SOCIAL RIGHTS AS FUNDAMENTAL HUMAN RIGHTS

- AN INTRODUCTION

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If we think about the absolute supremacy of human life, a life that, to be understood as such, must be a life lived with dignity, we have to think about life from a material point of view and, therefore, in a priority status to the so-called "social" rights, since social rights (economic, social and cultural) address issues as basic to life and human dignity as food, health, shelter, work, education and water. With this understanding, it becomes very clear that the materiality of human dignity rests on the so-called "existential minimum", the hard kernel of social rights, in such a way that social rights are genuine (true) *fundamental human rights*.

Recognition of social rights cannot be, therefore, a mere listing of good intentions on the part of the state. Social rights are fundamental rights, which are for all men, can be exercised by everyone and are essential to life and human dignity. Nevertheless, that leaves much to be done so that these rights can be put on a par with civil and political rights insofar as legal status is concerned.

In this context, it is necessary to indicate the adoption of a new viewpoint on economic, social and cultural rights, or simply, "social rights", since the

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exercise of any human rights, even the traditional individual civil and politic rights are intimately bound up with the notion of dignity and related to the freedom and autonomy of the individual, is not possible without a guarantee of the economically, socially and culturally dependent existential minimum.

This implies the need to address the process of trivialization (which, in practice, strips human rights of their authority) and theoretical fragmentation of rights since the implementation of the social rights cannot be considered separately from the consolidation of democracy itself. The fulfillment of civic responsibilities, essential for democracy, requires economic and social reforms and the reshaping of mental attitudes for the effective removal of the obstacles which impede it.

To speak of human rights, then, is to speak of making social rights accessible to groups of people who do not usually have effective access to them. That is, this is a matter of opening up a new path, alternative and real in the true sense, leading to a non-exclusive citizenship that is democratic in the sense of its recognition by everyone and its all-inclusiveness and directed toward an authentically transformative praxis of society. To get this moving undoubtedly requires great energy and tenacity and the capacity to conceptualize content and techniques which allow reconsidering social rights and their guarantees.

It is well known that legal institutions can be instruments of social oppression if divorced from democracy, but also that when coupled with participatory democracy and the strength of citizenship, the law can become a collective institution of freedom. It is clearly not possible to have meaningful citizenship without democracy, nor is it possible to have a substantially democratic model of democracy without participatory citizenship. This being so, it is necessary to reconstruct certain premises in the field of law towards a body of law intended, not only as an instrument of social defense against abuses, but also as an instrument intended to safeguard citizenship itself in an inclusive context and permanent creation of a more human, more just and more democratic model of development, by implementing particular acts aimed at the full exercise of social rights, through all means possible and using available resources to the maximum extent.

What we are seeking in this study, then, is to shed light on the

understanding that social rights are fundamental human rights, by contributing to a proposal to be offered for creating and demanding, politically and legally, certain social rights envisioned from another place, in a critical and humanistic way, as well as to help in some way so as to be able to overcome the social apathy of our times through an emancipatory and transformative process of rebellion.

1. INITIAL CONSIDERATIONS: ON HUMAN RIGHTS

One of the great advances of modern social constitutionalism is that it has bestowed upon the international legal status of human rights a binding power, a fact which makes the legal content itself of human rights compulsory supra-legal law, a fundamental axis generally with constitutional standing, to be applied by state officials and effectively honored by private individuals. This being the case, beyond the complex legal debate over the relationship between international law and internal law – monism and dualism –, it is true that, with more or less emphasis, modern constitutions contain clauses conferring special force on international treaties on human rights[2] for a very simple reason: the investment by a social and democratic state must necessarily begin with the idea of a constitutional democracy as a system deeply anchored in human rights. Human rights are – or, better yet, the effective respect for human rights – those rights which thus make up, currently, the primary principle of reference for evaluating the legitimacy of a legal-political system of law[3].

[2] This tendency seems to have begun with the Portuguese Constitution, in its well-known Article 16, which establishes that "Os direitos fundamentais consagrados na Constituição não excluem quaisquer outros constantes das leis e das regras aplicáveis de direito internacional" ("Fundamental rights guaranteed by the Constitution do not exclude any other rights established in the applicable laws and rules of international law") and that "Os preceitos constitucionais e legais relativos aos direitos fundamentais devem ser interpretados e integrados de harmonia com a Declaração Universal dos Direitos do Homem" ("Constitutional and legal precepts pertaining to fundamental rights must be interpreted and integrated harmoniously with the Universal Declaration of Human Rights"). In Latin America, the Peruvian Constitution of 1979 seems to present an innovation on the special treatment given to treaties on human rights, followed by the Constitutions of Guatemala in 1985 and Nicaragua in 1987. Modern constitutions of other countries, such as Brazil, Spain and Venezuela, show, to a greater or lesser degree, this tendency of modern social constitutionalism and, in particular, Ibero-American social constitutionalism, by recognizing the status and special hierarchy given to treaties on human rights.

[3] Thus, within the scope of modern social constitutionalism, the special and privileged treatment of human rights is justified based on a deep axiological and legalistic affinity between modern international law, which, beginning with the Charter of the United Nations and the Universal Declaration of Human Rights, places human rights at the pinnacle, and internal rights, which situate constitutional and fundamental rights in an equivalent manner: it is natural that modern constitutions underscore this affinity, by conferring a special status on the international instruments of human rights.

Nevertheless, this special approach to human rights treaties is also justified because such treaties contain notable ethical and legal details. In fact, while treaties of the traditional type generally establish reciprocal obligations between states and are entered into for the benefit of the parties, treaties on human rights have the special peculiarity that states adopt them even though such states may be neither the beneficiaries nor the intended subjects of these treaties, for the simple reason that such legal status is directed towards the protection of personal dignity: human rights treaties follow the establishment of public order common to the parties and are directed at states as the chosen beneficiaries, but rather, at individual persons; they are not treaties of the traditional type, entered into by virtue of a reciprocal exchange of rights for the mutual benefit of the contracting states, and their purpose is to protect the fundamental rights of all human beings, without consideration to their national origin, in terms of the individual's own state as well as the other states who are parties to the treaty.

In addition, upon approving these treaties on human rights, the states submit to a legal order within which they assume, for the common good, obligations not in relation to other states, but rather towards the individuals under their jurisdiction, whether nationals or foreigners. This point has been brought up repeatedly by the doctrine of law decided by the courts[4] and has, at least, one transcendental legal consequence: the principle of reciprocity is not applied, under any pretext, to human rights treaties in such a way that one state may not allege another's noncompliance with the human rights treaty for the purpose of excusing its own violations of these standards. This is so for the simple reason that such treaties have the particular feature that their rules make up guarantees benefiting individuals: obligations are imposed on the states, not for their mutual benefit, but rather to protect human dignity. Therefore, states may not invoke their internal sovereignty to justify human rights violations because they have made a commitment to respect them[5].

[4]See, among other things, the Advisory Opinion of May 28, 1951 to the International Court of Justice on reservations to the Convention on the Prevention and Punishment of the Crime of Genocide and Judgment of July 7, 1989 by the European Court of Human Rights, in the case of Soering vs. United Kingdom, No. 14038/1988.

[5] Article 27 of the Convention of Vienna on the Law of Treaties establishes that no state signing any treaty can fail to perform it by invoking its internal law. According to Dulitzky *apud* Martin, Rodríguez and Guevara (2004, page 91), insofar as it concerns treaties on human rights, "The particular nature of agreements of this type justifies the special treatment which various constitutions […] dispense to rights internationally protected by treaties. It is clear that the internal and international effect produced by

The foregoing reasons for the special treatment of human rights treaties is further strengthened if we take into account, in addition, that respect for human rights in the international order established after World War II is considered an issue directly affecting and concerning the international community and that, therefore, it progressively establishes mechanisms for the protection of these rights. This special and privileged constitutional treatment to human rights treaties has, in turn, two very important regulatory consequences which also complement the justification of this constitutional approach.

On one hand, this approach allows us, in legal terms, to remove, at least in part, human rights treaties from the complex debate about the relationship between international law and internal law, to the extent that the constitution itself usually attributes a special power to international law on human rights (which become constitutional rights and fundamental rights[6]when they are institutionalized),without detriment to the level of priority which other treaties may have in the internal system of law. This means that a constitutional system of law can grant constitutional rank in to international human rights laws, without that necessarily meaning that all treaties have such priority[7].

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ratification of a general international treaty is not the same as that produced by a treaty protecting human rights. This is one of the justifications by which the constituents are concerned with giving a special treatment to international conventions on human rights."

[6] It is not an accident that the expression "human rights" is generally used in its common sense meaning of "fundamental rights" and vice versa: it is evident that the degree of uncertainty with which expressions such as "human rights" and "fundamental rights" are used, including in the Universal Declaration of the Rights of Man itself, which, while it does impose on states the obligation to promote universal and effective respect for rights and human liberties, contains the expression "fundamental" in Article 8, when referring to the rights conferred upon the individual by the Constitution or by law. In Article 16.3, the family is defined as the natural or "fundamental" nucleus; in article 21.3, the people's will is described as "the foundation" (basis) of authority; and Article 26.2 specifies that education ought to be directed at "strengthening respect for the rights of man and fundamental liberties". Moreover, the preamble also provides for "human rights and fundamental liberties". But, although the expression "human rights" is absolute, in other words, it concerns man regardless of all contexts and apart from any other specific circumstances, the expression "fundamental rights" it is, on the contrary, plausibly open and relative. In other words, what fundamental rights are, from the point of view of their content is, obviously a decision that is above all ethical: for a set of rights, it can (or should) say that they are fundamental. If we assume the absolute inviolability of human rights in any state or culture, we can also seek the inviolability of the so-called fundamental rights, but only insofar as they are considered "fundamental", see Ferrajoli (2005, page 76 and following pages), Humphrey Marshall and Bottomore (1998); and Peces-Barba Martínez (1995) for more considerations on the distinctions between "human" rights and "fundamental" rights.

[7] Thus, the Argentine Constitution, after the constitutional reforms of 1994, establishes that, as a general rule, treaties do not have constitutional rank, although they have supra-legal rank; however, those same reforms confer constitutional rank on a specific label of human rights treaties and make it possible for

On the other hand, and directly related to the foregoing, this favorable internal treatment of human rights treaties allows for ongoing and dynamic feedback between constitutional and international law in the evolution of human. Hence, constitutions are, to a certain degree, linked almost automatically to international developments in human rights through the references to international human rights law made by the constitutional texts[8].

In turn, and by taking into account that general principles of law recognized by civilized nations are one of the acknowledged sources of international law (as indicated in Article 38.1 of the Statute of the International Court of Justice[9]), it thus becomes reasonable that international law take into account advances in constitutional law in terms of human rights for the development of international law itself, since the generalized constitutional adoption of certain human rights laws can be considered an expression of the establishment of a general principle of law.

So then, at least on the subject of human rights, a real "international constitutional law" or "law of human rights"[10] has emerged from the dynamic convergence between constitutional law and international law, which mutually aid each other in the protection of human dignity. The development of human rights law is, therefore, energized by both international and constitutional law, the interpreter of which has forced to choose,

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other human rights treaties to gain access to that rank if Congress so decides by a qualified majority. Similarly, in the Brazilian case, after the constitutional reform of 2004, the possibility was established that international treaties and conventions on human rights could gain access to constitutional rank if they were so approved, in each chamber of Congress, after two rounds of voting by three-fifths of the votes of the respective members. In Colombia, the Constitutional Court has demanded that some treaties, as those on human rights, have a privileged constitutional treatment and comprise the block called the "block of constitutionality".

[8] Cf. Méndez Silva (2002, page 374 and following pages).

[9] "The Court, whose function is to rule on the disputes submitted to it pursuant to international law, shall apply: a) international conventions, whether general or specific, which rules expressly establish rules recognized by the litigating states; b) international custom as proof of generally accepted practice with the force of law; c) general principles of law recognized by civilized nations; d) court decisions and doctrines published by the most prestigious scholars in the various nations as a supplementary means of determining the rules of law without prejudice to the provisions set forth in Article 59".

[10] As Dulitzky *apud* Martin, Rodríguez and Guevara (2004, page 34) indicates, the expression "law of human rights" is drawn from Ayala Corao, while the expression "international constitutional law" has been simultaneously put forward by Flavia Piovesan.

by virtue of the principle of advantages (*pro homine*), the standard most favorable to the dignity of persons[11].

The method of special and privileged constitutional treatment of human rights treaties enables national judges to apply, directly and with priority, those international standards without having to necessarily engage in a debate as to whether the constitution favors the theory of monism, dualism or integration of the relationship between international and internal law[12]. If the constitution is the applicable standard in which such treaties are integrated, then it becomes clear that the legal thinker must apply international human rights regulations internally[13].

But what type of legal system do we mean when we speak of "human rights"?

"Human rights", an expression which belongs to the spheres of political philosophy and international law, encompass those guarantees, powers, freedoms, institutions or demands relative to primary or basic needs, which include all human beings by virtue of the simple fact of their human condition, for the guarantee of a life lived with dignity[14]; they are, then, independent of particular factors, such as personal status, sex, ethnicity or nationality. From a more relational point of view, human rights have been defined as the conditions which allow an integrated relationship to be created between the individual and society allowing individuals to be persons, identifying with themselves and with others[15].

[11] On the material level, we should not speak (or it is irrelevant to do so) about ranking the rules governing human rights, since the rule that most defines the status of a right, of a freedom or of a guarantee will always be applicable (in the specific case). Speaking in material terms, therefore, it is not the status or ranked position of the rule which counts, but rather its content (because that which is most assured by law will always prevail).

[12] This does not mean that that debate does not have any relevance in this field of human rights, since it continues to be important. However, the privileged constitutional treatment, mentioned above, by international rules of human rights greatly facilitates their application by national legal experts, who are no longer familiar with the dilemmas with which national judges may previously have faced.

[13] Cf. Graham y Vega (1996, page 42 and following pages).

[14] Cf. Papacchini (2005, page 44). Similarly, see Santiago Nino (1989, page 40).

[15] Cf. Morales Gil de la Torre (1996, page 19). For Helio Gallardo and Joaquín Herrera Flores, human rights are supported on a social framework, by inter-subjective relations and experiences. According to Gallardo (2000), the foundation of human rights are transfers of power which occur between social

Human rights are usually defined as inherent to mankind, irrevocable, inalienable and non-waivable[16]. By their own definition, the concept of human rights is universal (for all human beings) and egalitarian, as well as incompatible with systems based on the superiority of a caste, race, people, group or social class and, by extension, also incompatible with systems of classification or hierarchy of persons. Human rights, heirs of the notion of natural rights, are an idea with great moral power and have growing support: the doctrine of human rights extends beyond law and forms a minimum ethical and moral basis, which should lay the foundation to govern the modern geopolitical order[17].

Human rights have gone from being considered a universal abstract, inherent to "ius-naturalism", towards the particular features of particular circumstances, which correspond to positivization in states, so as to end up as a concrete manifestation of the universal, ascribed to positivization at the international level[18]. We speak of abstract universality because human rights are predicated for all human beings, but the materialization of its sense is still precarious. This last aspect is the one which evolves towards specific referents which, in the end, are universalized. When human rights were considered only as "natural" rights, the sole defense possible against their

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groups, as well as the institutions in which they are articulated and the logic which inspires social relations. These transfers of power may or may not be effective and may be more or less precarious. For Herrera Flores (2000), along a similar line of thought, human rights are the practices and means by which spaces of emancipation are opened, which incorporate human beings into the processes of reproduction and maintenance of life.

[16] In this sense, see Thierry *et al.* (1986).

[17] Beyond the positivist theories reviewed by authors such as Hans Kelsen, Alf Ross, Herbert Hart and Norberto Bobbio, the dualist theory of rights formulated by Peces-Barba (cf. Ramos, 2006), which incorporate some elements from theories of Natural Law [Ius-naturalism], conceives of rights as the crossroads between the legal and the ethical, and as a legal translation of the values of dignity, freedom and equality, while simultaneously serving as legitimators of government. The theory of legal protectionism or guarantism, advocated by Ferrajoli (1990), affirms that the state of law possesses both a formal and another tangible form of legitimizing: formal legitimizing refers to the empire of law, while tangible legitimizing, refers to the link between all the powers of the state and the satisfaction of fundamental rights, of which, according to the Italian jurist, human rights are a subclass. For further considerations on this point of view, see Torre Rangel (2006, page 167 and subsequent pages).

[18] In fact, human rights have a growing legal force when they are integrated into constitutions and, in general, the legal systems of states, as well as within the scope of the international community, based on its recognition of numerous international treaties – those of a general nature as well as of particular, universal, and regional nature – and, based on the creation of jurisdictional or quasi-jurisdictional entities or those of any other type required for their defense, promotion, and protection. Furthermore, due to their acceptance, various human rights are considered part of international common law, as international bodies such as the Committee on Human Rights or the International Court of Justice, have affirmed.

violation by the state was what has been referred to as the "law of resistance". Later, constitutions which recognized the legal protection of some rights caused the right of resistance to be transformed into a positive right in order to bring a legal action against the state. In the end, universal declarations arose for the purpose of protecting those citizens in states which did not recognize human rights as rights worthy of protection.

So it is this way that human rights are a product, not of nature, but rather of human civilization (culture). Moreover, as clearly historic rights, they are always changing, in other words, they are capable of transformation and expansion: thus, in the initial stages of positivization, emphasis was placed on documents and mechanisms of general protection; on the opposite hand, during the last decades, advances are projected in specific documents which intervened on more concrete matters and protected specific populations.

So then, the Universal Declaration of Human Rights has become a key reference in the ongoing ethical and political debate, and the language of rights has been deeply incorporated into the collective consciousness of many societies. Nevertheless, there exists a permanent debate within the spheres of philosophy, political science and law about the nature, foundation, content and even the existence of human rights, and whether or not such rights are independent of time and of social and historical contexts. Problems also arise as to their exercise, since a large disproportion exists between violations that have occurred and the guarantees offered on the state level. Moreover, the various modern debates on the validity and legitimacy of great proclamations on human rights usually oscillate between the issue of the universal scope of rights labeled as human and the particular nature of that label when referring to the singular historical experience of each society, group or culture, its diversity and its references of identity and memory, and even its forms of expression and modes of creating, doing and living.

In this way, the label of the universal rights of man and of citizens seems to belong to the space of Western culture, at least, since the last decades of the 18^{th} century. Declarations which enunciate human and universal rights are deeply characterized, then, by the contrast between the universal and the particular, as well as by the Eurogenic-Eurocentric duality. The label of human rights exists with the intention of being valid for all and any human beings under any circumstances. In this

sense, its universal nature removes human beings from the concrete (historic) reality in which they actually live. If, in fact, the universalizing argument accepts the European origins of the label of human rights without greater objections, as stated and reproduced since 1776 with certain variations[19], then it does not admit under any circumstances that this universal nature can be relativized, a position which is grounded in a metaphysical premise: European experience would allow the complete inducement of the concept of "man".

So it is that the particular (or culturally relative) perspective of human rights would be restricted to the circumstance of origin, the assertion that the experience originating in Europe and its world-culture in the last decades of the 18thcentury colored in a definitive way the label of rights of man. Under such a premise, and given the successful itinerary of the systematic adoption of the Eurocentric methodology of human beings, especially since 1948[20], the elements which define and distinguish the cultural particularities of each group or society usually happened to be perceived as "different" or "foreign"[21].

This debate, if not a true dilemma, became constant in the last fifty years by virtue of the moral and political shock of the European authoritarian political systems of the 20th century and the atrocities committed by them, which are still felt to this day and which have given rise to the creation of the United Nations (U.N.) as the international political forum based on the universal proclamation of human rights.

[19] On May 15, 1776, the Convention of Virginia declared the independence of the North American colonies from the British Empire. Shortly afterwards, it adopted the Declaration of Rights of Virginia, a document which influenced the Declaration of Independence and the Declaration of Rights. The Declaration of Virginia is the first document in Western history which contains a specific catalogue of the rights of man and of the citizen. Another transcendent impulse in the cause of human rights occurred in Paris, after the historic sessions of 1789, with the Declaration of the Rights of Man and of the Citizen, adopted by the French Constitutional Assembly and accepted by the King of France on October 5, 1789, and with the Declaration of 1793, which the French National Convention approved on June 23, 1793 and which was incorporated as the preamble in the Constitution of June 24, 1793. With the French Revolution, the castle of feudalism crumbled with all its privileges and a new understanding of law emerged, based on the idea that all men are equal by nature and before the law.

[20] On December 10, 1948, the General Assembly of the United Nations approved the Universal Declaration of Human Rights.

[21] Cf. Kluxen (1997, pages 11-26) and Bielefeldt (1997, pages 256-268).

In truth, the history of human rights is the history of a "macro-ethics of humanity"[22], as yet unedited and still being developed in our time, whose practical relevance has been recognized, however, within various geopolitical, social, and cultural spheres. The great controversies which this same history reveals, indicate, moreover, in what way the philosophical issues surrounding its foundations, apparently abstract despite its distancing from empirical reality (or, perhaps, because of it), may have great value for that reality.

This historical verification can, perhaps, explain the passion with which certain philosophers criticized human rights, while other thinkers celebrated them with enthusiasm as the most important legacy that the Western spirit has left to a humanity who is slowly progressing forward[23]. In fact, the adoption of the Universal Declaration of Human Rights in 1948 by the General Assembly of the United Nations produced profound changes in the international legal order. Moreover, it also influenced numerous constitutions all over the world and within conditions of relationship under which sovereign states to this day act as collective agents in an international arena, with great practical success[24]. Since then, there have been so many and such diverse resolutions of the United Nations Organization, official declarations and national constitutions which refer back to this declaration, that an important part of their content – fundamental freedoms and economic, social and cultural rights of man in the face of the power of the state – can be considered an essential component of international law.

Human rights begin, both historically and in the rational order of their establishment, as a finite set of moral duties, for which (on behalf of everyone and for all mankind) universal validity is sought after. This is consonant with the premises of that formulation, that it is possible to overcome the particular nature of human rights until a more universal claim can be asserted.

To the particular nature of content, which gives us reason to universalize those moral duties, belong certain dramatic collective experiences of

[22] In this sense, see Apel (1992).

[23] In this sense, see Waldron (1987).

[24] In this sense, see Maxwell (1990) and Jones (1989).

injustice and destruction of life and other innumerable humiliations, which were revealed – and sometimes were concealed – over the course of recent historical processes, experiences and times which should never be repeated. We are speaking here about bitter, deeply degrading experiences for mankind[25]. In this way, the collective experiences of extreme suffering, called "sad stories"[26], are deeply ingrained in the history of the 20th century, prodigious in wars, dictatorships and genocides from start to finish[27], subjects of successive moral interpretations, and make up the basis of the so-called negative "moral wisdom"[28]. For those who possess that knowledge, the imperative urgency with which to implant protections needed to avoid repeating those experiences of persecution and collective suffering in the form of a regulating framework of a legal system of positive law[29].

[25] Cf. Margalit (1997, page 141 and following pages).

[26] One of the more well-known examples of these experiences are the forced work camps of Nazi Germany, intended to hold in custody, if not outright extermination, of ethnic and religious minorities and political prisoners, as well as the concentration camps of Dachau, Buchenwald and Sachsenhausen, in Germany, Mauthausen-Gusen, in Austria, and Auschwitz-Birkenau and Treblinka, in Poland. In Spain, the experiences of suffering caused by the regime of Franco left wounds which, even today, continue to be open: Franco's regime, between 1936 and 1947 made use of forced labor camps, if not of disguised extermination, intended to guard not only common prisoners, but also political prisoners and sexual minorities, in camps such as Los Merinales in Sevilla; Miranda de Ebro, in Burgos; and Castuera, in La Serena.

[27] The 20th century is notorious for its prodigious numbers of genocide, from start to finish: between 1904 and 1907, the Germans exterminated the Herero people in Southwest Africa (Namibia), inaugurating the first genocide of the 20th century, which, alongside other colonial "policies" served as a model for the genocide of the Jews and other ethnic minorities by Nazi Germany; now, at the end of the century, a massacre occurred in Rwanda in 1994, which lasted 100 days and left 800,00 dead, when French soldiers, sent by the United Nations to establish a protected zone in that country, permitted Hutu extremists to enter Tutsi minority camps. These "sad stories" did not start, however, in the 20th century: genocide has colored the entire experience of European colonial expansion, although it has only collided with the European peoples when, at the height of the struggles which had originated in industrial capitalism of the 20th century, it managed to reach European soil itself. Thus, it can be said that the plantations implemented on such a large scale by Europeans in their colonies were little more than true concentration and forced labor camps and they served as a laboratory for what some authoritarian regimes would later try to implant in Europe itself from the 1930's on, including the Franco and Nazi regimes. But these experiences were radicalized in the 20th century: as Bauman (1998, page 32) points out, the Hobbesian world of the Holocaust did not emerge from a completely unmarked grave, but rather appeared riding in a vehicle of industrial production, wielding weapons which only the most advanced science could supply and following a route laid out by a scientifically administered organization. Modern civilization (and industrial capitalism) was not the *sufficient* condition of the Holocaust, although it was, truly, a *necessary condition*.

[28] That observation is based on the so-called "evolutionary psychology of morals", according to which we can admit that the coercive force of moral duty imposes on the individual forms of behavior learned in these "sad stories". In this sense, see Edelstein and Nunner-Winkler (1998).

[29] According to Habermas (2003, page 124), in the majority of articles referring to human rights, the echo of injustices suffered resounds, which comes to be denied, so to speak, word by word.

This being the case, a current important criticism of human rights, certainly to be taken seriously and until now, neither resolved nor silenced by the ongoing crisis of modern capitalism (perhaps even dramatically aggravated by the invasion of Western countries to countries in the Persian Gulf), states that the Declaration of 1948 systematically glorifies representations of the heritage of values of "Western culture", secularized and liberal, with special emphasis on the individual. Therefore, the claim to universal validity of human rights would be an ideological perpetuation of colonization: the globalization of the legal documents of modern human rights started in 1948 would not only be Eurogenic (there can be no doubt about that), but also equally and irreparably Eurocentric.

The 1981 Banjul Charter on Human Rights (African Declaration of Human Rights) begins with the rights and duties of man and peoples. In this sense, the well-known debate in Valladolid between Bartolomé de las Casas and Juan de Sepúlveda and, afterwards, the legalistic-theological academic studies of the School of Salamanca, directed at finding the location of indigenous Americans in the chain of being and in the social order of an emerging colonial state, culminated in the enunciation of the "rights of peoples", the ancestor of the rights of man and citizens, which allowed the indigenous peoples to be classified as vassals of the King of Spain and servants of God[30]. In addition, the Universal Declaration of Human Rights gives as the basis for the legal authority of human rights formulated in its various articles: the human dignity of human beings who have the capacity for morality[31]. The Banjul Charter on Human Rights adopts an argument of the same type, but changes the subject of such rights in Articles 19 and 20[32].

[30] Cf. Mignolo (2003, page 84).

[31] "Article 1. All human beings are born free and equal in dignity and rights, and, endowed as they are with reason and conscience, and should behave fraternally towards each other".

[32] "Article 19. All peoples shall be equal: they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of one people by another. Article 20. 1. All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy which they themselves have freely chosen. 2. Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community. 3. All peoples shall have the right to the assistance of states which are parties to the present Charter in their struggle for freedom against foreign domination, be it political, economic or cultural".

Interpretation of the legal content of texts proclaiming human rights depends decisively, then, on the human dignity of individual personal beings, capable of morality; that is the spirit of the traditional understanding of human rights for political liberalism, which concentrates all its relevance on the defense of the individual against the state and on the rights of political participation of that individual within the former.

Another aspect of that dependency involves whether it should be placed or not, at the center of the deciding principles about the relevance of human rights of concrete ethnic and political communities – "peoples" – and their right to a balanced, participatory and distributive development of resources. That is the perspective that characterizes the Banjul Charter on Human Rights, having a communitarian and developmental vision of the society and the economy.

A modernizing revision of human rights which resorts to critical argumentation and social and international agreement, by reconciling those different perspectives, could activate mechanisms for the education of critically and politically relevant public opinion, which could have an effect in all national, international and community, regional and supra-regional, institutional and inter-institutional levels, by restoring the initial starting point of human rights, that was the seed of political liberalism.

Nevertheless, it is important to indicate that political liberalism and economic liberalism do not coincide with each other[33]. The moral core of political liberalism remains in the discursive understanding of human rights: it reflects the demand that all collective processes of self-determination be standardized by the problem to which they refer, as well as, within such processes, that freedom for self-determination (autonomy) of each individual must be preserved, strengthened and protected, in such a way that the autonomy of one person does not depend on questioning the operational autonomy of another. The moral core of economic liberalism, on the contrary, involves the protection of the exchange of benefits contracted between the parties. However, market regulation through the notion of

[33] On the definition of political liberalism, see Rawls (1993, page 43 and following pages) and Ulrich (1998, page 296 and following pages).

efficiency[34] cannot replace the central concept of political liberalism, which involves a sense of fairness between equal citizens[35].

The universal form of human rights lies in the demand for a world order in which all people can effectively enjoy all particular human rights, the content of which remains to be specified.

The process of specification and claim to content particular to the universal form of human rights is an empirical and collective process of moral and political learning. Its procedural dynamic must reflect defined or definable standards of negotiable argumentative discourse on disputed moral standards, at least so that the agreements reached in the – and by the – specific real community of communication and argumentation[36] can be formulated and presented as valid for all men.

Instrumentally, then, rights of information, communication and argumentation are the more relevant content because all other content depends on three factors: a) that each person would wish to have a correct idea of how other men in other places might want and/or need to live; b) that we all compare those ideas in an equal manner, and c) that we agree about them in terms of the essence of the matter and not in terms of the limits that the most powerful may have decided to set.

[34] In Neoclassical economic theory, the notion of efficiency, drawn by Pareto, refers to the efficiency of a system, with efficiency understood to be the notion that there is no way to improve the well-being of an individual other than having someone else be left in a worse position than before. An efficient distribution of resources, in this sense, is not a distribution in which all persons can manage to improve their well-being, or in which resources are offered to persons who might have most need for them, but rather it is a simple distribution in which no one manages to improve his own well-being without diminishing the well-being of someone else. The idea of efficiency is related to the concept of elite, defined and composed, in turn, of the "better elements" of society. This involves a theory which greatly influenced Italian fascism and which, paradoxically, continues to sift its way through current conservative economic thought. For a fuller understanding of efficiency in this context, see Pareto (1988) and Diez Alvares (2007).

[35] As Thurow indicates (1996), democracy and capitalism depart from very different beliefs about the appropriate distribution of power. The former is based on an egalitarian distribution of political power, "one man, one vote", while capitalism believes that it is the duty of those who are economically fittest to expel those who are not fit from business and eliminate them. The "survival of the fittest" and the inequalities in purchasing power are the basis of capitalist efficiency. What is essential is personal gain and, therefore, companies become efficient in order to enrich themselves. Thus it happens that today, the more developed the markets become, the more vulnerable equality among men seems to be.

[36] One example of a complex community of this type was the Conference of the United Nations on Human Rights in Vienna in 1993. In the conference, the representatives of states, commissioners of non-governmental civil organizations and human rights advocates formed a community of argumentation and communication clearly guided by the search to give concrete form to the content that effectively implements the universal rules which human rights allegedly are.

So that we may compare such analogous ideas within the framework of cultural diversity and come to an agreement in that respect, there is no need for a particularly ambitious or specialized method of reasoning, nor, perhaps, not even a culturally relative one. For this purpose, the reasoning which we usually use is enough to establish a dialogue and to offer and assess arguments: the reasoning behind argumentation. It is assumed that each can rely on "sufficient reasoning power" (rationalism) to carry on a dialogue with another using discursive argumentation about issues common to both. In this context, the reasoning of argumentation or discursive rationality consists on the ability and knowledge about how to articulate (or review) our claims of validity, our foundational beliefs, and our experiences without forgetting those of others[37].

The articulation of all processes of possible collective self-determination in regard to the problem at hand, in which the autonomy of each person is preserved, fortified and protected without having the operational autonomy be sacrificed to the benefit of the autonomy of another, is what human rights have in common with political liberalism – and what they have to do with social rights, as we will explain later on. Therefore, it has little – if anything at all- to do with economic liberalism, whose modern version still seems to succeed in the form of what is nowadays called globalization, which it is suspected to be a new way of practicing hegemonic economic policy with the same old Euro-centric model.

The foundation for the argument in favor of the presumptive universal validity of human rights must be able to be grounded in the appropriate notion of human dignity. Human dignity, then, is the essential element for building the foundation, regardless of legal form, for human rights. Human rights must be capable of positivization in human dignity, the foundation on which such a milestone must occur, is a "strong premise", in other words, it is present in all positivizations, but does not lose itself in them. That idea of human dignity has to create a solid universal legal foundation (which does not lend itself to be relativized because of the cultural diversity of its interpretations), from all the specific declarations of human rights.

[37] In this sense, see Apel and Kettner (1996).

Of course, it would be appropriate to ask if, in fact, we do have such a concept of human dignity. One of the first points to be addressed is the objection that presumptive human dignity is the specific perspective of a given understanding of man, an understanding linked to its Christian genealogy and its Eurogenic and Eurocentric political path of development. A European tradition with such features, used as an analytic and evaluative tool for all other traditions, seems to reflect that concept of human dignity. Its definition does not seem to have been reached yet, but only in a negative and indirect way, such that the expression of human dignity is considered only as a label of rights whose violation would also represent the violation of the dignity of man. Despite this evidently vicious circle, that indirect definition could be stated in the following terms: human dignity consists of that which would be violated if we deprived man of: (a) the essential goods needed for life; b) minimum freedoms; c) if physical and/or deep and lasting psychological pain were inflicted on him; d) if his legally accorded status were denied or diminished. This retroactivity makes clear the positing nature of that universal and transcultural basis of human rights.

The central core of the idea of human dignity as the universal basis of culturally "specified" human rights requires, therefore, variation concerning the approaches of the Kantian moral imperative[38]: it is demanded that any man treat another man in the same way in which he would like to be treated and not as the circumstances – legal, religious, political, economic, etc. – would dictate.

Provisionally, it can be concluded that the understanding of human rights, philosophically and historically, does not have to be constrained to the choice between the universal and the particular[39]. The premise of *humanitas*, insofar as it involves politicization and historicity, is intrinsic to the human rights program. The issue that remains is that of retracing the journey from the interpretation of *humanitas* as

[38] The principle of human dignity was developed, above all, after and from studies on Immanuel Kant. In fact, it was the German philosopher who, attempting to provide justification for one of the universal categorical imperatives formulated by him, demonstrated the unique and end-oriented nature of being human itself: "Act only according to that maxim whereby your act can become, through your will, a universal law of nature" (Kant, 1974, page 224, trans.). Thus, he points out that "man and, in a general sense, any rational being exists as an end in itself", not only as instruments for the arbitrary use of this or that will. On the contrary, in all his acts, those which are directed at himself as well as those which are directed at other rational beings, he (i.e., man) "always has to be considered simultaneously as an end" (Kant, 1974, page 229, trans.).

[39] Cf. Villoro (1993, page 131 and following pages).

identical to the problematic idea that only the European culture reflects the essence of the human species.

Human rights are, therefore, a cultural or educational matter more than a political or economic one. In the public sphere, discussion of *de facto* discrimination pollutes rational debate grounded, *de iure*, on the understanding, the conviction and practice of human rights, whether civil, political or social. The personal, collective, and civic awareness is produced through a long-term process whose stage is that of ideas.

Human, civil, political and social rights must be a universal matter, not only on an abstract or intellectual level, but also generalized to all segments of society. It is necessary to demand generalization and universality for human, civil, political, and social rights – generalization in the sense that such rights belong to everyone and are for everyone; universality in the sense of the metaphysical component of the understanding itself of the human being, regardless of his race, color, religion, sexual preference, culture or gender[40]. Moreover, it is necessary to awaken society, by calling it to reason and pointing out its iniquities, since today no one is just one thing; mere labels, such as Latin, female, Muslim or European, no longer serve as starting points, which based on concrete experience are shortly left behind. Imperialism, colonialism, and capitalism have consolidated a mixture of cultures and identities on a global scale, buts its worst, and more paradoxical legacy is to have people believe that they are only black or white, Western or Eastern[41]. Nevertheless, since human beings forge their own history, they also forge their own cultures and identities: the lasting continuity of traditions, customs, national languages, and cultural geographies cannot be denied, but no reason seems to exist, apart from fear and irrational prejudice, to continue insisting on the separation and distinction between human beings, by classifying or ranking them.

[40] In the field of human rights related to issues of gender, Álvarez (2000, pages 408-409) points out the importance of rejecting cultural relativism against the rights of women, affirming that, on this subject, the principle of harm helps to clarify which ones are the practices that filter out the autonomy of women, whatever the culture: "where there is intrusion into the sphere of women's freedom, it becomes necessary to intervene in order to reverse this situation".

[41] Cf. Said (1993, page 383 and following).

It is appropriate, then, to pose the question of human rights as something similar to a great existential struggle between resistance and affirmation[42]. It is incumbent upon each and every one of us, not being possible to delegate it to third parties – or even to the state – under penalty of loss of autonomy, dignity, and respect. Society, slowly but surely, now perceives that the state is no longer the supplier of utopias. Generous acts of unconditional supply of well-being have passed from the hands of the impersonal state to the reality of the laws of the marketplace and competition of the fittest, dictated by modern capitalism. Cultural delay in continuous expectations as a primary feature of mental attitudes, making affirmative action not a duty of the state (which may, perhaps, be one of its more significant allies), but rather a task for each and every citizen, regardless of origin or conviction. If such a cultural and mental revolution does not occur, it will be of little or no good, for the ruling-state to revise the attitude of an enlightened despot.

In summary, for those who still do not accept the idea of human dignity as a palpable value, accepted by the legal order and believing it to be too abstract a form and with only the obligation to serve as the basis for applying other fundamental principles, such as privacy, self-determination, psychological and physical integrity, etc., it will be necessary to juxtapose the particular and self-applicable character of human dignity, expressed in the specific reality of each subject and viewed from the perspective of the Habermas paradigm of communicative reason: language is the essential condition that makes human existence possible[43]; hence, life is not only the first and foremost fundamental right to be safeguarded by any legal order, but also the essential condition that makes other rights possible. The understanding of the absolute supremacy of human life – a life which, in order to be understood as such, must be lived with dignity.

This paradigm makes you think of life in its material aspects, in other words, the starting point for this model is life with an entirely material content,

[42] In this sense, Zambrano's thought (2008), for whom life cannot be lived without an idea, but an idea which cannot be abstract: it must be an informing idea from which is derived the continual inspiration for each act, at each instant. Thus things, acceptance and resistance, seem to be the ultimate condition of life, in other words, life ought to be open to accept, but must also be strong enough to resist: acceptance leads it to partake of action, movement, constant transformation; resistance, to persevere. The former is an incessant action, the latter, preservation.

[43] In this sense, see Habermas (2003).

since life is, above all, biological[44]. In this context, the core of the principle of dignity does not serve merely to guarantee protection of human dignity in the sense of assuring an individual, in a generic and abstract way, of non-degrading treatment, nor does it mean the mere offer of a guarantee of the integrity of the human being: in that context, of a renewed humanism, human vulnerability will be safeguarded as a priority wherever it manifests itself, in such a way that preference will be given to the rights and needs of certain groups considered to be , in one way or another, the weakest, and for whom special protection will be demanded: children, the elderly, those afflicted by physical or mental disabilities, consumers, workers, the unemployed or members of ethnic minorities, among others[45].

It is clear that, in this dimension, it would be impossible to reduce all that which makes up the essence of human dignity to a generic and abstract formula. Thus, it can be said that the discussion regarding the respect for dignity and the establishment of the limits of its content can be done only in a concrete sense in which an effective affront to the dignity of the individual can be perceived. Under those circumstances, it seems clear to us that the materiality of the principle of dignity rests on the so-called "existential minimum"[46].

In this context, it is necessary to indicate the adoption of a new viewpoint on economic, social and cultural rights, or simply, "social rights", since the exercise of any human rights, intimately bound up with the notion of dignity and related to the freedom and autonomy of the individual, is not possible without a guarantee of the economic, social and culturally dependent existential minimum. This implies the need to address again the process of trivialization (which, in practice, strips human rights of their authority) and theoretical fragmentation of human rights (rights of first, second and subsequent "generations")[47], through re-education about such rights and

[44] Thus, it can be affirmed that life can never be reduced to an idea, an abstraction, given its concrete, physical, and biological substratum. In this sense, see Maturana and Varela (2001).

[45] Cf. Bodin de Moraes (2003, pages 116-117).

[46] According to Barcellos (2002, page 198), the existential minimum reflects the set of material situations essential for human existence with dignity: the existential minimum and the material core of human dignity reflect the same phenomenon.

[47] Cf. Sampaio Ferraz Junior (2007, page 517 and following pages)

their guarantees, since implementation of the so-called "social" rights cannot be considered separately from the consolidation of democracy itself: the fulfillment of civic responsibilities, essential for democracy, requires economic, social and cultural reforms for the removal of obstacles which impede democracy[48].

In fact, the very social meaning of "personhood" is related to the different positions held by each and through which each one acts within a given field[49], and these positions, the set of which makes up our social definition of personhood, are defined within each field in such a way that they are the ones that allow us certain social practices and restrict us to others[50]. It can be concluded from all of this that, within each field, the positions are not egalitarian, but rather that one of the most prominent features of such fields is the distinguishing distribution of certain attributes among positions. This distinguishing distribution is what makes up the basis of certain social definitions, differentiating ones with respect to others; the different positions have established the manner in which they should relate to each other: as equals, in relation of superiority (one with more power over another), in relation of inferiority or even not being able to relate to each other[51]. Poor, different, migrant, or renegade determines the position of individuals and, consequently, establishes a given treatment on the part of the other agents in the field, while, at the same time, makes those who hold such a position expect a given treatment from all the others, in a cultural process of institutionalization of differences and discriminations as part of a scheme of social reproduction and domination[52].

[48] Cf. Dimenstein (2006, page 22 and following pages).

[49] Cf. Bourdieu (2000, page 112).

[50] In this sense, Zambrano (1996) advocates for a social utopia, for the equality of all human beings, and, by extension, supports the acceptance of differences and inclusion in the face of exclusion of such differences in the course of history, returning, in his reflections, to one of his most cherished notions: the oscillation between the individual and his persona, in order to postulate the notion that Western man throws away his mask, ceases to represent and be, in this way, a tragic person, and definitively affirm himself as a person, capable of opening himself up to others and of accepting the other in his multicultural nature.

[51] Cf. Zino Torrazza (2006, page 27 and following pages).

[52] Thus, for instance, in current societies, marked by capitalist consumerism, the power of consumption has been progressively replacing the fundamental rights of people. The concept itself of happiness is today directly related to how many products and services can be consumed; human dignity is reduced (or is measured) by the capacity to acquire certain goods, the adoption of a certain life style, and the possibility of frequenting certain spaces. With globalization, the market, by guaranteeing exclusions,

In this context, in terms of human rights, the position of the person as nexus between the abstract idea of personhood and our praxis as to the set of positions would be reflected in the set of rights – and implicit duties – which are recognized there. However, the social existence of individuals is characterized, in fact, by a constant restriction and violation of those rights as a result of various practices and definitions which are established. Thus, it can be concluded that abstract rights are given concrete expression in each field through practices resulting from the interaction between the different positions. Equality ceases to exist since each field is a distribution of attributes or goods which are considered scarce and which adopt the nature of privileges. In order to sustain this unequal distribution of attributes and goods, each field has organized some reproductive mechanisms which act synchronously and diachronically and which tend to affect – and often emphasize – the treatment given to the rights and duties in these positions.

Control of these reproductive mechanisms also leans towards the positions of privilege in each field, either because whoever holds them exercises direct control over these mechanisms, or rather because they exercise symbolic control[53]. Therefore, the very concept of society is shaped as a structure of fields in which individuals, by means of their positions (with their definitions and privileges) are related to each other, social practices are established, and diverse rifts – of race, color, social or economic status, gender, etc. – are perpetuated, as well as unequal distributions of goods and economic, social, and cultural rights.

To speak of human rights, then, is to speak of making rights accessible to groups of human beings who usually do not have access to them. In other words, an attempt is made to open up a new path, alternative and real in a true sense, leading to non-exclusive citizenship, democratic in the sense that it is participatory and oriented towards an authentically transformative praxis of society. Implementing this new path, of course, requires tremendous energy and tenacity and also the capacity to

becomes a more prolific and less controlled "assembly production line" of human waste or wasted people. As Bauman points out (2005), the concept of "waste" in a society of consumers is comprised of people lacking material resources and, therefore, incapable of consuming.

[53] Cf. Althusser (1977, page 301 and following pages).

conceptualize content and techniques which permit re-education about social rights and their guarantees[54].

It is well known that legal institutions can be instruments of social oppression if divorced from democracy, but also that when coupled with participatory democracy and the strength of citizenship, the law can become a collective institution of freedom[55]. It is clearly not possible to have meaningful citizenship without democracy, nor is it possible to have a substantially democratic model of democracy without participatory citizenship. This being so, it is necessary to recreate certain premises in the field of law towards the body of law intended, not only as an instrument of social defense against abuses, but also as an instrument intended to safeguard citizenship itself in an inclusive context and permanent b creation of a more human, more just and more democratic model of development, by implementing concrete acts aimed at the full exercise of social rights, through all possible means and using available resources to the maximum extent.

[54] In that sense, see Unes Pereira and Fonseca Dias (2008).

[55] It does not seem to be difficult to perceive that, if the rules are created by the very parties interested in seeing them enforced, through the cooperation of social agents anchored in the autonomy-solidarity duality, then their materialization is much more present in autonomy than in cases of anomia or heteronomy – it is necessary, then, to involve all participants in the production, interpretation and application of the rules, hence their legitimate legal exercise – and the legal model of action is, moreover, associated with a clearly democratic model of learning and self-awareness which takes into account the internalization of values (cf. Habermas, 2001, page 129).