

MARCELO GALUPPO, MÔNICA SETTE LOPES,  
KARINE SALGADO, LUCAS GONTIJO, THOMAS BUSTAMANTE  
*Editors*

**Human Rights, Rule of Law and the Contemporary  
Social Challenges in Complex Societies**  
*Proceedings of the XXVI World Congress of Philosophy  
of Law and Social Philosophy of the Internationale  
Vereinigung für Rechts- und Sozialphilosophie*

INITIA VIA  
EDITORA

Belo Horizonte  
2015

Human Rights, Rule of Law and the Contemporary Social Challenges in Complex Societies:  
Proceedings of the XXVI World Congress of Philosophy of Law and Social Philosophy of  
the Internationale Vereinigung für Rechts- und Sozialphilosophie

Marcelo Galuppo  
Mônica Sette Lopes  
Lucas de Alvarenga Gontijo  
Karine Salgado  
Thomas Bustamaente

*Editors*

1<sup>st</sup> Edition [E-book]– 2015 – Initia Via  
Copyright © [2015] Initia Via Editora Ltda.  
Rua dos Timbiras, nº 2250 – sl. 103-104 - Bairro Lourdes  
Belo Horizonte, MG, Brasil, 30140-061  
www.initiavia.com

Editor-in-Chief: Isolda Lins Ribeiro  
Review: Editors and authors  
Graphic project: Ana Caroline Azevedo, Agda Torquato,  
Olímpia Martins, Tomás Cirino.  
Cover design: Eduardo Furbino  
Cover image: Tiles at Church of Saint Francis of Assisi,  
designed by Oscar Niemeyer, at Pampulha, Belo Horizonte, MG, Brazil.

ALL RIGHTS RESERVED. This book contains material protected under International Copyright Laws and Treaties. Any unauthorized reprint or use of this material is prohibited. No part of this book may be reproduced or transmitted in any form or by any means, electronic or mechanical, including photocopying, without express written permission from the publisher.

Human Rights, Rule of Law and the Contemporary Social Challenges in  
Complex Societies: Proceedings of the XXVI World Congress of Philosophy of  
Law and Social Philosophy of the Internationale Vereinigung für Rechts- und  
Sozialphilosophie / editors: Marcelo Galuppo, Mônica Sette Lopes, Lucas Gontijo,  
Karine Salgado, Thomas Bustamante. - Belo Horizonte : Initia Via, 2015.

3159 p.

ISBN 978-85-64912-59-5 [E-book]

1. Law - Philosophy. 2. Human Rights. 3. Rule of Law. I. Galuppo,  
Marcelo. II. Sette Lopes, Mônica. III. Gontijo, Lucas de Alvarenga. IV.  
Salgado, Karine. V. Bustamante, Thomas. VI. Título.

CDU: 34(082)

# **Human rights: has the present economic crisis proven Bentham was right?**

*Maria Clara da Cunha Calheiros de Carvalho*

## **I. The present economic crisis and ideology. Notes from the Portuguese experience**

The present economic crisis has set a scenario, especially in the southern countries of Europe, for the unfolding of a social tragedy that seems far from ending.

The financial troubles and the intervention of European institutions along with the IMF in countries such as Greece, Ireland, Portugal or, more recently, Cyprus has led to the implementation of austerity measures designed to allegedly stabilize the economy and public budgets, thus regaining the credibility lost with international creditors.

One of the common features of the intervention programs has been the adoption of legislative initiatives towards the reduction of the welfare state.

Hence, it comes with no surprise that Courts have been asked to judge if such regulations/rules are in conformity with the constitutional laws of each country. Frequently the issues at stake concern the violation of individual rights once regarded as the result of previously accomplished social and human development. For the purpose of this paper it is particularly relevant that we start by analyzing the arguments that have been used by partisans and detractors of austerity measures. For brevity's sake, we will only focus on the Portuguese debate that arose from the late Constitutional Court decision declaring that a set of regulations adopted by the Portuguese government violated the constitution.

First, let us briefly summarize the content of such regulations. At the end of 2012, the Portuguese government attained the parliamentary approval of the 2013 budget law containing several articles whose conformity to the Portuguese constitution seemed dubious. In fact, the

President of the Republic himself, as well as several deputies of the opposition, submitted a request for the Constitutional Court to rule on the matter.

Following the issue of the court's decision, the international press quoted some Brussels officials, allegedly disappointed with the outcome of the procedure, to the point that they "could barely disguise their contempt for the black-robed judges" who had just decided "that cutting the 14<sup>th</sup> month's pay for public sector workers and pensioners constituted unfair discrimination"<sup>1</sup>. One Eurocrat was even quoted to have said that the Portuguese constitution was the last socialist constitution of Europe<sup>2</sup>.

The Portuguese government, having been asked to apply budget cuts worth 5.3. Billion euros, in order to keep the bail-out programme on track, had planned to do so by reducing public-sector salaries, pensions and benefits. The Constitutional court struck down four out of nine budget cuts before it. The elimination of one extra bonus month paid in the summer was found to flout the equitable treatment of public and private sector workers, the latter maintaining the right to the extra bonus payment. Additionally, the court also rejected the cuts in sickness and unemployment benefits on grounds that minimum payments established by law cannot be lowered.

In the aftermath of the Portuguese constitutional court decision, public opinion was divided between those supporting the government's point of view, and those applauding the reinstatement of the citizens' constitutional rights under threat.

This debate has moved rapidly towards the ideological field. On one side we have seen the use of arguments defending the revision of the Constitution in order to downsize the welfare state. Cuts on public employment, especially in educational and health areas are in order. On the other side, we find criticisms to what has been already defined as an ideological attack on social rights in disguise.

On matters of political philosophy, the debate that arises from the definition of the State's social role comes with no surprise. In fact, one should acknowledge that "since the eighteenth century [the distinctive political issue] has been whether government should do more or

---

<sup>1</sup> Euro wobbles, in "The Economist", 13th April 2013. Available on <http://www.economist.com/news/europe/21576129-portugals-constitutional-court-creates-new-problems-euro-euro-wobbles>. Last access 16 July 2013.

<sup>2</sup> Idem, *ibidem*.

less.”<sup>3</sup>

If we could consider to be true that in modern politics the debate between more or less government is being replaced by the discussion about what sort of activity politics is<sup>4</sup>, we should admit that the former has now regained relevance. This debate has generated prodigious amounts of academic discourse that cannot be dealt with here. Nonetheless, for the purpose of this paper we are particularly interested in ascertaining what implications the reduction of the welfare state will have on people’s rights and especially how it will reflect on the theory of rights.

At this point it is necessary to turn our attention towards the history of modern human rights as some of the arguments used in the above mentioned discussion that currently takes place in Europe seem oddly familiar to us, in spite of the fact that today’s politicians are apparently unaware of the pedigree of the ideas they are overseeing.

## II. Bentham’s assault on natural rights

The well known “Declaration of the Rights of Man and Citizen” stands as a landmark for the building of the modern concept of human rights. It was the product of France’s national endeavours to summarize, in a single text, the rights of all persons. However, its revolutionary proclamation of the existence of a set of inalienable rights that every man or woman ought to be acknowledged by did not cause a general and immediate applause.

In fact, it generated a choir of criticism instead; one can better understand why when we recall the tragic events that took place in France during the historical Terror period.

Among the critics, Jeremy Bentham stands as one of the fiercest. Although we can find Bentham’s ideas on natural rights throughout his works, his main assault on the topic is contained in a posthumous work published first in French, and later in English, under the title of *Anarchical Fallacies*<sup>5</sup>. In this text, the author condemns not only the very idea of

---

<sup>3</sup> LETWIN, Shirley Robin, *The pursuit of certainty*, Cambridge: Cambridge University Press, 1965, p. 1.

<sup>4</sup> LETWIN, *Shirley Robin*, op.cit., p. 1.

<sup>5</sup> The full title being “Non sense upon stilts or Pandora’s box opened or the French Declaration of Rights prefixed to the Constitution of 1791 laid open and exposed – with a comparative sketch of what has been done on the same subject in the Constitution of 1795 and a sample of citizen Sieyès.

the existence of natural and imprescriptible rights, but also the listing of liberty, property, security and resistance to oppression as such. It is here that Bentham writes his famous contention towards the concept of natural rights saying it consists of “nonsense upon stilts”.

Jeremy Bentham’s scepticism about natural rights is rooted in his particular vision of the world and the law. We agree with Hart’s view on the matter when he argues that Bentham’s opinion on human rights has to be understood in articulation with his formulation of the principles of Utilitarianism. In his work *A Fragment on Government*, he expressed his theory justifying the limits of government by resorting to the goal of achieving the “greatest happiness of the greatest number” rather than by means of acknowledging individual rights.<sup>6</sup> This work appeared only a few months after the issuing of the American Declaration of Independence and Bentham reiterated his rejection of the very concept of human rights later in another paper published under the title of *Answer to the Declaration of the American Congress*.<sup>7</sup>

Despite being critical of philosophical conceptions that underlie the American and French Declarations, BENTHAM sympathizes with the republican and democratic revolutionary spirit that animates the Americans and the French. In fact, his ideas have exerted considerable influence in these parts, and particularly in France, where he translated his works. Moreover, BENTHAM receives the title of citizen of France, in the year 1792<sup>8</sup>.

We will therefore briefly review here the various arguments that align Jeremy Bentham in his attack on the French Declaration of Human Rights. We will base our main object of analysis on the BENTHAM works titled *Anarchical Fallacies*, with the occasional mention of ideas and positions contained in other works. The thesis we seek to sustain is that Bentham’s text currently continues up-to-date, since it is an excellent showcase of a set of objections to human rights that are still brandished by their detractors. Opinions are divided on whether the same criticism would remain valid today, given the subsequent Declarations of Human Rights which have arisen, notably the Universal Declaration<sup>9</sup>.

<sup>6</sup> HART, H., *The Shell Foundation Lectures, 1978-1979. Utilitarianism and Natural Rights*, “*Tulane Law Review*”, 53, ap. 1979, *passim*.

<sup>7</sup> HART, *ibidem*, p. 664.

<sup>8</sup> Cf. GETTEL, Raymond, *História das Ideias Políticas*, trans. Port., Lisboa: Ed. Inquérito, 1936, pp. 395-397.

<sup>9</sup> Here I take into account the now classic analyses carried out by TWINING and DALGARNO. Cf. *The contemporary significance of Bentham’s Anarchical Fallacies*, in “Jer-

We shall not deal with analysing this question, but rather seek to demonstrate that, in theory, many of the criticisms that have continued to be addressed today to the natural rights or human rights follow, to some extent, the line of thought of BENTHAM and many of the human rights theories themselves move within the legalistic pattern he used to analyse and criticize natural rights. It is clear that many of the current critics of human rights have the benefit of being able to take into account the actual practice of human rights, with special emphasis on that which has marked international relations. For that reason alone, there would always be room for disagreement. The focus will be the Anglo-Saxon tradition of criticism of the Bills of Rights, in particular, with noticeable influence of utilitarian philosophy. Later, we will briefly comment on these criticisms.

In the interests of greater clarity of the exposition of ideas, we prefer to bring together the main arguments used by the British author under three distinct sections, which were given the following designations: logical objections, political objections, and legal objections. This is our arrangement and does not reflect any division the British author included in his original text.

## **1. BENTHAM's arguments against the Declaration of Human Rights**

### *a) Logical objections*

In the text of the Anarchical Fallacies, as in many other works, the British author clearly expresses the intellectual contempt he feels for the "doctrine" of natural rights. This is, in his opinion, the result of a series of errors of reasoning that he analytically looks to deconstruct. These errors in reasoning are enhanced by the poor quality of the drafting of the text, aspect which we focus here as well, given that it is difficult to maintain a line between the purely procedural and substantive aspects involved in the critical exercise of the British author.<sup>10</sup>

Bentham divides his analysis of the Declaration on two occa-

---

emy BENTHAM. Critical Assessments", London/New York: Routledge, vol. III, 1993; DALGARNO, M. T., The contemporary significance of Bentham's Anarchical Fallacies: a reply to William Twining, *ibidem*.

<sup>10</sup> An aspect with which we agree with TWINING, *op. cit.* P. 713.

sions: he starts with the analysis of the text itself, and then comments the adverse consequences that he envisions can derive from it. So he begins by identifying several flaws of the Declaration of Rights, from a logical point of view. One aspect relates to the use, criticized in the text, of propositions with a high degree of abstraction. In his opinion, the more abstract a proposition is, the higher the degree of probability of containing a sophism<sup>11</sup>. This is a flaw in the logical plan that, on the contrary, the English House of Commons would be free, thanks to the known British aversion to adopt provisions of an abstract nature<sup>12</sup>.

The wording of the text in itself is the subject of particularly virulent criticism. The author considers that particularly bad, accusing it of being vague, imprecise, inaccurate and full of truisms. He even claims that it is a perpetual stream of absurdities deriving from a perpetual abuse of words.<sup>13</sup>. Indeed, the ambiguity would start with the very status of the Declaration as it appeared separated from the Constitution, but preceding it. BENTHAM, as we know, considered that the appropriate place to establish mechanisms for executive control of the legislature

---

<sup>11</sup> “But the more ample the extent given to any proposition or sorting of propositions, the more difficult it is to keep the import of it confined without deviation, within the boundaries of truth and reason. [...] The more abstract – that is, the more extensive the proposition is, the more liable is it to involve a fallacy.” BENTHAM, *The works of Jeremy Bentham*, John Bowring ed., 1843, p. 496.

<sup>12</sup> BINOCHE e CLÉRO, *op. cit.*, p. 24, 21. BENTHAM says: “In the British Houses of Parliament, more especially in the most efficient house for business, there prevails a well-known jealousy of, and a repugnance to, the voting of abstract propositions.” BENTHAM, *The works of Jeremy Bentham*, *op. cit.*, p. 497.

<sup>13</sup> The British author considers particularly important the careful choice of words used in legislation, otherwise the result could be civil war. However, the expressions that the Declaration employs, seem particularly unsuitable and objectionable to him: “The logic of it is of a piece with its [the incendiary of the Efesian Temple] morality: - a perpetual abuse of words, - words having a variety of meanings, where words with single meanings were equally at hand – the same words used in a variety of meanings in the same page, - words used in meanings not their own, where proper words were equally at hand, - words and propositions of the most unbounded signification turned loose without any of those exceptions or modifications which are so necessary on every occasion to reduce their import within the compass, not only of right reason, but even of the design in hand, of whatever nature it may be.” BENTHAM, *The works of Jeremy BENTHAM*, *op. cit.*, p. 497. The great inspirer of utilitarian philosophy had, moreover, particular care with terminology issues and even created neologisms in English from Greek matrices. Some later became integral part of this language: *vg.* international, utilitarian, codification, minimize. GETTEL, *op. cit.*, p. 398.



was the *Constitutional Code*<sup>14</sup>.

The author points out in particular the blatant contradiction towards a tendency to affirm the existence of absolute rights and then make exceptions and limitations to those with an indefinite nature.<sup>15</sup> That is instantly evident to him in the analysis he performs of Article 1 of the Declaration: “All men are born and remain free and equal in rights. Social distinctions may be based only on common utility.” BENTHAM criticizes the falsity of the statements contained in the first sentence and the ambiguity of the second one.

The first sentence is analytically unfolded by the author in four propositions: that all men are born free, that all men remain free, that all men are equal in rights, and that all men remain equal in rights. The author invokes the multiple subjections, as well as the family, social and legal ties that all are subject to in society<sup>16</sup>, as well as the differences in wealth and hierarchy existing in society (between master and apprentice, for example) to support this accusation of falsehood<sup>17</sup>.

He then proceeds to review the alleged ambiguity in this phrase “social distinctions can only be based on common utility,” stating that a contradiction exists with the previous statement of equal rights for all. In fact, says he, one does not even understand what these social distinc-

---

<sup>14</sup> TWINING, op. cit., p. 705, 706, whose opinion we follow closely here.

<sup>15</sup> Cf. QUAH, The continuing Relevance of Anarchical Fallacies to Modern Rights Discourse, in “UCL Jurisprudence Review”, 2002., p. 218.

<sup>16</sup> BENTHAM says: “All men are born free? All men remain free? No, not a single man: not a single man that ever was, or is, or will be. All men, on the contrary, are born in subjection, and the most absolute subjection – the subjection of a helpless child to the parents on whom he depends every moment for his existence. In this subjection every man is born – in this subjection he continues for years – for a great number of years – and the existence of the individual and of the species depends on so doing.” The works of Jeremy Bentham, op. cit., p. 498.

<sup>17</sup> Cf. BENTHAM, The works of Jeremy Bentham, op. cit., p. 498. Among the many differences that the British author lists are those that are created by the differences of fortune, hereditary privileges, gender and hierarchical relationships in nature, as are the sovereign and subject, master and apprentice, doctor and nurse, among others. In the particular case of the relations between husband and wife, BENTHAM leaves no doubt as to his thinking about the recognition in this field of equal rights: “Amongst the other abuses which the oracle was meant to put an end to, may, for aught I can pretend to say, have been the institution of marriage. For what is the subjection of a small and limited number of years, in comparison of the subjection of a whole life? Yet without subjection and inequality, no such institution can by any possibility take place; for of two contradictory wills, both cannot take effect at the same time.” Ibidem, p. 499.

tions are, or how to make them compatible with the previously proclaimed equality. In his view, if they are distinctions that affect equality, they override it; if they are in compliance with equality, one cannot see how they can exist as such<sup>18</sup>.

On the other hand, the British author criticizes the list of natural and imprescriptible rights recognized - liberty, property, security and resistance to oppression - and that their establishment, without limits, makes them incompatible. Thus, pointing out, for example, that private property can only be established and be conceived as a limit or restriction on the freedom of others.<sup>19</sup>

All in all, however, it is not these more formal criticisms that constitute the fundamental objection to the theory of natural rights. As we will see, thenceforth, from a political point of view, those articulate with the deeply damaging consequences that this entails, according to the leader of the utilitarians.

### ***b) Political objections***

One of the fundamental reasons for the opposition that BENTHAM offers to the idea of the imprescriptibility of natural rights is political in nature. In his eyes, there is a manifest inconsistency in establishing natural rights conceived as negative limits for government action and, at the same time admitting that that same government is allowed to establish exceptions and limitations to those.<sup>20</sup> That is to say that its role (natural rights) as a desired brake to the arbitrariness of those in power was far short of what would necessarily be the intention of those who conceived the doctrines of natural rights.

However, if this is still an objection logical-political in nature, the truth is that criticism of BENTHAM does not end here. It is no coincidence that the text from which we have carried out our analysis has been rightly titled "*Anarchical Fallacies*". So the question is where the fallacies contained in the Declaration of Human Rights (or more correctly, the theory of natural rights that underlies it and that is truly the target of BENTHAM's attack) are likely to lead to anarchy. Or, put differently - borrowing the exact words of the author - are a threat to the entire gov-

---

<sup>18</sup> BENTHAM, The works of Jeremy Bentham, op. cit. p. 499.

<sup>19</sup> BENTHAM, The works of Jeremy Bentham, op. cit., p. 503.

<sup>20</sup> Cf. QUAH, op. cit., p. 218.

ernment and the stability of society itself<sup>21</sup>.

It seems to us that there are two main reasons why BENTHAM saw therein the existence of a threat. Firstly, the author considered that the Declaration was a standing invitation to insurrection as it made it almost a duty that the people should resent any violation of their natural rights<sup>22</sup>. Let us remember that one of the rights established was the resistance to oppression, which BENTHAM interpreted in the broader and most radical of terms. It is true that, even though they make no reference to the terrible events that characterized the era in France, they would not be oblivious to this interpretation made of the Declaration. As well remember some of the critics of BENTHAM's thinking, he lived a troubled moment of history, in which the fear of the "mob" was a constant concern of the upper classes of England<sup>23</sup>. Hence perhaps some exaggeration in the very radical interpretation which carries out the intentions behind the Declaration and its effects.

Otherwise we could not understand, for example, the analogy used by the English author to illustrate the harmful effect of the Declaration: this could resemble the legendary law that the murder of the prince on his throne gave the killer the right to succeed him<sup>24</sup>. All in all, it is to argue with the thesis that either "you always comply or never (comply) at all," accusing the revolutionaries of irreparably weakening the authorities of the present and future, to justify the destruction of order and previously existing authorities.

Obviously, Bentham was fully aware that the laws are not always good and that there would, therefore be cases in which disobedience would seem justified<sup>25</sup>.

---

<sup>21</sup> Also in this sense, HART, H. *op. cit.*, p. 79.

<sup>22</sup> That is clear in this passage: "People, behold your rights! If a single article of them be violated, insurrection is not your right only, but the most sacred of your duties." Such is the constant language, for such is the professed object of this source and model of all laws – this self-consecrated oracle of all nations." BENTHAM, *The works of Jeremy BENTHAM*, John Bowring ed., 1843, p. 496.

<sup>23</sup> Cf. BEDAU, Hugo Adam, *Anarchical Fallacies: BENTHAM's attack on Human Rights*, in "Human Rights Quarterly", 22, 2000, p. 268 HART also stresses the influence of these events in France and the fears they inspired in regards to the spread of social unrest, as a result of "contagion," to England itself, as a justification for the particularly vehement tone of criticism.

<sup>24</sup> BINOCHE and CLÉRO, *op. cit.*, p. 20, 21.

<sup>25</sup> BENTHAM makes a distinction in this respect, between the "rational" or "anarchic" attitude that could be taken against an unjust law: "The rational censor, acknowledging

But what disgusted him was the idea that any law could be disobeyed, for no reason, without adequately addressing the consequences of this disobedience, also harmful to the peace and public order. Hence it is critical to emphasize the word “cannot” that limits the action of the legislature, in view of the protection of natural rights<sup>26</sup>.

The second reason that the introducer of utilitarianism would have to identify an “anarchic” threat in the Declaration, has precisely to do with the recognition of the inalienable character of natural rights and therefore absolutely binding of the government. In his view, the entire government would forever be severely shackled in its ability for action.

BENTHAM’s objection in this regard is better understood by reading another of his subsequent works<sup>27</sup>, the *Book of Fallacies* that aims to carry out the analysis of the fallacies to which political discourse was particularly exposed. Now while we do not find any reference to *anarchical fallacies* there, there is an explicit statement of the fallacy consisting in the recognition of irrevocable laws. BENTHAM vehemently rejects the possibility of defence and consecration of these, stating, in a very eloquent and meaningful way that this would be worse than the despotism of Caligula and Nero.<sup>28</sup> However, the fallacy behind the French Declaration was precisely as stated, the one that induced anarchy:

“What then was their object in declaring the existence of impre-

---

the existence of the law he disapproves, proposes the repeal of it: the anarchist, setting up his will and fancy for a law before which all mankind are called upon to bow down at the first word – the anarchist, trampling on truth and decency, denies the validity of the law in question, - denies the existence of it in the character of a law, and calls upon all mankind to rise up in a mass, and resist the execution of it.” BENTHAM, *The works of Jeremy BENTHAM*, op. cit., p. 498.

<sup>26</sup> In this sense, HART, op. cit., p.p. 81, 82. Says BENTHAM: “For such is the venom that lurks under such words as can and cannot, when set up as a check upon the law”. *The works of Jeremy BENTHAM*, op. cit., p. 499.

<sup>27</sup> Subsequent in writing, not in the publication, of course.

<sup>28</sup> BENTHAM states: “Suppose this irrevocable law, whether good or bad at the moment of its enactment, is found at some succeeding time to be productive of mischief – uncompensated mischief – to any amount. Now of this mischief, what possibility has the country of being rid? A despotism, though it were that of a Caligula or a Nero, would be less intolerable than any such immutable law. By benevolence (for even a tyrant has his moments of benevolence), by prudence, in a word, by caprice, the living tyrant might be induced to revoke his law, and release the country from its consequences. But the dead tyrant! Who shall make him feel? Who shall make him hear?” BENTHAM, *BENTHAM’s Handbook of Political Fallacies*, Harold Atkins Larrabee, ed rev., 1952, p. 56.

scriptible rights, and without specifying a single one by any such mark as it could be known by? This and no other – to excite and keep up a spirit of resistance to all laws – a spirit of insurrection against all governments – against the governments of all other nations instantly, - against the government of their own nation - against the government they themselves were pretending to establish – even that, as soon as their own reign should be at an end.”<sup>29</sup>

It should not be forgotten that BENTHAM, with the publication of his *Fragment on Government*, introduces the utilitarian philosophy that refuses to recognize the existence of natural rights, replacing them with a utilitarian principle of the *greatest happiness of the greatest number*. Thus, although he did not exactly enunciate a theory of rights, one can consider that the concept of collective utility<sup>30</sup> will act as a filter for the individual rights to be maintained and created. This is summarized in the following passage:

What is the language of reason and plain sense upon this same subject? That in proportion as it is right or proper, i.e. advantageous to the society in question, that this or that right – a right to this or that effect – should be established and maintained, in that same proportion it is wrong that it should be abrogated [...] there is no right, which ought not to be maintained, so there is no right which, when the abolition of it is advantageous to society, should not be abolished.”<sup>31</sup>

That is to say that our rights should or should not be recognized in accordance with the benefit arising therefrom, in the light of government for the social whole, or rather, for the majority<sup>32</sup>. In fact, we must remember that BENTHAM has a pragmatically pessimistic view of human nature, considering that there are two enemies of public peace: the hostile passions and selfish passions. In this context, the role of government should be to achieve the necessary sacrifices to social cohesion and ensure safety<sup>33</sup>. However, from his point of view, the French Declaration

---

<sup>29</sup> BENTHAM, *The works of Jeremy BENTHAM*, op. cit. p. 501.

<sup>30</sup> Cf. BINOCHÉ and CLÉRO, *BENTHAM contre les droits de l'Homme*, Paris: PUF; 2007, p. 2, 3.

<sup>31</sup> BENTHAM, *The works of Jeremy BENTHAM*, op. cit. p. 501.

<sup>32</sup> Also in this sense, BEDAU, op. cit., p. 272.

<sup>33</sup> Also in this sense, TWINING, op. cit., p. 703.

emphasized both passions thus threatening social peace<sup>34</sup>.

Furthermore, the British author does not believe that any existing government- past, present or future - ever has the ability to perform such duties and expectations. There is therefore also a problem here of effectiveness that emphasizes the need for its rejection<sup>35</sup>.

### c) Legal objections

For Jeremy Bentham no rights exist other than those that positive law provides citizens with, at all times. It must be said that to understand the concept of rights for BENTHAM one must keep in mind his Theory of Fictions<sup>36</sup>.

According to this, the “right” and “obligation” are two fictitious entities, the first of which is a consequence of the second. That is, I can only claim to have the right X, when the law imposes a corresponding obligation Y. This means that the subject be forced to suffer a penalty imposed by law, should he not adopt the behaviour that such imposes and demands. The underlying reasoning is this: all rights derive from the Law, the Law results from the government, so there are no rights beyond the positive rights.<sup>37</sup>

The same is to say, in his opinion, “*there are no rights without law- no rights contrary to law – no rights anterior to law.*”<sup>38</sup> The British author

---

<sup>34</sup> Cf. BINOCHE e CLÉRO, op. cit., p. 22.

<sup>35</sup> “A government which should fulfil the expectations here held out, would be a government of absolute perfection. The instance of a government fulfilling these expectations, never has taken place, nor till men are angels ever can take place.” BENTHAM, The works of Jeremy BENTHAM, op. cit., p. 506.

<sup>36</sup> BENTHAM maintains that the word “law” is a fictitious entity that is used for purposes of discourse and is indispensable for it. He also states that the law depends on the idea of obligation for its understanding, since the efficient causes of the individual rights are two: first, the absence of an obligation imposed upon the holder of the right and opposite to the latter (i.e. each has the right to do what he is not obliged to do), and secondly, the presence of a correlative obligation on the other person (s) to refrain from disrupting the exercise of law. BENTHAM, Teoría de las Ficciones, Spanish trans. Madrid/Barcelona: Marcial Pons, 2005, pp. 165 e ss.

<sup>37</sup> In this sense, the analysis and opinion we follow here, offered by TWINING, W., op. cit., p. 703.

<sup>38</sup> Also in this identical sense, states BENTHAM: “there are no such things as natural rights – no such things as rights anterior to the establishment of government – no such things as natural rights opposed to, in contradistinction to, legal: that the expression is

conceived the Law merely as positive law, namely as a command of a particular sovereign. In this sense, and borrowing from another of his expressions, the subjective right is the *son of the law*<sup>39</sup>. Although Hobbes's philosophy was not alien to his thinking, BENTHAM rejects the idea that the existence of a natural law of self-preservation in the "state of nature" could be conceived (Hobbes, however, admitted to such). There are two reasons for this: first, such a right to exist, would lead to the war of all against all (*what is every man's right is no man's right*<sup>40</sup>); and, secondly, there not being fulfilled an essential requirement, in his view, to all rights, which was the nexus of correspondence with the corresponding obligation. Who was the obliged of this right? BENTHAM denied that the corresponding obligation could be identified there and its unequivocal holder<sup>41</sup>.

Indeed, in his theory of rights, the connection between rights and coercively enforceable obligations, due to the threat of a penalty, therefore plays a central role<sup>42</sup>. This is an aspect that is also associated with his concern about the effectiveness of rights. To BENTHAM, recognition of any system of rules cannot take place without the conditions of its existence being met.

Now the natural and imprescriptible rights which the Declaration spoke of did not seem at all to meet such requirements. In fact, the declared rights were so, regardless of acceptance or compliance, thus it

---

merely figurative; that when used, in the moment you attempt to give it a literal meaning it leads to error, and to the sort of error that leads to mischief – to the extremity of mischief." BENTHAM, *The works of Jeremy BENTHAM*, op. cit. p. 500.

<sup>39</sup> "Right, the substantial right is the child of law: from real laws come real rights; but from imaginary laws, from laws of nature, fancied and invented by poets, rhetoricians, and dealers in moral and intellectual poisons, come imaginary rights, a bastard brood of monsters, "gorgons and chimaeras dire". BENTHAM, *The works of Jeremy BENTHAM*, op. cit. p. 523.

<sup>40</sup> BENTHAM does not have a contractual view of the origin of government (considering that the strength of contracts comes from the government and not otherwise) and does not endorse a vision of a state of nature in which everyone would be entitled to all: "Nature, say some of the interpreters of the pretended law of nature – nature gave to each man a right to everything; which is, in effect, but another way of saying – nature has given no such right to anybody; for in regard to most rights, it is as true that what is every man's right is no man's right." BENTHAM, *The works of Jeremy BENTHAM*, op. cit. p. 502.

<sup>41</sup> Here we follow closely the observations of BEDAU, op. cit., p. 271.

<sup>42</sup> HART, *Essays on Bentham. Jurisprudence and Political Theory*, Oxford: Clarendon Press, 1982, p. 86.

was impossible to equate them to “real rights”, whose normative force came from the mandate of the law, and ensure the forcible compliance of the corresponding obligations that their effectiveness depended on. Which authority did the rights of man come from? The only justification led to theories that the British author rejects: those of natural law<sup>43</sup>.

In the opinion of HART, which we closely follow, his rejection of the “doctrine” of natural law is based on what he calls “*the criterionless character of alleged natural rights*”. This lack of criterion was an expression of the assumed separation of rights (subjective) and law (objective) and would have the terrible consequence of permitting that any political whim be confused with a right<sup>44</sup>.

To some extent, BENTHAM is not insensitive to the idea that all men should have some and certain rights, but he believes that the defence discourse of the innate natural rights, as a way to claim those rights for all (of universal character therefore), is misleading. The author says: “*But reasons for wishing there were such things as rights are not rights: a reason for wishing that a certain right were established is not that right – want is not supply, hunger is not bread*”.<sup>45</sup> One realizes why he employs the term “fallacy” to classify the propositions contained in the Declaration, as BENTHAM would precisely define this concept in his other work, as an argument employed with the intent to deceive (which is moreover, a questionable definition)<sup>46</sup>.

The alternative, that Bentham gives us some insight to, is a theory of rights built on the principle of utility, which can be understood to be alluded to in the passage of the text referred above<sup>47</sup>.

---

<sup>43</sup> Vd. QUAH, op. cit., p. 216.

<sup>44</sup> Cf. HART, Essays..., p. 82.

<sup>45</sup> Cf. HART, Essays, pp. 88, 89.

<sup>46</sup> Vd. BEDAU, op. cit., p. 265. A fallacy can be something that a speech suffers involuntarily.

<sup>47</sup> HART rejects that Bentham has somehow stated, a theory of utilitarian not legal rights that utilizes the principle of utility as a criterion for establishing and identifying the rights that man should have in addition to the positive. According to his view, the British author merely identifies two types of positive rights: the rights of freedom and rights to services. The reasons for this choice are, in his view, double in order: first, the principle of utility would also not be immune to social variations and nuances, not providing a more stable anchor point for the reasons for a rights theory than of the criticized “human nature” and, secondly, because such a theory of not positive rights would contend with his characterization of positive rights, in particular with its necessary correspondence to obligations that could be required to be satisfied by fear of suffering a



The interpretation that HART makes of the British author's thinking, the acceptance of the existence of moral rights (alongside real rights – the positive ones) was compatible with his utilitarian philosophy. Moral rights would emerge from positive morale created by each society and therefore from human conduct. Thus, continuing to pursue this train of thought, what BENTHAM denied was not that there were not only positive rights, but rather that there could be rights universally held by all, in a threefold sense: them not being the product of man or God, their existence not depending on social convention or recognition; nor constituting the reflex of certain features of human nature<sup>48</sup>.

### III. The Anarchical Fallacies and the crisis “discourse”

Let us look go back to our analysis of today's economic crisis.

The arguments now presented by those who are defending the downsizing of the welfare state are, in my point of view, very similar to the ones used by Jeremy BENTHAM in his works, and in particular in the “Anarchical Fallacies” even if, as I have said before, they do not seem at all aware of this similarity. Of course, not all the justifications given to us by Jeremy Bentham to offer a rejection of the concept of human rights are in place, nor has anyone ever been bold enough to publicly defend that human rights are just “nonsense upon stilts”.

However, the fact remains that the suppression or reduction of the welfare rights are being defended as necessary sacrifices that government must inflict on part of the population for the benefit of a greater good. Ultimately, we are being told that what must guide government is nothing but “the greatest happiness of the greatest number”. Moreover, the very existence of imprescriptible and unalienable rights is being questioned in a “Benthamian” sort of way as something which is incompatible with the free exercise of the powers of government.

As one should expect, the same supporters of the welfare state's downsizing are fearful of the ordinary functioning of democratic mechanisms, especially the expected outcome of general elections taking place. And again this recalls Bentham's first negative views on democracy.<sup>49</sup>

---

penalty. *Essays...*, op. cit., p. 85.

<sup>48</sup> Cf. HART, op. cit., pp. 83, 84, 85.

<sup>49</sup> He later on changed his opinion and expressed his compatibility with Utilitarianist principles, as Hart notices. However, at first he was not convinced by democracy supporters and indeed he seemed very critical of French revolution. Hart sustains this was

He changed his opinion later on, but there is a logical connection between the scepticism on human rights and the advantages of democracy.

To some extent the present economic crisis has put to a test Bentham's assertion that *"reasons for wishing there were such things as rights are not rights: a reason for wishing that a certain right were established is not that right – want is not supply, hunger is not bread"*. Indeed, the lack of sufficient economic resources has made the public aware of the frailty of individual rights. Furthermore, there was continuous public pressure on the Portuguese constitutional court in order to convey with the restriction of rights. The reiterated statement that the people were living in a way "they had no means to afford" conveyed the idea that having rights costs money.

In consequence, the public disbelieve in the protection offered by any system of rights has increased. This is particularly so in what concerns economic and social rights. The question now is no longer to understand how to work towards expanding those rights, but rather acknowledging that no progress ever made seems to be granted.

---

the result of fear of anarchy and excess inspired by news on the Terror period events. HART, *ibidem*, p. 666.