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.

---

* Published in *Boletín Mexicano de Derecho Comparado*, new series, year XXXIII, no. 97, January-April 2000.

[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.

---

[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

---

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.

---

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]

---

[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]

---

[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.

---

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.

VI. Works Cited

AQUINO, Tomás de, *Suma de teología*, Madrid, Biblioteca de Autores Cristianos, 1997.

BERLIN, Isaiah, *Cuatro ensayos sobre la libertad*, Madrid, Alianza, 1988.

DELUMEAU, Jean, *El miedo en Occidente*, Madrid, Taurus, 1989.

ELIADE, Mircea, *Dictionnaire des religions*, Paris, Plon, 1990.

FIX-ZAMUDIO, Héctor, "La libertad religiosa en el sistema interamericano", *La libertad religiosa*, México, UNAM, 1996.

GARCÍA-PELAYO, Manuel, *Derecho constitucional comparado*, Madrid, Alianza Universidad, 1984.

GARCÍA-PELAYO, Manuel, *El Estado de partidos*, Madrid, Alianza, 1986.

GARCÍA-PELAYO, Manuel, *El reino de Dios, arquetipo político*, Madrid, Revista de Occidente, 1959.

GARCÍA-PELAYO, Manuel, *Idea de la política y otros escritos*, Madrid, Centro de Estudios Constitucionales, 1983.

GARCÍA-PELAYO, Manuel, *Las transformaciones del Estado contemporáneo*, Madrid, Alianza Universidad, 1995.

LOCKE, John, *Carta sobre la tolerancia*, Madrid, Tecnos, 1985.

MAIER, Hans, *L'Eglise et la démocratie. Une hiostoire de l'Europe politique*, Paris, Criterion, 1992.

MARSILIO DE PÁDOVA, *Le défenseur de la paix*, Paris, J. Vrin, 1968.

MEDINA, José Toribio, *Historia del Tribunal del Santo Oficio de la Inquisición de México*, Santiago de Chile, Imprenta Elzeviriana, 1903.

MILL, John Stuart, "Considerations on Representative Government", *On Liberty and Other Essays*, Oxford, Oxford University Press, 1991.

MILL, John Stuart, "On Liberty", *On Liberty and Other Essays*, Oxford, Oxford University Press, 1991.

NETANYAHU, Benzon, *Los orígenes de la Inquisición*, Barcelona, Crítica, 1999.

PACHECO ESCOBEDO, Alberto, "La libertad religiosa en la legislación mexicana de 1992", *La libertad religiosa*, México, UNAM, 1996.

PÍO XI, *Firmissimam constantiam*, on POWERS, Francis J., *Papal Pronuncements on the Political Order*, Maryland, The Newman Press, 1952.

PIRENNE, Henri, *Mahoma y Carlomagno*, Madrid, Alianza Universidad, 1997.

POPPER, Karl, *All life is problem solving*, London, Rutledge, 1999.

POPPER, Karl, *Sociedad abierta, universo abierto*, Madrid, Tecnos, 1997.

RANKE, Leopold von, *Historia de los Papas en la era moderna*, Mexico, Fondo de Cultura Económica, 1943.

ROMILLI, M., "Tolérance", *Encyclopedie ou dictionaire raisonné des sciences, des arts*, Neufchastel, S. Faulche, 1765.

ROUSSEAU, J. J., "Du contrat social", *Oeuvres politiques*, Paris, Classiques Garnier, 1989.

RUSSELL, Bertrand, *A History of Western Philosophy*, Nueva York, Simon and Schuster, 1972.

SEVILLA, Isidoro de, *Etimologías*, Madrid, Biblioteca de Autores Cristianos, 1993.

SMITH, Adam, *La teoría de los sentimientos morales*, Madrid, Alianza, 1997.

SOBERANES, José Luis, "De la intolerancia a la libertad religiosa en México", *La libertad religiosa*, México, UNAM, 1996.

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, 1986.

VERGER, Jacques, "Le transfert des modèles d'organisation de l'Eglise a l'Etat à la fin du Moyen Age", *Etat et Eglise dans la genèse de l'Etat moderne*, Madrid, Casa de Velázquez, 1986.

VOLTAIRE, "Comentario sobre el libro 'De los delitos y de las penas' por un abogado de provincias", on BECCARIA, Cesare, *De los delitos y de las penas*, Madrid, Alianza, 1968.

VOLTAIRE, "Diccionario filosófico", *Obras completas*, Valencia, M. Senent, 1894.

VOLTAIRE, *La moral religiosa,* Barcelona, F. Granada Editores, s. f.

VOLTAIRE, "Tratado sobre la tolerancia", *Obras completas*, Valencia, M. Senent, 1894.

WEBER, Max, *Economía y sociedad*, Mexico, Fondo de Cultura Económica, 1964.