pensar
Revista de Ciências Jurídicas
e-ISSN:2317-2150
10.5020/2317-2150.2021.11403

The protection of Human Rights norms without State coercion

A proteção das normas de Direitos Humanos sem a coerção do Estado

Fredys Orlando Sorto[*]
Gilvânklim Marques de Lima[**]

Abstract

The present study, divided intofour chapters, aims to investigate the legal nature of Human Rights norms whose implementation is not immediately supported by state coercion. As to the research problem, the legal nature and purpose of Human Rights norms that have such characteristics are questioned. The initial hypothesis is centered on the assertion that Human Rights norms not supportedbystate coercive protection have the nature of legal promises only and are intended to cushion conflicts within society, keeping the unassisted groups in a state of inertia, onthe expectation that, in the future, they will be beneficiaries of what is only promised to them at the moment. The research was guided by the application of the method of deductive approach, initially investigating the general concepts of what we call Law in the strict sense, using mainly the studies of Derrida, Douzinas, Kelsen and Hart, which support that there is no lawunless it is supported by state coercive force.

Keywords: Law. Coercion. State. Promises.

Resumo

A presente pesquisa, dividida em quatro capítulos, tem como objetivo investigar a natureza jurídica das normas de Direitos Humanos cuja concretização não é respaldada, de imediato, pela coerção estatal. Como problema de pesquisa, questiona-se a natureza jurídica e a finalidade das normas de Direitos Humanos que possuem tal característica. A hipótese inicial centra-se na afirmação de que as normas de Direitos Humanos que não são providas da proteção coercitiva pelo Estado, possuem natureza de promessas jurídicas e se destinam a amortecer conflitos sociais, mantendo os grupos desassistidos em situação de inércia. Esses grupos ficam na expectativa de que, no futuro, eles serão beneficiários do que, no momento, apenas lhes é prometido. A pesquisa foi norteada pela aplicação do método de abordagem dedutivo, tendo-se investigado, inicialmente, os conceitos gerais do que se denomina Direito em sentido estrito, valendo-se, principalmente, dos estudos de Derrida, Douzinas, Kelsen e Hart, que sustentam não existir Direito que não seja provido da força coercitiva estatal.

Palavras-chave: *Direito. Coerção. Estado. Promessas.*

Introduction

To start with, it is worth mentioning that the concept of Declaration, or Catalog of Rights may have different meanings and reach, depending on itsfield of application and the legal body to which it is subject.In international Public Law (human rights), a declaration is a non-binding legal instrument; therefore, it is not illegal for the State to disrespect it. In such case, the most exhaustiveexample is that of the Universal Declaration of Human Rights, dating back to 1948.

Just like the Universal Declaration of Human Rights,there are declarations of domestic law[1]withno binding force. However, declarations of rights that have a binding forcedo exist such are the norms that address human rights and citizenship (fundamental rights). These are constitutional dignity norms related to political and social civil rights. A classic example of such type of Declaration (1791) is the United States Bill of Rights, which – as a matter of fact – is the text containing the first ten amendments to the US Constitution. In Brazil's 1988 Federal Constitution, such rights are concentrated, mostly, in articles 5 and 6, under the title *Fundamental Rights and Guarantees.* Such constitutional declarations are binding, although they are hard for the State to carry out, because they depend on

[*] Doutor em Ciência Política e Mestre em Direito Internacional Público pela Universidade de São Paulo (USP). Professor titular de Direito Internacional Público da Universidade Federal da Paraíba (UFPB). E-mail: sortofredys@hotmail.com

[**] Doutor e Mestre em Ciências Jurídicas pela Universidade Federal da Paraíba (UFPB). Juiz Federal. Email:gilvanklim@gmail.com

[1] Virginia Declaration of Rights (1776), the US Declaration of Independence (1776), Declaration of the Rights of Man and of the Citizen (1789).

the existence of public funding, which is usually scarce. The criticism of this paper is addressed, mainly, to such verbose constitutional declarations, which make a great deal of promises on paper but lack effectiveness in real life.

Therefore, the existence of rights of uncertain implementationthat have no legal instruments capable ofinsuring their effectiveness is stunning, since they do not meet the paradigm of rights that can be imposed by force.

The legal norms that have no instrument capable of coercively insuring their intended materialization are, mostly, the Human Rights norms. For this reason, Human Rights have been object of criticism: because they are not totally effective they are deemed fallacious.

However, even the lack of effectiveness of some norms has a purpose, which must be investigated because if they are not part of what is called Law in the strict sense – which can be imposed by force – they represent promises directed to specific groups in society.

The objective of our study is to investigate the legal nature of the Human Rights norms that cannot be implemented by coercive imposition of the State.

The problem is put in the following terms: What is the legal nature and the purpose of Human Rights norms not supported by State coercive protection to insure their implementation? The initial hypothesis is that Human Rights norms not provided for by State coercive protection are legal promises by nature and are meant to cushion conflicts in society, keeping the unassisted groups in a situation of inertia, expecting thatthey will eventually benefit from what is just a promise at the moment.

This study was guided by the application of the method of deductive approach; at first, we investigated the general concepts of what is called Law in the strict sense, mainly relying on the works of Derrida, Douzinas, Kelsen and Hart, who supportthere is no Law unless it is supported by statecoercive force. For this reason, it was necessary to investigate whether the Human Rights norms, which are not mandatorily implemented, are part of the Law in the strict sense.

This work is divided into four chapters: chapter oneintroducesa differentiation between Law in the strict sense and legal promises; in chapter two we analyze how Human Rights norms move between Law in the strict sense and legal promises; in chapter three we examine the individualistic aspect of Human Rights, we do an evaluation of the correlation between legal promises and Human Rights declarations, andwe analyze Human Rights that intend to be “universal”. Finally, chapter fouris about the social role of Law and legal promises, with a focus on the Human Rights rules.

1 The difference between Law in the strict sense and legal promises

Law and the capacity to impose its rules by means of coercion are inseparable. Derrida (1994, p. 22 and 58) sustains that Law and force are indissociable,and that violence is present in the moments offoundation and conservation of the legal order. According to Derrida, the founding violenceinstitutes and positions law, while the conserving violence is responsible for maintaining, conforming and insuring the permanence and enforceability of the law.

To Kelsen (1998, p. 36, 60 and 71), Law is a coercive order, whose coercive acts are ascribedto the legal community, in such a way that, without coercion there is no Law. To Kelsen, the distinction between Moral and Law is found in the possibility of using physical power to impose the enforceability of the legal norms, which does not occur when we are dealing with moral rules alone.

When Law is uncapable of coercively imposing the enforceability of its rules, it becomes evidentthat this legal order is facing a crisis and is tobe substituted by another one that can be imposed by force.

As Derrida (1994, p. 64) puts it, the State fears the founding violence, because it comes into operation when conserving violence loses the conditions of insuring the enforceability of legal norms.Therefore, it may be said that violence, in the sense of imposing force, will always be present when it comes to Law in the strict sense. The incapacity of conservation is replaced by the founding violence, which implies the construction of a new legal order capable of regulating the conducts of individuals and persists as long as it can justify and impose itself coercively.

Once this item is settled – that is, that Law must be able to impose itself by force in case its rules are not respected – we may differentiate legal rule, subject ofthe Law, and legal promise, subject of the interests of dominant groups in society, with the aim of cushioning social conflicts without resorting to force, thus using ideological control.

Legal promises lie on the threshold between Moral and Law. They are not connected to Moral, since it is stated through juridical language and seeks justification and support in the State’s legal order. However, because it cannot impose itself by force, it cannot be considered Law in the strict sense.

Legal promises play an important role in the maintenance of social order. Although legal promises cannot resort to force if they are not implemented by the State, they foster a feeling in society that they are insured, cushioning the social conflicts deriving from unequal access to specific legal goods, such as property, for example.

Douzinas (2009, p. 165 and 240) criticizes the proclamation of rights unaccompanied by the capacity of implementation. According to Douzinas, there is no use in insuring the "[...] abstractrighttolifeortofree speech and press to the victims of famine and war or to people who cannot read through lack of education facilities". Further on, Douzinas states that having a right in the abstract if the necessary resources for its materialization are not available "does not mean much".

However, the primary purpose of what is called legal promise and is named "abstract right" by Douzinas is to cast a shadow on the disparities of the enjoyment of legal goods. Such promises, in the field of implementation, are intended to only mean a declaration of good intentions. This is why such "rights", stated in the form of legal promises, take on a form of negative liberty, in an attempt to safeguard the interests of those who already possessthe legal goods mentioned by him.

Article 6 of the 1988 Brazilian Constitution is an example of legal promises with no possibility of effective implementation. The Constitution insures the following social rights: education, healthcare, food, work, housing, transport, leisure, security, social security, protection to mothers and children and assistance to destitutes. In the social reality of Brazil, such "rights" are very distant from the daily life of a big part of the population.

A right becomes a promise intended for future implementation, depending on the financial resources available that can support it, which produces in the intended beneficiaries the discourse that they have rights they willenjoyin the due time; for this reason, they must respect the space of those who already enjoy said rights, which represents a negative conduct, not to interfere with the legal orbit of those who have managed to enjoy such "rights".

As we already know, legal promises are not a product of the inefficacy of the legal order. On the contrary, legal promises play an important role in the conservative function of law, stimulating the inertia of groups devoid of access to important legal goods such as housing, for example. By insuring a right that cannot be implemented at the moment, followed by the discourse of future concretization, individuals enter a state of inertia deriving from the expectation that they may enjoy that legal good in the future.

However, for the legal promise to continue working, it must be subject to materialization, even if just in part. That is why public policies are implemented by the State, at times more timidly at other times more comprehensively, contemplating part of those devoid of "legal promises". However, they can never be claimed in a coercive way; if and when they are, they will assume the state of legal rules in the strict sense, integrating the coercive order, that is, that which is called Law[2].

2 Human Rights norms: between legal promises and Law in the strict sense

The discourse about acknowledging and defending human rights is currently rather popular. However, when it comes to their implementation, many of the so-called human rights, present in international declarations or in domestic constitutional documents, take on a role that puts them on a par with what is called legal promises.

In general, Human Rights do not bear orders of the power, to use an expression coined by Villey (2007, p. 22), when referring to Law in the strict sense. On the contrary, Human Rights take on the role of future intentions or control of the urges that compromise the survival of humankind, which were accountable for tragic situations experienced during armed conflicts in the past and which still take place nowadays.

However, when it comes to coercively imposing their rules, Human Rights rear their ugly head. Ifthey are incorporated into the domestic legal order as norms endowed with coercive power, to be used if and when they not met, they can be imposed by force. Therefore, we come to Law in the strict sense.

On the other hand, if they are not accompanied by the coercive force necessary to insure that they are enforced, human rights incorporate the legal nature of promises, because they lack the force to impose themselves onto those who refuse to enforce them.

---

[2] There are those who argue that the Law itself does not have pre-defined content. According to Posner (2010, p.14 and 37), the Law is simply what people authorized to do the Law do until their authority is removed from them by death, retirement or forced removal from office by impediment or other means . [...]. Legal formalism is the most effective rhetoric when judges are trying to go against the political leaning because it enables them to transfer (or pretend to transfer) responsibility for unpopular acts of themselves to an impressive abstraction, "the Law".

What differentiates a Human Rights norm from a legal promise is the capacity to impose enforcement coercively. If coercion does not exist, that which presents itself as law is, in fact, a mere intentional norm, whose materialization is left to groups that dominate the State structure.

A Human Rights norm can only be considered Law in the strict sense if it has been incorporated by the state legal order, and has taken on the element of State coercion, which will be put into action if it is not enforced.

Currently, Human Rights, in special, are taken as a response to all the illsof humankind. If someone is incarceratedwithout a fair trial, the response will be the need for respecting the right to individual liberty, which is seen as the counterpart to thearbitrariness of thestate. If there are homeless, starving, sick, or socially-secluded people, the answer to all these issues is said to be found in the respect for the right to housing, food and healthcare, all of which are under the umbrella of respect for the dignity of the human person[3].

It seems that the mere mention to law in the legal order would be enough to solve all the problems. When Brazilian legislators, for example, were faced with the chronic problem of the lack of housing, they issued Constitutional Amendment no. 26, February 14, 2000, which elevated the right to housing to the level of social right warranted by the constitution, as if this were the solution to the problem. Thus, housing was declared a right of each and every Brazilian citizen. If there are no financial resources or political interest in implementing it, that is another issue altogether, for the legislators would have made what they had to by making housing an elementary social right, as a first-class member of the metaphysical concept of dignity of the human person[4].

Douzinas (2009, p. 19) describes the scenario of the supposed triumph of human rights, by pointing out that they "[...] are trumpeted as the noblest creation of our philosophy and jurisprudence and as the best proof of the universal aspirations of our modernity,which had to await our postmodern global culture for its justly deserved acknowledgement".Therefore, we see that Human Rights integrate the same historical-philosophical root from which Natural Law stemmed, which constituted, over a long time, a discourse of resistance or justification of several legal orders.

When aiming to confront the legal order and consider it unfair or contrary to the interests of individuals, natural law would serve as a tool of resistance, fostering the argument that the practice of positive law was against a superior law, of either cosmic, divine origin, or rational, eternal and immutable origin, in such a way that, once disregarded by positive law, it would render the latter illegitimate and, consequently, subject to the resistance of those who might be affected[5].

On the other hand, when the aim was to insure the submission of all to the State's legal order, making it immune to confrontation, the same discourse of natural law was used, this time to inform the vassals that the positive law was a mere transcript of natural Law, eternal and immutable and, consequently, superior to human beings.

This is why, as Kelsen, (2005, p. 151) reminds, Kant defended that the people's resistance to the legislator would be unlawful, for the positive law would be a mere transcript of Natural Law. According to this conservative view, using the words of Kelsen, (2005, p. 150),"[...] resistance is justifiable if the use of force by the government is not only unjust but also "unlawful" – that is, contrary not only to the natural but also to the positive law".

Then, Natural Law constituted over time a discourse that could be shaped according to the interests of those who stood by it, and could serve as an argument for the resistance or justification of the positive legal order, and was a discourse adaptable to the interests of the speaker (VILLEY, 2007, p. 162).

Villey (2007, p. 3) remembers that Natural Law did not disappear in the 19th century, as was announced by some theoreticians. On the contrary, it was redesigned to becometoday's Human Rights.

---

[3] ODORISSI; LEAL (2014, p. 17), for example, defends that "[...] guaranteeing the social rights of citizens is insuring human dignity, which must be a permanent goal for the State". SARLET (2012, p. 93-111) also defends that the dignity of the human person plays an essential role in the fundamental principles of a constitution. However, it seems that the issue with the alleged principle of dignity of the human person remains unsolved, since each author ascribes it a definition and content that they see fit.

[4] The issue of food was also "solved" by Brazilian legislators through a change in constitution: Constitutional Amendment no. 64, February 4, 2010, included food in the list of social rights. It seems to be a subterfuge set to exempt the Brazilian State from adopting firm public policies meant to solve the problem of hunger. Altering the constitution is the way legislators have found to solve the problem, although people are still starving, since an ethereal social right will not feed the famished just because it is now part of the Federal Constitution.

[5] Such role of resistance that Natural Law once had, or that of superior fundament that sustains the positivized order, according to most of the doctrine, was inspired by the Greek tragedy known as Antigone, written bySophocles (496-406 a. C.). According to the Greek narrative, the character named Antigone decided to render funeral honors to his brother Polynices, despite a prohibition issued by Creon, the local sovereign. To back her act, Antigone claimed she was moved by the idea that the right of providing the dead with an honorable funeral is superior to any human prohibition, which, consequently, is not valid before this eternal and superior norm, laid out by the gods themselves.

3 The individualistic face of Human Rights

Unlike whatis defended by Human Rights enthusiasts, Human Rights do not seem to have distanced much from the discursive circle around which Natural Law orbited in the past. These days, Human Rights are believed to have a characteristic of resistance similar to that which Natural Law had in its primal years.

Douzinas (2009, p. 38) points out that two trends marked the passage from classic Natural Law to the phase of Human Rights. According to that author, "[...] Thefirst transferred the standard of right from nature tohistoryandeventuallytohumanityorcivilization.This process can be called the positivisation of nature". The second trend would be what he called"legalization of desire". In this phase, "[...] the center of the world, his free will became the principle of social organization, his infinite and unstoppable desire was given public recognition".

Thus, Natural Law was humanized as it became Human Rights. There is no cosmic, divine order anymore to inspire the positivization of Law. What we have, currently, in the theoretical formulation of Human Rights, is a discourse that human beings are born with some desires, wills that must be protected by the legal order. According to this point of view, the world, the organization of society and everything else, exist as a function of human beings and their dignity, and must cater to their satisfaction, who will never be fully satisfied.

This is why Marx (2010, p. 48) states that "[...] the so-called *rights of man*, as distinct from the *rights of the citizen*, are simply the rights of a *member of civil society*, that is, of egoistic man, of man separated from other men and from the community". (Emphasis in the original).

Marx (2010, p. 49-50) affirms that "[...] [t]he practical application of the right of liberty is the right of *private property*". In turn, security"[...] is the supreme social concept of civil society; the concept of the police. The whole society exists only in order to guarantee for each of itsmembers the preservation of his person, his rights and his property"(Emphasis in the original).

Considering the real human being, we may say that Human Rights, in their current version, somehow fosteregoism, because individual interests must be satisfied, for "[...] man as he really is, is seen only in the form of *egoistic* man, and man in his *true* nature only in the form of the *abstract citizen*" (MARX, 2010, p. 53). Thisinevitably leads to the acknowledgement that there has always been a real human being and an abstract one. Although Marx's criticism was made in another context, it remains up-to-date.

Villey (2007, p. 99), known for denying subjective rights and, consequently, denying human rights, goes in the same direction when he states that Human Rights have an egoistic narcissistic face, because each group only sees "their [own] rights" with no regard for the others'. In addition, according to him, Human Rights are amid"fake, unreal, ideological promisesthat cannot be fulfilled". The good thing is that this is only one of its faces; the other face of human rights is supposed to be altruistic and take others into consideration. This contradiction is applied with exactitude to the human rights that are and remain on paper and need implementation. However, we must acknowledge yet another side: that of the rights that are indeed implemented, as well shown, for example, by the decisions of the main Human Rights courts.

By fostering individualism, Human Rights – whose inspiration is in bourgeoisie, manage to hinder any revolutionary drive, since, as Losurdo states (1998, p.204), based on the lessons of Haym, individualism is "[...] the most efficient barrier not against conservation, but against 'revolution'".

What is seen, then, is the existence of a discourse that intends to claim the condition of "universal" norm, valid for all humankind, with no regard for the cultural differences between peoples. Nevertheless, the defenders of Human Rights, those who are driven by the view associated with Liberalism[6], are more concerned with the guarantee of individual liberty. It is no less important the fact that liberty is put as the main right to be protected by the State through non-interference in private matters (that is, private property); the State must only insure each and every individual'sfree enterprise. In this sense, liberty has an instrumental role.

Although it is unnecessary to affirm what is evident, it is not much in this case to asseverate that the essential right to be protected, according to the liberal view, is private property. Ever since the doctrine of Natural Law prevailed, property was in the apex of the rights deemed worthy of protection. When analyzing this historical context, Kelsen (2005, p. 158), mentions that

---

[6] Losurdo (2006, p. 13), defines liberalism as "[...] the tradition of thought whose central concern is the liberty of the individual, which is ignored or ridden roughshod over by organicist philosophies of various kinds".

> [...] Many of the followers of the natural-law doctrine argue that one of the essential purposes of the state, and that means of the positive law, is to protect the right of property established by natural law; and that it is beyond the power of the state, because against nature, to abolish this right, which exists independently of positive law.

Still, according to Kelsen (2005, p. 159) "[...] there is no absolute right to life; but there is an absolute right to property. The right reason, implied in nature, teaches that property is even more valuable than life".

Human Rights constructed on a liberal paradigm, as mentioned before, fosteregoism, because eventually individual interests are superior to the wishes of the collectivity. When one claims, for example, to have their right to healthcare, education, or housing met, the claimant is not always interested in the generalization of such rights. More than rarely, what this person wants is getting their wishescatered to at that moment and on an individual basis; once this person's wish is satisfied, he/she drops, most of the times, any interest in showing concern with the "universalization" or extending such rights for the benefit of collectivity. To illustrate, it is worth mentioning the qualitative difference between modern and ancient society: the inequality is abysmal. In fact, Athenian citizens cared for common interests, for the political community,whereas the modern citizen bears the evil of individualism. However, Feitosa (2013, p. 93) asseverates that "[...] the struggle for human rights is the struggle for their implementation; it is the struggle to guarantee the instruments to promote sociability rather than isolation and egoism".

The systematics of promoting Human Rights through promises driven to the egoistic individual has generated a liability that is impossible for the State to deal with; thus, Human Rights become a mirage (VILLEY, 2007, p. 5-6). There is no state budget capable of insuring, for example, "first-rate" medical treatment to all who need it, regardless of the illness they have.

For this reason, when promises are too many, taking in consideration the interests of each individual, the Human Rights created this way cannot be implemented. They become mere declarations, aimed to protect those who are already socially included, or tricking those who are excluded, making them believe that they have rights which are extremely far from their realities.

The discourse becomes even emptier when we consider the right to prosperity, for example. There is no need in warranting such right to those who have no access to it. The protection of property, in this context, is aimed only at protecting those who already have private property, to make them safe from any interference from those who have no access to it.

Human Rights guided by liberalism foster protection*a posteriori*, that is, rights are protected only for those who do have them, making them safe from the interference of those who do not. This way, when the right to property is protected, *verbi gratia*, it is insured to proprietors, discouragingthose who are deprivedfrom uprising on the hollow promise thatthey too, eventually, will be able to become proprietors and, consequently, will also have their legal position duly protected bypositive Law. In addition, the presence of a right to property in the Constitution creates a limitation in the legal orderfor the legislator; such limitation, according to the classification of Bobbio, makes any normative measure impossible to be adopted to violate the right of those who are already a proprietor. (BOBBIO, 2014, p. 63).

Therefore, it is necessary to take in consideration that one declaration of rights, even if, at first sight, it embodies the most respectable intentions, may bring about the objective of insuring legal situations that are already consolidated, freeing them from the interference of any individual that may be negatively affected by them.

In addition, when one declares the existence of rights that can be protected, the following conjecture is created: protecting the interests of those who already have said rights while fostering the wish that those who do not have said rights can get to enjoy them; the latter, moved by egoism stimulated by individualism, start to believe that, by their own efforts, they will have access to such benefits in the future.

4 Legal promises and the Declarations of Rights

The technique of declaring rights, with no actual preoccupation with their effectiveness, as already mentioned, make them hollow promises to those who do not have them. Said rights are insured to those who already have them and for those devoid of such benefits an illusion is created that they will be able to enjoy such rights in the future and, once said rights become part of their legal patrimony, their rights will be equally protected.

The declarations of Human Rights are said to have little effectiveness, although, as declarations, according to international Law, they are not legally binding. However, the so-called declarations present in each country's constitution must be effective and cannot be converted into a rhetoric instrument of repetitive decisions of their courts.

In this context, however, it is important to point out that the declarations of rights originating in the bourgeois movements, which have taken over the power as of 1789, reflect the social and economic values of the bourgeoisie and are not, consequently, declarations of rights valid for all the peoples, in all cultures at all times.

More than a product of human consciences that regret the acts of violence and massacres, making way for a certain form of penitence, which seeks to defendthe supreme dignity of the human person, as defended by Comparato (2013, p. 50), the declarations of Human Rights seek to structure the values that are deemed important for the dominating group, serving as guidance to structure the legal order.

Consequently, in all declarations of rights produced after the consolidation of the bourgeoisie as a dominant class, private property has always been among the basic rights to be protected, even if a great number of people have no access to such right or to the actual guarantee that they eventually will.

For this reason, the declarations of rights are constructed to legitimize the legal order that protects the declared rightsfor those who already have them; to those who have no access to such rights, that is, those who should be the first to enjoy such benefits, such declarations are eventually converted into an ineffectivehollow promise.

Lately, nearly everything has been positivized, as if this were the solution for all the penury of the neediest people, but the effectiveness of such rights onpaper is far from being satisfactory. Marx's acrid criticism to the citizens of the French Declaration of 1789 (Cf. On the JewishQuestion) remains rather pertinent these days.

There is yet another relevant point that is worth bringing up. In fact, it is necessary to face the question of "universalism" that the Human Rights existent in the declarations produced after 1789 intend to have. Some authors, among which are Douzinas and Villey, asseverate that all declarations produced since then represent only the textual consolidation of dominant values in western society, which, disguised as "universal", seek to be imposed to other peoples, with no further considerations about the specificities of each culture. Such criticism needs fixing. Thus, it is worth clarifying that, in fact, the declarations are not universal, because they apply only to the inhabitants of planet Earth; at most, they may be international declarations. Also, no one is forced to follow such declarations, because they are not mandatory since they do not have the legal status of treaties.

The conflicting values which we see these days between the West and the rest of the world are not surprising when we renounce the defensive view of the existence of rights valid for all peoples, such as is intended by "universalism". Much as we consider western values important and beneficial for Humankind, they must not be imposed on other peoples without establishing a far-reaching intercultural dialogue, with no intention of dominating. The end of Western history should be the beginning of world history, one that is plural and based on dialogue.

The culture of the other that has different values from those that prevail in the Westhas been labeled as primitive and, for this reason, fought against. How right is that? It is necessary to consider the fact that the declared Human Rights are the product of a view of the world; this is unquestionable. Still, we might inquire if this view is necessarily the best there is. Would it not be necessary to resume the dialogue between cultures and foster what is common rather than exclude the values present in other civilizations? On the other hand, it is necessary to consider that, if declarations are non-binding in the international field, the question about the content – which could be different – remains; however, legal-wise the problem in this field is irrelevant, since the norm is not mandatory.

Another relevant point is the need to raise awareness about the fact that the values contained in the declarations of rights are not really "universal", as originally intended. Such rights are changeable and, even if they are present in all or most of the cultures, the form of application or positivization in the several legal orders is different and must be respected, provided that the hard core of human rights is respected. More than this, if human rights are not eternal nor unchangeable nor innate, we cannot talk about Natural Law as a principle in the field of human rights. The fact is that such rights, in general, do not derive from concessions of the State; they were and still are achieved, above all, by the struggle of those who are deprived of all rights. This is the reason why we must acknowledge its historicity. Social rights, *verbi gratia*, were not born with the human person; many of these rights were conquered during the Industrial Revolution, especially employment rights.

The discrepancies that arose at the time of constructing the text of the Universal Declaration of Human Rights, in 1948, shows that the values and rights they encompass are not universal. The protection of property contained in the document was rejected by the countries that were part of the socialist bloc, which refused to openly consent

with the text and chose to abstain[7]. Does this mean that these countries were against the defense of Human Rights? Perhaps the answer to this question is not as simple as we – more than rarely –tend to believe.

Perhaps the nucleus of the answer lies in the confirmation that the human rights present in the text of the Declaration were not as "universal" as they were intended to be. As mentioned before, such rights are not universal, at most they can be said to be international. It is symptomatic the fact that the main focus of the text of the Universal Declaration of Human Rights, in 1948, was on the protection of individual liberties, which are very valuable for the bourgeoisie and the economic-philosophical system that best represents it, namely, Liberalism. The right aimed at the individuals' social protection did not get the same level of concern andbecame the object of more specific covenants in the 1960s[8], when it was already clear that the Liberal State had been exhausted and there was a need toconcede rights to the working classes, thus strengthening what was eventually known as Welfare State.

Therefore, it was not the advance of a political-social conjuncture that gave rise to the fertile ground for the proliferation of the Human Rights. As rights were declared, as a way of cushioning social dissatisfactions, their violation persisted or even intensified, so much so that the 20th century (the Human Rights Century) was also the century in which the cruelest violations were committed (DOUZINAS, 2009, p. 21).

This way, when the declarations of rights – of nearly null efficacy – were no longer enough to cushion social conflicts, and the repressive measures had exhausted with no success, then, the dominant classes started to make more concessions in favor of those devoid of the declared rights, and the benefits were proportional to the level of organization and awareness of the working classes.

However, it cannot be said that this form of treatment of the social conflicts is a privilege of the capitalist countries. In the bloc of socialist States, the systematics of treatment was also similar. As the idea that the States' businesses were managed on behalf of the people was disseminated, the dominant elite structured itself; this elite was formed by bureaucrats members of the only Party, which, appropriating the State, started to use it for their own benefit. All this happened at the expense of the people, who had to sustain the structure of the State and this new dominant class. In turn, the dissidents, who were deemed as "traitors", were submitted to cruel punishment and annihilation[9].

As a matter of fact, the technique of declaring rights without the concern with their effectiveness is a mechanism of ideological domination that has been used successfully throughout History. However, we must consider that Law is much more than the mere declaration of good intentions – as we see in most of the international documents of Human Rights protections or even constitutions – when they address the so-called social rights. To be effective, Law must be backed by mechanisms of coercion, capable of imposing the will of the law onto those who rise against it.

Then, we may conclude that law without the capacity of implementation is a hollow promise, set to alienate the classessubordinated by the political-economic system, making them believe they have some rights that are hard to obtain or even inviable due to the mechanisms present in the doctrine or caselaw of the courts, as what happens with some theoretical constructions such as the reserve for contingencies in confrontation with the guarantee of anexistential minimum, the existence of norms of limited efficacy or norms of contained effectivenessand other ideological instruments whose purpose is to mask the total inefficacy of the declared norm.

In this context, one question arises: has Law been currently doing its job? About the implementation of Law itself, as a norm that can be enforced by the State, the answer is affirmative. Legal promises also do their job, since they contribute to cushioning the conflicts in society.

---

7 When tracing the background of the construction of the international document known as the Universal Declaration of Human Rights, Comparato (2010, p. 237-253) informs that the initial intention was to produce a binding document, capable of making every people meet its precepts. However, due to the fiery divergence among the States that created the Universal Declaration, eventually the document was the object of a Recommendation by the UN General Assembly to its members. Comparato notes that the nucleus of the Declaration was taken from a speech of US president Franklin D. Roosevelt given on January 6, 1941, during which he sustained that the four freedoms to be defended would be the freedom of speech and expression, the freedom to worship God in his own way, freedom from want, and freedom from fear. This demonstrates that, despite its ambition to be "universal", the Declaration of Human Rights is deeply inspired by western values, especially the values of the countries that won WWII.

8 The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, both adopted by the UN General Assembly on December 16, 1966.

9 A very precise picture of the way the so-called real socialism was established and managed in the Soviet Union is presented by Reis Filho (2003, p. 77-134). In his work, the author describes the difficulties faced by the Russian people, especially peasants, due to the model of collective exploration of the land and the fixation of priorities by the State, especially during the third, fourth and fifth five-year plan for the assistance to the so-called base industry, such as mining, steel, and oil industry, leaving agriculture in the background. Reis Filho also presents the way individuals deemed dangerous by the system were treated: the punishment could come to the whole family, city or village to which the alleged delinquent belonged. Such practice was from the old tsar regime and was brought back in the Soviet Union, especially from the 1930s on.

Law is deemed efficient even when the supposed promises are not immediately implemented. To understand this phenomenonwell, it is important to distinguish between law in the strict sense and legal promises. Many times, human rights are not realized, they are only promises aimed to cushion the conflicts in society, whose members believe they have some rights which prove to be inexistent in the daily life of considerable parts of the population.

Mentioning the existence of rights, such as healthcare, housing and food for those who are ill and unassisted, homeless or starving, is moral violence. However, this position is adopted daily by the States and not because the model of Capitalist State is crueler than others that have existed. As a matter of fact, the discourse in the form of a promise from the dominant to the subordinate ones in the social scale has always been a technique used in the most diverse moments in history.

In the slave societies of the past, for example, the condition of slaves was justified by the existence of some cosmic order that would define their position in the social scale. In this sense, philosophical of religious justifications were used, in such a way that, notwithstanding the great numerical superiority of serfs when compared to the number of those in dominant position (in which case, uprisings were bound to succeed), we have no record of big popular uprisings that have been able to change the structure of old societies.

During feudalism, with society divided into estates of the realm, the order of things was kept based on the strong religious discourse that prevailed in society; the Catholic church worked to cushion occasional conflicts that might come up.

With the growing rejection of the social position of the human being defined according to a cosmic or divine order, current capitalist societies seek to find other mechanisms of discursive domination aimed to insure the social stability in a context of conspicuous economic differences between individuals. This role has been left, somehow, to the declarations of right, which promise much but, in practice, are little implemented by the States for the less-favored ones.

The capacity of implementing rights – whether present in international documents of human rights or in constitutional texts themselves – depends on the claiming capacity of several social groups, since those in dominant positions do not make concessions without being compelled to it.

However,the claiming capacity of those who are exploited by the political-economic system is always proportional to their awareness of the role they occupy in society. Such awareness needs to be accompanied by the interest in associating with other individuals that are in the same situation, making way for claiming groups, which, as they grow bigger, may succeed in changing society's form of organization, such as what happened, for example, in the French Revolution in 1789. This is about regaining dialogue as an instrument of political action, andabout avoiding the isolation that produces the end of political community, as Hannah Arendt would say.

Therefore, it is necessary to differentiate what is effective Law – which imposes itself coercively on all those to whom it is addressed – from legal promises, which represent declarations in society – whose implementation is always left in the background, relying on justifications such as the lack of financial resources for the promised right to be enjoyed by individuals to whom it is addressed.

This "right" in the form of a promise, which is present in several international documents of Human Rights, as well as in declarations of rights of constitutions of several Western countries, is a mere discourse lacking materiality and in need of some effectiveness. Without due organization, without the formation of social pressure groups to compel the members of more-favored strata of society to make concessions – since all rights in general originate from conquests rather than concessions of Natural Law – human rights will continue to be hollow promises, rights on paper, norms with no capacity to be imposed without coercion. In this sense, they cannot be considered rights, because they lack the indispensable efficacy as well as the necessary materiality. It is worth remembering that rights are not given away; rather, when it comes to social rights, they are historical conquests, as well demonstrate the so-called liberal revolutions and, especially, the industrial revolution.

Conclusions

As a coercive force, Law does not admit resistance without reaction. When its rulings are not observed, Law uses the instruments of force that the State puts at its disposal. If the apparatus that advocates for a legal ruling is inexistent or flawed, this is a case of a mere legal promise, whose main objective is to create a future expectation for a supposed right submitted to several conditions to be implemented, especially financial conditions.

When Human Rights, present in international declarations, or even in domestic legal documents, have no coercive force that insures theirimplementation, they have the nature of legal promises and are capable of creating expectations but have no practical effects that may be observed in the daily lives of those to whom they are addressed.

Given this need for implementation, which is experienced by many rules of Human Rights – which means that some rights exist only on paper –, it is not possibleto join those who defend that such fact is a certificate of failure of Law itself. On the contrary, as we sustained in previous lines, legal promises, ever since their formalization, are not meant to be completely implemented. What they seek is to create expectations in the less-favored social groups, to foster the maintenance of inertia due to a specific phatic situation which is not favorable to them.

Therefore, the rules of Human Rights, to be considered norms of Law in the strict sense, need to be backed by State force to guarantee that they are implemented. When denied, they will have the nature of legal promises, which arouse expectations, but whose implementation is left for the future that may never come to a number of those to whom the norms were meant.

Such a proliferation of norms that aim to produce false expectations, which do not contribute to catering to the needs of those who need protections is harmful. In this field, therefore, not even hope is secured.

References

BOBBIO, Norberto. **Teoria do ordenamento jurídico.** Tradução: Ari Marcelo Solon. 2. ed. São Paulo: Edipro, 2014.

COMPARATO, Fábio Konder. **A afirmação histórica dos direitos humanos.** 7. ed. rev. e atual. São Paulo: Saraiva, 2010.

COMPARATO, Fábio Konder. **A afirmação histórica dos direitos humanos.** 8. ed. São Paulo: Saraiva, 2013.

DERRIDA, Jacques. **Força de lei:** o fundamento místico da autoridade. Tradução: Fernando Bernardo. Porto: Campo das Letras, 1994.

DOUZINAS, Costas. **O fim dos direitos humanos.** Tradução: Luzia Araújo. São Leopoldo: Unisinos, 2009.

FEITOSA, Enoque. Bobbio e a crítica de Marx aos direitos humanos: o que e quais são os direitos humanos? Elementos para uma refutação da concepção individualista dos direitos humanos. *In:* TOSI, Giuseppe (org.). **Norberto Bobbio:** democracia, direitos humanos, guerra e paz. João Pessoa: Editora da UFPB, 2013. v. 1, p. 79-95.

HART, H. L. A. **O conceito de direito.** Tradução: Antônio de Oliveira Sette-Câmara. São Paulo: WMF Martins Fontes, 2009.

KELSEN, Hans. **Teoria pura do direito.** Tradução: João Baptista Machado. 6. ed. São Paulo: Martins Fontes, 1998.

KELSEN, Hans. **Teoria geral do Direito e do Estado.** Tradução: Luís Carlos Borges. 4. ed. São Paulo: Martins Fontes, 2005.

LOSURDO, Domenico. **Hegel, Marx e a tradição liberal.** Tradução: Carlo Alberto Fernando Nicola Dastoli. São Paulo: Unesp, 1998.

LOSURDO, Domenico. **Contra-história do liberalismo.** Tradução: Giovanni Semeraro. Aparecida: Ideias & Letras, 2006.

MARX, Karl. **Sobre a questão judaica**. Tradução: Nélio Schneider; Daniel Bensaïd; Wanda Caldeira Brant. São Paulo: Boitempo, 2010.

ODORISSI, Luiza Ferreira; LEAL, Mônia Clarissa Hennig. A República de Weimar como paradigma do Estado Moderno: o controle jurisdicional de políticas públicas como meio de efetivação dos direitos sociais. **Direito Público**, São Paulo, v. 11, n. 60, p. 9-25, nov./dez. 2014.

POSNER, Richard A. **Direito, pragmatismo e democracia.** Tradução: Teresa Dias Carneiro. Rio de Janeiro: Forense, 2010.

REIS FILHO, Daniel Aarão. **As revoluções russas e o socialismo soviético.** São Paulo: Unesp, 2003.

SARLET, Ingo Wolfgang. **A eficácia dos direitos fundamentais:** uma teoria geral dos direitos fundamentais na perspectiva constitucional. 11. ed. rev. atual. Porto Alegre: Livraria do Advogado, 2012.

VILLEY, Michel. **O direito e os direitos humanos.** Tradução: Maria Ermantina de Almeida Prado Galvão. São Paulo: WMF Martins Fontes, 2007.

Recebido em: 28.07.2020
Aceito em: 28.06.2021