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THE PROTECTION OF MINORITIES AS HUMAN RIGHTS CONSEQUENCE: CITIZENSHIP, NATURAL LAW, AND ITS RELATION TO THE PROTECTION OF VULNERABLE GROUPS

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This article is based on the hypothesis that the protection of minorities results from the effective exercise of citizenship, which, in turn, is derived from human rights. Based on this premise, the history of the evolution of natural law until its conversion into human rights is analyzed, emphasizing theoretical aspects of the general theory of law. Afterward, it is possible to observe how the protection of vulnerable groups fits into the concept of citizenship. The general objective, therefore, is to analyze from which perspective the protection of vulnerable groups can fit in as a result of the right to citizenship and under which approach it should be treated. It seeks, therefore, to legally validate affirmative measures taken by state bodies to ensure rights to such groups with a focus on citizenship..

Summary: 1. Initial Considerations. – 2. Historical aspects. – 3. Characteristics of Human Rights. – 3.1. The Dimensions of Human Rights. – 4. Citizenship. – 5. Minorities. – 6. Final Considerations.

1. *Initial Considerations.* – According to the United Nations, human rights can be defined as «rights inherent to every human being, regardless of race, sex, nationality, ethnic origin, language, religion or any other status»[1]. For Comparato[2], Human Rights translate the idea that no individual can claim to be superior to others, deserving equal respect. However, the conceptualization or content of Human Rights is not pacified, and several aspects of their definition,

[1] Human Rights, un.org, https://www.un.org/en/global-issues/human-rights, accessed on 2022-12-23.

[2] F. Konder, *A afirmação histórica dos direitos humanos*, São Paulo, 2015.

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such as their content, are commonly discussed. In this sense, it is important to analyze its historical evolution to obtain a better understanding of its real scope.

2. *Historical aspects.* – Human Rights, as understood today, own a relatively recent conceptualization. Previously, their essence was covered by natural law, whose existence, Douzinas[3] points out, was recognized in classical texts of the ancient Greeks, such as Antigone, by Sophocles, or in dogmas of the Stoics.

Aristotle was the one who developed the concept, in Rhetoric:

> On one side, there is the particular law, and on the other side, the common law: the first one varies according to nations, and it is defined concerning them, whether it is written or unwritten; the common law is the one which is according to nature. For there is justice and injustice, of which man has, in some way, the intuition, and they are common to all, even outside every community and every reciprocal convention.[4]

It can be observed, then, that the law was considered naturally arising from something intrinsic to man, not requiring any regulation for its existence or validity. In this sense, it is possible to observe its opposition to positive law. This dichotomy, according to Bobbio[5], can also be found in Roman Law, where there was a distinction between *jus gentium*, which was referred to nature, and *jus civile*, related to the legal statutes established by the social entity created by men.

According to the author, there was no preponderance of natural law over positive law during the classical period, but rather the opposite. This panorama was inverted during the Middle Age, with the preponderance of the natural law, with its divine origin.

During the formation of the States, there was also a new inversion of dominance. With government centralization, sovereigns refused to accept that laws emanated from a source other than the State, and a monist structure

[3] C. Douzinas, *O Fim dos Direitos Humanos*, São Leopoldo, 2009.
[4] Aristotle, *Arte Retórica e Arte Poética*, 1959, p. 86.
[5] N. Bobbio, *O Positivismo Jurídico: Lições de filosofia do direito*, São Paulo, 1995.

emerged. As Bobbio points out, the State monopolized legal production, and only recognized the law it produced as valid. Because of this, positive law came to be considered law in its own sense, and natural law lost its status as a cogent rule, a characteristic that remains to this day.

Considering that regulation has become an essential requirement of law, it is possible to conclude, in the words of Costa Douzinas, that «the condensed history of Natural Law ends with the introduction of the Universal Declaration of Human Rights»[6]. It is reinforced, therefore, the need for positivation of the right to be recognized as such, even if it emanates from the human essence itself.

In the same sense, Jürgen Habermas claimed, when establishing the need for regulation for enforcement purposes:

> Only when human rights have found their 'place' in a global legal and democratic order, that is, when they function in the same way as the fundamental rights in our national constitutions, will we be able to infer, at the global level, that the addressees of these rights can also be considered their actors.[7]

Douzinas attributed the passage from classical natural law to contemporary Human Rights to the «positivisation of nature», that is the transfer from natural to historical law. It is important to note, however, that the phenomenon that emerged with legal positivism received several criticisms, notably the accusation that its doctrine would have favored the emergence of totalitarian regimes[8].

Despite the criticism, the Universal Declaration of Human Rights stands as a global symbol of human rights in the world, laying the groundwork for the assertion of the guarantees contained in it. The idea that dignity – and the rights derived from it – are inherent to all human beings takes on normative significance. In this regard, contrary to what is claimed as a criticism of

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[6] DOUZINAS, *O Fim dos Direitos Humanos*, cit., p. 27.
[7] J. HABERMAS, *Era das Transições*, Rio de Janeiro, 2003, p. 50.
[8] N. BOBBIO, *O Positivismo Jurídico,* cit.

jusnaturalism, Abbagnano claims that the use of Human Rights, in its regulated form, would have helped to overcome authoritarian regimes:

> It can be said the demand for dignity of the human being has passed a test, revealing itself as a torque stone for the acceptance of ideals or forms of life established or proposed; this because ideologies, parties and regimes that, implicitly or explicitly, opposed this thesis proved disastrous for themselves and others.[9]

As Hannah Arendt has demonstrated, totalitarian regimes sought above all to take away men's rights, to make them superfluous, to remove their own traits in order to obtain power:

> Men, insofar as they are more than mere animal reactions and performance of functions, are entirely superfluous to totalitarian regimes. Totalitarianism does not seek despotic domination of men, but a system in which men are superfluous. Total power can only be achieved and maintained in a world of conditioned reflexes, puppets without the slightest trace of spontaneity.[10]

Although post-positivist, jusnaturalism managed to establish a minimum level of respect for all, universalizing these rights.

The concept of universalization of human rights adopted by the Universal Declaration of Human Rights found philosophical foundation in the studies of Kant, who formulated the so-called universal law of humanity. His second categorical imperative states «Act in such a way that you use humanity, both in your own person and in the person of any other, always and simultaneously as an end and never simply as a means»[11]. Tonetto explains the commandment by saying, «the human being is not a thing and, therefore, cannot be used arbitrarily by the will of others»[12].

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[9] N. ABBAGNANO, *Dicionário de filosofia*, São Paulo, 1998, p. 277.
[10] H. ARENDT, *As origens do totalitarismo*, São Paulo, 1989, p. 507.
[11] I. KANT, *A fundamentação da Metafísica dos Costumes,* Lisboa, 2011, p. 73.
[12] M.C. TONETTO, *A dignidade da humanidade e os deveres em Kant*, in *Revista de Filosofia Aurora*, 2012, 24, n. 34, p. 272.

This transition of viewpoint regarding men – with no distinction of basic rights inherent to all – enabled the strengthening of the humanist doctrine, expanding its horizons and establishing characteristics such as universality, which is discussed in greater detail in the following paragraph. As a result, the human being becomes only the author of rights, rather than the object. In this way, an intrinsic value is determined for everyone that cannot be set aside.

Following this brief historical introduction, the concept and the characteristics of Human Rights will be discussed as a way to better understand the subject of this study.

3. *Characteristics of Human Rights.* – After analyzing the historical development of Human Rights, it is necessary to scrutinize their characteristics in order to better develop the object of this study, which is to determine whether the inclusion of minorities and vulnerable groups can be understood as human rights, or as a result of them.

As stated in the previous topic, the concept of Human Rights is broad, and there is no consensus in the academic community. According to Bobbio[13], most definitions are tautological, and the list of Human Rights is frequently modified based on the historical conditions under which they are submitted. Along the same lines, Hannah Arendt[14] qualified Human Rights as a human achievement, in a constant process of construction and deconstruction.

In this sense, Flávia Piovesan[15] observes that Human Rights emerge gradually, arising from moral claims. As a result, it is a constantly evolving legal branch that requires social provocation so that new defense guidelines may emerge.

Although aspects of the definition or conceptual content of Human Rights are debatable, notably over time, there is a certain consensus that the Universal

[13] Bobbio, *A era dos direitos*, Rio de Janeiro, 2004.
[14] Arendt, *As origens do totalitarismo*, cit.
[15] F. Piovesan, *Direitos Humanos: desafios da ordem internacional contemporânea*, [*s.l.*], 2006.

Declaration of Human Rights of 1948 included, in its article 2, the universality and indivisibility of Human Rights:

> Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.[16]

Flávia Piovesan defines universality as an extensive aspect of Human Rights, extending the ownership of such guarantees to everyone, due to their condition as persons. Indivisibility, on the other hand, resides in the fact that disrespecting one right reflects on the others, which is why their protection must occur in an integral manner.

In the same sense, André Ramos defines the universality of Human Rights as the «attribution of these rights to all human beings, regardless of any additional quality, such as nationality, political preference, sexual orientation, or belief, among others»[17].

At this point, it is possible to notice that the vast majority of current authors adhere to the universalization and indivisibility of Human Rights in accordance with what was already declared by Kant, disregarding or abandoning the idea of relativization of such rights.

According to Heiner Klemme[18], the concept of universality of Human Rights stems from the tradition of Kant and his concept of universal value. Endorsing such a statement, Lucy Carrillo makes the idea even more explicit: «the Kantian moral law demands respect for every human individual [...] every

[16] Art. 2, Universal Declaration of Human Rights.
[17] A.C. Ramos, *Curso de Direitos Humanos*, São Paulo, 2020, p. 68.
[18] F.H. Klemme, *Direito à justificação – dever de justificação: reflexões sobre um modus de fundamentação dos direitos humanos*, in *Trans/Form/Ação*, 2012, 35, n. 2, pp. 187-198.

humiliation of one individual by another or in front of another is an offense to humanity and an attempt against equality and moral autonomy»[19]. Furthermore, the author approaches the concept of justice to the recognition of superior rights over particular interests, more specifically human rights: «justice means, rather, the recognition that above particular interests there is a universal interest»[20].

Still on universalization, Piovesan states that the contemporary conception of human rights derives from the internationalization of human rights, notably rebuilt after the end of World War II. This statement is consistent with Kant's point-of-view, as stated by Carrillo, that the place and circumstances of birth should not be taken into account when granting human rights. Indeed, humanity should be recognized wherever a human being exists, and it is neither feasible nor appropriate to limit basic guarantees based on cultural or legal characteristics of a particular region.

In terms of indivisibility, Ramos[21] approximates its concept to the definition of equality, stating that all human rights should receive the same legal protection, since they are essential. He emphasizes that indivisibility has two aspects: the indivisible uniqueness itself and the fact that it is not possible to protect only some human rights, but that all must be protected.

In this sense, an analysis of this aspect of equality is necessary, considering the study seeks to understand, in particular, the phenomenon of vulnerability of marginalized groups and how their guarantees can be protected by the mantle of human rights.

Thus, considering that the right to equality stems from the indivisibility recognized by the Universal Declaration of Human Rights, it is possible to deduce its concessive nature of isonomy, in which equal treatment among all is required, without the possibility of hateful discrimination, and dignified living conditions must also be guaranteed.

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[19] L.C. Carrillo, *El concepto kantiano de ciudadanía*, in *Estudios de Filosofía*, 2010, n. 42, p. 104.

[20] Ivi, p. 106.

[21] Ramos, *Curso de Direitos Humanos*, cit.

Ramos relates the right to equality to the universality of human rights, reminding us that the emergence of the Social States of Law enabled the search for effective equality among all people. Therefore, equality before the law is not enough, but only the eradication of inferiorizing factors can ensure the realization of this right. The promotion of equality, then, would figure as a duty of protection by the State.

Human Rights are also non-renounceable, inalienable and imprescriptible. By non-renounceability, it is possible to understand that, unlike subjective rights, «the basic characteristic of human rights is non-renounceability, which translates into the idea the authorization of their holder does not justify or validate any violation of their content»[22]. This is an important characteristic that ensures no one will be deprived of his basic rights, even if he expresses himself to the contrary. It is thus guaranteed, even against the will of the beneficiary, a minimum core of fundamental guarantees that cannot be violated.

The inalienability is related to the pecuniary assignment of rights to third parties. According to André Ramos, «inalienability pleads for the impossibility of assigning a monetary dimension to these rights for sales purposes»[23]. For him, inalienability finds support even in Rousseau, when he spoke out against slavery.

Finally, imprescriptibility refers to the impossibility of losing these rights due to non-use. As a result, the passage of time without claim does not prevent the recognition of these natural guarantees.

3.1 *The Dimensions of Human Rights.* – The literature classifies Human Rights in dimensions or generations. For the purposes of this study, it is necessary to present this doctrinal division so that it can later be analyzed how the protection of minorities qualifies as a human right and from which perspective.

The first dimension of rights is known as freedom rights. They constitute,

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[22] V.O. Mazzuoli, *Curso de direitos humanos*, São Paulo, 2019, p. 31.
[23] Ramos, *Curso de Direitos Humanos*, cit., p. 72.

therefore, a list of guarantees enforceable against the State in order to guarantee their free exercise, and are known as negative benefits. Among the rights of this generation are the right to life, freedom of movement and association, among others.

The second dimension of rights is related to equality and includes, among other things, economic, social, and cultural rights. They are related to positive actions taken by the government to ensure equal living conditions for all. This category includes, for example, the rights to health, citizenship, education, and social security.

Finally, the third dimension is related to fraternity, and it includes rights to development, the environment, communication, the common heritage of humanity, and so on.

It is possible, therefore, to relate the generations of rights to the French Revolution, whose motto *liberté, egalité, fraternité* inspired this widely adopted classification.

According to Mazzuoli[24], there is literature that suggests the existence of two other generations, the fourth related to solidarity (globalization of fundamental rights, direct democracy, right to pluralism) and the fifth related to the right to peace. These categories, however, were created later, and were not studied by Karel Vasak, the creator of the classical structuring.

As previously stated, the right to citizenship is included in the list of second-dimension rights, since it is aimed at positive actions by the State as well as ensuring equality for all. This guarantee is directly associated with the subject of this research, as it is the foundation of all social movements and minority inclusion movements, as will be demonstrated below.

Following that, concepts related to citizenship and its relation to the subject matter of the study will be presented.

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[24] Mazzuoli, *Curso de direitos humanos*, cit., p. 31.

4. *Citizenship.* – Citizenship can be defined as the «effective experience, by all citizens, of the rights normatively assured»[25]. The most famous concept of citizenship, however, was coined by T. H. Marshall, whose three-part division covered all aspects of the aforementioned right.

Marshall divided the concept of citizenship into three elements: civil, political, and social[26]. The civil part refers to the elements aimed at the realization of individual liberties. The political component is associated with the right to participate in the exercise of political power, influencing, and being influenced by the actors of the electoral process. Finally, the social element concerns the need to ensure a dignified life within the prevailing standards of society.

Citizenship is thus linked to the effective enjoyment by citizens of the guarantees conferred by the Constitution or the Law. Effectiveness, then, appears to be the central issue of this study, since it is precisely the failure to confer it that leads to discrimination against minority groups, as it will be discussed later.

The second dimension of Human Rights emphasizes the importance of effectively recognizing the guarantees granted to everyone. According to Lucy Carrillo[27], any harm done to another person can be understood as an offense to humanity itself and an attack on equality. It would be, from the Kantian point of view, a violation of the second categorical imperative, which demands respect for every individual.

In short, according to Hannah Arendt[28], the right to have rights derives directly from citizenship, as a direct consequence of Human Rights. But here, the definition of citizenship has no direct relation with nationality, but mainly

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[25] J.M. Araújo, *Cidadania, desenvolvimento e dignidade humana: uma releitura da esfera pública arendtiana à luz da solidariedade,* in *Pensar,* 2017, 22, n. 2, p. 570.
[26] T.H. Marshall, *Cidadania, Classe Social e Status*, Rio de Janeiro, 1967.
[27] Carrillo, *El concepto kantiano*, cit.
[28] Arendt, *As origens do totalitarismo.* cit.

with the rights that must be given to all.

Historically, the concept of citizenship has been used as a way of exclusion. In ancient Greece, there was a clear distinction of who could exercise certain rights based on citizenship. Hannah Arendt analyzes such particularity:

> The mastery of necessity then has as its goal the controlling of the necessities of life, which coerce men and hold them in their power. But such domination can be accomplished only by controlling and doing violence to others, who as slaves relieve free men from themselves being coerced by necessity. The free man, the citizen of a polls, is neither coerced by the physical necessities of life nor subject to the man-made domination of others.[29]

The point of view established in ancient times only started to change with the emergence of the Welfare State, which introduced inclusive citizenship policies, in which the power of the State was directly linked to its progressive capacity to offer rights and social services to all[30].

Despite the progress made possible by the Welfare State, today there is an apparent tendency towards the exclusionary concept of citizenship, with the increasing number of migratory movements. As Santoro[31] points out, European governments tend to adopt an exclusionary citizenship policy, even accepting the fact that in their territory there are subjects subject to a differentiated public policy, an *underclass*.

It's important to remark that citizenship, the «right to have rights», is a concept that, although it has roots in nationality rules, transcends this reality and should be offered to all, as a result of the universality of Human Rights.

With that in mind, it is possible to observe that citizenship rights, by dealing with equality issues, are daily evoked by minority groups, especially in

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[29] H. Arendt, *Between Past and Future. Six exercises in political thought*, New York, 1961, pp. 117-118.
[30] E. Santoro, *Dalla cittadinanza inclusiva alla cittadinanza escludente: il ruolo del carcere nel governo delle migrazioni,* in *Diritto & Questioni Pubbliche*, 6, 2007.
[31] *Ibidem*.

developing countries, as a way to remind the State of its obligation to all. The modern concept of Human Rights, based on Kantian principles, demands that all people live in dignity, and this flag is often raised by such groups.

As a result, studies that relate formal and material aspects of citizenship have emerged, seeking answers so that the State can materially guarantee the experience of legal rights to all. Formal citizenship, only foreseen in law, unaccompanied by its material part, which makes it effective and guarantees its exercise, is an innocuous right. Therefore, it is necessary to make it effective.

Araújo states that the failure to give effectiveness to the formally foreseen citizenship makes it an abstraction, without taking into account the: «real-life identities; it ignores aspects such as gender, race, or sexual orientation, to name a few. It focuses on the most generic political categories, which, due to their generality and universality, lose their political meaning by being distant from reality»[32].

It is critical to note that granting rights in a generic sense is insufficient. Recognizing specific characteristics of certain groups requires specific action in order for them to be effective. The pursuit of material citizenship, in which all groups benefit equally from the rights provided by law, is a direct consequence of the right to equality and, therefore, a human right, but it requires an analysis of individual characteristics in order to be accomplished.

Starting from the conclusion that material citizenship is a human right, we move on to the final part of the study in which we analyze how minority collectives fit into this panorama.

5. *Minorities.* – For the purposes of definition in this study, the term minorities can be understood by:

[32] Araújo, *Cidadania, desenvolvimento e dignidade humana,* cit., p. 571.

> Group of people who do not have the same political representation as the other citizens of a State or, furthermore, who face historical and chronic discrimination for retaining among themselves characteristics essential to their personality that define their uniqueness in the social environment.[33]

According to the author, the study of such vulnerable groups makes an exception to the principle of formal equality in order to consecrate material equality, especially given the unique characteristics of each of its members. This is distributive justice, as proposed by Aristotle[34] in which «if they are not equal, they will not receive equal things». It is what is called «proportional term», as the philosopher referred to.

In the same sense, Karl Marx highlights:

> Law, by its nature, can only consist in the application of an equal standard of measurement; but unequal individuals (and they would not be different individuals if they were not unequal) can only be measured according to an equal standard of measurement when observed from the same point of view, when taken only from a given aspect [...] one worker is married, the other is not; one has more children than the other one, and so on. For the same work, and thus with the same share in the social consumption fund, one is in fact paid more than the other, one is richer than the other, and so on. In order to avoid all these distortions, Law would have to be not equal, but rather unequal.[35]

Thus, it is critical that individuals have access to different tools for exercising their rights, even if they have unequal instruments. The main purpose of the State, then, becomes the guarantee of access to a certain legal good, even if through different policies. For Araújo[36], the norms that determine the reduction of these inequalities, such as regional differences, poverty, and development, do not have the mere status of a rule, but rather a much higher value load, urging positive actions by the State for their realization. The same

[33] Mazzuoli, *Curso de direitos humanos*, cit., p. 267.
[34] Aristotle, *Ética a Nicômaco*, São Paulo, 2003.
[35] K. Marx, *Crítica do Programa de Gotha,* São Paulo, 2012, p. 28.
[36] Araújo, *Cidadania, desenvolvimento e dignidade humana*, cit.

author also highlights that «every human being depends on external elements made available by the political-normative construction that allow him to insert himself in social and political life, making him an integral part of the State»[37].

One must ask, then: do minorities enjoy effective citizenship? Moreover, does citizenship remain a right to be guaranteed by the State?

About the effectiveness of citizenship, it is possible to verify the existence of a structural prejudice against historically vulnerable groups that generates a frequent subjection of such groups to practices of denial of rights and discriminatory treatment. Such discrimination is most explicitly seen in Brazil against black people.

Although the media and the government present a discourse that racism is relegated to the past, it continues to deeply influence social structures and behavior[38]. Acting out with discriminatory biases does not always come consciously. In fact, studies demonstrate that such racial scheming often occur automatically[39], which has direct repercussions on the actions of state agencies, whether through their internal protocols or the very people who work there.

Brazilian society has been marked by racism and gender inequalities since its inception, these structural oppressions are the result of a colonialist exploitation, and that have persisted to the present day in our relationships and social institutions[40]. It is in this prism of indifference on the part of those who already have their rights respected, as well as by the entrenchment of prejudiced behaviors, that the present study gains relevance, to the extent that it seeks the promotion of the right to equality of vulnerable groups. Costa and Barreto[41] point out that the notion of vulnerability is directly linked to greater

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[37] Ivi, p. 572.
[38] A. Davis, *Estarão as prisões obsoletas?*, Rio de Janeiro, 2018.
[39] M. Alexander, *A nova segregação: racismo e encarceramento em massa*, São Paulo, 2018.
[40] J. Borges, *Encarceramento em massa*, São Paulo, 2019.
[41] D.C.A. Costa, D.R.L. Barreto, *Direito penal dos vulneráveis: uma análise crítica da busca do reconhecimento por meio do Direito Penal*, in *Criminologia e Políticas Criminais*, 2015, 1, n. 2, pp. 57-83.

susceptibility to rights violations, which is why the issue requires greater attention.

In this sense, Piovesan[42] states that the victimization process of minorities occurs more frequently, highlighting the need to obtain policies that are not only universalistic, but specific. The author also stresses that the generic treatment of vulnerable groups is insufficient, requiring a look aimed at their specificities. Thus, a right to difference arises, allied to respect for equality. It is important to mention the protection of the right to diversity was the object of the 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities.

It is clear, therefore, that there is a need to guarantee rights to minority populations and that such a right stems directly from an intrinsic need: a Human Right.

6. *Final Considerations.* – It can be observed, therefore, that the most serious issue with the theme is not the content of citizenship, but its effectiveness. The State duty of wealth distribution is a relevant point in the discussion because it is the responsibility of the State to effectively enable the equal use of public goods, including the rights granted to all individuals.

A legal provision is not enough for a certain right to be considered effectively contemplated. Certain groups are known to have their own factors arising from various aspects (historical, cultural, physical, for example) that make it impossible or difficult to fully exercise these guarantees. Thus, it is up to the State to address the issue through affirmative action.

As a human right directly derived from the exercise of citizenship, the protection of vulnerable groups must take place in full, with the same intensity as the other rights set forth in the Universal Declaration of Human Rights. The fact is the non-exercise of these rights by these groups prevents the enjoyment

[42] PIOVESAN, *Direitos Humanos: desafios da ordem internacional contemporânea*, cit.

of their most basic needs, such as food, shelter, and education.

The agenda under discussion must leave the ideological field and move to the concrete level, since the difficulties faced by these groups in certain aspects are easily verifiable. This is a matter of justice, where universal interests must prevail over individual issues.

Social participation is an extremely important factor for the effectiveness of such governmental policies. The violation of human rights, as suggested by Kant, affects not only the victim, but all of us. We must ensure, therefore, that everyone can live with dignity, with full recognition of the guarantees to which we are all entitled.