THE FUNDAMENTAL DUTIES AND THE CONSTITUTION OF 88: PRECIPLE FORMATION OF THE DEMOCRATIC STATE OF LAW

OS DEVERES FUNDAMENTAIS E A CONSTITUIÇÃO DE 88: FORMAÇÃO PRECÍPUA DO ESTADO DEMOCRÁTICO DE DIREITO

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ABSTRACT

The purpose of this paper is to clarify the Fundamental Duties and their importance within state action, with an emphasis on the Democratic Rule of Law. Initially, a historical construction of state formation was sought up to the current model, after that, based on doctrines and articles, an analysis of the 1988 Constitution was made with an emphasis on the legal provisions referring to the Fundamental Duties contained therein. Finally, a discussion was established about what Fundamental Duties would be and his influence on state action. The bibliographic review of articles and books was used as a basis.

Keywords: Fundamentals Duties, 1988 Constitution, Democratic State of Law.

RESUMO

O presente trabalho tem por objetivo elucidar sobre os Deveres Fundamentais e a sua importância dentro da atuação estatal, com ênfase no Estado Democrático de Direito. Buscou-se, de início, uma construção histórica da formação estatal até o atual modelo, após isso, com base em doutrinas e artigos, fez-se uma análise da Constituição de 1988 com ênfase nos dispositivos legais referentes aos Deveres Fundamentais que nela constam. Por fim, foi estabelecida uma discussão acerca do que seriam os Deveres Fundamentais e a influência dele na atuação estatal. Utilizou-se como metodologia a revisão bibliográfica de artigos e livros como embasamento.

Palavras-chave: *deveres fundamentais; Constituição de 1988; Estado Democrático de Direito.*

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1. INTRODUCTION

When talking about the formation of the state entity, we go through epochs that are mixed up with the history of mankind itself. Furthermore, every time there has been a rupture in this entity - justified by historical precedents that will be addressed in this work - there has been, in the light of most scholars on the subject, the genesis of new Fundamental Rights. These rights accumulated within a political process until they became the basis for the formation of the Democratic State of Law that we live in Brazil today.

However, little is debated doctrinally about the Fundamental Duties, which, in a generic way, can be translated as the duty that the State assumes before the population to enforce the Fundamental Rights.

Thus, this paper aims to elucidate about the Fundamental Duties in Brazil and demonstrate its importance for the effectiveness and creation of the Democratic State of Law. However, the work is limited to doing this analysis in a constitutional way until the 1988 Federal Constitution, currently in force in the country.

In view of this, the paper sought to make a historical analysis of the old constitutions that headed the country. The focus of discussion in this part was to show the political ruptures that preceded each constitution cited. Moreover, a deeper analysis of the 1988 Constitution was made in a specific topic, since it is the one that inaugurated the issue of Fundamental Duties in the Brazilian legal system.

Therefore, the work was done based on a bibliographic and documental review of books, articles and legal texts, always seeking to use the doctrines that best deal with the subject addressed. Furthermore, it is a theoretical and exploratory research that uses the dialectic method as the basis of the work, based on the technical means of investigation by the historical and observational method. All this was done on the basis of an analysis of how the Fundamental Duties behaved within the Brazilian constitutional texts.

2. STATE EVOLUTION AND THE FOUNDATIONS OF THE DEMOCRATIC RULE OF LAW

For a better understanding, when studying the history of the State, scholars classify the state entity according to the characteristics it has in a given context. In this way, the socalled state models are created, which are modified over time.

It is worth noting that the changes between State models occur, primarily, due to popular pressure. As a result of people's indignation, these civil claims have caused the State to undergo metamorphoses until it arrived as we know it today, as the Democratic State of Law. Thus, the State went through successive remodeling processes that were directly associated with Fundamental Rights, but not always with Fundamental Duties.

The studies of professors Gina Pompeu and Rosa Pontes are emphasized, who, when studying the change of the State over time, associate this change with economic interests and

human needs that vary in each period and start to not correspond to the State model in force in the period, based on economic, social, and political changes acting on the increase or decrease of State power (POMPEU; PONTES, 2018).

At first, the concept of the State is not pacific, however, one can refer to it from the 16th century on, in modernity, where this entity is able to fit around all the constitutive elements elected by Dallari. (BASTOS, 1995).Thus, these elements are found in Dallari's definition as (1972, p.104) "[...] the State as the sovereign legal order, which aims at the common good of a people located in a certain territory". Thus, the elements are: people, territory and sovereignty.

Thus, before there was a State with all the aforementioned elements, what existed was the feudal system, Feudalism. As a model of organization of civil relations, Feudalism was characterized by not having a general centralization of power for the entire population, the power relationship here was limited to small territories and was based on vassalage, a regime known in the Middle Ages. Moreover, as an economic characteristic there was a minimalist mode of production based on the subsistence of the population that paid taxes in the form of food for the feudal lord, all far from accumulation of capital, Dobb (1977, p. 01):

> If we ask ourselves what was the basic conflict generated by the feudal mode of production, it seems to me that we will have only one answer. Fundamentally, the mode of production in feudalism was the small mode of production - carried out by small producers attached to the land and its instruments of production. The basic social relation rested on the extraction of the surplus product of this small mode of production by the feudal ruling class - a relationship of exploitation underpinned by various methods of 'extra-economic coercion' (DOBB, 1977, p. 1).

In the same line of reasoning, the author approaches the issue of the decline of the feudal system, associating the fact to the revolt of the small producers who had the excess product retained within the system, not making a profit, just subsisting, causing a discontent and a long process of changes in collective organization, in the words of the author herself:

> In my view, this is the connection. To the extent that small producers achieved partial emancipation from feudal exploitation - perhaps at first a mere softening (with the transition from labor-rent to money-rent) - they could keep for themselves a part of the surplus product. Thus they obtained the means and motivation to improve cultivation and extend it to new areas, which incidentally served to further sharpen antagonism against feudal restrictions. Thus the foundations were also laid for some capital *accumulation within the small mode of production itself,* and thus for the beginning of a process of *class differentiation within the small producers' economy* - the well-known process, witnessed at various times in widely scattered parts of the world, towards the formation, on the one hand, of an upper layer of relatively well-to-do progressive farmers (the kulaks in the Russian tradition) and, on the other, of a layer of ruined peasants. This social polarization in the village (and. similarly, in the urban crafts) paved the way for wage production and, as a result, for bourgeois relations of production. (DOBB, 1977, p.3).

The fact is that after the rupture of the aforementioned system, the Absolutist State began. Characterized by the advent of National Monarchies together with the mercantilist development, the time of the great navigations (QUIJANO, 2005), this state matrix was characterized by keeping the territorial unity. Thus, the State in this context was based on the Catholic religion that, besides validating the king's power by saying that he was chosen by God, also dictated rules

of behavior. Thus, a king-church binomial was maintained that left the king free to govern in an arbitrary way and without thinking about the people since everything that came from him was seen as God's will.

Thus, in the early seventeenth century and late nineteenth century, the bourgeois movements - French Revolution[3], Glorious Revolution - accelerated the decline of monarchies, since the State model was not based on the welfare of the people, a fact that gave rise to the Liberal State. It is in this context that the first dimension of Fundamental Rights emerged - rights that are essential to men in their coexistence with others and before the State itself, determining a relationship of harmony and reciprocal respect.

Briefly, the rights of the first dimension are the rights of man in the face of an absentee state, it is based on subjectivity, valuing the human person individually considered, reproduced as: right to life, property, religious freedom and freedom of thought, among others.This generation became known as the Rights of Freedom (BONAVIDES, 2008).

According to Renata Lima (2018, p. 8), about the freedom fostered in the first generation of Fundamental Rights, she states:

> Economic liberalism had the need to prevent the intervention of Absolutist states, and the concentration of power in the mothers of one person. For the greatest enjoyment of commerce, the obligation of the State not to do was essential, as well as the existence of equal laws for all. In this vein, it can be said that the liberal bourgeois state, which contributed to the rule of law, was the one that fought the absolutist states. Therefore, the determination of economic policy was in the sense of not intervening in private business, letting it flow, and be guided by the market. (LIMA, 2018, p. 8)

Thus, it can be seen that liberalism[4], in its first experience, is not linked to the idea of Fundamental Duties. The state organization did not intend to be an active entity within public policies, it was based on the minimum intervention of rulers so that the fundamental rights mentioned above were consolidated.

Moreover, there is the birth of the Social State[5] with the Russian Revolution of 1917. This State sought to regulate the economy on the basis of disciplinary norms, as well as the creation of companies to ensure services (BASTOS, 1995), trying to reverse the ills that the Industrial Revolution brought to workers, such as mass unemployment and the precarious conditions of underemployment.

On the other hand, the Social Rights are revealed, which claimed an economic isonomy among citizens, expressing themselves as rights to education, health, work, social assistance,

3 In the period before the French Revolution, Law was divided or fragmented into particular systems, both from the class point of view and from the material and territorial point of view. There was a Law for the clergy, as another for the nobility, and yet another for the people, while each region had its own particular system of rules, uses and customs, often conflicting, with certain relations being governed by Canon Law and another by State Law". (MIGUEL REALE, 1987, p. 412).

4 "The term liberalism has become associated with the idea of freedom, with political, economic, philosophical, social, and psychological nuances. In the political sense, liberalism was associated with democracy. In the economic sense, liberalism was associated with freedom of profession, of work, and of economic activity. Philosophically, liberalism was associated with freedom of belief, thought, feeling, and action. In the social sense, liberalism was associated with society's desire to enjoy autonomy to conduct and determine its own destiny. In this sense, liberalism has raised, notably, the cause of independence of the former English colonies, Spanish, Portuguese. (FARIAS NETO, 2011, p. 275.)

5 According to Gilberto Bercovici (1999, p. 37): "The basis of the Welfare State is equality in freedom and the guarantee of the exercise of this freedom. The State is no longer limited to promoting formal equality, legal equality. The equality sought is material equality, no longer before the law, but through the law. Equality does not limit freedom. What the state guarantees is equality of opportunity, which implies freedom, justifying state intervention."

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thus, social and economic cultural rights. Professor Paulo Gustavo Gonet Branco (2000, p.107) illustrates: "Fundamental rights assume a position of definite prominence in society when the traditional relationship between the State and the individual is inverted and it is recognized that the individual first has rights and then duties before the State, and that the State has, in relation to the individual, first duties and then rights. These rights are called the second dimension of Fundamental Rights.

In this way, we have the beginning of the discussion within the history of the State about the Fundamental Duties. At this point, the people add to their rights the ability to demand from the State an active posture towards their existence, bringing the beginning of the discussion of the State having the duty to guarantee the basic minimum for life, interfering in the people's private existence.

However, the State continues to remodel itself. There is World War II and, with its end, the establishment of the Democratic State of Law, as well as the Declaration of Human Rights in 1948, entering a new social order in which international ties are strengthened for the creation of global mechanisms that guarantee Fundamental Rights. In this perspective, there is the institution of the third dimension of these rights entitled the Rights of Fraternity or Solidarity, which refer to diffuse and collective rights, not purely to the man-citizen and the man-State, but to the focus on man and his fellow man. This dimension emerges in themes related to the right to peace, to the environment, to the self-determination of peoples, to development, to communication and to the common inheritance of humanity.

Thus, it is in this form of State that we have a legal system based on norms and principles. The set of laws of post-war countries began to adapt to the light of world pacts, highlighting as an example the Universal Declaration of Human Rights.

Thus, this period is marked by the attempt to consolidate the aforementioned dimension of fundamental rights. In Brazil, the 1988 Constitution - the source of discussion in the next topic of this article - was created at this historical moment, trying to guarantee both fundamental Rights and Duties.

There is, moreover, the fourth dimension of Fundamental Rights, defended by Professor Paulo Bonavides (2000, p. 525-526), as the right to democracy, information and pluralism, in his words:

> Fourth generation rights not only culminate in the *objectivity* of the rights of the two preceding generations, but also absorb - without, however, removing it - the *subjectivity of* individual rights, namely, first generation rights. These rights survive, and not only survive, but are enhanced in their *main objective* and *axiological* dimension, being able, from now on, to radiate with the highest normative efficacy to all rights in society and in the legal system. From here we can, therefore, proceed to the assertion that the rights of the second, third and fourth generations are not interpreted, but *concretized*. It is in the wake of this concretization that the future of political globalization resides, its principle of legitimacy, the incorporating force of its liberating values.
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> (...)
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> Finally, fourth generation rights comprise the future of citizenship and the future of freedom for all peoples. Only with them will political globalization be legitimate and possible. (BONAVIDES, 2000, p. 525-526)

Moreover, Bonavides goes further in his scientific research, as he deals with what he classifies as the fifth dimension of fundamental rights, the right to peace. The author illustrates in the text that classifying peace as a third generation right does not really qualify the importance it has in the era of what he calls the new constitutionalism, in his words:

> Today, the West, on the contrary, is witnessing the irresistible advent of another constitutionalism - that of normativity - dynamic and evolutionary, and at the same time, principled and fertile in the gestation of new fundamental rights. The realization and observance of these rights humanizes communion with the social, tempers and softens reactions to power, and makes the burden of authority weigh less heavily on the forums of citizenship. The new Rule of Law of the five generations of fundamental rights comes to crown, therefore, that spirit of humanism that, in the perimeter of legality, inhabits the social regions and permeates the Law in all its dimensions. The legal dignity of peace derives from the universal recognition that is due to it as a qualitative assumption of human coexistence, an element of conservation of the species, and the realm of security of rights. (BONAVIDES, 2008, p.86).

In this way, Paulo Bonavides demonstrates the importance of peace as a fundamental right, and goes further by raising the importance of the discussion of new fundamental rights that validate the new process of constitutionalism that he cites.

It is worth noting that scholars on the subject criticize the classifications of Fundamental Rights, not denying them, but rather seeking to go beyond them, making it a valid discussion, since, as much as the division of the dimensions of these rights is a didactic tool, one must go beyond, perceive the intersection of these dimensions beyond subjective and objective classifications, in the words of Hachem:

> [...] all fundamental rights, due to the complexity of their legal nature and normative structure, possess concomitantly the totality of traits that supposedly would be peculiar to each one of the generations: (i) they direct duties of abstention to the Public Power; (ii) they impose on the State obligations to provide factual and normative benefits; (iii) they possess at the same time both the supposedly exclusive transindividual ownership of "third generation rights", and the individual ownership allegedly typical of "first and second generation rights" (HACHEM, 2020, p. 409).

From the above, it can be inferred that the history of the state entity and all its reformulation is linked to the Fundamental Rights and their dimensions. However, Fundamental Duties require a more structural analysis within a legal system, since, besides being a subject, little discussed by research in the legal area, it varies within each nation-state.

3. BRAZIL'S CONSTITUTIONAL HISTORY AND THE CHANGE IN PARADIGM WITH THE 1988 FEDERAL CONSTITUTION

A constitution carries with it the foundations of the legal system of which it is a part. When studying Constitutional Law, the idea of hierarchy of norms is denoted right from the start. Thus, this structure was thought by Kelsen (1998), of pyramidal configuration, in which the constitu-

tion would be part of the apex of this form, thus legitimating its role of regulation within the order and ensuring that all rules below must follow the dictates outlined by it. In this sense, the importance of understanding the Charter of each state is demonstrated, and from this, linking each document with the historical moment that governed.

In Brazil, right after the end of the so-called Colonial Brazil, the first constitution was created, the Constitution of 1824. This Magna Carta brought in its legal text contradictions since its creation, since within its legislative process it sought to ally the ideas of liberal regimes that had been conquered in France, such as the vote, however, it was not determined the universal character of this right, in the words of Mattos:

> The First Constituent and Legislative General Assembly for the Kingdom of Brazil was convened by Decree No. 57 of June 19, 1822, signed by José Bonifácio de Andrada e Silva. The deputies were to be nominated by the voters of the parishes, and these were to be chosen directly by the mayor of the parishes. To be entitled to vote in the parish elections it was necessary to be married or single over 20 years old, as long as one was not a child of the family. Everyone, however, needed to have at least one year of residence in the parish where they were going to exercise their right to vote, it was mandatory, with the exception of those who lived on salary. The only people not included in this rule were the bookkeepers and first clerks of commercial houses, the servants of the Royal House (who did not wear white coats), and the administrators of rural farms and factories. Excluded from voting were also regular religious, naturalized foreigners and criminals. (MATTOS, 2011, p.8).

However, even with a selective process for a legislative assembly that was totally excluding and aimed at an elite that was forming in the new context of the country, Dom Pedro I, afraid of losing his sovereignty, dissolved this assembly and established the Constitution of 1824 in a dictatorial manner, establishing a distorted legislative power, since it disregarded the tripartite division of powers and established the Moderator Power:

> From the analysis of the way in which the Brazilian State was structured in the Constitution of 1824, it is clear that it blends the liberal ideas reinstated at the time with a monarchical structure marked by conservatism. This is in fact the result of the inevitable clash of interests between the members of the Constituent Assembly, appointed by Pedro I, who were moving toward the structuring of a Charter that would reflect the republican ideas then conquered by the people of France, and the natural resistance of the prince who found himself facing a threat to his monarchial authority. [...] With the coup that resulted in the bestowal of our first Constitutional Charter, it can be seen, therefore, that the Emperor sought to ally the ideas of the liberal French Charter, without, however, giving up his power. In this way, he repudiated the tripartite model of power implemented in France by the ideals of Montesquieu, which had among others the power to limit the others. (MERGULHÃO, JUNIOR, MACHADO, 2011, p. 104-105).

Thus, the Political Letter brought with it characteristics such as the centralization of power in the regent's hand through the Moderator Power. Moreover, this same power would bind all state attributions, since everything that happened in other spheres would have to be approved by Dom Pedro I. Furthermore, an excluding electoral process is denoted - precisely in articles 92, 94 and 95 (CONSTITUIÇÃO FEDERAL, 1824, BRAZIL) - as it took into consideration criteria of income.

Furthermore, the old monarchical regime entered a process of decline as the collective ideals changed. Two main reasons are given for the long process of decline, namely the abolition of slavery - the basic structure of the economy in the empire - and the Proclamation of the Republic in 1889.

Thus, the Magna Carta in force (Constitution of 1824) no longer harmonized with the reality of the country that was undergoing the process of transition to the Republic. Soon, in this context, in the same year of the proclamation of the Republic, the first organizational changes in the country were also instituted. About these changes, Mattos explains that:

> Each State would later enact its definitive Constitution, electing its deliberative bodies and local Governments. Meanwhile, the new States would be administered by the "governments they had proclaimed or, in their absence, by governors delegated by the Provisional Government", without recognizing any local government contrary to the republican form. (MATTOS, 2011, p. 12).

Thus, the Constitution of 1891 was created and its main landmark was the establishment of federalism in Brazil, a model that is still adopted today in the political organization of the country. Trindade explains that the federalism adopted:

> It leaves the newly created states a significant margin of autonomy. According to the Constitution, they own the mines and vacant lands located in their respective territories and can make agreements and conventions among themselves, without political character (art. 62). They can also legislate on any matter that is not denied to them, expressly or implicitly, by the constitutional principles of the Union (art. 63)
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> [...]
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> This device allows the states, for example, to levy interstate taxes, to decree export taxes, to borrow abroad, to elaborate their own electoral and judiciary system, to organize military force, etc. (TRINDANDE, 2011, p. 188)

Besides federalism, presidentialism was also instituted as a system of government, thus having the first military president in power, Deodoro da Fonseca, who would soon be replaced by his vice-president, Floriano Peixoto, when the Estado de Sítio was instituted in the country. The new law also introduced provisions such as habeas-corpus, and, of course, the extinction of the Moderator Power.

However, the basis of support for the economic and political system of the First Republic, or Old Republic, was the "coronelismo". Trindade elucidates that:

> Having occupied the leadership in his municipality, the colonel, on whom everyone depends, has his local power base structured from alliances with some other colonels, generally leaders in the municipal districts, with important people in the localities - doctors, lawyers, civil servants, merchants and priests, among others -, besides a personal guard, formed by henchmen and hired guns. (TRINDADE,200, p. 180)

In this way, the country entered an unstable political process, passing through numerous presidents who did not remain in power for the duration of their mandate. At the same time, the Liberal Alliance is gaining strength, a movement that introduces the discussion about the representation of professional associations within the national politics. Barreto explains that the movement:

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> (...) presented a much greater quantity and intensity than historiographical research usually indicates. It had some important general characteristics: it was up to date with international issues; it was not merely theoretical or rhetorical, since it had the formulation of the new Constitution as a natural outflow; it ended up drawing the attention of the main national sectors and of outstanding intellectuals, as well as taking place with great intensity and a strong sense of urgency, given the climate of uncertainty about the directions that the "revolution", started in 1930, would lead the country to. In short, it was an intellectual debate in both meanings of the term: the production and dissemination of ideas and political engagement on the issues in vogue. (BARRETO, 2004, p.120).

Thus, the "coronelismo" was framed as a political system, a complex network of relations that went from the President of the Republic to the regional colonels, characterized as a relation of reciprocal compromises that maintained the executive power between São Paulo and Minas Gerais. In this system, the colonels, who were regional leaders, held the power to command the votes of their subordinates and did this based on political interests and promises coming from the governors, and these governors were linked to the president, and so everything was formed. (CARVALHO, 1997).

In this way, the political movement of 1930 shakes the structure of the Brazilian Republic and will have as its main agendas:

> The purpose of modifying the regime established by the 1891 Constitution. The program of the Liberal Alliance, which would become victorious with the Revolution of 1930, included the idea of "representation and justice" with an undefined element of propositions, corresponding in the political plan to the free manifestation of the will and popular sovereignty with freedom of vote, the guarantee of the autonomy of the states and the organization in new bases of the Executive Power of the Union and the States. (MATTOS, 2011, p.17).

A Provisional Government was established, headed by Getúlio Vargas. This government had the economic paw to overcome a deficit left by years of mismanagement along with a drop in the value of the coffee bag, the country's main export product. Later, more precisely in 1932, this government issued a decree for elections to the National Constituent Assembly. (LIMA, 1970).

Thus, in 1934, the new Constitution was born, which would follow the current models that were emerging in the world, giving a first idea of what the Fundamental Duties would be when talking about issues such as economic and social order, even though not talking about them expressly, in Mattos' words:

> The 1934 Constitution is part of the movement of post-war constitutions in the Western world, containing what was called the "social meaning of law" and inspired by the German Weimar Constitution of 1919 and the Spanish Constitution of 1931. The most important points of the Constitution fall within the framework of the economic and social order, for the first time included in a Brazilian constitutional text.
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> [...]
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> It was up to the union to draw up the National Education Plan, whose basic laws were immediately fixed. Education was proclaimed as a social right, as well as work (...) (MATTOS, 2011, p.18).

It is also worth noting that the social rights cited by the Constitution confirm what is classified as the second dimension of Fundamental Rights.

However, the Magna Carta of 1934 did not have a prolonged validity, since after the known "Estado Novo" of Vargas, who did not want to leave power, the Constitution of 1937 was established. Target of much criticism, the aforementioned Constitution is seen by intellectuals as a non-legitimate document, besides being considered a document of little use for understanding the problems the country was going through at the time, states Abreu::

> Even today, some 80 years after its granting, specific studies by jurists and historians on the 1937 Constitution are rare and limited. Perhaps this lack of studies is due to a common contempt for this document, for its granting character and supposed lack of legal and political legitimacy. For some and others, whether contemporary or not to the Constitution, its lack of legal and political legitimacy would not only justify the contempt for this document but also demonstrate its limited character as a source for understanding Vargas' Estado Novo and its authoritarian and corporative political model. (ABREU, 2016, p. 463).

Thus, with the precepts of the Aliança Nacional Libertadora (National Liberation Alliance), and also the Cohen Plan, established so that Getúlio would remain in power, the 1937 Charter ended up falling at the time the Estado Novo was extinguished. In 1945, a new National Constituent Assembly was established that would open the way for a new Magna Carta. (MEZZAROBA, 1992).

Thus, in 1946, yet another Major Law was born in Brazil, undoubtedly seen as a response to Vargas' Estado Novo. Demonstrating itself as a mature constitution within the republican regime, the Lei Maior sought to divide its attributions in its genesis, designating subcommittees for its elaboration. This constituent process was based on returning the attributions of the old Magna Carta of 1934, however, updating certain concepts for the time when it was made. (MATTOS, 2011)

Soon, it dealt with issues such as the Federal Organization, in addition to the Organization of Powers, especially the Executive, in which it was taxed its powers and responsibilities, denoting then that it sought the containment of this power that ended up being inflated in the last state experience as seen before. It instituted a republican regime, being a democratic and liberal legislation. Other federalist attributions were also treated as the basis of the country's new constitutional phase, in Cavalcanti's words:

> The distribution of incomes, the legal, political and economic regime of the Municipalities, the organization of the legislative chambers, the economic structure and so many other subjects were studied in view of the experience and the harsh provocations suffered by the country in the last decades. (CAVALCANTI, 1947, p.1).

In this way, the 1946 constitution did not bring any direct attribution to the Fundamental Duties, there was no direct application of the term nor of the determination of what these duties would be.

Consequently, in 1964 the military ascended to political power. Preceded by moments such as the March of the Family with God for Freedom, and based on the support of some sectors of the time, such as the church and the religious civil authorities that defended private property, the then future president, João Goulart, did not take office and a new political history began in the country that would last for years. (GUISOLPHI, 2010).

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With this change in the administrative bases, when an authoritarian and repressive government was installed, the old constitution (1946) no longer matched reality. Thus, after successive Institutional Acts promulgated by the presidents of the Military Era, in 1967 the then president Castello Branco began the process of drafting a new Magna Carta, in which the dictator:

> He appointed a committee of notables supervised by himself, and charged the Congress elected in 1962, mutilated by dozens of annulments, with no representation whatsoever, to approve, with a clarion call, a new Constitution for discussion and vote on which it had not been mandated. Thus was born, in the context of a farce, without any legitimacy, the sixth Brazilian Constitution. The endeavor had a double objective: to contribute to the institutionalization of the dictatorship (whatever that might mean) and to bind the dictator himself - already 'elected' by an obedient and shrunken Congress - in a legal framework alien to his will. Among not a few, the illusion was created that the dictatorship had been overcome, giving way to an authoritarian rule of law. (REIS, 2018, p. 279).

Thus, the 1967 Constitution is far from talking about what the Fundamental Duties would be. Furthermore, in 1969 there is the most important Institutional Act, number 5, which is treated as a new constitution, since the Act alters basic fundamental rights, such as freedom of the press and due process of law.

However, after 21 years of military regime, democracy was again established in Brazil, a fact that occurred on the basis of civil movements throughout the country. This phenomenon became known as redemocratization. Therefore, with the rupture of the social reality previously experienced, the foundations of the legal system could not remain the same. Consequently, in 1986 elections were held to choose Governors, Representatives and Senators, who would also be the constituents:

> The constituents would be deputies and senators, who would be in charge of drafting the Constitution and routine legislation. The social groups and classes interested in getting their ideas approved and defending their interests in the new Constitution chose their candidates, whose campaign they began to finance. (MATTOS, 2011, p.34)

Thus, it was in a historical context based on repudiation of the atrocities and the regressions that the Military Dictatorship represented for Human Rights that the 1988 assembly approved the text of the well-known Carta Cidadã (Citizen's Charter), the 1988 Federal Constitution, still in effect today.

Known for its immense list of guarantees and delimitations of state attributions, the 1988 Constitution shows itself as a response to the dictatorial regime after it. In addition, the Major Law expressly brought an entire chapter dedicated to the Fundamental Duties, a subject that will be discussed in the next topic, in which this concern of the original legislator will also be explained.

4. THE 1988 CONSTITUTION AND THE FUNDAMENTAL DUTIES.

When starting the discussion about the Fundamental Duties, some precepts elucidated by authors who talk about the subject become interesting in order to understand the core of the subject. Thus, one of the most valuable teachings for the debate is made by Georg Jellinek when dealing with the four statuses that the individual may find himself facing the State.

The author classifies these statuses in: passive, positive negative and active (JELLINEK, 2002). Namely, in the passive status, the individual before the state is subordinated to the public powers and is seen as a subject of duty - occurring predominantly with a cooperation with the state. In the negative status, on the other hand, the individual is consecrated as a being that has the power of self-determination, guaranteeing a state noninterference in his life. When found in the positive status, the citizen would have the right to demand the State to provide services and goods. Finally - and most importantly for the theme of the work - in the active status, the subject starts to enjoy influence before the state formation, here it is highlighted as an example the suffrage, therefore, he starts to exercise his political rights, being demanded and being able to demand from the state. (JELLINEK, 2002).

Thus, it is noteworthy that the Fundamental Duties, in one of its main assignments happens when the political being is in the "active status" before the State, term used in Jellinek's classification. Thus, in this status created by the author, the individual has the power to influence the State directly or indirectly, no longer just being influenced, one of the greatest examples of this citizen role would be the power to choose their representatives through the vote. However, as it will be explained in the present topic, the legal garantism also approaches the State-Citizen bond in other aspects, deepening even more the discussion.

Furthermore, based on the discussion above it is necessary to define what the Fundamental Duties are and the importance that the theme has in our legal system. Dimoulis and Martins define these duties as:

> Duties of action or omission, proclaimed by the Constitution (formal fundamentality), whose active and passive subjects are indicated in each rule or can be deduced through interpretation. Very often the ownership and passive subjects are diffuse and the content of the duty (required conduct) can only result from infra-constitutional concretization. (DIMOULIS; MARTINS, 2000, p. 67).

In complement, the meaning of Vieira and Pedra (2013, p. 5) exposes the relationship of duties with the legal system: "Fundamental duties are not mere impositions based on human virtues. They constitute, in truth, a reciprocal model proper of the social contract, where, finally, citizens will have a duty of obedience to the legal system. "Finally, and no less important, another definition that seems correct to us would be that of Duque and Pedra:

> [...] fundamental duties can be conceived as legal duties of the person, both physical and legal, which, by determining the fundamental position of the individual, present a meaning for a certain group or society and, thus, can be demanded in a public, private, political, economic and social perspective (DUQUE; PEDRA, 2013, p.151).

From what was exposed, it is evident that the Fundamental Duties are primarily related to the legality of each legal system, that is, they carry the need for recognition in the texts of the Constitution and regulation by ordinary laws.

Furthermore, when studying these duties, one notices a scarcity of legal texts on the subject, especially when comparatively analyzing the studies on Fundamental Rights, a related matter. Some authors justify the lack of approach for the following reasons:

> [...] we are of the opinion that such a neglect of fundamental duties has more proximate causes. These certainly include both the political, social and cultural situation of the second post-war period and the return to a strict liberal view of fundamental rights. As for the first cause, we need only recall that the dominant concern at that time was the establishment or foundation of constitutional regimes that were strong enough to protect fundamental rights and liberties. That is, regimes that would oppose in a fully effective way any and all attempts to return to the totalitarian or authoritarian past. It was therefore necessary to exorcise the past dominated by duties, or rather, by duties without rights (NABAIS, 2007, p.13).

In a complementary way, still on the subject:

> There is not in the Brazilian jurisprudence and doctrine the due development of fundamental duties. This legacy of omission takes place basically on foundation of the Liberal State heritage and the first generation rights, with the position of the particular in face of the State [...] (Vieira; Pedra, 2013, p. 2).

This limited approach by authors who speak on the subject is also related to the low number of provisions found in the current Federal Constitution that governs Brazil. Our Magna Carta, even though in its Title II, Chapter I, it bears the statement "Of the Individual and Collective Rights and Duties" brought exhaustively rights and only a few duties without even making use of the term Fundamental Duties.

In this sense, the texts by Dimoulis and Martins, deduce, in a didactic way, classifications about the duties that can be found within the Constitution taking into account the characteristics of the devices. The attributes used, in general, would be: The autonomy or not of the Fundamental Duty - i.e. whether it exists in its own form or by linkage to a Fundamental Right -; the duty to be explicit or implicit - whether it is written or not in the constitutional text - and finally, to whom the duty relates - common person or State (DIMOULIS; MARTINS, 2000).

Thus, when compared to the Indian Constitution, for example, the 1988 Federal Constitution is still lagging behind on the subject of Fundamental Duties. India, after its independence in 1947, promulgated its first constitution and became a republic in 1950. The text of the Charter incorporated both Fundamental Rights and Fundamental Duties. (SRIPATI, Vijayashiri; THIRUVENGADAM, Arun K., 2004).

Thus, the Fundamental Duties in the Indian Constitution are found as guidelines and principles of national policy. The text in Part IV of the Constitution is focused on the actions that the Indian state should take in relation to social, economic, and cultural rights. In this way, Article 37 of the Charter further deduces the importance of recognizing these duties in order to govern the country. (SRIPATI, Vijayashiri; THIRUVENGADAM, Arun K., 2004)

As the list treated by the doctrine is extensive, it would not fit to talk about all of them in this article, however, there are three important classifications to elucidate the research on the

duties portrayed, they are: Implicit and non-autonomous State Duties; Autonomous State Duties and Autonomous Private Duties.

The Implicit and non-autonomous State Duties, according to the authors, are those that arise in the light of the Fundamental Right to which it relates, besides having emerged with the first legal-objective dimension of fundamental rights, therefore, in the perspective of a negative State regarding the interference in private life. Examples of these duties are the state duties of protection, which are configured as the duty of the State to protect the Fundamental Right in relation to threats and aggression to this guarantee (DIMOULIS; MARTINS, 2000).

On the other hand, there are the Autonomous State Duties, which in a different way, are sanctioned by the constitutional text for the States to do them, an obligation before the population that may demand them. The example in this case would be the duty that the State has to criminalize conduct that the legislature, influenced by what society considers negative. (DIMOULIS; MARTINS, 2000).

In addition, one must overcome the understanding that only the State is the subject of duties, and it is in the classification of the autonomous duties of individuals that we can visualize the statement. These duties are those that are outlined and must be obeyed by private individuals in their legal actions, therefore, they are duties directed to a certain sector of the population. The best example within the Federal Constitution is education as a duty of the family over children and adolescents. (DIMOULIS; MARTINS, 2000).

Still on the duties between private individuals, another point that is raised in the texts of scholars would be the issue of solidarity in private relations, considered as the other side of the relationship rights and duties between individuals, ensuring the dignity of the human person, namely:

> Solidarity is, in fact, the other side of the same coin in the game of rights and duties, since it ratifies the incidence of fundamental rights covered by the constitutional norm, and can be understood from a relationship of reciprocity: if there are rights, in return, there is the duty to provide solidarity (DUQUE; PEDRA, 2013, p. 148).

Finally, the last point to be remembered when talking about the Fundamental Duties would be to overcome the idea that duties are suppressors of rights. The authors who have dedicated themselves to studying the duties are unanimous in considering that there is a synallagmatic relationship between rights and duties, since there is a mutual protection by them to the legal system itself, therefore, to the Democratic State of Law (NABAIS, 2007).

In conclusion, also adduces Vieira and Pedra (2013, p. 3): "It is necessary to understand fundamental duties not as a counterpoint or a mitigator of rights, but rather as a provider or promoter of them."

5. FINAL REMARKS

It is concluded in this paper that the Brazilian legal system lacks a specificity on the Fundamental Duties, influencing, thus, to a limited number of authors who are dedicated to dealing with the subject. However, this is a characteristic of Western legal systems, the low visibility

of the Fundamental Duties, since the constitutional history of these countries were founded, primarily, based on individual freedom as a maximum premise. (BONAVIDES, 2008).

When analyzing the history of the Magna Carta of Brazil, it was confirmed the absence of rules destined, and even the use of nomenclature, as to the Fundamental Duties. The original Brazilian legislator, in none of the conjunctures highlighted the importance of the guarantee of duties for the consolidation of the democratic bias that a republic brings with it. Furthermore, when the legislator employed conducts considered to be Fundamental Duties, he did not clarify the forms required for their consolidation, leaving it to the infra-constitutional legislations to elucidate on the subject. An example of this is the solidarity in private relations. Considered as one of the main aspects of the Fundamental Duties, this solidarity guaranteed by the constitutional text - in singularity and not entitled in itself as a Fundamental Duty - is studied in the light of private law, therefore, of civil law, demonstrating that it was left to infra-constitutional legislation to delimit this duty.

In this way, the analysis of the 1988 Federal Constitution, made in the article, also proves the absence of a specific nomenclature that speaks about the Fundamental Duties. This fact shows that the original legislator did not in fact focus on these duties, even though in Chapter I of Title II of the Constitution he tries to portray the so-called Individual and Collective Duties together with the Rights.

Furthermore, the body of national works shows a disparity in the number of authors who speak of Fundamental Duties in their bibliography when compared to the number of writers who speak of Fundamental Rights.

The Fundamental Duties convalidate as a significant theme to understand the power to demand and indirectly direct that every citizen has in a Democratic State of Law.

In view of all this, it is noted that, even with the importance proven by authors who speak on the subject, the Fundamental Duties do not enjoy the due value as a forming base of the Democratic State of Law. Scholars converge in considering that Fundamental Rights go hand in hand with Duties, duties that shape the State as much as and in the same proportion as the principle norms. It is defended, then, the need for greater research in the Brazilian scenario on the Fundamental Duties that govern our legal system, both constitutional and infra-constitutional.

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