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THE ONTOLOGICAL RATIONALE OF HUMAN RIGHTS

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ABSTRACT: The subject of human rights is analyzed from the standpoint of jurisprudentialism, a theory of law as linked to the reality of conflicts that are transmuted into judicial cases. Thus, the theoretical construction of the law and its concretization have as its core the very jurisdictional activity, posture which presupposes a concept of law involving it, with repercussions in the field of logic, epistemology and methodology, in dealing with the problems respectively raised. Drawing on the methodology proposed by Husserl's phenomenology, it is a question of elaborating a human rights ontology from the jurisprudentialistic perspective, as well as demonstrating how they project themselves in the dimensions of knowledge that subsidize the methodology of law as experience, as well as on the resulting knowledge.

KEYWORDS: Human Rights. Jurisprudentialism. Phenomenology. Historicity. Universality.

1. Human rights, phenomenology and jurisprudentialism

The problem of the foundation of human rights has oscillated between the tradition of natural law and legal positivism. The first emphasizes its aprioristic character, in the sense that the ordinances do not create them substantially, only declare them and take care of their effectiveness; the second is to remove metajuridical criteria, in view of the need for scientific, nuclear fundamentals in positivist thinking. Although

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debatable, it is an attitude that pervades the current epistemological context that is called post-positivism.

In this doctrinal environment, attempts are made to re-elaborate philosophy as rigorous science - Edmund Husserl's phenomenology - to develop sociology as a theory of observation on a naturalistic and empirical basis - the sociology of Niklas Luhmann -, and the reconstruction of law as a praxis that takes place in history - the jurisprudentialism of António Castanheira Neves -. The three examples are considered in the following study, but the main objective is to reflect on human rights from the perspective of the third of these guidelines.

Jurisprudentialism is a look at law as a phenomenon of human life. It is a question of overcoming the recurrent paradigms of juridical knowledge, especially with regard to the positivist conception of science and methodological rationality.[2] In this regard, law is seen in community experience, and linked to the reality of conflicts that are transmuted into judicial cases. Thus, the theoretical construction of law and its concretization have as its core the jurisdictional activity, a position that presupposes a concept of law that includes it, with logical-methodological and epistemological repercussions, in the treatment of the problems respectively raised.

In the following discussion, the subject of human rights is analyzed from this perspective, which means transferring the respective presuppositions to humanitarian law, or "jus-humanism", nomenclature with which I refer to the human rights theory.[3]

The juridical ontology of jurisprudentialism regards law in a specificity that Nuno Coelho expresses as radical historicity,[4] an allusion to the singular way in which Neves refers to the constitutive intersubjectivity of legal experience. It is the jusophilosophical incorporation of the existentialist view, which asserts the precedence of man's existence over his own being, that he is nothing more than a project

[2] CASTANHEIRA NEVES, António. **Questão-de-facto - Questão-de-direito ou O Problema Metodológico da Juridicidade. Ensaio de uma reposição crítica**. Coimbra: Almedina, 1967.

[3] The name of the discipline which, in the context of the legal sciences *lato sensu* and the branches of positive law, refers to human rights is the subject of discussions. Because of the history of the construction of this new type of knowledge, I opted for the term "humanitarian law", an expression initially coined to bring together the norms that, on the international scene, sought to establish limits to the autonomy of States with regard to the treatment that should be given to wounded soldiers, prisoners and people in general, victims of the wars waged in the twentieth century. It is the initial phase of the construction of international human rights law. Cf. PIOVESAN, Flavia. Cf. PIOVESAN, Flávia. **Direitos Humanos e o Direito Constitucional Internacional**. 7ª ed. São Paulo: Saraiva, 2007. p. 112.

[4] COELHO, Nuno Manuel Morgadinho dos Santos. **O Princípio Ontológico da Historicidade Radical e o problema da Antinomia do Direito: ensario de aproximação filosófica ao Jurisprudencialismo**. Disponível: *https://web.direito.ufmg.br/revista/index.php/revista/article/viewFile/228/209*.

aimed at his own essence, which is permanently constructed by virtue of the responsible freedom that permeates the respective existential choices.[5]

It is the ontological-radical understanding of being, an expression used by Dussel in his critique of modernity, when he alludes to the rejection of the predominance of the subjectivity of Descarte's *cogito*.[6] In this context of existentialist thinking, the radical ontology of law indicates its historicity, not as a fact that happens at a given time point, but as an instance of self-determination of the human open to the being and charged with giving oneself its own being.[7]

As far as human rights are concerned, it is possible to understand it in its historical trajectory, but also in its ontological essence, and for that matter, I use the distinction that Husserl establishes between two factors that lead thought towards the discovery of truth: *noema* and *noesis* . The first is the set of data - *noemata* - that flow from the object to the consciousness. Husserl admits that they reveal the significance arising from their essence and circumstance. The second is the subjective aspect of the attribution of meanings, comprising all the attitudes that interfere in the intellectual apprehension of that correlate: thought, perception, imagination, mystical and religious experiences, intuition, etc. If intentionality consists in attributing meaning to things, noesis is the subjective way in which consciousness is revealed.

The mutual implication between the two dynamics, dialectical-material in the noematic plane and logical-formal, biconditional, in the noetic dimension, correlation in which the phenomenological method is evidenced: basically, an eidetic reduction of verifiable empirical elements, until the remaining invariable in the object, its essence, its material *a priori*.[8]

Assuming that the juridical-social phenomenon bears a real structure, it identifies the inner horizon of society as something that presents itself as a cognoscing object. But beyond the inner horizon, knowledge reaches its outer horizon, the comprehensiveness of the understanding in function of the circumstances *hic et nunc*. To the extent that these are determined by the subject, in the *noema/noesis* encounter, the meaning of the object is not autonomous, as something that leaves it and that the subject perceives, but heteronomous, because attributed or influenced by the subject. When it comes to the social or

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[5] SARTRE, Jean-Paul. O existencialismo é um humanismo. Trad. Vergílio Ferreira. São Paulo: Abril Cultural, 1978, col. "Os Pensadores".

[6] DUSSEL, Enrique. **Hacia uma Filosofía Política Crítica**. Bilbao: Desclée de Brouwer, 2001, p. 403.

[7] CASTANHEIRA NEVES, A. **Coordenadas de uma reflexão sobre o problema universal do direito – ou as condições da emergência do direito como direito**. *In* **Estudos em homenagem à Professora Doutora Isabel de Magalhães Colaço**. Coimbra: Almedina, 2002, p. 839.

[8] HUSSERL, Edmund. **Investigaciones Lógicas**. Trad. Manuel G. Morente e José Gaos. Madrid: Revista de Occidente, 1976, p. 485.

its communicative expressions, such as the rules of morality and juridicity, even the essential meaning is heteronomous, since there is no essence of the social previously given, as there is no essence of the legal before the subject. It is he who constructs them, what is verified in the real plane by the participation of the subject in the object, and in the conceptual one, by means of theoretical elaboration made in conformity of a paradigm of knowledge equally adopted.

The evidence of the modification of the object by virtue of the cognitive action, and in the measure of the exercise of this subject's involvement, is the referential of the criticism that epistemologists of the importance of Gaston Bachelard[9] and Karl Popper[10] direct to the positivist model of science and the postulate of the verification of the neo-positivists,

Neves identifies the construction of the ontological essence of the juridical in the historical development of the sense, an element more in the dialectical structure of the law; but temporality is not defined by the opposition to the timeless metaphysician, but by function of a characteristic that flows from its own being, a historicity affirmed on both the metaphysical and anthropological-existential planes.

The jurisprudentialist understanding of historicity wears out the distinction between system and problem, the noematic dimensions of law that support its noetic dimension, its meaning. The system incorporates normative intentionality and the problem incorporates the problematic intentionality, linguistically proposed as an inquiry, the question about the possible answers that are hauled in the system, which, in a rather prosaic way, can simply mean the legal-normative order in the traditional understanding, but which is much more than this.[11]

This "much more" is described by Ferraz Jr. as a reflexivity of the question-answer relation, the primary model of the discussion, which is not limited to the questioning of objectives and foundations of all rational discourse, which must be justified, but involving problematization of their own justifications. It is then to capture the discussion as a form of argumentation, which means treating it as a means of persuasion and convincing.[12] In jurisprudentialism, the

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[9] BACHELARD, Gaston. **La Formation de l'Esprit Scientifique**. Paris: 1967. Tb. QUILLET, Pierre (org.). **Introdução ao Pensamento de Bachelard**. Rio de Janeiro, 1977.

[10] POPPER, Karl. **A Lógica da Pesquisa Científica**. Trad. Leônidas Hegenberg e Octanny Silveira da Mota. São Paulo: Cultrix e USP, 1975, pp. 300 e ss. Tb. **Conhecimento Objetivo**. trad. Milton Amado. Belo Horizonte: Itatiaia e USP, 1975, pp.328 e ss, esp.p. 322.

[11] CASTANHEIRA NEVES, António. **Questão-de-facto - Questão-de-direito.** Ob cit. Tb. **Metodologia Jurídica. Problemas fundamentais**. Coimbra: Editora Coimbra, 1993, p. 155.

[12] FERRAZ Jr. Tércio Sampaio. **Direito, Retórica e Comunicação**, 2ª ed. São Paulo: Saraiva: 1997, p. 5 e s.

question synthesizes the problem and the answer comes from the system.

The understanding of the system also stems from authors who attribute to law an ontological reality far from the pure *a la Kelsen* idealism, and which consider the juridical phenomenon as a form of social experience

One of these masters, Ronald Dworkin, outlines what he calls the skeleton of law in three basic propositions: a) the existence of a set of norms to determine which behaviors should be punished by the public power; b) the existence of a legitimized authority to solve the issues that actually occur, subsumed to such norms; and c) the existence of subjective situations that identify a legal obligation.[13] However, it asserts that law is not exhausted in the system of valid norms and its concreteness through the experience of jurists, because it understands other standards that do not function as norms, but operate as principles, goals and other metajuridic standards. Here is the synthesis of his theory of law as normative integrity.

Similar to a language and way of thinking peculiar to Anglo-American lawyers - the common law system - it has its corresponding notions in the language of the continental European tradition. Thus, the existence of a legal order is conceived when there are valid and effective social norms, inserted in the normative set derived from the fundamental rule of the system, the constitution. Validity refers to how the rules are developed, and the effectiveness, to their applicability potential, which is measured in proportion to their compliance by the addressees and the imposition by government authorities and judges.

The concept of integrity, Dworkin sees it from an axiological point of view, a social virtue that imposes on the collective as a whole the observance of the founding principles of collective morality. And he points out that a democratic society requires the justification of state coercivity with principles, a moral responsibility that weighs on the collectivity.[14]

Dworkin is constructivist, in the tradition of the sociological school, and his goal is the edification of democratic society, and he points to historical experience as the means by which the gradual progress occurs in the elaboration of a normative system capable of satisfying the majority. This is constituted by directives of conduct in two levels: the principle and the regulative; in this constructive task, it

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[13] DWORKIN, Ronald. **Is Law a System of Rules?** *In* DWORKIN, R.M. (editor) *et al*. **The Philosophy of Law**. Oxford: Oxford University Press, 1979, p. 38 e ss. Tb. CHUEIRI, Vera Karam de. **A Filosofia Jurídica e Modernidade - Ronald Dworkin e a possibilidade de um discurso instituinte de direitos**. Curitiba: JM editores, 1995.

[14] CALSAMIGLIA BLANCAFORT, Albert. **El concepto de integridad en Dworkin**. *In* Doxa. Nº 12 (1992). Pág. 208. Disponível em: http://rua.ua.es/dspace/handle/10045/10728.

is imperative that all government bodies, especially the constitutional courts and lower courts, take the rights of citizens seriously.[15]

It is an attractive posture, because what is aimed at is the removal of the inconveniences of strict judicial casuism and the possibility of breaking the judicial harmony when they accept different criteria for similar cases.

But such attractiveness did not seduce the cultists of jurisprudentialism, although Dworkin's emphasis on the responsibility of the judiciary as an instrument of juridical-political-social integration brought him closer to Neves; but this one in fact diverges, since the bias it adopts is that of the autonomy of law, either as normativity in the set of rules that translate social morality, or as praxis, in the complex of professional activity directed to the solution of concrete cases. Hence the difference in relation to Dworkin, for the idea of integrity subordinates judicial praxis to the ethical-axiological dictates of the political community. Neves understands that the normative system is not static, something accepted as given to provide the rights to be taken seriously; in addition, the phenomenology of law and rights reveals an ontological-existential autonomy that conditions legal knowledge in the logical-methodological and epistemological planes; therefore, to make the legal validity of decisions depend on their integration into the whole of normative-social practice, implies reducing the normative-juridically decisive moment of these only to the hermeneutic problem directed to the system, with the consequent exclusion of the moment of the valid judicial- decision-making body.

2. The noematic intentionality of human rights

Applied to human rights, the jurisprudentialist view leads to consider them in their temporal dynamism, which is a dialectic of implication and polarity between the very history of civilization, with its tragedies and conquests,[16] which today converge towards the affirmation of values that concern to the whole of humanity. This means that just as the subjects of fundamental rights were initially understood in relation to individuality and, subsequently, to collectivities as holders of social rights and citizenship, today they form a new generation,[17] rights whose ownership is independent of geopolitical or ideological boundaries. Human rights are on the side of environmental and bioethics as a new generation of fundamental rights.

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[15] DWORKIN, Ronald. **Taking Rights Seriously**. Cambridge: Harvard University Press, 1977.

[16] REALE, Miguel. **Fundamentos do Direito**. 2ª ed. São Paulo: Universidade de São Paulo, 1972. Tb. **Filosofia do Direito**. 9ª ed. São Paulo: Saraiva, 1982.

[17] BOBBIO, Norberto. **A Era dos Direitos**. Trad. Carlos Nelson Coutinho. Rio de Janeiro: Elsevier, 2004.

In the dialectic of intentionality as taken from Husserl, the noematic elements of juridicity constitute a normative intentionality; in the Portuguese master the system, the regulative structure incorporated to civilization, is constituted, at least as a rationality that condemns all sorts of crimes that face it. In this case, they present themselves as a problem when they impact legal regulation and are submitted to the judiciary. This is the radical historicity of law: its problematicity as a historical experience,

Historicity is not confused with historicism. This is a conception that admits the existence of laws of history with the possibility of guessing the future. In Saint Augustine, the meaning of history is the struggle between good and evil,[18] in Hegel the dialectical evolution of the universal idea[19] and in Karl Marx, the clash between the ruling class and the dominated social segments.[20] Historicism is also the designation attributed to the doctrine of the Historical School formed by Savigny and his followers, who opposed the codification of German private law under the understanding that law is the work of the people's spirit - *Volksgeist* - through custom and tradition, rather than the legislator. To this it would only be necessary to give normative form to the rules already previously created in the underground of the social life.[21] In "The Misery of Historicism", written in allusion to Marx's essay "The Misery of Philosophy", Karl Popper refutes any and all forms of historicism "simply by the evidence that the course of history is influenced by the evolution of knowledge," and it is impossible to predict, with the use of rational methods, the future expansion of our knowledge.[22]

Unlike historicism, the concept of historicity concerns the quality of law that denies its pre-existence as metaphysical normativity. In jurisprudentialist bias, it is the characteristic of what leads the legal phenomenon to be confused with the very human essence, that is, law does not occur in history, it is history. Hence the conceptual radicalism, when it is noticed that the existence of human rights is not due to an *a priori* normativity that is incorporated in the institutions, because they

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[18] SAINT AUGUSTINE: **A Cidade de Deus**, 2ª ed**.** Trad**.** J. Dias Pereira. L.isboa: Fundação Calouste Gulbenkian, 1996

[19]HEGEL, Georg W. F. **A Fenomenologia do Espírito**. Trad. Henrique Cláudio de Lima. Vaz. 1ª ed. São Paulo: Abril Cultural, col. "Os Pensadores". vol. XXX, 1974. **Enzyclopädie der Philosophischen Wissenschaften**. Hamburg: Verlag von Felix-Meuine, 1959.

[20] MARX, Karl. **O Capital**. Postfácio da 2ª ed. Trad. Regis Barbosa e Flávio R. Kothe. São Paulo: Nova Cultura, 1965.

[21] SAVIGNY, Friedrich von. **Da vocação do nosso tempo para a legislação e a Ciência do Direito**. 1814. Tb. **Los Fundamentos de la Ciencia Jurídica**. *In* **La Ciencia del Derecho**, Buenos Aires: Losada, p. 29.

[22] POPPER, Karl. **A Miséria do Historicismo**. Trad. Octany S. da Mota e Leônidas Hegenberg. São Paulo. Cultrix e Universidade de São Paulo, 1980.

identify with their own history, just as the human being is on his own evolution. Thus, if the ontological essence of law is confused with the human *eidos*, which is the product of a simultaneously ontological and anthropological creativity, human rights are also constructed to the same extent.

This is the basis of one of the presuppositions of the understanding of human rights: the universal character, not in the sense of its incorporation in the ordinations of all nations, but as a noematic projection that is independent of this fact and which finds noetic juridicity deriving from the sense with which the different legal doctrines face it.

The jus-humanitarian *noemata* are the principles that differentiate human rights from other subjective prerogatives, and provide the necessary theoretical support for their disciplinary autonomy. They are presuppositions that proclaim the dignity of the human person, its otherness, aprioristic universality, constitutional fundamentality, irreversibility, imprescritibility of crimes of lesa-humanity and universal jurisdiction for the prosecution and trial of such delicts. All of them converge to the hermeneutical principle *in dubio pro humanitate*. It is a principle that is not exhausted in a dogmatic approach, even if *de lege ferenda*; but which derives from an ontological foundation that considers the human being the source of all positive ethical values.

The evolution of human rights had two moments worth highlighting; the understanding of the subject as a person clothed with special dignity and the (re) construction of them as aprioristically universal.

The philosophical concept of the human being as a person, deserving of differential treatment that preserves the humanistic and humanitarian condition, received special emphasis when American society was led to face the economic crisis of the thirties, which, in addition to revealing a false appearance of prosperity, led to World War II. In this context of reflection on the world crisis, existentialism developed and, in parallel, personalism. Both were preoccupied with the recovery of the eudemonistic sense of human existence, but existentialism, at least in its expressions of greater popularity as Sartre and Kierkegaard, led to a certain pessimism about the possibilities of man being happy. On the other hand, personalism, imbued with spirituality, exalted the person as a value in itself, whose dignity should be rescued through ethics in social relations.

Emannuel Mounier, the most significant representative of personalism, proclaimed the need for moral reform much more necessary than the reform of economic and political structures. His conception of the human person introduced a new dimension to the

classic anthropological dualism that brought together the individual and the social being. For Mounier, man is a three-dimensional being, involving bodily or incarnational reality, the universal or of communion with others, and spiritual or supernatural. He thus distinguished the individual from the person, considering that an inferior stage to be purified, so that it would transpire the person.[23]

In jus-humanism, these ideas have their noematic manifestation in the principle of the dignity of the human person, which synthesizes all other presuppositions and, for this very reason, the very ethical and axiological foundation of law, and consequently of the juridical conception of human rights . From this condition arises its articulation with the values pertaining to the person, individually and collectively. In the first place, the values of freedom and isonomy, to which are added historical achievements defined as the right to life, intimacy, private life, honor, etc. This does not mean that they are secondary values, but that, at all levels of social normativity, their actual realization submits itself to the view of the dignity of the human being in his existential concretion.

In the area of legal normativity, it acts as a limiting factor for political action; hence, the first duty of the State is respect for the dignity of the human person and guarantee of the conditions for the same respect to be imposed intersubjectively. From this arises the need for order in society, which is expressed as a legal order and the rule of law.

The state institution itself has respect for the dignity of the person the first and most important of its objectives. Thus, current political science presupposes a doctrine of human rights that goes beyond the moral or religious stage of state theory, and is even correlative of the notion of the rule of law. But overcoming the moral and religious level does not prevent their traditions from being maintained in modern constitutions, including legitimizing the invocation of God in the respective preambles.

In order to establish a time frame for the institutionalization of human rights as a system, the English Magna Carta of 1215 can be considered as the beginning of the consolidation of an order for the protection of human rights. Although addressed to the nobility in its relations with the king, its importance comes from the declaration and guarantee of some basic rights, expression of the individual freedom, secured much later by the Habeas Corpus Act of 1679, with the aim of safeguarding the inviolability of all individuals against arbitrary interference in their lives and privacy.

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[23] MOUNIER, Emmanuel. **O Personalismo**. Trad. Vinícios Eduardo Alves, São Paulo: Centauro, 2004, p. 45.

Such antecedents subsidized the semantic reach of human rights, a work of the Enlightenment, which was consolidated in the Declaration of Rights of the People of Virginia, June 16, 1776, followed by the Declaration of Independence of the United States, two weeks later. In these documents there is the solemn recognition that all men are equally entitled, by their very nature, to the constant perfecting of themselves and the pursuit of happiness.

The United States Constitution of 1787 repeated the statement. It should be noted that the expression "by its very nature" entails the understanding that human rights are inherent in human nature, that is, that they do not depend on the political order, which only recognizes and declares them.

On August 26, 1789, the Declaration of the Rights of Man and of the Citizen was proclaimed in Paris, proclaiming in its article 1: "men are born and remain equal in rights", which was reaffirmed by the French Constitution, enacted in 12 of November of 1848.

On August 22, 1864, the Geneva Convention introduced the subject of human rights in the international sphere, which was consolidated more than fifty years later, with the definitive abolition of slavery. In the same city, on July 27, 1929, the Convention Concerning the Treatment of Prisoners of War reformulated and developed the set of these specific protection standards.

The Mexican Constitution, promulgated on February 5, 1917, was the first to assign to labor rights the quality of fundamentals, along with individual freedoms and political rights. The German Constitution, promulgated on February 6, 1919, was drafted and voted on in Weimar, just after the end of the First World War.

Finally, on December 10, 1948, the United Nations adopted the Universal Declaration of Human Rights, the basic document that crowned the historical process of building a universal ethic. In proclaiming the dignity of all members of the human family and declaring that everyone has equal and inalienable rights, a condition for freedom, justice and world peace, was the eloquent expression of a sentiment that incorporates all humans into an ethical unity, humanity.

In addition to this basic document, others have reinforced it: the International Covenant on Civil and Political Rights of December 16, 1966, and the American Convention on Human Rights adopted at the San José Conference of Costa Rica on 22 November 1969 .

It is also worth noting the Convention Concerning the Protection of World Cultural and Natural Heritage, signed in Paris on November 21, 1972. Although it had a specific purpose, it was the first international normative document that recognized and proclaimed the existence of a "right of humanity ".

More recently, the UN Convention on the Rights of Persons with Disabilities has been signed by the UN on 25 August 2009.[24] The importance of this document goes beyond its specific objective, the protection of all disabled people, and reinforces the principle of equality by establishing the duty to accept differences. The preamble to the Convention reaffirms the principles of equality, freedom and dignity and further states "the universality, indivisibility, interdependence and interrelation of all human rights and fundamental freedoms, as well as the need to ensure that all exercise them without discrimination. "

Although constitutionalist movements have laid the basis for the reception of human rights in modern legal systems, their understanding as concretely universal is a doctrinal work of the postwar period. The awareness of this universalization led to the elaboration of an international human rights law and this whole movement occurred under the doctrinal and dogmatic reception of the dignity of the human person as the supreme value.

The recognition of human rights at the international level has led to the inclusion of new subjects. Alongside States and official international organizations, citizens from all over the world, peoples and communities have been set up as subjects of international law, with postulatory capacity in international forums, either by themselves or through non-governmental organizations.

In addition, the documents signed by the nations functioned as a sign of new understanding, that of a universality not properly doctrinal, but lawful-positive. He ceased to consider it an axiological orientation to make it a rule that would gradually be adopted by all peoples of the earth, a historical universality and *a posteriori*. It was this new mentality that led to the 1993 World Conference on Human Rights in Vienna to give normative form to a trait hitherto discussed only doctrinally: "All human rights are universal, indivisible, interdependent and interrelated."

The new guidelines established for international law and the effectiveness of supranational norms stem from the consensus, now common among nations, and also from the normative provision of international conventions, in the sense that their internal observance becomes mandatory from the moment of signature of the respective document by the country. The most expressive example comes from the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on November 4, 1950. The

[24] LIBERATI, Wilson Donizeti. **Comentários ao Estatuto da Criança e do Adolescente.** 4ª ed. São Paulo: Malheiros, 1999, p.15 e s.

Council of Europe incorporated these provisions into the European Social Charter in l961,

But the understanding of human rights as universal has its main juridical support in the preamble to the 1948 Universal Declaration of Human Rights, which considers "the recognition of the inherent dignity of all members of the human family and of their equal and inalienable rights as the foundation freedom, justice and peace in the world." What is stated in Article I: "All men are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

3. The noetic intentionality of humanitarian law

The jus-humanitarian noesis involves the sense in which human rights are affirmed. This can be conceived as constructivism, which involves both the system as the source of possible solutions to the problem, and the same problem that is requiring solutions from the system.

In the legal sciences, constructivism, also referred to as constructionism,[25] is at the base of conceptions that indicate the creative vocation of juridical knowledge, be it in the formulation of normativity through hermeneutics, involving logic, rhetoric and legal argumentation,[26] or as use of the law, through its conceptual and linguistic expressions, as an instrument for the improvement of society.

The assertion that legal experience implies a creative action, and that is not exhausted in the retrospective description of social phenomena, had three expressive moments in its elaboration. The first is aimed at the law itself, when it was taken into account that normative production occurs in all strata of legal activity, including the jurisdictional one, not being a monopoly of the legislator. That is, law is also created by the judge and by the jurist in his hermeneutic work. The second moment involved raising awareness of the role of the jurist in evolution, not that of a zealous defender of order, nor an interpreter and enforcer of the provisions that regulate it, but that of constructor of society: a scientist, a technician, a social engineer whose work is expressed explicitly by its results in the community. And the third turns realistically into today's society, aiming at the careful reconstruction of its foundations and its guidelines to transform it into a just, equitable and solidarity community.

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[25] In psychology, constructivism and constructionism refer to diverse semantic contents.

[26] CARVALHO, Aurora Tomazini de. **Curso de Teoria Geral do Direito — o Construtivismo Lógico-semântico**, 4ª ed. São Paulo: Noeses, 2014.

The first moment shines forth in the French school of free scientific inquiry;[27] the second, in the American sociological school;[28] and the third is an improvement of American sociological constructivism, which is inferred from the ideas of Rawls[29] and Dworkin.[30]

The jurisprudentialism of Castanheira Neves is also constructivist, but diverges from previous ones regarding methodology. All are directed to the law, but while the former view it as integrated in social normativity in function of its objectives, the Portuguese master safeguards its ontological autonomy as a being that is constructed and reconstructed through the jurisdictional activity. It is in this sense that he asserts himself in his radical historicity.

The analysis of the problematic of law as a critical instance of conduct in the social environment has been dealt with within the framework of practical philosophy, reflecting the medieval theological worldview and, since the Enlightenment modernity, with a fulcrum in an axiomatic rationality directed towards action linked to ends. In this development, positivism has given it a new meaning, identified with an individualistic conception of man, with the exclusion of all heteronomous references and its own recollection as subject in and of itself, averse to the idea of association.[31] And it was from this existential solipsism that modern man intended to build the new societal order through legislation. The primacy of law and legalistic hermeneutics were the epistemological consequences of this worldview.[32]

In contemporary thought the consequences of globalization, the domain of information and the idea of the end of history linked to the apparent victory of capitalism, in their ideological conflict with socialism, are experienced;

In this context, also defined as post-positivist, the sense of law ceases to be thought of as realization of the rule of law and of the ideological presuppositions of legal dogmatics, to impregnate itself with a new conception, a neo-humanism centered on three vectors: human rights, the protection of nature and democracy.

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[27] GÉNY, François..**Método de Interpretación y Fuentes en Derecho Privado Positivo**. Madrid: Reus, 1925. Tb. **Science et Téchnique en Droit Privé Positif**. Paris: Sirey, 1924/1930.

[28] POUND, Roscoe. **Interpretations of Legal History,**1923, *apud* FRIEDMAN, W. **Théorie Générale du Droit**. Paris: L.G.D.J., 1965, p. 294. Tb. **Introdução à Filosofia do Direito**. Trad. Álvaro Cabral. Rio de Janeiro: Zahar, 1965.

[29] RAWLS, John. **Uma Teoria da Justiça**. Brasília: Universidade de Brasília, 1981.

[30] DWORKIN, Ronald. **Taking Rights Seriously**. ob. cit.

[31] BRONZE, Fernando José. Ob. cit. p. 318 e ss.

[32] *Idem, ibidem*.

At the heart of the affirmation of human rights as the nucleus of the contemporary sense of the law, one sees the rebirth of the doctrine of natural law, but distanced from the metaphysical and rationalist notion with which it has consolidated as a doctrine, towards an existential anthropological sense that is confused with the notion of radical historicity. It is a concept that, besides the phenomenological inheritance, recovers the anthropological vision of Teillard de Chardin, and the legal existentialism of Fechner, Mayhofer and Baptista Machado, another of the great masters of the Faculty of Law of the University of Coimbra.

The idea of the existence of natural rights seems contradictory to jurisprudentialistic thinking. Nevertheless, the notion of radical historicity reconciles it with jusnaturalism, insofar as it asserts the non-existence of a previously given universal human essence, but only as a result of the action of the human being in history, hence he constructs his own *eidos*.

By the thesis of anthropological jusnaturalism, it is affirmed that the universe in which we live is the product of a cosmogenesis, something that is being created, and the meaning of its evolution is not metaphysical inquiry, but competence of science: to discover the meaning of evolution, here the key to the solution of the problem of man, of history and of the universe. It is a worldview that surpasses the natural sciences and invades chemistry, physics, sociology and mathematics, the humanities and religions.

Man is the end for which evolution has progressed, but which, from it, ceased to be blind and determined in a heteronomous way, to become a conscious and voluntary movement. Now he is not a spectator but a ruler of the cosmogenic process, from the passage from animal to cultural existence, when he acquires capacity to do, which goes beyond his capacity to be.[33] Man is directly responsible for his own evolution; he is co-creator of the world, of himself and of society, and he is also responsible for it; which involves the solution of basic social problems through law. This non-aprioristic essence is capable of founding its justice arising from its concrete existence, which is not reduced to a product of the environment but an achievement, a creation presided over by the conscience.

A new conception of the ontology of the social being, the existential vision of the human open to the being, is envisaged as self-enriching in its immanent creativity as an integral individual of a collectivity, in an eudemonistic sense that integrates its own essence.

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[33] CHARDIN, P. Teillard de. **O Fenômeno Humano**. Rio de Janeiro: Martins, 1965. Tb. MACHADO, J. Baptista. **Antropologia, Existencialismo e Direito**. Coimbra: Universidade de Coimbra, 1965.

From this anthropological point of view man appears as the product of evolution and, at the same time, the cause of this evolution. This is not conceived with a sense of hierarchy in relation to previous stages, but as acquisition and enrichment, not as gifts of nature, nor as metaphysical discoveries, but relative to things which he himself creates for his own good and that of which the surrounding

The evolutionary process of the human being stems from its open and creative adaptability, its historical existence being a continuation of acquisitions: man is the product of his action in the world, where it is inferred that history is creation and that man creates his own nature.

The doctrinal construction of this ontology culminated with the notion of the integral human being, the meeting of the dimensions of the individual human, social, spiritual and communicational, ontological foundation of the principle of the dignity of the human person.

From the articulation between the integral vision of the human person and its inherent dignity can be extracted three corollaries.

The first concerns minority rights, which, because of cultural factors, have been scorned and relegated to a condition excluded from society. In the juridical field, this implies the respect to groups that are organized according to a proper culture, like the African and Asian immigrants in Europe and Latin American in the USA; or when their own physical or psychological condition leads them to group together as self-defense against the dictatorship of the majority, like the groups defined as LGBT (lesbian, gay, bisexual and transsexual).

In the name of the principle of the dignity of the human person, these rights of minorities should be protected in a sense analogous to the protection given to the incapable. In the same way, it reverberates in the antinomy principle that opposes the scientific freedom applied to bioengineering to the rights of the human embryo. Were these mere objects, appendages of the female body liable to be discarded, or persons comprehended in their completeness from conception? The integral conception of the human person abhors all forms of exclusion, including eugenics, voluntary abortion, and the genetic selection of human embryos.

Another implication for both the legal and the philosophical fields lies in the conditions that must be given to human labor in its broadest sense. Human acts are not things that can be the object of mercantile exchange.

This was the mistake made during the Industrial Revolution, when labor relations were considered under the same assumptions of private relations, the individual contract of work as of a synallagmatic character, where there would be the simple exchange between the

worker's effort and the wage as retribution. Such an understanding still persists, and under false principles listed by the general theory of labor law, what is verified is the rampant exploitation of the labor force in many countries, especially those considered emerging in terms of capitalist economy.

The principle of humanitarian law has as its ideal the full realization of man through work, his principal instrument of alienation. But in today's world the worker remains alienated, his consciousness is still filled with alienating ideological contents, he replaces what is his own with the other, he ceases to be a person in himself to become an object-being, a being in function of the others. But the other is not his equal, he is his superior, boss,his *big boss*. At the same time that he is a part of the extraordinary machine of production to generate sufficient goods for all, he remains excluded from the benefits of this production, for the economic destination of goods is the accumulation of capital and never the improvement of the social conditions of the workers. These remain alienated.

It is an incessant process of transformation of the human being into things, which continues in a state of permanent alienation, losing its interiority and self-determination. As a result of this transformation, society itself becomes a material thing, since the logic of the market demands that everything be measured from its value of use and exchange. When the person becomes a material thing, in the face of the need to offer oneself as a product of commercial value in search of the best offer, it loses its dignity.

4. Radical historicity and *a priori* universality of human rights

In the previous items, two mutually complementary theses on human rights have been demonstrated: their affirmation as the product of practical reason through temporal evolution and, at the same time, as the ontological implication of human nature in becoming and progressivity. Both are unified in the notion of aprioristic universality, which receives a new reading from jurisprudentialism: the radical historicity of human rights.

However, although it has been philosophically understood as an existential natural right, a concrete universality has only been recorded since the Universal Declaration of 1948. As Bobbio notes, for the first time in history a system of values has become a condition of universality in fact, since the consensus on its validity and suitability to govern the destinies of all men was expressly stated.[34]

[34] BOBBIO, Norberto. **Presente y futuro de los derechos del hombre** (1968), *in* **El Tiempo de los Derechos** .Madrid: Editorial Sistema, 1991, p.66.

Until then, awareness of the need for human rights protection hardly went beyond geopolitical borders. Such a requirement was admitted, if incorporated into the systems of positive law, but all linked to the exercise of national citizenships, understood as advances in their constitutions. In short, universal human rights were not considered, universality being understood as a concept linked to the idea of supranationality.

Paradoxically, what precipitated the conviction that the protection of human rights would be above the interests of the States, were the atrocities practiced by the dictatorial regimes of the twentieth century, especially Nazism, Facism and other ideologies that subjected the individual to the interests of the State , the idea that the end justifies the means, the holocaust of the Jewish people, persecution of racial minorities, ethnic cleansing, dictatorships, etc. They are horrors that are part of the problem to be subsumed to the system.

When bloodthirsty despots, after moving state terrorism against their own people, were welcomed by other countries as refugees or immigrants to take advantage of the stolen wealth of their miserable people, money deposited in Switzerland, the United States, and tax havens, spread in the international consciousness the conviction that there should be a " enough" .

This idea has been accepted by international law, with some important consequences.

Firstly, the notion that had already been stated doctrinally and put into practice in the Nuremberg trial of "crimes against humanity" was institutionalized. A second implication was to consider and declare the imprescriptibility of these crimes. A third is the establishment of supranational jurisdictions with internationally recognized competence to prosecute and to punish such crimes. And finally, the attribution to all States of the right to bring to trial those criminals accused of crimes against humanity, although despite provisions to the contrary in countries where they had obtained reception or citizenship, except for the jurisdiction of the international courts.

In addition, the principle of universality based a new interpretation on a dictates related to the need to block retrocessions in the dogmatics of constitutional principles. It was embodied in the principle of the constitutional fundamentality of human rights.

One of the most important problems that the principle of universality entails is the confrontation between a rational understanding of the principle as aprioristically universal and, therefore, with a tendency to impose it on all peoples as a dictates of rationality itself, and the resulting relativism of its understanding as a legal concept involved by the ethics elaborated in different cultural contexts.

This issue has become an obstacle to the ideal of the universalization of human rights, when incorporated into the discussion on the need to preserve the authentic cultural production of peoples. In this debate, the tradition and customs of primitive societies, such as the natives of Brazil, the descendants of pre-Columbian civilizations, such as the Mayans, the Aztecs and the Incas, the remnants of the North American red-skinned autochthons, natives of the South Pacific islands, and the culture of the peoples of India, Islam and China.

In the context of international relations, the problem has crystallized in the opposition between universalism and multiculturalism as regards the scope of applicability of the norms that should govern national and international human rights policies.

It is argued that the universalist notion underlies a Western bias which disregards the traditions of other peoples, particularly with regard to Islamic, African, Hindu and Chinese culture. Moreover, it is argued that the universalist notion declared in the 1948 UN Declaration conceals a hegemonic and abstract conception characteristic of European thought, and that its normative imposition represents the swan song of colonialism of earlier eras. In other words, the colonialist view that in the past was based on military force, replaced by economic and later cultural power, now seeks to maintain itself in terms of a universal hegemonic ethic that despises the specificities of each culture. Hence the need for the theory and practice of human rights to absorb the reality of multiculturalism as a guarantee of otherness, conceived as recognition and acceptance of the "other."

Nevertheless, multiculturalism is not only descriptive of cultural diversities, it is also an ideology that induces the group to affirm and defend its own identity, and even to project it as superior to the others. This ideological bias is present in the very definition contained in the 2001 Universal Declaration on Cultural Diversity (DUDC) and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions held by UNESCO in 2005. Both reaffirm culture as the totality of the spiritual and material elements of a society or social group, encompassing, in addition to literary and artistic production, ways of life, values, traditions and beliefs. And that cultural diversity is one of the main drivers of the sustainable development of communities, peoples and nations, as it increases the range of possibilities and nourishes human capacities and values.

However, human rights are mentioned as an ethical and political limitation. Parallel to the reaffirmation of respect for diversity, international documents declare a commitment to respect human rights and fundamental freedoms, in particular those of minorities and indigenous peoples.

The counterpart of this approach is the tendency towards globalization, in the sense of avoiding the homogenization of culture, which is denounced as prejudicial to civilization itself, since the cultural production of each people must be preserved in its originality.

The multiculturalist ideology brings in its wake the affirmation of another diversity, not related to material criteria, but spiritual, axiological and moral. Against the theory of metaethical oneness founded on reason and common sentiments, moral relativism is affirmed, which has repercussions on the understanding of human rights. The validity of moral systems is defended only for a given culture, whose members, intersubjectively sharing the same axiological, political, and ethical beliefs and convictions, form a moral community. Corollary of this relativism is the refusal of any axiological hierarchy that goes beyond the ethical boundaries of the group, and also the resistance to accept heteronomous metaethical criteria. With a focus on this understanding, multiculturalism legitimizes ethical-religious fundamentalism, the idea rooted in the collective unconscious of the group that its criteria are superior to the others and, therefore, deserve to be presented as a universal standard, if not imposed by force, by messianism or by advertising.

One has two opposing doctrines. On the one hand cultural universalism, which corresponds to the project of modernity, firmly grounded in Enlightenment rationalism, with metaphysical universalism as its corollary. On the other side, multiculturalism, bringing ethical relativism into context.

Both positions deserve respect, but when they are projected onto the ethical plane, the impasse looms. Is a universal ethic, in the Kantian fashion, expressed in a rational imperative that functions as a category of practical reason? Either they respect the ethical convictions of each particular society, provided they do not intend to export them.

The discussion has ignored the reality of globalization. It is not about valuing it positively or negatively, but accepting it as the event of contemporary history that has come to stay. And so we cannot speak today of multiculturalism or minority rights, when traditionally differentiated cultures tend to be standardized by the influence of globalization factors, the confluence of progress in various sectors, technology, information and the world economy; coordinated by large international organizations and made possible through agreements and treaties that practically subjugate all the nations of the globe, in addition to the signatories, to adopt unified positions under a single thought in matters of political economy.

The common feature between these organizations is precisely the repercussion of their union policy in sectors other than the economy,

but a common cultural policy and the closest approach among their peoples, in order to jointly face the crises that dominant capitalism has suffered. And the fact is that, lately, at each crisis of the world economy, the measures suggested have represented retrocession in social rights considered to be consolidated in the welfare state.

Now the crisis of capitalism, exacerbated after 9/11 by the Bush administration's disastrous policy, which had seen no solution other than military intervention, made the search for a solution to the real problems of hunger and misery even more distant in the world.

If one no longer speaks of the "third world", given the economic and civilizing rise of the former countries located on the periphery of capitalism, in the case of the BRICS (Brazil, India, China and South Africa) and others, where the most absurd helplessness of entire populations reigns. These, in addition to suffering from the evils of climate change caused by the destruction of forests and disorderly exploitation of subsoil wealth, are victims of monarchical and oligarchic tyranny, civil wars and the most blatant corruption, often sheltered and protected by governments of rich countries and institutions bank that keeps stolen money in secret accounts; money that pays for ostentation, debauchery, and bad taste.

Take a look at what is happening in Rwanda, Zaire, Uganda, Sierra Leone, some Islamic countries, Africa and Asia, a humanitarian tragedy that is not absent in Brazil and the most impoverished regions of Latin America, such as Haiti.

As an ideology, multiculturalism supports the policy of not coping with these situations. It is alleged that the universalization of human rights according to the Western view, hosted by the UN, tends to ignore differences. But it is not the deliberate action of the West or of the more developed nations, or even of the international organization through its official bodies. Globalization is an inexorable process of humanity's progress in the material, cultural, and transcendental sense. It is no longer a matter of expanding exchanges between peoples, of cultural exchanges between people from different regions of the globe, but of intersubjectivity arising from information and communication. Citizens from the most distant and differentiated countries see the world today through television, the global computer network, social information and entertainment networks and shopping center windows. Individual and collective behaviors, as well as people's own way of feeling, are strongly influenced because what is disclosed is not only products, but also notions about the market, democracy, ethics, division of labor, the role of minorities, education, marriage, the family, sexuality, work, leisure and much more.

The most obvious and probably most harmful fruit of globalization is, as has never been foreseen, the unidimensionalization of the human being, translated into conformity with heteronomous patterns that try to mold their external behavior, their culture and their feelings, as well as their inner soul. The one-dimensional man is ever closer to the mass man, to which Hanna Arendt referred, propitiating the new outbreak of totalitarianism. But what I am referring to is not national or regional totalitarianism, but a totalitarian domination of a few states over others through money, a metaethical colonialism.

These reflections lead us to realistically reject the arguments in favor of multiculturalism on the issue of human rights, since they are no more than euphemisms, with a more political rather than a moral scope, to legitimize tolerance for abusive practices by corrupt and insensitive governments. Whether for economic reasons or a simple strategy of domination, nations that have already progressed in the implementation of a human rights policy are turning a blind eye to the constant violations that are now known to all.

Multiculturalism can serve to value the cultural production of a people against the import of cultural waste produced by economically advanced countries.

But, applied to human rights, the idea of multiculturalism leads to a near relativism in the politics of implanting the same rights, and cannot serve to excuse tolerance with the transvestite religious practice of barbarism or respect for tradition. It does not serve to excuse the clitoridectomy of the girls nor to subjugate the women; much less to authorize any form of racism.

The same intolerance against abusive practices by despotic governments, such as torture, disappearance, arbitrary arrest and detention, racism, anti-Semitism, repression of trade unions and churches, misery, illiteracy, and epidemics should be extended to barbarism enshrined in respect to tradition and culture.[35] Multiculturalism is for good, never for evil.

Such occurrences, linked to the obstacles to the *de facto* universalization of human rights, motivate their philosophical understanding, which establishes the meaning by which their historical-temporal content must be interpreted.

The affirmation of human rights in temporality emphasizes its ontological nature as a cultural object, an entity accessible by reason through understanding derived from empirical experience. This dimension makes its historical universality apriorize, becoming a specific expression of the radical historicity of law, which was

[35] DONNELLY, Jack. **Universal Rights in Theory and Practice**. 2ª ed. Ithaca, NY: Cornell University Press, 1989, p. 235.

considered phenomenologically in the two dimensions in which it is projected as *noema* and *noesis*, both implied in the principles of human rights.

As a noematic, historicity has revealed itself in the dynamics of the construction of the normative system concerning human rights in the course of historical time and in the definition of its problematic that, in the jurisprudentialist sense, is presented in the judicial cases defined from this specific normativity. These are situations of conflict affecting the world community, to which the concept of crimes against humanity and the principles of irreversibility, imprescriptibility and global jurisdiction apply.

As a noetic, the sense of the practical and doctrinal elaboration of humanitarian law was glimpsed, which was consolidated in elevating the individual to the *status* of person and to the formulation of the principle of the dignity of the human person.

The combination of both aspects - temporality and ontology - is likewise an implication of phenomenological analysis, hence the identification between the presupposition of radical historicity and the principle of the *a priori* universality of human rights is demonstrated. With this convergence, it is stated that they are not circumscribed to the geopolitical frontiers of States, nor even to their adoption by national positive systems. They are valid and being in force throughout the world, and their protection is the first duty of the State and international organizations.

The "aprioristic" adjunct is inspired by Kantian ethics, which ascribed *a priori* validity to the universal rule of practical reason, prescribing the duty-being (*sollen*)of rational actions independently of temporal experience. When it comes to human rights, the legal and moral rules that determine their observance and assurance are the result of this experience, but, once established in the constitutions and incorporated into the fundamental documents of the international community, they constitute stony clauses. Nevertheless, its validity does not depend on this positivity.

Therefore, the understanding of its logical and ontological nature reflects its character at the same time of historicity and apriority, for it is a phenomenon that occurs in history, but which is not joined to temporality.

In such conditions, the universality of human rights does not set them up as an abstract object and metaphysical, but accessible by reason of an intersubjective will experienced by all the people and peoples of the world. For this reason, there is today the awareness that respect for human rights must remain in the condition of invariable axiological, irreversible conquest of the human species.

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