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# **The Dialectic of Emancipation and Repression in International Human Rights Law**

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Thesis Submitted for the Fulfilment of the Degree of Doctor of  
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I hereby declare that this thesis has not been submitted, either in the same or different form,  
to this or any other university for a degree.

Signature: .....

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UNIVERSITY OF SUSSEX

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THESIS SUBMITTED FOR THE DEGREE OF DOCTOR OF PHILOSOPHY IN  
INTERNATIONAL RELATIONS

THE DIALECTIC OF EMANCIPATION AND REPRESSION IN INTERNATIONAL  
HUMAN RIGHTS LAW

**SUMMARY**

The main objective of this thesis is to investigate, using the dialectical method, why human rights are not only just emancipatory in the international context but are also often used for the legitimisation of repressive policies. The argument in this thesis accepts that human rights have an important role in the general development of international law, and that their historical development has had a transformational effect on international politics. My thesis is that political groups have sought to mould political and social interactions by questioning and reshaping both the definitions and the system of human rights. In doing so, those actions – defined as political power – are used to legitimise new social and political constellations by changing the legal definitions of rights and by erecting new forms of protection.

In the development of my argument, I analyse first the different historical moments in which significant transformations and redefinitions of human rights occurred. For that, I will identify two processes: the formalisation of rights (emancipatory) and their de-formalisation (repressive). Secondly, I will seek to show that these processes are politically constituted in a dialectic that operates in the implementation of such rights by the State in both domestic and international spheres. I shall then provide an interpretation that tries to explain how this dialectic has helped legitimise the system of international human rights. As a result, it can be observed that while in the West there was, domestically, an emancipatory movement able to formalise rights that progressively reached larger social groups, the same cannot be said for those who lived in the colonial world. Internationally, there have been different interpretations that prevented the expansion and implementation of human rights on the same basis as in the domestic sphere. The dialectic of emancipation and repression, therefore, can be visualised by looking, historically, at political struggles between formalising and de-formalising forces.

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## **LIST OF ABBREVIATIONS**

UN	United Nations
NGO	Non-Governmental Organisation
UNSC	United Nations Security Council
ICC	International Criminal Court
NATO	North Atlantic Treaty Organisation
IL	International Law
IR	International Relations
CLS	Critical Legal Studies
UNHCR	United Nations High Commissioner for Refugees
OHCHR	Office of the High Commissioner for Human Rights
IICK	Independent International Commission on Kosovo
KLA	Kosovo Liberation Army
SPD	Social Democratic Party of Germany (German: Sozialdemokratische Partei Deutschlands)
OAI	Old Age Insurance
ADC	Aid to Dependent Children
NIEO	New International Economic Order
ICESCR	International Covenant on Economic, Social and Cultural Rights

ICCPR	International Covenant on Civil and Political Rights
EU	European Union
US/USA	United States of America
USSR	Union of Soviet Socialist Republics

## TABLE OF TREATIES AND OTHER LEGAL INSTRUMENTS

Charter of the United Nations 1945

Universal Declaration of Human Rights 1948

Berlin Conference 1884-85

Declaration of the Rights of Man and Citizen 1789

International Covenant on Civil and Political Rights 1976

International Covenant on Social, Economic and Cultural Rights 1976

Pope Sixtus IV's *Aeterni regis* of 1481

Treaty of Alcáçovas 1479

Pope Alexander VI's Bulls of Donations 1493

Bull *Inter Caetera* 1493

Pope Paul III's *Sublimis Deus* 1537

The New Laws of Indies (*Leyes Nuevas*) 1542

The Sugar Act (American Revenue Act) 1764

The Currency Act 1764

The Stamp Act 1765

The Tea Act 1773

United States Declaration of Independence 1776

Bill and Declaration of Rights 1689

Habeas Corpus Act 1679

King James II's First Declaration of Indulgence 1687

King James II's Second Declaration of Indulgence 1688

The Militia Ordinance 1642

Constitution of Year I 1793

Declaration of Rights of the Constitution of Year III 1795

Treaty of Ryswick 1697

Black Code (Code Noir) 1685

Declaration of Rights of the Working and Exploited People 1918

Weimar Constitution 1919

Final Communiqué of the Asian-African Conference of Bandung 1955

Charter of Economic Rights and Duties of States (A/RES/29/3281) 1975

Convention on the Prevention and Punishment of Genocide 1948

## INTRODUCTION

International human rights law is a complex issue. It represents not only an historical conquest but also the banner under which individuals or groups continually justify their fight against injustice. There are several social demands that have been claimed in the name of human rights. At the international level, they have been historically linked to the Universal Declaration of Human Rights of 1948.

Mainstream analyses have provided a linear and progressive reading on the origins and development of human rights (Donnelly, 2013; Forsythe, 2012). They explain the extent to which human rights norms have been respected and applied, although they have been silent about the internal transformations that this type of law can historically suffer, or even if the meaning of human rights still protects groups against injustices. A second position among academics, however, represents the discourse of human rights as representative of the ideology of empire. They have tried to provide a deeper understanding of human rights not only as a tool for political actions but as one that leads to repression while leaving their emancipatory potential behind (Douzinas, 2002, 2007; Lang, 2009; Schick, 2006).

Recent historical events can help us understand both positions. For instance, the 1990s was considered the era of human rights. During the Cold War, several legal norms such as anti-colonialism and anti-racism were developed, as a consequence of the inclusion of several African and Asian countries in the United Nations (UN) human rights body. It was, however, at the end of the Cold War, that the system showed unparalleled institutional and technical development. UN human rights bodies, such as the UN Human Rights Commission (later substituted by the UN Human Rights Council), were supported by advocates who used or created new systems for monitoring reports and individual complaint mechanisms. In this development, NGOs targeted the UN Security Council (UNSC) and lobbied to have human rights included in its resolutions and to create courts such as the International Criminal Court (ICC) (Mertus, 2009).

The development of the human rights regime at the international level, however, did not overcome the contradictions of human rights. The system was suffering the effects of problematic interventions against humanitarian violations. Interventions in places such as

Sudan, Kosovo and Timor did not achieve the desired results. Each intervention presented different problems and resulted in different attempts to legitimise State actions. For instance, in the case of Kosovo, the North Atlantic Treaty Organisation (NATO) acted despite lacking formal authorisation from the UNSC. In Timor, on the other hand, intervention took place following an Indonesian invitation. Despite the differences, violence remained a constant, and the ‘international community stands accused of doing too little, too late’ (Annan, 1999). The violence and the lack of consistency on humanitarian intervention led the UN Secretary-General, Kofi Annan (1999), to question the model and to urge the need for reform. According to him, the interventions of the 1990s could not be considered as a model for the next millennium. In this context, the UN Charter should be read as an instrument to protect the individual against human rights violations. It should not allow the UN and Member States to be selective in responding to such violations.

The expansion and development of human rights, questioning the legitimacy of international policies at the end of the twentieth century, has highlighted these contradictions, as the examples above have shown. Each position in the current literature, however, has been able to identify only one side of the contradiction without clearly exploring the contradictions as an immanent element of human rights. This lack of explanation raises several questions. For instance, it seems unproblematic – and in some ways almost desirable – that international policies have been legitimised in terms of human rights. Therefore, I want to understand in this thesis, how transformations in the practices and discourses of these rights emancipated a portion of the population, while at the same time legitimised the perpetration of violence and repression in the colonial world. From this question, I also ask how these contradictions have transformed International Law and legitimised policies in international relations. Despite the advances in studies of international human rights law, there is not a satisfactory approach that can explain matters. I understand that current literature on the subject lacks the necessary historical methodology. Such historical analysis is crucial because it provides us with the necessary elements to understand the social contradictions that will legitimise a certain set of human rights. In this account, I will follow the historical analysis developed by the decolonial literature.

To answer these questions, I propose in this thesis to undertake a different approach, based on that of the Frankfurt School, which will apply a dialectical methodology to early sixteenth century judicial practices. The early Frankfurt School provided a more in-depth

understanding of the dialectical method. However, both Neumann and Kirchheimer had a less theoretical approach to the dialectical issue and made more of an use of the method. The application of this methodology will differentiate my argument from the current literature, that deals with the role of human rights in International Law and the legitimacy of policies in International Relations, because, as I will explain in Chapter One, historical analysis gives a better explanation of the changes in International Law. This methodology will contextualise the contradictions inherent in the discourse and practice of human rights. Because the contradictions that operated differently in each historical context, the historical dialectical methodology will result in a better understanding of the practices and discourses, and their development. In addition, this methodology is different from the current literature in that it understands that each historical context presents a particular balance between emancipation and repression. This situation is part of the nature of human rights and changes within each historical context. As in Adorno, constant change happens because the dialectic is never reconciled and leaves a reminder, a violence (Adorno, 2003).

The methodology developed in this thesis is also based on a particular understanding of the politics. This subject will be better explained in Chapter Two. It will be suggested – based on the Frankfurt School – that there can be a particular way to understand the politics that can relate the political order with the legal and the historical. First of all, political struggles are confined to those historical situations. Secondly, politics and law are intrinsically related. Political struggles will result in rights, and those rights will later be the focus of political dispute. Because the individual in a liberal order distrusts the government, their intention will be to protect themselves by establishing several rights against the State. During the establishment of these rights, the role of the political struggle will be to create a consensus around an idea of human rights. Once formed, the consensus will then legitimise a specific legal order and discourse that can be used by the State as a tool to legitimise violence.

In this Introduction, the problem will be developed in two different sections. First, we will look at how human rights have developed in international law based on a liberal progressive approach and how this set of norms can be understood not only as a discourse, but as a discourse that legitimises punitive practices. Having explained the problem in this thesis, we will focus on the contradictions that human rights can present as part of the dialectical movement in international relations. A chapter plan will be outlined at the end of



this Introduction.

## **The Contradictions of International Human Rights Law and the Academic Discourse**

The history of human rights has been described mostly by liberals as a linear history, steadily moving towards emancipation. For instance, the French Declaration of the Rights of Man and of the Citizen and the revolutions of the eighteenth century were the substance for the pronouncement of universal and eternal rights. The source of authority moves from the sovereign to the nation, which is also the source for the universal rights. Against the perversion of the *ancien régime*, the Declaration constituted new institutions and a new concept of man entitled to rights such as ‘liberty, property, security and resistance to oppression’<sup>1</sup>. At this time, human rights were considered to be natural rights and they were used against oppression. It did not mean that there were no conflicts. The rights set out in the French Declaration, however, were justified by declaring them as universal and thus outside political and social struggles. The new dominant class transformed central capitalist institutions (like property, contractual relations and family) as rights for all men.

The function of human rights changed after 1945. At this point, different supra-national values and constitutional principles were part of the discourse of both left and right. (Howard, 1996). There was continuity in the attempt of the bourgeoisie to use constitutional theory to control the democratic legislature and structure between the period pre-1933 and post-1949. This situation created a connection between forms of democracy and the positivisation of law. During the Cold War, there was the implementation of general human rights standards within States and their enforcement at a global level through the practice of humanitarian interventions. Created as a peace organisation and as a reaction to the actions perpetrated by the Nazi regime, the United Nations (UN) incorporated into its Charter most of the democratic achievements of the State, including popular sovereignty. The actions of the organisation are characterised as an attempt to encourage respect for human rights (Maus,

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<sup>1</sup> Article 1 ‘Men are born and remain free and equal in rights. Social distinctions may be founded only upon the general good.’ Article 2 ‘The aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression.’ Article 3 ‘The principle of all sovereignty resides essentially in the nation. No body nor individual may exercise any authority which does not proceed directly from the nation.’ (French Declaration of the Right of Man and Citizen, 1789, available at [http://avalon.law.yale.edu/18th\\_century/rightsof.asp](http://avalon.law.yale.edu/18th_century/rightsof.asp)).

2006, p. 474)<sup>2</sup>. However, it was only after the end of the Cold War that human rights became the ideology of the ‘end of history’, linking the universal and particular, and spaces of emancipation and oppression. Because of that, human rights can reveal the *status quo* in the process of de-politicised social struggles, turning them into universal and acceptable rights. However, since the political action is determined by the language of rights, they can also help challenge oppression and inequality. This order is moral-legal and human rights provide the basis for the economic, political and military norms. At the same time, international law has codified and constitutionalised the rights – relating to the rights of ‘empire’ and representing the international *status quo*.

If we understand human rights as a liberal ideology, then there is an attempt to build an entirely cosmopolitan order based on a system of law that proclaims national sovereignty. In this sense, human rights legitimise and give an ethical significance to actions in international relations. At the same time, the principle of sovereignty allows the victorious to remain free from prosecution in cases where they have violated human rights while acting in the name of humanitarian interest, or their own self-interest. This debate about human rights and the upholding of human dignity was, in reality, a process of re-legitimation of the principles of sovereignty and non-intervention in the domestic affairs of sovereign States. In this way, there should be no contradictions, and thus, human rights should be just emancipatory.

Notwithstanding, human rights can also be presented as repressive. A historical analysis based on this liberal trend cannot explain the violence perpetrated in international relations, legitimised by human rights norms. Thus, at the other end of the spectrum there is the understanding of human rights only as repressive. The scholars who developed this argument, often departed from the idea that human rights are a discourse of law/international law (Evans, 2005). One of these discourses has been concerned with the entitlement of rights. During Western history, people tried to determine who was entitled to rights. In this sense, ‘one could write the history of human rights as the ongoing and always failing struggle to close the gap between the abstract man and the concrete citizen; to add flesh, blood and sex to the pale outline of the “human”’ (Douzinas, 2007, p. 54). However, from the universe of discourses that exist in international politics, human rights differ from the economic

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<sup>2</sup> See Maus 2006 474 and development based in her footnote. 43. UN Charter, Arts. 2 (1 and 4), 39, 42, and 2 (7). 44. Ibid., Art. 1 (2). 45.

perspective at the point of globalisation. It happens because human rights represent the search for absolutes rather than the economic language of management and governance, as much as against relativism and abuses from the bureaucracy. The language of rights is capable of pushing the debate away from instrumental reason – the idea of calculation and reasoning in terms of costs and benefits – at the same time from the debate and from the association with the mainstream discourse according to which ‘if they [rights] are in this way counter-posed to political power, their natural place must be outside of politics, yet constraining politics’ (Meckled-García and Cali, 2006, p. 4). This type of discourse transforms human rights and they become almost intangible and untouchable and the definition, almost apolitical.

This debate has provided a means for a second body of literature to valorise a different side of human rights. When observing the international order, this literature has diagnosed that ‘the current order promotes human rights in specific contexts and by means of punitive practices but without being nested in a broader rule-governed [...] order’ (Lang Jr, 2008, p. 9). In this sense, the human rights regime would constitute an order in which punitive practices have contributed to an illiberal order, even though these practices have been oriented towards the promotion of a liberal order (Ibid, p. 10). In this context, the discourse of human rights would have become central to political actions at the international level – or in terms of an ethical order (Frost, 2009). Hence, military actions would be used to protect these rights when they are violated. This is the argument behind the humanitarian interventions of the 1990s.

Therefore, it is possible to understand humanitarian intervention within the realm of punitive practices. It is a practice defined as ‘the intentions, justifications, events and outcomes that delimit a certain area of reality at the global level’ (Lang Jr, 2008, p. 14). Moreover, it is punitive in the sense that it uses violence to respond to a violation of human rights norms. Despite the fact that Lang Jr. insists that there are differences between punitive interventions and humanitarian interventions<sup>3</sup>, he characterises the intervention in Kosovo – the focus of Chapter Six of this thesis – as a punitive intervention. The importance of Kosovo lies in the fact that it represented an increase in the use of military action to protect human rights at the end of the twentieth century. During this period – which corresponds to

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<sup>3</sup> Lang’s differentiation is technical. Despite the fact that both practices are human rights oriented, he believes that humanitarian intervention would halt human rights violation while punitive intervention would cause harm in response to a violation already committed. Also, the target of humanitarian intervention would be the sovereign state, while the target of punitive practices would be diffuse (Lang Jr, 2008, pp. 61–62).

American hegemony and the inclusion of a liberal trend in American militarism – there was an emphasis on the use of force against human rights violations (Lang Jr, 2008, p. 67). The ‘solution’ to this problem within the current order would be to constitutionalise the structures of the international order for a more just order. This procedural or quasi-procedural literature concluded that a ‘just’ constitutional order is necessary to justify punishment in the liberal international order. In fact, there are some ideas about the rule of law behind this literature, such as the necessity for a constitutional structure in international relations, that are not well explored. The diagnosis is, nevertheless, alarming: the international human rights regime increases military violence.

Based on the above conclusions, these attempts to ‘assess’ the current liberal order could be recognised as based on liberal democracy and principles such as equality, protection of individual rights and market economics (Burley, 1992; Slaughter, 2000, p. 235). After the ideological conflicts of the Cold War, this new order visualised the universal consensus over Western values. Also, this celebrated universalism placed human rights as the central argument for international law. As a moral force, international relations were conducted by ethical norms and actions based in terms of human rights. The international order of the 1990s showed that human rights were everywhere, albeit not necessarily in a positive sense:

In humanitarian wars, military force has been placed in the service of humanity. Economic sanctions have been repeatedly imposed unilaterally and multilaterally allegedly to protect nations and people from their evil governments. Politics are legalised through the increased use of criminal procedures against political leaders in domestic and international courts. Finally, human rights and good governance clauses are routinely imposed by the West on developing countries as a precondition for trade and aid agreements. Human rights appear to have triumphed in the world (Douzinas, 2007, p. 177)

In sum, this apparent contradiction can be understood in the sense that human rights legitimise, and give an ethical significance to, actions in international relations. In this case, however, the principle of sovereignty would allow the Great Powers to remain free from prosecution in the event of their interventions involving human rights violations. This debate about human rights and the upholding of human dignity was, in reality, a process of re-legitimation of the principles of sovereignty and non-intervention in the domestic affairs of hegemonic powers and the primacy of their own interest against the general will. The most powerful States, through the human rights discourse, made their priorities the universal concern of others (Evans, 1998, p. 89). For this second debate, international order could only be argued in terms of a punitive (i) liberal international order. However, I will claim that they

failed to grasp the contradiction between human dignity and the sovereignty of hegemonic powers. In the next section, I will provide some of the arguments that differentiate this thesis from the literature and consider how I will answer the questions raised in this introduction.

### **Human Rights and Paradoxes: Analytical Foundation**

The literature on human rights has not yet explained satisfactorily the connection between emancipation and repression in human rights, nor how it transformed international law and legitimised international policies. On the one hand, human rights tend to be understood, particularly within the setting of the State, as being a project of freedom that involves an internal consensus and is centred on human dignity. On the other hand, the historical evolution of human rights norms shows that they can also be utilised by States to legitimise violence. In this sense, the consensus generated by human rights has often been used by such States to legitimise their policies, which often are not related to the protection and dignity of human beings. Thus, the main objective of this thesis is to investigate, through using the dialectical method, why human rights do not only play an emancipatory role in the international context but are often used for the legitimization of repressive policies.

There has not yet been any work on international human rights law that could satisfactorily answer the questions above, or has been inspired by the work of Neumann and Kirchheimer. The strength of their work relies on the fact that they were able to observe how the law was transformed in the Weimar Republic, where conflicts regarding constitutional rights played an emancipatory role in the case of the proletariat, but also legitimised the repression of the Nazi regime. I understand that the contradictions observed by them can also be perceived in the historical context presented in this thesis because they represent not only an important transformation in human rights but also the legitimacy of a certain violent colonial relationship. The lack of the historical component tends to naturalise certain contexts and policies and consequently, universalises them. The problem lies in the fact that the universalisation of just emancipation or just repression prevents us from understanding deeply the transformation of the system and different consensus. After presenting several transformations in international human rights law in each period, I will focus on humanitarian intervention, in particular in the case of Kosovo. This intervention will illustrate a military action legitimised in the name of human rights and within a broader transformation of International Law.

To answer the question, I will develop a dialectical methodology based on the legal theory of the Frankfurt School and apply it to historical contexts according to decolonial research. Despite the fact that Neumann and Kirchheimer did not deal with international law and international relations, I understand that the steps they took to understand transformation in the legal form and its relationship to the social order could well be applied to international law and international relations. However, with a view to undertaking such a task, it is necessary to make some adjustments. First of all, I have to deal with different legal orders. Their argument is not necessarily bound by issues of sovereign power. But by focusing on international relations, the boundaries between domestic and international law become more apparent. In the domestic sphere, the authors from the Frankfurt School were able to deal with one set of rights, from one historical context and one society. Their arguments were based on bourgeoisie rights as they were established in Germany and the transformation that occurred under Weimer which, in turn, generated the Nazi State. Secondly, by applying the dialectical method to international human rights law, I use the same process more than once – as the legitimacy of a certain constellation of rights forces other societies not only to deal with new rights domestically but also, with the demand for those rights internationally. For instance, the inclusion of social rights in the legislations of European States, first, inspired social groups in Third World countries to discuss and demand those rights within their domestic legal order – constituting one dialectic between repressive and emancipatory interests. Then, it allowed social groups in Third World countries to demand the right to development in the international arena – constituting another dialectic of emancipation and repression. Both movements relate to each other.

Besides, there is an issue with the difference between social groups in one particular State and the structure of international society. In this case, I focused on the decolonial literature and the differentiation between interests in a structure of international inequality. This choice also helped me limit the historical moments dealt with in Chapters Three to Six. Each historical chapter represents a moment recognised by the decolonial literature as a historical period in which rights were denied to colonial/Third World countries (Mignolo, 2000). Mignolo's paper presented the historical development of international human rights law in relation to different hegemonic power. In his vmony; political and civil rights under the French/British hegemony and social rights and development under the American hegemony. I adopted this historicisation as part of my historical chapters. Despite this recognition, the decolonial literature is unable to present the mechanisms according to which

rights were transformed and applied differently.

The Chapters are connected by the fact that when we perceive the legitimization of a certain constellation of rights, several groups use the juridical system to re-signify those rights, transforming them and perpetuating the dialectic. Following Neumann, the formalisation of general rights is preferable and would lead to a more emancipatory society – although the result of this dialectic would help create the Nazi State. This thesis, thus, follows the formalisation of international human rights law in different contexts and shows how it helped maintain the structure of coloniality of power.

However, Mignolo does not account for human rights during the imperialism of the 19<sup>th</sup> century. I have included this period because there are processes of formalisation and deformalisation that are necessary for the argument presented in Chapter Two. The thesis relies on legal documents produced during the historical periods studied and in the secondary literature, as long as it can provide information about the various interests and conflicts that occurred before the creation of the legal norms. Thus, it is not a textual reference, but a new interpretation of the transformation of international human rights law. The thesis turns to Neumann and Kirchheimer because, despite the fact that the decolonial scholarship has explained the repression that comes from the colonial expansion, often, their explanations turned to elements other than the legal. In this area, therefore, my thesis can help understand the legal development of international human rights law under coloniality. There are several elements, including the choice of historical cases and the unequal structure of the international society that are derived from decolonial authors.

While dialectics was used by Hegel to show that the result of contradictory elements resolve or reconcile through the articulation of more complex concepts, often leading to a more progressive situation, the *Dialectics of Enlightenment* (Horkheimer, 2002) does not aim to reconcile both elements. There is no intention to solve the dialectics of enlightenment, ‘but rather, to articulate and illuminate that paradox and to think through its implications’, because reconciliation means leaving a reminder, a conceptual violence to one or the other side of the dialectics. (Allen, 2014, pp. 16–8). The totalitarian moment observed by them at that time showed how the Enlightenment could become repressive, despite its rational thought that was supposed to be liberating. Thus, by arguing that the dialectics of international human rights law as both emancipatory and repression historically recurs and repeats, I can properly illuminate this paradox and show how the legitimacy of a certain constellation of rights is the

force behind new struggles for rights both domestically and internationally. The lack of reconciliation allows me to find certain continuity in the changes observed historically. There are emancipatory and repressive issues regarding international human rights law today that were unthinkable to people from the 16<sup>th</sup> or 18<sup>th</sup> centuries. However, the contradictions displayed in the rights of Indians and the universalisation of civil and political rights is present in those current issues. In a way, this is how Neumann constructed the structure of his study on the Rule of Law (Neumann, 2013, 1936). Neumann historically reconstructed the dialectic of emancipation and repression present in Western thinkers, highlighting differences and continuities through to exploring how this theoretical development is presented in the Nazi State

This thesis is based on an understanding of politics that relates this sphere with law<sup>4</sup>. The liberal attitude toward political power is generally one of distrust, and, thus, there are concerns about establishing protection. This protection comes in the form of rights, and it can be understood as the development and formalisation of the expansion of entitlements of human rights norms. In this sense, the result of political struggles can be found in the establishment of consensus toward certain standards, which legitimise a legal order. As a consequence, human rights are codified, creating the idea that they make us all human. In the process of the recognition of rights, the West denoted its protection as the hallmark of a civilised society acting against barbarism. The language of the law has colonised life and the social world. In this colonisation, human rights are a response to social claims and once there is a response – which means the establishment of a new law, representing a new right – the potential for transformation is extinguished. Once the law comes into force, it will, at the same time, solve the first necessity for right, and unleash the desire for a new one (Douzinas, 2007, p. 50).

The contradictions in international human rights law are not a current development or even an external feature to the subject, but rather paradoxes/contradictions that are fundamental to the idea of human rights. Thus, the focus on the negative side of human rights fails to present the political mechanisms according to which there is an emancipatory potential in the idea of rights. ‘Paradox is the organising principle of human rights for a number of reasons’, stated Douzinas (2007, p. 8). For example, due to the apartheid regime in

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4 . A better development of this concept and Neumann and Kirchheimer’s work can be found in Chapter 2.



South Africa, most struggles against the regime were rights-based actions that later were institutionalised in the South African Constitution. These constitutional provisions, however important they were at that moment, were also important in supporting the property rights of white property-owners (Koskenniemi, 2010, p. 53). Nevertheless, the example is important in highlighting the dialectic issues central to this thesis, representing both progressive and repressive forces in the development of human rights. At the end of the apartheid regime, the institutionalisation of human rights freed the black population. In this case, the use of rights by property owners did not dismiss the importance of the rule of law nor the emancipatory function that it had, but constituted an element in this dialectic of the liberal legal system in South Africa and how liberalism adapted itself. As Carol Harlow states, ‘in the present era of human rights supremacy, the best way to constitutionalize due process values or present them as “universal” is in the guise of human rights’ (Harlow, 2006, p. 206).

Human rights thus can represent an entitlement of the right-bearer against another individual that can be legally enforced. This characteristic has developed in numerous institutions, in regional and international environments, and it is the subject of different treaties, conventions or cases. Human rights also represent the moral code that can be recognised by the legal system, in as much as they entitle the individual to a standard of treatment circumscribed by a morality intrinsic to those rights. Human rights exist in the relationship between the legal and moral aspects of the individual. As moral standards, they depend on different theoretical sources and justifications that have changed during history. Human rights have their source in various locations, from transcendental justifications, based on God and the Scriptures, to ideas of human nature and also in the constitution of States and international law. However, they are also, paradoxically, a source of rebellion and provide a tool for domination. Natural right/law surged in contradiction with the power established. In the French Revolution, natural law was the basis for the French Declaration of the Rights of Man that identified the State with the nation, but, at the same time, was aimed at cosmopolitanism. The Rights of Man was a universal declaration, entitling all human being to share the same rights. In its universality, these same rights and declarations served the interests of the bourgeoisie. Nevertheless, uprisings and revolutions against the bourgeoisie and fascist regimes of the nineteenth and twentieth centuries, used the language of human rights. It is an idea built on the concept that society can be organised in terms of community, where conflicts will not happen as long as there is respect for human rights (Salecl, 1994, pp. 127–128).

Therefore, when observing international politics, this thesis will present the role of human rights as part of international politics, as a standard against which governments can measure their action and show the contradictions that are part of a theory of law of the Frankfurt School. I am using human rights in its broader sense. Despite the fact that it seems anachronistic, I believe that the use of the term human rights in relation to different constellations of liberties and claims will give us the idea of continuity and change of this concept presented by the historical development of the dialectic of emancipation and repression proposed in the thesis. The same can be said about the two central concepts in this thesis – emancipation and repression – have been left without proper definition. The reason for that was to avoid discrepancies that might occur when working with different definitions of rights given in various contexts. It is possible to understand that the definition of emancipation (or rather the necessity for freedom) in the context of the colonial enterprise against the Amerindians is different from the emancipation sought by European workers at the end of the nineteenth century. The same can be argued about repression and how different populations experienced it.

Nevertheless, we can claim that there is a common denominator between them. In this sense, emancipation can be understood as it was by the Enlightenment, as the project toward more freedom, while repression is the opposite movement, working towards fewer rights and freedom, representing violence towards individuals or groups. It is important to highlight, on the one hand, that there is no conflict between the enlightened emancipation and the emancipation sought by decolonial thinkers, despite the differences in rationality (Dussel, 1993). On the other hand, the dialectic developed by the Frankfurt School is not silent about its repressive side. In Adorno's *Negative Dialectics*, the author states that 'is that [the dialectic] it cannot be resolved, at least not without remainder, not without doing conceptual violence to one or the other of the poles of the dialectic' (Adorno, 2003; Allen, 2014, p. 18). Or, as described by Horkheimer,

Enlightenment, understood in the widest sense as the advance of thought, has always aimed at liberating human beings from fear and installing them as masters. Yet the wholly enlightened earth is radiant with triumphant calamity (Horkheimer, 2002, p. 1).

Thus, not only is there no contradiction between readings of the decolonial thought and the dialectical thought – as long as we understand the difference of rationality between decolonial and Eurocentric views on modernity – but also the lack of a unified definition is necessary to understand the changes that occur in the course of history. The idea is not to

debate whether ‘history matters’, but to understand the transformations in international human rights law. The application of Neumann’s and Kirchheimer’s dialectic as developed in this thesis allow us to understand the interests at the moment of the formation of international human rights norms, the role these interests played in legitimising a world view and how emancipatory and repressive forces change in different historical contexts. ‘History matters’ because the dialectical method is applicable to specific historical contexts. But it is not the main focus of this thesis. I set a historicisation based on the decolonial thought that focuses on the different forms of violence perpetuated from one geographical place to another within a structure of power called coloniality of power. Then, I applied the dialectical method to analyse how repressive interests that formed international human rights law contributed to this violence, at the same time as it allowed space for emancipation.

As part of this theory – and filling the gap in the discussions presented in this Introduction – it is important to understand the relationship between human rights and the rule of law and how legal liberalism has transformed it into oppression. As a discourse, social and historical struggles operate in power relations in which expert knowledge constitutes, reproduces, contests and transforms the same relations of power. The legal structure is, thus, a discursive structure obeying this same ceaseless process (Baxter, 1996, p. 477). Therefore, power relations and social claims will historically develop human rights’ norms in an attempt to reconcile the existing contradictions. Different from the literature behind the presented diagnoses, this thesis will include the post-colonial element in the construction of these paradoxes, an element often overlooked in the discussion. This will be done by highlighting the major importance that coloniality has in the dialectical process, not only as an international subject of international human rights law but also as a constituent of this same law.

## **Chapter Plan**

The first chapter reviews the analytical literature surrounding the relationship between international law, international relations and legitimacy. More specifically, it analyses two different approaches, the Natural Law and Positivist theories and the Critical and Marxists theories. The first, connected with the structure presented by Hans Kelsen, often differentiates

the two realms and does not grasp the influence that the juridical and the political spheres have on the international. The second group, the Critical and Marxist theorists, focus on the economic rather than the political dimension – or on the indeterminacy of international law (following the work of Carl Schmitt). It also analyses the concept of legitimacy in relation to the institution of rights and its political aspects. This review raises questions about the relationship between international law and international relations. Despite the fact that they influence each other, the process by which both arenas are co-constituted remains underdeveloped. Often, scholars tend to lean to one side over the other. When it comes to the legitimacy of international politics, the literature is more likely to interconnect both subjects. Different from these groups of approaches, this thesis seeks to provide a dialectical explanation for the role human rights play in international law and how this influences international relations, by legitimising certain international policies or political constellations. The current literature gives, at best, an unsatisfactory explanation about how human rights can legitimise punitive practices and other repression in international relations. Therefore, in the light of this conclusion, it will be argued that the legal theory of the Frankfurt School, expressed especially by the work of Neumann and Kirchheimer, is important to highlight the contradictions historically present in the constitution of international human rights law, providing an explanation that is rooted in a dialectical methodology.

Chapter Two will lay the foundation for the methodology applied in this thesis. It will discuss, in depth, the concepts and elements developed by Neumann and Kirchheimer at the beginning of the twentieth century. There are some elements that must be highlighted. First of all, this is a dialectical methodology. As such, the chapter will focus on the co-constitution of law and politics in the legitimacy of international politics. Contradiction in social and political forces will not only create law as an emancipatory entitlement, but it will also generate repression. Based on the authors' understanding of a liberal attitude toward political power, the chapter will show that in the definition of rights, social groups seek to create protection in terms of rights against the established power, which are determined by historical context and help create the structures of the rule of law. In this sense, the liberal attitude expected would be to protect oneself by formalising law and erecting institutional protections. In doing so, it also creates a regulatory power that is in favour of the State's repression. This process of interpretation and re-interpretation of human rights norms will legitimise actions and the arguments about right and wrong in the juridical sphere. The chapter will also provide an account of the importance of the historical analysis, within the

methodology inspired by both authors.

The third chapter provides the first historical case. It will offer an account of the development of international law and international relations, in the context of the Conquest of the Americas and the colonial enterprise. In Francisco de Vitoria's works on natural law, we shall see how it was possible to express the universal rights of the Amerindians and the Spanish right to conquest. Vitoria's natural law, as well as Grotius' version, can be understood in the same sense, legitimising the protection and expansion of rights of the Amerindians, at the same time as legitimising Spanish domination. If Vitoria's natural law provided Spaniards with the legitimation they needed, the American Revolution would lean on Locke's natural law to provide them with the political power necessary to challenge colonised rights towards political emancipation.

The fourth chapter of this thesis will advance historically, and it will explain the transformation of human rights that began in Europe and expanded into America. In this sense, European revolutions at the end of the seventeenth century and in the eighteenth century were responsible for controlling the absolute power of the monarch, providing their societies with a bill of rights and institutional development that could protect them from that absolutism. The Enlightenment provided the revolutionaries with the necessary tools to transform human rights from the Christian rights of Vitoria to the Rights of Man and of Citizens. Those rights, however, were constructed in a contradiction: they were both universal and national. At this time, the Haiti Revolution interpreted these rights in a radical universalism, to obtain their freedom, as the Frenchmen had obtained theirs.

Chapter Five develops the issue of human rights and imperialism in the nineteenth century. The Legal theory of the Frankfurt School developed in Chapter Two provides us with the necessary elements to understanding a period of de-formalisation of law. This chapter shows that despite emancipatory elements presented in the Enlightenment, as described in the previous chapter, the development of a civilising discourse present especially in legal positivism, allowed imperialism to be a driving force in the development of human rights in international law. In this context, international law was open-ended and vague, serving the interests of the monopoly. Nevertheless, positivism was used, at the same time, by non-European States to argue for equal rights in the society of nations. If, in Chapters Three and Four, it will be possible to observe that the dialectic of emancipation and repression resulted in the disenchantment of the law by formalising human rights in general terms and relating

the rights with the community that it represents, in Chapter Five I will argue that imperialism worked in contradiction to previous periods by de-formalising rights and by detaching them from the community.

Chapter Six provides arguments about the role of human rights in the transformation of international law in the context of twentieth century international politics. Two distinctive situations are analysed in this chapter. The first is the spread of social rights in Europe and the development of the Welfare State. In this context, the situation at the end of the nineteenth century allowed positivism to help political groups legitimise a situation in which the interests of the monopolies could be satisfied by breaking with the system of classical liberal law. The open-ended and vague legal norms spread in this period, and they worked against the functioning of a system of rights based on the rule of law. This chapter, thus, shows that the political power of social groups in the period forced a re-interpretation of economic norms and sought to protect an entitlement to a series of social rights. In the international context, however, the same argument of development that existed in this period, associated with social rights, prevented Third World countries from enjoying the same list of rights. The second situation exemplified in this chapter takes into consideration that the synthesis of these historical moments has created a system in which human rights can be understood as a punitive practice. In this sense, the chapter develops the argument that despite the fact that there are emancipatory processes in such interventions (as the case of Kosovo shows), the lack of proper legal definition acts in the sense of a decisionist type of norm – associated with Schmitt – and, thus, the fulfilment of any emancipatory practice is difficult. The chapter shows that humanitarian interventions, if left unchecked, without a proper system of rule of law or even a system of general legal norms, legitimise a system of repressive punishment.

# **CHAPTER 1 – RULE, HUMAN RIGHTS NORMS AND LEGITIMACY IN INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: A LITERATURE REVIEW**

In international relations, the role of norms, of many kinds, has increased. As such, it has become an academic concern and has raised different questions. Scholars and politicians made an effort during the 1990s to moralise and avoid future wars. This was considered to be one of the great promises of a liberal order after the end of the Soviet Union, represented by the idea of human rights in the early 1990s. This effort, however, failed, and the West was unable to address properly violations of human rights. The end of the Cold War, on the other hand, allowed the development of different legal structures related to human rights in world politics. Among these, it is possible to cite the Vienna Declaration and Programme of Action of 1993, which established the Office of the High Commissioner for Human Rights (OHCHR). The 1990s, however, did not represent a process of legality. Instead, this discourse of human rights was, and has been, part of the legitimisation and transformation processes in the West and its expansion to the rest of the world, which depends on justifications that can be given for developing some policies and also forming consensus about them, such as the establishment of military humanitarian intervention.

As expressed in the Introduction, the main objective of this thesis is to understand how human rights can be used as a repressive tool in the international context, at the same time as they are presented as being emancipatory. If human rights should be the language used by individuals or social groups to ensure some degree of protection against different types of power (for instance political or economic power), how is it possible that governments can associate violent policies in the international order with human rights? It is the central argument of this thesis that the dialectic of emancipation and repression has historically changed the discourse of human rights toward the legitimacy of a certain political constellation. Based on the questions that have been raised, and drawing on literature on international human rights law, this thesis seeks to engage with political aspects of the formulation and application of these legal norms, and with cosmopolitanism in international relations.

Therefore, in order to attempt to answer these questions, this literature review will focus on arguments concerned not only with the relationship between international law and international relations, but also with legitimation in the world order, and the role of human rights in this process. I will argue that there are at least two main issues that need to be addressed: first, the idea of legal norm in the political context, and the importance of the law for our understanding of international politics, and, secondly, the relationship between norms and international politics. The following sections will try to present a review of the current literature about both issues.

The first issue will be addressed by presenting the literature that relates to the subject of human rights in the intersection between the study of International Law and International Relations. It is important to realise that both areas have numerous, usually differing, perspectives each with different questions and concerns. Not all approaches in International Relations understand that the juridical aspects of social reality can present answers to the puzzles in international order and, in turn, that not all perspectives in International Law centre politics in their debate. Despite these differences, the intersection between both areas represents a significant context in which this thesis will be developed. Therefore, ordering and managing this diverse body of literature becomes necessary, even though the division of this literature review into groups is very limiting. Despite these limitations, I identify a first body of literature (permeated by different positivist and traditional approaches) that takes for granted the discourse on which the current international society is understood and established – the liberal order – including the central pillars of its rights and political underpinnings. This body of literature tends, however, not to provide relevant critiques of capitalism, or the debate relies on State behaviour and the possibility of a policy-oriented understanding of their work. The other group, dominated by Critical and Marxist approaches, shares some critiques about capitalism and liberalism. Many left-wing authors bring Marxian perspectives, arguments and assumptions to bear on the study of human rights, leading to some critique of the establishment.

To address the second issue, it is necessary to review the literature on legitimacy because this work tries to understand the conditions according to which certain legal norms can be valid. The idea of legitimacy may reveal to us how a foreign international system of law can be accepted and applied by non-European states even when the consequence is violence, limiting rights. It contributes to changes in how power can be executed in a society.



In this sense, legitimacy has the function of obtaining compliance in relation to practices and transformations without over politicisation or specific mobilisation. This function allows the political systems to enforce its decisions and create stability, integration and motivation. It also allows the political system to reflect on its practices, highlighting the adaptability of the system to match societal adequacy and as such, it 'facilitates, generalises and renders probable the processes of political inclusion and exclusion which it presupposes for its functional adequacy' (Thornhill, 2011, p. 140).

My argument is that the importance of the theory of law of the Frankfurt School lies in the fact that it provides a better means to understand the transformations of human rights law, especially because the idea of change has not been well developed in the legal scholarship. Cotterrell, for instance, stated that 'it seems necessary to stress, nevertheless, that most legal philosophy and much legal scholarship do not register as fundamental these complex social, economic, and political changes' (Cotterrell, 1995, p. 162). In this sense, legitimacy becomes an important subject that needs to be clarified in relation to legal norms and human rights. Although it is central to political philosophy (Thornhill, 2007, p. 162), legitimacy is constructed in some different, often polarised perspectives. The common ground for this issue, however, seems to stem from the idea that there is something between the political system and its citizens indicating that the 'law will be met with willing compliance on the part of those they addressed' (Ibid., p. 162). This means that citizens do agree with a law being passed for reasons other than just fear or fleeting self-interest. As a converged position, there is the belief that the State policies are constrained, and will only use its power within these consensual constraints. It will be more or less legitimate depending on the motives it has for using such power. As can be pointed out, the Legislative branch has a 'moral right' to legislate and/or to impose duties that its subjects will comply with, while using coercion when necessary (Simmons, 2000, p. 130). Therefore, this chapter will present the relationship between the different approaches to international law and international relations from the perspective of legitimacy. Each approach deals with the idea of legitimacy in terms of legal norms and institutes, and has at least one of the following three views on the issue. The first is the normative understanding of legitimacy, in which legal norms and institutions are accepted and followed mostly because they are seen to be right. The second is a sociological view of the subject, according to which there is a binding relationship between law and institutions and the individual. Lastly, the idea of rational discourse and the procedures to obtain it, present a third way to understand legitimacy. It must be understood

that, even though there are these different approaches to legitimacy, the literature on international law and international relations usually presents a combination of all three.

### **Perspectives in International Relations and International Law**

This section will deal with perspectives in International Relations and International Law that manage to present some argument about the politics and legal norms in the international order, focusing on the idea of human rights. I will first review the body of literature that shares with legal positivism the same concept of the law, as positive law. Here, we find Liberalism, Behaviourism, and the New Haven School. Another body of literature to be reviewed takes its position among Marxists, Critical Theorists and Foucauldian and provides a different argument about the nature of legal norms in international politics, by understanding it within its social-economic context.

Both Natural Law and Legal Positivism share an understanding about what the expression ‘positive law’ stands for, and both systems include this type of law laid down by an authority and created by an act of will. Within this debate, the Grotian tradition from the eighteenth century would rely on the fact that positive international law is the law that exists and is legitimised by the tacit or express consent of the community of States and as part of international society. Writers from the nineteenth century, however, did not consider international law any differently from internal law. For them, besides the positive law, international law was also partly formed by natural law, and policies would be legitimised in observance with rational understandings of pre-existent rights and understandings of human dignity (Ago, 1957, pp. 693–695). These approaches, however, detached the law from the political context and analysed the conduct of States based on ‘fixed and unambiguous rules of restraint’ (Falk, 1967, p. 478). It was only in the years following the Second World War that scholars were sensitive to examining international law and international human rights law in relation to international politics. They decided to give ‘realistic goals for international law in light of the decentralised character of international society’ and, in pursuing this objective, the movement was to bring the study of the subject ‘into ever closer association with the outlook, method, and concerns of the social scientist’ (Falk, 1967, p. 479). This task was problematic. Several scholars in both International Relations and International Law decided to search for institutions that were functional equivalents to those existing in domestic law. In

this sense, there are perspectives, such as Realism, Liberalism and the English School that use the domestic analogy as a methodological tool to understand the international dimension. The analogy does not necessarily disregard international law from international politics, but in those cases the system is considered a reality in itself.

Legal Positivists are concerned with how the law and the institutions work. Josef L. Kunz (1962), for instance, detailed the work of legal internationalists to reform the idea of international law following the Second World War. He argued that there were academics, especially in International Relations, who disregarded international law. Thus, the main task at that moment was to reform international law not only as a legal system, but also as a science. This task, however, would centre on the idea of human rights and peace. He attempted to describe how the system worked and how lawyers would act within it. Critics have pointed that together with Natural Law and Legal Positivism the legal order was reduced to ‘a formally “immanent” and self-referring system of rules, which excludes all external moral or sociological contents in the deduction of validity and entitlement under law’ (Thornhill, 2007, p. 299). Legal Positivism provides us with a system that corrupted the rational process of self-legislation and Enlightenment, reducing freedom and legitimacy. Their arguments have been capable of separating law from politics. As a consequence, even the idea that human rights can play a role in international politics is denied.

The New Haven School is a body of literature that tried to shed new light on the problem of international law but within the positivist approach. This perspective has as its argument the idea that it is necessary to analyse the behaviour of the government of States and the international system in terms of processes and with a rule-based approach. As such, puzzles to international law should be mapped as social science methods, aimed ultimately towards the extensive analysis of case studies. During the Cold War, researchers of this approach realised that the USA had a dominant power position in the system and that the principal task of the scholar was to create a jurisprudence that could help law practitioners to discharge their role in maintaining the USA’s dominant position (Kunz, 1962; Steinberg and Zasloff, 2006, pp. 76–78). Although they sought to use social science methods, their analysis of cases is isolated from broader historical context. This perspective understands that it was possible to achieve a normative statement or adequate policy from an analysis of a case. However, a case study in itself is insufficient to understand the transformations in the role played by human rights law. A case study would be valid if included in a wider historical

interpretation. Instead, they assumed that, from an analysis of a case, it would be possible to achieve a normative statement or an adequate policy. However, this method, inspired by behaviourism, could not deal properly with the struggles politically engaged in by actors. An example of how this approach understood human rights and how scholars engaged and debated with past views, can be found in one work (McDougal and Bebr, 1964), which, for instance, understands traditional international law theory as being insufficient to explain the totality of human rights. According to this argument, once it is understood that there are no convincing explanations, any developed doctrines and procedures for protecting fundamental rights for individuals also become problematic. The focus of the New Haven School is on the procedures that can be created by 'good explanations' about human rights. In this case, the procedures developed by the UN were considered ineffective due to the bipolarity of the then global order:

As grand as is the vision which inspires the United Nations human rights program and as indispensable as such vision may be to the achievement of a free, peaceful, and abundant world society, it is improbable in the present world context of bipolarized and other bloc power and of imminent expectations of violence, that startling new progress can be quickly effected on a global scale either in the acceptance of new authoritative prescriptions about human rights or in the establishment of workable enforcement measures (Ibid, 1964, 640).

The system failed due to power relations that were external to the constitution of international human rights law. For New Haven's scholars, Legal Positivism was responsible for maintaining human rights as a domestic law; it could not be reached by international law. Although it seems interesting, their view of law as something authoritative as well as effective is rather narrow, and, thus, does not analyse human rights as a political discourse from which rules, norms and practices can be related.

The New Haven School shared some arguments with Behaviourists in International Relations. As well as the New Haven School, Behaviourism led to the creation of a field of studies in which the focus was on the role and impact of international institutions and in the idea of 'regimes', defined as 'the principles, norms, rules and decision-making procedures that pattern States expectations and behaviour' (Burley, 1993, p. 206). It gave space for the study of international rules during the 1990s, and, during this period, Institutionalism became closer to liberalism in international relations. Once Institutionalism had begun to share methodological, epistemological and ontological positions with international law, the result was a transformation of how this perspective understood State behaviour. Institutionalism started dealing with regimes in terms of norms, which deepened the relationship between

both approaches, creating a dual agenda of research between liberal international relations and law (Burley, 1993; Slaughter, Tulumello, and Wood, 1998; Steinberg and Zasloff, 2006). In this case, human rights became part of a role played by the State. They do not constitute the international order, but it is the sole action of governments that will constitute a legal norm. In this case, they will give more importance to the idea of *consuetude*, a repetitive behaviour. The idea of *consuetude*, however, is oriented to the maintenance of the *status quo*. The behaviour constitutes a consuetudinary norm to the extent that the pattern of behaviour is reproduced in the international arena and accepted as a customary law. It cannot deal with the contradiction. The contradiction is not part of behaviour, but an exception. Hence, if the contradiction is immanent to the human rights, as argued in the Introduction, I contend that as well as the New Haven School, Behaviourists/Institutionalists lack the methodological tools to understand the inherent contradiction in human rights, because repression is not the expected behaviour.

Within Critical and Marxists approaches, theorists have also developed an understanding of international law and legitimization of policies under human rights. Starting with a critique of the concept of liberalism, the main argument from this perspective relies on the indeterminacy thesis. For some writers, such as Robert Knox (2010), Ken Kress (1989), and Miéville (2004), the theory of international law of Pashukanis, who argued that the foundation of the law could be found in the economic system, especially in the contract, helped them understand that the indeterminacy of law is a function of modernity, focusing on economic arguments. Because modernity is a function of liberalism itself, and liberalism is considered by them as contradictory, their conclusion could only be that international law must be contradictory as well. Indeterminacy of law is, thus, a result of this contradiction. The indeterminacy thesis provides an interesting way of critiquing liberalism. Nevertheless, I understand that the focus, by advocates of this thesis, on the dialects of production – as is the case of Pashukanis, – and their use of Marxian understandings of the theory of law, limits their analysis to aspects of economics, and it is not enough for an understanding of the internationalisation of human rights and the idea of rule of law, in which they relate both arguments simply to deny their existence. For instance, the Marxist approach has arguments that understand the necessity for an Empire to legitimise international law, but at the same time the decisions under international law can be undermined by force. Thus, the rule of law only would rest on the problem of cosmopolitanism and in how liberals have understood cosmopolitanism.

There other Marxist approaches that also need to be reviewed. One of them is the Critical Legal Studies (CLS). The term Critical Legal Studies refers to different strands in legal theory. Duncan Kennedy argues that at the end of the 70s, the so-called Critical Legal Studies were a response from the left to three different strands of the American Legal Scholarship. According to him, each of these strands is related to specific notions of American liberal legal thought. The first legal liberal strand is the Liberal Constitutionalists. Those scholars produced legal arguments for the legal recognition of liberal legal positions. The second is constituted by scholars who are part of an elite that supports liberal positions toward the universalisation of subordinated groups' interests. But these interests have already been recognised by judicial opinions, even if they are dissident. The task of these scholars is, thus, to link these judicial opinions with contemporary liberal political philosophy. The third group is part of popular discourse about rights and their identity with subordinate groups. They understand that because there is an identity between subordinate groups and rights, these rights should be recognised by the legal system (Kennedy, 2002, pp. 179–80).

Against those three liberal legal thoughts, the left produced three different critiques of rights that are loosely considered Critical Legal Studies. The first was of the left intelligentsia that developed from the fifties and sixties associated different attitudes towards rights with a radical discourse. They did not, however, develop an internal criticism of legal reasoning. The second critique was developed when the left lost most of the pressure made by the social groups and the radical discourse. This group was nostalgic of the transformations that occurred in the sixties, but they agreed with how liberals interpreted the rights movement from that time. The third group was the 'CLS Critique of Rights'. This group was modernist – it developed 'with many hesitations and false steps, the same kind of internal critique, leading to loss of faith, that the critics were then applying to legal reasoning'. (Kennedy, 2002, pp. 181–4).

The critique applied by this strand of CLS argued that rights played a central role in the (American) political discourse. Rights mediate between facts and value judgments. But this mediation must be understood as both value and logic. When reasoning about rights, the person is not stating preferences, but expressing it in terms of a universal value and a fact that derives from the universality of rights. This critique is heavily focused on rhetoric and analysis of discourse. Scholars argue about mediation as part of the legal reasoning, not as a dialectical relationship. Despite the necessity to analyse the legal text and the interpretations

presented at the moment the legislation was enacted, my thesis focuses on the contradictions presented in the formation of those legal norms. CLS, nevertheless, understands that ‘the demand for agreement and commitment on the basis of representation with the pretension to objectivity is an enemy’ (Kennedy, 2002, p. 218).

Mangabeira Unger, another member of the CLS, wrote one of these critiques. In his work *Knowledge and Politics* (1976) he focused on an extensive critique of liberalism, understood as ‘a framework of ideas that is embodied in particular institutions and practices, constituting a way of life and a form of consciousness’ (Thigpen and Downing, 1982, p. 42). The law, thus, is part of the grand scheme of social relations. Unger proposes to conflate law and society under a social theory that revolves around human agency and social structures. This theory is concerned with localised production and reproduction of hierarchies of authority, with the law, as the primary site for the interaction between social and political understandings, interacting to empower and legitimise one set of interests. The law is itself a discourse of power that ‘identifies who can speak and can or cannot be spoken’ (Lucaites, 1990, p. 442). For Mignolo, the most important feature of Unger’s thesis is the fact that he wants to decipher and break the liberal code. Following this idea, Mignolo’s contribution in particular, and the contribution of the Decolonial thought as a whole, is not only to identify a ‘Western code sustained by and anchored in the rhetoric of modernity and the logic of coloniality but also to break it (Mignolo, 2011, pp. xvii–xviii).

In the case of rule of law, China Miéville’s understanding is that while the advocates of an international rule of law argue that it would be possible to ‘achieve a well-ordered society’ with this concept, actually, it will only obscure the problem of international law in the liberal order (Miéville, 2005, p. 315). Moreover, the structure of international law related to capitalism can lead only to violence and imperialism. In the end, he argues that the politics, the patterns of violence, and the imperialism of international relations are the rule of law (Ibid, p. 319). Despite the facts presented by the literature, I cannot agree with the conclusions of the author. It is my understanding that cosmopolitanism, in terms of different global designs, lets us observe the emergence and utilisation of the rule of law as part of the liberal legal order as both emancipation and repression. Although Miéville says that the idea of rule of law simply obscures the problem, the reality is actually contrary, since highlighting the problem will let us understand better what is happening and how human rights have been used to legitimise policies.

Alongside the Marxian arguments, there are Critical perspectives that focus on the conceptualisation of human rights as a construction, expressing a liberal political project. The defining language of human rights can be seen both in relation to a social and a cosmopolitan liberalism, whose theoretical understanding can ‘encourage a distinction between discourse and practice’ (Schick, 2006, p. 322). Also, while the rules of the liberal human rights regime are designed to be neutral and universal, few have been made in relation to enforcement, keeping a distance from concrete historical situations. For this literature, there is a serious concern with the moral role that human rights play once they provide much-needed ideological legitimacy in the construction of a new world order. Although this body of literature provides an important contribution, it does not recognise, or highlight as much as is needed, that the process of codifying human rights – initiated with the Universal Declaration and with the two Covenants on Civil and Political Rights and Social, Economic and Cultural Rights – was linked with the liberal project of modernity. The development of the human rights regime failed to escape from the liberal construction of Law. Within this codification process, human rights have followed the same logic of sanction and typification, losing any possibility of gravitating towards a project of emancipation, and moving instead towards increased repression. Once a rigid parameter, within which accepted understandings of human rights must conform, has been delimited, these rights stop being an expression of a society and start to represent, at the international level, the expression of a certain correlation of forces. This situation leads to a consequence not only in terms of definition. If one wants to understand, for instance, how human rights were internationalised, one must understand how the ‘rule of law’ was developed in the international arena. Neumann and Kirchheimer provide an interesting explanation of the rule of law, focusing on historical context. They argued that the rule of law is not only an internal process of States, but actually a process that is in constant historical change. Neumann and Kirchheimer were, thus, more sensitive to the historical transformation of the rule of law and, as I will explain in Chapter Two, the Frankfurt School was able to provide a better understanding of the emancipatory role played by legal norms that is missing in most Marxist or Critical Theorists.

Foucauldian accounts contribute enormously to our understanding of the ‘subject’, by dealing with the relationship between human rights and power (Evans, 2005). Scholars that wrote about this subject appear to be weary of the dichotomy between dismissal and glorification of human rights. Rather, they understand that there is a ‘multi-level and multi-perspectival ambivalence of human rights’ (Odysseos and Selmeczi, 2015, p. 1034).



Interesting enough, some contributions set out to investigate the same dichotomies that they intend to move beyond. Although Foucauldian analyses of human rights in the international context tend to highlight the discourse analysis (Evans, 2005; Manokha, 2009), there is a trend within the Foucauldian perspective with different concerns with the idea of ‘subjectification’ in the context of human rights.

‘Subjectification’ is a known issue in Foucauldian readings on human rights<sup>5</sup>. According to Ben Golder (2010), on his late work, Foucault is accused to deployed a version of liberal humanism that he had previously set aside. This liberal humanism would be the way Foucault found to accept ‘what had been missing from his discourse all along: some manner of properly agentic human subjectivity’ (Golder, 2010, p. 356). But the effects of this change would have had another effect: the inclusion of human rights and the rights discourse in Foucault’s work – a position Foucault had previously dismissed. Foucauldian readings tend to understand Foucault’s work within the imbrication of power and knowledge, arguing that it constitutes a change of emphasis, not a re-work of the theme of the subject.

In his earlier works, Foucault opposed the formalism of rights with a system of privately organised institutional domination. Foucault defined his understanding of the juridical based on the idea that the monarchical power constituted itself in relation to law.

Historically, the process by which the bourgeoisie became in the course of the eighteenth century the politically dominant class was masked by the establishment of an explicit, coded and formally egalitarian juridical framework, made possible by the organization of a parliamentary, representative régime. But the development and generalization of disciplinary mechanisms constituted the other, dark side of these processes. The general juridical form that guaranteed a system of rights that were egalitarian in principle was supported by these tiny, everyday, physical mechanisms, by all those systems of micro-power that are essentially non-egalitarian and asymmetrical that we call the disciplines. And

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<sup>5</sup> By subjectification, scholars mean ‘the complex range of processes through which human rights incite new moral and political subjects in the very acts of defining and claiming rights, including the ways in which truth discourses surrounding human rights allow people to understand themselves as subjects bearing rights and, as a result, able to pursue new paths of action, struggle and moral comportment for themselves and others’ (Odysseos and Selmeczi, 2015, p. 1034).

although, in a formal way, the representative régime makes it possible, directly or indirectly, with or without relays, for the will of all to form the fundamental authority of sovereignty, the disciplines provide, at the base, a guarantee of the submission of forces and bodies. The real, corporal disciplines constituted the foundation of the formal, juridical liberties ... The “Enlightenment,” which discovered the liberties, also invented the disciplines (Foucault, 1991, p. 222) Legal norm cannot be understood only as in its relation to power and by the use of violence. Rather, legal norms can be understood bearing in mind “an implicit logic that allows power to reflect upon its own strategies and clearly define its objects” (Ewald 1990, p. 139). Within this argument, the Foucauldian subject would exist in a field of contestatory power relations and only because it is present in this field is that Foucault’s subject can act upon itself (Golder, 2010, p. 368). The return of the subject in Foucault’s work and his critique of humanism were the elements that allowed him to affirm human rights<sup>6</sup>:

Through these different practices—psychological, medical, penitential, educational—a certain ideal or model of humanity was developed, and now this idea of man has become normative, self-evident, and is supposed to be universal. Humanism may not be universal but may be quite relative to a certain situation. What we call humanism has been used by Marxists, liberals, Nazis, Catholics. This does not mean that we have to get rid of what we call human rights or freedom, but that we can’t say that freedom or human rights has to be limited at certain frontiers. For instance, if you asked eighty years ago if feminine virtue was part of universal humanism, everyone would have answered yes. What I am afraid of about humanism is that it presents a certain form of our ethics as a universal model for any kind of freedom. I think that there are more secrets, more possible freedoms, and more inventions in our future than we can imagine in humanism as it is dogmatically represented on every side of the political rainbow: the Left, the Center, the Right (Foucault in: Golder, 2010, p. 372).

By criticising humanism, Foucault would criticise the definition of human in human rights. The promises of human rights, thus, would be constituted by the resistance to the determination of what human being is. Anna Selmeczi, for instance, will deal with the subjectification under a neoliberal constellation. She will draw from Louiza Odysseos’ work to understand that human rights are a technology of subjectification. In her account, international institutions and global civil society actors would be ‘instrumental in creating the self-governing subject as *homo juridicus* who, in turn, complements the neoliberal ideal of the entrepreneurial *homo oeconomicus* shaped by other means’ (Selmeczi, 2015, p. 1079).

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<sup>6</sup> L.M. Coleman (2015) presents an interesting account on the anti-humanistic defence of human rights.

Even globally, there would be the necessity to produce the free and sovereign subject. But it is not any subject. Rather, the ‘subjectifying technology of human rights’ would reconfigure the idea of freedom at the point to modify the liberal tradition of rights. This technology would be capable of inverting the relationship between government and subject. Instead of rights against the government, as is the liberal tradition, freedom would only be able to be conducted within the neoliberal rationality. The technology would be used by powerless and powerful groups alike. Powerful groups within the neoliberal governmental logic would also internalise human rights and use human rights discourse as a way to keep their own privilege (Tagliarina, 2015). Because the logic is the neoliberal one, the process of internalisation of human rights would be the same to both groups and, therefore, there would be no contradictions between human rights discourse and powerful groups. Powerful and powerless groups would just emphasise different rights.

Despite the fact that Foucauldian approaches have grasped the idea of human rights with the dichotomy of emancipation and repression, the dialectic present in this thesis established an open system at the international level, facing the idea that there is a clear separation between domestic and international law. By dealing with the subjectification, Foucauldian approaches understand local histories (Großklaus, 2015), while my thesis focuses on larger processes of transformations of international human rights law and legitimisation of a particular constellation of rights in the context of colonial violence. Foucault focused on law and the creation of the subject in the ascension of the bourgeoisie. By highlighting the dialectic presented in this thesis, I sought to explain how emancipation and repression were already in play when the emancipatory project in France led to decolonial movements in Haiti and how both sides continued to exercise influence even after the independence of Haiti.

Based on the perspectives presented in this section, it is necessary to challenge the nature of law and the form from which the law is constituted. It is my understanding, as will be presented in Chapter Two, that the dialectic studies in this thesis are better informed if we take into consideration that the law is politically constituted not only by political struggle but within a political power that will attempt to legitimise a certain world view. Therefore, the next section will provide a review of theories specifically related to the connection between rights and legitimacy.

## Rules, Human Rights and Legitimacy in International Relations

Legitimacy is a disputed term in the literature, presenting different definitions according to what orientation is used. It can be defined, for instance, as ‘the capacity of the system to engender and maintain the belief that the existing political institutions are the most appropriate ones for the society’ (Lipset, 1959, p. 77). It can be seen as something that has significance in political life, meaning that political actors seek and desire it while the subjects will respond and recognise it. It can also be considered as a key concept for political life, and its entry into International Relations discourse represents a shift in the way world politics theorists think about it, since it represents ‘the ultimate political judgement, and also [...] the grounds for that judgment’ (Mulligan, 2006, p. 361).

There are some analyses in International Relations that show that the term ‘legitimacy’ was not present in the first works on international relations, nor in important debates. The analysis of legitimacy in International Relations, from D. Lake (2009), also demonstrates the fragility with which political scientists had been discussing the subject. This situation occurred because the main preoccupation throughout the twentieth century was to rule over the territory (*Ibid.*). Also, there were scholars, such as Martin Wight, who discussed the issue in the following terms:

Let us define international legitimacy as the collective judgement of international society about rightful membership of the family of nations; how sovereignty may be transferred; how state succession should be regulated, when large states break up into smaller, or several states combine into one. It concerns the presuppositions of the region of discourse that international lawyers seek to reduce to juridical system when they write about the recognition of states. It is the answer given by each generation to the fundamental, ever-present question, what are the principles (if any) on which international society is founded? (Wight, 1972, p. 1)

First, Wight reduced legitimacy to a collective judgement about membership of the family of nations. This definition echoes the legal positivism that was developed in the nineteenth century<sup>7</sup> and it would be a very limited form. But then, at the end of the quote, Wight opened the concept of legitimacy and defined it in terms of the founding principles of international society. As a consequence, Vincent was able to identify international human rights law as a process of socialisation:

[If] the modernization which was associated at its outset with westernization

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<sup>7</sup> See Chapter 5.

continues, even in the circumstances of relative western decline, we may call it a universal social process in which it is difficult to identify the particular contribution of this or that culture. In this regard, the international law of human rights may be an expression of this global process, and not merely of the American law of human rights writ large (Reus-Smit, 2011; Vincent, 1986, p. 108)

This process of legitimacy would be more complex than simply Western domination. It would encompass different struggles in the recognition of rights in international politics (Reus-Smit, 2011). Thus, the legitimacy of human rights norms would depend on power relations and consensus. If we take these readings into consideration, the inclusion of human rights in the debate on legitimacy helps us understand the relationship between politics and law in the legitimacy of international policies. Legitimacy creates consensus, but this consensus will be achieved by an act of power.

In this section, I will review three major different positions regarding the subject of legitimacy. The first is a formal-legal concept of legitimacy, the second is a normative position on the subject of legitimacy, and the third position is the legitimation that appears from the communicative action, which is related to Habermas' works. Finally, I will suggest a reading of legitimacy that includes law and politics in the formation of consensus.

The exposition of the conceptualisation of legitimacy is required because the result of the dialectics, albeit momentary and often not reconciled, will legitimate a certain constellation of rights and produce different legal documents. Despite the fact that there are several understandings on the subject, I present at the end of the section an understanding of legitimacy that is more appropriate to my approach because it integrates social, legal and political aspects in a way that allow the dialectic to reproduce. If in the previous section I dealt with the way the perspectives integrated emancipation and repression in their work about human rights, this section will deal with the result of the dialectics.

### *Formal-legal form of Legitimacy*

While analysing legitimacy in International Relations theories, it is possible to observe an approach concerned with formal-legal arguments and with a relational type of authority, based on Legal Positivism. In this approach, duly constituted legal rules are understood to confer authority on individuals (Lake, 2009, p. 331). There are rules that can be applied to the authority and that legitimate the individual to act according to their position. It

is not derived from personal qualities, but is a pre-existent legal structure that confers authority. This approach does not, however, deal with several issues that arise from legitimacy. First, this type of authority can lead to a conundrum, in which it is impossible to determine who came first. Therefore, it must be understood that there is something besides the legal form in which authority can have its base. While it may be appropriated for regimens in which the rule of law exists, in IR, whose system is considered anarchic for the majority of scholars, we need to rethink these categories. The usual argument, based on the formal-legal concept of authority, is that, since there cannot exist formal constitutional structures on which authority and legitimacy can rely on – mostly due to the formal equality between States and the non-existence of norms superior to these actors – there is no authority between them.

A second form of authority derived from the norms is the relational authority. In this case, a ruler is able to produce such a ‘social order of value’ that the subordinate will not regret his loss of freedom. It is legitimate to enforce the established norms. If the ruler cannot enforce them, the subordinate can withdraw his support. In this case, the ruler loses his legitimacy to create new rules or to apply punishment. This social order, according to H. Bull (1977), is ‘a pattern of human activity that sustains elementary, primary, or universal goals of social life’ (Bull, 1977, p. 5). Among these goals, it is possible to find a personal security, defence of property rights and an expectation that promises and agreements, once made, will be honoured, an idea called *pacta sunt servanda* by international lawyers.

Relational authority between ruler and ruled can be an equilibrium or a self-enforcing the contract. Social order is the glue that binds ruler and ruled in an authority relationship. Without the desired social order, the ruled have no reason to subordinate themselves voluntarily to the commands of the ruler, and without the compliance of the ruled, the ruler lacks the endogenous means to produce the social order. This equilibrium becomes more robust as members of the community of subordinates are vested in the existing social order or acquire assets that are themselves specific to the particular order obtained (Lake, 2009, p. 336).

Although all doctrine of International Law agrees with formal equality between States, in International Relations, arguments of authority and legitimacy of politics can only happen in a social environment where forms of rulers and subordinates can emerge. To obtain such structures, though, I ought to observe different hierarchies in the system, where relational forms of authority can emerge, excelling legal forms. There is a dialogue with others IR theorists, including with Wight when he shows that legitimacy is related to belonging to the ‘family of nations’. It has a matter or moral choice to be accepted by the

others. Nevertheless, some thoughts about the subject appeared slowly. For instance, the starting point of this approach is to analyse in which sense international norms are accepted and obeyed. The European Union has been cited as the example, its supranational characteristic being said to give some ‘nation-state characteristic’ to the organisation and, thus, has to merge this analysis to traditional public policies perspectives. It is often noted that EU literature uses the first or the second approach, or even a combination of both (for example, Jachtenfuchs, 1995).

Formal-legal types of legitimacy are consistent with legal positivist approaches to International Law, and consequently, with the theories of International Relations that derive their understanding of the norm from it, as described above. Hence, as is the case of positivist approaches, I understand that for the purpose of this thesis, this approach fails to take sociological issues into consideration. There are situations in which legal transformation in human rights law comes with changes in the political authority. However, those transformations are not necessarily constitutional ones. Not only that, but the highly hierarchical situation described by formal-legal approaches does not address the difference in power with the system of States in world politics. I understand that following the path of colonial inequality, a large number of hierarchies will appear, revealing structures of domination in which the most powerful States legitimately rule over less powerful ones, so helping us understand better the repressive elements in human rights law.

### *Normative theory and legitimacy*

In the normative strand, theorists debated the conditions under which the domination of one human being to another should legitimate. There was always proximity between law and morality, mostly in terms of Natural Law, but also in some notions of positivism, considering normativity in terms of recognition of such and of the necessity to follow it because it is a custom (Mulligan, 2006, pp. 357 – 358). In this case, if governments respect the rules and principles, and are established under these same rules and principles, they receive the adjective ‘legitimate’. Since it is used in a prescriptive sense, it is not concerned with the acceptance of the social order by the people (Steffek, 2003, p. 253). In the normative sense, legitimate institutions or authorities mean that they have the right to rule. Different theories will debate what the right to rule is and the necessary conditions for an institution to

have this right. Some authors will say that the right to rule means that it is ‘widely believed to have the right to rule’ (Buchanan, 2010, p. 79). In this case, there must be a moral judgement regarding the actions. Assertions about the legitimacy or otherwise of institutions are considered moral evaluations, as distinct from legal evaluations.

The moral judgement about an institution is not related to the idea of justice, and the judgement about legitimacy does not imply that it is just or fair. Both arguments can be disconnected and even though an institution can be considered legitimate, there can be disagreement about whether it is just. The literature also points out that an institution considered unjust for a period of time can lose its status as legitimate. In International Relations, once there is a sense that strong disagreements about justice will not be resolved, legitimacy can be used to satisfy moral requirements. When moral reasons support the actions of an institution, it is likely to function successfully, despite the lack of coercion, and legitimacy can be a substitute for moral judgment when there are disagreements about justice (Buchanan, 2010, p. 81). Some interpretations observe the role of the UN and the legitimization function that this organization can have in International Relations. For instance, I.L. Claude states that the UN works as ‘a dispenser of politically significant approval and disapproval of the claims, policies and actions of States, including, but going far beyond, their claims to status as independent members of the international system’ (Claude Jr, 1966, p. 367). However, this approval/disapproval has significance for the actors, not only in terms of the subject of the action, but also in relation to other aspects. This approval/disapproval also reflects the power holders’ need to convince themselves and satisfy their consciences, and represents the crystallisation of the judgement influenced by legal norms and moral approval. It creates a paradox in which the UN’s dispensations have morality as a factor, but, at the same time, to be claimed as such, this morality must depend on the UN’s approval (*Ibid.*, pp. 368 – 369; Mulligan, 2006, p. 363).

In another spectrum of the liberal literature, based on the work of Rawls, they are working with the idea of global justice and cross-cultural perspective. To do so, the idea of legitimacy is divided into two different sets of concepts: legitimation and justification. According to this literature, when working with pluralism, liberalism may be understood as a ‘meta-theoretical device arguing for a political consensus compatible with plurality of comprehensive doctrines’ and encouraging cross-cultural dialogue (Maffettone, 2012, p. 240). Philosophical justification, following the author’s arguments, depends on a shared cultural



background that is the ‘tool’ to express dissent, while justifications, on the other hand, are based on premises that share local cultures. Because it would be impossible for those who do not share the same cultural background to appreciate each other’s reason, it is necessary to have some sort of legitimation – practices or experience derived from a historical success, agreed by the majority. It is usually based on institutional practice, and it is this ‘widely recognized practice’ that allows institutional legitimacy to be conferred (*Ibid.*, p. 242).

### *Sociological Approach to Legitimacy*

The analysis of legitimation has, in Weber, a turning point toward an empirical understanding of the subject. According to this tradition, legitimation is a social fact, a phenomenon in which the social order enjoys ‘the prestige of being considered binding’ (Weber, 1978, p. 31). In this sense, the social scientist is supposed to describe the specific motive that makes people believe in this<sup>8</sup>. Because it is descriptive, it should be value-free, not privileging one social arrangement over another, but trying to determine the attitude of the group related to domination. This legitimate order may be guaranteed in two different ways. It can be subjective, resulting from emotional situations, based on rational beliefs of any type about the value of the order, or by the religious belief that following the order is essential for salvation. However, it can also be guaranteed by an expectation of external effects and interests. In this case, the order can be conventional, in which deviance from the order will generate a significant reaction of disapproval from most of the group; or law can guarantee it and, thus, it is the probability of physical or psychological coercion applied by specific members of the group (*Ibid.*, pp. 33–34). On this matter, one must warn that there is a difference between the legitimacy and the acceptance of the government (mostly in terms of the identification of the relationship between legitimate order and the law). The empirically oriented literature on the subject has identified three possible individual behaviours towards a norm. The person can either accept it for fear of punishment or coercion, by cost-benefit calculations or by acceptance of the norms as binding (Kratochwil, 1984; Steffek, 2003, p.

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<sup>8</sup> The work of Weber presents five different meanings for legitimacy. It could be legitimacy as the belief in a political order; as a claim in the right to rule; as a justification for a system of domination; as a promise that the system of domination is for a greater good; and as a self-justification given by the dominant class (Bensman, 2015, p. 344). Clark, however, in his work on legitimacy in international relations (Clark, 2005) emphasises the idea of legitimacy as a system of belief.

254). Because Weber positions his theory of legitimation as a phenomenon that psychologically works when it is considered binding, he is against the other two ways and admits that following the rule because it is binding is a moral choice. In this sense, it is not possible to conclude whether or not the norm is legitimate by pure observation. This position could lead to a mistake when prudence could lead to somebody accepting the rule, even though it is not legitimate.

In terms of morality, in the sociological approach, the social order enjoys ‘the prestige of being considered binding’ and when this prestige is achieved, this order is legitimate. Following the law, as stated, is a moral choice. Weber’s definition of legitimacy is based on a belief in the legitimacy of the order, and it shows a potential for justification. Also, it drives out attention from the actual values of the others. On the basis of legitimacy, domination becomes valid or it is revealed on which grounds it is possible for the master to claim obedience from his ‘officers’ and for them towards their subordinates (Habermas, 1988, p. 96).

According to Habermas, the problem of legitimation has been derived from Weber’s definition, contrasting ‘order of domination’ with the beliefs of the subjects to the domination. It means that institutions and players in the order enjoy high credibility, in terms of rightness, appropriateness and morality (*Ibid.*, 1979, p. 199). In a debate with dominant philosophical views – understood as the sociological approach to the legitimacy of the State – some normative views state that it must be necessary to lose the concept of legitimacy and stop giving excessive attention to the ideas of governance and right, including the coercive power whose monopoly belongs to the State when discussing International Relations. Their argument is that not only institutions that have the right to rule, can be considered legitimate or illegitimate. When observing international institutions, they also argue that there are institutions that do not claim to rule in a robust way. In addition to this observation, the concept of legitimacy is re-interpreted and shall mean: ‘being morally justified in issuing rules and seeking to secure compliance with them through attaching costs to non-compliance and/or benefits to compliance’ (Buchanan, 2010, pp. 82–83). It is expected that this definition can characterise institutions that do not use or rule in terms of coercion, like some international institutions.

Clark has suggested that the literature on International Relations has a primary

concern with the function of norms in the construction of identities (Clark, 2007, p. 176).

The literature on IR has taken the study of norms very seriously since the 1990s (Finnemore, 1996). A central suggestion in much of this discussion has been that states do not have already established interests, but acquire them along with the formation of their identities (*Ibid*, p. 175)

For this Weberian perspective, the main concern was with ‘normative beliefs’ and defined international legitimacy as ‘essentially a dominant practice within international society’ (Clark, 2007, p. 176). The normative beliefs, as well as practices of legitimacy, would legitimise dominant practices. In this sense, there would be two motives that legitimised the inclusion of the human rights issue in the UN Charter. First, that it was based on previous experience with social justice in 1919; and secondly, the insertion of human rights in the Charter did not change any views about international legitimacy.

The first was accomplished by extension of the logic that had already been applied to social justice in 1919. Social justice, it had been argued then, was a precondition of international peace and stability, and hence fell properly under the purview of international society. This logic was insistently replicated in the drafting of the Charter, and was present from the outset. Secondly, human rights did not displace existing views of international legitimacy but, in important respects, simply grafted them onto what already existed. Secondly, human rights did not displace existing views of international legitimacy but, in important respects, simply grafted them onto what already existed (*Ibid.*, pp. 150–151)

Therefore, human rights would not have prevailed over concepts of international legitimacy. They would not be an integral part of the system that could legitimise international policies. This approach, thus, would understand the necessity to legitimise human rights, but not be legitimised by them.

The critics noted that the sociological approach should be able to go beyond antinomies of normative and conventional sociological inquiries, since explanatory commitments made by Sociology include paying attention to normative practices. By ignoring normative understandings, sociological approaches cause themselves various problems. For example, when ignoring the function of theoretical norms, the structural or functional motives, which societies tend to use to explain political operations in terms of normative categories, cannot be taken into account (Thornhill and Ashenden, 2010, pp. 137–138).

Habermas seeks to provide an approach that tries to present the possibility to engage in this double debate, both normative and sociological, about legitimacy. He deviates from

pure normative understanding to legitimacy because, in part, the legal-normative pre-conditions of legitimacy are socially constructed. Habermas' theory of legitimacy depends on the communicative process elaborating norms that form legitimate power. According to him, there must be certain dimensions of interaction in which communication that is immune to different societal determinacy happens, allowing the producing of universal norms in different social stratum and below power relations (Habermas, 1996, p. 34). In his model, legitimate power exists in both normative and sociological aspects and, thus, it is presented as a communicative power in contrast to power as perceived in the system. Legal norms created by the discursive processes within society have the function of producing and measuring legitimate power and, therefore, they have been stabilised against power. In the next section, I will show the elements of Habermas' theory on legitimation.

### *Legitimacy in Habermas*

Legitimacy in Habermas' theory of communicative action originates from rational deliberation in which there is an accepted consensus between the parts. The moment of foundation of an international regime is important because the agreement in terms of concepts, principals, values, goals and principles will serve as guidelines for the bureaucracy (Steffek, 2003, pp. 263–264). I understand that this approach, however, provides problems for international relations. Habermas' approach addresses some questions about the relationship between the State and the citizen. In International Relations, it will recreate that relationship based on the domestic analogy applied to the discipline. Nevertheless, applying communicative action in the case of this thesis would require us to look for the citizen/State type of dominance. But this analogy will not be sufficient to understand formal relationships of international dominance that are usually voluntary, circumscribed to issue areas and based on non-coercive means that create at least acceptance of the norm, such as colonial relationships (*Ibid.*, pp. 258–260).

Systems and institutions operate at a certain level of justification, and historically, certain cosmologies grounded in ethics, religions and philosophies were used to offer this recognition to the political system on a dogmatised knowledge. Habermas stated that the ontological tradition of thought was grounded at this level. However, with the separation between theoretical and practical argumentation, the reconstruction of classical natural law

became a last possibility for an argumentation. This time, classical natural law was not legitimised by cosmologies, religions or ontologies. Kant and Rousseau replaced any argument concerned with God or Nature in legitimised norms and actions, with the principle of reason. It means that instead of reality outside the political order, it is ‘the formal conditions of justifications themselves [that] obtain legitimating force’. In contract theories (Hobbes, Locke and Rawls), the state of nature, or pre-conditions to the creation of the State, specify the conditions under which the agreement expresses a common interest. In transcendently oriented theories (Kant to Karl-Otto Apel), the conditions are universal and ‘unavoidable presuppositions of rational will-formation’, and they are transposed into the subject itself or into the ideal communicative community. Either way, it is the formal conditions of possible consensus formation that possess legitimate force (Habermas, 1979, p. 184).

Habermas observed that Rousseau determined a procedural legitimization, regulating the social and replacing instinct with justice. Every individual surrenders himself and his natural rights towards the community. The analysis of legitimacy in the liberal political theory tends to suggest to Habermas that legitimacy is close to the idea of levels of justification (Habermas, 1979, pp. 185–186). In an attempt to present a concrete debate towards these differentiations between procedures and justification, the author applies it to the debates regarding democracy. For Habermas, there must be a difference between these so-called levels of justification for domination, following the application of his work on democracy, and the procedures for the organisation. Democratisation should not be seen as an *a priori* one or other type of organisation, but, actually, it should be understood as:

[...] a question of finding arrangements which can ground the presumption that the basic institutions of the society and the basic political decisions would meet with the unforced agreement of all those involved, if they could participate, as free and equal, in discursive will-formation (*Ibid.*, p. 186).

The modern level of justification in Habermas’ theory can only be achieved when free and equal individuals agree. This situation is different from contingent or forced agreements and rules, and communicative presuppositions are arguments presented to differentiate both situations (*Ibid.*, p. 188). Habermas describes his account of legitimacy as ‘reconstructive’ and seeks to solve the problem of both sociological theorists and normativists. Although sociological approaches are better employed by social science, the critic’s concerns are with the abstraction from grounds of validity, while pure normativists are rejected due to the

metaphysical context of their ideas.

The reconstructive analysis of legitimacy understands that an action, a norm of action or even a system of such norms can be considered legitimated in the same sense that it would be considered as in the general or public interest. Although there is a system of justification, a single justification is called legitimation by Habermas, and it is possible to reconstruct this system. According to him, first one needs to discover the justificatory system and how legitimations can be understood, within that system, as valid or not. Being valid means that the grounds on which it is judged are common to everyone who believes in it (*Ibid.*, p. 204).

Within International Relations, there is a trend that studies security and institutionalism. They relate their field to the construction of legitimacy. According to Finn (2010), one can find international authority when there is a common belief that a certain rule or hierarchy is legitimate and, therefore, contributes to the interest of the same actor. In this sense, deliberative setting from the Security Council and other institutions is seen as a source of legitimacy. Some of the arguments presented about authority in International Relations can be seen from the perspective of constructivism. In this case, the debate about Agent and Structure are transformed, and thus States become the Agents, while the Security Council is the Structure. The question is about the extent to which the perception in relation to this concept of authority is sociological, rather than being legal or power oriented. For this literature, therefore, it is important to realise how this process happens and if it varies among States (Finn, 2010, pp. 551–552). There is a Habermasian argument behind the idea of deliberative democracy on which this approach relies. Some of them portray the Security Council as a legislative body and because of that, there is the recommendation for the decision to be supported by ‘good arguments’ (Cronin and Hurd, 2008, pp. 80–109), which vary according to the issue. Besides that, the possibility of a discourse among equals is part of the theory of communicative action to which this approach relates. Although it is argued that single decisions can give legitimacy to norms (Finn, 2010, p. 553), some of the critics present the Security Council as a forum for the most powerful States. The UNSC is considered the only body available for ‘reasoned deliberation about the rules of international life’ (Cronin and Hurd, 2008, p. 102). Also, there is the recommendation for change in the institution, allowing a G-16 to be created and so strengthening the deliberative democracy (Jones, Pascual, and Stedman, 2009, p. 52).

Notwithstanding Habermas’ theory of Legitimacy as presented above, further

developments in his theories deviate from this initial position. His theory of law and democracy published in 1996<sup>9</sup>, ends by being more focused on the role of procedures in an effort to understand both arguments. Therefore, democracy is based on the procedural arguments of what should be considered a true democracy from the work of R. Dahl (1991), which considers the arguments about the ideal condition of speech as being central to the idea of democracy. As such, a procedural form of legitimacy would not be able to grasp the transformation in the law.

However, before his procedural understanding, Habermas provided us with a different theory of legitimation, focused on the idea of Constitutional patriotism as one way to view the issue. His objective was to deal with the sociological approach to legitimacy in a post-national world, in which he argues about a ‘universalist form of democratic political allegiance’ (Müller, 2006, p. 278). The concept of Constitutional patriotism can be determined as:

In general, the concept of constitutional patriotism designates the idea that political attachment ought to centre on the norms, the values, and, more indirectly, the procedures of a liberal democratic constitution. Thus, political allegiance is owed, primarily, neither to a national culture, as proponents of liberal nationalism have claimed, nor to “the worldwide community of human beings,” [...]. Constitutional patriotism promises a form of solidarity distinct from both nationalism and cosmopolitanism (Müller and Scheppele, 2007, p. 67).

In Habermas, the source of legitimacy can be found in popular sovereignty<sup>10</sup>. Thus, constitutional patriotism, like the Federal Republic, can be developed from the idea of a right and democratic republic, but not so much from historical identities – an idea abandoned by him. The binding between individuals (the source of Weber’s idea of legitimacy) still exists in this version, but, instead of the sociological arguments, it exists due to ‘universalist principals of the rule of law and democracy’ (Müller, 2006, p. 289). There is a normative and universalistic argument behind this notion. Because of that, it suffers from the same critique identifying democracy and the juridical form, mostly related to promises of the Enlightenment, as universals. However, it is important to highlight that Habermas is debating

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9 Habermas, J. (1996) *Between Facts and Norms*: contributions to a discourse theory of law and democracy (Cambridge, USA: MIT Press).

10 According to Habermas: ‘Fortunately, law is a medium that allows for a much more abstract notion of civic, or public, autonomy. Today, the public sovereignty of the people has withdrawn into legally institutionalised procedures and the informal, more or less discursive opinions- and will formation made possible by basic rights. I am assuming here a network of different communicative forms, which, however, must be organised in such a way that one can presume they bind public administration to rational premises.’ (Habermas, 1996, p. 505). Also, Cf. Habermas (1992).

the argument of constitutional patriotism within the German context, using universal arguments to do so. Although it seems to offer one explanation for the way he constructs his idea, it is also one of the criticisms. The debate is characterised as German; it appears to be impossible to go beyond Germany, or the European Union<sup>11</sup>.

Despite the criticism, the idea has been attractive in modern political theory and it has been used to understand situations in which society has developed in such a pluralistic way that it is not possible to find a common ground – in national terms – that can legitimate policies. In Habermas' own words, 'a liberal political culture is only the common denominator for a constitutional patriotism (*Verfassungspatriotismus*) that heightens an awareness of both the diversity and the integrity of the different forms of life coexisting in a multicultural society' (Habermas, 1996, p. 500). Due to historical events, the USA and Switzerland are often considered examples of pluralistic nations that manage to deal with binding citizens, without reference to history<sup>12</sup>.

Constitutional patriotism is attached to norms or principles, which is a characteristic that has made it different from other sorts of attachments. This concept intends to be political and, in this sense, people and culture, central in other understandings about the subject, just become relevant when they impact on politics and on the 'ground rules for the collectively authorized exercise of coercion' (Müller, 2007, p. 60). More specifically, citizens attach themselves to the norms and values at the heart of the constitution, that is, the constitutional essentials, and, in particular, to the fair and democratic procedures that can be presumed to produce legitimate law (*Ibid.*, p. 59). Despite some interesting arguments, I maintain that Constitutional patriotism is not a theory of justice or legitimacy, but rather it depends on other theories and it needs a background theory that explains how political arrangement can be legitimate. In this sense, it seems that this concept has relied on the liberal ideas of universal arguments based on Kant's ideas and the role of democracy and the law (Habermas, 1996;

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11 On the interpretation about the European Union, Habermas has his own work on the issue (Habermas, 1996, pp. 491–500) For contrary arguments, cf. Matthias Kumm (2008), 'Why Europeans Will Not Embrace Constitutional Patriotism'.

12 There are some criticisms in relation to this. The USA has a long historical tradition that is politically mobilised during elections, economic crises and war situations. Termed as "American Exceptionalism", the origin of the country based on the first Pilgrims and the Founding Fathers was used during the all American History and mostly by the neo-conservator movement, including members of George W. Bush's Administration and the Tea Party. There are Juridical reflections on the issue, since the movement called Originalism stated that the American Constitution should be interpreted by judges taking strongly into account the original intent of the Federalists. This position is usually marked as being against social and economic rights, since it was not developed in the Constitution.



Müller, 2007, p. 62). The theory of Habermas, as presented in this section, is insufficient to explain how European domestic transformation in human rights law can be exported and accepted in the colonial world. Because of the structure of international politics, this theory, as presented below, needs to be able to take legitimacy and legality into consideration, at the same time as it must apply a dialectical method to accommodate the historical contradictions in the development of human rights.

### **Normative and Historical-sociological Approaches to Legitimacy: for and against Habermas**

The approaches presented in this review have failed to consider deeply the historical context when dealing with the relationship between law and politics. Despite some disagreement with Habermas' approach to legitimacy, I understand that he came close to providing an approach that could include historical change in his theory. Thus, there are elements that can contribute to the methodology that will be presented in Chapter Two, based on the legal theory of the Frankfurt School. In my case, historical relationship is central to understand the political constitution of law in terms of the dialectic between emancipation and repression. It is also especially important for the analysis of Neumann and Kirchheimer, who provided a better understanding of the relationship between Politics and the Judiciary.

This type of legitimacy cannot be separated from its historical context. In the next section, I will suggest that the liberal legal order was based on a concept of legality that has been superseded by a legitimacy-based system. While a legitimacy-based system survives as long as the system appears to be universal, a legality-based system can incorporate the 'dialectic of historical change more smoothly than a system of rule based on an appeal to legitimacy can accomplish' (Kirchheimer, 1969a, p. 58). In this case, it is important to emphasise the relationship between Politics and the Judiciary as a form to obtain legitimacy. Political Justice can be understood as the utilisation of judicial proceedings for political ends. When a new constitution is approved, we can observe 'the power of the policy-maker to change the established rules of the community' (Kirchheimer, 1969c, p. 409). The policy-maker is capable of changing not only the nature of substantive law, but also what is considered by society to be justice. He can do so when he revises or changes the goals of

justice by any means. The second link concerns the fact that the judiciary does not create its own procedures and, third, justice and politics are linked by the circumstances in which the political authority chooses the magistrates, at least in higher courts.

Deriving from Habermas' debate, one can find other approaches to legitimacy that try to avoid the mainstream debate on the subject. In his approach, the relation between legality and legitimacy is one of the most basic questions for both modern legal and political philosophy, and it is constitutive of theoretical sociology in terms of the conceptual problem. An idea of legitimacy, based on the work of Luhmann and Habermas, states that there must not be a dichotomy between the normative and historical-sociological interpretation of legitimacy. Instead of being seen as contrasting, they should be seen as complementary. It should be possible to escape from this debated problem, integrating both visions in one different understanding of the subject. For this task, C. Thornhill (2007) claims first that norms are not external to modern societies and second, that ideas of legitimacy can rely on aspects other than theoretical abstraction when supported by normatively valid evidence. For instance, modern societies have shown a reliance on self-explanations based on generalised political arguments. Therefore, a dual approach to political legitimacy is important to understand modern societies. This dual approach should encompass by a normative trend, formed by arguments that seem possible and based on palpable grounds, and by a historical-sociological trend that has the tools to analyse the patterns of political legitimacy constructed by the normative.

Thornhill proposes an interesting interpretation of how to incorporate the sociological and the normative positions of legitimacy. However, he proposes a systemic answer, based on Luhmann. That is to say, he considers the State as an autonomous system. These autonomous systems, such as, for example, the political and economic, would communicate and evolve. Thus, history would indicate the evolution of such autonomous systems. My argument, however, is based on a dialectical method. My thesis deals with the contradictions in human rights, and how they transform international law. The contradiction is not solved. In a specific historical moment, a consensus toward human rights will be formed and it will legitimise international policies. This balance between repression and emancipation will work until a new historical context challenges the legitimacy of such consensus. This means that it is always changing. Consequently, the dialectical method is the one that better incorporates the constant changes in the relationship between the political and the normative systems. It is

better to incorporate both as part of the same phenomenon. Hence, despite his interesting understanding of legitimacy as sociological and normative, the methodology based on the Frankfurt School truly understands the contradictions as integral to the reality of human rights. Moreover, when we emphasise the legitimacy of policies as a process of formation of consensus and as power, dialectical historical methodology will be more sensitive to changes in the consensus on human rights. Historical sociology as a methodology, thus, can be used to interpret normative patterns of legitimation. These observations allow it to highlight and analyse patterns of social formation, which are a constituent of legitimate political order, and also to express 'consistent generalized normative accounts of legitimacy' (Thornhill, 2008, p. 167). The duality masks the fact that both practices of legitimacy and normative constructions of a subject were co-developed by modern societies. Long periods of normative analysis led to the adequacy of practices of legitimacy, pre-determined by the way in which power took its form and how it was content, at the same time as the State used the normative discourse to include practices in constitutional arrangements. Thus, the historical-sociological approach has the necessary tools to identify preconditions and transform it into 'generalisable or transferable institutional and constitutional models' (*Ibid.*, p. 168).

The condition of legitimacy represents the establishment and adequacy of diffusions of power and permeates the different formal aspects – in terms of institutions and mechanisms – of using power. In modern States, the constitution is the abstract form used for the diffusion of power. Law and power are co-constituted in this society, and there would be no power without law. Due to this reliability in relation to the law, most European societies opted to develop abstract theoretical principles to provide explanations for the actions of the State, presenting explanations of how actions and the origins of institutions can be validated – bearing in mind that these explanations are usually related to ideas of political legitimacy. As a consequence, constitutional structures and a formal catalogue of rights were developed, externalising the idea of universal legitimacy of the political system and trying to integrate those who were the subject of the power of the State. It constitutes the central piece for the modern state, once they made explicit the boundaries between what is politics and what it is social. The rights were important for the organisation of the State, giving a political status to social themes and allowing the State to explain its function as a legitimate actor in the integration of society.

Constitutional rights, thus, represented a historical construction that contributed to the

development of the modern state and it is understood as central to the idea of modernity. The State is legitimate because, during its origins, it was able to differentiate practices of power and itself as an institution from other spheres of social practice, using constitutional forms and rights to establish what should be considered as within its jurisdiction and what it should use as coercion. The historical is used to explain the role of normative understandings concerned with the legitimacy of the modern state.

A close examination at some norms can give a better explanation of this complex type of legitimacy. The stability of most modern States requires the existence of an opposition to some or any degree. Also, this same opposition must be certain that the rules which bestow power, promote changes in the political *status quo* in terms of whichever interests are behind the Party or coalition that holds political power. Political changes without revolutions can only happen if the rules that control the transference of power, usually constitutional norms, are seen as legitimate.

The historical-sociological arguments about legitimacy, as presented, deal with processes of inclusion and exclusion. Because my thesis is about the role of human rights in transforming international law and its application in International Relations, focusing on the colonial world, I am dealing with different processes of legitimacy that influence the political system and create consensus about rights, at the same time as create forms of inclusions and exclusions. I will argue that depending on how the society develops, there are some norms related to human rights that are central to the system and, thus, these cannot be touched during political change without causing deeper political change, or even changes within the system. Those changes will be reflected in the emancipation of social groups within the State, but they will also create exclusions and violence in international politics.

## **Conclusion**

As this chapter has shown, there are several understandings about norms and how they relate to international relations. Despite the fact that most theories of international relations take international law for granted, I have argued that for most of the time, these theories have provided an explanation derived from some positivism (be it Kelsen or Hart). In this context, international law is a self-referring system of norms and procedures with more

or less importance placed on the behaviour of the agents. From a critical perspective, on the other hand, international law is a realm of indeterminate norms whose functions depend, to a great extent, on the economic system.

These approaches are unable to provide an explanation about the political constitution of the law. In this sense, they fail to include political and legal arguments in the formation, transformation and diffusion of human rights norms. To understand it better, I have provided a review of different approaches to legitimacy. Legitimacy depends on a historical context and cannot be separated from it. The approach proposed in the next chapter is deeply rooted in the historical dialectic, especially because of the situation observed by Neumann and Kirchheimer, who had the legal and legitimacy changes from Weimar to the Nazi Regime in mind when they dealt with the constitution of law and with the possibilities of emancipation and repression that were originated from the law. Thus, the approach to legitimacy has also to be rooted in historical change.

In the next chapter it will be argued that the legal theory developed by members of the Frankfurt School can provide a better explanation on the relationship between the political constitution of law/human rights and the legitimization of policies of the current liberal legal order in international law. It will do so because this theory will relate the rule of law with techniques and proceedings as abstract concepts and liberal values, understood under the term political justice. Further, I will examine the theory of law from the Frankfurt School, especially the work of Neumann and Kirchheimer, that highlights their ‘political’ understanding of the law and its dialectical nature.

## **CHAPTER 2 – THE FRANKFURT SCHOOL AND THE POLITICAL CONSTITUTION OF HUMAN RIGHTS.**

In the first chapter, the literature concerned with international law and norms was considered. I showed that the existing approaches to International Law, and approaches to International Relations that derive their concept of law from International Law, fail to account for the relationship between politics and law existent in human rights norms. This failure is due to the fact that they are not able to explain, or take into consideration, the political constitution of law in a historical context. Politics and law can be related to different issues such as the formalisation of law, the idea of the rule of law and the political expression of legitimacy. Regarding legitimacy, the previous chapter highlighted the existence of at least three different approaches to legitimacy: entirely normative, sociological and a middle way between both approaches. It was argued that the literature fails to apply a dialectical methodology to human rights law taking into account its political constitution. Therefore, it is imperative to fully understand its historical development and the relationship between the human rights norm, as it was formalised, and the current international politics. As a conclusion, it was noted that a perspective based on the critical theory of the Frankfurt School could provide a theory of law grounded in historical development. Such a perspective will observe the political action, in its sociological and normative characteristic, towards human rights. Therefore, it will explain how, historically, political actions have shaped human rights law and its functions. Moreover, how the contradictions between the political uses of human rights and the emancipatory value of these same rights are part of the present international political moment.

It is necessary to explain further my understanding of the connections between law and politics in the context of human rights, and in what order I perceive the formation of each occurs. Therefore, this chapter will deal with the development of the law in terms of Critical Theory, mostly based on the work of Franz Neumann and Otto Kirchheimer. In the first section, I will explain how they answered questions about the liberal legal order in terms of the formalisation of law, the rule of law, bearing in mind the possibility of reconciliation between the Enlightenment project of emancipation and the liberal legal order developed in the context of the transition to the Weimar Republic and the Nazi regime. Although the application of Neumann and Kirchheimer's work in order to understand human rights in

international politics has not yet been done, their work can contribute substantially to an understanding of the transformation of international law and its implications for international relations. There are two characteristics of their work that are essential for the development of my argument. First, the socio-political conflicts observed by them, which originated from the Constitution of Weimar and the Nazi regime, are crucial for their application of historical analysis and understanding of contradictions. Secondly, their application of dialectical methodology, as developed by the members of the Frankfurt School, provided better accounts of the role of human rights and their emancipatory and repressive potential. The lawlessness of the Nazi regime showed an emancipatory potential of the law, not recognised by most theories. This situation, thus, allowed the Frankfurt School to understand the transformations of the function of law in Germany at the beginning of the twentieth century,

The second section will deal with international politics and the idea of human rights. Human rights are both a form of control and an emancipatory tool. In this sense, human rights help recognise the individual and the human being, and because this can be considered as its primordial role, human rights lack a critical force. Also, it is stated that governments have understood the benefits of having human rights as moral justification for their policies (Douzinas, 2007). Koskeniemi, for instance, claims that the actual moment of human rights reveals 'a certain failure of the rule of law'. Just as post-liberal ideas have affected the welfare state, he asserts that the ideology of the rule of law as being a set of general and uniform rules has also been affected, revealing its inadequacy to regulate situations (Koskeniemi, 2010, p. 47). Bearing in mind the difference presented by Douzinas, in terms of subjective and objective rights, the approach based on the early Frankfurt School explores the liberal concept of law and, while criticising its development, explains the mechanisms behind this differentiation in terms of natural law and how, politically, human rights have been used in the definition of the subject (the members of the community of nations; the differentiation between the 'other', or the colonies, and the West) and how this political relationship was fundamental for the development of human rights as it is today.

### **Law and Politics in Neumann and Kirchheimer**

Law and politics are intrinsically and dialectically related. It means that this relationship must be understood in its historical context and in terms of the ways in which

contradictions can be reconciled. Therefore, this characteristic allows me to perceive how human rights can be described in a dialectic of repression and emancipation. Central to it, is the idea of the rule of law and its promises of freedom for the individual. To give a better understanding of the relationship between politics and human rights, it is necessary to demonstrate that it is possible to understand the contradictions that exist in the formation of human rights in its political and legal framework, using a theory of law based on the work of the Frankfurt School, especially that of Neumann and Kirchheimer. To this end, the debate between legal realists and legal liberal-positivists in terms of the formalisation of the law will be presented. This first part is important because it highlights the importance of the historical context, unlike other approaches that were developed at the same time. After that, Neumann and Kirchheimer's work on law and politics will be analysed focusing on the change in the function of law in modern societies as perceived by them, including the debate over the Weimar Constitution. Finally, their historical view of the rule of law will be explored along with some further considerations on the subject.

At the same time as the Frankfurt School started its analysis, there were different debates on law and jurisprudence, specifically between liberal-positivists (Hans Kelsen) and realists (Carl Schmitt). Their debate focused on the role of the judge and the law. While positivists tend to demand clarification and codification, for Schmitt, all legal norms have been characterised as open-ended and indeterminate. This characteristic, presented by Schmitt, has been called 'the enigma of legal indeterminacy' (Bernstein, 2011, p. 403). In other words:

Classical liberal conceptions of a "mechanical and automatic binding" of the judge to the legal norm are clearly overstated. Pace liberal jurisprudence, all legal concepts are profoundly and unavoidably open-ended and indeterminate. Every legal decision is a hard case. Liberal demands to clarify and codify law are inherently flawed because no system of legal norms can hope to guarantee even a minimal degree of regularity and determinacy within legal decision making (Scheuerman, 1999, pp. 16–17).

The positivistic liberal form of law assumes that there are universal concepts known by the common man and applicable to the case when there is a judicial decision bringing certainty to the system. In Kelsen, the judge uses the law as a frame in which his interpretation is set (Kelsen, 2009), the structure of this frame represents the universal concept from which it is impossible to deviate. However, if there is also no universal concept, there is no foundation for this frame.

Part of Schmitt's criticism of Kelsen's positivism focuses on the non-existence of the



frame, advocating the indeterminacy of an international legal norm. Similar to the national level, international law is also developed as open-ended norms. Using the rule of law as binding in international law is thus an illusion. His criticism goes further to explain how indeterminacy of the law at the international level is used and exploited.

All legal concepts, and not just those obviously open-ended in character, are “easily disputable and dubious” in the international arena. Radical indeterminacy is at the very core of international law; it is not simply a problem resulting from vague and de-formalised standards (Scheuerman, 1999, p. 148).

Several scholars of International Law – from realists to critical theorists – have used the term indeterminacy to highlight the conditions of law in the international realm. For them, the formalistic system of law is inadequate to overcome the insecurity of the decisions – the situation desired by liberals. Instead, liberal values stated in legal norms are of little help to judges, and different interpretations can be taken from the same legal norm. As a result, recognising the indeterminacy of the law is tantamount to recognising the non-existence of universalism (*Ibid.*, p. 118).

Contrary to the views of Kelsen and Schmitt, Neumann and Kirchheimer developed an understanding of the law that related political aspects with normative aspects, and, at the same time, emphasised the emancipatory potential of the law. They observed that the monopolistic economic situation of the capitalist system of their time required extensive State intervention. The monopolistic economy could modify original institutional assumptions and also threaten the rule of law. For both, it is necessary to acknowledge these transformations and the ambivalence that they can represent. In Neumann’s and Kirchheimer’s account, these transformations, from Weimar to a totalitarian regime, were harmful to the emancipatory project.

Unlike both Kelsen and Schmitt, the historical context was fundamental to the development of Neumann’s and Kirchheimer’s arguments. They focused their work on their observation of the law from Weimar to the Nazi regime. In this sense, Weimar was an important moment in history for the scholars of the Frankfurt School. It allowed them to perceive the dialectical process of the formation of a rights-based, social democracy and the totalitarian regime, based on the assumptions of Schmitt’s decisionism. In the process of analysing the new regime and the legal transformations of that time, they worked within the dialectical Hegelian framework. This framework, developed by them, provided a political understanding in which the notion of ‘positive freedom’ could be combined with the end of

political alienation if one adhered to universally valid rational laws (Jay, 1973, p. 119). Universal laws were at the core of this project. The idea of freedom was related to 'positive freedom'. In Fromm and Marcuse's work, freedom should be 'freedom to' but not 'freedom from'. Freedom has to be considered as a political concept, only possible in a 'rationally' organised society. Freedom can, however, only be perceived in relation to the 'unfree'. Therefore, the dialectical methodology can be expressed, in Marcuse's words, as the following:

Dialectical thought starts with the experience that the world is unfree; that is to say, man and nature exist in conditions of alienation, exist as "other than they are." Any mode of thought which excludes this contradiction from its logic is faulty logic. Thought "corresponds" to reality only as it transforms reality by comprehending its contradictory structure (Arato and Gebhardt, 1982, p. 444).

From this perspective, Neumann traced the function of legal theory in bourgeois society, challenging the liberal notion of 'equality before an impersonal law': a concept that works as an ideological cover for the fact that there are social groups, behind the law, ruling society. Before the law, the possibility of equality is only formal in a negative sense of freedom, and because of that, Neumann admits that liberal theory can only assure minimum legal equality. Joining Horkheimer and Marcuse, he stated that formalism could not be ignored as a safeguard, and should be considered a 'genuine moment of the dialectical totality, which ought not to be simply negated' (Jay, 1973, p. 145).

Against the indeterminacy thesis and the idea of equality before the law, Neumann argues that the State should not be legislated only by general law. It had become nonsense since legislation dealt with monopolies instead of free markets – which meant that generality had no equalising function as before. However, while realists had introduced 'institutionalism' as a replacement to individualism, Neumann argued that this was an 'ideological façade for decisionism, because the institution was divorced from the context of power relationships, without which it is unintelligible' (Jay, 1973, p. 146). In a fascist country, therefore, the legitimacy of law was based neither on the generality of liberal-positivist law nor on the rational foundation of natural law, concluding that because of that, the law was illegitimate. Neumann's argument was deeper and stated that the same behaviour towards legitimacy could be found in non-fascist countries.

In contrast to the illegitimate source of legitimacy of fascist (and some non-fascist) countries, Neumann argues that reason ought to be the 'source of law' and he agreed with Hegel, who had not attacked the idea of rational law, but only the previous form of natural

law:

We must not be driven [...] to the extreme of positivism, pragmatism, and perhaps still further to a nihilistic relativism [...] The truth of a doctrine will depend upon the extent to which it embodies concrete liberty and human dignity, upon its ability to provide for the fullest development of all human potentialities. It is thus in the historic development and the concrete setting of the natural law doctrines that their truth must be determined (Neumann and Marcuse, 1964, p. 72).

For Neumann, the appreciation for de-formalised law corresponded to a trend that ultimately resulted in the terror of the Nazi regime. Classical liberal theory, although incapable of responding to contemporary political crises, should not be excluded entirely. It should help us transform society into a more democratic and anti-capitalist form. De-formalisation of law, on the other hand, has been used by strong economic powers to undermine the rights-based system created by the welfare-state (Neumann, 1936; Neumann and Marcuse, 1964, pp. 59–66; Scheuerman, 1994a, p. 3; Whitehead, 2001, p. 673).

Against de-formalisation of the law, Kirchheimer defends the law's generality. He explains that Schmitt's criticism of the classical rule of law is based on a semantic definition of the general rule. The idea of general law should be analysed in the origin of the formal law. The generality of the law, consistent with a classical view of the rule of law, must be enacted by a broadly participatory democratic process:

Kirchheimer's alternative notion of generality, on the other hand, would entail the democratic construction of laws through wide and active participation in self-government. This might produce laws that are much more specific. While no longer semantically general, such laws would nevertheless be general in their origins because they would be the product of a general consensus (Whitehead, 2001, p. 675 note 74).

Also, in terms of the classical liberal law, Neumann understands that all varieties of natural law somehow expressed concerns about humanity. It happened because the principle of law is rooted in a lawfulness of nature in which man himself shares. However, his conclusion, in terms of natural law, is that the only legal and political authority that man should follow would be reason. In the Weimar Republic and in the development of the capitalist system, Kirchheimer's analysis showed that although liberal democracies were based on universal law and consensual or legitimate agreement, they are used as a mechanism to ensure that political order can have none of both. The cult of private law makes it easier to form 'radically non-consensual types of authority'. This is because private law had a status of inviolability given by liberal constitutional States (once declared as rights of the man), and it meant that independent economic interests (protected under private law) had securities that undermined constitutional norms in a liberal democratic state. The very fact that private law

is recognised as an autonomous legal sphere in liberal democracies means that liberal democracies are always unstable.

In the formation of this liberal system, the legal subject and the State had evolved to a form of rationalisation connected to positivist assumptions regarding the law. As part of their dialectical method, subject and State relate in a system reduced to ‘a formally “immanent” and self-referring system of rules, which excludes all external moral or sociological contents in the deduction of validity and entitlement under law’ as developed by positivists (Thornhill, 2007, p. 299). Whilst related to powerful economic prerogatives, legal liberalism corrupted the rational process of self-legislation and Enlightenment, reducing freedom and legitimacy. The liberal law was able to develop a self-referring system due to the relationship between the law and power. In Neumann and Kirchheimer’s account, political power can be seen as two different realities. The first is the intellectual power over nature and understandings about nature. The other is actual power over men. ‘This Political power is social power focused on the State’ (Neumann and Marcuse, 1964, p. 3). Because the term is referring to the control of one man over another, political power is intended to change behaviours at State level, including its legislative, administrative and judicial activities. Politics, and thus history, is not simply a struggle between power groups, but an attempt to mould the world according to one’s image: to impress one’s view upon it. The historical process has a meaning (Neumann and Marcuse, 1964, p. 5).

The attempt to change the other gave allowed them to analyse the historical modes in which the individual acted toward political power. In Neumann’s account, there is a spectrum of different historical attitudes. At one end of the spectrum, represented by the Greek philosophers – especially Plato and Aristotle – political power is the community. It is the total power of the community, and every activity within the community is political. At the other extreme, in the political-theological work of St. Augustine, politics is always evil, and political power is converted into coercion. As such, the attitude is in the direction of monasticism, although ideas of the destruction of political order can be related to this position.

A central position in this spectrum is represented by St. Thomas Aquinas. His attitude regarding political power understands that hierarchies, which exist through political power, are not natural. There are connections between spiritual power and political power that operate in unclear ways, but political power is subordinate to spiritual power. This

relationship occurs through various levels of power. The Thomist understanding prepares for the liberal attitude towards political power. Because political power is allegedly distrusted, there is concern about erecting protection against the power of the State. Rights, therefore, represent the form in which it is possible to dissolve power. Power will be dissolved into legal relationships that will eliminate any sense of personal rule, while developing and including the idea of rule of law in which all relationships must be 'purposive-rational, that is, predictable and calculable' (Neumann and Marcuse, 1964, p. 6).

During the beginning of the twentieth century, fascism and social reformism critiqued liberalism because it was a negative State, while liberals consider its non-existence as the higher virtue of the State. The negative state, however, works imperceptibly, and it is not a weak state. The rule of the liberal State had depended on force as well as the law, instead of relying on social sovereignty and freedom. It used the law as the barrier against political power. However, the liberal state does not take into account that social sovereignty is required in order to:

destroy local and particularistic forces, to push the church out of temporal affairs, to establish a unified administration and judiciary to protect boundaries and to conduct war, and to finance the execution of all these task (Neumann and Marcuse, 1964, pp. 22–23).

Without social sovereignty, force and law have been used and are part of any modern theory of law and State. Depending on the historical situation, there will be differences in emphasis. For example, while today the language of rights and law is stronger, there were moments in history when force and military action were more relevant. Although the system of rights has been constructed since the end of the Second World War, the relationship between the USA and the USSR was more related to force. At the national level, there are also contradictions between force and law that are expressed in juridical terminology as two different concepts: objective law and subjective right. Whilst objective law, being law created by the sovereignty, negates the autonomy of the individual, subjective right represents the claim of the individual.

In this development, objective law became a measure of sovereign power. As it is part of the sovereignty, and its acts are generically defined, this law is expressed just as *voluntas*. However, a rational concept of law does not depend on its source, but rather on its material content. For this concept of law, norms are intelligible, and its contents are based on ethical *postulae* usually related to equality. In this way, law is *ratio*, not *voluntas*. This concept,

especially in terms of natural law, states that this rational law is independent of the sovereign. There will be a valid system of law, though positive law ignores it.

This separation reflected changes in the function of law in society. For example, there is no such separation between objective and subjective law in the Thomist system of natural law. As a result, not all measures of authority are law and, therefore, Aquinas' idea was used in non-secular terms by the bourgeoisie against the Church. During moments of struggle and conflict, natural law changes in different ways, serving at one time 'a revolutionary function, and at another a conservative one, at still another critical function and then an apologetic one' (Neumann and Marcuse, 1964, p. 27). The historical moment in which the system of natural law is separated into two distinctive possibilities of rights, shows us how human rights can, at the same time, result in emancipation and repression. Upon winning the conflict, the victorious group would suppress the revolutionary sense of natural law and transform it into a conservative sense.

After the differentiation between rational law and positive law was complete, natural law<sup>13</sup> became the opposition to the law of the sovereign, and it is expressed in universally and generally valid legal norms. It contains social demands regarding equality before the law and private property. During this new face of liberalism, different from its classical form and based on positivist assumptions of law, at the same rate as democracy and social contract were accepted, natural law declined. At this moment, there were three elements characterising the legal norm: it had to be formulated in general terms (it could not be addressed to a particular person); its generality had to be specific (in terms of content); and it was not acceptable for it to be retroactive (Neumann and Marcuse, 1964, pp. 27–28).

The change of function of law was perceived during their time in Germany and the difference of regimes. The State was in a crucial position because it secured the political order. According to this idea, Neumann's argument about the Nazi State is that it was inherently irrational and did not represent a State (Kelly, 2003; Neumann, 1967). The State was not the laws or the legal order. It became a tool to be used. Nevertheless, Neumann is

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<sup>13</sup> There are two distinctive uses of natural law throughout the thesis. They reflect both the liberal use of natural law as described in the literature review, which is historically located even earlier in the legal debate, and the use made by Neumann when dealing with classical legal thought. For Neumann, the classical legal thought, based on natural law is different from the uses of natural law that were made at the beginning of the twentieth century by liberal scholars. Regarding the classical legal thought, Neumann highlighted the fact that the law was general and formalised against the openness perceived in his time.

aware that it was also a relationship of domination, presented in his reading of Weber when he states that ‘every human relation has an irreducible element of domination or *Herrschaft* within it’ (Kelly, 2003, p. 262 note 25). Neumann was not confident about Kelsen’s argument on the State. He could not accept his definition of the State as a legal order. The State was an institution rooted in society, a sovereign institution. It should not be a fiction or abstraction. The actions of the organs of State are, at the same time, related to society and caused by social factors (*Ibid.*, p. 262; Neumann, 1936, p. 23). The idea of a ‘sociologically sovereign’ that comes from Weber’s concept of the State possessing the monopoly of legitimate violence, showed Neumann that sovereignty is separate from society and that the source of legal legitimacy cannot be based on an ideal conception of legal order. It depends on its empirical and historical development, and it is represented by the dialectical relations existent in the formation of law. Political struggles developed historically are the basis for legitimate legal norms. Because of that, legitimacy can only be seen in relation to its sociologically sovereign position.

One of these positions can be visualised in the constitution that represents the political regime. When there is a revolution, and the group in power changes, one of the measures taken is a constitutional change. Kirchheimer tried to show that constitutions represent a victory or defeat of a social class. The legal text is not ‘bad’ or ‘good’ as it is not any specific governmental institution or procedure (Burin and Shell, 1969, p. xiv). As with the French Constitution of the National Assembly created during the French Revolution, which celebrated the victory of a new bourgeois era, the Weimar Constitution represented a second high point for the bourgeoisie in that it destroyed the remains of a semi-feudal system. The bourgeoisie proclaimed themselves as protectors of inalienable human rights after overthrowing the feudal monarchy in the name of those same rights. In the Weimar Constitution, there was an imbalance between the classical and social rights included in the constitution. It happened because civil and social rights were simply included without an organic relationship between them in the text of the Constitution. However, the relationship between two sets of rights was only part of the characterisation: according to Neumann, there was excessive tension between groups within civil society. Because of that, the Constitution was only possible due to formal commitments within society itself.

The major problem was the tension between what can be considered to be the essence of the Constitution, and the way it was implemented or interpreted. According to

Kirchheimer's understanding, the conditions under which the capitalist system had been developed after the Weimar Constitution changed the meaning of liberty and rights. Freedom can be referred to as freedom within the State – political freedom – and freedom from the State – individual liberty. While political freedom refers to the creation of legal norms, individual liberty is related to the contents of legal norms and spheres of individual activities. Although individual liberties can take the form of rights of citizenship, political rights and private rights, it does not mean that they exist at the same time. As such, 'the existence of private rights, and even to some extent the rights of citizenship, may even prove to be independent of the amount of political freedom realised at a particular historical junction' (Kirchheimer, 1969a, p. 66). Nevertheless, it is still possible to glimpse freedom in the legal text. This freedom is realisable only in terms of the free market, whilst masking functions of the freedom of contract. This dysfunction is part of the way the Constitution was interpreted. Not only was freedom masked, but also the idea of equality. It is, therefore, possible to distinguish (at least) two different notions of the concept of equality: negative and positive. While liberal democracies are related to the negative account of equality, social democracies, as noted by Neumann, are related to the positive concept of equality. It is related to material equality that can be supported by State action, 'in some forms of post-capitalist society' (Kelly, 2003, p. 269). That is also the moment when general law will have a meaningful place. Otherwise, as with the situation in which the Weimar Constitution applied, Neumann saw that the revival of the generality of the law and its indiscriminate application to the spheres of economic and political activities served as a tool against the sovereignty of Parliament. The general law was intended to be applied as a means of maintaining the existing property order, and it was used as a factor designed to discredit the sovereignty of Parliament. In this way, the generality of the law took the place of natural law. It was, in fact, nothing but a hidden natural law (*Ibid.*, p. 271). The dialectic between oppression and liberty within the Weimar Constitution is represented by the contradictory political principles that exist in democratic regimes.

Kirchheimer realises that the idea of something being 'democratic' has contradictory principles and has been loosely used, losing its meaning. Analysing strong democratic States such as Germany, France, England and the United States, he argues that they are considered as democratic only because they grant the right to vote to a large number of their citizens, which he considers to be a 'dubious, not very functional, and historically incorrect perception' (Kirchheimer, 1969a, p. 38); the mere abolition of barriers to voting does not



represent a full realisation of democracy. According to him, the problems faced by democracy are social. While the proletarians perceived that the master simply changed, they were willing to move beyond national democracy to social democracy. On the other hand, the dialectic existence in a democratic regime showed the bourgeoisie that it was possible to have a situation without political equilibrium. This lack of equilibrium can happen with social democracy. As presented by Kirchheimer:

The basic contradiction of this constitution consists in this: through the establishment of universal suffrage it places political power in the hands of just those classes, the proletarian, the peasants, and the petty bourgeoisie, whose social slavery it seeks to perpetuate (*Ibid.*, p. 39).

As an example of how rights have an internal dialectical relationship with their own negative, and how they can be used as a political weapon, Kirchheimer analysed the right of universal suffrage. In the first instance, universal suffrage removed political power from the ruling class that sought to keep the old social power. However, while the bourgeoisie worried about losing power, the proletarians noted that they had simply changed their masters. The Weimar Constitution created a situation in which one group demanded not to proceed beyond political emancipation to social emancipation, while the other group demanded not to lose the social changes that they had acquired.

In the spirit of the Weimar Constitution, Kirchheimer understood the role of basic rights as programmatic. Basic rights included in a Constitution have different meanings in different eras. When the French Revolution happened, the Rights of Man had the important task of contributing to revealing the revolution's greater morality in the eyes of other European societies and helping ensure its success. Although it had lost much of its solidifying power in the nineteenth century, the importance of the Rights of Man should not be underestimated. At the time of the promotion of the Weimar Constitution, however, it was not the greater morality of the French Revolution that inspired the constituent, but developments in Russia following the Soviet Revolution and the Declaration of the Rights of the Working and Exploited People:

In Neumann's analysis "[...] to decide the function of the law in general, we have to study inductively all social orders as they appear in the course of history, from the most primitive to the most highly developed. By this method we obtain the general categories of the social order and at the same time the general functions of the law" (Kelly, 2003, p. 278)

Following this idea, Kirchheimer developed a critical understanding of the Weimar Republic by looking into the theory of property and expropriation. Starting with the study of

institutions, he traced the evolution of the concept and practice of expropriation from the French Revolution and showed how and why it was limited by its function of protecting bourgeois 'rule over specific pieces of property'. It was a protection against any sort of expropriation without proper indemnification. This situation was later developed into a protection of anything that had an exchange value, in the late period of capitalism. Kirchheimer argues that this evolution represented an abusive use of the law made by a biased judiciary. This use was not only against the idea of the Weimar Constitution, but also it was against the communal organisation of the State in favour of unrestrained capitalism. In terms of the transformations from Weimar to the Nazi regime, Neumann and Kirchheimer observed how the political actions were not only legal but also moral. The legal order observed during Nazism was able to close the gap between law and morality.

Thus, there was no 'pure law' as desired by liberals. Actually, moral concepts were part of the way in which the legal order was constructed; the idea of community ideology applicable to legal standards, destroyed general legal concepts equally applicable to all cases (Kirchheimer, 1969b, p. 89). It developed a rationality where there were no universal rules applicable. It meant that 'the whole apparatus of law and law-enforcing is made exclusively serviceable to those who rule' (*Ibid.*, p. 99). As such, it is given importance for the purpose of those ruling – a situation of 'technical (or instrumental) rationality' – and the result is rational only for the ruling. In this technical rationality, the judiciary is a part of, and the 'perfect tool' for, the realisation of its orders. In defence of traditional legal understandings, Kirchheimer observed that the change realised by the Nazi regime, developed this instrumental rationality as the foundation of law and legal practice and had, at the same time, transformed them into an 'instrument of ruthless domination and oppression' (Kirchheimer, 1969b, pp. 108–109).

That was possible by different procedures, one of them being termed 'political justice', understood as the utilisation of judicial proceedings for political ends (Kirchheimer, 1969c, p. 408). It referred to the establishment of the use of judicial process to achieve a given political end. Thus, it did not relate to legitimacy or illegitimacy, but only to the process. The process reaches a situation when history is created, when the political offence can be artificially created. In that case, the verdict is not given by the jury – remembering that the judiciary does not create its procedures and that the political authority chooses the magistrates, at least in higher courts – but the interpretation of the situation is a collective social process (*Ibid.*, p. 422). The use of juridical proceedings to achieve political ends can

represent a way to protect the community ‘from the grave danger’ of repression. However, at the same time, political justice can give the status of legitimacy to repression. According to the author, although it can be argued that the term ‘political justice’ should not be used because there are cumulative safeguards against any type of perversion, Kirchheimer states that the psychological effect of these proceedings on the population was important and must be considered, since it was the government of the day that could use terms as sedition and treason.

In terms of political justice, it is possible to observe that political actors have long used the language of basic, individual, human rights to legitimate their actions. Equality and freedom, for example, are ideas that have been used as self-legitimation of a constitution. The justification of regimes/systems/actions happens in terms of rights and, as the political justice suggests, the relationship between politics and a particular set of values can be instrumentalised, or can be instrumental in an indirect fashion. For instance, although justified by these values, the regime may not realise it at that moment, but the possibility of realising it in the future keeps the regime working. According to this interpretation, the regime is a means to achieve these values. The human rights regime and the actions in this matter can be seen as both justified in themselves, and as a means to something else (Kirchheimer, 1969b, p. 68;70). These are material-legal constitutional standards that go beyond the traditional set of organisational norms and guarantees of freedom. Therefore, the administration tries to reach these rights. Nevertheless, it is important to emphasise the existence of inalienable institutional rights for the citizen as a way to reconcile State action and the citizens’ will, and so justify the regime.

### *The Frankfurt School and the Rule of Law*

Formalisation of law, the relationships between politics and legal studies and the rule of law are issues that have been of concern to other approaches. The previous sections have demonstrated how the Frankfurt School debated these questions with legal realists and legal liberals/positivists. After explaining the basis of a theory of law and its critique from the point of view of the Frankfurt School – defining it as a theory rooted in the project of emancipation developed in the Enlightenment, and with the understanding that the classical rule of law should be based on radical and broadly participatory post-capitalist democratic processes to

overcome the contradictions presented in the legal system that allow the political usage of it – it is first necessary to present how different it can be from other Marxist approaches and, subsequently, to examine what this perspective has already explained in terms of international politics.

The theoretical movement made by them, in terms of the debate about formalisation/de-formalisation and the political uses of the judiciary, will end in an apology for the classical liberal rule of law. Neumann and Kirchheimer acknowledged the crisis in which the rule of law was damaging the welfare-state, but they never defended the disappearance of the classical liberal notion of the rule of law. They continued to believe in the unfulfilled potential of the rule of law to support radical democracy (Whitehead, 2001, p. 668). Regarding the separation of powers, Kirchheimer argued that the judiciary should be used to resolve conflicts between the individual and the community (Kirchheimer, 1961, pp. 16, 21). Although forms of political justice (in the sense that the judiciary defines those who are friends and foes) are necessary, as the Nuremberg trials exemplified, his conclusion was that a true democracy depends on a high level of debate and dialogue that this kind of judicial action blocks (Kirchheimer, 1961, pp. 232–47; Whitehead, 2001, p. 673).

The concept, however, cannot be detached from its historical development. In this regard, natural law disappeared in England during the reign of Henry VII when the supremacy of Parliamentary law and the role of judges to obey to these laws became undeniable. Even though there was this historical change, natural law was still a source of theories of liberty, and it was used as such during the Puritan revolution when there were strong natural law tendencies on both sides. Republicans used it against monarchism, while Royalists defended their position in the same terms. While providing a theory of liberty, it represented a critical theory for the bourgeoisie against absolutism. On the other hand, it also appeared as apologetic, legitimating the sovereignty of the State.

The Frankfurt School's historical understanding of the rule of law comes from the situation in which both the British and German rule of law was created. According to Kirchheimer, the British Rule of Law was formulated by Dicey in 1885 as a safe and successful system that represented a high level of political civilisation and a long history of constitutionalism. In his definition, Dicey had fused some timeless historical elements, represented by the will of all individuals to be hauled into court for specific breaches of law and this law being general propositions under regular procedures, and a 'myopic view of

equality before the law', understanding that the law becomes State law (Kirchheimer, 1969d, pp. 429–430). The German *Rechtsstaat*, on the other hand, represented the clash between the bourgeoisie and other forces to show strength. The responsibility for accommodating these tensions was given to Bismarck who granted the bourgeoisie an undetermined share of participation in local self-government, but a full share of legislative power (Kirchheimer, 1969d, p. 432). Despite such differences, the author argues that there is a common denominator:

[...] the security of the individual is better served when specific claims can be addressed to institutions counting rules and permanency among their stock-in-trade than by reliance on transitory personal relations and situations (*Ibid.*, p. 429).

In the beginning of the twentieth century, the rule of law, understood as a liberal concept instead of self-government and protection against power, would be concerned with 'the techniques of guaranteeing individual freedom and property'. At that time, the State had limited functions. It was only when universal suffrage spread to European countries that many 'mass' parties appeared in the Parliament. These parties demanded speedy welfare norms and actions by the State and, as a consequence, raised new problems for the rule of law. Kirchheimer pointed out that although many considered the extensions of States' activities as harmful and incompatible with the rule of law or the equality of law, destroying its protective character, 'on the contrary, a more far-reaching measure of social equality [...] while not required by the equality postulate of the rule of law, is in no way contradictory to it.' (*Ibid.*, p. 433).

Even though the State has increased its activities in different fields of individual activities, the scholar maintains his believe that there are spaces of legal opportunities for the citizen when social preoccupation is included in the concept. The effect of the modern law system, with the rule of law as central, is liberating for the individual. Freedom and power cannot be seen as a 'zero-sum' game, but rather as different spaces, each in relation to the other. The modern legal system creates an environment in which the nature of freedom, generated by the law and dynamics of power, influence each other (Martire, 2011, p. 20). In a rule of law system, the juridical system promulgates laws without external constraints. The individual is, thus, protected in his individual rights.

In sum, classical rule of law represented 'the process of the divorce of positive from natural law, by which positive law became self-sufficient and autonomous [...] a process

which, from the analogy of Max Weber's famous generalisation of the "disenchantment of the world," we may call a "disenchantment of law" (Neumann, Rule of Law, in Scheuerman, 2008, p. 70). The development of the rule of law represented a political dispute between sovereignty and the law. In the account of the rule of law, universalisation of general law is followed by the emancipatory function of human rights. This is only possible when 'the sovereign power [...] ceases to be sovereign, [when] it is no longer an external power confronting the subjects' (Neumann, Rule of Law, in Scheuerman, 2008, p. 73). It is society that governs itself, and this structure obliges the State to behave according to legal norms that are clear, general, public and prospective. However, as stated above, contemporary capitalism developed the necessity for de-formalisation and particular legal norms that, until now, had threatened the idea of the rule of law.

The capitalist system moved from a classical, competitive system to a monopolist-organised capitalism, at the same time as the structure of the law changed, so undermining its liberal characteristics. Weimar was seen by Neumann and Kirchheimer as vague and open-ended, allowing the discretion of the judiciary and bureaucracy. The way the rule of law was classically conceived, as a protection against absolutism, was threatened by what Neumann considered as a decay and deterioration of the capitalist development that included massive social and economic transformation. He stated that the rule of law represented an 'ethical moment' that transcended its sociological functions and, as such, should not be dismissed. The modern rule of law, however, was built on a vague and open-ended system that could be better used by monopolist groups who retained more power.

Therefore, if the problem of the rule of law is located in the origin of the law and in poor democratic participation, the liberal rule of law has its problems because of the connection between liberalism and capitalism. In the history of liberalism, one can observe a struggle between the rule of law and sovereignty. Nevertheless, liberalism was willing to sacrifice rational law in defence of sovereignty and its 'naked' political power. Even the sacrifice of rational law made by the Nazi regime could be traced to capitalist inequalities (Neumann, 1967). Rule of law, therefore, can only be saved in a post-capitalist democracy. In addition, because ambiguous laws can be used by powerful elites, formalised laws, based on Kirchheimer's idea of generality, represent, together with the notion of the rule of law, part of classical liberalism that must be preserved (Neumann, 1936; Neumann and Marcuse, 1964).

There are different strands of the Marxist tradition that deal with similar questions.

Critical Legal Studies (CLS) is a movement closer to the Frankfurt School and the latter is considered as one of its roots. However, the development of part of CLS in a post-modern critique showed how this perspective shifted from its roots. In terms of method, the dislocation from a dialectical method to different methodologies as an attempt to renounce all forms of social hierarchy and to broaden the critique of the *status quo*<sup>14</sup> has been highlighted. However, the dialectical method has much to add to a critique of current legal liberalism. It can show how law constitutes and is constituted by the material base, as well as its separate identity as desired by CLS. It could change the critique of liberal law in at least three ways: 1) it could include CLS's indeterminacy thesis on one side of the dialectical contradiction, while observing on the other side that this inconsistency supports the liberal regime – including focusing on the notion of rule of law; 2) it could include CLS's non-determinism, bearing in mind that there are spaces and boundaries determined by economic, political and social forces, but also spaces where these forces leave law to be freely picked; and, 3) it could work with rejection against Marxist deterministic claims, according to which there is a direct causal relationship between economy and society. However, different from post-modern CLS, the Frankfurt School uses a multidimensional relationship, rejecting the current post-modern understanding that there is no such relationship. The law is both influenced by, and autonomous of, economics, politics, and culture. This contradiction reveals the dialectical understanding, according to which 'it is a contradiction that drives liberalism and gives it shape' (Whitehead, 1998, pp. 736–738).

The notion of the rule of law is another interesting differentiation between the Frankfurt School and the Marxist literature. Other contemporary left-wing Marxists base their analyses on orthodoxy Marxism, dismissing the rule of law. For this strand, a critique that maintains the rule of law is conservative<sup>15</sup>. However, the Frankfurt School highlights that the rule of law and the capitalist system are not necessarily affiliated. This is a different feature from most political theorists who describe the relationship between both phenomena as necessary. Neumann, nevertheless, maintains his belief in the ways in which the traditional model of rule of law can provide an environment for the realisation of justice. According to

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14 Whitehead analysed the work of Duncan Kennedy as representative of this postmodern CLS. According to him, 'Kennedy has not rejected the dialectic because it fails as a methodology for understanding social totality. Rather, Kennedy has rejected the dialectic because he, along with other postmodern theorists, wants to broaden the leftist attack on the established order. Instead of seeking to overcome only the liberal form of law and society, Kennedy and other postmodern CLS theorists seek to renounce all forms of social hierarchy' (Whitehead, 1998, p. 735).

15 It can be seen in the debate between Koskienniemi and Scheuerman (Cf. Scheuerman, 2008, p. 6 note 12).

Neumann, the transformation in the context of the structure of neo-liberal economic globalisation would create impediments to the establishment of the rule of law. In his work, any left-wing alternative to the current political and legal system has to maintain a minimum of the same characteristics presented by classical legal liberalism with fidelity to the rule of law. (Scheuerman, 2008, pp. 2–9).

The complexity of the historical dialectical thinking on the issue of rule of law developed by the Frankfurt School gains an interesting parallel in E.H. Thompson. For instance, the author, in his attempt to draw a line between theory of law and politics, condemned the disconnection between class struggles and academicism, and the threats to civil liberties and democratic rights. Thompson was aware of how useful law was for the dominant class. However, he advocated in favour of civil liberties, otherwise there would be only authoritarianism. As much as law has a ruling class component, Thompson argued, historically, it is possible to observe that the rule of law has at its core a ‘logic of equality’ above class domination. Especially in *Whigs and Hunters*, Thompson (2013) debates the idea of rule of law not only as a corruption of the eighteenth century, but also as an ideal notion constructed in the sixteenth and seventeenth centuries that transcends the transformations in law and society (Fine, 2002, pp. 169–189).

E.P. Thompson (2013) argued that the use of the Black Act of 1723 resulted in transformations within the law that cannot be explained by traditional legal arguments. According to him, ‘the greatest of all fictions is that the law evolves, from case to case, by its own impartial logic’ (Thompson, 2013, p. 250). Despite all attempts to bend the law in order to achieve stability, as presented in by the example of the Black Act, Thompson actually found it remarkable that there was a rule of law in the eighteenth century. Its continuity, however, made him realise that those who reject the rule of law have done it based on an old Marxist tradition. This tradition argued that law was another cultural or institutional artefact that exists in the ‘superstructure’. However, this superstructure does not exist in itself. It exists in relation to the ‘infrastructure’, that is composed of productive forces and relations. In this structural system, the necessity of the infrastructure matches the necessity of the ruling classes; hence, as the law (‘superstructure’) constantly adapts itself to the interests of the productive forces and relations (‘infrastructure’), the law cannot be anything else besides the instrument of the ruling class to achieve their interests. As such, the law mediates class relations, defining and defending claims about what is property, its rules and sanctions. As a



consequence, the rule of law is also an instrument of the ruling class and it masks the interests of this class (*Ibid.*, p. 259).

However, the study of the Black Act revealed more than a simple interest of class and a much more complex reality. It is true that Thompson's studies revealed some mystifying functions in the development of that law, and that there were some class-bound issues within it (*Ibid.*, p. 260). In this sense, law may be assimilated by the ruling class and it may be seen as ideology. Alternatively, it may be part of a definite and active relationship between rules and sanctions, and social norms. Nevertheless, social context is more complex than that, and it cannot exist without law. His studies could not conclude that this mystification, albeit existent, was the only role law played in society. According to him, law mediates the relationship between classes. To the same extent that law mystifies, crystallises and legitimises class relations – at the point of masking injustice – it also inhibits power and provides protection to the powerless. It happens because the forms of law acting in the mediation of social classes are something different from un-mediated force. It is not only an imposition from above: when the law is serving as a medium between social forces in conflict, there is always the possibility of the ruling class being defeated in their turn. The victory of the powerless in a class struggle mediated by law has a second function. It helps control and retain the power of the ruling class within constitutional controls that, paradoxically, ‘consolidate power, enhance legitimacy, and inhibit revolutionary power’ (*Ibid.*, p. 265).

Thompson's conclusion regarding the Black Act, therefore, reveals an interesting understanding of the rule of law. Because of several transformations in the criminal law and in the relationship between social forces in England during the period of effectiveness of this law, the Marxist difference between superstructure and infrastructure regarding the role law plays cannot be sustained. Rather, the rule of law supported the claim of the powerless against the ruling class. Instead of a direct link between the interests of the bourgeoisie and legal form, Thompson made clear that this form may contain both interests. At the same time that as it may mask their interests, it creates a form in which their power is contained. The law, once approved, would also become a constraint on the powerful. The exercise of the law as a social medium, thus, exists in a constant dialectical movement between the interests of the powerful and powerless groups, between oppression and emancipation that, in the end, constrains power and advances the necessity of some, while, at the same time, legitimising

the regime and power of the other.

There is much that we can absorb from Thompson's perspective about the rule of law. As with Neumann and Kirchheimer, Thompson observed how the Black Act was politically constituted. His work is much closer to the methodology developed and applied by them: a historical analysis of the legal norm and the rule of law in which the legal norm was politically constituted, highlighting the dialectic behind this development. Therefore, after explaining what a theory of law based on the works of the Frankfurt School is, the next section will present my own account of how this perspective – different from orthodox Marxists and CLS – can provide an interesting answer to the current developments in human rights, especially addressing how human rights can achieve both emancipation and repression in international politics.

### **The Frankfurt School and the Method of Studying Human Rights in International Law and Politics**

The previous section has differentiated between the legal theory of the Frankfurt School not only from their direct opponents, legal liberalism and legal realism, but also from Marxists perspectives that may or may not have been derived from it. I have showed that Neumann's and Kirchheimer's work provides us with a theory of law based on a dialectical method, allowing us to understand the political constitution of law. Contradictions in social and political forces will not only create law as an emancipatory entitlement, but will also use it for repression. The next section will suggest that we can only explain the contradiction of emancipation and oppression in international human rights law by analysing it historically. To do so, I will first summarise the method developed by Neumann and Kirchheimer. Secondly, an account will be given of the historical development of international order and the distinctions made, in terms of its global design and cosmopolitanism, that will be used in this thesis; and finally, I will provide the historical context in which human rights norms have been politically constituted.

The idea of a methodology that could be applied to the study of human rights is a matter of academic discussion. There have been attempts to analyse this issue and to provide stronger methodological tools – or at least a better *compendium* – to research human rights.

According to Fons Coomand, Fred Grünfeld and Menno T. Kamminga (2010), the main problem regarding human rights researchers is that ‘human rights scholars tend to believe passionately that human rights are positive’ (Coomans et al., 2010, p. 182). They understood that because most of the scholars are activists or former activists, their objective is to contribute with respect for human rights. Their methodology, as a consequence, will reflect this oriented agenda in their research, reducing the spectrum of possible approaches. Not only that, but in the end the conclusion will be directed to a progressive view of human rights and frequently lack the social-political relations that undermine the creation and implementation of international human rights norms.

That does not, however, answer the questions proposed in this thesis. It is necessary to understand the subject of human rights politics. Hence, this thesis will present the role of human rights as part of international politics and a standard against which States can measure and legitimise their actions. In this process, this thesis will show the contradictions that are part of the theory of law of the Frankfurt School. The importance of a rule of law structure and how legal liberalism has transformed it into oppression has also been highlighted. Also, some ideas on how a cosmopolitan law, based on human rights, can be the next step towards human emancipation have been presented. However, it is still necessary to give a historical account of how law can be politically constituted. This matter will be done by highlighting the major importance that coloniality has in the dialectical process, not only as an international subject of international human rights law, but also as a constituent of this same law.

When analysing the theory presented so far, it is clear that there are some important elements that need to be connected. I have argued that law is politically constituted in a dialectical process. This statement means that in the definition of rights, social groups will act in accordance with political power. This political power, in a liberal order, means that they will try to protect themselves from the power of the State by interpreting rights in a significative way and they will try to raise institutional protection. In other words, there will be a process of formalisation of the law. This posture will generate a contradictory action from the *status quo*. When they do this, however, they provide the State with more power, because the State will then have the power to regulate this new right. The State, on the other hand, will try to protect the interests of the groups that are already in power by maintaining their interpretation or by providing a new meaning to rights established by the first group. In

the end, the juridical arena will be permeated by different political arguments to convince the other of their world view. This political power that is exercised in this dialectic is not only a struggle, but also a genuine attempt to try to impose its view on the other. It will legitimise different policies in the national and international arena by providing the ‘right’ juridical interpretation. This interpretation will be emancipatory, in the sense that it will entitle rights to different groups, but it will also be repressive, in the sense that the interpretation provided by some social groups can and will limit the enjoyment of those same rights, despite its universal vocation.

Neumann and Kirchheimer's work applied a dialectical method. By dialectic, I mean the acknowledgement of the social ontology of world politics as a process and change, and the social relations that generated those changes. It contradicts the alleged stasis and immutability that traditional approaches seldom portray. Rather, it focuses on the social relations underlining the international. In this form of thought, States and political subjects are seen as part of the whole, focusing on the human side of the relationship. ‘Dialectics is nothing if not a “live” method that enables us to look critically at human reality and the potential futures therein’ (Brincat, 2011, pp. 679–680). With the use of the dialectic method, there is a real possibility to understand changes, first focusing on a particular phenomenon within the totality of social reality, then, providing an analysis of these social relations in their own context while interpreting the elements that interconnect the phenomena with tendencies for social transformation. For the Frankfurt School, there were no social facts that could inform a social theory. ‘Instead, there was a constant interplay of particular and universal, of a “moment” and totality’ (Jay, 1973, p. 54).

Kirchheimer understood that the dialectical method was necessary to unveil the relationship between power and rights. He argued that a system based on legality could incorporate the dialectic of history and, in this case, change would be smoother than in a system of legitimacy. In contrast, a system based on legitimacy would survive as long as social and political conditions of a given historical moment could maintain its appearance of eternal validity (Kirchheimer, 1996, p. 58). Kirchheimer's claims are directly related to Cotterrell's as described above, in the sense that Kirchheimer's methodology is centred on socio, political and economic change, which is the case in his work on political justice. According to him, there is a contradiction between the political and the judicial. While political action attempts to change or reinforce power relations, the judicial apparatus seeks to

create and reinforce obedience to pre-established values. The judicial, in this way, limits power, at the same time as it is the nature of power to defy limitation (*Ibid.*). The consequences of this dialectical relationship are developed by Kirchheimer in his studies of particular cases, but only to the extent that he could draw conclusions about the system by relating the political content with the juridical form, and considering the search for an ideal order (Kirchheimer, 1961).

The dialectical method is also of great importance for the work of Neumann. In ‘The Governance of the Rule of Law’ (Neumann, 2013, 1936), Neumann applied the dialectical method to express the relationship between rights and coercion as a contradiction that was present in every thinker, usually described as a dual characteristic of law: *voluntas* and *ratio* (Cotterrell, 1995, p. 165). Some scholars also highlighted the importance of Rousseau’s works, especially influencing Neumann’s critical analysis. In this sense, Rousseau figured as both the starting point for Neumann’s understanding of the political situation and the vanishing point for his meaning of the history of political idea (Rodriguez, 2004; Scheuerman, 1994a, p. 106; Söllner, 2013, p. 215). Thus, the contradiction between *voluntas* and *ratio* could be found in different moments in this history.

Neumann traced European political ideas from Aquinas to Hegel as a reflex of the political situation at the beginning of the twentieth century. He observed that this relationship was presented as contradictory by them, leading those scholars to develop several non-satisfactory solutions. It is within this context that the work of Rousseau can be highlighted. From Neumann’s point of view, Rousseau was a thinker who better engaged with this issue and presented a better methodology. In his explanation, Neumann followed three different steps. He first analysed Rousseau’s argument on the influence of social and political conditions over the nature of man. Then, Neumann described the possibilities of constituting rational legitimation of State power in Rousseau’s work through the representation of State sovereignty as the sum of *volonté général*. Both steps led Neumann to his critical analysis in which Rousseau’s conclusion can be understood within two dimensions. First, he argued that Rousseau’s solution was fictive because logical and institutional barriers were insufficient to prevent the constitution of a totalitarian state. However, in a second dimension, Neumann contemplated the situation in which if society is transformed and follows a more egalitarian path – both socially and economically speaking – Rousseau’s solution could become probable or even real (Söllner, 2013, p. 219).

Thus, for instance, the rights declared by the revolutions of the 18th century – especially the French and the American revolutions – expressed the contradictions between the idea of nationalism and the construction of universal rights. Rights were universal because they did not depend on government, but expressed the formalisation of natural rights. Human rights can, thus, be identified with both legality and morality. They are legal entitlements based both on different international treaties developed after the Second World War, and national developments before that, carrying the legitimacy of being democratically accepted by the society of nations. As morality claims, human rights represent the universal rationalisation of the same values they promote internationally. In Habermas, the universalism of human rights is derived exclusively from its position as moral norms. However, different from morality, a violation of any human rights norms can be punishable using juridical logic, as part of the cosmopolitan law. There is a symbolic force behind human rights that represents a potential for emancipation. These rights, in the intersection between morality and law, represent a utopia, a universal abstraction of what the reality can be. Due to this, it represents the language behind resistance and dissents. In this way, the European experience of human rights is based on shared memories of unjust situations that are suppressed by a human rights-based solution (Günther, 1999).

This analysis is historically based, as is the work of the Frankfurt School, when it observed the transformations in Germany from Weimar to the Nazi regime. The political constitution of social rights in the Weimar Republic is understood within the political and economic development of Germany. Also, the idea of rule of law is observed in the British and German historical contexts. On the subject of human rights, it is possible to observe that at one point in history, bourgeoisie revolutions used some conception of human rights to deliver the necessity for change. The French and American Revolutions demonstrated the role that political rights had in the political system, even though the idea about how they could change the modern state was not clear at that time. At that moment, concerns about human rights were used to reflect upon the function of rights in society, establishing connections between both functional and reflexive/normative dimensions of legitimacy. Once their function is crystallised, the constitutional form in which the modern state normatively realises itself, determines the extent to which human rights would be considered in a given society, in some cases being central to the constitution.

In several ways, I am inspired by the methodology presented by Neumann and

Kirchheimer in respect of the political constitution of law, the dialectic of repression and emancipation, and the transformation of law and society. However, their work was not concerned with international law and international relations. Of course, both of them were aware of the international dimension. However, the international context served as an inspiration to them, providing enough elements for them to understand the legal system in Germany. For instance, Kirchheimer explained the historical development of the rule of law in England before contemplating this institution in Germany, and Neumann critically assessed European scholars on the rule of law to explain the Nazi regime.

My work, on the other hand, has the international dimension as the *locus* of discussion. To better explain the political constitution of human rights in international law and the influence on international relations, I need to adjust my variables to the moment of research. First of all, I have to explain the historical choice I have made. In this regard, repression can be best observed in the relationship between the West and the rest of the world. The dialectical process that transforms human rights in international law can be highlighted in its historical development. However, the point of departure for the historical analysis of this thesis in the international arena will be the process of colonisation, starting with the colonisation of the Americas. This period was chosen not only because it is considered as the beginning of a doctrine of international law (Grewe, 2000), but also because it represents one important side of modernity, within the context of the multiplicity of the origins of the concept of modernity (Escobar, 2004; Mignolo, 1995; Quijano, 2000, 2007).

This discussion has recognised the importance of colonisation in the process of relating international law, politics and human rights. Colonialism brings numerous challenges to human rights. There is a pattern in which human rights is a civilising tool used against the barbarians, ‘the other’ (Douzinas, 2007, p. 83). While the dichotomy *civilisation v. barbarian* was the motto in the universalistic view and the relationship between the West with the other parts of the World, today, the secularisation of our perception of the world works in the same way, desiring to bring humanity, instead of civilisation (Beck, 2006). The literature is also aware of the importance of human rights not only in the construction of Western subjectivity and construction of ‘the other’ as the barbaric inhuman, but also, as subjects of law, as people

that have not accepted properly the ways of Western Modernity<sup>16</sup>.

Colonialism was a conscious choice. If in Weimar the participation of the proletariat was the force behind the possibility of emancipation in the law, in international politics, it is the voices of non-Western societies on matters of human rights that will genuinely fulfil the emancipatory potential of international human rights law. Human rights have been repressive due to legitimising interventions, but they have also been emancipatory. Non-Western societies are not only the subjects of human rights, but also people who claim them. Although historically the West has used the discourse of human rights as the motif behind all forms of colonialism, fights against dominance and oppression have moved human rights in the emancipatory direction. In this debate, the literature presents the difference between global design – when the international project does not intend to be universal, but rather to be an imposition – and (critical) cosmopolitanism (the emancipatory project) (Dussel, 1993; Mignolo, 2000, 2007; Quijano, 2007). While describing global designs and critical cosmopolitanism, it is important to highlight the role of political power in Neumann's work, according to which, political power moulds the world according to one's view. Human rights and the different sorts of natural rights are important because, historically, they represent the attempts of the West to mould the reality according to their will. While global design represents this attempt, cosmopolitanism is counter-posed as the historical construction in which the local histories will be heard and on which the real possibility of universal coexistence, can be based.

The mark of colonialism divides history into at least three global designs<sup>17</sup>. Each design recognises one type of rights as an expression of what are human rights today (rights of the people, of men/the citizen, or of human beings). The first design corresponds to the Spanish and Portuguese colonialism of the sixteenth and seventeenth centuries. It is based on the Christian mission of civilising the Amerindian and in the definition of who is human and deserves to be entitled to rights. The second corresponds to the eighteenth and nineteenth centuries, to French and English colonialism, and to the civilising mission, based on the rights of Man and Citizen. The third corresponds to the second half of the twentieth century,

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<sup>16</sup> For more details on this matter, Cf. Bankowski, 2001; Mutua, 2001.

<sup>17</sup> Mignolo highlights a fourth design. 'Today we witness a transition to a fourth moment, in which the ideologies of development and modernization anchored in leading national projects are being displaced by the transnational ideology of the market — that is, by neoliberalism as an emergent civilizational project' (Mignolo, 2000, p. 723).



to the U.S. and transnational (global) colonialism/coloniality, and to the modernising mission, now based on human rights (Mignolo, 2000). All global designs present elements of the political constituent of human rights. In every historical period, it will be possible to distinguish the moments when the design worked, and the colony was oppressed, but also moments in which the function of law changed, and the subject and the definition of rights moved in an emancipatory direction and transformations happened in human rights.

Despite ‘decolonial’ experiences with human rights being emancipatory, there were also historical moments in which human rights legitimised repressive policies. Neumann and Kirchheimer were able to observe the dialectic of emancipation and repression in the domestic context. The contradiction is empirical. It helps us understand the different positions/interests within the formation of the rights which constitute emancipatory and repressive elements. There is a dialectical relationship between historical and legal/normative developments. Thus, it is hard to understand one without the other, as in the case of the theory of law developed by the Frankfurt School. By reconstructing the historical context, my thesis demonstrates the contradictory nature of legal/normative developments. This contradiction is located in the origins of human rights, which are inherent to the nature of human rights. By locating the contradiction in the origins of human rights, I understand that contradictory interests not only constituted the legal norm but also continue to exist even after the syntactical moment. The formalisation of human rights norms fails to solve the contradiction. As a consequence, those norms present an openness that can represent either emancipatory or repressive positions adopted by economic interests and political power.

By referring to the decolonial thought, my thesis deals not with a different definition of reason, but with a different rationality. The decolonial critique understands that modern reason is problematic because of the irrational myth that it conceals. This literature follows Dussel, to whom modern reason is based on an irrational myth that justifies a genocidal violence. Because the Conquest of the Americas was left aside from central theoretical issues, European thinkers were unable to deal with the alterity and, as a consequence, with the violence that effectively promoted the development of Europe. In this Eurocentric view, modern reason is understood as a product of the Enlightenment, while the Conquest of the Americas and the Spanish and Portuguese history is forgotten, leaving the Americas at its periphery. The violence of the Conquest can be defined as:

an extreme sectarian violence it unleashed in its final stages (broken treaties, elimination of

local elites, endless massacres and tortures, the demand that the conquered betray their religion and culture under pain of death or expulsion, the confiscation and repartition in feudal form of lands, towns, and their inhabitants to the officers of the conquering army), was, in turn, the model for the colonization of the New World (Dussel, 1993, p. 67)

It is within this rationality that the historical chapters of this thesis are constructed. The decolonial thought understands modern reason as the result of this combined effort: both the Reconquest and the form it took to implement violence. It defied the European thinkers who placed the origins of modern reason firmly in the Enlightenment. Regarding European scholars and the Enlightenment, Dussel argued that placing the source of modern reason in the Enlightenment allowed them to reaffirm the idea that all cultures should follow the same stages of development as the European States. In Hegel, development is ontological. It determines the movement of the 'concept' until it becomes absolute knowledge. Development, thus, indicates a series of determinations of freedom, born from the nature of freedom by its consciousness. It is ontological, and its direction could be well perceived: 'The movement of Universal History goes from the East to the West. Europe is the absolute end of Universal History. Asia is its beginning' (Hegel, 1975, p. 243).

However, as critical of modern reason as the decolonial thought is, the emancipatory elements of modern reason are not abandoned, which allows me to introduce the dialectic as described in Chapter Two. Therefore, it is an issue of rationality. By uncovering how violent was the origin of modern reason, the decolonial project changes its rationality, proposing that modern reason is a result of the colonial violence, rather than European development, and thus, the scholars from the decolonial thought start their studies with the Conquest of the Americas.

In international politics, it is necessary to take into consideration the domestic development of rights in, and its expansion to, other areas. In my understanding, the overall argument of the thesis minimises the difference between international and domestic law. The historical cases presented in the thesis show legal norms that are intended to be universal or are developed in international organisations such as the humanitarian intervention normativity. All those legal norms are presented in terms of their relationship with domestic laws. The dialectic, as presented, is legally and politically constructed, relating the domestic with the international spheres. It means that the contradictions presented domestically in the formulation of human rights law could be found in the international arena, where new and different syntheses were established. For instance, when dealing with the French Revolution

and its Declaration of Rights, I show that there were those who advocated the limitation of its universality. In this case, although it emancipated different classes in France, the declaration lacked the necessary legitimacy to deal with slavery in Haiti. Despite the fact that all Frenchman were considered free and equal, not all of them were liberated. Thus, the dialectic had a different synthesis more emancipatory domestically and more repressive internationally. The continuity of the dialectic from the domestic level to the international thus represents a different degree of connectedness between those two legal spheres. In this account, as part of this methodology, I will provide an account of the formation of rights in the European context. I will show how the formation, or transformation, of the meaning of law, transformed society and was, at a certain point emancipatory. These domestic moments coincide with radical political transformations. As I explained in the last section of my first chapter, these moments of legal transformations are those that legitimise a political order because the political and the normative are co-constituted.

After offering an account of the emancipatory potential of the transformations domestically, I will consider if and how it was applied in international law. Because Western powers have been hegemonic since the Conquest of America, several concepts and theories about law and rights have been later applied by social groups in the colonies that also desire the same freedom and rights. However, this is not always achievable. Therefore, I suggest that the concept of human rights will clash with European interests and, thus, because there are repressive tendencies in the origins of human rights, they may be applied in a repressive rather than in an emancipatory way, legitimising the violence of the colonial system.

The choice of cases was made focusing on struggles for emancipation that resulted in a formal legal document either in the European context or in relation to the American colonial continent (as influenced by the decolonial literature). The formalisation of rights is important evidence as theorised by Neumann because he regards this process as the part of the classical law that could be emancipatory. In addition, I seek to analyse moments with the historical context that deal with the same set of rights. For instance, political and civil rights in France and Haiti. I will deal with texts and Other situations were dismissed not because it would be impossible to analyse the dialectic in them, but because the cases selected were more representative of the theory developed.

## Conclusion

The legal theory of the Frankfurt School provides a deep and insightful notion of law based on the dialectical method, according to which, the constitution of law and its origins are due to the reconciliation of contradictory social and political forces toward projects. These can be emancipatory but, simultaneously, politically used to guarantee oppression and domination. Although there is domination and oppression, the space for emancipation exists. Therefore, in a radical democracy with broad democratic processes, it is possible to realise the promises of freedom existent in the notion of law and the rule of law of classical legal liberalism and the Enlightenment.

At the international level, human rights represent an ethical moment and the expectation of freedom. However, the structure of the liberal legal order allows the same rights, in which freedom and justice are based, to be used politically to repress, punish and intervene against populations that are not considered to be ‘developed’, ‘First World’, or ‘Western’. In the name of human rights, wars and domination have occurred and have justified politics in the international order. However, it is not a new process. Rather, as the theory of law of the Frankfurt School allows us to perceive, the political process described, has as its base what we call ‘human rights’. The theory examined in this chapter also gives us a direction towards more freedom: it is necessary to discuss human rights as broadly and democratically as possible. It must consider old and new structures of dominance and coloniality, hearing the voices of different societies. Only with this radical (and critical) cosmopolitanism, will it be possible to redress the current situation of human rights legitimising structures of power.

To this end, in the following chapters, the historical and dialectical constitution of human rights law in different historical contexts will be examined. Chapter Three will look at how the concepts of formalisation and the dialect of power and emancipation in the context of the colonisation of the Americas, constituted an important moment for human rights in international politics. The main concepts described in this chapter will demonstrate the dialect in the thoughts of Francisco de Vitoria regarding colonialism and human rights, and also the change in interpretation during the American Revolution.

## **CHAPTER 3 – THE CONQUEST OF AMERICA AND THE AMERICAN REVOLUTION: NATURAL LAW AND COLONISATION AT THE END OF THE 15TH CENTURY**

In the previous chapter, I suggested that by using the theory of law developed by Neumann and Kirchheimer, it is possible to understand legal norm creation and further development using a dialectical historical analysis. For instance, using the example of the Weimar Republic and its Constitution, they highlighted the dialectical relationship between economic and political forces that acted in the construction of liberties and individual rights. From the struggles between different powers, they were able to explain not only how the Parliament embodied the emancipatory project in which freedom and liberty were central, but also how the working class was weak, allowing the dominance of a conservative group that strengthened the position of the President.

The mechanism for their work attempted to reveal the supposed progress made in the continuity or development of political power between the first and the second moment. It was not an attempt to disqualify the gain in rights that the proletarians had acquired with the Weimar Constitution. Rather, by highlighting this development, how they were able to show the significance of the basic right in the given order. In addition, they sought to understand how the bourgeoisie operated to maintain its power. Hence, not surprisingly, this theory contributes to our understanding of the mechanisms of oppression and emancipation in the use of human rights in international relations. So far in this chapter, we have seen that the oppressive side of the use of human rights in international relations is a pattern that has been established since the beginning of the period in which Europe became hegemonic. If we set colonialism as the central issue in the international sphere, and as the expression of the pattern established under European hegemony, we will find different fascists within the relationships of colony/coloniser (Santos, 2002).

In that regard, this chapter will suggest that the Conquest of the Americas highlights the relationship between Europe and the rest of the world. It describes a pattern of violence and domination that has been reproduced repeatedly over the years, and which can be observed in different areas of European society and international order. Economically, colonialism provided an immeasurable amount of gold and other riches necessary for the

development of capitalism. Socially, it was the basis of race differentiation. Due to colonialism, it was possible to establish the difference between ‘the European’ and ‘the other’, ‘the Amerindian’. This ‘other’ needed salvation or civilisation. Hence, this category of people needed to become more European. Legally, it helped develop most of the concepts that later became known as international law. The discovery of new land and people, obliged the European to re-image its position in the world and, in consequence, their rights about this new situation. This issue was expressed by Francisco de Vitoria and Bartolomé de Las Casas.

Following on from the theory developed in the previous chapter, my intention is to develop a historical analysis of the dialectical development of human rights in the context of the global design that it is identifiable with the conquest of the Americas and the first moment of European hegemony globally. To do so, I will first explain the economic and political process at work in the creation of the global design based on the idea of Christendom. Next, will follow an analysis of the role of Portugal and Spain in European economic development that culminated with the colonisation of the Americas. Then, and as a consequence of the conquest, I will provide an account of the definition of natural rights that played an essential role in the justification of the colonial enterprise, together with the historical development of the colonies. In the last section, I will show that there was wide discontent with the violation of human rights both in the colony and in the metropolis. While some dissenters remained as the voice of reason against the poor treatment given to Amerindians without many practical effects – as is the case of Las Casas – the change in the significance of freedom and liberties resulting from the American (United States) and French Revolutions and from liberalism was the force against the colonial power and proved to be essential in the struggles for recognition.

### **Christianity as a Global Design**

The development of international law in the sixteenth century included universalistic rights in its formulation. In this sense, universalism was a necessary response to the expansion of the known world. Spain and Portugal discovered not only new territories, but also new populations. In the face of those discoveries, Europeans were eager to divide the world between the two powers. Vitoria, thus, has to answer to Spanish hegemony and conquest. In this sense, Vitoria provided an international law founded on the law of nations.

Before that, the traditional understanding of international law was based on the *ius gentium* as developed by San Thomas Aquinas. Vitoria re-interpreted Aquinas' natural law and included subjective rights. Based on Neumann and Kirchheimer's explanation, Vitoria's theory of international law represented modernity. It was not natural law, rather, it represented a first movement of 'disenchantment of law', part of the transformation that represented an emancipatory function. In this section, the economic and legal context in which Vitoria developed his theory of international law will be described, so that later the emancipatory and repressive issues in the inclusion of human rights by Vitoria can be explained. This context was the Conquest of the Americas and the papal division of the world<sup>18</sup>.

The Conquest of the Americas is an important event in the discussion of the international for several reasons. First of all, it broadened the geographical realm of European politics. The inclusion of a vast territory into the European circle of influence, and of its domination, became one of the most important concerns of politicians at the beginning of the sixteenth century. Also, the Atlantic became a sphere of interaction between European nations (Burnard, 2007, p. 91). Furthermore, the development of capitalism as an economic system depended on Mercantilism. Although Mercantilism cannot be considered to be a mode of production '*stricto sensu*' (Weaver, 2000, p. 11), its development contributed to the rise of capitalism. There is a deep economic, political and social connection between this first colonial system and modernity.

During this period, the set of designs used to manage the world were based on religious grounds, aimed at the formation of an *orbis christianus*, as articulated in the Spanish debate, mainly by Francisco de Vitoria. The set of ideas and interpretation that was fundamental to the establishment of this design existed within the European Renaissance and it was part of the main constituent elements of modernity and coloniality. We have to bear in mind that, in the late fifteenth century, there were economic transformations in some parts of Europe, allowing the expansion of commerce and the development of relations between

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<sup>18</sup> Decolonial literature highlights the importance of the discovery of the Americas for the Enlightenment project. Despite different contests, the Church represented an important institution at that time, capable of legitimising legal norms and international agreements, such as the division of the world between Portugal and Spain. In this Chapter, the papacy is included as part of European politics. Also, the papal bulls are offered as historical legal documents that attempted to justify the domination of the Americas. Nevertheless, the colonial situation presented in the literature is a stronger argument for the colonial domination. In addition, the 'dominium' described was contested several times as was both the hegemonic position of the Spaniards and the role of the papacy in European politics.

social classes, which had never been previously seen. The unique position of Portugal and Spain in the European system after the wars to free the Iberian Peninsula from the Moors, created the necessary environment for a more centralised political system, where this incipient bourgeoisie, as a commercial class, allied themselves with the political power, the king, to develop an enterprise with economic interests. If the idea was to provide an alternative route for goods produced in the East, the new territory also provided them with the opportunity to conquer and expand. This expansion was not only political and territorial, since the main objective of the colonies was to provide a base of production for some of the products already consumed, like sugar and also gold. It was, thus, the first period of globalisation from which the displacement of this system to different parts of the world emerged. Even though there were other maritime civilisations, Europe stood alone, deciding crucial issues that emerged from this supremacy, such as norms about dividing the world.

One of the first papal bulls issued regarding the division of the world and the use of oceans, was the *Aeterni regis* of 1481. In this bull, Pope Sixtus IV confirmed the Treaty of Alcáçovas ceding ownership of the Canary Islands to Castile and to Spain, while granting Portugal lands in Africa and effective dominance of the Atlantic Ocean. After Columbus's voyage to America, the Portuguese king understood that by this treaty, all lands discovered by Columbus were, in fact, Portuguese. The Monarchs in Spain sought the judgement of Pope Alexander VI to solve the matter and maintain control of the regions. In 1493, the Pope granted three different bulls that, in conjunction, were called the Bulls of the Donation to Spain. The most important of the three bulls was the one known as *Inter Caetera* which established that all lands distant 100 leagues west and south of the group of Azores and Cape Verde islands would be controlled by the Spaniards. It established the first zone of Spanish rights, excluding any possible claims by the Portuguese. The bull described the conquest as an expression of the Spanish religious obligation as follows:

Among other works well pleasing to the Divine Majesty and cherished of our heart, this assuredly ranks highest, that in our times especially the Catholic faith and the Christian religion be exalted and be everywhere increased and spread, that the health of souls be cared for and that barbarous nations be overthrown and brought to the faith itself [...] you should appoint to the aforesaid mainlands and islands worthy, God-fearing, learned, skilled, and experienced men, in order to instruct the aforesaid inhabitants and residents in the Catholic faith and train them in good morals (Papal Bull *Inter Caeteras*) .

The bulls from Pope Alexander constituted the juridical title of dominion for the Spanish Crown during this period. The document had its importance recognised for the rights



of the Amerindian, especially because the bull *Inter Coetera* was part of the juridical foundation of several legal documents regarding the domination of America. For instance, in the official compilation of legal documents of 1680, this bull expressly figures as the most important title of domination (Sánchez Bella, 1993).

The colonies in Americas were an integral part of this system. They participated as the periphery of this system, sometimes with more (North of the continent) or fewer liberties (Latin America), but they were an integral part of the economic system. The goods produced reflected the cycle of riches in which the metropolis and other countries were subordinated, whether it was the spoils of agriculture (sugar) or, especially, mining (silver and gold).

The discovery of America, and the passage to the East Indies by the Cape of Good Hope, are the two greatest and most important events recorded in the history of mankind (Smith, 1981, p. 626). By opening a new and inexhaustible market to all the commodities of Europe, it gave occasion to new divisions of labour and improvement of art [...]. The productive powers of labour were improved (Smith, 1981, p. 448).

The conquest of the Americas and expansion into the Pacific was unprecedented. For the first time, the entire world was not only known, but dominated by European powers. Vitoria had, thus, to provide an explanation that would take this division into consideration. The treaties and papal bulls of the time divided the world between European powers, without consideration for the populations that already existed, but, with colonisation, it was the beginning of the thought that it was possible to be politically and economically hegemonic in the whole world. My argument is that this repressive process was concomitant with attempts to include and emancipate native populations. This thesis, thus, understands that colonisation was the way in which the hegemonic power related with the world. In the next section, I will develop the idea of human rights during this period and how it legitimised the colonial enterprise.

### **Human Rights in the *Orbis Christianus***

The Spanish Legal School of thought, based on scholars such as Vitoria and Suárez, made an effort to resolve some of the practical juridical-theological problems of the sixteenth century. In the previous section, it has been suggested that Vitoria had to answer for the economic expansion and the colonisation of the Americas as divided by the Pope. Reality

brought different concerns about the legitimacy or illegitimacy of the conquest of the Americas, including the rights of indigenous people and Spaniards in respect of the lands. Even among the Spaniards there were those who doubted that their behaviour towards indigenous people was correct, and that the colonial process was legitimate. Those concerns were called the 'Indian doubt' (García y García, 1997, p. 26).

The reinterpretation of the theology of St. Thomas Aquinas in the context of natural law, was essential in addressing the challenges of the New World. Scholars from the Spanish Legal School were able to present different connections between international law (law of nations) and human rights (subjective natural rights). It was a step toward the generalisation of international law and a stronger possibility of emancipation, as suggested by Neumann and Kirchheimer. The introduction of the law of nations would give international law a degree of rationalisation and a connection with different political groups. Nevertheless, in an attempt to give a new foundation to international law, answering to the various interests of his time, Vitoria legitimised the rights of Indians and the conquest.

In relation to the dialectic of emancipation and repression regarding the rights of Indians, it is interesting to note the positions of Sepúlveda and Bartolomé de Las Casas. Despite the fact that both derived their work from Vitoria, each represented one side of this dialectic. They dealt with both the legitimacy of the conquests, and the rights of man and indigenous people. The Spanish Crown relied on the scholars of Salamanca to decide the legitimacy of the conquest. The mainstream legal thought of the period was strongly based on the work of St. Thomas Aquinas and the importance of natural law to the legal system. Despite the already existent *ius gentium*, Vitoria developed a unique approach based on using natural law for international law. As the theory of natural law also encompasses statements about subjective rights, Vitoria placed what we understand as human rights in his system of international law. Because of this preoccupation with the Thomist understanding of the law, some literature on the history of human rights stated that in Vitoria:

we find the first virtually complete enumeration of human rights and principles of democratic government and law, both on national and international level, long before the American Declaration of Independence and Thomas Paine's *Rights of Man* (de Torre, 2004, p. 139).

Therefore, the Salamanca thinkers sought to create a theory of international law based on the differentiation between the law of nations and natural law. According to this school, this differentiation was troublesome especially because the law of nations and natural law

were both common to all men, and contained both prohibitions and permissions. However, while in natural law evidence could be found in natural principles, the law of nations was positive driven, meaning that the prohibition is derived from the law itself indicating that the conduct was forbidden. Besides, natural law bore an immutability that could not be found in the law of nations, because immutability depended on necessity. Since the law of nations was not natural law, but represented a part of it and bore universality to govern the behaviour of men, there were, in terms of rights, possible conclusions to be drawn. In the Thomist understanding of rights, there was the category of *subjective rights*, which encompassed those rights ‘which human beings have by the mere fact of being humans’ (García y García, 1997, p. 32). Subjective rights, declaring man as being entitled to subjective rights, were the basis of ‘declarations’ developed throughout the eighteenth century. Nevertheless, while defining the law of nations as a human and positive law, Suárez was able to disconnect the Thomist understanding of subjective rights from the natural law, from the law of nations. Hence, the human rights system was, from the very beginning, a constitutive part of international law.

The law of nations, developed from the work of Vitoria, was modern in the sense that he positioned *ius gentium* not as part of human law, but also not entirely as natural law. Albeit that Vitoria and the Salamanca school tried to deny the medieval right and the papal theory of domination, they did it by establishing new rights and titles, later justifying the Spanish *dominium* over the territories conquered in the Americas. The issue of ownership of the Americas, therefore, depended on whether infidels, and subsequently the Amerindians, were protected by the same laws. If it was true that infidels and their rulers were not willing to yield their lands, in *De Iustitia*, Vitoria argued that no one could take them from their hands (Tierney, 2001, pp. 265 – 266). Consequently, the Spanish justification for conquering the Americas was not based on the theory of *dominium*, but on Vitoria's understanding of the law of nations. Since the law of nations is (or is derived from) natural law, there were some rights given to every man including: ‘the right to travel freely, the right to trade, the right to equal treatment with other strangers, the right to acquire citizenship’ (*Ibid.*, p. 271). Only if the Amerindians had failed to meet one of three conditions, could the Spaniards wage a just war against them. Besides, the law of nations would prescribe the protection of innocents and the possibility of intervention in the instance of their rights being disrespected. Consequently, the Spanish king could intervene in ensuring their protection even if not requested.

Vitoria argued that the first entitlement which Spaniards would have when sailing to

the Americas, would be to possess lands by right of discovery (*in iure inentionis*). According to this right, all things without a proper owner could be claimed by the first to discover them (Vitoria, 1991, p. 264). He also disregarded the idea that because they did not share the same level of civility as the Spaniards, indigenous people could be considered irrational, which meant that they could not have their rights over their lands protected. In sum, there was no real argument to undermine the rights of indigenous people over the lands they had dominion of before the conquest. Spaniards would also have ‘the right to travel to the Indies, the right to engage in commerce and trade and the obligation, imposed on the Indians, to permit peaceful preaching of the Christian faith’ (Boast, 2010, pp. 253 – 254; Cf. Vitoria, 1991, pp. 278 – 280; 284).

While indigenous people would thus maintain their rights in relations to their lands, the main consideration was their inferiority in relation to the European. Because they did not share the same level of development as the Spaniards, they could be subjected to consent tutoring. Derived from the rights of conquest, the Spaniards could be considered the lawful tutor in a civil servitude between conquered and conqueror. However, Vitoria allowed a ‘*de facto*’ *dominium* over the land and established that the Spanish tutoring would be of utmost interest and benefit to the Indians (Pich, 2012; Vitoria, 1991, p. 291). From Vitoria’s point of view, it was impossible to forbid the conquest entirely. Ceasing to trade with the Americas would be a great loss to the Spanish exchequer, a situation considered intolerable. In a different lecture, Vitoria admitted that the conquest would be better justified by the *laws of war* (Vitoria, 1991, p. 295). In this writing, the definition of a just war was narrow, but once the war was considered just, the actions that could be taken in the Americas were plenty. These definitions were useful, allowing the enslavement of non-Christian combatants and the plundering of the place, as long as it was sufficient to repair the damage caused by the other side.

The language of natural rights survived this division and remained a part of the debate on sovereignty, thus as a complicator. In the line of thought derived from the early debate on the Americas, there has been the attempt to combine a theory of State based on the pillar of sovereignty and individual natural rights. In this sense, the political literature of the seventeenth and eighteenth centuries used individual rights/necessities as the basis for societal development and sovereignty. Vitoria struggled to reconcile the rights of Indians and the sovereignty interest toward colonialism. Hence, it was because practical absolutism could

not be easily reconciled with a theory of natural rights, and also because theorists did not want to abandon this language, that modern constitutional thought evolved in the way it did (Tierney, 2001, pp. 288 – 289). The European society of the seventeenth century depended economically on the conquest of the Americas, and academically on the School of Salamanca (Anghie, 1996; Dussel, 1993, 1994; Mignolo, 2000). Consequently, the rationalisation of law and its process of ‘disenchantment’ was permeated by this contradiction.

Vitoria was not the only one to struggle with the necessity to conciliate repression and emancipation. Suárez, for instance, provided a well-developed theory of political power and the State based on natural rights, liberties and the origin of society. Despite his interest – as Vitoria before him – in harmonising the juridical tradition of thinkers, such as Ockham and Gerson, with the Thomist tradition of natural law, when it was related to politics and society, he based himself on a secular, rather than a divine, justification of power, moving away and in opposition to divine theories (Tierney, 2001, p. 302). Moreover, even though the Salamanca School can be portrayed as ‘primitive’ (Kennedy, 1986; Koskenniemi, 2006), its significance for the period and the construction of human rights is certainly important. Several authors understand that international law was hugely influenced by Spanish scholars<sup>19</sup>. Some of them have represented Vitoria as ‘a theorist of human rights and even a “democrat”, a Thomas Jefferson or a Thomas Paine before his time’ (Boast, 2010, p. 236). However, Vitoria provided the ideological basis on which the Spaniard acted (Cavallar, 2008).

In the context of the ‘Indian doubt’, Vitoria was able to disqualify the role of the Pope, while creating new rights that constituted ‘just titles’ for the Spanish conquest, and justified the actions of the Spaniards. These ideas kept the Christian tradition in mind and accepted the colonies as part of the system (Grewe, 2000, pp. 146 – 147; 149). The law of nations was created because of the contact with non-Europeans by people related to the colonial enterprise, believing that its theory was universal. Any action on the part of the Amerindians justified intervention (Anghie, 1996), and was morally justified by Vitoria, as protection of innocent people against the barbaric way of life of the Amerindians (Jahn, 2012).

In the next section, I will examine the contradictions in the legitimisation of colonialism as explained by this version of natural law and discuss the debate in Valladolid, especially

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19 Cf. Anghie (1996), Boast (2010), Grewe (2000), de Torre (2004) and Williams (1992).

because it represented both sides of the foundation of the law of nations and the rights of Indians. S  pulveda and Las Casas based their theory on that of Vitoria, but they represented different aspects of it. Thus, the objective of the following assessment of this historical debate is to determine the positions of the dialectic.

### **Salamanca and its Dissents: The Leyenda Negra and the Situation of the Amerindians**

Even before being legitimised, the colonial enterprise had created a situation that was prejudicial to the lives of the natives. Despite numerous debates concerned with the situation of the Amerindians, they ‘did little to ameliorate their plight’ (Tierney, 2001, p. 256). Most debates lost their meaning with the accounts given of the several massacres against indigenous people that occurred in several places in the Americas. If these debates were not enough, as they were not, to bring justice and equality of rights for the newly conquered population, they were, nevertheless, of major importance for the debate on natural rights in Europe, and greatly affected the development of Western political theory concerning the theme of natural rights. My argument is that Las Casas represented the possibility of an emancipatory interpretation of the thoughts of Vitoria, while Sep  lveda represented a repressive interpretation.

Bartolom   de Las Casas is considered to be one of the first defenders of the Amerindians, beginning with his speeches a few years after the conquest and producing a more critical cosmopolitan thinking (Mignolo, 2000). With his deep theological thinking, Las Casas had, as a starting point, the philosophy that all men, including the new unknown people were creatures of God and as such, they were all entitled to human rights (Miller, 1972, p. 1). The *Law of Indies* – the legislation produced by Spain in the context of Latin American colonisation – was a product of its culture, the first modernity. As such, the implications of the *Law of Indies* cannot be separated from the Eurocentric perspective from which it was developed and from violence, since ‘colonial legislation is an incomplete practice without violence – it relies upon the social practice of human dominance for its efficacy’ (Marrero-Fente, 2009, p. 248). Protecting the Amerindians, Las Casas outlined most of the human rights violations that were practised in the relationship between the colonisers and the colonised, and its intellectual agenda was the protection of indigenous people (Guti  rrez, 1995).

Part of the arguments presented at that time circumscribed the idea of the division of the world. In this sense, Las Casas had a particular reading of the *Inter Caetera* bulls of 1493, presented in Valladolid in 1550. When reading Pope Alexander VI's bulls, Las Casas had in mind a later bull named *Sublimis Deus* of 1537, issued by Pope Paul III. In *Sublimis Deus*, the Church textually forbade wars of conquests. However, instead of understanding it as a correction of *Inter Caetera* bulls, Las Casas reinterpreted the wording to accommodate both the forbidding of wars of conquests and donations made to Spain.

Las Casas' reading of the bulls is part of a larger debate against Juan Ginés de Sepúlveda, likely to be his most theoretical adversary on this issue. Their disagreements were laid out in the format of a debate known as the Debate of Valladolid, in which each side presented their arguments to a panel of their peers. Although using the same normative sources, Las Casas and Sepúlveda focused their arguments in different areas (Carman, 1998, p. 194; Miller, 1972, pp. 49 – 50). While Las Casas continued to rely on canon law, Sepúlveda – one of the earliest translators of Aristotle – focused on political philosophy. Nevertheless, both agreed with the infallibility of the papal bulls: the contrary would delegitimise the Spanish conquest and be considered disloyal (Miller, 1972, p. 48). The bulls had given King Ferdinand and Queen Isabella the right to conquer any newly discovered land that was not part of a Christian sovereignty, a decision not questioned by Francisco de Vitoria (Carman, 1998, p. 194).

Las Casas and Sepúlveda, as Vitoria before them, were inclined to debate the condition of the Amerindians and whether or not they could be considered 'natural slaves', the Aristotelian argument already debated by Vitoria and then repeated by Sepúlveda. Las Casas based his argument on a more inclusive and inalienable notion of the natural rights of man and declared in the debate that 'all people are men'. Only peacefully should Spaniards and missionaries convert the Amerindians to the Christian faith. As recognised by the papal bulls, the Spanish Crown had the right to teach the Christian faith and Las Casas focused on the act of teaching stated in the bulls and so moved the bulls away from permission for waging a war of conquest. Spain, on the other hand, had the right to protect those Amerindians who peacefully and voluntarily decided to accept the Christian faith, including them within its sovereignty. Las Casas' reading of the papal bulls condones violence, showing that the *Summo Pontifice*, in his spiritual power, stated that 'it pleases God "that barbarous

nations be overthrown and brought to faith”<sup>20</sup>.

Although both Las Casas and Sepúlveda were interested in the conversion of the Amerindians, Las Casas advocated peaceful methods, believing not only that they would freely accept the religion, but also that they leaned on it. Sepúlveda, on the other hand, advocated that the use of violence was the most efficient method to liberate these indigenous people from their barbarian condition. For Sepúlveda, interpreting from Aristotle, the people discovered in the Americas could be considered barbarian because they behaved like savages. They had not produced a written language, presented an evil or wicked character, practiced a false religion, and lacked laws to regulate and also reasoning abilities. When the first report came from the Americas, the Spaniards categorised the Amerindians as beasts, especially because of their human sacrifices. Amerindians were also accused of sodomy and idolatry. Since the debate occurred in an extremely religious society, the arguments regarding natural law were largely based on the Christian tradition and in accordance with Sepúlveda's arguments, the entire lifestyle of the indigenous people was criticised. The spread of Christianity in America could only be achieved by waging war against its infidel people as a preparation for them to be Christianised. (de las Casas, 1992, pp. 11 – 16; Marrero-Fente, 2009, pp. 250 – 251).

In his response, Las Casas argued that there was no race other than the human race, forcing the non-differentiation between Spaniards and Amerindians. As a creature of God, reason was given to all people, meaning that even the Amerindians could resort to their intelligence in word to achieve the true knowledge of God. Also, they were given free will, allowing them to accept freely, or not, the reality of God and His purposes. Therefore, Las Casas believed that the Amerindians should first be subject to their choice, only after their acceptance of Christ could they really be converted. Las Casas argued that true conversion would be impossible after suffering the effects of war and since Christianity was a work of the Divine Providence, it certainly would not be difficult to persuade them. His arguments against Sepúlveda attested his capacity to think of natural law based on multicultural arguments. The inclusion of ‘the other’ in his case was quite impressive and even radical.

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20 Carman made a peculiar and detailed reading of the debate over the use of force in the papal bulls. According to the author, not only the quotation above, but also in another sentence in which Pope Alexander VI stated that: ‘the Catholic monarchs “have sought with the favour of divine clemency to subject and bring to the Catholic faith the said countries and islands with their residents and inhabitants”, there was the use of the verb *reducere* in Latin that can be misleading, potentially connoting forceful transformation. This would be against Las Casas arguments (Carman, 1998, pp. 195 – 196)



Against the main argument, according to which indigenous people were committing crimes against natural law, Las Casas preferred to highlight that there could be a different meaning to their actions, advocating freedom of religion, and, thus refuting another of Sepúlveda's arguments. Quoting Saint Thomas Aquinas, he demonstrated that:

To avoid some evil, namely, scandal or discord (which could result from interference by Church) or an obstacle to the salvation of those who, by being tolerated in this way, would be gradually converted to the faith, for this reason, whenever there has been a great number of unbelievers, the Church has even tolerated the rites of heretics and pagans (de las Casas, 1992, p. 69)

In sum, the defence of Las Casas was an attempt to protect indigenous people from the violence of the colonisers. The rule of Spain in the Americas was such that it became associated with cruelty and religious insensitivity in the European consciousness. Since the main argument toward colonisation was the conversion of the indigenous people, Las Casas sought to prove that the Church did not have the locus to judge or to decide the fate of the Amerindians while they were not baptised. As a result, any possible crime committed against natural law could not be judged by them. It meant that Spaniards could not enforce any decision upon them. Although Las Casas also wanted the conversion of the Amerindians, his defence was the closest to protect fundamental human rights, such as their right to self-determination and protection against the unjust system of *encomienda*, which was the formal permission for turning them into slaves. However, the first modernity at the end of the fifteenth century based on Spain, included the Amerindians and defined them as the first barbarian, a category modernity intrinsically needs to be fully defined (Dussel, 1994, p. 67).

Colonisation was legitimised and understood as a better way to organise the world. With the debate of Valladolid, I was able to show how the constitution of international law in the sixteenth century not only took into consideration the normative development of that time, but also the political interest of the monarchies. The law of nations was universal, and Vitoria provided several arguments that could include the Amerindians. As a formulation, international law of this period was a step further towards formalisation and rationalisation, as described by the Frankfurt School. However, the political interest eclipsed the right of the Amerindians, and international law legitimised the exclusion of several political communities for whom rights were refused. However, with the development of the Enlightenment and the interpretation of rights as freedom and liberties, the colonised sought protection against the arbitrary power and related the right to govern themselves as part of natural law. Their posture was, at this time, to erect protections in terms of the same rights that were denied to

them.

In this sense, natural rights would legitimise the independence of the American colonies, especially based on the Enlightenment, at the same time as they would provide the means to differentiate civilised European nations from the barbarian world, and thus allow the second colonialism. In the next section, we will witness the contradiction with the established Spanish order and how the independence of the region tried to solve this dialect by including the colonial political communities among those entitled to rights.

### **The Colonial Fight for Recognition**

The empires of the sixteenth and eighteenth centuries were hierarchies – considered to be a system of asymmetrical distribution of power. In this system, not only was the distribution of power unequal, but these empires also institutionalised unequal entitlements that, as a consequence, distributed power unevenly, according to social status. Different international constellations formed global designs based on a system of rights that ultimately legitimised the existence of these same empires, along with their relationships with their colonial subjects (Reus-Smit, 2011, p. 209). Revolutions, in the colonial context, took root in what were considered to be modern ideas about individual rights. These rights conflicted with the rights derived from the social distribution of power created by the entitlements. Furthermore, individual rights were represented as general rights, in the sense that they were not related to the position of the individual within society. Hence, they can be considered as one of the driving forces behind the struggle for political rights (Honneth, 1996).

As part of the contradictions presented in the previous section, I understand that the unevenness of the distribution of power between metropolis and colony created the conditions for different struggles for recognition (Hobson, 2003; Honneth, 1996) in the international arena, in which the colony sought not only to be freed from imperial authority, but also to be recognised as a State. In Latin America, for instance, the States were first freed from control, and granted international recognition after independence. Independence and subsequent recognition was also an issue following the two World Wars. These unequal entitlements legitimised the power and social structures of the empire, and they similarly sanctioned relations between the elite and the individual. They were ‘special’, meaning that

they expressed ‘special’ transactions between people and also ‘differential’ because individuals were allocated entitlements in terms of their social role or position. Because most entitlements were formed after historical bargains and represented a ‘legitimate’ social distribution of power, different struggles for rights represented something that had to be combated (Reus-Smit, 2011, p. 217). The next section will explain the connections between colonialism, independence and human rights in the United States.

### *The American Revolution*

The American Revolution was able to reinterpret human rights based on the work of Locke and, because of that, presented a different version of natural law that legitimised independence. It was due to this new interpretation, that the revolutionaries were able to provide the Revolution with the necessary legal and theoretical arguments against British dominion. The American Revolution happened in the aftermath of the Seven Years’ War that ended with a British victory. In 1763, England had expanded its empire throughout most of the globe from North America to India. However, it was the same British supremacy that brought about the American Revolution. British officials were interested in reforming the structures of the British Empire in order to expand royal authority over the American colonists. Those reforms, however, were blocked by domestic concerns that gave primacy to English politics over the colonial enterprise. As a result, the Empire grew with relative freedom from the interference of London (Wood, 2003). Despite general acknowledgement that the relationship between the metropolis and the colony ought to be unequal, the inefficiency of the bureaucracy, loopholes in the legal norms and corruption prevented imperial officers from controlling the colony, and allowed them to pursue their own economic and social interests.

This situation changed after the conclusion of the Seven Year’s War due to war debt which forced an increase in the budget. The first attempt to solve the cash flow problem was to tax landowners in Britain. However, exorbitant taxes were already a source of complaint. For instance, the government implemented a new English cider tax in 1763 the enforcement

of which depended on troops in the producing counties. The solution was to overtax products in the colony. Three such taxes resulted in the worst outputs, and they have been highlighted as the trigger for the revolution: the Sugar and Currency Acts of 1764, the Stamp Act of 1765, and the Tea Act of 1773 (Alden, 1954, pp. 4–8; Allison, 2011, pp. 4–5; Wood, 2003).

The reasons behind the revolution, however, extended beyond economics. American politicians argued that the power to establish tax, signified the power to control the affairs of the colonies. Despite the fact that even Benjamin Franklin, at that point, would have anticipated that the colonies would remain part of the British Empire, there were concerns about independence or the risk of losing the independence they already had (Allison, 2011, p. 4). For instance, the lawyer James Otis from Boston argued, in 1764, that the absence of colonial consent over taxation turned them into slaves of the British Parliament. He stated that:

The colonists, being men, have a right to be considered as equally entitled to all the rights of nature with the Europeans, and they are not to be restrained in the exercise of any of these rights but for the evident good of the whole community. By being or becoming members of society they have not renounced their natural liberty in any greater degree than other good citizens, and if 'tis taken from them without their consent they are so far enslaved (*Ibid.*, p. 6).

It was an understanding present in Thomas Jefferson for whom independence would be derived from the power of making law that belonged to the people, and it was the people who could establish the form of the Commonwealth. From his understanding of Locke and his interpretation of the British government, Jefferson proposed that the King should be elected and approved by Parliament. It was an important conclusion just before independence, especially because the law passed by the British government was deemed oppressive by the colonists. If there were not an elected King, approved by the Parliament, it would mean that the laws were illegal until a legitimate King sanctioned them (Jayne, 1998, pp. 42–45).

The role the European Enlightenment played in the American Revolution, especially in the making of the Declaration of Independence of 1776, is somehow a matter of dispute<sup>21</sup>. Most authors, however, tended to highlight the influence of Locke in the work of Thomas

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<sup>21</sup> Some authors dismissed such influence arguing that there is no actual proof that Thomas Jefferson had Locke's *Second Treatise* among his books. In addition, his paraphrase of the book could be mistaken. However, further analyses of Jefferson's government commonplace book showed the correct use of Locke's works (Becker, 2009; Jayne, 1998, p. 41; White, 1978).

Jefferson, especially Locke's *Second Treatise of Government*<sup>22</sup>. As with some thinkers of the Enlightenment, the presence of inalienable rights in the Declaration and, consequently, in the thoughts of the American Revolutionaries, created a view of natural rights characterised as self-evident. There is a well-known passage from the document in which the Revolutionaries declared that:

We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness (Declaration of Independence, in: Jayne, 1998 annex).

Locke considered natural law to be a degree of superior will that commands what can and what cannot be done. It binds men, not like positive law, even though it would have all necessary requisites and it is sufficiently known by men that can perceive it naturally. He presented several arguments for the existence of natural law. First, based on Aristotle's principle that men exercise the mind's faculties in accordance with a rational principle, he drew the distinction between natural justice and legal justice, by which natural justice would be the one that can be found everywhere and, thus, natural law would be the law that could also be found everywhere (Locke, 1997, p. 83). Second, natural law's existence could be proved based on one's conscience. Locke could not see past social construction and universalised European values. Rather, because after a 'wicked' action, men would pass judgement upon themselves, the only consequence one could have, would be that this happens because of an innate natural law. The third argument was derived from the observation of the fixed laws of nature. He complemented this idea based on the Thomist understanding of eternal law. If everything else seems to be subjected to fixed law, Locke could not understand why men would not be bound to some law as well. His fourth argument was based on his observation of human society. He argued that without natural law, society would be impossible because the cornerstone of society would be the *pacta sunt servanda* and a definite constitution of a State (*Ibid.*, pp. 86–87). For his fifth argument in favour of natural law, Locke expanded his second argument, by maintaining that the definition of good and evil would only exist within the system of natural law (*Ibid.*, p. 88), but in the end, 'the binding force of the law of nature is perpetual and universal' (*Ibid.*, p. 121).

The theory of rights followed by the Americans in their Revolution, must therefore be

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<sup>22</sup> There are those who seek to mitigate Locke's influence by expanding the role of thinkers from the Scottish Enlightenment. For a debate on this issue, Cf. Wills (2002) and Hamowy (1979).

understood within the idea of natural law as developed by Locke. As a result, this presentation of Locke's work has an important function as it presents a second role of the Enlightenment in the Revolution. Nevertheless, the Federalists claimed that a separated Bill of Rights was not important. In this regard, Hamilton wrote:

I go further, and affirm that bills of rights, in the sense and to the extent in which they are contended for, are not only unnecessary in the proposed Constitution, but would even be dangerous. They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted (Hamilton et al., 2010, p. 267).

It was the fear of Anti-federalists that the Union could subvert individual freedom that the Bill of Rights included in the form of Amendments, integrated separately into the Constitution. In short, it passed amendments that dealt with individual rights (substantive rights) and the *due process* (procedural rights). These rights were based on the tradition of English common law, on the theory according to which national and state spheres share sovereignty and on the theories of the natural law of the Enlightenment (Reck, 1991, p. 74)

Thus, the Constitution shared its view on human rights with the Declaration, both declaring several natural rights. Among them, equality was promoted by the Declaration as inalienable for human beings. Despite their arguments against a Bill of Rights, the Federalists showed that government was formed in order to secure those rights, by consent of its people. Therefore, in this system, if the government went astray, there would be the right to alter or abolish the government and to re-form it. Those rights were understood as connected, as one narrative (Zuckert, 1998, pp. 8–9). If equality was the norm to be followed, there were people among the revolutionaries who defended unrestricted equality of both gender and race. Nevertheless, equality was not as broad as it was supposed to be. When the revolution started, there were those who presented a more radical option. One such individual was James Otis who exalted the liberation of slaves and woman for the fruits of their labour:

The colonists are by the law of nature freeborn, as indeed all men are, white or black. [...] Does it follow that 'tis right to enslave a man because he is black? Will short curled hair like wool instead of Christian hair, as 'tis called by those whose hearts are as hard as the nether millstone, help the argument? Can any logical inference in favor of slavery be drawn from a flat nose, a long or a short face? [...] It is a clear truth that those who every day barter away other men's liberty will soon care little for their own. [...] Are not women born as free as men? Would it not be infamous to assert that the ladies are all slaves by nature? (Allison, 2011, p. 6)

The reality, however, presented a situation according to which only a small group of white European descendants, related to the new bourgeoisie class, were entitled to the rights

declared by the Constitution. The situation was ambivalent, but it did not mean that the revolutionaries were unaware of it. In reality, there were tensions between both groups about the rights being protected and slavery. The Constitution was silent about the term. The Congress passed the Northwest Ordinance, in 1787, prohibiting slavery in the new territories, but the situation remained. The solution found by slave owners was to differentiate between slavery and the slave trade in both legal and moral terms. Thus, while slavery was legal and moral, the slave trade was banned by the Confederate States of America (Martinez, 2012, pp. 38–39). The non-inclusion of a massive portion of society would not be solved quickly or easily.

## Conclusion

After the Conquest of the Americas, the idea of inalienable natural rights was universalised to the new territories. At that time, human rights were related to belonging to Christendom as a condition for this entitlement. However, Vitoria was the first to apply the Thomist theology to expand natural rights to the people who had never had contact with the Christian faith. Despite the fact that Europe had had contact with a non-Christian population, there is a novelty to this situation in the fact that for the first time in history, European states were hegemonic across the globe.

It has been argued that, in this context, Vitoria was able to expand the rights of Amerindians and legitimise the Spanish Conquest. According to him, there were inalienable rights, including property that did not depend on religious condition. He also enumerated several rights that were considered to be natural by the Europeans – such as freedom of navigation and commerce – that, once respected, would not allow Europeans to wage war. Nevertheless, he also allowed the conquest. Among the several rights, there was the right to preach and convert the infidels. In case of rejection, the Spanish could control the territories and, in the event of conversion, Spain would also dominate the colonies by the use of papal bulls. Despite disagreements about the situation of the Conquest, especially with Las Casas, Vitoria developed a system of natural law that removed the Pope from his position as source of legitimacy in respect of the Conquest, but included natural law at the core of the debate. He even rejected the theory of *dominium* as the source of Spanish rights. At this point, it was a set of rights enumerated by both sides that acted in the legitimization of the colonial

conquest, in contradiction with the general purpose of his theory, but still, with a dialectical connection between them.

Those natural rights, however, would not remain under the same interpretation. The political and economic limitations in the Thirteen Colonies after the Seven Years' War motivated the elite to break away from the British Empire. The Declaration of Independence was the legal document that sought to explain and legitimise this separation. In the analysis of the theoretical influence on the making of this declaration, it can be observed that there was a reinterpretation of natural law that provided the core argument in favour of it. While the more revolutionary political party in England based itself on the natural law developed by Vitoria, the American revolutionaries appropriated Locke's version and defied the British authority. According to them, self-government should be considered natural law, but they were unable to pass laws and taxes by themselves. The solution was to protect themselves from State power by passing a Bill of Rights and creating the Union to protect both them and their rights.

At the moment of these ruptures, individual rights helped people 're-imagine themselves as moral and political subjects, [...] provided justificatory resources in struggles over legitimate authority, [...] (and) constituted "deal-breakers", principles that had to be recognised if attempts to resolve the imperial crises of legitimacy were to succeed, and subject peoples discouraged from existing' (Reus-Smit, 2011, pp. 221 – 222).

Following the dialectic presented in the previous chapter, I have argued that the doctrine of natural law provided international law with at least two different interpretations. While the first interpretation legitimised the conquest and colonialism, the second interpretation was behind the entitlement to new rights and the independence of most States in America. The system resulting from these contradictions could not legitimise colonialism based on religious rights to convert the natives, nor could it legitimise the *orbis christianus*. As discussed, the American Revolution prompted concerns over the situation of the citizens in the interior of the State and the colonies, besides the protection of their rights. It was a new political constellation; one that would highlight the development of an extensive list of individual rights focused on the role of the citizen, not of the servant. This new situation of human rights would trigger several debates about colonialism and slavery.

The next chapter will examine the domestic political transformations that led to the



development of an international system based on the rights of Man and Citizens and explore the Glorious and the French revolutions, comparing the type of rights and the ideology of both movements. It will be suggested that the Haitian Revolution was an attempt to radically reinterpret the rights of the French Revolution and to apply it in the colonies. Finally, the consequences of these transformations will be considered.

## CHAPTER 4 - REVOLUTIONS, HUMAN RIGHTS AND THE DIALECTIC OF EMANCIPATION AND REPRESSION

The previous chapter considered how the global design was led by the absolutist conquest of the New World and a system of International Law was developed based on the universalism of rights (*ius gentium*) that ultimately instrumentalised the law in order to legitimise colonial practices. This chapter, however, will show that, in the domestic realm, transformations in the law and rights were to be a step further in respect of legal emancipation. The Glorious Revolution of 1688 and the French Revolution a century later, would produce different declarations of rights, the consequences of which would be a step further in the process of disenchantment with the law, especially due to the rationalisation of the law. Despite the formalisation of general and universal norms during the nineteenth century – proclaiming the beginning of a liberal society– the rights of man were, in the international context, constrained by the colonial system. Understanding the political constitution of human rights during the French Revolution and its relationship with the struggles in Haiti, will allow us to understand why the whole emancipatory process within the European context was unable to spread internationally, demanding new forms of libertarian struggles and, consequently, new understandings of human rights.

At the end of the eighteenth century, there were several changes in the material realm, especially with the decadence of the Spanish and Portuguese colonial empires, provoking a shift in European power relations. These changes were a result not only of the impossibility of maintaining the colonial pact, but also changes in the mode of production and in the ruling class. The old system of rights, in which the old colonial world was based, was considered prejudicial to the new ruling class, producing more oppression than liberties. In this context, the French Revolution produced a new set of rights, which were supposedly universal. The struggles between the Girondists and the Mountain – represented by Robespierre – can be expressed by this difference of interpretation, winning the formal concept of equality established in the French Constitution of 1793 (Neumann, 1981, p. 337). The impact of the French Revolution, however, did not spread rapidly, even across Europe. In Germany, for instance, it was only with the ‘victory’ of the working class, and its preponderance in the creation of the most significant parts of the Constitution (*Ibid.*, p. 338) that the decree on equality could propose a positive social and economic equality, according to which people not only had the ideational right to share the goods of society, but also had the potential to enforce it. Because Weimar was developed in the spirit of the working class, the analysis developed

by the legal theorists of the Frankfurt School on the decree of equality before the law, was that the democracy established at that particular moment was a social, rather than a liberal, democracy. It showed us that even without changing its wording, equality before the law was transformed from the pure bourgeois concept, to a positive equality embodied in the project of a social democracy. Hence, equality before the law in Weimar was concerned with ‘the promotion of the rise of the working class, securing liberty and property only in so far as they do not hinder the advancement of this class’ (Neumann, 1981, p. 334).

Changes in the legal system, therefore, can occur not only with the total transformation of its material base, but also without it. According to Neumann and Kirchheimer, the system of law can be the place for social and political disputes and even for legal emancipation (not necessarily social emancipation, but connected with it). To explain, it is necessary to focus on two main issues: the promulgation of the Declarations of Rights as the result of social transformations, and the process of emancipation described as the formalisation of the law, and its detachment from morality. The first section will relate the historical revolutionary processes in England and in France, with these two main issues and show the changes in the domestic plan.

Neumann, however, was not thinking about the construction of this universalism in the international arena, which finds its most important contribution in the idea of cosmopolitanism. Of course, there were obstacles to the legal emancipation he glimpsed. As in the previous chapters, the cosmopolitan global design was based on the colonial system and legitimised it using the system of rights. At the end of the eighteenth century, however, the system of rights was unable to give universal enjoyment to the Rights of Man. It could be argued that despite advances in domestic legal emancipation, international politics represented the instrumentalisation of these rights and, in the case of the Haitian Revolution, the realm of conservative forces. I will explore the critiques of universalism proposed by the French Revolution in the final section, especially in Kantian theory, but also the concept of citizenship. Both will be considered in relation to the struggles of the slaves and free coloured men<sup>23</sup> of the then French colony of San Domingo.

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<sup>23</sup> I opted to characterise the free man with African descendent or those who were freed as free coloured men, as used by the literature about the Haitian Revolution in the bibliography of this thesis.

## **The Glorious Revolution and French Revolution: Institutional Transformations and the Legal Emancipation.**

This section aims to explain how the Glorious Revolution and the French Revolution were able to produce unprecedented changes in the structure of human rights in relation to the ancient regime. My argument will follow two possibilities of social transformations and the legal system, described by Neumann. I will show that the English Bill of Rights was more the product of immanent changes with few social material transformations – albeit the violence in the revolution is debatable – while the French Declaration of the Rights of Man was created from the struggles between the noblesse, full of rights, and other classes, including the bourgeoisie. The political processes resulting from these two documents, nevertheless, resulted in profound institutional changes, and allowed a complete detachment between morality and positive law. While the Glorious Revolution was more localised, the French Declaration of the Rights of Man proposed a universal application, not confined to its national borders. It empowered a different class that, before, had been subject to the oppression of the noblesse. In doing so, the Rights of Man became one of the strongest paradigms of positive human rights, responsible for concealing the political struggles before the French Revolution.

The Glorious Revolution overthrew King James II by a union of Parliamentarians with the Dutch ruler William of Orange between 1667 and 1668. There were really several acts that caused discontentment among the British nobility. The King used his power to approve several unpopular policies, including the re-approximation with catholic subjects in order to gain more power. As a result, the revolutionaries demanded that he be deposed and that the legislative power be in their hands, instead of in the hands of an absolutist. Therefore, with their victory, the Bill of Rights established inalienable rights, and the creation and supremacy of the Parliament.

The French Revolution, on the other hand, at first opted for a more radical solution, overthrowing the monarchy and declaring a republic. There are several causes for the French Revolution and there is no consensus between historians regarding this topic. However, it is understood that the financial crisis that resulted from previous costly wars contributed to the dissatisfaction. From 1789 to 1799, the French Revolution went through three phases. The first, in which the National Assembly (1789-1792) was established, saw the rise of the Third State and the institution of several liberal and enlightened principles. During the second phase, the population was united in the National Convention (1792-1795). This was the most dreadful period in which the

guillotine was used for mass executions. It was also the most radical period with the Jacobin in power after a *coup* due to the radicalisation of the *sans-cullotes* because of the economic situation. The Terror, as the period of Jacobin government was called, generated a new constitution that established the Directory as a bicameral legislature. Because of several conflicts, both inside and outside France, Napoleon became popular for his victories and, in 1799, seized power, so ending the Revolution.

*The Language of Rights and the Glorious Revolution.*

The direct relationship between the Glorious Revolution and the establishment of rights in England was the work of the Whigs who interpreted the event as the crucial moment for the development of the unwritten constitution. Following this interpretation, some scholars argued against the government of James II, while praising the Glorious Revolution for its modernising role<sup>24</sup>, being responsible for several benefits such as political liberty, constitutional stability, economic progress and religious freedom. The Revolution of 1688 had such a potentially emancipatory role in British society that it was not without support. The Whig ideology allowed itself to see the French Revolution as a re-enactment of its own revolution. However, there is another side to the events that defied this ideology. Historians, including those on the Marxists side, understood the Glorious Revolution as a mere ‘palace revolution’ or even a *coup d’état*, while others attempted to set this revolution within the context of European affairs, connecting the acts of William III in relation to the Dutch need to guarantee the support of the British army and navy against the French. Against the traditional argument of freedom and liberty, others preferred to stress the violent acts of William III (Cruickshanks, 2000, pp. 1 – 2).

The English Bill of Rights could have influenced other declarations of rights, especially in the American Declaration of Independence and Bill of Rights. However, the English Bill of Rights was centred on the rights of Parliament (Lovejoy, 1972; Hall, 1964). Unlike the French Declaration of the Rights of Man, it was less concerned with individual rights. There were few, if any, specific rights for the English subject, and for any constitutional defence against the power of the King. At that moment, Tories and Whigs worked together to obtain as many concessions for the Parliament as it could in order to preserve the existence of the legislative branch (Cruickshanks, 2000, pp. 41 –

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<sup>24</sup> Cf. The debate on different understandings of the role of the Glorious Revolution for the English Constitution in Gar W. Cox (2012).

42). Given its right proportions, the Bill of Rights was the revolutionary outcome of the British noblesse against the abuses of power perpetuated by the monarchy, including James II. With the Bill of Rights, the British political class was able to control the power of the monarch and so guarantee a more 'popular' legitimization of power.

Traditional understandings of the Bill of Rights stressed its merits in shaping the future political system after the Revolution. The Bill would not only replace the King, but it would also change the relationship between the monarchy and its subjects. In this way, the Crown, accepted by William of Orange, would be significantly different from that of his predecessors. As a reflection of the political reality of the period, and the desires of some, the result of the Revolution cannot be said to have been without problems. Despite the fact that for those who were determined to limit the power of the King, the results were only partial, the importance of the changes in the monarchical system cannot be undervalued. Those involved in the debates wanted more than they achieved. Nevertheless, it was considered to be better than expected and the Convention, responsible for the Bill of Rights, became a regular Parliament (Schwoerer, 1981, p. 3).

In the process of creating political-constitutional history, it is argued that the Bill of Rights was not the result of a violent process; it was not the result of a bloody contest and that the whole process happened without significant violence. This argument is, however, out of perspective and Schwoerer (1981) was capable of giving us a direction on how to posit the Bill of Rights in British history. Traditional views on the subject tend to portray events as happening in a less violent manner. The author claims that the reasons for this were because of the 'memory of the earlier Civil War and the aversion of contemporaries to endangering their lives, property and social status, but also the sophistication of the major proponents in political manoeuvring, parliamentary tactics, and the use of novel forms of propaganda' (Schwoerer, 1981, p. 4). However, he also allowed us to understand that the revolutionary process started before the dispute between William of Orange and James II. Rather, the Bill of Rights was an attempt to resolve several constitutional struggles in the British political arena, dating from 1640 and including the English Civil War and the Restoration.

In its thirteen articles, the Bill of Rights established twelve interrelated rights dealing with the power and prerogative of the King. Throughout the Bill and Declaration of Rights, the main concern was to limit the power of the King in at least three areas: legislative power, power related to war and peace, and taxation power. The winning group in the political dispute decided that it was in their best interest to protect the ultimate power of the Parliament against the absolute power of the King in each of these areas. At the individual level, legal norm tried to establish a minimum

protection against excessive power. The subject, for instance, could start using the institution of petitioning the King without fear of reprisal. Moreover, there would be no excessive sanctions, (cruel and unusual) punishment or fines. Anticipating what later would be understood as guarantees of the penal system, the Bill of Rights allowed the individual 'to be protected against excessive bail, excessive fines, and cruel and unusual punishments; and to be spared the granting and promising of fines and forfeitures before conviction' (*Ibid.*, p. 58). In the case of taxation, the Bill of Rights protected the individual against unreasonable fines and bails. The 'excessive bail' refers to the imprisonment of five knights without proper cause because they did not subscribe to the King's Forced Loan (Schwoerer, 1981, p. 89). Moreover, excessive fines were a long part of the struggle between the King and his parliamentary critics. They were considered heavy and arbitrary, imposed by courts that were dominated by King Charles II and James II against those who disagreed with them. Article 10, despite its importance in expressing the supremacy of the Parliament over the right to impose fines, taxes and similar, opened the judicial system for the writ of *habeas corpus*, especially reinforcing the Habeas Corpus Act of 1679, the intention of which was to regulate and protect the individual liberty against unjustified detention.

Regarding the relationship between the King and the legislative power, Articles 1 and 2 declared that the power to suspend or dispense laws without the consent of the Parliament was illegal. Since the Civil War, the idea that the King had no such power became part of the parliamentary thought and later, a fundamental principle used by the Whigs in their opposition against the King. At the same time, the late Stuart kings, Charles II and James II abused these powers to threaten the Anglican church without direct authorisation, putting aside the King's position as head of the Anglican church – while appealing to catholic subjects – and changing the Anglican hierarchy and positions in the universities.

The literature does not consider the dispute about dispensing power as a major issue in the Civil War. But the emergent situation faced at the time of the Civil War in relation to the political thought of 1689 - according to which the kingdom was a mixed monarchy, coordinated by the King, lords and commons - stressed its importance. According to this view, the power of the King was community-based. Despite the fact that the power of the King was religiously justified, during the Glorious Revolution, it was the community that intermediated the relationship between God and the King: power would first emanate from God to the community, then from the community to the King. The same argument was expressed by Charles I's *Answer to the Nineteen Propositions* (1642). The political struggle regarding the prerogative to dispense law was a more pressing issue

after the Restoration. The Restoration Settlement, which was issued at that time, disallowed several royal prerogatives, but it was silent about this matter. In three different instances between 1662 and 1685, the King asserted his authority to reaffirm his prerogatives, while Parliament tried to deny them, taking this power to themselves (Schwoerer, 1981, pp. 60 – 61).

Contemporary to the Glorious Revolution, Article 5 of the Bill of Rights was a direct response to the episode of the prosecution of the Seven Bishops – and indirectly related to the issue of suspending and dispersing powers. The Article contemplated the right of the subjects to petition the King without fear of being prosecuted or committed. In this episode, James II issued the Second Declaration of Indulgence in 1688 and required it to be read in all churches. This document was a reissue of the First Declaration of Indulgence of 1687, and its content was an attempt to establish the freedom of religion in England – understood as one of his policies favouring catholic subjects. To achieve his objectives, the King had to dispense a series of religious penal laws. Because of the content of the law and worried about the consequences for the Church of England, the Archbishop of Canterbury, with six other bishops, presented a petition to the King asking him to withdraw the Declaration, based on the fact that the use of the power to dispense, in that case, was illegitimate. As a consequence, the King prosecuted the seven bishops charging them with seditious libel. This case strongly supports my reading of the Revolution, according to which, the Bill of Rights was a declaration of the supremacy of Parliament in relation to the King, rather than a list of individual rights – freedom of religion, in this case – showing that those declarations favoured institutional changes. On an individual level, the reaction of Parliament to this episode brought to an end the fear of subjects, and of Parliament, of being prosecuted by a tyrant king, due to the limitations imposed on the monarchy (Schwoerer, 1981, pp. 69 – 70).

The Parliament also reaffirmed its power by establishing free elections in Article 8. Despite the fact that this right was considered ancient, there were different attempts by different monarchs to influence the outcome of elections. However, it was Charles II who introduced the *quo warranto* proceedings. According to this, all charters should have a clause giving the King the right to nominate town officers. It was used to change borough charters, including the charter of the borough of London, in a way that the King could maintain his influence. James II went even further. He dissolved the Parliament in 1687 and remoulded corporations to gain influence in the elections. He purged the Justices of the Peace and deputies, reinstating only those favourable to him (Cox, 2012, pp. 570 – 571; Cruickshanks, 2000).

In relation to war and peace, the Bill and Declaration of Rights forbade the King from



raising or maintaining a standing army in times of peace. The idea of giving Parliament control over the legitimate authorisation of raising and maintaining an army grew with the Stuarts, at the same time that the idea of a professional body of soldiers answerable directly to the King, even in times of peace, gained more prominence. There were no royal standing armies until the seventeenth century. But the Stuarts, as feudal lords, possessed the right to maintain a personal army due to the feudal array. During the Restoration and the Revolution, the issue was still debated with most members of Parliament opposed to the idea. Cromwell, however, established his New Model Army during the Civil War and it was maintained for a decade. After that, Charles II disregarded the necessity to have Parliamentary approval and established a small number of permanent guards. The issue of a standing army grew in importance with James II, who increased the number of permanent guards and gave command to Catholic subjects – against the Test Act, an action whose legitimacy was obtained once more by dispensed power. Legally, the Militia Bill of 1642 allowed members of the Parliament to debate the transfer of authority over the army from the King to the Parliament. By the time of the Restoration, however, the King was given authority over the military by statute law. Other acts stressed the authority of the King and the right to maintain a standing army, as long as the King was meeting the costs. In 1666, the Parliament granted £30,000 for the payment of guards, so legitimating them. It was only in 1678, due to the increase in the number of Catholics appointed as commanders of the army, that Parliament declared as illegal the right to maintain a standing army. Parliament first considered the standing army as a grievance in 1674 and, in 1679, the term illegal was added to the previous declaration. With the Glorious Revolution, it was the work of the Whigs, critical of a standing army in times of peace without Parliamentary consent, which led to the inclusion of the article in the Bill of Rights and shifted power towards the legislative branch (Cox, 2012).

In sum, due to the different attempts to minimise the importance of the noblesse, while imposing an absolutist monarchy, the political environment, developed in England under the Stuarts, caused turmoil during at least three different periods: the Civil War (1642 – 1651), the Restoration (1660) and the Glorious Revolution (1688). During these periods, conservative and emancipatory forces tried to define the future of the country, with several implications for legal norm production.

In the end, transformations in the political social base were followed by legal transformations, represented by William III's acceptance of the Bill of Rights, according to which the nation would be governed by the Parliament, where the social forces – represented by the

junction between Lords and Commons – would have most of the authoritative power. The Bill of Rights was clearly about the supremacy of Parliament (Beckett, 2014). This institution, therefore, had to become permanent, preserving the laws of the kingdom (Article 13), and functioning without interference, especially in its election, and in the matter of free speech (Article 9).

*The Rights of Man and of the Citizen in the Foundation of French Constitutionalism*

The French Revolution, as with the Glorious Revolution before it, represented a liberal project, resulting from Enlightenment thought, that produced a Declaration of the Rights of Man not only to support its demands, but also as a new social contract. In other words, the Declaration of the Rights of Man represented a new social and political constellation. Much has been written about the French Revolution, with several perspectives and revisions about the subject. The second half of the twentieth century, however, observed an attempt at revision of this traditional historiography, focusing less on class struggles, and more on cultural and ideological formation. In the theory exposed and developed in this thesis, I have presented the dialectic between human rights norm formation and social changes, following the works of Neumann and Kirchheimer. I have suggested that their reading of the transformations in Weimar and the issue of rights made them realise that there was potential for human emancipation in the dialectic existent within the Law. It was noted by Neumann that the passage from an absolutist system to a rational system of law that occurred with these revolutions, was one important path towards emancipation, despite not being a fully socialist emancipation. As a result, this section will deal with the importance of the Declaration of the Rights of Man for institutionalisation in the ancient regime. The Declaration of the Rights of Man and of the Citizen were not developed without problems. The Marxist understanding on the relationship between these rights and the bourgeoisie, including its inherent contradictions, will be explored. However, this does not invalidate my argument regarding institutional changes in the system of law. Rather, it helps us to understand the problems these rights faced with the expansion of international law.

The French Revolution, and its Declaration of the Rights of Man, has been presented as an act on behalf of mankind and the prime source of human rights in the modern world. As asserted by H. Arendt:

The Declaration of the Rights of Man at the end of the eighteenth century was a turning point in history. It meant nothing more nor less than that from then on Man, and not God's

command or the customs of history, should be the source of Law. Independent of the privileges which history had bestowed upon certain strata of society or certain nations, the declaration indicated man's emancipation from all tutelage and announced that he had now come of age (Arendt, 1973, p. 290).

The inclusion of the Glorious Revolution in this chapter, however, has sought to demonstrate that, despite claims that the Declaration of the Rights of Man and of the Citizen has assumed the position of introducing universal rights to mankind, the essential core of civil and political rights provided by the Declaration of 1789 was not, in itself, original. Rather, most of them were already protected by the English and American declarations (Best, 1988, p. 101). The interpretation, according to which the Glorious Revolution and the American Revolution also presented important developments for liberal rights, is considered insufficient to explain the expansion of such rights in its universal form. Despite their importance 'as a dispenser to humankind at large, of some of the same liberal benefits that are claimed to stem from 1789', the British and American Bill of Rights 'rests on its pre-eminent regard for political and civil rights, which were only a small part of the content of the French Revolution' (*Ibid.*, p. 5). The Glorious Revolution was considered to be a conservative constitutional change that claimed the good from the past, instead of building new rights for a new future, and it was so localised that it did not invite other countries to share in its change. The French Revolution, on the other hand, had the appearance of a universal act (*Ibid.*, p. 102).

In the development of human rights in France, historiography has debated the importance of the Enlightenment in the making of the Revolution. In the case of human rights, in particular, there were two different perspectives: one derived from Rousseau (Robespierre, Saint-Just and Barère), and the other based on Montesquieu-Voltaire (Best, 1988, p. 103). This dispute, nevertheless, was under the influence of the same liberal ideas and turned the culture of the French enlightenment at the end of the *ancien régime* into an 'endless symbiosis of myth and self-mystifying disenchantment' (Comay, 2004, p. 378). In the process of disenchantment of the law, as proposed by Neumann, the 'Declarations of rights must be viewed as the place in which the passage from divinely authorised royal sovereignty to national sovereignty is accomplished' (Agamben, 1998, p. 128). As such, Agamben followed Arendt's analysis and stated that human rights are often formulated and mobilised within the nation-state as an instrument to reinforce sovereignty (Cadava and Balfour, 2004, p. 282; Rancière, 2004, pp. 299 – 300).

In an attempt to understand the institutional changes in France, it is necessary to broaden the idea of feudalism in order to include not only its economic, but also social, judicial and cultural

aspects. In a new Marxist interpretation, Comninel introduced the idea of 'State' as being central to an analysis of the French Revolution. According to him, 'the central struggle of the French Revolution was about the State, precisely because the State itself was so central to the interests of the antagonists [nobles and bourgeois]' (Cobban, 1999, p. xxvii; Comninel, 1987). The French State is also central for the analysis of David Parker for whom the State is an instrument of the ruling class, one that 'fulfilled its class function with devastating effect, draining the countryside of its not inconsiderable wealth to the benefit of a privileged minority who accumulated colossal fortunes' (Parker, 1996, p. 266).

Despite all attempts to emphasise the rupture between the *ancien regime* and the formation of the modern state, the social forces that comprised the revolutionary forces were rather conservative. Cobban, for instance, disagreed with general Marxist thought, according to which, the French Revolution represented 'the collapse of feudalism and the "triumph of the bourgeoisie"' (Cobban, 1999, p. xiii). The change in the understanding of the Revolution was such, that it created a vacuum in the explanation that could not accommodate the themes of bourgeoisie v nobility, or modern world v conservatives that were present in the traditional historiography (Reinhardt and Cawthon, 1992, p. 116). Cobban was considered one of the first revisionists of the traditional historiography who debated the importance of 1789. This revision understood the Revolution as a product of the liberal political ideas based on the Enlightenment (Cobban, 1999; Reinhardt and Cawthon, 1992, p. 117), while the Terror was considered an exception to the direction taken by the Revolution towards capitalist change. Lynn Hunt, for instance, used cultural explanations to argue that the Terror resulted from the 'revolutionaries' obsession with expunging the past and living in what she called the "mythic present"' (Reinhardt and Cawthon, 1992, p. 117).

At the time of the Revolution, the bourgeoisie belonged with the 'moderately prosperous noblesse, adding that whether they were rising or not, they were part of the conservative and not the revolutionary section of society'. (Cobban, 1999, p. xix). The whole idea of one bourgeois class should be put into perspective, and it is more accurate to visualise several bourgeois groups that did not agree with each other (Reinhardt and Cawthon, 1992, p. 116). Hence, Cobban identified at least two major groups: the commercial and the industrial capitalists. While industrial capitalists – described as the traditional Marxist concept of the bourgeois class, incorporating those with direct exploitation of workers – were few and uninfluential, wealthy merchants were resistant to 'liberal, free-trade and anti-corporatist policies that the Revolutionary Assemblies sought to promote' (idem). Moreover, despite its importance in understanding the Terror, there are difficulties in

presenting a rural bourgeoisie that could lead the attack against feudalism. The wealthier *fermier* – defined as tenant farmers, seigniorial agents and stewards – and *laboureur* – successful farmers that could hire labour – were conservative and their intent was to gain control over the countryside and the poorer peasantry. The rural bourgeoisie had much to gain from the Revolution, but they were not revolutionaries. While the peasantry wanted to divide common lands, increasing their small-holdings, the rural bourgeoisie wanted to keep it as their pasture. Revisionist arguments, therefore, sought to invert the logic of traditional historiography, in the direction of Colin Lucas' arguments, according to which 'the bourgeoisie, whether urban or rural, did not make the Revolution: they were made by it'. It is in this context that Cobban stressed the importance of the landowners, the social group that truly benefited from the Revolution of 1815 and ended up being more powerful than before 1789. According to him, if 'this class can be called bourgeoisie, then this was the revolutionary bourgeoisie' (Cobban, 1999, p. xxi).

There was a small but influential liberal, professional bourgeoisie who were the architects of the Revolution in towns. The key to understanding the Revolution is not so much the division of class, but the division within classes. The professional bourgeoisie saw its importance declining, with its offices - generally bought from the Crown - losing value over the century. It was its presence in the revolutionary assemblies that made the Revolution truly revolutionary and enabled change in France. In the countryside, however, seigniorial due was abolished due to the work of the peasantry. While the National Assembly consisted of this professional bourgeoisie, the rural bourgeoisie was rather conservative. Nevertheless, the fear of peasant revolts was always present. It was the *Grande Peur*, the fear of rebellion in the countryside, that led the National Assembly to abolish feudalism on the night of 4 August 1789. The continuing fight of the peasantry for its own interests against those of the bourgeoisie and aristocracy made it possible to dismantle the remains of the feudal system. The National Assembly knew that 'unless concessions were made to the peasantry, the whole of rural France would remain in the state of rebellion' (Cobban, 1999, pp. xxii – xxiii).

The Declaration of the Rights of Man and of the Citizen was a product of the Constitution Committee of the National Assembly that met a few days after the storming of the Bastille. It was the result of numerous debates in the National Assembly. The debates occurred between 11-26 August 1789, when Mirabeau was chosen to lead a group of five members to work with the projects presented in the Assembly. From twenty different propositions, Mirabeau and his group drew up a draft of declaration comprising nineteen articles. However, strong opposition to Mirabeau's draft

resulted in its rejection, in favour of an anonymous draft produced by the Sixth Group of the National Assembly. Between 20-26 August, this draft was debated and seventeen articles from the original twenty-four were chosen as part of the accepted Declaration (Comay, 2004; Pogrebinski, 2003, p. 135). In 1793, the Constitution of Year I presented an extended version of the Declaration of the Rights of Man and of the Citizen with thirty-five articles.

The idea of issuing a Declaration of Rights was prompted by the American Declaration of Independence. The French thought that, as with the revolution in America, its revolution would change the relationship between the various ranks in society and, thus, a declaration of rights that could express these changes had to be established before the Constitution could take its form. This declaration would also inform the masses of the principles according to which the revolutionaries were fighting and invite the people to engage in the revolution (Kropotkin, 1986). As described by one of the revolutionaries:

I do not quite understand the Declaration of the Rights of Man: it contains very good maxims, suitable for guiding your labours. But it contains some principles that require explanations, and are even liable to different interpretations, which cannot be fully appreciated until the time when their true meaning will be fixed by the laws to which the Declaration will serve as the basis. Signed: LOUIS (*Ibid.*).

There was not so much one Declaration of Rights, but several declarations during the process of revolution. At each attempt, changes were made, with the inclusion and exclusion of rights and changes to the writing and wording of sentences, giving different meanings to the rights of man. For instance, Siey  s, one of the main ideologists of the Revolution, proposed that ‘if men are not equal in means, that is in riches, intellect, and strength, it does not follow that they may not be equal in rights’ (Kropotkin, 1986). This proposition, however, never made the final draft. Besides the Declaration of 1789 and its proposal, there was also Robespierre’s proposed Declaration of Rights, the Declaration of the Constitution of the Year I (both from 1793) and the Declaration of Rights of the Constitution of Year III in 1795. The Declaration of 1789 set in motion the liberal programme of equality before the law, directed to the legal system, while creating a government controlled by national will without removing feudal rights of property (Kropotkin, 1986).

The modern state produced by the French Revolution took the form of a representative democratic state. It was representative in the sense that it separated society from the State and was democratic in the way in which its universal character reflected the abstraction of egalitarianism. This abstraction, however, could not be verified in reality. At the same time, economic inequality and the domination of the bourgeoisie was masked by the illusion of community created by the

representative democratic State (Furet, 1988, p. 14). The State, however, was not the problem. Despite his criticism, Marx was an admirer of the radicalism of the Jacobinism of 1793 that better understood the problems set in motion by the Revolution. In his *Critical notes on "The King of Prussia and Social Reform"*, Marx stated that the French Revolution represented the 'classical period of political understanding' (Marx, 1992, p. 413). According to him, the 'heroes of the French Revolution' – Robespierre and the Jacobins – identified social ills as the source of political problems, instead of blaming the State as being the source of social ills. Robespierre understood that the discrepant inequality between the wealthy and the poor prevented pure democracy. In other words, they 'represented the illusion of the priority of the political over the social in its most complete form (Furet, 1988, p. 15).

Hence, the process of political emancipation that occurred during the French Revolution saw the dissolution of an old society, the dissolution of feudalism and its transformation into something new, based on liberal rights and the centrality of the egoistic man (Marx, 1992, p. 233):

Political emancipation is at the same time the *dissolution* of the old society, on which there rested the power of the sovereign, the political system [*Staatwesen*] as estranged from the people. Political revolution is the revolution of civil society. What was the character of the old society? It can be characterised in one word: *feudalism*. The old civil society had a *directly political* character, i.e., the elements of civil life such as property, family, and the mode and manner of work were elevated in the form of seignior, estate and guild to the level of elements of political life (Marx, 1992, p. 232).

Despite being categorised as egoistic, in Marx's view, the French Revolution was able to destroy the foundations of feudalism and create a new society based on man. 'Feudal society was dissolved', wrote Marx, but it was dissolved 'into its foundation, into man [...]. This man, the member of civil society is now the foundation, the presupposition of the political state' (*Ibid.*, p. 233). When analysing the 4<sup>th</sup> article of the Declaration:

IV. Liberty consists of the power to do whatever is not injurious to others; thus, the enjoyment of the natural rights of every man has for its limits only those that assure other members of society the enjoyment of those same rights; such limits may be determined only by law (Stewart, 1951, p. 114).

The revolutionaries opted for the definition of liberty already expressed by Montesquieu, considered as a classical definition of liberty. This type of liberty, however, can be considered as a negative type of liberty, according to which there is a limitation, expressed by law. Men, therefore, ought to live in exclusion from one another, enjoying their rights where they cannot influence the rights of the other. Liberty was defined in relation to the State, whose sovereignty and power to establish new law was considered the measure of one's liberty. In the absence of the State, man was

free. The sphere of actions of the State was defined by the State. The legal limitation of liberty imposed by the State, however, created an immanent contradiction between the definition of liberty from Article 6 (or 4 in the Declaration) in relation to article 16 of the Declaration of Rights from the Constitution of 1793. While freedom in itself was limited by law, the Declaration of Rights in the Constitution of 1793 gave private property unlimited freedom. Article 16 declared that ‘The right of property is the right appertaining to every citizen to enjoy and dispose at will of his goods, income, and the product of his labor and his skill’ (Stewart, 1951, p. 457).

There was no limitation to the right to private property that could be enjoyed and disposed of as one willed. There was also no regard for others, giving the idea that this right could be enjoyed independently of society, as a right of self-interest. Because of that, man could not see its own realisation in the other, but rather its limitation. The realisation was given egoistically in the private property. Liberty and private property are represented as the genesis of the modern state (Furet, 1988, p. 23). In this genesis, there was also the appearance of the concept of citizenship. The history of the French Revolution, therefore, took place in the dialectic between State and civil society. It was in the exclusion from politics and its economic and social power that Marx placed the Revolution, within the development of society. Seigniorial rights are substituted by law that mediates the relationship among men, stressing its separation from the political sphere. In this context, it is the egoistic man who is glorified and celebrated by human rights. The revolutionaries transformed the means into an end and transformed the necessity to guarantee protection of human rights into something more important than the right in itself. This transformation would lead to limitations to human emancipation (Pogrebinschi, 2003, p. 131). It was not an emancipation from religion, but the crystallisation of the liberty of religion. Nor was it liberty from private property, but liberty of property.

There were, nevertheless, other forms of liberty that fought the battle to become central to the Revolution. It has been suggested that the Declaration of Rights presented by Robespierre in 1793 embodied an idea of freedom and liberation closely connected with the right to resist oppression. This idea of freedom would be closer to the Marxist anticipation of the concept of political emancipation (*Ibid.*, p. 132). In Robespierre, the concept of liberty is different from the principles of 1789. In Robespierre’s Proposed Declaration of Rights, from 24 April 1793, he inverts the limitations presented in the first declaration criticised by Marx. In Robespierre’s reading, ‘liberty is the power which appertains to man to exercise all his faculties at will; it has justice for rule, the rights of others for limits, nature for principle, and the law for a safeguard’. He did change



the logic of the bourgeoisie liberty and proposed a less narrow possibility to exercise one's liberty: according to article 7, for instance, law could only forbid whatever was injurious to society and in article 8, the law that tried to violate inalienable rights of man, would be considered unjust and tyrannical, and thus would not be law. Liberty was not considered to be a faculty defined by the State in Robespierre's conception. Moreover, private property, on the other hand, was more limited than in the original. In this case, it was the law that would have the right to limit its freedom. Article 9 stated that 'Property is the right of each and every citizen to enjoy and to dispose of the portion of property guaranteed to him by law. In the sequence, 'the right of property is limited, as are all others, by the obligation to respect the property of others' (Stewart, 1951, pp. 430-431).

The rights in the Declaration suffer from extreme opposite criticism regarding their concreteness and universalism. While liberal tradition focuses on its abstractness and lack of concreteness, from the Marxist approach it is the opposite. Regarding its concreteness, Marx stated that the Declaration separated man from citizen and was centred on one specific group of men: the bourgeois. According to him, the rights of citizens were different from the rights of man. At the same time, during the Revolution, the bourgeois man was separated from the citizen. On the Jewish Question, Marx observed that the bourgeois man is called man in general, and their rights are considered rights of man. The citizen, on the other hand, became the servant of the 'man'. Because of the concreteness of the Declaration, Marx claimed that it could not express the universality of humanity.

Despite the interest of the revolutionaries to make the rights universal, it is clear to Marx that they are the interest of one class and one individual and egoistic man (Pogrebinski, 2003, pp. 145 – 146). On the other hand, in the construction of rights proposed by the French Revolution, Hegel would recognise the relationship between absolute freedom and terror in the construction of the universal, since this relationship would help the fusion of the individual into the collective. It was the abstract individualism, however, that helped to reconcile different ideologies within the Revolution and the tensions in the Declaration of Rights. Between these tensions, he described individual rights and national sovereignty, rights of each against rights of all, rights of the citizen and rights of man, private and public liberties (Comay, 2004, p. 384).

In sum, different revolutionary processes dealt with important issues regarding the legitimization of political power, individual rights and the institutional organisation. Both Revolutions were different. While the Glorious Revolution maintained the nobility in power, the French Revolution was the product of the Third State and popular dissatisfaction that resulted in the

establishment of the Republic and focused on citizenship. Despite the different institutional outcomes, they are united in that they clearly represent forms of political power expressed by Neumann. In the end, they successfully reinterpreted human rights norms and imposed their view on other groups. Also, as suggested in the second chapter of this thesis, these changes were essential in giving meaning to a legal system based on general norms and rationality, while being free from arbitrary power. These changes were formalised in declarations of rights and in the subsequent promulgation of constitutions or constitutional changes.

### **Rights Revolution and the Haitian Revolution**

In this section, however, I will show that despite the universalistic concept of human rights developed in the French Revolution, there were several debates about the real meaning of this idea when dealing with the reality of colonisation. There were some revolutionaries who proposed a radical universalism, considering the colonies and its slaves as citizens and, hence, empowering them with the new rights. However, despite the discourse of universalism, the understanding of the Rights of Man was narrow, justifying the permanence of the French colonial enterprise that later expanded throughout Africa and Asia. Accordingly, the Haitians had no other option than to radicalise their position and force through their independence. The Haitian revolution, therefore, represented the possibility of radicalisation toward a true universalistic destination of human rights and was the first revolution in which the colonial other - the European alterity - defied the violence perpetuated by the coloniser.

There are two main concepts that will be central to understanding the conservative forces within the development of international law and human rights norms, and in relation to the global design developed in the eighteenth century: universalism and citizenship. The Haitian Revolution figured as an important event in the debate about human rights during this period. The French revolutionary actions towards universal man and citizens became contradictory in the debates and actions towards slavery.

#### *The Struggle for Freedom in the French Colony of San Domingo*

Revolutions in the colonial world were related to political and economic matters. In San

Domingo, for instance, its pre-revolutionary economic situation was better than that of the US. It was producing more sugar and coffee than Cuba, Brazil and Jamaica combined. However, the influence of the French Revolution in the emancipation of San Domingo is a matter of debate. In this colony, African-born slaves used the Republican rights and the universality of individual rights as part of their discourse and as a way to claim freedom. It created a real dilemma of how to justify a Republican imperialism based on an ideological system whose core was the principal of universal rights. Instead, the Revolution was presented as terror, a 'very hell of horrors' (Burnard, 2007, pp. 101–102). The French colony of San Domingo (now Haiti) was an example of the profits that the colonial enterprise of merchant capitalism, based on slaves and the plantation, could make. In 1791, however, the labour conditions were unsustainable and, together with transformations in France, led to the largest slave revolt in the world, and the only one to ever succeed.

The colony, one of the oldest existent parts of the territory of Hispaniola, was finally given to France by the Treaty of Ryswick after the pillage of Cartagena in 1697. The French forces consisted of not only Frenchmen, but also of inhabitants and slaves of San Domingo, at that point, the capital of Hispaniola. With the siege, San Domingo became officially a French colony. Following the experience of the military enterprise, there were both slaves and free workers in the plantations of San Domingo (Dubois, 2004, pp. 17 – 18).

The industrialisation of sugar plantations in the Caribbean was without precedence. Plantations depended on intensive labour and slaves were essential for the work done in the colonies. San Domingo, however, experienced a mixture of slavery and free-labour. In 1687, for instance, there were 4,411 whites compared to 3,358 slaves. It was in the eighteenth century that the increase in the production and industrialisation made the Caribbean extremely racist. The workforce suffered a deep transformation, relying entirely on the labour of African descendants, while few managerial posts available were assigned to white people. The result was an inversion in the composition of the population. By 1700, the population of slaves jumped to 9,082, while the number of whites decreased to around 700. By the time of the French Revolution, there were around 150,000 slaves, corresponding to 90% of the population. At the same time, the number of plantations increased from 18 in 1700 to 120 in 1704 and continued to increase (*Ibid.*, pp. 18 – 19).

The size and importance of slave labour in the French colonial system made the contention of this population one of the main issues for the colonial administration. However, there were disagreements about the measures. From 1685, the *Code Noir* had been the code with detailed legal norms about slave work. It regulated the treatment given to slaves, the working-hours, food,

housing, punishment and the process of emancipation. The slave masters, however, openly broke the provisions of the Code to the extent that they became ineffective. In 1793, one planter activist wrote about the absurdness of the Code and the impossibility of implementation (*Ibid.*, p. 30). As a response to the non-implementation of the Code and to rumours about uprisings in the colony, the Colonial Administration adopted two royal decrees in the mid-1780's with the objective of increasing the rights of the slaves and improving their situation. The slave masters saw these decrees as an attempt to emancipate the slaves, and, in turn, decided not to accept these 'despotic' regulations. The fear of rebellion, however, was greater than the ideas of liberty, even on the side of the Enlightenment intellectuals. Eventually, it was not only the slaves, but the free people of colour who were discontent with the decision on both sides: the colonial and the local administration.

Without much consideration in the metropolis and after several attempts to legally participate in a revolution, there was no other option but armed rebellion. In this way, the insurrection of 1791 was unprecedented. For the first time in the New World there was a successful rebellion of armed slaves, organised and self-directed (Fick, 2000, p. 11). The declaration of rights played an important role in this insurrection. Despite several attempts to prevent the spread of revolutionary thought in the colonies, in some cases, the slaves phrased their demands using the language of rights expressed in the Declaration. Some of them also declared that 'they wanted to enjoy the liberty they are entitled to by the Rights of Man' (Dubois, 2004, p. 105). The success of the insurrection made the National Assembly declare the equality of rights between all men in France on 4 April, 1792. The decree not only recognised the universalism of the declaration of rights towards free men of colour, but it also extinguished the racial discrimination in the definition of citizenship, allowing those who met the financial criteria to participate as active citizens. Counter-revolutionary planters, on the other hand, were considered linked with conspiracies against the nation. Slavery was a different, pressing issue.

The events of 1793 shook the situation. The imperial war of Spain and Britain against France had several consequences for San Domingo. The Spaniards and the British had interests in the colony and they both tried to use insurgent slaves in their own army, including Toussaint Louverture – leader in the North and future French administrator of the colony (Fick, 2000, p. 16). It was Sonthonax and Polvorel that first recognised the importance of those slaves in the French military ranks against the imperial war. Both comprehended that if something had been done for the benefit of the slaves, the war in the colonies could have been better managed. Besides, both slaves and French soldiers were fighting for liberty. The proclamation of the end of slavery in the colony

was declared in 1793 by Sonthonax and Polvorel, who guaranteed freedom to all slaves who decided to participate in the war (*Ibid.*, p. 17). Later in the same year, both issued different decrees giving gradual emancipation to all slaves of the provinces. But the decrees had still to be confirmed by the National Convention, which was done when the first delegates elected in San Domingo arrived in Paris (Dubois, 2004, pp. 169 – 170). The defence of the liberties gained by slaves in San-Domingo was trusted to Toussaint Louverture, a participant in the insurrection and in the war. He had to administer a colony destroyed by both events.

The fall of the Jacobins brought conservatism back to French politics. Also, the end of the war against Britain and Spain guaranteed the French position internationally, while internally the situation deteriorated. Toussaint consolidated his position as commander-in-chief and governor of a now unified San Domingo. In addition, he promulgated a constitution in 1801, formally abolishing slavery in the colony. This episode was considered necessary because there was distrust among freed men. The bourgeois internal logic that commanded the revolution was not prepared to abolish slavery. Only when it was overthrown in the colony, did the National Assembly decide to issue the decree. Therefore, the position of conservative forces under the Directory was against the emancipation that needed the colonial system (Fick, 2000, p. 23). The outcome of the shock between these two world views was the military expedition under the regime of Napoleon Bonaparte after slavery was re-instated in France. In the end, the revolutionary army in San Domingo was successful, declaring its independence.

### **Universalisation and Particularism in the French and Haitian Revolutions**

Cosmopolitanism, as a hidden agenda of modernity, is an idea that has been tracked to the development of the French Revolution and, in particular, to the works of Kant. Because of the ideological and social transformations and legal development that happened during the era of Revolutions, there was a connection between the law of nature and society, the consequence of which was the *ius cosmopolitanicum*. For modernity, America and the commerce in the Atlantic, which were the conditions for the origin of capitalism in France, were considered pre-modern, while the imposition of new empires, France and England, marked the beginning of the new global design. It marked the re-articulation of the ‘other’, no more related to the American inhabitants, but to the ‘other’ in Africa and Asia. Traditional conceptualisation of modernity took this period into consideration and pointed out the rational concept of emancipation. However, it also developed an

irrational myth that justified genocidal violence (Dussel, 1993).

Sex, Race and Nation are all elements of the Kantian person and it is his personal characters that will develop the national characterisation. The universalisation of rights made possible by his cosmopolitanism is, therefore, permeated with both national ideology and racial prejudgement. They require the transformation of the 'other' into 'himself' (Mignolo, 2000). When democratic peace theories defined 'liberal state', they did so by marginalising the differences between western States and the rest of the world. They not only embodied universal values into particular States (Jahn, 2005, p. 188), but they also tended to forget the racial components of Kant's theory. As Arendt affirmed, 'the fact that racism is the main ideological weapon of imperialistic politics is so obvious that it seems as though many students prefer to avoid the beaten track of truism' (Arendt, 1973, p. 160).

In the context of San Domingo, the colonial administration saw the necessity to control free people of colour. After the Seven Years' War, the administration undermined their rights and altered legislation, increasing discrimination against them. First, they were forbidden to work in health related professions (medicine, surgery or pharmacy) and legal activities, including notaries. Then, in 1773, they were also forbidden from using the name of their older masters, 'on the grounds that such a practice destroyed the "insurmountable barrier" which "public opinion" had placed between the two communities and which government had "wisely preserved."' (Dubois, 2004, p. 62). When the French Revolution started, free people of colour were subject to several regulations based strictly on grounds of race. With the Seven Years' War, there was intensive migration to colonial areas, and this white population had to compete with coloured people who were already established in the area, causing several disagreements and leading to discriminatory laws. Dubois is clear with regards to racist differentiation:

Over the eighteenth century, law, economy, and discourse worked together to produce a set of racist practices that, once in place, appeared to many as both natural and permanent. Yet this system of racial hierarchy, which most whites saw as necessary for the survival of the colony, was saturated with contradictions and dangerous fissures. [...] Such distinctions were eventually institutionalised in the colony; the census of 1782 divided free people of colour into two categories: "gens de couleur, mulâtres, etc.," who had European ancestry; and "free blacks," who did not. [...] Some writers then and since have drawn sharp distinctions between these two groups, but in reality the differences were blurred: there were many slaves of mixed ancestry who had been freed, and second-generation free people who had no European ancestry (*Ibid.*, p. 70).

At certain points, the situation was unsustainable. The work of Enlightenment philosophers helped some of the first individuals in their fight against slavery in France. The ambiguity and

contradiction of the Enlightened thought towards slavery is accounted for<sup>25</sup>. Nevertheless, the ideas produced in the Enlightenment were from the roots of the French anti-slavery movement. Moreau and Condorcet believed that it was possible to end this institution: the former was dedicated to improving the conditions of the slaves, while the latter claimed that slavery could be progressively outlawed. With the French Revolution, Moreau and Condorcet ended up at different ends of the spectrum of political debate and the discussion against slavery was prejudiced. Despite this setback, in 1788, the *Société des Amis des Noirs* was founded in Paris by Jacques-Pierre Brissot de Warville. The Society wanted the gradual elimination of the slave trade and, ultimately, the emancipation of slaves in the Americas, following in the steps of their British counterparts.

Slavery was also threatened by the Declaration of Rights. The first proposition of the Declaration, giving equal rights to all man, generated distrust and extreme reaction. Some planters considered the Declaration a disease that should be contained, while slaves were forbidden from entering the kingdom. Their contact with debates in Paris could be communicated in the colony. Nevertheless, Raimond and Ogé found support in different groups, which received their demands for liberty and accepted them as a natural right, or even as a true expression of the universalism of the Declaration. On the other hand, some observed that only race justified their exclusion. In the beginning of the revolution, the justification for the limits placed on citizenship took into consideration the possibility of being financially independent, a situation that this group from the colony clearly demonstrated. At this point, delegates, influenced by ideas of universalism and egalitarianism, considered the colonial aristocracy a violation of the ideas of the revolution (Dubois, 2004, p. 82).

In defence of their interests, the planters managed to impose their will on the National Assembly against the inhabitants of the colonies. The argument that prevailed was that there were essential differences between France and the colonies and that, therefore, those places demanded different laws. The National Assembly, at this point, decided to establish a Colonial Committee, without abolitionists, responsible for debating the future of the colonies. The National Assembly, nevertheless, failed to end the slave trade and slavery. A rebellion in the colony, mobilised by a discontent Ogé was necessary to avoid total disregard of the subject.

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25 In this account, the work of Louis Sala-Molins (2006, 2011) can give us an interesting perspective of the relationship between the Enlightenment and anti-slavery movements. Dubois (2004) commented that there were several disagreements among them. Some of thinkers could maintain relative racism against Africans, while understanding the immorality of slavery. Others, despite believing in the total emancipation of the French Revolution, agreed that slavery was economically important at that moment.

The connection between the French Revolution and the Haitian Revolution, in fact, disappeared from the revolutionary propaganda. Hannah Arendt asserted that there was real enthusiasm brought about by the French Revolution in the spirit of universal liberation, as if the French had emancipated men everywhere. The message of fraternity inspired the acceptance of the values of the Revolution and made one believe that it belonged to every nation (Arendt, 1973, p. 162).

The Rights of Man and the Citizen, as it originated in the French Revolution, was therefore an important step toward what Neumann considers an emancipation through legal forms. However, it is important to understand that there were, and still are, conditions for the full enjoyment of these rights. Arendt, for instance, observed that the disintegration of nations in Eastern Europe created a category of stateless people for whom it was almost impossible to guarantee human rights (Arendt, 1973, p. 269)<sup>26</sup>. For my argument, it is necessary to clarify that there is an important connection between rights and the State, especially because of the relationship between citizenship and rights:

In this conviction, which could base itself on the fact that the French Revolution had combined the declaration of the Rights of Man with national sovereignty, they were supported by the Minority Treaties themselves, which did not entrust the governments with the protection of different nationalities but charged the League of Nations with the safeguarding of the rights of those who, for reasons of territorial settlement, had been left without national states of their own (*Ibid.*, p. 272).

The Rights of Man and the Citizen were supposed to be universal, but they could not go beyond the boundaries of its own national State, blurring the difference between both: in the end national and citizens were one of the same and, at this point, ‘the loss of citizenship deprived people not only of protection, but also of all clearly established, officially recognised identity’ (*Ibid.*, p. 287). In the French colonial context, the racist thinking and racial prejudice blocked inhabitants of San Domingo from acquiring such rights. It is possible to observe that Arendt considered the ideology behind racist thinking as one of the most important ideologies that existed in Europe. It was able to destroy other ideologies and transform history in a ‘natural fight of races’ (*Ibid.*, p. 159).

The Declaration has its format establishing these human rights as inalienable, irreducible and non-deducible, given by Man himself and no other authority, in the new secularised society that claimed their social emancipation. But all human beings were citizens of some nation - part of some

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<sup>26</sup> More recently, there have been several works about the conditions of refugees, the institution of asylum and the (in)applicability of human rights that followed Arendt’s analysis. Cf. M. Bradley (2014), W. Heuer (2007), J.C. Isaac (1996, 2002), J. Lechte and Saul Newman (2012), S. Parekh (2004), H. Saussy (2013), L. Stonebridge (2011). Also, see Owens (2012) about the citizenship and political community.



political community. Nevertheless, the Rights of Man were supposed to prescind from citizenship or nationality, but nationals of countries that did not guarantee these rights were expected to change their own legislation. The application of these rights would be better understood in the context of their own citizenship, as civic rights (Parekh, 2004, p. 45).

However, in the context given by Arendt, the struggles for recognition and citizenship in Haiti become more significant to the understanding of the conservative forces that avoided the emancipation of the form law, due to racial prejudice established by legal norms. In 1791, Julien Raimond, one of the main political figures in San Domingo during the French Revolution, wrote a pamphlet centred on the prejudice against free people of colour who, despite their wealth, participation in the army, and importance in national politics, were prevented from participating in the Revolutionary Assembly in the colony. This category of people demanded equal participation and declared that racial prejudice ran counter to the French Revolution. The *Code Noir* attributed the right of citizenship to emancipated slaves. As was the case with many other planters in the colony, Julien Raimond had a long and almost forgotten African ancestry. One ascendant of his mother was born in Africa, while the other side of her mother's family and his father's family were French. The status of emancipated African descendants was subject to different norms throughout history and the racial terminology was present in the legal documents before the Haitian Revolution. By the *Code Noir*, the same rights were given to those who were emancipated, freed individuals and those who were born in the kingdom. The freed individuals could be re-enslaved in certain situations. In relation to individuals who were born free, there were no provisions. Their condition of free individual was not related to their ancestry and, in principle, there was no discrimination (Dubois, 2004, pp. 60 – 61).

The anti-slavery group tried to obtain as much support as possible, but they faced the group of planters who were afraid of the consequences of colonial participation in the Estates General. Anti-slavery forces were more present in the Estates General and there was the general idea that if representatives of San Domingo could participate in the formulation of national policies, the emancipation of the slaves would be more possible. The decision was made to forbid colonial delegates, but seventeen uninvited members, elected in San Domingo, were present in the debates of the Estates General. The whole episode showed the limits of democracy in the colonies: the white French delegates, in any case, could represent the entire population subjugated to them (*Ibid.*, p. 75). Nevertheless, Julien Raimond and Vincent Ogé, including other free men of colour, arrived in October 1789 as a delegation to participate in the National Assembly. According to this

delegation, when it was decided to forbid their participation, they created a second class of citizens, a group that, “though “born citizens and free,” lived as “foreigners” in their own land; they were “slaves in the land of liberty”” (*Ibid.*, p. 80).

Despite the political environment and the normative disposition of the French Revolution, there was never political will to end slavery and the slave trade in the colonies. Rather, there were continuities between pre-revolutionary and revolutionary thoughts on the issue. The *Code Noir* was developed as an ethical instrument that could preserve slavery and prevent revolts. Several moral and practical concerns combined in the *Code Noir*, and constituted a ‘strategic humanitarianism’. This strategy represented the complexity of French attitudes towards colonial slavery, while suggesting that the anti-slavery movement depended on the legal system on which their demands could rely. According to Ghachem, ‘a sense of legality and legitimacy was important’ for some insurgent leaders and ‘the *Code Noir* was a central, although not exclusive, reference point for those values’ (Ghachem, 2012, p. 282). The emancipation observed in the metropolis was not reproduced in the colonies. Universalism of individual rights and citizenship were not supposed to destroy the economic system of the colonial world. While in the metropolis the law was the tool used to emancipate, in the colonies, ‘conservative forces’, as described by Neumann, were in action to instrumentalise the law in a way that emancipation was not.

## Conclusion

In the passage from a global design based on the absolutism of Spain, to another based on France and England, there were several transformations in the organisation of the State, in the relationships between different branches, and in individual rights. These represented the process of ‘disenchantment with the law’, and at that moment, presented the possibility of legal emancipation. It was represented by the application of general and abstract norms in a system of separation of power and ‘checks and balances’ that ultimately prevented arbitrary power. The dialectic happens not in the formulation of these rights, but in the reinterpretation and transformation of the rights already established. The methodology developed in Chapter Two is applied here to show us that the social groups in each revolution tried to act with political power, in the sense that they, first, disbelieved in the power of the State already established. Secondly, because of this disbelief and their reinterpretation of human rights, social groups proposed further protection against the power of the State, usually by formalising their own right, and, thirdly, these groups established further

institutional protection within the State. These actions, nevertheless, caused the State to gain power and control over the population, although limited by the new Bills of Rights. These contradictions between old and new interpretations and more or less power to the State, legitimise new policies and political constellations. In this way, the American and French Revolutions built a new international order based on the Rights of Man and of the Citizen and in the spirit of the Enlightenment. It was an era of the universalisation of human rights that, nevertheless, was later stopped by the civilisation principle developed from the same ideas.

In this sense, my argument is that while domestically there was an advance in the idea of human rights, the European imperialist position imposed a system according to which human rights was not to be fully enjoyed. It created a situation of rights owners on one side, against those without rights on the other: those lower in position in relation to the European. This refusal to empower certain groups – the colonial individual – with their ‘universal’ rights, allowed Empires to morally intervene in the African and Asian contexts. The idea of universal rights, as proposed by the French Revolution, joined by the individual and private-based rights in the American Constitution, would guarantee that the political order had none of those rights. In the colonial system these can be demonstrated by the Haitians who suffered in order to obtain the same status as their counterparts in Europe. Their only option was to become independent, as was the case for other colonial territories in the XX century. The full embodiment of human rights was not possible within the colonial enterprise.

The next chapter will focus on the period in which the synthesis between the formalisation and de-formalisation of human rights norms in international law – during the period of imperialism – legitimised colonialism based on racial and civilising arguments.

## **CHAPTER 5 – IMPERIALISM, INTERNATIONAL NORMS AND CIVILISATION IN THE LATE 19<sup>TH</sup> CENTURY.**

During the period of French and British hegemony, the Enlightenment formalised human rights and strengthened popular sovereignty, albeit at the expense of the colonies. It has been argued that domestic transformations in the understanding and legitimation of law and rights in the Glorious Revolution and the French Revolution, represented an important step towards the universalisation of human rights and in the disenchantment of law, by rationalising and formalising human rights, creating a stronger relationship between political communities and the process of law-making, and developing general norms. Hence, it was in this period that law was separated from the will of the monarch and became part of national sovereignty. Faithful to the arguments presented so far, I have showed that this universalisation did not happen without conflicts, especially when it was used to extend rights to the colonies.

In this chapter, the conditions of human rights in international law in the nineteenth century will be examined from the point of view of the theory established in this thesis, focusing on the period known as imperialism, between the end of the nineteenth and the beginning of the twentieth century. My argument is that, despite the lack of development in international human rights (Fitzmaurice, 2012; Stearns, 2012), the monopolistic economic system of imperialism created the necessity for an international law composed of vague, open-ended norms that would resemble the legal structure developed in the Nazi Regime. This characteristic, focusing on the legal transformations, allows us to perceive the contradictions between the international system at the end of the eighteenth century and the one constructed in the late nineteenth century and the legitimacy of neo-colonialism. Hence, the foundation of international law evolves from the development of the French Revolution, at the same time as it negates the expansion of rights. First, the socio-economic conditions in which monopolies and colonisation happened will be identified, before exploring international positivism and the transformation of socio-economic conditions imposed by international law. It will be argued that the standard of civilisation – or the civilising mission – corresponds to the same open-standards required by the monopolies. Thereby, I will be able to conclude that changing the foundations of the rights of man to sovereign, created a situation which relied on the absence of a system of human rights. Finally, I will provide

some examples of legal attempts towards the emancipation of areas in the colonial world within this new system.

## **Imperialism and Law in the Nineteen Century**

The importance of the end of the nineteenth century for the study of international law is vast, due to the fact that the literature understands it as the moment of expansion and universalisation of European International Law (Anghie, 2007; Koskenniemi, 2004; Lorca, 2010; Sylvest, 2008). There were at least three factors that contributed to this expansion: 1) Britain's position of predominance in this new global system, including its colonial practices; 2) the intellectual development that transformed the qualification imputed to the States, from 'Christian-European nations' to 'civilised nations'; and, 3) the expansion of the European state system with the inclusion of American States (Grewe, 2000, p. 445). Following the division presented by Grewe, I will, in the first section, characterise imperialism and identify its principal concepts. This will include a description of the economic transformations of the period, highlighting the appearance of monopolies and their social significance within the colonial world. Concluding this section, we will return to the work of Neumann and Kirchheimer in order to understand how these conditions changed the notion of law and norms domestically, and present the conditions in which this happened. Subsequently, in the following section, this interpretation will be examined in relation to international politics.

Marxist literature at the beginning of the twentieth century used the term 'Imperialism' to describe capitalist transformations in the previous century<sup>27</sup>. At that time, Lenin (1999) managed to outline and reflect on most of the terms debated by the Left on this matter. There were general explanations shared by them, to the point that more recent work doubted Lenin's originality (Marshall, 2014). At the end of the nineteenth century, imperialism was considered to be part of the international policies of the great Western powers. As such, imperialism was thought of as an impersonal force, distinguishable from power itself, impersonal and, to a certain degree, a form of power that could override power. There were those who considered Germany's participation in the new colonialism as an

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27 Among those Marxists, we can find Rosa Luxemburg, Hobson, Hilferding, Bukharin and Lenin. For an outline of those theories, cf. Brewer (1990).

attempt to take its ‘honourable share of the civilised world’. Eduard Bernstein, a member of the German SPD, argued in 1907, that colonialism reflected ‘the right of peoples to a higher culture over those with a lower culture’ (Bernstein, in: Marshall, 2014, p. 319). According to the Germans who sustained an imperialistic ambition, their participation in the imperialistic conquest was an opportunity to be represented in the council of nations. In Britain, intellectuals, such as the socialists of the so-called Fabian Society, saw no harm in imperialism. According to the Fabians, there was no harm in exchanging civilisation for gold; it was not considered robbery. At that point, most would argue that this new capitalism, together with new colonialism, was progressive.

The end of the nineteenth century observed the development of a new phase in the capitalist system. The technological advances enjoyed by the economic system, allied to a new expansion of the colonial system and conservative governments post-1848<sup>28</sup>, changed profoundly the capitalist system (Arendt, 1958, p. 34). In this case, Imperialism was more than a policy, representing the political and economic situation found in the world. The capitalist system changed from national economic systems, based on small proprietors, to a world system of colonial oppression (Lenin, 1999, p. 28). Hence, the principal characteristics of the imperialist economy were the growth of monopolies and the further concentration of production. A few industries in each line of production handled the goods produced in each country. Also, the way in which the supply chain evolved allowed the combination of different enterprises in the same chain to form one conglomerate. The concentration of capital and production of that time – which was made possible due to the expansion of colonial policies – allowed agreements that encouraged international cartels. Reflecting such concentration, the world was divided into two different monopolistic spheres, one economic – represented by monopolies and cartels – and the other political – formed by high powers (Callinicos, 2009, p. 15). Both spheres were intricately connected. Colonialism was the solution presented by the Metropolitan as an assurance that the exploration of raw materials abroad would happen without interference or competition, and the guarantee that monopolies would obtain the degree of concentration they desired.

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28 The term Revolutions of 1848 encompasses several political uprisings in the European context, whose main objective was to remove old feudal relations within the national state, with some places urging for independence. It spread throughout Europe and America, with different outcomes. Most of the revolutions ended quickly and they could not avoid conservative governments or rules to rise to power. Nevertheless, despite criticisms of the movements, Neumann observed that the Weimar Constitution had drawn inspiration from them. Therefore, because I will pay closer attention to the relations between international law and the idea of the Welfare State in chapter six, I believe that chapter to be more suitable for dealing with this issue.

When Neumann and Kirchheimer developed their understanding of the transformations of the function of law in society, Lenin's work on imperialism was central not only to Soviet analysis and posteriorly for Stalin's foreign policy, but also to the Left. In this context, both authors from the Frankfurt School developed some of their arguments based on Lenin. Since then, Lenin's *Imperialism* has been widely criticised. Lenin's analysis isolated economic factors, despite his awareness of social complexity. Proof of this can be found in the fact that he described capitalism as the universal single event that drove history, leaving many other factors – such as ‘restlessness of displaced aristocracies, ambitions of soldiers, momentum of earlier conquest’ – as background (Kiernan, 1974, p. 39). When analysing Lenin's work on Imperialism, V.G. Kiernan stated that, at that time, it was almost common sense to relate monopoly capitalism with imperialism. It was a proposition beyond doubt because both phenomena happened at the same time. In this sense, Lenin observed how capitalism developed in Germany and the United States provided him with his factual background. Lenin, however, was unable to relate fully with both realities and also failed to exclude certain discrepancies in his argument. Even though Germany and the US provided sustainability to his argument, he did not take into consideration British economic development.

Despite the limitations of earlier theories of Imperialism, the legal theory of the Frankfurt School was able to provide an account of the domestic legal transformations taking into consideration, not Lenin's theory as a whole, but specifically the advent of monopolies. Even Lenin's critics have agreed that despite the flaws, his arguments on monopoly capitalism should not be taken lightly (Lindsey, 1982). Lenin claimed that imperialism could be characterised as the stage in which financial capital and monopolies had been established. Charles W. Lindsey argued that Lenin was unable to establish a causal relationship between the rise of monopolistic capitalism and the division of the world. Notwithstanding, Lindsey understood that when dealing with a monopoly, the term could have a different context. If we can make a distinction between the acts of monopoly capitalists and the acts of capitalist governments that created the conditions for the monopoly of its bourgeoisie in the international order, then Lenin's arguments could be better understood (Lindsey, 1982, pp. 5–6).

It is my understanding that Lenin's initial proposition can be criticised because it was too focused on economics. For the purpose of this thesis, it is necessary to expand the scope

of this concept to give it a more social context. Because I have been dealing with the repression represented by colonialism in relation to human rights, I will show that H. Arendt's interpretation can provide us with a better account of the relationship between imperialism and colonialism, without losing sight of the central argument of this thesis, due to the fact that she took into account the important contradictions between the internal and the external. This will, therefore, help us situate how rights transformed international law in this period.

The strength of the connection between monopolies and colonialism was such that, at certain points, Hannah Arendt defined imperialism as the 'colonial expansion of Europe which began in the last third of the nineteenth century and ended with the liquidation of British rule over India' (Arendt, 1958, p. 34). Imperialism existed as a strategy, according to which, Western nations survived the economic transformations of the nineteenth century. At the same time, the expansion was only 'for expansion's sake' (*Ibid.*). The political side of imperialism, therefore, was represented by colonial expansion. It was expressed in terms of lasting domination and assimilation. The politics of expansion, however, created an internal contradiction within the political structure. While the economic side of imperialism could count on the growth of human production, the nation-state, as the dominant political structure, could not account for its expansion. Previous experiences proved that it would be difficult to mimic the structures of the nation-state in the colony. Nevertheless, there were nationalist interests that demanded that the State keep them in their territory. The Great Powers wanted an expansion of power without changing their national political structures. The solution was to allow the colonisers to maintain their legal system, instead of integrating the colonial political system into the metropolis. Meanwhile, a separated metropolitan institution would enforce colonial policies in the area (Arendt, 1973, pp. 129 – 131). It was necessary, however, to justify the intervention against 'the conscience of the nation'. In England, the solution to differentiate the imperial government from the colonial administration was called the 'imperial factor'. As in the work of the School of Salamanca, including in Francisco de Vitoria's work about indigenous people in America<sup>29</sup>, the 'imperial factor' corresponded to an attempt to qualify the colonised as inferior and in need of protection. The Imperial Parliament would represent the natives, but they never received full representation in the government (Arendt, 1973, p. 133). This protection, however, can be characterised by the exportation of the apparatus of violence. In this case, the policy and the

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29 About this subject, Cf. Chapter three of this thesis.



army were frequently separated from the national institutions to which they often responded. In the colonial context, they became institutions in themselves, representing the civilised against the uncivilised. The exportation of violence is an important feature of imperialism. The problem with the way violence was exported indicated that, in this context, violence administered by power and not by the possible constraints of the legal system and the rule of law, would not serve to achieve political gains, but, rather, it would only become a destructive force whose only intention was violence (*Ibid.*, p. 137).

Hence, imperialism separated power from the political community that it sought to serve. The development of the political community was responsible for the political emancipation of the bourgeoisie, and thus, the capture of the State by the bourgeoisie. In this process, the concept of citizen, derived from the French Revolution, universalised human rights and included the men of the nation as the lawmaker, and, thus, as a part of the political community. The Rights of Man and the Citizen and the ideology of the Enlightenment represented several national interests and objectives for the nation in general. Imperialism, on the other hand, was able to define politics as the realm of power and the expansion of power as its sole aim, as described above (Arendt, 1973, p. 125; Benhabib, 2010, p. 87). Human rights, therefore, are here presented as the negation of these rights to the colonised.

The ideology of the nineteenth century, allied with economic and political interests, permitted the creation of a society that would match the unsuccessful with criminals and other outsiders, along with a horde of excluded. Violence alone was not sufficient. The *status quo* and its process of never-ending accumulation of power and capital was maintained by a 'progressive ideology' known as race-thinking. At this point, this ideology could only present a tautological argument: the economic side needed the political aspect to guarantee the stability of their economic laws, but to be successful, the political aspect required the accumulation of more power. Indeed, this would only be possible in the imperialist context, where economic and political accumulations were (at least up until that time) at their finest (Arendt, 1973, pp. 138 – 144).

The imperialistic enterprise would not have been possible without resorting to the use of racism as its ideological weapon. Europeans had to promote their superiority, turning the colonised into a barbarian. However, in the end, a civilising mission was just a 'smoke screen' (Kelley, 2000, p. 21), and the 'the idea of the barbaric Negro is a European invention' (Césaire, 2000, p. 53). An invention that would set the path for global politics not only at the

end of the nineteenth century, but with reminiscences in the twentieth century (Arendt, 1973; Benhabib, 2010, p. 85; Césaire, 2000; Kelley, 2000).

In sum, imperialism represented an epoch of profound political and economic change. It separated power from the political community and created a situation in which power sought power for its own sake. There were two situations that legitimated the expansion of power: first, the foundation of international law in the sovereign state, thanks to the appropriation of positivism in international law and, secondly, the limitation of rights to civilised nations. Racial differentiation represented by the civilising mission, and the development of monopolistic economy – both allied with the positivist and naturalistic attempt to justify imperialistic expansion – became the conditions of the political constellation presented in this chapter. For the Frankfurt School, there was no doubt that German imperialism was related to legal transformations in its economic base. In the domestic arena, Neumann and Kirchheimer provided a detailed explanation of the transformations suffered by formal law, especially with the ascension of the Nazi regime. My argument is that the conditions observed by them in their period can shed some light on the transformations that occurred in international law in the nineteenth century, and it will help us understand the role human rights played during this period. Previous chapters have dealt with a synthetic situation in which legal interpretation and institutions favoured the protection of human rights. Now, the role of the legal system and rights in this political constellation will be examined, along with how the regulation of rights led to the de-formalisation of law and repression.

When Neumann and Kirchheimer developed the idea that monopolies sought to de-formalise legal norms and develop a system of legal indeterminacy, their argument reflected the impact of the monopolised capitalism and enterprises in the form of law. They showed that those monopolies depended on different types of norms that could be flexible enough to comply with their own economic interest. This fact was reported by them as the instance in which the generality of the law lost its influence in the judicial system, altering the possibilities of emancipation as shown in Chapter Two. This new type of law supported vague and open standards that could be interpreted in different ways, taking into consideration the interests of powerful groups. As explained before, against this transformation, they advocated that the emancipatory potential found in the legal system could only be perceived when all people were radically equal before the law.

The idea of law based on the classical liberal system was originally supposed to mean ‘a general, rational rule which was valid for an indefinite number of concrete, future factual eventualities.’ (Kirchheimer, 1987, p. 68). This idea was that the law would not recognise or legislate for specific individuals, but that its function would be to facilitate interventions on freedom and liberty. These interventions were only supposed to happen when they were controlled, to avoid arbitrary actions. Although the general characteristic of the law was the element that embodied reason, this formal general law also served to protect the weak (Neumann, 1967, p. 441;447). In terms of the concentration of economic power, it was observed that the monopolist could impose his will upon consumers. Therefore, under a monopolistic system, formal law became suppressed. Without the pulverisation of companies, the law lost its generality. In the end, it regulated only one company. As a consequence, there was a shift in the division of powers, and most legislative tasks were delegated to the administration or the Executive, the branch that would negotiate the national interest against the company. Besides, the position of the monopolist and impossibility of generalisation, the law existed in the form of ‘vague, open-ended standards’ (Scheuerman, 2008, p. 19), allowing more flexibility for the singular judge and giving a sense of generality. These legal standards, however:

serve the monopolists. The individual norm is calculable for the monopolist because he is strong enough to dispense with formal rationality. Not only is rational law unnecessary for him, it is often a fetter upon the full development of his productive force, or more frequently upon the limitations that he may desire (Neumann, 1967, pp. 446 – 447).

On the hand of political power that did not seek emancipation, legal standards were constructed so vaguely that ultimately they represented not the rule of law and human rights, but the will of the political power<sup>30</sup>. In the context of imperialism, in which the capitalist system became centralised, based on monopolistic structures, and in which violence was controlled by a power detached from its social basis, law became an *arcanus dominationis*. As a consequence, the teleological element was not dominant, transforming the law into a mere technique to transform political will into legal forms (Neumann, 2013). Imperialism, therefore, as a phenomenon that detached power from its political community, was able to create a ‘*social-baseless law*’. The idea of *arcanus* in the legal theory of the Frankfurt School is related to decisionism. The recognition of this *arcanus*, therefore, represented the prevalence of the doctrine of C. Schmitt – and of decisionist elements – in the legal system of

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<sup>30</sup> In Behemoth, the author matched this will to the will of the Leader (*Führer*) (Neumann, 1967, p. 447).

the period and was also a recognition that fascist elements were prevailing in the regime being examined.

This section has shown that the concentration of economic power developed a system of law that gradually shifted the separation of power and produced highly discretionary norms. I have argued that imperialism profited from the ideology presented in international law based on national interests, when it detached power from the political community at the same time as scholars derived the idea of sovereign will as the source of legitimacy of the system. Seen in these terms, it was a source of new repression, as a result of the denial of the same rights to colonial communities. In addition, because law was converted into a '*social-baseless*' law, without the institutional control represented by the rule of law, the law lost its emancipatory potential and could not protect the weak against the interests of monopolies. The next section will deal with these transformations in international law.

### **From the Domestic Realm to the International: Colonialism and the Structure of International Law**

In the previous section, I have provided an account of the development of law when influenced by economic imperialism. In this section, I will not only show that legal positivism and international law could only be developed in relation to colonialism, but also demonstrate that the similarities between economic conditions, domestically and internationally, will guide international law to become closer to the model described by the legal thought of the Frankfurt School. As a consequence, international human rights law will also depend on vague and open-ended concepts. In this case, one of the most important elements is the idea of civilisation. It will now be argued that lawyers from (semi-) peripheral countries sought conservative resistance. This occurred because they developed an intellectual recognition of their nations based on the same international positivistic basis, but had a different understanding of the criteria of 'civilised'.

International law had a long history aligned with arguments based on natural law. Most European jurists developed a body of jurisprudence based on this theory. The Enlightenment and the subsequent period were dominated by legal reasoning that was consciously, or unconsciously, derived from this jurisprudential body. With the advent of

legal positivism, the doctrine of natural law suffered, and it was expelled from the new theorisation. In the nineteenth century, universalisation became a consequence of the imperialistic enterprise of the late nineteenth century (Anghie, 2007, p. 32). The conditions created by imperial practices were such that ‘concepts of universal rights were eclipsed’ (Fitzmaurice, 2012, p. 124), damaging the relationship between international law and human rights. The law moved away from concepts of justice and equality constituted in previous periods. Hence, adverse developments in international law became superior to the positive ones (Koskeniemi, 2004, p. 98). With the new theorisation, there was an attempt to substitute ‘human’ from its foundation and include the sovereign will. In Chapters Three and Four, we learnt that disputes regarding human rights were fundamental to our understanding not only of the international legal system but also as the form according to which international policies were legitimised. However, mainstream interpretation of the foundations of international law at the end of the nineteenth century were able to migrate the basis of international law. They migrated from human dignity to sovereign will, a movement that neglected the role of human rights in transforming international law. From this context, I will argue that the lack of development in human rights and also the lack of institutions with a ‘rule of law’ function, produced a situation in which the law became a weapon against the ‘Other’, especially by formalising vague concepts of civilisation. First, however, we must examine the connection between colonialism and international law before exploring how the idea of civilisation and the dichotomy between civilised/barbaric was immanent to the system. Finally, I will suggest some of the consequences for the constitution of international law, based on the arguments presented by Neumann and Kirchheimer.

As was the case of Vitoria and the Spanish expansion, colonialism was central to the development of international law at the end of the nineteenth century. The constitution of its fundamental doctrines, such as sovereignty, was formulated in the context of the encounter with the colonial other, and as an attempt to create a legal system that could give an account of the relationship between both sides (Anghie, 2007, p. 3). In this creation, it was the civilising mission that gave the tone of the project:

the grand project that has justified colonialism as a means of redeeming the backward, aberrant, violent, oppressed, undeveloped people of the non-European world by incorporating them into the universal civilisation of Europe. [...] in the field of international law, the civilising mission was animated by what I crudely term the question of ‘cultural difference’ (*Ibid.*, p. 3).

In analysing the conditions that brought about the regime of imperialism in world

politics, it is possible to centre the ideological dimension on international legal positivism (*Ibid.*, p. 36) – while the economic and social aspects were established in the section above. Gradually, references to Christendom were progressively changed to civilised nations in the treaties of the period (Grewe, 2000, p. 445). In terms of international liberalism, the Positivist approach delegated particular privileges and responsibilities to liberal-democratic states. Nevertheless, these practices were embedded with imperial projects and concealed within certain forms of liberal moralism (Fitzmaurice, 2012, p. 123; Sylvest, 2008, pp. 403 – 404)

The nineteenth century saw the increasing positivisation of international law. The origin of international law as an agency outside the system and deeply dependent on arguments of natural law was gradually becoming insufficient. However, while domestic law passed through the process of disenchantment as described by Neumann, international law lacked the same development, and therefore, it was often considered a form of morality. At this moment, the discourse on scientific progress and evolution was more fashionable and helps explain why international law was powerless despite its spatial expansion. The idea of international order and justice in an international context, nevertheless, was appealing to the liberal agenda. In this context, the apology of the empire was based on the understanding that European views of progressive civilisation would benefit the world and, hence, should be projected internationally. As a consequence, the justification of imperial expansion, underlying arguments of international law, became common (Sylvest, 2008, p. 406).

Among those arguments, international law sought to conceptualise the difference between the civilised and uncivilised using the constant creation and recreation of this difference as a justification for the practices legally established. Civilised/uncivilised derived from the position European countries enjoyed as imperialists in the nineteenth century. Without the colonial enterprise, international law would have been confined to the relationship between European nations. The expansion of international law, therefore, occurred concurrently with the necessity to justify formal or informal forms of colonialism. Despite the expansion of European international law in this period, it was necessary to qualify this expansion. In justifying imperial practices, writers of the period stated that international law could only be applied between civilised nations. As such, because it would be necessary to act by reason, only civilised nations could be part of the system (Anghie, 2007, p. 53)

The relationship between Western and Non-Western nations created a ‘dynamic of

difference' that allowed the imperial power to delimit clearly the difference between what was civilised, thus universal, and what was uncivilised and particular. The expansion of international law in the context of imperialism and the colonial experience highlighted the encounter not among equals, but between a civilised and sovereign European State and an uncivilised Non-European State, in a logic of exclusion-inclusion (Koskenniemi, 2004, p. 127). As a consequence of this understanding, universalism functioned as a tool to conceal other international experiences under a global European prescribed international law.

Intellectuals in the nineteenth century sought to devise a system of international law that could include the idea of a single set of rules, institutions, procedures and principles that would be universal (Anghie, 2007, pp. 40 – 41). However, positivists in the nineteenth century had never developed a formal procedure to determine how civilised a nation should be (Koskenniemi, 2004, p. 134; Schwarzenberger, 1939). As domestically observed by Neumann and Kirchheimer, the dichotomic pair, civilisation/barbarism, became a vague standard in favour of Western powers but applied to the colonial world. The concept of civilisation and its main elements had different definitions and explanations, usually related to their linguistic origins and philosophical approach. In its usual Anglo-French characterisation, civilisation referred to a European creation of the nineteenth century, as part of an Anglo-French cultural consciousness, and highly linked to ideas of progress and development, particularly in terms of technical/industrial development of the Industrial Revolution (Grewe, 2000, pp. 447 – 448). Meanwhile, the distinction between civilised and barbaric (or uncivilised) corresponded to one of the most important features of this philosophical approach. This indeterminacy of the concept of civilisation accounted for the possibility of mobility between one category and the other. At the same time, the dichotomy of civilisation and barbarism presented an immanent European background of superiority (Sylvest, 2008, p. 407). Some scholars of international law of the period created several subdivisions of humanity in terms of how civilised a nation actually was. James Lorimer (1883) is a constant example of a jurist who embodied the ideas of a civilising mission and the dichotomy of civilisation/barbarism in the literature. According to him, there were stages of civilisation, and international law could entitle partial recognition to 'semi-barbarous' nations, even though those recognitions had no effect on the issue of rights and duties of nations, nor on the enjoyment of full membership of the society of nations (Grewe, 2000, p. 454; Lorca, 2010).

Those who advocated the need to be civilised to enter the society of nations, understood that the expansion of this legal order occurred when non-European nations were accepted as part of the society of nations. In this sense, international law should regulate the relationship between States which were attributed international legal personality. Hence, legal personality regulated the division between civilised and uncivilised. Only then, could the State be considered a member of the international community. The initial concept, and the justification for the whole system of international law, therefore, depended on one necessary vague and open requisite: the standard of civilisation (Lorca, 2010, p. 476).

In sum, the international law developed by legal positivism during the period of imperialism had to deal with a similar concentration of power and capital to that which Neumann and Kirchheimer observed domestically. Instead of the leader being the holder of power, Western nations had a stronger position than non-Western nations. These were the countries from which most cartels originated, concentrating economic power and distorting the capitalist system based on competition of pulverised enterprises in a free-market. In this context, international law could not function based on general norms, but it developed a normative based on vague concepts. The lack of international institutions and the underdevelopment of international human rights law could not avoid the use of vague norms to comply with power holders' interests, in this case, justifying colonialism.

It has been recognised that the period provided some benefits for international law, such as: the 'increase and technical improvement of treaty law and private international law, and progress in arbitration and the emergence of functional international cooperation' (Koskeniemi, 2004, p. 98). In terms of human rights, several interventions were described as 'humanitarian' or as a 'humanitarian support', to the extent that, with a few exceptions, humanitarian interventions 'increasingly absorbed all other grounds for intervention' (Grewe, 2000, p. 493). However, these interventions were used to shadow economic and political interests. This issue appeared in the Berlin Conference. Designed to articulate a European colonial practice and handle the subsequent scramble for Africa, all participants put forward a version of their civilising mission. In the conference, they proclaimed a humanitarian treatment of the inferior and the necessity to expand civilisation to the natives. It was in this ideological context that the Congo Free State was created, later recognised as belonging to the personality of King Leopold II of the Belgians (Anghie, 2007, pp. 96 – 97). Other interests than humanitarian actions were later justified by Sir Travers Twiss (1809 – 1897),



manipulating international law to serve King Leopold's cause, while John Westlake (1828 – 1913) justified the South African War (1899 – 1902) by avoiding legal arguments (Sylvest, 2008, p. 405). In the end, in the political constitution of the observed international law, conservative forces prevailed and the emancipatory force, prompted by the revolutions of the seventeenth and eighteenth century, were blocked by this system of power.

This thesis has shown that the dialectic of emancipation and repression appeared in the development of international law in relation to human rights in several historical instances. As argued by Neumann and Kirchheimer<sup>31</sup>, law has an emancipatory role, but in distinctive historical times, this role has been overwhelmed by a repressive one. In this case, human rights norms would be used as a tool for political and economic power. A capitalist economic system, based on the concentration of capital and monopolies, with a concentration of power and based on the inequality of its members, created a system of vague and open-ended norms, whose definition was highly discretionary, protecting the strong. In the next section, I will critically assess attempts from the peripheral world to resist this system.

### **Conservative Transformation: Imperialism, Peripheralism and Universalism of the Nineteenth Century International Law**

In previous chapters I have argued that there were elements in the emancipatory side of the dialectic that generated repression. In these periods, there were some elements that political power interpreted differently. In Chapter Three, for instance, both the conquest and the universalisation of natural law for indigenous people were derived from the development of international law and natural law based on Vitoria's works, resulting in the necessity to radically change the basis of natural law in order to progress to more emancipation. In this sense, the American Revolution challenged the traditional interpretation and raised the Enlightenment as a viable political alternative that could legitimise a new political constellation. In Chapter Four, I argued that this alternative was present in the French Revolution, but that the Rights of Man and of the Citizen were also central to maintain repression in Haiti. In this chapter, I will show that the Enlightenment also provided an ideal of civilisation that was further developed by positivism. It will now be argued that, despite the situation created by legal positivism at the end of the nineteenth century, the elements

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31 Cf. Boaventura (Santos, 2002).

found in its theory to repress the periphery of the system were also re-interpreted to allow them to belong to the 'society of nations'. There were different strategies used by former colonies to legitimise their position as sovereignty and, thus, as entitled to rights.

In this sense, Arnulf B. Lorca (2010) outlined different movements on the eve of positivism theory in international law. Nevertheless, this perspective did not acknowledge that, despite the progressive attempt from the periphery to achieve equality with European nations, this attempt was rather conservative. Dealing with the work of international lawyers originating from peripheral parts of the world, Lorca stated that 'semi-peripheral international lawyers rarely critiqued the standard of civilisation' (Lorca, 2010, p. 501), rather, they decided to incorporate the new positivist approach and this standard in their reasoning, transforming the original idea behind the principle in order to be accepted as civilised and, thus, equal. Although there could have been gains in terms of the relationship between a particular peripheral State and European nations, it could be argued that this movement was conservative and did not represent the duality of rights dealt within this thesis.

The transformations that occurred in German society with the inclusion of proletarians in the Parliament, as stressed by Neumann and Kirchheimer on several occasions<sup>32</sup>, represented a profound transformation of the forces of that society and a greater emancipatory potential. When the proletarians ascended to the *Reichstag*, the constitution derived from this process suffered numerous transformations, including and universalising rights that were denied to several parts of their society. In the political constitution of these rights, the judiciary was forced to review some of the concepts in order to incorporate the changes proposed by the Parliament. These transformations were so profound, that the author witnessed a significant change from a system of Rule of Law, to one of Social Rule of Law. The subsequent destruction of this system by the Nazi Regime, strengthened the argument, according to which there was an emancipatory potential within the legal system. The uses of the international positivism approach by (semi-) peripheral international lawyers in the nineteenth century, however, did not challenge the rights and the system of power already established.

Peripheral lawyers opted to discuss the situation of their nations within the framework given by European international law, especially regarding the idea of the standard of

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<sup>32</sup> And in this thesis, chapter two.

civilisation. Several jurists from semi-peripheral regions, such as Carlos Calvo from Argentina, Etienne Carathéodiry (a Turkish national but ethnic Greek), Nicolas Saripolos (also Greek) and Tsurutaro Senga (Japanese), among others, sought professionalisation in international law in Europe. They developed similar versions of the positivist international law theory as a strategy to include their own nations as part of the Society of Nations. At the same time, it would extend the privileges of formal equality to them (Lorca, 2010, pp. 482 – 483). Their expectation was to resist European expansion by declaring themselves as an equal part of the system, and, therefore, unsuitable for interventions. It was not an attempt towards universal equality between Western and Non-Western nations. They managed, nevertheless, to limit ‘the grounds for a *de iure* justification of inequality’ (*Ibid.*, p. 488).

Their opting toward international positivism was conscious. At that time, and due to the spread of naturalism in legal theory, legal reasoning based on natural law was detrimental to semi-peripheral states. James Lorimer, a Scottish jurist, presented his concept of international recognition, revealing racial and power differences with arguments from natural law. His theory assumed that the law of nations could only be discovered by observing natural facts and that positive international law was only an expression of the law of nature declaring itself. The reality of world politics, however, would have shown him that in international law, inequality of power between States was the most natural phenomenon. ‘Power is the measure of their extent and the warrant for their enforcement’ (Lorimer, 1883, p. 226). He stated that power is the measure according to which a civilised nation has the right to interfere. The duty to interfere would originate from power itself, allowing more civilised nations to interfere, or, in Lorimer's words:

The moment that the power to help a retrograde race forward towards the goal of human life consciously exists in a civilised nation, that civilised nation is bound to exert its power; and in the exercise of its power, it is entitled to assume an attitude of guardianship, and to put wholly aside the proximate will of the retrograde race (*Ibid.*, p. 227).

Therefore, by applying a *de facto* principle, there would be no formal legal equality. Despite Lorimer's works, semi-peripheral lawyers focused on two positivist arguments for recognition: the separation between law and nature, and positivism's understanding that laws are only rules which emanate from a sovereign. However, positivism alone was not enough to maintain and expand the non-Western presence in international society. Even when the sovereignty of certain nations was guaranteed, interventions were still possible. As seen in this chapter, international law during the period of imperialism served to justify a European

presence elsewhere and also interventions. Semi-peripheral lawyers, therefore, had to argue not only against naturalistic perspectives but also against European positivism.

Against European positivism, semi-peripheral lawyers focused on two issues. The first one was absolute sovereignty, emphasising autonomy and equality. Whereas Western lawyers stressed factual independence, semi-peripheral internationalists included rights and duties in their definition. Formal equality could only be achieved when sovereign nations respect both terms. According to them, embedded in this respect were several principles such as political independence and preservation of territorial integrity (Lorca, 2010, pp. 491 – 493). Hence, international interventions should be subordinate to the situation in which the nation finds itself, not intrinsic to the situation. Carlos Calvo (1896) argued that interventions in the European context followed principles of international law such as equilibrium among nations and protection of moral or religious values. In the case of the Americas, however, interventions after independence were politically motivated or for pecuniary compensation – justified as the protection of private interests. In the American context, Calvo stated that:

Regardless of the point of view adopted, it is impossible to discover a single serious and legitimate reason that could justify up to a certain point the European interferences in the domestic affairs of the Americas (Calvo, 1896, para. 204 trans. by Lorca (2010), p. 493)<sup>33</sup>.

Therefore, for non-Western lawyers, absolute sovereignty was related to the principle of non-intervention. If Europeans had the right to intervene in American affairs, the opposite would also be true. In this situation, the maintenance of treaties and the relation between nations would be difficult and impractical.

The second issue was the standard of civilisation. Semi-peripheral jurists accepted this principle as necessary for the establishment of those nations which merited being part of the international society. They opted to focus on the institutional side of domestic politics as a gateway to international society. By establishing the minimum institution necessary to be part of the international realm, it would inhibit the discretionary power of European nations against non-Western nations in terms of recognition. Also, for non-Christian nations, clear standards could soften the relationship between Christianity and International law (Lorca, 2010, p. 496). The lack of criticism of these standards by non-Western jurists can also be

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<sup>33</sup> §204. A quelque point de vue qu'on se place, il est impossible de découvrir une seule raison sérieuse et légitime qui pousse justifier jusqu'à un certain point ces ingérences européennes dans les affaires intérieures de l'Amérique (Calvo, 1896, p. 348).

explained by the internal situation after the period of colonisation. In the Latin American context, it has been suggested that the vacuum left by the European authority – aligned with regional self-consciousness of their situation in comparison with modernity in Europe – provided, at the beginning of the nineteenth century, the origins of a project of ‘completing civilisation’. Nationals from several parts of the region would have appropriated the idea, and they would have turned it into a powerful legal discourse domestically (Obregón, 2006).

In sum, the universalisation of international law in the nineteenth century found a conservative resistance in the writings of semi-peripheral jurists. With the independence of their nations, several jurists sought to understand better European International law and its application. Fearing that the geographical expansion of European power, justified by their set of international rules, could end in intervention in the former colonies, these lawyers absorbed the European approaches and legal reasoning to develop several attempts to use their theory against expansion. This resistance, nevertheless, was not universal, nor transformative. Rather, each jurist appropriated international positivism at their will and adapted concepts and principles to justify the recognition of their nation within international society. Despite the fact that there was not a strong debate about human rights in terms of resistance and emancipation in the development of international law in the period, the periphery found a way, albeit conservative, to try to resist the expansion of European power.

## **Conclusion**

In this thesis, it has been argued that human rights have played a role in legitimising politics in international relations. I have examined the post-colonial literature that affirmed the role of human rights law in the development of global designs. It has been noted, however, that it is necessary to deal with the political constitution of law, and to understand the role the dialectic of emancipation/repression plays in the constitution of practices in international relations. With that in mind, having examined the work of the legal theorists of the Frankfurt School, it would seem that their understanding of the conditions of human rights in the process of creating the Weimar Constitution, could shed some light on the problems human rights faced in international law.

Therefore, I have demonstrated that international law and human rights followed a

process of ‘disenchantment’ in different historical periods, always highlighting the colonial side. Domestically, the institutional development, aligned with the idea of democracy, and national sovereignty based on the Parliament, would result in a protection of these rights in the form of the rule of law that, later – especially with the proletarian participation in the Parliament – would become a social rule of law. Nevertheless, the Nazi regime, supported by (monopolists) capitalist interests, would create a situation of lawlessness, in which the last legal resort would be the decision of the Leader.

In this chapter, I have argued that the characteristics of international law during imperialism resembled the economic environment described by Neumann and Kirchheimer. Therefore, some of the transformations suffered by the law in the German context could also be perceived in the colonial context. Using the idea of confining conditions to understand regimes, it could be suggested that during colonialism, the ideological element was the legal positivism that defined, and was defined by, the differentiation between Self and the Other, or civilisation and barbarism. Not only is it evident that civilisation was created in the European context – eclipsing other (multicultural) international experiences – but I also observe that there was an absence of clear procedure and necessary juridical institutional framework to determine which nation was, or was not, civilised and, therefore, a member of the society of nations and possessor of rights. In this hostile environment, the law was delegated to the power holders, unable to fulfil its emancipatory role.

The next chapter will deal with the situation of human rights and international law in a slightly different situation. Human rights violations in World War II allowed unprecedented development and universalisation of rights. The institutional framework and legal structure in relation to the economic situation would still contain some of the elements presented in this Chapter. It will be in this context of the expansion of social rights on the one hand, and economic concentration and American imperialism on the other, that I will analyse the dialectic of emancipation and repression, specifically in humanitarian interventions.

## **CHAPTER 6 – SOCIAL RIGHTS AND HUMANITARIAN INTERVENTION IN THE TWENTIETH CENTURY**

In the previous chapter I looked at the issue of human rights in the nineteenth century and how they were negated at their foundation, by the detachment of social groups from the process, creating a social-baseless law. In contrast with the movement in terms of rights given by the revolutions of the eighteenth century, the nineteenth century saw a reduction in the expansion and universalisation of human rights. Since the beginning of the twentieth century, however, especially after the end of World War II, human rights have become a central part of the international order. If we consider the historical argument developed in this thesis, according to which the development of law/international law into formal law signified the disenchantment of the law and consequently codification of those norms, it was in the second half of the twentieth century in which most international rules became ‘concrete in terms of international legal instruments’ (Lang, 2009, p. 193).

Following the theoretical approach of this thesis, I have been working to increase awareness of the ‘contradictions and tensions within and among the principles and practices of Western modernity’ (Cotter, 2005, p. 95). I understand that the condition, post-World War II, sought to re-introduce a social base in international law, by advancing the rationalisation and formalisation of international human rights law. At the same time, it created the mechanisms necessary to legitimise violence in the name of human rights. With this proposition in mind, this Chapter will focus on two issues that highlight the dialectic of emancipation and coercion in human rights. The two distinctive elements are the development of social welfare policies and the increase of humanitarian interventions – especially in Kosovo – during the post-Cold War era. It will be argued that human rights, on the one hand, can represent the emancipatory in the expansion of social rights in the West, and internationally by establishing Covenants on Human Rights, while they can also present challenges for the universalisation of social rights in the Third World. On the other hand, the context of American imperialism during the Cold War changed the relationship between universalisation of human rights and the violation of human rights, clearly regulating the roles of the West and of the Third World.

The context for the transformations in the twentieth century is the revolution of modern constitutionalism. In the eighteenth century, sovereignty was proclaimed in the name of Man, not

God, and consequently it integrated human rights in this new movement. Hence, it developed the idea that human rights and people's sovereignty would have co-originated. In this sense, Hannah Arendt wrote that '[it is] only natural that the "inalienable" rights of man would find their guarantee and become an inalienable part of the right of the people to sovereign self-government' (Arendt, 1973, p. 291). However, she doubted that people's sovereignty and human rights could guarantee one another. While human rights were related to the Right of Man and the eighteenth century tradition, sovereignty was a discourse understood 'as the claim to control, rule, and assert jurisdictional supremacy by an undivided, single political instance within a territorial body politic. [...] It is a discourse of rule and domination' (Benhabib, 2010, p. 139). The contradiction arose from the transition human rights suffered: if at first they were the heritage of all human beings, the politics of colonialism restricted the initial universalism, moving them to the heritage of specific nations, while the State became an instrument of the nation (Arendt, 1973, pp. 230 – 231; Brunkhorst, 1996). In addition, the meaning and significance of Rule of Law is a matter of debate. It has been described as 'a concept of the utmost importance but having no defined, nor readily definable, content' (Cotterrell, 1995, p. 160).

The first part of this Chapter will deal with social rights. This section will look at how rule of law and social rights were connected in the Weimar Constitution, spreading social human rights across Europe. I will develop the idea that social human rights were important in creating a real social rule of law that could, in theory, suppress the capitalist system. It will also be shown that despite the fact that the West experienced a better situation, the Third World lacked the same benefits. The gap between both sides was not bridged, and the Third World had to demand the right for development. It should be explained that the movement of expanding rights is not only bottom-up, from the powerless to the powerful, but that the fact that the State granted the rights it is also a part of the politics studied, and it does not minimise the importance of the contradiction presented. Rather, the necessity to expand rights in order to beneficiate economic needs just emphasizes the political use of human rights, and its repressive side.

The second section will detail a repressive situation in the development of human rights. If, up until the middle of the twentieth century, there was a preoccupation with developing and implementing human rights, the positivation and codification of human rights norms took another step in the enforcement of those standards. In this context, humanitarian intervention became the ideal, according to which the well-developed nations in the West sought to intervene in situations of domestic mass human rights violation.



## **Social Rights and the Development of International Human Rights Norms**

This section will trace the development of social rights in the welfare state from its beginning until its consolidation in the Weimar Constitution. I will examine the internal transformations in German society that, in the end, allowed the inclusion of social rights in the constitution and changed the relationship between State and society. These transformations allowed Neumann to perceive the emancipatory possibilities of classic formal law and the establishment of a social rule of law. Despite the Nazi regime, this development was important in spreading social human rights and the welfare state internationally.

Social-economic rights developed as a response to several events. In the theoretical context, Marx and others pointed out that there was enough provision for the sustenance of the individual or the unfair distribution of wealth (Marx, 1992). Politically, the upheavals in Europe in 1848 revealed the disillusionment with the liberal order and claimed better conditions of life and work, which were the basis for subsequent social legislation. Those rights were designed as positive rights, meaning that the actions of members of the State were actively responsible for them, instead of the traditional negative movement, in which the government would only refrain from action (Lang, 2009, p. 194). Despite the fact that these rights are central to the current international order, their codification was tumultuous (Forsythe, 2012). Both signature and ratification of the large human rights treaties, demanded time and persuasion. In the end, there was a dispute about their implementation in the Third World.

In regard to the passage from civil to social rights, Norberto Bobbio (2004) has an interesting argument. He addressed the process that originated the multiplication of rights in three ways. First, there was an increase in the number of situations that were considered worth tutelage. Second, there was an expansion of the entitlement of rights and third, there was a transition between considering man in the abstract, to considering him in his concreteness. Instead of thinking about the Rights of Men in general, there was a movement that forced the understanding of the needs of specific groups: the physically challenged and children, among others. In sum: more goods, more subjects, more *status* of individual (Bobbio, 2004, p. 68). This process was focused on social rights and, therefore, was at the centre of social welfare. In a theoretical sense, social welfare could be theorised in terms of well-being, which means that it was concerned with ‘the levels of health, security, material prosperity, participation and so on, experienced by members of a population -

individually or collectively'. Alternatively, 'welfare comprises a system of social and institutional relationships through which people secure or maintain their individual or collective welfare'. (O'Brien, 1998, p. 7). It can also be a discourse that comprises a matrix of knowledge – 'a culturally constructed and politically sanctioned framework for defining experience and for realising definitions in practice' - shaping the world and defining it (*Ibid.*, p. 8).

The historical development can show us that, initially, social rights were not part of the fabric of citizenship; social historical development provided a long process of uneven distribution of income that gradually bridged the gap between social classes. Starting at the end of the nineteenth century, especially with the Revolutions of 1848 that spread across Europe claiming better conditions of life, the monopoly of 'civilised and cultural life' was brought to within the reach of others and progressively strengthened the demands for the abolition of inequalities (Marshall and Bottomore, 1992, pp. 27 – 28). In this sense, the suffering of British soldiers during World War I inspired the movement whose objective was to build homes for those who fought in the war, relieving them of their torments. The post-war depression prevented the expansion of social rights, and it was only during the Great Depression, that most governments expanded social welfare programs. Because of the severe economic problems their countries faced, the private sector was unable to deal with these massive problems and it became the role of national governments to assume them as their responsibility. Even in the United States, where there had always been strong criticism of State intervention, President F.D. Roosevelt's policies developed a form of social welfare that was called Social Security. After the Great Depression, his main concern was with the 'vicissitudes of life' (Macarov, 1995, p. 4; Spicker, 2000, p. 73). In a speech he delivered on 14 August 1935, Roosevelt stated that:

We can never insure one-hundred percent of the population against one-hundred percent of the hazards and vicissitudes of life. But we have tried to frame a law which will give some measure of protection to the average citizen and to his family against the loss of a job and against poverty-ridden old age. This law, too, represents a cornerstone in a structure which is being built, but is by no means complete.... It is...a law that will take care of human needs and at the same time provide for the United States an economic structure of vastly greater soundness (Altman, 2005).

It was, however, during the Second World War<sup>34</sup> that the exigence of aid, obliged governments to make a stronger commitment in favour of social welfare, aiming to guarantee the

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34 The Welfare State was not a consensus after World War II. Neo-liberal perspectives, from Hayek and Friedman works, proposed to deal with the problems of the contemporary welfare state. They believed that the knowledge of the Enlightenment is fundamentally misleading about the effect of the state in organising society. Rather, the market should be the measure of efficiency. Welfare is reduced to the realisation of freedom by the individual in their own terms within a legal framework.

protection of their citizens against unforeseen situations. In the United Kingdom, it was the Beveridge Report of 1942 that laid the foundations for the modern welfare state, with many of its proposals being implemented, including the creation of the National Health Service, during the period of the Labour government, between 1945 and 1951.

The debate over social rights and the construction of the welfare state in pre-war Germany were connected with the shaping of the Weimar Republic. Religious based relief groups, the Workers' Welfare from the SPD and Progressives, disputed the importance of rights in the new State. Progressives and Social Democrats considered labour as the essential characteristic of citizenship. Because of the special role of labour in society, they expected that the new social contract would oblige the government to guarantee social rights to work, health and education as part of allowing the citizen to fulfil their role imposed by the welfare state. That would create a society that could transcend bourgeois individualism and excessive collectivism (Hong, 1998, pp. 44 – 45).

The Weimar Constitution gave one step forward and embodied the social rights that are behind many of the welfare reforms in Germany and elsewhere in Europe. When dealing with the inclusion of social rights in the Constitution, Neumann and Kirchheimer focused on the relevance of the Soviet Declaration of Rights of the Working and Exploited People of 1918. My argument is that the development of social rights due to an overall concern over the proletarian situation can also be traced to the Revolutions of 1848, and to the role of Pope Leo XIII and his Encyclical *Rerum Novarum* in the European consciousness.

The fulfilment of some emancipatory potential was once more possible in the European domestic politics. The Revolutions of 1848, also known as the Spring of Nations, was a widespread revolutionary wave, formed from several political upheavals. It happened in the wake of nationalism and the processes of reunification in Italy and Germany. There were several demands, but mostly they called for an end to the old feudal structures, while their dissatisfaction also required changes in political participation and several liberties, such as freedom of press and rights of the working class. With the advent of the Industrial Revolution, there was an increasing mismatch between the situation endured by the proletariat, and by the bourgeoisie. Despite the widespread revolutions in this period – the 'spirit' of the Spring of Nations even reached Pernambuco, Brazil in the so-called Praieira Revolt – most movements were suppressed by reactionary forces.

Concerns about the workers' situation, however, did not disappear. The Catholic Church expressed its concern in a progressive stance taken by Pope Leo XIII in 1891. In the Encyclical *Rerum Novarum*, Leo XIII sought to reaffirm the role of the Church and its moral ground to deal with social issues, especially social justice. The Encyclical posits Catholicism within the main issues proposed by the revolutions of the period. Although it condemned the socialist solution to the conditions of the working class, the Church understood that the situation of the workers was a pressing issue at the time the Encyclical was published, and affirmed that the working class should be treated with the justice that had been denied to them:

the interests of all, whether high or low, are equal. The members of the working classes are citizens by nature and by the same right as the rich; they are real parts, living the life which makes up, through the family, the body of the commonwealth; [...] It would be irrational to neglect one portion of the citizens and favour another, and therefore the public administration must duly and solicitously provide for the welfare and the comfort of the working classes; otherwise, that law of justice will be violated which ordains that each man shall have his due (Leo XIII, 1891, para. 33).

In 1918, Russia's Revolution and the Declaration of Rights of the Working and Exploited People also influenced the adoption of an extensive list of social rights in Germany. Despite not being exhaustive, this Soviet Declaration of Rights established the main issues in the socialist agenda, abolishing exploitation by eliminating social classes. That was made possible by introducing a socialist organisation of society and guaranteeing the power of the working people (Lenin, 1964, pp. 423 – 425).

Therefore, since the beginning of the Weimar Republic, those responsible for drafting the Constitution had to answer to domestic dissatisfaction and economic interest, with the novelty that there were elected workers in the Parliament. After the German Revolution of 1918, the 'architects' of a new constitutional order sought to develop an unprecedented social and economic equality that could be supplementary to political democracy. This project was derived from a classical Marxism that 'demand[ed] to outfit so-called formal democracy with an egalitarian post-capitalist social structure' (Scheuerman, 1994a, p. 44), while the social rule of law represented the rationalisation of the demands of an industrial proletariat for equality in the nation's political life (Neumann, 1967, p. 46).

The importance of the proletarians in the Parliament should not be underrated. In his historical analysis, Neumann observed some attempt to include the excluded in Hegel. However, Hegel was unable to include a fourth group – of the dependent workers – in his division of the State. Because Hegel derived his idea of State from the harmonic interests between states, to include this

fourth estate, Hegel would have to assume that the benefit of workers and the bourgeoisie would be identical. However, Hegel was aware not only that both groups had different interests, but also that the poverty of the fourth estate produced the riches of the third estate. Hegel would rather abandon the fourth estate (Neumann, 2013, pp. 284 – 285).

The historical development at the beginning of the twentieth century suggests that it is possible to reconcile formalisation of law and social welfare policies. For instance, social welfare-type reforms made by the American government during the New Deal were important to address this issue. Because these norms were based on classic formal law, stating concrete and clear objectives, the politicians were forced to use legislative power to achieve welfare. Recent reforms, however, were the result of semantically ambiguous status that ultimately originated from diffused forms of regulatory state capacity, that, in consequence, granted poorly defined legislative authority to antagonistic interests. Social rights, thus, re-established the generality of the law, despite the monopolistic phase of the beginning of the century. At least at the individual level, human rights advanced in providing rational and general forms of law.

As a consequence, the rule of law presented in the constitutional order of Weimar was no longer bourgeois, but explicitly anti-capitalist. Thus, this project goes beyond classical Marxism because it understands the relationship between human rights norms, institutions and the social and economic life differently. In addition, ‘recent’ history also contributed to the establishment of social rights that, ultimately, allowed the analysis of Neumann and Kirchheimer as presented in this thesis, culminating with the social rule of law. In this period, components of the rule of law were disintegrated under the contemporary regulatory state. This disintegration accounted for the increase of amorphous and indeterminate norms that were constructed using vague standards. Insofar as the legal tradition has advocated the importance of a clear and predictable form of legal norms, the current state of international law presents concepts such as ‘public interest’ or ‘in good faith’ that deviate from the original idea. In a comparison between the Old Age Insurance (OAI) of 1935 and the Aid to Dependent Children (ADC), Scheuerman observed that the OAI presented clear criteria of eligibility, while the ADC was more discretionary. The decision about eligibility in the ADC forced several arbitrary shorthand decisions on numerous subjects. One of these decisions is about the fulfilment of the criteria ‘suitable home’, a standard that does not have a clear definition, allowing similar situations to have different outcomes (Scheuerman, 1994b, p. 207).

However, I understand that some problems can be noted in this period. When the requirement is fulfilled by formal law, specifically in terms of the formal process of legal norm

codification, there can be found the generality of law. This completeness between formal law and capitalism, therefore, should indicate that any change in the economic side would necessarily oblige a change in the legal side. In this sense, the challenge caused to capitalism by the welfare state, would undermine the importance of formal law. However, the co-existence of capitalism and de-formalised forms of law showed that this affinity cannot be taken for granted. Notwithstanding, the lack of formal law and the predominance of open-ended norms and vague standards could have the effect of enhancing the power of already powerful economic groups, allowing more beneficial rules to these economic conglomerates than to individual capitalists (*Ibid.*, p. 204). However, it could be suggested that the transformations in human rights at the beginning of the twentieth century turned classical general law into a form that it is not necessarily 'bourgeois'. In this sense, the elective affinity between organised capitalism and *Situation-Jurisprudenz* – 'legal system dominated by the exigencies of the ever-changing individual situation' (Neumann, 2013; Scheuerman, 1994b, p. 205) – poses a real threat to the rule of law.

Although it is true that the rule of law can be institutionalised in different ways, including in a bourgeois way, the common position, according to which the rule of law only crystallises in a bourgeois state, obscures the significant relationship between the rule of law and democracy. At the same time that formal law is one of the conditions (one of the main conditions) for legal calculability and regularity, it also contributes to relatively free and unconstrained decision making. Only when the State is well regulated, including the relationship between State and public or private actors, can there be the presupposition of an autonomous citizenship. Also, cogent formal law can better provide the legal framework to regulate State intervention. If the welfare state requires State intervention, cogent formal law would be a tool to avoid excessive interference in individual liberties and free political action (Scheuerman, 1994b, p. 205). Because the left was worried about responding to criticisms, the current debate between de-formalisation and the welfare state ended, making the literature forget the perils of the contemporary administrative State. The disintegration of key components of the rule of law, related to the massive discretionary authority that the State possesses, is a problem in itself. Also, despite the widespread assumption that there is a tension between rule of law and the welfare state (*Ibid.*, p. 206), Scheuerman noted that, on the account of the American welfare state, the New Deal of F.D. Roosevelt was built within the traditional legal form.

Moreover, when describing article 109 – about equality before the law – Kirchheimer insisted that equality should also mean positive social economic equality, and that it would call a

legislator to guide this transformation. Despite the traditional liberal/negative interpretation, a historic-sociological interpretation of this article would give the idea that '[equality] can demand not only that each is provided with the legal potential to share the goods of society, but it can also offer the real possibility implied in the demand' (Kirchheimer, 1987, p. 32). In the end, the Weimar Constitution was central to the idea of social rights, because of the political role played by industrial proletarians, managing to protect their interests, and including labour rights as constitutional law, and its structure spread to other constitutional orders. After a period in which human rights were negated and monopolies forced the introduction of vague and open-ended norms, the transformations in social rights represented a new era of legal emancipation. At that time, this was, however, in contradiction with an international economy. Nevertheless, the emancipation observed in Europe was not universalised as it should have been.

In the next section, I will suggest that the expansion of social rights and the welfare state had important ramifications in the Third World that demanded an answer from the First World. These ramifications were expressed in the Bandung Conference and in the understanding that the Third World could only achieve the same standard if developed nations participated in the process guaranteeing development as a right and bridging the economic gap generated by imperialism and colonial practices.

### *The Third World and the Fight for Development*

It was suggested in the previous section that the inclusion of social rights in the domestic politics of European States was an attempt to escape from the inequalities produced by the de-formalisation of law in development since the monopolisation of the economy. In this section, I will suggest that the principle of the development and entitlement of social rights in the Third World depended on economic development that could not be achieved due to the economic structure that permitted social rights in the first place.

The social welfare state became hegemonic in the West and crystallised the interest of a class that, until the beginning of the twentieth century, had been marginalised. With the codification and formalisation of social rights that transformed constitutionalism everywhere, the possibility of a social rule of law was a step toward an emancipatory legal-political system. It once more forced the West to give an answer to universalistic issues about the implementation of human rights in the

Third World. In this sense, despite being the era of the internationalisation of human rights – represented by the Declaration of Rights and the two Covenants in Political and Social Rights – this step was not sufficient to universalise human rights as would have been expected. There were, therefore, different questions posed by the Third World with respect to their implementation, based on the idea of development. In this context, the fight for the inclusion of development as a human right represented an attempt to emancipate further, places that were in the process of decolonisation. Concerning the Declaration of Rights and Covenants, notwithstanding that they could have presented important elements for this thesis, the focus on development and the Third World followed more closely the historical development of the civil rights to social rights and avoided the repetition of elements already presented in the literature. Moreover, the decolonial literature give more importance to the Bandung and development as a starting point to think about coloniality/decoloniality.

The expansion of the Welfare State in Western countries demonstrated that development was a major force in implementing human rights at the domestic level. A more social oriented definition of development, as stated by Amartya Sen (2001) assumes that the exercise of development is the overcoming of new and old problems, including:

persistence of poverty and unfulfilled elementary need, occurrence of famines and widespread hunger, violation of elementary political freedoms as well as of basic liberties, extensive neglect of the interests and agency of women, and worsening threats to our environment and to the sustainability of our economic and social lives (Sen, 2001, p. xi).

In Sen's approach, freedom is intimately connected with development. He argued that political and economic freedoms, as well as social welfare policies, help to strengthen rights in society, instead of being hostile to one another. The understanding, according to which development depends only on economic growth, is one-sided and limited. Rather, the implementation and enforcement of social and political rights and development are co-constitutive and result in an overall increase in freedom. Sen identified five instrumental perspectives in empirical studies about freedom. According to him, political freedom, economic facilities, social opportunities, transparent guarantees and protective securities link each other and end with the enhancement of human freedom in general (*Ibid.*, p. 10).

In accordance with this, after the Second Word War, the process of decolonisation also resulted in a new demand for social rights as freedom. Hence, one of the important events in the process of decolonisation that happened in the second half of the twentieth century was the Bandung Conference. Considered as the first intercontinental conference of people of colour, this



Conference was unprecedented, unifying the Third World (Tan and Acharya, 2008, p. 1). The then 'new' nations, or recently independent nations, used the Conference to express their concerns about how international relations were conducted until that moment, and expressed their discontentment against power politics. Most of the participants still had to show their adequacy in relation to the national standards imposed by the European system. Some of them could not give proof of identity in accordance with the Weberian ideal-type of nations – one territory, one people, one authority – hence, the conference also served as a place to establish their sovereignty and their position in relation to other international law. Consequently, the Final Communiqué of the Conference expressed their position on several 'universal' norms, or rather, a contextualisation of so-called universal international norms in the Asian-African context. Delegates present in Bandung also rejected the idea of intervention (Tan and Acharya, 2008, p. 4). The Conference also provided the Third World with a third diplomatic approach, expressed in terms of the possibility of non-alignment. Alongside the principles of coexistence, dialogue and compromise, non-alignment would permit weak governments to stress their autonomy and solidarity. Bandung, therefore, represented an important step for the Non-Aligned Movement and, in its way, an alternative to the dichotomy of the Cold War (Tan and Acharya, 2008, p. 9).

After the Conference, there were other attempts to unify the Third World around a common agenda. The Bandung Era, from 1955 to 1975, dealt with national development in the context of an emergent Third-Worldism and proposed the establishment of a New International Economic Order (NIEO). The evolution of the issue generated the First Conference of Heads of State or Government of Non-Aligned Countries, in Belgrade, Yugoslavia in 1961. With the crescent decolonisation in the Third World, the priorities moved from decolonisation to inequalities between nations. This discussion was amplified and expanded from the Third World to the UN. With their growing importance as an alternative, the members of the Non-Aligned Movement successfully raised concerns about the exploitative economic relations between the East and West. In consequence, the UN incorporated the NIEO in the 1974 UN Declaration and Programme of Action for the Establishment of a New Economic Order (Berger, 2004, p. 50; Tan and Acharya, 2008, p. 69; Young, 2001, pp. 191 – 192). Among the topics for debate in the NIEO were the fairness of the system and international economic justice, and equity between East and West. When the welfare state and Keynesian economic policies were developed at the domestic level in most Western liberal nations, the introduction of the debate on the NIEO sought to implement the same principles and social welfare rights at the international level. It was with this principle in mind that the 1975 Charter of Economic Rights and Duties of States (A/RES/29/3281) declared the end of the

economic gap between developed and developing as one of the objectives in the area. In this sense, development was a universal right and all States had the duty to aid the economic development of other States (Murphy, 2005, p. 113), respecting the principles of the Charter A/RES/29/3281 that included sovereignty, equality and non-intervention, among others.

Some would say that Bandung worked as an ideological force whose centre was Third-Worldism, and that the main objective of this conference was to discover proper and authentic forms of State-mediated development (Berger, 2004). This role played by Bandung allowed some scholars to argue that the movement mattered and, therefore, it has its place in the history of the Cold War and international development. More importantly, Bandung, and the Era following from it, shared at least three main objectives: non-alignment, the elimination of colonialism and racism, and modernisation and economic development (Tan and Acharya, 2008, pp. 73 – 74). The analytical strength of the Bandung Era, however, can only be understood within the post-colonial analytical tool, in an attempt to develop a subaltern history, opening the historical analysis beyond Europe (Chakrabarty, 2007; Spivak, 1988). According to Pasha, ‘colonialism, in all its disguises, effectively removed vast populations from international society, denied equality and prevented the realisation of freedoms’ (Pasha, 2013, p. 158). When we observe this period from these perspectives, the narrative of the relative success of Bandung – creating legal norms – is lost. It happens because the narrative of international relations works to occlude the post-colonial ‘other’ and the outsider remains peripheral. Instead of success, Bandung and the Non-Aligned Movement were unable to present themselves as a more radical alternative, and as a consequence, their actions were directed at mimicking Western political and economic organisation. It was not a rupture (*Ibid.*, p. 146).

With decolonisation and the expansion of Third-Worldism to other parts of the world, especially Latin America, the analytical tool developed the perspective of the Dependence Theory. However, it is important to highlight that the historical narrative in relation to the post-colonial world happened to occlude ‘the other’ from the general perspective, naturalising the dialectic of coloniser/colonised, and, in addition, it prevented the subaltern to construct a narrative outside the categories of the coloniser. Even at that moment, dependency theory was responsible for giving ‘a response to the fact that the myth of development and modernisation was a myth to hide the fact that Third World countries cannot develop and modernise under imperial conditions’ (Mignolo, 2011, p. 276).

## **Humanitarian Intervention**

In the last section, I suggested that the economic system at the end of the nineteenth century was responsible for the demand for a transformation in domestic politics that, ultimately, resulted in the spread of social rights. This argument demonstrates that social rights protected the individual against the power the State had in legislating outside the system of generality that is core in a classic liberal law. I argued that social rights were the interest of a different group, and as such, opened new possibilities of emancipation. The importance of this is that the advance in social rights demanded classical legal forms of law and re-signified the generality of law, even in the context of open-ended norms. Nevertheless, it does not mean that the system was capable of formalising all systems of human rights law. Rather, while at a domestic and international level there were initiatives that formalised human rights, such as social rights and the establishment of international covenants on international human right law (ICCPR and ICESCR), the interest of hegemonic power still forced the production of open-ended and vague norms in international human rights law.

There are several political choices that governments are forced to make when dealing with humanitarian interventions. There are economic interests, protection of the order to avoid violence to escalate. However, I will argue that humanitarian law has been the area of international human rights norms that has suffered from de-formalisation. In the previous chapters, it has been suggested that the dialectic of emancipation and repression showed its repressive form in the treatment of the colonial world, and that in including human rights in international law, there were struggles that maintained their own interests by negating the universalisation of rights. This negation was possible by differentiating the colonised with vague and open-ended legal definitions: the infidel or the non-citizen. In this sense, Kosovo was chosen because it is a case representative of a group of humanitarian interventions whose legitimacy relies on human rights discourse. I have not claimed that all interventions are human-rights based. However, I have placed those human-rights based interventions, which took place mainly in Kosovo, within the dialectics of emancipation and repression in international human rights law. I argue that changes in international human rights law, from classical legal thought to the current situation, developed open-ended norms capable of concealing the repressive side of human rights norms as they related to interventions in Kosovo. When we take that into consideration, it is possible to realise that the fact the legal norms lacked a precise definition allowed repressive elements in the formation of such norms.

In the case of humanitarian intervention, my analysis can only conclude that the vagueness of the letter of the law will be interpreted in a slightly different way. Here, the problem is the lack of proper legal definition that allows this humanitarian intervention to be punitive, despite some emancipatory gains. There is no legal definition of what constitutes the conditions in which a military intervention can be considered as being a 'humanitarian'. In order to exemplify this argument, the intervention in Kosovo can be highlighted. The use of this intervention in particular is justified by the fact that the literature has characterised it as both a humanitarian intervention and a punitive practice (Lang, 2008, 2009; Wheeler, 2000).

Since there is no proper legal definition of humanitarian intervention, the literature tries to provide one that could be used internationally. In this sense, there are those who understand that the historical analysis of these actions has not been developed because the term 'humanitarian intervention' has not been accurately defined, or because the terms of the debate are related to certain definitions that arise in the middle of the nineteenth century (Heraclides, 2012). Nevertheless, the literature on the subject has focused on the elements present in the post-Second World War era to clearly define these interventions. Nicholas Wheeler, for instance, goes as far as the 1970s in his investigation on the matter (Wheeler, 2000). The disagreements are not only theoretical, but also practical. On the practical side of these international policies, it is evident that there are certain types of human tragedies that legitimise them. In general, only tragedies inflicted by men, on men, qualify as such. These actions, perpetrated by men, have often created concerns about 'ending tyranny, stopping slavery, or ensuring efficient and equitable delivery of disaster relief or general humanitarian aid' (Simms and Trim, 2011, pp. 3 – 4).

A first attempt to 'solve' this situation can be found in work that favours an intrinsic connection between morality and politics in the understanding of humanitarian intervention. In this context, the work of solidarists provided the framework for a new 'moral imagination' after the intervention in Kosovo. The solidarist approach sought to explain that through the development of interventions with humanitarian purposes it would be possible to create a better world. According to Karina Butler (2011), the solidarist approach to humanitarian intervention has been influential in the multilateral arena, specifically by prominent UN agencies and prominent NGOs. According to her, an overall agreement about military humanitarian intervention in a given circumstance dictated by Supreme Humanitarian Emergencies (Walzer, 2006, pp. 251 –255; Wheeler, 2000, p. 13) would demonstrate that international society is committed to the protection of human rights and, consequently, to the creation of a better world (Butler, 2011, p. 1).

The arguments about the legitimacy of humanitarian intervention in this solidarist approach, found in the concept of supreme humanitarian emergency, concern the possibility to counter the doctrine and the normative of non-intervention. Because it breaks the 'conventional pattern' of relationship between States, there had to be a new element that could justify these interventions. Hence the focus on these moments. Only by addressing supreme humanitarian emergencies, can the military intervention be truly qualified as humanitarian (Butler, 2011, p. 3; Wheeler, 2000, p. 13). The supreme emergency idea contains two criteria that are related to the imminence of the danger and its nature. The uniqueness of the situation requires that both criteria be satisfied (Walzer, 2006, p. 252). It seeks to differentiate a 'normal' situation of oppression from those that can be the target of humanitarian policies. Therefore, 'the danger must be close and [...] it must be "of an unusual and horrifying kind"' (Bellamy, 2003, p. 335). If humanitarian intervention has difficulties in overcoming its lack of clarity and definition, the concept of supreme humanitarian emergency suffers from the same problem. There is no objective criterion to point out exactly when a supreme emergency situation becomes a humanitarian issue, but in a sense, scholars comprehend that at some point the situation is such that the only hope is to rely on an outside force (Wheeler, 2000, p. 34). This doctrine, therefore, was developed to allow better legitimation of intervention. It is required because non-intervention is an important norm of the international system, with the Charter of the United Nations forbidding the use of force against this domestic situation (United Nations, 1945 art. 2). The exceptionality of the situation and mass human rights violations were the points raised to permit it. It was also important to differentiate other humanitarian actions, such as humanitarian aid, in which the use of force is not allowed, from the debate on military humanitarian intervention. Part of the literature sought to limit it to genocide, others preferred to open it to any action of a tyrannical government. In the end, humanitarian emergencies stand as being the result of 'violent oppression, mass killing and ethnic cleansing' (Bellamy, 2003, p. 336). These concepts cannot be generalised. The definition would often be based on concrete cases and, thus, it will not be decided within a system of general laws, as described by the Frankfurt School.

Another aim of the literature is to attempt to centralise the ideas of a constitutional order. This perspective understands that decisions should be scrutinised by arguments regarding juridical institutions and constitutional framework. Therefore, the intervention could be analysed by taking into consideration its situation within a global constitutional order. In order to be able to understand NATO's military actions within a global constitutional order, Lang had to focus on the judicial side, especially the 'practice of interpretation by judicial institutions [...] alongside these practices of interpretation, judgements by judicial authorities need to be balanced by the political activities of

legislative authorities and the administration of judgement by executive authorities' (Lang, 2009, p. 187). In other words, it was not expected that the intervention follows a pre-existent set of rules, but that the whole decision follows a 'constitutional-like' structure. Only with a constitutional global order could the dispute over the intervention be legitimately debated by a prosecutorial and judicial structure.

Notwithstanding the fact that this literature tried to debate it in terms of law, it does not do it by addressing how the humanitarian law is politically constituted. Because of that, it fails to observe that hegemonic interests depend on vague norms to impose their own interests. For instance, after the 90's, under American hegemony, the idea was to transform the system from a rights-based to an enforced-based system. It is problematic. In the case of Kosovo, the questioning was not only about human rights norms that should be applied to humanitarian intervention, but also about the violation of such norms. These concerns about violation of human rights by the Yugoslav authorities, led the UNSC to approve several resolutions that, once violated, required punishment. NATO's air campaign, on the other hand, led to several debates over the violation of non-intervention and non-aggressive rules. The structure of authority was also put in check. In an enforced-based system, it is hard to know clearly the structure of authority that monopolises the legitimate use of force. In the current international order, the system relies on its agents to impose sanctions (Lang, 2009, p. 192).

As a last resort, Simms and Trim (2011) tried to provide their definition by outlining common elements present in the literature on the subject. They found three key aspects: the place where it happens, the subject, and the object of these actions. Based on these three aspects, they formulated a synthesis of the debate and realised that humanitarian intervention is: a coercive (but not necessarily using force) intervention carried out by a foreign administration whose intention is – to some extent – to 'avert, halt, and/or prevent recurrence of large-scale mortality, mass atrocities, egregious human rights abuses or other widespread suffering' caused by action or inaction of the target State (Simms and Trim, 2011, p. 4). As such, humanitarian interventions have been perceived as practices outside the normal spectrum of State practices, which often 'break the conventional pattern of international relations' (Vincent, 1974, p. 13), sometimes as a last resort (Simms and Trim, 2011, p. 5). As it has been explained, this situation derived from the perspective according to which the international system was constructed based on sovereignty.

This thesis has demonstrated that the development and implementation of human rights present both emancipatory and repressive sides, and that the prevalence of one or the other depends on the political activities at a given moment, legitimising one or other form of implementing those

rights. By their nature, human rights possess both possibilities. Political actions thrived on their emancipatory potential in the French Revolution, inasmuch as they negated their universality to Frenchmen in the colonies. Kosovo, however, illuminates new dilemmas for the new order. It represented 'an international order built on a contradictory, shifting, and unstable mix of international norms, great power interests, and American military predominance' (Ikenberry, 2000, p. 85). Ikenberry understands that as the government of the United States emerged as 'victorious' and as the only super power after the Cold War, its role in response to State crime and humanitarian interventions was critical. At the same time, its role in the humanitarian interventions became an obstacle to the evolution of human rights and humanitarian interventions. However, American actions in Kosovo were seen from the perspective of imperialism. At the moment of the attacks, in the media, John Pilger suggested that despite the fact that imperialism and the 'civilising mission' were purged from the political vocabulary of the West, the economic and political crisis, together with debts and the uprising of liberation movements in the developing world, served as justification for imperialism (Pilger, 1999). In the next section, I will present and develop the discussion on Kosovo and its repercussions for the international arena in terms of the dialectic of emancipation/coercion.

### *Kosovo*

The crisis in Kosovo was triggered by a new wave of nationalism led by Milošević when he rose to power. When in office, he managed to adopt an extreme Serbian nationalist agenda. In this sense, his government revoked the autonomy of Kosovo in 1989 and created an 'apartheid-like society' using Belgrade policy to change the ethnic composition of Kosovo. According to the Independent International Commission on Kosovo (IICK)<sup>35</sup>, the situation was well-known by international institutions and governments from the beginning of the nineties, especially because it was, in part, the situation in Kosovo that resulted in the break-up of Yugoslavia. Nevertheless, the international community was unable to prevent the events. Not only that, but they also failed to

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35 The historical facts of the human rights violation in Kosovo is well described in the IICK (2000) final report and it is the basis for the information presented in this section. The Independent International Commission on Kosovo was an initiative established in August 1999 by the Prime Minister of Sweden, Göran Persson. The main objective was to assess, among others, 'the adequacy of present norms and institutions in preventing and responding' to ethnic conflict as seen in Kosovo' (Independent International Commission on Kosovo, 2000, p. 25). Despite its members being mostly academics, the work of IICK was not without criticism. It was pointed out that the majority of its members were nationals from NATO's members. Not only that, but their final conclusion that the intervention was 'illegal but legitimate' also raised questions over whether the Commission was truly independent or just a way to contour NATO's bad press (Aranas, 2012, pp. 137 – 138).

support the non-violent movement that spread throughout the country.

One of the events that triggered the increase in violence and human rights violations in Kosovo was the Dayton agreements in 1997 from which Kosovar Albanians were excluded. This decision, along with the final text of the agreement and unsuccessful non-violent actions, resulted in the conclusion that only by war would the international community pay attention to the situation in Kosovo. It was after those episodes that the Kosovo Liberation Army (KLA) first appeared. In their attempt to mobilise international interest, the KLA pursued hit and run tactics and some guerrilla warfare. In February 1998, the Serbian government brutally responded to KLA's attacks, massacring 58 people in Preckazi/Prekaze, escalating events into an internal war. From this moment until June 1999, the armed conflict – characterised as both armed insurgency and counter-insurgency and as a war of ethnic cleansing against civilians – killed many civilians and displaced even more. According to the IICK report, the actual number of casualties was unknown but low; they estimated that between February and September there were 1,000 civilians killed and that between then and March, it was probably less. The same cannot be said about internal displacement and refugees. Around 400,000 people became refugees or were internally displaced. This situation changed when NATO started its air campaign. After the first attacks, the forces of the Federal Republic of Yugoslavia responded with more violence, killing around 10,000 civilians, mostly Kosovar Albanians, forcing 863,000 to become refugees outside Kosovo and displacing another 590,000 internally. This picture does not take into account other situations such as rape, torture, looting, pillaging and extortion (Independent International Commission on Kosovo, 2000, pp. 2 – 3).

At this point, the international community proposed some diplomatic measures, including the Holbrooke-Milošević agreement of October 1998. It allowed the introduction of international monitors whose presence reduced the violence for a short period. KLA troops seized the opportunity to re-establish control over areas vacated by Serbian troops. It started a new wave of conflicts in December 1998, when Serbian forces re-entered the territory. It was in this context that NATO started its air campaign. NATO's expectation was that as a result of the attacks, Milošević would sign and respect the agreement. Unfortunately, this was not the case. In consequence, NATO expanded the attack to strategic targets in Serbia and despite the discourse of 'casualty-free' attacks, 500 civilians were killed. NATO's attack caused not only direct casualties. Next came an air campaign launched against Yugoslavia on 24 March 1999 in an attempt to force the authorities to respect the rights of Albanians living in Kosovo.



The actions, however, were taken by NATO's forces, instead of the UN Security Council. Toni Blair and Bill Clinton justified the attacks explaining that they were necessary to enforce human rights rules, especially those concerned with the human rights of minorities groups. The attacks ended on 10 June 1999, when the government of Slobodan Milosevic agreed to a peace plan (Lang, 2009, pp. 185 – 186). Subsequently, the IICK noted that a type of cluster bomb, which used depleted-uranium tipped armour-piercing shells, and missiles had been used that had caused widespread environmental damage. In addition, the attacks had caused toxic leaks from petroleum complexes in several cities. There were also reports of non-strategic or military targets, such as the Serbian television, being attacked on 17 April 1999 (Independent International Commission on Kosovo, 2000, p. 5).

Internationally, NATO's justification for attacking Yugoslavia was on the grounds of an imminent human rights mass violation, and, in reality, it did manage to free the local population and improve the internal population displacement. According to the discourse, only an intervention could 'avert an impending humanitarian catastrophe' (Wheeler, 2001, p. 113). The first problem was to deal with the possibility of a group of States outside the legal framework of the United Nations, and without the authorisation of the Security Council. This group defended the necessity to breach the sovereignty rule based on humanitarian grounds. At that particular time, the response to NATO's actions was mixed. The spectrum ranged from those who claimed that the possibility of the use of a veto could not be an obstacle to actions whose primary concern was the protection of human rights, to the argument deployed by Russia, China and India, which was that all humanitarian intervention outside the institutional framework could not be considered legal, and that it would damage the foundation of international order. In the middle, were those who defended the triumph of morality and legality in cases of mass violation of human rights, while being against changes in the established law – changes that ultimately could allow abuses – and those who saw NATO's actions as the crystallisation of a new customary humanitarian law (Wheeler, 2001, p. 114).

Institutionally, there were major concerns about it. Despite the arguments presented in the Security Council by Russia, China and India, Kofi Annan addressed the General Assembly recognising both the concerns about NATO's actions and, also, the problems resulting from inaction. According to Kofi Annan, several parts of the globe demanded more action from the international community. Places such as Sierra Leone and Cambodia, to name but few, were eager to obtain international help to end historical cycles of violence. In Rwanda, the inaction of the international community in facing a mass murderer cost the lives of numerous Tutsi and marked the

decade. Annan, therefore, re-thought the actions in Kosovo, in light of this inaction. Although he understood the difficulties of legitimising the intervention without institutional approval, at this point, the Secretary-General could only state the institutional challenges the UN faced by taking unauthorised military actions in Kosovo and acknowledge that if NATO acted in that way, it was because the UN proved unable to come to a consensus about 'universal legitimacy and effectiveness in defence of human rights' (Kofi Annan, 1999). His question resonates with solidarists concerned about the humanitarian intervention:

One might ask – not in the context of Kosovo – but in the context of Rwanda: If, in those dark days and hours leading up to the genocide, a coalition of States had been prepared to act in defence of the Tutsi population, but did not receive prompt Council authorisation, should such a coalition have stood aside and allowed the horror to unfold? (Kofi Annan, 1999)

There were those who did not consider the violations in Kosovo an issue of human rights. According to Tim Judah, although the NATO governments tried to emphasise human rights violations, that was not the main issue. Judah was aware of the suffering Kosovars were experiencing and of the human rights abuses by Serbian authorities. Nevertheless, he argued that the main question was one of territorial control. He suggested that human rights issues were raised because Kosovars were successful in using them as political weapons (Judah, 2002). On the other hand, after a visit *in locus*, Michael Ignatieff was convinced that the human rights situation in the region had deteriorated even before NATO's air campaign and that a systematic ethnic cleansing was indeed happening (Ignatieff, 2001).

There were also several criticisms of the fact that humanitarian intervention arose in the 1990s. The values and standards developed by Western countries and deployed as part of the humanitarian 'programme' was acknowledged as a strategy to enhance the power of Western actors. Not only were human rights values a tool but also they potentially strengthened the Western military position across the globe, given the fact that the operation originated with them. Also, the criticism of this relied on the possibility that non-authorised military use of force could become customary law, and it could be used in a non-critical situation. Therefore, the argument of China, Russia and India was related to how humanitarian intervention represented a new standard of civilisation imposed by the West on weaker States through unauthorised military actions (Wheeler, 2001, p. 118).

Despite Kofi Annan's *mea culpa*, NATO's bypassing of the authority of the Security Council was fundamentally problematic for the multilateral and universal system of peace and security, as

was the inability of the Security Council to produce a consensus on atrocities that shocked mankind. The Security Council had already adopted three resolutions under Chapter VII that recognised human rights violations against Kosovar Albanians by the Serbian army (Wheeler, 2001, p. 119). However, it failed to present and implement policies. The argument is that the power of veto could not be used in cases of severe human emergencies. Andrew Linklater, for instance, was one of the authors who, despite expressing his concerns about the use of force in those cases, expressed the view that the international society could not avoid taking a stand. He stated that the use of force to prevent progressivist human rights has posed several moral challenges. Nevertheless, the 'good international citizen' who participates in political communities that respect liberal values at home, cannot act as a bystander when 'neighbouring societies are consumed by ethnic violence and human rights atrocities' (Linklater, 2000, pp. 487, 490).

Non-Western governments criticised the selectivity of such interventions. It was pointed out that the cases of East Timor and Rwanda were appalling from the point of view of human rights violations. Western countries, however, did not act in these cases. Hence, they argued that humanitarian claims masqueraded as other security interests and demonstrated the hypocrisy of the humanitarian discourse. One of the security interests in the intervention in Kosovo was the credibility of the NATO Alliance and the promise that NATO's air power could deliver maximum and quick results with little risk. However, the means employed were ineffective in solving the humanitarian crisis. In fact, instead of ending the slaughter, NATO's attacks accelerated the ethnic cleansing. It did not coerce Milošević into accepting NATO's terms, therefore forcing NATO to escalate its air campaign. Also, several civilian facilities were attacked producing a number of casualties among the Serbs (Schnabel and Thakur, 2000). Ultimately, 'NATO's desire to undertake a "casualty-free" intervention was achieved at the expense of inflicting great suffering on Kosovar Albanians and Serb civilians' (Wheeler, 2001, p. 127).

One argument against this criticism observed that the selectivity was a question of prudence, not of selfish interest. Although Wheeler argued that the West should not have used arguments related to the Cold War context as justification for the inaction, he understood those who excused the American inaction in terms of prudence and stated that this ought to be the basis for humanitarian intervention (Wheeler, 2000, p. 305). One of the rules considered in the case of Kosovo was the human rights norm against genocide. In the context of the end of World War II – especially after the Nuremberg Trials – genocide was detached from main human rights treaties and debate. In 1948, the Convention on the Prevention and Punishment of Genocide was ready for

signature, and it came into force in 1951. Some of the writers at the time of the intervention asked themselves whether or not the situation in Kosovo was one of violation of human rights. Despite the framework provided by international human rights norms and specifically the Convention on genocide, there was no consensus. The proper answer to this question would have given Western intervention the legitimacy it sought at that time.

Another issue resulting from the intervention in Kosovo was the situation of refugees. In the moments before and during Western activities in the region, the forced expulsion of the population caused a high number of refugees and ultimately this, in turn, also demanded diplomatic and military action. In the context of rights and sovereignty, Arendt (1973) observed that although totalitarian regimes produced the expulsion, relocation and misery of refugees, there are several contradictions that contribute to this situation. The contradictions occurred even in liberal democracies. One of these contradictions is the commitment to both universal individual rights and national sovereignty. They are national in character because the government of the State is responsible for agreeing to enforce them within their borders, and the enforcement of human rights can be sometimes restricted to citizens. Universality in this context, therefore, does not exist. True universality would mean that human rights should be available without any conditions. Due to this contradiction, refugees were considered by her as the 'most symptomatic group in contemporary politics' (Arendt, 1973, p. 277; Benhabib, 2010, p. 172). The 'refugee factor' was certainly a problem in the decisions regarding the intervention in Kosovo. While the administration of some European States accepted refugees, such as Turkey and Sweden, others were not keen to do the same. There was an influx of Kosovar refugees into Italy and Greece after the Cold War, and these countries were concerned about having new arrivals. The discussion was such that NATO initially justified the intervention on the basis of this problem (Schnabel and Thakur, 2000, p. 173).

The situation was problematic even before the attacks. From 1990 there had been an influx of Kosovar refugees into Europe. In an attempt to counter the problem, the European Union had established a ban on Yugoslav airlines and several countries sought to deport the refugees back to their country of origin. In 1996, for instance, Germany signed a readmission agreement with Yugoslavia and deported 170,000 refugees. Despite European actions, the escalation of violence in 1998 made the situation worse, and 350,000 Kosovar Albanians were displaced internally. This figure is believed to be higher, reaching 500,000 before the hostilities decreased, while 100,000 were already seeking asylum. The situation degraded with the hostilities, and there was no agreement in the West about how to solve the situation. Neither NATO, nor the UNCHR were able

to agree on a solution. Due to this, the end of the conflict did not result in a political settlement in which human rights were a priority. As a consequence, the influx of refugees that returned to Kosovo after the negotiations were left unsupervised, and little was done to guarantee their safe return and their rights (Booth, 2001, pp. 164 – 183).

Humanitarian intervention cannot be dismissed *prima facie* as only an instrument of power. To some extent, this is a last resort mechanism that resolves gross human rights violations by freeing the population from its violator. However, as presented in this thesis, it is a mechanism that has been used (and is increasingly being used) as a form of punishment without a World Government or any other formal structure of rule of law that could check and protect human rights during this period. Moreover, humanitarian intervention has plenty of theoretical definitions, but it does lack a legitimate organic legal body that could limit the actions of States that intervene and protect the rights of both sides. As demonstrated, the lack of a structure of classical liberal law – and consequently the lack of a general norm relating to it – has historically legitimised repressive, rather than emancipatory, policies. In Kosovo, the actions taken by the administration of the United States and NATO in the process of intervention were representative of this situation. Left unchecked, the norm of humanitarian intervention will err towards a decisionist structure and produce an undesired outcome.

## Conclusion

We have seen in this chapter the challenges that the universalisation of human rights faced in the twentieth century and the roles that emancipatory and coercive forces played in the process of the positivation of international human rights law. The theoretical approach developed in this thesis has allowed us to understand that international law is politically constituted. As such, there were times when despite being emancipatory, its full potentiality could not be achieved.

The first of these instances was the establishment of welfare policies in Europe, especially those expressed in the Weimar Constitution. The revolutionary process in the second half of the eighteenth century demanded better life conditions for workers who had suffered the impact of the Industrial Revolution. In this process, religious groups and associations sought to develop charity work for the poor. However, it was only later that the demand for social rights changed the relationship between the individual and the State, demanding that governments should be

responsible for relieving workers from their conditions. The introduction of social rights in the Weimar Republic was both an attempt to answer the demands of the workers and the product of their participation in Parliament. It was these conditions that allowed Neumann to develop his analysis according to which, the formal law should be founded on the basis of a Social Rule of Law. Also, it would be this social rule of law that would guarantee the necessary conditions to go beyond the capitalist system.

We have also seen that these new social rights spread across Europe and became the new standards of living. These standards were one of the measures of development used to classify nations and, eventually, exclude Third World nations. When the process of decolonisation started after the Second World War, the ex-colonies of Africa and Asia sought to unify their political agenda in a movement that would express their concerns. They wanted to participate in this new standard of living, given that it could also be done on their terms, without imposition. It was clear, however, that their degree of economic dependence hindered development in Third World countries, preventing them from achieving the same level of development and consequently, the same standard of living. Without development, there would be no social rights in the Third World. The answer to their demands would come from the understanding that development should be considered as a universal right, even though it did not mean that rights would be implemented universally.

The second event of significance was the practice of humanitarian intervention in the post-Cold War era. While dealing with the contradictions presented in the formulation of human rights, and with the understanding that human rights norm can be both emancipatory and coercive, I have suggested that humanitarian intervention has been considered a legitimate way to enforce human rights in the international sphere. The development of this statement, however, indicated that despite all the good, humanitarian intervention exists in a grey area where legal definitions derived from formal legal procedures are not available. The consequence was the possibility of an attack in Kosovo by NATO forces without 'international adjudication'. In addition, Western attacks caused an escalation in violence and the subsequent degradation of people's lives. These people were eventually forced – by the Yugoslavian authorities or by the situation – to dislocate internationally or domestically and to endure lack of rights as refugees.

In sum, the idea of the international in relation to global designs developed by the hegemonic power is based on a particular understanding of human rights that, in the end, is politically constituted. Despite the fact that the implementation of human rights and their universalisation sought to be a force for emancipation, the political struggles between the

hegemonic forces and the 'other' prevented them from reaching their full emancipatory potential and developed several areas of coercion in international relations.

## CONCLUSION

The idea of human rights and the practices associated with them have constantly transformed themselves, and their role has been historically diverse. At present, it is possible to observe that this dialectic has shifted from the guarantee and the implementation of rights in the international arena, to a system of repression and coercion, ultimately leading to punishment. Despite worldwide inequalities, the current development of human rights law has focused on several areas: the strengthening of an already established system (reforming and establishing the UN Human Rights Council), the creation of a judicial system (the International Criminal Court) and the development of justifications for interventions (humanitarian intervention) that serve as punishment for human rights violations. Against this background, I have argued that the current system of rights in international relations is the result of the dialectic movement in the immanent political constitution of human rights.

Based on the Frankfurt School, my thesis is that during certain historical events, political groups have sought to mould political and social interactions according to their own view. They have done this by questioning both the definitions and the systems of rights and entitlements of social groups that had a monopoly over the definition of right and wrong. In doing so, this political power has been used to legitimise new social and political constellations by changing these legal definitions of rights and by erecting protection – such as the rule of law. This process is concerned with the formalisation of rights and it can be perceived as fulfilling some emancipatory potential of the law. However, as a consequence, the implementation of legal procedures and institutes gives more power to the State, and it clashes with economic and other interests that force the de-formalisation of those norms. Thus, political conflict between formalising and de-formalising forces in the legal context, has helped shape the system of human rights and it will operate as both a political tool for the emancipation of political groups, while, simultaneously, being used for the oppression of others.

This can be observed when we take into consideration the historical process of expansion and restriction of rights in the relationship between domestic and international arenas. Since the beginning of colonialism in the fifteenth century, these rights have been constituted and transformed



by political emancipatory struggles domestically, at the same time as they have legitimised the restriction of rights internationally. Therefore, human rights law cannot only be perceived as the result of a progressive accumulation of rights in the domestic sphere that, at some point, is protected by international law and, thus, participates in the progressive development of international society. Nor can it be seen solely as the product of one class over another, functioning as a discourse of dominance. Or even as an ideology that, because it has not yet fulfilled its own promises, should be discarded. Rather, human rights have a long and conflicting history.

## **Core Results**

This thesis has further developed and applied a theory of law based on the Frankfurt School, according to which conservative and emancipatory forces have historically constituted human rights by the process of formalisation or de-formalisation. The political struggle between them has formed human rights in a dialectic of emancipation and oppression. In this way, I have filled a gap in the literature that has been unable to analyse human rights within this dialectic and, therefore, has failed to historically comprehend the role that human rights play in the international arena and how the development of international law, in relation to the principles of the rule of law, can shape the relationship between social and political groups and the entitlement to human rights. A stronger critique of the international liberal order, therefore, can only be achieved when the literature starts to take this dialectical process into consideration, to better demonstrate when, and how, conservative forces have been using human rights for oppression. In international relations, the idea of legitimisation of policies has taken human rights into consideration. The mainstream understanding of it has considered human rights as an emancipatory project whose internal consensus is centred on the concept of human rights.

This thesis has presented the following situation: on the one hand, human rights have been constructed under the light of emancipation, the language used by social and political groups or movements to expand and protect different rights demands, whereas, on the other hand, States have been able to legitimise their own international policies using the language of rights, even when the result or objective of the policy was against the historical promises of human rights. More recently, in the 1990's, for instance, humanitarian interventions were criticised as being unable to deliver the emancipation promised, despite solving gross human rights violations. The literature on international law and international relations, however, has not been able to understand this

conundrum in its entirety.

To further comprehend and answer these questions, I have shown that the theory of law from the Frankfurt School is more adequate to understand the relationship between the legitimacy of policies and the dialectical political constitution of human rights. As civil and social rights have been the source of legitimacy in the modern state, human rights have historically been the source of legitimacy for the expansion of the European system of States. I have borrowed from Critical Theory, especially from Habermas, the possibility of analysing the legitimacy of the constitutional state with both normative and socio-historical elements. As such, we can analyse socio-historical elements that have contributed to the legitimacy of both: the European States (Habermas, 1988, 1998, 2001; Habermas and Cronin, 2002) and the organisation of the international formulated by hegemonic powers (Mignolo, 2000).

The struggle between the emancipatory use of law – as understood in the universalisation of human rights and protection of indigenous people and to free the colonies – and the repressive – that used the same understanding to legitimise their conquest and colonies – resulted in a moment in which the bourgeoisie in Europe and in the colonies demanded the protection of their rights and the establishment of a political system that could protect the individual. It meant revoking the privileges of the established powers in order to include a larger number of social groups. With the transformations in the views of freedom and liberty, for instance, other nations also transformed their understanding of human rights and provided further rights and individual protection. Due to the specificities of the monopolising capitalism, and as an attempt to regain control of the situation, there was an increase in the use of vague and open-ended norms that contradicted the general law. These vague and open-ended norms that were included in the Weimar Constitution, allowed them to treat the monopoly with different laws, benefiting it over other social segments. Because the norm regarding individual and social rights, as well as economic issues, was vague, the responsible authority was able to easily change the meaning of those norms for its own interest.

At the same time, it does not mean that human rights were truly universalised in the twentieth century. Conservative forces and the process of de-formalisation are still in action and human rights are far from fulfilling their emancipatory potential. The uneven relationship between the Third World and developed countries still presents a challenge. The Third World movement, for instance, has been demanding its share of development. Understanding development as a condition for the full enjoyment of human rights, the Third World has fought to include it as a human right. Despite the formalisation of human rights law in the international arena, with the Declaration of

Human Rights and the Conventions coming into force, the idea of development as a human right has been vague and the current uses of aid are an extension of this de-formalisation. Bandung was not able to universalise human rights or to present a radical alternative to the liberal order. Indeed, the implementation of human rights in several areas of the Third World is still problematic.

The system, however, moved from implementation of protection and universalisation of human rights norms, to the creation of protection in terms of punitive practices. In this context, despite their exceptionality, humanitarian interventions have been presented as necessary actions in cases of drastic human rights violations. Nevertheless, conservative forces have also de-formalised the idea of humanitarian intervention. Despite attempts to maintain it within a rule of law structure, the lack of institutions and legitimacy to do so has turned these interventions into actions outwith a legal definition. In this formalised/de-formalised situation this thesis has shown how the lack of proper legal general norms, combined with a plurality of theoretical definitions about humanitarian intervention, has helped us to understand the current synthesis. In the end, a decision relies on the UN Security Council, which will shape its decisions based on its own interests. The humanitarian intervention in Kosovo, for instance, showed how the lack of judicial structure and the openness of the law contribute to actions that create more violence instead of freedom and liberty.

### **Implications for the Understanding of International Politics**

This thesis contributes on different levels to our understanding of current politics. Regarding the multilateral system, I have shown that international law, without the structure of rule of law, can damage the principle of generality and, therefore, create unevenness and violence. As a consequence, regarding the level of norm production, it is imperative to avoid establishing treaties with vague and open-ended concepts. It is necessary to fill the legislative void which ratifies treaties that clearly express and characterise important political concepts such as international aid and humanitarian intervention, in order to avoid pure power interest acting against human rights law.

The core results of this thesis suggest that the possible implication for our understanding of politics is in the relationship between hegemonic powers and human rights. When observing a given moment, we should be able to perceive the immanent contradictions present in the transformation of law. In this sense, when dealing with historical context, we have to be able to perceive that hegemonic powers have used the language of human rights as part of their justification for the

construction of the international – legitimising the expansion of the European international system. At the same time, these rights were at the core of emancipatory revolutions in the European context, constantly reinventing themselves. European countries witnessed the demand for more rights and the gradual implementation and enforcement of human rights. Internationally, however, human rights have been at the source of different forms of interventions against the ‘colonial other’. Therefore, the very nature of human rights can be presented as both emancipatory and repressive. In my thesis, I have shown this dialectic in international politics.

In sum, in the sixteenth century, the conquest of the Americas resulted in a new sense of international and inter-cultural relations. In addition to the discovery and conquest of new territories, the sense of global hegemony experienced by Spain changed the view of the world, towards the idea of an *orbis universalis christianus* and, with that, a new sense of universality. This rationality took law of nature as the alternative to legitimacy. Domestically, the debates of Las Casas in Valladolid and Vitoria in Salamanca drew attention to the definition of ‘human’ in relation to the atrocities in the colonies. Vitoria re-imagined the existent principles of law, especially Thomist principles and universality, and examined the rights of the Indians (Mignolo, 2000, p. 728). However, the extension of rights to Amerindians was not without struggles, and the definition of human was blended with that of belonging to the *orbis christianus*. Full membership of this ‘cosmo-polis’ vision was through religion, which gave the Spaniards the duty of converting the Indians. Once rejected, the Spaniards would have the right to wage war, incorporating the territories as a Spanish protectorate (Anghie, 2007, pp. 23 – 31).

Subsequently, the ideas of rights developed in the Enlightenment, together with the internal economic situation, inspired the American Revolution. It was due to transformations in the meaning of rights and, in this case, in the idea of natural law, that the colonists challenged the power of the State and sought to provide a different meaning of liberty. They developed a new understanding of natural law, established a Bill of Rights where this understanding could be formalised and created new institutional protections from external political and juridical domination. The solution was independence from British rule.

There was a struggle between views that ended with the legitimacy of a new political constellation. In France, the Revolution was more radical, extinguishing the royalty and proclaiming the sovereignty of the nation. At this point, human rights were central in the discourse of the revolutionaries that radicalised the meaning of natural law and its universalisation of rights of Men and Citizens. Domestically, human rights and the rule of law were strong emancipatory forces

extending the entitlement of those rights to larger groups. Internationally, however, this expansion was not automatic.

Although the rights resulting from the Revolution were considered universal, the category of Men and the idea of universalisation was surprisingly vague and open-ended. As with the idea of 'human' before, there were 'exceptions'. The colonised of Haiti, for instance, fought alongside the bourgeoisie in the Revolution, but they did not share the benefits and they were not entitled to the same rights. The structure of human rights norm allowed conservative forces to maintain the colonial relationship. Therefore, there was a situation in which new rights and freedoms were given to a larger part of the population of the French nation, while colonists, although members of the same nation, were discriminated against. Independence was also the *via* used by these revolutionaries to acquire the same freedom and rights.

In the nineteenth century, emancipatory forces in the colonies suffered a set-back. The interpretation given to the Rights of Man and the Citizen followed that which allowed the colonisation of Haiti and perpetuated oppression in the international arena. As the capitalist system evolved to become a situation of monopolisation, more and more norms suffered the process of de-formalisation. Domestically, the proletarians suffered from the abuse of the economic system and demanded an expansion of rights. The struggle was not only about the entitlement to liberal rights, but also to social rights. Many considered the situation unjust and the power of the bourgeoisie overwhelming. Confined by the national-state, the bourgeoisie were able to legitimise their power over the nation and compete in the international economy. In the European context, there were several attempts to continue along the path initiated by the French Revolution in order to fulfil the emancipatory potential of human rights. The Revolution of 1848, for instance, represented an attempt to transform the situation and shift the balance toward the expansion of rights. Social rights were demanded on different fronts and, eventually, the Russian Revolution was able to overthrow the established power.

At this point, the de-formalisation of law in the national context was responsible for benefiting the monopolies over individual enterprise. In the international context, on the other hand, de-formalisation was the tool to limit the extension of the universalisation of rights especially to regions affected by colonisation and imperialistic practices or to nations that depended on the European economy. The new nations, whose independence occurred in the nineteenth century, were forced to prove their Statehood, fulfilling various requirements. In the colonial world, European intervention was justified in terms of protection and the spread of civilisation – under the term

‘civilisation mission’. This not only allowed them to re-enact the colonial practices, but also to justify their violence as a protection and expansion of human rights.

The approach developed in this thesis forces us to take seriously the historical context. In order to analyse international human rights law, we should be able to look for formalising or de-formalising structures or mechanisms that will lead specific groups of international politics to emancipatory or repressive situations.

### **Implications for the literature**

Scholars have tried to show that human rights have historically been on the side of the individual against the power of States, or of forcing the State to provide social rights. Both Natural Law and Legal Positivists have similar understandings about the idea of ‘positive law’. In domestic law, positivism based on Hans Kelsen has been an important paradigm for understanding. In the Kelsenian system, there is little space for moral issues. Human rights, therefore, are just another set of laws in the pyramid, independent of moral issues. Their strength relies on the existence of law in the higher hierarchy. In the intersection between international law and international relations, there were those who observed the ‘domestic analogy’ (Bull, 1977) and argued that it was impossible for an international ground norm to exist in the Kelsenian sense. Twentieth century positivism took ideas from Natural Law and nineteenth century Legal Positivism, reducing the law to a formally ‘immanent’ system of a self-referring system of rules, in which its validity and decisions about entitlement are devoid of sociological and moral content (Thornhill, 2007, p. 299). Therefore, despite the importance of natural law in the foundation of legal international positivism, human rights could not play a role in this system. The inclusion of moral issues – and consequently a more inclusive debate on rights and human rights – was brought forth by normative theories. According to this approach, the legitimacy of State actions depends on a moral judgement about them. It does not mean that a legitimate institution is necessarily just, or that it is mainly concerned with justice. However, it has the potential to de-legitimise an institution. Normative theories, nevertheless, do not operate in a dialectic register. The part of normative theory that defines this quasi-judicial structure engages in a functionalist approach that resembles what has been proposed by the New Haven School.

On the other side of the coin, different critical approaches have dealt with the critique of law

in the context of economic issues. Marxists and Critical theorists have been criticising the liberal order and the law that resulted from it from different perspectives. Traditionally, the critique of law, which was developed by Pashukanis, centred its analysis on the commodification of law and in the relationship between the right of liberty and the instrument of contract (Pashukanis, 1989). The nexus between rights and economic activity is such that the whole system of individual rights has its only function in establishing the necessary freedom required by capitalism. In this system, the right of property and the freedom to contract and to sell labour constitute the core of individual rights. The focus on the dialect of production, nevertheless, alienated these approaches from the political issues that underpin the constitution of human rights. A second set of critical scholars, on the other hand, have tried to demonstrate that international law is a function of the liberal international order and, therefore, that it would suffer from the same contradictions observed in liberalism. This approach, mostly based on the CLS, proclaimed that international law produced an indeterminacy that cannot be resolved.

This indeterminacy thesis, as it is called, echoed some arguments presented by Carl Schmitt, for whom the solution relied on ‘an authoritarian alternative to Weimar democracy’ (Scheuerman, 1996, p. 4). It is used to highlight that international law is contradictory at the point that the decision is ultimately political. In this approach, therefore, human rights do not play a role in legitimating policies and there is no possibility for emancipation. The spectrum of Left-wing theories separated the economic and the political sides from their analysis, focusing on one or the other side of the dialectic. Despite understanding the immanent contradictions of international law as a function of the liberal order, they have been unable to understand that the rule of law can represent the possibility of emancipation, and that it is in understanding the interaction between emancipation and oppression in the constitution of human rights that one discovers the real possibility of change. Rather, this approach prefers to define politics, patterns of violence, and imperialism as the international rule of law (Miéville, 2005, p. 319), over facing the emancipatory role human rights have played in history.

Because current theoretical approaches on international law with political implications for international relations tend mostly to side with a Kelsenian positivist approach to law or a Schmittian decisionist one, mainstream theories have been unable to fully grasp the role human rights norms have in transforming international law, creating consequences for the legitimacy of international politics within the immanent dialectic of these rights. As a result, for a better understanding of the changes and transformations of human rights, due to its dialectical

characteristic, it is necessary to broaden our theoretical view of law beyond current mainstream theories. It is my argument that the theory of law of the Frankfurt School is more adequate for the task in hand. Within the Frankfurt School, two members focused on understanding the law in their society: Franz Neumann and Otto Kirchheimer. Both scholars were involved with the main plan of the Frankfurt School, which understands social transformations at the beginning of the twentieth century as a result of changes in the capitalist system. In accordance with the main ideas of the Frankfurt School, changes in the economic system forced them to review the main characteristics of the Marxist theory. They realised that despite the fact that Marxism had foreseen the proletarian revolution due to successive crises in the capitalist system, they could not recognise this class as revolutionary (Jay, 1973; Wiggershaus, 2010). Rather, capitalism changed, and the role of the proletariat changed with it, preventing widespread socialist revolutions. Therefore, they needed to re-think the theory and its categories to better adapt to the reality. In addition to the transformation perceived by the main authors, Neumann and Kirchheimer added a new issue: the political changes of Weimar and the legal transformation created by the Constitution. The Constitution of Weimar marked an important event for Neumann and Kirchheimer, representing a new political constellation in the German State.

Their analysis of law and the importance of the rule of law in the Weimar Constitution – especially in terms of fundamental rights – constituted the framework for the analysis of this thesis. Kirchheimer observed the effects of the rise of the proletarian class in the German Parliament as a transforming force in the German context and paid attention to the conflict between the ruling class and the new demands that were included in the Constitution. At the same time, Neumann praised this event as a demonstration of the emancipatory potential of the rule of law. Both relied on this, in a historical analysis, to show that although based on classical legal concepts, the rule of law could be transformed into a social rule of law, working in favour of the dominated.

Despite their focus on the events that led to the Nazi regime in Germany, I have used their analysis about the development and disenchantment of law to understand human rights in the international arena. The historical analysis of the relationship between political groups in Europe and between the ruling classes in Europe and the colonial other, show us moments in which the contradictions between emancipation and oppression were defined politically, transforming the global design established by the hegemonic power. In this context, human rights law had its meaning and significance altered, in contradiction to open standards that ultimately restricted the reach of those rights. This thesis focuses on the process of formalisation and de-formalisation as



being elemental for the dialectic of emancipation and repression. Formalisation of the law is important to provide the necessary means to fulfil its emancipatory potential. This potential can be found in its generality as Neumann and Kirchheimer understood the classical rule of law. Historically, the movement of codification of law resulted in the ‘disenchantment’ of the law, meaning that its own foundation was grounded in the popular/national sovereignty, rather than in any metaphysical explanations.

In this sense, the legal norm should contain the idea of generality. In this sense, it provided the opportunity to treat all members of society as equals. It was the product of revolutionary actions against the domination of the *status quo*. It was, however, only a promise of its full emancipatory potentiality. It would also be necessary to entitle a larger number of members of society to the rights to participate in self-government to truly fulfil its potential (Whitehead, 2001). The election of proletarians to the Reichstag and the changes in the system of rights resulting from their participation in the Weimar Republic, for example, represented a step further towards the emancipatory role of the rule of law. The process of de-formalisation of the law, on the other hand, has provided the means necessary to maintain oppression. Kirchheimer has shown that there are several ways in which the rule of law can be used for political ends. These ‘techniques’ ensure the power to change the rules and its meanings for policy-makers (Kirchheimer, 1961).

Although Neumann and Kirchheimer focused on the period of the Weimar Republic and in the monopolised capitalism that occurred in that period, I have suggested that regarding human rights, those formalising and de-formalising forces could historically be found shaping the meaning of human rights and legitimising a political constellation. I have showed that the idea of a political constitution of human rights means that both forces are in action. Because human rights represent a set of standards according to which ‘State actions’ are politically and juridically legitimated, there are often some concepts that permit further or greater liberty in their interpretation. For most of the time, determining who was entitled to human rights lacked proper definition, being manipulated to maintain oppression over certain groups. While domestically there was an emancipatory movement able to formalise rights that progressively reached larger social groups, the same cannot be said for those who lived in the colonies. Internationally, there have been different ideas, such as the civilising mission, that were able to prevent the expansion of human rights abroad, creating a system of inequalities in which the colonial world was dependent on Western nations, despite their liberalisation. The dialectic of emancipation and oppression, therefore, can be visualised as political struggles between formalising and de-formalising forces in action historically.

In conclusion, because the current literature has been unable to understand the dialect of emancipation and coercion in the political constitution of human rights, the theory of law on the part of Neumann and Kirchheimer, as developed in this thesis, represents a unique approach to dealing with this issue and demonstrates the importance of using historical analysis in this context.

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