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State evolution and conception of right to education as a fundamental right

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Abstract

The right to education, as a fundamental right has followed, the evolution of the democratic State and it can be found both at the level of the internal law of the States, in the constitutional texts and in international law. It appears in the Constitution of the Portuguese Republic of 1976, inserted in the economic, social and cultural rights and is consecrated in the European Union (EU). And is there a connection linking state evolution and conception of the right to education as a fundamental right? Through a methodology with literature revision of portuguese national legal texts and of the EU law it is possible to analyse the progress achieved historically towards the impletation of the education as a fundamental right. That study leads to the recommendation of States, in their internal dimension and as members of international organisations, to value the education as a vehicle for the realization of democratic values.

Keywords: education; fundamental right; European Union.

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1. Introduction

The question arises whether the conception of the right to education as a fundamental right has accompanied the evolution of the democratic State.

It is possible to find the right to education enshrined both in the domestic law of States in constitutional texts and in international law or in general organisations, such as the United Nations or regional organisations, such as the European Union (EU). The facet of consecration has already been achieved.

In the specific national case of the Constitution of the Portuguese Republic (CPR) of 1976, the right to education is presented as a freedom and as a cultural right inserted in economic, social and cultural rights. Already in world international law, the right to education is now one of the objectives of the UN Agenda 2030 and is enshrined in the EU in the texts of the founding treaty, article 165 of the Treaty on the Functioning of the EU (TFEU), and in article 14 of the Charter of Fundamental Rights of the EU

Within the framework of the UN (United Nations), the 17 Sustainable Development Goals with 169 targets adopted in 2015 (UN Resolution A/RES/70/1, 2015) demonstrate the scale of this Universal Agenda to be achieved by 2030. In Objective 4 comes Ensure inclusive education, equitable and quality education and to promote lifelong learning opportunities for all.

The right to education, as well as the right to vocational and continuing training—long life education—are worthy of attention in recent EU documents which, without the dignity of legislative acts (Comissao Europeia, 2016), slowly shape the orientation of the Member States in their performance.

The value of the rule of law (Comissao Europeia, 2014) remains. But, it turns out that the realisation of the right to education is not yet fully achieved. And, it will also be through education and training policy that common values and general principles of law will be maintained (Conselho, 2017a, p. 3). The focus of the intervention by the State and the international community is still a necessity and priority.

This study, of theoretical-academic proclivity, is consolidated through systematic and methodologically selected normative interpretation of national and international legal texts and EU law.

The analysis of the progress achieved historically towards the objectives of consolidating the right to education leads to the recommendation of States, in their internal dimension and as members of international organisations, to value education as a vehicle for the realisation of democratic values.

2. The enshrinement of fundamental rights

The declarations of fundamental rights are the result of the liberal revolutions either of the French Revolution, of 1798, or of the American Revolution, before. This does not mean that there was no prehistory or history of declarations of rights before that time, as we can point out the English Magna Carta—*Magna Charta Libertatum* (Carvalho, 1993, p. 33; Maurois, 1976, p. 123; Miranda, 1990, p. 13)—which dates from June 15, 1215 and recently celebrates its 800th anniversary. Thus celebrated in the United Kingdom, by way of curiosity, with an issue of collection stamps by the Royal Mail in June 2015, which declare it ‘history's most influential human rights declaration’. It was a written document imposed on King John (1199–1216) by the English barons and it was not yet a true declaration of rights, as we understand it today, but the resolution of the problem of the state domain according to the feudal structures of the time and which came to assure the different social classes guarantees against the sovereign's prepotency, stating that the monarch must respect the domains and prerogatives acquired. However, it was intended to restrict certain despotic attitudes of the monarch by protecting the people.

The written declarations of rights, as we see them today, they came about with liberal revolutions. First, in America, with the Virginia Declaration of Rights of 1776, that was the first declaration of written law, followed by declarations in other American states. This was followed by the Declaration of the Rights of Man and the Citizen in France, adopted in 1789 by the French National Constituent Assembly. That says: 'Any society in which the guarantee of the rights is not assured, nor established the separation of powers has no Constitution'.

These were then the first declarations of modern and written rights. And both arose linked to the very evolution of the state, because the state changed, as result of the ideas of the liberal revolutions. They sought to put an end to the historical type of State in force, known as the police state, where all power was concentrated on the monarch, who acted in a discretionary and arbitrary way, without any respect for the rights of citizens. Even because the concept did not even exist, since the laws worked only to regulate the relations between the individuals but there were no laws to regulate the relations between the private and the State. The state acted without limits and the citizen could not dispute, had no means or where to turn.

The police state caused a saturation point in the citizens who rebelled against this situation and whose revolt culminated in the eruption of the well-known liberal revolutions. These revolutions, which resulted victorious, had as their main objective to end with that shape of state, to end the monarch's only power, to end the concentration of power. From these revolutions came new and very important concepts, which today are perfectly consolidated and unquestionable, but which at the time were innovative such as the concepts of the rule of law and constitutional state. The state has now been endowed with a constitution, a concept that we naturally report today but which only emerged at the end of the eighteenth century in North America and France. In most of the other states, this reality only arose in the early 19th century. In the Portuguese case, in 1822 and in Spain, earlier, in 1812, a written document is given to the name of constitution, a document that immediately incorporates the declarations of rights that soon result from the revolutions that gave rise to them. The constitutions include, in writing, the declarations of rights. In this way, the consecration of fundamental rights is now considered as an essential element of the state.

We can see the Constitution of Cadiz, promulgated on March 19, 1812 and annulled by King Ferdinand VII on May 4, 1814. Replenished in 1820 is revoked again in 1823. In Portugal: the Constitution of September 23, 1822; the Constitutional Charter of April 29, 1826; the Constitution of April 4, 1838; Constitution of August 21, 1911 and the Constitution of April 11, 1933. Today, the sixth Portuguese fundamental text, as amended by the seven constitutional revisions: Constitutional Law nº 1/82 of September 30; Constitutional Law nº 1/89 of 8 July; Constitutional Law nº 1/92 of November 25; Constitutional Law nº 1/97 of 20 September; Constitutional Law nº 1/2001 of 12 December; Constitutional Law nº 1/2004 of 24 July and Constitutional Law nº 1/2005 of 12 August at www.dre.pt.

3. The evolution of the state

The rule of law is nowadays an undeniable fact. It is a state that creates its laws not only for the citizens, which already happened in political state, but also the state is subject to its own laws. Laws are created for citizens and for the state. We expressly find it in the wording of article 5 of the present CPR of April 2, 1976, when it says that the Portuguese State is governed by the principle of democratic legality; it is subject to the Constitution and the law. The laws are also to bind the state itself.

In this new concept of the rule of law, protection and guarantee of fundamental rights are fundamental elements. It is not enough to enshrine these rights in the fundamental text, but rather it is necessary that all constitutional organization be oriented towards its guarantee and promotion (Miranda, 2017, p. 246). Now, if it is, in fact, a fundamental element of the rule of law, its understanding is that it has varied with the historical manifestations of the state. The conception is

not the same in a 19th-century state or in a 20th-century state, between which it has changed flagrantly, or even at the beginning of the 21st century.

To recap a little: the consecration of fundamental rights is essential for the recognition of the rule of law; just is not conceived in the same way over time, changing with the very evolution of the state. Fundamentally this happened with the shift from the 19th century to the 20th century.

Until the two Great World Wars there was a historical type of State identified as the Liberal State, which had specific characteristics. The motto was: the political for the politicians and the social for the citizens, because one of the assumptions was the separation between the state and the society. It was understood that the state should only guarantee security and collect taxes, and everything else was entrusted to the citizens, hence to say that the social side was up to the citizens. Because, from the perspective of the time, no one better than the citizens themselves would know what their needs and what their interests are, and therefore, no one better than them to know how to achieve those interests and the satisfaction of those needs. Therefore, the state was perfectly abstentionist, did not intervene and let individuals try to reach their interests. This was also reflected in the economic doctrine of this age of *laisser faire, laisser passer*, to freely operate the law of supply and demand with freedom of business, principles of economic liberalism. These were the assumptions of the Liberal State.

4. The understanding of fundamental rights

Obviously, with these assumptions, fundamental rights were enshrined in liberal constitutions, in many cases, especially in the Portuguese Constitution of 1822, so the first articles of the constitutions were devoted to fundamental rights, but were considered in the light of the principles of that time.

The fundamental rights at that time were just what we now call the traditional rights, freedoms and guarantees. They were original rights of man, understood as pre- and supra-state. The state could not fail to consecrate them and guarantee them because they were prior to and superior to the state itself. Constitutions and declarations of rights did nothing more than consecrate what came from the human being. Rights were also conceived merely as negative rights, that is, rights translated into spheres of citizen liberties in which the state did not need to intervene for citizens to enjoy them. As for example, the right to life, the right to physical integrity, the right to personal identity, all of them characteristic rights of that time that were enough to be consecrated in the Constitution for the state to worry that they would not be violated. No greater concern was required than to be enshrined in the fundamental text. They were, as was said, spheres of freedom of the citizen before the State and also against the state, because an understanding linked to the idea of the state as a prepotent entity, by the image of the previous state, the absolute state, that everything decided and imposed (Silva & Alves, 2016, p. 220). It was intended to move to the antipodes in the understanding that the state should do nothing but merely respect the rights.

The distinction between the rights of man and the rights of the citizen emerges, the first inherent in man as an individual as a human being and the second in the individual as a being living in society. There, a differentiation begins. Human rights were inherent in his condition, so all were guaranteed; the rights of the citizen in his life in society were considered fundamental only when they did not leave the margin of the social area. In this historical period, throughout the 19th and early 20th centuries, there were rights that today are considered fundamental, such as the right to freedom of expression, the right of assembly, the right of association, which at that time were considered as a crime, because they went beyond the sphere of the social and entered the area of the political. In next step, rights were only fundamental rights when they remained apolitical.

Another way to show this conception was by understanding the property right. The right to property was consecrated in the Constitution, but it was a different right from other rights, because it was a premise for the exercise of other rights. Only those who owned property could exercise political rights.

At the time, suffrage or the right to vote, today a universal right, was a restricted suffrage, and in the modality of census (Silva & Alves, 2016, p. 230). One could only vote, one could only choose his representatives, who had property and, by force of that, paid taxes, the census, hence the designation of census suffrage. Not everyone was entitled to vote.

4.1. The rule of law, today

The idea of the rule of law (Silva & Alves, 2016, p. 226) is a source for the general principles of judicial protection arising from the legal order of the EU today; not always expressed is an inspiring principle but results as a common denominator which is also present in the constitutional traditions common to the Member States (Comissao Europeia, 2014). And it will also be through education and training policy that common values and general principles of law will be maintained (Conselho, 2017a, p. 3).

Value and principle of the EU, this ideal has been present since the beginning of the original European construction, remains at the heart of the concerns because it faces recoils and setbacks in relation to what has already been achieved over the course of almost 70 years, institutions to strengthen the protection of the rule of law as 'the backbone of European liberal democracy and one of the founding principles of the EU stemming from the constitutional traditions of the Member States' (Parlamento Europeu, 2017a, pp. 7–9). It is now embodied in the Treaty on European Union (TEU), in article 2 and safeguarded through the article 7 mechanism introduced by the Amsterdam Treaty of 1997 and subsequently amended (Comissao Europeia, 2003, p. 3). In fact, there is no procedure, other than article 7, which provides for a form of control over respect for the rule of law of a Member State. The proper functioning of the EU stems from mutual trust between the European institutions and the Member States. And the EU believes that the internal measures of the Member States respect this same principle of the rule of law, but that balance can fail even though the mechanism of article 7 TEU has never actually been achieved. This preventive and sanctioning remedy—which leads to a finding of a 'risk of serious breach' of the amounts referred to in article 2 TEU or to the verification of its 'serious and persistent breach'—has an undesirable that a further and complementary step is being pursued, as presented by the Commission (Comissao Europeia, 2017a, p. 10) and remains in its most recent concerns (Comissao Europeia, 2017b, p. 38), as hailed by the European Parliament (Parlamento Europeu, 2017a, p. 14).

The idea remains and is continually threatened, as it did recently, in December 2017 by the European Parliament's position, which is still only visible through the media, in the face of the situation in Poland, where there is a breach of respect by the judiciary power, being the division of powers is one of the pillars of the concept.

In this respect, a whole doctrinal analysis with the institutions of the EU have re-emerged on the mechanism provided for in article 7 TEU.

5. The right to education as a fundamental right

The right to education as a fundamental right is itself a vehicle for the enshrinement of fundamental rights (Queiroz, 2010, p. 361) as a whole. The development of a policy of public awareness and education on fundamental rights by states and international organizations which have a practice in this field, leads to great achievements in the field of fundamental rights (Comissao Europeia, 2003, p. 13).

Valued by the EU, the right to education appears as relevant in a wide range of subjects (Conselho, 2017a). The education system, from early childhood to higher education, will be responsible for maintaining the skills (knowledge, skills and attitudes) essential to the exercise of democratic ideals.

It should be emphasised that the right to education clearly does not stop at the performance of higher education in universities (Feijo & Tamen, 2017, p. 10), but it has a very close connection with it

because, if it is true that in degrees lower than that level, it is welcomed by people who have passed through that degree. That is, for many to enjoy pre-school, primary and secondary education, some who teach it have passed through higher education themselves. In this way, the understanding transmitted at this level will condition the following generations. Perhaps because of this, the great relevance of higher education found in the guiding texts of legislation and the need to consecrate the relevance of the right to education culturally and historically (Queiro, 2017, p.11). It will be the training of the education of academic professionals that will enable, in the long term, the education of all levels of education and the lifelong training of all professionals. Where will be achieved by making full use of the potential of higher education institutions which will contribute, through education and research, to innovation and the development of the economy in general (Conselho, 2017b, p. 4).

The fundamental right to education arises in a zone of coincidence between fundamental rights and personality rights, in the original rights, while linked to the protection of the human being, although the former belong to the domain of constitutional law and the latter to that of civil law (Miranda, 2017, p. 91).

On the positive side, since it entails incumbencies on the part of the state for its implementation, namely, financial costs (Miranda, 2017, p 133). On the other hand, and in return, education is one of the main drivers of the economic development of a territory (Queiro, 2017, p. 11) and it is the law that in all matters contributes to its realization (Taveira & Biesek, 2012, p. 48).

5.1. In Portuguese constitutional law

The constitutional right to education arises as one of the so-called social rights (Cunha, 2010, p. 378; Queiroz, 2010, p. 378), the rights of the person situated in society (Miranda, 2017, 148). The right to education is a typical social right (Canotilho & Moreira, 2007, p. 888), with a positive dimension to be fulfilled by the state.

While all Portuguese constitutions mentioned this right, none did so in such a vast way as the present fundamental law (Cunha, 2010, p. 297). In the current Constitution of CPR, there is expressly in article 73, alongside culture and science, in the Title regarding cultural rights and duties, there, in the area of social rights.

It is curious to mention that it is one of the few titles in which the Portuguese Constitution mentions the ‘duties’ having as title holders all citizens (Cunha, 2010, p. 298), the duty of education (Canotilho & Moreira, 2007, p. 319).

5.2. In the EU law

Education, in many aspects but also as a right, has been increasingly included in the EU documentation. In addition to its consecration in the highest texts of the original law, in article 165 of the TFEU and article 14 of the Charter of Fundamental Rights of the EU (CDFUE), it appears in ‘soft law’ (Martins, 2017, p. 503), in the same way , integrated in the so-called European Pillar of Social Rights, which the present Commission intends to pursue through a solemn inter-institutional proclamation in order to strengthen social rights and to produce a positive impact on people's lives in the short and medium term, and to facilitate support for European integration in the 21st century (Parlamento Europeu, 2017e, p. 12).

Concerning respect for fundamental rights (Parlamento Europeu, 2017d, p. 170) or the exercise of European citizenship, the mention of the importance of education and access to education as a vehicle for knowledge of the law and recourse to democratic life (Parlamento Europeu, 2017b, p. 148).

The rights associated with citizenship of the Union, a concept reinforced by the Treaty of Lisbon, are thus incorporated into the Treaties and CDFUE (Parlamento Europeu, 2017b, p. 146) which ‘has

become legally binding for the EU institutions and the Member States by applying the Law of the Union, thus transforming basic values into concrete rights' (Parlamento Europeu, 2017c, p. 222).

The course is still under construction but the documentation points as a way forward to promote high quality education as important for the future of a social Europe (Comissao Europeia, 2017c, p. 13) so that school education can play its role in promoting equity and social justice. In pursuit of an ambitious European agenda in the field of education, the unceasing pursuit of European identity is valued (Comissao Europeia, 2017c, p. 3).

6. Conclusion

We were able to briefly analyse the conception of fundamental rights throughout the nineteenth century, up to the two Great Wars. They really came to exist constitutionally consecrated, but only the traditional rights, freedoms and guarantees were recognized and with this attitude of abstentionism of the state.

With the two world wars, the understandings have changed deeply, the war has forced it, the devastation of the European countries and the impoverishment both from the economic and moral point of view have led to a new conception of the state. The state was called upon to manage the problems caused by the war for which the citizens had no capacity for resolution. So the state changed its character, from an abstentionist state to an interventionist state. Out of necessity, because the post-war climate demanded it. This change begins to feel with the World War I, but it is with World War II that the state change is settled. There is the phenomenon of the stateualisation of society and the socialization of the state, studied in the context of political science. That is to say, the state is going to intervene in society to solve all the problems that occurred, but society itself, citizens, individually or organized, also requires that intervention to fulfil their needs, in a double phenomenon.

It is the change from a Liberal State to a Social and Democratic State of Law. Beyond security and justice, the 20th and 21st century state is now concerned not only with these aspects but also with the social and economic well-being of citizens. The State must guarantee its citizens decent living conditions, and this is done with ever-widening social extracts, guaranteeing access to essential goods.

This great change in the conception of the state has also brought about a great change in the conception of fundamental rights. The Constitutions continue to enshrine the fundamental rights of the first generation, the so-called traditional rights, freedoms and guarantees, but new generations of rights follow. In them, social rights in a broad sense, which cover economic, social and cultural rights. And, of course, the right to property loses its status as a relief and becomes a right as the rest and may even be limited. Already, political rights become the rights of all, therefore moving from a narrow suffrage to universal suffrage. Power rests with the people and the people have the power to elect their representatives.

The rights are widened successively as the state evolves. If, at the beginning of the 20th century, the satisfaction of essential needs related only to water, light and other basic needs, the idea was widened and today's state has to worry about the right to the environment or the right to protection of cultural goods , since these new rights are already enshrined in the text of the Constitutions. Rights that previously did not even exist, arises along with traditional ones, which remain, but even those reinterpreted in a new way.

The consecration of rights of second generation, arisen after the Second War, also followed in rights of third generation and even more of fourth generation, according to rights related to diffuse interests and to all the technological development that is coming living in society.

It is in this alignment that the EU promotes education as a basis for active citizenship and promotion of common values through documents based on legal value but more broadly guiding the conduct of states and citizens as a whole.

This study, of theoretical-academic nature, with selected normative interpretation of national and international legal texts and EU law, not quite with data collection tools shows that the progress achieved historically towards the objectives of consolidating the right to education may result to the recommendation of States, in their internal dimension and as members of international organisations, to value education as a vehicle for the realization of democratic values.

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