article 5 of the ‘Magna Letter’, among which will be, according to the object of study, the right to life, equality, intimacy, private life, honor and image.

The Federal Constitution was the precursor in using the principle of human dignity, which is inserted in the list of foundations of the Federative Republic. According to Martins (2005, p. 71-72) “the principle of the dignity of the human person constitutes the basis, the foundation, the foundation of the Republic and the Democratic State of Law established by it”.

Once this is established, after CF/88, the dignity of the human person becomes one of the founding values of the Republic and of the Democratic State of Law, being the duty of the State to prioritize the human being in all its dimensions. That is, the state should offer conditions for people to have the means to guarantee their dignity.

Because of this, fundamental rights and guarantees were recognized and positive in CF/88. These rights and guarantees are norms intended to offer protection to citizens in their relations with the state entity, in order to guarantee decent coexistence, with freedom and equality, according to the provision of *the caput* of Article 5, which provides that “all are equal before the law, without distinction of any nature, ensuring to Brazilians and foreigners residing in the country the inviolability of the right to life, liberty, equality, security and property”.

The concept of fundamental rights is open in doctrine once it is not possible to establish a universal definition on the subject.

In this sense, Comparato (2010, p. 74), states that they are “human rights expressly recognized by political authorship” and protect “something that is inherent to the human condition itself, without connection with certain particularities of individuals or groups”. Thus, for the renowned indoctrinator, fundamental rights are human rights that protect the essential values of the human condition itself.

Silva (1992, p. 182), argues that:

Fundamental rights of man is the most appropriate expression for this study, because, in addition to referring to principles that summarize the conception of the world and inform the political ideology of each legal order, it is reserved to designate, at the level of positive law, those prerogatives and institutions that it embodies in guarantees of a dignified, free and equal coexistence of all people.

It is possible to infer that fundamental rights reflect a set of principles that refer to the organization and political ideology adopted in the legal system. Moreover, fundamental rights have the function of guaranteeing the human being in dignified coexistence, free and equal to his fellow men.

Shortly thereafter, Trindade (2003, p. 38) indicates that fundamental rights are multifaceted in relation to the scope of their protection. In this sense, they as “a right of protection, marked by their own logic” are aimed at “safeguarding the rights of human beings and not states”.

On the conceptualization of fundamental rights, we have to cover a union of rules and laws with care to protect the individual before the State, restricting the actions of the individual in order to allow citizens to exercise their freedom, in addition to establishing the necessary borders for the right of others is not reached, thus providing conviviality in society (DUQUE, 2014).

In this compass, Tavares (2008, p. 122)

[...] it is also necessary to rule out the possibility that “fundamental precept” is any and all norms contained in the Fundamental Law. If, theoretically, this construction is permissible, the same does not occur with the current constitutional system. [...] It is necessary to guarantee “the relevance of every word constitutionally used”, and one cannot simply pretend to ignore the letter of the Constitution in order to be able to construct a meaning arbitrarily. Therefore, when the Constitution speaks of “fundamental precept” it is not referring to the Constitution as a whole.

In other words, it is possible to say that the fundamental precept does not need to be in the greater legal order of a State in order to be considered as such. It is necessary that there is importance regarding the relationship of the individual with the collectivity.

Araújo and Nunes Júnior (2009, p. 110) teach that fundamental rights symbolize:

A legal category, constitutionally erected and dedicated to the protection of human dignity in all dimensions. Thus, they have a polyhedral nature, providing themselves to the protection of the human being in their freedom (individual rights and guarantees), in their needs (economic, social and cultural rights) and in their preservation (rights to fraternity and solidarity).

In this sense, the polyhedric nature concerns the achievements of the human being throughout history, in the face of various disrespects to the dignity of the human being, such as slavery, torture, religious impositions, etc., which have come to be overlooked by various legal systems. Thematic issues will be addressed on the generations or dimensions of fundamental rights, in order to establish doctrinal concepts, examples and notes.

About the fundamental rights, it is common among indoctrinators to divide them into dimensions or generations and, according to Mendes (2008, p. 233) the fundamental rights of the first generation encompass the rights referred to in the American and French Revolutions. These rights were created with the aim of abstaining the power of the State, so as not to interfere in the intimate life of individuals. Such rights deal with individual freedoms, for example, that of conscience, worship, inviolability of domicile, among others.

Mendes (2008, p. 234) says that in view of the social problems arising from the pressures of industrialization, demographic growth, and the conflicts of society, it required the intervention of the State and, in this context, the second dimension rights emerged. These concern social, economic and cultural rights, such as social assistance, health, education, work and leisure.

The above-mentioned author also writes that third-dimensional rights protect the collectivity, and they are created with the aim of protecting peace, development, the quality of the environment, the conservation of historical and cultural heritage.

On the dimensions of fundamental rights, Moraes (2006, p. 26) transcribes the vote of Minister Celso de Melo:

[...] While first-generation rights (civil and political rights) – which comprise classical, negative or formal freedoms – highlight the principle of freedom and second-generation rights (economic, social and cultural rights) – which identify with positive, real or concrete freedoms – they emphasize the principle of equality, third-generation rights, which materialize collective ownership powers assigned generically to all social formations, enshrine the principle of solidarity and constitute an important moment in the process of development, expansion and recognition of human rights, characterized as unavailable fundamental values, by the note of an essential inexhaustibility.

In this sense, it is capable of affirming that first-generation rights express the principle of freedom, while the principle of equality and, finally, the principle of solidarity, are second-to-ones.

Fundamental rights have some characteristics of their own, they are: universality, all individuals are subject to these rights; imprescriptibility, these rights are eternal and do not change over time; individuality, it is about personal rights, so that it can only be exercised by the person himself; complementariedade, such rights must be interpreted jointly, in this sense, there is no

hierarchy between them; inviolability, they cannot be broken; unavailability, cannot be arranged by any means; inalienability, it is not possible to commercialize them (OLIVEIRA, 2008, p. 125).

Other characteristics are laid down by the doctrine with regard to the legal regime for the protection of fundamental rights. This regime has constitutional force. Thus, for its modification to happen a rigid process is necessary, so they are considered high standards of the constitution (Article 60, §4, IV CF/88).

Dias (2006, p. 72-73) explains the importance of fundamental rights in Brazilian society, according to its historical evolution:

The evolution of human rights has reached its apex, its subjective and objective fullness. They are full human rights, of all subjects against all subjects, to protect everything that conditions human life, fixed on human values or goods, a patrimony of humanity, according to standards of evaluation that guarantee existence with its own dignity.

Thus, fundamental rights arrive at their apogee with the positive, guaranteeing their existence in the objective scope, and the regulation of their functioning and protection of human dignity, existence at the subjective level.

Article 5 of the CF/88 states that all citizens, without distinction, have the right to life, liberty, equality, security and property. It is observed that, among the list of fundamental rights, the right to life is the most important the first of them since the State has a duty of protection in all its aspects. In addition to ensuring the right to live, it also protects the right to live with dignity in the care of the basic needs of every human being (LENZA, 2010, p. 748-749).

Moraes (2015, p. 34), on the right to life, understands that the State must “assure you in its double meaning, the first being related to the right to stay alive and the second to have a dignified life regarding subsistence”.

Thus, the right to life does not only cover respect for one’s own existence, but rather covers the protection of conditions necessary to ensure the minimum necessary of a dignified life.

## 2.1 RIGHT TO EQUALITY AND FREEDOM

The Declaration of Human and Citizen Rights of 1789 establishes:

Art.1 Men are born and are free and equal in rights. Social distinctions can only be based on common utility. (...); Art. 4 Freedom consists in being able to do everything that does not harm others: thus, the exercise of the natural rights of every man is limited only to those who assure other members of society of the enjoyment of the same rights. These limits may only be determined by law; Art. 5 The law prohibits only actions harmful to society. Everything that is not sealed by the law cannot be hindered and no one can be constrained to do what she does not order

This Declaration was made in the midst of the French Revolution. In this period, as mentioned, the concept of equality is not dissociated from freedom. In this sense, men are endowed with natural rights, being restricted by the rights of other citizens, these limits are set by law.

Let us have a look at what the Universal Declaration of Human Rights establishes on the subject:

Art. 1° All human beings are born free and equal in dignity and rights. Endowed with reason and conscience, they must act with one another in a spirit of brotherhood; Article 2 All human beings may invoke the rights and freedoms proclaimed in this Declaration, without distinction, in particular race, colour, sex, language, religion, political or other opinion, national or social origin, fortune, birth or any other situation. Furthermore, no distinction will be made based on the political, legal or international status of the country or territory of the person's nationality, whether that country or independent territory, under guardianship, autonomous or subject to some limitation of sovereignty. Art. 3 Every individual has the right to life, freedom and personal security

As well as the Declaration of Human and Citizen Rights, the Universal Declaration of Human Rights also reiterates the sovereign and inseparable stance of freedom and equality.

The right to equality also provided for in that constitutional provision, which defines that "all are equal before the law, without distinction of any kind ...". In turn, it should be interpreted with caution, since all individuals should be treated equally, as far as their inequalities are. And in order to do not discriminate between social classes, religion, biological sex, the law must be applied equally (Article 3, IV, CF/88).

Thus, Moraes (2006, p. 31) teaches:

Thus, what is deterring are arbitrary differentiations, absurd discrimination, because the unequal treatment of unequal cases, to the extent that they are unequal, is the traditional requirement of the concept of Justice, because what is really protected are certain purposes, only if the constitutional principle is harmed when the discriminating element is not at the service of a purpose accepted by law [...]

In this follow-up, the principle of equality is applied in CF/88 in the sense of being a means to reach justice. In this point of view, the State must provide mechanisms for individuals to find no equal situation for a given specific case.

Regarding the right to equality, Silva (2006, p. 216), flanked by other scholars, teaches that the "concepts of equality and inequality are relative, imposes confrontation and contrast between two or several situations so that where one exists is not possible to ask whether there has been equal or discriminatory treatment".

The right to freedom was earned over time. In this context, Oliveira (2007, p. 104) collects:

According to the Declaration of human and citizen rights of 1789, 'Freedom consists in being able to do anything that does not harm others: thus, the exercise of the natural rights of every man is limited only to those who assure other members of society of the enjoyment of the same rights. These limits can only be determined by law'

Article 5, IV, of the Federal Constitution guarantees the right to free expression of thought. By guaranteeing free expression, this constitutional rule records the existence of the right of opinion, which considers two values: value-demand, which would be the right to have and be able to express an opinion freely and value-indifference, when one has the freedom not to take into account the opinion of a third party (ARAÚJO and NUNES JÚNIOR, 2009, p. 141).

Related to the theme, Dias (2009, p. 63) writes in his work that:

Freedom and equality – correlated with each other – were the first principles recognized as fundamental human rights, integrating the first generation of rights to ensure respect for the dignity of the human person. The role of law – which aims to ensure freedom – is to coordinate, organize and limit freedoms, precisely to guarantee individual freedom. Sounds like a paradox. However, there is only freedom if there is, in equal proportion and concomitance, equality. If there is no assumption of equality, there will be domination and subjection, not freedom.

Thus, when the author studies on the principle of freedom, she highlights the bond between her and equality, without one, the other would lose her meaning.

## 2.2 RIGHT TO EXPRESSION, OPINION, INTIMACY AND PRIVATE LIFE

The CF/88, in article 37, emphasizes the information of neutrality of the Public Power “in the face of opinion, prohibiting, therefore, persecutions or privilege that take into account individual convictions” (ARAÚJO and NUNES JÚNIOR, 2009, p. 141).

The right of expression can be exhibited in different ways, such as through music, theater, cinema, image, thus, “the expression of intellectual, artistic, scientific and communication activity is free, regardless of censorship or license” provided for in Article 5, IX, of the CF/88.

Thus, the right of opinion concerns a declaration of thought, a conceptual judgment, while the right of expression deals with the manifestation of feelings and creativity of the human being regardless of the formulation of values or definitions (ARAÚJO and NUNES JÚNIOR, 2009, p. 143-144).

Nevertheless, Lenza (2010, p. 761) indicates that there are cases in which federal law must regulate amusements and public spectacles, so that the recommended places, times and age groups must be respected.

Regarding the right to intimacy and private life, expressly provided for in Article 5, item X, of the Federal Constitution of 1988, there are those that “relate to the subjective relationships and intimate treatment of the person, their family relationships and friendship”, while the right to private life “involves all other human relationships, including objects, such as commercial relationships, work (MORAES, 2015, p. 54).

When the right to honor and image, provided for in the same constitutional legislation, Silva (2006, p. 209) says that they integrate the concept of right to private life. This is because, “the Constitution rightly reposes them with distinct human values. Honor, image, name and personal identity are therefore the object of a right, regardless of personality.”

## 2.3 RIGHT TO SEXUAL FREEDOM

In accordance with what was previously stated, the objectives of the Federative Republic of Brazil are formed by the construction of a free and egalitarian society, and these precepts are already based on the Declaration of Human and Citizen Rights of 1789.

In the meantime, the Federal Constitution is clear by prohibiting any and all forms of discrimination, further in so far as that all individuals have the right to legal equality and freedom to do everything that the law does not prohibit. And, as stated, the violation of such rights implies the suppression or limitation of the dignity of the human person, in addition to violence to democracy, offense to the Federal Constitution.

Constitutionally, the right to freedom of thought, personality, intimacy, private life, free initiative and movement of citizens are protected. In this sense, it can be said that individual freedoms must be considered a fundamental right, which is protected in constitutional norms.

Thus, considering the various expressions of freedom, within freedom of personality and human individuality is sexual freedom. I say, "the right, in your private life, to express your sexuality in the best way that suits you" (CUNHA, without page, 2009).

For Maria Berenice Dias (p. 188, 2009): "no one can be carried out as a human being if they have not ensured respect for the exercise of sexuality, a concept that comprises both sexual freedom and freedom from free sexual orientation". In other words, respect for sexual freedom and free sexual orientation, understands the protection of human dignity.

Complementing this idea, the same author states that it is necessary to recognize that "sexuality integrates one's own human condition", because no one can realize itself as a human being if it has not ensured respect to freely exercise their sexuality. For the author, sexual freedom comprises within individual freedom, in this sense it must be interpreted as a natural right that integrates the rights of the first generation, which has already been seen here.

Although many indoctrinators consider the right to sexual freedom and free sexual orientation as a first-dimensional right. There are scholars who deepen their studies by making more detailed arguments on the subject, such as Castro (2016, p. 82), let us see:

Equality and the sealing of discrimination and prejudice against homosexuals guarantee the classification of the right to free sexual orientation as a second-dimension right (protection against groups of social oppression, such as that resulting from homophobia, which places homosexuals as socially hyposufficient). The right to sexuality, as an integral realization of humanity for the preservation of human dignity for the purpose of free exercise of its sexuality, is classified as a third dimension right, including as a right of solidarity, without which the human condition does not take place.

Thus, it is able to say that the right to the free exercise of sexuality composes the three dimensions of rights, since it is associated with individual freedom, social equality and human solidarity, because sexuality belongs to personality and its development depends on the satisfaction of basic needs, such as the desire for contact, intimacy, emotional expression, pleasure, affection and love.

That is, to withdraw the individual's right to experience his sexuality, whatever it may be, is to offer this person an unworthy life, dias (2006, p. 76) is quoted:

The identification of the gender of the object of desire, whether male or female, is the revealing data of sexual orientation, an option that cannot merit differentiated treatment. The fact that the attention is directed to someone of the same or different sex can not be the target of discriminatory treatment, because it is



based on the sex of the person who makes the choice. The court decision that you take by criterion, not the effective conjunction of people, of their own lives, but the mere coincidence of sexes is part of a social prejudice.

That is, adopting precepts that segregate, which hurt the freedom of orientation, hurts fundamental precepts and reveals social prejudices on the part of those who qualify such attitudes as unworthy.

In this way, it should be in mind that it does not differentiate, as a human being, a cisgender or transgender individual. The two are individuals endowed with rights, with clear constitutional protection, being denied any discrimination due to their affective orientation, since this is a characteristic of human nature itself and includes dignity, not offending the rights or freedoms of other individuals.

In carrying out an analysis under civil-constitutional law on personality rights, Tartuce (2012, p. 142-143) notes that they are related to three major constitutional principles, they are: principle of protection of the dignity of the human person laid down in Article 1(III) of the CF/1988; principle of social solidarity that is one of the objectives of the Federative Republic of Brazil, Article 3, I and III, of the CF/1988; principle of *latu sensu* equality or isonomy that states “all are equal before the law, without distinction of any nature”, present in Article 5, *caput*, cf/1988.

After his studies, the author concludes: “in the civil-constitutional view, just as personality rights are for the Civil Code, fundamental rights are for the Federal Constitution” (TARTUCE, 2012, p. 143). To this end, the scholar uses Utterance No. 274 of the IV Civil Law Day to maintain that both the list of personality rights and the list of fundamental rights are merely explanatory:

The rights of personality, regulated in a non-exhaustive manner by the Civil Code, are expressions of the general clause of protection of the human person, contained in Art. 1, inc. III, of the Constitution (principle of the dignity of the human person). In case of collision between them, as none can overtake the others, the weighting technique should be applied.

In this sense, the next chapter will deal more deeply with the rights of personality, making the necessary relations with the proposed theme.

### 3. PERSONALITY RIGHTS

The protection of personality is not innovative, although the theory of personality rights only began “to enter into laws and codes” after the twentieth century (BITTAR, 1990, p.49). However, even today, the understanding of matter is not unison.

The former Civil Code of 1916 had an individualistic and patrimonialist view. Already with the making of the current Civil Code, the 2002, this vision was modified and the dignity of the human person became more valuable through the rights of personality, consistent with the constitutional precepts.

With the new rules of the Civil Code of 2002, a new scenario arose in the Brazilian legal order, because this order considered the constitutional principles and placed in its articles the rights of personality.

Due to the inclusion of these rights, the current Civil Code began to value the person and his/her achievements, showing the existential rights of the human person, which should also be protected in relations between individuals (BELTRÃO, 2014, p. 10).

Personality rights are defined by Beltrão (2014, p. 12), as a “special category of subjective rights that, based on the dignity of the human person, guarantee enjoyment and respect for their own being in all its spiritual or physical manifestations”. In other words, these are subjective rights, because the good of personality is its object of study.

In this area, Diniz (2007, p. 142) discourse:

They are the subjective right of the person to defend what is his own, that is, his physical integrity (life food, own body alive or dead, body of others alive or dead, separate parts of the body alive or dead); their intellectual integrity (freedom of thought, scientific, artistic and literary authorship) and their moral integrity (honor, recato, personal, professional and domestic secrecy, image, personal, family and social identity).

Otherwise, personality rights are essential for the person. This is due to the content conferred on the personality.

In this same sense, Azevedo (2012, p. 33) teaches how personality rights “relate to the physical, psychic and moral aspects of the person, to himself or to his dismemberments and social projections”. The author concludes that “these rights ensure the existence of the human being, constituting its essence”.

France (1996, p. 1033) says that these are “legal faculties whose object are the various aspects of the subject’s own person, as well as their fumes and extensions”.

For Diniz (2002, p. 135) personality rights “are subjective rights of the person to defend his own”, some examples are the protection “ his physical integrity, (...) intellectual integrity, (...) and moral integrity.”

For Venosa (2002, p 148) reports that personality is “like the set of powers conferred on man to figure in legal relations”.

Still on the conceptualization, France (1988, p. 200) defines how: “Personality rights are said to be the legal faculties whose objects are the various aspects of the subject’s own person, as well as their essential projection in the outside world” and Gagliano and Pamplona Filho (2009, p. 150) assert that the holders of personality rights are “those who object to the physical attributes , psychic and moral of the person himself and in his social projections”.

These rights are provided for in the Civil Code of 2002 in Articles 11 to 21. Gonçalves (2009, p.153). It understands that in addition to the economically appreciable rights, there are others with reference to the person, and it binds to it in a perpetual and permanent way - the rights of personality.

Categorizing such rights, as provided in the Civil Code, they refer to: the acts and provisions of the body itself (Article 13 and 14), the right not to submit to risky medical treatment (Article 15), the right to name and pseudonym (articles 16 to 19), protection of word and image (Article 20), and protection of intimacy (Article 21).

In general notes, it is verified that the Civil Code in Article 2 determines that “the civil personality of the person begins from birth with life; but the law makes safe, from conception, the rights of the unborn child.”

In this sense, most scholars agree with the idea of the Brazilian legislator in codifying the Natal theory.

Nevertheless, this position is not unique, as for example Oertmann who defends the theory of conditional personality that says that “the unborn child has rights under suspensive condition” (GAGLIANO; PAMPLONA Filho, 2009, p. 131).

Beviláqua, Limongi França and Francisco Amaral Santos, support the idea of conceptist theory, which, in general, says: “the unborn child would acquire legal personality from conception, thus being considered a person” (GAGLIANO; PAMPLONA Filho, 2009, p. 131).

Thus, Rodrigues (2003, p. 61) states that the right of personality brings within it the subjective rights of which the human being is the holder, being easily distinguished by two different species, because some are detachable from the people of its holder and others that are not inherent rights to the human person and, therefore, to it linked eternally and permanently cannot be granted to the individual who does not have the right to life, to physical or intellectual freedom. These are called personality rights.

#### 4. TRANSEXUALITY AND CONCRETION OF RIGHTS

Just as different groups of individuals who form society, such as children and adolescents, Indians, the elderly and women, are protected, we also find legal protection, right and indirect, granted to the portion of the population formed by transsexual people. In doctrinal conceptualizations, Maranhão (1995, p. 134) teaches, are the people who “phenotypically belong to sex defining, but psychologically to the other and behave according to the other, rejecting that”. In addition, the same author says that they “do not obtain efficient psychotherapeutic results and obsessively seek the ‘correction’ of morphological sex, through radical surgery”.

In this same sense, Ramsey (1998, p. 32) elaborates three characteristics that permeate this group, the first of which is the search for permanent hormonal treatment and/or the performance of sexual reassignment surgery; the second characteristic that these individuals have is to “complete some phases of hormonal treatment and/or sexual reassignment surgery, and be satisfied with the result”; and, finally, the latter would be that characteristic belonging to transsexuals who cannot perform hormonal treatment and/or sexual reassignment surgery for religious, political, financial reasons, among others.

At the international level, regarding the discussions of his rights, Sampaio (1998, p. 128) shows that the European Court of Human Rights has had the understanding that the change of sex and its legal consequences are due to the protection of the right to life and intimacy. Thus, for the scholar and for European jurisprudence, matters concerning transsexuals fall within the scope of the right to private life and intimacy.

In this same conjecture, Araújo (2000, p. 70) states that “the right of transsexuals occupies several topics of personality rights”. This is because the transsexual when he conquers surgery,

he has the right to identity and forget about his past situation. In addition, the author states that the rights of the transsexual relate to various personality rights and fundamental rights from each moment and decision he makes. Thus, the scholar concludes: “we can therefore affirm that the right of transsexuals will prove to be multifaceted, depending on the concrete situation that requires protection.”

Below we will discuss some public policies created with the aim of guaranteeing the aforementioned rights for the transgender population.

#### **4.1 TRANSSEXUALIZING PROCEDURE AND SEXUAL REASSIGNMENT SURGERY**

As stated, personality rights have categories within the legal instrument itself. Among the first categories are those mentioned above.

Such rights have an influence on the right to sexuality. Among the most varied examples about the acts and dispositions of the body itself and the non-right to submit to risky medical treatment, the following stand out: the sexual reassignment surgery and the transsexualizing procedure.

It should be clarified that sexual reassignment surgery is not synonymous with a transsexualizing procedure, that is, “the first is the surgical intervention itself that alters the genital organ, the second is broader and deals with the entire procedure before and after surgery” (BOZZ E LIMA, 2017, p. 7).

The Transsexualizing Process in the SUS is regulated through Ordinance No. 2,803/2013 published in the Official Gazette. This ordinance establishes guidelines for the regulation of outpatient and surgical procedures for genital readjustment in transsexuals.

That said, let us see:

Art. 4º The integrity of care to users and users with demand for the performance of actions in the Transsexualizing Process in the Primary Care Component will be guaranteed by: I - welcoming with humanization and respect for the use of the social name; eII - regulated referral to the Specialized Care Service in the Transsexualizing Process.

Art. 5º To ensure the integrity of care to users and users with demand for the performance of actions in the Transsexualizing Process in the Specialized Care Component, the following modalities will be defined: I - Outpatient Modality: consists of outpatient actions, namely clinical follow-up, pre- and postoperative follow-up and hormone therapy, aimed at promoting specialized care in the Transsexualizing Process defined in this Ordinance and performed in a health establishment registered in the National Registry System of Health Establishments (SCNES) that has conditions appropriate techniques, physical facilities and human resources as described in Annex I to this Ordinance; eII - Hospital Modality: consists of hospital actions, which are performing surgeries and pre- and postoperative follow-up, aimed at promoting specialized care in the Transsexualizing Process defined in this Ordinance and performed in a health establishment registered in the SCNES that has technical conditions, physical facilities and adequate human resources as described in Annex I to this Ordinance.

As can be noted, in the first articles the Transsexualizing Process composes the so-called “Primary Care” and “Specialized Care”, the first refers to the treatment given to the individual in his initial approach, before surgery. The second one scores the basic care of the treatment, subdividing into two categories: outpatient and hospital.

Sexual reassignment surgery, or sex change surgery, or transgenitalsurgery, must comply with some requirements for it to be performed. According to the retro ordinance mentioned, the individual must be at least 18 years old, and the public health system should be sought, presenting the complaint of incompatibility between anatomical sex and the feeling of belonging to the opposite sex.

Surgery consists of sexual reassignment, mastectomy, reconstructive breast surgery and thyroid surgery (voice change), as well as hormone therapy and pre- and postoperative follow-up with medical specialists and psychologists.

After analyzing the legal procedure, let us see how the national jurisprudence has been deciding on the subject:

Civil APPEAL. VOLUNTARY JURISDICTION PROCEDURE. CHANGE OF CIVIL REGISTRY. CHANGE OF FIRST NAME AND SEX. Transsexual. TRANSGENITALIZATION SURGERY. DISNECESSITY. DIGNITY OF THE HUMAN PERSON. 1. This is an appeal brought against the judgment which, in the file of the procedure of voluntary jurisdiction - request for change of civil registration (reassignment of first name and gender) -, partially upheld the requests, to defer the change of the author's name in his civil registry, pursuant to Article 58 of Law No. 6.015/73, leaving rejected the request for gender change, because he understands that sexual reassignment surgery is essential to the request for sex change. **2. Identity, an element that integrates the minimum content of personality rights, can be understood as the set of characteristics proper to an individual, which characterize him as a subject. It is the manifest sign of his individuality, what makes him unique.** 3. Transsexuality can be understood as a profound conflict with genetic and morphological identity. It expresses the feeling of inadequacy in relation to gender, and of psychic incongruity in relation to biological/morphological sex. The individual does not see himself as what he is convinced of being, developing revulsion and rejection that often lead to self-mutilation or suicide. **Four, four, four. The recording of the physical person, as a mirror of civil identity, must overcome the reductionist view linked to the biological/morphological aspect and start to consider the psychosocial aspect - expression of personality, as a way to allow the guarantee of a dignified existence.** 5. Requiring transgenitalization surgery as an indispensable element to change sex in the civil registry denotes a severely disproportionate imposition, especially when it comes to a person who presents himself socially as of the opposite sex, especially when this remains proven by expert report. 6. It cannot be observed that, even if the exclusion of the costs of surgery is considered- if it is consolidated through the Unified Health System-, the transgenitalization procedure, as inherent to any other intervention, involves risks of complications and sequelae, especially if considering the delicacy and relevance of the systems and structures involved situation that touches the right to health. Nor should one neglect the hypothesis in which the transsexual has an interest in procreating before performing transgenitalization – a hypothesis pertinent to the right of freedom. Having been recognized as a transsexual, to the point of deferring the nominal change based on the need to make the embarrassing situations non-existent when the civil registry is exhibited, it is imperative, for the tables reasons, the sexual reassignment in these settlements, under pen-

ality of judicial provision is innocuous. 7. The Superior Court of Justice, in the judgment of REsp no. 1,626,739, the Supreme Court, analyzing the thesis of general repercussion no. 761, defined that it is possible to change sex in the civil registry, even for citizens not submitted to the transgenitalization procedure. 8. Appeal known and provided. (TJ-DF 201500110260473- Secrecy of Justice 0003988-87.2015.8.07.0016, Rapporteur: SANDOVAL OLIVEIRA, Trial Date: 21/03/2018, 2nd CIVEL CLASS, Publication Date: Published in SJE: 27/03/2018, p. 269/277) (our griffin).

Initially, it is preferred to clarify that, after a quick search in an online bank, the courts of the other Courts present consonances with presented here.

The jurisprudence set out here was handed down in recursive state by the Court of Justice of the Federal District and Territories. In it, in addition to other elements, it is noted that the understanding that sexual identity is a minimum element of the rights of personality and, consequently, of the dignity of the human person, as stated in the previous chapter. Such identity must overcome the reductionist view generated by biological appearance and must respect the psychosocial aspects that represent personality traits. The other topics about changing the social name and gender in the registry will be covered in later item.

Therefore, for all that is contained here the right to sexuality has grounds in the right of personality with regard to the acts and dispositions of the body and the right not to submit to medical treatment at risk, when it comes to reassignment surgery and transsexualizing process.

## 4.2 RIGHT TO NAME TO PSEUDONYM

The name, as already said, has the objective of individualizing the person, being his identification at first.

As an example of the constitution of the right to sexuality in the rights of personality, we have the creation and permission of the social name as a mechanism of access to transsexuals to build their identity.

The social name was systematized in Decree No. 8727 of April 28, 2016. This Decree sought to regulate the use of the social name as well as the recognition of gender identity.

In accordance with this Decree, the social name refers to the “designation by which the transvestite or transsexual person identifies and is socially recognized”. The social name should not be confused with the expression “gender identity” since this would be the “dimension of a person’s identity that relates to the way it relates to representations of masculinity and femininity and thus translates into their social practice”.

The application for the social name can be made by the transsexual or transvestite person, no longer needing the TranssexualProcess, is what says judgment of RE 670.422 and ADI 4.275.

After the legal analysis of the subject, it is necessary to analyze how the national jurisprudence has been dealing with the theme:

Civil APPEAL. ACTION OF RECTIFICATION OF BIRTH REGISTRATION FOR THE EXCHANGE OF FIRST NAME AND INDICATION OF FEMALE SEX (GENDER) FOR MALE. TRANSEXUAL PERSON. **DISNECESSITY OF TRANSGENITALIZATION SURGERY**. MITIGATION OF THE PRINCIPLE OF THE VERACITY OF PUBLIC RECORDS. WEIGHTING WITH THE PRINCIPLE OF THE DIGNITY OF

THE HUMAN PERSON. PRECEDENT OF THE Supreme Court. ASSENT OF THE ATTORNEY GENERAL'S OFFICE. Host. REFORMED SENTENCE. KNOWN AND PROVIDO FEATURE. 1. In the light of the provisions of the arts. 55, 57 and 58 of Law No. 6,015/73 (Public Records Law), it is inferable that the principle of immutability of the name, however public policy, can be mitigated when the individual interest or social benefit of the amendment emerges, which claims, in any case, judicial authorization, duly motivated, after hearing of the Public Prosecutor's Office. 2. The social humiliation resulting from the exposure of the registration name and gender with which the Alant does not identify itself is a cause of psychosocial suffering, not only for this case in question, but for all subjects who do not identify with the socially attributed gender. **3. This is because, if the change of the forename configures gender change (male to female or vice versa), the maintenance of the sex constant in the civil registry will preserve the incongruity between the seated data and the gender identity of the person, who will remain susceptible to all sorts of constraints in civil life, constituting a blatant attack on the existential right inherent to personality.** KNOWN AND PROVIDO FEATURE. (Class: Appeal, Case Number: 0568650-05.2015.8.05.0001, Rapporteur: Joalice Maria Guimarães de Jesus, Third Civil Chamber of Bahia, Published: 04/04/2018) (our griffin)

First, it should be clarified that, after a brief research in online data, the jurisprudence of the other States has been following in accordance with here, in relation to the theme pointed out.

The case-law on screen is the origin of the Court of Justice of Bahia, which the decision was handed down in recursal state. It is observed, initially, the conformity of the judge in relation to the position of the Supreme Court on the disnecessity of the transsexual or transvestite person to perform surgery or start the hormonization procedure to be possible to rectify the social name. Moreover, the judge makes explicit the combination of the importance of the name as a right inherent to personality and, finally, of the dignity of the human being.

In this sense, by all that has been explained, the protection of the name is one of the rights of personality. Transsexual or transvestite individuals need the procedure of rectifying their name as a mechanism for preserving their sexual identities and, so to speak, their personality. Thus, the institution of the social name is an advance towards the guarantee of sexual rights and to base this guarantee on the precepts of personality is to say that both are based on the same pillar that is human dignity.

## 5. FINAL CONSIDERATIONS

In view of all that is, it is possible to infer that fundamental rights are individual guarantees that, among other functions, safeguard the human being from the interference of the State in private life. In addition, they represent rights that serve as protection of freedom, equality and justice.

By defending individual freedom, we must compose it among several others among them: religious freedom, thought, personality, locomotion, among others. In relation to the types of freedom, in this work, it is worth mentioning the sexual freedom that would be the way the person can freely express his sexuality. In this way, I have that the right to sexuality is founded on fundamental rights, precisely by commencing one of the examples of freedom.

Short of this aspect, it is important to elucidate that sexuality itself already integrates an element of the human condition, so it must be respected under penalty of attack human dignity.

Still regarding fundamental rights, it is necessary to consider that the right to sexuality integrates the three dimensions of law, since it is associated with individual freedom, as said; social equality in the sense of protecting political minorities; and human solidarity, because it is a human condition.

Once this is done, the work is based on the right of personality, initially conceptualizing that these rights represent an extension of fundamental rights because they are founded on human dignity.

Because it understands the right of personality as legal instruments that protect the human essence itself, the right to sexuality emerges, in this context, as an integral element of the human personality. For this, he took care to bring the list of personality rights and associate with the right to sexuality.

Regarding the acts and dispositions of the body itself and the right to non-submission to risky medical work, it addressed the sexual reassignment surgery and the transsexualizing procedure.

On the right to name and pseudonym discussed the creation of the social name, a legal instrument that sought to regulate the recognition of gender identity by the name of transsexual and transvestite people.

Therefore, the work, in general, took care to deal with the definition of basic rights and their application in the face of the manifestation of sexuality, in particular that of transsexuals.

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