

# THE CHALLENGE OF ETHICAL-CULTURAL PLURALISM TO THE UNIVERSALITY OF HUMAN RIGHTS

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**Abstract:** One of the main criticisms directed against the legitimacy of internationally recognized human rights is that they are ethnocentric or parochial. The examination of this objection leads to the conclusion that it is not relativism but cultural-ethical pluralism the main challenge to the universal validity of human rights. Ethical pluralism queries that the justification of human rights that has prevailed since the approval of the UDHR has arbitrarily given, under a deceptive appearance of universality, a weight far superior to individualistic values than to collectivistic. After examining some of the main attempts to overcome this challenge (the constructive theory of human rights and justificatory minimalism), the one based on the defense of a kind of ethical individualism compatible with a moderate ethical objectivism is defended as a preferable alternative.

**Keywords:** human rights, parochial objection, relativism, cultural ethical pluralism, individualism, ethical objectivism.

**Summary:** I. INTRODUCTION: THE PAROCHIAL OBJECTION; II. THE ETHICAL RELATIVISM; III. THE CULTURAL ETHICAL PLURALISM; IV. THE DISADVANTAGE CLAIM; V. AN OBJECTIVE JUSTIFICATION OF THE INDIVIDUALISM OF HUMAN RIGHTS. THE CONSTRUCTIVE THEORY OF HUMAN RIGHTS; VI. THE JUSTIFICATORY MINIMALISM; VII. SOME PROPOSALS TO REFUTE THE ETHNOCENTRISM OF THE OFFICIAL JUSTIFICATION OF THE CURRENT INTERNATIONAL HUMAN RIGHTS SYSTEM; VIII. FINAL CONSIDERATIONS.

## I. INTRODUCTION: THE PAROCHIAL OBJECTION

One of the main criticisms directed against the legitimacy of internationally recognized human rights is that they are ethnocentric. This is also known as *parochial objection*. According to this critique, the local is confused with the universal, the universally valuable (in this case, the human rights) is confused with what is valued from the perspective of some particular culture or society. The parochial objection is that international human rights law embodies a “parochial” set of values or ordering of the same values that it unjustifiably imposes, through its quasi-universal or universal scope, on people and societies who do not share it<sup>2</sup>. Its origins go back to at least the drafting in 1947 of the Universal Declaration. Already then the Executive Board of the American Anthropological Association warned of the danger that the Declaration would be “a statement of rights conceived only in terms of the values prevalent in Western Europe and America. For that reason, insisted that “values and standards are relative to culture from which they derive”

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<sup>2</sup> BESSON, S., “The egalitarian dimension of human rights”, *Archiv für Sozial-und Rechtsphilosophie Beiheft*, 136, 2013, pp. 19-52, at. 36.

y, henceforth, “what is held to be a human right in one society may be regarded as anti-social by another people”<sup>3</sup>.

Parochialism objection queries the legitimacy of human rights in two different ways which, however, are often confused: through what is known as skepticism or ethical relativism, on the one hand, and the doctrine of ethical pluralism, on the other. Although the former apparently contains more subversive implications for the legitimacy of internationally recognized human rights, it does not offer the most adequate expression of the anxieties and perplexities related to parochialism. On the contrary, although it is a more modest metaethical thesis, ethical pluralism queries this universality much more seriously.

Both meanings of the parochial objection must be distinguished from another type of accusation of ethnocentrism to which human rights have also been subjected: that they are a Western concept that is not, in many cases, transferable or translatable to other societies and cultures. According to this version, the concept of human rights could not be extrapolated from the context of the culture and history in which it was conceived into a global valid notion. Proof of this are the difficulties in finding a translation of the term “right” in languages such as Chinese or Japanese<sup>4</sup>. However, to maintain that the concept of human rights is parochial, it is not enough just to highlight its Western origins. Assumed that human rights are a product of Western political history and philosophy, their universality rests on the conviction that it is a language with a sufficiently generalizable literal tenor to be able to transcend its historical origin. In fact, people in whose cultures the concept of a right may not be indigenous nonetheless have found it to be extremely valuable for protecting their vital interests<sup>5</sup>.

## II. THE ETHICAL RELATIVISM

At the *metaethical* level, ethical skepticism or relativism defends the non-existence or non-cognoscibility of a set of universal values since it considers that moral truth and the justification of moral judgments are not objective, but relative to cultural and historically contingent factors. From this point of view, an objective foundation of human

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<sup>3</sup> The Executive Board, American Anthropological Association, “Statement on Human Rights, *American Anthropologist*, 1947, 539-43, at 542. As Nickel affirms, this is not the stance of most anthropologists today. Currently the American Anthropological Association has a *Committee on Human Rights* whose objectives include promoting and protecting human rights and developing an anthropological perspective on human rights. More than emphasizing the importance of cultural differences, anthropologists now often support cultural survival and the protection of vulnerable cultures; non-discrimination, and the rights and land claims of indigenous peoples. NICKEL, J., “Human Rights”, *The Stanford Encyclopedia of Philosophy* (Spring 2017 Edition) ZALTA, E (ed.), url: <https://plato.stanford.edu/archives/spr2017/entries/rights-human/>. Nonetheless, prominent anthropologists such as Richard Shweder and the late Clifford Geertz have defended relativist positions in recent years.

<sup>4</sup> ZOLO, D., *Cosmopolis. Prospect for a World Government*, Polity Press, Cambridge, 1997, p. 119. INAGAKI, R., “Some Aspects of Human Rights in Japan”, In *Philosophical Foundations of Human Rights*, Paris, UNESCO, 1986, ch. 9.

<sup>5</sup> BUCHANAN, A., “Human rights and the Legitimacy of The International Order”, *Legal Theory*, 14, 2008, pp. 39-70, at. 45.

rights cannot be sustained since the unavailability of a credible objective grounding for such standards. A very clear exponent of this position are the following words of Zolo:

“the universal character of human rights is a rationalistic postulate not only without substantiation in the theoretical sphere but also historically contested by cultures different from Western culture. (...) [T]he risk is thus very great that the cosmopolitan project implicit in the Western doctrine and policy of human rights is in actual fact operating as – and is perceived as – an aspect of that process of the “Westernization of the world” which is currently overrunning the technologically and economically weaker cultures, depriving them of their identity and dignity”.

Zolo does not merely highlight the incompatibility between the values embedded in human rights and the dominant ethos in countries like China, Pakistan and Saudi Arabia, the Sudan or Nigeria. In his critique of universalism and deontologism characteristic of ethical pacifism, the author of *Cosmopolis* shows his closeness to the realist and subjectivist philosophies of values, that is to say by the entire tradition of ethical non-cognitivism, from Hume to Nietzsche, to Weber, to Neurath, to René Girard, to Rorty<sup>6</sup>.

Although conceptually different, *metaethical relativism* is often associated with *normative relativism*<sup>7</sup>, with the belief that moral values and judgements are endogenous and immeasurable, and thus have no meaning and validity beyond the social or cultural context in which they originated. According to this vision, each form of life, each "language game" constitutes its own world (Wittgenstein), with its own particular rationality, so there are no objective and universal criteria to judge it and, even if these existed, we would be too conditioned by our own culture and society to be able to discover them. It is therefore wrong to judge other people who have substantially different values because they are as valid as ours<sup>8</sup>. If cultures are insurmountable frameworks of understanding and research and assessments and comparisons between them are not possible, human rights are no more than a Western concept that cannot be transculturally applied to judge other forms of life and other conceptions of good and justice. What, in the light of Western values, may seem incorrect, incomprehensible and even reprehensible, may, on the contrary, be perfectly correct and acceptable according to different local or domestic morals<sup>9</sup>.

Ethical-cultural relativism offers, in the opinion of its defenders, a double attraction. On the one hand, it appears as the most egalitarian, democratic, pluralist and tolerant

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<sup>6</sup> ZOLO, D., *Cosmopolis*, p. 59.

<sup>7</sup> In addition to the *metaethical* and *normative*, another level of ethical relativism is the *descriptive*, that is, with the coexistence of a plurality of value systems and conceptions of good by virtue of different cultural, political, religious or social traditions. On these three levels, see FRANKENA, W.F., *Ethics*, Prentice-Hall, New Jersey, 1973, p. 109; CORRADETI, C., *Relativism and Human Rights. A Theory of Pluralistic Universalism*, Springer, 2009, p. 36.

<sup>8</sup> WONG, D., “Relativism” In SINGER, P (ed), *A Companion to Ethics*, Wiley-Blackwell, 1993, pp. 442-443.

<sup>9</sup> KRAUZ, M., “Varieties of Relativism and the Reach of Reasons,” in HALES, S.D., (ed.), *A Companion to Relativism*, Malden, MA: Wiley-Blackwell, 2011, pp. 70-84, at. 71.

position, since it denies the hierarchy of values and considers the inferiority and superiority of peoples as an ethnic and racist prejudice<sup>10</sup>. On the other hand, it appears to be the most respectful position to the principle that everyone is equally entitled to respect, as it ensures that to respect a person entails respect for that person's culture, because culture constitutes, at least in part, a person's identity<sup>11</sup>.

I share the view of Buchahan and Tasioulas that cultural ethical relativism does not constitute a worrying challenge to the legitimacy and/or universality of human rights. As the second points out, “the idea that skepticism about the objectivity of ethics is a highly controversial in metaethics and not a platitude<sup>12</sup>. Without attempting to be exhaustive, we can begin the summary of the inconsistencies and logical fallacies on which ethical-cultural relativism rests by pointing out that, in addition to incurring in the naturalist fallacy, by simply inferring from the fact that there exists a diversity of cultures the duty to respect them<sup>13</sup>, suffers from a serious logical inconsistency. On the one hand, it rejects the existence of objective and independent values of different cultures and traditions that would allow them to be judged, but, at the same time, it is presented as a philosophy that promotes a single principle that would be objective and transcultural: that of tolerance of all cultures and moral codes. At the level of normative ethics and at the level of metaethics, the moral relativist cannot defend tolerance, but must abstain from making moral judgments or, in any case, his defense of tolerance must also be relative.<sup>14</sup> The relativist, as such, cannot say anything for or against tolerance from a moral point of view since, from the moment he did so, he would cease to be an observer of morality and would become a defender of it. Therefore, the value of tolerance does not derive from relativism, but is a universal moral imperative that must, as such, satisfy criteria of universality and impartiality<sup>15</sup>.

In addition to the logical fragility of its philosophical premises, ethical-cultural relativism is queried for hypostasis on the role of social and cultural determinants and confusing, in a reductionist manner, personal and social identity; for exaggerating the homogeneity and autonomy of culture and society; and, above all, for its tendency to identify the integrity of a culture with its oldest and most resistant elements to change<sup>16</sup>. For anti-relativists, neither individuals are passive objects lacking in moral and intellec-

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<sup>10</sup> SEBRELI, J.J., *El asedio a la modernidad. Crítica del relativismo cultural*, Ariel, Barcelona, 1992, p. 66.

<sup>11</sup> FREEMAN, M., “Universalism of human rights and cultural relativism” in SHEERAN, S & RODLEY, N. (eds), *Routledge Handbook of International Human Rights Law*, 2014, Routledge, Oxford, 2013, pp. 49-61, at. p. 51.

<sup>12</sup> TASIOULAS, J., “Parochialism and the legitimacy of International Law” in SELLERS (ed), *Parochialism, Cosmopolitanism, and the Foundations of International Law*, Cambridge University Press, 2012, p. 27.

<sup>13</sup> RENTELN, A., “Relativism and the search for Human Rights”, *American Anthropologist*, 90, 1988, pp. 56-72, at. pp. 61-62; TESÓN, F., “International human rights and cultural relativism”, *Virginia Journal of International Law*, 1985, 25, 4, pp. 869- 898, at. pp. 888-889.

<sup>14</sup> LUKES, S., *Moral relativism*, Profile Books, London, 2008, pp. 36-37.

<sup>15</sup> GARZÓN VALDÉS, E., «Cinco confusiones acerca de la relevancia moral de la diversidad cultural», in *Derecho, ética y política*, centro de Estudios Constitucionales, Madrid, 1993, p. 201.

<sup>16</sup> Vid. NUSSBAUM, M., *Women and Human Development: The Capabilities Approach*, Cambridge University Press, 2000, pp. 49 ff.

tual resources different from those provided by their own culture or society, and consequently incapable of adopting a critical and independent point of view with respect to dominant beliefs, nor do cultures possess such absolute integrity as relativists attribute to them<sup>17</sup>.

### III. THE CULTURAL ETHICAL PLURALISM

The dichotomy between universalism based on naturalistic ethical objectivism and relativism who holds that "anything goes" is, in the opinion of a significant group of thinkers, too radical. For this reason, they opt for an alternative that can be considered an intermediate position: ethical pluralism. This should not be understood in a merely descriptive sense, as the fact, without further, that different cultures accept different moralities or moral principles, but, as Buchanan points out, as it holds that there is a plurality of objective, or at least not unreasonable values, and that there is not a uniquely valid comprehensive ranking or weighing of them. It is therefore not a descriptive but a normative point of view.

Now, what is to be understood by a valid morality? As noted above, ethical pluralism is a more modest thesis than metaethical relativism. The concept of valid morality admits a strong interpretation, compatible with the possibility that objective moral truths exist, as other weaker ones, compatible with a non-objectivist vision of ethics. According to this last vision, that a morality is valid only means that it performs, in a credible and persuasive way, the characteristic functions of a morality: providing social cohesion, facilitating productive cooperation, contributing to the relatively peaceful resolution of commonly occurring conflicts and providing useful guidance in the pursuit of good life<sup>18</sup>. These are, however, necessary but not sufficient conditions for the validity of a morality. It is also necessary that these are not un simply set of rules enforced by coercion, without internalization and that it does not rely importantly on easily falsified factual beliefs or on patent gross inferential errors. According to this last normative or epistemic requirement, a morality is valid only if it includes some notion of impartiality or universality of moral reason or is consistent with some version of the idea that all human beings have moral standing (though perhaps not equal moral standing)<sup>19</sup>.

Buchanan, as Wong had previously held<sup>20</sup>, establishes a great division between, on the one hand, valid collectivistic moralities and, on the other, individualistic moralities. It is not, however, a question of pure models in the form of all or nothing, but that moralities can be ranged from more individualistic to more collectivistic<sup>21</sup>. Surely the most plausible understanding of ethical pluralism is that which considers not only that there exists a plurality of valid morality, but also that such a set of moralities "will include both

<sup>17</sup> PAREKH, B., «Non-ethnocentric universalism» in DUNNE, T. and WHEELER, N. (eds), *Human rights in global politics*, Cambridge University Press, 1999, pp. 133-135.

<sup>18</sup> BUCHANAN, A., "The Challenge of Ethical Pluralism", cit., p. 258.

<sup>19</sup> Ibid, pp. 251-252.

<sup>20</sup> He distinguishes two different approaches to morality: a virtue-centered morality that emphasizes the good of the community, and a rights-centered morality that stresses the value of individual freedom. Vid. WONG, D., *Moral relativity*, University of California Press, 1984, p. 160-176.

<sup>21</sup> BUCHANAN, A., "The Challenge of Ethical Pluralism", cit., p. 254.

collectivistic and individualistic moralities and will not include either purely individualistic or purely collective moralities”<sup>22</sup>.

But in what way, in what sense, does it call into question the ethical pluralism, thus understood, the legitimacy or universality of human rights? Rather than the assertion that there is a conceptual incompatibility between the principles of valid collectivist morality and the existence of an international human rights regime (*inconsistency claim*), in my view, what this meaning of parochial objection holds is that international human rights do not embody the values of all existing valid ethical conceptions. The formulation of these would have ignored or insufficiently considered those of some of them and given a privileged place to that of others, in particular Western values (*disadvantage claim*). I believe that this last thesis is the one that best reflects the reasons why ethical pluralism represents a challenge of considerable magnitude to the legitimacy of the current international human rights system<sup>23</sup>.

#### IV. THE DISADVANTAGE CLAIM

Despite the efforts of the United Nations Human Rights Commission set out to draft the UDHR to incorporate the values and world views of all cultures and civilizations of the planet, the preambles of the 1948 Declaration and the 1966 Covenants seem to conceive human rights as an attempt to realize certain moral rights based on the moral equality or dignity of persons<sup>24</sup>. Both in the opening passage and in the preamble and the first articles, the Declaration appeals to the dignity and worth of persons as beings endowed with conscience and reason<sup>25</sup>. The Declaration therefore uses rhetoric that, at least apparently, is too individualistic and inconsistent with collectivist moralities.

Hence, simultaneously with the drafting and adoption of the Universal Declaration, the predominantly Western and liberal bias prevailing behind the formally universal language of the text adopted in 1948 began to be denounced. If at first these criticisms were aimed at postponing economic, social and cultural rights in favor of civil and political, almost simultaneously also began to develop a discourse centered on ignorance of

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<sup>22</sup> Ibid, p. 257.

<sup>23</sup> In fact, in a previous paper, Buchanan defines parochial objection as a disadvantage claim rather than an inconsistency claim. There he will say that, according to the parochialism objection, “*what are called human rights are not really universal in the sense of being rights of all individuals but instead merely reflect (1) an arbitrarily restricted set of moral values; or (2) an arbitrary ranking of certain moral values.* According to this objection, both sorts of arbitrariness are due to cultural bias: supposedly universal values (or rankings of values) are merely the expression of a mistake—the mistake of thinking that what happens to be *valued* from the perspective of some particular culture or type of society is universally *valuable*”. BUCHANAN, A., “Human rights and the Legitimacy of The International Order”, cit., p. 40.

<sup>24</sup> BUCHANAN, “Human Rights”, in ESTLUND, D. (ed), *The Oxford Handbook of Political Philosophy*, Oxford university Press, Oxford, 2012, pp. 279-97.

<sup>25</sup> One of his best-known philosophical self-understandings of this view would be the human rights rationale developed by Griffin. He construes human rights as grounded in a restricted subset of universal human interests, which he calls the goods of personhood or normative agency: autonomy (our being able to form our own conception of a worthwhile life), liberty (being free for external interference to pursue one’s choices) and the minimum material provision necessary for meaningful autonomy and liberty. GRIFFIN, J., *On Human rights*, Oxford University Press, Oxford, 2008, pp. 66 ff.

religious, historical and cultural peculiarities that would implicitly carry the abstract, anthropocentric and secular universalism of the Declaration and the Covenants. This spirit of denying, or at least correcting, the Eurocentrism dominant in the international human rights regime has been evident both in the drafting of some regional human rights texts (such as the Arab Charter on Human Rights of 1994 and the Banjul Charter of 1981) and in the inexistence so far of such a document in Asian countries. Without questioning the universal validity of human rights, they point out, however, on the one hand, the need to take seriously the idea that the concept of human rights is a product of historical development, closely associated with specific social, political and economic conditions and the specific history, culture and values of a country. On the other hand, many East and South-east Asians also express their rejection of the extreme form of individualism practiced in the West. They agree that every individual is important. However, he or she is not an isolated being, but a member of a nuclear and extended family, clan, neighborhood, community, nation, and State. So, they tend to look askance at the starkly individualistic ethos of the West in which authority tends to be seen oppressive and rights are an individual's "trump" over the state. Most people of the region prefer a situation in which distinctions between the individual, society, and state are less clear-cut, or at least less adversarial<sup>26</sup>.

The abundant bibliography on the present difficulties in making human rights compatible with African, Confucian and Islamic religious and cultural values offers a very complete picture of some of the main differences between collectivist (at least preferably) and individualistic morals, as well as the difficulties in harmonizing them<sup>27</sup>:

1) In the former, the weight of social circles (family, clan, guild, etc.) is greater than that of the individual who is defined precisely by his belonging to them. Therefore, there is no sacralization of the individual in front of the community, nor is there an excessive obsession for his dignity and value<sup>28</sup>. According to this vision, the concept of human rights would protect a Western and liberal conception of human dignity, namely: that the person has an absolute and irreducible equality that must be defended from society and the State, and that the autonomy of the individual requires that society is not organized in a hierarchical way but as a sum of free individuals.<sup>29</sup>

2) The duties of the individual towards the community of which he is a part are the origin of rights. Therefore, the link to duty prevails over the vindication of rights. In all these traditions the predominant image of the human being is not, therefore, that of an autonomous individual who affirms and needs to defend himself -bearing rights- against

<sup>26</sup> KOH, T., "The 10 Values That Undergird East Asian Strength and Success", *International Herald Tribune*, 1993. KAUSIKAN, B., "Asia's Different Standard", *Foreign Policy*, 1993, 92, pp. 24-41.

<sup>27</sup> BREMS, E., *Human Rights: Universality and Diversity*, Martinus Nijhoff, The Hague, 2001; PEERENBOM, R.P., "What's Wrong with Chinese Rights? Towards a Theory of Rights with Chinese Characteristics", *Harvard Human Rights Journal*, vol. 6, 1993, pp. 293-321; OUGUERGOUZ, F., *The African Charter of Human and People's rights. A comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*, Martinus Nijhoff Publishers, The Hague, 2003, pp. 377-421. PANNIKAR, R., Is the notion of human rights a Western concept? *Diogenes*, 1982, 30 (120):75-102.

<sup>28</sup> DONNELLY, J., "Human rights and human dignity", *The Political Science Review*, 76, 1982, p. 311.

<sup>29</sup> SOUSA SANTOS, B., "Towards a multicultural conception of human rights" in HERNANDEZ TRUYOL, B., *Moral Imperialism: A critical Anthology*, New York, 2002, pp.44-45.

power and other men but, on the contrary, that of a subject whose identity is defined by belonging to the community and the duties he has towards it.

3) Against the liberal-formalist view of law and the market as the main factors of social control or integration, especially to resolve or mediate conflicts between individuals, these cultures insist on mutual agreement, social harmony through recourse to tradition, ethos, education and solidarity as forms of social integration.

From the perspective of some of the main valid collectivist morals, human rights would be individualistic because they encourage an atomistic view of human relations and social order. As its communitarian critics also point out, liberalism would not have been limited to considering individual rights as the foundation of the social order and as the foundational category of power and law. It would also have ended up inextricably linked the defense of human rights to the exaltation of the capacity to act as one wishes, to the intrinsic value of affirmation of itself choice<sup>30</sup>, and promoting an understanding of society as a mere conglomerate of individuals whose objective is solely the satisfaction of private interests through relationships considered instrumental and insensitive to the needs of society as a whole<sup>31</sup>. It would be this individualistic *ethos* of human rights that cannot be accepted as universal or universalizable by all cultures.

#### V. AN OBJECTIVE JUSTIFICATION OF THE INDIVIDUALISM OF HUMAN RIGHTS. THE CONSTRUCTIVE THEORY OF HUMAN RIGHTS

Some theorists have tried to refute the parochial objection by pointing out that individualism, which, as we have just seen, is excessive for collectivistic moralities, is not the result of an arbitrary selection or ranking of moral values, but the inevitable result of certain objective conditions. As can be seen, this perspective delves into the fundamentally economic and social causes that would explain why human rights arose only at a certain moment in Western history and not before, nor in other cultures and civilizations. If it were possible to isolate these factors or presuppositions and enunciate a kind of law from the history of human rights, the fate of the universalization of human rights would move away from cultural imperialism and towards an apparently more objective and neutral factor: the extension of these historical presuppositions to the different societies of the world, the development of social and economic transformations similar to those that caused the flourishing of the idea of human rights in Europe. These would come to argue that:

a) It seems demonstrated that there are essential historical presuppositions, a kind of laws of the history of human rights by which these only arise and can arise in individualistic, capitalist societies, with separation between political and religious power, etc.<sup>32</sup>.

<sup>30</sup> All options are equally worthy, because they are freely chosen, and it is choice that confers worth. TAYLOR, C., *The Ethics of Authenticity*, Harvard University Press, Cambridge, Massachusetts, 1991, p. 37.

<sup>31</sup> MACINTYRE, A., *After Virtue. A Study in Moral Theory*, University of Notre Dame Press, 2007, p. 25. TAYLOR, «Atomism» In *Philosophy and the Human Sciences*, Philosophical Papers 2, Cambridge University Press, 1985, pp. 187-210.

<sup>32</sup> Vid. FERNÁNDEZ GARCÍA, E., “Acerca de si la historia de los derechos humanos tiene algo que decir sobre el individualismo moral y los derechos colectivos”, *Derecho y Libertades*, 12, 2003, p. 210. Vid. also

The doctrine of natural rights therefore presupposes an individualistic conception of society and the State<sup>33</sup>.

b) Individualism, thus understood, is necessary in modern societies which, while destroying traditional forms of identity and community protection, generate powers from which it is necessary to defend oneself not as members of groups but as individuals.

c) Modernization is an unstoppable process from which no society can escape.

d) Therefore, human rights will end up being "necessary" in all societies.

Combining pragmatic and historical approaches to human rights, it can be seen that these appear as historical responses to problems of coexistence and protection needs, specifically, as a solution to the dangers and threats to individual dignity arising from the transition from a model of community or holistic society to another individualistic one that modernization brought with it. Human rights ideas and practices arose not from any deep Western cultural roots but from the social, economic, and political transformations of modernity<sup>34</sup>. As Donnelly points out, in the *gemeinschaft*, that is, in small communities based on family clans, the individual does not need many or almost all the rights so valued in democratic states. He suffers from this need because he has a safe and meaningful place in his society and has a wide range of intense personal and social relationships that provide him with important material and moral support. Hence, introducing the idea of the rights of the individual into such contexts would end up diminishing their prospects of achieving a life worthy of a human being. The social, economic and political transformations of modernity "have created a largely isolated individual who is forced to go it alone against social, economic, and political forces that far too often appear to be aggressive and oppressive. Society, which once protected his dignity and provided him with an important place in the world, now appears, in the form of the modern state, the modern economy, and the modern city, as an alien power that assaults his dignity and that of his family"<sup>35</sup>.

According to all this, human rights are not natural, they are not -to paraphrase Rorty- something that in itself, regardless of human interests and needs, but a construction, the "artefact" designed by Western ethical and political engineering with a view to protecting human dignity after the loss of the traditional sources of certainty and protection that modernization, economic and technological development, has brought with it<sup>36</sup>. One of the clearest exponents of this way of understanding the origin and universality of human rights is Habermas. For this one:

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PECES-BARBA, G, et alii, *Curso de derechos Fundamentales, Teoría General*, Universidad Carlos III de Madrid-Boletín Oficial del Estado, Madrid, 1995, pp. 116 y 132.

<sup>33</sup> BOBBIO, *The Age of Rights*, Polity Press, Cambridge, 1996, Part. I, chap. 3.

<sup>34</sup> DONELLY, J, "The relative universality of human rights", *Human Rights Quarterly*, 29 (2), pp. 281-306, at. p. 287.

<sup>35</sup> DONELLY, J., "Human rights and human dignity", cit., pp. 311-312.

<sup>36</sup> Ulrich refers to this vision as a "constructive theory of human rights", since he considers that human rights "are to be grounded neither in metaphysical principles nor in the traditional cultural values but rather in history. In essence, human rights are not timeless principles but a *construct* that respond to the exigencies of a particular type of social formation emerging in the world stage during a particular historical epoch". ULRICH, G., "Universal Human Rights: An Unfinished Project" In HASTRUP, K. (ed), *Human Rights on Common Grounds: The Quest for Universality*, Kluwer Law International, The Hague, 2001, p. 214.

“standards of human rights stem less from the particular cultural background of Western civilization than from the attempt to answer specific challenges posed by a social modernity that has in the meantime covered the globe. However, we evaluate this modern starting point, human rights confront us today with fact that leaves us no choice and thus neither requires, nor is capable of, a retrospective justification. The contest over the adequate interpretation of human rights concerns not the desirability of the “modern condition,” but rather an interpretation of human rights that does justice to the modern world from the viewpoint of other cultures as well as our own. The controversy turns above all on the individualism and secular character of human rights that are centered in the concept of autonomy”<sup>37</sup>.

On the one hand, commercial traffic requires freedoms to be able to make decisions, and, as Weber has already shown, of protected responsibility and confidentiality and legal certainty. On the other hand, in complex societies arising from modernization, individuals need an abstract form of civil solidarity and a rational legal system and protected subjective rights to “can rely on the fairness of dealings with strangers under conditions of anonymity”<sup>38</sup>. For all these reasons, it is impossible to embark on capitalist modernization without making use of the advantages provided by an individualistic legal order. One cannot wish to have one thing and not the other<sup>39</sup>.

For these authors, the same or very similar problems and threats that modernization entails (in respect of which human rights have proven to be a very effective invention) are already emerging and will do so even more in the rest of the planet. From this point of view, human rights will end up becoming valuable and valued, sooner or later, in any society or culture because the flourishing of an industrialized market economy and a bureaucratically organized state is an irreversible process, it is like a wave that engulfs traditional cultures one after the other<sup>40</sup>. With the traditional mechanisms of self-control eroded as a result of bureaucracy, social mobility, urbanization, industrialization and social differentiation, and making other mechanisms necessary, the only alternative that so far seems to have worked reasonably well in most societies is human rights. And the fact is that, as McCarthy questions himself, if we assume that one of the inevitable features of globalized modernization is convergence towards similar economic, political and legal institutions to a certain degree, what kinds and degrees of divergence are still possible and desirable? Specifically, how much space do these modernizing

<sup>37</sup> HABERMAS, J., “Remarks on Legitimation Through Human Rights”, in *The Postnational Constellation*, Political Essays, The Mit Press, Cambridge-Massachusetts, 2001, p. 121.

<sup>38</sup> RAZ, J., «The Politics of the Rule of Law» In *Ethics in the public domain: essays on morality of the law and politics*, Clarendon Press, Oxford, 1995, p. 372.

<sup>39</sup> HABERMAS, J., “Remarks on Legitimation Through Human Rights”, cit., p. 124. Frank expresses himself in very similar terms: “There is no reason to believe that these underlying emancipating forces-urbanization; industrialization; advances in communications; scientific discoveries; a revolution in information storage, distribution and retrieval- are indigenous to Western society and cannot affect other societies as they have affected our own. On the contrary, one must assume them to be independent variables, which, when they come to the fore anywhere under the right conjunction of circumstances, can tilt the balance in favor of more personal autonomy. FRANK, T., Is Personal Freedom a Western Value? *The American Journal of International Law*, 91, 4, 1997, p. 608.

<sup>40</sup> TAYLOR, C., «Nationalism and modernity», In HALL, J (ed.), *The State of the Nation: Ernest Gellner and the Theory of Nationalism*, 1988, pp. 191-218, at. 205.

tendencies leave for deep cultural differences?<sup>41</sup> Phenomena such as the decline of the agricultural way of life, professional differentiation and specialization, diversity of lifestyles, perspectives and attitudes, pluralism of belief systems, value commitments, forms of individual or community identity, challenges to patriarchal, racist or ethnocentric stereotypes, etc. seem sufficient to suggest that deep divergences do not seem possible.<sup>42</sup>

Now, can we find, in all assumptions, this sequence of modernization-individualism-human rights? The empirical premises of constructive theory are very controversial. On the one hand, they rest on the Marxist simplification according to which value commitments are merely by-products of underlying socioeconomic forces. As Taylor has pointed out, the pointed constructivists start from a materialistic or "acultural" explanation of the social and political transformations triggered by modernization. The development of science, negative freedoms, individualism, etc. would appear, from this perspective, as the inseparable result of certain social changes derived from industrialization, the increase of mobility or urbanization, never as the result of the spiritual vision proper to the West, of the option for a certain system of values or vision of the human and the good.<sup>43</sup> Taylor does not deny that there are important causal relationships between the former and the latter, but he does deny that these transformations can be explained as inevitable causal processes that form a whole (*the Enlightenment Package*) that every modernizing society will probably end up experiencing. Western modernity is, in part, the product of an original moral and cultural perspective<sup>44</sup>. On the other hand, the trinomial modernization-individualism-human rights is called into question by the possibility of "alternative modernities". Taylor considers feasible modernities that avoid some of the features of the Western societies already pointed out and that have been so criticized, on the other hand, from the ranks of communitarianism: the atomist-individualist image of identity, the contractualist and instrumental conception of the community, radical secularism etc.<sup>45</sup>.

On the other hand, it is not true that the result of the destruction of traditional identities and community ties is, in all cases, the emergence of social and political systems based on personal freedom and human rights and not also cultural and value differentiation<sup>46</sup>, or illiberal backlashes in the form authoritarian government and religious fundamentalism<sup>47</sup>. An obvious example of this is the way in which, following decolonization, Arab societies have endeavored

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<sup>41</sup> McCARTHY, T., "On reconciling Cosmopolitan Unity and National diversity", *Public Culture*, 1999, 11(1): 175–208, at. 206.

<sup>42</sup> *Ibid*, p. 207.

<sup>43</sup> Hunt's vision of the origin of human rights would confirm Taylor's critique. For her, "to have human rights, people had to be perceived as separate individuals who were capable of exercising independent moral judgment (...) But for these autonomous individuals to become members of a political community based on those independent moral judgments, they had to be able to empathize with others. Everyone would have rights only if everyone could be seen as in some fundamental way alike. Equality was not just an abstract concept or a political slogan. It had to be internalized in some fashion". HUNT, L., *Inventing human rights. A story*, WW Norton & Co, N. York, 2007, pp. 27.

<sup>44</sup> TAYLOR, C., "Two theories of modernity", *The International Scope*, vol. 3, Issue 5, Summer, 2001, pp. 6-8.

<sup>45</sup> *Ibidem*, p. 9.

<sup>46</sup> In this sense HUNTINGTON, S., *The Clash of Civilizations and the Remaking of the World Order*, 1997, Simon & Schuster, N. York, chapter 3.

<sup>47</sup> TASIOLAS, J., "Parochialism and the legitimacy of International Law", *European Journal of International law*, 2002, 13, 4, pp. 99-1023, at. p. 28.

to build modern States, enjoy the advantages of material and technological development and emulate Western levels of welfare and consumption while rejecting democracy and human rights as alien to their cultural and religious identity. The case of China and the rest of the Asian tigers is undoubtedly more ambiguous. The dominant impression a few years ago that China appeared to be following a predictable path towards a liberal political order, seemingly having opted for a familiar path of transition towards a political-legal system modelled on the liberal constitutionalism that is required for a better protection of human rights, has not been fulfilled<sup>48</sup>.

However, even if the empirical thesis on which constructive theory rests were true, it would be no more than an *explanation* of the origin of human rights, not a *justification* for them. As Tasioulas points out, even if a commitment to the values of personal freedom and self-determination is caused by vast, impersonal historical forces to which we are inescapably subject, the question remains whether these values are acceptable to us. The argument is not acceptable because its conclusion shows only that history is "on the side" of the human rights. Hence, it is precisely the absence of the above reasons that animates skepticism about human rights<sup>49</sup>.

## VI. THE JUSTIFICATORY MINIMALISM

A very different way to overcome the challenge that ethical pluralism represents for the universality of human rights is ethical minimalism. It has been followed by some theories of international justice illuminated in the last decades that have tried to find an inter-section point between the universal and the irreducible ethical-cultural diversity, between the extremes of naïve cosmopolitanism and the relativistic exaltation of difference. This minimalism adopts, in some suppositions, in substantive terms, the defense that the list of internationally recognized and protected human rights must be "reasonably short and reasonably abstract". It would be the minimalist path proposed by Lukes, Vincent, Walzer or Wiggins<sup>50</sup>. However, the best-known expression of substantive minimalism continues to constitute the point adopted by Rawls in *The Law of Peoples*.

Rawls links the overcoming of the parochial objection to the development of an idea of tolerance, understood not in a negative sense (such as abstaining from military, diplomatic or economic sanctions against those whom we understand must change their ways of life) but as the recognition that these non-liberal societies are equal members of the community of peoples<sup>51</sup>. One of the keys to such tolerance would be that non-liberal decent societies also respect human rights, although not all those that derive from the two principles of justice as equity, but those that do so from the most abstract and restricted version of those principles that express

<sup>48</sup> PILS, E., *Human rights in China: a social practice in the shadow of authoritarianism*, Cambridge, Polity Press, 2018.

<sup>49</sup> TASIIOULAS, J., "International Law and the limits of fairness", p. 1003; TASIIOULAS, J., "Parochialism and the legitimacy of International Law", cit., p. 29.

<sup>50</sup> LUKES, S., «Five fables about human rights» in S. SHUTE and S. HURLEY (eds), *Human rights. The Oxford Amnesty Lectures*, Basic Books, N. York, 1993, p. 38; VINCENT, R.J., *Human rights and international Relations*, Cambridge University Press, Cambridge, 1986, p. 125; WALZER, M., *Thick and Thin Moral Argument at Home and Abroad*, University of Notre Dame Press, 2006, ch. 1. WIGGINS, D., *Ethics: Twelve Lectures on the Philosophy of Morality*, Penguin Books, London, 2006, pp. 355-356.

<sup>51</sup> RAWLS, J., *The Law of Peoples with "The idea of Public Reason Revisited"*, Harvard University Press, Massachusetts, 1999, pp. 65 y 79.

the right of peoples integrated by the minimum and urgent rights: the right to means of subsistence and security (rights to life), to freedom from slavery, servitude and armed occupation, to personal property and to formal equality expressed in rules of natural justice<sup>52</sup>. Thus, for example, hierarchical societies (confessional states) are not required to recognize a complete freedom of conscience but to admit a certain amount, even if such freedom is not, as in liberal regimes, the same for all members of society<sup>53</sup>.

The advantage of these minimum human rights is that they cannot be rejected as peculiar to Western culture, since they do not necessarily have to be derived from the liberal idea that considers people as free and equal individuals and citizens and treats them independently of culture and society. They can also be understood as the result of the requirements of justice based on the common good and the good faith of officials in explaining and justifying the legal system that any society has to satisfy. In a society that is not based on the Western individualistic political tradition, that does not regard citizens as rights-holders as individuals but rather as duties as members of a community, human rights could be seen as rights that enable people to perform their duties in the groups to which they belong (guilds, corporations, etc.). In this sense they are politically neutral<sup>54</sup>. The attraction of this restricted core of human rights lies in the realism of its neutrality with respect to the main political, economic and cultural divisions existing in the world, as well as in its claim, as Vincent points out, "to put only a floor under the societies of the world and not a sky above them"<sup>55</sup>.

As can be seen, substantive minimalism aspires to present a conception of human rights that does not connect them with any particular ethical or religious conception, with a view to ensuring that they enjoy the broadest support at the global level<sup>56</sup>. Not in vain, one of the most recurrent explanations for the consensus on internationally recognized human rights that has dominated since the adoption of the UDHR and the 1966 Covenants is that they have managed to play the role for which they were created and have been playing in the international community by not asking too many questions about their foundation or justification. As early as 1947, the Catholic philosopher Jacques Maritain, one of the most prominent scholars of the UNESCO Committee on the Philosophic Principles of the Rights of Man, expressed this kind of mentality in the following terms:

"I am quite certain that my way of justifying belief in the rights of man and the ideal of liberty, equality, fraternity is the only way with a firm foundation in truth. This does not prevent me from being in agreement on these practical convictions with people who are certain that their way of justifying them, entirely different from mine or opposed to mine ... is equally the only way founded upon truth".

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<sup>52</sup> Ibid, p. 79.

<sup>53</sup> RAWLS, J., "The Law of Peoples" in S. SHUTE and S. HURLEY, *Human rights. The Oxford Amnesty Lectures*, Basic Books, New York, 1993, pp, 39-82, at. p. 65.

<sup>54</sup> Ibid, p. 69.

<sup>55</sup> VINCENT, R.J., *Human rights and international relations*, cit., p. 126.

<sup>56</sup> COHEN, J., "Minimalism about human rights: The Most we can Hope?", *The Journal of Political Philosophy*, 12, 2004, p. 192.

The truth is that, while the idea or concept of human rights cannot be explained without the role of philosophers, that eighteenth-century Declarations are born as philosophical theories, in particular from the work of Locke and Rousseau<sup>57</sup>, international human rights are not the work of philosophers, but of politicians and citizens, and philosophers have only begun to try to build conceptual justifications for them. Hence “the international expressions of rights themselves claim no justification, nor do they reflect any clear philosophical assumptions; they articulate no particular moral principles or any single, comprehensive theory of the relation of the individual to the society”<sup>58</sup>. Assuming this perspective, Taylor has argued that a genuine unforced international consensus on human rights should be achieved -using the well-known expression of Rawls- through an overlapping consensus, in which “we would agree on the norms, while disagreeing on why they are right norms”<sup>59</sup>.

Justificatory minimalism, conceived as an escape from the justification of human rights in order to account for their de facto universality in international practice, would also be one of the main features of the so-called political conception of human rights defended by Beitz. He insists on the thesis that, in order to understand the role that human rights play in the practice, it is necessary to distinguish between the problem of describing human them from the problems of determining what they may justifiably require and identifying the reasons we might have for acting on them. Hence, according to him:

“human rights need not be interpreted as deriving their authority from a single, more basic value or interest such as those of human dignity, personhood, or membership ... Human rights protect a plurality of interests and require different kinds and degrees of commitment of different agents. These rights have a distinctive identity as normative standards, but this identity is not to be found in their grounds or their requirements for action. We find it, instead, in their special role as norms of global political life”<sup>60</sup>.

Despite the undoubted attractions of substantive and justificatory minimalism (neutrality, tolerance, etc.), this is a way of overcoming the challenge that ethical pluralism represents for internationally recognized human rights that is still unsatisfactory. On the one hand, Rawls offers an overly modest view of the role of human rights at the international level and a notion of “decent” non-liberal hierarchical societies that shelter norms and practices that are clearly incompatible with systematic discrimination based on gender, confession or race. On the other hand, faced with the adoption of a merely functionalist approach to human rights such as that initiated by the author of *The Law of Peoples* and perfected by Beitz, it seems difficult to question that human rights have, in addition to an essential practical and institutional dimension, an unquestionable ethical dimension. It does not seem possible to argue with regard to human rights that its norms seek to protect important human interests against threats of state sponsored neglect or oppression<sup>61</sup>, without an unequivocal affirmation of the intrinsic moral value of the individual on their own account. A purely conventionalist or positivist reading of the UDHR is

<sup>57</sup> BOBBIO, *The Age of Rights*, cit., chap.V.

<sup>58</sup> HENKIN, L. *The age of rights*, Columbia University Press, 1990, p. 6.

<sup>59</sup> TAYLOR, C. “A world consensus on human rights?”, *Dissent*, Summer, 19996, p. 15.

<sup>60</sup> BEITZ, C., *The idea of human rights*, Oxford University Press, 2009, p. 11, 128.

<sup>61</sup> *Ibid*, p. 11.

therefore not possible<sup>62</sup>.

Moreover, the humanist considerations that Beitz considers unnecessary to account for the content of human rights in international practice are present in that practice. As Gilibert has drawn attention to, humanist considerations can help shape the procedure and substance of global public reasoning with respect to the meaning, content and justification of human rights<sup>63</sup>. Certainly, the objective of the participants in the world forums where this takes place is not to look for the ultimate foundations of human rights, but to achieve a consensus that provides shared motives for international political action. This is why it is important to avoid the foundationalist background of the more traditional naturalist conceptions and why the political approach is right in recommending suspending or postponing the dissent on the ultimate philosophical foundations. But it must also be avoided that global public reasoning simply consists of informing the intersection of existing normative beliefs. The aim is not only to seek consensus, but to build it on methods and assumptions that are normatively sound<sup>64</sup>.

## VII. SOME PROPOSALS TO REFUTE THE ETHNOCENTRISM OF THE OFFICIAL JUSTIFICATION OF THE CURRENT INTERNATIONAL HUMAN RIGHTS SYSTEM

The accusation that the official discourse on human rights gives arbitrary weight to individualistic moralities as opposed to collectivist moralities constitutes a challenge to the universality of human rights that must be faced trying not to incur in what, in my opinion, are the major defects of both justificatory minimalism and, above all, constructive vision. On the one hand, the identification of ethical objectivism with a universalism of an essentialist or naturalist nature. On the other hand (although it may be a dimension of human rights originating in a Western vision of the relations between people and the community), its tepidness in offering not only causal explanations but justifiable reasons for any reasonable person to accept as reasonable the (well understood) individualism of human rights.

In my opinion, it is possible to put forward reasons for defending as correct the assertion that human rights are justifiable as protections of the interest of individuals as such, as human beings, in having access to a minimally decent life<sup>65</sup>. This would therefore not be a selfish

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<sup>62</sup> BUCHAHAN, A., "Human Rights", cit., p. 283; GLENDON, M., *A world made new: Eleanor Roosevelt and the Universal Declaration of Human Rights*, Random House, Nueva York, 2011.

<sup>63</sup> Although they do not exhaust it, human rights may be regarded as part of global justice and even a central part. In this sense GRIFFITH, *On Human Rights*, cit., p. 65. BESSON, S. "The bearers of human rights' duties and responsibilities for human rights: a quiet (r)evolution?", *Social Philosophy & Policy*, 2015, 32 (1), p. 246, IGLESIAS VILA, M., "¿Los derechos humanos como derechos especiales? Algunas ventajas de una concepción cooperativa de los derechos humanos", *Anuario de Filosofía del Derecho*, XXXII, 2016, p. 132, nota 43; According to Gilibert, "human rights are becoming the currency of debates about global justice, or at least of its most urgent demands". GILABERT, P., *Human dignity and Human Rights*, Oxford University Press, 2019, p. 43.

<sup>64</sup> GILABERT, P., "Humanist and Political Perspectives on Human Rights", *Political Theory*, 39 (4), 2011, pp. 439-467, at. p. 450.

<sup>65</sup> As affirms Nickel, "human rights do not promise the good life and the great society; the vision is rather of a decent life for all and of societies than can at least be describes as civilized". NICKEL, *Making sense of Human Rights*, Wiley-Blackwell, Second ed., Massachusetts, 2007, p. 51. In the same sense MILLER, D., 2014: «Personhood versus Human Needs as grounds for Human Rights», In CRISP, R. (ed), *Griffin on Human Rights*, Oxford: Oxford University Press, 2014, pp. 161.

individualism, but an egalitarian and libertarian, since to defend human rights is to protect individuals from utilitarian sacrifices, communitarian impositions, and from injury, degradation, and arbitrariness<sup>66</sup>. Hence, when there is a conflict between people's interests in accessing an adequate or decent range of life choices and certain collectivist values, the former must be put before the latter. This would be precisely the ultimate or most profound meaning of human rights. As Ignatieff writes, "individuals and groups will always be in conflict, and rights exist to protect individuals. Rights language cannot be parsed or translated into a nonindividualistic, communitarian framework; it presumes moral individualism and is nonsensical outside that assumption"<sup>67</sup>. Thus, for example, the imposition against the will of a girl or woman of the person to be married, even if it is a practice justifiable according to certain collectivist morals, exceeds the threshold of decency compatible with any valid justification of human rights<sup>68</sup>.

Thus, I do not believe that in order to refute the parochial objection it is necessary to renounce the defense of a certain ethical objectivism. When I speak of ethical objectivism, I am referring to the possibility of giving reasons in favor of individuals deserving the kind of protection against the group noted above that any reasonable person would have to accept. This does not mean that the moral judgment on which this statement is based is infallible, absolute, or inviolable, but simply that their consistent application to everyone is supported by considerations that anyone should accept, were he to view the problem from what is contended to be the appropriate moral perspective, that is, the moral perspective which is "valid for anyone"<sup>69</sup>. It would be, then, a position far removed from ethical universalism and which coincides with what Fishkin calls a minimum objectivism, which is a fallibilist position, which accepts that moral rules have exceptions, but which, just as factual statements have at least a claim to truth, considers that ethical judgments have a claim to correction<sup>70</sup>.

The defense of this type of individualism in the justification of human rights is not an obstacle to the recognition of the latter, and in some cases, has been linked to other forms of individualism that are much less acceptable. Its association with the concept and justification of human rights would explain the misgivings that, as we saw in section four, range from Asian

<sup>66</sup> LUKES, S, "Five fables about human rights" in S. SHUTE and S. HURLEY, *Human rights. The Oxford Amnesty Lectures*, Basic Books, N. York, 1993, p. 30.

<sup>67</sup> IGNATIEFF, M., *Human rights as politics and idolatry*, Princeton University Press, 2001, p. 67. Nino had already expressed a very similar position in his defense of a foundation of human rights based on the principle of inviolability: "whatever that scope, once rights are recognized following the principle of inviolability of persons, we are logically committed to recognize that there is a certain sphere of interest of the individual that we cannot invade for the sake of the common good". NINO, C.S., *Ética y Derechos Humanos: un ensayo de fundamentación*, Ariel, Barcelona, 1989, p. 262. In addition, the notion of moral status as a foundation of human rights defended by Nagel carries with it a very close notion of inviolability. NAGEL, T., "Personal Rights and Public Sphere"; *Philosophy & Public Affairs*, 24, 1995, pp. 84-107, at. pp. 85-86.

<sup>68</sup> It is therefore disconcerting to me that Buchanan gives as an example of the way in which the implementation of some rights in the existing does work to the disadvantage of some elements of some collectivistic moralities the right of the individual to choose a marriage partner. According to him, "if effectively implemented everywhere, would presumably disadvantage moralities that view the choice of a marriage partner as a decision for the family or for the village elders, rather than the individual. BUCHANAN, A., "The Challenge of Ethical Pluralism", cit., p. 271.

<sup>69</sup> FISHKIN, J.S., *Beyond subjective Morality: Ethical Reasoning and Political Philosophy*, Yale University Press, 1984, p. 12.

<sup>70</sup> On this understanding of ethical objectivism see ATIENZA, M., *Filosofía del Derecho y Transformación Social*, Trotta, Madrid, 2017, pp. 193-220.

or Islamic values to the current international human rights system. First, the belief that a completely prior self-independent of the community can be, in addition to a philosophical position underlying certain neo-contractualist formulations, a psychological or sociological thesis on the identity of individuals. The processes of socialization, the impossibility of language, thought or moral life outside the social order demonstrate that the individual owes to the social matrix the image he has of himself and his conception of good. The person is parasitic of society with respect to the image it has of itself, even when it is conceived as an individual<sup>71</sup>. The community is, to a greater or lesser extent, constitutive of identity and belonging to it an almost as important need as individual freedom. Hence, it makes no sense to radically oppose the individual to the community since, as Raz explains, freedom presupposes the availability of options to choose, options that presuppose a culture. It is largely our quality as members of a culture that determines the horizon of our opportunities, of which we can become or (if we are older) than we could have been<sup>72</sup>.

The recognition of this community dimension of human condition and dignity, together with the fact that not only individuals but also groups may be vulnerable and need protection, would be the basis for the recognition of the collective rights of indigenous peoples over the last few decades. Such rights constitute the needed holistic response of the law to the human condition and its vulnerabilities<sup>73</sup>. With this recognition, international practice would have assumed a less individualistic view of human rights that reflects more adequately the social embedded of individuals and the importance of collectivistic values.

A second form of individualism associated with human rights that is also unacceptable is the view of rights as demands insensitive to the collective responsibilities and general interests of the political community. The conception of human rights as "trumps" promoted by Dworkin would have encouraged a view of these as absolute demands, which in all cases prevail not only over the decisions of the majority, but also over considerations based on public order or the general interest (not measured in simple terms of maximizing utility)<sup>74</sup>. In this way, human rights would operate as totally exclusionary reasons for action, which would function *more kantiano*, regardless of the consequences of their fulfilment. If it adopts this vision, it is very likely that human rights will end up being considered as something essentially opposed to the common good and, consequently, to collectivistic values.

This latter view is not acceptable for a number of reasons. First, no philosopher rejects the possibility that human rights may be limited, not only for other rights, but also for reasons of public order, general interest, etc. Certainly, the consideration of an interest or need as deserving of protection as a human right presupposes a strong predisposition not to accept trade-offs with other rights and to impose limits that are difficult for States to cross. However, even the basic legal rights that Dworkin has primarily in mind, cannot be, as he claims, to act as

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<sup>71</sup> MULHALL, S. & SWIFFT, A., *Liberals and Communitarians*, Blackwell, Oxford, 1996.

<sup>72</sup> RAZ, J., «Multiculturalism: A Liberal Conception», in *Ethics in the Public Domain. Essays in the Morality of Law and Politics*, Oxford University Press, 1995, pp. 181-182.

<sup>73</sup> WIESSNER, S., "The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges", *The European Journal of International Law*, 22, 1, pp. 121-140.

<sup>74</sup> DWORKIN, R., "Rights as Trumps" in WALDRON, J., (ed), *Theories of Rights*, Oxford University Press, Oxford, 1984, pp. 153-167.

trumps over appeals to the general welfare. Hence, "human rights are resistant to trade-offs, but not completely so"<sup>75</sup>. Except the rights not to be tortured, not to be subject to cruel and unusual punishment, and not to be held in slavery or servitude, it does not appear that, at least from a moral point of view, there are absolute rights<sup>76</sup>. Moreover, it is also not sustainable that the consideration of an interest as deserving of consideration as a human right automatically generates, without further considerations, duties that operate as exclusionary reasons. For the naturalistic or ethical vision of these rights, which considers them pre-institutional demands based on the mere human condition, the existence of the duties they impose only depends on the values that make them morally desirable, regardless of how feasible or accessible their economic and political satisfaction is today. On the contrary, for the political vision, it is not enough to affirm that an interest is universal in order to determine the responsibilities that come with its satisfaction.

A satisfactory explanation of what the existence of a human right entails will depend on several considerations: whether of dignity and individual interest are sufficient to impose an obligation on others and on whether it succeeds in providing some explanation of the origin of the resources to satisfy it, on whether it is feasible to fulfil it and on the reasons why a certain person has to provide them<sup>77</sup>. Therefore, it is not possible to conclude that there is a conceptual tension between individual human rights and collective values.

Secondly, it is not true that the sole purpose of human rights is to protect individuals against the State or the community. In favor of this last reading, it is pointed out that the current regime of international human rights is, fundamentally, the response given by the international community to the horrors of the Second World War. Human rights were conceived as instruments to avoid the repetition of situations in which a State dominated by certain collectivist conceptions denying the moral value of each and every person (fascism, nazism, etc.) could attack the basic interests of all individuals. However, this view does not sufficiently take into account that the objective of the interwar totalitarian ideologies was, as much or more than individuals, national, ethnic and religious groups and communities: Jews, Communists, Gypsies, etc. Hence, the importance of this protective vocation of individuals taking into account their status as members of groups and not just separate individuals. The creation by the Nuremberg Tribunal of the crime of genocide is a clear exponent of the need to give life to new legal concepts that reflect the collective dimension that encouraged the persecution and murder of millions of individuals during that period. Also, the UDHR, and the process of internationalization of human rights driven by it, has this dimension. Some theorists have highlighted how the recognition and international protection as human rights of some classic freedoms (for example, freedom of movement within borders), would have, in addition to the function of promoting individual autonomy, protect certain ethnic or religious groups from suffering discrim-

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<sup>75</sup> GRIFFIN, J., *The idea of Human Rights*, pp. 20-21, 76.

<sup>76</sup> Vid. WEBBER, G., "Proportionality and Absolute Rights" in JACKSON, V & TUSHNET, M, *Proportionality*, Cambridge University Press, 2017, pp. 75-99; FINNIS, J., "Absolute Rights: Some Problems Illustrated", *The American Journal of Jurisprudence*, 61, 2, 2016, pp. 195-215

<sup>77</sup> BEITZ, C., *The idea of human rights*, cit., p. 109. TASIOULAS, J. 2017. "Minimum Core Obligations: Human Rights here and now", p. 22. Available at <https://openknowledge.worldbank.org/handle/10986/29144>. (Consulted on 15/03/2019).

ination, be excluded from political power, or be economically exploited and socially stigmatized<sup>78</sup>. Therefore, an international human rights regime would be of great value, even if all current morals were collectivistic.<sup>79</sup>

### VIII. FINAL CONSIDERATIONS

The examination of the parochial objection leads to the conclusion that it is not relativism or skepticism but ethical-cultural pluralism that is the main challenge to the legitimacy and universal validity of human rights. It does not question that human rights can be morally justified, but (a) that the justification that has prevailed since the approval of the UDHR is not the only one but one of the possible ones and (b) that this justification has arbitrarily given, under a deceptive appearance of universality, a weight or protagonism far superior to individualistic values than to collectivistic. I have examined two attempts to confront this critique of a very different sign: constructive theory and ethical minimalism. Both are at the end unconvincing since, in different ways, they avoid facing the inescapable task of developing a discourse on the ethical reasons that justify the current internationally recognized human rights system. Faced with this approach, the consideration that one of the basic functions or dimensions of human rights is to serve as protection of the individual against potential threats not only from political power but also from ethnic, cultural or religious communities, constitutes a form of ethical and political individualism that can be defended as a point of view proper to a minimum or modest ethical objectivism.

Such an ethical objectivism would be fallibilistic and would avoid confusing objectivity with singularity<sup>80</sup>. Dworkin, one prominent defender of ethical objectivism versus ethical pluralism acknowledges, in the case of international human rights, it is much more difficult “to defend the hedgehog against the different foxes”<sup>81</sup>. For this reason, it admits the possibility that there may be, within certain limits, non-individualistic justifications valid for internationally recognized human rights. Instead of only as the protection of a certain space of inviolability of the individual against the community, its foundation can also be a plurality of interests that are not reduced to autonomy or liberty, but also others such as achievement, friendship, play and avoidance of pain<sup>82</sup>. In addition to the justification of rights in the abstract, this justifying pluralism would also operate when specifying the content of the rights and in the weighting between those cases in which they could conflict with other rights or the general interest. It is in this dimension that his fallibilistic character of the moral objectivism for which I advocate becomes most evident.

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<sup>78</sup> MILLER, D., «Is there a Human Right to immigrate?» In YPI, L. & FINE, S. (eds), *Migration in Political Theory: The Ethics of Movement and Membership*, Oxford University Press, Oxford, 2016, pp. 11-31, at p. 24.

<sup>79</sup> In this sense TASIOULAS, J., “Parochialism and the legitimacy of International Law”, cit., p. 37.

<sup>80</sup> WOLF, S., “Two levels of pluralism”, *Ethics*, 1991, p. 791.

<sup>81</sup> Besides Dworkin, “no doubt we must take pluralism into account in deciding what account of human rights could possibly be agreed upon in treaties and enforced in practice”. DWORKIN, R., *Justice for Hedgehogs*, The Belknap Press of Harvard University Press, Cambridge, Massachusetts, 2011, p. 339.

<sup>82</sup> TASIOULAS, J., “Parochialism and the legitimacy of International Law”, cit., p. 37.

In the line followed by Wolf, Nagel or Alvarez<sup>83</sup>, this not necessarily linked the idea of an answer based on the truth of the arguments. For Tasioulas, an example could be the compatibility or not of the recognition of the right to life and the permitting of the death penalty in certain cases<sup>84</sup>. Another example of pluralism when it comes to harmonizing conflicting values is the regulation of the use of the Islamic veil in public spaces in different European countries. While some, such as France, have shifted the balance to the side of collective values, such as the duty of the State to provide education under premises of neutrality when not directly public order, others, such as Germany, have done so on the side of individual freedom.

In addition to being compatible with ethical objectivism, justificatory pluralism makes it possible to realize that, although it considers that an ethical individualism such as this one offers the best justification for the current international human rights system, it is not only not the only one, but it is surely also a justification based on a correct but limited vision that does not capture the whole moral truth. Surely, even in the version I have defended, an individualistic justification of human rights can, in certain positions, establish an overly strict dichotomy between the individual and society, just as collectivist morality fails to recognize that human suffering has an irreducible individual dimension, which can be adequately confronted only in a society that is not hierarchically organized<sup>85</sup>. Hence the need to promote a dialogue between the two morals that makes the moral universe of others less strange, that allows recognition by all cultures of their weaknesses and limitations, that is willing to incorporate alternative knowledge and that, finally, does not rule out that in the justification of human rights there is probably something still to be decided or that admits better solutions to the currently existing.

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<sup>83</sup> ALVAREZ, S., "Multiculturalismo, Cosmopolitismo y Conflictos" in RUIZ MIGUEL, A (ed), *Entre Estado y Cosmópolis. Derecho y Justicia en el mundo global*, Trotta, Madrid, 2016, p. 185.

<sup>84</sup> According to him, "perhaps (...) the capacity of the perpetrator of even the most heinous wrongdoing to atone, justifies the prohibition of the death penalty, as in Article 1 of Protocol No. 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms. It is a further question, however, whether the only eligible orderings of the relevant values justify the same conclusion, with the result that the right, to life must be interpreted by all societies as incompatible with capital punishment". Ibid, p. 35.

<sup>85</sup> SANTOS, B., «Towards a multicultural conception of human rights» In HERNÁNDEZ TRUYOL, B., *Moral Imperialism. A Critical Anthology*, New York University Press, N. York, 2002, p. 49.