TOWARDS A PHILOSOPHICAL FOUNDATION OF HUMAN RIGHTS IN CONTEMPORANEITY: Overcoming obstacles in competing views for the legitimization of Human Rights[1]

POR UMA FUNDAMENTAÇÃO FILOSÓFICA DOS DIREITOS HUMANOS NA CONTEMPORANEIDADE: A Superação dos obstáculos nas correntes concorrentes pela legitimação dos Direitos Humanos

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ABSTRACT: Using bibliographical review and analysis, this article seeks to elaborate upon the philosophical foundations of Human Rights. In order to do so, we conducted a research regarding the jusnaturalist, positivist, moralist and negationist schools in order to present aspects of converging 'concentric circles'. This structure enables the possibility of a shared philosophical foundation of Human Rights instead of multiple theoretical misconceptions emerging from each theory read individually. There is therefore a lesser risk of leading such theories and their interpretations into anachronism and stasis.

KEYWORDS: Human Rights. International Law. Philosophy of Law.

RESUMO: Utilizando-se da revisitação bibliográfica, o presente artigo tem a missão de apresentar uma contribuição para a fundamentação filosófica dos Direitos Humanos. Para tanto, socorreu-se da releitura das escolas jusnaturalistas, positivistas, moralistas e negacionistas para, então, ao final, apresentar uma convergência em círculos concêntricos que permite a fundamentação filosófica dos Direitos Humanos contra as equivocidades teóricas de cada uma das teorias individuais sem, porém, levar ao congelamento no tempo e espaço de uma interpretação.

PALAVRAS-CHAVE: Direitos Humanos. Direito Internacional. Filosofia do Direito.

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[1] Este artigo foi publicado anteriormente em língua portuguesa no livro coletâneo **Ensaios em defesa da dignidade da pessoa humana: contributos dos Direitos Humanos e dos Direitos Fundamentais.** Organizadores: Ygor Pierry Piemonte Ditão, Stefano Del Sordo Neto. Curitiba: Instituto Memória. Centro de Estudos da Contemporaneidade. 2022, pp. 09-47. (ISBN 978-85-5523-477-4) sob o título "Por uma fundamentação filosófica dos Direitos Humanos na contemporaneidade: superação dos obstáculos nas correntes concorrentes pela legitimação dos Direitos Humanos" dos mesmos autores.
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1. INTRODUCTION

The Fundamental Law has already shown in Art. 133 that "Lawyers are indispensable to the administration of justice, being inviolable for their acts and manifestations in the exercise of their profession, within the limits of the law". Because of such, and inspired by it, the Bar Association carries out fantastic work through its commissions, directing both active civic action and, in other cases, study and intellectual formation seeking to be mature enough as to improve the world one day at a time.

In this spirit, the 125th sub-section of the São Paulo Bar Association distributes the fundamental duty of developing this work among several commissions, such as the Civil Process commission under the presidency of Dr. Stefano del Sordo Neto, of great importance. The launch of the book "Processo Civil Constitucionalizado: as diversas faces de defesa dos Direitos Fundamentais" by Stefano del Sordo Neto, provoked the various commissions to work on a more daring project of construction of a collective work destined to the protection of Human Rights. Once the invitation was made, the Philosophy of Law Commission assumed the unsurpassable responsibility of presenting the philosophical foundations of Human Rights.

The present article, as a gateway for readers to the subject of Human Rights, has then two functions: (i) to guide jurists, political scientists and society as a whole towards the existing debates on Human Rights; and (ii) to present a new position that allows for a continuous defence of Human Rights at a time when unfortunately there are many accusations and attacks against Human Rights, both empirically and verbally, by parliamentarians, heads of states and even anonymous citizens.

However, there is a warning: given the depth of such theme, it is unfeasible to think about completely covering the subject or even approaching all the existing currents and positions, under risk of transforming the present article into a checklist. With this certainty, this work, then, develops and presents the main philosophical currents that underlie Human Rights today, lastly presenting a hypothesis and development of synthesis.

The first four major currents will therefore be presented: (1) jusnaturalism (cosmological, theological and rational); (2) positivism; (3) moralism; and (4) cultural emphasis negationism. Afterwards we propose a convergence between all theories inspired by the lesson of Cicero in The Republic of mixed constitutions, developing a theoretical and empirical possibility of immunizing the deficiencies of each theory or thesis individually and, in return, allowing for a minimum structural protection without, however, freezing in time and space the interpretation of the primordial foundations of Human Rights.

The present work then attempts to demonstrate that Human Rights behave metaphorically as light: where there is light (even flickering and weak from a single and tiny candle considered insignificant before the potent light of the sun) there is still the minimum understanding of the place and order of things, but where all light is extinguished and sinks into the deepest darkness of authoritarianism, one realizes that even the tiniest candle and the weakest flame is irreplaceable. As long as genocide and human rights violations are easier to find in history books than in books on International Law, there will be a long way to go for peace and humanity.

2. JUSNATURALISM AS THE PHILOSOPHICAL FOUNDATION OF HUMAN RIGHTS

In the wake of Kant's philosophy of ethics, when one is inquiring about the foundations of a certain right, what one is looking for, in the last analysis, is the justifying reason, that is, the legitimating source of this right. It is no different with human rights. To talk about the philosophical foundations of human rights is, therefore, to talk about the raison d'être of such rights.

For the purposes of this article, the questions that impose themselves for now and urge this investigation are: what would legitimize the protection of human rights, that is, what is the justifying reason for rights themselves? Why should these rights be respected?

Many have looked into these questions and various philosophical currents have been developed to answer them. Many of these statements necessarily go

through the discussion about the very existence of the legal phenomenon. Is law a natural phenomenon or a human creation?

The first to rigorously formulate the problem of whether the law has a natural foundation (jusnaturalism), that is, whether what is fair by law (positive law) is also fair by nature, were the Sophists.[5] Therefore, the age-old discussion about the existence of a natural law (jusnaturalism) dates back to Classical Antiquity.

Although the Sophists presented a negative solution, that is, they defended the non-existence of a natural law, the mere delimitation of the problem already represented an important advance for philosophy, insofar as it enabled other philosophers to try and find an affirmative solution.[6] It was precisely in opposition to the negative solution of the Sophists that what is called cosmological jusnaturalism arose.

2.1. COSMOLOGICAL JUSNATURALISM

Cosmological jusnaturalism was the natural law doctrine that brought together the thoughts of several Greco-Roman philosophers, from Socrates, Plato and Aristotle, through the Stoic School, to Roman jurists such as Cicero and Ulpiano.

Roughly speaking, all of these philosophers, each one in his own way, understood that there were natural rights inherent to the very dynamics of the universe, rights that derived from the immutable laws that governed this universe[7]. It was precisely to designate this regularly organized and integrated universe, this universal harmony, that the Greeks used the word "cosmos" (κόσμος), from which the expression cosmological jusnaturalism was then derived.

In this manner, the justification for human rights was the simple fact that man[8] belonged to the cosmos, which made him, therefore, part of this universal harmony and holder of the natural rights that also governed it.

5 VECCHIO, Giorgio del. **Lições de Filosofia do Direito.** Translated by Antônio José Brandão. 5th ed. Coimbra: Armênio Amado, 1979, p. 36.

6 *Idem ibidem.*

7 MEDEIROS, Alexandre Melo. **Jusnaturalismo e Contratualismo.** Available on: https://www.sabedoriapolitica.com.br/products/jusnaturalismo-e-contratualismo/ . Acess in 26 out. 2020.

8 We cannot forget that, both in Greece and in Rome, when we speak of a man as the holder of rights or as a citizen, due to the social conformation of the time, we are referring to a male, national, and free individual.

Socrates, for example, understood that for a man to reach this natural law, or, in other words, Justice in itself, it was necessary for him to learn to see beyond the simple thesis or legal norms, reaching the intelligible world where a superior Justice would rest, whose validity would prescind from positive sanction and written formulation therefore transcending the empirical world itself. This did not mean, however, that man was allowed to disobey the laws of the State. On the contrary, Socrates argued that the good citizen had a duty to obey the laws of the State, even bad laws, in all cases.[9]

This system of idealist philosophy inaugurated by Socrates was developed firstly by Plato, who, drawing a parallel between the State and man, understood that Justice would be a relationship of harmony between the various parts of a body; it would be, therefore, a virtue enabling harmony to the State, if considered as an organism momentarily constituted of several individuals for the attainment of a particular end. The foundation of the State would thus be human nature itself, and Justice would be the virtue that would require each individual to do his or her part in order to achieve a common end: the happiness of all through the virtue of all.[10]

Unlike Plato, who was more speculative, Aristotle was a thinker more inclined to the observation of facts. He conceived man as a political animal by nature and the State as a logical consequence of this political nature, as a perfect organic union, indispensable for the attainment of the highest good: Happiness (Eudaimonia). The State would be responsible for regulating the life of its citizens by means of laws whose content would be derived from justice. The idea of justice, in turn, would be based on the concept of equality.[11] [12]

The Stoics, in turn, defended the existence of a universal law that would transcend the limits of the State and to which the wise man would have access by freeing himself from all his passions and all external influences, thus attaining the

9 VECCHIO, *op. cit*., p. 38.
10 Idem ibidem, p. 39-40.
11 Idem ibidem, p. 44-47
12 The Aristotelian conception of equality, however, is not monolithic. In fact, Aristotle conceived of an idea of equality proportional to the merits of the individual (and which became widely known as material equality) from which distributive justice would derive alongside an idea of abstract and objective equality (and which became widely known as formal equality) from which corrective or equalizing justice would derive.

authentic freedom that would allow him to live according to nature itself. In this perspective, man was considered cosmopolitan, that is, a citizen of the world.[13]

Cicero was an eclectic scholar. Like the Stoics, he believed in the existence of an eternal law, an expression of universal reason cognizable to human consciousness. In other words, for Cicero, man's natural common sense would be able to distinguish what is right and what is not. And right, in Cicero's perception, did not always coincide with established laws. A law that was not just would not be right.[14]

Finally, Ulpiano understood that the foundation of Law lay in the very nature of things. In fact, Law would be more extensively developed in mankind, but could also be found in other animals.[15]

2.2. THEOLOGICAL JUSNATURALISM

In the centuries that followed, the spread of Christianity resulted in profound changes about the conceptions of Law and the State. In effect, although Christ's doctrine was apolitical, the evangelical preaching of charity, fraternity and a universal love of God for all men, equal in origin (all children of God) and freedom, brought Law and Theology closer together and led to the emergence of a new autonomous political authority: the Church.[16]

If in the past it was understood that the highest good, that is, Happiness, could only be reached through the State, as it occurred, for example, in the Platonic and Aristotelian conceptions, with Christianity, the idea that was pursued was that of an eternal mundane happiness which could only be reached if man subordinated himself to the divine will, represented by the Church.[17]

In this context, the justifying reason for human rights became theological. Roughly speaking, it was understood that, since God had created man in His image

13 VECCHIO, *op. cit.*, p. 50-52
14 Idem ibidem, p. 55.
15 *Idem ibidem*, p. 57-58.
16 Idem ibidem, p. 59-62.
17 Idem ibidem, p. 59-62.

and likeness, man would be the holder of natural rights that had been granted to him by this same God. In Del Vecchio's words:

> If the World is governed by a personal God, then one comes to consider Law as emanating from a divine order and the State as a divine institution. In turn, the divine will is known, not by reasoning, but by Revelation: before being demonstrated, it must be believed or accepted by faith.[18]

This Christian philosophy, born in the ancient world and developed in the Middle Ages, was divided into two main periods: Patristic and Scholasticism.[19]

The Patristic found its main exponent in St. Augustine who, starting from the opposition between the divine city (*Civitas Dei*) and the earthly city (*Civitas terrena*), saw in the earthly State a means for the Church to achieve its own ultramundane ends.[20]

Patristic was followed by Scholasticism, whose most distinguished figure is St. Thomas Aquinas. Reapproaching Classical Philosophy, St. Thomas Aquinas reprised the importance of the State, understanding it as a natural and necessary product to satisfy human needs, whose purpose would be to guarantee security and promote the common good. This, however, did not mean that the State was on a par with the Church. On the contrary, the Thomism doctrine defended that the legitimacy of the State would derive precisely from its subordination to the Church.[21]

Moreover, the Thomism doctrine systematized Christian thought by supporting the existence of three categories of laws: *lex aeterna, lex naturalis, and lex humana*.[22] The *lex aeterna* would be the immutable law of God, cognizable only partially to human reason; the *lex naturalis* would be "an ordination imposed on human reason through the inclinations of its own nature, and as an ordination made by human reason from these inclinations "[23]; and the *lex humana* would be a creation of man from the principles of natural law.

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18 Idem ibidem, p. 60, free translation.
19 Idem ibidem, p. 62.
20 Idem ibidem, p. 62-64.
21 Idem ibidem, p. 64-68.
22 *Idem ibidem*, p. 65.
23 POOLE, Diego. *Lei natural e realização humana em Santo Tomás de Aquino. In* **Revista Brasileira de Estudos Políticos.** Belo Horizonte, n.114, pp. 105-127, jan./jun. 2017; p. 110.

2.3. RATIONAL JUSNATURALISM

During the Renaissance, Hugo Grotius inaugurated a new phase of legal thought and for this reason is considered the founder of modern Philosophy of Law.[24] Distancing himself from the theocentrism typical of the Middle Ages, Grotius conceived the idea of a natural law that did not emanate from God, but rather was constituted by conditions of sociability, among which he emphasized the inviolability of pacts, from which the legitimacy of governments and the inviolability of international treaties would derive. Grotius was thus, from an empirical perspective, a contractualist.[25]

Taking up the Aristotelian conception that man is a political and social animal, Grotius understood that the Law would be necessary to allow life in society. In the words of Vecchio: "Law, therefore - it is rationally demonstrated (it is not shown by revelation) - to make life in common possible, is that which right reason demonstrates to be in conformity with the social nature of man." [26]

Natural law would derive from the nature of man and would be cognizable through human reason in two distinct ways: the *priori*, through the verification of the conformity or nonconformity of a thing with its rational or social nature; and the *posteriori*, through the verification that a thing is just by all the most civilized peoples.[27]

As we can see, this current of philosophical thought inaugurated by Grotius defended that the foundation of human rights, as natural rights, would be the universal human reason itself, and for this reason it is, until today, known as rational jusnaturalism, which congregates, besides Hugo Grotius, other great thinkers, such as Thomas Hobbes, John Locke and Jean-Jacques Rousseau.

Although the jusnaturalist school, in all its aspects (cosmological, theological and rational), is very important for understanding the raison d'être of human rights, notably by legitimizing the universalization of these rights, it is not immune to

24 VECCHIO, *op. cit.*, p. 82.
25 *Idem ibidem*, p. 86-87.
26 *Idem ibidem*, p. 86.
27 *Idem ibidem*, p. 86.

criticism. In fact, its critics usually point out two main weaknesses of this school: the impossibility of theoretical or empirical proof of natural rights and the disregard for the historical dimension of human rights, since history reveals a constant alteration of the essential individual's rights.

3. POSITIVISM AS THE PHILOSOPHICAL FOUNDATION OF HUMAN RIGHTS

The Renaissance and the Enlightenment brought an important technical and methodological development of the natural sciences, but the 19th century was marked by the concern with the development of the human and social sciences.

It was in this context that Auguste Comte's Positivism emerged in the 19th century, using the criteria and methods developed by the natural sciences to explain the social reality of that time. The human and social sciences sought a precise delimitation of the object of knowledge and a strict separation between the cognizing subject and the cognizable object in order to achieve axiological neutrality.

It was precisely on this paradigm that an attempt was made to build a science of Law, thus originating the philosophical current known as Legal Positivism, whose main exponent is Hans Kelsen.

Kelsen sought to remove all subjectivism from the Law, refuting, therefore, any legal construction that was guided by an idea of Justice. Justice, being a value, would be non-scientific and it would not be possible to consider the existence of an absolute justice, as defended by the jusnaturalists, since this would mean conceiving nature as part of society, which would not be supported in a scientific approach.[28]

28 In Kelsen's words: "The natural doctrine presupposes that value is immanent in reality and that this value is absolute, or, in other words, that there is a divine will inherent in nature. Only under this assumption is it possible to hold the doctrine that Law can be deduced from nature and that this Law is absolute justice. Since the metaphysical assumption of the immanence of value in natural reality is not acceptable from the standpoint of science, the doctrine of natural Law is based on the logical fallacy of an inference from "is" to "ought to be." The norms allegedly deduced from nature are - in fact - tacitly presupposed, and are based on subjective values, which are presented as the intentions of nature as legislator. By identifying the laws of nature with the rules of law, claiming that the order of nature is or contains a just social order, the doctrine of natural law, like primitive animism, conceives nature as part of society. But it can easily be proved that modern science is the result of a process characterized by the tendency to emancipate the interpretation of nature from social categories." (KELSEN, Hans. What is Justice? : justice, law and politics in the mirror of science. Translated by Luís Carlos Borges. 3rd ed. São Paulo: Martins Fontes, 2001; p. 141-142) free translation.

Kelsen thus develops a Pure Theory of Law, whose goal is to answer the following question: what is Law and how is it? "But it is no longer concerned with the question of what Law should be, or how it should be made. It is legal science, not the politics of law "[29].

And, in this order of ideas, Law would be an order of human conduct, a set of systematized norms that regulate human behavior (hence the term legal system) and the object of the science of Law would be, therefore, the legal norm, which could be studied in isolation, under a static perspective, or be studied in relation to the other norms of the legal system, under a dynamic perspective.

Under the static perspective, the legal rule would be a hypothetical judgment that conveys a rule of imputation of the type "If A is, then it must be B" and whose noncompliance would result in a sanction. Differently, therefore, from the natural sciences, which are rooted in the field of ontology, Law would rest in the field of deontology, that is, of the duty to be. And this legal duty to be would be that established by the legal norm.

Although he rejected the existence of an absolute Justice and advocated for the strict separation between Law and Moral, Kelsen did not defend the total incompatibility of Justice with Law, but, rather, he brought the value of Justice into the legal norm. Just would be, therefore, the human behavior that conforms to the legal norm and unjust, the behavior that opposes it. There would be, therefore, no question of the existence of intrinsically bad conducts (mala in se); the valuation of any and all human conduct would be determined by the confrontation of the conduct within the legal system, so that one could only speak of prohibited conduct (*mala prohibita*). Similarly, there would be no rights that are not foreseen in the legal norm (in the law).

From the dynamic perspective, what is then analyzed is the hierarchical relationship between the legal norms, which would find their basis of validity in the higher hierarchical norm, thus forming the famous Kelsenian pyramid. At the top of

29 KELSEN, Hans. **Teoria Pura do Direito.** Translated by João Baptista Machado. 8th ed. São Paulo: WMF Martins Fontes, 2009; p. 1.

the pyramid is the Constitution, which, in turn, is based on the hypothetical fundamental rule (Grundnorm)[30].

And what does all this have to do with human rights? For the positivist school, the raison d'être of human rights would be the existence of formal law, which means that only positivized human rights, that is, those provided for in law, would be subject to protection by the law. In the words of André de Carvalho Ramos:

> For the Positivist School, the foundation of human rights consists in the existence of positive law, whose presupposition of validity is in its edition according to the rules established in the Constitution. Thus, human rights are justified by their formal validity. Now, the justification of human rights lies in the will of the law, and it is the will of the law that justifies the preservation of human rights. This obvious tautology weakens the protection of human rights when the law is silent or even contrary to the dignity of the human person.
> Indeed, in the case of human rights, the weakness of positivism is dramatic if local laws do not protect or recognize a certain right or category of human rights. The Nazi example shows the insufficiency of the positivist grounding of human rights.[31]

4. MORALIST AND NEGATIONIST THEORIES OF HUMAN RIGHTS

30 About the hypothetical norm, it is convenient to bring to light an important observation by jurist Miguel Reale about the overcoming of the jusnaturalist thesis by juridical positivism: "More significant, however, is Hans Kelsen's posing of the problem in a little remembered passage from his General theory of law and State, where the great critic of jusnaturalism writes textually: 'The fundamental norm (Grundnorm) has been described here as the essential presupposition of any positive juridical knowledge. If one wishes to regard it as an element of a doctrine of Natural Law, despite its rejection of any element of material justice, very little objection can be opposed. After insisting that the fundamental norm, as a transcendental norm, 'is not a given of experience, but a condition of experience', Kelsen goes so far as to admit that 'the theory of the fundamental norm can be considered a doctrine of natural law in the direction of Kant's transcendental logic' (in keeping with Kant's transcendental logic). Earlier he had related the minimum of possible metaphysics (the concept of transcendental a priori condition of possibility of experience) to the minimum of Natural Law, without which no legal knowledge would be possible." (REALE, Miguel. Direito Natural/Direito Positivo. São Paulo: Saraiva, 1984; p. 1-2, free translation).

31 RAMOS, André de Carvalho. **Teoria Geral dos Direitos Humanos na Ordem Internacional.** 7th ed. São Paulo: Saraiva, 2019; p. 48.

The foundation of human rights, under a prism of universality based upon the legacy of liberal traditions and jusnaturalism, is at the heart of a normative and ontological debate that touches on contemporary developments in International Law. Among the branches that oppose this idea of universality based upon the human individual as a metric system of uniform applicability, we have the notions of relativism[32], notably on the slope of the culturalist argument; in general a Cultural Relativism[33], recurrently based on a perspective that is founded on the so-called Communitarian arguments for the proper establishment of values and rights[34]. The latter is based on the notion of the sociocultural community as a formative unit.

The normative precedent of universality is strengthened, especially in the post-World War II Declarations, notably by the Universal Declaration of 1948, which emphasizes in its second article an attribute of universality without any distinction of kind, ethnicity, gender, religion, or public opinion[35] , its first article emphasizes the innate and immanent character of freedom of the human individual as well. These charters fill the gap and the longing for a minimum guarantee in face of the systematic atrocities that took place throughout the 20th century, developing a paradigm that is able to encompass the human species without ethnic, political, or any other kind of cleavages.

A distinctive element that was, equally, an instrumental force of these same violations not only in the last century.

Specific developments in the normative repertoire of the United Nations system, through Declarations and Agreements, notably in the 1960s, dealt with more specific cultural, economic and social guarantees with political and participatory emphasis[36].

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32 LI, Xiaorong Li. ***Ethics, Human Rights and Culture: Beyond Relativism and Universalism***. Palgrave Macmillan, 2006.

33 ALMQVIST, Jessica. ***Human Rights, Culture, and the Rule of Law. Human Rights in Perspective*.** Hart Publishing, 2005.

34 FORST, Rainer. ***Contexts of Justice Political Philosophy beyond Liberalism and Communitarianism*** University of California Press, 1994.

35 Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. (United Nations, Universal Declaration of Human Rights, 1948 p.1., free translation).

36 ONU. Organização das Nações Unidas. United Nations General Assembly. ***International Covenant on Economic, Social and Cultural Rights***, 1966.

> Human rights are perceived as entitlements for all individuals by virtue of their humanity. Thus, human rights exist independently of culture, ideology, and moral and social value systems. The power of the universalist argument is manifested in an appeal to certain principles concerning humanity.[37]

Given these two references, this section will now review and comment on the so-called Negativist theories in the axiology that underlie or criticize human rights.

Special attention will be given to the arguments of cultural emphasis and the clash between the liberal and the communitarian traditions[38]. In this dichotomy, the major opposition is the basis of unity that validates the legitimacy of these rights, whether in the individual, his realization and self-expression as a person, or his insertion in a community that implies the formation and continuity of values and practices, through culture in particular.

In structural and practical terms, the applicability also falls to the elements of Realism in the theories of international relations and the political interface in the defense and deliberation of these agendas in the international arena as a problematic world that says something about the risk of instrumentalization and power struggles capable of interfering in such debates:

> Today, different views on the correct approach to human rights issues certainly persist, including on what is the appropriate role of human rights in foreign policy. Irrespective of whether it is to limit the reach of human rights or to unleash their promise, all states have with the passage of time incorporated a human rights dimension into their foreign policy. Even states that are dismissive of those 'imperceptible limitations hardly worth mentioning known as international law', end up incorporating a reactive and negative approach to human rights into foreign policy in an effort to curtail if not their codification at least their implementation. Yet, all human rights instruments are based on intergovernmental negotiations, where the nature, scope and precise language employed to enshrine each human right is intensely negotiated.[39]

37 AL-DARAWEESH, Fuad, SNAUWAERT, Dale T. ***Human Rights Education Beyond Universalism and Relativism: A Relational Hermeneutic for Global Justice***. Palgrave Macmillian, 2015, p. 22.

38 Liberalism gives rights to an individual to fulfill his self-interest. Liberals maintains that rights are inherent in an individual. Communitarians have criticised the liberal concepts of rights on the basis that they consider individuals as unit for the distribution of resources. Every individual is deeply embedded in his own culture. Therefore, the attention should be paid to his identity connected to community, despite paying attention to individual. (SINGH, Minakshi. ***Human Rights: Liberal and Communitarian Perspectives***. IJRAR- International Journal of Research and Analytical Reviews, 2017. p. 174).

39 SHEERAN, Scott. RODLEY, Sir Nigel. ***Routledge Handbook of International Human Rights Law***. Routledge, 2014. p.142

In this aspect, the necessarily international interface of human rights in their deliberative and implementation sphere is clear, even though there is the cogent adoption of these rights in domestic constitutional mechanisms, as it is the case of the Brazilian Constitution, notably in its fifth article[40]. If, on the one hand, human rights as a wide-ranging international agenda reinforce their universality and relevance to humanity as a whole, on the other hand they reiterate the political aspect of implementation and challenges associated with the internal jurisdiction of each sovereign State.

In this same vein of a political nature, we can see the institutional development of regional systems of human rights protection through their own agreements and treaties, such as the American system and the American Convention on Human Rights, the Pact of San Jose of 1969, as well as specialized mechanisms for monitoring.

4.1. MORALIST THEORIES

Human Rights have a main semantic core that is based on the legitimacy of moral theorization, a reflection on the compromise that supports the interface between legality and an intrinsic sense of morality. Perelman's Moralist branch[41] sees these rights as grounded in the moral conscience of a people focused on an argument based strongly on the discourse and applicability of values, with a distinctly linguistic emphasis, where Perelman aims to establish an element of permanence and relevance through the rhetorical and discursive structure.

The rhetorical aspect advocates the power of adherence to these same values, as well as the continuity of their relevance. Later on, in the conclusion of this commentary, we will try to establish an interface between this element of consciousness of a people and its cultural framework in order to denote a common

40 BRASIL. **Constituição da República Federativa do Brasil.** 1988. Available in http://www.planalto.gov.br/ccivil_03/constituicao. Acess in: 05th oct.2020

41 PERELMAN, Chaim; OLBRECHTS-TYTECA, Lucie. **Tratado da Argumentação. A nova Retórica**. São Paulo Martins Fontes, 2005

feature of foundation through multiculturalism, in contrast to mere criticism through relativism.

Within the theoretical elaboration mobilized by the author, there is a tension between the abstract and the concrete, in the sense of foreseeing applicability in recurring situations, which incites a hierarchy of values, these hierarchies ground the "structure" of the values more than their own substance[42], in an interdependent structure. The crucial axis of Perelman's moralist theory makes use of a sense of conviction and perceptive importance towards an agenda of rights and guarantees based on core values. Now, the last perspective is elaborated upon the notion of social coexistence and a perception that emanates from this very coexistence. In this sense, it is possible to associate this reflection with the notion of meaning that is formed in the social realm and, therefore, the cultural life of a people, something that is typical of the communitarian view.

The discursive mechanism underlying the applicability and reasonableness of these values highlights the potential of their flexibility and how the discursive and linguistic framework interferes in the promotion of Human Rights. While considering Culture as the most extensive formative realm of doctrine itself as well as of social values for all intents and purposes, there is a strong point of intersection between this notion of argumentation and the relativism that is typical of the eminently culture-based critique of Human Rights. In a broad sense, the cultural emphasis elaborates an argument ultimately regarding rights as properly symbolic constructed sets of values, being equally cultural and linguistic products, without an immanent moral truth, but rather a socially variable sense of meaning representative of the culture and society that grounds them in a historical trajectory.

Part of this debate is also reinforced in the post-colonial political disputes and power balances that seek to question the Western legacy by questioning universalities according to the social reality and demands of each given country, community, and people:

42 PERELMAN, Chaim; OLBRECHTS-TYTECA, Lucie. **Tratado da Argumentação. A nova Retórica**. São Paulo Martins Fontes, 2005. p.90-92.

> Indeed, on a world scale the conflict between universalism and relativism might also be viewed as rooted in the power relationships that are the vestiges of colonialism. In both the cases, the problems are essentially those of power relationships; and as much as any contentions across culture or political ideology, reconciliation is essential to the resolution of the complex problems that compose the respective problematics in these cases.[43]

Because of this linguistic emphasis, Perelman's analysis, not surprisingly, rests on the vagueness of the referent, that is, the potentially open and imprecise character of the texts and of the normative framework of human rights, which, due to their open scope favor a plasticity of adherence and interpretation, but do not in return facilitate disputes at the level of hierarchical clashes over these same rights. Understanding the production of the norm as associated with discourse and being attentive to its analysis allows for equally valuable contributions when we admit that the norm, ultimately act as a "system" cohesive language[44]. On the other hand, the notion of vague contents and senses of meaning contribute to aspects of discretionary applicability by states, room for violations and an imprecise margin of domestic implementation:

> Toleration in this latter sense, occurs within conformity to universal objective principles of human rights whose vague formulation, within international charters of human rights, allows for states' self-determination as according to situational variation and implementation[45].

The core of the author's concern lies precisely in this ontology of the symbolic and its practical applicability.

4.2. THE DENIALIST THEORIES IN A CULTURAL EMPHASIS:

Human Rights denial equally holds a diversity of arguments that commonly fall into the notion of imprecision, vagueness and diffuse character about the effective notion of these same rights, given their open scope as well as prevalence

43 AL-DARAWEESH, Fuad, SNAUWAERT, Dale T. **Human Rights Education Beyond Universalism and Relativism: A Relational Hermeneutic for Global Justice**. Palgrave Macmillian, 2015. p.14.
44 GOODRICH, Peter. Language, **Discourse, Society. Legal Discourse; Studies in Linguistics, Rhetoric and Legal Analysis**. Palgrave Macmillan UK, 1987.
45 CORRADETTI, Claudio. **Relativism and Human Rights: A Theory of Pluralistic Universalism**. Springer, 2009. p.46

of a critique of universality for its alleged "imposition" upon others. A second branch, which covers recurrent disputes in the international arena in opposition to the liberal legacy that is based on the unity of the individual and the universality of rights, is structured at the level of a culturalist argument, which seeks to deconstruct the bases of these same rights into socially constructed values at a given historical and cultural point, and for this very reason, understand them as ultimately variable.

Due to the cultural diversity of peoples and their specific notions derived from language, symbolic universe and traditional practices, there is, equally, a variation of rights that opposes the possibility of a perfect uniform applicability as sought by the codification of Human Rights[46].

In fundamental terms, all relativism is based on the diversity of sense, the relationships underlying construction of meaning in the most basic ways of language and culture when linked to the production and practices of a people.

In result, this kind of argument extends to more diffuse topics such as values, dogma, beliefs, and the definition of rights and guarantees, including human rights. In this notion of variability lies therefore the questioning of universals as an ontological certainty.

In basic terms, the basis for relativism is ultimately allocated in the importance of cognitive and linguistic constructions, thus giving focus to the variable and therefore non-universal realities that represent the practical contexts of each community. This contextual emphasis that underpins all internal coherence of identities and value construction is a general premise in the argument for communitarianism, which takes this collective logic as a stratagem of validation and legitimacy, rather than favouring any metric or notion external and immediately applicable to it:

> There is a version of the notion of relativism that must be considered in order to understand the epistemological difficulties involved in the notion of cognitive and linguistic relativism. Some of its most renowned representatives are Lyotard, Malinowski, Wittgenstein, Kuhn, Whorf, Herskovits and generally all those who have been interpreted, rightly or wrongly, as proposing a notion of meaning, or an epistemic category, as

46 CORRADETTI, Claudio. **Relativism and Human Rights: A Theory of Pluralistic Universalism**. Springer, 2009. E DONNELY, Jack. **Cultural Relativism and Universal Human Rights.** Human Rights Quarterly. Vol. 6, No. 4. pp. 400-419. 1984.

> strictly determined by the non-universal conditions attached to the contextual practice of a community[47].

Briefly stated, the relativist perspective emphasizes the freedom of choice, discretion, and political destiny of specific peoples and cultures, in this sense placing the definition of rights and values in the spectrum of historically and culturally localized events and phenomena. The benefit of this perspective is the appreciation of discretionary choice as endogenous and voluntary, which do shine a light on criticisms of domination and imposition. However its negative spectrum are the open margins for instrumentalization and justification of violations in practices even already anachronistic in that same reality, based, for example, on historical conflicts, tradition, and appropriations:

> For Cultural Relativists, there is no universal moral doctrine, since morality is viewed as a relative social and historical phenomenon. From this relativist perspective, human rights are valid only in and for those cultures that established the discourse of rights (...)At the heart of relativism is the belief that human rights can impede the ability of some cultures to control their own destiny[48].

Precisely framed within this broad scope of relativist critique, the communitarian branch, in counterpoint to the liberal legacy, is distinguished precisely by a problem of metric and nature of the “general units” of human life, in this sense; of the "subjects" constitutive of identity and values. In the communitarian case, instead of the universalized autonomous individual, there is an emphasis on the community, the group and the collective as a constitutive and formulating unit, in this equally diverse according to the plurality of cultures themselves:

> Formulated at a sufficiently general level, however, one communitarian thesis that justifies the use of this label can be regarded as central. It states that the "context of justice" has to be a community that, in its historically evolved values, practices, and institutions-in its identity, in short-forms the normative horizons that are constitutive of the identity of its members and thus of the norms of justice[49].

47 CORRADETTI, Claudio. **Relativism and Human Rights: A Theory of Pluralistic Universalism**. Springer, 2009. p.5.
48 AL-DARAWEESH, Fuad, SNAUWAERT, Dale T. **Human Rights Education Beyond Universalism and Relativism: A Relational Hermeneutic for Global Justice**. Palgrave Macmillian, 2015. p.22.
49 FORST, Rainer. **Contexts of Justice Political Philosophy beyond Liberalism and Communitarianism**. University

Finally, the question of universality and relativistic concerns the practical face of applicability of these same rights to diverse realities and contexts.

There is no denying that, like every concept, there is a genealogy of ideas regarding the development of Human Rights and a historical trajectory of their implementation which do locate them in a time and space of human development, configuring them in one way or another, as products of their time with a margin for future development and updates. On the other hand, relativistic deconstruction should not favour plain fragmentation in itself, giving space for total dissidence of genuinely common and immanent traits of human beings as a species. There are even interfaces and correlations between cultures and between peoples in each of the other spheres of human existence, as well as analogous historical developments which shed light I drawing bridges, favouring human diversity without segregation and drawing contributions from a truly multicultural perspective guided by critical thought, and not mere destruction. Interestingly both relativistic criticism and universalism can be used for secondary political purposes, and even violations.

In this sense, there is a rich possibility of contribution from a multicultural and sociological perspective that is attentive to political realities and conjunctures, as well as to civilizational contributions to Human Rights, seeking to embrace an intrinsic respect for life and its diversities through the analysis of correlations, similarities, and adaptations, even at the linguistic and conceptual level. A reflection that benefits from being equally attentive to the similarities in common, and not only to the sometimes ephemeral differences, to the detriment of the implementation by inert canonical definitions, is pertinent. To deny the historical and cultural facet is to assume a risky axiomatic reliance on minimal, ideal types. In this procedural sense, there is the possibility of mutual enrichment through the interaction of diversities as implemented, precisely, by means of always keeping the possibility of open dialogue.

of California Press, 1994. p.2.

5. A ROMAN LESSON: FROM CICERO'S MIXED CONSTITUTIONS TO THE MIXED FOUNDATION OF HUMAN RIGHTS

A famous lesson is given by Cicero about the great difficulty of finding the best and most dexterous model to govern: the mixed constitution. In it, Cicero sees all the qualities of all the models emerge and, in return, avoids the appearance of the defects of each individually perceived model and thus gives life to the best possible model for humanity by maintaining a similar Aristotelian-Confucian balance of the middle ground among all the qualities.

On this point, the author's words are irreproachable:

> I speak thus of these three forms of government, not considering them disordered and in confusion, but in their normality; and yet each has all the defects I have indicated and many others, for they all drag to fatal precipices. After a tolerable king, and even worthy of love, as Cyrus was, for example, there appears, as if to legitimize his scruples, the tyrant Phalarides, an odious type, to which kings can too easily resemble; beside the wise aristocracy of Marseilles, there appears the oligarchic oppression, the fraction of the Thirty, in Athens; finally, without looking for new examples, didn't the absolute democracy of the Athenians see a crowd drunk with license and rage cause the ruin of this people?
> Almost always the worst government results from a confusion of aristocracy, factious tyranny of royal power and popular power, which sometimes brings out of these elements a State of a new kind; this is how States accomplish, in the midst of repeated vicissitudes, their wonderful transformations. The wise man has the obligation to study these periodic revolutions and to moderate the course of events with foresight and skill; this is the mission of a great citizen inspired by the gods. For my part, I believe that the best political form is a fourth constitution formed from the mixture and reunion of the first three.[50]

The reader might ask, however, what connection does Cicero's mixed constitutions have with the philosophical foundation of human rights? It's simple, under the corollary of the same structure of reasoning that Cicero used to promote the republic of Rome it is possible to raise the foundation of a structure of Human Rights that avoids, in practical terms, that the excesses of universalism become imperialism and the excesses of negationism pervert into the denial of Human Rights, just like the millennial struggle between positivism and naturalism. Thus we

50 CÍCERO, Marco Túlio. **Da República** / Marco Túlio Cícero; translated by Amador Cisneiros – 2nd. Ed. – São Paulo: EDIPRO, 2011. p. 32. Free translation.

find concentric circles that lead to the evolution of the ratio essendi of Human Rights, without which, it must be warned, all the previous currents, if interpreted in isolation and in reductio ad absurdum, could lead to anti-human rights shields such as, for example, the positivism that does not recognize non-positivist Human Rights.

Following Cicero's previous statement that "the wise man is bound to study these periodic revolutions and to moderate with foresight and skill the course of events",[51] the lesson from history is irrefutable that the currents already worked on in this article, whenever favourable to Human Rights violators, were interpreted to the extreme of their logical line as to simply deny Human Rights, such as the radical universalism that disregards cultural particularities in the world making Eurocentric or strictly Western Human Rights in diverse cultures such as the indigenous, Asian or African ones, or even the questionable choice to restrict the concept of genocide practiced by notable North American and Soviet influences so that the violations of the rights of the African-American people in the United States of America and the gulag in the Soviet Union turn against them to briefly cite just a few examples.

In addition to the divergences between schools of thought and extreme opinions, such as those that deny the very hypothesis of the foundation of human rights, since "first, however, it must be mentioned that, for some, the foundation of human rights is impossible or even dangerous "[52], one must know that "the search for the foundation for the recognition of human rights is of capital importance when it is motivated by the existence of doubts or contestations "[53]. Without this foundation, the not-so-distant historical examples of our generation can invigorate the pages of the history books with new events of atrocities, mockery, misdeeds and cruelties under the constant attack of the lack of foundation of human rights or, else, abusive interpretations of the currents that support them.

Therefore, before entering exclusively into the field of Human Rights, this work considers that International Law faces a greater difficulty in legitimizing international norms when they are under litigation given that in the international

51 CÍCERO, Marco Túlio. **Da República...** *op. Cit.* p. 32.
52 RAMOS, André de Carvalho. **Teoria geral dos direitos humanos na ordem internacional** / André de Carvalho Ramos. – 6th ed. – São Paulo: Saraiva, 2016. P. 51.
53 RAMOS, André de Carvalho. **Teoria geral dos direitos humanos na ordem internacional...** *op. Cit.* p. 52.

environment, questions of policy are much more solid and palpable than those that exist - because they do exist! - in domestic law, but this does not mean that the controversy will imply non-existence when international law itself is greater than just the jurisdictional application of it in the International Courts, and thus understands that "an international society where non-compliance with international law is normal would be a world where the life of humanity would be simply impossible "[54], resignifying repeated myths (mainly by the emergence of a dictatorial culture such as Latin American militarisms) and recognizing, consequently, that "most acts conducted by state organs certainly coincide with international law "[55], i.e:

> [...] international law certainly controls a state's power, either directly or indirectly, in various ways and to varying extent. The form and degree of such control vary according to a number of factors, and must be analyzed on an empirical basis. International law sometimes fails to control state power, but it continues to function as legal norms fulfilling various social functions as law does. Simply arguing that international law may or may not control the power of states is overly simplistic theoretically and futile in practice. A qualified and nuanced deliberation must be sought in concrete fields such as human rights, the environment, trade, and security.[56]

Thus, International Law presents its normative force in different ways, just like Human Rights themselves, whose imperfections in defense do not imply the mere absence of foundations or, furthermore, do not justify demagogic hermeneutical bending that, in the end, serves the absolute negative. But, in a diametrically opposite way, these imperfections serve to make us understand the very existence of Human Rights, since "the global hegemony of human rights as a language of human dignity is today incontestable "[57] , and, of course, to understand their deficiencies, fixing correct questions about the imperfections that demand hard work from all of us, since:

54 Yasuaki, ONUMA. **Direito internacional em perspectiva transcivilizacional: questionamento da estrutura cognitiva predominante no emergente mundo multipolar e multicivilizacional do século XXI** / ONUMA Yasuaki; translated by: Jardel Gonçalves Anjos Ferreira [et al.] – Belo Horizonte: Arraes, 2017. P. 60.
55 Yasuaki, ONUMA. **Direito internacional em perspectiva transcivilizacional: questionamento da estrutura cognitiva predominante no emergente mundo multipolar e multicivilizacional do século XXI...** *op. Cit.* P. 66.
56 Idem. P. 69.
57 SANTOS, Boaventura Sousa, 1940- **Se Deus fosse um activista de direitos humanos.** Coimbra: Edições Almedinas S.A., 2014. P. 13.

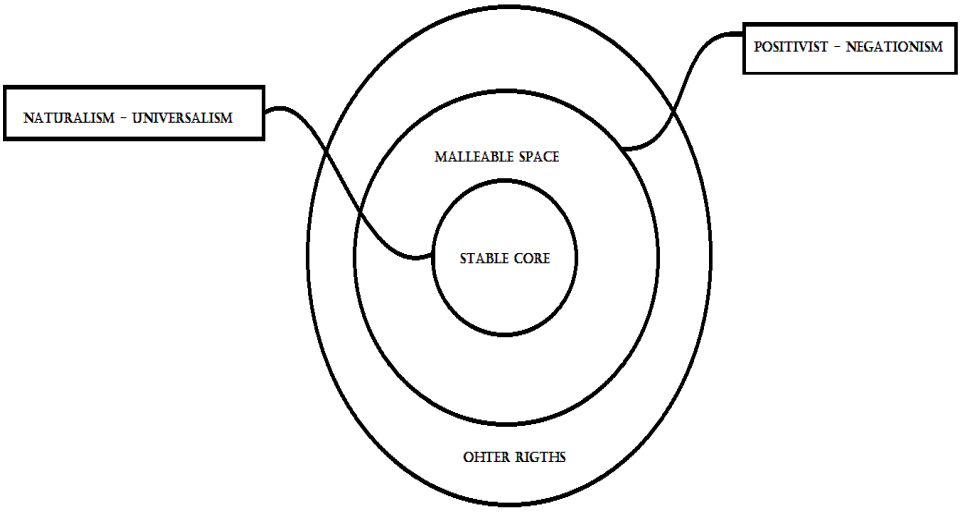
> However, this hegemony coexists with a disturbing reality. The vast majority of the world's population is not the subject of human rights. They are the object of human rights discourses. We must begin, then, by asking whether human rights effectively serve the struggle of the excluded, the exploited, and the discriminated, or whether, on the contrary, they make it more difficult. [...] Since human rights are the hegemonic language of human dignity, they are inescapable, and oppressed groups cannot help but ask whether human rights, even if they are part of the same hegemony that consolidates and legitimates their oppression, might not be used to subvert it?[58]

To answer precisely these questions and inspired by Cicero's lesson, this section presents a proposal for a multiple foundation of human rights, thus structuring a space of minimum incidence of protection against the deviations and interpretative schizophrenias of despots, as well as a space of fluctuation able to understand and allow a multicultural convergence of a global world that imprints more than just the Judeo-Christian and Greco-Roman Western culture, drawing, with this, concentric circles accommodating the theoretical accuracy of the foundations and excluding their inherent defects of misrepresentation by the concomitant existence of other currents as a control of excesses.

Based on this premise, human rights are based on four currents: positivism-naturalism and universalism-negationism. In the rigid or fixed core, that is, a field of immutability, there is a group of Human Rights marked by the minimum protection common to all societies, such as, for example, life, and which is founded, concomitantly, by jusnaturalism and universalism; while in another space, external to the fixed core, there is a malleable field - but still inherent to Human Rights - which is marked by the existence of a group of variable rights, changeable and equatable to the various existing cultural pluralities, and therefore supported by positivism-negationism.

58 SANTOS, Boaventura Sousa, 1940- If God were a human rights activist... op. Cit. P. 13.
In this sense, by the way, one of the authors of the present article has already had the opportunity to criticize mistaken interpretations of rights made by International Courts as in the case of indigenous people, pointing out: "the defense of Indigenous Rights in the international sphere reclaims a re-reading from the concepts, thoughts and social construction of the indigenous themselves and not a Eurocentric creation imposed uncritically when, in the end, judgments of the aforementioned International Courts ignore other aspects such as the scope of the indigenous sacred applying to them the same rules of the Western patrimonialist context, so that it is not the States that are able to lead the indigenous peoples, but they themselves. " (DITÃO, Ygor Pierry Piemonte; MARCELLO, Karen. From the Salamanca School to the Threshold of the 21st Century - the difficult mission of protecting indigenous rights. Revista da Faculdade de Direito da Universidade de São Paulo, vol. 114, 735-761, ISSN 2318-823, 2019. P. 758, free translation).

It can even be illustrated as follows:



In short, Human Rights are understood from two perspectives: (i) formality (what defines that right as a Human Right?) and (ii) materiality (what is the semiotics of that Human Right?). In the first perspective (of formality), the questioning concerns the origin and qualification of this right as a Human Right (what are the requirements to frame it as a Human Right: naturalism-universalism), while in the second perspective (of materiality), the questioning concerns the legitimacy of the semiotics of the concept of Human Right that integrates its lexical variable (what are the values that are included in the legal goods it protects: positivism-negationism), thus applying a Confucian-Aristotelian balance that comprises the correctness of the theoretical claims of both currents within a predetermined argumentation space. [59]

59 Do not confuse the present theorization with that made by Professor Virgílio Afonsa da Silva on the theory of absolute essential content and relative essential content, since, besides dealing with the pyramidal optics of the Kelsian theory, that is, with a theory that finds a coercive force capable of imposing, within its territory, the fulfilment of the constitutional legal order (which does not exist in the state models in the international environment), it deals with an antinomic perspective of the two theories denying each other reciprocally, where, on one side we have that "all versions of the theories that defend the existence of an absolute essential content have in common the idea that, if it were possible to graphically represent the scope of protection of fundamental rights, there should exist a core, whose external limits would form an insurmountable barrier, regardless of the situation and the interests that might eventually exist in its restriction", while, on the other hand, we have "the central point of all relative theories consists in the rejection of an essential content as a scope of fixed and definable contours a priori for each fundamental right. According to the supporters of a relative essential content, the definition of what is essential - and, therefore, to be protected - depends on the factual situations

Thus, the three circles mark, respectively, the axiological degrees of the legal goods protected by the international legal system, thus fixing, in the first internal layer, the fixed immutable core, a range of rights common to all mankind - understood beyond the Western culture - including Western, Islamic, African and Asian values, since, even if we know "that there have always been conflicts and fights between these universal religions and local cultures or religions in the process of universalization "[60], there is no doubt that, even in strongly opposed creeds such as Islam and Christianity, there are groups of legal goods that are equally protected by both, such as, for example, the famous Jewish-Christian Ten Commandments:

> Then God spoke all these words, [...] honor thy father and thy mother, that thy days may be long in the land which the LORD thy God giveth thee. Thou shalt not kill. Thou shalt not commit adultery. Thou shalt not steal. Thou shalt not bear false witness against thy neighbor. Thou shalt not covet thy neighbor's house. Thou shalt not covet thy neighbor's wife, nor his manservant, nor his maidservant, nor his ox, nor his ass, nor any thing that is thy neighbor's.[61]

Similar opinions can be found in the Islamic sacred text as well:

> Come, I will recite what your Lord has forbidden you: associate nothing with Him. And have kindness to parents. And do not kill your children for fear of poverty: We provide for you, and for them. And come not near obscenities, apparent and latent. And do not kill the soul, which Allah has forbidden to kill, except with just cause. This is what He recommends to you, that you may be reasonable. "And come not near the riches of the orphan, except in the best manner, until he attains his full strength. And complete the measure and the weight with equity. We impose on no soul but that which is of his ability. And when you speak, be just, even if it is a relative. And be true to the covenant of Allah. This is what He recommends for you to meditate upon. "And surely this is My straight path: then follow it, and follow not the other paths, for they would separate you from His way. This is what He recommends to you, that you may be godly.[62]

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and the collisions between several interests in the concrete case" (SILVA, Virgílio Afonso da. Fundamental Rights: essential content, restrictions and effectiveness / Virgílio Afonso da Silva - 2nd ed. - São Paulo: Malheiros Editores, 2014. p. 187 and 196, free translation).

60 Yasuaki, ONUMA. **Direito internacional em perspectiva transcivilizacional: questionamento da estrutura cognitiva predominante no emergente mundo multipolar e multicivilizacional do século XXI...** *op. Cit.* P. 249.

61 A Bíblia Sagrada. Translated to portuguese by João Ferreira de Almeida. 2nd ed. – Barueri – SP: Sociedade Bíblica do Brasil, 1999. P. 70, free translation.

62 Alcorão Sagrado. Translated by Samir El Hayek. Foz do Iguaçu – PR: Centro Cultural Beneficiente Árabe Islâmico de Foz do Iguaçu, 1994. – available on: http://www.ebooksbrasil.org/adobeebook/alcorao.pdf –Access in: 29.11.2020. P. 166.

The situation, by the way, is very clear, even in the philosophical dimensions, when - already cited indirectly in this text - one sees the Aristotelian-Confucian equity, to which, in the embryo of Western culture, Aristotle imprinted the understanding that "virtue is the middle ground [...] a middle ground between two vices "[63] and, in the Asian culture, Confucius brought identical values when he said that "both he who passes the goal and he who does not reach it does not reach the goal "[64]. Thus, both religious and philosophical experience materialize the existence of an essential universal lexicon of common values, such as the understanding that there is a group of legal goods that "belong to the law of nature, that to which man naturally inclines, and in this is included that which is proper to man, inclining to act according to reason[65]. The stable core is, therefore, formed by the concomitant existence of legal goods that are equally and universally protected by all contemporary cultures in the world, such as, for example, physical safety, life, honor, family, conscience and other values whose contribution, study and statistical survey may provide more accurate configuration parameters beyond the examples already mentioned here.

At this point, that is, at the core, the legitimacy mark is based only on universal and natural primates, that is, on what is common to all humanity[66] (from the most primitive tribes to the most technological culture), and conceived from reason, that is, according to the Kantian premise of rationalism. It is formed by a group of legal goods "that does not depend on experience and sense impressions [...] called a priori "[67], because in this group of rights that form the fixed nucleus "reason alone is

63 ARISTÓTELES, **Ética a Nicômaco** / Aristóteles. Tradução Torrieri. – 5th ed. – São Paulo: Martin Claret, 2011. p. 50.
64 CONFÚCIO, 551-476 a. C. **Os analectos** / Confúcio, tradução do inglês de Caroline Chaung; tradução do chinês, introdução e notas de D. C. Lau; - Porto Alegre, RS: L&PM, 2012. P. 111.
65 AQUINO, Santo Tomás de. **Suma teológica** / Santo Tomás de Aquino; tradução de Alexandre Correia – Disponível em: https://sumateologica.files.wordpress.com/2017/04/suma-teolc3b3gica.pdf -- Acesso em: 29.11.2020. P. 1.531.
66 Here it is convenient to quote the historical example of the !Kung, a group of "hunter-gatherers who live in the Calaari Desert between the countries of Angola, Namibia, and Botswana. [...] In the dry months, the most social period of the groups begins: three or four of them gather around a point with permanent water and there is intense exchange of gifts (no trade, not even barter), exchange of experiences with stories told from side to side, elaboration or tightening of alliances and activities that lead to the formation of new pairs. (emphasis added). PINSKY, Jaime. As primeiras civilizações. 25th. Ed - São Paulo: Contexto, 2018. p. 34 and 36, free tanslation by the author.
67 KANT, Immanuel, 1724-1804. **Crítica da razão pura /** Immanuel Kant; translated by Lucimar A. Coghi Anselmi, Fulvio Lubisco. – São Paulo: Martin Claret, 2009. P. 13.

capable of establishing secure rules and of supplying what is lacking in rules that were not secure, inserting its exceptions".[68]

However, as the fierce opponents of jusnaturalism and universalism have already stated, it is necessary, concomitantly to the fixed nucleus, to open a field of space for the undecipherable and contemporary, whose mutabilities, ever more rapid, forge an ever more frightening field of unpredictability and open a margin for negationist theories such as the historical revisions of new and new human rights, a field marked by sedimented days and, according to Bauman,[69] of uncontrollable fluidity:

> From the Second World War there is a rupture with the previous system and a readjustment of the State to the international society, which will seek, in joint discussion forums, answers to their problems, as well as new basic principles are established that will guide, from then on, international relations. All these previously described factors were enhanced by the unleashing of the globalization process, which represented the expanded conjunction of these elements with others of a political, technological, scientific, cultural, and economic nature. In a historical coincidence that constitutes, in this panorama, the contemporary international society.[70]

"It is in this context that a series of transformations in international society emerge, facilitated by this amplification of the channels of communication between states "[71], reconfiguring the political real once fixed only of the prefixes and suffixes of force, but which, today, in the permeability of the crusading powers, is incapable of having a Roman renaissance. Thus, the values of those who were once merely subjugated come to be considered, and with that, a dialogue that was once nonexistent is allowed. It is in this field of dialogue that the construction of a

68 LEIBNIZ, Gottfried Wilhelm. **Novo ensaios sobre o entendimento humano** / Gottfried Wilhelm Leibniz; translated Luiz João Baraúna. – São Paulo: Editora Nova Cultural, 1996. P. 24.

69 One must understand that, "in the world we inhabit, distance does not seem to matter" (BAUMAN, Zygmunt, 1925- Globalization: the human consequences / Zygmunt Bauman; translation, Marcus Penchel. - Rio de Janeiro: Zahar, 1999. p. 85), because "as for power, it sails away from the street and the market, from assemblies and parliaments, from local and national governments, beyond the reach of citizens' control, to the extraterritoriality of electronic networks" (BAUMAN, Zygmunt, 1925- Liquid Modernity / Zygmunt Bauman, translation Plínio Dentzien - Rio de Janeiro: Zahar, 2001. p. 54), so that "at the same time, the new and undefined game of metapower cannot be played alone, much less according to the rules of the old game of the nation-state." (BECK, Ulrich, 1944-2015. The metamorphosis of the world: new concepts for a new reality / Ulrich Beck, translation Maria Luiza X. de A. Borges, technical revision Maria Claudia Coelho. - 1. ed. - Rio de Janeiro: Zahar, 2018. p. 196, free translation).

70 MENEZES, Wagner. **Ordem global e transnormatividade.** Ijuí: Ed. Unijuí, 2005. P. 117

71 MENEZES, Wagner. **Tribunais internacionais: jurisdição e competência.** – São Paulo: Saraiva, 2013. P. 85.

malleable space of Human Rights will emerge that allows the peaceful coexistence of antagonistic values such as the polytheism of some beliefs and the monotheism of others; the perception of private and collective property; social or liberal values; and so on.

It is in this space, for example, that one will find positivism on one side and the cultural matrix of negationism, on the other. It is in this space, for example, that positivism on the one hand and cultural negationism on the other will be found, for in this way a lexicon is given for the construction of a varied range of human rights graded from regional to local, allowing, illustratively, the creation of a group of human rights of the European Community, of Mercosul, of Africa, Asia and Oceania, as well as sub-numerations of local human rights that, in all these cases, would not empty the fundamental matrix of the hard core and that, finally, will be stated to norm according to the rules of each place or region and materialized on the basis of the cultural values existing there.

In this second space - that is, in the flexible space - the most adequate metaphor is that of word morphology: the fixed core would become the radical of the word while, in the malleable space, there would be suffixes and prefixes that could connect to a radical to build new words, thus allowing a minimum maintenance of conceptual intelligence because the fixed core (radical) will be "the element that contains the basic meaning "[72] of Human Rights or, better yet, while the malleable space will allow for the concomitant existence of a group of Human Rights that keep the same base of meaning[73] but encompass cultural, temporal, and spatial matrixes such as the African, Asian, or even Latin American axiological pillars, as Wagner Menezes has pointed out:

> It is possible, therefore, to concretely visualize a Latin American International Law, constituted by a set of institutions, customs, principles, rules and norms that must be rescued and cultivated by its actors from the roots of its history, not from the point of view of systematic or doctrinal

72 MARTINO, Agnaldo. **Português esquematizado: gramática, interpretação de texto, redação oficial discursiva** / Agnaldo Martino. – 2nd Ed. – São Paulo: Saraiva, 2013. P. 64.
73 CUNHA, Celso. 1917-1989. **Gramática do português contemporâneo** / Celso Cunha & Lindley Cintra. – 6th Ed. – Rio de Janeiro: Lexikon, 2013. P. 92.

> sectarianism, but conformed and inserted in the normative framework of International Law.[74]

With this, Human Rights find a more rightful and effective way of being protected, weeding out the weeds of human limitations that exist in all isolated theories. Like Cicero's Mixed Constitution, we also find here a middle ground capable of optimizing the struggle - because no theory is perfect! - recognizing, in the end, the need to provide better mechanisms to control nationalist excesses (so in vogue today). This paper understands that the role of the philosophical foundation of Human Rights must embody "one of the most important modern means of seeking the spiritual and material welfare of mankind "[75] and not just another brilliant abstract theory that is impractical in reality (like many works around the world).

It is enough to remember that, before the UN Declaration of Human Rights of 1948, there already existed reasonable tools to control despots and tyrannies, such as, for example:

> Martens Clause - a provision included in many IHL treaties since 1899 that provides general protection to both civilians and combatants. In Martens cases it states verbatim: In cases not provided for in the written provisions of international law, civilians and combatants shall be under the protection and the rule of the principles of the law of nations, derived from established custom, the principles of humanity, and the dictates of public conscience.[76]

However, it did not prevent the Armenian genocide, the Holocaust, or the Gulag. Therefore, the understanding that there is a "hard core of the whole process of positivization of human rights "[77] and, consequently, "it has 'a greater evaluative intensity of a fundamental core that would be untouchable' is necessary. Therefore, the 'heart of Law', which cannot be affected and consists in the dignity of the human

74 MENEZES, Wagner. **A contribuição da América Latina para o Direito Internacional: o princípio da solidariedade** / Wagner Menezes. – Programa de Pós-graduação em Integração da América Latina (PROLAM) da Universidade de São Paulo (USP) – PhD thesis – São Paulo, 2007. 238.
75 Yasuaki, ONUMA. **Direito internacional em perspectiva transcivilizacional: questionamento da estrutura cognitiva predominante no emergente mundo multipolar e multicivilizacional do século XXI...** *op. Cit.* P 241.
76 COMITE INTERNACIONAL GENEVE (CICV) – **Exploremos o Direito Humanitário – CICV 2006. –** Disponível em: https://www.icrc.org/en/doc/what-we-do/building-respect-ihl/education-outreach/ehl/ehl-other-language-versions/ehl-portuguese-glossary.pdf – Acess in: 02.12.2020. P. 03.
77 LAFER, Celso. **Direitos humanos: um percurso no Direito no século XXI, 1** / Celso Lafer. – São Paulo: Atlas, 2015. P. 211.

person "[78], allows the creation of a barrier such as *erga omnes* norms and *jus cogens* in International Law that confront nefarious strategies of despotic sovereigns.

The fixed nucleus, therefore, makes unequivocal the assertion that "the consolidation of the concept of imperative norms of general international law and its acceptance is becoming irreversible "[79] and that "the new international law is based on the protection of human rights in all its forms [...] human rights permeate relations of all kinds and must be preserved at all costs, raising them generically to the category of *jus cogens* "[80].

It should also be understood that "we need new ways of seeing the world, of being in the world, of imagining and doing politics "[81], and that the malleable space allows for the conformation of the doctrinal lesson that "this recognition of the mutability of any culture, religion and other ideas or belief systems including the notion of human rights, is very important for understanding the human rights situation in the twenty-first century world" and thus understanding that "for human rights to take root in nations with different political, economic, social, or religious systems, they must be accepted by people living under those systems in each nation.[82]

In the end, it must be consigned that history has always shown the recognition of the foundation of Human Rights as inherent to the human being (stable core) and has demonstrated this ever more bravely when violated as, inclusively, were the cases before the Nuremberg and Tokyo Tribunals, recognizing them clearly and unquestionably. He also recognized the need to balance this fixed dimension with the cultural aspects of each place or time (malleable space) to avoid, mainly, cultural imperialism and, furthermore, theoretical misrepresentation.

78 LAFER, Celso. **Direitos humanos: um percurso no Direito no século XXI, 1...** *op. Cit.* P. 240.
79 CASELLA, Paulo Borba. **Fundamentos do Direito Internacional pós-moderno** / Paulo Borba Casella. – São Paulo: Quartier Latin, 2008. p. 771.
80 FINKELSTEIN, Cláudio. **Hierarquia das normas de direito internacional: *jus cogens* e metaconstitucionalismo** / Cláudio Finkelstein. – São Paulo: Saraiva, 2013. P. 309 e 312.
81 BECK, Ulrich. 1944 – 2015. **A metamorfose do mundo: novos conceitos para uma nova realidade** / Ulrich Beck; tradução Maria Luiz X. de A. Borges; revisão técnica Maria Claudia Coelho. – 1st. Ed. _ Rio de Janeiro: Zahar, 2018. P. 234.
82 Yasuaki, ONUMA. **Direito internacional em perspectiva transcivilizacional: questionamento da estrutura cognitiva predominante no emergente mundo multipolar e multicivilizacional do século XXI...** *op. Cit.* p. 300 e 297.

6. FINAL CONSIDERATIONS:

It is impossible to reach a definitive conclusion. Considering, most probably, more the Socratic aspect of thought and that "ideas, only ideas, can illuminate the darkness "[83], the present work - understanding the somber dimension of national and international questionings about the validity, legitimacy and strength of Human Rights - has performed the arduous lesson of overcoming the theoretical clashes existing behind the existing philosophical foundations on the delicate, valuable and important subject that is promoting Human Rights.

As was necessary to the mission of this book, the work presented, at first, the most known fundamental bases about Human Rights as jusnaturalism, positivism, moralism and negationism to, then, embracing them all, recreate – such as Aracne[84] did - the web of the functioning sets of the protection of Human Rights, converging all the great theses that support it without, by doing so, leading to incoherence. To do so, as is logical, it needed to specify an exact delimitation of incidence, that is, it presented concentric circles in which, in a gradation, it went from the fixed nucleus (smaller), in which exists the fundamental radical of Human Rights as the duty of protection to life, physical integrity and subsistence to a malleable space (larger), where the conceptual variations (affixes) of Human Rights are drawn according to the values, the place, the time, and all the legitimate variables that may influence the interpretation of the content of Human Rights as individual/collective property or free market economy and social welfare.

In the fixed nucleus, universal jusnaturalism was adopted as a foundation, and in the malleable space, what we can call cultural positivism, that is, the convergence of positivism and negationism of cultural matrix, so that, like Cicero, the clashes of the various forms of constitution (monarchy, aristocracy and democracy) would coexist in a single environment (mixed constitutions) removing the imperfections of each one (tyranny, oligarchy and populism). In other words: the separation of the

83 MISES, Ludwig von. **As seis lições sobre política econômica para hoje e amanhã** / Ludwig von Mises. Trad. Maria Luiza X. de A. Borges. – 8th ed. – São Paulo: LVM, 2017. p. 213.
84 "Virgin skilled in spinning, transformed into a spider by Minerva for daring to compete with her" (BULFINCH, Thomas, 1796-1867. **O livro da mitologia: A Idade da Fábula.** Tradução Luciano Alves Meira. – 1st. Ed. – São Paulo: Martin Claret, 2013. p. 550).

groups allows the coexistence of a universalism without making it imperialist and a negationism without removing the minimum existence of a Human Rights content, as well as the concomitant existence of a jusnaturalism and positivism allows the protection of a juridical security, but avoids that the simple positivism allows, as Hitler did, the quixotic legitimization of the form.

Few answers seem so clear. However, when a certain way is not feasible, the middle ground always proves to be the most prudent. Putting plebs and patricians in the same constitution gave long life to Rome; why shouldn't it give long life to the eternal struggle for the protection of Human Rights? And so there remains the certainty that "in all things the middle ground is worthy to be praised. "[85]

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85 ARISTÓTELES, **Ética a Nicômaco** / Aristóteles. Tradução Torrieri. – 5ª ed. – São Paulo: Martin Claret, 2011. P. 51.

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