

**BARROSO, LUÍS ROBERTO (2013). [THE
DIGNITY OF THE HUMAN BEING IN
CONTEMPORARY CONSTITUTIONAL LAW:
THE CONSTRUCTION OF A LEGAL CONCEPT
UNDER THE LIGHT OF THE WORLD'S CASE
LAW]. BELO HORIZONTE: FÓRUM.**
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*A DIGNIDADE DA PESSOA HUMANA NO DIREITO
CONSTITUCIONAL CONTEMPORÂNEO: A
CONSTRUÇÃO DE UM CONCEITO JURÍDICO À
LUZ DA JURISPRUDÊNCIA MUNDIAL.*
BELO HORIZONTE: FÓRUM.

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This is an abstract of Luís Roberto Barroso's book, which is based on the article "Here, there and everywhere: human dignity in contemporary law and in the transnational discourse". The article was developed in 2011 during the period Barroso was a visiting scholar at Harvard University.

In a legal context more and more globalized, "*human dignity would be one of the main ideas of this setting*" (p. 12). However, the concept regarding human dignity is not well delimited in the current legal discourse, as the concept is usually hostage by the fallacies that take advantage of its amorphous characteristic. Such problem reflects on the book's main proposition: to structure a legal concept of human dignity assuming that the concept is a potentially valuable tool for the decision of morally complex controversies in constitutional field. In order to achieve his goal, the author goes through three main objectives: to demonstrate the importance of human dignity in Brazil's jurisprudence, international jurisprudence and in "*the transnational discourse*"¹; to explore the legal nature of human dignity (value/fundamental right/principle) aiming to condense the concept into its core meaning and to demonstrate the utility of the core meaning of the concept.

At the beginning of the book, the author establishes a narrative under various points of view about the origin and evolution of the concept of human dignity. Barroso underlines two different representations of the concept. The first one regards to ancient Rome until the 18th century, period in which "*the first sense attributed to dignity, while a categorization of the individuals, was related to a superior status, a higher position or social classification*". The second one is related to a contemporary representation, which is "*based on the assumption that each human being owns an intrinsic value and enjoys an especial position in the world*" (p. 14). This is a reference to the Judaeo-Christian tradition, the Enlightenment and the postwar period. It is precisely during the post-World War II period that the concept of human dignity is incorporated in the legal and political discourse.

There are some factors that have contributed to the diffusion of the concept of human dignity in the legal discourse, which are: the textual record of human dignity in treaties, international documents and national constitutions; and the "*rise of a post-legal positivism culture that has reconnected law with moral and political philosophy, lessening the radical clash between these three elements imposed by the pre-World War II positivism*." (p. 19). Barroso describes the presence of the legal concept of human dignity on various constitutional texts, jurisprudence of constitutional courts and on documents and international treaties. The presence of the concept on these fields has enabled institutional and rhetorical phenomena to contribute to the diffusion and standardization of the legal meaning of human dignity. In this sense, the author identifies the "*legal transposition*"² and the so-called "*transnational discourse*". Newly democracies, such as Greece, Portugal, Spain, Brazil, Chile and Argentina, have taken as their model institutional designs from more deeply rooted democracies (United States of America and Germany). According to Barroso, such influence is also observed on the constant dialog between constitutional court and higher courts noted on mutual mentions, conferences about

academic exchange and the organization of public transnational forums, such as the Venice Commission (p. 34).

First, the author discusses about the legal nature of the concept of human dignity, and after, he defines the core meaning of the concept. Some problems become evident since the concept is exposed to multiple influences that come from religion, philosophy, politics and law. According to the author, the rise of the concept of human dignity in law is linked to a change on the legal thinking: it grew apart from the formalist thinking and came closer to a post-legal positivism perspective. Considering this context, Barroso describes the idea that human dignity is characterized as a fundamental value implicit in constitutional democracies as a consensus. The concept of human dignity would be part of the legal system under the shape of “*legal principle with constitutional status*” (p. 64), whose functions would go from source of rights and duties to interpretative guide to criterion for nullity (p. 66). Those functions are closely related to the way the author of the book systematically describes the constitutional principles as two concentric circles. Inside the inner circle, close to the center, the “*essential content of the principle*” (p. 65) would be working as a source of rights and duties. Therefore, the principle of human dignity, while working as a source, acts as a mechanism of inclusion of rights that are not recorded on text in any legal system. Inside the outer circle, the principle of human dignity works as an interpretative tool, thus it would act as a link of communication between the essential core of the fundamental rights – such as equality, freedom, right to vote – and the core meaning of human dignity. This would result in the correct interpretation and would help on the decision process about the meaning of the fundamental rights in real cases. Therefore, when confronted with the ambiguities, loopholes or collisions between fundamental rights, the principle of human dignity “*may be a proper compass to the search for the best solution*”. In situations that are conflicting with the principle of human dignity any law that violates the dignity, whether it is in the abstract case or in real life, the law will be null” (p. 66).

The author, at last, offers the core meaning of human dignity, a concept that aims to make it more objective and crystallize it in the application of law. “*Broadly speaking, this is my minimalist conception: the human dignity identifies 1. the intrinsic value of all human beings, as well as 2. the autonomy of each individual; 3. which is limited by some legitimate constrictions imposed in the name of social values or state interests (community value)*.” (p. 72). According to the author, the intrinsic value would be the ontological element of human dignity (p.76) and it is expressed as the fundamental rights to live, equality, physical and psychiatric integrities. The autonomy, on the other hand, would be the ethical element, the individual’s freedom to route its biographic path through a group of fundamental rights: basic freedoms (private autonomy, the freedom of the modern ones?), right to political activism (public autonomy, the freedom of the ancient ones?) , fundamental social right to minimal conditions of life (the existential minimum). The community value would be the social element of human dignity. During the debate over human dignity, the community value

(which is especially investigated by the author) is present in controversial cases, due to its restrictive character to personal autonomy. According to Barroso, the community value element is present in the justification for controversial legal decisions, some of them mentioned by the author: the case of the dwarf tossing, decided by France's *Conseil d'Etat* and endorsed by the United Nations Human Rights Council; the peep show case judged by the Federal Constitutional Court of Germany; the restrictions to prostitution in South Africa and in Canada - going on a different path from the one chosen by the Constitutional Court of Colombia, which considers prostitution a tolerable social phenomenon. The author establishes methods of observation aiming to build a proper justification for the concept of community value in order to avoid the risks of legal decisions invading personal autonomy by moralistic or paternalistic stances. Therefore, three points must be taken in consideration: "a) the existence or non-existence of a fundamental right being attacked; b) the potential damage that can be inflicted on others and the person who is into consideration; and c) the level of social consensus regarding the subject under analysis" (p. 95-96).

After having delimited the three basic elements, Barroso starts to explore them as three essential analytic levels between the subjects that are related to complex cases and human dignity. The author analyses abortion, same-sex marriage and assisted suicide. In each case, the conflicting elements between rights and duties present in each element of human dignity are considered and, at the end, the author takes a conclusive stance. According to Barroso's considerations, this is the way to ensure "*more transparency and accountability to the argument and decisions made by judges, courts and interpreters in general.*" (p. 112).

On a postsript that goes beyond the article that inspired the author to write the book, Barroso analyses the use of human dignity in Brazilian jurisprudence. He makes a list of jurisprudential data from Supreme Federal Court and the other superior courts in Brazil. According to the author, due to the wide range and the great thematic detail present in the 1988 Federal Constitution — along with the long list of fundamental rights mentioned on the constitutional text — "*many situations in which other jurisdictions would imply the need to use the more abstract principle of human dignity, between us [Brazilians] they are already present in rules more specific and of more legal density.*" The Brazilian jurisprudence based on human dignity usually is shown as a mere "*reinforcement to the argument*" of another fundament or a "*theoretic ornament*" (p. 115). The concept of human dignity is used mainly in situations of ambiguity, loopholes and when constitutional rules and fundamental right collide with each other (p. 115). It is rarely met as a central element during the development of an argument. Thus, its minimal elements are rarely specified or shown in the Brazilian jurisprudential arguments. Actually, they are fragmented as an approach of the fundamental value or the constitutional principle of human dignity and dispersed in various particular themes present in different jurisdictional instances in Brazil.

>> ENDNOTES

- ¹ On the note n° 8, the author explains the term: *“The use of the expression ‘transnational discourse’ intends to mean the mention and the argumentative use of foreign and international jurisprudences by the legal system of a country.”* (p.11).
- ² Term defined by Frederick Schauer used by the author. Its definition would be *“the adoption by a country of the law and legal institutions developed by another country.”* (p.33).