

## CONSUMER RIGHTS AS HUMAN RIGHTS: LEGAL AND PHILOSOPHICAL CONSIDERATIONS

LOS DERECHOS DEL CONSUMIDOR COMO DERECHOS HUMANOS:  
CONSIDERACIONES LEGALES Y FILOSÓFICAS

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## Abstract

This paper analyzes the interrelation of consumer rights and human rights. A wide range of philosophical and legal arguments support the necessity of consumer protection in order to ensure human dignity. Consumer rights are human rights and must be enforced as such. The unanimous adoption of the United Nations Guidelines for Consumer Protection reveals international concern about the theme.

**Keywords:** Consumer protection; Consumer rights; Human rights; Pure practical reason; Human dignity; United Nations Guidelines on Consumer Protection.

## Resumen

Este artículo analiza la interrelación entre los derechos del consumidor y los derechos humanos. Una amplia gama de argumentos filosóficos y legales respaldan la necesidad de la protección del consumidor para garantizar la dignidad humana. Los derechos del consumidor son derechos humanos y deben ser exigidos como tales. La adopción unánime de las Directrices de las Naciones Unidas para la Protección del Consumidor revela la preocupación internacional sobre el tema.

**Palabras clave:** Protección del consumidor; Derechos humanos; Razón práctica pura; Dignidad humana; Directrices de las Naciones Unidas para la Protección del Consumidor.

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## 1. Introduction and Methodological Approach

Consumer relations are permeated with several issues that deserve full attention: mass production, sustainable consumption, “adhesion” contracts, e-commerce. A globalized and digital era is accentuating the imbalance between consumers and providers. Consumers are continually vulnerable and must be protected accordingly.

The unanimous adoption of the United Nations Guidelines on Consumer Protection, by the United Nations General Assembly, demonstrated solid international recognition of the importance of consumer rights, and several States around the world have already included consumer rights in their national constitutions and local laws.

Given that consumption is a universal necessity of every individual, consumer protection is crucial to achieve and maintain human dignity. That is why consumer rights are interconnected and interrelated to several human rights. But are consumer rights human rights? Furthermore, are consumer rights recognized as human rights?

In order to provide adequate answers to these questions, the first two sections of this paper provide a general panorama of consumer rights and human rights, respectively. The following topics present philosophical considerations

and legal arguments that might support the relationship between consumer rights and human rights.

Throughout this paper, facts and practical issues are also presented in order to support the research towards a substantial conclusion. Therefore, the overall methodological approach of this paper was qualitative, but some quantitative aspects were also analyzed, conferring a threefold approach to the research: legal, philosophical and practical.

The legal analysis was guided by a number of factors, such as the nature of human rights, their higher hierarchical status, and their connection with consumer rights. Philosophical considerations were also essential to assess the hypothesis of the relationship between human dignity and consumption, especially nowadays when giant companies' revenues are bigger than the Gross Domestic Product (GDP) of some European Countries. Practical aspects, such as the growing United Nations (UN) debates about consumer rights and the increasing number of countries recognizing the fundamental nature of consumer rights, allowed the assumption that consumer protection is interrelated to human rights.

In order to research for this topic, diverse sources were used, including legal doctrine, scientific articles, and philosophical works of several authors of different nationalities and backgrounds.

## **2. Consumer Rights**

Consumer protection finds its milestone in President John F. Kennedy's speech on 15 March 1962. In this "special message to the Congress of the United States of America on protecting consumer interests" he stated that:

"Consumers, by definition, include us all. They are the largest economic group in the economy, affecting and affected by almost every public and private economic decision. Two-thirds of all spending in the economy is by consumers. But they are the only important group in the economy who are not effectively organized, whose views are often not heard... We cannot afford inefficiency in business or government. If consumers are offered inferior products, if prices are exorbitant, if drugs are unsafe or worthless, if consumers are unable to choose on an informed basis, then [their] dollars

are wasted, [their] health and safety may be threatened, and the national interest suffers"<sup>2</sup>.

Although trades and markets have always been present in human history, the necessity of consumer protection is a fairly modern concern. There are intrinsic disparities in the consumer–supplier relationship that need to be addressed. In order to guarantee rights and sustain functional market economies, public and private actors are coming to the conclusion that it is imperative to correct verified imbalances in the consumer relations.

However, the correction of these imbalances requires a modern view of the theory of contracts. The traditional standards, i.e. autonomy of will and *pacta sunt servanda*, must be limited by the social role of contracts. Factors such as bargaining power and knowledge, reveal a clear inequality of the factors involved in consumer–supplier relations<sup>3</sup>. Therefore, consumer protection has undoubtedly influenced the modernization of the traditional contract theory, replacing the blind compliance of unjust and dysfunctional contracts.

In this regard, even if the contract does not explicitly mention them, providers have intrinsic obligations towards consumers, such as transparency, information, and objective good faith<sup>4</sup>. Given the informality of many consumer contracts, even some pre-contractual elements must be binding to providers<sup>5</sup>, e.g. advertisement. For example, a provider may not advertise a product for a price and charge a higher price for the exact same product.

This modern and dynamic view of contracts responds to socioeconomic changes on the society as a whole, including consumer relations. The digital era highlights the importance of consumer protection even more. Mass consumer relations have substantially diminished the number of “customized” contracts, which had given place to the so-called “adhesion” contracts. These “adhesion”

2 UN Conference on Trade and Development (UNCTAD), Manual on Consumer Protection, 30 January 2019, UNCTAD/DITC/CPLP/2017/1/Corr.3, p. 2.

3 Ídem.

4 MIRAGEM, B., Curso de Direito do Consumidor, 7 ed. rev. atual. – São Paulo: Thomson Reuters Brasil, 2018, p. 259.

5 *Ibidem*, p. 262.

contracts were conceived to fit an unidentified consumer and given to almost every client who the provider comes to conquer. “Adhesion” contracts offer little or no space for negotiation. Fixed terms narrow the consumer’s choice to a “take it or leave it” decision.

The internet age provides another modality to the already problematic “adhesion” contracts: the electronic “adhesion” contracts. As very well stated by Consumers International specialists “... it is a matter of `tick, click and hope for the best”<sup>6</sup>. There is no need for a scientific study to come to the conclusion that most people will never read the electronic contract before checking the little box which states: “I have read and agree with the terms of this contract”. In fact, even if the person overcomes the temptation of lying and reads the book-length contract, it is very difficult to understand the terms.

It is also very important to emphasize that consumer protection is not limited to the preservation of economic rights. Consumer protection also guarantees the implementation of social, cultural, and even civil rights. In extreme situations, consumer rights deprivation may lead to serious diseases and even life-threatening situations. Just to mention an example on how important the topic is, the United Nations Conference on Trade and Development (UNCTAD) made clear that consumer protection is an essential tool to reach distributive justice, as follows:

“The development of rights to consumer protection, especially in the developing world, can now be seen as part of a strategy to eradicate poverty and to bring socioeconomic justice to the underprivileged. In this regard, one of the advantages of consumer protection is that it does not only focus on the income of the poor, but also on their expenditure”<sup>7</sup>.

Given the importance of these rights, who is responsible for consumer protection after all? States, of course, but not exclusively. President John F. Kennedy’s speech affirms that consumers affect and are affected by the economy of any market society. Therefore, their protection must be carried out by a

6 UN Conference on Trade and Development (UNCTAD), *Manual on Consumer Protection...* Op. Cit., p. 4.

7 *Ibidem*, p. 5.

complex net, which encompasses both public and private bodies. Examples of the latter are consumer associations and self-regulation councils. While private bodies play an essential role to implement consumer rights, their ultimate protection and enforcement must be guaranteed by the State through administrative and legislative instruments.

The content of consumer protection laws will certainly depend on the reality and needs of each State. However, the internet age created a borderless global market, easily accessible worldwide. Nowadays, a Brazilian resident may purchase a product from a Chinese provider in a matter of minutes. Therefore, there are many challenges to drafting consumer protection laws. Fortunately, the United Nations General Assembly anticipated this dilemma and adopted the United Nations Guidelines for Consumer Protection in 1985 (revised in 1999 and 2015), which has provided the basis for the framework of consumer protection laws in many countries<sup>8</sup>. Maybe now it is time to take a step further towards a binding instrument, such as an International Covenant on Consumer Rights.

The United Nations Guidelines for Consumer Protection (hereinafter UNGCP) affirms to be "... a valuable set of principles [...] on consumer protection legislation"<sup>9</sup>. The fact that it was adopted by all members of the United Nations's General Assembly, demonstrates an international recognition on the importance of consumer protection and an international will to gather forces to achieve this goal. The document's preface states that the UNGCP "... help promote international enforcement cooperation among Member States and encourage the sharing of experiences in consumer protection"<sup>10</sup>. Although a binding instrument would be more effective in terms of enforcement, the choice of words in the preface clearly indicates an intention towards international enforcement.

International cooperation is of great importance in the UNGCP. It dedicates the entirety of Section VI to set an extensive framework on how the Member States should make joint efforts to achieve consumer protection. Guideline 95 determines that the institutional machinery will be provided by

8 *Ibidem*, p. 16.

9 UN Conference on Trade and Development (UNCTAD), *United Nations Guidelines for Consumer Protection*, New York and Geneva, 2016, UNCTAD/DITC/CPLP/MISC/2016/1, p. 3.

10 *Ibidem*, p. 8.

an intergovernmental group of experts on consumer protection law and policy under the auspices of the UNCTAD<sup>11</sup>. The 2013 Implementation Report on the United Nations Guidelines on Consumer Protection concluded that the UNGCP have been widely implemented by Member States<sup>12</sup>.

### 3. Human Rights

Human rights are defined as rights inherent to all human beings. In the precise words of Marek Piechowiak, they are “... rights which belong to any individual as a consequence of being human...”<sup>13</sup>. Therefore, the existence of human rights does not rely on acts of law, they are beyond legal recognition. What we now know as human rights were early recognized by the Theory of Natural Law, whose roots are found in Sophocles play, *Antigone* (441 B.C.)<sup>14</sup>.

The theory of Natural Law evolved to the Human Rights Theory, and, in 1948, the Universal Declaration of Human Rights (hereinafter UDHR) was proclaimed by the United Nations General Assembly. Its preamble states that recognition of inherent dignity and inalienable rights are the foundation of freedom, justice, and peace. This milestone document was a response to the barbarous acts which resulted due to disregard for human rights. Therefore, it did not bring a new set of rights, but recognized they existed and highlighted their crucial role of achieving dignity and equality among the “human family”.

The UDHR, although non-binding, was followed by two binding Covenants: the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Alongside other international treaties, these documents recognize and enforce human rights. But do they contain all human rights or could others be added? On this matter, it is pertinent to briefly recall the division of human rights in generations.

11 UN Conference on Trade and Development (UNCTAD), *Manual on Consumer Protection...* Op. Cit., p. 15.

12 Ídem.

13 PIECHOWIAK, M., *What Are Human Rights? The concept of human rights and their extra-legal justification*, in: HANSKI, R. and SUKSI, M., *An Introduction to the International Protection of Human Rights*, 2 ed. rev. – Turku: Institute fo Human Rights Abo Akademi University, 1999, p. 12.

14 GUSMÃO, P. D., *Introdução ao Estudo do Direito*, 39 ed.– Rio de Janeiro: Forense, 2007, p. 56.

In 1977, Karel Vasak divided human rights into three generations<sup>15</sup>. This threefold view is widely accepted by most modern scholars, but it requires a careful analysis. The word "generations" might give the idea of time periods, but regarding the study of human rights, the analysis goes beyond chronology, also embracing the substance of these three groups of rights. In other words, generations indicate historical transitions and qualitative shifts equally<sup>16</sup>. According to Derek G. Evans, the emerging rights do not make the former obsolete, instead they expand the overall framework<sup>17</sup>.

The first generation refers to civil and political rights and was formally acknowledged in the ICCPR (1966). Also known as "basic principles"<sup>18</sup>, they are a set of "negative rights" which prevented the State from interfering with individual liberties<sup>19</sup>. Liberty and equality are the pillars of this group of rights which limit the power of the State. Historically, the recognition of the rights of this generation seems to point at a period between the end of World War II and the founding of the United Nations<sup>20</sup>. Evans clarifies that:

"This first generation was very conscious that it was working to establish human rights as a new language and ideology in an international context emerging from the rubble of global war and mass genocide"<sup>21</sup>.

The second generation congregates the economic, social, and cultural rights, and their most emblematic binding expression is the ICESCR (1966). This generation requires positive action by the State. In this sense, the State must act to implement the rights. That is, they require institutional support to be fully

15 VASAK, K., *A 30-year Struggle – The sustained efforts to give force of law to the Universal Declaration of Human Rights*, in: *The UNESCO Courier*, 30<sup>th</sup> year – Paris: November, 1977.

16 EVANS, D.G., *Four Generations of Practice and Development*, in: ABDI, A. A. and SHULTZ, L., *Educating for Human Rights and Global Citizenship* – Albany: State University of New York Press, 2009, p. 2.

17 Ídem.

18 Ídem.

19 VASAK, K., *A 30-year Struggle – The sustained efforts to give force of law...* Op. Cit., p. 29.

20 EVANS, D.G., *Four Generations of Practice and Development...* Op. Cit.

21 *Ibidem*, p. 3.

guaranteed. From a chronological point of view, during the 1960s, 1970s and 1980s, a massive awareness led to binding documents –such as covenants, treaties, and, conventions– known today as the International Human Rights Law. The moral force of the UDHR was translated into legal instruments.

The third generation of human rights was described by Vasak as solidarity rights<sup>22</sup>. The implementation of these rights requires collective effort. In other words, they may only be effectively guaranteed and protected by the combined work of States, individuals, and public and private institutions<sup>23</sup>. They are often described as emerging rights, because they were conceived during a time in which humanity was engaged in debates regarding “new” affairs, such as environmental protection, humanitarian aid, and common heritage of mankind.

Lately, scholars have discussed an upcoming fourth generation of human rights and it is very likely that other generations will follow. The dynamism of human rights theory clearly indicates that the recognition of new rights is a response to socio–economic changes. In this context, it would be inaccurate to state that new human rights may arise. They may indeed be recognized because, as already established, human rights are not “created,” they simply exist.

However, although possible, there is a considerable resistance to the admission of new human rights. On this regard, Sinai Deutch states the following:

“It has been argued that admission of new rights could create a damaging climate in terms of the value and validity of existing human rights. Thus, the proclamation of new human rights can be justified only when the need is sufficiently great and when the chance of acceptance by the international community is strong”<sup>24</sup>.

After these considerations about consumer protection and human rights, complex questions arise: are consumer rights human rights? Furthermore, are consumer rights already admitted as human rights?

22 VASAK, K., *A 30-year Struggle – The sustained efforts to give force of law...* Op. Cit, p. 29.

23 Ídem.

24 DEUTCH, S., *Are Consumer Rights Human Rights?*, in: Osgood Hall Law Journal 32.3: 1994, p. 540.

## 4. Consumer Rights as Human Rights – Philosophical and Juridical Arguments

In order to categorize consumer rights as human rights, it is mandatory to go through a variety of arguments conceived from many standpoints. This complex study extrapolates the standpoint from the legal perspective. For this reason, before starting a legal examination, this paper proposes some philosophical reflections.

### 4.1 Brief Philosophical Considerations

In his book entitled "Justice"<sup>25</sup>, philosopher Michael Sandel proposes moral and political reflections that are also suitable to guide a study about human rights and consumer protection. In chapter 5, the Harvard professor presents Prussian philosopher Immanuel Kant's approach regarding human rights. According to the Prussian philosopher, the protection of rights must be motivated by the idea that we are rational beings, worthy of dignity and respect. Kant acknowledges that morality is about respecting the human being as an end and never only as a means. His idea has heavily influenced both eighteenth-century revolutionaries, especially concerning what they called rights of man, and what in the early twenty-first century was conceived as universal human rights<sup>26</sup>. In the words of Sandel: "Kant's emphasis on human dignity informs present-days notions of universal human rights"<sup>27</sup>.

Kant offered a *sui generis* perspective regarding justice and morality. He was a powerful criticizer of the utilitarian approach. Furthermore, although Christian, he also disagreed with the idea of morality based on divine authority. For him, the supreme principle of morality is only achieved through a process called "pure practical reason"<sup>28</sup>. In order to comprehend Kant's view, it is worthy to briefly go through the ideas of the two other main chains, i.e., utilitarianism and libertarianism.

Utilitarians believe that there is a happiness principle which directly

25 SANDEL, M. J., *Justice: what's the right thing to do?*, 1 ed – New York: Farrar, Straus and Giroux, 2009.

26 *Ibidem*, p. 104.

27 *Ibidem*, p. 105.

28 *Ídem*.

establishes morality. For Jeremy Bentham and his followers, a person's sovereign masters are pain and pleasure. In Sandel's words:

“We all like pleasure and dislike pain. The utilitarian philosophy recognizes this fact, and makes it the basis of moral and political life. Maximizing utility is a principle not only for individuals, but also for legislators. In deciding what laws or policies to enact, a government should do whatever will maximize the happiness of the community as a whole... Citizens and legislators should therefore ask themselves this question: if we add up all of this policy, and subtract all the costs, will it produce more happiness than the alternative?”<sup>29</sup>.

Alternatively, Immanuel Kant refuses to accept simply empirical considerations to support a whole justice and moral system. He correctly affirms that desires and preferences of people vary from time to time, thus they may not support universal and timeless moral principles such as universal human rights<sup>30</sup>.

The libertarianism is another chain which establishes a link between justice and freedom, affirming that we own ourselves. For them, for example, the ideal scenery would be an unfettered market, which would determine by itself a just distribution of wealth. Sandel explains that libertarians are in favor of a minimal state, whose role is limited to enforcing contracts and protecting private property from theft<sup>31</sup>. This approach does not seem to be the most appropriate because, as already exposed in this paper, contracts, especially consumer contracts, may not be enforced without a previous analysis on the socio-economic inequalities of the parts. In other words, the autonomy of will and *pacta sunt servanda* are limited and should not justify a “blind” enforcement of any contract. Kant's fierce criticism of utilitarianism may give the impression that he advocates the opposite philosophical chain: libertarianism. However, he has a *sui generis* notion of freedom. Sandel gives an example to explain the Kantian concept of freedom. It is about an advertising slogan of a soft drink: “obey your thirst”.

29 Ibidem, p. 34.

30 Ibidem, p. 105.

31 Ibidem, p. 60.

The professor affirms this slogan inadvertently contains a Kantian insight, i.e. when you drink the soft drink it is an act of obedience to your desire, which you did not choose. Sandal claims that:

“People often argue over the role of nature and nurture in shaping behavior. Is the desire for Sprite (or other sugary drinks) inscribed in the genes or induced by advertising? For Kant, this debate is beside the point. Whenever my behavior is biologically determined or socially conditioned, it is not truly free. To act free, according to Kant, is to act autonomously. And to act autonomously is to act according to a law I give myself – not according to the dictates of nature or social convention”<sup>32</sup>.

Therefore, freedom is not the absence of obstacles to doing what you desire, but the ability to go through a path towards an end you chose. Only human beings have this ability, because it is based on a rational standpoint. Desires may be driven by instinct, but true freedom is related to the ability to make decisions autonomously. This logic is universal; it does not vary from time to time. It is intrinsic to human nature. This is the Kantian principle of “pure practical reasons”, based on the idea that reason can be sovereign. Only this autonomy may confer moral responsibility.

This notion of freedom and recognition of human beings as rational creatures should have a profound application on legislative initiatives. The ability to act autonomously gives human lives extraordinary value; it is what distinguishes people from things<sup>33</sup>. For Kant: “... man, and in general every rational being, exists as an end in himself not merely as a means for arbitrary use by this or that will”<sup>34</sup>. That means justice will only prevail if people have intrinsic value, i.e. if they have their dignity recognized, respected, and enforced as an absolute value.

Hence, the Kantian logic solidly sustains the modern idea of universal human rights, but does it also sustain the recognition of consumer rights as human rights? The answer to this question is in the affirmative. The Kantian

32 *Ibidem*, p. 108.

33 *Ibidem*, p. 110.

34 *Ibidem*, p. 122.

notion of freedom, or the lack of it, is directly related to modern consumer relations in which the consumer is vulnerable, because the provider detains the technical information about the product and the expertise to advertise it in a manner that generates desire and restricts a truly rational choice. In this case, the consumer, as a human being, has his dignity threatened.

Regarding Kant's understanding of human freedom, Michael Sandel explains that:

“[T]he idea of freedom he puts forth is demanding – more demanding than the freedom of choice we exercise when buying and selling goods on the market. What we commonly think of as market freedom or consumer choice is not true freedom, Kant argues, because it simply involves satisfying desires we haven't chosen in the first place”<sup>35</sup>.

Nowadays, sales and marketing techniques are so advanced that consumers' vulnerability might be increasing. There are countless experts, whose main goal is to make consumers buy products and hire services. Of course, it would be an inaccurate generalization to say that all marketing and sales departments are working to deprive consumers from their freedom and consequently attacking their dignity. However, selling strategies may involve creating desires and necessities that do not exist.

The digital transformation brought many sensitive questions regarding data collection and the use of algorithms to induce consumers. For example, the advertisements displayed on the screen when a person accesses his or her social networks are often customized. Computer robots are very effective to induce people to buy products they do not need, maybe even more effective than salespeople.

At this point in history, it would be naive to believe that a completely unfettered market is the best option. Information is essential to a truly free choice and it is also a consumer right. But in many cases, providers manipulate and omit information in order to sell their products. They may do that, for example, by using difficult language on contracts. For these and many other

<sup>35</sup> *Ibidem*, p. 106.

reasons the law must regulate consumer relations as a means of protecting universal human rights.

Some of the most intense philosophical discussions about justice are related to the role of markets. Therefore, they directly or indirectly involve debates about consumer relations. As incoherent as it may sound, a free market does not guarantee freedom to consumers. Sandel asks: "Is the free market fair?"<sup>36</sup> And "[h]ow free are the choices we make in the free market?"<sup>37</sup>.

Libertarians will evoke individual liberty to sustain the free market. For them, people must be left to their choices and their voluntary exchange will determine the distribution of wealth. They believe that a State's interference on the market violates individual liberties. Utilitarians also defend the free market, but based on the argument of general welfare. They understand that when people make deals, everybody wins<sup>38</sup>.

Based on the Kantian theory, the market's conceptions of both chains are questionable. Libertarians are right to establish a connection between market intercourses and liberty, but fail to comprehend the concept of liberty. Utilitarians, on the other hand, have the ultimate argument of welfare, which also fails because it is not timeless and universal. Conceptions of welfare may vary in different cultures, places, and periods.

Therefore, the Kantian approach leads to a third idea. The State must regulate the market guided by human freedom and dignity. Thus, given the panorama of a global economy, consumer protection is a universal human right that must not be left to the free-flowing waves of a free market. It is important to notice that when the State rightfully regulates the economy, it may be good for both consumers and providers (for example, establishing good competition policies and laws). However, it is not enough. The State must legislate and act to directly enforce consumer rights as it should do regarding any other human right.

36 *Ibidem*, p. 75.

37 *Ibidem*, p. 101.

38 *Ibidem*, p. 75.

## 5. Legal Arguments

In the past, human rights and consumer rights were seen as different fields of law with little interaction, but lately more and more scholars have proposed reflections about their convergence<sup>39</sup>. In 1994, Sinai Deutch presented a comprehensive study about the theme, entitled “Are Consumer Rights Human Rights?”<sup>40</sup>. At the time, he concluded the following:

“This paper proposes a novel thesis, which may be received with some skepticism by the reader. It suggests an initial acknowledgement of consumer rights as soft human rights, leading finally to full recognition as human rights”<sup>41</sup>.

If this topic arose back in the 1990s, then that means that nowadays, with the rapid advances of technology and internet, it requires special attention. Today a global market is established and there is no return. There has never been a time when consumer relations were more highlighted as part of human life and dignity than they are now. The importance of acknowledging consumer rights as human rights resides on the fact that they have to receive special protection to counterbalance the abusive market behaviors which directly affect human beings.

As previously stated in this paper, the main international human rights covenants did not mention consumer rights. However, recalling the study of human rights in generations, it is possible to infer that the third generation congregates emerging rights or “new” rights. For Deutch, third generation rights “attempt to extend the scope of human rights beyond those found in the Universal Declaration and two international covenants”<sup>42</sup>.

These rights emerge as a response to socio–economic changes that demand new modalities of protection. Consumer rights, as human rights, originated in

39 HOWELLS, G., RAMSAY, I and WILHELMSSON, T., *Handbook of Research on International Consumer Law*, 2 ed. – Uk and USA: Edward Elgar, 2018, p. 16.

40 DEUTCH, S., *Are Consumer Rights Human Rights?... Op. Cit.*

41 *Ibidem*, p. 577.

42 *Ibidem*, p. 555.

response to the growing power of States and business corporations<sup>43</sup>. Regarding the word "new", it is important to notice it does not refer to emerging rights *per se*, because human rights simply exist, for they are intrinsic to human beings. Therefore, what is "new" is their recognition, triggered by cultural and socio-economic changes.

Carlos Eduardo Tambussi illustrates that human rights are part of a pre-normative category and as such they have a concept that is open to social developments<sup>44</sup>. He states that the consumer right is "el más cotidiano de los derechos [The most recurrent of all rights]"<sup>45</sup>. Therefore, it is possible to conclude that consumer rights are third generation rights. They certainly are solidarity rights, for they are closely connected to global development and the preservation of the environment.

However, this assessment must be based on substantial arguments, because reckless and inconsequent admission of "new" human rights may lead to the trivialization of the already established ones. That is why, this paper will now present an analysis founded on three formal human rights characteristics that may be used as guidelines to conclude whether consumer rights are human rights. First, universality and international acceptance. Second, the acknowledgment of human beings as the primary concern. And third, protection against governments and business organizations<sup>46</sup>.

### **5.1 Universality and International Recognition of Consumer Rights**

To be characterized as human rights, consumer rights must be universal. And they are. Every person is a consumer. These rights do not belong to specific groups of people, they are individual rights that apply to all. Some may argue against this universality, saying that there are people isolated from market economies, who live in isolated places, planting and harvesting everything they need to survive, so they would not need to purchase products.

43 TAMBUSI, C. E., *Los Derechos de Usuarios y Consumidores son Derechos Humanos*, in: Lex n. 13 - año XII, 2014, p. 95.

44 Ídem.

45 Íbidem, p. 93.

46 DEUTCH, S., *Are Consumer Rights Human Rights?...* Op. Cit, p. 551.

However, there are other human rights that are exercised for even less people than consumer right. For example, the right to peaceful assembly or association. Certainly, many people who are reading this paper have never exercised this right, but it is still a human right recognized on the UDHR and the ICCPR. Moreover, many people have never formed or joined trade unions, but they still have this human right envisaged on the UDHR and on the ICESCR. Hence, universality does not mean every single human being will exercise these rights, but it means every single person is entitled to these rights.

Regarding universality, it is also important to evoke the Kantian notion that human rights are not linked to society or culture, but are intrinsic to a human being. Consumer rights fit perfectly with this idea, for they are guided by general principles suitable to every person, regardless of their country, language, or culture. This is especially true in times of globalization, marked by mass production and a global market. For example, an Argentinian may easily purchase a product from a Hong Kong based provider. Or a Russian resident may hire online English lessons from an Australian Language School. Even these relations that are established among people of different cultures and social backgrounds demand consumer protection. Therefore, consumer rights are a universal and international concern.

The United Nations Guidelines on Consumer Protection (UNGCP) were the first international document regarding the theme and it revealed an international willingness to acknowledge and enforce these rights. While not binding, the UNGCP's unanimous approval by the United Nations General Assembly inspired many States around the world to enforce its principles. Deutch infers that:

“Although the UNGPD is not a mandatory international document, it is not fully voluntary and it does have an effect on national and international consumer protection law”<sup>47</sup>.

Esther Peterson, cited by Sinai Deutch, shortly after the approval of the UNGCP, enthusiastically affirmed the following:

47 *Ibidem*, p. 569.

"International guidelines can serve as a Charter of Human Rights in the consumer area. That does not mean that every nation would scrupulously obey and implement these principles. Many may not. But the existence of a UN-sponsored Charter of Consumer Rights can simply not be ignored by any nation which wishes to be considered civilized"<sup>48</sup>.

Peterson's words might have seemed a little too optimistic in 1986, but 30 years later she was proved to be right by the innumerable legal and practical initiatives around the world. Several countries adopted consumer protection laws inspired by the UNGCP. In 2008, as many as 26 countries had constitutional provisions about consumer rights<sup>49</sup>. Some of these countries went even further and conferred fundamental status to consumer rights. According to the UNCTAD, "in many cases consumer protection has been constitutionally enshrined and some countries have recognized consumer rights as human rights"<sup>50</sup>.

In the Brazilian Constitution, for example, consumer protection is expressly mentioned in article 5, XXXII, under Title II – Fundamental Rights and Guarantees<sup>51</sup>. According to Bruno Miragem:

"[A] caracterização dos direitos do consumidor como direitos humanos, revela o reconhecimento jurídico de uma necessidade humana fundamental, que é a necessidade de consumo [The characterization of consumer rights as human rights, reveals the legal acknowledgment of a fundamental human necessity, which is the necessity to consume]"<sup>52</sup>.

In Latin America, Argentina, Brazil and Mexico are known to have comprehensive consumer protection laws. All three have consumer protection

48 *Ibidem*, p. 570.

49 UN Conference on Trade and Development (UNCTAD), *Manual on Consumer Protection...* Op. Cit., p. 17.

50 *Ibidem*.

51 According to most scholars, the term "fundamental rights", used by national laws, refers to human rights, the latter being fundamental rights recognized in international treaties. Therefore, essentially speaking, there is no difference.

52 MIRAGEM, B., *Curso de Direito do Consumidor...* Op. Cit., p. 64/65.

explicitly mentioned in their national constitutions, along with Colombia, Costa Rica, Ecuador, Paraguay, and Peru<sup>53</sup>.

The complexity of constitutional amendments creates an obstacle to including consumer protections in more national constitutions. That is why the ideal legal instrument would be an internationally binding treaty. Besides the inherent importance of such an instrument, it would facilitate the inclusion of consumer protections in more constitutions, because many States' legal systems receive international treaties on human rights as constitutional provisions.

While the United Nations has not yet recognized consumer rights as human rights, several Member State around the world have constitutional consumer protection provisions. And many others, although not explicitly mentioned, protect consumer rights through other provisions enshrined in their constitutions. Therefore, it is possible to affirm that there is, to say the least, a strong tendency to admit consumer rights as human rights. In any case, the numerous constitutional provisions in almost every region of the world are another solid expression of the universality of consumer rights.

## **5.2 Consumer Protection and the Individual as the Primary Concern**

Human dignity is a universal value. In philosophical terms, dignity demands the recognition of humanity as an end in itself. From a legal point of view, the law must guarantee basic rights that recognize and enforce the intrinsic worth of a human being. Thus, human rights are based on the notion of the individual as the primary concern. In order to guarantee human dignity, all human rights must be respected because they are indivisible, interdependent, and interrelated. There is no hierarchy. If one is breached, the others will consequently be denied.

Therefore, to be considered human rights, consumer rights must be connected to other rights, ensuring human dignity. And they are. Consumer rights are part of this protective legal system. They are interrelated not only to economic rights, but to many others, including the right to life, health, and property, to mention a few. In reference to this, Deutch explains:

53 HOWELLS, G., RAMSAY, I and WILHELMSSON, T., *Handbook of Research on International Consumer Law...* Op. Cit., p. 21 – footnote 25.

"In a consumer society, protection of the individual consumer is part of maintaining human dignity. If not given the right to fair trade, the right to a fair contract, and the right of access to courts, a person's dignity is disregarded"<sup>54</sup>.

A good example of this idea is the civil right to privacy (article 17, IC-CPR), which is currently at stake on consumer relations. The UNGCP n. 11 (e) affirms that "businesses should protect consumers' privacy through a combination of appropriate control, security, transparency and consent mechanisms relating to the collection and use of personal data". Therefore, an online provider is forbidden, for example, to collect personal information of customers and sell them to others without consent. The words "control" and "security" might also mean that providers are responsible for the protection of personal data and must guarantee they are safe, for instance, from hacker attacks.

Moreover, the first legitimate need which the UNGCP intend to meet is: "access by consumers to essential goods and services" (UNGCP, 5 (a)). Then, consumer protection is essential to fulfill the social right of an adequate standard of living, including adequate food, clothing, and housing (article 11, ICCPR), because to enjoy these rights, a person must purchase several products and services.

Consumer protection is also very important to guarantee equality. According to guideline 11 (a), "[b]usinesses should avoid practices that harm consumers, particularly with respect to vulnerable and disadvantaged consumers". In other word, a provider must not take advantage of consumers' ignorance, illiteracy, or inexperience while attempting to sell their products or services. Through disclosure and transparency (UNGCP, 11 (c)) businesses must provide all the information needed in order to give the consumer the opportunity to make a free and conscious choice.

Although not expressly mentioned in the UDHR, the ICCPR, or the ICESCR, consumer protection is essential to guarantee many of the first and second generation rights. Moreover, the interdependence of consumer rights with third generation rights is evident. Under the category named solidarity rights, consumer rights also aim to protect the society as a whole.

54 DEUTCH, S., *Are Consumer Rights Human Rights?*... Op. Cit., p. 552.

For instance, there is a clear link between sustainable consumption and the right to development (UNGCP, 49–60). “Sustainable consumption includes meeting needs of present and future generations for goods and services in ways that are economically, socially and environmentally sustainable” (UNGCP, 49). All development must be human-centered; indicating the human being is the paramount reason of development<sup>55</sup>. In the words of Tambussi:

“El crecimiento no es el fin del desarrollo humano, sino un medio. Ambos están estrechamente ligados... así, el uso de servicios y productos relacionados que responden a las necesidades básicas y conllevan una mejor calidad de vida debe realizarse minimizando el uso de recursos naturales y materiales tóxicos así como también la emisión de residuos y contaminantes sobre el ciclo de vida [Growth is not the goal of human development, but a means to it. Both are closely connected [...] hence, the use of related products and services, that meets the basic needs and brings a better quality of life must minimize the use of natural resources and toxic materials as well as the emission of waste and pollutants upon the life cycle]...”<sup>56</sup>.

Thus, consumer rights are interdependent and interrelated to several other human rights, for they are also based on human dignity. Therefore, as a human right, consumer protection plays a crucial role on placing the individual as the primary concern.

### **5.3 Protection Against Governments and Business Organizations**

Traditionally accepted human rights, as already stated in this paper, are negative (civil and political—first generation) and positive (economic, social, and cultural—second generation). Under the third generation rights, it is not possible to place consumer protection under negative or positive labels. Hence, States must refrain from arbitrary infringements as well as take measures to protect the individual against big business organizations, multinational corporations, and monopolies<sup>57</sup>.

55 TAMBUSI, C. E., *Los Derechos de Usuarios y Consumidores son Derechos Humanos...* Op. Cit., p. 101.

56 *Ibidem*, p. 102.

57 DEUTCH, S., *Are Consumer Rights Human Rights?...* Op. Cit., p. 552.

The State is the supplier of public services. Many governments establish public corporations to provide these services. Resolution 124/96 of the Southern Common Market (Mercosur) concerning consumer rights, establishes an adequate provision of public services<sup>58</sup>. In Brazil, for example, according to the Consumer Protection Code, public corporations might fit within the definition of a provider<sup>59</sup>. Also in Argentina, the National Constitution determines that authorities must ensure the quality and efficiency of public services<sup>60</sup>. These cases exemplify the Government as a provider, which, as such, must refrain from arbitrary infringements on consumer rights.

58 TAMBUSSI, C. E., *Los Derechos de Usuarios y Consumidores son Derechos Humanos...* Op. Cit., p. 98/99.

59 ARTIGO 3º Fornecedor é toda pessoa física ou jurídica, pública ou privada, nacional ou estrangeira, bem como os entes despersonalizados, que desenvolvem atividade de produção, montagem, criação, construção, transformação, importação, exportação, distribuição ou comercialização de produtos ou prestação de serviços [Article 3. A supplier is any physical person or corporate entity, of a public or private nature, domestic or foreign, as well as other involved in the activities of production, assembly, creation, construction, transformation, importing, exporting, distribution, or commercialization of products or services].

60 Artículo 42. Los consumidores y usuarios de bienes y servicios tienen derecho, en la relación de consumo, a la protección de su salud, seguridad e intereses económicos; a una información adecuada y veraz; a la libertad de elección y a condiciones de trato equitativo y digno. Las autoridades proveerán a la protección de esos derechos, a la educación para el consumo, a la defensa de la competencia contra toda forma de distorsión de los mercados, al control de los monopolios naturales y legales, al de la calidad y eficiencia de los servicios públicos, y a la constitución de asociaciones de consumidores y de usuarios. La legislación establecerá procedimientos eficaces para la prevención y solución de conflictos, y los marcos regulatorios de los servicios públicos de competencia nacional, previendo la necesaria participación de las asociaciones de consumidores y usuarios y de las provincias interesadas, en los organismos de control [Article 42. As regards consumption, consumers and users of goods and services have the right to the protection of their health, safety, and economic interests; to adequate and truthful information; to freedom of choice and equitable and reliable treatment. The authorities shall provide for the protection of said rights, the education for consumption, the defense of competition against any kind of market distortions, the control of natural and legal monopolies, the control of quality and efficiency of public utilities, and the creation of consumer and user associations. Legislation shall establish efficient procedures for conflict prevention and settlement, as well as regulations for national public utilities. Such legislation shall take into account the necessary participation of consumer and user associations and of the interested provinces in the control entities].

Deutch makes an interesting analogy about providers and States. For him, the structure of a big business organization is similar to a government in the sense that both have the capacity to control private consumers<sup>61</sup>. In other words, consumers cannot bargain with them on equal terms. Just to mention a few examples, Walmart's revenue in 2017 was bigger than Belgium's Gross Domestic Product (GDP) and if Apple was a country, it would be the 47<sup>th</sup> in the world by GDP<sup>62</sup>.

The most recurrent cases involve the State as the consumer's protector against providers. The UNGCP n. 4 states that "member States should develop, strengthen or maintain a strong consumer protection policy..."<sup>63</sup>. This should be done through legislative and administrative measures. Tambussi wrote that:

"El consumo es una dimensión esencial del ser humano, que involucra derechos fundamentales que deben ser protegidos por el Estado, de ahí que deba prodigarse al consumo también una tutela de la más alta jerarquía [Consumption is an essential dimension of the human being, which involves fundamental rights that must be protected by the State, hence a protection of the highest hierarchy must be conferred to consumption]..."<sup>64</sup>.

While legal protection is crucial, it must not be the sole measure. Administrative steps must be taken to protect consumers. Many times administrative measures are more accessible and less expensive to consumers. The UNGCP encourages governments to establish consumer protection agencies<sup>65</sup> who might act not only after a breach has occurred, but also take preventive actions, such as consumer education. In Brazil, for instance, there is a federal government

61 DEUTCH, S., *Are Consumer Rights Human Rights?*... Op. Cit., p. 552/553.

62 <https://www.businessinsider.com/25-giant-companies-that-earn-more-than-entire-countries-2018-7#apples-revenues-in-2017-were-higher-than-portugals-gdp-23>, accessed on 19 April 2019

63 UN Conference on Trade and Development (UNCTAD), *United Nations Guidelines for Consumer Protection...*, Op. Cit., p.7

64 TAMBUSI, C. E., *Los Derechos de Usuarios y Consumidores son Derechos Humanos...* Op. Cit., p. 96.

65 UN Conference on Trade and Development (UNCTAD), *United Nations Guidelines for Consumer Protection...*, Op. Cit., p. 15.

agency, SENACON<sup>66</sup>, which coordinates a consumer protection system composed of numerous provincial agencies called PROCONS<sup>67</sup>.

States must always stimulate the development of mechanisms to address consumer complaints. Alternative dispute resolution, such as conciliation attempts by administrative agencies, might be very effective and shall be encouraged. Nevertheless, the State must always guarantee to the consumer the right of access to justice, regardless of the prior attempts of administrative organs.

To sum up, consumption is an essential part of human life and totally necessary to guarantee dignity to every human being. Punishment to perpetrators of consumer abuses are necessary, but consumer protection goes far beyond that. It requires the empowerment of consumers themselves. It is unrealistic to expect the State to control every single consumer relation, so it is crucial that the consumer is well educated about his rights. Conscious consumers are able to identify breaches of their rights, avoid abusive contracts, and report violations to authorities.

## **6. Conclusion**

In essence, consumer rights are human rights and must be protected as such. This conclusion is based on philosophical and legal arguments presented throughout this paper. It is important to acknowledge that regardless of formal recognition, human rights exist simply because they are intrinsic to every human being.

However, there is a massive international recognition of the crucial importance of consumer rights. Several States around the globe have already incorporated consumer protection in their constitutions and national laws. Although the United Nations has not yet explicitly conferred to consumer rights the status of human rights through a binding instrument, the UNGCP contains several principles that connect both fields.

66 SENACON – Secretaria Nacional do Consumidor, under the Brazilian Ministry of Justice.

67 UN Conference on Trade and Development (UNCTAD), *Manual on Consumer Protection...*, Op. Cit., p. 25.

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