Lo fundamental de los derechos fundamentales

The essence of fundamental rights

A essência dos direitos fundamentais

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"Propugno el derecho del hombre a decir lo que piensa del Gobierno que exista, por poderoso que sea, y asimismo su derecho a derribar este Gobierno si cree que con ello va a mejorar su humor".
Winston Churchill

Resumen

La reforma constitucional mexicana del 10 de junio del 2011, trajo un nuevo paradigma sobre el reconocimiento y aplicación de los derechos fundamentales en nuestro sistema jurídico, aunado a la obligación de todas las autoridades del país pertenecientes a los tres poderes de los tres niveles de gobierno bajo el control difuso constitucional y convencional de los derechos humanos de resolver los conflictos de derecho respetando los derechos humanos del individuo reconocidos por la constitución nacional y los tratados internacionales suscritos y ratificados por México, y aplicando los principios constitucionales de universalidad, interdependencia, indivisibilidad y progresividad. El grave problema es que no existe acuerdo jurisprudencial ni doctrinal sobre cuáles pueden ser los derechos fundamentales, ni sobre cómo se deberían ponderar e

interpretar algunos de los ya reconocidos positivamente; solo conociendo cuáles son su axiología, teleología, ontología y epistemología se pueden desentrañar los fundamentos filosóficos de los derechos fundamentales.

Palabras clave: derechos humanos, fundamentos filosóficos, interpretación, argumentación, Constitución, justicia.

Abstract

The Mexican constitutional reform from June 10, 2011, brought a new paradigm on the recognition and implementation of fundamental rights in our legal system, in addition to the obligation of all authorities of the country belonging to the three branches of the three levels of Government under the constitutional and conventional fuzzy control of human rights for resolving conflicts of law respecting the human rights of the individual, recognized by the national Constitution and international treaties signed and ratified by Mexico, and applying constitutional principles of universality, indivisibility and interdependence and progressiveness. The problem is that doctrinal or jurisprudential agreement there is no about what may be the fundamental rights, or on how it should be weighed and interpret some of the already recognized positively; only by knowing what his axiology, teleology, ontology and epistemology is can unravel the philosophical foundations of fundamental rights.

Key words: human rights, philosophical foundations, interpretation, argumentation, Constitution, justice.

Resumo

Reforma constitucional mexicana de 10 de Junho de 2011, trouxe um novo paradigma sobre o reconhecimento ea aplicação dos direitos fundamentais no nosso sistema legal, juntamente com a obrigação de todas as autoridades do país pertencentes aos três ramos das três esferas de governo sob o controle difuso direitos constitucionais e humanos convencionais de resolução de conflitos de leis que respeitem os direitos humanos do indivíduo reconhecido pela constituição nacional e os tratados internacionais assinados e ratificados pelo México, e aplicando os princípios constitucionais da universalidade, interdependência, a indivisibilidade ea progressividade. O problema grave é que não há

acordo jurisprudencial ou doutrinária sobre o que os direitos fundamentais podem ser, ou como você deve pesar e interpretar algumas das já reconhecidas positivamente; apenas saber o que axiologia, a teleologia, ontologia e epistemologia pode desvendar os fundamentos filosóficos dos direitos fundamentais.

Palavras-chave: direitos humanos, filosófica, interpretação, argumento, constituição, justiça.

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ABBREVIATIONS

Constitución Política de los Estados Unidos Mexicanos	CPEUM
Cooperación y Desarrollo Económicos	OCDE
Corte Interamericana de Derechos Humanos	CIDH
Derechos Humanos	DDHH
Estados Unidos de Norteamérica	EUA
Programa Internacional para la Evaluación de Estudiantes	PISA
Unidad Torreón	UT
Universidad Autónoma de Coahuila	UA de C

Introduction

He present article aims to be a material of support for the students of the master in HR of the Faculty of Law, TU, de la AU of C, and it has been formed with teaching experience from university professors and authors. The discourse of HR is currently dominated largely by legal positions on its application.

The Mexican constitutional reform of June 6 and 10, 2011, in the field of protection and HR revolutionized legal science in Mexico in an extraordinary way; today speaks of a neo-constitucional State humanist and personalistic that puts the human being as the center of his political work, which effect domino involved an amendment to the Amparo Law to protect such rights efficiently and effectively. It also speaks of the transcendental importance of the correct interpretation of HR and of the legal argument as a tool suitable for this, as well as from a preponderance of the judiciary on the other two branches and the dangers that generates.

Can be said that the above reforms are the most important of the Mexican legal postmodern era, in a sort of Copernican revolution (Kuhn, The Copernican revolution, 1996) or paradigm (Kuhn, 2015), since the reform on protection and HR gradually leave behind the old constitutional system based on ius-positivism, which in the early career of law is traditionally taught in most universities in the country with the help of the textbook "Introduction to the study of law "jurist and philosopher Eduardo Garcia Mexican Maynez. Later he is clinching his knowledge with books of Mexican constitutionalists, Tena Ramirez and Ignacio Burgoa, who spoke on individual rights in the Mexican constitutional law.

Today this important reform on protection and human rights has led to a paradigm shift so important that the Supreme Court of Justice of the Nation decided to end an era of Mexican jurisprudence (the ninth) and start a new (tenth); and students of legal sciences (which are students and teachers of schools and law schools) are avocan to review, analyze and understand the various theories of the great contemporary neo-constitutionalist: Italian Luigi Ferrajolli, German Robert Alexy and American Ronald Dworkin; the first with his theory of penal guarantee, contained in its law and reason work, without belittling his later work Principia iuris. Theory of Law and Democracy; while the second of the above mainly with his work Theory of Fundamental Rights, closely connected with the above concept and validity of the law and legal argumentation theory; and finally the last of the mentioned his main work Taking Rights Seriously and of course also the rule of justice, Justice for Hedgehogs and a matter of principle, among others. One of the scholars of law that has been most concerned to review, analyze and understand the various neo-constitutionalist theories is the jurist Miguel Carbonell Mexican (Carbonell, 2007) (Carbonell, Neoconstitutionalism (s), 2003) (M. Carbonell, 2010), who has been concerned about these new theories land in our country, like Ferrer Mac-Gregor (Ferrer Mac-Gregor, 2014) (Ferrer Mac-Gregor E., 2014) regarding protection.

It is obvious that the latter eventually constitutional reforms that affect the foregoing, the second most important in contemporary times, that is, the criminal justice system. This phenomenon has been occurring not only in Mexico but also in most of Latin America, where over the past two decades have been rehabilitated first its criminal

justice system (INACIPE, 2003) and lately the constitutional justice system. The first one with the oral proceedings in the criminal trial, his adversarialidad and acusatoriedad system, similar in general terms to the Chilean justice system and a little less Anglo-Saxon, although many own particularities of the various regions; and the second one with a paradigm shift in the legal universe, produced not only in Latin America but in almost all Western culture. This has to do with the reform of the old constitutional system where what mattered in a political constitution was the form of government or organic part and the power structure in the traditional division of powers. The least important part was, without being in some cases necessary, the rights of man, which in Mexico is known as the section on individual guarantees, or so-called fundamental rights in Europe, referring to those who said the French Declaration Universal Rights of Man and of the Citizen in 1789, and reformulated issued by rational natural law but iuspositivizados in the Constitution, based on the principles of Liberte, Egalite, Fraternite, and have been contained in the organic part. The State granted as the minimum rights that could not be expanded within the domestic level to avoid undermining the almost absolute state power.

This structure has now shifted to a new paradigm neo-constitutional where the roles of importance in a political constitution has been invested and is now an indispensable part for any country, one that just has contained the human rights of its citizens, by focusing on an anthropological philosophy or anthropocentrism. These states have become the light of international law in true democratic rule of law, leaving in second term the organic part of the form of government and reorienting the importance of their organic part of the task of ensuring by its governmental structure fundamental rights of its citizens.

In the European mainstream it is not called a constitution because the constitution does not refer primarily to the establishment of state power, but a fundamental law of fundamental rights. According to Alexy (Alexy, 2012), its function is to protect and guarantee those rights; this transformation has been carried to such an extent that now the Constitution of the United Mexican States refers to a very particular way in its first article that: "In the United Mexican States every person shall enjoy the human rights recognized in this Constitution and international treaties to which the Mexican state is a party, as well as guarantees for their protection, "which is all paradigmatic lights

because before there was talk that the Mexican government" gave "individual guarantees to citizens, ie, from a legal positivist stance created individual rights and the granting its citizens, whereas now implicitly recognizes that human rights existed prior to the formation and origin of the state, and that the State alone is left concurring with its existence and it explicit in the Constitution harmonizing its regulations while to agree with those who are also contained in international treaties of which the Mexican State is a party. Therefore, its normative content is binding.

This radical transformation in the neo-constitutionalist, ends define and affect the criminal legal philosophy of the new system accusatory-adversarial justice and amparo, inserting in these institutions the new way of doing justice not only national but global legal paradigm based on the way you look and guarantee the human rights of litigants, and its extension and mandatory expansion of all human rights also contained in international treaties to which Mexico is part and which they have been ratified, and now have, according Article 1 of the Constitution the same valuation range that constitutional norms; as well as the jurisprudence in human rights has given the Commission, located in San Jose, Costa Rica.

They combined with the above, and were implemented in two of the most cherished goals Mexico for many Mexicans in criminal justice matters and constitutional lawyers: the unification of procedural law with the enactment of the new National Code of Criminal Procedure,[1] and the new Law on Amparo.[2] Thus two of the most anticipated desires in our country, who come to put a cherry on the legal delicacy prepared with all these reforms are met, as in criminal procedure many problems are solved that by regionalisms and powers between courts and authorities thirty-one federal states and a federal district existed not only among themselves but also with the federation, which produced functionality problems in the legal, competence and efficiency and effectiveness in the fight against crime systematic and legal certainty. Moreover, in amparo some of the main problems of procedural disability are resolved to fulfill what referred to in Article 1 of the Constitution, on the State's obligation to comply with the provisions of the third paragraph of that article, ie, with the obligation to promote,

[1] Publicado en el Diario Oficial de la Federación el 5 de marzo de 2014.
[2] Publicada en el Diario Oficial de la Federación el 2 de abril de 2013.

respect, protect and guarantee Human Rights, as well as prevent, investigate, punish and remedy human rights violations (Hernández Choy Cuy, 2014).

All this raises many and varied legal problems of interpretation and application of human rights to be analyzed at the level of axiomatic ontological and legal teleological, to know their origins that give base and also achieve the ultimate goal of the law is the justice throughout the length and breadth of the Mexican justice system and, of course, in the criminal branch. It is also imperative to be adopted by a university curriculum that avoque training of law graduates, updating of already graduates and professionalization of public servants and trial lawyers, for current and future professionals must be updated on these issues of universal importance.

This obviously impacts deeply on the social and economic life of a country, because today in our contemporary society can not do business in a globalized world if the parties are not respectful of human rights. Mexico can not compete in international markets if it does not respect human rights, this seems obvious, since no country, whether the US, China, Japan, Spain and Germany, to name a few, are not going to put their business and legal transactions in territory where human rights are violated. They may become violent rights of any kind (economic, social, commercial or civil) of legal entities and nationals of their countries, or even can generate violations to the rules of trade agreements. Respect for legality and legal certainty in the country, involves at least the requirement of respect for human rights, as the international community takes place within a legal framework and among democratic states of law. This also implies conceiving law as rector of the form of social life in our culture.

Although important reforms have been promoted in our country, things do not change as if by magic. It is important to implement legal reforms go in daily life to scroll the mistakes of its application, that is, generate constructive criticism that allow us to correct them. For forty years, Sergio Garcia Ramirez said that in Latin America we have the most beautiful constitutions in the world (Garcia Ramirez, 1976), but the problem is that they remain on paper and are not applicable or effective in real life.

The psychiatrist and writer Jorge Bucay criticized the theoretical sciences saying that "one of the most serious problems they have, especially those dedicated to

understanding the behavior is" confuse what I want it to be what it is. " Bucay also said that scientists "have the shirt of the position that best suits his theory of the facts". His theories are confused again and again with reality or your vision is confusing perceived to get that best fits their theories reality, it happens that the relationship between what theoretically can be demonstrated and what actually happens, always evokes the approach of the difference between the best maps and the real territory (Bucay, 2007). This happens to the right, because lawyers are like boyfriends of his theories, which do not see them defects; agree on the way the theory interprets reality in his beloved theories are the embodiment of the best and true. We study what ought to be and sometimes we confuse that I should be with what actually is, we study should be, then the duty being is what it should be but is not, then the lawyers study what is not, what does not exists.

Therefore we can not be unrealistic, because in Mexico the legal and political systems are dysfunctional, since 1917 we have a very advanced and beautiful, up to the rest of the democratic nations in progress, legislation which is constantly evolving, but is not It applied correctly and effectively; our culture, corruption, dogmas and religious and political ideologies as well as countless related causes that escape us, affecting turn in some other consequences are difficult to analyze, and low socioeconomic status and these in turn in the low educational level in all social classes. The president of the republic failed to correctly say the books that have marked his life,[3] and the average Mexican only read 5.3 books a year,[4] This low educational and cultural level is what brings us back to corruption and a complex web of phenomena in a cyclical return ethene.

This paper aims to cover a small problem related to the implementation of the constitutional reform of human rights, and that given its enormous complexity can not cover all, which has to do with a small part of culture and education. We know that we need a culture of legality and urges a true educational reform that prepares us to be competitive globally as China and Japan; according to the results of PISA 2012, Mexico

[3] Noticias CNN México, sábado 3 de diciembre de 2011.

[4] Resultados de la Encuesta Nacional de Lectura y Escritura 2015 realizada por el Consejo Nacional para la Cultura y las Artes (Conaculta).

is one of the worst countries assessed in education, located on levels 52, 53 and 55 in 65 different areas of applying this test coordinated by the Organization for OECD.[5]

However, these two lines of research are still very large, but among them there is a small space in the philosophy of human rights would contribute to a better understanding of the reform and, therefore, its best application. Indeed, philosophy aims to reach the scientific knowledge of all things through their first causes (Fernandez del Valle, 2013) and in the case of human rights is come to the knowledge of these causes. A state that claims to be democratic rule of law and respectful of human rights should properly understand the concept and validity of these as well as its essence, not only to know the rules of our CPEUM they deserve that description, but to know also if the logical semantics of the same wording is fully adequate to capture them.

To this should be used as a tool philosophy, to question what are human rights ?, how useful are ?, what is your axiología, teleology, ontology and epistemology? And most importantly does of course have it help solve the most pressing problems of our country? These questions are indisputable today.

Method

All knowledge should lead to solving the major problems of our society, if this is not without purpose expending energy to undertake a scientific investigation. For the serious problems of our society overpopulation, environmental pollution, wars, unjust distribution of wealth, extreme poverty, hunger, violence, crime, forced disappearances, corruption, etc., to name a few, you have to start looking realistic solutions with gradual progress through the theoretical development of public policy models that address these issues from a social engineering.

It is important the correct application of the law to avoid violating Human Rights, however, it is indispensable to understand what human rights are, what are your axiología, teleology, ontology and epistemology? This is important to draw on the philosophy and sociology, have arisen because certain rules of efficiency and

[5] Noticias ADN Político, diciembre 3 de 2013.

effectiveness that can serve as reasonable responses to basic to understanding the problems concerning the human rights issues.

Today it seems that the issue of human rights is fashionable. Courts at all levels work with them in resolving social conflicts, like all public policy and legislative reform, but it seems that they are not within its scope, one example is the Law on the Declaration of Absence for Disappeared people of the State of Coahuila, which provides in Article 10, section IV the obligation of employers to pay salaries and allowances for missing persons the benefit of their families, which seems to be an incorrect perception of human rights in law state that while providing for the protection of rights to secondary victims, invades areas of federal competence to legislate on labor plus the bosses injure the human rights sector. Understood incorrectly the legal concept of forced disappearance of persons, which is considered internationally a crime of State, therefore, the employer sector can not take responsibility for the disappearance, neither subjective nor objective, so it can not force him to pay salaries and employee benefits during the time of the disappearance. This seems to be an inadequate understanding of the human rights of solidarity.

There is still worse in this confusion, it seems that far from clarifying the crimes committed by the state as does the International Convention for the Protection of All Persons from Enforced Disappearance,[6] or committed by persons or individuals directly related to and coordinated with the state. Such is the case of the doctrine of "Drittwirkung Basic Rights" (Mijangos y González, 1998), which is regulated by the jurisprudence of the IACHR in the Velasquez Rodriguez vs. Honduras (judgment of 29 July 1988), in which state agents apparently intervened on his own in the forced disappearance of persons. Also involved people outside the state, as happens in Mexico with "butters" or "claveros" which help them to the Federal Police in their operational; the Act of the State of Coahuila seems to deflect responsibility with members of organized crime, since they attributed them to the crime of enforced disappearance with

[6] El artículo 2 de dicha convención define el delito de desaparición forzada como: "…el arresto, la detención, el secuestro o cualquier otra forma de privación de libertad que sean obra de agentes del Estado o por personas o grupos de personas que actúan con la autorización, el apoyo o la aquiescencia del Estado, seguida de la negativa a reconocer dicha privación de libertad o del ocultamiento de la suerte o el paradero de la persona desaparecida, sustrayéndola a la protección de la ley" (subrayado añadido).

the state, which we estimate is a fatal mistake, because individuals who do not are related to the state, such as organized crime, do not commit, according to the International Convention for the Protection of all Persons from enforced disappearance, the crime of enforced disappearance. In any case, they will make imprisonment, kidnapping, murder or some other crime confuse the state with particular offenses only generates impunity and difficult to prove the international responsibility of the Mexican State.

The philosophical foundation of human rights is a complex issue that has been studied in numerous writings by several contemporary authors without have agreed on it. That is what the debate led by Luigi Ferrajoli on the topic with Luca Baccelli, Michelangelo Bovero, Ricardo Guastini, Mario Jori, Anna Pintore, Ermanno Vitale and Danilo Zolo (Ferrajoli, 2009), because they have not agreed on what are fundamental rights, namely the minimum that any fundamental law should contemplate, nor in its origin, purpose and value.

The working hypothesis H1 is that proper understanding (axiological, teleological, ontological and epistemological) may be important to recognize the problem of discourse, application and interpretation of human rights, which will be achieved by the theoretical effort to give good reasons for the concept, the foundation and purpose of them.

However, Norberto Bobbio has expressed an important thought that could set the null hypothesis Hn of this work, which has to do with the "sign of the times",[7] it is not easy task to undertake an argumentative effort for which reasons are offered on its meaning. Indeed, Norberto Bobbio considers a waste of time to make the effort of intellectual search hard in the middle of a philosophy he called barren and sick to find those philosophical foundations also questioned metaphysics, estimating as overcome the discussion on the basis of the aforementioned rights.[8]

It is important to discern how far the search for the philosophical foundation is a legitimate and useful against the other solution to consider solved the problem at

[7] N. Bobbio, El Tiempo de los Derechos, Einaudi Tascabili, Torino, p. 258.
[8] Bobbio, op cit., p. 7.

alternative and therefore unnecessary. Bobbio has denounced this state of affairs, but has ended up favoring against philosophical controversy, the issue concerning the scope of the effectiveness and terms of guarantees of rights.[9] Reiterates that what is at issue is whether it is reasonable to formulate a problem as for the foundation of human rights, or if it is preferable to avoid the issue opting for evaluating other aspects relevant to the effectiveness and security.[10]

An alternative hypothesis Ha, may have to do with the legal argument is in vogue these days, as just has to do with philosophy is clear from a special type or branch of philosophy, specifically the philosophy of language, like it stays within analytic philosophy, divorced from metaphysics, which has been much development since Wittgeintein Ludwig, J. L. Austin, Henrik von Wright Georg, to Robert Alexy, Aulis Aarnio and Aleksander Peczenik; also received influence of European continental philosophy with Hans-Georg Gadamer and Jurgen Habermas, and finally the Mexican philosophy with Mexican Mauricio Beuchot. This has has to do with the possibility of combining the principles of previous authors, mainly Alexy, Aarnio and Peczenik with Mexican Beuchot, then you may give more light to the problem for solving

While it is true that the ancient philosophy of the polytheists Eastern peoples and Greco-Roman philosophy range from the pre-Socratic periods of classical Greece, the Hellenistic philosophy, you can not talk about development of human rights as they are obvious violations of those rights such as slavery, monarchies, the obvious inequality of social classes despite the early development of democracy in classical Greece. The ideas developed by Western metaphysics could reveal the express rejection of those who feel the horror of being left without gods. However, this view is not exclusive, especially

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[9] Bobbio afirma que debe pasarse de lo meramente discursivo a la acción, de lo teorético a la protección; por esto sostiene: "El problema de fondo relativo a los derechos del hombre es hoy no tanto el de justificarlos, como el de protegerlos. No es un problema filosófico sino político." Cfr. Ibid., p. 16.

[10] Se comparte con Gregorio Robles el cuestionamiento que ofrece frente a la afirmación bobbiana, reformulando su planteamiento en los siguientes términos: "el problema práctico de los derechos no es el de la fundamentación, sino el de su realización; pero el problema teórico de los derechos humanos no es el de su realización, sino el de su fundamentación". Porque un problema sea de difícil solución no tenemos derecho abandonarlo o a calificarlo de pseudoproblema. Un problema lo es cuando se nos plantea la interrogante respecto de algo, y carece de sentido negar el problema porque no conozcamos la respuesta, o porque creamos que desde nuestros planteamientos intelectuales no es posible hallarle cabida». G. Robles, Los derechos fundamentales y la ética en la sociedad actual, Madrid, Civitas, 1992, pp. 11-12.

when undertaken a deconstructive effort to address the problem. In this position you can call intuitionistic.

While the medieval era was characterized by brutality, torture, religious dogma, stagnation of science and philosophy, the latter born as an ideology under the more humanistic foundation of his time, ie, the doctrine of Jesus of Nazareth who he puts the human being at the center of all philosophical foundation, especially protecting vulnerable groups, a thought way ahead of his time. His famous Sermon on the Mount says:

> Blessed are the poor in spirit, for theirs is the kingdom of heaven. Blessed are those who mourn, for they shall be comforted. Blessed are the meek, for they shall inherit the earth like. Blessed are those who hunger and thirst for righteousness, for they shall be filled. Blessed are the merciful, for they shall obtain mercy. Blessed are the pure in heart, for they shall see God. Blessed are paci fi ers, for they shall be called sons of God. Blessed are those who are persecuted for righteousness' sake, for theirs is the kingdom of heaven…

In addition, the Middle Ages received the humanist thought of St. Augustine, St. Thomas and Caesar Beccaria in the dogmatic criminal justice system. However, since the thought of the Nazarene to Beccaria, these points thoughts were drowned by the authoritarian, monarchical, anti-humanist and transpersonalist system of the Middle Ages.

In modern times the way of non cognitivism or intuitionism, has been chosen different from that essentialist look that was incorporated in understanding the discourse on human rights. God's transcendence and specifically conceived as an irrelevant issue. It is the case of the Hobbesian model, in which man is affirmed as an ambitious and selfish, only recognized in a world constantly seeking advantages and benefits.

Promethean path that man pursues its final independence from divinity is chosen. The bestial part of man leads him to shape the political state to ensure coexistence. The rules

are subsequent to the state constitution and regulate all the limits of political power shaped and regulated from the utility and convenience themselves.

Modernity, to assert their choice by the subject, proclaimed his paternity in formulating the discourse of human rights, which was consolidated from developed postulates from the rationalist-individualistic natural law. an anthropocentric option is confronted, as well as confirm the Cartesian cogito ergo sum and the Kantian autonomous subject. The primacy of the concept of individual is the very slogan of a time when the emancipation of subject and object was consolidated at various levels.

This scenario includes the need to replace the concept of duty by law, since it is the individual, as part- the basic starting point for recognizing a society that sought to conceive of politics, morality and the right of a different way. However, in a postmodern address all would be aimed at establishing as a priority the recognition of the human being as subject, which implied in modernity rebelliousness against the empire of the object that was set in the middle of a cosmos organized and led by God.

However, it must be stated that the individual revolution meant the absolute emancipation from the theistic arguments that had penetrated Western society; what he was given rather it was a break point against a organismic and Catholic vision of man. It is necessary to indicate that although the Age of Enlightenment sought to consolidate the process of setting the subject, could not be separated from the natural law and pre-legal reflection on man. Incidentally, the project illustrated the moral justification, in its cognitivist variant human nature conceived from a belief in a shared sense with classical theistic understanding and man, despite the commitment to a process of secularization.

the convergence of political predominant philosophical project with the formulation of declarations and constitutions that linked some rights identified from what he considered human nature, although initially included in a negative sense and subsequently defined as positive rights are warned. It should investigate how far a metaphysics of subjectivity can accommodate exclusively the foundationalist discourse of human rights. Metaphysics refers allowed to define the human being as subject, enabling their understanding as holder of some freedoms that could not be reduced to a common objective basis; He also assured the boundary between natural law and positive

law, allowing the definition of a morality demands before the normative regulation could be attributed to individuals.

The natural law has estimated that natural rights, linked to human nature, predate and superior to positive law rights. Rights are conceived as subjectively reflect an objective and normative order natural. Modernity continues with the configuration of the doctrine of natural law, whose conceptual foundations date back to earlier times, as confirmed by the metaphysical and theistic tradition already established by then.

However, it is the discourse on the individual that outlines the rights attributed to reflection on beings that are not understood in an organismic society. Without the predecessor tradition definitely exceeded tension with the Aristotelian understanding of society is inevitable. It is very problematic identify own boundaries of a speech that sets the priority of natural rights, but definitely without theistic metaphysics. It seems that the world of subjectivity did not achieve its emancipation from an order objective that is recognized as a starting point and that are considered subjective derivations that are properly human rights. In this context the presence of rationalist natural law option is confirmed. This, from the subjectivist turn taken by modernity, offers an ontological framework that accommodates the discourse of human rights. The man is regarded as an autonomous subject and similar to their peers.

The American and French versions of human rights are the product of that natural law understanding that not far from the theistic and classical formulation on the analogy of the human being with God. The idea of affirming the man as a being created in the image and likeness of God, seems to be key in understanding the state of affairs. Adam is the image of God, creature and creator are identified, but the second Adam an absolute correspondence between man and God is confronted, as is final image of the Father.[11]

The idea of man as the image and likeness of God is maintained, despite the situation of rupture generated by the expulsion of Paradise man suffered by an act of disobedience. However, this rationalist version would fall far short of conservatism which also

[11] Cfr. 1 Cor 15 y 2 Cor 4.

anchored within the Christian tradition, as is the case with the criticism that would be configured from English thinkers, which would not matter one priority abstract and optimistic metaphysical reflection on a state ideal man, as offered since the Enlightenment, but rather the realization traditions that inferred directly in the act of individuals.[12]

Rationalist natural law rebellion against the medieval philosophical work, in view of their atomistic understanding of society, as noted in the French illustrated direction, expressed in secularisation. This is configured the way, as the flag flying the proclamation of the individual as the center of a space relative to Caesar and not properly God, as it could be justified from the biblical text.[13]

In this respect a distinction between the Catholic and the Protestant understanding is evident, although it is debatable whether this claim of secularization, closer to the Protestant proposed separation of these two areas, it continues a priority European idea. For this, it was essential that a state that was proclaimed as tolerant and have as a fundamental pillar respect for religious freedom, as she ponders in the Lockean proposal on tolerance, despite their reservations against Catholics, Muslims and atheists builded .

The discourse of human rights was consolidated in modernity, from an ideology that emphasizes the sovereignty of the individual and the limitation of state power from freedom. an atomistic understanding of the state of nature, which is considered the power of decision for the individual is confronted; This aspect comes into tension with the Aristotelian conception of man.[14] Power is thus a process leading to the

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[12] Cfr. E. Burke, Reflexiones sobre la Revolución en Francia, tr. de C. Mellizo, Alianza Editorial, Madrid, 2003.

[13] Mateo, cap. 22, "15. Entonces los fariseos se retiraron a tratar entre sí cómo podrían sorprenderle en lo que hablase. 16. Y le enviaron sus discípulos con algunos herodianos que le dijeron: Maestro, sabemos que eres veraz, y que enseñas el camino de Dios conforme a la pura verdad, sin respeto a nadie, porque no miras a la calidad de las personas. 17. Esto supuesto, dinos qué te parece: ¿es o no es lícito pagar tributo al César? 18. A lo cual Jesús, conociendo su malicia, respondió: ¿por qué me tentáis, hipócritas? 19. Enseñadme la moneda con que se paga el tributo. Y ellos le mostraron un denario. 20. Y Jesús les dijo: ¿de quién es esta imagen y esta inscripción? 21. Le responden: del César. Entonces les replicó: pues dad al César lo que es del César y a Dios lo que es de Dios. 22. Con esta respuesta quedaron admirados, y dejándole, se fueron".

[14] Cfr. P. Ricoeur, *Fundamentos filosóficos de los derechos humanos: una síntesis*, en A. Diemer y otros, *Los fundamentos filosóficos de los derechos humanos*, tr. de G. Baravalle, UNESCO/Serval, Barcelona, 1985, p. 12.

proclamation of the autonomy of the individual, with the Enlightenment, with the Kantian proposal, a great exponent.

The Enlightenment, by insisting on the constitution of the subject, sought to consolidate the majority of age in a man deeply marked by rationalism. In this context it is important to establish whether that statement by subjectivity leads to a new commitment to the transcendent and essential aspect that is problematic.

This takes into account that the modern discourse of human rights found in the idea of autonomy and constitution of the subject a central point of support for the identification of its contents. It is interesting to investigate in what way the discourse of human rights is integrated into a reading over the already configured humanism, in which the idea of man as an individual claimed that some freedoms are those that do similar with its creator is adopted. And well might ask, how far modernity, in order to understand the idea of man, has allowed a definitive replacement of the Christian transcendent?

A. MacIntyre, incidentally, has denounced the failure of the Enlightenment project on human rights, defined axiomatic truths from beliefs that were linked to a scheme incoherently. What is apparent, rather, is a phantasmagoric reflection that leads nowhere. The author in question, incidentally, says that "there are no such rights and belief in them is like believing in witches and unicorns”.[15]

What constituted the natural law tradition is anchored to a religious idea discourse, as a natural right adjusted to the divine commandments written on human hearts is conceived. In this direction worth considering in what terms could noted a unique product of the Judeo-Christian understanding of man and that took hold in Europe. Incidentally, the reading on the subject could be made from Nietzsche is revealing, if this is what is making a deconstructive effort, without having to opt for a nihilism.

Thus, it is possible to think that the human rights discourse does not offer anything different against those alternatives consolidated humanists in the West. It would be a very perspective identified with the idea of imago Dei, and in which the assembly could

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[15] A. MacIntyre, *Tras la virtud*, tr. de A. Valcárcel, Crítica, Barcelona, 2001, pp. 95-96.

also be confirmed between antiquity and Christianity, between Greece, Rome and Judea. This fusion of visions, in Nietzschean terms, not moral scheme subtracts the distinction between good and evil; although at that meeting who ends up prevailing it is Judea, which means, from the perspective of Nietzsche, the victory of a religious idea on how to understand the nature of human beings.

The natural law reflection, thus support the traditional discourse of human rights, it could be revised in order to recognize whether what he has wrought is the continuation of a religious project with universalist pretensions. The dialogue against such readings from nihilistic critical insights causes itching. You could ask: Does the solution which seeks to overcome this religious idea into the discourse of rights would be in the level of a consensualist reformulation, in which concepts should be in secular password? Thus, it could be considered far can be addressed towards a truly emancipatory reflection.

The point at issue is certainly controversial, because even in this consensualist orientation, politically enhanced by liberalism, following Nietzsche's thought, would continue its own projection of the history of an error. Thus, in Nietzschean key it could be considered a speech like HR express a morality in which Roma ends up bowing to the Jews. Incidentally, the German writer states:

> The Romans were indeed strong and noble, strong and noble as there has been no other men on earth, as they have not been dreamed; every vestige of his, any registration is fascinating, assuming guess what is written there. The Jews, however, were the priestly people of resentment par excellence inhabited by a genius unparalleled popular moral: only compare to court with them on that talent, for example, the Chinese or the Germans, to feel who they are and who first rank fifth. And meanwhile, who has conquered, Rome or Judea?[16]

When the human right is linked to the laws of nature, or the laws set forth by God, which are considered as universal, immutable and eternal, the presence of the Christian roots in the definition of discourse is confronted. From the Nietzschean critique it could be considered that the discourse of human rights set up a "moral resentment." Thus, it

[16] F. Nietzsche, Genealogía de la moral, tr. de J. L. López y López, Tecnos, Madrid, 2003. p. 92.

could be argued that the French Declaration of the Rights of Man and of the Citizen, the product of a revolution, is nothing more than the continuation of that moral constituted the most decisive victory over the classical ideal. Note that following the thought of Nietzsche, it could be inferred that speech expressed as "Judea again achieved victory over the classical ideal" and "collapsed under popular instincts of resentment."[17]

Understandings cognitivists not have tried to overcome the traditional view of assembling moral and right. Arguments such as those developed in the Hobbesian model constitute benchmark for understanding the scope of a project is important to define what is useful or desirable. So, continuing with the discussion in previous lines, it could be evaluated carefully whether or not this scenario fits the "moral of resentment" ahincara alleged that under the prevailing religious scheme.

In contemporary times, many of the defenders of human rights discourse intended to give simply by appealing to history, despoiled of supposedly superstitious solution components. Is this a reasonable alternative to finally avoid to human rights? It is not easy to answer this question. Philosophy, incidentally, offers tools that specify a responsible argumentative work on the subject. You can confront, through the exercise of thinking, what they are lights and shadows that are forged into the discourse of human rights.

As precise Patzig: "Philosophy is for anyone who owns what is called common sense; naturally with the limitation that philosophy is not acquired without effort".[18] Thus, through a deconstructive effort, provided by philosophy, it could address the problem more seriously on the substance of those rights.

The task of the philosopher may consist of listening to the possible origin and mythical religious discourse of human rights. This activity can lead to the philosopher, thanks to the sense of wonder and constant exercise that dialectical confrontation of various arguments, and conclusions of denunciation and delegitimization of speech, or also a reaffirmation of foundationalist approaches. If the former, it would have rejected any relocation of the transcendent or metaphysical, insisting on an argument "demystifying"

[17] Cfr. Ibid., 93.

[18] G. Patzig, *Ética sin metafísica*, tr. de E. Garzón Valdés, Coyoacán, México, 2000, pp. 123-124.

the sacralizador speech that was present. If the latter, it would be assessed on what terms it is worth considering a foundationalist understanding, recognizing different existing readings. Precisely in modernity prospects voltage derived from the peculiar way of conceiving morality, politics and law are confronted.

The discourse of human rights is not alien to the traditional claim that has accompanied humanisms bet on the chances they have to achieve individual and social nobility of man. There is a process of finding a being who seeks to understand himself better, and allows a dense concrete reflection, formulated through a universal language. This way, you get to consolidate a speech called from an expression as MacIntyre says, "is now more current than any other eighteenth-century expression”[19]. This is, incidentally, the very scene of universalist discourse of human rights, and MacIntyre relates as requirements that "relate equally to any individual, regardless of their sex, race, religion and little or a lot of talent, and provide foundation multitude of specific moral choices”.[20]

The consolidation of a universalist discourse, in turn, is a complex task when taking into account the existence of contemporary historical forms in which it can be realized. These, being related to the aforementioned speech, can lead to devaluativo process. By the way, you can stand the problem on how to find meaning and purpose in a space where inflation is manifest rights catalogs.

Please note that the adoption of listings is a recurring inflationary effect of utilitarian and conventionalists theses that have been offered on the discourse of human rights. To this apologetics bet made for the defense of human rights adds, ignoring the wealth of the own dialectic of particularity and difference. It is important that the claim ramble philosophically on a topic that, in their current historical forms, is manifested by the production of documents which list various rights are not obnubile. It is at this level that can confront identify the limiting minimum contents that are starting points in drawing rights catalogs.

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[19] A. MacIntyre, op cit., p. 95

[20] Ibid., p. 95.

A global understanding of man is the one that has forged the West. This, in the midst of a universalist claim that can be linked to a language that can be dogmatic. Therefore it is inevitable that they assume with great caution the task of recognition of a speech that often and paradoxically, in defense of man has spread death of specific beings under the pretext of protecting the dignity of a personal being without borders.

HR could be seen as a bet over humanisms amid the crisis thereof, after the death of God and man's death have proclaimed. This raises a new question: how to prevent a speech like HR does not lead to desolation and sacrifice of historical contingencies? Precisely in this field against an essentialist and ideological understanding of man, the nominalist debate on universal, since the fourteenth century, William of Ockham formulated reactualiza.

The debate over universal, so well was raised at the time of trance towards modernity, it seems to have great present for a responsible approach on the issue. one is confronted permanent tension generated from the priority Nominalists understandings. These allow us to consider the importance of greater emphasis on men, ie, in individuals who express concrete realities, not universal. Thus, any possibility of giving way to an Aristotelian ontology which prevails over the whole party is rejected.

It highlights the possibility of considering the raison d'etre of the rights in response to an idea. The foundation, in this context, could be linked to "the abstract idea of human rights", as stated Joaquín Rodríguez-Toubes Muñiz.[21] This, for the Spanish teacher, involves associating human rights, "not so much the catalog of rights positively presented in international texts," but rather with the idea of "a core of rights to respectful treatment of the human being as free and equal to other”.[22]

The search path the foundation can not be a second-tier issue, although not walk it easy task. What is not acceptable is the trivialization of philosophical thought. an argument for claiming legal language could be adopted, confronting the various catalogs referred to in international documents and within states; but this choice can not be exclusive of

[21] J. Rodríguez-Toubes Muñiz, *La razón de los derechos, perspectivas actuales sobre la fundamentación de los derechos humanos*, Tecnos, Madrid, 1995, p. 34.

[22] Ibid., p. 34.

the contribution that can be offered from philosophy, whether for a previous level from a deconstructive work done.

Nor it can sacrifice philosophical reflection exclusively privileging the study is made on guarantees and protection mechanisms required to enforce human rights. However, as has been considering this philosophical trasegar is complex, generating an intense resistance in scenarios such as those for the foundation, and especially when it is linked to the idea of opening the space origins to metaphysics itself.

When looking substantiate Human Rights, it is possible a continuous reflection that responds to the constant desire to find a lost origins or a few reasons on our belonging to a unique and irreducible species. Search the principle is the proper path of Western metaphysics, enabling compression of the specificity of some creatures that are identified as human. This road is undertaken by the West, from the Greeks; enough to evoke the "know thyself" Socratic, which in turn is identified with the inscription: "gnosti you autvn (nosce te ipsum)" placed in the temple of Delphi.

According to Mounier, that know thyself is set to "the first great personalist revolution known".[23] Although the world of the subject claimed speech freedoms for himself fostered reflection on man, since metaphysics is precedent. The question arises, by the way, if the person is the key to understanding what concept is the specificity of the different beings with self fitness. In this way, a reflection on the thinking subject make a conscious effort to better understand himself and his environment is necessary.

But it does not be useless this effort, the dangers of embarking on a path in which the naturalistic fallacy appears as inseparable companion? The dilemma is inevitable. This, especially when trying to base a morality demands, considered prior to positive law, from identification between natural and good. This issue has been well exposed by George H. Moore. In this direction it could be seen in what way things are seen as good, but none of them can claim the adjective good.[24]

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[23] E. Mounier, *El personalismo*, tr. de A. Aisenson, Eudeba, Buenos Aires, 1962, p. 8.

[24] Cfr. G. E. Moore, *Principia Ethica*, tr. de A. García Díaz, México, UNAM, 1959.

You must confront how far the foundationalist discourse represents a kind of political mythology, why the myth about the logos claimed. Incidentally, those who choose not cognitivist argument that speech denounced hard when formulated from natural law proposal. This, as noted by Gómez Alonso, can be accused of having "specialized in making up a religious justification rational terms" and "hypertrophy of morality with pseudonaturalista vocabulary or fervent adherence to the modern distinction between ethics and politics, goodness and correction, private virtue and public citizenship”.[25]

The critical consisting consider the discourse of human rights is a priority superstitious is very topical. From this argument it could confront how far it is possible to continue humanism threatening contingencies own; the above taking into account the voltage generated from the formulation of a religious argument, although present in a secular language.

The non-cognitivist has chosen to address the need to deconstruct what is reported as an error, as any kind of essentialism contingent sacrifice is rejected. The humanist argument is rooted in the Christian understanding of person may be questioned from deconstructive effort from the philosophical work. But what can not be guaranteed is if from the process that takes place could be a final blow to the discourse of human rights.

Is confronted in these conditions a new topic, although the amount of information available. Therefore, priority should be recognized attend philosophical reasons. In accordance with what has been exposing, then, when questioned by the self-justification of a foundational reference as a basis for human rights, not about discovering something new. But what stands out is the possibility of rethinking the status of the issue.

The study is very interesting, with a major impact. This because what is at stake is the continuation of a discourse that unfortunately in their historical forms has generated violence, as when it comes to advocating on their defense. Hence it is advisable to listen to criticism from opponents of human rights, noting that altruism promoting this discourse has generated desolation, and in the words of Gómez Alonso: "It seems safe

[25] M. M. Gómez Alonso, *Los derechos humanos: justificación filosófica y política*, en Ratio Iuris, Medellín Universidad Autónoma Latinoamericana, 3, 2005-2006, p. 96.

to say that seems less harmful selfish that for convenience, it performs good deeds that altruistic that extend the well, transforms history into a slaughterhouse".[26]

Philosophers like Habermas, have said that human rights are moral values of contemporary society (Habermas, 2012), which have replaced the moral values of religion that were left behind by the abuses of absolute power that occurred in the obscurantism of the medieval times, where political and religious power power seized the body and soul of human beings and abused their power to use it as a suitable medium for purpose of political domination, this happened with the arrival of scientism in the modern era Enlightenment, where religion by science and God was replaced by the scientific method, forgetting the moral, generating a scientific, political and economic liberalism criticized by Marx ended with two world wars. At the end of the Second World War our society is the need to end with the return of the absolutist states (Nazi and fascist) realizing that the lack of moral and ethical principles led us almost to extinction of humanity and gradually the international treaties on human rights, starting with the Universal Declaration of Human Rights, have incorporated values and moral principles of minimal intervention in the sphere of human freedom (contrary to religious morality of absolute control in the sphere of the man who leaves no freedom to act and think sinfully).

Like Habermas, some jurists as Carlos Nino and all neoconstitucionalistas (Ferrajoli, Alexy and Dworkin), think that there is a politicization of law that affects the morality or justice of its content (Nino, 2014). Also they think that the fundamentals of human rights are moral and ethical principles seeking an embodiment as far as possible to protect human beings and seek their happiness in the greatest possible freedom in a globalized society.

Other theories such as Luhmann, indicate that such a moral society does not exist (Luhmann, The Moral Society, 2013), according to this author, the current, functionally differentiated society, can no longer be integrated thanks to the moral. Nor it can isolate the moral in any of the functional systems of society, which appear uncoupled the moral code. However, operate on them functional equivalents of morality means of

[26] Ibid., p. 96.

symbolically generalized communication seeking fluency and continuity of communication between them may be the human rights as a means of communication between legislators and citizens, and the judge in his legal interpretation as a means of communication with litigants using a language that rests on moral standards. The sociological analysis and discover the function of every moral rule in expectations and expectations of expectations, required for stabilizing interactions in a society of individuals. Within its project of a theory of society, they pose a new kind of ethics as -description of moral or reflective of the moral -theory. the possibility of a study of morality in relation to the risks and dangers as well as a conception of the person from the perspective of their inclusion in society on the basis of the esteem and contempt This opens. That is, the moral view very generally used for social cohesion, but applied to the particular case serves as contempt, so if a judge based on a maximum mortal resting on a law condemns a rapist, makes a judgment of contempt their behavior and this far from generating inclusion, generates exclusion.

In other works, Luhmann reveals that fundamental rights serve to differentiate society and state power under the theory of differentiation. It is functional analysis and function of human and fundamental rights, in the context of differentiated social order. It is the problem of stabilization improbable structurally distinct order. That is, for lack of human rights Luhmann generates totalitarian states "dedifferentiated" as he calls them, because power is centralized. Basically it is the formula of power that the aggregation of this and potentiation is the configuration of a despotic state and paradoxically less powerful (Luhmann, 2010), because as said Burgoa, abuse of power generated social unrest and rebellion the people (Burgoa, 2009), however, according to Luhmann, control of state power by the institutionalization of human rights differences in the structure of society (ie, divide the power in his classic formula presented by Montesquieu) and far from weakening It streamlines power is becoming a democratic and legal state, therefore reliable, who can do international business dealings, it becomes responsible for the rights of its own citizens (subjects) State.

Luhmann, a student of Talcott Parsons, in fact continued the theory of systems under its own perspective and correction. His teacher Parsons developed his theory on the idea of society as a structure, Luhmann accepts some of his ideas and develops them to understand the functioning of this structure; This was called structural functionalism

theory that has been collected and applied by some jurists as Jakobs to develop the "functionalist theory" on the part of the "theory of crime" and "theory of criminal law of the enemy" (Daza Gomez, 2007) which is an application of the "role theory" developed by Luhmann.

Systems theory intended to apply universally to all existing society, it describes and explains the functioning of any society as a complex communication system. The point of that part diverges radically from traditional theories, which understood man as "basic unit" of social construction, however, Luhmann considers that it is not man, but communications units that constitute and reproduce systems social.

The concept of communication is the key in Luhmann's theory. In a communication means a process of forming social systems; is diametrically opposed opposed to the concept of Habermas, who understood human action communication, a technological phenomenon, an exchange of information. In this regard, Luhmann argues that men can not communicate, because "only communicates communication".

Luhmann argues that the communication occurs by means of generalized symbolic communication, different but comparable in every social system each other by their structural nature. For example, the economic system operates with the average money, the judicial system justice politics with power, and so on. These means determine coding systems, reducing their inherent complexity of a binary code: Payment / Non-Payment, Legal / Illegal, Power / Opposition and so on. According to Luhmann, social systems emerge (Luhmann, Communications and Body Theory of Social Systems, 2015).

Luhmann describes the concept of "autopoiesis," originally developed by biologists Humberto Maturana and Francisco Varela and applies to social systems developed his theory. The term comes from the Greek autopoiesis: αύτο, ποίησις [self, poiesis], 'himself; creation, production, is a neologism or new word, with a system able to reproduce and maintain itself (Marutana R., 2004) is designated.

Luhmann describes as autopoietic social systems, which means that systems have self-referential character that is not restricted to the plane of its structures but includes its

elements and components, building the same system their own elements. In this sense, a autopoietically closed system is one that produces communication from its communication and only allows the entry of communicative irritations of the environment by channels structural coupling, since the communication system can only occur through its own symbolic means and responding to its own binary code (Luhmann, Introduction to Systems Theory, 1996).

An example of this can be deduced from the "theory of legal argument" authored by Robert Alexy, because as he explains in his work, communication in society is through a concept developed in turn by Habermas and consisting of the rules of general practice argument, explaining Alexy in the legal community, the justice system works in their environment through a particular very own communication of symbolic means, and although part of the argument general practice differs from this by having their own distinctive language, technical and further regulated in a more complex manner (eg, in court or in the sessions of the Supreme court), so that there are different forms of language interpretation and arguments to which called legal (Alexy, Theory of legal argumentation, 2012).

Luhmann reflects the fundamental idea of constructivism, where the process of obtaining knowledge, it not directly related to an ontological reality is explained, but rather the process builds the observed reality. The difference between operation and observation is the basis of constructivism and one of the pillars of the theory terminology.

Constructivist theory of knowledge has been developed by Jean Piaget, and in Mexico by Rolando Garcia, both explain basically that knowledge is not obtained from the object to the mind or intelligence, that is, that the truth does not lie in the objects which must be observed and applied senses objectively to discover its elements (as traditionally has been held by the old scientific model and method), but rather coincides somewhat with the theories of the philosophy of language, where knowledge is constructed by applying the object observed our acquired by the language in society and their complexity, as well as our prejudices, cognitive barriers, feelings, emotions and intuitions and communicatively discussed by the language our perceptions by agreeing in the scientific community about the knowledge cognitions (Piaget, 2008).

This means that language allows us to develop the knowledge and interpret the world, similar to those held Wittgenstein, for whom the words had the function of describing the world (Wittgenstein, 2003). This is, I know that the apple is red because red it is an emission of light that my eyes see, but the language we have agreed that the issuance of this or that tone should be given the name red, even though there is a little lighter or darker shades; and interact with the words through language game (Wittgenstein, Blue and Brown Books, 2009), so that as in any game, for example, the domino has its rules (ie they can only play up to four competitors, the cards are shuffled before play and spread over a seven per player, which has the highest mule is the first to start the game, etc.) and language use rules as in games for work, an example of this are the oral proceedings in criminal matters (the judge directs the debate begins by identifying the parties, then the prosecution begins with the prosecution, then it is given the use of voice to defense, etc.).

Continuing Luhmann's theory on social systems says that a system emerges and reproduces, as far as its operations lead to other operations; for example, if organic processes are spliced with other organic processes arises an organic system; if thoughts lead to other thoughts and psychic system arises when communications with other communications butting social systems emerge.

In this subject, the possibility of joint operations is limited only to operations of the same type and determines, in turn, autopoiesis and condition of operative closure of the system (and hence condition of existence). A digestive process can not be spliced with a thought, only a thought can be spliced with another thought; this is the condition of possibility of organic and psychic systems.

Operations can only be registered by an observer. Observation is the specific operation of the constituent systems sense (ie, social systems). This specific type of operation is to mark differences and denominations; all observation begins with a difference and becomes a network of differences, where all depend on the original difference (Luhmann, Organization and Decision, 2010).

The concept of difference is basic for the description of observation: any observation, according to Luhmann operates with differences, positing a specific difference, marking one side and ignoring another. Applied to systems theory itself, one of the main differences is that between system and environment. the concept of difference also within the theory has a high degree of abstraction and represents the condition of possibility of access or observation. (The difference is also a distinction between identity and difference).

The concepts of "difference" ("Differenz") and "distinction" ("unterscheidung") are practically synonymous; however, this emphasizes the operational nature of the marking of a difference while that accentuates the substantive nature, the demarcation line itself.

This concept of differentiation or distinction is very important in the case of human rights, as these serve to differentiate archaic societies with a centralized social system of political power, for example, totalitarian states whose Germany a very strong political leadership with Hitler, where the power of political and social domination practically focused on it; or in a smoother manner as in Mexico where presidentialism has led to abuses of power as the 121,683 people killed war against narco former President Calderon,[27] from which it appears that Mexico's human rights are not respected and a cause is the centralization of power by authoritarian politicians.

According to Luhmann, the role of human rights is precisely to distinguish the structure of society, that by effectively decreasing the abuse of power, this is achieved when HR allow for example strengthen other reserves of power, such as the judiciary, which has greater political participation in society and the effect of the obligation to promote, respect, protection and guarantee of human rights (as with the Constitutional amendment to article 1 of June 10, 2011). This allows transform societies where different subsystems with reserves of power that are becoming and operate autonomously or, as Luhmann says, are in a state of operational closure, without much centralized influence, or dedifferentiated (Luhmann, are distinguished Fundamental rights as an institution , 2010).

[27] Cfr. Artículo nacional escrito por la redacción de la Revista Proceso intitulado "Más de 121 mil muertos, el saldo de la narcoguerra de Calderón: INEGI" ubicado en: http://www.proceso.com.mx/348816/mas-de-121-mil-muertos-el-saldo-de-la-narcoguerra-de-calderon-inegi. Fecha de consulta 16 de junio del 2016.

The structural coupling is a non-causal relationship between a system and its environment (the only type of possible relationship between the two). With the structural coupling, Luhmann's theory solves the dilemma proposed by the postulate of autopoiesis, because although the systems are in a state of operational closure, reproduce their elements from their own elements, only know their internal states and they can not communicate directly with their environment, they must also observe their environment and adapt to it in order to exist.

To establish a relationship of structural coupling, the system builds structures with expectations that sensitize it to certain irritations. For example, the political system can not observe the communications that occur in the economic system (because that operates with the code "Power / Opposition" while this does with "Pay / No Pay"), but can create structures irritation, use eg GDP and the fiscal deficit and interpret their values as relevant for political communication (procurement / maintenance of power) .In this way a "structural mismatch", ie, a particular series of events in different occurs systems that simulates an intervention that actually never happened.

The concept of expectation has been developed in legal theories developed by jurists as Claus Roxin and Gunther Jacobs for his functionalist theory and the law it creates enforceable expectations and engaged citizens in their respective structures to generate communication between the power of domination of the State under Ius puniendi with other social systems. For example, in the subsystem family where communications are solidarity, they can interact with the economic system where communications are "pay / no pay" through the expectation of support or payments for food concept because the right food means an enlarged conception,[28] therefore as an example the parent fails to pay maintenance to their minor children, this disappoints the expectation generated by the law, thus maintaining communication with the subsystem of the family, which is a communication "fair / no fair ", related to solidarity and economic system through

[28] La Ley para la Familia del Estado de Coahuila define en su artículo 276 a los alimentos en los términos siguientes: "Para los efectos legales se entiende por alimentos: la alimentación nutritiva, el vestido, la habitación, la atención médica y psicológica preventiva integrada a la salud, la asistencia médica y terapéutica en casos de enfermedad, la recreación. Respecto de las niñas y niños, los alimentos comprenden los gastos necesarios para la educación preescolar, primaria, secundaria y media superior del alimentista, su recreación y para proporcionarle algún oficio, arte o profesión honestos y adecuados a sus circunstancias personales".

communication" pay / no pay ", so the communication that occurs is that when the parent does not pay child maintenance, ties are broken solidarity and this situation becomes unfair, allowing the state to take control of the situation by the power of domination and making use of criminal law may even in certain extreme and criminal legal relevance use their ius puniendi cases, to impose a sanction .

Luhmann incorporated into his theory a figure of the Austrian psychologist Fritz Heider: the difference between "medium" and "form" (Heider speaks of "price / thing"). The forms are made up of "rigid couplings" between elements within a medium (which in turn is a system of "flexible couplings"). For example, a footprint in the sand is a form that has a certain durability and whose figure is fixed, while the sand is the medium in which they can arise without proper form and "settling" the forms of its forms.

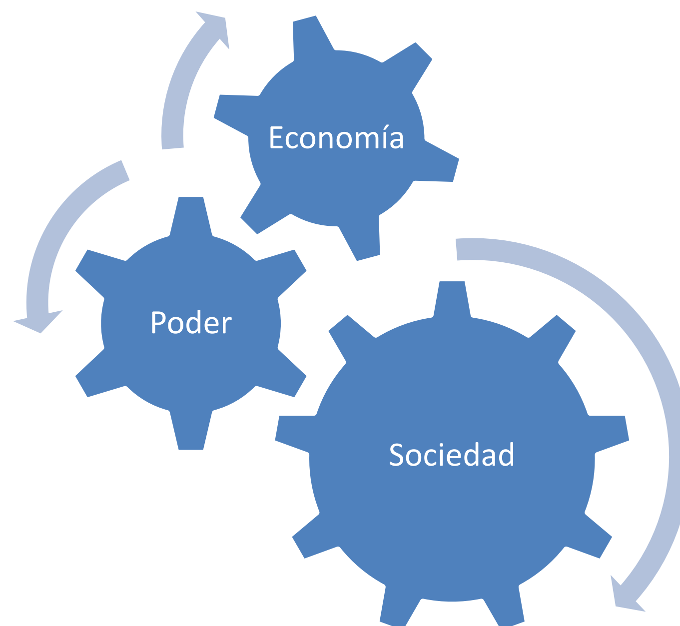
For Luhmann, as opposed to Vetero-European idea of a difference between "substance" and "form" things do not have an "ontological" entity that determines to form or medium: his character is always given by the relationship established by an observer, with another element. To use the example above, the sand is a means in relation to the shape of the tracks, but is a form regarding the molecules that form. Another example: the letters are the medium of words, which are the prayers, which are the means of ideas. The means are always forms other means.

The resonance indicates the possibility of transmission processes between systems or between parts of a system with other parts due to a similarity or structural parallelism. For example, labor seasons certain sector of trade and industry tend to be guided by the existing school year in the region in question. In this sense, the resonance is related to the concept of structural coupling.

Contingency is the state of those facts from a logical point of view are neither true nor false. Contingency is the opposite of necessity: an act or contingent fact which could not have occurred or taken place; an act or event is necessary, otherwise it would not have happened.

The concept of "operative closure" describes the way systems have generated, reproduce and communicate. According to Luhmann, systems are defined by the operations by which the systems produce and reproduce; everything does not happen within the framework of these operations automatically become part of the system environment and in this sense, all systems are operationally closed to him because only react to internal operations; transactions giving rise to other operations that give rise to other operations (and so on), but always within the limits of the system itself.

This super-theory has been severely criticized by Habermas, who in his "Theory of Communicative Action" mentioned that Luhmann's theory can be summarized as conceiving society as a great system where two operating systems basically operate, power and the economy. In particular I imagined, and so I use in class for explanation, such a structure as follows:



The right is a subsystem responsible for making them work the latter two systems, ie, the right is not in the service of justice, but the service of power and economy (Habermas J., 2008), similarly, the explanation of Luhmann on his Theory of structural functionalism, in relation to the law, is to design said superstructure (society) with a series of autopoietic subsystems that are correlated with the economy and power systems, examples are education subsystems, marriage-family, politics, culture, medicine, religion, tourism, sport, military, research (science), mass media, art, intimacy

and the main subsystem: "the right". In classes for explanation, what is said it is structured as follows (Figure 1).

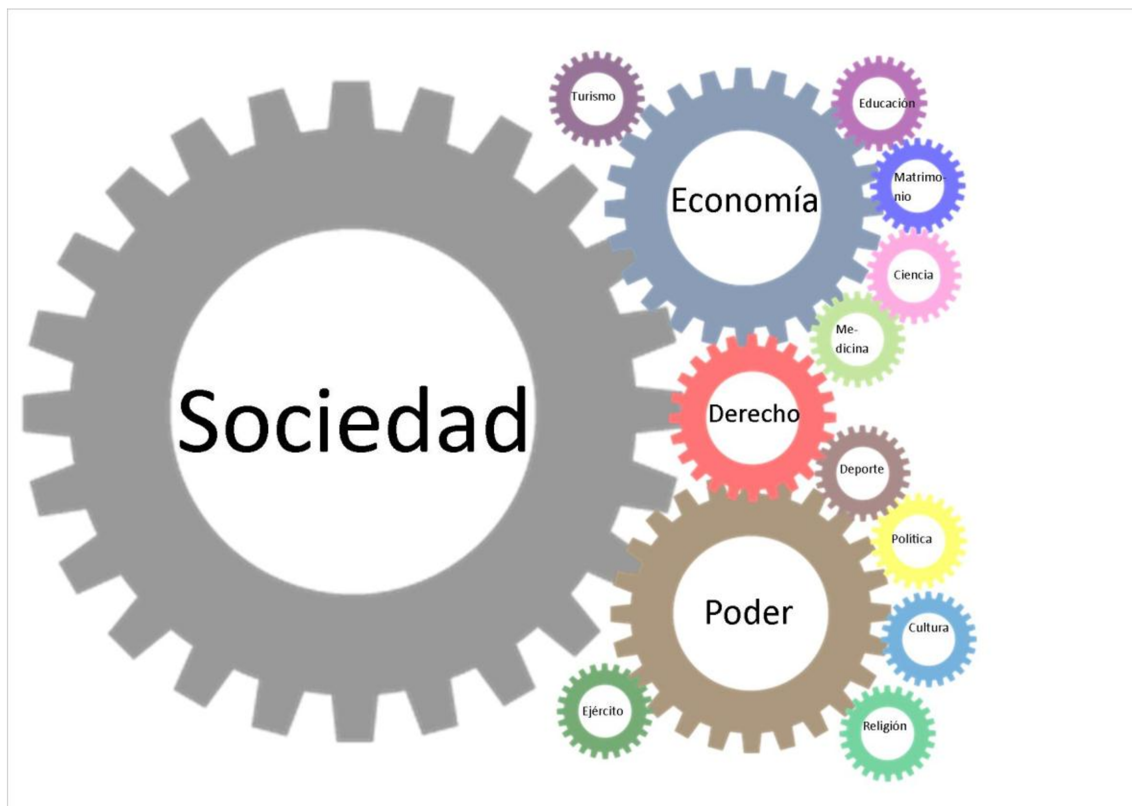


Figura 1

Thus, there are subsystems that are running alongside the economy, and so I understand why, for example, marriage is more related to an economic question of power, because its origin has to do not with love, this does not it is recognized as a right in any constitution in the world, except for marriage whose story has more to do with the economy. Weber explains in his book "Economy and Society" that marriage before modern societies did not exist, social relations were basically polygamous, monogamy is established when the goods satisfactions of needs are created in the form of wealth accumulation, then comes the serious problem of heredity, and thus the need for legal certainty exists that the heir was legitimate son of the cause of the inheritance (the deceased) (Weber, 2012). Because of this marriage is monogamous and sacred, sanctioned by legal and religious laws, and even virginity testing (stain sheets with blood on the wedding night), was required because otherwise it could annul the marriage contract.

The same could be explained by education, because in our contemporary society education no longer has the function that had the paideia in times of Greek culture, which could be reduced to the satisfaction of curiosity merely know, contemplation beauty proclaiming Socrates, the civic art of being a good citizen (Jaeger, 2008); but rather to the knowledge society, where education plays an important role which is derived from scientific and technological development, highlighting the contributions of philosophy. The challenges of education go towards the development of the knowledge society, as well as the use of science and technology for the solution of social problems that require interdisciplinary approaches and transdisciplinary many occasions (Olive, 2011); ie innovative approaches that open the way for approaches that can not provide for themselves none of the traditional disciplines, and this in turn has a direct impact on the economy, because today society values most the most qualified, who receive the best income. Science goes hand in hand with the economy, copyright protected, trademarks, patents, etc. (Silvestre Mendez, 2013).

Side to have the army, politics, religion, of which one can easily see that they are power structures, the same goes with the sport where competitions of power or strength, skills and dexterity are made, very related activities military training and culture that serves to introjecting the power structure of society.

The function of law has been explained by Luhmann and criticized by Habermas, in the sense of defining roles at home subsystem and those roles rights and obligations, so for example in the family parents have roles and rights and obligations flow; if these are not met, for example, that a parent does not give food to their children, social structure sends to said subject to the law, which has the function of punishing him by legal sanction (civil, family or criminal law), for example the discount alimony or imprisonment for the crime of serious breach of family obligations, to reaffirm the knowledge and learning that culture introjected him and that the law protects and values regarding their social role, and once learned you back again to the social structure.

If a member of the army disobeyed military discipline, commits homicide or disappears to a person, the law sanctions it and returns to society to fulfill a social role depending on the severity of his conduct, if mild can continue to play your old role, if severe as is assigned to another suitable structure.

The role is a complex function, but is more or less similar to what law is known as legal personality, this is full of rights and obligations, it is recalled that the word personality comes from the term person and this in turn the word character, reminiscent of the actors in the plays that played a role, but they did so with a mask. Garcia Maynez tells of the relationship between the mask with personality (Garcia Maynez, 2007), which is similar to what I meant Gibran Khalil in his story "El Loco" when representing that character that one day stole his seven masks of their previous seven lives and seeing people without any mask with his bare face was called "crazy", but realizing he not had to represent any social role and just be himself feels for the first free and happy (Gibran), this gives us the importance of the role, because if we are not "crazy" no one can live without a role, without a mask, without a character, at least not since I get up I "husband" "parent", then when I'm on my way to work I am "the car driver," then to get to school I am "professor", "employee", "partner" when I go to my master classes am "student". Each role has its rights and obligations and every act of my life have different roles: "the citizen", "user", "the consumer", "tax debtor" and so on. I can not imagine my life without a role, being nothing more "," I do not know me unmasked.

The theory of structural functionalism of Luhmann has been taken even further by De Giorgi (disciple of Luhmann), who emphatically says that even though philosophy seeks the foundation of human rights, they lack it, just no foundation, criticizes human rights to be treated in our time as sacred, untouchable maxims, as unfounded basis, returning to an old language, deciduous, taken from the natural law, to name and dethrone the iuspositivism criticizes Human Rights saying that these are not a extrapositiva reality, are not absolute, irresistible and perennial truths do not belong to a hierarchical norms superior, are not the positivization of morality, nor the axiological foundation of the right to De Giorgi law is not what it should be but what is the right it says which is right and that is not right, the law says who are equal and who is not, the law says what it means to be worthy, the law says who can be treated as different and those without, the right does not resolve social conflicts, but more While used (De Giorgi, 2015). This can be seen in any example, a subject who commits murder is punished criminally for their behavior, but the conflict is not resolved: the dead is dead and hurt forever family.

A punitive penalty does not return life or restore the social fabric between the convict and the family of the deceased, far from it on many occasions the conflict escalates, since the sanctioned instead of reintegrating into society because of the application of the sentence imposed, can deflect further into his antisocial behavior, because it is a known fact that prisons in most countries (if not all) does not work as a means for rehabilitation, reintegration, rehabilitation, or as it is called, and that on the contrary, serves as a school of crime (Leucona Zepeda, 2014), and within the interior is intercepted by organized crime gangs that often enlist the professional offender and prepare to leave.

Another example away from the criminal matters could be a divorce case where the state separates family unity, economic goods and the care of children without either resolve the conflict between parties. Of course, it is not to reconcile or re-enamorarlos, but if it were true the myth that the right resolve conflicts, should at least restore the social fabric to the point that they no longer see as real enemies sometimes. Of the latter another discipline that is sometimes used as a means by law in certain processes is responsible, and even has recognition use the same constitution, but it does not belong, I mean the Alternate Means of Dispute Resolution (MASC), since this technique belongs more to psychology or management career HR (Moore, 2006).

For the sake of this point made by De Giorgi, a reflection similar has been addressed by Zaffaroni, who criticizes the criminal law the myth about the role of criminal law to safeguard or protect legal interests of society, he says that the criminal law attributed this feature falsely as criminal law does not protect property, it must protect them involve prevent being injured, which is not its function, because this is not ex ante, it does not prevent crimes committed, its main function is ex post facto, and when the injury to legal interests is when intervenes (Zaffaroni, 2013) occurs.

The thesis of De Giorgi in the sense that the law conflicts is used in order to allow the State to impose its right to punish, sovereignty, or power of domination over subjects. And he says that the new theories of justice (Rawls), new theories of principles (Dworkin, Alexy), theories of balancing (Alexy) of rational consensus (Habermas, Alexy, Atienza) and the right as department moral (Nino, Alexy), new convencionalimsos (Ferrer Mac-Gregor), the neo and pospositivismos (Hart), of

neoconstitucionalismos (Ferrajoli, Carbonell), the garantismo (Ferrajoli) and other trinkets, or even understand the foundation of human rights that are theoretical objects with which they work. They are, he says, recycled old messianism objects, bringing back the old language of natural law to explain again with the light of moral glass universal principles, the democracies of the constitutional rule of law, pluralism, self-determination and new citizenships Plato, Aristotle, Leibniz, Thomas Aquinas, Kant, Hauriou, Santi Romano, Kierkegaard, Hiedegger, Sartre, Wittgenstein, Gadamer, Kantorowicz, Husserl, Stammler, Hegel, Weber. The problem is that now there are no big buildings as they did, no major theoretical assumptions, there is no great philosophies of history, only returning waste, small ideas that called junks.

An understanding of these philosophical, sociological and sources postures, it is important to have more light on the problem. Holding all is said and no more arguments to say about the foundation or its rejection, you can bury the problem in false ideologies and stop social progress, progress of science is based on the criticism of mistakes and successes, it only allows the evolution of thinking, this involves re-reading and reflection of this interesting problem.

Thus, while on the subject of the foundation of human rights has bast and good theories, it does not prevent to continue seeking new own explanations to understand the problem from a particular perspective. It is offer some arguments on a matter of great interest, without seeking the discovery of an unprecedented reality, on the other hand it confronts that it is already manifest. It is possible to assume a different from the patriarch of Macondo, who as he arrived at the conclusion that the earth was round, unaware that his famous discovery had already been recognized before in other latitudes attitude, but later admitted he was not alone. Therefore it is possible to stake a problem already addressed, recording credits others, and without giving up the possibility of evaluating a given reality from unusual perspectives; so could realize reasons on the need to base rights.

Aware of what already developed from various sources, it is possible to undertake a personal journey for reflection on the problem of the foundation of human rights. Legal rules can be evaluated as an expression of certain demands that human beings are

integrated into groups seek to raise a range of more tangible existence, and can be fitted with mechanisms of protection against ignorance.

In the field of nation states is, for example, that different communities have positivado, in their political constitutions, requirements or specific needs categorized as fundamental rights; They are endowed with constitutional legal protection. Equally normative consensus that achieved among the various peoples of the earth to realize international declarations, are even in this scenario protection is more difficult to obtain, first by the coercive mechanisms that have been developed gradually address the issue of sovereignty States, and secondly by the issue of protection of prompt and rights, which is still not a reality and it is also difficult to achieve the goal of short-range, since the processes of violation of human rights before the courts international (either the American or the two European) is very, very slow, especially for the supplementary nature of international justice, it must first go through a long ordeal of domestic judicial processes in the responsible country, not to mention sometimes mechanisms discriminatory selection such as the Inter-American Commission very complex and sometimes little understood. In these various ways a legal discourse, where the various positions of legal positivism have tried to assume an important position is set.

The question arises whether the concept of human rights must be understood from a forethought to that legal discourse. And it is at that level that precedent can investigate whether international declarations and covenants, in addition to the constitutional listed on fundamental rights, stay or short in identifying the various rights.

In this context we consider the foundationalist arguments on Human Rights, from which it has been estimated that universal declarations and covenants that enshrine realize reality prior to positive law. They include, for example, approaches substantiation of the rights referred to in terms of natural law, and those that defined in attention to the utility in a defined space and a specific time.

In this sense, it can be said that the universal declarations and covenants on Human Rights did not create rights only recognize them. The traditional foundationalist argument on Human Rights has ruled out the possibility of circumscribing their understanding and content to the provisions of certain political and legal documents. It

questions how far the norm, which expresses the existence of the right, exhaust the recognition of this reality, and thus the question of the foundation is incorporated. It could be considered that this issue, in said direction, paraphrasing Heidegger, is linked to the problem of transcendence.

A purpose is what might be at stake is the pursuit of being, being essential to review the ideological substratum that has been present within the discourse of human rights. a search process on the possibilities of sustaining a certain reality that should be allowed to stay in a reflection basilar laying give meaning to a concept confronts. So, finding a foundational basis can mean the rejection of emptiness, that is, a radical opposition to meaninglessness.

Results

It was found that there is currently a serious problem of theoretical and doctrinal foundation of the conception of human rights that can be reliable and accurate enough to build a solid framework that can be based on a structure where they can substantiate legal solutions and philosophical to justice and interpretation of human rights.

There are doctrinal limitations on contemporary philosophy, and especially of postmodern Iusfilosofía that allow unitarily conceptualizing the human rights so that they can have a practical use for resolving serious legal problems which today threaten our societies lose the sense of justice. One example is the exploitation of coltan has caused in the Congo an environmental and human looting to maintain a hyper-technological society victimized by consumerism of neo-liberalism postmodern, which to date has claimed more than 6 million dead29, and it has caused serious environmental degradation, as well as endangered species in the region as the Gorillas.

Everything indicates that short-term judges interpret human rights as moral principles that can make the right as a raw material ductile, free valuation and allowing them to disapply legal rules that limit. This is a serious global concern, as each judge may individually have a different conception of human rights, and there may be as many

[29] http://www.independent.co.uk/opinion/commentators/johann-hari/johann-hari-how-we-fuel-africas-bloodiest-war-978461.html

ideas as judges in the world exist; which generates an ontological chaos of conception and therefore a non-uniformity of criteria of justice that threatens the global legal certainty.

In the medium term it is expected that over the next 20 years from all the different conceptual approaches on human rights can draw valid conceptualizations for all variants, at least its essence, for the same conceptual variability is a reflection of the changing ideological democracy in our societies free thought, but it is desirable to move away from relativism to approach even a little to a more correct and universal design.

In the long term it is expected to be clear about the human rights and democracy implicit that allows going to implement its ontology together with advances in other sciences as an interdisciplinary approach to the solution of the serious conflicts that afflict us, especially environmental geocentrist application where we can see anthropology as a small part of a system of universal problems.

The benefits expected to contribute to the development and dissemination of the philosophy of law on the understanding of human rights as the foundation of the Democratic Esado of law, and in this way is a tool for social engineering, ie to go by solving little little each serious social conflicts to the extent of its relevance and hand from other disciplines such as politics, economics, sociology, science and technology, education, culture and moral, because among all interrelated can concentrate solutions more solid and efficient.

Potential risks especially for our country is for now the rule of individual discretion of each judge or state official who improperly and according to their own particular interpretation apply justice guided by their subjective conception of human rights, creating legal uncertainty and a weakening of the rule of law and democracy.

There collateral hypothesis as Gorgi, Luhmann and Ferrajoli (especially the first two) to report that everything revolves around power and economy around the powers that be, who now have social control and bombard us with mass psychology to tell us how to behave, all under one political, technological, scientific and economic liberalism that deliberately handled convenience conception of human rights as ideological bumpers,

taking advantage of its universal principles, this could make further research of great interest.

Discussion

These results mean the democratic expression that characterizes us today our postmodern era, the current policy has allowed the constitution to be inserted by way of new conceptions and generations of human rights, ideologies and partisan ends of different and heterogeneous groups of power shift and fashion that are distorting the constitution of the ancient and almost extinct sovereign states, as an example our CPEUM has suffered 552 reforms 110 of them which were generated only during the presidency of Felipe Calderon, who are complicating the ontological understanding of the HR.

What was learned was that it needed further from philosophy to enter up rational bowels of the different conceptions of human rights and their essential characteristics, and this is essential for the development of new scientific studies, so it is indispensable return of philosophy (especially analytical) to the scientific field to explode the effectiveness of the latter, because science has generated different differentiated and heterogeneous conceptual theories about human rights that today are incompatible, and is the philosophy that It allows to go deep to generate the minimum basis to resume starting new theoretical paths that lead to stronger useful to our conceptions analysis time.

Conclusions

To conclude this reflection, it is reiterated that the founding referent of human rights is a problem nowadays, without having to terminating from a speech given by the peoples of the earth consensus. Diagnostic reflection is offered in this context. And without presenting an original hermeneutics proposal, it is possible that the investigative process to focus on confronting various sources. These, finding light and shadow, may consider the feasibility of recognition of minimum requirements of morality that protect the man as an individual and pacta in a society in order to survive; but equally one might think

on what terms it is considered an argument over a projected in a community being and from there to speak of rights.

The human rights discourse goes through a significant devaluation, due to ideological manipulation, and the absence of specific arguments in the dialogue on human beings. So much confusion is generated, as when hybridization into the speech comes from the chaotic assembly of various traditions. Hence it is important to determine whether the speech should be replaced by another, as is the corresponding fundamental rights; more contextualized and linked with human needs and identify the most valuable interests in a particular community.

Incidentally, those who choose this alternative estimate that at this precise scenario, it is possible to adequately define certain requirements protected by legal guarantees. But question: is this more modest and clear that the traditional HR substitute speech? It is the commitment to discern whether this idea introduces the philosopher unsolvable and useless metaphysical questions.

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