El reconocimiento de los derechos públicos subjetivos y la reforma constitucional en materia de derechos humanos de junio de 2011

Recognition of subjective public rights and constitutional reform on human rights June 2011

Francisco José Murillo Ruiseco
Universidad Autónoma de Zacatecas
murillo_456@hotmail.com

Yanalte Rodríguez Soto
Universidad Autónoma de Zacatecas
yanalters@hotmail.com

Samanta Deciré Bernal Ayala
Universidad Autónoma de Zacatecas
samanta_bernal@yahoo.com.mx

Resumen

El reconocimiento de los derechos públicos subjetivos constituye uno de los principios fundamentales del Estado moderno. Limitarse a considerar los derechos del hombre frente al Estado como una esfera extrajurídica al modo de Hans Kelsen, o como una capacidad de hacer o no hacer optativa al modo que Eduardo García Máynez, no permite comprender el contenido con que la idea se ha ido presentando históricamente. Los derechos reconocidos al hombre frente al Estado no son puramente libertad en el sentido formalista, sino aptitud de exigir al propio Estado una cierta conducta y no se podrá concebir el concepto en su plenitud sino a condición de que se haga una revisión, siquiera superficial, de su proceso de transformación.

Palabras clave: Derechos, Públicos, Subjetivos, Estado, Hombre

Abstract

Recognition of subjective public rights is one of the fundamental principles of the modern state. Merely to consider human rights against the State as an extralegal sphere Hans Kelsen mode, or as an ability to make or not make elective mode Máynez Eduardo Garcia, the content does not explain that the idea has been presented historically. The rights granted to men before the State are not purely formalist freedom in the sense, but ability to require the State itself a certain behavior and you can not conceive the concept in its fullness but on condition that an overhaul, even superficial, of the transformation process.

Key words: Rights, Public, Subjective, State, Male

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Introduction

Since 1945, following the completion of the Second World War, a gradual process of internationalization of human rights, ie, a process began in which not only states but also the international community will progressively assume responsibilities in the field of human rights.

As a result of the internationalization of human rights have emerged various systems, both universal and regional, for their protection; systems must meet the following requirements to become effective means of respecting and protecting human rights.

The Organization of American States is the world's oldest regional organization, dating back to the First International American Conference in Washington, DC, from October 1889 to April 1890 At this meeting, it was agreed to create the Union International and American Republics began to weave a web of rules and institutions that would become known as the inter-American system, the oldest international institutional system.

The OAS was established in 1948 when subscribed, in Bogotá, Colombia, the Charter of the Organization of American States, which entered into force on 13 December 1951 Mexico ratified on November 23, 1948 and deposited the instrument itself date.

The American system was formally launched with the American Declaration of Rights and Duties of Man, adopted by the Ninth International Conference in Bogota, Colombia, in 1948, in which the OAS Charter was also signed.

The American Convention on Human Rights (Pact of San José), was adopted on 22 November 1969 and entered into force on 18 July 1978, having been the deposit of the tenth instrument of ratification by a member state of the OAS . Mexico ratified on March 2, 1981, and deposited its instrument the 24th of the same year.

The American Convention meant the consolidation of the supervision and monitoring of human rights already held by the Commission since 1965, but also added to the system a judicial body of official interpretation and final decision of specific cases of violations rights established in the Convention itself: the Inter-American Court of Human rights.

Mexico accepted the contentious jurisdiction of the Inter-American Court of Human Rights on December 16, 1998, then President Ernesto Zedillo Ponce de León.

On October 4, 2011, entered into force the Tenth Age of Judicial Weekly of the Federation and also published in the Official Gazette the judgment call Radilla, which means the novation of the system to provide justice for the country , in which all Mexican judges, in compliance with the obligations commit American system must enforce the human rights of all persons within their respective jurisdictions.

The creation of the Tenth Time is more than an administrative act symbolizes the beginning of a change in the perspective of administering justice, the result, perhaps today we could not measure the correct dimension.

The August 25, 1974, illegally detained at a military checkpoint Mr. Rosendo Radilla Pacheco, who was last seen in the former military barracks of Atoyac de Alvarez, Guerrero. Radilla was a prominent social leader and beloved town of Atoyac de Alvarez, Guerrero, who worked for the health and education of their people and who served as Municipal President.

The detention and subsequent forced disappearance of Mr. Radilla Pacheco was denounced publicly by the family at the time the events occurred and was subsequently reported to law enforcement instances national justice; was part of the investigation by the National Human Rights Commission which concluded in a special report published in 2001 in conjunction with recommendation 26/2001 and also was one of the preliminary investigations investigated by the Special Prosecutor created in the democratic transition reached-the so-not clarify past crimes, prosecutors said was closed unexpectedly on November 30, 2006.

The March 15, 2008 the Inter-American Commission on Human Rights submitted to the Court an application against the United Mexican States, which originated in the complaint filed on November 15, 2001 by the Mexican Commission for the Defense and Promotion of Human Rights and the Association of Relatives of the Disappeared and Victims of Human Rights Violations in Mexico. The November 23, 2009 the Inter-American Court of Human Rights ruled.

The June 10, 2011, major reforms to the Constitution of the United Mexican States published. In it, the recognition of the escalation of human rights is evidenced by the clear expression of pro persona principle as governing the interpretation and application of legal rules, those that promote and provide greater protection to people.

The recognition of individual rights against the state

The recognition of individual rights against the state, achieves its consecration in the *"Declaration of Rights of Man and Citizen" (Jellinek, 2000, p. 167) made in France on August 26, 1789, consisting of seventeen articles, the second of which defined "The aim of every political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security and resistance to oppression"*

A statement that you are considered inspired by British and American documents; therefore, we will review such records and then we will return to the French statement.

The English political history hears civil wars, revolutions and other acts of violence. It seems strange that one can speak of the British constitution as a traditional constitution, not

revolutionary. Yet this statement is true in the main, by revolution if we understand the establishment of a new order by using violence. Well, in fact, while European and American revolutions were born in the era of rationalism, sought its legitimacy on rational principles, and the irrational justification of the existing order, however, the English revolution, the historical period in which they appear and also by the historical peculiarities of the people, legitimize and justify the traditional way, ie by its intention to restore an old order weakened by the monarch and his collaborators. Rather than abolish old texts and institutions, what came was doing them a new meaning here in the midst of changes possible to find a line of permanence and continuity.

In 1215 the privileged classes (1) form before King John Lackland (2) a resistance movement whose consequence is the "Magna Charta Libertatum". This letter is not intended to create anything new, but to restore old ways and to this end a series of express subjective rights of heterogeneous nature: from the rules of inheritance or matrimonial law; limits on the prerogative of the monarch in taxes and in general, to any measure affecting the monarch to free men who owned land ownership.

In 1627 the Lords made a series of demands to King Charles I, who goes by the name "Petition of Rights" (Jellinek, 2000, p. 107). The document is presented as a reaction to abuses that were listed. In 1679 formulated the "Habeas Corpus" (Jellinek, 2000, p. 107).

In 1688, with the flight of King James II of Scotland to France, Parliament declared the throne vacant and calls of Orange-Nassau William the Silent who receives the scepter by a sworn written statement that goes by the name "Bill of Rigths "1689 (Jellinek, 2000, p. 107).

The statements contained in the aforementioned documents reveal a practical sense, not due to speculative buildings, has no doctrinal note itself, but are provided as a result of the experience that the English lords had accumulated through the historical development of their community.

Also characteristic of particular importance as it is to note that the rights whose recognition is required in the documents were not understood as rights of the human person, and rights of all men, but simply as a prerogative of the English subject; liberi homines including what was discussed in the Magna Carta, the English were not all men, but those who formed the nobility.

The statesman, philosopher and politician born British Ireland Edmund Burke has said he tried to assert freedoms estimated bequeathed to the British by his predecessors and that they would transmit to their posterity as property belonging to the people and "conventions the constitution, rights and duties of traditional English, the living presence of a rich national culture transmitted from generation to generation were not abstractions but real existences, developed with the heat of the burning ardor of patriotism and moral sentiment. [...] The collective life of England becomes a conscious reality "(Sabine, 2006, p. 453). The English jurist, professor of the University of Oxford, Sir William Blackstone in turn indicated that documents are those mere declarations of rights and freedoms innate to the English "are absolute rights of every Englishman" (Jellinek, 2000, p. 112). In the ideological climate of the thirteen British colonies that formed in North America, the belief held in certain rights pertaining to the quality of English, which later came to be regarded as inherent in the human personality.

It highlights the fact that the recognition of these rights is inspired not only British history, but in the flow of natural law and general political philosophy that fueled Rousseau, the English philosopher and physician John Locke, the writer and French jurist Charles-Louis de Montesquieu and the French writer and philosopher Voltaire François Marie Atouet; and this explains why it is found as a fundamental trait, its generality; You no longer about rights privileged classes, even the rights of all subjects of a given state, as in the English documents, but the rights of the person in general, of all men.

Jellinek cites a comment of political and historian George Bancroft, in the sense that while "The Rights of the British request for 1688 was historical and retrospective; Virginia's statement comes directly from the heart of nature, and proclaims the principles of government for all peoples in all future times "(Jellinek, 2000, p. 108). The German author states that for American statements the individual should not the state, but its very nature the subject of rights, the inalienable and inviolable individual rights they enjoy; however, in English law is not an eternal natural law, but only a right that comes from the ancestors, "the ancient rights, indisputable, the English people" (Jellinek, 2000, p. 109) was recognized.

Jellinek also highlights this point, "The English laws are far from wanting to recognize the general rights of man; have neither the strength nor the intention to limit legislative factors, nor attempt to formulate principles for future legislation. Under English law, Parliament is omnipotent: all laws accepted by him or made equal value. American statements, however, contain rules that are above the ordinary legislator "(Jellinek, 2000, p. 108).

Made the previous post, back to the French Declaration of Rights of 26 August 1789 (Jellinek, 2000, p. 96). Its content, in short, is this: men are born free and equal in rights; natural and essential rights of man are liberty, property, security and resistance to oppression; State the purpose is the preservation of those rights; The principle of all sovereignty resides essentially in the nation; freedom is to be able to do anything that does not harm others; Law can only prohibit actions harmful to society; law expresses the general will and all citizens have the right to attend their training, it must be the same for all; citizens are eligible to all dignities, offices and employments, according to their ability, no more distinction than that of their virtues and talents; no one can be accused or detained except in the cases determined by law and with the formalities prescribed therein; which rid arbitrary orders must be punished; the law has strictly necessary to set penalties and no one may be punished except in accordance with established law before the offense and legally applied; innocence of every man is presumed guilty until it is therefore unnecessary for securing his person must be severely repressed rigor; no one shall be molested for his opinions, even religious, while the manifestation of them does not disturb the public order; every citizen may speak, write and publish freely their thoughts subject to respond to the abuse incurred; law enforcement is instituted for the advantage of all and not for the particular use of those to whom is entrusted; contribution to public expenditure should be evenly distributed among citizens on the basis of their abilities; all citizens have the right to verify the necessity of the contribution as well as to consent freely, investigate its use to determine the quality, fee, payment and duration; society has the right to hold accountable administration to any public official; the company has not secured the guarantee of their rights, or has given the separation of powers, has no constitution; no one can be deprived of their property but upon the request of a public need and proven under the condition of a just and prior indemnity.

While the originality of the ideas contained in this French document has been discussed quite justifiably, that fact does not remove that document its historical significance, projected from the angle of the tremendous expansive force that informed them. As with some American statements, it was incorporated into the Constitution of September 3, 1791 (Jellinek, 2000, p. 82) thereby forming definitely classic mode for charters of the future, a first statement of principles, which are cataloged rights of the person and a second organic part, which serves the structure, powers and relationships of the organs of the state.

Beside the concept of individual public rights has been placed public concept of social rights. To get an idea about the basics of this distinction, one can ask here the following paragraphs.

The cosmopolitan humanist philosophy of the French and American revolutions, while having an undeniable foundation of truth, was insufficient to solve the problems of economic and social life; was left standing serious disagreement between legal equality and actual inequality of individual, constrained by the fact of being born poor, to accept a slightly different kind of slavery of the old; what had led to calls for the application of the principles of liberty, equality and fraternity, also the economic and social fields. This ideological movement struggle for social freedom, as a corollary to the legal-political freedom won in the French and American Revolution, begins in the first stage, in the revolution of 1848 in Europe and the adoption of measures by the social French Constitution of 1848.

Therefore, while the realization of the values of individual public content rights will be held by individuals, provided that the State is not prevented, the values that give content to social rights require, given the lack of personal effort, activity State for your satisfaction. That is, individual civil rights as a condition of achievement have an attitude of abstention of the State; it does not interfere obstructing the field of freedom of individuals; instead claiming social rights state intervention, including reducing the circle of individual freedom.

Social rights are human beings, valuing the collective aspect of their nature, and are inspired in order to curb the excesses of individualism, for the improvement of economically weaker classes; social rights originally appeared as referring particularly to

the working class way. But its essence and content overflows the concept of worker to get to cover all the economically weak, that is, to anyone who requires assistance or help from the community.

It can not be overemphasized that the recognition of one or other of the categories of rights that we have mentioned above, is not unique to one school of thought at the expense of others; that just as there is no need to be Rousseau to recognize individual rights need not be a Marxist to recognize social rights; acquisitions of ordinary intelligence, under the action of the various currents that intersect it, greatly exceed the school disputes.

We can say that both species picture is translating that desire for freedom by the man himself urges because of the requirement of their humanity.

For this reason it seems incorrect to claim social rights call "new rights", as have some contemporary authors, calling it being "old" to the individual, if not "outdated". For us, the way to distinguish must be taken with reservations, accepting only as referred to simply developing concepts, for otherwise, as it is intended that these are realities born one after another, you will incur false understandings.

Neither the French statement quoted above, nor any other document we present history, can be taken as a source or other rights. These statements, as the constitutional documents in each state address book them, are but parts that have been recognized publicly transporting them to the positive law; because they were born with man as an individual and man as a social being, and only by dint of abstraction can imagine the human being outside of society, in the original state that Rousseau imagined.

It is also understood that grave error between individual rights and social there posed a situation of antagonism, opposition; who think and forget that social man can not be separated from the individual man, but, as stated above, in abstraction plan merely because the entity that both concepts refer is precisely the human person.

Thus, the expression rights of man, or rather, human rights, beyond that duality comprising both notions, Talk yourself as individual rights or social rights Talk yourself, the reference to the human essence is essential.

Conclusion

Recognition of subjective public rights is one of the fundamental principles of the modern state. Merely consider the rights of man against the state as an extra-sphere mode Hans Kelsen, or capacity to do or not to do so optional Máynez Eduardo Garcia, does not explain the content with the idea that has been presented historically. The rights granted to men before the State are not purely formalist freedom in the sense, but ability to require the State itself a certain behavior and you can not conceive the concept correctly but on condition that a revision, even surface is made, of the transformation process.

On October 4, 2011, entered into force the Tenth Age of Judicial Weekly of the Federation and also published in the Official Gazette called Judgment Radilla, which means the novation of the system to provide justice for the country , in which all Mexican judges, in compliance with the obligations commit American system must enforce the human rights of all persons within their respective jurisdictions.

Regarding judicial practices, the Inter-American Court of Human Rights has established in its case law that recognizes that judges and courts are subject to the rule of law and, therefore, are required to apply the provisions in the order legal. But when a State has ratified an international treaty such as the American Convention on Human Rights, its judges, as part of the state apparatus, are also subject to it, forcing them to ensure that the effects of the provisions of the Convention are not are undermined by the application of laws contrary to its object and purpose, which from the beginning have no legal effect. In other words, the Judicial Power of the Federation must exercise control of "conventionality" ex officio between domestic standards and the American Convention clearly within their respective competences and relevant procedural regulations. In this task, the Judicial Power of the Federation must take into account not only the treaty, but also the interpretation thereof made by the Court, the ultimate interpreter of the American Convention.

Explanatory notes

(1) The privileged classes are closed social groups, in not letting anyone in who does not accredit his inherited nobility (honor) or granted by King (merit). Until the eighteenth century nobility, high clergy and the Crown share power within a stable social structure.

(2) King of England from 1199 to 1216 After the death of his brother, Richard the Lionheart, murdered his nephew Arthur of Rouen in 1203 Defeated by the English barons and prelates, was forced to grant the famous Magna Carta of English liberties.

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