

THE RIGHT TO WATER AND SANITATION: INTERLOCUTION WITH LUIGI FERRAJOLI'S GUARANTEEISM

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ABSTRACT

This study addresses the importance of the fundamental right to drinking water and basic sanitation, under a guaranteeist bias. Despite its preponderant association with Criminal Law, it is assumed that Luigi Ferrajoli's Theory of Guaranteeism applies to the subject under study, starting with the understanding of the fundamentality of access to drinking water and basic sanitation for human beings and the need for its positivization. The peculiarities of Ferrajoli's theory have three important meanings: normative model of law; theory of validity and effectiveness; and philosophical perception, relevant to its definition of fundamental rights that should be standardized and not intermediated by the State. For this, the deductive method will be used in the investigation and treatment of data and reports, jurisprudential analysis, using the technique of bibliographic and documentary research. Results point to the relevance of the constitutional incorporation of the right to drinking water and sanitation through constitutional amendment in order to provide the law enforcers with adequate tools to guarantee their universal access.

Keywords: access to basic sanitation; access to drinking water; Constitutional amendment; fundamental rights; guaranteeist theory.

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*O DIREITO À ÁGUA E AO SANEAMENTO BÁSICO:
INTERLOCUÇÕES COM O GARANTISMO DE LUIGI FERRAJOLI*

RESUMO

Aborda-se a importância do direito fundamental à água potável e ao saneamento básico sob um viés garantista. Apesar de sua associação preponderante ao Direito Penal, parte-se do pressuposto que a Teoria do Garantismo de Luigi Ferrajoli aplica-se ao tema em estudo, iniciando com a compreensão da fundamentalidade do acesso à água potável e ao saneamento básico para os seres humanos e a necessidade de sua positivação. As peculiaridades da teoria ferrajoliana apresentam três importantes significados: modelo normativo de direito; teoria da validade e efetividade; e percepção filosófica, relevantes para sua definição de direitos fundamentais que devem ser normatizados e não intermediados pelo Estado. Para tanto, utilizar-se-á do método dedutivo na investigação e no tratamento de dados e relatórios, análise jurisprudencial, utilizando a técnica da pesquisa bibliográfica. O resultado aponta para a relevância da incorporação constitucional do direito à água potável e ao saneamento por meio de emenda à Constituição de modo a dotar os aplicadores do direito de ferramentas adequadas para garantir seu acesso universal.

Palavras-chave: *água potável; direitos fundamentais; emenda à Constituição; garantismo; saneamento básico;*

INTRODUCTION

The drinking water of Planet Earth, an indispensable component for the survival of humans and other species, was considered an³ infinite natural resource for a long time. Currently, with the bad use and increased demand, one can see the scarcity of water is a fact that can jeopardize current and future generations.

According to the latest report from UNICEF and the World Health Organization (WHO), billions of people continue to suffer from a lack of access to water, sanitation, and hygiene. About 2.2 billion people do not have safely managed water services (UNICEF, 2019). In Brazil, 35 million people do not have access to drinking water. According to data provided by the National Sanitation Information System (SNIS, 2018, *Sistema Nacional de Informação sobre Saneamento*) and Instituto Trata Brasil (BATISTA, 2012), for every 100 liters of treated water, 37% are not consumed.

The concepts of health and maintenance of a healthy environment are intrinsically related to the right to water and basic sanitation, which, in turn, are revealed in the definition of the right to life. This study seeks to address the importance of access to drinking water and basic sanitation from an perspective founded on the theory of guaranteeism by Luigi Ferrajoli, dealing fundamentally with the need to amend the Constitution to support the establishment of such guarantees by materializing the idea with jurisprudential analyses.

This work centrally discusses the need for drinking water and basic sanitation services from the perspective of a fundamental right, essential to the dignity of the human person; and analyzes the reasons why Luigi Ferrajoli's theory of guaranteeism could also be used for the theme under analysis, even if it is predominantly associated with criminal matters. Finally, it is relevant to carry out a study of the Brazilian constitutional legislation in force to verify, through the analysis of judicial decisions, what changes are necessary for the adequate management of water in order to guarantee its universal access.

The definition of the issue revolves around three matrices: a sociological one, which represents the background of every article, a moment in which it assumes and recognizes that a considerable part of contemporary society does not have due access to the liquid that is indispensable for their

³ *Water* and *resource* are not synonyms; however, since the Brazilian 1988 Federal Constitution uses the expression "*recursos hídricos*" (water resources), this study will use both terms with no distinction.

survival; the other is the observation that Luigi Ferrajoli's theory of guaranteeism is perfectly applicable to the present discussion; and the last is the attempt to list the possibilities of amendment to the constitution, starting with a study of concrete cases, in order to support the determination of guarantees with the scope of minimizing the precariousness of access to drinking water and basic sanitation.

The hypothesis expressed through the question (problem) is evident if, based on the analysis of the terms of decisions in specific cases, the approach used by the courts was guaranteeist when dealing with the fundamental right to water and sanitation.

The methodology used is based on empirical and theoretical studies, starting with an understanding of the fundamentality of access to drinking water and basic sanitation for the dignity of the human person. We also decided to carry out an exploratory study that consisted of collecting reports from the World Health Organization (WHO) and the United Nations Children's Fund (UNICEF), at a global level and from the SNIS and the Instituto Trata Brasil regarding access to drinking water and sanitation in Brazil, in order to demonstrate that even though it is essential to human survival, a large part of the population lives in a precarious way, without these resources.

Such rights were observed from the perspective of Luigi Ferrajoli's guaranteeism theory and the aspects related to the constitutional legislation in force and its deficiencies perceived in a study of four specific cases extracted from Brazilian courts. The sources of data collection were: bibliographic research and jurisprudence.

Finishing the bibliographic research and the studies of concrete cases, data were classified in a systematic way, allowing for greater clarity with regard to the visualization of results, so that the text of the article is elaborated with conclusions of what should be inserted in the constitutional text about the fundamental right to access to drinking water and basic sanitation, demonstrating the importance of its positivization in order to legitimize the guaranteeist theory, the last stage of the research.

According to this line of reasoning, the inaugural section of this article seeks to discuss the importance of the drinking water service and basic sanitation for the survival of the human species, which is a vital fundamental right to the dignity of the human person, highlighting that even being so indispensable, its inaccessibility is clear in Brazil. There is also no consistent inclusion in the constitutional legal system, although necessary.

The second section defends the possibility of addressing universal

access to drinking water and basic sanitation under the guaranteeist perspective of Luigi Ferrajoli, because, despite the theory having been conceived in the context of the perspective of criminal law, it cannot be said that currently is directed only at that sphere. For this, the approach focuses on the three meanings of the Theory of Guaranteeism, namely: normative model of law, legal theory of validity and effectiveness, and political philosophy. Ferrajoli's conception of fundamental goods is approached. In the end, it is argued in favor of a better positivizing of the right to water and basic sanitation in order to support the guarantees.

Finally, the third section develops the heart of the debate by bringing concrete cases in order to materialize the constitutional deficiencies pertinent to the subject, answering the fundamental question of this article: from the study of the decisions of the concrete cases, was the focus used by the courts guaranteeist? We suggest the Amendment of the Constitution, so that such guarantees become clear.

1 WATER AS A FUNDAMENTAL RIGHT AND ITS UNIVERSAL PROTECTION

In this section, access to drinking water and basic sanitation as a fundamental right and the need for universal protection to ensure the health and consequent survival of the population and future generations will be explored.

Issues pertaining to regular access to water and treatment and sanitation in Brazil will be studied, a developing country that suffers from rapid urban expansion, population density and the occupation of urban and rural areas with clear deficiencies in supplying this vital and basic need (SNIS, 2018). In this sense, water scarcity leads to social and economic instability.

From the verification of this scenario, we will face the necessary notability the Public Power should grant to this matter, and should seek means for effective access to such resources. For that, constitutional positivization of such rights is essential.

1.1 Drinking water and basic sanitation as fundamental rights

The Federal Constitution of 1988 provides, in its Article 225, *caput*, that “ All have the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life, and both

the Government and the community shall have the duty to defend and preserve it for present and future generations.”⁴

Although outside Title II of the Constitution and confirmed by the text itself, access to drinking water and basic sanitation is a fundamental right, as according to the custom of Brazilian constitutionalism, other rights are admitted in addition to those arising from the regime and principles annotated by it or the international treaties to which the Federative Republic of Brazil is a party (MILARÉ, 2015, p. 259).

It should be noted that there may be implicit or fundamental rights in a material sense. The Constitution, when admitting as fundamental the rights deriving from regimes and principles, employs the existence of unwritten fundamental rights, which can be deduced by an interpretative act, based on rights present in its normative text (SARLET, 2015). Thus, it is often done with art. 6 of the Federal Constitution, which recognizes the right to health as fundamental.

It is unequivocal that water is the environment where human and non-human life are developed and its use must provide quality for the maintenance of life and for the progress of the environment (SILVA, 2001). The vital human needs related to water are composed of several and relevant components, highlighting the drink, the preparation of human food and the means of personal hygiene (MACHADO, 2018).

In this sense, and returning to the analysis of the legal provision, it is clear that the main protagonist in the proper maintenance of the ecologically balanced environment for the present and future generations is water, a component that is exhaustively mentioned as indispensable and essential for the maintenance of human life and of all living things.

The right to life, compatible with the dignity of the human person, is the most basic of all rights, since it manifests itself as a true prerequisite for the existence of the other rights enshrined in the Federal Constitution. However, it is not enough for the population to have access to fresh water for the continuity of life to be viable. It is necessary that the water is potable and supplied in sufficient quantity to guarantee human dignity (VIEGAS, 2005).

In the same way, the right to water also stems from the right to health. The lack of basic sanitation directly impacts the proliferation of diseases, causing an increase in infant mortality, especially in peripheral areas (IRIGARAY, 2003). The lack of collection and treatment of water and sewage

4 Available from: <http://www2.senado.leg.br/bdsf/handle/id/243334>

is a factor driving generalized ill-health.

Federal Law no. 6.938 / 1981 provides for the National Environment Policy defined water as an environmental resource. Therefore, it communicates with the common use of the people and the essentiality to a healthy quality of life and, consequently, to a dignified life, a constitutional guarantee backed by Article 5th⁵.

In turn, Federal Law no. 11,445 / 2007, updated by the Legal Framework for Basic Sanitation (Law No. 14,026 / 2020), establishes the national guidelines for basic sanitation, recognizing as a fundamental principle water supply, sanitary sewage, urban cleaning, waste management solid, all carried out in ways appropriate to public health and environmental protection (BRASIL, 2007). The absence of these resources is incompatible with the dignity of the human person⁶.

At the international level, in 2010, the United Nations General Assembly, the main deliberative organ of the United Nations (UN), through Resolution no. 64/292, of July 28⁷, 2010, recognized, for the first time, the right to drinking water and sanitation as a human right “essential for the full enjoyment of life and all human rights” (UN, 2010). The Resolution promptly invites States to develop strategies, plans and legal provisions that can bring about the realization of such rights.

It is also relevant to mention that, in 2015, countries had the opportunity, through the UN, to reach a global agreement on sustainable development, entitled Agenda 2030 for Sustainable Development⁸ which resulted in a list of 17 (seventeen) objectives to be achieved by 2030 and one of them, specifically target number 6, highlights the need for sustainable

5 TITLE II – Fundamental Rights and Guarantees. CHAPTER I – Individual and Collective Rights and Duties. Article 5. All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms: [...] (BRASIL, 1981).

6 Thus explains Ingo Sarlet “we have for the dignity of the human person the intrinsic and distinctive quality recognized in each human being that deserves the same respect and consideration on the part of the State and the community, implying, in this sense, a complex of fundamental rights and duties that ensure the person both against any and all acts of a degrading and inhumane nature, as they will guarantee the minimum existential conditions for a healthy life, in addition to providing and promoting their active and co-responsible participation in the destinies of their own existence and of life in communion with other human beings , with due respect to the other beings that make up the network of life” (SARLET, 2015, p. 70-71).

7 108th plenary session. There were 122 favorable votes and 41 abstentions.

8 In September 27, 2015, the United Nations Summit on Sustainable Development formed by government and State leaders from 193 countries, including Brazil, adopted the 2030 Agenda for Sustainable Development, which contains a set of 17 (seventeen) Sustainable Development Goals (SDGs). Each objective comprises a set of goals defined by the results from Rio +20 and considering the legacy of the Millennium Development Goals (MDGs), eight goals to reduce poverty that the world has committed to achieving by 2015 (ONU, 2017).

water management and access to sanitation.

Noting that the right to water and sanitation are indispensable for human survival and that their scarcity calls into question the health of human beings and all living beings and even their survival, there is no doubt about its fundamentality, even if it is not expressed in the Federal Constitution. It happens that, even though it is so indispensable, its wide and satisfactory access is not a reality in Brazil.

1.2 Access to drinking water and basic sanitation in Brazil

The quantitative and qualitative scarcity of water generates incalculable consequences for present and future generations, since it alters nature as a whole, directly affecting the physical and mental health of living beings and, therefore, their quality of life. Natural factors, population expansion, pollution caused by human activities, excessive consumption and the high degree of water waste further impair the availability of water for human consumption and hygiene (MACEDO, 2010).

According to the report by the World Health Organization (WHO) and the United Nations Children's Fund (UNICEF), in 2017, around 2.2 billion people in the world do not have safe managed water services and 4, 2 billion individuals do not have access to sanitation. In Brazil, according to the latest report by the National Sanitation Information System (SNIS), of 2018, about 35 million Brazilians are not served with treated water supply. In 2016, according to the report of the Trat Brazil Institute (INSTITUTO TRATA BRASIL, [sd]), it was found that 1 out of 7 women and 1 out of 6 Brazilian men do not have access to water. The following tables show the reach of drinking water and total service with sewage networks by region of the country⁹.

Much of the lack of access to drinking water and basic sanitation is due to the urban expansion that, at first, followed the peripheral pattern, that is, it did not comply with standards or articulated projects aimed at the extension of the city. The central areas with urban services infrastructure were destined to the high-income population, while peripheral areas were occupied by the poorest sections of the population, who started to build their homes on their own, often located in illegal and clandestine subdivisions. (ROLNIK; KOWARICK; SOMEKH, 1990). In this sense, it is

⁹ The map with the sample of municipalities whose data on water provision are collected for the elaboration of a report of the National Sanitation Information System (SNIS) of 2018 does not shows data for considerable municipalities of the North region, especially in the State of Amazon. Nonetheless, this is the most complete report on the subject in the country.

understood that the evolution of the urbanization process has evidenced the absence or low reach of housing policies, real estate speculation, deficient State action and social inequalities. Thus, the result of this process that is being built is considering a social disaster, not a natural one.

Table 1 – Data on access to drinking water by region

Region	Population percentage with access to water
North	57.05%
Northeast	74.21%
Southeast	91.03%
South	90.19%
Central-West	88.98%

Source: SNIS 2018

Table 2 – Data on access to basic sanitation by region

Region	Population percentage in total service with sewage networks
North	10.5%
Northeast	28.0%
Southeast	79.2%
South	45.2%
Central-West	52.9%

Source: SNIS 2018

Although environmental changes can be a component of different disasters, the water crisis is closely associated with its management. The public domain of water, stated in Law no. 9,433 / 1997 does not transform the federal and state public authorities into possessing the water, but a manager with the purpose of satisfying everyone's interest (MACHADO, 2018).

Thus, knowing that a significant part of the population does not have access to this right, which is fundamental to the maintenance of the dignity of the human person, it is understood that the State, being this manager of collective use, is entitled to greater intervention towards expanding the reach of these people. essential services, including the possibility of constitutional positivation.

1.3 The recognition and positivization of water in the 1988 Constitution of the Federative Republic of Brazil

As stated above, the Federal Constitution does not include water and basic sanitation as an express fundamental right, but only as a good for the Union and the States (art. 20, III). It is understood that considering the scarcity of water resources, as well as their essentiality for the survival of human beings, of living beings and for sustainable development, it is essential to change the Constitution, through a proposed amendment.

The positivization of fundamental rights means the inclusion in the positive legal system of rights considered natural and essential to the maintenance of the dignity of the human person. The law must not be merely positivized, but it must be pointed out to the dimension of fundamental right, placed at the highest level of the sources of law: the constitutional norms. Without such positivism, fundamental rights are only hopes, aspirations, ideas, impulses, but not rights guaranteed under the shield of norms (CANOTILHO, 2000).

The proposed amendment to Constitution no. 04, 2018, by Senator Jorge Viana, intends to include a new item in Article 5 of the Federal Constitution, which is the access to drinking water with the following wording: “LXXIX – everyone is guaranteed access to drinking water in an adequate quantity to enable livelihoods, well-being and socioeconomic development” (BRASIL, 2018).

It is important to highlight that in the justification of the proposed Amendment to the Constitution, water is recognized as an indispensable and irreplaceable asset, and its access cannot be private or reduced. Still, it argues that positivization will provide the right enforcers with adequate tools to guarantee their access and to weigh social, economic and commercial interests. In order for the proposal to be more complete, it is suggested that basic sanitation is also expressly included in the list of fundamental rights, in view of its intrinsic relationship with health, quality of life and the development of society as a whole. In this light, recognizing water and basic sanitation as a fundamental right means saying that the State should be held responsible for its supply and access for the entire population, which cannot be subject to strict market rules, but to the logic of the right to life (BARBOSA, 2011).

The constitutional and express insertion of the fundamental right to drinking water and sanitary sewage is significant for this right to be

recognized under the guaranteeing perspective of Luigi Ferrajoli, a subject that will be explored in the next section.

2 THE GUARANTEEISM THEORY OF LUIGI FERRAJOLI

Initially, it is relevant to clarify that Ferrajoli's erroneous and inaccurate reading carried out in Latin American countries and Brazil, due to the book entitled *Law and reason: theory of penal guarantee*, made the theory of guarantee to be associated, many times, to theories linked to criminal law when, in fact, it is a normative model that can be extended to all guarantees and fundamental rights (TRINDADE, 2012), thus being applicable, including, to the fundamental right to access to water and sanitation.

The term guaranteeism, primarily, is the character of the most evolved democratic-liberal constitutions, which means that they must establish safer and more efficient legal instruments for citizens. Second, it is the political-constitutional doctrine that suggests an ever and broader elaboration and introduction of such legal means (IPPOLITO, 2011).

In the preface to the work "Law and reason", Norberto Bobbio explains that guaranteeism deals with a theory of the system of guarantees of fundamental rights resulting from the paradigm shift driven by the advent of the Constitutional State of Law, which aims to safeguard the freedoms of the individual in the face of various forms of arbitrary exercise of power (FERRAJOLI, 1997).

In this section, the essential aspects of the theory of guaranteeism were analyzed, approaching its three distinct and related meanings which are the perception of guaranteeism as a normative model of law; the theory of validity and effectiveness and the philosophical conception that has as premise the separation between law and morality. Finally, the basic concepts of fundamental goods for the author under study will be addressed. From this perspective, the argument in favor of positivizing the right to water and basic sanitation as a means of solidifying such fundamental rights is ratified.

2.1 The three meanings of the Theory of Guaranteeism by Luigi Ferrajoli

"Garantismo" (Guaranteeism) designates a normative model of law: precisely, with regard to criminal law, the SG model of "strict legality", proper to the rule of law, which under the epistemological plan is characterized as a cognitive or minimum power system, under the political plan it is characterized as a tutelage technique

suitable to minimize violence and maximize freedom and, under the legal plan, as a system of bonds imposed on the punitive function of the State in guaranteeing citizens' rights. Therefore, we can regard as "guaranteeist" any penal system that conforms normatively to such a model and that effectively satisfies it (FERRAJOLI, 2010, p. 786, our translation).

In this sense, guaranteeism assures citizens that, in a Democratic State of Law in which power necessarily derives from the legal system and, mainly from the Constitution, it acts as a mechanism to reduce the punitive power and guarantee, to the maximum, the freedom to individuals.

Many constitutional guarantees, even though perceived as parameters of rationality and legitimacy, are unnoticed in practice, causing divergence between normativity and the model at the constitutional level. Thus, the lack of effectiveness at the lower levels turns the model into a facade with a purely ideological function (SILVA, 2015).

Ferrajoli believes that a central law of reduced malleability should ensure the survival of guaranties and, consequently, reduce the scope for judicial discretion, since the relationship between rights would be regulated by legal rules, thus demonstrating the importance and maintenance of the leading role of the Legislative Power, leaving to the judiciary only the annulment of unconstitutional norms (CADERMATORI; STRAPAZZON, 2012).

The second meaning occurs under the focus of the theory of law and criticism of law, as according to Ferrajoli (2010, p. 785-786 our translation),

It designates a legal theory of "validity" and "effectiveness" as distinct categories not only among themselves, but also due to the "existence" or "vigor" of the norms. It is a "theoretical approach" that keeps the "is" and the "ought" separate in Law.

The author also emphasizes

[...] the divergence existing in the complex orderings between normative models (tendentiously guaranteeist) and operational practices (tendentiously anti-guaranteeist), interpreting it with the antinomy – physiological within certain limits and pathological outside these – that subsists between the validity (and non-effectiveness) of the formers and the effectiveness (invalidity) of the latters. (FERRAJOLI, 2010, p. 785-786, our translation).

Thus, according to the Theory of Guaranteeism, a law is valid if it is in accordance with the Constitution and should only be complied with and prevail in the legal world if it is in force. Positions about enforceability are

built based on empirical facts (normative acts), whereas, regarding validity, such positions derive exclusively from the meaning of the produced norms (TRINDADE, 2012).

The correspondence between enforceability and validity at the heart of each ordering may bestow its internal justice, whereas the acquiescence of the ordering, in its entirety, to external political values, that is, the correspondence between validity and justice, will be called external justice. This second meaning makes it clear that Ferrajolian theory is concerned with formal and substantial aspects that must exist for the law to be valid.

The third understanding of the “guaranteeism” meaning, unlike the first two, brings an obligatory external view of the theory. It is an ideological brake for the indiscriminate action of the State, enabling the expansion of possibilities for the effective guarantee of rights. In other words, it would function as a meta-legal basis. For Ferrajoli (200, p. 787), “guaranteeism presupposes the secular doctrine of the separation between law and morality, between validity and justice, between internal and external points of view in the valuation of the ordering, or even between the ‘is’ and the ‘ought’ of Law” (our translation).

In all three meanings, constitutionalism is equivalent to a normative project that demands to be carried out through the construction – use of policies and performance laws – of integral guarantees and guarantee institutions. For this reason, the guaranteeism is another face of constitutionalism¹⁰.

2.2 The concept of fundamental goods for Luigi Ferrajoli

Fundamental rights can be defined as legal norms, intrinsically related to the idea of the dignity of the human person and limitation of the state power of a certain Democratic State of Law that, due to their axiological importance, support and legitimize the entire legal system (MAR-MELSTEIN, 2011). Ferrajoli argues that these rules dispense the fact that these rights are positivized either constitutionally or in fundamental laws (KURTZ, 2015).

¹⁰ Luigi Ferrajoli’s theory differs from principalist constitutionalism which, according to the author, is equivalent to the overcoming of juridical positivism, which is not suitable to deal with the new nature of current constitutional democracies. It is characterized by the configuration of most non-constitutional norms that are not expressed as rules anymore, susceptible to observation or not, but as principles at the mercy of ponderation (and not subsumption), as they are in conflict. Furthermore, fundamental rights are, under such perspective, ethical-political “values” with and unavoidable relation to morals. In addition, it concentrates judicial practice, mainly, to the activities of judges (FERRAJOLI, 2012).

In this light, Ferrajoli defends that the given rule guarantees the subsistence of the rights considered fundamental, since this enables the suppression of political availability and the availability of the market, being formulated in the form of a general rule and, therefore, conferring them equally to everyone. The mere indication of the need for its obedience by the ordinary legislator does not guarantee universal compliance with the law, but it functions as a foundation condition of legal equality and its universality appears as a structural characteristic, which comprises the inalienable and unavailable character of the substantial interests in which they consist (FERRAJOLI, 2011).

According to Ferrajoli, guarantees are normative techniques with the purpose of protecting subjective and solid rights through positive or negative duties (commissions and commissions) corresponding respectively to positive or negative legal expectations, which, if not met or violated, legitimize the viability of repair¹¹ (IPPOLITO, 2011). Therefore, its positivation supports the possibility of charging for the fulfillment of state duties in order to guarantee access to a fundamental right in an unequivocal manner and free of interpretations by the Judiciary Power.

2.3 Guaranteeism as a new paradigm of law and democracy

Guarantee constitutionalism is configured as a new juspositivist paradigm of law and democracy that seeks the minimum intervention of the State in the normative system in order to safeguard the freedom and other fundamental rights of the citizen. It aims to find solutions to the growing crisis of the Law, which can be analyzed under three aspects: as a crisis of legality, that is, of the binding value associated with the rules by the holders of public powers, characterized by the absence and inefficiency of controls; a crisis of the social state, determined by the structural inadequacy of the forms of the rule of law marked by selective and unequal characteristics; and, finally, a crisis of the national state determined by the exchange of sovereignty places, by the alteration of the system of sources and resulting in a inefficiency of constitutionalism (FERRAJOLI, 2011).

Furthermore, Ferrajoli points out that the threat to the future of fundamental rights and their guarantee is concentrated not only on the risks listed above, pertinent to law, but also on the legal reason that underlies the normative and theoretical paradigm of the rule of law. Thus, the author

¹¹ Guarantee of Second Degree.

proposes to rescue the Constitutional Rule of Law from the understanding that the legal reason of today presents the advantages arising from the progress of constitutionalism in the 20th century, which allow the organization of the Law as an artificial system of guarantees, constitutionally predetermined protection of fundamental rights. The guarantee of a right is made possible not only by the positive character of the norms produced, but also by its subjection to the Law (FERRAJOLI, 1997).

Regarding the access to drinking water and basic sanitation, as previously explained, its constitutional provision is implicit in the “right to an ecologically balanced environment” set out in art. 225 and the fundamental right to life (art. 5, *caput*) and health (art. 6), being at the mercy of interpretations by the Judiciary.

Thus, we defend the due positivization of the fundamental right to drinking water and basic sanitation as a means of better adapting the events of the empirical world to official normative prescriptions and to prevent such rights from being left out of the Judiciary’s role as positive legislator as well as of judicial precedents that can be removed and, worse, of political decisions.

3 WATER AND BASIC SANITATION AS A FUNDAMENTAL HUMAN RIGHT: INTERSECTIONS WITH THE GUARANTEEISM THEORY OF LUIGI FERRAJOLI

This section will highlight Luigi Ferrajoli’s Theory of Guaranteeism as a mechanism to protect universal access to drinking water and basic sanitation. For its understanding, it was essential to understand these resources as fundamental rights, as well as the concepts and propositions of legal guarantee, contemplated in the previous topics. For a better visualization of the object of this essay, four specific cases will be analyzed.

After centuries of environmental exploration, the world began to pay attention to the fact that water suitable for consumption and hygiene is finite and its condition of vulnerability, and not renewability, shows the need to consider it a fundamental common good, which belongs to all, and with equally guaranteed accessibility. The misuse of water will result in its scarcity, thus compromising the survival of future generations.

The section ends by demonstrating the need for approval of a constitutional amendment, as an instrument to guarantee access to drinking water and sanitation, since, for Ferrajoli, fundamental rights must be

constitutionally affirmed so that the good is protected to the maximum and if avoid various judicial decisions at the discretion of the magistrates.

3.1 The jurisprudential affirmation of water and sanitation as a fundamental human right and the relevance of Luigi Ferrajoli's guaranteeism in practice

There is no doubt that water and basic sanitation are human rights that are indispensable for human and other species' survival. In this logic, the decisions coming from the Judiciary Power tend that the distribution of these resources in a full and adequate manner comprises an essential public service, considering that, according to their characteristics of fundamental goods, they must be provided in a dignified manner, meeting the basic needs of the human being. It happens that this reality is not universal and, many times, even resorting to the judiciary, the population is subject to decisions that do not contemplate their access, making it necessary to use resources that demand time, as we will see below.

In the first case¹², the Federal Public Prosecutor's Office, through a public civil action with an injunction request, in the face of the municipality of Dourados-MS, of the Brazilian National Health Foundation and of the Union, uses Article 6 of the Federal Constitution, which deals with the social right to health, but does not specify water, to require the implementation of a water supply system for the quilombola community in the region. The omission of the State resulted in the abstraction of water through homemade wells, drilled by the individuals of the community themselves, without any treatment, and with the situation aggravated by the absence of garbage collection and basic sanitation.

For more than seven years, the community – which wanted only drinking water to meet their basic needs and avoid diseases that affect children, youth, adults and the elderly, thus not needing to cross roads in search of favors from neighbors and the goodwill of others third parties – had to submit to a situation not in conformity with the dignity of the human person. It became necessary for the Federal Regional Court of the 4th Region

12 Summary: ADMINISTRATIVE. PUBLIC CIVIL ACTION. EARLY INJUCTION. WATER SUPPLY IN INDIGENOUS VILLAGE. 1. The right to a full and adequate supply of water is an essential public service. That is, since the right to water is a fundamental right of all individuals, it must be provided in a dignified manner, taking into account the basic needs of the human being. The entire population has the right to access water of a quality standard suitable for use. It is not enough that the water supply is made in an insufficient and unsustainable way as has been done in relation to the Vera Tupã village. (Rapporteur MARGA INGE BARTH TESSLER. TRF4. 3rd Panel of the Federal Regional Court of the 4th Region. 05.05.2014) (BRAZIL, 2014).

to interpret the constitutional fundamentality of the request to demand the execution of the work.

In the second case¹³, specifically regarding access to basic sanitation, the Public Prosecutor's Office of the State of Acre, through a public civil action against the Municipality of Rio Branco, the State of Acre and the State Department of Paving and Sanitation, sought the compliance with the obligation to make the installation of a sewage network consistent in a specific region of the capital of Acre. A stir was created around passive legitimacy, leaving the population at the mercy of health problems, due to the lack of access to sanitation, for reasons of discussion about competence. Only on appeal, after four years with the population exposed to risks, did the Superior Court of Justice, for interpreting the basic sanitation corresponding to public health and protection of the environment, among others, judged it to be a common competence.

Thus, even well aware of the impossibility of exhausting the topic by means of discussions in court, we mention another decision by the Federal Regional Court of the Fourth Region – TRF4, which adduces that “since the provision of water is a fundamental right of all individuals, it must be rendered in a dignified manner, contemplating the basic needs of the human being”¹⁴. In this sense, it is understood that it is up to the State not only to make the precious liquid available to any and all citizens, but to do it in a dignified manner, in order to meet basic needs (FRANCESCHINA; MOZETIC, 2015). However, even though the assertion of access to water and basic sanitation as a fundamental right seems clear, there are many controversies on the subject.

The absence of a positive law implies the performance of the Judiciary

13 Summary: ADMINISTRATIVE. CIVIL PROCEDURE. INTERNAL INSTRUMENTA APPEAL AGAINST SPECIAL APPEAL. PUBLIC CIVIL ACTION. OBLIGATION TO DO. PUBLIC HEALTH AND BASIC SANITATION. EMINENTLY CONSTITUTIONAL BASIS. MATTER INSUSCETIBLE TO SPECIAL APPEAL ANALYSIS. 1. The present special appeal arises from a public civil action that seeks to compel the Municipality of Rio Branco, the State of Acre and the State Department of Paving and Sanitation – Depasa, to proceed with the installation of a collection network and sewage treatment system in a determined region of the Acre capital. 2. The issue of passive legitimacy ad causam of the State of Acre was resolved by the Tribunal a quo based on the exegesis of art. 23, II, VI, IX and X of the Federal Constitution, so that the examination of the controversy goes beyond the special appeal. 3. Internal instrument appeal not provided. (STJ: 1794303, 2019 / 0023366-3, Rapporteur: Minister SÉRGIO KUKINA, Judgment Date: 19/09/2019, T1 – FIRST PANEL, Publication Date: DJe 23/09/2019) (BRAZIL, 2019b).

14 Summary: ADMINISTRATIVE. SUPPLY OF WATER TO THE INDIGENOUS COMMUNITY. FUNDAMENTAL RIGHT. Since the supply of water is a fundamental right of all individuals, it must be provided in a dignified manner, taking into account the basic needs of human beings. (Federal Regional Court of the 4th Region – Instrument Appeal: 14410 RS 2008.04.00.014410-0, Rapporteur: MÁRCIO ANTÔNIO ROCHA, Judgment Date: 08/27/2008, FOURTH PANEL, Publication Date: D.E. 09/15/2008) (BRASIL, 2008).

within the scope of public policies. In the case of the Court of Justice of the State of Ceará, the Appellate Judge Antônio Abelardo Benevides Moraes justified his decision by saying that “although the right of access to drinking water is not expressly provided for in the Federal Constitution as a fundamental right, I understand that it deserves, above all, to be protected as such”¹⁵.

Therefore, if fundamental rights cannot be put into practice by the Courts and Tribunals, they run the risk of being considered mere political rhetoric, with the population being the most affected, but, on the other hand, if these rights are enforceable in court, emerges the threat of displacement of political decisions from the Legislative and Executive to the Judiciary (MARMELSTEIN, 2011). The situation is aggravated when there is not even a clear constitutional provision, but an entire interpretation is necessary to apply the recognition of the fundamental right in the specific case.

Thus, the importance of the Guaranteeism Theory of Luigi Ferrajoli is evidenced, which, in turn, requires that fundamental rights and, in the case under analysis, the right to water and sanitation be inserted in the ordering by the legislative route in order to protect such rights of judicial decisionism. In this light, the term guarantee characterizes support, repair and defense to protect something, aiming to indicate the protection and defenses that protect a specific good, and that is constituted by the positions of individuals in political society. The legal system can be said to be guaranteeist when it has structures and institutes capable of sustaining, offering reparations, defending and protecting individual and social and collective rights (CADERMATORI, 2006).

Ferrajoli adds that judges and legal operators must, by obligation,

15 Summary: MOTION FOR CLARIFICATION IN INSTRUMENT APPEAL. PUBLIC CIVIL ACTION. DEFECT IN THE DRINKING WATER SUPPLY SERVICE. EMERGENCY INJUNCTION GRANTED. OMISSION. INEXISTENCE. REDICUSSION OF THE MATTER. IMPOSSIBILITY. INCIDENCE OF SUMMARY N. 18 OF THE CEARÁ COURT OF JUSTICE. INTUIT OF QUESTIONING. INVIABILITY. APPEAL RECEIVED AND NOT PROVIDED. 1. According to article 1022 of the Code of Civil Procedure / 2015, motions for clarification are applicable against any judicial decision in order to clarify obscurity or eliminate contradiction, as well as to make up for the omission of a point or question on which the judge, automatically or by request, should pronounce, in addition to to be able to correct material error. 2. In the case of the present file, the issue identified as missing was duly analyzed, being decided in a reasoned manner, which denotes the claim to rediscuss the matter, which is not allowed for a motion for clarification. 3. Incidence of Summary no. 18 / Ceará Court of Justice, which adduces: “Motions for clarification are undue, when the sole purpose is to review the legal controversy that has already been considered”. 4. As repeatedly proclaimed, the motions for clarification, even though opposed for the purpose of pre-questioning, are inadmissible if the motioned decision does not show any of the defects that would authorize its interposition. 5. Motion for clarification received, but not provided. (Ceará Court of Justice: 06210742920178060000, CE 0621074-29.2017.8.06.0000, Rapporteur: Antônio Abelardo Benevides Moraes, Judgment Date: 04/29/2019. 3rd Chamber of Public Law, Publication Date: 04/29/2019 (BRAZIL , 2019a).

apply the provisions of the law. However, they are not free to conduct their decisions in accordance with their personal moral convictions, but they must be subject to the laws even though they are contrary to these individual conceptions (FERRAJOLI, 2010). In this perspective, guarantees are nothing more than limits to discretion and, consequently, to the power of the judges to start by strict legality or, in other words, by the formulation of legal language in the most rigorous and exhaustive way possible for the purpose of enforcing fundamental rights. (FERRAJOLI, 2012).

To this end, it is essential that the rights to water and basic sanitation are incorporated into the Federal Constitution and that guaranteeism emerges as a strategic response to the crisis of justice and politics, since the limitation of the Judiciary's power protects citizens from possible excesses, ensures uniformity in the solution of cases and, consequently, defends individuals from possible limitations to access to the liquid deeply associated with the dignity of the human person.

FINAL CONSIDERATIONS

Guaranteeist constitutionalism adds to the traditional model of legal positivism a system of limits and material links to the positivized norms and represents an aspect of overcoming traditional positivism that does not corroborate the neo-constitutionalist ideals, but rather places the State regulated by laws so that the public powers should be subject to them. Guaranteeism seeks the minimum intervention of the State in the normative system with the objective of guaranteeing citizens the prevalence of rights to the detriment of the excess of power of the State.

When it comes to access to drinking water and basic sanitation, essential for the maintenance of the dignity of the human person, these fundamental rights are not expressed in the Federal Constitution. Its inclusion in the list of fundamental rights is understood by the fact that there is a constitutional provision, albeit outside the title relating to fundamental rights and guarantees, of the right to access an ecologically balanced environment, as well as its intrinsic relationship with the right to life.

Thus, judicial decisions involving access to drinking water and sanitation, when favorable to the recognition of their essentials to a dignified life, must rely on such interpretative explanations. The clear and essential right is at the mercy of judicial interpretation. On the other hand, if constitutionally confirmed and observed from the perspective of

Ferrajoli's guarantee, the judiciary would be limited to the fulfillment of the determinations previously examined by the legislature, being, therefore, the fundamental right to drinking water and to sanitation properly protected.

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