



JURIDICAL AND PHENOMENOLOGICAL HERMENEUTICS OF HUMAN RIGHTS FUNDAMENTS

HERMENEUTICA JURÍDICA E FENOMENOLÓGICA DOS FUNDAMENTOS DE DIREITOS HUMANOS

HERMENÉUTICA JURÍDICA Y FENOMENOLÓGICA DE LOS FUNDAMENTOS DE DERECHOS HUMANOS

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Abstract: This article explores the issue of international Human Rights proclamations and their vague application concerning the rights disposed. It also elaborates on the phenomenological philosophy in Edmund Husserl and its application as a scientific research method, emphasizing in applications in juridical research. It proposes the implementation of the phenomenological method as a solution to fulfill the need of understanding the essence of Human Rights as proclaimed in legal documents. Phenomenology, in Edmund Husserl is understood as a philosophy that allows an intuitive comprehension of the essence of things. That being, the phenomenological method of scientific research would be able to find the essence of phenomena and their fundamentals. It is a descriptive, phenomenological research, having as methodology the investigation of international legal documents that talk about ratified Human Rights in countries in all five continents, as well as the Brazilian juridical ordering and the existing lack of fundament concerning Human Rights such as freedom, equality and dignity.

Keywords: Human Rights Fundaments, Phenomenological, Edmund Husserl; Phenomenological Method.

Resumo: Este artigo explora a questão das proclamações internacionais dos direitos humanos e sua vaga aplicação sobre os direitos disputados. Também desenvolve a filosofia fenomenológica em Edmund Husserl e sua aplicação como método de pesquisa científica, enfatizando em aplicações em pesquisa jurídica. Propõe a implementação do método fenomenológico como uma solução para satisfazer a

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necessidade de compreender a essência dos direitos humanos como proclamada em documentos legais. A fenomenologia, em Edmund Husserl, é entendida como uma filosofia que permite uma compreensão intuitiva da essência das coisas. Sendo assim, o método fenomenológico da pesquisa científica seria capaz de encontrar a essência dos fenômenos e seus fundamentos. Trata-se de uma pesquisa conceitual e fenomenológica, tendo como metodologia a investigação de documentos jurídicos internacionais que falam de direitos humanos ratificados em países nos cinco continentes, bem como o ordenamento jurídico brasileiro e a falta de fundamentação existente em matéria de direitos humanos como a liberdade, igualdade e dignidade.

Palavras-chave: Fundamentos dos Direitos Humanos, Fenomenologia, Edmund Husserl; Método fenomenológico.

Resumen: Este artículo explora el tema de las proclamaciones internacionales de Derechos Humanos y su aplicación vaga en relación con los derechos dispuestos. También desarrolla la filosofía fenomenológica en Edmund Husserl y su aplicación como método de investigación científica, enfatizando en aplicaciones en investigación jurídica. Propone la implementación del método fenomenológico como una solución para satisfacer la necesidad de comprender la esencia de los Derechos Humanos proclamada en los documentos legales. Fenomenología, en Edmund Husserl se entiende como una filosofía que permite una comprensión intuitiva de la esencia de las cosas. Siendo así, el método fenomenológico de la investigación científica podría encontrar la esencia de los fenómenos y sus fundamentos. Se trata de una investigación descriptiva, fenomenológica, que tiene como metodología la investigación de documentos legales internacionales que hablan de los Derechos Humanos ratificados en países de los cinco continentes, así como el ordenamiento jurídico brasileño y la falta de fundamento existente en materia de Derechos Humanos como la libertad, igualdad y dignidad.

Palabras clave: Fundamentos de los Derechos Humanos, Fenomenología, Edmund Husserl; Método fenomenológico.

1 Introduction

In Human Rights international proclamations and in the Brazilian juridical ordinance, a lack of fundament and comprehension can be observed regarding the definition of fundamental rights such as, freedom, equality and dignity. Regarding Human Rights, the claims are diversified, but few describe the essence of what is a right. In a lot of cases, Human Rights are claimed without the fundament of its essence and of its real content and meaning.

Then how should one search for the fundamentals of Human Rights and find their true meaning? What is the essence of freedom? What is the essence of equality? Are there more adequate research methods when studying the fundamentals of human rights than what is proposed by legal documents? It is in this context that the search for the essence and fundamentals of human rights through the Phenomenological research method is proposed.

The more common social science research methods are the inductive, deductive and dialectic methods, having in philosophy, a contribution from the so called phenomenological method or method of the study of phenomenology, which originated in the twentieth century and was important to the philosophy of the time.

Since its origin, Phenomenology exhibited ties with psychology, which served as a bridge that allowed Phenomenological concepts to spread to other subjects. It is a method rarely practiced, perhaps due to the difficulty that an individual with a shallow understanding of philosophy faces when trying to comprehend it. The phenomenological method of scientific research is characterized by the searching of the essence of phenomena and their fundamentals³.

The objective of this article is to reflect upon human rights proclamations as well as the rules of the Brazilian juridical ordinance, exposing the devices that possess a lack of fundamentals when referring to a fundamental human right. It is a phenomenological and descriptive research, and relies on an analysis of Human Rights international documents ratified by countries in all five continents.

The relevance of this work is anchored on the increase in the number of cases of violation of fundamental human rights, but without fundament in what the right itself is. Vague content allegations that make possible any claim, where everything can be addressed, but little room remains for fundamentals.

This article starts with brief presentation of the phenomenological philosophy and the phenomenological method proposed by philosopher and mathematician Edmund Husserl. Followed by addressing the issue of fundamentals in Human Rights proclamations, to then propose the adoption of the phenomenological method as a solution to the lack of understanding of human rights fundamentals.

2 Phenomenology proposed by Edmund Husserl

Phenomenology is a movement of change in French and German philosophy that arose during the first half of the twentieth century (from approximately 1900-1950). European philosophers as such as Derrida, Habermas, Foucault, Gadamer, Levinas, Beauvoir de Marcel and Sartre were all influenced by phenomenology at some point in their careers. But perhaps the three most important and influential philosophers of phenomenology – Philosophers that contributed the most to the development of the method and substance of phenomenology – were Edmund Husserl(1859-1938), Martin Heidegger(1889-1976) and Maurice Merleau-Ponty(1908-1961).

This philosophy has Edmund Husserl's first phenomenological publication, *Logish Untersuchungen*(Logical Investigations) published in 1901, as a starting point. However, as stated by Castilho (2012, p. 202):

In 1913, however,(Edmund Husserl) published what is considered his

greatest work: 'Ideas related to a pure phenomenology', a deepening of professor Franz Brentano's theory on the intentionality of human consciousness.

Husserl's phenomenology was strongly influenced by the intentionality of human consciousness inherited by Franz Brentano, however, Husserl was also influenced by British empiricists ideas of "perception". The connection of these two ideas ("perception" inherited by British empiricists and "intentionality of consciousness" by Franz Brentano) allowed Husserl to build the Phenomenology of intentionality (CASTILHO, 2012).

Husserl is considered as the thinker of phenomenology. He had an academic formation in mathematics and his first work on philosophy focused on the philosophy of arithmetic. After a criticized review of this work by Gottlob Frege, Husserl, in 1984, returned his general attention towards the fundamental issues of philosophical logic. His objective was to develop a philosophical approach to logic that not only adequately represented the formal relations between allowed propositions, but also the content found within them.

Phenomenology is usually understood as a designator to a philosophical movement that surfaced in the turn of the twentieth century, and that proposed a new and radical scientific philosophy. Castilho (2012, p. 202) argues:

Husserl's phenomenological method simply consists of showing the object, the real data, and clarifying this data. That is why knowledge is based in the essence of an object and not in the individual's impression on the object.

Phenomenology serves as support to a wide variety of philosophical issues – from philosophical logic, ontology and metaphysics – to issues regarding the nature of the mind and the contents of perception. But, as an initial approach, phenomenology focus on the fundamental issue of accurately and completely describing essential characteristics of ordinary life. In this point of view it becomes possible to share Castilho's (2012, p. 202) thoughts on Husserl's phenomenology:

And this is exactly where Husserl's originality resides. He wanted to see the world in a pure manner, free of impressions, comparisons and associations. As he searches for the essence of each object and being, Husserl escapes from rationalism, which claimed knowledge originated only from the reason of the individual, and at the same time escapes from empiricism, which suggested knowledge could only be obtained through experience.

Phenomenology begins in the fundamental issue of precisely describing the essential characteristics of the experiences lived every day. It is through this perspective that the focus of the phenomenological method is revealed: the experience felt in the world of life. Another phenomenology philosopher, Meleau-Ponty⁸, stated that phenomenology was far from being completely clarified, and felt that after half a century had passed since Husserl's first publications, the necessity of explaining it seemed odd.

The phenomenological method deals with the study of essences and the issues of

phenomenology seek to define the essence of perception and consciousness. In this sense, Urbano Zilles⁹ suggests that phenomenology observes essences and phenomena exclusively and does not research facts. The Analysis of phenomena and the essence of things are better clarified by Moreira (2002, p. 71):

As pre-phenomenology concepts, positive sciences are naïve, in the same manner that everyday life is naïve. Living consists of compromising with the world that gives us experience through thought, (...) and only phenomenology, through a radical analysis of intentionality, can be the science of sciences, because it loses the world through the phenomenological reduction and finds it again through the intentionality of consciousness. It is necessary to move from a naïve attitude to a transcendental one, in which consciousness builds the world as a pure phenomenon.

It is not a simple philosophy. Husserl was a self-entitled eternal beginner in phenomenology and recognized the complexity of this field of philosophy. To better comprehend this phenomenological thought, it is necessary to understand some of Edmund Husserl's basic ideas. According to Moreira (2002, p. 82), to Husserl:

The roots or beginnings of knowledge should be found in things, in phenomena, in common sense, in which all of our concepts are referenced. Gradually, Husserl started believing that these roots became too deep in the conscience of the individual that knows, to whom the phenomena appeared, in something that he latter came to call transcendental subjectivity. The return to the object was supplemented by "a return to the individual".

In addition, it is necessary to comprehend some basic fundaments of phenomenology, such as the concept of essence. "When a fact is understood in the conscience, an essence is understood with it" (MOREIRA, 2002, p. 84). In order to comprehend phenomenology, it is also fundamental to be familiar with the concept of intentionality, "to say that understanding is intentional, is to say that every understanding comes from the understanding of something else. Consciousness is not a substance, but an activity constructed by actions (perception, imagination, passion, etc.), through which something is intended" (MOREIRA, 2002, p. 85).

Another fundamental concept developed by Husserl is the Apodictic Evidence, that can be defined as certain and irrefutable knowledge.

It signifies the appearance of what truly is, and for this reason it manifests itself so strongly that the possibility for doubt or error is excluded. Evidence is a criterion of truth and certainty. To Husserl, there will always be evidence if there is a perfect connection between what is given and what is intended, when a "fulfillment of intention" is given, that is, the intention receives an absolute plenitude of content, the plenitude of the object itself. (MOREIRA, 2002, p. 86)

Finally, the concept of phenomenological reduction proposed by Husserl must be exposed. It means placing phenomena in parenthesis, as highlighted by Guimaraes (2007, p.22):

Phenomenological reduction begins by placing facts in parenthesis, as it is praised by positive sciences". Reducing facts to pure phenomena means "the placing of the world in parenthesis, that is, to halt the belief in the duration of the world in order to recover it in its essence.

From these understandings of phenomenology it is possible to start observing phenomenological philosophy as a method of scientific research.

3 The phenomenological method and its application in scientific research and juridical studies.

Edmund Husserl (2001) was the thinker that gave origin to phenomenology. To him, the phenomenological method concludes that, through the intellect, human beings acquire immediate and absolute certainty regarding a phenomenon. Even though Husserl's had an academic formation in Mathematics, the origin of his thoughts lie in philosophy and Zilles (1996) shows that this way of thinking has as objective to become a science of essences, and not a science of facts.

With time, phenomenology began being utilized as a basic methodology in social sciences and in the last few years has also been utilized in juridical studies. However, the application of this philosophy as a scientific research method is still questioned. Maybe it is too early to imagine a purely phenomenological research method, even with many authors requiring its change from philosophy to phenomenological research method. In addition, Edmund Husserl's (2001) own ideas possess diverse philosophical ramifications, to the point of the Philosopher and Mathematician himself considering his own ideas incomplete.

The application of phenomenology is no easy task. Its understanding demands dedication in the study of its philosophy and in its application, Giorgi (1985) elaborates on three issues in which the degree of difficulty of applying phenomenological philosophy in scientific research is clearly demonstrated: 1) it goes against the natural tendency of consciousness to drift towards things instead of their processes; 2) the work of Edmund Husserl, considered the founding father of phenomenology, evolves with time, with significant alterations to its concepts, which remain in study, and 3) Husserl's disciples certainty regarding the concepts and fundamentals of phenomenological philosophy are fragile. These remarks demonstrate the arduous task of comprehending and applying the phenomenological method in scientific and juridical studies.

Regarding phenomenology's difficulty of application, as a young student, Giorgi experimented on an interesting point of view. In an encounter with Strauss, he asked why he did not have students anymore; Strauss replies that phenomenology is a philosophy very difficult to study. Giorgi also highlights that as he made works of phenomenology available for study, students simply disappeared. This experience shows a significant issue in the study and utilization of the phenomenological philosophy (MOREIRA, 2002, p. 61).

Faced with these thoughts, any scientific research initiative that seeks to utilize the phenomenological method must be seen in a positive light. However, It will be a nearly

impossible task to accomplish without the instruction of a minimal philosophical basis that does not diminishes the phenomenological method's enormous potential, meaning the search for the essence of phenomena will have a weak appreciation.

It becomes necessary to study the main characteristics of this philosophy and its creator, Edmund Husserl. However, as observed in the first topic, the concepts that compose phenomenology are difficult to grasp, a difficulty that can also be observed in the concept of Phenomenology as a method of Scientific Research.

It is a point that must be thoroughly analyzed: How can the phenomenological method in philosophy be compared to the phenomenological method utilized in scientific research. In semantics, a method is the systematic grouping of rules and procedures conducted by a cognitive investigation that arrives at a truth or a result and Moreira (2002)²¹ states that the phenomenological method is a group of principles that give phenomenological philosophy fundaments. In this sense, phenomenology reveals closer to the definition of a doctrine than of a scientific investigation system or method.

This approximation of phenomenology from philosophy to a scientific research method, was worked on by Herbert Spiegelberg who revealed the three characteristics that structured phenomenological philosophy as a scientific research method. The first characteristic consists of investigating individual phenomena where other three steps must be followed: have an intuitive perception of the phenomenon; administer an analytical examination; and describe the phenomenon to be analyzed. The second characteristic would be to investigate general essences, in Moreira's (2002, p. 98) perception:

Prior to the existence of an intuition of essences, there must be an intuition of particulars (...) that must be dealt with as examples of the general essence, which is the universal. The essences are conceived as something that is a part of the particulars, and simultaneously different from them. The essence "color" differs from "red", which exists in the "pink", or even in the "red color" this "red" differs from "pink".

The third characteristic would be the comprehension of fundamental relations within essences, which may be realized in two ways: relations within one essence and relations within many essences.

That being said, it is observed that phenomenology is rigorously worked on in classic concepts of its philosophy, with Edmund Husserl as the great thinker at the vanguard of these studies. Those who are not intimate with the study of philosophy regard the phenomenological method as practically unexplored, especially with the high degree of difficulty in comprehending this philosophy. However, as it will be observed ahead, the phenomenological method reveals itself in accordance with studies concerning human life.

These comprehensions of phenomenology and phenomenological method, make possible to ponder upon the fundamentals of Human Rights e observe how phenomenology and the phenomenological method proposed by Edmund Husserl can contribute to the interpretation

of Human Rights beyond their proclamations.

4 The issue of Human Rights fundamentals

The Human Rights proclamations describe a wide variety of rights, health, education, shelter, and even the dignity of men. These declarations seek to understand the essence of mankind, which would reveal its primordial necessities, implying that we cannot escape one of philosophy's central questions: what is humanity? What does it mean to be a human being? Comparato (2006, p.11) adopts the following position on the issue:

The idea that individuals and human groups can be reduced to a general concept or category, which includes all, is of recent elaboration in history. As an anthropologist observed, in people that live on the margin of what is classified as civilization, there is no one word that expresses the concept of being human: the elements of the group are called "men", but those strange to the group are assigned a different nomenclature, signifying that they belonging to a different animal species.

With the evolution of history, men acquired a definition of equality among all, and according to Comparato (2006, p. 12), the first expression of this positive declaration was the Universal Declaration of Human Rights of 1948, stating that "All human beings are born free and equal in dignity and rights".

However, normative postulates regarding human rights can be found even earlier in history such as the Magna Letter *Liberatum seu Concordiam inter regem Johannem et Barones pro concessione liberatum ecclesiae et regni Angliae* (Magna Letter of the Agreement on Liberties between King John and the Barons for the Approval of the Liberties of the Church and the English Kingdom). Devices regarding ecclesiastic liberties can be found in this document (clause one); principle of legality (clause sixteen and twenty three); private property (clause thirty and thirty one); due legal processes (clause thirty nine); among other dispositions.

In addition to the Magna Letter, a number of other legal documents deal on the subject of Human Rights, it is possible to cite the English Declaration of Rights of 1689; the United Nations Letter; the Universal Declaration of Human Rights of 1948; and the International Human Rights Pacts of 1966 as the main ones. All of which possess as common ground, the historical claiming of men exalting rights such as, liberty, equality and dignity of the human person.

In the Universal Declaration of Human Rights, for example, the following is stated in article one; "Every human being is born equal in dignity and rights". In this portion, claims of rights to freedom, equality and dignity can be found, but there is no explanation as to the content and fundamentals of these rights. What is Freedom or Liberty? What is equality? What is dignity?

In the International Human Rights Pacts of 1966, article six predicts that "The right to life is inherent to every human person". This document contains a vague definition of what

would be the right to life, who detains it and against whom can it be opposed, not to mention the lack of definition on the meaning of life, when it starts and when it ends.

There is vagueness regarding the essence of these claims, it is then necessary to reflect upon what the fundamentals of these rights would be and how they attained this comprehension. This lack of definition on the fundamentals is easily observed when exploring simple questions such as, the right to freedom, exalted in Article one of the Universal Declaration of Human Rights of 1948. What would be this freedom? To which point is a human free to trace its own life? Against who would this right be opposable and who detains it?

The issue of the fundamentals of Human Rights was also demonstrated by Guimaraes (2007, p. 69):

The so called “human rights” **exist in the plane of proclamations but not in the order of fundaments** [...] the proclamations of “human rights”, all of them, denounce the vagueness of thought regarding the fundamental question: what is human right? [...] We have to return to what has already been said, in order to integrate in a synthetic order of “human rights” phenomenology the light of the description of its essences.

Before searching which would be the fundamentals of human rights, we must first understand what a fundament is. Guimaraes (2009, p. 67) shows us that a search through the history of philosophy takes us through many answers depending in which era and which thinker are analyzed. To Plato, fundament would be the idea; Aristotle would define it as substance; Saint Thomas would define it as God; Descartes would claim it to be the consideration; in Kant the fundament would be reason; in Husserl it would be conscience; and Heidegger would put liberty as a fundament.

To these philosophers, fundaments relate to principles, maybe today the fundament of Human Rights could be dignity, but as Guimaraes (2009, p. 68) himself would put, principle is not fundament, “it is a standard of rationality through which we hold our belief in the granting of a possible fundament”.

Is it possible to say that the fundament of a right is its respective legal device? In this sense, seeking the fundamentals regarding freedom in the Constitution of the Federal Republic of Brazil, it can be found that the Democratic State must ensure freedom and as the constitutional text progresses, it can be found that freedom is a right impossible to violate. These dispositions do not satisfy the anxiousness brought about by the search for the essence of the right to freedom that is predicted in the constitution, for there is little explanation in what the right to freedom itself would be.

The same situation can be observed when dealing with the right to equality, Article five of the Brazilian constitution ensures that, “all are equal in the law”. But can the right to equality be solely summed up by this expression? What would this equality be in the law? Many situations in which individuals are not treated equally can be observed within the normative passages of the Brazilian juridical ordinance.

From the logic exposed above, the fundamentals of the claims of Human Rights are not related to their respective legal documents, since they only address these rights without venturing any deeper in their content, their essence. Where then, would the fundamentals of Human Rights be found? Guimaraes (2007, p. 87) would state that they can be found in the human person, where the beginning and the end of the claims can be found. It is then necessary, in the search for the fundamentals of human rights, to turn to mankind itself, the original source of its own rights. Guimaraes (2007, p. 90) states that “searching for fundamentals of ‘human rights’ means returning to humans, with the objective of understanding the origin of their claims”.

It is in this context, that the utilization of the phenomenological research method is proposed. As observed in the previous topics, Phenomenology is a method of research capable of arriving at the essence of things. It is a redefinition in the way of thinking: make philosophy a rigorous science. “While positive sciences seek truth in facts, phenomenology describes these truths through the perception of the essence of facts” (GUIMARÃES, 2009, p. 73).

Phenomenology then rises as a research method capable of pursuing Human Rights fundamentals as proclaimed in international documents. In this research on Human Rights and in the quest for its fundamentals, Edmund Husserl’s phenomenological philosophy reveals itself able to trace a path to the implementation of phenomenological fundamentals of Human Rights.

Positive legislations possess a relative lack of fundament concerning Human Rights, to the point of becoming possible to claim, cloaked as a right, any aspiration, disregarding its true content. By detaching from the search and comprehension of the fundamentals of Human Rights, and by conforming to proclamations in legal documents, anything can be demanded in that field. It becomes necessary to seek conceptions that penetrate human social acting, its goals and desires, to then realize a strong fundament to Human Rights such as Liberty, Equality and Dignity.

5 Final considerations

This article focused on studying phenomenological philosophy as a method of research when attempting to understand the essence of Human Rights. It is a poorly explored research method, especially by juridical studies with few publications of scientific works that engage in the phenomenological method.

Edmund Husserl’s phenomenological philosophy itself is poorly studied, to the point of Husserl considering himself a novice on the subject. Furthermore, by continuing studies on the field, his disciples ended up distorting some of the concepts, as is the case of philosopher Jean-Paul Sartre, who studied phenomenology with Husserl, but wound up gearing his knowledge on the subject towards developments in the field existentialism.

Phenomenology, in Edmund Husserl is understood as a philosophy that allows an

intuitive comprehension of the essence of things. That being, the phenomenological method of scientific research would be able to find the essence of phenomena and their fundamentals.

This study faced the issue of the implementation of fundaments of Human Rights. The proclamations that exalt rights such as liberty, equality and dignity are many, but when trying to comprehend the essence of these devices, a lack of fundament can be observed, especially after noticing that everything is defined with basis on Human Rights, but very little is known about the true fundament of their essence.

The application of the phenomenological method of research to comprehend Human Rights is then proposed. Legal documents claim to include fundaments in their devices. Phenomenology observes fact and revolutionizes them with the rules to which they apply to, as it occurs in jurisdictional procedures. Phenomenology finds the essence and the fundamentals of rights themselves through the means of perception, intuition and the description of the phenomenon.

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