

## CONSTITUTIONALISM AND CITIZENSHIP: FACING THE MULTICULTURAL CHALLENGE

FRANCISCO IBARRA PALAFOX\*

*ABSTRACT. Citizenship, as it was originally conceived, does not satisfy the current expectations of contemporary multicultural societies. In order to better understand the current problems of citizenship and ethno-cultural diversity, this article briefly contextualizes citizenship within the three main historical periods of Western constitutionalism. Notwithstanding that constitutionalism has addressed citizenship through two different models, the national and the republican ones, the article questions these old models and offers new arguments in order to build a transnational and multicultural citizenship. A core proposal of the paper is the creation of a new and more flexible conception of citizenship for ethno-cultural minorities. The new citizenship should meet the following characteristics: 1. Enable ethno-cultural minorities the access to basic rights and liberties; 2. Integrating cultural elements; 3. Including a set of basic socio-economic rights; 4. Incorporating residence as an essential rule for the acquisition of citizenship; 5. For migrants en route, it is essential to recognize the freedom of movement by granting temporary citizenship status.*

**KEY WORDS:** *Citizenship, minority rights, constitutional history, multiculturalism.*

**RESUMEN.** *En la actualidad, el diseño original de la ciudadanía no satisface las expectativas de las sociedades multiculturales contemporáneas. Con el objetivo de comprender los principales problemas entre la ciudadanía y la creciente diversidad etnocultural, este artículo contextualiza a la ciudadanía en los tres principales periodos históricos del constitucionalismo occidental. No obstante, el constitucionalismo ha abordado el concepto de ciudadanía a través de dos modelos básicos: el nacional y el republicano. Ambos modelos se cuestionan y se presentan argumentos para construir una ciudadanía multicultural y transnacional. La propuesta central del artículo es la creación de una ciudadanía más flexible para las minorías etnoculturales; esta nueva ciudadanía debe cumplir con las siguientes características: 1) Facilitar el acceso de las minorías a los derechos y libertades básicas; 2) integrar los aspectos culturales; 3) incluir el conjunto fundamental de derechos socioeconómicos; 4) incorporar a la residencia*

---

\* Professor and Chair of Post-Graduate Studies at the Institute for Legal Research, of the National Autonomous University of Mexico (UNAM).

*como elemento para adquirir la ciudadanía; 5) para los migrantes en tránsito de un país a otro, el derecho de movimiento debe ser reconocido para otorgarles un estatus temporal de ciudadanía (ciudadanía en movimiento).*

PALABRAS CLAVE: *Ciudadanía, derechos de las minorías, historia del constitucionalismo, multiculturalismo.*

## TABLE OF CONTENTS

I. INTRODUCTION: CONTEMPORARY ETHNO-CULTURAL DIVERSITY.....	60
II. CONSTITUTIONALISM AND ETHNO-CULTURAL DIVERSITY .....	63
III. THE <i>APORIAS</i> OF CITIZENSHIP AND THE APPEARANCE OF MINORITY RIGHTS .....	64
IV. CLASSIC MODELS OF CITIZENSHIP .....	69
V. CITIZENSHIP AND ETHNO-CULTURAL DIVERSITY .....	71

### I. INTRODUCTION: CONTEMPORARY ETHNO-CULTURAL DIVERSITY

Contemporary constitutionalism faces an enormous challenge originating from the growing ethno-cultural diversity in constitutional democracies. Over the last two decades, we have witnessed how ethno-cultural minorities have gained more presence in national and international forums to demand that the principle of equality contained in constitutions become reality. Of the existing minorities, three of them stand out the most due to the constitutional challenges they have presented: on the one hand, there are nationally based minorities, specifically indigenous peoples and sub-state nations; and on the other, there are those minorities that arise as a consequence of the international migratory process.<sup>11</sup>

Indigenous people occupied defined territories before national States were created and were frequently excluded from accessing the rights that were given to the members of the predominant society. To ensure the segregation of indigenous peoples, they were often even expelled from their original territories. Normally, indigenous peoples do not compete with national States in terms of wanting to form a different State. Their principal claim lies in the recognition of their political autonomy and equal access to basic rights and freedoms.

Sub-state nations, however, did compete with nation-states to form their own state, but lost the battle through conquest or were transferred from one state to another. This is the case of the Quebecois, Catalans, Basques and the Northern Irish, for instance. These minorities often fought to create a nation-

<sup>11</sup> WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP. A LIBERAL THEORY OF MINORITY RIGHTS* (Oxford University Press, 1995).

state and having been unable to achieve their own state, they have sought to emphasize the need to obtain the autonomy needed to reproduce their culture inside the dominant state.

With regard to immigrants that came as part of the international migratory phenomenon, there are two main causes that explain this occurrence. There is migration for economic reasons that causes millions of people to move from one state to another in search of a job or educational opportunities. This migration segment includes regular and irregular workers who work in the most important national economies. And there is also migration due to political reasons, as in the case of refugees and asylum seekers.<sup>2</sup>

To measure the challenge that these minorities pose, according to UN estimates, in 2008, there were nearly 214 million immigrants worldwide, of which 49% were women. In other words, these immigrants represent 3.1% of the global population.<sup>3</sup> If all of them were in a single place, it would be the fifth most populated country in the world.<sup>4</sup> Likewise, it is estimated that in 2008 global remittance flows exceeded \$444 billion dollars, of which \$338 billion were sent to developing countries.<sup>5</sup> Besides, there are between 20 and 30 million irregular migrants in the world, representing around 15 percent of the total immigrant population.<sup>6</sup>

In 2009, there were 43.3 million displaced persons from around the world,<sup>7</sup> 15.2 million of which were refugees—a number that includes 938,000 asylum seekers—and 27.1 million internal displaced persons in 52 countries.<sup>8</sup> The UN also identified 6.6 million people without a nationality.<sup>9</sup>

In regard to indigenous peoples, there are around 370 million individuals that fall under this category which comprises more than 5,000 different

---

<sup>2</sup> STEPHEN CASTLES & ALASTAIR DAVIDSON, *CITIZENSHIP AND MIGRATION, GLOBALIZATION AND THE POLITICS OF BELONGING* (Macmillan Press LTD, 2000).

<sup>3</sup> United Nations, Department of Economic and Social Affairs, *Trends in International Migrant Stock. The 2008 Revision* (United Nations database, POP/DB/MIG/Stock/Rev.2008). <http://esa.un.org/migration> (last visited June 21, 2010).

<sup>4</sup> US Census Bureau, *International Database — Country Rankings*, <http://www.census.gov/ipc/www/idb/ranks.php> (last visited June 21, 2010).

<sup>5</sup> World Bank, *Migration and Development Brief 11* (November 3rd, 2009): *Migration and Remittance Trends 2009*, <http://go.worldbank.org/5YMRROVW80> (last visited June 21, 2010).

<sup>6</sup> International Labour Organization, *En busca de un compromiso equitativo para los trabajadores migrantes en la economía globalizada*, Geneva, 92nd meeting, 2004, Report VI, at 12 in [http://www.ilo.org/global/Themes/Labour\\_migration/lang-en/docName--KD00096/index.htm](http://www.ilo.org/global/Themes/Labour_migration/lang-en/docName--KD00096/index.htm) (last visited June 21, 2010).

<sup>7</sup> OFFICE OF THE U.N. HIGH COMMISSIONER FOR REFUGEES, 2009 GLOBAL TRENDS. REFUGEES, ASYLUM-SEEKERS, RETURNEES, INTERNALLY DISPLACED AND STATELESS PERSONS <http://www.unhcr.org/4c11f0bc9.html> (last visited June 21, 2010).

<sup>8</sup> NORWEGIAN REFUGEE COUNCIL, INTERNAL DISPLACEMENT MONITORING CENTER'S INTERNAL DISPLACEMENT, GLOBAL OVERVIEW OF TRENDS AND DEVELOPMENTS IN 2009, <http://www.internal-displacement.org> (last visited June 21, 2010).

<sup>9</sup> Office of the U.N. High Commissioner for Refugees, *supra* note 7.

peoples, whose forms of knowledge and organization are some of the greatest cultural reserves in the world.<sup>10</sup>

Today, ethno-cultural minorities have demanded different constitutional modifications to eliminate or reduce inequalities. These claims go from recognizing cultural rights (especially, linguistic rights) to the modification of constitutional design to allowing minorities political participation (group representation and other mechanisms associated with consensual democracy). One of the minorities' demands that deserves special attention is a more flexible approach to citizenship-granting since citizenship is necessary to access basic rights and liberties.

Citizenship, as it was originally conceived, does not fulfill the current expectations of contemporary multicultural societies or the growing ethno-cultural diversity. Currently, it is undergoing a transformation that will give it a new face in the future. Once the period of crisis is over, citizenship will be transformed and will continue to be one of the most important constitutional institutions, not only to allow political participation, but also to establish a common identity among the population.

Before explaining the place of citizenship in the history of constitutionalism and the theoretical possibilities of adapting it to ethno-cultural diversity, it should be noted that Latin American countries, with the exception of Argentina, Brazil and Uruguay, have made a distinction between citizenship and nationality in their constitutions. For these countries, being national is enough to have access to fundamental rights, while citizenship is a concept that refers only to political rights. Conversely, most world constitutions do not differentiate between nationality and citizenship, referring only to citizenship as a requisite to enjoy all fundamental rights, including political ones.

As stated by Diego Valadés, the distinction between nationality and citizenship originates in Latin American constitutionalism and goes back to the 19th century when these countries gained their independence. After the colonial ties with Spain were broken off, there was still a segment of the European population that remained loyal to the Spanish crown and whose political participation in the nascent nation-states had to be limited.

The first constitution that differentiated between nationals and citizens was the Peruvian Constitution of 1823. In Mexico, the distinction has formed part of the constitutional order since 1836. Currently, except for Argentina, Brazil and Uruguay, all other Latin American Constitutions make this distinction. It is an institution proper to Latin-American constitutionalism, and therefore, understanding it is difficult in other systems. In general, it has been understood for almost two centuries that nationality is a legal link between a person and a state, whereas citizenship is a requisite for exercising political rights. Nationals are entitled to all the fundamental rights recognized by constitutions, except rights of

---

<sup>10</sup> INTERNATIONAL LABOR ORGANIZATION-INTERNATIONAL TRAINING CENTER, INDIGENOUS AND TRIBAL PEOPLES: RIGHTS AND DEVELOPMENT, <http://www.ilo.org/indigenous/Resources/lang--en/index.htm> (last visited June 22, 2010).

an electoral nature. Thus, Latin American constitutionalism incorporated the trend of fundamental rights that was drawn up by the United States and France in the 18th century and, at the same time, it built a defense against the presence of numerous persons that still maintained loyalty to the Spanish crown.<sup>11</sup>

In this article, I will only refer to citizenship as the essential condition for the recognition of fundamental rights, without ignoring the fact that there are constitutional orders that make a distinction between nationality and citizenship. With this in mind, we will go on to examine the place ethno-cultural diversity and citizenship has in modern constitutionalism.

## II. CONSTITUTIONALISM AND ETHNO-CULTURAL DIVERSITY

By placing the concept of citizenship in three main periods of Western constitutionalism helps to better understand the current problems of citizenship and ethno-cultural diversity.<sup>12</sup> In general terms, the earliest period took place in the late 18th and first half of the 19th centuries when the first American and European constitutions appeared, establishing the division of powers (as a way to control political power) and recognizing classic civil rights (the right of ownership, due process of law, the freedom of movement and freedom of expression, among others).

The second period occurred during the 20th century and its central characteristic was the recognition of socio-economic rights. Although the fight for the recognition of these rights began in the second half of the 19th century, it was not until the 20th century that they were incorporated into national constitutions. In this movement, the Mexican Constitution occupies a significant place as it was the first to establish the principal social rights at the time.<sup>13</sup>

The third period of constitutionalism appeared after World War II and marks the beginning of the gradual recognition of human rights. Unlike the first two periods in which constitutionalism was implemented in only some national States (principally in the United States, as well as in some European and Latin American countries), this third phase had a much wider dimension. Its reach was global and spread throughout the five continents, primarily influencing the decolonization processes in Africa and Asia following the fall of the traditional colonial powers after World War II. This third period has three sub-stages related to the development of international human rights.

---

<sup>11</sup> DIEGO VALADÉS, LOS DERECHOS POLÍTICOS DE LOS MEXICANOS EN ESTADOS UNIDOS 12 (Instituto de Investigaciones Jurídicas, UNAM, 2004).

<sup>12</sup> Pedro de Vega, *Apuntes para una historia de las doctrinas constitucionales del siglo XX*, in TEORÍA DE LA CONSTITUCIÓN. ENSAYOS ESCOGIDOS 3-44 (Miguel Carbonell ed., Instituto de Investigaciones Jurídicas, UNAM-Porrúa, 2004); *see also*, Carlos de Cabo, *La función histórica del constitucionalismo y sus posibles transformaciones*, *id.*, at 45-66.

<sup>13</sup> On the history of Mexican social constitutionalism, see JORGE SAYEG HELÚ, INTRODUCCIÓN A LA HISTORIA CONSTITUCIONAL DE MÉXICO 361 (PAC, 2006).

The first of these sub-stages is symbolically linked with the *Universal Human Rights Declaration* adopted by the UN General Assembly in December 1948. The second sub-stage includes the emblematical event of the signing of the *International Covenant on Economic, Social and Cultural Rights* adopted in 1966 by United Nations, which played an important role in developing second generation human rights. The third sub-stage is associated with the advance of the third generation human rights, which include heterogeneous rights, such as environmental rights, the right to peace, minority rights or guarantees against genetic manipulation. Concerning minority rights, there are three international documents that support these rights: in 1989 the International Labor Organization approved the Convention on Indigenous and Tribal Peoples (No. 169), the first international document to recognize the collective rights of indigenous people;<sup>14</sup> in December 1992, the UN approved the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*; and finally after 20 years of discussion, in September 2007, the UN approved the *Universal Declaration on the Rights of Indigenous Peoples*. This significant evolution of international human rights and the growing presence of minorities have had an impact on constitutional law, which has seriously begun to re-think how to accommodate ethno-cultural diversity at a constitutional level.

In other words, the challenges posed by ethno-cultural minorities have just recently presented themselves to constitutional law and correspond, to a certain degree, to the development of human rights since the mid-20th century. The advance of minority rights and subsequent recognition in constitutionalism has manifested itself in many ways in the State, especially in the adoption of more flexible constitutions that recognize these rights<sup>15</sup> and the creation of constitutional courts that advocate the defense of these rights.<sup>16</sup> Obviously, the slow acceptance of minority rights into constitutions has highlighted the *aporias* regarding citizenship in view of the growing multiculturalism in divided ethno-cultural societies, which will be examined in the next section.

### III. THE APORIAS OF CITIZENSHIP AND THE APPEARANCE OF MINORITY RIGHTS

The citizenship crisis occurred because of three significant problems: first, citizenship as a concept was not able to generate adequate political represen-

<sup>14</sup> See José Emilio Ordóñez Cifuentes, *Aplicación del Convenio 169 de la OIT. Análisis Interdisciplinario*, in XIV JORNADAS LASCASIANAS INTERNACIONALES 262 (José Emilio Ordóñez Cifuentes coord., Instituto de Investigaciones Jurídicas, UNAM, 2006).

<sup>15</sup> See GIUSEPPE DE VERGOTTINI, *DERECHO CONSTITUCIONAL COMPARADO* 126-49 (UNAM-Secretariado Europeo per le Pubblicazioni Scientifiche, 2004).

<sup>16</sup> See Francisco Ibarra Palafox, *La Suprema Corte de Justicia y consolidación democrática*, in EDUARDO FERRER MAC-GREGOR & ARTURO ZALDÍVAR LELO DE LARREA, *LA CIENCIA DEL DERECHO PROCESAL CONSTITUCIONAL. ESTUDIOS EN HOMENAJE A HÉCTOR FIX-ZAMUDIO EN SUS 50 AÑOS COMO INVESTIGADOR DEL DERECHO. TRIBUNALES CONSTITUCIONALES Y DEMOCRACIA* 773-98 (UNAM, 2008).

tation in governmental bodies; second, the concept of citizenship traditionally has been resistant to the incorporation of socioeconomic rights; and third, it has not recognized the diverse identities generated by ethno-cultural diversity, due to which citizenship status has been frequently denied to minorities.

As to not generating adequate political representation, citizenship was not problematic in the beginning while it was bound to restricting voting rights to privileged people with a certain economic level (by income or means of livelihood) or with a certain level of education (literate or professional qualifications) or by membership in a group or organization (the aristocracy or the government). Under these circumstances, very few were qualified to vote and when they did, they inevitably chose their equals, men with wealth, education and superior social standing. This was the nature of voting rights during most of the 19th century in the United States, the United Kingdom and Latin America.

Political representation and citizenship became an issue when voting rights acquired a universal character. As the ideas of the French *Declaration of the Rights of Man and of the Citizen* spread throughout Western societies and the revolutionary movements of the 19th century demanded universal suffrage, the principal problem of political representation became apparent: the increasing difficulty of elected politicians to represent the interests of voters. In other words, when larger masses of citizens could exercise their voting rights, their representatives moved away from representing the interests of their constituents and the distance between representatives and citizens grew.

Insufficient representation has been a strong characteristic of extended citizenship in modern States.<sup>17</sup> When citizenship was linked to universal suffrage, which consolidated the institutions of representative democracies, citizens lost presence in State institutions and in the political decision-making process.<sup>18</sup> Universal citizenship was born into an extreme paradox: as universal suffrage spread and citizens were given the right to participate in politics, their public presence was gradually diluted since governing was left to professional politicians.

This association between citizenship and universal suffrage had very few things in common with the early concept of citizenship in the Greek polis, in which citizens governed directly. Today, considering the vast demographic dimensions of modern national States, direct democracy is impractical. Demographics have significantly changed the original Greek concept of citizenship; modern democracies can only aspire to be representative democracies and direct democracies are now a part of history.

Before the Modern Era, when States did not exist and cities were not very large, some people could devote their attention, to some extent, to politi-

---

<sup>17</sup> See RICHARD SENNETT, *THE FALL OF PUBLIC MAN* 390 (Penguin Books, 1978).

<sup>18</sup> See DAVID HELD, *DEMOCRACY AND THE GLOBAL ORDER: FROM THE MODERN STATE TO COSMOPOLITAN GOVERNANCE* (Stanford University Press, 1995).

cal matters and government. But when national States appeared in the early 19th century, these States were demographically large and the need for political representation arose. For instance, in 1804, Mexico had a population of 6.5 million people; Spain, 11.5; the United States, 10.2. France reached a staggering amount of 30.6 million inhabitants while the Russian empire had 54 million.<sup>19</sup> Without doubt, the problems of representation intensified as national States continued to grow exponentially. In 2010, these same countries have the following demographic figures: Mexico, 112.5 million people; Spain, 40.5 million; United States, the third largest country in the world with 310 million; France, 64.7 million; and Russia, 140 million. These figures may seem large, but are insignificant if compared to the imposing populations of the two biggest States on the planet, China and India with 1.33 billion and 1.173 billion people respectively.<sup>20</sup>

In short, while the rupture of ancient regimes, the demographic pressure of modern national States and the universalization of rights made institutions of representative democracies necessary, the distance between representatives and the citizens grew despite the fact that universal citizenship was a revolutionary concept. The problem worsened during the 20th century when the right to vote extended to women, for the simple reason that women's electoral strength did not correspond to women's presence in the government: while half of the electorate were women, very few of them could access public office.

In terms of resistance to incorporating socioeconomic rights, the capitalist transformations that took place in the 19th century brought to light the fact that if socio-economic circumstances were disregarded, citizens could not be equals. Hence, during the second part of the 19th century, an economic and political thought that tried to breach the gap of material inequality in society proliferated throughout Europe and America. This school of thought had various branches, ranging from those who wanted to make capitalism more humane to those who fought for the abolition of private property and for the creation of collective ownership of the means of production. Such theories proliferated and influenced second generation constitutionalism in the first half of the 20th century. For example, in European and Latin American States, some constitutions were promulgated or reformed so as to incorporate socio-economic rights; other constitutional movements, such as those in the USSR, China and Cuba, were more radical, declaring State control of the means of production and a State-planned economy.

Social constitutionalism spread throughout the first half of the 20th century and was first established in the 1917 Mexican Constitution. The Great Depression of 1929 and two world wars heightened the need for national

---

<sup>19</sup> ALEJANDRO VON HUMBOLDT, *ENSAYO POLÍTICO SOBRE NUEVA ESPAÑA* 289-90 (Arnao Vicente González trans., Librería de Lecointe, 1836).

<sup>20</sup> US Census Bureau, <http://www.census.gov/ipc/www/idb/ranks.php>.



constitutions to recognize socio-economic rights. Formal equality of citizens was not enough to fight the socio-economic inequalities. As a result, constitutions began to recognize social security, labor rights and universal basic education. Social constitutionalism raised the need for citizenship that was comprised not only of classic first generation rights and liberties, but also of basic socio-economic rights. This reassertion of citizenship with social attributes is found, for example, in T.H. Marshall's essay.<sup>21</sup>

However important social constitutionalism may have been in the 20th century, in the 1970s the global economy was restructured, which led many countries to limit privileged monetarist economic policies, prices stability, inflation control, reduction in public spending, accumulation of capital and international commerce made many countries limit socio-economic rights.<sup>22</sup> In fact, in the last quarter of the 20th century when social constitutionalism was just starting to build a concept of citizenship with the main socio-economic rights, a new economic order with its own new theoretical approach appeared to challenge it.

Just as this attack against socio-economic rights took place, a third problem appeared. This happened when ethno-cultural diversity intensified on a global scale and required the creation of multicultural citizenship. This demand was more groundbreaking because when modern citizenship was created in the late 18th century, it was based on homogenous national identities in the process of consolidation, as in the case of many European States. For a long time, these States assiduously fought to build a single national identity. This was why 19th century liberal constitutionalism and its concept of citizenship were not open to ethno-cultural diversity; they were conceived with the idea that constitutional institutions were for homogenized populations, even though almost all modern States had multicultural societies with more than one ethno-cultural identity. With these early efforts to build a homogenous population, citizenship was used as a tool to build a "unique nation."<sup>23</sup>

At the end of the 20th century, the national objective upheld during the first and second generations of constitutionalism began to change with the presence of indigenous peoples, increasing flows of immigration and pressure for minority rights. After nearly two hundred years of including citizenship in constitutions, it was possible to believe citizenship could reflect ethno-cultural diversity. Third generation constitutionalism saw how the old dream of building a mono-national State went into crisis. Hence, building a plural citizenship has become a crucial project for the 21st century. This movement follows the trend set by the 1948 Universal Declaration of Human Rights and the 2007 Declaration on the Rights of Indigenous Peoples.

---

<sup>21</sup> See T. H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS* (Cambridge, 1950).

<sup>22</sup> See JEFFREY SACHS AND FELIPE LARRAIN, *MACROECONOMICS IN THE GLOBAL ECONOMY* (Prentice Hall, 1993).

<sup>23</sup> See ERNEST GELLNER, *NATIONS AND NATIONALISM* (Blackwell Publishers, 1983).

To a certain extent, minority rights differ from first generation human rights: first of all, minority rights are assigned to persons of ethno-cultural minorities facing situations of disadvantage or inequality in their access to basic rights, while first generation human rights are assigned to every person, regardless of their belonging to a minority group; secondly, minority rights, such as those stated in Declaration on the Rights of Indigenous Peoples may recognize collective rights, uncommonly found in first generation human rights, which are essentially individual rights.

Until very recently, almost none of the Latin American countries with important indigenous communities had developed a multicultural constitutionalism that recognized this diversity. The Latin American constitutions that recognized the rights of these peoples have done so only recently, mainly in the 1990s: Argentina in 1994; Belize in 1981; Bolivia in 1995; Brazil in 1988; Chile in 1981; Colombia in 1991; Ecuador in 1998; El Salvador in 1992; Guatemala in 1986; Honduras in 1986; Mexico in 2001; Nicaragua in 1995; Panama in 1994; Paraguay in 1993; Peru in 1993; Uruguay in 1996; and Venezuela in 1999.<sup>24</sup> The fact that these constitutions accepted some kind of indigenous peoples' rights does not imply that all constitutions accept the right to autonomy, one of the most important rights in view of its political implications. Until 2010, only eight countries in the region had recognized the autonomy of these peoples: Bolivia, Colombia, Mexico, Nicaragua, Panama, Paraguay, Peru and Venezuela.<sup>25</sup>

In summary, the constitutional incorporation of minority rights is the result of a long process of recognizing rights that began after the end of World War II, when constitutional systems gradually began to include human rights. This lengthy process coincided with the development of third generation constitutionalism, the starting point of which lies in the 1948 UN Universal Declaration of Human Rights. Since then, human rights have slowly left their marks on constitutions that rested on nationalistic assumptions and closed systems. Since then, constitutions have acquired more open distinctions for recognizing minority rights. This extension of rights had a significant impact on the constitutional theory of citizenship, which had begun to question its old concepts and put forth new arguments to build multicultural citizenship.

---

<sup>24</sup> See Jorge González Galván, *Los derechos de los pueblos indígenas*, in *DERECHOS DE LOS MEXICANOS: INTRODUCCIÓN AL DERECHO DEMOGRÁFICO* 401-29 (Luz María Valdéz coord., Instituto de Investigaciones Jurídicas, UNAM, 2009); see also CLETUS GREGOR BARIÉ, *PUEBLOS INDÍGENAS Y DERECHOS CONSTITUCIONALES EN AMÉRICA LATINA: UN PANORAMA* 36 (Comisión Nacional para el Desarrollo de los Pueblos Indígenas-Editorial Abya-Yala, 2nd ed., 2003).

<sup>25</sup> Regarding indigenous peoples autonomy and its effects in Latin American, see Francisco Ibarra Palafox, *Multiculturalismo y Estado de bienestar en Latinoamérica*, Introduction to KEITH BANTING Y WILL KYMLICKA, *DERECHOS DE LAS MINORÍAS Y ESTADO DE BIENESTAR* (Instituto de Investigaciones Jurídicas, UNAM, 2007).

## IV. CLASSIC MODELS OF CITIZENSHIP

Traditionally, constitutionalism has addressed citizenship by using two different models: a national one and a republican one.<sup>26</sup> In the national model of citizenship, society had its own cultural life, which was independent of the State. There is a cultural, ethnical and linguistic heritage, a common religion or a shared historic experience.<sup>27</sup> Normally, the national idea of citizenship forms a hegemonic culture within the State that is imposed on the other cultures that coexist in it.

Under the national model of citizenship, a human community forms a dominant nation and takes over the State. It later tries to impose its cultural heritage on other communities so that citizenship is essentially assigned to whoever shares said cultural heritage. Through its governmental organs, the State may also try to shape a core population with a common national identity. In this case, national identity will be a State construct. In either case, the national model of citizenship makes citizenship accessible to those who claim membership in the dominant national culture, regardless of where they live. Therefore, the national concept holds that cultural and historical affinities give rise to a homogenous national identity that the State must adopt and promote. This model may at times require reproducing an ethnic identity or a particular religion that tends to be associated with said culture.

This model privileges the rules of citizenship transmission through generations and reflects an ideal auto-reproduction of national membership, considering *jus sanguinis* as the best form of transferring citizenship. In this model, *jus soli* also occupies a significant place for citizenship adscription as it considers those born in the territorial space historically occupied by the national State citizens.<sup>28</sup>

However, in places where national culture, ethnic background, religion or race mark the boundaries of citizenship, minorities will find strict obstacles for integrating themselves and will normally be excluded from acquiring citizenship. This exclusion originates from the fact that minorities that have come about by immigration have recently begun the long and complicated process of integration. In places where national languages or hegemonic cultural traditions are invoked, ethno-cultural minorities are required to assim-

---

<sup>26</sup> See Rainer Bauböck, *The Crossing and Blurring of Boundaries in International Migration. Challenges for Social and Political Theory*, in *BLURRED BOUNDARIES: MIGRATION, ETHNICITY, CITIZENSHIP* 33 (Rainer Bauböck & John Rundel eds., Ahsgate Publishing, European Centre Vienna, 1999); see also FRANCISCO IBARRA PALAFOX, *MINORÍAS ETNOCULTURALES Y ESTADO NACIONAL*, 196-216 (UNAM, 2005).

<sup>27</sup> About the idea of an imagined community as a base of national identity, see BENEDICT ANDERSON, *IMAGED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM* (New Left Books, 1983).

<sup>28</sup> See Rainer Bauböck, *supra* note 26.

late in order to qualify as full citizens, which implies a huge sacrifice for these minorities in terms of cultural rights.

In fomenting a single national identity, the national model involves a disregard for the cultural identities of immigrants who have just begun the integration process in the receiving nation. Furthermore, the model ignores preexisting national minorities, such as indigenous peoples or sub-State nations (Basques, Catalans, etc.), which are excluded from integration. This also affects their ability to enjoy basic liberties and fundamental rights.

In contrast to the national conception, the second model conventionally assumed by constitutions is the republican one that favors political society and political participation. Here, political society takes priority over any other affiliation, such as national, ethnic, religious or cultural. This concept encourages patriotism and civic virtues while promoting political participation. Thus, citizenship is given to those engaged in public affairs and not necessarily to those who have the same national affiliation.<sup>29</sup>

With regard to ethno-cultural diversity, the republican model has a serious problem: it often excludes minorities from citizenship since it privileges the exercise of political rights that minorities do not have. Since republicans only consider as full citizens those who have continuously participated in the political life of the State, this is almost impossible for minority members. Neither is the republican model suitably designed to value minority cultures. On the contrary, it tries to overcome any national, ethnic, religious or cultural identity to assign citizenship only to those who share a common public life. In other words, while for the national model only a culture is relevant, for the republican one, nations and cultures are irrelevant. Negating peoples' cultures is problematic because they give the context for persons decisions and, in doing so, individuals are free; that is to say, because it is the culture which gives meaning to options, people can only be free when they have a culture in which they choose between different significant alternatives. It should be added that the republican model frequently tends to be elitist. For instance, in the Greek polis and in the cities of Venice and Florence (in the early stages of the Renaissance), citizenship normally combined a republican element with an elitist one, such as property ownership. Thus, according to the republican-elitist concept, the only recognized citizens were those who were qualified, namely, those owning property, well-educated or willing to participate in politics, excluding working classes, women, any ethno-cultural minority and slaves.

It is clear that neither of these two models is suitable for incorporating the growing ethno-cultural diversity of contemporary States. These models were more appropriate for homogenous political societies than for existing ones. While political realities have changed, the theory of citizenship has been adamant in issues regarding cultural plurality. In consequence, it is essential to rethink citizenship in terms of this cultural diversity.

---

<sup>29</sup> *See id.*

## V. CITIZENSHIP AND ETHNO-CULTURAL DIVERSITY

A new and more flexible concept of citizenship for ethno-cultural minorities should integrate cultural elements, territorial residence and mobility rights. In essence, the new citizenship should meet the following characteristics:

1. Granting members of ethno-cultural minorities access to basic rights and liberties.
2. Integrating cultural aspects.
3. Including a set of basic socio-economic rights for individual development.
4. Incorporating residence as an essential rule for acquiring citizenship (*jus residentis*).
5. Adding freedom of movement as a right of citizen status (*jus transitus*).

Each of these characteristics can apply to assigning citizenship to the main existing minority groups, except for numbers 3 and 4, which concern minorities formed by the international migratory process. Each point will be examined below.

1. First, an essential prerequisite to any concept of citizenship is to provide everyone, including members of ethno-cultural minorities, access to basic rights and liberties on equal terms. Some of these rights include freedom of expression, freedom of thought, the right of conscience, right of transit, freedom of association and the right to due process of law. These characteristics should be established from the beginning because ethno-cultural minorities are often excluded from access to basic rights and freedoms. In consequence, any model that tries to establish a balance between minorities and the dominant society must begin by giving priority to the recovery of these basic rights. Moreover, the fulfillment of this requirement is consistent with the first principle of justice, as established by Rawls.<sup>30</sup>

The intention behind this is not to create a privileged position for minorities; on the contrary, it aims at reducing the inequality gap between members of the dominant societies and those of ethno-cultural minorities since the current conditions for citizenship (established mainly by the national and the republican models) have become exclusionary rather than equalitarian, restricting minorities from full access to their basic rights.

2. Citizenship must incorporate a cultural element since culture is the framework that allows people to enjoy their basic rights and freedoms. As explained by Kymlicka, Raz and Tamir, culture is indispensable for assigning value to different options; only through a particular culture can we identify what is really valuable for us.<sup>31</sup> In other words, a person is truly free if he can

<sup>30</sup> See JOHN RAWLS, A THEORY OF JUSTICE (Oxford University Press, 1973).

<sup>31</sup> With regard the relationship between culture and freedom, see generally WILL KYM-

distinguish what is valuable in order for him to live a “good life”, and only through a particular culture can a person or group identify what is really worthwhile. Without assigning a value to different options, it would not be possible to make a choice and without the ability to choose from meaningful options, it would not be possible to exercise the right of freedom. In short, without a culture, we could not be free nor truly exercise our rights.

Therefore, it is of the utmost importance for countries with high levels of immigration and those with indigenous peoples to promote bilingual education. This is an indispensable bridge between minority cultures and the State’s dominant culture. Bilingual education is also an essential vehicle to enjoy basic rights and liberties. How else can immigrants and native peoples exercise their fundamental rights, if they do not have enough court translators? It would simply not be possible.

In cultural terms, the national and the republican models are not suitable for integrating the different cultures that coexist in contemporary States. On one hand, the nationalist model, which could be called uninational, favors the construction of a single cultural identity or a dominant culture, which is imposed on the members of ethno-cultural minorities. On the other hand, cultures are almost irrelevant to the republican model as it tries to build citizenship on the basis of people exercising their political rights; for republicans the most important rights are the “civic rights”, not the cultural ones.

Only a multicultural model of citizenship will allow the coexistence of different identities to be fully appreciated and valued. However, this model does not intend to create “cultural islands” within national States. For example, the fact that significant place is given to the cultures of indigenous peoples does not imply the dismantling of the dominant national culture, nor the formation of cultural ghettos, but an opportunity for minorities to implement all their cultural practices. In the long term, such practices will promote social integration among minorities within the dominant society.

A multicultural model of citizenship must build a common background, so that different cultures may coexist within the same State and with mutual respect. From an essential agreement on the basic rights and liberties, a kind of plural citizenship can be built. These basic rights and liberties would serve as the foundations on which a consensus on multicultural citizenship can be built. In other words, from those basic rights and liberties that must be respected by all, overlapping agreements could be created around the different ethno-cultural identities that coexist in contemporary national States.<sup>32</sup>

---

LICKA, *supra* note 1; Joseph Raz, *Multiculturalism, a Liberal Perspective*, in DISSENT (1994); YAMIR TAMIR, LIBERAL NATIONALISM (Princeton University Press, 1993).

<sup>32</sup> Regarding the overlapping consensus, see JOHN RAWLS, POLITICAL LIBERALISM (Columbia University Press, 2nd ed., 2005); Jürgen Habermas, *Citizenship and National Identity: Some Reflections on the Future of Europe*, in RONALD BEINER, THEORIZING CITIZENSHIP (State University of New York Press, 1995).

3. As stated above, since the appearance of social constitutionalism, any design for a civic institution should incorporate basic socio-economic rights, which principally consist of the right to basic subsistence, and not only referring to the typical first generation rights. These socio-economic rights are also a prerequisite for people to access their basic rights and liberties. For instance, without a minimum wage to ensure adequate food and medical care, it would not be possible to enjoy other rights. Among the socio-economic rights provisions we can find the rights to housing, health care, food, water and social security.

Hence, any concept of citizenship should include the main socio-economic rights for an individual's well-being, as T.H. Marshall established in his seminal book *Citizenship and Social Class*, written when the welfare State was still in its initial phases. In fact, Marshall's main contribution to the theory of citizenship was in determining that any citizenship policy should take into account basic socio-economic rights, instead of only focusing on the traditional rights common in the 19th century.

4. In response to intense international migration, it is necessary for residence to become a key element for acquiring citizenship. Unlike national and republican models, citizenship should be more flexible and recognize the possibility of granting citizenship to immigrants based on simply living for a long period of time in the national State territory. Hence, these immigrants, whether irregular or not, would be able to obtain citizenship after proving a minimum period of residence in the receiving State and demonstrate their desire to acquire citizenship.

A citizenship model that incorporates the rule of residence is the only one suitable to accommodate ethno-cultural minorities formed by international migration. Considering that the organization of modern States is determined by well-defined internal borders, citizenship that incorporates the rule of residence (*jus residenci*) and creates citizen status that corresponds to the resident population in the State, would be the only one of the three models that includes foreign workers, asylum seekers and undocumented migrants, the three main categories of foreign migrant residents in receiving countries.<sup>33</sup>

*Jus residenci* allows the unification of citizens and all the groups of immigrants who had been subjected to the exclusion of citizenship and were, for a long time, considered foreigners. If it does not suppress all the differences, it at least weakens them by extending rights, the traditional prerogatives of formal citizenship, to the members of minorities who have not yet been naturalized and can prove the residence time required by the receiving State. Of course, this residence period should never be too long because it would discourage people from completing the process of incorporation: between three and five years might be enough for immigrants who wish to acquire the new citizenship.

---

<sup>33</sup> See Rainer Bauböck, *supra* note 26.

This does not mean that *jus soli* and *jus sanguinis* should be ignored as rules for granting citizenship. These rules are essential for determining citizenship, inasmuch as they apply to the vast majority of the population in every national State. *Jus residenci* or rule of residence, however, recognizes anyone who has decided to live in the territory of the State and has lived there for a certain time. Whereas *jus soli* and *jus sanguini* allocate citizenship from the beginning of a person's life and look at a person's past, *jus residenci* should be viewed as forward-looking and implies an act of will on behalf of those who have moved to a country different from that of his birth and decided to settle there.<sup>34</sup>

In other words, the rule of residence serves as an adjustment to *jus soli* and *jus sanguinis* and produces a full nominal order of origin. As a result, *jus residenci* can be used to correct the granting of citizenship made either by *jus soli* or *jus sanguinis* and when there is a permanent discrepancy between the place of birth and the country where someone lives. Thus, the rule of residence might be considered "a rule of inclusion".<sup>35</sup>

Indeed, the master rule of citizenship should always be a rule of automatic transmission (through *jus soli* or *jus sanguinis*) from one generation to the next. However, when a corrective rule is necessary, the rule of residence (*jus residenci*) regulates what might be called "secondary admission"; that is, granting citizenship to immigrants, whether irregular or not, who want to acquire it and have permanently resided in the receiving State.<sup>36</sup> It should be pointed out that combining *jus soli* and *jus sanguinis* with *jus residenci* does not completely exclude irregularities like those arising from the existence of people without citizenship or with multiple citizenships. However, it can significantly reduce the problems that arise from transnational migration for either economic or political reasons.<sup>37</sup>

5. Finally, the right of transit (*jus transitus*) must be added to granting citizenship for migrants in transit from one country to another. In attention to the important developments in means of communications and transportation during the 20th century, the phenomenon of transnational migration has acquired a dimension and intensity never experienced before. In consequence, for example, an important number of immigrants that are dispersed in receiving States regularly go back to their countries of origin to renew their cultural and family ties. This is particularly true for Mexican immigrants who live in the United States since the extensive border between the two countries facilitates territorial movement.<sup>38</sup> Nonetheless, this phenomenon is not exclu-

---

<sup>34</sup> See RAINER BAUBÖCK, *TRANSNATIONAL CITIZENSHIP, MEMBERSHIP AND RIGHTS IN INTERNATIONAL MIGRATION* 32 (Edward Elgar Publishing Limited, 1994).

<sup>35</sup> See *id.*

<sup>36</sup> See *id.*

<sup>37</sup> See *id.*

<sup>38</sup> JORGE BUSTAMANTE, *MIGRACIÓN INTERNACIONAL Y DERECHOS HUMANOS* (Instituto de Investigaciones Jurídicas, UNAM, 2002).



sive of Mexican-Americans: an important number of immigrants around the world do the same. In Europe, for example, similar trips are made by Turkish immigrants between Germany and Turkey.

It is not enough to grant citizenship after a long period of residency. It is also essential not to prevent immigrants from going back to their country of origin to renew their cultural ties. Without the opportunity of coming in contact with their first culture, it is not possible for minorities to make significant choices since culture is indispensable to accessing basic rights and liberties, as explained above.

Special attention should be given to migrants who are *en route* to settle in another country, as in the case of Mexican and Latin-American migrants who go across Mexican territory to enter the United States. This is the same situation for thousands of migrants traveling through Northern African countries with the intention of entering Europe, or transiting through certain European countries to enter another. The vulnerability of this type of migrants is overwhelming and there are abundant cases of human rights violations. Not only do they have to travel hundreds of miles in high-risk conditions, but they are also subject to constant abuse by public and private security forces, as well as by criminal groups.

The obvious vulnerability of this category of migrants makes it imperative to create a *transnational transit right* or a *right of transit for economic reasons* (if we consider that most migrants are seeking work) that might be recognized by constitutions of national States that are experiencing these migration flows. This right of transit should be assigned as a temporary citizenship that can be named *migrant or moving citizenship* to provide sufficient security to those traveling through one country to reach another.

The transit right should be a non-territorial right or a transnational one since freedom of movement can no longer be regarded as a purely national-State right without creating a legal fiction that is unsustainable according to the socioeconomic realities imposed by migration. That is to say, the transit right should recognize not only citizens of the State, but also migrants in transit to another national State. Notwithstanding the fact that a right of transit would remain limited by State boundaries as national States continue to exist, this right must be open to migrants as a transnational right as it is a right inherent to any migrant who is forced to leave his country of origin for economic or political reasons. Only then, it would be possible to create a temporary status of citizenship to guarantee the migrant transit from one country to another, for as long as said transit lasts.

The transit right as a condition for the creation of a special status for migrants contradicts the State-centered approach in which it is the action of the State alone that defines what is political and who are citizens. For this approach, which is dominant in constitutional studies, it is only the State that has the right to determine who are citizens and who are foreigners or intruders. A migrant or moving citizenship moves to an approach in which

the individual fits into a structural framework which compels the individual to move on to another country for economic, political or cultural reasons. As a result, these individuals have the right to move and to be protected during their journey.<sup>39</sup> Leaving the State-centered approach would also help decriminalize migratory flows around the world,<sup>40</sup> as well as help introduce human rights into the concept of citizenship.<sup>41</sup>

A last word: building a more flexible theory of citizenship for ethno-cultural minorities is a project that will take time and is barely beginning. However, the five points listed above could serve as a guide to start on the main pillars of a multicultural citizenship.

---

<sup>39</sup> ELSPETH GUILD, *SECURITY AND MIGRATION IN THE 21ST CENTURY* (Polity Press, 2010).

<sup>40</sup> MARTA MONCLÚS MASÓ, *LA GESTIÓN PENAL DE LA MIGRACIÓN. EL RECURSO AL SISTEMA PENAL PARA EL CONTROL DE LOS FLUJOS MIGRATORIOS* 544 (Editores del Puerto, 2008).

<sup>41</sup> YAFFA ZILBERSHATS, *THE HUMAN RIGHT TO CITIZENSHIP* 257 (Transnational Pub., 2002).