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A **Revista Internacional CONSINTER de Direito** é uma publicação de cariz periódico do **CONSINTER – Conselho Internacional de Estudos Contemporâneos em Pós-Graduação** que tem por objetivo constituir-se num espaço exigente para a divulgação da produção científica de qualidade, inovadora e com profundidade, características que consideramos essenciais para o bom desenvolvimento da ciência jurídica no âmbito internacional.

Outra característica dos trabalhos selecionados para a **Revista Internacional CONSINTER de Direito** é a multiplicidade de pontos de vista e temas através dos quais o Direito é analisado. Uma revista que se pretende internacional tem o dever de abrir horizontes para temas, abordagens e enfoques os mais diversos e, através deste espaço, colaborar com um melhor diálogo acadêmico.

Resultado de um trabalho criterioso de seleção, este volume que agora se apresenta destina-se a todos aqueles que pretendem pensar o Direito, ir além da sua aplicação quotidiana, mas sem deixar de lado o aspecto prático, tão característico das ciências.

Capítulo 02

DIREITO PÚBLICO

THE HISTORICAL CONSTRUCTION OF SOCIAL RIGHTS
A CONSTRUÇÃO HISTÓRICA DOS DIREITOS SOCIAIS

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Abstract

It is chosen to develop this topic as a relevant object to the study now undertaken, which is a current and extremely important topic for the political and economic moment currently experienced in the world in light of the principle of prohibition of social retrogression as a result of the dignity of the human person.

For a good understanding of the issue about social rights, it was necessary to draw some preliminary considerations about the historical construction of rights and the relationship with the intervention of the democratic State in the individual sphere as an agent in charge of carrying out and effecting the fulfillment of social values.

This article sought to demonstrate, in a systemic way, the Historical Construction of Fundamental Social Rights. The main objective of this study was to demonstrate the applicability of human rights at the constitutional level, as well as to justify the need for Brazilian society to enforce these rights for the egalitarian construction of a Social State. The doctrine and the Law support and justify this work, which adopted the perspective of Human Rights. The research line is that of Human Rights, while the scientific article is a bibliographic review that used the deductive method, qualitative and descriptive research. As a reference, we used scientific literature and published materials that were pertinent to the purposes discussed here.

Key words: Fundamental Social Rights; Human Rights; Democratic State.

Resumo

Elege-se desenvolver esse tópico como objeto relevante ao estudo ora empreendido, sendo este um tema atual e de extrema importância para momento político e econômico vivenciados atualmente no mundo à luz do princípio da proibição do retrocesso social como decorrência da dignidade da pessoa humana.

Para a boa compreensão da problemática acerca dos direitos sociais foi necessário traçarmos algumas considerações preliminares acerca da construção histórica de direitos e da relação com a intervenção do Estado democrático na esfera individual como agente encarregado de realizar e efetivar o cumprimento dos valores sociais.

Esse artigo buscou demonstrar de forma sistêmica, a Construção Histórica dos Direitos Sociais Fundamentais. O objetivo principal deste estudo foi demonstrar a aplicabilidade dos Direitos humanos no plano constitucional, bem como justificar a necessidade de cobrança da sociedade brasileira para efetivação desses direitos para a construção igualitária de um Estado Social. A doutrina e a Lei fundamentam e justificam esse

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trabalho, que adotou a perspectiva dos Direitos Humanos. A linha de pesquisa é a do Direitos Humanos, já o artigo científico é de revisão bibliográfica que se utilizou do método dedutivo, pesquisa qualitativa e descritiva. Como referência, recorreu-se à literatura científica e materiais publicados que fossem pertinentes aos propósitos aqui aventados

Palavras-chave: Direitos Sociais Fundamentais; Direitos Humanos; Estado Democrático de Direito.

INTRODUCTION

Social rights have come a long way to be recognized from the Ten Commandments, which are still par excellence the code of moral conduct for Christians, through the Code of Hammurabi, to the Law of the Twelve Tables[2], however this normative class still requires more legal, social and financial conditions to fully materialize[3].

Norberto Bobbio clarifies that in antiquity the individual was only an object of power, being bound by the laws of divinity and the orders of the sovereign, based on Jusnaturalism[4].

Natural Law or Jusnaturalism is a theory that postulates the existence of a law whose content is established by the nature of reality and, therefore, valid anywhere and in any circumstance. It is sometimes contrasted with the positive law, or juspositivism of a given society, which sometimes allows it to be used to criticize the content of that positive law. The natural law is a set of superior, eternal, uniform, permanent, immutable ideas or principles, which are given to man by a deity.

By natural law, the granting of principles to human beings varies according to the branch: a) for the ancient philosophers (Heraclitus, Aristotle, Socrates, Plato, Cicero, among others), the granting of principles would be when the divine creation yourself the reference point to know what is right or wrong, good or bad, the basis of all laws, b) theological, having Saint Augustine[5] as the first Christian systematizer of integral personalism based on the search for God and the divine will as eternal law, the source of the law would not be linked only indirectly to divinity, but directly, that is, the genesis of the law would not have been inspired by God, but written and bestowed by the deity, and c) rationalist or contractual branch (Thomas Hobbes, John Locke, Montesquieu, Rousseau among others), for them there were two

[2] BOBBIO, Norberto, *A Era dos Direitos*, Tradução de Carlos Nelson Coutinho, Rio de Janeiro, Elsevier, 1992-2004, p. 52.

[3] SANTOS, Júlio Edstron; CALSING, Renata Assis; MORAIS, Arnaldo Godoy, *A construção dos direitos sociais: panorama histórico, social, jurídico e perspectivas no Brasil atual*, REPATS, Brasília, v. 4, n. 1, p. 662-699, Jan-Jun, 2017.

[4] BOBBIO, Norberto, *A Era dos Direitos*, Tradução de Carlos Nelson Coutinho, Rio de Janeiro, Elsevier, 1992-2004, p. 52-53.

[5] FIGUEROA, Herrera Miguel, *Justicia y Sentido*, Imprensa da Universidad Nacional de Tucuman, 1955, p. 36.

categories of laws or legal orbits: 1) Natural Law (its origin would no longer be in the divinity, but in the rational nature of man) and 2) Positive Law (derived from the social pact).

As for Saint Thomas Aquinas, there were four categories of laws: 1) the eternal law, the law derived from the reason of God, the ruler of the entire universe, 2) the natural law (the participation of the eternal law in rational creatures), 3) human law, which is temporary because it is changeable, and 4) divine law, which is based on Scripture and the decisions of Popes and Councils. Saint Thomas Aquinas also mentions another law that he calls sin, but tries to say that it is not a law because it does not meet the requirements of law.

For Saint Thomas Aquinas, body and soul are one thing, hence all the bodily bases of the same being, of the same life. It is based on this principle that the personality of man and the common good is formed. Social activity belongs to the common good and, of course, from the formation, union of this universal principle, legal justice is formed[6].

From the 16th century, but mainly in the 17th and 18th centuries, natural law, strongly supported by the doctrines of contractualists, reached its highest point of development, inspired in large part by the philosophy of Francisco Suárez (1548–1617), Richard Hooker, Thomas Hobbes (1588-1679), Hugo Grócio (1583-1645), Samuel Pufendorf (1632-1694) and John Locke (1632-1704).

It should be noted that it was precisely in England in the 17th century that the contractualist conception of society and the idea of the natural rights of man acquired particular relevance, and this not only on a theoretical level, the simple reference to the various signed Letters of Law sufficing by the monarchs of that period[7].

The philosophical doctrine of natural law made the individual the starting point for the construction of a moral doctrine and law, but with secularization the State starts to take a more concrete action in interpersonal, economic and power relations, supported by positivism.

With the imposition of capitalism and the empowerment of the State based on theories of positivism, social inequalities increased between the end of the 19th century and the first half of the 20th century. Social inequalities should be rethought from the logic of existing class conflicts between the proletariat and capitalism, resulting from the productive process of transformation and the complexity of social life.

During the 19th century and in the first half of the 20th century, the problem of inequalities between individuals was considered, to a large extent, based on the logic of social classes and conflicts arising from the production process. Therefore,

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6 FIGUEROA, Herrera Miguel, *Justicia y Sentido*, Imprensa de la Universidad Nacional de Tucuman, 1955, p. 36.

7 SARLET, Ingo Wolfgang, *A Eficácia dos Direitos Fundamentais: uma teoria geral dos direitos fundamentais na perspectiva constitucional*, 12ª ed. rev. atual. e apli, Porto Alegre, Livraria do Advogado Editora, 2015, pág 39.

the complexity of social life appeared, to some extent reduced to a supposed historical protagonism of two classes: owners of the means of production, or bourgeoisie, and working class, or workers. It is quite true that the antagonism of classes currently moves and explains certain historical contradictions, it is also true that many other contradictions transcend this logic. Just think about problems such as machismo, intolerance, ethnic diversity, genetic safety etc. However, in the second half of the 20th century, we all saw the end of the cold war and the imposition of capitalism as a single world order. This resulted in a change in the current ideological agenda: the paradigm inspired by Marxism was losing strength in its ability to analyze reality and propose political actions. Of course, this cannot be understood as the failure of Marx's philosophical genius, but rather as a new moment in the world's ideological and political arrangement. In this new moment, moral values were raised in their dignity, especially after the horrors of World War II. This was fertile ground for the theme of human rights to occupy a significant space in the new agenda, leading, to a certain extent, the confrontation between the new right and the new left. Betting on human rights and its emancipatory capacity has become the benchmark for the action of those who are not satisfied with reality, as opposed to those who prefer to keep it as they are because they benefit from it[8].

2 HISTORICAL DEVELOPMENT OF SOCIAL RIGHTS

Human rights have their roots in historical systems such as those of the Greeks and Romans, due to their respective contributions, both to the theory of law and to human rights. 'There is, in our intellectual imagination, a tenacious prejudice regarding the bipartition of the ancient heritage: the Greeks would have bequeathed philosophy and democracy to us, the Romans would have offered us a solid legal and political system.'[9]

In a brief historical context, social rights began in the 12th century, more precisely in England, when the Magna Carta enacted on June 15, 1215 by King John without Land, guaranteed public freedom by establishing rights for free men.

In 1601, England underwent a population increase with the arrival of migrations of rural workers to urban areas in search of work, these people were not always absorbed in the labor camps and the number of miserable people who roamed the streets increased in England[10]. This made the Church preaches that it was the State's duty to meet the needs of the less fortunate. The Poor Law basically

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8 CUNHA, José Ricardo Ferreira; SCARPI, Vinicius, *Os direitos econômicos, sociais e culturais: a questão da sua exigibilidade*, Direito, Estado e Sociedade, 2007, p. 69 a 85, Disponivel em: <https://pt.scribd.com/document/37160774/Jose-Ricardo-Ferreira-Cunha-Scarpi-n31-Os direitos-economicos-sociais-e-culturaisa-questao-da-sua-exigibilidade>. Visualizado em 15 fev 2017.

9 BILLIER, Jean Cassien; MARYIOLI, Aglaé, História da Filosofia do Direito, Barueri, Manole, 2005, p. 98.

10 JUNIOR, Gilson Lopes da Silva, A Lei dos Pobres, 1601, Primeira Lei Assistencialista e Política de Bem Estar Social, Publicado em 22 de Dezembro de 2012. Disponível em: < https://www.webartigos.com/artigos/a-lei-dos-pobres-1601-primeira-lei-assistencialista-e-politica-de-bem-estar-social/101885/>. Visualizado em 15 de maio de 2018.

consisted of a monetary fund for people who did not have a job or conditions to support their children. These people were supposed to work for the State and for the Church, but it was not until 17th century England that the 1628 Petition of Rights and the Habeas Corpus Act of 1679 and the Bill of Rights of 1689 emerged.

Natural law exerted a profound influence on the legal rationalism movement of the 17th century, when the notion of fundamental rights emerged.

Also in the 18th century, in the United States, the Virginia Declaration in 1676 was created, which in its section proclaimed the right to life, liberty and property.

Equally of transcendental importance was the Declaration of the Rights of Man and Citizen of 1789, the result of the revolution that brought about the overthrow of the old regime and the establishment of the bourgeois order in France. Both the French and the American declarations had as a common characteristic their profound jusnaturalist inspiration, recognizing natural, inalienable, inviolable, imprescriptible rights to human beings, rights of all men and not just of a caste or status[11].

In the 19th century, the main texts dealing with fundamental social rights are: the Mexican Constitution of January 31, 1917, the Weimar Constitution of August 11, 1919, the Soviet Declaration of the Rights of the People, Workers and Exploits of 17 of January 1918, the Soviet Constitution (1st) of July 10, 1918 and the Labor Charter edited by Italy on April 21, 1927 during the period of the Fascist State.

From then onwards, many other texts followed, such as the Spanish Constitution of 1931, the French of 1946, the Italian 1947, the Germany of 1949, the Constitution of Greece in 1975, the Magna Carta of Portugal in 1976 and Spain in 1978[12].

This scenario of humanitarian, communitarian ideas to do the common good is inserted in the ideals of the French Revolution of 1789, abolishing the forms of slavery and the power of the oppressive State.

In this context, it should be noted that the concern with the social and with the principle of equality appears not only in the Declaration of 1789, but also in the Constitution of 1791, as well as and especially in the Constitution of 1793, strongly inspired by Rosseau, in which the rights to work, education and assistance to the destitute were recognized[13].

And finally, these values were inserted and recognized by law in 1948 with the Universal Declaration of Human Rights, adopted on December 10 by the

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11 PÉRES LUNO, Antonio Enrique, Los Derechos Fundamentales, Editorial Tecnos, Madrid, p. 36.

12 *Ibdem*.

13 SARLET, Ingo Wolfgang, *A Eficácia dos Direitos Fundamentais: uma teoria geral dos direitos fundamentais na perspectiva constitucional*, 12ª ed. rev. atualizada e aplicada, Porto Alegre, Livraria do Advogado Editora, 2015, p. 44.

General Assembly of the United Nations. This ballast was reinforced by the 1993 UN Vienna Conference on human rights.

Second Cunha and Scarpi, although a few countries abstained from voting, notably the Soviet Union, Saudi Arabia and South Africa, the Declaration was unanimously approved. Thus, it can be said that the elaboration of the Universal Declaration of Human Rights had the same motivating factor for the creation of the United Nations Organization itself[14].

The Declaration took up, to a certain extent, the ideals of the French Revolution, and, almost two centuries after that, it finally recognized, in the universal sphere, the supreme values of equality, fraternity and freedom. This would be, therefore, a historic moment of affirmation of the essential equality of every human being in his dignity as a person. At the end of World War II, it was realized that the promises of modernity, a world marked by peace and prosperity, ended up not being fulfilled. The belief in a libertarian reason, given all the absurdities produced during the world conflict, had to be revised[15].

It appears that the Law has existed since humanity was collectively constituted at times and felt the need for a minimum of organization, or even, according to the legal textbook, ubi societas ibi jus, as recommended by Miguel Reale (2013)[16].

Throughout its historical construction, Law, understood as a set of rules of conduct, alternated moments in which it was recognized as an instrument of domination of social classes and even as an instrument of social liberation of individuals. The law had an inhibiting character, restricting and not expanding rights, as it derived from commandments and prohibitions imposed by a code of moral conduct. It is also observed that there was a change between Natural Law and Positive Law and for various social and legal security issues, Positive Law prevailed.

Second Nobrega[17]:

> *'Positive law is the second stage in the trial of the realization of justice. In the first, the idea of justice is translated by some deontological principles, which are taken as the foundation of the normative system of law; in the second stage, these principles will serve as a basis for value judgments on human conduct, giving rise to the various norms of law.'*

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14 CUNHA, José Ricardo Ferreira; SCARPI, Vinicius, *Os direitos econômicos, sociais e culturais: a questão da sua exigibilidade*, Direito, Estado e Sociedade, 2007, p. 69 a 85, Disponivel em: < https://pt.scribd.com/document/37160774/Jose-Ricardo-Ferreira-Cunha-Scarpi-n31-Os-direitos-economicos-sociais-e-cultura isa-questao-da-sua-exigibilidade>. Visualizado em 15 fev 2017.

15 *Ibdem*.

16 SANTOS, Júlio Edstron; CALSING, Renata Assis; MORAIS, Arnaldo Godoy, A construção dos direitos sociais: panorama histórico, social, jurídico e perspectivas no Brasil atual. REPATS, Brasília, v. 4, n. 1, p. 662-699, Jan-Jun, 2017.

17 NOBREGA, João Carlos Santos, *História do Direito e do Estado*, Rio de Janeiro, Forense, 1954, p. 54

The view of law as a science, in the West, began in the 20th century, having as reference the thought of Hans Kelsen, especially from 1934, with the publication of his Pure Theory of Law, which represents a watershed in thought. and influenced most Western legal systems. Kelsen starts the realization of his theory from the thought inaugurated by the so-called Vienna Circle, formed at the beginning of the 20th century by a group of philosophers whose concern was the constitution of a theory of science as an autonomous discipline, which ended up founding the so-called logical positivism or neopositivism, a current later known by the name of analytic philosophy[18].

As society evolves, so does knowledge about human behavior and life in society, and the social sciences were divided into particular sciences, such as economics, anthropology, political science, as well as new branches of Law as Sociology is.

In sociology, which is a branch that tries to describe and explain the legal phenomenon as part of social life, sociology does not see law as a set of rules, but as a set of real actions of human beings. For Sociology, the law does not have its origin in God, nor in reason, the law is a social fact and has its origin in the social interrelations of man and his coexistence with society.

In the field of Sociology, from 1882 onwards, the following began to appear: Émile Durkheim, Léon Duguit and also Max Webber.

Durkheim's entire intellectual production, from 1887, turned to the study of sociology and the understanding of what he called social facts, which would be general laws that govern societies and give scientists the key to sociological study. Social facts are distinguished by their exteriority in relation to individual consciences and by the coercive action they exert or are likely to exert on those same consciences. This means to say that social facts are greater than any individual conscience and they create what the sociologist called collective conscience[19].

In Latin America, in order to better explain the social phenomena in the relations between man and society, a new branch of Law appears; The Trialist Theory of Law, by the Brazilian Miguel Reale and the German based in Argentina, Werner Goldschmidt, among others.

The dimensional theory of law is part of the theoretical study outlined by Brazilian jurist and philosopher Miguel Reale in his work Fundamentals of Law (1940) and was definitively established in his book in 1968. Reale preaches the interpretation of law from the point of view of three pillars simultaneous and complementary to norms, factual and axiological, unifying three independent philosophical and sociological currents (normative, sociological and moralist, in that

[18] AQUINO, Jorge Inácio de, *O Direito e sua interpretação na atualidade*, Jus Navigandi, Teresina, ano 13, n.1817, 22 jun 2008, Disponível em: <https://jus.com.br/artigos/11415/o-direito-e-sua-interpretacao-na-atualidade>. Visualizado em 10 jan 2018.

[19] PORFÍRIO, Francisco, "*Émile Durkheim*", Brasil Escola, Disponível em: <https://brasilescola.uol.com.br/biografia/emile-durkheim.htm>. Acesso em 03 de agosto de 2021.

order) one of the most important general theories of Law in Brazil and Latin America[20].

Reale's work emerged largely as a reaction to the exclusivist interpretations of law by three main schools of thought in the area, which are: a) the normativist, focusing on the normative character of law, b) the sociologist, focusing on facts and contexts; and, c) and the moralist, focusing on the axiology of law values.

For normativists, laws should be understood by their intrinsic value, which is understood as normativism. According to this current, cultural factors or value judgments have little weight in the interpretation of law, with laws being a cause and an end in themselves. The school of sociologism, on the other hand, believing that laws are a product of their time and space, shifts its focus to the facts of law, interpreting legislation according to its need (does society need such laws?) and results (such laws are effective ? If yes, how?). Finally, moralists focus on the ancient doubt of whether a law is fair or not. For them, the value (axiom) of the legal code is more important, and the law must be in harmony with what those subordinate to it judge to be fair or correct[21].

Of equal importance Werner Goldschmidt, known worldwide for being the creator of the trialist theory of the legal or three-dimensional world of law, maintains equal Reale, in short, that the legal phenomenon constitutes a complex totality called the legal world, to be analyzed from the three elements that compose it: fact, norms and values[22].

Currently, the Law has been adapting to new paradigms, based on the recognition of the need to implement fundamental human rights[23].

Well demonstrated by the philosopher Joaquim Carlos Salgado[24]:

> *'The idea of justice in the contemporary world, as I have studied it in recent years, is the maximum universalization of law in the form of fundamental rights, a list of maximum values recognized universally and equally to all human beings. Here is how law appears in the contemporary world, as the ethical maximum, and justice as the unfolding of freedom in the form of subjective rights and, in the contemporary Rule of Law, as universal justice, extended as the declaration and realization of fundamental rights in democratic constitutions of civilized peoples in the Charter of the United Nations.'*

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20 CYSNE, Diogo, *A Teoria tridimensional do Direito*, Disponível em: <https://www.infoescola.com/filosofia/teoria-tridimensional-do-direito/>. Acesso em: 25 de jun 2018.

21 *Ibdem*.

22 GOLDSCHMIDT, Werner, *Introducción al derecho*: la teoría trialista del mundo jurídico y sus horizontes, Imprensa, Buenos Aires, Depalma, 1967.

23 SANTOS, Júlio Edstron; CALSING, Renata Assis; MORAIS, Arnaldo Godoy, *A construção dos direitos sociais: panorama histórico, social, jurídico e perspectivas no Brasil atual*, REPATS, Brasília, v. 4, n. 1, p. 662-699, Jan-Jun, 2017.

24 SALGADO, Joaquim Carlos, *A Idéia de Justiça no Mundo Contemporâneo,* Fundamentação e aplicação do direito como maximum ético, Belo Horizonte, Del Rey, 2006, pág 8.

It is recognized, then, that Law is a social creation that accompanies humanity, regulating it and providing heterogeneous means of resolving disputes, or even as Britto (2007, page 38) pointed out, 'it stands out that Law is the system of rules that best reconciles imperative with enforceability'[25].

The construction of the Social State, as an intervener in society that slowed down liberal principles and started to regulate social relations, based on logical positivism, incorporating for itself investments in social policies, still lacks resources to achieve minimum levels of health, education, work, housing and social security, and most importantly, the fundamental focus of this study is that we must guarantee and maintain the rights we have and not lose them, rights that have been acquired with iron and fire throughout the history of humanity.

3 THE INTERNATIONALIZATION OF SOCIAL RIGHTS

The theme of human rights is a fundamental piece for understanding the Democratic Rule of Law, whose emergence has always been related to the limit of intervention of the individual sphere of each citizen[26].

After the naturalist, positivist, and socialist legal movements, the theme of human rights gained greater notoriety for the satisfaction of individual and collective rights through social constitutionalism, charged with realizing and implementing the social and fundamental values widely spread in our legal system.

According to Weiss, the recent emergence of universal and regional systems of norms and bodies aimed at promoting such rights, combined with the current situation in times of economic and legal globalization, reveals its particular relevance at the present time, given Brazil's ratification of the main international treaties related to human rights, resulting from the national redemocratization movement, marking a new moment for Brazilian public law[27].

The theme of human rights is, therefore, a historical construction, which has the universal aim of seeking, carrying out and recognizing that all people, regardless of color, race, creed or religion, or regardless of where they are or their condition social, have access to guarantees and certain rights.

First, it brings to light the classic concept of Bobbio[28]: 'Human rights are those that belong or should belong to all men, or from which no man can be

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[25] SANTOS, Júlio Edstron; CALSING, Renata Assis; MORAIS, Arnaldo Godoy*, A construção dos direitos sociais: panorama histórico, social, jurídico e perspectivas no Brasil atual*, REPATS, Brasília, v. 4, n. 1, p. 662-699, Jan-Jun, 2017.

[26] WEISS, Carlos, *O Pacto Internacional dos Direitos Econômicos, Sociais e Culturais*, Disponível em: <http://www.pge.sp. gov.br/centrodeestudos/bibliotecavirtual/direitos/tratado6.htm>. Acesso em: 25 jun 2018.

[27] WEISS, Carlos, *O Pacto Internacional dos Direitos Econômicos, Sociais e Culturais*, Disponível em: <http://www.pge.sp. gov.br/centrodeestudos/bibliotecavirtual/direitos/tratado6.htm>. Acesso em: 25 jun 2018.

[28] BOBBIO, Norberto*, A Era dos Direitos*, Tradução: Carlos Nelson Coutinho, Rio de Janeiro, Editora Campus, 1992, p. 17.

dispossessed' that is, human rights represent the recognition that all people are holders of rights and must have a guaranteed minimum for a dignified life condition.

Second, it should be borne in mind that the term "human rights" has a wide meaning in the legal field, varying in meaning according to the term used, whether by legal culture or even by doctrine. According to Mendes et al[29]: 'the very reasons for finding an ultimate foundation for human rights contribute to making it difficult to conceptualize human rights as well.'

Human rights are those inherent to the human condition of the person, as a being endowed with reason, freedom, equality and dignity, and encompass the indispensable and essential aspects for a dignified life. Its ownership stems from the fact that the person exists, not including any type of distinction or discrimination, and is specifically provided for in international documents[30].

Antonio Enrique Pérez Luno, in turn, considers human rights as the set of faculties and institutions that, in each historical moment, fulfill the requirements of human dignity, freedom and equality, which must be positively recognized by legal systems at the national level and International[31].

It is possible to affirm, therefore, that human rights have always existed, that they were born with man and that, in one way or another, there has always been a struggle waged by society for better living conditions.

In this sense, Santos, Calsing and Morais (2017) clarify that, regarding the realization of fundamental social rights, it is worth remembering that with the promulgation of the Universal Declaration of Human Rights in 1948, the dignity of the human person was recognized as a fundamental value for all countries that are part of the United Nations (UN) system and, with this understanding, the need for international society to establish standards for the realization of the rights inherent to the protection and promotion of human beings, whether in their individual or social dimensions, emerged.

Even though it cannot be forgotten that the Universal Declaration is not endowed with binding force, that is why it was necessary to establish two legal instruments that increase specific sanctions for their Member States and favor the realization of these rights.

At the international level, the definitive sign in this direction was the simultaneous adoption of the two treaties by the United Nations, on December 16, 1966, through Resolution n. 2200-A of the General Assembly. Interestingly, the Covenants came into force almost at the same time, that is, three months after the deposit of the thirty-fifth instrument of accession or ratification with the UN Secretary General, which occurred on January 3, 1976 for the International

[29] MENDES, Gilmar et al, *Curso de Direito Constitucional*, 8ª. ed., São Paulo, Saraiva, 2016, p. 114.

[30] DEL PRETI, Bruno; Lépore, Paulo, *Manual de Direitos Humanos*, Editora Jus Podivm, p. 28.

[31] PÉREZ LUNO, Antônio Enrique, *Derechos humanos, Estado de derecho y Constitución*, 5ª ed., Madrid, Tecnos, 1995, p. 48.

Covenant of Rights Economic, Social and Cultural and March 23 of the same year for the International Covenant on Civil and Political Rights[32].

About this architecture of historic construction and enforcement of rights, the following highlight by Alves[33]:

> *'The three main elements that underpin the entire international architecture of norms and mechanisms for the protection of Human Rights are the 1948 Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic and Social Rights and Cultural.'*

Therefore, the relevance of these two great pacts, is constituted in the process of institutionalization of human rights when it comes to creating sanction mechanisms regarding their effectiveness and applicability by the State.

Specifically about the ICESCR, it is healthy to remember that it entered into force in 1976, with the 35th instrument of ratification of a State party, it should be remembered that 'As of April 12, 1996, 143 States had ratified the Covenant, thus voluntarily assuming the obligation to comply with its rules and provisions' (UN, 2016, p. 7)[34].

Second Ramos[35], The ICESCR is considered a milestone for having ensured prominence to economic, social and cultural rights, overcoming the resistance of several States and even the doctrine, which saw social rights in a broad sense as mere recommendations or exhortations.

Brazil ratified the ICESCR on January 24, 1992, obliging itself to promote and guarantee all the rights promoted in the Pact, both for the adoption of public policies and programs, and to promote actions compatible with its implementation for all its citizens[36].

The importance of mentioning the ICESCR lies in the fact that civil society must monitor the actions of the State, in order to verify if Brazil is complying with the recommendations and suggestions proposed by the Committee. Monitoring by civil society, through the Alternative Report, is essential to guarantee the rights contained in the ICESCR. This is yet another way to exert pressure to demand actions from the State to promote human rights in Brazil[37].

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32 WEISS, Carlos, *O Pacto Internacional dos Direitos Econômicos, Sociais e Culturais*, Disponível em: <http://www.pge.sp. gov.br/centrodeestudos/bibliotecavirtual/direitos/tratado6.htm>. Acesso em: 25 jun 2018.

33 ALVES, José Augusto Lindogren, *Arquitetura Internacional dos Direitos Humanos*, Brasília, FUNAG, 1995, p. 24.

34 SANTOS, Júlio Edstron; CALSING, Renata Assis; MORAIS, Arnaldo Godoy, *A construção dos direitos sociais: panorama histórico, social, jurídico e perspectivas no Brasil atual*, REPATS, Brasília, v. 4, n. 1, p. 662-699, Jan-Jun, 2017.

35 RAMOS, André de Carvalho, *Curso de Direitos Humanos*, 3ª ed., São Paulo, Saraiva, 2016, p. 159.

36 PRR 4ª REGIÃO, *Pacto internacional sobre direitos econômicos, sociais e culturais*, Disponível em: < http://www.prr4.mpf.gov.br/pesquisaPauloLeivas/index.php?pagina=PIDESC >. Acesso em: 9 fev. 2018.

37 *Ibdem*.

Moving forward, in 2008, the UN General Assembly approved the Optional Protocol to the Covenant on Economic, Social and Cultural Rights. This protocol, which has not yet been ratified by Brazil, has 22 articles that seek to further enforce the protection of fundamental social rights[38].

This protocol, according to Cunha and Scarpi op. cit. it represents an important mechanism for strengthening civil and political rights, as it allows the committee to hear complaints made by the victims of violations of rights guaranteed in the pact. The authors emphasize, however, that the denunciation will only be accepted if it concerns a State party to the pact that is also a signatory to the optional protocol. Despite the obvious limitations, since many signatory states of the pact on civil and political rights did not accept the optional protocol, it cannot be denied that the very existence of the protocol represents an important weapon in the process of struggle for the realization of civil and political rights.

Thus, the Covenant on Economic, Social and Cultural Rights should be considered an important driver of fundamental social rights.

FINAL CONSIDERATIONS

This article sought to demonstrate, in a systemic way, the historical construction of Fundamental Social Rights. The main objective of this study was to demonstrate the applicability of human rights in the Brazilian constitutional plan, as well as to justify the need for Brazilian society to enforce these rights for the egalitarian construction of a social state.

It is true that the realization of these social rights requires a greater contribution of resources as well as a positive action by the State in the sense of implementing public policies as well as social projects and programs, which certainly requires greater investments of financial resources by the State, but on the other hand, it is unreasonable to believe that for their realization, the fundamental social rights have to submit to the principle of the reservation of the possible, as well as it is unreasonable to admit the non-applicability of a legal norm due to social retrogression.

As a conclusion of this study, it was found that the Fundamental Social Rights are the result of a historical construction that goes back to the birth of humanity.

Over the years, due to the empowerment of the State, there was an alternation of social rights, which initially were built from the ideals of jus naturalism and which later suffered a remarkable preponderance of positive law, but due to the natural evolution of society this right also evolved and new branches of law emerged such as Legal Sociology, which is a branch that tries to describe and explain the legal phenomenon as part of social life.

[38] SANTOS, Júlio Edstron; CALSING, Renata Assis; MORAIS, Arnaldo Godoy, *A construção dos direitos sociais: panorama histórico, social, jurídico e perspectivas no Brasil atual*, REPATS, Brasília, v. 4, n. 1, p. 662-699, Jan-Jun, 2017.

Throughout its historical construction, the Law was used as an instrument of domination and oppression of a portion of society, the law had an inhibiting character, restricting and not expanding rights, as it derived from a code of moral conduct.

The State, in turn, was getting stronger, removing the idea of individualism and claiming for itself the preponderance of regulator of interpersonal relations.

With the ideals of the French Revolution, society once again called for more egalitarian demands and a Minimum Intervening State, positivization of individual values and rights and recognition of minority rights.

Finally, based on a tripod, social and fundamental rights were demanded through the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

It is worth emphasizing the double degree of mandatory effectiveness that economic, social and cultural rights achieve, while it is an effective condition of these rights, it also reveals the legal commitment established by the Member States to ensure the realization of these rights.

The dignity of the human person is a social value in which the entire legal system is established and founded, with dignity being a value, which cannot, therefore, its tutelage be fractioned, as stated in the Vienna Declaration: 'all human rights are universal, indivisible, interdependent and interrelated'.

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