

# The Limits of Toleration

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1. The concept of toleration plays a major and yet ambivalent role in contemporary political discourse. Just think of the following examples, which are taken from the German context but have a certain paradigmatic character as debates about the very meaning of toleration. In 1995 a provision of the Bavarian School Law which required hanging a cross or crucifix in each public classroom was struck down as unconstitutional by the Federal Constitutional Court; since then there has been heated debate about whether the provision was intolerant toward minorities or whether it was not rather the minorities who objected to displays of crosses or crucifixes who were being intolerant. As another example, the debate still rages about whether a Muslim teacher should be allowed to wear a headscarf in school: is it intolerant to require her not to wear it or is, rather, wearing it a sign of intolerance? And when the German government put through a law that granted homosexual unions a legal status with some of the rights and duties of marriage, it was argued that toleration does not require such legal equality; rather, for the opponents of that law toleration requires no more than legally permitting homosexual relationships. The limits of toleration were reached, so they said, where such laws put the traditional institution of marriage into question (one of the slogans used said: “Tolerance yes, marriage no!”).<sup>1</sup>

Finally, during the last years in many German cities and regions political “alliances for toleration” have been established, “declarations of toleration” have been issued by parliaments, and large demonstrations for toleration took place (such as in Berlin in November 2000 with 200,000 people). The motivation for these demonstrations was the wave of violent racist attacks on foreigners, especially blacks. The reactions against this consisted in calling on citizens to show more tolerance toward culturally and ethnically different people on the one hand, and, on the other, promoting policies of “zero tolerance” against the perpetrators of violence and their organizations. In that context, parliament and government filed a claim before the Constitutional Court to declare the National Democratic Party (NPD), an extreme right party, unconstitutional – a weapon for demarcating the democratic limit of toleration that had not been used since 1956. However, the members and supporters of that party were not alone in finding this intolerant.<sup>2</sup>

Such examples show the high political use value of the concept of toleration: one always tries to construct one’s own position as tolerant and that of the others as intolerant, lying beyond the proper limits of toleration. So given how contested

these limits are, in the following I want to address the question of what criteria should be the basis for drawing them.

2. I have already hinted at a seemingly simple answer to that question. It holds that *the limits of toleration are to be drawn where intolerance begins*. Toleration can only be called for towards those who are tolerant; it is a matter of simple reciprocity.

A brief look at the classical texts in the history of toleration supports this. Pierre Bayle defends the maxim “that a religion which coerces conscience has no right to be tolerated,”<sup>3</sup> by which he has in mind Catholicism; and John Locke urges that “those who will not own and teach the Duty of tolerating All men in matters of meer Religion” have “no right to be tolerated by the Magistrate.”<sup>4</sup> He also includes those “who deny the Being of a God” because “Promises, Covenants, and Oaths, which are the Bonds of Humane Society, can have no hold upon an Atheist.”<sup>5</sup> Rousseau formulates only one negative dogma in his declaration of faith of citizens: that of intolerance.<sup>6</sup> And, according to Voltaire, “men must avoid fanaticism in order to deserve toleration.”<sup>7</sup> He also warns against atheism, for a “violent atheist would be as great a plague as a violent superstitious man.”<sup>8</sup> Both can be avoided by “sound ideas of the divinity.”

These few citations may suffice to support the following:

- (a) As undisputed as the thesis is that the limits of toleration are to be drawn where a person’s or group’s intolerance begins, it remains all the more disputed what this means in a given context. Where does intolerance start: with those who are willing to use religious force, or with those who question the religious foundations of the political order, i.e., “papists” or atheists? It is obvious that the mere slogan, “no toleration of the intolerant,” is not just vacuous but potentially dangerous, for the definition of the intolerant all too often is itself a result of one-sidedness and intolerance.
- (b) This may lead to a very skeptical conclusion concerning the concept of toleration.<sup>9</sup> There simply is no toleration, one could say, for any concrete understanding of that concept leads to intolerance towards those who are arbitrarily called “intolerant” – which means that toleration is always merely a more or less effectively veiled form of intolerance. The whole idea seems to be nothing but a rhetorical manoeuvre in political power struggles in which each party raises, but has no justification for, a claim to a higher level of legitimacy and impartiality in defining the difference between the tolerant and the intolerant. Then the sentence above, “The limits of toleration are to be drawn where intolerance begins,” acquires a very different meaning that shows the very limits of the *concept* of toleration. It is thrown into doubt by the paradox that toleration ends as soon as it begins: as soon as an arbitrary limit is set by defining the “intolerable” and “intolerant.”

3. This radical de(con)struction of the concept of toleration points out an important problem, but it draws the wrong conclusion. It rightly reminds us to be suspicious of the way the limits of toleration have been and are drawn between the tolerant and the intolerant/intolerable. One always needs to ask who draws those limits against whom, on the basis of what reasons, and what motives are in play. In short, whoever speaks of toleration cannot be silent about power.

But one should also take a careful look at that kind of deconstructivist rhetoric about the “groundlessness” of normative terms. For it conflates two meanings of “intolerance” which need to be distinguished – or rather, which those who still want to use the concept of toleration would do better to distinguish: the intolerance of those who lie beyond the limits of toleration because they deny toleration as a norm in the first place and the intolerance of those who do not want to tolerate a denial of that norm. To call both of those viewpoints equally “intolerant” presupposes that there is no non-arbitrary, impartial way of drawing the limits of toleration in the light of higher-order normative considerations. Yet if the concept of toleration is to be saved from this destructive paradox, then there must be such a possibility; only then can the critique of and (possible) action against “intolerance” be more than just another kind of “intolerance” itself.

From the deconstructivist exercise we can, however, also learn that the concept of toleration itself is too indeterminate to generate a justifiable answer to the question how the limits of toleration are to be drawn. Toleration is what I call a *normatively dependent concept*, which, in order to have a certain content (and specifiable limits), is in need of further normative resources that are not dependent in that same sense. Tolerance is thus, contrary to a common view, not itself a value but rather an attitude called for by other values or principles. To avoid the charge of arbitrariness, moreover, the required foundations must be normatively “free-standing” and must have a quality which allows one to draw boundaries and limits in a mutually justifiable way. The history of toleration shows that all too often this has not been achieved, since the ideas of political order and morality that have been used for that purpose were too particularistic and especially one-sidedly religious. Hence, if one wants to avoid the deconstruction of toleration, one must start with a reconstruction of the concept.

4. For that purpose, a clear definition of the concept of toleration itself is needed (for the thesis of normative dependency just developed does not mean that the concept itself is amorphous). It is to be analyzed by the following six characteristics.<sup>10</sup>

First, the *context of toleration* needs to be specified. What is the relation between tolerator and tolerated (e.g., parents and children, friends, citizens, etc.)? What are the subjects (individuals, groups, the state) and the objects (beliefs, actions, practices) of toleration? Obviously, the reasons for and against toleration vary according to these contexts.

Second, it is essential for the concept of toleration that the tolerated beliefs or practices are considered to be objectionable and in an important sense wrong or bad.

If this *objection component*<sup>11</sup> were missing, we would not speak of “toleration” but of “indifference” or “affirmation.”

Third, the objection component needs to be balanced by an *acceptance component* which does not remove the negative judgment but gives certain positive reasons that trump the negative ones in the relevant context. According to these reasons it would be wrong not to tolerate what is wrong, to mention another well-known paradox of toleration. The said practices or beliefs are wrong, but not intolerably wrong.

Fourth, the *limits of toleration* need to be specified. They lie at the point where reasons for rejection become stronger than the reasons for acceptance (which still leaves open the question of the appropriate means of possible intervention). It is important to see that the reasons for *rejection* need not be identical with the reasons for *objection*;<sup>12</sup> they can be independent or (what is more probable) internally connected to the reasons for acceptance, which specify certain conditions and limits for that acceptance. It furthermore needs to be stressed that there are *two* limits involved here: the first one lies between the normative realm of those practices and beliefs one agrees with and the realm of the tolerable practices and beliefs which one finds wrong but still can accept in a certain way; and the second lies between this latter realm and the realm of the intolerable, which is strictly rejected (the limit of toleration properly speaking). There are thus three, not just two normative realms in a context of toleration.

Fifth, one can only speak of toleration where it is practiced *voluntarily* and is not compelled, for otherwise one would speak of “suffering” or “enduring” certain things which one rejects but against which one is powerless.

Sixth, one can distinguish between *toleration* as a practice (of a state, for example) and as an attitude or even a virtue, which we call *tolerance*. The former can be present in a society without the latter.

5. Based on these six central characteristics of the *concept* of toleration, one can spell out different *conceptions* of toleration applicable in the context of a political community in which the citizens are divided by deep cultural and religious differences. For present purposes, I will highlight two of those conceptions, each of them implying a different way of drawing the limits of toleration.<sup>13</sup>

According to the first conception, which I call the *permission conception*, toleration is a relation between an authority or a majority and a dissenting, “different” minority. Toleration then means that the authority (or majority) gives qualified permission to the members of the minority to live according to their beliefs on the condition that the minority accepts the dominant position of the authority (or majority). As long as their expression of their differences remains within limits, that is, is a “private” matter, and as long as they do not claim equal public and political status, they can be tolerated on both pragmatic and principled grounds – on pragmatic grounds because this form of toleration is regarded as the least costly of all possible alternatives and does not disturb civil peace and order

as the dominant party defines it (but rather contributes to it); and on principled grounds because one thinks it is morally wrong (and in any case fruitless) to force people to give up certain deep-seated beliefs or practices.

This permission conception is the classic one that we find in many historical documents and precedents illustrating a politics of toleration (such as the Edict of Nantes in 1598) and that – to a considerable extent – still informs our understanding of the term. Here toleration means that the authority or majority which has the power to interfere with the practices of a minority nevertheless “tolerates” it, while the minority accepts its dependent position. The situation or the “terms of toleration” are non-reciprocal: one party allows another party certain things on conditions it specifies according to its own beliefs and interests. It alone defines the “limits of the tolerable.” It is this conception that Goethe had in mind when he said: “Tolerance should be a temporary attitude only: it must lead to recognition. To tolerate means to insult.”<sup>14</sup>

As opposed to this, the other conception of toleration – the *respect conception* – is one in which the tolerating parties recognize one another in a reciprocal sense: even though they differ remarkably in their ethical beliefs about the good and true way of life and in their cultural practices and they hold in many respects incompatible views, they respect each other as moral-political equals in the sense that their common framework of social life should – as far as fundamental questions of the recognition of rights and liberties and the distribution of resources are concerned – be guided by norms that all parties can equally accept and that do not favor one specific “ethical community,” so to speak.<sup>15</sup> The basis for this is moral respect for others as equal citizens and the capacity to draw the two limits mentioned above in relation to (a) the realm of those values and practices which one fully (or for the most part) affirms, (b) the realm of the beliefs and practices one judges *ethically wrong* but which one still tolerates because one cannot judge them to be *morally wrong* in a more objective sense, and finally (c) the realm of what cannot on that moral basis be tolerated.<sup>16</sup>

If one takes the criteria of normative independence and impartiality as standards for determining the substance and limits of tolerance (see § 3 above), and compares the two conceptions on this basis, one sees that the permission conception gives the authority in power sole discretion over the values that justify and limit toleration. For the most part, these will be the values and *mores* of the ethical-political form of life of the majority of citizens; and therefore the limits of toleration could be broad if the relevant value basis is interpreted in an abstract way (and the value of personal liberty, for example, is stressed), but they could also be quite narrow if, for example, religious values provide their normative underpinning. Most important is the fact that there is no higher order principle for evaluating these interpretations, so that drawing the limits of toleration runs the danger of arbitrariness. This violates the criterion of impartiality.

The respect conception tries to heed this criterion in determining the content of toleration with the help of considerations of *procedural justice*. According to

these considerations, neither a political authority nor a majority of citizens has the right to form the basic institutions of the state on the basis of its ethical conceptions of the good as long as those conceptions can be criticized by other citizens as one-sided and particularistic. Within the respect conception of toleration, then, it is a conception of justice that provides the ground for a justifiable distinction between the three realms of one's own ethical views, of those that are tolerable, and of those that are not. This is what I want to briefly discuss – and defend – in the following sections.

6. A reflexive democracy, one that is aware of its own principles, must be based on the fundamental *principle of the justification of justice*, which says that all those institutions which determine social life and thus the individual lives of citizens to a high degree need to be justifiable in the light of norms that the citizens cannot reciprocally and generally reject.<sup>17</sup> This follows recursively from a reconstruction of the validity claim of these norms to be reciprocally justifiable and generally legitimate – a claim that needs to be made good discursively, i.e., in a justificatory discourse that tries to generate reciprocally and generally non-rejectable reasons. *Reciprocity* in this context of justification means that one does not make any claim to certain rights or resources one denies to others, and that one does not project one's own reasons (values, interests, needs) onto others in arguing for one's claims. One must be willing and able to argue for basic norms with reasons that are not grounded in "higher" truths or in conceptions of the good which can reasonably be rejected by others with a different ethical or cultural identity. Furthermore, according to the criterion of *generality*, reasons for basic norms need to be reciprocally acceptable and shareable among all citizens, not just the dominant parties. Understood in the right way, then, the criteria of reciprocity and generality imply that not just any kind of dissent can invalidate general norms, but only dissent that raises objections which themselves cannot be rejected given these criteria.

The kind of respect that corresponds to the principle of justification I take to be the most fundamental form of moral recognition: the respect of the other as having a *right to justification*.<sup>18</sup> A special case of a violation of that respect occurs when members of one religion find it legitimate to enforce their partial conception of truth and goodness against others by making these – reciprocally rejectable – values the basis for binding general norms. Seen in this way, intolerance is a specific form of injustice, and toleration a demand of justice. The demand is to tolerate those beliefs and practices with which one disagrees but which themselves do not violate the criteria or the "threshold" of reciprocity and generality, i.e., practices of individuals and groups who do not deny basic forms of respect to others and do not illegitimately enforce their ethically rejectable views (and thereby trespass the "border" between legitimate ethical views and valid general norms). Those who tolerate each other find each other's ethical views wrong and misguided, but with reasons that those others can justifiably

reject given their own views and conceptions of the good. In such a situation, tolerant persons recognize that their *ethical objections* are good as far as they go, but that they are not sufficient to justify a *moral rejection* of the other's views as intolerable (to use the language of "objection" and "rejection" suggested in § 4). Whereas an ethical objection is one that can be rejected given the criterion of reciprocity and thereby leads to "reasonable disagreement," a moral rejection is based on reasons others cannot reciprocally and generally reject.

The limits of toleration hence are reached when one party tries to dominate others by making its rejectable views the general norm. Such a denial of the right to justification is a form of intolerance that cannot be tolerated. Not tolerating this, however, is not simply another form of intolerance, for it is justified by the principle of justification itself and does not absolutize one controversial ethical view. The determination of the limits of toleration itself is reflexive and can always be questioned by those who see themselves excluded.<sup>19</sup> As opposed to this, the way the permission conception draws the limits of toleration is partial and potentially repressive towards minorities.

For the examples I started with (§ 1), this means the following. In a society where one party contends that the cross or crucifix is a symbol for general, "Christian-occidental" ethical values such as tolerance rather than "an expression of the declaration of one's belief in a certain denomination," as the Bavarian High Administrative Court held,<sup>20</sup> and another party argues that it is indeed a sign of Christian particularism and maybe even a symbol of its "missionary expansion," as the German Constitutional Court allows,<sup>21</sup> it violates the criterion of reciprocity if the state takes a side here with one of these interpretations and orders hanging the cross on the walls of public classrooms by law. This case is, furthermore, an important example of the conflict between an understanding of toleration based on the permission conception and one based on the respect conception in German society. The Bavarian Court did not just hold that the cross is a more general symbol of liberal ethical values; it also contradicted itself in arguing that the cross on the wall is an expression of the "positive right to religious liberty," i.e., the right to express one's religious beliefs publicly. It further found that this is more important than the plaintiffs' negative right to religious liberty, the right to be free from religion. This argument constructs the plaintiffs' position in a purely negative way and so denies their views a positive religious content. More than that, it also implies that it is the minority which here is called upon to be tolerant: "Given the obligation of tolerance that applies to him, too, a non-Christian or a person with different ethical beliefs can be required to tolerate [representations of the cross] according to the required respect for the beliefs of others, even if they reject these representations."<sup>22</sup> Seen in this way, it is the minority which is being called intolerant of the majority's views, while the majority's tolerance shows itself merely in not interfering with the beliefs of minorities. This way of identifying the beliefs of a majority with the basis of institutions such as schools is a clear violation of the principle of justification and of equal respect. The plaintiffs

hence had a reciprocally non-rejectable claim to equal rights and recognition, whereas the other party in the case did not.

As far as the question of whether teachers should be allowed to wear religious symbols is concerned, those who wear Christian or any other symbols are equally obliged to respect the religious liberty of their students as well as other fundamental norms such as the equality between men and women. *Prima facie* there is no reason to suspect a particular religion – in this case (as in many others) Islam – of being generally intolerant and to exclude its symbols as not being proper apparel for school teachers. To be sure, symbols are open to many interpretations, and for some, the *hijab* can be a “sign of oppression,” but it can also be a sign of one’s freely affirmed religious identity. Society and the state have to be sensitive to mechanisms of cultural and religious repression and indoctrination, *both* within society at large *and* within smaller communities. But general exclusions of certain symbols are as inappropriate here as are justifications for toleration that do not see the difference between a *hijab* and a funny hat.<sup>23</sup> The claim to equal recognition of one’s ethical-religious identity is mutually non-rejectable.

The respect conception does not imply a strict separation between the ethical “private person” and the political *citoyen* free from all particularity; rather, it implies a kind of “qualitative equality” of *equal* respect and *equal* rights for persons with *different* ethical-cultural identities. This can call for exceptions from standard legal requirements and social traditions, but it can also call for a more comprehensive new interpretation of existing institutions. This is the case with homosexual marriage, where couples demand the same legal possibilities as other couples who are allowed to get married.<sup>24</sup> While this argument for equal rights is based on political reciprocity, counterarguments that deny those equal rights and rely on non-generalizable (for example religious) views to justify that violate both criteria of reciprocity and generality. A mere social “toleration” of homosexual life forms, as many argue, is not enough (though it is also “toleration” according to the permission conception); rather, equal legal recognition is what justice demands.

In all these cases one needs to stress that the demand for toleration does not have any skeptical or relativist implications, for the beliefs or practices that are to be tolerated are still seen by the tolerant as ethically wrong. To tolerate them out of respect is *not* to appreciate them or to have some kind of esteem for them. All that is required is the understanding that such a kind of ethical critique is not sufficient to draw the limits of toleration.

7. At this point, an objection can be raised. According to it, one only has a one-sided understanding of a democratic political community if one believes it to be grounded upon abstract principles such as the principle of justification. For a democratic state is culturally and historically situated and not the project of simply applying general moral principles; it has particular ethical, cultural, and historical foundations. Not to see this, the objection goes, means neglecting a political community’s resources for cultural reproduction and its specific self-understanding as a



collective unity. Liberal-democratic states need “inner regulatory forces of liberty” that secure its “homogeneity,” as legal theorist and former Constitutional Court Judge Böckenförde says – a concrete form of *Sittlichkeit*, to use Hegel’s term. Böckenförde concludes with the important remark that “the liberal, secularized state is nourished by presuppositions that it cannot itself guarantee.” And he raises the question of “whether the secularized, temporal state must not also, in the final analysis, live by the inner impulses and bonding forces imparted by the religious faith of its citizens.”<sup>25</sup>

If this objection were right, if the liberal and democratic state had no “neutral” but rather particularistic ethical foundations, and if these were necessarily connected to specific religious values and beliefs which form the “moral substance” of the community and generate social “homogeneity,” then the danger of the following *dialectic of toleration* would arise. Insisting on a kind of toleration based on the justification principle – in the crucifix debate, for example – could lead to undermining and weakening this moral substance, which could only be preserved if the dominant political-ethical form of life were not questioned and endangered. For otherwise too much toleration would lead to its opposite, to disorientation, the loss of values, and ultimately to intolerance and the loss of freedom. Principled toleration would destroy its own cultural presuppositions, it would be self-destructive. To avoid this, and to secure the possibility of toleration, a certain measure of intolerance (as seen through the lens of the respect conception) would seem necessary and justified.<sup>26</sup>

From the perspective of the respect conception, however, this raises the danger of an inverse, *second dialectic of toleration*. The attempt to preserve and secure the alleged ethical-cultural presuppositions of a liberal, democratic, and tolerant state would lead to intolerance. For then a number of rules and regulations that discriminate against cultural and religious minorities could be justified in the name of toleration. Behind this veil, prejudices against those who are “different” could determine what the law counts as tolerable or intolerable. Hence the objection needs to be rejected.

8. Still, Böckenförde’s thesis points to the important issue of the moral-cultural basis for a democratic and liberal state. For clearly a tolerant polity according to the respect conception is impossible without tolerance as a civic virtue of citizens based on a sense of justice.<sup>27</sup> But such an attitude and virtue, such an insight into what one owes to others, can hardly grow on a cultural soil which only nourishes the values and conceptions of the good of a part of the citizenry. Rather, a sense of fairness must grow culturally and mutually, out of experiences of fairness,<sup>28</sup> and in a democratic political culture the relevant sense of justice must gain an autonomous character, insofar as the respect of the right to justification is owed *to* and required *of* each and every person without exception, regardless of his or her ethical-cultural or religious identity. If citizens of a pluralist society are not connected through such a sense of justice, if they think that basic moral capacities require specific ethical-religious foundations, they will not trust persons with the

wrong kind of religion or those without religion – which indeed was Locke's position. The result will be a one-sided, narrow drawing of the limits of toleration, excluding those who are not morally trustworthy.<sup>29</sup>

To avoid such exclusions, a kind of unconditioned moral respect must form the kernel of what one could call a "democratic *Sittlichkeit*" firmly anchored in the identity of citizens. They will surely have their own ways of combining it with their conceptions of the good, a process which will not always be free from inner tensions; yet the practical insight into the duty of respect towards every other person must be "freestanding" in the sense of being an autonomous "human" insight, not dependent on other kinds of reasons.<sup>30</sup> This does not mean that it is not historically and culturally situated, for the necessity for such a kind of respect may well be seen as the central lesson from a history of exclusion and violence characterizing a given political community. It grows out of a plurality of sources and experiences that are by necessity particular, but they all lead to the point at which a person recognizes that a human being is a person who is to be respected *without* requiring any additional reasons. To ask for such reasons, instead, would be considered to be "one thought too many."<sup>31</sup>

9. This leads me back to the above mentioned example of right-wing radicalism. Given what has been said so far, it seems obvious that here the limit of toleration is reached, as the respect conception draws it. For those who question and violate the basic right to respect and justification cannot justifiably claim to be tolerated according to that conception. Thus, drawing the limits of the tolerable in that way is not just another form of intolerance but the exercise of a moral duty towards the victims of those acts.

This, however, leaves open two questions. First, what does this mean in practice – who draws this line against whom by what means? And secondly, could there be other grounds on which a toleration of such beliefs may be justified?

As to the first point, just a few (insufficient) remarks. In the first place, tolerance is a virtue of democratic citizens, and so drawing and defending the limits of toleration is a special task of the members of civil society. A democratic state lives from the normative attitudes of its citizens and from their willingness to act on democratic principles, to act in solidarity and to fight undemocratic prejudices. This is even more important in light of the consideration that right-wing radicalism is often not merely a phenomenon on the fringes of society; rather, racist and nationalist resentment can be widely found in society and provides a background for racist violence.

A further important question is how far citizens should use the law as a means of stressing and defending the limits of toleration – classically speaking, how tolerant the legal state should be. In this context, the aspects of legitimacy and effectiveness need to be distinguished. As far as legitimacy is concerned, "zero tolerance" is called for with respect to violent attacks. But apart from that, difficult questions arise about restricting the basic liberties of expression and communication, the rights of assembly and association of racist and neo-Nazi

groups – questions about whether such drastic forms of restriction are necessary as a kind of *ultima ratio* to secure the basic rights of citizens (which may be the case in certain social situations). Also, one needs to consider questions of effectiveness, for it may well be that such legal restrictions are not very successful and can even lead to unintended, negative side-effects. At times it can be more useful not to defend the limits of toleration by means of laws but instead out of pragmatic considerations to exercise tolerance towards groups that are in principle intolerable – which may even have positive results.<sup>32</sup> This then already provides an answer to the second question asked above: there may be pragmatic reasons to tolerate the intolerant, at least legally, even if they cannot demand it.

At this point one could object that this shows the “return of the repressed” within the respect conception, i.e., the return of the permission conception we thought we had overcome. For it seems that in the case just discussed the tolerant allow the intolerable to enjoy certain liberties that the permission-giving authority can arbitrarily revoke, which is exactly what the permission conception implies. In a sense this is true: those groups are tolerated to a certain degree because the costs of interference are too high, under the condition that they do not trespass certain limits. But the important difference between this and the classic permission conception is the role played by the principle of justice based upon the criterion of reciprocity; hence those who complain about unfair treatment will not be able to reject this principle as arbitrary because they will have to appeal to it themselves. They would find themselves in the paradoxical situation of rejecting a principle they at the same time invoke.

10. A final remark. As important as the many calls for tolerance and civic courage are, one must be careful here, too, for example when one hears appeals to “tolerance towards those who think and look different.” For one must remember that to speak of tolerance only makes sense where there is a normative objection against certain beliefs or practices. This can be the case in relation to people who think differently from oneself in an ethically relevant way. But it is far from clear what kind of reasons could lead to an objection against somebody who “looks” different. Attitudes of that kind – against blacks, for example – rather seem to be grounded on racist prejudices and not on any even minimally “reasonable” reasons. But then to ask such persons to be “tolerant” runs the danger of declaring their prejudices legitimate, at least reasonably possible, ethical judgments. To avoid this, one should not aim at tolerance here but at a dissolution of such prejudices and at the development of basic respect. The concept of toleration always was and still is an ambivalent concept.

#### NOTES

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1. I discuss these conflicts in detail in my historical and systematic study of toleration, *Toleranz im Konflikt. Geschichte, Gehalt und Gegenwart eines unstrittenen Begriffs* (Frankfurt/Main: Suhrkamp, 2003), § 38. In the second part of that book, I develop the arguments presented in this article at greater length.

2. The claim has been struck down by the Federal Constitutional Court (on March 18, 2003, 2 BvB 1/01) for procedural reasons, esp. because the claim for the party ban cited problematic speeches and activities of members of the party who were also informants of state security agencies.

3. Pierre Bayle, *Philosophical Commentary on these Words of Jesus Christ, Compel Them to Come in*, ed. and tr. A. Godman Tannenbaum (New York et al.: Peter Lang, 1987), 147.

4. John Locke, *A Letter Concerning Toleration*, ed. J. Tully (Indianapolis: Hackett, 1983), 50.

5. *Ibid.*, 51.

6. Jean-Jacques Rousseau, *The Social Contract*, in *The Social Contract and Other Later Political Writings*, tr. and ed. Victor Gourevitch (Cambridge: Cambridge University Press, 1997), IV.8.

7. Voltaire, *A Treatise on Toleration and Other Essays*, tr. J. McCabe (Amherst: Prometheus Books, 1994), 203.

8. *Ibid.*, 207.

9. See, e.g., Stanley Fish, "Mission Impossible: Settling the Just Bounds Between Church and State," *Columbia Law Review* 97 (1997): 2255-333.

10. For a fuller discussion of the following, see my "Toleration, Justice and Reason," in: *The Culture of Toleration in Diverse Societies*, ed. Catriona McKinnon and Dario Castiglione (Manchester: Manchester University Press, 2003), 71-85.

11. The terms "objection component" and "acceptance component" I take from Preston King, *Toleration* (New York: St. Martin's Press, 1976), 44-54.

12. On this point, see Glen Newey, *Virtue, Reason and Toleration* (Edinburgh: Edinburgh University Press, 1999), 32-34, from whom I differ, however, in the understanding of the nature of the reasons of objection, especially.

13. The other conceptions (not directly relevant here), the "coexistence conception" and the "esteem conception," I discuss in "Toleration, Justice and Reason," 73-76.

14. "Toleranz sollte nur eine vorübergehende Gesinnung sein: sie muß zur Anerkennung führen. Dulden heißt beleidigen." Johann Wolfgang Goethe, "Maximen und Reflexionen," in: *Werke 6* (Frankfurt/Main: Insel, 1981), 507 (my translation).

15. See my discussion of "neutrality" in Forst, *Contexts of Justice: Political Philosophy beyond Liberalism and Communitarianism*, tr. J. Farrell (Berkeley and Los Angeles: University of California Press, 2002), ch. 2.

16. Terminologically, I introduce here a distinction between "ethical" conceptions of the good and "moral" norms of rightness, which follows (and elaborates) the suggestion made by Jürgen Habermas, "On the Pragmatic, the Ethical, and the Moral Employments of Practical Reason," *Justification and Application*, tr. Ciaran Cronin (Cambridge, MA: MIT Press, 1993), 1-17. For my own version of the distinction, see esp. "Ethik und Moral," in *Die Öffentlichkeit der Vernunft und die Vernunft der Öffentlichkeit*, Festschrift für Jürgen Habermas, ed. Klaus Günther and Lutz Wingert (Frankfurt/Main: Suhrkamp, 2001), 344-371.

17. For a discussion of this principle (and its obvious relation to the theories of Rawls, Habermas, and Scanlon, for example), which I cannot lay out here, see my *Contexts of Justice*, ch. 4, and "Die Rechtfertigung der Gerechtigkeit. Rawls' Politischer Liberalismus und Habermas' Diskurstheorie

in der Diskussion,” in *Das Recht der Republik*, ed. Hauke Brunkhorst and Peter Niesen (Frankfurt/Main: Suhrkamp, 1999), 105–168.

18. On this, see esp. my “The Basic Right to Justification. Towards a Constructivist Conception of Human Rights,” *Constellations* 6 (1999): 35–60.

19. On this point, see also Onora O’Neill, “Practices of Toleration,” in *Democracy and the Mass Media*, ed. Judith Lichtenberg (Cambridge: Cambridge University Press, 1990), 155–185, and James Bohman, “Reflexive Toleration in a Deliberative Democracy,” in *The Culture of Toleration in Diverse Societies*, 111–131.

20. Verwaltungsgerichtshof München, decision of June 3, 1991 (7 CE 91.1014), in: *Neue Zeitschrift für Verwaltungsrecht* 11 (1991): 1099–1101, here 1101. I have discussed this case in more detail in “A Tolerant Republic?,” in *German Ideologies Since 1945*, ed. Jan-Werner Müller (New York: Palgrave Macmillan, 2003), 209–220.

21. Bundesverfassungsgericht, decision of May 16, 1995 (1BvR 1087/91), in *Europäische Grundrechte-Zeitschrift* 22 (1995), 359–369, here 364.

22. Verwaltungsgerichtshof München, 1101 (my translation).

23. See Anna Elisabetta Galeotti, “Citizenship and Equality: The Place for Toleration,” *Political Theory* 21 (1993): 585–605, on the question of respect towards religious and cultural minorities and their symbols.

In the most famous German *Kopftuch* case, the Constitutional Court has decided (decision of September 24, 2003; 2 BvR 1436/02) that the state of Baden-Württemberg must not deny a Muslim teacher the right to wear *hijab* at school since there is no sufficient legal ground within the laws of that state for such infringements of basic rights to religious freedom and an equal chance to gain public office. That ruling, however, seems to leave open the possibility of providing such ground, and it is a matter of dispute how much leeway there is for forbidding the *hijab* and still allowing Christian symbols, for example, as the state parliament has done in a law passed April 1, 2004.

24. On homosexual marriage, see also Anna Elisabetta Galeotti, “Toleration as Recognition: The Case for Same-Sex Marriage,” and Richard Dees, “Of Socinians and Homosexuals: Trust and the Limits of Toleration,” in *Toleration: Changing Perspectives in a Time of Conflict*, ed. Ingrid Creppell, Russell Hardin, and Stephen Macedo (in preparation).

In its decision of July 17, 2002 (1 BvR 1/01), the German Constitutional Court upheld the law for the establishment of *eingetragene Lebenspartnerschaften* for homosexual couples, arguing that it is not in conflict with the constitutional protection of (traditional) marriage (as had been claimed).

25. Ernst-Wolfgang Böckenförde, “The Rise of the State as a Process of Secularisation,” in *State, Society and Liberty: Studies in Political Theory and Constitutional Law* (New York: XX, 1991), 44f and 46.

26. I should add here that this is a conclusion Böckenförde himself does not explicitly draw (esp. not in cases such as the *Kopftuch* conflict); I merely point out a possible implication of his famous thesis that is often stressed in such debates.

27. See esp. my “Tolerance as a Virtue of Justice,” *Philosophical Explorations* 4 (2001): 193–206.

28. See John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, MA: Harvard University Press, 1999), ch. 8.

29. In an important sense, this problem reappears in Jeremy Waldron’s reading of Locke and in the argument for a religious basis of moral respect. See Waldron, *God, Locke, and Equality* (Cambridge: Cambridge University Press, 2002), esp. ch. 8.

30. Here lies an important point of difference with Rawls’ idea of an “overlapping consensus,” which presupposes a “freestanding” political conception of justice, the moral grounds of which, however, will not be freestanding and autonomous but will be derived from the diverse comprehensive doctrines. See John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), esp. 147f. As I see it, this creates a “paradox of political liberalism” with respect to questions of normative priority.

31. I use here a famous phrase by Bernard Williams which he, however, has coined in a quite different sense, namely in the context of a critique of Kantian moral theories. See Williams, *Moral Luck* (Cambridge: Cambridge University Press, 1981), 18. I elaborate this point in my “Moralische Autonomie und Autonomie der Moral,” *Deutsche Zeitschrift für Philosophie* 52 (2004): 179–97.

32. On this point, see Rawls, *A Theory of Justice*, § 35, and Norberto Bobbio, “Gründe für die Toleranz,” in *Das Zeitalter der Menschenrechte* (Berlin: Wagenbach, 1998), 87–107.

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