The Rhetorical Function of Law for the Boundaries of Tolerance

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English Abstract

Thinking of the discussions about the legal effects of the Brazilian Amnesty Law, the thesis in this paper is that positive law has to coercively assure the basic environment for the development of tolerance. So it has to stay completely apart from religion, politics, money etc., and it cannot privilege any sort of moral view, which would be in itself valid. The price to pay is the formalization, that is: the task of law is to guarantee an arena, a public space of procedural rules in which the different ideologies towards how the world ought to be can confront each other to gain the minds and opinions of the people. On the way to the thesis, I will first show how the sophistical movement turned into a rhetorical philosophy through the incorporation of the ideas of historicism, humanism and skepticism. In the second place, there will come an historical analysis of the idea of tolerance, nearly as old as culture itself. Then, in the same line, I will try to show more specifically how this evolution led to modern rhetoric, in order to, finally, situate the paradox of tolerance and how law could be able to deal with it and overcome the ethical burden that the modern democratic world has brought to it.

Resumen en español

En el contexto de las discusiones acerca de la Ley de la Amnistía a los crímenes políticos, cuyos efectos están en discusión en Brasil, la tesis en este texto es que el derecho positivo necesita asegurar coercitivamente el ambiente para el desarrollo de la tolerancia. Para esto precisa estar completamente separado de la religión, de la política, del dinero etc. y no puede privilegiar ninguna forma de convicción moral que sea válida en sí misma. El precio a pagar es la formalización: la función del derecho es garantizar una arena, un espacio público hecho de reglas procedimentales, bajo las cuales las diferentes ideologías sobre cómo el mundo debe ser sean confrontadas para conquistar las opiniones y los espíritus. El derecho positivo procura realizar la ideología de los vencedores en la lucha política. Para demostrar esta tesis, empiezo por argumentar que la sofística de los abogados de la antigua Sicilia se transformó en una filosofía retórica, por medio de la incorporación de las ideas del historicismo, el humanismo y el escepticismo. Posteriormente, presento un breve análisis histórico de la idea de tolerancia, que es casi tan antigua como la cultura misma. De este modo, procuro exponer más específicamente cómo esta evolución desembocó en la retórica contemporánea para, finalmente, exponer la paradoja de la tolerancia y sugerir cómo el derecho puede lidiar con la sobrecarga ética que las democracias contemporáneas le han traído.

Resumo em português

Pensando no contexto das discussões sobre a Lei de Anistia aos crimes políticos, cujos efeitos estão em discussão no Brasil, a tese neste artigo é que o direito positivo precisa assegurar coercitivamente o ambiente para desenvolvimento da tolerância. Para isso precisa estar completamente separado da religião, da política, do dinheiro etc., e não pode privilegiar qualquer espécie de convicção moral que seja válida em si mesma. O preço a pagar é a formalização, ou seja: a função do direito é garantir uma arena, um espaço público composto de regras procedimentais, sob as quais as diferentes ideologias a respeito de como o mundo deve ser confrontem-se para conquistar as opiniões e os espíritos. O direito positivo tenta realizar a ideologia dos vencedores na luta política. Para mostrar essa tese, primeiro argumento que a sofística dos advogados na Sicília antiga se transformou em uma filosofia retórica, mediante a incorporação das ideias de historicismo, humanismo e ceticismo. Em segundo lugar, há uma rápida análise histórica da ideia de tolerância, quase tão antiga quanto a própria cultura. Seguindo a mesma linha, tento expor mais especificamente como essa evolução levou à retórica contemporânea para, finalmente, colocar o paradoxo da tolerância e sugerir como o direito pode lidar com ele e com a sobrecarga ética que as democracias contemporâneas lhe trouxeram.

Introduction: How the Rhetorical Perspective Could Contribute to Contemporary Functions of Law

A delicate issue in contemporary Brazil relates to the actual debate about the 1979 act conceding amnesty to individuals involved in violence during the last military dictatorship, which took place from 1964 to 1984, mainly in the period between 1968 and 1978—the so called "led years." This is a practical example of the paradox about how far tolerance and forgiveness could go when the case deals with certain kinds of crimes.

This paper does not really concern this historical problem, but the thesis here is that positive law has to assure the basic environment for the development of tolerance. It has to stay completely apart from religion and it cannot privilege any sort of moral view, which would be in itself valid. The price to pay is the formalization, that is: the task of law is to guarantee an arena, a public space of procedural rules in which the different ideologies towards how the world ought to be can confront each other to gain the minds and opinions of the people.

On the way to the thesis, I will first show how the sophistical turned into a rhetorical philosophy through the incorporation of the ideas of historicism, humanism and skepticism. In the second place, there will come an historical analysis of the idea of tolerance, nearly as old as culture itself. Then, in the same line, I will try to show more

specifically how this evolution led to modern rhetoric, in order to, finally, situate the paradox of tolerance and how law could be able to deal with it and overcome the ethical burden that the modern democratic world has brought to it.

One goal of modern democracies is the domestication of intolerance, for democratization implies inclusion, common rules, reckoning of the other, fragmentation of power, distribution of wealth. Philosophically, it also presupposes some mistrust of human characters and features, with their self-indulgence, vanity, struggle for power and self-esteem. As a political system, democracy formalizes the means of decision through proceedings and empties law of any previous ethical content, that is, a moral conception that is in itself valid. Ethical "is" no specific (ontological) behavior, ethical is what is decided to be ethical.

In terms of the theory of knowledge, today's occidental, democratic conception comes with the overcoming of the mathematical Cartesian model of objective certainty and the establishment of the paradigm of discursive contexts and consensual agreements, even though they are highly contingent, conditioned, changeable and unaccomplished; in a word: rhetorical.

Ethical attitudes are self-referent goods, in the sense that convictions can only be confronted by different convictions. Ideologies, human beliefs in a broad sense, only understand the language of ideology and the confrontation of contrary ideologies is perennial. So the problems which originated the necessity of tolerance are still at large nowadays, for being tolerant has not been the rule, despite obvious ethical advantages, especially in what concerns law and politics.

Intolerance seems to have received a great impulse with the historical appearance of the new and revolutionary idea brought by monotheisms. This implies the attractive pretense of an absolute truth and an absolute conception of ethics (and law that are the only valid ones and do not accept different perceptions of the world.

This finds support in a third factor, most decidedly anthropological, which is the human inclination to join similar people, to feel safer among those who are alike, be it in the simpler perspective of physical appearance, be it in the subtler cultural aspects. This is noticed even today in complex differentiated societies, including the so-called highly developed countries, in which one can detect these simple-minded forms of intolerance, such as racism, which shows that not only in the primitive cultures of Babel is there an aversion for difference.

The word "tolerance" shall not be understood here merely in its common meaning, more faithful to its origins, of bearing something unpleasant; it means much more the acceptance and mutual support given to individuals, communities, opinions, attitudes, which come from different backgrounds and perceptions of the environment (*Weltanschauungen*) and cannot be reduced to one another. Examples include religions, ideologies and other systems of normative orientation. Those diverse and

mutually irreducible systems imply potentially conflicting interactions. Hence the necessity of tolerating differences.

In complex societies tolerance comes to be a vital ethical attitude to deal with these conflicts, and dogmatically organized law becomes the sole guarantee of this tolerance, while emptying itself of definite ethical contents by means of formalization (proceduralization) and differentiating and emancipating itself from other normative orders like religion and morals (neutralization).

While the monotheisms are geographically separated there is, of course, no problem. When geographically connected, however, their mutual exclusivity engenders conflict. In Western culture, this happened in the 7th century, when the three great monotheisms confront one another: Judaism, Christianity and Islam. Their adherents accused the followers of other religions of being infidels, heterodox, heretics, schismatics, anabaptists, apostates and many more, with all its manifold subdivisions, in a complex and dangerous lexicon of intolerance.

There are also the additional issues of Buddhism—and of other Eastern religions which Westerners can hardly distinguish, such as Confucianism—and the conflicts with the Indians of the Americas and, a little later, with the enslaved Africans.

Humanism also played a role in the debates around the historical events involved in the discovery of the New World and the actions of European conquerors, which is important to understanding how international law cooperated in the construction of tolerance in the Americas.

One of the first historians to deal with these American events was the Spaniard Bernardino de Sahagún (1500-1590), who wrote about the genocide of the Aztecs in a book that describes the so-called "New Spain." He advocates the idea, rare at the time, that American natives are human beings and demonstrates admiration for their culture. Juan Luis Vives (1492-1540) agreed with this revolutionary approach.

The international, legal, and philosophical question concerned whether the "Indians" would be human beings, the main subject of the disputatio between Bartolomé de las Casas (1474-1566), as lawyer of the Indians, and Juan Ginés of Sepulveda (1489-1573), defender of the Spanish conquerors. But the times were contradictory enough, insofar as Bartolomé de las Casas shows indulgence towards the enslaving of Africans and the persecution of Muslims. The writings of Casas, shocked by the so-called Caonao massacre in 1512, seem to have influenced Emperor Charles V, who, on November the 20th, 1542, promulgated the New Laws, which recognized human dignity to Indians and forbade their enslavement.

Concering Ginés of Sepulveda, there remain even today disputes about his supposed defense of slavery and even annihilation of Indians. Menéndez Pelayo attributes the bad reputation of Sepúlveda to the eloquence and inadequate evaluation

on the part of Las Casas, "making the name of such a harmless and prominent humanist come to posterity with the most odious colors..." Garcia-Pelayo, another contemporary analyst recognized similar evaluation errors in several other reviewers. Francisco de Vitoria (1483-1546) also took part in this controversy and was criticized by Las Casas for his ambivalence and political opportunism. Vitoria is clear in his writings about his defense of the Indians, up to the point of being prohibited to mention the subject.

An historical view is likely to reconcile a humanistic conception of culture with a skeptical understanding of human "nature", which becomes a profound force towards tolerance. Besides history, whose importance obliges us to mention it separately, culture shall be understood in terms of literature, philosophy, music and art in general.

The relation between culture and science has been problematic. To know physics or mathematics deeply does not imply culture, just like understanding everything about financial or administrative law. One cannot call a person ignorant for not knowing Gauss' curve, Gödel's proof or the difference between prescription and decadence of subjective rights. But the epithet could be appropriate for someone who thinks Thomas Jefferson is a soccer player. Culture and history are narrowly connected: both go against one-sidedness, prejudice and ignorance. Thus tolerance constitutes an ethical exigency which has been historically built inside some specific cultures, but not only in Western tradition.

I Historicism, Skepticism, and Humanism are the Rhetorical Foundations that Lead to Tolerance

A first point of departure would be a realistic anthropology, a conception of the human being that is more in the direction of Hobbes' *homo homini lupus* than Rousseau's noble savage because "men, intolerant by nature, come to be tolerant by necessity."[1] But a realistic anthropology does not mean pessimism towards humanity. Recognizing this is important to understand the necessity of law and also to an ethical approach towards a philosophical justification of tolerance.

According to ontological, essentialist philosophies, clearly prevailing in the Western tradition and in contemporary philosophy of law, language is a mere instrument for the discovery of truth, which can be apparent to some, or concealed to others, or to hide behind appearances and so on, with all combinations and eclecticisms. The common idea is that with method, logic, intuition, emotion and all their knowledge apparatuses, it is possible for human beings to find truth, that is, statements that would compel everyone to "rationally" accept them   In what ethics is concerned with, truth equals correctness and justice.

This paper defends the thesis that these compelling instances of truth and justice are discursively created "realities" and that the precarious agreements of language not only constitute the maximum possible guarantees but are the only ones. Tolerance

should be a good guide through these uncertainties, and law has to guarantee its realization, while it renounces any previous moral content. Moreover, despite being temporary, *autopoietic*, circumstantial and frequently disrespected, these agreements are all that can be called rationality in ethics.

I will refer here to a dichotomy suggested by Hans Blumenberg, based on the anthropology of Arnold Gehlen, which presents a schematic opposition, like Max Weber's *Idealtypen*, dividing the conceptions of occidental philosophy about human "nature" into two main streams: as a rich being (*reiches Wesen*) or as a poor being (*armes Wesen*). As rich or full (plenary), the human being has the criterion and is able to reach the truth, while language consists of an instrument, and rhetoric serves as a mere ornament, by which the person who speaks can influence the environment in a more or less effective way; as a poor or needy being, humans are unable to perceive any truths about any world that stands behind the appearances of a linguistic context, the sole artificial reality with which they can deal.[2]

And I could add that these two main trends can be detected in Western philosophy since its beginnings in ancient Greece, opposing the rich perspective of Plato and Aristotle to the poor perspective of the sophists. Or even before, comparing Parmenides (nothing changes) and Heraclitus (everything changes). Departing from that basic anthropology of the sophists, three new ideas came to turn sophistry into philosophy, giving birth to the rhetorical philosophy. Historicism, humanism and skepticism sophisticated the mainly practical work of sophists and turned lawyers into philosophers.

This contextualization of truth and justice leads to an historical perspective of culture, the conviction that researching history gives support to a better understanding of the present, even though history does not have the objectivity sometimes given to unavoidable interpretations of it. On the other hand, history should not be regarded only as a matter of opinion or taste. All of this means that an historical perspective leads to a more relative conception of the present.

To define this first perspective (historicism), Thucydides criticizes the Homeric narrative of the war in Troy and defends his own methodology of sharply separating history from art and literature. History, originally a rhetorical art, needs to compare sources in order to describe events as faithfully as possible—"the accuracy of the report being always tried by the most severe and detailed tests" (Thucydides, 1990 [I, I, 20-22], 353-354)—in order to keep a distance from artistic language, romance, poetry, even if the absence of those would deprive it of interest and applause from the public.

With other criteria, Aristotle, in his On Poetics, tries to differentiate history from literature: history is concerned with what "really" happened, not with what might happen. The difference is not in the form of prose or verse, respectively, but in the individuality of historical facts. Hence the surprising conclusion— in the opposite direction of Plato, in whose Republic poets shall be banished— that "poetry is something more philosophic

and of graver import than history, since its statements are of the nature rather of universals, whereas those of history are singulars."[3]

But the historical reports were traditionally considered a form of art, and it is not at random that history comes later to be included in the system of the seven liberal arts, as a part of grammar and rhetoric, *artes bene dicendi et scribendi* (the art of speaking and writing well). It is therefore easy to see how important the relationship between history and literature has been to the concept of tolerance.

The second point, also impregnated with rhetoric, is the humanism brought by Socrates and the Sophists. This tradition was kept alive among some philosophical outsiders in the middle ages, against the main ontological trends that claimed to have discovered truth. The marginal rhetorical approach gained new force every now and then, as happened in the Renaissance and in the Reformation, ideas that spread throughout Europe, by means of the Platonic Academy of Florence and the work of Erasmus, More, Sebastián Castellio, to mention only a few. Humanism, with its philosophical attitude of sympathy towards human beings, has always been associated with tolerance of differences, and has even been plainly defined as human dignity, meaning legally enforced rights of protection and respect.[4]

Historical perception and humanism are correlative presuppositions, for history is unavoidably human. Following Vico, God shall take care of the cosmos, which he created, while humans shall take care of history, which they make.[5] He tries to reconcile what he calls the ancient method (rhetorical), inspired in Cicero, and the modern (critical), represented by emerging Cartesianism: *De recentiori et antiqua studiorum ratione conciliata*.[6]

The humanistic way of thinking which comes from Renaissance to Modernity contributed significantly to the development of the new idea of tolerance, as did the political weakening of the official way to truth, determined by Catholicism. Since any grown up man could come directly to terms with the word of God, the contents of an intrinsic just law will depend on the interpreter, even if he is not aware of that.

Finally, the historical perspective unites humanism with another element to promote tolerance: *skepticism*, the conviction that there always are different points of view to human divergences and truth is not within the reach of communication and cannot constitute a rational goal. So one's own ways towards the world (thinking, acting, responding) become relative, paving the way to tolerance and its two solutions for conflicts: *isosthenia* (equal strength) for the theory of knowledge and ataraxia (serenity) in what concerns ethics.[7]

It is an old idea, already clear in the biblical episode of the Tower of Babel, that differences suggest and may bring divine punishment, as if the diversity of languages and opinions were something bad because God considered it evil. That aversion to difference seems to be characteristic of homogeneous primitive cultures. In the Bible

one learns that, after the Flood, there was only one language on Earth. Having learned more advanced methods of construction, with tiles cooked in fire, bitumen and lime, the men said to each other: "Come, let's build us a city, and a tower whose peak reaches the sky; let us make our names celebrated before we spread throughout the Earth". The penalty for this haughtiness was the "confusion of all languages of the world."[8]

Historicism, humanism and skepticism thus lead to a rhetorical conception of language, which means to see language as a self-referent process that at the same time (and very literally!) constitutes what we call reality.

II Marginal But Steady Evolution of an Ethics of Tolerance in Western Culture

It seems that the first time that the word *tolerantia* was coined, in a modern sense, is found in Luther, in 1541. But this meaning becomes common in European culture only with the Enlightenment, in the 17th century. Of import is Kant's text *Beantwortung der Frage: was ist Aufklärung?*, from 1784, that attempts to define the enlightened attitude. After saying that the path to intellectual maturity (*Mündigkeit*) is difficult and painful for most people (including "all the beautiful sex" in his ironical and politically incorrect expression), Kant affirms that the only presupposition of the Enlightenment is freedom, understood as the "public use of reason", that is, its free manifestation at any time and place.[9]

But of course the idea of tolerance is much older than Kant's writings.

In opposition to polytheism, seen as "natural" in more primitive cultures, there are records of the Egyptian Pharaoh Ikhnaton demanding of subjects that only the God Aton should be venerated, also causing the first protests against monotheism. There are also recommendations of tolerance as old as the oldest writings and juridical regulations dictated by intolerance. In Genesis (9:1-31) God is already telling Noah that he formed a pact with all life on Earth, not only with the "chosen people". Moses Maimonides, the great Jewish philosopher of the middle ages (1137-1204) interprets this pact with Noah and the other one between God and Moses under the light of the Ten Commandments, concluding that both have been made with the Jews, not as the exclusively chosen people, but as representatives honored with the task. So both contracts apply to all human beings. That is why Maimonides says, in his Repetition of Doctrine, that people should never be forced to obey the Torah.

The Christian New Testament also accentuates the exhortation to tolerance. In his Gospel, Luke affirms the duty to love everyone, for it is much more worthy than to love only those who love us, since any sinner can be a friend to friends;[10] accordingly, he also commands not to judge, in order not to be judged.[11]

Among the first priests, Tertullian (160-220) and Lactantius (250-325) should be remembered. The former was living while Christians were still being persecuted and calls for tolerance on the part of the Romans towards them; the latter lived when

Christianity was newly the official religion and asks for tolerance from Christians towards barbarians and heretics. Tertullian, in his Letter to Scapula, argues that it is a natural human right to choose one's own religion, because nobody can be constrained to believe, while Lactantius follows the same steps, saying that nothing is so dependent on free will as faith and religion.

And these old references do not only come from Jews and Christians. The Sura 2, 256, brings an example from the Koran: "No coercion in matters of religion! The path of rectitude distinguishes itself from the path of corruption". Other Muslim thinkers interpret the Koran with the same sense of freedom of creed.[12]

Although there had already been some institutionalization of religious tolerance in old Greece and Rome, as well as in the early days of Islamic culture, the concept of tolerance, as understood today, does not appear at the time. Originally, the Latin word *tolerantia* was related to the ideas of fearlessness, bravery and courage, meaning patience or indifference in the face of pain, torture or setbacks in life.[13]

Augustine appears to have been the first to innovate, using the expression as a social ethical imperative, when he recommends tolerance of Jews and prostitutes.

Years later, Thomas Aquinas (1225-1274), whose doctrine in many other points remains the official one for the Catholics, says, in his Summa Contra Gentiles, that "infidels" (Jews and Muslims) should not be forced to believe. But heretics and apostates, on the other hand, who had the opportunity of contact to Catholic faith, should be compelled even with means of bodily harm (*sunt etiam corporaliter compellendi*) and could be excluded from the world by death (*etiam per mortem a mundi excludi*), a euphemism for "executed."

Fortunately this is not the case with two other Catholic philosophers, one earlier and the other later than the Angelic Doctor, showing the intense debates at the time: respectively Peter Abelard (1079-1142) and Nicholas of Cusa (1401-1464), who defended a single core for the various religious manifestations (*una religio in rituum varietate*). Also dogmas such as the Pope's infallibility, the necessity of baptism for the salvation of the soul, or the virginity of Mary do not have the same importance as those standards common to all religions, such as solidarity and respect for the others.

The path of tolerance should not be taken eschatologically, however, for it would be quite optimistic to think that intolerance is bound to disappear.[14] Recently the Roman Catholic Pope Benedict XVI repeated his exclusivist perspective of the world by presenting Catholicism as the only true religion.[15] Although compatible with his biography, this statement shows that the anachronistic radicalization of fundamentalist monotheisms—with the intolerance which is its corollary—remains alive even today and still speaks to the hearts of many people.

Already in the 13th century the Jewish thinker Ibn Kammuna (1215-1285) writes an impressively tolerant treatise, comparing the three great Western religions and also mentioning Buddhism. His Christian contemporary Raymond Lully (1232-1316) goes in the same direction, showing that not all educated minds thought as Aquinas.

The disaster of the many Crusades, a period that extends from the Council of Clermont (1095) to the 14th century, and the recognition of the high level of Muslim culture by some more enlightened minds upset the old Christian certainties and the effectiveness of the speeches about the "will of God"; in other words, the failure of the Crusades gave further impetus to the idea of tolerance.

This development can also be seen in the courageous attitude of Jerome (345-420) towards the belief, current at that time, that seventy translators had miraculously translated the Old Testament in a literally equal form, a version known as the Septuagint. The saint contested it and, under strong opposition, invoked the help of wise Jews versed in Greek and Hebrew, in order to demonstrate a lot of mistakes in the Septuagint and make a new translation into Latin, until today the official version of the Roman Church, the Vulgate.[16]

Another important novelty for the construction of tolerance, brought into the historical development of western law, and already present in the philosophy of Thomas Aquinas, is the sophisticated idea that humans are judged by God according to rationally understandable criteria and to their actions during life on Earth. This is much different from the previous gloomy damnation because of inscrutable divine decisions. The three golden rules of Augustine and Calvin go in the opposite direction: humans are decayed beings, grace follows God's own unintelligible rules and salvation is unconditional. These postulates start to be questioned and streamlined and this will starkly influence legal procedures, going from the medieval ordeals, the "judgments of God," to modern rationally organized procedural law.[17]

In the field of education, the evolution of humanism is influenced by Cicero and Quintilian, whose ideas are adopted in the school curricula of the two centuries after the Renaissance. Quintilian states what the student needs to master, besides grammar and rhetoric, three *Scientiae*: poetry, moral philosophy and history.[18] These came to be the five fields of the *Studia Humanitatis*, carried out in Latin and Greek.

Such debates and their reflections in the education of youth have embodied Western culture, Brazil included. Today three aspects can be noticed in these cyclical developments.

First, a growing interest in rhetoric on the part of different circles, such as in literature and music, not to mention the academic milieu, particularly in the area of Humanities, at the expense of scientism and ontological, eschatological or metaphysical conceptions. Rhetoric has always been there, but today enjoys a renewed prestige in a world created by the certainties of science's success, the new monotheistic religions,

which soon got tempered by unaccomplished promises and more modest conceptions about the universe.

Secondly and in contrast, the popular design of rhetoric is reduced to a mere empty ornament of discourse, eventually (but commonly) linked to factual lying and unconfessable purposes in which ethics is concerned.

Thirdly, and in the same direction, the stubborn permanence of a technocratic mentality in education, based on supposed efficiency and competition, aiming at domination of nature and fellow persons, at the expense of a rhetorical humanism.

III From the Humanistic Curriculum to the Proteus of Modernity

Never before had Western culture changed both so much and so quickly as from the period known as the Renaissance, a not so precise reference to a rebirth of the study and admiration of classical Greece. This process goes on until today: the modern human being becomes a Proteus. With this metaphor it is suggested that this mutant environment seems to be related to the resurgence of more rhetorical perspectives.

This God is presented sometimes as a child of Tethys and Ocean, sometimes his parents are Fenice and Poseidon. He received the gift to know past, present and future, which he would not reveal to mortals. To avoid the queries, he could modify his forms, transmuting into diverse human beings, animals, trees and elements, such as water and fire. The versions of Homer, Euripides, and Virgil are different, but all state the feature of the mutability of Proteus, the difficulty to perceive his "essence." This perplexity includes his offspring: among his children there is Eidothea who protects Menelaus in the Odyssey, there are also the cruel monsters Tmolus and Telegonus, whose abominable acts cause their father's retreat to Egypt.[19]

This Proteus anthropology, a rhetorical conception of the human being, is more adequate to understanding (not only the actual) society but also the ontological anthropology of the man conceived by sciences and religions, exactly by doubting the possibility of an "essence" in ethics and in knowledge.

Marsilio Ficino (1433-1499), physician and humanist, is considered the founder of the Platonic Academy of Florence, funded by Cosimo de Medici. Ficino translated into Latin the Platonic dialogues and argues that many old pagan texts permit the same conclusions about the nature of God preached by the Church of Christianity. In addition to Nicholas of Cusa, another important friend of his was Giovanni Pico della Mirandola (1463-1494), who dedicated himself not only to Latin and Greek philosophy, but also to Egyptian, Chaldean, Jewish and Arab philosophy, viewing in all of them a perennial philosophy (*philosophia perennis*), different ways to expose the same truth. His work *Conclusiones philosophicae, cabalisticae et theologicae*, from 1486, was immediately prohibited by the Church, provoking the edition of the Apology (1487), an unsuccessful attempt of defense.[20]

In 1509, Erasmus of Rotterdam dedicated to Thomas More his In Praise of Folly. Both wanted a secular State, but were on the other hand also against the submission of religion to the State, denying the *cuius regio, eius religio* principle (i.e. the principle that the one who has the power determines the religion).

The specific contribution of jurists was very important because tolerance means mutual recognition of rights, which demands a set of general laws to protect and ensure that each person be seen and treated as equally important subjects.

The beginning was the international law, the *jus gentium*. It did not mean that all men were equal, by the time of the Romans, but at least that humans should be recognized as such and not as animals or things. Hence, Cicero and also Gaius identified the *jus gentium* with natural law, anchored in the order of the cosmos. Canon law comes afterwards with the same alleged universal character.

Hugo Grotius (1583-1645) is considered one of the first jurists in modern international law and also is important in the philosophy of law and to the development of tolerance. He argues that natural law does not come from the revelation of God's will – *ius divinum voluntarium* – but solely from human reason (although created by God). He says, "[T]his natural law we deal with, both regarding human sociability as well as natural law in a broader sense, even if originated from principles inherent to the human being, can be reasonably allocated to God because he commanded such principles to exist in us" (citation?). Then he clearly states that natural law does not need the official hermeneutics of the Church. He writes, "[N]atural law is so immutable that God Himself cannot change it. For as great as the power of God may be, we can say that there are certain things it does not include."[21]

That is not to forget the importance too of a certain political pragmatism. Also to rulers, tolerance begins to prove beneficial, even on economic grounds. These victories in the direction of tolerance were not exactly caused by ethical beliefs of the ones in power. In a way similar to Constantine's time, smarter kings and emperors realized the counter-productivity and the political uselessness of religious wars and persecutions. Hence, the famous phrase of Henry IV, who himself changed religion six times in his life,: "Paris is well worth a Mass."[22]

After the Magna Charta Libertatum in 1215, the Petition of Right in 1628, the Law of habeas corpus in 1679 and the Bill of Rights in 1689, the Emperor Joseph II (1741-1790) issued the *Toleranzpatent* of September the 23rd, 1781. These laws prepared the advent of the American and French revolutions.

The problem of tolerance had gained more and more legal and political importance.

IV The Paradox of Tolerance and the Ethical Overburden of Law

In post-modern societies, law becomes the only common ethical environment because other ethical orders, such as religion and morals, lose their social importance, dilute and pulverize themselves in a progressive differentiation. Proceduralization and the ever present possibility of quickly modifying the ethical contents of positive law, which took place with the dogmatization of law, lead to an unprecedented availability of ethical options. Law encourages tolerance because it guarantees a common public space, in the Arendt's use of this word.[23] It is not hard to understand why the social role of courts, especially constitutional courts, stays at the center of public attention and is daily discussed in the media.

The problem is that the boundaries of tolerance must be defined and religion or morals do not play this role anymore. First, law becomes differentiated from them and other ethical environments, such as politics and social manners; then the fragmentation of those ethical orders, which traditionally supported law, become merely individualized or linked to small groups, rendering infeasible its social function of being a shock absorber and use for solving conflicts. Instead of only taking care of the most acute social conflicts, as was traditionally its function, many questions are posed to overburden law. Neighborly relations, family conflicts, problems between teachers and pupils, all of these retreat from the scopes of moral and religious authority, for example, to overload the performance of law.

We must remember that those normative orders have traditionally functioned in a coordinated manner, upgrading the mutual promises concerning the future and thus controlling mutual expectations. With social complexity, however, there is a dissociation between them, which become more and more independent of each other, pulverized up to the point that each group or even individuals bear their own morality, their religion, their sexual orientation, their political position and their social set of rules. So these normative orders, which weaken social conflicts, lose this aggregative function and leave law as the sole meaningful means of conflict treatment in a complex society.

This overload of law also implies an overburden of the State, once, as in modern times, the State's claim to the monopoly of jurisdiction provokes an unprecedented proximity between State and law, up to the point of Kelsen suggesting their identity.[24] If law gets overloaded, the same occurs with the responsibilities that the State assigns to itself in what concerns the treatment of conflicts (fixing what is legally relevant, the prohibition of the *non liquet* or the constraint to decide, the monopoly of jurisdiction, the hermetical plenitude of the juridical order and so on). Within the traditional division of State powers, this causes a functional overload of the official organs that are in charge of concrete decisions, particularly judicial power and the various councils and committees of the executive branch of government. As power is a scarce resource, this happens to the detriment of the legislative power.

Because justice comes to be the result of a legal proceeding, obtained in terms of distribution of competencies and rites for elaborating rules, the ethical contents of law, which are certainly present in all concrete cases, become highly volatile and circumstantial. Hence, the need for tolerance, for a paradoxical ethical relativization of legal constraints of social behavior. Contemporary law needs to ensure these levels and plumb lines (*nomoi*), guaranteeing the conditions for the opposition of ideologies, interests and expectations: the most successful will become the circumstantial ethical content of legal standards; the rest will remain in protest, seeking to become positive, coercive law.

Furthermore, legal justice cannot be the justice of love. It has to react against the bad and incompetent, it has to administer many inequalities that exist in a social environment. Nor is its function to deal with the jealous, ungrateful and concupiscent people, who should be taken care of by other ethical systems. The need for such justice is paradoxical and shall also be criticized, because too much tolerance can lead to indifference or cowardice, i.e. the tolerance of the intolerant.

In a society in which freedom is really effective, tolerance would not be necessary, this is Goethe's "paradox of tolerance." Parodying him, one can say that genuine tolerance needs to lead to "recognition" (*Anerkennung*) because the mere word "tolerate" (*dulden*) has a pejorative load, a concession from someone superior. Then to face the paradox means trying to reconcile the principles of tolerance and equality.

And this is a dispute between Carl Schmitt and Hans Kelsen: while Kelsen believes that tolerance helps democracy with the coexistence between government and opposition, majorities and minorities, Schmitt says that this democratic "neutrality" of the State means indifference and consequent emptying of power and ethical content of law.

Only tolerance towards ethical differences can unburden contemporary law and give more effectiveness to other, non-coercive norms in the function of stabilizing conflicts.

This is why Kelsen says that democracy not only consists of the principle of majority: "the domination of the majority, which is so characteristic of democracy, differs from any other form of domination because, in its most intimate essence, it not only presupposes conceptually an opposition—the minority—but also recognizes it politically."[25] The necessary existence of a minority requires coexistence between different sides, exactly what democracy fosters, insofar as it guarantees the existence of majorities and minorities, related concepts, which demand each other reciprocally.

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Notes

[1] Mohammed Talbi, "Tolerancia y intolerancia em la tradición musulmana," in *Several Authors. La intolerancia* (Buenos Aires – Barcelona – México – Santiago – Montevideo: Granica - Academia Universal de las Culturas, 1997), 45-49.

[2] Hans Blumenberg, "Antropologische Annäherung an die Aktualität der Rhetorik" in *Wirklichkeiten, in denen wir leben – Aufsätze und eine Rede* (Stuttgart: Philipp Reclam, 1986), 104-136; and Arnold Gehlen, *Der Mensch. Seine Natur und seine Stellung in der Welt* (Wiesbaden: Akademische Verlagsgesellschaft, 1978).

[3] Aristotle, *On Poetics, Great Books of the Western World* (Chicago: Encyclopaedia Britannica, v. 8), [9, 1451b], 686.

[4] Antonio Carlos Wolkmer, *Fundamentos do humanismo jurídico no Ocidente* (Barueri: Manole / Florianópolis: Fundação Boiteux, 2005), XI.

[5] Giambattista Vico, *Elementos de retórica: El sistema de los estúdios de nuestro tiempo y Princípios de oratória* (Madrid: Trotta, 2005), 67.

[6] Theodor Viehweg, *Topik und Jurisprudenz. Ein Beitrag zur rechtswissenschaftlichen Grundlagenforschung* (München: C. H. Beck, 1974), 15-18.

[7] João Maurício Adeodato, "Semiotics in the philosophy of law - the skeptical contribution of pyrrhonism to epistemological and ethical relativism' *American Journal of Semiotics* 20.1-4 (2004), 59-84.

[8] Genesis 11: [1-9] 4.

[9] Immanuel Kant, "Beantwortung der Frage: Was ist Aufklärung?" in *Schriften zur Anthopologie, Geschichtsphilosophie, Politik und Pädagogik* 1. Wilhelm Weischedel (Hrsg.). Werkausgabe — in zwölf Bände (Frankfurt a.M.: Suhrkamp, Bd. XI), 53-55.

[10] Luke 6:27-36.

[11] Luke 6:37-38.

[12] Mohammed Talbi, "Tolerancia y intolerancia em la tradición musulmana," in *Several Authors. La intolerancia* (Buenos Aires – Barcelona – México – Santiago – Montevideo: Granica - Academia Universal de las Culturas, 1997), 46.

[13] Joachim Ritter and Karlfried Gründer, (Hrsg.) *Historisches Wörterbuch der Philosophie* Band X (Basel – Stuttgart: Schwabe & Co., 1998), 1252.

[14] The concept of eschatology here means the doctrine that preaches that one can detect the ends to which history will lead through the study of some supposedly evident causal paths. From the old Greek *eschatos*, the last, that is, a doctrine "about the end of time and history," "about the last ends of man." ("Eschatologie", in *Meyers Konversations-Lexicon*, fünfter Band (Leipzig-Wien, 1897), 996).

[15] Antôno Flávio Pierucci, "A verdade verdadeira. Em busca das ovelhas." Folha de São Paulo, Domingo, 15 de julho de 2007, Caderno Mais!, 4; Ribeiro Neto, Francisco Borba, "Em busca das ovelhas." Folha de São Paulo, Domingo, 15 de julho de 2007, Caderno Mais!, 5.

[16] Bertrand Russell, *History Of Western Philosophy — And Its Connection With Political And Social Circumstances From The Earliest Times To The Present Day* (London: Routledge, 1993), 340-341.

[17] João Maurício Adeodato, *Ética e retórica – para uma teoria da dogmática jurídica* 4th ed. (São Paulo: Saraiva, 2009), 183 f.

[18] Marcus Fabius Quintilianus, *Institutionis oratoriae*, Liber X. Helmut Rahn (Hrsg.). Ausbildung des Redners (Darmstadt: Wissenschaftliche Buchgesellschaft, 1988), 430 f.

[19] Homer, (1990). *The Odyssey*, in *The Iliad and the Odyssey of Homer* transl. Richmond Lattimore (Chicago: Encyclopaedia Britannica, 1990), 340-341; and Euripides, 'Helen', in *The Plays of Euripides* ed David Grene and Richmond Lattimore (Chicago: Encyclopaedia Britannica, 1990), 407f.

[20] Heinrich Schmidinger (Hrsg.), *Wege zur Toleranz – Geschichte einer europäischen Idee in Quellen* (Darmstadt: Wissenschaftliche Buchgesellschaft, 2002), 99f.

[21] Hugo Grotius, *O direito da guerra e da paz*, Introdução de António Manuel Hespanha, trad. Ciro Mioranza(De Juri Belli ac Pacis, 2004), 41 and 81.

[22] Heinrich Schmidinger (Hrsg.), *Wege zur Toleranz – Geschichte einer europäischen Idee in Quellen* (Darmstadt: Wissenschaftliche Buchgesellschaft, 2002), 241 and 251.

[23] Hannah Arendt, *The Human Condition* (Chicago-London: The University of Chicago, 1958), 50f; João Maurício Adeodato, *O problema da legitimidade – no rastro do pensamento de Hannah Arendt* (Rio de Janeiro: Forense-Universitária, 1989), 113f.

[24] Hans Kelsen, *Reine Rechtslehre* 2 Auflage (Wien: Verlag Österreich, 2000), 319.

[25] Hans Kelsen, *Vom Wesen und Wert der Demokratie* (Tübingen: Scientia Verlag Aalen, 1981), 101.