John Alberto Tito-Añamuro [*]

AGAINST THE UNIVERSAL APPLICATION OF HUMAN RIGHTS [**]

Abstract: The present study realizes a critical analysis of the universal application of the Human rights. The starting point is the analysis of two sinister cases of violation of Human rights, one in Rwanda and other in Republic of the Congo. This study tries to demonstrate the hypothesis that the rules of the human rights do not apply to all equally. There are privileges as the American excepcionalism. Therefore, the universal application of the human rights is doubted.

1. — *Introduction.*

The regulation of the human rights lies more upon moral and political meaning rather than legal. Proof of that, is the problem regarding international jurisdiction effectiveness against national States, and also the rule of law in criminal issues were national law do not previously regulate the alleged crime, or doing so, it is not compatible with the international prohibition. Both cases then, represent a problem in the effectiveness of human rights.

In contrast, and referring to practical matters, it is possible to acknowledge

---

[*] PhD from *Universidad de Salamanca* (Spain), researcher for the *Max-Planck-Institut* in Hamburg (Germany) and professor of Private Property Law at *Universidad del Norte* (Colombia).

[**] This article is part of the research project *Critical to the universality of human rights* of the Universidad del Norte, Colombia.

a double standard for complying human rights law; on one hand, those who promote them, impose the observance of human rights and democracy as if they were normative statements, and even finance projects and mega projects as a means to sensitize people and nest the idea of human dignity in their hearts. While, on the other hand, they fail to comply their own imperatives regarding human rights compliance.

If this is not a contradiction then, the compliance standards of human rights are deliberate consequences of political power of their promoters rather than a legal issue. A current example of this, would be Guantanamo Bay detention camp and the open practice of torture. In the same sense, historical examples would be the sponsorship of *coups d'état* in Latin America, the refusal to ratify multilateral United Nations instruments and the nonintervention in Israel and Turkey. All of the above contrast, from every point of view, with the contents and application of human rights.

Moreover, since this category does not belong to all legal systems around the world, it becomes more than difficult to defend its worldwide legal legitimacy. Then, if we add to it the vocation of universality, we come up with more than one controversial issue worth analyzing, not only because it compromises their application, but also because it contributes to the idealism of a series of generic, self-proclaimed global rights. In that sense then, we undoubtedly face a problem in the foundation of human rights.

Nevertheless, and despite all the problems this category entails, it seems like there is no way back, as one who saw the light and has no thought of coming back to the dark. Yet, we consider it needs to structure, re-found and re-adapt itself to the demands of a real not utopian society.

Certainly, at this point, there is a risk that should be avoided: the legitimization of a malign syllogism, which means establishing the consequences before justifying their basis. Since that is not the aim of this paper, it is important to state this text intends to show the scars of a society, produced by the biased application of the normative statements' theory, which includes human rights.

2. — *A starting premise: Congo v. Belgium and the problem of applying human rights.*

In 1998, Belgium accused Abdoulaye Yerodia, the Minister for Foreign Affairs of the Democratic Republic of the Congo, of crimes against humanity before the International Court of Justice, based on the Belgian Universal Jurisdiction Law (*Loi du 16 juin 1993*). This law regulated the criminal prosecution of the offenders in events of violation of human rights (HR), regardless the place they were located.

According to Jacques Verges, counsel of the Republic of the Congo, in a speech broadcasted on TV on August 4, 1998, Yerodia encouraged "his brothers" to «rise up as one to expel the common enemy of the country, using all possible weapons, including guns, machetes, picks, arrows, sticks and stones», adding that «they are scum, germs which must be methodically eradicated»[(1)].

The execution of these actions led Brussels's judges to issue an arrest warrant against Yerodia, and to activate the application of a universal justice, which caused unexpected consequences not only for them, but also for those who issue and impose norms of global reach.

Now that the dispute had been initiated, the first reaction of the Republic of the Congo was to file a petition against Belgium before the ICJ for the annulment of the arrest warrant, arguing that under customary international law, a Minister for Foreign Affairs enjoys diplomatic immunity; therefore, the Belgian Universal Law clearly violated this right. After a series of objections, the most relevant action by the Congolese defense was when the judge *ad hoc* Bula-Bula from the Republic of the Congo stated that Belgium was guilty not only of moral arrogance, by appointing itself as the prosecutor of all humanity, but also of imposing its economic and political interests using human rights standards as an excuse. Bula-Bula also reminded that Belgium had inflicted control over Congolese people, based on threats and persecution for decades[(2)].

---

(1) D. Luban, *Una teoría de los crímenes contra la humanidad*, Bogotá, 2011, p. 161.

(2) Ibidem.

Given the circumstances, how could Belgium demand obedience to Human Rights when it had previously been involved in Patrice Lumumba's, the Congolese Nationalist Prime Minister, death? Besides, since Yerodia was his supporter, Belgium's intervention had a more political character rather than legal; as a matter of fact, it supported the Congolese opposition party. In addition to this, Belgium had no comments regarding the illegal exploitation of Congolese natural resources by Belgian companies. Logically then, the material application of universal justice differed in this particular case. Now, if there was any justification for this, it would be that the protection of second-generation and third-generation HR turns out to be more difficult than first-generation HR. In this regard, De Sousa emphasized on the fact asking whether «the consensus only refers to first-generation human rights or if it encompasses as well second and third-generation rights»[3].

Nonetheless, there is no excuse for not prosecuting those responsible for the deaths of millions of Congolese people in the recent war against Rwanda and Uganda; a fact that has almost been forgotten by the international press, and it seems no one is willing to activate the universal justice machinery in order to prosecute these actions as crimes against humanity. The real question is: Why is that? It is a question that should be examined piece by piece by those who optimistically state that when it comes to HR, there is the «widespread belief that they are already well based»[4] and, consequently, they merely need to be applied.

If we analyze it thoroughly, we comprehend both deviate from reality. Regarding the latter, the application of human rights is not based on equality terms; the severity of a law is applied to some and not to others, which means the selection process does not follow a legal criterion, although it is well known that laws are general and applicable to everybody. Yet, due to the aforementioned facts, is not totally convincing. Regarding the former, HR are based on the fragile notion of being a *widespread belief*; once again, a

---

[3] B. De Sousa, *Los derechos humanos en la posmodernidad*, in M.A. Alonso, J. Giraldo, *Ciudadanía y Derechos Humanos Sociales*, Andalucía, 2001, p. 170.

[4] N. Bobbio, *Presente y porvenir de los derechos humanos*, en *Anuario de Derechos Humanos*, I, Madrid, 1981, p. 10.

highly questionable conception, especially because of its subjective nature, which means in other words, the lack of comprehension and delimitation of what a widespread belief is. In fact, it seems to be based on *ius naturalism* rather than in Positive Law. If obedience to HR is a *duty* for some, but not for others, then the result would not be a *widespread belief*, but a *partially shared believe*, which essentially happens in practice.

But the most particular aspect in the Congo-Belgium case was the objection claiming for an equal prosecution for Israel; in this way, the Congolese defense threw a dart regarding the application of law regarding the crimes committed by Ariel Sharon. Neither the frenetic eagerness for persecution, as a subjective component, nor the arrest warrant, as an objective component, occurred in Israel. To nobody's surprise, one of the most recalcitrant opponents to the application of the Belgian law was the United States of America. In addition to Sharon's prosecution, the trigger in this case was the investigation held against former President George W.H. Bush, Vice President Dick Cheney, Secretary of State Collin Powell and late General Norman Schwarzkopf for crimes against humanity, specifically for the bombing to the al-Amiriyah shelter in Baghdad during the Gulf War in 1991.

North American pressure exerted by the Secretary of Defense, Donald Rumsfeld, against Belgium was so overwhelming that they immediately caved in, changed the law and held back the investigations. Precisely, this is not a correct, legal and by no means, elegant way to deprive the law from its legal effect. However, at this point, one question arises: what opposing argument could be presented to the HR promoters and the hegemony they normally exert? Perhaps, it could be the idea of the universality of the law, though it is not enough, given that «Rumsfeld's ultimatum of moving NATO headquarters from Brussels to another country, unless the Belgian law was repealed»[5] was loaded with American anger, which naturally no country would dare to contradict, let alone, Belgium.

Frankel, citing one of the supporters of the law concerning North

[5] V. Loeb, *Rumsfeld Says Belgian Law Could Imperil Funds for NATO*, in *Washington Post*, 2003, 13 June, p. A24.

American irruption, pointed out that: «We didn't lose everything, but we lost a lot. We have to live in the real world. It was an excellent law, but unfortunately it was used in a political way, and at the end of the day, we moved backward rather than forward. It's a setback»[6]. Precisely because of these facts, and others which will be commented on the following pages, both the universal vocation of the law, and the fragile foundation of human rights, are absurd.

3. — *Guantanamo bay detention camp, torture and human dignity.*

A well-known case of human rights denial is the practice of torture and other abuses to the dignity in Guantanamo. Like in the former case, the USA, one of the promoters of the defense and application of HR, act contrary to their discourse full of rhetoric about the protection of human dignity.

One of the clearest examples of this contradiction is the situation (illegal in every aspect of the HR) of prisoners in Guantanamo, and the use of torture as an instrument to obtain and manage information. As it is well known, since January 2002, more than six hundred detainees from Afghanistan, including minors under thirteen, are held in Guantanamo detention camps, in Cuba, with no formal charges or access to the court, lawyers, or even family visits[7]. According to Amnesty International reports, these people, who should not be excluded from the application of HR laws, are compelled to wear shackles on their ankles and blindfolded with goggles covered with black tape, as well as other offenses to the dignity determined by the need to obtain information in Guantanamo bay cells[8].

Protests around the world have had little to no impact. The USA refused to acknowledge the detainees as prisoners of war under Geneva Conventions,

---

[6] G. Frankel, *Belgian War Crimes Law Undone by its Global Reach. Cases Against Political Figures Sparked Crises*, in *Washington Post*, 2003, 30 September, p. A15.

[7] A. Estévez, *El excepcionalismo estadunidense y los derechos humanos: los retos de Obama tras el desastre de George W. Bush*, in *Norteamérica*, 2008, pp. 69-89.

[8] Cfr. *The Amnesty International Report*, of 2003, London: Amnesty International.

consequently causing the non-application of HR[9], and, what is worst, there was no possibility of legal questioning on this conduct against HR. Under these circumstances, this situation verges on the borders of impunity. A proof of this is the fact prisoners are even subjected, as stated by Hoffman, to «military tribunals which do not fulfill the standards to guarantee a fair trial under international legislation»[10].

Forsythe[11] is right by stating that Guantanamo bay was deliberately selected with the sole objective of avoiding the international court's jurisdiction, and even the American courts, to certain extent Guantanamo, as remarked by Hoffman, is a "human rights-free zone"[12].

This evidence reveals the prioritization of political power and the double standard discourse on the protection of HR. Some people may wonder why these political issues have not been yet confronted by legitimizing torture, and in that sense, disengaging form the false universal and legal rigor of HR. However, it is clear that giving up the *simulated* protection of HR is not contemplated in the US foreign policy plan, since it is more convenient for them to keep their double standard discourse, rather than a consistent and realistic one. In consequence, the "American Exceptionalism" concept has been legitimated, representing an extremely controversial variation of Human Rights components, which will be addressed in the following pages.

As a general reflection on the foundation of HR, we could assert that if they have universal value, it would be irrelevant whether they are contemplated in a State's positive law or not, and in the same way, they would be applied to North Americans and people with other nationalities, to an equal extent. So, if an exception is to be conferred within this framework, first of all, it should be noted that it would fragment the universality criterion, and secondly, if the exception is still to be legitimated, it should be done under the approval

---

[9] Cfr. *The Amnesty International Report*, of 2003, London: Amnesty International.

[10] P. Hoffman, *Human Rights and Terrorism*, in *Human Rights Quarterly*, 4, no. 26, 2004, pp. 932-955.

[11] D.P. Forsythe, *United States Policy toward Enemy Detainees in the War of Terrorism, in Human Rights Quarterly*, 2, no. 28, 2006, pp. 465-491.

[12] Ibidem.

of every country around the world. Since this instrumental condition has not been exploited yet, the theory of *American exceptionalism* emerges on the dangerous borders of immunity to the application of HR.

Since, pragmatically, both demands (the universal application of HR and the legitimization of the American exception by every country) have few possibilities to be fulfilled, the foundation of HR appears fragile in the real world once again.

As shocking as it may seem, Anglo-Saxon countries have been contemplating the possibility of legitimizing torture in order to mitigate the currently persecutory effects it bears. Regarding this particular topic, Tony Blair has declared that in the United Kingdom, «Let no one be in any doubt that the rules of the game are changing»[13] and, at the time, former president G. Bush sought the way to legitimize a method called *torture lite*, justified by the fact of obtaining information in life-saving situations[14].

From a utilitarian point of view, torturing in order to save more lives is perfectly justifiable, and regardless of what we do, the authorities will continue torturing detainees as a means to protect us. Therefore, it is better to make legal what is real[15].

Nonetheless, I do not consider that the end justifies these means; due to the fact that criminal law has already featured equivalent formulas in this respect. The grounds for excluding criminal responsibility, when the preservation of another equivalent or superior legal right is legitimized on the same plane of circumstances (with no intention of injuring another person's legal interest), is an example of the above. For this reason, it is necessary to precisely establish criminal defense devices; having this in mind, we can discern from the facts, torture is never inflicted without the intention to harm others' well-being. Plus, even if legitimate torture was subjected to judicial oversight, as proposed by the utilitarian theory, it would be unfeasible in practice.

---

[13] C. Castresana, *La tortura como mal mayor*, in *El viejo topo (Derechos Humanos)*, 2012, pp. 16-25.

[14] D.P. Forsythe, *United States Policy toward Enemy Detainees in the War of Terrorism*, cit., p. 470 ff.

[15] C. Castresana, *La tortura como mal mayor*, cit., p. 21.

Let us consider that in most of the cases of torture, the grounds for excluding criminal responsibility are not dragged to the limit, that is, when two or more protected legal rights are facing imminent danger. The usual proceeding then is the indiscriminate use of torture; there is no time for a legal assessment, especially for judicial oversight or authorization, since time in these circumstances is essential. In relation to this, Castresana indicates that «during Latin America's dirty wars that took place in the 70's and 80's, torture was a race against the clock»[16], because the information obtained from the tortured person was useful only during the first few hours following the detention; after that, it became useless, especially because once the news of the capture were known, the incriminating evidence would disappear. Similarly, yet with more voracity, it occurs nowadays and can be observed, for instance, in the events taking place in the Middle East.

Under this perspective, to reactivate the practice of torture as an exception to the general rule of universal application of HR laws is highly harmful to human dignity. It would imply to "dust off" the old arguments about the infliction of torture from the Middle Ages and directly attacking the prohibition, which started in the 18th century, first in Naples in 1738, then England in 1762, Austria in 1776 and, finally, France in 1780 to nowadays were the prohibition of torture as a universal sphere is more specific. This can be deduced from the rules of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December, 1984, which is based on the Charter of the United Nations, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the UN General Assembly on 9 December 1975. In this sense, to reactive the practice of torture clashes with the defense of human dignity, in every way.

The structure of any democratic country relies on the pillar of human dignity, leaving torture behind the threshold delimited not only by legal

[16] C. Castresana, *La tortura como mal mayor*, cit., p. 22.

principles and rules, but by political and moral principles as well, relegated to a place where it should remain. Crossing this threshold, by adapting it to the interests of a handful of individuals, clearly violates not only a State's objective interests, but also the essential interests of any citizen across the world: human dignity.

Moreover, given the fact that dignity is a material condition of the universal character of HR, its non-observance or violation from the creation of the protection law -as in the case of *American exceptionalism,* and in the instances of application of the Belgian law-, removes the material content from HR universal laws and, therefore, hinders the defense of the universal character of HR.

4. — *American exceptionalism and the (gray) areas were human rights' are not applied.*

American exceptionalism embodies the most perverse paradox of the strategy of USA's political power in contrast to the general rule of defense of human rights. Proclaiming the protection of universal human dignity through HR on the one hand, and violating their application instruments on the other, reveals an extremely cynical attitude, banned from any moral, and even empirical, point of view.

Mertus[17], Ignatief[18] and Forsythe[19] agree that the USA has created a double standard discourse regarding HR. *American Exceptionalism* is the theory in which the American government promotes plans of indoctrination with HR, along with electoral, judicial and civil society reforms. Though, at

---

[17] J. Mertus, *The New US Human Rights Policy: A Radical Departure*, in *International Studies Perspectives*, 4, no. 4, November, 2003, pp. 371-384.

[18] M. Ignatieff, *Introduction: American Exceptionalism and Human Rights*, Princeton, 2005, pp. 1-26.

[19] D.P. Forsythe, *United States Policy toward Enemy Detainees in the War of Terrorism*, cit., p. 477 ff.

the same time, it measures itself (and its allies) under different and more privileged standards in their commitment to those ideals [20].

The legitimation of this exception has allowed this nation to sponsor *coups d'état* in the Southern Cone, impose reserves regarding the prescriptive commands of the ICC, avoid ratifying the Pact of San José, and withdraw its signature from the Rome Statute, which set the basis of creation of the ICC. In addition to the aforementioned threat to the Belgian law, Reagan accused the ICJ of becoming politicized and anti-American when the court upheld a judgment against the USA for having violated customary international law and the bilateral agreement signed with Nicaragua. In this case, the Central American country had previously complained before the ICJ about the USA sponsoring policies against them and sabotaging its ports. However, Reagan simply ignored the verdict [21].

The list of cases proving this double standard toward the defense of HR in (gray) areas, where the universal norms in favor of human dignity are not applied is very extensive, yet I consider the ones that have already been exposed are sufficient. Now, what is convenient to examine in detail is the three types of *American exceptionalism* that have been identified by Ignatieff [22]; first, the tendency to exempt themselves from treaties they impose; second, the double standards (some for friendly nations and others for the enemies); and, third, legal isolationism.

With regard to the first category, Americans are willing to sign any HR treaty that emerges, but, afterwards, they either refuse to ratify them, or doing so, they exempt themselves from its provisions. Mertus [23] has called this issue "exceptional exceptionalism". A sample of this was that the USA

---

[20] A. Estévez, *El excepcionalismo estadunidense y los derechos humanos: los retos de Obama tras el desastre de George W. Bush*, cit., p. 70.

[21] A. Estévez, *El excepcionalismo estadunidense y los derechos humanos: los retos de Obama tras el desastre de George W. Bush*, cit., p. 78.

[22] Cfr. M. Ignatieff, *Introduction: American Exceptionalism and Human Rights*, cit., p. 3 ff., who distinguishes types of American Excepcionalism, saying that the American excepcionalism has at least three separate elements.

[23] J. Mertus, *The New US Human Rights Policy: A Radical Departure*, cit. p. 375.

manipulated the ICJ's silent attitude so that no American politician, diplomat or military was involved. They achieved their objective, first, through their withdrawal from the Rome Statute and, second, by also withdrawing financial and humanitarian aid from the countries that did not agree to such immunity before the Court[24].

In relation to the second one, the USA handles a quite particular concept of application of HR principles and laws. On the one hand, if those laws are to be applied to them and their friendly nations, such standards are permissive and extremely flexible. On the other hand, they are stringent if they are to be applied to enemy nations[25]. An accurate example of this is the case of Israel which, as everyone knows, performs a systematic violation of Palestinians' HR. What have the USA done? 'Not a thing' would be a neutral and extremely positive response; yet, as the facts show us, Americans instead of withdrawing their economic, military and logistical aid from Israel, openly supports it and, naturally, has not reported it before multilateral fora. A similar case was the one of Kosovo: the separatist actions were subjected to repressive measures similar to those in Israel, but exceptionally in this circumstance, the USA opted for an open and direct intervention. Everybody remembers they led the occupation of Kosovo together with the NATO forces, an action which, according to Turner[26], influenced the growth and importance of American power as well.

For Hongju Koh, this double-faced attitude of Americans towards HR, is the most dangerous and damaging type of exceptionalism, since it places them at the same level of authoritarian and repressive regimes, undermining their global leadership, among other things[27].

Regarding the third category (legal isolationism), the US opposes the

---

[24] K. Meyer, *American Unlimited: The Radical Sources of the Bush Doctrine, in World Policy Journal*, 21, no. 4, 2004, pp. 1-13.

[25] M. Ignatieff, *Introduction: American Exceptionalism and Human Rights*, cit., p. 21 ff.

[26] S. Turner, *The Dilemma of Double Standards in U.S. Human Rights Policy, in Peace and Change*, 28, no. 4, 2003, pp. 524-554.

[27] Cfr. H. Hongju Koh, *On America's Double Standards*, in *The American Prospect*, no. 15, October 2004, pp. 16-19.

application of the International Human Rights Law under the argument that their constitutional tradition is superior in terms of protecting civil and political rights than any other country in the world. They provide evidence of this, such as during a state of emergency, where their citizens' civil guarantees are not suspended. However, if the issue is analyzed in detail, social and economic rights of constitutional character are not recognized in it, although they are contemplated in most constitutions around the world. In consequence, carrying weapons is legal, regardless of the negative effects it entails. Not even the murder of dozens of children in Connecticut by a teenager has weakened the American legislator's pulse and will in order to change the laws. The only thing they have taken into consideration, in addition to the tragic scene, is the weight of the non-binding nature of the Convention on the Rights of the Child of 1989, which they did not ratify, regardless of the fact it is one of the most ratified agreements for the protection of HR in history. Contrary to what everyone might expect, given that they were the most active in the negotiations after only eleven days following the fall of the Berlin wall.

Donnelly[28] has also exposed serious circumstances such as failing to ensure the access to medical services, violations of the right to health, and police brutality, which bring into question the reality of the American double standard and legal isolationism.

In short, the interests in which this exceptionalism is based diverge from those of HR. A further proof of this was the report by Samantha Power[29], the Pulitzer prize-winning journalist, which brought to light that in the case of the death of more than a million people in Rwanda, the interests of the US and not the values of HR determined the nonintervention and the failure to prevent Rwanda's deplorable genocide[30]. In addition to this, another journalist, Philip Gouveritch, documented the White House's

---

[28] J. Donnelly, *International Human Right*, 3rd ed., Boulder, 2007, pp. 15-19.

[29] S. Power, *Problema infernal: Estados Unidos en la era del genocidio*, Mexico: FCE, 2005, pp. 16-33.

[30] P. Gouveritch, *We wish to inform you that tomorrow we will be killed with our families: Stories from Rwanda*, New York, 1998, p. 15 ff.

refusal to intervene in Rwanda. The title of his book speaks for itself: *We wish to inform you that tomorrow we will be killed with our families* (the book's title). It was precisely the title of the statement sent from Rwanda to the UN, and due to their delay from New York, the prediction came true the following day: almost a million human beings were killed[31].

5. — *Back to reality.*

As a much as the idea that human rights are universal and applied as such in all corners of the globe, and intended to be planted in the minds of every citizen of the world through the manipulation of their emotions and use of control strategies over them, it surely odds with its actual practice. The problem lies on their origins, since universal moral, as a foundational argument of HR, motivates in human beings the idea of an alternative response to the explanation of individual moral and its global standardization. However, it is devoid of reality, of the heterogeneity of practical reality, and the importance of uncertain and instability of the ideal constructs in practical reality.

Human beings have been dragged toward the dream of the global neutralization of anti-human rights behaviors through the inconsistent path of justifying human nature and the always controversial *iter* of the idealization of its effects, by standardization, either through the law or the strength of the facts. Sincerely, I find a treacherous connection between philosophical premises and empirical results. A connection where a *must be,* with no empirical justification, is imposed to the behavior of a human being who *is* part of an unstable and heterogeneous reality and, therefore, far from universal, closed and perfect solutions.

This does not imply that the whole legal machinery for the protection of HR at a global level must be stopped, but that this type of solution not

[31] P. Gouveritch, *We wish to inform you that tomorrow we will be killed with our families: Stories from Rwanda*, cit., p. 3.

only has to be gradual; instead, it means that reality must be re-inserted in its foundations, processes and applications. From the political point of view, from the pragmatic reality of human beings in their factual circumstances, the metaphysical foundation is an anachronistic ambition for the application of HR, especially because its access to the universe of the *being* is highly objectionable and its introduction to the world of human *being*'s reality is, ultimately, unacceptable. In line with the previous reasoning, its removal (or overcoming) from the metaphysical creation of an «abstract humanism which proposes the idea of the human condition as something eternal and uniform, which spreads by itself throughout the centuries»[32], is a criterion that must be followed by the human being.

a) Objection to the ideological subsumption

The current logic of the application of HR has led human beings to the futility of an only (universal) thought, disengaged from reality, that results from the abstraction in ideal premises, such as the metaphysical essentialism of the nature of human being, without considering historical, contingent, unstable and cultural facts. On the basis of these criteria, as Herrera notes, «our reality has been ideologically stolen»[33] we should ask ourselves: is it necessary to recover it? Certainly, this is the context for a very remote possibility, provided we consider that under these ideals the individual has already been almost inevitably absorbed by those who build, organize and control through those ideological subsumptions. But there are always spaces, such as the university, which should be useful for more important things than just discussing this or that paragraph by some professor, jurist or philosopher yielded to the logic of the only language he/she understands: the language of domination[34] and lack of critical sense of reality.

---

[32] J. Herrera, *Los derechos humanos como productos culturales, crítica del humanismo abstracto*, Madrid, 2005, p. 77.

[33] J. Herrera, *Los derechos humanos como productos culturales, crítica del humanismo abstracto*, cit., p. 24.

[34] J. Herrera, *Los derechos humanos como productos culturales, crítica del humanismo abstracto*, cit., p. 249.

Returning to reality becomes the central objection against the ideal constructs. One of the first steps towards this goal, as Rorty indicates, is the rejection of the foundationalism of human rights, due to the fact that abstraction, which defines this discourse, makes impossible to understand and clarify a problem where, essence is irrelevant[35], since all that matters is the existence of historical, heterogeneous and unstable facts.

Herrera remarks that we have been led to think that there is no other reality than the one this ideology offers to us, and that we have to accept that we can only fight within the standards of ideally recognized rights, oblivious to our reality[36]. It is necessary to put an end to those foundational myths, which are led by the specific interest of historically legitimizing a universal being, with the serious consequence of constraining his/her possibility for the future, by placing him/her in a teleology in an inevitable horizon, where history will eventually come to an end. It is necessary to leave that world subsumed in ideological justifications. It is necessary to leave the logic of abstract humanism behind, refining it to the actual condition of the human being in life, where he/she is regarded as a conscious agent that requires gradual cooperation from others in order to survive a reality that is unrelated to superstition.

In that sense, a *concrete humanism* – instead of the abstract one –, would reject this imposing logic, which lies on a fragile moral guarantee that is grounded on suspicion, metaphysics and the ahistorical condition of the human being. Given this circumstance, it is necessary to reflect on the reality that over fifty years after the establishment of human rights law, they are still disregarded by most countries worldwide; in addition to this, further action must be taken, such as proposing alternative solutions or redefining or adapting the ones in use. In such endeavor, it is essential to take into account the fact that a handful of countries have hampered the real and concrete application of HR. To bring the idea of dignity to a field of more pragmatic than ideal actions, it would be enough to insert that real premise

---

[35] R. Rorty, *Derechos humanos, racionalidad y sentimentalidad*, in S. Luckes, *De los derechos humanos*, 1993, pp. 119-132.

[36] J. Herrera, *Los derechos humanos como productos culturales, crítica del humanismo abstracto*, cit., p. 23.

in the ideological syllogism of the universality of HR. As noted by Rorty, «it is necessary to overcome a philosophy which has manifested itself in a metaphysical outmoded language, and which has set the foundationalist argument of human rights around the principles of freedom and dignity»[37].

Therefore, it is crucial to explain reality from social practices, from the prospection of not universal but rather stable rules, in line with the heterogeneity of the world; rules that are not immutable, not even verifiable, but unpredictable in their actual strict sense, as argued by Prigogine[38].

In such a world, the contingent, circumstantial, historical and cultural facts are bound to be the core of the analysis, the center of logic and ideological reductions, since these facts are what separate humans from other creatures. Therefore, it is relevant to analyze what human beings can make of us, rather than analyzing our nature.

The human rights culture is recent within the history of humanity and, as such, it should not only be included in the biased logic of an idea alone, but in that of a paradigm that integrates pragmatism and reality. It should as well not be simply reduced as the common idealization of human beings, but a complex one, where the non-determinism has its place in the evaluation and search of solutions.

As stated by Rorty, the aim is no to answer the question «what is man?», since it is well known that it is «the most sordid and dangerous of animals»[39], and this empirical reflection, this attribute, cannot be left behind, cannot be removed from human nature. Therefore, prioritizing the least sordid aspect corrupts the analysis as well as the conclusion; for this reason, taking this as a foundation makes the identification and evaluation of the existence of rights regarding human dignity unfeasible. Finally, by integrating these factual variables to the equation, it may be possible to come to the formulation of a set of common principles on which the culture of universal human rights may be built anew.

---

[37] R. Rorty, *Derechos humanos, racionalidad y sentimentalidad*, cit., pp. 119-120.

[38] I. Prigogine, *El fin de las certidumbres*, Santiago de Chile, 1997, pp. 9-16.

[39] R. Rorty, *Derechos humanos, racionalidad y sentimentalidad*, cit., pp. 126-127.

b) Stability instead of universality

If we take into account what we have commented above, the first thing to be said is that the idea of universality is inconsistent. Pragmatism or, more exactly, pragmatic anti-rationalism, has been decisive for breaking down the idealization of constructs oriented towards the standardization of the conduct of the *being* in a world full of instability, heterogeneity and the uncertainty of any conjecture that result from the cognitive and cultural construction of human beings.

From our point of view, Rorty reveals the inconsistencies where the category of universal HR is grounded, based on the reality of human action of the *being* in his/her relative life. If we continue this path, the protection of HR «would be condemned to failure because of the impossibility to access the being»[40] and, ultimately because of the failure to integrate it to these global equations and solutions.

This does not mean that, with regard to HR policies and the current legislative policy, it verges on nihilism and, even less, on relativism or intolerance (as is usually argued: If God does not exist, then everything is permitted), but it does verge on the understanding and integration into a new paradigm (a new unit of analysis) of the evaluations and conclusions on both the cognitive and political aspects. Consequently, this does not imply destroying the empirical or the dogmatic opponent but, on the contrary, it is necessary to value the *rationalizations* it used as a support for his idealizations, by re-thinking those solutions, which are simply the stigmas of the classic legacy of humanity, and a result of an anthropology based on the absolute reason.

From pragmatism, and the logic of complex thinking, which integrate, on one hand, the simplicity of the rational and absolute solutions, and on the other, by extension those nonlinear, which means, those who do not rely on the traditional reduction that when facing a fact, what needs to be done is to *idealize, streamline and standardize*[41]. This reasoning that consists on

---

[40] R. Rorty, *Derechos humanos, racionalidad y sentimentalidad*, cit., pp. 119-127.

[41] E. Ciurana, *Introducción al pensamiento complejo*, Valladolid, 1997, pp. 11-15.

reducing reality to simplifying schemes is grounded on the classical science, and has evolved from Plato to current thinkers. The ultimate goal is to bring ideals closer to realities, and to break the pattern of "victims of tyranny", and to gradually favor respect and protection of human dignity.

Finally, it is necessary to note that this new pattern of thought is not definite or absolute but, with no end, as stated by Morin[42]. This implies that there will never be a comprehensive map of all the procedures and solutions that the being formulates facing the phenomena. To think otherwise would be to return to the model where reality can be reduced to an idea and subjected to standards and reasoning. For this reason, it is rather necessary to start from scratch by selecting ideas, concepts, ways of thinking, solutions, among others, so that, according to Ciurana[43], they contribute to the creation of an atlas of cognitive schemes of a no ending thought, always open to the construction and re construction of the obtained categories; that is, to place ourselves in a new mental space, in a new ecology of the spirit, as indicated by Benson in Ciurana's words[44].

If the formulation of human rights is seen from the standpoint of this new logic or thought pattern, it is necessary to reformulate everything that has been said about or applied to the resolutions of specific HR disputes by selecting ideas, concepts, processes and positive results, and by reconsidering those which verge on incoherence and hinder the gradual increase of respect for human dignity dictated by the legal norm. As it has been said several times, in this prediction, especially on the extension of a legal norm which includes the gradual protection of HR, it is important to leave universality out of the equation, and instead of this, it is necessary to work on the stability of the rule, since it is closer to reality than logic, especially because its sensitivity to transformation and change are characteristics missing from the paradigm of universality.

---

[42] E. Morin, *On Complexity. Advance in systems theory, complexity, and human sciences*, New York, 2008, pp. 37-51.

[43] E. Ciurana, *Introducción al pensamiento complejo*, cit., p. 13.

[44] Ibidem.

It has already been said that «stability is a paradigm which belongs to the practice rather than the form, to the dynamics of fluctuations or changes rather than the immutability of a legal structure in the world of the reality of the conducts of human beings toward Law»[45]. For this reason, the foundational origin of HR law, based on the essence of the universal, unmodifiable, abstract and eternal nature of human being, must be re-adjusted and must re-organize itself within the framework of fluctuation and changes of reality and law. In the meantime, the application of those human rights law, grounded on the flaws of the metaphysical essence, is bound to be a failure.

6. — *Conclusions.*

a) The design of the normative contents regulating the protection of human rights, that is, with double standards depending on who must be prosecuted and sanctioned, evidences a problem of effectiveness, especially when the legal systems around the world do not have the same standard regulations, and when the international prohibitions do not exist.

b) The reality of things brings to light the fact that the law of protection of human rights is not regulated by the domestic law of all countries worldwide, making the defense of their global legal validity inconsistent.

c) The category of human rights built on the idea of the common human nature, which seeks to organize the conduct of the human being based on his encounter with the essence, is inconsistent and, as indicated by Rorty, is bound to fail since it abstracts from reality a humanism that does not belongs to it.

d) The paradigm of universality lies on the logic of a simplifying scheme that, from Plato to classical science, reduces the explanation of facts with arguments of idealizing, rationalizing and standardizing, leaving aside the

[45] J. Tito, *Modernización e integración del derecho contractual latinoamericano*, Barranquilla, Bogotá, Lima, 2010, p. 15.

impact of the fluctuations and changes relevant to the non-universal validity or stability of those standardization norms. Consequently, the uncertainty has been reduced to formulations and equations opposing the facts or, as indicated by Prigogine, the certainties, and this is not convenient for the global protection of human rights. For this reason, instead of universality, the paradigm of stability is closer to the reality of protection of the human beings' dignity, because a legal norm is intended to remain stable within the aggressive and constant sphere of fluctuations present in the heterogeneous world of facts, a characteristic which is not attributable to norms like those of human rights, which are based *ab initio* on the standardization of the essential nature of human beings.