Constitutional Problems of the Rule of Law

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CONSTITUTIONAL PROBLEMS OF THE RULE OF LAW

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EDITORIAL NOTE

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NOTA EDITORIAL

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PRELIMINARY NOTE

The problems of the rule of law have been discussed for a long time. Experience shows that new solutions are in turn accompanied by new unknowns. The rule of law is one of the most complex issues facing the theory of the constitution, precisely because it supposes a dynamic relationship between two polyhedral concepts: state and law. Regardless of the doctrinal conceptions that identify or differentiate these concepts, even if only as an object of study, the separate dissection of both is carried out in all the methodological currents of constitutional theory.

The historical and cultural fact that can be demonstrated is that there is no unambiguous concept of the rule of law, although there are elements that, in certain circumstances, present homogeneous expressions. As a technique of domination, the rule of law becomes a set of rules that backbone the legal argument of each state. The invocation of the rule of law is as familiar in autocracies as in democracies, both because it provides arguments for the exercise of coercion and because it offers elements for the defense of freedoms. From the cultural and historical horizon, the rule of law is an amphibological concept that has proven its functionality to support diametrically opposed constitutional structures. Within democratic constitutionalism, the rule of law acquires its own characteristics. The type of state implies the type of rule of law, for this reason, in a tendency, democratic constitutional states are incorporating common elements that characterize the rule of law. In the authoritarian state, power obeys its own rules, which include wide margins of discretion. There is, therefore, no certainty of their rights for the recipients of the

norm; the possible reactions of power are not foreseeable and legal certainty becomes intangible. Of course, the degrees that this volatile situation can reach vary according to the severity assumed at each moment by the holders of power in that type of state. In the democratic constitutional state, on the other hand, there is certainty in relations with power; the decisions of the organs of power are always predictable and legal certainty is a general guarantee for fundamental rights. Everything indicates that the democratic nature of the constitutional state is what gives a meaning and content to the rule of law. But insofar as the constitutional state in turn presents many variants, the problems of the rule of law multiply.

In this study I have grouped three essays in which I examine three questions concerning the rule of law, which in turn raise numerous constitutional problems: the non-application of norms in the rule of law; the constitutional regime of tolerance, and the relationship between the electoral system and the rule of law. The three works were previously published, as indicated in each case. I clarify, however, that the versions collected here present changes in relation to the originals, product of adjustments that I consider necessary for the greater clarity of the text or for the expansion of some arguments; these changes are due, in several cases, to the suggestions and comments of some colleagues. These modifications, however, do not alter the meaning of the previous statements. For this reason, even when these variants exist, I kept the references to the original publication that appear at the beginning of each text.

THE NON-APPLICATION OF THE RULES AND THE RULE OF LAW*

I. General Considerations

The problem of the rule of law is one of the most relevant issues in constitutional systems. Constitutionalism has, among other objectives, that of the certainty of the rights recognized and guaranteed by the supreme rule. This certainty means that the norms approved in accordance with the constitution itself will be applied without exception as many times as the assumptions that they themselves foresee occur. In this sense, any act that deviates from punctual compliance with the norm is considered in turn as contrary to the rule of law.

Constitutionalism also aims to establish the legal bases for tolerance. This principle, which was at the origin of constitutional systems, supposes that there are spaces for freedom that transcend even what is strictly established by the norm. The standard sets only acceptable minimums, but individual and collective behavior in accordance with that norm can broaden the content of tolerance. Of course, the extent of tolerance is linked to the nature of the tolerated acts and the acts of authority. This is not a simple matter; it is one of the most complex issues in the daily life of the state.

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I deeply appreciate professors Enrique Cáceres, Jorge Carpizo, Héctor Fix-Zamudio, Javier Saldaña and José Ma. Serna for their valuable comments.

At that point it is necessary to consider the question of legitimacy. It is known that this is not a peaceful issue in doctrine. The dominant theses related to legitimacy have an important Weberian influence. However, the nuances are many. In a general way, it can be said that the idea of legitimacy is impregnated with a subjectivism that goes beyond the interpretation of a norm; it is about the interpretation of political power, which is the source of law and its enforcement body.[1]

This work starts with a conceptual scheme of the rule of law and concludes with a reference to the issues of representation and legitimacy and to the cultural problems that are noted regarding the admitted cases of non-application of the norm, considering that they are closely linked. The central question that remains is that of the limits of law, understood as the circumstances in which the organs of the state choose not to apply the norm as a way of preserving the rule of law. It is undoubtedly one of the various paradoxes that can be seen in constitutional systems, and only after applying the categories of analysis proposed by Peter Häberle, as will be done in the final part, will it be possible to find satisfactory solutions.

It is not a new problem, although it does present new dilemmas. Subjection to the law of the organs of power is one of the most relevant guarantees to prevent and correct acts of arbitrariness. At this point, the cases of the constitutions that expressly prohibit arbitrariness must be borne in mind: Argentina (article 43), Chile (article 20), Spain (article 9.3) and Switzerland (article 9). Accepting that these bodies can stop applying the legal norm means opening a space for discretionary action.[2] The historical experience of power shows that through this gap, derogatory practices of the law have been introduced; but the application of the norm alone is not a sufficient guarantee to reconcile the cer-

[1] See Balaguer Callejón, Francisco *et al.*, *Derecho constitucional*, Madrid, Tecnos, 1999, pp. 55 et seq.

[2] See Fernández, Tomás-Ramón, *De la arbitrariedad de la administración*, Madrid, Civitas, 1997.

tainty regarding the acts of authority and the space of freedoms that individuals and society require. Often, for example, the legal principle of the rule of law has been confused with the conservative political discourse of "law and order"[3].

For these reasons, it is necessary to incorporate, to the considerations made on the problems of the rule of law, the question of representation and legitimacy, considering that these elements are part of a single legal reality and the cultural environment of the norm. The only representative institutions have, as contemporary doctrine has shown, numerous vulnerable points (deformations in electoral systems, media distortions, failures in the regime of political parties, influence of interests, irresponsibility of representatives, among others); on the other hand, the principle of legitimacy is much more complex than is usually considered, because it implies the need to combine three factors: origin, exercise and social perception of power.

At this point a prevention must be formulated: when referring to the non-application of the norm within a rule of law, the full validity of the constitutional order is being considered. The question of the applicability of constitutional norms has another dimension, as demonstrated by J. J. Gómes Canotilho[4] and J. Afonso da Silva.[5]

The non-application of the rule referred to in this study corresponds to acts of the administrative authority, not of the courts and congresses. The non-application in the case of these two organs of power has other implications that are not examined here. In the case of congresses, they have the possibility of modifying the norm, but in accordance with the previously established pro-

[3] Cf. Durán Muñoz, Rafael, *Contención y transgresión*, Madrid, Center for Constitutional Studies, 2000, pp. 185 et seq.; Raz, Joseph, *La autoridad del derecho*, Mexico, UNAM, Institute of Legal Research, 1985, p. 266.

[4] Gómes Canotilho, José Joaquim, *Constituiçao dirente e vincçao do legislalador*, Coimbra, Coimbra Editora, 1994, especially pp. 216 et seq.

[5] Afonso da Silva, José, *Aplicabilidade das normas constitucionais*, Sao Paulo, Malheiros Editores, 1998, especially pp. 209 et seq.

cedures; any act of non-application of the rules of the legislative procedure is subject to legal challenge, and cases of omission in the development of constitutional rules may give rise to unconstitutionality by omission.[6] As regards the courts, on the contrary, the possibility of applying principles instead of rules is much broader. It can be said that while Congresses have this possibility forbidden, the courts have it more widely, and the governing bodies are in the middle. The German Basic Law synthesizes this situation in its article 20-3, by stating that the legislator is subject to constitutional order, while the executive and jurisdictional powers are subject to the law and the law. Of course, the doctrine is not unanimous regarding the content and scope of this constitutional provision. Starck[7] identifies a wide range of understandings, coming from various authors, in relation to this formula: it alludes to the law in a formal and material sense; refers to written and customary law; recognizes the coexistence of positive and natural law; combines positivity and axiology; it is tautological, because law and law are synonymous. It becomes clear that this plurality of interpretations shows how difficult it has been for the doctrine to admit that judges and the government have legal margins that go beyond the law *stricto sensu*, and that the matter is much simpler if, as we will see later, the distinction between rule and principle is considered. This reference is intended to underline the complexity of the issue of the non-application of the norm within a rule of law, in relation to which, in this work, we will refer exclusively to the aspect that concerns the government.

The characteristics of the constitutional state in terms of its structure, organization and operation are known; but there are two aspects whose elucidation is also necessary: how this state is being configured, and what may be the causes of breakdown. The constitutional state goes through previous phases that lead to

6 See Fernández Rodríguez, José Julio, *La constitucionalidad por omisión*, Madrid, Civitas, 1998.

7 Starck, Christian, *El concepto de ley en la Constitución alemana*, Madrid, Center for Constitutional Studies, 1979, pp. 61 ff.

its consolidation, in the same way that it runs the risk of disintegration. It is necessary to determine how this constructive process is taking place and how to avoid that the tensions and pressures end up unleashing a destructive process.

It is not an easy task to identify the elements of both processes, because although all constitutional states tend to present homogeneous characteristics, the dynamics that lead to their formation or generate their erosion are due to unrepeatable circumstances in time and space. The conjunction of multiple factors, cultural, political, and even personal, is what determines the intensity and direction of these processes.

In the case of this study, not all the problems concerning the construction or destruction of the constitutional state are addressed, but only a problem that is present in the various phases of the life of this type of state. This element present in the different stages of the life of the constitutional state is the one concerning the strict application of the norm.

This phenomenon is important to define the constructive process of the constitutional state, and it is also relevant to warn that trends are underway that lead to their decline. To be able to identify to what extent the non-application of the norm corresponds to a stage in the formation of the constitutional state, is compatible with the validity of that state or preludes its crisis; it is a task that the constitutionalist must develop to specify the possibilities or the risks through which the constitutional life is passing.

This study attempts to explain that in every constitutional state there are reasonable margins for temporary, partial, controllable, and explainable deviation of the institutional functioning in relation to the current legal framework. The subject has interested me since this situation is common in constitutional states consolidating, in consolidated ones and in those that are in crisis, but in each case, it presents causes and has different consequences.

When it comes to the formation of the constitutional state, an excessive rigor in the application of the law could inhibit expressions of pluralism in the making (for example, demonstra-

tions, freedom to express ideas and opinions, isolated cases of disobedience). If these expressions are prevented, the possibilities of consolidating the constitutional state will probably also be reduced or deferred. If, during the constitutional state, the margins of tolerance were reduced, it would incur a contradiction with the very nature of that state, and excessive tensions could be generated that would end up undermining the functioning of the institutions. And if the margins of non-application of the norm were expanded in such a way as to promote entropy, the constitutional state would run the risk of losing its meaning and validity.

In addressing these problems, I have had as a reference the concept of constitutional State formulated by Peter Häberle[8], which is made up of a plurality of elements: human dignity; popular sovereignty; the constitution as a contract; the separation of powers understood as pluralism; the rule of law, the social state, and the cultural state; fundamental rights and their guarantees, and the independence of the jurisdiction, among others.

This is not intended to be a work of a philosophical nature, but a constitutional one. What essentially interests me is to find some regularities that make the circumstantial non-application of the norm compatible with the constructive process or the functioning of the constitutional state, and that it does not go to the extreme of triggering the bankruptcy of that state.

In this work, the problems that result for the rule of law from the circumstantial non-application of the norms will be approached from a constitutional perspective. Regardless of the considerations that may be made on this subject with a philosophical approach, in this study only the aspects that are relevant to the constitutional state will be considered. It is evident that the prism of observation varies if a problem is approached as part of the general theory of the norm or of the theory of the constitution. In this case, the latter approach has been chosen.

[8] Häberle, Peter, *El Estado constitucional*, Mexico, UNAM, Institute of Legal Research, 2001.

One more comment concerns the not applied norms. In all cases it should be understood as secondary rules, that is, not those that prescribe a conduct but rather those that provide a sanction. At this point, we do not pronounce ourselves due to the coercive nature of the legal order or the possibility that there are rules without sanction, as E. Allorio postulates, for example. In this study, such debate is irrelevant, because it is not a matter of not applying the possible rule without sanction, in which case the problem we wish to examine would not occur, but we are interested in exactly the opposite: there being a sanction provided for by the law, it is not applied.

II. Rule of Law

The rule of law consists in subjecting state activity to the constitution and to the norms approved in accordance with the procedures it establishes, which guarantee the responsible and controlled operation of the organs of power, the exercise of authority in accordance with known provisions and not retroactive in harmful terms, and the observance of individual, social, cultural, and political rights.

The concept of the rule of law was developed during liberalism and finds, among its philosophical sources, the works of Kant and Humboldt. Both reached the conclusion that state action is limited to safeguarding the freedom of the individual. Although the idea appeared clearly in his writings, the first to introduce it as a relevant topic for the political and legal definitions of the state was the German jurist and politician Robert von Mohl[9] in his work *Das Staatsrecht des Königreiches* Württemberg, published in 1829. Many authors They even attribute to him having coined

[9] Cf. Carcagni, Angelo, *I diritti della "società": stato di diritto e associazione in R. von Mohl*, Napoli, Giannini, 1990.

the expression; however, Böckenförde shows[10] that it was first used by Carl Th. Welker in 1813, and by Ch. Freiherr von Aretin in 1924. With this, there is no doubt that the concept is from a Germanic cradle. But what is most interesting is not the genesis of a concept, but both Welker and Aretin and Mohl attribute a central characteristic to this new concept: the rule of law is the state of reason, of understanding, of political rationality. These lines were blurred to allow other notes to integrate the content of the rule of law. In this study we will see that, despite the time that has elapsed, and the additions adopted, the essence of the rule of law continues to be the rationalization of the exercise of power; this is what makes it possible to explain that its essence is not altered when, in certain circumstances, episodes occur in which the norm is not applied.

The concept of the rule of law is a response to the absolutist state, characterized by the absence of freedoms, the concentration of power and the irresponsibility of the holders of the organs of power. Hence, the legal guarantee of the rule of law corresponds to modern constitutionalism. Interestingly, the term "constitutionalism" was first used in 1832 by the English poet Robert Southey, and its spread as a legal expression is relatively recent. Constitutionalism has been understood to contain two basic elements, which have long been considered synonymous with the rule of law: the supremacy of the constitution and the separation of functions in the exercise of power. The French Constitution of 1791 included in its article 16 the expression that would later become the dogma of liberal constitutionalism: "Every society in which the guarantee of rights is not assured, nor is the separation of powers adopted, lacks a constitution". However, it should be borne in mind that in 1793 the draft Constitution of Saint-Just proposed to modify the concept: "every town in which the exercise of its rights is not guaranteed, and the fulfillment of

[10] Böckenförde, Ernst Wolfgang, *Estudios sobre el Estado de derecho y la democracia*, Madrid, Trotta, 2000, p. 19.

its duties is not guaranteed, lacks a constitution and principles of social order."[11] In this case, only constitutional supremacy mattered.

It is useful not to lose sight of the fact that although the rule of law is the antithesis of the absolutist state, the instruments of one and the other are the same: the supremacy of the norm. What varies is not the content (this will only happen when the social rule of law appears) or the application (this will only be presented when the democratic rule of law emerges) but the source of the norm.

Dicey[12] demonstrated how in England, from the fourteenth century, the Crown and the supremacy of the rule were integrated as a concept. The Crown required the norm to ward off the dangers of overthrow and usurpation; the norm assumed, in turn, the existence of a power that imposed it. The royal power resided in the elaboration and in the application of the norm, both in the same hands. The English Revolution involved the transfer of supreme power (sovereignty), which passed from the monarch to Parliament; but the instrument to exercise power was the same: the norm. The rule of law, in turn, involved a triple guarantee: the legal process, the universality of justice, and the subjection of the acts of power to the decision of the judges.

Later, in the 20th century, the rule of law had as a counterpoint to totalitarianism. It is noted that the sole ideas of the legal process and the universality of justice are insufficient. And as for the control of the acts of power by the judges, it is necessary to guard not only against the excesses of the government, but also of the legislator. That is why the state of law is oriented to prohibit the totalitarian expansion of the state. Totalitarianism was characterized by the suppression of individual and public freedoms, including the banning of parties, deliberative organs,

[11] Cited by Blanc, Louis, *Histoire de la Révolution Française*, Paris, Pagnerre, 1870, t. VIII, pp. 489.

[12] Dicey, A. V., *Introduction to the Study of the Law of the Constitution*,Indianápolis, Liberty Fund, 1982, pp. 107 et seq.

and freedom of movement, assembly, and expression. However, totalitarianism tried to legitimize itself through legal instruments. Except for communism and corporatism, which developed a formally constitutional apparatus, Falangism, National Socialism, and fascism were expressed through various laws that did not form a systematic body.

Hitler ruled essentially supported by the Authorization Act of 1933, which empowered him to legislate at his own discretion. Based on that parliamentary delegation he issued, among others, the racist laws of Nuremberg of 1935 and the 11th Ordinance on the Reich Citizenship Law of November 25, 1941, which deprived Jews of German citizenship.

Alexy[13] transcribes the recitals of a resolution of the Federal Constitutional Court in a case related to this ominous rule. Among other important expressions, the Court declares that "the validity of the National Socialist legal provisions must be denied as law, because they so clearly contradict fundamental principles of justice that the judge who wanted to apply them or accept their legal consequences would dictate 'no-law' in instead of law"; later it reaffirms: "the 'no-right' imposed that manifestly violates the constitutive principles of the law does not become a law by being applied or obeyed." As Alexy himself observes, the Court could choose to invoke precepts of the German constitutional order but preferred the non-positivist argument; In any case, for the purposes of this study, the insufficiency of a strictly formal rule of law is corroborated.

In Italy, on the other hand, the formal Albertine Statute of 1848 remained in force, but various laws consolidated the power of Mussolini. In addition to the integration of the Great Council of Fascism, its most important provision was the Acerbo Law, of 1923, where it included the "governability clause": the party that obtained a simple majority in the elections was automatically at-

[13] Alexy, Robert, *El concepto y la validez del derecho*, Barcelona, Gedisa, 1997, p. 15.

tributed the absolute majority in the election. In 1925 Mussolini was invested with delegated powers to legislate, and his main decision was to integrate, in 1926, the Special Court for the Defense of the State, which several authors have considered the true fundamental law of the regime.

For this reason, aspects of a strictly formal nature (having a constitution, for example) were considered insufficient to identify the rule of law. Hence, Zippelius[14] has argued that the rule of law is governed by two basic principles: that of proportionality (that there is an adequate relationship between the harm and the benefit caused by state acts), and that of excess (that is not affect anyone's interests to a greater extent than necessary). As will be seen later, the conjugation of both postulates will be useful to determine to what extent the acts of non-application of the norm can be consistent with or contrary to the rule of law.

It is known that for Kelsen there is an identity of the state order and the legal order, "every state has to be the rule of law in the formal sense, since every state has to constitute a coercive order... and every coercive order has to be an or - legal den"[15]. However, this author accepts that one can speak of a material rule of law to allude to the question of the extent to which specific legal guarantees are required to ensure that individual legal acts correspond to general norms.

Hence, Raz[16] considers the rule of law as a negative value: by granting it powers of coercion, the law creates the danger of arbitrary power; "The rule of law is made to minimize the danger created by the law itself." For his part, alluding to the Kelsenian questioning, García-Pelayo points out that the idea of the rule of law makes sense from a legal and political point of view, insofar as it represents the functionality of the state system, and intro-

14 Zippelius, Reinhold, *Teoría general del Estado*, Mexico, UNAM, 1985, p. 314.

15 Kelsen, Hans, *Teoría general del Estado*, Barcelona, Labor, 1934, p. 120.

16 Raz, Joseph, *op. cit.*, note 3, p. 279.

duces normalization, rationality and, therefore, the reduction of uncertainty factors.

Few constitutions expressly adopt the principle of the rule of law. This is the case in the case of the Russian Federation (article 1), Honduras (article 1), the Republic of South Africa (article 1 c), Romania (title 1, article 4), and Switzerland (Article 5), for example. In the Constitution of Chile (Article 6) it is established that "the organs of the State must submit their action to the Constitution and the norms issued pursuant to it", with which without making direct reference to the rule of law, its meaning is stated.

III. Social Rule of Law

As a correlate of the tendencies of contemporary constitutionalism, complementary concepts of the rule of law have been coined. Those of the social state of law, the social and democratic state of law have appeared, and with the Venezuelan Constitution of 1999 (article 2) the so-called democratic and social state of law and justice emerged. The latter lacks elements that allow it to be differentiated from the previous ones, and the inclusion of the expression "justice" only plays a semantic function.

The legal-political concept that serves as the immediate antecedent to the social rule of law is the rule of law. The emergence of social constitutionalism with the constitutions of Querétaro (1917) and Weimar (1919), also generated a new approach to the rule of law. Although the Constitution of the Federated Soviet Russian Socialist Republic, of 1918, included a broad "declaration of the rights of the working and exploited people" and various provisions on the right to work,[17] with what could be considered to this Constitution among the precursors of the Social rule of law, it is also necessary to note that the electoral system and the

[17] Cf. Johnson, E. L., *El sistema jurídico soviético*, Barcelona, Península, 1974, pp. 42 et seq., and Castro, Horacio de, *Principios del derecho soviético*, Madrid, Reus, 1934, pp. 990 et seq.

extreme concentration of power established by the Russian norm do not allow it to be squared as part of modern and contemporary constitutionalism.

In the case of the Querétaro and Weimar letters, it was found that the rule of law, by establishing formal equality before the law, produces economic inequalities. Thus, the apparent paradise of the rule of law concealed deep contradictions. Hermann Heller clearly perceived this situation and proposed the transition from the liberal state (of law) to the social state of law. This Hellerian conception of the social rule of law would allow the workers' movement and the bourgeoisie to reach a legally regulated equilibrium. In other words, the viability of a just order of authority over the economy was raised, particularly through the limitation of private property, the subordination of the labor regime to the law, the coercive intervention of the state in the productive process, and the transfer of economic activity from the field of private law to the field of public interest.

For Heller,[18] the rule of law is the provisional result of a process of rationalization of power according to which the bourgeoisie is vindicated and strengthened. Progressively, however, also the workers, organized in unions and even parties, manage to establish the "legislative power of the people". Thus, the economically weak seeks, through new legislation, to "lock" the economically powerful and force them to grant higher benefits.

Zippelius[19] adopts the expression "liberal social state" to characterize the industrialized society of the West where the possibilities of individual development are guaranteed while limiting the selfishness that damages the freedom of the whole. As a corrective to the distortions of liberalism, this social state must intervene whenever the market economy endangers the very conditions of the free market or causes significant damage to the national economy or the environment.

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[18] Heller, Hermann, *Escritos políticos*, Madrid, Alianza Universidad, 1985, pp. 283 et seq.

[19] Zippelius, Reinhold, *op. cit.*, note 14, p. 307.

Hermann Heller and Elías Díaz[20] identify the social rule of law as a transition stage: the first towards socialism (hence the "provisionality" of the social rule of law), and the second towards the democratic state of law. Zippelius's judgment is more reserved: it alludes to an oscillation of historical development between the welfare state and liberalism through which the risk that the state continually faces is evidenced: lowering the threshold of freedom, "thus suffocating an elemental necessity", or to extend the effects of freedom, "thereby opening the door to the possibilities, gladly exploited, of abusing it". For this reason, he concludes, the instability of the forms of the liberal state originates in the fact that "freedom induces, again and again, to abuse it," and such abuse again leads to its restriction.

Three observations by Elías Díaz are of significance and must be taken into consideration when it comes to the social rule of law: one, that not everything that is called the "rule of law" is necessarily the rule of law. This assertion can be exemplified by the normative hypertrophy ("normocracy", Heller would say) of dictatorships; the second, that the social state of law requires a "strong executive", capable of making the claiming interest of society and the interventionist aptitude of the state prevail over the complacent vocation of parliamentarism; and the third, that there is an evident kinship between the social state of law and the welfare state. The latter, in effect, is usually characterized by the increasing provision of public services of social interest, such as education, housing, food supply, medical care and social assistance; a progressive tax system; the protection of urban, worker and agrarian rights, and the redistribution of wealth.

The Weimarian (or European) vision of the social rule of law identifies it strictly with the working class and with its organized forms of struggle: the union and the party. In turn, a Latin American vision of the same reality tends to involve, as already

[20] Heller, Hermann, *op. cit.*, note 18; Díaz, Elías, *Estado de derecho y sociedad democrática*, Madrid, 1969, Cuadernos para el Diálogo, pp. 125 et seq.

mentioned in the preceding paragraph, marginalized sectors of cities and agricultural workers, the protection of whose interests (very diffuse in the first case) is hardly produced with medium effectiveness by agricultural organizations. Thus, the economic chapter of the social rule of law in Europe and Latin America is made up of different headings: industrial and commercial in the first case, added to urban and agricultural in the second.

For all the foregoing, I consider that, to the basic principles of the rule of law (proportionality and excess) enunciated by Zippelius and that were mentioned above, two more can be added, complementary to those and that allow satisfactorily framing the social rule of law. I propose to include the principle of reasonableness, by the state organization must tend towards integration and not the stratification of society, and the principle of equity, since equality between unequals is merely conjectural. These principles (those supported by Zippelius and those proposed by me) allow us to explain the role of the rule of law in a democratic constitutional system.

Just as the concept of the rule of law is questioned by Kelsen, the concept of the social rule of law is not peacefully admitted by the doctrine. In particular, Forsthoff[21] argued in 1961 that the relationship between the rule of law and the social state raises serious problems. They are, he says, two different and incompatible states in the constitutional sphere. On the one hand, the rule of law has as its axis a system of freedoms, and on the other, the social state has as its object a system of benefits. The author considers that the trend of the social state leads to a progressive expansion of organized power, and to a growing dependence on society in relation to benefits and wealth distribution actions by that power. At this point, Forsthoff adopts the same conclusion that Hayek called the "path of servitude": the social state ends up transforming the rule of law into a totalitarian state.

[21] Forsthoff, Ernst, "Problemas constitucionales del Estado social", in Abendroth, W. *et al.*, *El Estado social*, Madrid, Center for Constitutional Studies, 1986, pp. 45 et seq.

Fifteen years later Forsthoff[22] qualified his points of view and admitted that the presence of democratic institutions could lessen the tension between the two models of the state, and even allow their complementarity. This conclusion is partially confirmed by the tendencies of contemporary constitutionalism. In the constitutions of Colombia (article 1), Ecuador (article 1) and Paraguay (article 1), for example, the concept of the social state of law already appears; in those of Germany (article 28), Spain (article 9.2), Turkey (article 2) and Venezuela (article 2), the social principle appears accompanied by the democratic one. Furthermore, as can be seen in number III, social constitutionalism arose with the Mexican Constitution of 1917 and the German Constitution of 1919, although the term social was not expressly used. The social nature of numerous constitutions has been implicit in their content, in the same way that it has happened with the very concept of the rule of law.

Now, contrary to what Hayek and Forsthoff himself envisioned in 1961, it was not the social state that dismantled the law state, but the law (liberal) state that prevailed over the social one. Despite the constitutional provisions, where they exist, the dominant trend is in the direction of reducing the presence of the state. The benefit system and the wealth redistribution policies that characterize the welfare state are in decline. Where they are preserved in the constitutional text, they are progressively transformed into semantic clauses.

IV. Social and Democratic Rule of Law

The first time that the term "democratic and social state" was used was during the Paris Revolution of 1848, although the integration of individual law and social law had already been noted since the

[22] Forsthoff, Ernst, "Concepto y esencia del Estado social de derecho", in Abendroth, W. *et al.*, *op. cit.*, previous note, pp. 71 et seq.

intense years of the Convention.[23] The demands for recognition of the right to work raised by the socialists, led by Louis Blanc and seconded by the constitutionalist Comernin, found strong resistance in the arguments of Tocqueville and Thiers. In the process of agreements prior to the elaboration of a new constitutional text, the Socialists and Conservatives agreed to promote a transactional model of a "democratic and social State", as a result of which the presidential Constitution of that year was approved. This norm incorporated some social demands, but not the right to work.

A century later, the Basic Law of Bonn (article 28.1), of 1949, was the first constitutional provision that included the concept of the democratic and social rule of law. Afterwards, the constitutions of Spain (article 9.2), Turkey (article 2) and Venezuela (article 2) have also done it. In other constitutions, the principle of a democratic state of law has been incorporated, without expressly mentioning the social component. This is the case of the supreme letter of Brazil (article 1). Abendroth[24] warns that, as for Germany, the formula "Social rule of law" has lost connection with that of "Social and democratic state of law". To corroborate this, he mentions the decisions of the Federal Constitutional Court and the Federal Labor Court, which only allude to the social component of the constitutional text. The same author admits,[25] however, that "with the formulation of the legal principle of statehood of democratic and social law, the Constitution has undoubtedly sought to effectively ensure a minimum of ideas about the content of that principle," which it exerts a binding force on the legislator, the government and the *Länder*.

The social and democratic state of law includes the protection of the individual and their rights to political participation

[23] Blanc, Louis, *op. cit.*, note 11, t. XII, pp. 603 y ss.

[24] Abendroth, Wolfgang, "El Estado de derecho democrático y social como proyecto político", in Abendroth, Wolfgang *et al.*, *op. cit.*, note 21, p. 97.

[25] Abendroth, Wolfgang, *Sociedad antagónica y democracia política*, Barcelona, Grijalbo, 1973, pp. 267 and 287.

and class relations, instituting mechanisms for the distribution of wealth through wages, the exercise of collective rights and a set of benefits that cater to well-being. What is characteristic of this form of state is the link between social content and those concerning pluralism. Citizen participation is essential both to expand the rights that correspond to the social body, and to exercise effective vertical control over the organs of power. A state that dispenses with pluralism tends rapidly to paternalism, and from there to the adoption of dogmatic forms of exercise of authority.

V. Rule of Law and Constitutionalism

The characteristics of the rule of law have made it possible to define the constitutional system. In this sense, there are four major trends: liberal, social, democratic and cultural. When the twentieth century entered, the liberal constitutionalism forged throughout the preceding century dominated. The constitutions were structured based on the rights of freedom, property, legal security, and equality. Some of its corollaries were the rights of association, petition, suffrage, and freedom of conscience.

Although, as Vanossi[26] affirms, it is not easy to formulate a judgment that includes the entire cycle of social constitutionalism, among other things because it is not yet extinct, but it is possible to identify some traits of a general nature. Social constitutionalism appeared in the Queretaro Charter of 1917 and in the German Constitution of Weimar of 1919. This was the one that had the greatest influence in Europe, while the Mexican one received the greatest diffusion in Latin America. Weimar's social theses had resonance in industrial societies, above all because they made it possible to face the workers' pressures that were inspired by the Soviet Revolution; the Mexican theses were

[26] Vanossi, Jorge R., "Etapas y transformaciones del constitucionalismo social", Magazine of the *Colegio de Abogados de La Plata*, Argentina, year XXIV, no. 42, 1982, p. 21.

more attractive to those who had to alleviate the restlessness of rural societies.

The fundamental characteristics of social constitutionalism consisted in the recognition of the rights to professional organization, to strike, to collective bargaining, to access to wealth (in the Mexican case it meant a wide range of actions of an agrarian nature), and of principles of equity in legal and economic relationships. This explains the emergence of social security, labor courts, and the defense of rights such as hours, wages, and compulsory rest. Benefit rights charged to the state also appeared, such as those relating to education, health, housing, and supply.

One of the most notable effects of social constitutionalism was to serve as a basis for the interventionist action of the state. For this reason, during the process that began in the eighties, the progressive dismantling of the interventionist state has inevitably implied the progressive reduction of the welfare state.

Democratic constitutionalism, for its part, was the subject of important provisions immediately after the second postwar period. The parliamentary systems, based on the concept adopted by the Basic Law of Bonn, were stabilized through their partial presidentialization, and the presidential systems tended to their progressive flexibility to become more receptive to instruments and procedures of political control, of parliamentary origin. Even in the United States, limits were placed on presidential reelection (22nd amendment, 1951).

The characteristics of democratic constitutionalism have consisted in the recognition of political parties; in the guarantee of free and impartial electoral processes; in the decentralization of power, including the forms of the federal and regional state; in the strengthening of the organization, powers and functioning of the representative bodies; in the adoption of forms of semidirect democracy, sometimes even to the detriment of representative systems, such as the legislative referendum, the plebiscite, the popular initiative and, although much rarer, in the revocation of representatives.

The constitutionalism of the last decade of the 20th century was signified by the emphasis on cultural rights. Cultural rights are not, like social rights, class rights, nor like democratic ones, universal rights. Cultural rights are collective rights that protect relevant interests that concern all socioeconomic strata. Among those interests are human rights, but the range is very wide. It includes the right to protection of the environment, development, leisure and sports, privacy, non-discrimination, migration, information, conscientious objection, consumer safety, and linguistic, cultural and ethnic diversity, among other aspects.

Peter Häberle, on the other hand, considers that the social rule of law is an element of the constitutional state. This thesis should not be confused with Zagrebelsky's proposal, reasonably refuted by Rodolfo Vázquez,[27] while the Italian author raises the concept of "constitutional rule of law" as an alternative to that of rule of law. In the case of Häberle[28] the substitution of one concept for another is not suggested, but rather to subsume one in the other. The arguments are convincing, because, as mentioned above, the relationship between the rule of law and constitutionalism has developed in a symbiotic way, until it has formed a clear unity.

VI. Limits of the Law

From Habermas's perspective[29] the rule of law is the form of regulation of power cycles in complex societies. In this sense, it contributes a new element: that of complex societies. It is not difficult to guess what he is referring to, but in any case, it is not explicit. Apparently, it could cover a tautology, because the very idea of the state, with its normative and conceptual framework, is only pos-

[27] Vázquez, Rodolfo, *Liberalismo, Estado de derecho y monorías*, México, Paidós, 2001, pp. 86 and 87.

[28] Häberle, Peter, *El Estado*..., *cit.*, note 8, pp. 224 et seq.

[29] Habermas, Jürgen, *Facticidad y validez*, Madrid, Trotta, 1998, pp. 58 and 63.

sible in "complex societies"; by no means in what would be their antinomy: tribal societies,[30] for example. But this apparent redundancy is cleared up when the same author affirms[31] that the rule of law "cannot be had or maintained without a radical democracy." At this point, the new question to clear is what should be understood by this type of democracy. It is not, of course, a concept of radicalism derived from the forceful action of power on behalf of society, or of society under the pretext of freedom. Democracy is radical and society is complex, simply because communicative reason prevails.[32] This reason is the linguistic medium that allows forms of life to be structured and the interactions typical of these types of democracy and society to take place. Elías Díaz[33] also develops with precision the intimate link between the democratic system and the rule of law, identifying the convergent lines of its evolution.

This communicative reason enunciated by Habermas is present in everyday relationships, and it is what allows finding agreements or postponing the resolution of conflicts. There is a permanent tension between normative approaches "which always run the risk of losing contact with reality", and objectivists, "which eliminate all normative aspects". It is, in the words that Habermas uses for this object,[34] the problem of facticity and validity. In order to resolve conflicts, the normative regulation of interactions emerges,[35] which is what makes law a category of social mediation.

The assumption of legal validity, with its factors of freedom and coercion, must bear in mind the tension with reality, or facticity. Here Habermas's concept of complex society reappears:

30 *Ibidem*, p. 205.

31 *Ibidem*, p. 61.

32 *Ibidem*, pp. 65 et seq.

33 "Estado de derecho y derechos humanos", *Ética pública y Estado de derecho*, Madrid, Fundación Juan March, 2000, pp. 20, 40 et seq.

34 Habermas, Jürgen, *Facticidad..., cit.*, note 29, p. 68.

35 *Ibidem*, p. 88.

"modern societies are not only socially integrated through values, norms and processes of understanding, but also systematically, through markets and power used administratively"[36]. For the same reason, while in the rule of law power can only act based on the normative order, which makes it possible to stabilize society's expectations[37] and maintain a legally organized coexistence, factuality introduces stress factors whose solution is also demanded by society. In this case, voluntary agreements are not ruled out as instruments of conflict resolution. The "communicative power" is located in the two spaces: that of the creation and application of the norm, and that of the deliberation and signing of agreements. It is, therefore, a concept of remarkable breadth that includes the phenomena of factuality and validity.

The problem is that the consensual composition of conflicts lends itself to distortions. The sociological perspective of the rule of law[38] does not exclude a balance between the powers of social integration: money, political power and solidarity. Here there is the risk of excessively expanding the number of factors that intervene in social mediation, in addition to the law itself. The solution is to accept that all powers of social integration are regulated powers. For the matter at hand, the non-application of the rule allows us to reach a satisfactory solution from the perspective of the rule of law: it is likely that when a rule is not applied to avoid greater damage than with its application, another provision is being applied. In other words, the specific rule may sometimes give way to the general principle. This, we know, involves risks, but it is explained only in extreme situations, which every rule of law has to face without exposing itself to a fracture. The statement of principles runs into interpretive problems that are not always easy to overcome. It should also be borne in mind that the le-

36 *Ibidem*, p. 102.
37 *Ibidem*, p. 200.
38 *Ibidem*, p. 218.

gal system constitutes a system[39] that makes it possible to explain the omission in terms of the application of a given norm while another is applied. While the system denotes a relationship of coherence between the norms (be they rules or principles) that compose it, it could be said that when one provision is not applied, there is another that is fulfilled. This, however, would in turn mean that a system is perfect and lacks gaps. As it has not been demonstrated that such a thing exists, we have to admit that in some cases it can be affirmed that the non-application of one rule can be explained in terms of the application of another, without this constituting an antinomy, since in this case, it would be a deficient system because it includes contradictory rules. But it is also possible that in some cases one provision simply ceases to apply without fully demonstrating the application of another. It is, therefore, a highly complex problem.

Regarding the application of general principles, it must be borne in mind that the legal system is extensive and includes rules and principles. In this work we are using the word "norm" as the equivalent of "rule". This clarification is relevant, because the distinction with the principles can lead to confusion. Without going into the long-standing controversy about the meaning of both concepts (rule and principle), I find the differentiation formulated by Alexy[40] very functional for the purposes of this study: the principles are optimization mandates that can be fulfilled to different degrees, inasmuch as the rules can only be followed or not. On the other hand, and within the purpose of legally framing (as corresponds to a problem of the rule of law) the non-application of the norm, we can also resort to the wide space that opens for us the renewed conception of legal pluralism of Elías Díaz.[41] To Díaz

[39] Bobbio, Norberto, *Teoría general del derecho*, Madrid, Debate, 1991, pp. 189 et seq.

[40] Alexy, Robert, *Teoría de los derechos fundamentales*, Madrid, Center for Constitutional Studies, 1997, pp. 86 et seq.

[41] Díaz, Elías, *Curso de filosofía del derecho*, Madrid, Marcial Pons, 1998, pp. 85 et seq.

the relationship between society-state-law allows us to understand that the legal system is composed of new norms and previous behaviors, by the capacity for social self-regulation, by the autonomy of the will, by the jurisprudential creation and by the coercive order of the state, which at present it is subject to very dynamic processes of transformation. The thesis, linked to the sources of law, has a long tradition; but what is relevant is to note that even well-established paradigms are subject to conceptual updating, precisely because of the need to provide an explanation for such heterodox phenomena as the non-application of the norm in a rule of law.

Since ancient times there has been an area of collective life where the strict application of the law has been subject to nuances. In *Analects*,[42] Confucius declared:

> If you govern the people by means of laws and keep them in order by means of punishments, they will evade punishments but they will lose their sense of shame; but if you rule by your moral excellence and keep them in order by your righteous conduct, they will retain their sense of shame and catch up with your model.

At this point, as Wilhelm[43] points out, the Chinese philosopher contrasts the norm with the custom. This is not understandable to modern man, adds the biographer of Confucius, because "a state mechanism cannot be represented without codes", but it was part of the debate on social organization in 6th century China. The Confucian counterpoint was adopted by Han Fei Zi,[44] almost three centuries later. Contrary to the old master, Han considers that the severity of punishment is the expression of true love, because it is the only action that allows man to drive away evil.

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42 Confucius, *Analectas*, Buenos Aires, NEED, 1998, II, III, 1 and 2.

43 Wilhelm, Ricardo, *Kungtsé*, Madrid, Revista de Occidente, 1926, pp. 131 et seq.

44 Han Fei Zi, *El arte de la política*, Madrid, Tecnos, 1998, pp. 175 et seq.

Tsï Tschan, a contemporary of Confucius, who ruled in Tschong, decided to publicize the laws by having his text engraved on bronze plates, so that no one would claim to be in breach of them by not knowing them. This form of diffusion of the law in antiquity, inscribing it in stone or metal, was a practice also followed by the Semitic peoples, and later by the Greeks and Romans.[45] In the case discussed, the discrepancy between Tsï and Confucius lies in the different perspective of the government. The moralist knew that no law could foresee all behaviors.

This must have been discussed throughout the centuries. Five centuries later Cicero also underlines this, when he picks up a proverb that seems to be very widespread in his time: *summum ius summa iniuria*.[46] Indeed, almost a hundred years before Cicero wrote, Terence uses a similar expression and identifies it as from common use since long ago. In the outcome of the comedy The Self-Tormentor,[47] the point is reached where it becomes necessary to pay a large sum for one of the characters to recover his daughter, "given as a pledge" by a third person. It is then that he exclaims *"verum illud dicunt:'ius summum saepe summa est malitia'"* ("that is why they say: 'many times the supreme right is supreme evil'").

On his part, Cicero alludes to a very illustrative example: suppose, he says, that a thirty-day truce is agreed between two rivals; however, one of them devastates the opponent's fields at night, "because in the truce they only talked about days and not nights." The aphorism refers, as is evident, to a form of interpretation of the norm; but in any case, it is known that every act of application is a form of interpretation, so he uses here the Ciceronian principle as an element to prove the already very remote concern to attenuate the rigors of the law.

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45 Cf. Cortés Copete, Juan Manuel (ed.), *Epigrafía griega*, Madrid, Cátedra, 1999.

46 Cicerón, *Sobre los deberes*, Madrid, Tecnos, 1989, I, 10, 33.

47 Terencio, "El atormentador de sí mismo (Heautontimorumenos)", *Comedias*, Mexico, UNAM, 1975, p. 796.

Coincidentally, Columella expressed himself at the same time. When referring to the legal burdens that weighed on agricultural workers, Columella[48] emphasizes that not everything that the law establishes should be applied, because it can cause the "people" more inconveniences than advantages. For that reason, he adds, since "the ancients" it has been known that the maximum rigor of the law is equivalent to the maximum rigor of oppression (*nam summum ius antiqui summam putabant cruzem*).

For Kant[49] the principle summum *ius summa iniuria* ("the strictest law constitutes the greatest injustice") represents the apothegm of equity. However, he adds, that damage is not remediable through legal procedures, "even if it affects a legal requirement." Equity is "a mute divinity, which cannot be heard." In Metaphysical Principles of the Doctrine of Law[50] he reiterated that this expression constitutes the motto of equity, noting that the claim based on equity has no force "except in the court of conscience", and not in the civil court.

On the other hand, the philosopher is often attributed with formulating the devastating expression "*fiat iustitia et pereat mundus*" ("let justice be done and the world perish"), which reproduces another also in use *"fiat iustitia, ruam caelum"* ("let justice be done and heaven falls"), and Hegel had corrected it in the sense of *"fiat iustitia ne pereat mundus"* ("justice be done so that the world does not perish "). As for Kant, it is an expression that was already circulating in his time, but which he justified[51] as "a courageous principle of law that cuts across all paths twisted by violence or deceit". But then he also warned that it should not be misinterpreted as a license to use the law with the utmost rigor, because

48 Columella, Lucius Junius Moderatus, *Res rustica*, Cambridge, Harvard University Press, 1977, I, VII, 2.

49 Kant, Emanuel, *Fundamentación de la metafísica de las constumbres*, Madrid, Santillana, 1996, p. 45.

50 Kant, Emanuel, *Principios metafísicos de la doctrina del derecho*, Mexico, UNAM, 1978, p. 38.

51 Kant, Emanuel, *La paz perpetua*, Madrid, Tecnos, 1985, p. 57.

this would be contrary to ethical duty, and that its true dimension consisted in the obligation of the holders of power not to deny no one your right. In this way, the justice to which he refers, and this is how Kant understands it, is the one that can be claimed before the authority. For this reason, the German philosopher concluded, "an internal Constitution of the State is necessary in accordance with the general principles of law". There is no room for misunderstanding, and the direct reading of the Latin expression, without the intelligent nuance adopted by Kant, becomes a license to trample in the name of the law.

Tacitus[52] refers to a case for which the Senate discussed the severity of applying the law. In the year 61 the prefect of Rome, Pedanius Secundus, was assassinated by one of his slaves. The irritation was enormous, and it was immediately demanded that an ancient custom, made into law during the reign of Augustus, be applied, according to which when a slave attempted against the life of his owner, all other slaves were to be executed. In this case the victim was a person of great wealth, and the number of his slaves amounted to four hundred.

A good part of the population mutinied, asking for indulgence for the slaves of Pedanius. In the Senate the positions were divided, until the criterion of Senator Gaius Cassius prevailed: the law should be applied. Gaius Cassius declared that Pedanius could "have been rightly killed"; that surely "many innocents would die", and that "the cruelty of that ancient custom" was evident, but that this was the law, and its application was inexcusable. However, the political argument that really convinced the senators was very simple: Rome was filling up with slaves of various origins, and it was necessary to send a dissuasive and forceful message to avoid any action adverse to the interests of power. This must have struck a chord, at a time when Christian religious preaching was progressively gaining a greater number of

[52] Tacitus, *Los anales*, Madrid, Viuda de Hernando y Compañía, 1891, p. 170.

followers. The senatorial decision was based on considerations of the reason of state. This explains why such a drastic provision has been applied, even though the disproportionate sanction has been recognized.

The most precise perspective of the problem of the rigor of the law is offered by Seneca in his exceptional work on clemency. Forced by the circumstance of being the tutor, first, and the advisor, later, of Nero, he formulated a summary of the Stoic policy thinking of guiding the decisions, whose meaning perhaps he already foresaw, of the new prince. The treatise was written before Nero made the decisions that characterized him as a psychopath. It is more than likely that Seneca already noticed the emperor's tendencies, and that is why he begins his treatise[53] by explaining: "I have proposed to write about clemency, O Nero Caesar, to serve you as a mirror".

Putting Seneca's arguments related to the exaltation of Caesarean power on the one hand, "De la clemency" is a profound study of politics from a perspective close to what we would now call tolerance. Seneca himself is in charge of differentiating clemency from mercy, because the former is linked to reason and the latter to the pain caused by the miseries of others.[54] Nowadays, a coincident expression occurs when Zagrebelsky admits[55] that the tensions of the time that runs make converge the "rigor in the application of the law, but also the mercy before its more rigid consequences". Seneca's philosophical legacy overshadows his literary work, and to a greater extent his political work. It must be borne in mind, however, that his political gifts were evident in the doing and saying of Nero, in the early days of his rule. In his first speech before the Senate, the new emperor took up an old principle already enunciated by Aristotle: the separation of power.

53 Séneca, Lucio Anneo, "De la clemencia", *Tratados filosóficos*, Madrid, Sucesores de Hernando, 1913, p. 103.

54 *Ibidem*, pp. 136 and 137.

55 Zagrebelsky, Gustavo, *El derecho dúctil*, Madrid, Trotta, 1995, p. 16.

According to the text prepared by Seneca, Nero launched a democratic proclamation: "that the government of the few should not be given the absolute domination of all";[56] later he stressed that his power and that of the Senate "were separate and different", and that justice only corresponded to the consuls.

Seneca argues around clemency also in the Aristotelian way of the right means: "clemency does not have to be blind ..., because there can be as much cruelty in forgiving everyone as in not forgiving anyone. It is necessary to preserve the middle ground."[57] He adds that the prince must be for his subjects as he would like the gods to be for him: lenient and just. "The gods, in their indulgence and justice, do not immediately punish the crimes of the powerful with lightning...[58]"

There is another important glimpse, which preludes the theses on the reason of state that only appeared until the Renaissance (Machiavelli, Botero, Campanela, Frachetta, Zuccoli, Settala, Chiramonti, etc.): the difference between the tyrant and the prince is that the first he punishes for pleasure and the second for necessity. Also, the dilemma that Machiavelli would raise centuries later appears already in Seneca,[59] when he alludes to an "execrable verse" that, as he says, so many princes had made their own: "that they hate me as long as they fear me". This happened, according to the philosopher, because they did not practice mercy.

What, finally, is clemency? Seneca attributes several characteristics to it: punish without harshness, punish out of necessity, and punish with opportunity. Clemency, he concludes, "is moderation that suppresses some of the punishment due and deserved."[60] The key to clemency is in equity, which allows "abso-

56 Tácito, *op. cit.*, note 52, p. 87.
57 Séneca, *Lucio Anneo, op. cit.*, note 53, p. 106.
58 *Ibidem*, p. 114.
59 *Ibidem*, p. 117.
60 *Ibidem*, p. 135.

lution and assessment of punishments."[61] With this, Seneca again preludes considerations about justice that would only develop eighteen centuries later, when the subject is taken up, albeit from another angle, by Vattel, who in his famous treatise on the law of nations[62] postulated, in the middle of the eighteenth century, that "the very nature of government requires that the executor of the laws has the power to dispense them, when he can do so without harming anyone, and in certain particular cases in which the good of the State requests an exception." Here, the famous Swiss humanist points to a subject to which we will return later: the effects of the non-application of the norm with respect to third parties. The core, on the other hand, resides in the way as precise and clear as he sees the problem, which does not escape the conception of "justice and clemency" that we find from Seneca.

Regarding the non-application of the norm, Seneca refers to a striking case:[63] an edict of the Senate had established, "in another time", that slaves would wear a particular costume that would distinguish them from free men. "Very soon the danger that threatened us was understood if our slaves began to tell us." He then chose not to apply the sanctions provided by the norm, because it was noted that the damage was greater than the benefit it caused.

This fact was not strange to the behavior of the Roman state. Ihering[64] has shown the extent to which there is a marked contrast between the modern state, organized largely to offer tranquility to the governed and attenuate mistrust in institutions and politicians, and the Roman state, with only a few written and many customary norms , in which trust towards the holders of power lay in the controls that they reciprocally exercised among them-

61 *Ibidem*, p. 139.

62 Vattel, Emer, *Derecho natural y de gentes*, Madrid, Imp. Campuzano, 1846, &CLXXIII.

63 Seneca, *Lucio Anneo, op. cit.*, note 53, p. 129.

64 Ihering, Rudolf von, *El espíritu del derecho romano,* Madrid, Marcial Pons, 1997, pp. 167 et seq.

selves, in the short duration of the mandates and in the search for prestige and respect that characterized the performance of public functions, at least from the 4th century BC and until the end of the Republic. An old principle of law formulated by Ulpiano says: *dura lex sed lex*. Its implications are clear: between the harm of applying the law and that of not doing so, the former is chosen. The consequences of relentless rigidity can be vast; worth the literary examples of Victor Hugo in Les Misérables, Heinrich von Kleist in Michael Kolhaas, or Dostoiewski's The Grand Inquisitor. It is about intense moral pictures in which the application of the harsh law leads to the monstrous. The reflections of The Great Inquisitor in the sense of having to apprehend Christ, who had appeared in Seville, and condemn him to the stake, because failure to do so would establish an exception to the rule that would precipitate the collapse of Christianity, also implies the paradox that rigor turns against itself: the system that relies on rigor is destroyed if you stop practicing it and destroyed if you practice it.

But let's go back to Ulpiano. The statement we have mentioned actually expresses a warning contrary to legal rigor. The expression *dura lex sed lex* is an interpolation; the literal text says *durum est, sed ita lex scripta est* ("it is hard, but the law is written that way").[65] The case to which it refers concerns the restrictions on the manumission of slaves, hence, after identifying the rule that prevents divorced women from granting freedom to their servants, recognize that "it is certainly hard, but the law is so written."

It happens that every contemporary political system, fundamentally the most open ones, admits the possibility of limits for the application of the law. These limits consist, precisely, in the freedom of assessment attributed to the representatives so that they determine in which cases, and to what extent, it is possible

[65] Ulpiano, "De los adulterios", *Digesto*, Madrid, Ramón Vicente, 1874, 40, 9, 12, 1o.

to tolerate conduct that transgresses the law. The most frequent cases are those in which tumultuous demonstrations take place that, from the perspective of the strict legal order, can influence actions normally sanctioned. Here the useful typology of power proposed by Jorge Carpizo is applicable,[66] according to which there are six classes of power, one of which is considered original. This power establishes the rules of freedom and legal security, and in reality, it is usually expressed in a regulated and organized way, for example through electoral processes, or spontaneously and sporadically, for example through demonstrations and rallies.

No one is authorized to prevent traffic on the roads; but this limitation does not usually operate when it comes to popular concentrations, authorized or not by the administrative authorities. Cases like that abound. The terms of tolerance are extended, in all democratic constitutional systems, for the benefit of public liberties, beyond the limitations imposed by legal precepts.[67] Societies accept that their representatives enjoy the wider margins of discretion the more consider them legitimate. In other words, the more they distrust their representatives, the more demanding they will be with them in terms of law enforcement.

Under these conditions, the law becomes the object of ritual and textual application. The holders of power cannot exempt anyone from this process because they are not favored by collective trust either. It happens, however, that every society requires escape valves for daily tensions, which represent spaces for tolerance. When these spaces are lacking because there is also a lack of confidence in the suitability of the representatives, the hardening of social life ensues, in the name of society but to the detriment of itself.

Although it is not a question of high political relevance, it is an example that can be mentioned because of the lively contro-

66 Carpizo, Jorge, *Nuevos estudios constitucionales*, Mexico, Porrúa, 2000, p. 333.

67 See Voltaire, "Traité sur la tolérance", *Oeuvres completes*, Paris, Garnier, 1883.

versy that it aroused, and because of the effects it had on the exercise of fundamental freedoms, particularly those of creation and expression. In 1892, Oscar Wilde announced the presentation of his drama Salomé, played by Sarah Bernhardt. The official responsible for authorizing the public presentation prevented the premiere, claiming that an old ordinance prohibited the showing of biblical scenes in the theater. Although this ordinance was only repealed in 1968, from October 1931 it ceased to apply, precisely to allow, finally, the premiere in London of Wilde's work.[68]

We also find another illustrative example in Germany. Shortly after German reunification, human rights fighter Bärbel Bohley[69] claimed: "we wanted justice and they gave us the rule of law". Indeed, those who immediately after the reunification of Germany wanted to bring to justice those responsible for numerous human rights violations, found that the rule of law does not allow the retroactive application of the law. This case raises a partial opposition between the rule of law and reality, although in the opposite direction to the one we have been supporting. According to Ms. Bohley's thesis, the rule of law constituted an obstacle to justice, while according to our approach, the rule of law is not interrupted by the exceptional non-application of the rule. Failure to apply the rule that prohibits the retroactive effects of the law would have meant serious harm to individuals and the legal order.

Despite the fullness of the legal order, it must be admitted that not everything that happens in the life of a society can be normatively foreseen and regulated. Democracies, as open systems, are exposed to considerable vicissitudes. Due to their own characteristics, these systems even allow behaviors that are contrary to them. Tolerance is the great virtue of democratic systems, but it is also its most vulnerable point. Dictatorships col-

68 Hyde, H. Montgomery, "Introduction", *Oscar Wilde. The Complete Plays*, London, Methuen Drama, 1988, p. 27.

69 Münch, Ingo von, "¿Estado de derecho versus justicia?", *Estado de derecho y democracia*, Buenos Aires, CIEDLA-Konrad Adenuer Stiftung, 1999, p. 279.

lapse when the excesses of intolerance leave no other way out than violence; while democracies break down when tolerance is transformed into defenselessness.

Discretion has two dimensions: the arbitrary and the one that we can consider according to the rule of law. Regarding this, the original argumentation appears in Aristotle,[70] and refers, fundamentally, to the inability of the legislator to foresee all possible behaviors. "The law, he says, does not retain more than ordinary cases, without ignoring on the other hand its insufficiency." Hence, the "proper nature of equity is to correct the law, insofar as it is insufficient by virtue of its general nature." However, the philosopher then examines another question that acquires an ethical dimension, because the "equitable man" is one who "does not adhere to his rights with excessive rigor", and even agrees to "take less than his share, even having the law on his side". As you can see, these are two different issues.

Although the problem that Aristotle analyzes corresponds to what we could call loopholes in the law, he also refers to the "rigor" in the exercise of proper law, which is a different matter. In the first case, there is a behavior that the norm does not foresee; in the second, there is a regulatory provision, but it is admitted that its application may result in a harmful excess. This is the topic that interests you now. Therefore, it is not a question of what contemporary administrative doctrine has been examining as the discretion of the administration to regulate the law or to stop doing so; or to carry out administrative acts with wide decision margins, such as when contracts are signed or permits, or concessions are granted. That is not the issue; what is raised here is in which cases, having an express provision, the authority body can stop coercively applying a norm without violating the rule of law. Furthermore, it is necessary to determine whether there are circumstances in which the discretion of the governing body

[70] Aristotle, "Ética nicomaquea", *Obras*, Madrid, Aguilar, 1982, 1137 b, 1138 a.

forms part of the rule of law, and in these cases, what is the limit and who determines it.

The extreme of discretion is expressed with the well-known Spanish colloquial expression: "there go laws where kings want them". The origins of this locution are certainly funny. Mariana[71] refers that in 1088 a curious matter arose at the court of Castile. For several centuries, Gothic stone had been used; but the Crown, in agreement with the papacy, proposed to introduce the Roman breviary. As the use of the first text was deeply rooted and the population did not willingly accept the substitution, it was agreed to settle the dispute through formal duel. In the throwing of arms, the knight who competed in favor of the ancient breviary won. For this reason, a second challenge was decided, which consisted of putting both missals on the stake, remembering that the one that was not consumed by fire would prevail; but the Roman missal was "scorched." Faced with this circumstance, the king decided that the Gothic breviary was applied in the oldest churches, called "Mozarabic", and the Roman one was used in the other temples. The defeated traditionalist sector quickly coined the answer: "there go laws where kings want them". The experience and the expression present a good picture of a stage in which monarchical authoritarianism was not fully consolidated, but in which the tendencies of concentration and discretionary exercise of power were already being pointed out.

The problem of discretion has not disappeared. When Wade,[72] for example, raises a series of objections to Dicey's ideas on the rule of law (*Rule of Law*), he emphasizes that the British constitutional system admits many discretionary powers of the government, the exercise of which in all case is subject to the assessment that the courts make of them. Administrative doctrine has extensively developed this topic, also approached from

[71] Mariana, Juan de, *Historia de España*, Valencia, Benito Monfort, 1787, IX, XVIII.

[72] Wade, H. W. R., *Derecho administrativo*, Madrid, Institute of Political Studies, 1971, pp. 11 et seq.

the perspective of the theory of the state,[73] and it is a minimally controversial aspect at present. What now is necessary to determine is whether the government authority can make exceptions in the application of specific norms, on the grounds of not causing damage greater than that which would result from that application.

In examining the semantic implications of the English expression "to enforce the law," which is often translated into French and Spanish as "apply the law," Derrida formulates a series of useful considerations for the purpose of this study. The real meaning is directly related to the force of the law, and implicitly that force is translated into its application. It corresponds, as Derrida also points out, to Kant's idea of the categorical imperative:[74] an action that is objectively necessary by itself. Now, the problem is not in the coercibility of the norm, but in the circumstantial decision not to exercise that coercion. The norm does not cease to be so because it is not enforced, in the example invoked by Derrida. Simply, the body of power in charge of its application makes the decision, in accordance with a rule of powers (rule A), not to apply the sanction provided for by the rule infringed (rule B). It is at this point where we have to determine if the rule of law is altered when the secondary (coercive) rule is no longer applied.

On the other hand, in the face of the enforcement thesis referred to by Derrida, US law has also developed the so-called norm of justifiable nonenforcement[75] and the concept of "departure from the norm",[76] which for our part we refer to as "nonapplication "of the rule. Some officials are explicitly authorized to enforce the law "according to their own discretion."[77] This

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73 Zippelius, Reinhold, *op. cit.*, note 14, pp. 313 and 331.

74 Derrida, Jacques, *Fuerza de ley*, Madrid, Tecnos, 1997, p. 38.

75 Ugartamendia Eceizabarrena, Juan Ignacio, *La desobediencia civil en el Estado constitucional democrático*, Madrid, Marcial Pons, 1999, pp. 401 etseq

76 "*Lawful departure from legal rules*": Kadish, Mortimer y Kadish, Sanford, *Discretion to Disobey*, Stanford, Stanford University Press, 1973.

77 *Ibidem*, pp. 44, 72 et seq.

is the case of officials in terms of their powers to apprehend or not to apprehend lawbreakers in special circumstances (for example, demonstrations street); from prosecutors, who may not pursue specific individuals (for example, protected witnesses); of the judges, whose possibilities of assessing the seriousness of the crimes is very wide, and of the rulers themselves, state and national, who can exercise the supreme attribution of pardon (pardon or amnesty).

Alongside this "delegated discretion" (explicit) there is the figure of "legitimate filing",[78] which occurs when officials justifiably separate themselves from the competition rules that regulate their activity. As can be seen, the key is that this omission is "legitimized". At this point the concept of legal system intervenes.[79] It is a useful concept, because regardless of the particular norm that is not applied, the system contains a whole set of principles and provisions that are permanently complied with, and that they are not affected by the exception. Here the exception is justified insofar as it contributes to the ends of the legal system and, to this extent, the rule of law. This partial and exceptional non-application does not correspond, therefore, to the validity collisions referred to by Alexy,[80] when he warns that the rules cease to be effective when they are not "generally" obeyed or the sanction corresponding to its infringement.

Legitimate filing, or non-application, cannot be confused with usurpation or violation of the law. In the first case, the agent of the authority would be acting in accordance with the powers attributed to another body; in the second, he would be incurring an action or omission sanctioned by the norm. The non-application to which we refer does not consist in usurping the functions of another agent of the authority nor is it carried out to violate the norm, but to avoid a greater damage than that which its application would cause.

78 *Ibidem*, p. 66.

79 *Ibidem*, pp. 184 et seq.

80 Alexy, Robert, *El concepto..., cit.*, note 13, pp. 90 et seq.

This is, of course, a highly controversial aspect, because it suggests the recognition of discretion in the actions of law enforcement officials. It is the type of question that Dworkin[81] calls "embarrassing" because they do not have a satisfactory answer for everyone. According to Dworkin[82] there are three forms of discretion: the action that is carried out within the margins of reasonableness allowed by the norm; the action that does not admit further review, and the action that is carried out under the strict responsibility of the agent. Looking closely at the differentiation adopted by Dworkin, we see that the true element to distinguish the levels of discretion lies in the definitiveness of the decision.

Perhaps the most complete positive formula, which allows overcoming the risk of discretion based on the reasonableness of the actions of the agents of authority, has been the one coined by Professor Meijers, considered the most prominent Dutch jurist of the 20th century, that from 1958 prepared the draft of the new (1994) Dutch Civil Code. Article 248-2 establishes that "a rule that governs between the parties as a result of the contract is not applicable, insofar as this application is inadmissible in the given circumstances, according to the criteria of reason and equity". Here we find an additional factor to that of equity: the rationality of the norm and, eventually, its non-application. It is true that this introduces new problems, because determining the rationality of the rules and of the decisions that lead to their application or non-application opens a new and wide space for reflection; I point it out only as a perspective on which it will be necessary to continue deepening, which results from the suggestive innovation of the Dutch Civil Code. For its part, the 1999 Swiss Constitution introduces (article 5) a new concept as an element of the rule of law: state bodies, like individuals, must act in good faith. This

81 Dworkin, Ronald, *A Matter of Principle*, Cambridge, Harvard University Press, 1985, p. 14.

82 *Ibidem*, pp. 31, 32 and 69.

supposes that the possible cases of non-application of a norm cannot be considered as an act of leniency or as an adverse precedent to the legal system, but rather as a decision aimed at preventing social cohesion from being affected, which is one of the the basic objectives of the state.

Another important point of view is the one supported by O'Donnell,[83] which underlines the obligation of the authority to apply the norm, which implies certainty for the governed and control of the authority's action and adopts the thesis of Raz[84] on the characteristic elements of the rule of law, which includes a total rejection in relation to the discretion of crime prevention agencies. Notwithstanding this, Raz also offers a broad argument concerning compliance with the law, by "on innumerable occasions an act in violation of the law has no adverse consequences,"[85] which O'Donnell apparently does not share. Raz's thesis regarding compliance with the law does not rule out margins for "administrative discretion,"[86] if it is controlled.

In the case of non-application of the rule, without violating the rule of law, it must be a decision revocable by the agent who adopted it, or modifiable by a control body. Otherwise, lacking the possibility of rectification, the discretion could translate into arbitrariness. Of course, not all the risks that are run with the non-application of the norm concern the possible excesses on the part of the authority. Another phenomenon that is equally harmful to legal security and freedoms may arise: inducing collective practices of breaking the norm as an instrument to achieve certain reasonable objectives that could also be achieved through legal procedures.

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83 O'Donnell, Guillermo, "Polyarchies and the (Un) Rule of Law in Latin America", document presented at the Meeting of the Latin American Studies Association, Chicago, September 1998, p. 12.

84 Raz, Joseph, *op. cit.,* note 3, p. 272.

85 *Ibidem*, p. 323.

86 *Ibidem*, p. 277.

An aspect worthy of consideration is that of the effects of the non-application of a norm in relation to third parties. In general, this is an issue whose relevance has focused on the direct relationship between the subject to whom the norm does not apply and the subject who ceases to apply it, without the rule of law being violated in principle. However, it is necessary to consider the situation of third parties, to whom the non-application of the norm may cause damages greater than the benefits that would result from the application of the norm.

Let us use once again the example of violent demonstrations, consented on the basis of the principle of tolerance in the exercise of public freedoms. In this case, we not only have the relationship between protesters and agents of the authority; it could also happen that the rights of transit and assembly of third parties are affected, regardless of the property damage that the protesters may have caused them. In this circumstance the problem is considerably complicated because the major damages that are avoided on one side occur on the other. An extremely complicated situation can arise in which, on the one hand, the sanction is not applied to the offender and, on the other, and to the same extent, the right of the affected party is left unprotected.

Non-application of the rule faces a huge problem when it comes to third-party effects. This problem obliges, in the first instance, to determine who should be considered as third parties in the cases to which we refer, because if such a concept were extended to the entire society in which the events occurred, it would be difficult to explain many cases of non-application of the norm in which it is not involved to avoid significant social damage. Society, therefore, cannot be considered as an injured party in the cases to which we have referred in this study. On the other hand, it is very clear that there are specific people who can suffer the effects of the non-application of the rules.

The case of those who are prevented from traveling, working or meeting has already been mentioned. Equity damages can also occur, either because an asset is affected, or because, as with un-

regulated itinerant commerce, the legitimate expectations of the businesses established in accordance with the norm are affected. Once again it is evident that the measures of non-application of the norm must be transitory; especially if the negative effects are partially absorbed by third parties.

Another aspect that is very important to take into account when referring to third parties is that the punishable acts in relation to which a rule is no longer applied are not directed against those third parties, but rather constitute conducts that mainly concern the bodies of the state. If the non-sanctioned conducts had been directed exclusively or deliberately to cause some type of affectation to other members of society, the non-application of the norm is inexplicable from the point of view of the rule of law. One thing, for example, is the holding of demonstrations that limit the transit of people, but in which case the direct objective is not exactly that, and another is the sabotage practices that affect sources of work. In this case, the action is directed directly against specific individuals or legal entities.

The issue of third parties has not been satisfactorily resolved in any positive system. Not even in the states where there are instruments to claim civil liability from the administration, have they been used to claim compensation for damages caused by tolerance in relation to certain behaviors that are harmful to the interests or rights of third parties. For example, when the communication channels in Europe have been blocked, due to an action outside the norm of the carriers, no one has even tried to demand the consequent reparation on the part of the authorities who, in this case, stopped applying the norms to the transgressors.

Of course, it is not possible for the authorities to use force majeure as a defense, because they would denote that their inaction was not due to a decision of prudence and tolerance, but of strict impotence; this would be incompatible with the very nature of power. In this case, what can give us a reasonable explanation to admit that in certain circumstances third parties absorb the

negative effects of the non-application of the rules is, once again, the theory of representation. Only in this way is it explainable that third parties are forced to accept the effects of the non-application of the rules; those who make decisions do so based on the legitimate representation they hold, with which the legal effects of their decisions are transferred, despite the possible damage, to those represented. Otherwise, there would be no theoretical solution to this problem.

VII. Representation and Legitimacy

The problem of political representation constitutes one of the fundamental themes in the organization of the contemporary state. The legitimacy of the political systems as a whole depends, to a large extent, on an adequate representative system. When the representation ceases to function in the terms prescribed by the constitution or expected by the citizens, there is a fracture in the legitimacy of power.

This is a matter of great importance, because the rule of law depends on the action of the representatives. It is usually considered that the legality of the conduct of the rulers corresponds to their adaptation to the precepts of the law. This is what is often called the rule of law. But it happens that in addition to legality, the representatives are required to have come to power through procedures considered by the entire community as reasonable, free, objective and equitable.

Regardless of the traditional conceptions about the rule of law and the concept that we have adopted in this work, there is an observation by Dworkin in which it is necessary to stop. He warns[87] that there are two "conceptions" of the rule of law: one according to which the power of the state can never affect individuals, except in accordance with express norms of competence and another that corresponds to the perception that individuals

[87] Dworkin, Ronald, *op. cit.*, note 81, pp. 11 et seq.

have in the sense of being holders of rights before third parties and against the power as a whole.

Although in general terms both conceptions are part of the same legal reality, the differentiation is useful to understand the different attitudes that exist before the rule of law. Therefore, in addition to what Dworkin pointed out, a third category must be added: the one that corresponds to those who consider that the rule of law only applies when the organs of power act for the preservation of what a certain number of people understand that they are their rights, compared to several other people who are considered to be violators of those rights.

According to this scheme, perceptions of the rule of law vary depending on whether they come from individuals, in their direct relationships with other individuals and with power, or in their relationships with other individuals through power; or they come from power itself in its relations with individuals, or from the organs of power among themselves.

All these elements depend, to a large extent, on the subjective appreciation of the collective entity called political society. When, according to the prevailing general perception, the mechanisms for attributing power to representatives are reasonable, free, objective and equitable, society is willing to obey the decisions of those who represent it; when this is not the general perception, the bases of civil disobedience begin to appear.

This issue is one of the concerns that affect many societies. Many of the phenomena that are noticed on a daily basis and are classified as part of a process of institutional deterioration correspond to the loss of the generalized conviction of the legitimacy of the representatives. One of the most frequent manifestations in this regard is disdain for politics. It even goes to the paradoxical extreme that the political protagonists themselves express their contempt for politics.

The downside is that the discrediting of politics often precedes autocratic episodes, now euphemistically called "authoritarian." Indeed, a few decades ago, "authoritarianism" began to

be spoken of as a way of softening the references first to Nazi totalitarianism and then to the Franco dictatorship. The term prospered, especially with the impulse that Juan Linz gave it, and now operates as a substitute for what is nothing other than the propensity to concentrate power in the hands of a person or a group. The loss of prestige of politics has a double effect in terms of legitimacy: on the one hand, citizens begin to view with suspicion all those who aspire to represent them, and instead of appreciating them for their political merits, they value them precisely the opposite: for lacking the blemishes that the exercise of politics brings. Thus, honesty ends up being attributed to the inexperienced, simply for not having had contact with the political task. This leads some societies to accept proposals of manifest irresponsibility and demagoguery as the most appropriate to solve the problems generated by politicians.

The generalized conviction of the legitimacy of the representatives is at the origin of the collective and voluntary compliance with the authority. It is known that when authority is exceeded, there are adequate means to correct the mistake, but that in general terms there is a guarantee of effectiveness and objectivity in the action of the organs of power. This even makes it possible to solve one of the most serious problems facing the state: that of the limits of the law.

No constitution establishes where the point of equilibrium is. This aspect corresponds largely to politics. That is why law is the ethical content of politics, while politics is the practical exercise of law. Whoever hopes to find all the solutions to power problems in the letter of the codes runs the risk of being wrong; and whoever ignores that the law has limits, beyond which it is necessary to act based on the precepts of politics, he runs the risk of being left without answers.

Rodolfo Vázquez[88] has shown that the rule of law implies an ethical content. How to frame, from that perspective, the non-ap-

[88] Vázquez, Rodolfo, *op. cit.*, note 27, pp. 86 et seq.

plication of the norm? The best constructed argumentation, capable of being applied to this problem, is the one offered by Max Weber[89] when he distinguishes between the ethics of conviction and the ethics of responsibility. The first concerns action without considering its consequences; the second corresponds to the decision taken from foreseeing its effects. As Weber points out, the two are not necessarily incompatible, but what is also obvious is that in certain circumstances the decisions to apply a norm or not should be made with the choice of conviction or responsibility in mind. Surely in cases where non-application is chosen, the criterion of responsibility will prevail, while in cases where regulatory rigor is preferred, the ethics of conviction will be dominating. It will be a situation in which, in effect, it will be preferred that justice be done even if the world perishes.

The rule of law consists in the adaptation of the acts of power to the letter of the law. However, the law itself provides for the possibility of extreme cases, outside of its express regulation. It is not a contradiction, provided that the possibility of situations not covered by the legislative provisions is allowed, in which case the solutions will have to be found in the principles of law. We know, of course, that these principles are also rules in the broad sense; that is why we make this reservation to underline the lack of foresight of a behavior by a rule. The Mexican Constitution provides (article 14) that "in civil trials, the final judgment must be in accordance with the letter, or the legal interpretation of the law, and in the absence of this it will be based on the general principles of law." The limits of this provision have been clearly noted by Héctor Fix-Zamudio and Salvador Valencia,[90] while the separation between application and interpretation of the law has given way to the concept of integration, "whose scope is still con-

89 Weber, Max, *El político y el científico*, Madrid, Alianza Editorial, 1979, pp. 163 et seq.

90 Fix-Zamudio, Héctor and Valencia Carmona, Salvador, *Derecho contitucional mexicano y comparado*, Mexico, Porrúa-UNAM, Institute of Legal Research, 1999, pp. 142 et seq.

troversial." However, it is admitted, as the authors point out, that the application of a norm is impossible without its prior interpretation. For our case, what is relevant is to underline that the interpretation alone does not generate controversies in the sense that, when it is restrictive in terms of the effects of the rule, it conceals hypothetical acts of non-application of the rule.

In this sense, it is also appropriate to bear in mind that the Civil Code for the Federal District (article 19) includes the constitutional precept and even extends its consequences, since it refers not only to sentences but, more generally, to "judicial controversies". The genesis of these devices is in the civil codes of Austria, of 1812, and of Sardinia, of 1837. Later they passed into Spanish legislation and appeared in Mexico in the Civil Code of 1870 and in the Constitution of Querétaro. The civil doctrine has resolved this statement, but a question can be validly formulated: is the supplementary application of the general principles of law by judges valid only in matters of a civil nature?

Does it not also proceed in matters of a political order and by administrative authority? The "expansion of the normative force of the principles"[91] should be explored in that direction, beyond the power of the judge to invoke the principles in certain cases.

Another question also arises: the supplementary application is allowed when there is no legal provision for the case in question. Now the question is to determine whether or not whoever applies the law is in a position to choose between the lesser evil and the greater evil that results from applying or omitting the law. In other words, there are extreme situations in which the cost of applying the law may be greater for the community than that of not applying it. This seems like a paradox, but if we examine examples obtained from reality, we will see that it is not so much.

In 1999, the Turkish courts imposed the death penalty on the well-known Kurdish leader Abdullah Ocalam, based on the

[91] Hierro, Liborio, *Estado de derecho. Problemas actuales*, Mexico, Fontamara, 1998, pp. 36 et seq.

numerous and cruel attacks that he ordered and carried out, in which many people lost their lives. Ocalam's response was swift: his execution would be followed by a wave of terrorist attacks. The European community reacted in a way that does not correspond to the strict application of the law: it asked the Turkish government to annul the court ruling. Is this reasonable?

This is not a case in which the law does not provide the keys to resolve a specific situation. On the contrary, the Turkish penal provision in the case of murderers is very clear. But it happens that the application of the law can represent greater harm to society than its omission. This is what we call the limits of the law.

Another case is the one that is spreading in the penal provisions, especially in countries severely affected by organized crime. A form of mitigation of the rigor of the law has been developed in relation to the "repentant", or to those who offer relevant information to be able to prosecute other criminals. These are exceptions to the strict application of the law, in order to avoid a greater harm or to obtain a greater advantage.

The Rome Statute of the International Criminal Court, approved in July 1998, establishes in its article 16 that the Security Council of the United Nations Organization can ask the Court to suspend an investigation or a prosecution for up to twelve months. The same provision indicates that this request may be renewed by the Security Council. In this way, an investigation or a procedure already initiated may be suspended for strictly political reasons. It is not a small thing, if one takes into account what is the jurisdiction of the International Criminal Court (Statute, article 5): genocide (for example, killing of group members, preventing births within the group, transfer by force of children from the group to another group), crimes against humanity (for example, extermination, slavery, torture, violation of fundamental norms of international law, forced disappearance of persons, sexual slavery, forced prostitution, persecution for religious, racial, or sexual reasons), war crimes (for example, attacking civilian targets, intentionally attacking hospitals, subjecting prisoners

of war to physical mutilation and medical and biological experiments, inflicting severe suffering on the population, or seriously damaging the physical integrity or health of the population), and the crime of aggression, the definition of which is still pending.

As can be seen, the Statute of the International Criminal Court expressly provides for the non-application of sanctions, leaving the decision in the hands of a political body and without forcing it to find and motivate its determination. Nor does it regulate the conditions under which a decision of that magnitude can take place.

In these circumstances, it must also be borne in mind that the holders of the organs of power normally carry out their duties after taking an oath to comply with and enforce the law. When they do not do so based on considerations close to those justified by states of exception, do they incur a punishable offense? All democratic constitutional systems include provisions applicable in cases of extreme tension, according to which it is possible to suspend the effects of one or more norms of the constitution itself. In this case, it is a question of facing risks of considerable magnitude for the validity of the constitutional order; but how to deal with minor cases, which are also likely to cause harm to the community and the legal order of the state?

What should be done in situations like this? Take the route of inflexibility, even when it leads to a likely conflict greater than the problem you are trying to solve, or do your best to overcome it? Which of the two options represents lower social costs? The doctrine and the law recognize that special treatment should be applied to people who, in a state of need, engage in punishable behavior. Can the concept of the state of necessity be extrapolated to the organs of power when it comes to protecting public freedoms?

Note that it is a situation exactly opposite to the state of exception, which corresponds to the old reason of state. If the power can partially and temporarily limit some public freedoms and

individual rights, is it prevented from doing the opposite, and in extreme situations expanding the threshold of tolerance and freedoms, beyond what the norm establishes? Until now, the possibility of restricting the space of social and individual freedom under exceptional conditions is accepted by practically all constitutional systems. Are there not exceptional conditions that justify precisely the opposite: to expand and guarantee that space?

The Constitution of Guatemala (article 155) contains a unique provision: there is responsibility of public servants when "they break the law to the detriment of individuals". It operates as an analogous principle to the one that prohibits the retroactive application of the law "to the detriment of any person." If retroactivity that favors people is admitted, apparently in the Guatemalan system the infringement of the law is also admitted when there is some benefit for the recipients of the norm.

In political practice this is the case and has always happened in open systems, only that the problem has not been addressed in terms of its multiple theoretical implications. One of the problems that arise, in these cases, is that of opening the doors to the discretion of the rulers, with the risks for society that this implies. That is why the issue of representation has to be linked to that of legitimacy. As representation is not imperative, certain margins of appreciation can be left to the representatives so that, in extreme circumstances, when the damage to public liberties resulting from the strict application of the law is greater than that of its partial omission, opt for this last decision. This is only admissible insofar as the nexus of trust that legitimizes the holders of the organs of power is based on the recognition of their public virtues, which Aristotle[92] already warned as the requirement of obedience that the governed impose on the rulers.

It is a transcendent issue. On many occasions the authority cannot solve certain challenges only with the law in hand; there are also issues in which effective political solutions must be adopt-

92 Aristotle, *Politique*, Paris, Les Belles Lettres, 1991, IV, 4, 17.

ed that do not cause greater harm than is desired. A problem is not solved by creating another, but neither by avoiding it. These political solutions, however, cannot be alien to the legal order, at least in a democratic constitutional system. Political agents must make appropriate decisions to solve specific problems of social coexistence, but in no case can it be understood that the non-application of a specific norm opens the doors to discretion, and that the norm becomes an instrument of political coercion.

President Porfirio Díaz is credited with having expressed: "For my friends, justice and grace; for my enemies, just justice". This phrase synthesizes the risk of putting the determination of the limits of the law in the hands of political agents. For this reason, when reference is made to the political decision not to apply a norm, it should not be implied that this decision is made outside of any norm. Political acts, in a constitutional system, always have a legal basis. Otherwise, the prevailing order would not be the constitutional one. The political aspect of the decision resides in the assessment of the circumstances and in the choice of the corresponding action. Let us suppose that the fact before which the authority is faced consists of the violent demonstration of a group and the consequent interruption of a public road. The agents of the authority will have two options: to apply the penal norm or, extending the effects of the freedom of assembly and expression of ideas, to tolerate the facts.

At this point, it is convenient to establish that, in addition to the fact that in all cases the political decision must have a legal basis, it must also be assured that the representative system, the only one that allows decisions to be subject to political control, is working. In politics it is even more difficult than in the field of civil relations to foresee all possible circumstances in the life of a society. Hence, trust in political representatives is so important. The greater the conviction of its legitimacy, the greater the space for tolerance that all citizens will enjoy. The problem of representation has been examined from many different perspec-

tives. Kelsen[93] regards representation as a legal fiction, and for Rousseau it is nothing more than a democratic fiction. However, Rousseau, in his study of the Constitution of Poland (VI), had to admit, unlike the Social Contract, that there were aspects of political life that could only be resolved through representative procedures.

At present, no one disputes those democratic systems require mechanisms of representation. Only Swiss democracy is based on instruments of direct democracy. But the problem of our time must be seen in another dimension:

How "representative" is the "representation"? Electoral systems, media influence, the action of interest groups, and "globalization" itself are factors that influence the functioning of representative systems. It is a political and legal fact that the representatives are not linked to those represented[94] other than by very tenuous ties that do not imply an imperative mandate for those who receive a favorable vote. In this sense, the criticism of Rousseau[95] is also redeemable when he pointed out that British citizens were only free during the fleeting moment in which they were voting. The democratic corrections of representation are various.

One is the so-called recall, or revocation, which is applied in constitutional systems such as the Swiss and the Venezuelan, but which entails a clear contradiction with the representative system;[96] another is the use of forms of direct consultation with citizens, such as the plebiscite and referendum. One more, the most effective, is the possibility that the voter re-elects or not his

93 Kelsen, Hans, *Teoría general del derecho y del Estado*, Mexico, UNAM, 1979, pp. 343 et seq.

94 Carré de Malberg, R., *Teoría del Estado*, Mexico, Fondo de Cultura Económica, 1998, pp. 956 et seq.

95 Rousseau, J. J., "Du contrat social", *Oeuvres politiques*, Paris, Garnier, 1989, III, 15.

96 Manin, Bernard, *Los principios del gobierno representativo*, Madrid, Alianza, 1998, p. 201.

representative. The latter is practically universal in application; there are very few cases, as is the case in Mexico and Costa Rica, in which successive reelection of legislators is prohibited. This limitation means, in the Mexican case, a strong conditioning to the democratic nature of the representative system.

However, no corrective guarantees the proper functioning of the representative system. The electoral systems have not succeeded in banishing the clientelist practices that accompany a good part of the elections. Nor have they been able to prevent the hegemony of the directive groups of the parties, which condition the electoral freedom of citizens. For its part, the influence of the media on citizens is closely related to the ascendancy of large economic interests over the media. This also could not be resolved.

Regarding the forms of direct consultation with citizens, they basically present two limitations: on the one hand, it is not possible to ensure the objectivity of the propaganda action of the parties and the advertising of the media;[97] on the other hand, the use of consultation plebiscite usually puts in the hands of the heads of government a powerful instrument to subdue the congresses, or at least to reduce their importance and autonomy.

Finally, the procedures for re-electing representatives are also liable to generate distortions. For this reason, in some constitutional, national and local systems, there has been a tendency to adopt limits for reelection. These are the cases of numerous states of the American Union.[98]

As can be seen, there is a direct relationship between the forms of representation and the idea of legitimacy. What is not easy to resolve is the relationship between legitimacy and the rule of law, in terms of the unregulated powers that the holders of the

[97] Habermas, Jürgen, *Historia y crítica de la opinión pública*, Barcelona, Gustavo Gili, 1994, ch. VI.

[98] Tarr, G. Alan, *Understanding State Constitutions*, Princeton, Princeton University Press, 1998, pp. 170 et seq.

organs of power exercise, in the sense of not applying a rule in exceptional circumstances.

It has been seen that it is a question posed for more than twenty centuries, for which there is an answer in the world of politics, but not in law. Here, therefore, we are faced with a contradiction that may be apparent or in the background. It would be fundamental if, in all the cases in which the non-application of the norm was registered, we were faced with the rupture of the rule of law; but what in reality we can verify is that where the legitimacy of the exercise of power is not questioned by other concepts, it is not always questioned by the act of non-application; however, where the legitimacy of power is questioned, not only all acts of non-application are rejected, but even those of application of the norm.

Weber[99] points out that the application of the law can be irrational and considers decisions that depend "essentially on concrete evaluative appraisals of an ethical, sentimental or political nature and not on general norms" as materially irrational. As non-application is a decision, it could be read that, in the same way, it can be irrational. Now, the cases of non-application of the norm to which I have referred in this study are considered justified insofar as, far from affecting individual and collective rights, they seek to avoid greater damage in the sphere of fundamental rights than the that would occur if the standard were rigorously applied. It is not, therefore, a consideration of an ethical, sentimental, or political nature, but a legal one, so that the irrational action referred to by Weber would not be incurred.

There is another matter to clear. French doctrine coined the concept of excess power to refer to the acts of the administration carried out by incompetent bodies, or by competent bodies that do not comply with the legal formalities or incur in misuse of power. The latter case consists of using the power of attorney for

99 Weber, Max, *El político*..., *cit.*, note 89, p. 511.

purposes other than those entrusted to it.[100] Nor is this the case that arises here, since the non-application of the law to which reference has been made addresses the opposite: not to affect the sphere of fundamental rights of the governed.

Noting the presence of government acts that are difficult to explain in the legal system, Merkl[101] tried to find an explanation by identifying the possible existence of meta-legal acts. This is an interesting exercise that shows that every act of a state organ is, by necessity, legal.

In the legal order, perhaps there would be a conceptual solution in the pure theory of law. If we admit, with Kelsen, the identity of the state with the law,[102] we will find that the non-application of the norm is a legal act and, as such, produces effects. Who or those who consider themselves affected by that legal act are able to oppose it, in accordance with the requirements and formalities established by law. When the consent of the non-application of the law is produced, it could be considered that the authority body acted within the limits of respect for the fundamental rights protected by the constitutional order. This conclusion, however, would be clearly contrived and unsatisfactory.

What specific acts are referred to when speaking of "not applying" a rule? To understand the problem statement, it will be useful to refer to a case lived in Mexico for decades. Article 130 of the Constitution provided, until before the 1992 reform, that "the ministers of worship may never, in a public or private meeting constituted as a board, or in acts of worship or religious propaganda, criticize the fundamental laws of the country, the authorities in particular or the government in general...". The 1992 reform removed the reference to private gatherings and replaced the prohibition of criticizing laws with that of "opposing laws".

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100 Hauriou, Maurice, *Précis de droit administratif et de droit public*, Paris, Sirey, 1921, pp. 422 et seq.

101 Merkl, Adolf, *Teoría general del derecho administrativo*, Mexico, Editora Nacional, 1975, pp. 62 et seq.

102 Kelsen, Hans, *Teoría pura del derecho*, Mexico, UNAM, 1979, pp. 291 et seq.

The application of the precept was one of the reasons why a religious conflict broke out between 1926 and 1929, which resulted in an armed confrontation. When the fighting ended, the precept remained in force but was no longer applied. When it was reformed, more than sixty years later, it was expressly recognized by the organs of power that the norm lacked positivity.[103]

The religious conflict that Mexico experienced between 1926 and 1929 could only be overcome by the establishment of a modus vivendi that meant the non-application of the norm. In the phase of negotiations promoted by the North American ambassador Dwight Morrow, the priest J. J. Burke addressed a note to President Plutarco Elías Calles (March 29, 1928) in which he said:

> ...the Mexican bishops have believed that the Constitution and the laws, especially the one that requires the registration of priests and that which attributes to the states the right to fix the number of priests, applied in a spirit of antagonism, threatens - They would recognize the identity of the Church, giving the State the power to control spiritual matters. I am convinced that the Mexican bishops are encouraged by sincere patriotism and long for lasting peace. I am also convinced that they wish to resume public worship, if this can be done in accordance with their loyalty to the Mexican Republic and to their consciences. I believe that this could be carried out if they were sure of a tolerance within the Law that would allow the Church to live and freely exercise her spiritual activities...[104]

To this note the president replied: "...I and my collaborators are always ready to listen to any person, dignitary of a Church or simple individual, who complains about the injustices committed by an excess in the application of the Law. "[105] The conflict was finally resolved. The Pope accepted (July 20, 1929) a "secular"

103 Diario de Debates, Chamber of Deputies, December 16, 1991.
104 Meyer, Jean, *La cristiada*, Mexico, Siglo XXI, 1988, t. II, p. 319.
105 *Ibidem*, p. 320.

solution; and by "secular" it was understood "in accordance with the laws."[106] On July 21, a group of bishops met with President Emilio Portes Gil and the Secretary of the Interior, Felipe Canales, and reached the agreements that put an end to the conflict religious. A year later, Archbishop Pascual Díaz declared that "the existence of the Church with all its rights and freedoms was in fact recognized, and to that end the government has committed itself that the laws, while their modification is achieved, are applied with a benevolent interpretation."[107]

VIII. Final Remarks

Hobbes[108] formulated the first concept of fundamental law: it is one that offers support to the existence of the state. There are, therefore, laws whose absence or failure does not pose a risk to the very subsistence of the State. He later offers a suggestive differentiation between law and law. The first, he said, concerns freedom, while the second corresponds to obligations, and is therefore restrictive of freedoms.

Hobbes did not develop his concept of fundamental law with greater precision, but it can be inferred that it is the norm from which the complete legal order derives, integrated, following his reasoning, by rights and laws. If we wanted to use these elements to identify those that correspond to the rule of law, we could conclude that it is in the fundamental norm and in the concept of law as the axis of freedom that the idea of the rule of law resides. Hence, not every violation of the rule constitutes a bankruptcy of the rule of law.

106 *Ibidem*, pp. 339 and 340.

107 *Ibidem*, p. 376.

108 Hobbes, Thomas, *Elementos de derecho natural y político*, Madrid, Center for Constitutional Studies, 1979, X, 5; Hobbes, Thomas, *Leviatán*, México, Fondo de Cultura Económica, 1980, II, xxvi.

If it were understood that any act or omission resulting in both an infringement of the norm and a defense of freedoms, were considered as a breach of the rule of law, it would simply mean that we are privileging the concept of law over that of law, in the Hobbesian sense of the terms.

Zagrebelsky's idea of law is aimed at explaining the integrating function of law, which is why he defines it[109] as an objective order established to "limit" the instability of wills. However, the law is "ductile" for several reasons: it varies according to the forces that impose it[110] or agree to it;[111] as applied by its interpreters,[112] or according to its structure, composed of principles and rules.[113] The axis is in recognition that the law only "limits", but certainly does not suppress, the relations of instability.

The function of the norm in the rule of law is to reduce the discretion of the authority to the minimum possible, and to increase as much as possible individual and collective rights (freedom, equality, property, legal security, etc.), and their guarantees. As the power to decide is more discretionary, its will is less predictable, and to the same extent it introduces a random element that contravenes one of the basic postulates of the rule of law.

It is possible to reduce this risk, but not eliminate it. For this reason, instruments for jurisdictional control have been designed, aimed at protecting the constitution and the laws. The important thing for a community is that no act of power remains outside some form of control, be it jurisdictional or political. If it is foreseeable that the authority exceeds its functions, there must be the institutional means that decides and repairs the affectation; and if it is desirable that on occasions the authority does not apply the norm, because in this way less damage is caused to people, there

109 Zagrebelsky, Gustavo, *op. cit.*, note 55, p. 94.
110 *Ibidem*, p. 37.
111 *Ibidem*, p. 38.
112 *Ibidem*, pp. 131 et seq.
113 *Ibidem*, pp. 109 et seq.

must also be the body that assesses and decides on that decision, so that the discretion does not become arbitrary.

In his study on the social contract and obedience to the law, Pérez Bermejo[114] eloquently synthesizes Rawls's thesis: unjust laws are enforceable while their disobedience could lead to greater injustices. Without going into the controversial issue of "just laws", it is possible to argue that the argument is reversible: just laws can cease to apply if this avoids superior injustices. After all, it is the same reason: in both cases the option of minor damage is being supported as the most appropriate to the rule of law. It can hardly be argued that the rule of law is weakened by damaging freedoms to a lesser extent, or that on the contrary it is strengthened when security prevails in the application of the rule over individual and public freedoms.

The two principles of justice that Rawls[115] identifies as proper to a constitutional system consist of: first, each one has the same right to the widest freedom, compatible with the same extension of freedom for all, and second, inequalities are arbitrary unless that it is reasonable to expect them to be applied to the benefit of all and whenever similar circumstances arise. In this case, Rawls abounds, the moral obligation to obey the law, which corresponds to the social contractual principle of cooperation and fair play, is not affected.

At this point, it is appropriate to return to a convincing contribution by Vanossi,[116] according to which to identify the limits of power and the scope of rights there are, essentially, two perspectives: that offered by force, whose most representative doctrine is decisionism, and that proposed by reason, whose most

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[114] Pérez Bermejo, Juan Manuel, *Contrato social y obediencia al derecho*, Granada, Comares, 1997, p. 258.

[115] Rawls, John, "Legal Obligation and the Duty of Fair Play", in Hook, Sidney (ed.), *Law and Philosophy*, New York, New York University Press, 1964, p. 11.

[116] Vanossi, Jorge R., *El Estado de derecho en el constitucionalismo social*, Buenos Aires, EUDEBA, 1987, pp. 9 et seq.

precise expression appears in contractualism. This differentiation is based on the fact that reason supposes an agreement, while force is justified by itself. In the problem to which we have alluded, the non-application of a norm, in the circumstances already mentioned several times, is only compatible with the rule of law insofar as it does not violate the basic terms of the social agreement.

The central concern regarding the validity of the rule of law in a democratic society consists in identifying the aspects situated at the limit of the law but at the center of politics. The rule of law constitutes a supreme value as a guarantee of the system of freedoms demanded by modern society and consolidated in contemporary society thanks to constitutionalism. But it is also indisputable that within an open society forces are at work that put democratic institutions in conflict, because they cannot react as they would according to preconstitutional procedures.

The non-application of the norm is seen from two conflicting perspectives:[117] one, utilitarian, indicates that the law is "weakened" and society as a whole is affected by the decrease in the value of the norm; another, pragmatic, argues that when the state's right to punish and the right of individuals to be protected by the state come into competition, the state must prevail. Dworkin[118] is decidedly inclined to find a balance that allows the authority to resolve particular cases that are at the limit of legality. His conclusion[119] is categorical: the rule of law is "more complex and more intelligent" than the only draconian application of the norms.

The most widespread phenomenon is that of public protests. Viewed from the perspective of strict law, these actions usually translate into conduct that can be classified as a crime. The mere obstruction of public roads, for example, is one of the greatest at-

[117] Dworkin, Ronald, *Taking Rights Seriously*, Cambridge, Harvard University Press, 1978, pp. 193, 201 and et seq.

[118] *Ibidem*, p. 217.

[119] *Ibidem*, p. 222.

tacks that a constitutional system can suffer. Most of the laws prevent very harsh sanctions for those who attack the general means of communication, precisely because these routes are one of the most valuable instruments for exercising individual and public freedoms: expression, transit, and assembly. This phenomenon of protest, however, is common in all democracies.

In the daily practice of the States, we find that in general terms those who obstruct the free movement of people and goods are not sanctioned in certain circumstances. It also happens that only some are sanctioned, but not all, and it happens, finally, that the sanctions are very benevolent and sometimes even are subject to revocation or remission. Faced with this situation, the question arises as to whether the rule of law is being sacrificed, and to that extent the power uses indulgence as a kind of alibi for its own projects of unsanctioned authoritarian expansion, or if the iterative non-application can lead to forms corruption in the exercise of public functions.

Paradoxically, it is not possible to demand that the public power be inflexible in the application of the letter of the law, without thereby distorting the foundations of an open society that requires spaces for tolerance; but neither can it be accepted that the power disposes of the coercive apparatus in a discretionary manner, without running the risk of distorting the exercise of the public function and the value of the norm.

Despite these problems, it is necessary to identify the terms that reconcile the attitude of the authorities when they do not apply the norm in a categorical way, and the protection of the collective interest so as not to open the door, through this decision, to new forms of authoritarianism. Throughout these pages I have tried to expose the dominant concepts of the rule of law and the vicissitudes in the application of the norm. With these elements, I consider it possible to propose some rules that allow us to accept, exceptionally, the non-application of the norm without fracturing the rule of law.

The doctrine has addressed in various ways the right to resist oppression, the right to revolution and the right to civil disobedience. It is presumed that, before any of them, the action of power, even if it is said based on the law, may become unlawful. In this regard, criticisms of the formal rule of law were examined. For this reason, this study has not addressed any of the issues concerning the collective manifestations of rejection of the hypothetically illegitimate authority. In such cases, the rule of law is presumed to have disappeared. Here we have only dealt with the non-application of the norm in a rule of law, and not as a correlate of the right of resistance. However, it is important to record an intelligent work by Estévez Araujo in which he examines the possible legal justification of civil disobedience in the field of democratic constitutional systems, in which he concludes[120] that this justification results from the crisis of legitimacy of the procedures defense of the constitution. What is raised here is not a case of non-application of the norm (because disobedience is no longer sanctioned) without affecting the rule of law, but of tolerance of disobedience to restore the rule of law. These are, of course, two different issues.

It is necessary to differentiate these manifestations from simple acts of public protest, especially when they express opposition to certain public policies. In this case, the legitimacy of the authority is not questioned, but only some of its decisions. It is normal that in situations like this, the norm is not strictly applied, because "after all, the rule of law is made to allow the law to promote the social good, and it should not be used lightly to show that it should not be so. Sacrificing many social purposes for the sake of the rule of law can render the law sterile and empty".[121]

Another different problem, which does not arise here either, concerns the inability of the agents of power to apply the norm.

120 Estévez Araujo, José Antonio, *La Constitución como proceso y la desobediencia civil*, Madrid, Trotta, 1994, especially pp. 143 et seq.

121 Raz, Joseph, *op. cit.*, note 3, p. 285.

In this case, one is faced with either of two situations, similar but not necessarily the same: the organs of power have partially or totally lost the instruments to exercise their coercive functions, or social resistance is greater than the government's possibilities of action. In both cases, as Bobbio points out,[122] it is close to anarchy, and therefore to the cessation of the legal order, or close to a radical change in the legal order. Here the problem no longer concerns the validity of the rule of law, but rather the permanence or replacement of the form of the state. A recent study of the case[123] makes it possible to note the importance of social mobilizations in the transitions of Portugal and Spain.

As we have seen, the non-application of the norm in certain circumstances has been admitted since the classical age. At present it is a reality contemplated by doctrine, jurisprudence and some legal provisions. Although efforts have been made to explain the phenomenon, the truth is that satisfactory statements are still lacking that allow us to go beyond the understanding of the problem and formulate the bases that support the non-application of the norm without breaking, and even to uphold, the rule of law.

The difficulties in admitting that an act of non-application of the norm does not violate the rule of law can be overcome from the perspective posed by Peter Häberle:[124] the constitution is part of the cultural sphere of a society. Hence, he also formulates the idea of an "open society of constituents", while the interpretation of the constitution is subject to the broadest possible assessment by all members of political society.

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122 Bobbio, Norberto, *Contributi ad un dizionario giuridico*, Turín, Giappichelli Editore, 1994, p. 256.

123 Durán Muñoz, Rafael, *op. cit.*, note 3.

124 Häberle, Peter, "Normatividad y reformabilidad de la Constitución desde la perspectiva de las ciencias de la cultura", *Yearbook of Latin American Constitutional Law*, Buenos Aires, 1999, p. 391; Häberle, Peter, *Retos actuales del Estado constitucional*, Oñate, IVAP, 1996, pp. 15 et seq.

This Häberle perspective has the disadvantage of reducing or expanding the scope of interpreters according to the cultural development of each national society. Where the levels of cultural development are higher, individual, and collective participation in the constitutional interpretation process will tend to be more active; whereas where significant cultural deficiencies remain, the ability to identify constitutional values will be equally more precarious. However, and regardless of the order of magnitude assigned in each case to the cultural environment, when accepting the categories proposed by Häberle it is essential to examine the context in which the norms are applied or in which they are not partially applied. The central thesis of Häberle[125] is that the constitution is not limited to being a mere set of normative provisions, "but the expression of a certain degree of cultural development". Hence the "constitutional culture" is derived, which is formed by the sum of ideas, values, attitudes, experiences, and individual and collective expectations, related to the normative order.

But there is an additional cultural problem of law that Häberle warns about:[126] the function of truth. On the one hand, there is a commitment of the norm with the truth, when expressly reference is made in the constitutional and legal texts to the validity of the truth. The first example that Häberle identifies appears in the United States Declaration of Independence (1776). On the other hand, the concept of truth appears as an inseparable complement of the democratic state. There is only pluralism where there is unrestricted freedom of science and conscience or, in other words, of knowing and believing. Hence, the truth becomes the axis that legitimizes the actions of the rulers and that articulates the demands of the ruled.

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125 Häberle, Peter, *Teoría de la Constitución como ciencia de la cultura*, Madrid, Tecnos, 2000, pp. 34 et seq.

126 Häberle, Peter, *Diritto e verità*, Turín, Einaudi, 2000, pp. 17 et seq., and 93 et seq.

From this perspective, the decisions of the authority and the acts of political control related to the non-application of the norm are valued in a free, responsible, and informed manner by the members of society. This assessment is of extraordinary importance to make the exceptions regarding the specific application of the norm compatible with the rule of law. It is a complex operation that is directly related to cultural factors. The relationship of trust that exists between the public and the authorities will determine in each case the acceptance or rejection of the exceptions regarding the rigorous application of the norm.

When examining different cases, it is also necessary to consider different scales. A society in which there are contrasting levels of culture, or in which it is ostensibly deficient, will cause greater collective resistance to accept that the authority separates from the letter of the norm, especially when, as Cortiñas-Peláez recalls,[127] the heads of the bodies of authority are bound by the formal protest to comply with and enforce the laws

However, it is necessary to identify the general principles to which the non-application of the norm must be subject in order not to violate the rule of law, assuming that the cultural conditions are suitable to carry out an adequate assessment of the authority's decisions. In this sense, we understand that the non-application of the rule does not affect the rule of law provided that all the following circumstances occur:

— The authority that omits the application of the norm does so by a greater damage is avoided than that which it would cause with its application.
— The non-application of the norm cannot be the result of the negligence or leniency of the official.
— The authority has legitimacy of origin.

127 Cortiñas-Peláez, León, *De la fórmula trinitaria como fundamento del Estado democrático social de derecho* (in press), p. 26.

— There are political instruments of control, equally legitimate, that must assess the performance of the authority that did not apply the rule.
— In all cases the decision not to apply the rule must be reasoned.
— The non-application of a rule should not be understood as a derogatory practice.
— The non-application is exceptional.
— The repeated non-application must be examined by the legislative bodies to assess the conditions of validity of the norm or the possibilities of its possible reform.
— The causes of the non-application of the norm must be studied by the political control bodies, in relation to the public policies that generate them or that do not resolve them.
— The decision not to apply a rule must always be revocable or amendable.

All and not just some of the conditions mentioned must be present. The rule of law is a principle without which democracy is impossible. In reviewing some of the current problems of the rule of law, related to the representative system and the application of the law, in fact we have done nothing but raise old questions of the normative life of the states; but we have wanted to do it from the perspective of the democratic state of law, in relation to which it will still be necessary to clear up many unknowns.

Constitutionalism is part of a long process of rationalization of power. The concept of the rule of law is only understandable from the perspective of a normative constitution. Hence, this study has placed emphasis on correlating the rule of law and constitutionalism. However, as has been seen, the variants of the rule of law (liberal, social, and democratic) and the stages of constitutionalism (liberal, social, democratic, and cultural) by themselves do not offer an answer to the problem of the non-application of

the law without breaking the rule of law enunciated and guaranteed by the constitution.

In addition, in the constitutional order there are some pathologies that it is necessary to distinguish from the non-application of the norm without contravening the rule of law. The phenomenon that in another study I have called "constitutional irregularity" seems to have some similarity with the non-application of the norm; but that resemblance is only an appearance. Constitutional irregularity consists in the coexistence of fully effective norms with others of merely formal compliance, conditioned by processes of a political nature. There are also more acute cases in which there is a displacement of the constitutional norm, but in this case, it is evident that there is a bankruptcy in the rule of law; the situation is not so evident when this displacement is more or less concealed, and there is simply the preterition of certain aspects of the legal system, pretending however that the regulations are being punctually complied with. This phenomenon is not part of what we have raised here either, because it also amounts to a breach of the constitutional state and, consequently, of the rule of law.

From the formal point of view, the rule of law was, in its origins (in Germany with Von Mohl and in Great Britain with Dicey), a strictly procedural concept: it consisted of the possibility that the acts of the administrative authority could be valued by the judicial authority. However, from social constitutionalism, and later with democratic constitutionalism, the concept was modified, and from a strictly adjective consideration it was passed to a substantive one. The social rule of law and the social and democratic state of law concern the content of the rule of law, not its exercise. From this point of view, what represented an advance to prevent the distortions to which a strictly formalistic concept gave rise, on the other hand meant a setback in terms of the adjective nature that had originally been attributed to the rule of law.

The rule of law is not related to the content of the rules, but to the way in which they are enforced. On the contrary, by incorporating the social and democratic content, the rules were confused with the principles, and the rule of law moved away from its adjective nature. It is here where the point of conciliation between the non-application of the norm and the rule of law can be raised, in accordance with the rules that we have just enunciated. Although originally the rule of law was only alluded to when the government was responsible to the courts, it must be borne in mind that the concept of political responsibility was not yet developed, as it has been done later.

To that extent, although the assessment of the rigorous application of the rule corresponds to the jurisdictional bodies, the assessment of its eventual non-application can and should be carried out by the bodies of political representation. Thus, the procedural nature of the rule of law is recovered, but the scope of government responsibility is expanded beyond the courts, to also include political assemblies. Both possibilities of control, far from colliding, complement each other; they constitute additional guarantees for the governed. To the powers of jurisdictional control are added those of political control exercised by congresses and parliaments.

It is necessary, therefore, that we distinguish between the rule of law in the substantive sense, which corresponds to the social and democratic content, and the rule of law in the adjective sense, which refers to the responsibility of the governing body before the other constitutional bodies of control. In general, we can consider that as long as there is the possibility of controlling the decisions and actions of the governmental authority in accordance with the constitutional norms, the rule of law can be preserved even when the circumstantial non-application of some norm occurs.

The rule of law has a dual, substantive, and adjective nature: it enunciates rights and establishes guarantees for those rights. If we properly distinguish these two components of the rule of law,

we will be able to resolve the paradoxes of the non-application of the norm within a normative system.

The assessment made of the circumstances in which the norm is not applied will make it possible to define whether the problem lies in the deficient construction of the rule, or if there is a public policy problem that is generating the behaviors in relation to which the rule does not apply. An example that is recorded in many constitutional states is the holding of public demonstrations that often result in criminal acts. This is the case of the growing expressions of rejection of globalization processes, which in many cities in Europe and North America acquire a very violent character.

Faced with these demonstrations, as with most of those that take place in political spaces regulated by democratic constitutions, the usual response of the political authorities is one of tolerance, leaving the applicable criminal regulations unapplied. Acting in this way is considered to prevent the generalization of unrest which, if it increases, would lead to increasing tensions and more violent confrontations. It can be said that this is a very clear case in which the non-application of a certain norm produces fewer collective damages than those that could be caused, in this case, by the exercise of criminal action.

In that case it is very clear that the specific rule not applied does not present problems, and that it can continue to be observed in numerous other cases. The problem lies in the public policies that give rise to the protest, the solution of which is beyond the regulatory provisions. These policies have, however, a direct impact on the behavior of various members of society, and for the law there is a risk that the multiplication of episodes of the same nature may generate a social process of entropy that makes it difficult to conduct of collective life through a legal order that is freely followed. The characteristics and consequences of this scenario no longer correspond to a legal study.

Non-application of the rule must be exceptional; when it becomes a recurring phenomenon, it does damage the rule of law,

while the conduct of those who do not abide by the norm and of the agents of authority who do not apply it, is presented as a tendency regularity. A regularity outside or against the rule does harm the rule of law. This phenomenon goes beyond the reasonably explainable isolated cases to which we have referred in this work.

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CONSIDERATIONS ABOUT THE CONSTITUTIONAL REGIME OF TOLERANCE*

I. Current Tolerance Issues

The question of tolerance falls within the sphere of power relations. I will adopt, therefore, the scheme of these relationships elaborated by the admired writer Manuel García-Pelayo.[1] The modesty of the title of his essay *Diagram of an introduction to the theory of power* certainly does not reflect the depth of his work. This study, combined with the so-called *Contribution to the theory of orders*, represents a remarkable theoretical construction concerning power. Both texts provide a very valuable instrument to frame specific problems of power.

To establish the function of tolerance in a constitutional system we can use the scheme of power relations drawn up by García-Pelayo. These relationships have two expressions: one asymmetric of supra and subordination, and another symmetric, of cooperation or antagonism. An asymmetric relationship is understood to be one where one of the parties becomes an active subject and is the only one who has the means of coercion that allow him to decide and order, while the other party becomes a taxable person and acts in accordance with the conduct prescribed by the former. In this relationship, communication between the parties is mandatory and compliant.

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[1] *Idea de la política y otros escritos*, Madrid, Center for Constitutional Studies, 1983, pp. 187 et seq.

Asymmetric relations are typical of the power of the state. That is why García-Pelayo's contribution is relevant, insofar as it allows us to confirm that the hypostatic link between civil and ecclesiastical power functioned as a precursor of the modern state.[2]

In symmetric relationships, the parties are in equal circumstances ("each of the terms is united by the same relationship with respect to the other or the others"). The author identifies two modalities: one, of cooperation, which occurs when two or more actors participate "with a determined quantum of power" regarding a common objective; another, antagonistic, when they fight each other "opposing their respective power capacities."

An important aspect of García-Pelayo's theory is that relationships flow and intermingle, so that in practice there may be forms of relationship that are not absolutely symmetrical or asymmetric, and it is also possible that alternative elements characteristical of one or the other prevail. It is here where I consider that constitutional constructions that establish principles of tolerance have a place, for which the García-Pelayo scheme is particularly useful. Shaping and ensuring symmetrical relationships is a function of modern and contemporary constitutionalism. Furthermore, ensuring that symmetrical relationships are carried out, as far as possible, in accordance with cooperation modalities is a complicated but sometimes viable undertaking. At least a constitutional structure that establishes symmetric relationships can be considered functional when it limits flow to the modalities of coordination and antagonism but excludes transformation into asymmetric relationships.

From García-Pelayo's theory it is possible to infer that the fluid character that power relations have in practice resides in

[2] Cf. Tourbet, Pierre, "Eglise et Etat au XIe. siècle: le signification du moment grégorien pour la genèse de l'Etat moderne ", Etat et Eglise dans la genèse de l'Etat moderne, Madrid, Casa de Velázquez, 1989, and Verger, Jacques," Le transfert des modèles d 'Organization de l'Eglise a l'Etat à la fin du Moyen Age', *Etat et Eglise dans la genèse de l'Etat moderne, cit.*; the now classic study of Maier, Hans, *L'Eglise et la démocratie. Une hiostoire de l'Europe politique* (Paris, Criterion, 1992, especially pp. 67 et seq.) is oriented in the same direction.

the levels of tension that are reached at a given moment. Hence, a symmetric relationship of antagonism is closer to breaking the equilibrium than one of cooperation and is therefore more susceptible to becoming an asymmetric relationship. Here once again the constitutional construction can intervene which, if properly conceived and operated, will establish mechanisms to absorb tensions and consolidate balances.

In the constitutional domain, tolerance concerns three spheres: that of conscience, that of culture, and that of politics. The first is basically referred to religious convictions, the second to ethnic, linguistic, and regional identity issues, and the third to pluralism. Of the three, the first that arose historically, and opened the way to the other two, was the one concerning consciousness.

The problems that arise as a result of tolerance are certainly not new. From the 1st century BC, Hillel had coined, among his Seven Rules, the "golden law" of Judaism: "do not do to another what you do not want for yourself."[3] This maxim holds the key to tolerance. The sage pointed out that only the observance of this principle would allow believers and non-believers, poor and rich, powerful, and weak to coexist.

Centuries later, Saint Ambrose, one of the three Doctors of the Church, together with Saint Jerome and Saint Augustine, was a determined defender of the privileges of the nascent Church, but he did not cease to disapprove of the acts of intolerance that resulted in the sacrifice of lives. In 390 Emperor Theodosius ordered the Thessalonica massacre which, according to sources accepted by Bertrand Russell,[4] left seven thousand victims in a single day; the bishop of Milan called it an atrocity to use the power of arms against those who protested helplessly. The reasoning of the saint of the Church was based largely on the principles of Roman law.

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[3] Eliade, Mircea, *Dictionnaire des religions*, Paris, Plon, 1990, p. 238.

[4] Russell, Bertrand, *A History of Western Philosophy*, New York, Simon and Schuster, 1972, p. 339.

For his part, Isidoro[5] assured that the law cannot be "dictated for private benefit, but for the benefit of the common good of the citizens." It was thus clear that the rule could not impose discriminatory exceptions. However, Isidore himself[6] offers an interpretation of how the community is integrated: "Church", he tells us, comes from the Greek, and is translated as "assembly"; "Catholic", he adds, comes from the same language (*katholon*) and means "universal", that is, he concludes, "according to the total."

From this Isidorian concept one passes to that of "heresy." This is a word that also comes from the Greek, and means "choice", so that "each one, according to his free will, chooses which ideology to profess or follow."[7] But it is here where the foundation of intolerance appears, without that from the logic of the wise man the principle of universality of the law is broken. "We, he says, we are not allowed to elaborate any beliefs according to our criteria; not even affiliate with what anyone else has conceived according to their own speculations." Hence, those who choose a course other than that of the universal community constitute "sects", which derive their name from "follow" or "sustain."

In addition to sects, Isidore identifies the "pagans" as originating from the Athenian villages (*pagus*) where the "gentiles" established their holy places and erected their idols. That is why "Gentiles are called those who do not know the law."[8] "Gentiles" and "ethnic" are also synonymous, since the Greek ethnos corresponds to the Latin *gens*, from which the word "gentile" derives.

It is up to Thomas Aquinas to develop the Isidorian concept of law.[9] "The law is instituted as a rule and measure of human

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5 Sevilla, Isidoro de, *Etymologies*, Madrid, Library of Christian Authors, 1993, V, 21.

6 *Ibidem*, VIII, 1.

7 *Ibidem*, VIII, 4.

8 *Ibidem*, VIII, 10.

9 Aquino, Tomás de, *Suma de teología*, Madrid, Library of Christian Authors, 1997, I-II, c. 96, a. 2.

acts." But it happens that not all men, in all circumstances, are on an equal footing. The law, therefore, must take into account the differences, "hence also men imperfect in virtue must be allowed many things that could not be tolerated in virtuous men." So far it would seem that the principle of tolerance does not affect the universality of the Church; but the theologian specifies: "human law tries to lead men to virtue, not suddenly, but gradually. That is why it does not suddenly impose on the mass of imperfect those things that are proper to the already virtuous, forcing them to abstain from all that is bad." With this Saint Thomas leaves open the possibility of a gradual implantation of the principles of the universal Church, as Isidore had done.

That is why later[10] he argues that

> ...the kingdom of God consists mainly in interior acts, but also, and consequently, in everything without which such acts cannot exist. For example, if the kingdom of God is interior justice, and peace, and spiritual joy, it is necessary that all external acts that are repugnant to justice, peace, or spiritual joy should also be repugnant to the kingdom of God and, therefore, they are to be prohibited.

The dogmatic basis of intolerance was thus intelligently established. As Manuel García-Pelayo points out,[11] Juan de París would have to appear to recognize "that the moral virtues can be perfect without the theological ones." Without meaning to, some royalists represented the counterpoint to the doctrine of intolerance. The medieval argumentative culmination favorable to tolerance was reached in the fourteenth century with Marsilio de Pádova.[12] During the late Middle Ages, various symbols were also used as instruments of domination. Jean Delumeau,

[10] *Ibidem*, I-II, c. 108, a. 1.

[11] *El reino de Dios, arquetipo político*, Madrid, Revista de Occidente, 1959, p. 224.

[12] *Le défenseur de la praix*, Paris, J. Vrin, 1968, I, vi.

for example, has shown[13] how the rise of "Satanism" was directly related to the forms of social control adopted in the period of expansion of the feudal system. Intolerance, in this regard, is associated with the concentration of power and, therefore, with the asymmetric relationships analyzed by García-Pelayo.

For its part, the Inquisition has been used as an example of the excesses of intolerance. There are good reasons for this assessment; but, as has been shown,[14] that institution was obeying, rather than religious motives, essentially political and socio-economic interests. It is true that the Inquisition participated in many horrors, and that it applied fire as an execution procedure,[15] but the political origin of the sanctions is very clear in many cases. As an example, recall the execution in 1642 of Guillén Lombardo, in Mexico, as a result of the fact that he was found conspiring to free New Spain shortly after the Duke of Escalona had been dismissed as viceroy "on suspicion of bow to the party of Bragança."[16]

In 1542, when the old Dominican Inquisition had entered into crisis, at the proposal of Cardinal Caraffa and the Bishop of Toledo, the Pope established the General Inquisition. The rules established by Caraffa[17] are strict. The fourth of them said: "Against heretics, and especially against Calvinists, there will be no room for any tolerance." The political motive for the persecution is clear.

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13 Delumeau, Jean, *El miedo en Occidente*, Madrid, Taurus, 1989, especially pp. 361 and et seq.

14 See Netanyahu, Benzon, *Los orígenes de la Inquisición*, Barcelona, Crítica, 1999.

15 Voltaire points out that the reason for burning heretics was that "God punished them in this way in the other world." "Comentario sobre el libro 'De los delitos y de las penas' por un abogado de provincia", in Beccaria, Cesare, *De los delitos y de las penas*, Madrid, Alianza, 1968, p. 119.

16 Medina, José Toribio, *Historia del Tribunal del Santo Oficio de la Inquisición en México*, Santiago de Chile, Imprenta Elzeviriana, 1903, p. 296.

17 Ranke, Leopold von, *Historia de los Papas en la era moderna*, México, Fondo de Cultura Económica, 1943, p. 125.

In response, the century of enlightenment provided a wide range of arguments in favor of tolerance. In Great Britain, among others, the voices of Adam Smith were heard, who identified the concept with that of "benevolence."[18] Prior to his, however, was the important doctrinal argument of Locke. His *Letter on Tolerance*[19] continues to be a source of reflection on freedom of conscience and religious tolerance. In France they were pronounced in vigorous terms Montesquieu (XXV, ix and x), Rousseau,[20] The encyclopedia (the voice was developed by M. Romilli),[21] and most especially Voltaire.[22] Without mentioning Kant by name, Voltaire qualifies his project of perpetual peace as absurd, "not in itself but in the way in which it has been proposed." For the French philosopher, "the only perpetual peace that can be established between men is tolerance."[23] With a simple question, Voltaire synthesizes the advantages of tolerance: "Will freedom of conscience be as barbaric a calamity as the bonfires of the Inquisition?"[24]

Later John Stuart Mill was an innovator of the arguments for tolerance. Unlike Locke, who was concerned above all with the protection of the individual before the power of the State and the Church, Mill warned that social and political practices could also interfere with the exercise of freedom.[25]

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[18] Smith, Adam, *La teoría de los sentimientos morales*, Madrid, Alianza, 1997, pp. 409 et seq.

[19] Locke, John, *Carta sobre la tolerancia*, Madrid, Tecnos, 1985.

[20] Rousseau, J. J., "Du contrat social", *Oeuvres politiques*, Paris, Classiques Garnier, 1989, IV, viii.

[21] Romilli, M., "Tolérance", *Encyclopedie ou dictionaire raisonné des sciences, des arts*, Neufchastel, S. Faulche, 1765.

[22] *Traité sur la tolérance*. Spanish version: "Tratado sobre la tolerancia", *Obras completas*, Valencia, M. Senent, 1894.

[23] Voltaire, *La moral religiosa*, Barcelona, F. Granada Editores, s. f., pp. 9 et seq.

[24] Voltaire, "Diccionario filosófico", *Obras completas*, Valencia, M. Senent, 1894, p. 789.

[25] Mill, John Stuart, "On Liberty", *On Liberty and Other Essays*, Oxford, Oxford University Press, 1991, pp. 32 et seq.

The theses in favor of freedom of religion opened the way to other aspects of tolerance. There was a hint of skepticism in Mill when he noted that persecution was a historical constant, while episodes of tolerance represented only an accident. The factor that he did not consider was that constitutionalism, in the process of development when he wrote, would consolidate itself to become the enduring support of all forms of tolerance. The Virginia Bill of Rights of 1776 was a forerunner in this regard. Subsequently, the Declaration of the Rights of Man and the Citizen of 1789 (article 10) and the French Constitution of 1791 (title 1, paragraph 2) contributed to establish the foundations of a trend that would become irreversible throughout the 19th century.

In the pages that follow, I will allude, very schematically, to the Ibero-American constitutional expressions related to tolerance in religious, ethnic, and political matters.

II. Constitution and Religion

In Mexico, religious tolerance is one of the principles that cost the most time and suffering to conquer. A civil war in the nineteenth century and another in the twentieth, show the difficulties that had to be overcome and the bitterness that was reached. The split took lives and kept society divided for decades. This phenomenon, moreover, was common in Latin America and even today it continues to affect various national communities.

In the world there are six great religions practiced through numerous churches, congregations, religious movements, sects, and rites. The geographical boundaries between them tend to blur. In Europe and the United States, the largest migratory destination areas in the world, Christianity, Judaism, Islam, and Buddhism coexist. In this sense, the process that characterized the last years of the Roman Empire is repeated, permeated by German religious and legal practices, in the face of which a tolerant at-

titude prevailed.[26] Some ancient and contemporary empires tend to be very receptive and tolerant in matters religious; others, on the other hand, like the Spanish and the Ottoman, were very intolerant.

Currently in most places a system of coexistence has been found; tolerance tends to prevail. However, there are cases where violence persists or has emerged as a consequence of intolerance. Only in the last decade of the 20th century can the cases of Northern Ireland, Bosnia, Kosovo, Sudan, Lebanon, Palestine, Afghanistan, Iraq, East Timor, Myanmar, Sri Lanka, India be identified (in various settings: Bombay, Tamil Nadu, Ayodhya, Kashmir, Punjab, Karnataka, Utar Pradesh), Tibet, Bugainville Island, Armenia, and Azerbaijan, just to mention a few examples.

In Latin America the panorama has evolved in relation to the dominant intolerance at the beginning of the century. Today, only two constitutions preserve the state religion: Bolivia (article 3) and Costa Rica (article 75); although ten others (Argentina, Colombia, Ecuador, El Salvador, Honduras, Nicaragua, Panama, Paraguay, Peru, and Venezuela) invoke divine inspiration in their respective preambles. Thus, even though only six of the eighteen democratic constitutions in the hemisphere are absolutely secular, they all guarantee citizens the freedom of religious belief.

In the case of Mexico, the last constitutional reform that was carried out in religious matters was that of 1992. It included articles 3, 24 and 130; it was an institutional advance of great magnitude that made it possible to overcome very old reserves. To introduce this reform, it was necessary to overcome many great resistances. It was not a question, as in many cases in the hemisphere, to soften the terms of the state's religious commitment, but rather to make the relationship with the churches more flexible. Especially with the Catholic, whose doctrine is professed by 89% of the national population.[27]

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[26] Pirenne, Henri, *Mahoma y Carlomagno*, Madrid, Alianza Universidad, 1997, pp. 29 et seq.

[27] See Fix-Zamudio, Héctor, "La libertad religiosa en el sistema interameri-

Although there are not so many years since 1992, it is possible to examine their first results. Essentially, three major attitudes can be distinguished: that which concerns the general population; that which corresponds to the Church, and that which concerns the parties. Popular tolerance preceded legal tolerance, and religious disputes for decades ceased to be a dominant issue in Mexican society. The problems essentially centered on limitations in providing religious education, but lax application of the law had led to *de facto* tolerance.

As for the ecclesiastical dignitaries, there is a perception that, after the reform, they accentuated the frequency and raised the tone of their political opinions. The reality, however, is not that. The years, even decades, that preceded the reform were characterized by growing tensions, which led to religious at all levels expressing very acid opinions against the Mexican constitutional order. The encyclical *Firmissimam constantiam*[28] of 1932 and various pastoral letters, as well as numerous informal expressions, are examples of this attitude. It is natural that immediately after the 1992 reform, which among other things granted religious ministers the active right to vote, there were pronouncements about the electoral preferences of ecclesiastics, but reduced those that questioned the axis of Mexican institutional life: the Constitution.

As for the political parties, they must be observed with prudence and not confuse the personal positions of some of their members with the dominant currents within them. Among the leftist parties, anticlericalism has diminished, and in the National Action Party a balanced current dominates.

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cano", *La libertad religiosa*, México, UNAM, 1996; Pacheco Escobedo, Alberto, "La libertad religiosa en la legislación mexicana de 1992", *La libertad religiosa*, *cit*., and Soberanes, José Luis, "De la intolerancia a la libertad religiosa en México", *La libertad religiosa*, *cit*.

[28] Pío XI, "Firmissimam constantiam", en Powers, Francis J., *Papal Pronuncements on the Political Order*, Maryland, The Newman Press, 1952.

In general terms, the balance of the 1992 reform is positive. However, the risks of going backwards, in any sense, are present. There are also those who consider that the clergy are exceeding their political opinions, as well as those who believe that progress is insufficient and that it is necessary to implement religious education in schools, for example.

For this reason, when in Mexico the possibility of a complete change of the Constitution is raised, one must think about the implications that reopening the discussion on this matter would have. If there were not, as there are, many arguments to prefer a profound reform of the Constitution, but not its replacement, this alone would be enough. Political tensions intensified year after year in the last decade of the 20th century, and all the symptoms are to the effect that this process will continue in the years to come. We have in sight examples that the religious issue at any moment of neglect can become a new element of dissent.

The international legal order offers a frame of reference that tends to consolidate. The Universal Declaration of the Rights of Man (article 18) and the American Declaration of the Rights and Duties of Man (article II) of 1948, and the European Convention of Human Rights of 1950 (article 9), enshrine the principle of freedom religious. His influence cannot be underestimated. In the Ibero-American case, for example, the Inter-American Commission on Human Rights has issued recommendations regarding religious freedom with respect to Argentina, Guatemala, and Cuba.[29]

III. Constitution and Ethnics

The indigenous question has been present in Mexico throughout its history; In other countries, however, they have adopted more direct and categorical solutions than the Mexican ones. Although the problems of the Mexican Indians gave rise to an intense con-

[29] Fix-Zamudio, Héctor, *op. cit.*, note 27, pp. 505 et seq.

troversy between Las Casas and Ginés de Sepúlveda in the 16th century, it was not until 1992 that it was decided to grant them access to the Constitution. What is striking is that this had not happened even on a revolution that caused social demands.

Article 4 of the Mexican fundamental charter was reformed in 1992. Since then, the first paragraph of this precept recognizes the multicultural nature of the nation, "originally based on its indigenous peoples." In addition, it adopts two important provisions: the protection and development of indigenous languages, their cultures, uses, customs, resources and forms of social organization, on the one hand, and on the other hand, "effective access to the jurisdiction of the State." including the guarantee that "their legal practices and customs" will be taken into account in agrarian lawsuits.

Although this reform filled a constitutional gap, it is worth seeing how other constitutional systems have addressed this same issue, so that we can appreciate how much progress was made or how far behind the Constitution in terms of the treatment of indigenous people. I clarify that I use the word "indigenous" as a synonym for "natural" or "Indian", even though it is known that "indigenous", properly said, is any person from a specific place.

Argentina is, with Uruguay, the country with the lowest density of indigenous population in our hemisphere. The Uruguayan Constitution does not refer to the indigenous, and it is understandable, but the Argentine one does (article 75.17), and it is laudable; above all because, in addition to recognizing the ethnic and cultural pre-existence of indigenous people, it goes further than ours in two aspects: it guarantees the right to bilingual and intercultural education and ensures that indigenous people participate in the management of their natural resources. In Brazil, the Constitution dedicates a complete chapter (VIII, of Title VIII) to the Indians. Even more precisely than Argentina, the Brazilian law establishes (article 232) that hydraulic and mineral resources belong to the nation (article 176), but those located on indigenous lands (article 20-XI) can only be taken advantage of

with the authorization of the National Congress and giving the indigenous people a share in the product obtained. If their rights are affected, it is the responsibility of the Public Ministry (article 129-V) to defend the rights and interests of indigenous populations before the federal courts (article 109-XI). Regarding education, it is also guaranteed (article 210-2) that the mother tongues will be used, in accordance with "adequate learning processes."

In Colombia, the country's strong political tradition led to the establishment (article 171) of a special national constituency made up of indigenous people to elect two senators. In matters of justice, it was recognized (article 246) that the authorities of the indigenous peoples exercise jurisdictional functions in accordance with their own norms and procedures, in "coordination" with the national judicial system.

The territorial organization of Colombia is based on entities. These entities are the departments, districts, municipalities, and indigenous territories (article 286). All entities enjoy autonomy, can be governed by their own authorities, and participate in national income (article 287). The law specifies the requirements for an indigenous community to acquire the character of an entity (article 329). The government of these entities corresponds to councils formed in accordance with the uses and customs of the communities (article 330). Its functions include those of applying the norms of land use and settlement, formulating development plans and programs in accordance with the national, promoting public investments, and receiving and distributing resources. Regarding the use of natural resources, it is guaranteed that in addition to participating in the products, the cultural, social and economic integrity of the indigenous people is not affected.

In Ecuador (article 1), Quechua, Shuar, "and the other ancestral languages" are explicitly recognized as the official use of indigenous peoples. For the rest, the Constitution recognizes (articles 83-85) the rights of indigenous and black or Afro-Ecuadorian peoples, including the protection of ritual and sacred places. Indigenous peoples have the right to be consulted on plans

and programs for the exploitation and non-renewable resources found on their lands and that "may affect them environmentally or culturally," to receive the appropriate compensation for such damage and to participate in the resulting benefits.

In Guatemala the Constitution (articles 66-70) places special emphasis on social issues. It assures indigenous people, in addition to conventional rights regarding identity, that they will receive preferential credit and technical assistance to stimulate their development, and special protection in labor matters when they have to move outside their communities.

Honduras (article 346) is the only country where the Constitution hardly alludes, without significant contributions, to the indigenous people. In Peru (articles 69 and 149) the Constitution is also very laconic, although it recognizes the autonomy of native communities.

In Nicaragua, on the other hand, it is foreseen (articles 5, 180 and 181) that the communities of the Atlantic Coast will enjoy a regime of autonomy according to which they will have their own social organization, will administer their local affairs and will freely choose their authorities and deputies. To grant concessions for the exploitation of natural resources, it will be necessary to have the approval of the Indigenous Autonomous Regional Council. In Panama, the Constitution (articles 84, 86, 120 and 123) orients its precepts to the protection of indigenous property (a common feature with the other constitutions mentioned here), and emphasizes cultural aspects, particularly the study, conservation and dissemination of indigenous native languages. For its part, the most relevant contribution of the Paraguayan supreme law (article 66) consists of the state's commitment to defend the indigenous population "against demographic regression."

The Venezuelan Constitution of 1999, unlike the previous one of 1961, devotes a broad chapter to the rights of indigenous peoples (articles 119 et seq.). This Constitution includes the recognition of the religions professed by indigenous peoples and communities and the defense of their sacred places and places of

worship, as well as the practices of an economy based on barter. In addition, indigenous representation in the National Assembly and in the deliberative bodies of the federative entities is guaranteed. Regarding the use of the natural resources corresponding to the places of settlement of these peoples and communities, it is prescribed that the state will do so without harming their cultural, social, and economic integrity, and after informing and consulting the indigenous people.

This is a quick review of the most outstanding elements of Ibero-American constitutionalism in relation to the indigenous question. However, these are solutions that meet the particularities of each country. That does not mean that the experiences of others are useful when it comes to solving a problem that in several places, as is the case in Mexico, is testing the flexibility of institutions, the functionality of politics and the value of tolerance.

IV. Pluralism and Tolerance

In Mexico, as of 1977, the rights of political parties have a constitutional nature. Thus culminated a slow process of recognition of the parties, begun with the electoral law of 1911. Progressively, the rights -and in some way the obligations- of the parties have been expanded. Pluralism, as an expression of tolerance, or as the "value of political coexistence", in the words of García-Pelayo,[30] has found a generalized trend in the constitutional recognition of parties since the second postwar period.

Democracy has two moments: the election of the holders of the organs of power, and the exercise of power by the elected. If the election is carried out through free, secret, universal and direct elections, it cannot be questioned. The criterion of fairness in elections is, on the other hand, debatable. The party in power may benefit from its position of influence, but it may also be af-

[30] *Las transformaciones del Estado contemporáneo*, Madrid, Alianza Universidad, 1995, p. 204.

fected by the wear and tear that results from making decisions. Whoever competes to retain power has certain advantages over those who struggle to displace it, but also whoever seeks to achieve power has the strength of hope in his favor and, above all, that he has no accounts to render. To this extent, despite the unequal relationships in the contest, the factors can be offset. Hence, in every democracy the defeat of the powerful at the hands of the weak is common.

The other aspect: the exercise of power, is the most important part of constitutional democracy. It is not an electoral episode, by definition, ephemeral, and usually preceded by emotional overflows and hyperbolic promises, but rather a long-lasting, stable phase, where affirmations are put to the test and it is shown that in addition to speaking, one knows how to act and that also to say you can think.

To govern in a democracy, three elements are required: a system of norms that serves as a reference to the rulers and the ruled; a system of political attributions that establishes the margins of action of the rulers, and a system of freedoms that allows citizens and their representative organizations to control power. In this system of freedoms are inscribed the rights of the opposition, still in the development phase.

The second postwar period brought with it the constitutionalizing of the political parties.[31] The intention was to avert the possibility of another catastrophe such as that represented by the rise of fascism to power. Later it was seen that the mere incorporation of the parties into the Constitution left ends untied, and space was opened to the problem that Max Weber had pointed out premonitory since the beginning of the 20th century: the financing of the parties.[32] This problem has been approached as part of the electoral legislation to introduce minimum elements

[31] García-Pelayo, Manuel, *El Estado de partidos*, Madrid, Alianza, 1986, pp. 47 et seq.

[32] Weber, Max, *Economía y sociedad*, México, Fondo de Cultura Económica, 1964, pp. 1086 et seq.

of control in the flow of resources used by the parties. Two important issues remain: democracy in the internal life of parties and the rights of opposition parties. This last problem is directly linked to the principles of tolerance.

The classical conception of democracy was based on majority rule, to such an extent that at some point it was possible to allude to a *plebiscitary democracy*. The experience led to the beginning of a few decades ago to talk about —and in a way to practice— consensual democracy. Through this form of exercise of power, many of the tensions that result from political struggle can be overcome. The parliamentary system was presented as the instrument par excellence of this way of understanding democracy. Presidential systems, however, have gradually adopted mechanisms of political composition that also allow them to absorb the harsh pressures that have on numerous occasions triggered the breakdown of democracies.

But in contemporary constitutionalism a figure has emerged that helps to underline the tolerant nature of political pluralism: the right of the opposition to participate in the power process. In addition to the electoral presence of the parties, access to the media and sources of financing, and their possibilities of forming coalitions to govern, today there is a trend that gives parties new rights and, therefore, responsibilities. A good example is that offered by the Portuguese Constitution of 1977, which expressly recognizes the right of minorities to exercise democratic opposition (article 117). This implies that opposition parties have the right to be informed by the government, in a "regular and direct" way, about the main issues of public interest.

The Constitutions of Colombia and Ecuador already contain similar provisions. The Ecuadorian (article 117) indicates that political parties and movements that do not participate in the government have guarantees to exercise "a critical opposition." With this, a part of the provisions of the Portuguese text are accepted. In Colombia (article 112), in addition to the critical

role of the opposition, it is guaranteed access to official documentation and information.

For a constitutional democracy these new rights represent a considerable advantage. The parties' freedom of action is also accompanied by the responsibility to share official information. The parties have the power to criticize the government and to propose political orientations and decisions, but in the exercise of these tasks they also have the right to have timely official information. Information ceases to be, therefore, one of the keys to favor the party or parties in power. Matters of public interest leave the patrimonial sphere until now reserved for the majority and become part of the collective domain. It is a conception that reaffirms the public nature of political power.

The behavior of properly informed opposition parties tends to be more responsible. Information ceases to be an instrument of domination and becomes an element for the consolidation of democracy. It is a process that is just beginning to make its way into contemporary constitutionalism, but its adoption can only result in benefits for democratic systems. Democracy is an open system. By expanding the rights of the opposition, citizens have better instruments to consolidate democracy. The majority has the right to rule, but the minority has the right to be well governed.

The most relevant consequence of the recognition of the opposition's rights is to consolidate democracy, in the terms that García-Pelayo proposes: "the democratic and free State is a neutral State in the sense that it is not existentially linked to a certain party."[33] According to this accurate statement, the state cannot be part of a party; the state has some organs whose holders are chosen from among candidates of various parties, but the triumph of a party and its candidates does not make the party the owner of the organ of power.

[33] García-Pelayo, Manuel, *El Estado*..., *cit.*, p. 86.

The function of the party is different from that of a Congress. The party controls but is not controlled, Congress controls and is controlled; in the party there is no jurisdiction, in Congress there is jurisdiction; the party does not exercise sovereign functions, Congress legislates; the party does not have a mandate, Congress is an assembly of leaders; the party is not representative, Congress is. Minority parties are just beginning to have specific rights, while in Congresses minorities tend, every day to a greater extent, to be holders of rights that precisely serve their minority condition, especially in terms of control. In any case, the joint action of parties and Congresses, both in parliamentary and presidential systems, supposes the consolidation of norms and practices that guarantee political tolerance.

In 1861 John Stuart Mill published a work that would become a classic: Considerations on Representative Government. There he defines democracy as the "government of the people and by the people", which will undoubtedly have influenced Abraham Lincoln's famous Gettysburg Address. As for the democratic system, he pointed out[34] the risk of turning the representative system of all into the representative system of the majority. He found, there, a threat to freedom and, consequently, to tolerance. His argument is still valid and the constitutional response to that already long-standing approach lies in the recognition of the rights of the opposition.

V. Final Remarks

Manuel García-Pelayo said[35] that comparative constitutional law can be approached from four different perspectives. One of them is the "reduction of the Constitutions of the particular States to collective groups", in such a way that the "collective singularities",

[34] Mill, John Stuart, "Considerations on Representative Government", *On Liberty and Other Essays*, Oxford, Oxford University Press, 1991, pp. 302 et seq.

[35] *Derecho constitucional comparado*, Madrid, Alianza Universidad, 1984, p. 20.

or "similar or related notes" of the constitutional systems are noticed. That has been the purpose of this work, taking as a reference the problem of tolerance.

I have wanted to address the issue of tolerance for several reasons. The first is to underline that tolerance is the axis of constitutionalism. Tolerance is the result of two convictions: guaranteeing freedom and rationalizing collective life. To that extent, article 16 of the Declaration of the Rights of Man of 1789 is axiomatic: any society in which these rights are not guaranteed, lacks a constitution. While democratic reason is oriented in the sense of enforcing the majority decision, constitutional reason is characterized by enforcing the rights of all. That is why in our time the constitution and democracy are complementary. This is the distinctive sign of contemporary constitutionalism.

But I am also interested in specifying another question, already noted but not developed by Mill. Tolerance does not mean indifference. It cannot be translated into a form of disinterest in the different, in terms of "you can behave as you want, as long as you don't affect me." Berlin rightly points out[36] that although Mill is recognized as the great builder of modern liberalism, the Fabians "proclaimed him as a forerunner." This is related to Mill's position, in the sense that understanding is not the same as sharing. Social commitment is precisely the opposite of disinterest in the community, or in some of its members.

What is the above? In this brief review of some institutions concerning the rights of minorities in Ibero-American constitutionalism, I have been concerned to highlight the provisions adopted within what can be identified as a trend to broaden the scope of tolerance. I identify myself with that current of thought, but this does not mean that I accept, as regards minorities, in all cases, their immutability. This is particularly significant in cultural matters.

[36] Berlin, Isaiah, *Cuatro ensayos sobre la libertad*, Madrid, Alianza, 1988, p. 254.

The rights of minorities must have the constitutional guarantee of their effective defense. In matters of conscience there should not, in any case, actions that may offend or affect the full freedom to believe. The same can be said with regard to differences of a political nature. But on the cultural side, I adhere to Mill's principle: allowing is not sharing.

Respecting and guaranteeing the right to identity cannot be made equivalent to admitting that there are groups that are left to the edge of development on the pretext that they have decided so themselves. If the right to difference is recognized, different people cannot also be denied the right to choose. If the preservation of the traditions of a group includes the healers, it cannot be deprived of the surgeons; if their right to the original language is recognized, they cannot be confined to monolingualism. In other words, tolerance is not synonymous with indifference.

Conservative arguments are supported by a hypothetical defense of the right to national integration of minority groups, especially in the cultural order. Consequently, they are denied the right to difference. That is why I believe that instead of acting in a negative sense, they should start from the recognition of this right, without thereby depriving them of knowing and deciding freely about its incorporation into the prevailing context.

The recognition of the cultural rights of minorities is a form of tolerance that, in no case, implies disregarding these groups. If this were done, tolerance would become an elliptical form of segregation: "I neither meddle in your affairs nor interfere in mine"; "You keep what you have, and I keep what I have." This would be a reversal of the concept of tolerance, and in its name new and more enduring barriers would be erected between supposedly tolerant and tolerated.

In the former case, tolerance could become disguised discrimination and be merely rhetorical. Taken to demagogic extremes (or "populist", as has been preferred since the post-war period, to implicitly discredit socialism), tolerance, far from corresponding

to the constitutional objectives of guaranteeing freedom and rationalizing power, would serve to build a disguised reality.

Now, if it has been seen that tolerance, as a constitutional element that guarantees freedom and rationality in the exercise of power, is not synonymous with indifference, it is appropriate to distinguish it also from leniency. Since Voltaire it has been said that the limit of tolerance is intolerance. Popper[37] maintains that "if we admit the nomological claim of intolerance to be tolerated, then we destroy tolerance and the rule of law. This was the fate of the Weimar Republic."

Popper associates the problem of tolerance with ethics. Hence, he deduces a series of rules, among which he includes one that is central: we must learn from our mistakes. This involves admitting one's own error and that of others; the inverse option is not to do it and, in this case, to prevent the correction of the error. But Popper goes further: while no one can know everything, no one is free from error, so no one should be banned or censored for whatever they believe or affirm.[38]

Popper's position is related to Voltaire's: the limit of tolerance is where intolerance for tolerance itself begins. The deliberative process that allows the correction of error cannot reach the point where it is admitted that someone claims to be free from error and imposes his own truth as the only truth.

The issue is relevant to the constitution, to the point that the Austrian philosopher himself alludes to the failure of the Weimar Republic because its constitutional regime lacked adequate defenses and allowed a political power to rise above it that claimed to be the owner of the total truth.

The Weimar lesson is relevant. A constitutional system that blocks itself and that builds a series of controls that limit the guarantee of its defense is bound to succumb, as happened in the case of the example invoked by Popper. The constitution, as an

[37] Popper, Karl, *Sociedad abierta, universo abierto*, Madrid, Tecnos, 1997, p. 142.

[38] Popper, Karl, *All life is Problem Solving*, London, Rutledge, 1999, pp. 81 et seq.

instrument of guarantee of tolerance, cannot in turn be exposed to succumb to intolerance. This has to do with the rights of freedom that the Constitution guarantees, but also with the organization and functioning of the organs of power that it establishes.

All the Constitutions foresee extreme cases, called states of exception, which allow the suspension of some of the freedoms to face threats to constitutional life. In contemporary constitutionalism these provisions are drafted with the greatest possible care, to avoid distortions in their application that render the constitutional system itself null and void.

Additionally, some constitutional texts contain specific provisions regarding the safeguarding of constitutional principles. The Bonn Charter (article 20.4) empowers every German to exercise the right of resistance, when there is no other means, "against whoever tries to eliminate constitutional order." The Italian Constitution (articles 54 and tr. XVIII) provides that all citizens must be faithful to the Republic and observe the Constitution. In the case of Germany, the failure of the Weimar rule was taken into account, and in both countries, it was an object of concern to prevent the resurgence of political organizations adverse to the democratic order. This is corroborated by the express prohibition to reorganize the fascist party in Italy (tr. XII), and the ban in Germany (article 21.2) of parties "that, due to their objectives, or because of the behavior of their affiliates, intend to undermine or eliminate the liberal and democratic constitutional order."

In Estonia, the supreme text contains a point (articles 10 and 11) of the greatest interest: even the freedoms to which it does not refer directly are compatible with the Constitution, provided they are compatible with its democratic content. For its part, the South African Constitution, which makes tolerance one of its greatest concerns, establishes (article 2) as contrary to it all conduct inconsistent with human dignity, with non-racism and non-sexism.

A special case of subsistence of constitutional intolerance is that of Turkey (preamble), where it is declared that ideas and

opinions contrary to the interest of the country are not object of constitutional protection. This is not about safeguarding the principles of democratic constitutionalism, but about a very abstract national interest. The origin of this decision is in the fragmentation processes represented by various ethnic groups, and by political tensions with neighboring countries, especially with Greece.

In Latin America, the Mexican Constitution (article 136) associates the idea of freedom of the people with the validity of the Constitution, although it does not go so far as to raise the right to resistance, as in the German case. In Honduras (article 375) all citizens, invested with authority or not, must collaborate in the maintenance or reestablishment of constitutional order. This provision had been taken from the Venezuelan one of 1961 (article 250), which retains the one of 1999 (article 333).

This relationship between freedoms and power, for which the García-Pelayo theory to which I referred at the beginning is so useful, acquires special importance when facing a process of constitutional consolidation. While constitutionalism is characterized by being a normative system that ensures freedoms, constitutional consolidation refers to the positivity of the constitution and constitutional sentiment or, in other words, to its specific application and collective adherence to the values that it represents.

The axes of constitutionalism and constitutional consolidation converge at a point called tolerance. Tolerance is at the same time a requirement of the system of freedoms, of constitutional sentiment, and of compliance with constitutional order. Tolerance runs all the way from the conception of the rule to its application, passing through the general conviction of its validity. That is why constitution and tolerance are concepts that involve and explain each other.

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ELECTORAL SYSTEM AND RULE OF LAW*

I. Initial Remarks

Although the concept is much more complex, in general terms we understand the rule of law as the subject of the activity of the organs of power, legitimately established, to the norms approved in accordance with the provisions of the constitution. The sole consideration that the organs of power satisfied the conditions of a rule of law if they acted in accordance with the norm, is insufficient. This understanding led any authority to configure its own regulations and, when applying them, claimed to be complying with the principles of the rule of law. That is why Elías Díaz[1] affirmed that not every state is the rule of law.

It has been shown that formal compliance with any type of rule is not enough to establish the validity of the rule of law.[2] Hence, it has become necessary to introduce two additional ideas: the legitimacy of the organs of power, and the presence of an order constitutional. The concept of legitimacy, of course, exceeds the purposes of this work; we have addressed it at some length in another study;[3] for its part, the concept of constitution has occupied numerous writers, and although it would also require a very extensive development, in general terms it is understood as

* Published in Studies in *Tribute to Don Manuel Gutiérrez de Velasco*, Mexico, UNAM, Institute of Legal Research, 2000.

1 Estado de derecho y sociedad democrática, Madrid, Taurus, 1966

2 For example, León Cortiñas-Peláez, *De la fórmula trinitaria como fundamento del Estado democrático y social de derecho*, in press.

3 Valadés, Diego, *El control del poder*, Mexico, UNAM, 1998

a normative order that guarantees freedom, legal security, equality and equity, and that establishes the procedures for the access, exercise and control of power.

In accordance with the above, the doctrine and different constitutional systems have developed the principle of the social and democratic state of law, to avoid the possible distortions of a more restricted and formalistic statement. Today we can only speak of the rule of law in democratic systems; any other form of creation and application of law by a state organization cannot be considered as corresponding to the rule of law. In other words, there is no totalitarian or dictatorial rule of law, for example, no matter how much under conditions of totalitarianism or dictatorship there is a state apparatus and a rigorously applied normative corpus.

According to this understanding, the different aspects related to electoral systems acquire an important significance to establish the validity of the rule of law. This brief study will address some of those aspects that are still pending resolution in the Mexican constitutional system, and that are closely related to electoral issues.

II. Evolution of the Electoral System

In 1917 we began to travel a difficult and delayed path to build electoral democracy in Mexico. The ninth transitory article of the Constitution empowered "the citizen First Chief of the Constitutionalist Army" to issue the electoral law according to which the first federal elections of constitutional life were held. On February 6, even before the Constitution came into force, the electoral law was promulgated.

Article 26 of that law was key: the ballot containing the vote had to be delivered to the president of the polling station, with the voter's signature; if he did not know how to sign, then he would cast his vote verbally. It should be borne in mind that at

that time the illiteracy rate was close to eighty percent of the population. There began a series of practices that for decades distorted the electoral processes, and that also for a long time led to electoral struggles turning into armed contests.

The evolution of our electoral life is well known, and in a general way it can be said that the most significant sections of change began to occur with the 1977 reform, without this statement underestimating the profound importance that the reforms had at the time. 1953, which gave the vote to women, and 1963, which established party deputies.

The almost twenty-year period from 1977 to 1996 frames the gradual transformation of the Mexican electoral system and, therefore, the democratization of the country. However, some challenges remain. Democracy is pending consolidation, and this largely depends on the adoption of new decisions that are directly linked to the electoral system.

III. Democracy in parties

To make a democracy work, which is by nature a highly competitive political system, the convergent action of public institutions, political parties and citizens is required. Without it being possible to say that the chapter on institutions is resolved, because precisely we are heading towards an indispensable democratic reform of the state, what can be seen is that among the weakest points for the consolidation of Mexican democracy are the lack of culture politics, which affects citizens, and the vulnerability of political parties, which go through unequal processes of internal democratization.

The experience that Mexico lives has few differences with that accumulated by other countries. Some were able to resolve their conflicts and consolidated their democratic systems; others were shipwrecked in rhetoric and returned to authoritarianism. A relevant aspect to avoid regression has consisted in offering, in the constitutional sphere, space and guarantees to political par-

ties. Let us take five cases: Italy and Germany did it at the end of World War II, Portugal and Spain at the end of the dictatorship, and Greece when replacing the Monarchy.

The constitutionalization of political parties is a typical phenomenon of postwar constitutionalism. In Mexico, since the political reform of 1977, political parties have also been welcomed by the Constitution. But various constitutions are not satisfied with recognizing the right of citizens to join parties, and theirs to participate in the struggle for power. There are supreme norms that also establish guarantees for parties such as freedom of action and the rights to financing, publicity, and information. At the same time, constitutional norms have established responsibilities for political organizations, such as practicing democracy in the internal sphere.

Although talking about internal democracy in the parties should be redundant, it turns out that it is not. Sometimes there is the paradox that democracy is claimed with the participation of the parties while it is eluded in the functioning of the parties. To avoid the contrast between internal verticalism and external pluralism, which confuses citizens, various systems have incorporated the only possible solution: democracy within and outside the parties; democracy with and in the parties.

In 1947, Germany adopted a fundamental law, which is formally a constitution, which for the first time establishes the obligation of political parties to practice internal democracy. Literally, the supreme German norm says, in relation to political parties: "Their internal order must respond to the principles of democracy" (article 21, 1). It was understandable that the Germans adopted this formula; They came from suffering from a totalitarian system that had been made possible, among other causes, by a party characterized by despising freedom.

To support this precept of the German Constitution, the party law establishes that every two years, at least, party congresses must be held; that its leaders will be elected by secret ballot, and that the appointment of electoral candidates will also be made by

secret ballot. The results of the German legislation are in sight, with solid and democratic parties.

The German example has been making its way into contemporary constitutionalism, particularly in countries where it has been necessary to strengthen democracy. Opinions were divided in Italy. When the Constitution addressed the labor issue, it established that unions should be governed by "an internal regime founded on democratic principles" (article 39); But when he alluded to the parties, he settled for saying that they should act according to "democratic procedures." Since then (1947) it has been debated whether these procedures correspond only to the external sphere or also include the internal sphere of the parties. The results are in sight: the fascist party has re-emerged and characters like Silvio Berlusconi have been able to take over a party structure. The ambiguity is paid. Italy is a democracy, yes, but it is restless.

In Spain the criterion was more precise: the "internal structure and operation (of the parties) must be democratic" (article 6), and in Greece it is established that the organization and activity of the parties must correspond to the "operation of the regime democratic" (article 29, 1). These examples are multiplied in contemporary constitutionalism and denote the effort to prevent parties, indispensable instruments of democracy, from acting as spokesmen for the autocracy.

Regarding the democratic commitment of the parties, in Portugal it has gone even further. The Constitution provides that the parties must be informed "regularly and directly by the government about the progress of the main matters of public interest" (article 117, 3), and the Statute of the Right to Opposition also specifies that the parties have the right to "inform the President of the Republic and the government of their views on such matters". In the matter of information, the parties have the right to participate in the superintendency and control of the communication organs belonging to the state.

It is certainly debatable whether or not the legislator should regulate the internal life of the parties. It is a question of magnitude comparable to the problem of financing. This, of course, presents edges that make it especially sensitive, especially because through financial resources the parties can fall into networks of dominance or influence that distort their objectives.

One may wonder if financial transparency alone ensures fitness in the conduct of a party. One hundred years of experience in dozens of countries offer the same answer: no. And it is that the same process cannot be measured with different rods. Preaching democracy and practicing autocracy constitutes a contradiction that inhibits the citizen, that hinders the political culture and that distorts the functioning of the institutions.

There is no democracy possible without the presence of political parties. At the beginning of the 1970s, in Mexico there was intense pressure, mainly from the academic sphere, for the statute of political parties to be determined by the Constitution. The "constitutionalization" of the parties was finally adopted on the political reform of 1977.

By introducing the concept that "political parties are entities of public interest" (article 41), and establishing their rights, prerogatives and responsibilities, an indispensable step towards democracy was advanced in Mexico. For this reason, the ban that had weighed on the communist party was lifted, for example, which excluded from political life a current that at that time had a significant social force.

For a long time, the overriding concern was with party financing. After trying various modalities, this issue has been resolved in a more or less satisfactory way for the parties. Today the problems under discussion consist of the proper application of the precepts in force. Regardless of what happens in practice in terms of the way in which the parties' income is generated and in what way they spend it, this is an aspect that has been partially resolved by the electoral regulations in force.

However, it remains to address the problem of pre-campaigns. The Federal Code of Electoral Institutions and Procedures establishes limits for campaign expenses, but this in turn can only begin when the registration procedures have been carried out (article 190) which, in the case of presidential candidates, occurs between the 1st and January 15 of the year of the elections (article 177, e). What is spent before registration is legally out of control. This is a delicate lagoon. The political reality has exceeded the normative forecasts. The pre-campaigns that preceded the federal elections of July 2, 2000 were developed *de facto*, with no legal basis to regulate them and to allow monitoring of the origin of the resources and their application.

Mexican democracy has a weak flank, precisely because the Constitution has not provided that the internal life of the parties must be subject to democratic procedures. We have a vulnerable constitutional democracy, because the internal sphere of the life of the parties is subtracted from the principles of democracy. That is why it can be said that today we need a democracy without exceptions: democracy in society and democracy in the parties that citizens freely integrate. Democracy cannot be left to the discretion of the parties, so that they adhere or not to it, according to their exclusive decision at each moment.

Internal democracy in parties concerns the selection of their candidates and the appointment of their leaders. The parties, the centerpiece of democratic systems, are exposed to the effects of the concentration of power in a few hands. This oligarchic phenomenon, which from the beginning of the century was identified as the "iron law" of the parties by Robert Michels,[4] has produced an adverse distortion of constitutional democracy. The concentration of power within the parties is incompatible with the political pluralism that those same parties seek to promote within society. The phenomenon supposes a contradiction that affects public confidence in the parties and negatively influences

[4] *Los partidos políticos*, Buenos Aires, Amorrortu, 1983.

the election of national leaders. There are no oligarchic democracies.

The risks posed by democratic limitations within the parties must be overcome through various measures, including adequate constitutional regulation. This is not the only option; another very important one is the reelection of legislators, which in systems where there is a majority election allows partially offsetting the excesses of power of party leaders. In any case, it is possible to underline the importance of internal democracy in the parties as a condition for consolidating democracy in society.

In the same way that the German constituents did first and then the Spanish, they have proceeded in various countries of our hemisphere. The 1994 Argentine Constitution "guarantees the democratic organization and functioning" of the parties and "the competence for the nomination of candidates" (article 38); the Costa Rican, reformed in 1989, provides that "the internal structure and functioning" of the parties "must be democratic" (article 98); the Chilean one of 1980 establishes that the statutes of the parties "must contemplate the norms that ensure an effective internal democracy" (article 19, 15); the Salvadoran, reformed in 1996, is even more emphatic and determines that "the norms, organization and functioning" of the parties "shall be subject to the principles of representative democracy" (article 85); the 1992 Paraguayan law provides that "the law will regulate the constitution and functioning of political parties and movements, in order to ensure their democratic character" article 125); the Uruguayan, reformed in 1996, establishes: "The State shall ensure that the parties have the widest freedom. Notwithstanding this, the parties must effectively exercise internal democracy in the election of their authorities" (article 78), and that of Venezuela requires that the candidacies and leadership positions of the parties be decided in internal elections (article 67).

The life of the institutions does not imply the cancellation of leadership; but it does claim that its operation is not at the ex-

pense of strictly personal decisions. Balance is an indispensable condition for an adequate organization and functioning of the political instruments that society has. It is necessary to allow the expression of social leaders to flow freely, but it is also important that their activity is not carried out at the expense of the democratic order. Democracy is compatible with the presence of leaders capable of influencing citizen activity; what is not reasonable is that in the same society there are two levels of social organization: one democratic and the other non-democratic. In other words, democracy does not admit zones of exception.

The political parties have the responsibility of generating the conditions that allow their consolidation. Failure to do so runs enormous risks. They risk losing public trust, thereby weakening the very basis of democracy, but also losing control of their own destiny. If the Mexican constitutional order does not guarantee that the parties will adopt democratic procedures in their internal organization and activity, the various political organizations will remain exposed to playing an instrumental role in decisions made outside of them, or within them but by power groups that administer your own ambitions. While this occurs, democracy will not be able to consolidate itself, to the detriment of the rule of law, because exclusive political phenomena cannot coexist in the same society: some of a democratic nature and others alien to it.

IV. Rights of the Opposition

As of 1977, the rights of political parties have a constitutional nature in Mexico. Thus culminated a slow process initiated by Francisco I. Madero with the electoral law of 1911. Progressively, the rights —and to some extent the obligations— of the parties have been expanded. However, we are far from having consolidated the party system that a democracy that faces risks and challenges requires.

The problems posed by the parties are very numerous. From 1738 Bolingbroke pointed out[5] the risks of political fracture that the parties represented. In 1911 Robert Michels[6] identified the oligarchic nature of any organization ("the organization is what gives rise to the domination of the elected over the electors, of the leaders over the constituents, of the delegates over the delegates. Who says organization says oligarchy") and formulated his well-known "iron law" of the parties.[7] The conviction that this oligarchy would end up destroying the possibilities of democracy led Michels, over time, to abandon his socialist and democratic theses and justify Mussolini. On his part, Max Weber[8] warned, from 1918, that the financing of political parties presented problems that had to be addressed.

On the other hand, it has been argued regarding the relevance of parties to democracy. Hans Kelsen, in 1920, categorically stated that "modern democracy rests on political parties".[9] In the third decade of the 20th century, the concept of "Party State" arose in Germany, which in 1930 Gustav Radbruch justified by pointing out that it is the form of the democratic state of our time. Radbruch's militancy in the socialist party from 1919 and his participation in Parliament,[10] explain his affirmation in the sense that "without the organizational mediation of the parties between individuals and the totality, the formation of an

5 Bolingbroke, vizconde de, "The Idea of a Patriot King", *The Works of Lord Bolingbroke*, Filadelfia, Carey and Hart, 1841.

6 *Los partidos políticos*, *cit*., note 4.

7 *Ibidem*, p. 55.

8 "Parlamento y gobierno en una Alemania reorganizada. Una crítica política de la burocracia y de los partidos", *Escritos políticos*, Madrid, Alianza, 1991.

9 Kelsen, Hans, *Esencia y valor de la democracia*, México, Editora Nacional, 1974, p. 35.

10 Martínez Bretones, Ma. Virginia, *Gustav Radbruch. Vida y obra*, Mexico, UNAM, Institute of Legal Research, 1989, pp. 54 et seq.

opinion and collective will would be impossible". Following this thesis, years later García-Pelayo assured,[11] in turn, that

> ...the democratic state must be configured as a state of parties, because only these can provide the state system with the inputs capable of configuring it democratically, such as the electoral mobilization of the population, the ascent to the state of the parties. Political orientations and social demands duly systematized to provide both the corresponding programs of political action, as well as the people destined to be holders or bearers of state political bodies.

Numerous studies have shown the serious problems posed by political parties for the development of public institutions. Since the second postwar period, the expression "partycracy" was coined to denote the distortion of the role of the parties and the corruption phenomena in public life, generated by the parties, which have negative effects on institutional functioning.[12] However, this relationship between parties and the representative system is beyond doubt, and when instruments are adopted that attenuate the weight of the parties in institutional life, such as the popular initiative, the legislative referendum, the plebiscite, the revocation and the independent candidacies, the effects adverse to the parties are projected equally on the congresses. That is why it is important to identify the new mechanisms that make it possible to reduce the concentration of power by the majority or coalition parties, that do not affect the representative system and that even strengthen it.

In this sense, the constitutional provisions that guarantee the opposition's own rights represent a way of consolidating democracy and avoiding the "monopoly" of political information by a single party or a coalition. Hoarding information is an exclusive

[11] García-Pelayo, Manuel, *El Estado de partidos*, Madrid, Alianza, 1986, p. 85.

[12] Vergottini, Giuseppe de, *Diritto costituzionale*, Milán, CEDAM, 2001, p. 310.

and discriminatory attitude that encourages political intolerance. The conditions of political competition between the parties are unequal if the lack of political information is added to the disproportion of financial resources and access to the media, which results from their electoral position.

The first constitutional system that introduced corrections in this matter was the Portuguese one. The 1977 Constitution provides (article 117) that minorities have the right "to democratic opposition in accordance with the Constitution", and especially that parties represented in the Assembly of the Republic that are not part of the government, enjoy the right to be informed directly and on a regular basis by the government about "the progress of the main matters of public interest." This provision, which establishes specific rights for the opposition, also found acceptance in the Constitutions of Colombia (1991) and Ecuador (1998). Ecuador's law establishes (article 117) that political parties and movements that do not participate in the government enjoy "full guarantees to exercise, within the Constitution and the law, a critical opposition". For its part, that of Colombia (article 112) contains a broad opposition statute: in addition to the parties, political movements that do not participate in the government are also recognized the right to "freely exercise a critical function vis-à-vis the government and raise and develop political alternatives". For these purposes, access to official information and documentation is guaranteed; the use of the state media, and the right of reply in those same media "in the face of serious and obvious misrepresentations or public attacks by high official officials." Finally, these parties and movements have the right to participate in the electoral bodies and in the boards of directors of the collegiate bodies of which they form part.

Without going into the analysis of these precepts, some of which present serious problems of interpretation, as in the case of the "serious and obvious misrepresentations" referred to in the Colombian Constitution, what is interesting to underline is the incipient process of explicitly recognizing rights specific to

the opposition in the constitutional sphere, as a way of extending the guarantees for the fundamental rights of liberty and equality. The most important problem that the Colombian Constitution presents is that it refers to access to information by the opposition, but it does not indicate the government's obligation to offer that information in a periodic and systematic way. This is a considerable difference in relation to the Portuguese Constitution, because in its terms the government must report regularly and on all aspects of its activity, while the Colombian law leaves open the possibility that the government only inform the opposition when required by it, and in relation to the matter on which information is requested. In these terms, it would not be going beyond what anyone could demand, in accordance with the right of access to information.

A democratic constitutional system cannot favor the concentration of political information. Restricting, limiting, or hoarding political information is a way of affecting the exercise of public freedoms and, therefore, can be considered as a form of intolerance. Using information as an instrument of domination damages one of the bases of pluralism and damages the functioning of democratic constitutional institutions. As parties are public interest entities, no differences can be established between them other than those resulting from citizen decisions. If the dangers of parties manipulating voters through multiple propaganda strategies have been warned, this risk increases to the extent that some parties have information that others do not know.

V. Pluralism and the Presidential System

With the registration of new political parties before the 2000 elections, eleven participated in the electoral process of that year. It was a test of the political vitality of the country, but it will be necessary to ask if the current organization and operation of the institutions will allow to channel that energy.

When Venustiano Carranza inaugurated the sessions of the Constituent Congress of Querétaro, on December 1st 1916, he recognized that Mexico lacked political parties and that, as a consequence, a "strong Executive" should be chosen. The work of Congress, which culminated in the approval of our current Constitution, ratified that criterion of the first chief. Thus, the legal bases of our presidential system were consolidated.

Every constitution is, at the same time, a normative expression, and a cultural product.[13] In the case of ours, both the norm and the environment have contributed to developing a very powerful presidential system. Beyond what is prescribed by the Querétaro text, what Jorge Carpizo rightly calls the "meta-constitutional powers" of the presidents have been developed.[14] This means that, in addition to what the norm establishes, the presidential institution has extended its powers. This breadth is what the social and cultural environment allows and even supports. Formed in a paternalistic tradition, and with centuries of living in submission, it was not alien to our behavior patterns to accept a vigorous and uncontested authority. In addition, other factors contributed, from our first years of independent life, to forge what would be the essence of Mexican presidentialism. The first heads of government, with few exceptions, were formed on the battlefields; first in the war of independence and then in the successive riots that fill the pages of our nineteenth-century history.

Civil power in Mexico also had to consolidate itself against that exercised by the Catholic Church, and national power had to do so in the face of threats, several times carried out, of foreign invasions. Finally, another element appeared: voluntarism. Everything could be solved, it was thought, by acts of individual will. It was enough to elaborate norms that translated the determination to be free and fair, to achieve it.

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13 Cf. Häberle, Peter, *Retos actuales del Estado constitucional*, Oñate, IVAP, 1996.

14 Carpizo, Jorge, *El presidencialismo mexicano*, Mexico, Siglo XXI, 1978.

With that baggage we arrive at 1917, and to 2000. Today, expressions of political voluntarism continue to be very frequent. They are surprising not so much for their anachronism, as for their naivety. It is still assumed that the key to social, moral, and even political changes is only in the modification of laws or in the adoption of new ones. It is not realized that the real changes must be accompanied by modifications in individual and social behaviors.

Changes in the norm that do not translate into social behavior produce disenchantment and skepticism; changes in behavior that do not have normative support create the impression of disorder and even anarchy. Hence, the reconstruction of our institutions, so battered today, requires changes in norms and behaviors at the same time.

In the case of the new party system and the old presidential system, we find two opposing realities. On the one hand, a strong pull towards democratic consolidation based on the plurality of political agents acting freely; on the other, a tendency towards the concentration of power, which does not depend on the intentions of whoever holds the presidency but on the structure of that power itself. The panorama posed by Carranza, which compensated for the lack of political formations with the robustness of the presidential institution, is no longer present. However, the precepts that resulted from that Carranza perspective remain. The Constitution provides that "the Legislative Power of the United Mexican States is deposited in a Congress...", and that "the exercise of the Judicial Power of the Federation is deposited in a Supreme Court of Justice, in an Electoral Court, in Tribunals Collegiate and Unitary Circuit, in District Courts, and in a Council of the Judiciary ", while on the other hand it determines: *"the Supreme Executive Power of the Union is deposited in a single individual..."*.

It cannot be seen as inconsequential that the Constitution refers to the executive as "supreme power." Words are made to mean what they say, and "supreme" is "that which has no supe-

rior." Note that within the Judicial, the Court is "Supreme" in its relationship with the other constituent organs of that power; but among the three powers, the executive is the only one qualified as supreme, in this case in relation to the other two powers.

Semantic disquisitions aside, there is a central fact: there is a power of the state that resides, completely, in a single person. If no president has said it, he could well do it, and with constitutional grounds: "I am the power." This concept of the power deposited in a single individual comes from the North American Constitution of 1787. But there is a great difference: although in practice the president of the United States is chosen by most citizens, in the constitutional order he is still elected according to indirect way. It is not, therefore, a plebiscite system like the Mexican one.

The archaic Mexican system of plebiscitary president and sole depositary of power is only followed, in Latin America, at present, by the Constitutions of Nicaragua, Paraguay and the Dominican Republic. In Argentina and Peru, the constitutional norm that makes the president the sole depositary of the executive power also subsists, but in the constitutions of both countries the presence of a cabinet with constitutional powers and headed by a chief minister is established.

An intermediate position, of transition, is the one that characterizes Colombia, Chile, Ecuador and Honduras, where despite the fact that the executive power is deposited in the president, specific functions are assigned to the cabinet and the responsibility of the ministers before the Congress is recognized.

The mainstream is represented by Bolivia, Brazil, Costa Rica, El Salvador, Guatemala, Panama, Uruguay, and Venezuela (although in this case they have been adapted to the Mexican formula, more akin to the authoritarian manifestations of President Hugo Chávez). In the constitutional systems of these countries the executive power is deposited in the president and the cabinet; it therefore has a collective nature consistent with the plural order of a democracy.

In this context, the idea, latent in Mexico, that the president of the republic is elected through an electoral procedure that admits a second round, when in the first no one has obtained a certain majority, must be analyzed. It is known that second-round systems favor the fragmentation of the electorate, give rise to false majorities, and generate imbalances between the apparent majority that supports the election of a president and the composition of congress. But, in addition to these aspects, there is another that should not be overlooked: in presidential systems, the second round strengthens the figure of the president and accentuates his plebiscite traits.

The plebiscitary presidential system did not emerge in the United States but in France, in 1851, with Luis Bonaparte. In the United States, good care was taken not to build a figure that would add a significant number of constitutional powers to a high degree of political power. That is why a different way of electing the president (indirect election) and the members of Congress (direct election) was established. The arguments put forward[15] were oriented precisely in the sense of preventing presidential excesses, electoral corruption, and violence on the occasion of the election of the president. Such was the accumulation of powers attributed to it that it was not considered prudent to invest it, in addition, with the popular power that would result from a direct popular election.

Louis Napoleon would follow another course. To reach the presidency he used the plebiscite route and introduced a new meaning to the presidential system. His statement "I have abandoned legality to return to law",[16] is an expression that reveals the extent to which plebiscitary presidentialism constitutes a risk to the rule of law.

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[15] For example, James Wilson, Philadelphia, October 6 and December 11, 1787; Noah Webster, October 17, 1787, in *The Debate on the Constitution*, Washington, The Library of America, 1993.

[16] Bluche, Fréderic, *Le prince, le peuple et le Droit,* Paris, PUF, 2000.

VI. Interregnum

Some years ago, the expression "interregnum" was widely used in Mexico to mean the period between the election of a president and the protest of the office. The locution is strictly conventional and is taken in the institutions of Roman law at the time of the Monarchy.

The first Roman monarchs were appointed, for life, by the Senate. When the lack of king occurred, and until the election of the new monarch was made, the Senate appointed a magistrate called inter rex, whose functions lasted five days; there were as many as necessary, while the vacancy was permanently filled. The inter rex was, therefore, a precarious manager of power.

In modern European monarchies "interregnum" was called the period in which the "sovereign" was missing, and the term was even extrapolated to speak of "parliamentary interregnum", alluding to the recess of Parliament.

Among us, this idea became effective in the time between the nationalization of the bank, on September 1st, 1982, and the 1st the following December, when a new president took office. During that period there was the circumstance of a president who ended his term and that, due to the way the Mexican political system worked, no longer had full power, and of another who, because he was just an elected president, still did not have any power. The devastating effects on the economy are accurately remembered.

Plato (the politician) saw the linking of the cycles that end with those that begin with clarity, and to explain it, he used it, as he used to make a phenomenon more understandable, the myth of the inversion of the cycles. According to this myth, the universe rotates alternately in opposite directions, and the most difficult moment occurs precisely when one cycle is exhausted and the next is about to begin, in the opposite direction. According to this perspective, there would be a moment of paralysis, just

when the direction of the movement is going to reverse. What he calls "the collision of the contrary impulses of movement" takes place, with a wide series of consequences. The most spectacular that Plato identifies is the appearance of the "sons of the earth": times are reversed, the elderly become young, the young children, the children disappear, and the dead are reborn.

Although numerous theses have been grounded in this myth on a theory of historical cycles that lacks scientific basis, what Plato intended was simply to show that movement does not stop; that it changes direction and that not everything new is necessarily unpublished. Change is necessary and inevitable, according to this approach. The problem is that the change, read as this reversal of the cycles, generates disorders. The fantastic example is fully applicable to the period known as "interregnum" in Mexican politics.

The stages of transit between one government and another have caused, to varying degrees, a lack of certainty regarding economic and domestic policy decisions. Until now, the most critical moment has been the one produced in 1982. That is why the idea of "shortening the interregnum" arose then, and the president presented an initiative of constitutional reforms that were adopted in 1986. The most important of these reforms consisted in the fact that federal elections would be held in August, instead of July, and the regular session of Congress would begin on the 1st of November.

Thus, between the election of the president and his inauguration, only a little more than three months would elapse, instead of almost five when the elections were held in July. It was not possible to further reduce that period, because the self-qualification system for the deputies' elections subsisted, and the Chamber of Deputies continued to be the electoral college that qualified the presidential election.

The election qualification system progressed until reaching the current situation, of heteroqualification, in charge of specialized organizations (Federal Electoral Institute and Federal Elec-

toral Tribunal), with which, in addition to having better guarantees of impartiality, procedures are available faster to know the final results of the elections. However, through an inconvenient constitutional reform of 1993, the elections returned to July and the installation of Congress to the first day of September.

In the future, this situation will have to be corrected, which periodically generates an adverse tension to legal security that, in accordance with the principles of the rule of law, must characterize all acts of public power. The possibility of foreseeing the decisions of power, insofar as they are based on normative provisions, is affected to the extent that factors of indeterminacy are introduced that last longer than is usual in democratic systems.

Due to changes in government, all systems undergo adjustments. The prospect that some of the "rules of the game" are subject to modification due to the adoption of new political plans and programs generates situations of relative uncertainty. This is a common phenomenon in all democracies, but the important thing is that the effects can be absorbed by an institutional complex that allows doubts to be channeled without causing tension.

The problem is accentuated when the institutions themselves have a limited response capacity. It is true that there is no univocal concept of the term "institution". For some it is an organization that has an indefinite duration; for others it is a set of procedures practiced in a general and lasting way; some more understand it as forms of conduct adopted by a community that endure independently of the will of each of its members. But regardless of the content attributed to the institutions, they include the different organs of power.

Democratic changes always involve changes in the way of exercising power; but on some occasions they also include the transformation of the very organs of power. As for the first case, the exercise of power is subject to the known and current rules; in the second, what is proposed is precisely the adoption of new rules. Excessively prolonging the uncertainty about the direction that these definitions will take alters the behavior of social agents

and makes the behavior of power unpredictable for some time. This does not strengthen the rule of law. Hence, the problem that arises in Mexico of a very long "interregnum" must be solved by adjusting the federal electoral periods.

VII. Final Remarks

Even though the bases of the electoral system have undergone a Copernican turn from those that were elaborated as a result of the Constitution of 1917, and despite the fact that there are already reliable electoral processes in Mexico that ensure the democratic legitimacy of the heads of the organs of the power, there are still aspects that must be addressed as a condition for the social and democratic state of law to prevail.

Internal democracy in political parties, the recognition of the rights of the opposition, the limitation of plebiscitary presidentialism and the reduction of the period of uncertainty that elapses between the presidential election and the inauguration of the president, are some aspects that should be considered. The study of comparative law allows us to notice the tendencies that have been registered in this sense, and that are gradually acquiring a diffusion.

The rule of law requires permanent adjustments in the functioning of the institutions. Of course, what has been proposed here is only one part of the many changes that the Mexican constitutional system requires. Like any normative order, it will always need adjustments that make it permanently functional. Keeping it unchanged is transforming previous successes into future problems.

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