Toleration and Democracy

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It seems natural to mention the concepts of toleration and democracy in the same breath, for from a historical perspective toleration appears to be no less a modern achievement than the constitutional state and democracy. Moreover, toleration is regarded as a necessary component of democracy. John Locke's *Second Treatise of Government* and his *Letter Concerning Toleration*, published at the same time, seem to testify to this connection as much as the coinciding of the Glorious Revolution with the Toleration Act of William III, all of which occurred in the year 1689.

Yet, on closer inspection things appear different. For a century later, at the very moment when social and political relations were being fundamentally transformed by the American and French revolutions in the name of popular sovereignty, we find Kant speaking in 1784 (in his answer to the question "What Is Enlightenment?") of the "arrogant name of tolerance."[1] And in the debates over the *Declaration of the Rights of Man and Citizen* in the French National Assembly in August 1789, Mirabeau declared that the concept of toleration "smack(s) of tyranny" because it involves the power to grant or withhold freedom of religion.[2] In *The Rights of Man* (1791), Paine likewise describes toleration as the counterfeit of intolerance and as no less despotic than the latter.[3] Finally, Goethe would take up this critique of toleration and raise it from the political to the interpersonal level: "Tolerance should be a temporary attitude only; it must lead to recognition. To tolerate means to insult."[4]

Thus, toleration suddenly finds itself in conflict with democracy; it seems to belong to a pre-democratic, absolutist era. Conversely, however, the numerous political-religious conflicts from the modern period up to the present demonstrate that a pluralist democracy in which different conceptions of the good and the just confront each other cannot get by without toleration. The profound *ambivalence of toleration* that becomes apparent here is no accident—this, at any rate, is my thesis. Ambivalence is a distinguishing feature of the concept of toleration. For it remains a matter of controversy not only where the limits of toleration should be drawn within a political community but also what toleration actually means and, in addition, whether toleration is even *something good* when viewed from the perspective of an enlightened understanding of democracy.[5]

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This can be shown by some examples from German politics that appear similarly in other political cultures as well:

2.1

The "crucifix decision" of the German Federal Constitutional Court, which agitated the republic in the summer of 1995, became the focus of still ongoing disputes over whether it is intolerant to hang crucifixes or crosses by law in public schools, or whether instead the objections against this practice are a sign of intolerance.

2.2

In the context of the "headscarf" conflicts, it is asserted that it is intolerant to prohibit a Muslim teacher from wearing a headscarf, while it is objected to this that this very headscarf is a symbol of unfreedom and intolerance.

2.3

While the proponents of the law on so-called "registered lifelong partnerships" for same-sex couples regarded its critics as intolerant, the latter responded with the motto "Toleration yes, 'marriage' no." But *this* toleration in particular is rejected by the supporters of the law.

2.4

And—a final example—whereas one side wants to highlight the limits of democratic toleration by prohibiting the far right National Democratic Party of Germany, for the other side this is an act of intolerance.

These kinds of conflicts, in which each of the parties to the dispute lays claim to the virtue of tolerance for itself, represent a challenge for political theory on a number of levels. At the *conceptual* level, it must be asked whether quite distinct concepts of toleration may not be involved here and whether they can be unraveled. From a *historical* perspective, we should draw parallels to past controversies that might be helpful in analyzing these problems. And from the perspective of *political analysis*, it must be asked which conflicting interests and arguments are present here and how they *can* be and—to pose the *normative* question—*should* be reconciled in democratic institutions. In view of these kinds of disputes, I would like to speak in terms of *"complex" political conflicts*, specifically because

here we are not simply dealing with a political conflict of interests but with a controversy over the correct understanding of toleration and, above all, of democracy itself.

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How should we proceed? Let us begin with an analysis of the concept of toleration. In my view, a closer consideration of the matter reveals that there is not a plurality of "concepts of toleration" here but just *one* meaningful concept of toleration. This concept involves—and here I will confine myself to the essentials—three components.[6]

3.1

The first is the so-called *objection component*. It states that the tolerated convictions or practices are regarded as false or condemned as bad. Without this component, there would either be indifference or affirmation, but not toleration.

3.2

Second, toleration involves a positive *acceptance component* that specifies the reasons why it is right or even required to tolerate the false or bad convictions or practices. Thus, toleration does not mean that the reasons for objecting are annulled, however, but instead that in each case they are weighed and over-ridden.

3.3

Finally, third, a *rejection component* is also involved that contains reasons for determining the much-disputed limits of toleration. Here a clear negative evaluation predominates that calls for an end of toleration and, if necessary, intervention. Clearly, this evaluation must be based on particularly sound reasons if it entails legal consequences of restricting liberty.

This very brief analysis shows that we are dealing with three kinds—or three functions—of reasons, so that the exercise of toleration always involves the task of connecting these reasons in the right way. It should be noted that the definition of the concept as yet leaves open whether all three reasons are of one and the same kind—for example, religious reasons—or whether they are of different kinds (moral, strategic, etc.). A complex space of practical reflection opens up here.

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The complexity of the matter again becomes apparent on closer inspection. For each of the three components—objection, acceptance, and rejection—involves a *paradox* of its own.

4.1

The objection component is confronted with the *paradox of the tolerant racist*. According to this paradox, someone who rejects other human beings because of their "race" would be all the more tolerant the stronger this rejection is, provided that he refrains from acting in the way implied by such rejection—for strategic reasons, for example. But would we really want to ascribe the *virtue* of tolerance to such a person, assuming that we regard tolerance as a virtue? Shouldn't we instead reject his reasons for objecting themselves? But what are the criteria for "reasonable" reasons for objecting?

4.2

The acceptance component gives rise to the *paradox of moral toleration* because, when objection and acceptance are based on moral grounds, it seems morally right, or even obligatory, to tolerate what is morally wrong. Can this paradox be resolved by differentiating among reasons?

4.3

In the case of the rejection component, the result is the *paradox of drawing the limits*. For every act of drawing boundaries between us and those who seem to be intolerable—and often also intolerant—will appear to them to be an act of intolerance, an arbitrary demarcation. So toleration would always be its opposite, too. Is this arbitrariness avoidable or does it condemn the endeavor of drawing the limits of toleration in a justified way to failure?

I will return to these paradoxes. Here, I would like to point out that their formulation already gives rise to certain criteria for a more specific normative definition of toleration. So far, however, the concept of toleration has proved to be a *normatively dependent concept* that must be filled with normative substance, substance that has to be drawn from resources that it does not contain itself. This will be confirmed by a further, historically informed stage of the analysis. For, starting from the *core concept* of toleration proposed, different *conceptions* of toleration can be distinguished, two of the most important (though not the only) of which I will outline briefly, for they are immediately relevant for an analysis of the above-mentioned conflicts in pluralistic societies.[7]

5

The first, classical understanding of toleration I call the *permission conception*. On this conception, an authority grants one or several minorities the permission to live in accordance with their convictions, which are described as "deviant," provided that they do not challenge the supremacy of the authority. The difference of the minorities is supposed to remain a "private matter," confined within a narrowly circumscribed and clearly defined framework laid down unilaterally by the side that wields power; toleration is something bestowed and it can be revoked at any time if the minorities violate certain conditions. Objection, acceptance, and rejection are under the control of the authority, which is not subject to any institutionalized pressure to generally justify its decisions.

Within the history of ideas, this vertical conception of toleration can be found in a wide variety of authors, whom it will not be possible to list here. Moreover, if we broaden the perspective in a genealogical manner to include practices of toleration, it can also be found in the classical toleration laws, for example, in the Edict of Nantes (1598), which speaks a clear language: "[N]ot to leave any occasion of trouble and difference among our Subjects, we have permitted and do permit to those of the Reformed Religion, to live and dwell in all the Cities and places of this our Kingdom and Countreys under our obedience, without being inquired after, vexed, molested, or compelled to do any thing in Religion, contrary to their Conscience . . ."[8]

The ambivalence of this kind of toleration becomes apparent here. Whereas, on the one hand, it grants persecuted minorities a certain security and certain liberties, on the other hand, it is a continuation of domination by other means. The tolerated minorities must pay for their liberties with obedience and loyalty because they rely on the protection of the authority, and they are marked out as second-class citizens who deviate from the norm. The result is a complex picture of *disciplining by granting freedom*, of exclusionary inclusion, as it were—the exercise of a form of power that, to speak with Foucault, governs by *permitting* instead of forbidding. This simultaneously disciplining and repressive toleration is the target of the critical remarks by Kant, Mirabeau, Paine, and Goethe cited above.

6

It would take too long to recite the story here of how a second, not vertical but *horizontal, democratic* conception of toleration, which I call the *respect conception*, broke new ground in the course of the revolutionary changes beginning in the sixteenth century, first in the Netherlands, then in England, and finally in America and France. The basic idea is that toleration is a stance adopted by *the citizens toward each other*: They are simultaneously tolerating and tolerated—as subjected to and also as authorizing the law. Even though they have sharply divergent conceptions of the good and of salvation, they grant each other the status of

citizens endowed with equal rights (extended to women only much later), which means that the basic structure of political and social life common to all can be founded only on those norms that can meet with the equal acceptance of all citizens. The "authority" to "bestow" liberty now no longer resides exclusively in a power center but in a process of legitimation that must not violate certain basic rights and stipulates a particular level of justification in questions of principle. With this, religious oppression is condemned as *political* oppression, and freedom of religion becomes a right that democratic citizens grant each other because the exercise of religious coercion cannot be reciprocally justified among political equals.

7

A cursory examination of present-day conditions, however, shows that it would be wrong to assume that the second model is the dominant one in modern democratic societies and that the first belongs to a dark, pre-democratic past. For the permission conception has maintained its strong position up to the present by transforming itself. The permission-granting side is now conceived as the *democratic* majority that "puts up with" minorities. Thus, in conflicts such as the above-mentioned ones, we find precisely those two mutually antagonistic understandings of toleration that point to different notions of democracy. To clarify:

7.1

In the crucifix debate mentioned,[9] the advocates of a permission conception took the view that, although religious minorities should be granted freedom from coercion of conscience in principle, there was absolutely no obligation to grant them legal-political equality, such that their objection could have had the effect of preventing the Christian majority among the citizenry from expressing their "positive religious freedom" by affixing their symbols *by law* in the classrooms of public schools. Toleration of "dissenters" meant not "proselytizing" them; but they in turn were expected to exhibit an entirely different kind of "toleration," namely, recognizing the dominance of the majority. From the perspective of the respect conception, this turns the democratic function of freedom of religion on its head. For the latter requires that central social institutions should be neutral in religious matters on grounds of fairness toward minorities; it prohibits the mixing of religious and governmental symbols in the way described.

7.2

In the case of the headscarf controversy,[10] it seems to be sufficient from the perspective of vertical permission toleration to permit a Muslim teacher to practice

her occupation on the condition that she forgoes wearing a "conspicuous" religious symbol that unavoidably affects the schoolchildren. For it is argued that, regardless of the teacher's motives, this symbol exercises a negative religious influence over children, especially over girls from Muslim families. On the other hand, making such a sweeping judgment and stigmatizing a religion without regard to the individual case is unjustified from the perspective of the respect conception of toleration. Instead, mutual respect among citizens means tolerating each other in their different ethical and cultural identities and scrutinizing laws and regulations to determine whether they measure up to the claim to equal respect or whether they discriminate against "foreign" forms of life and expose them to a general suspicion. The neutrality of a public institution can neither mean that employees, by fulfilling their duties, become "neutralized" beings stripped of their identities, nor may it be interpreted in such a way that conventional, "inconspicuous" forms of life become the norm and receive preferential treatment. Culturally or religiously motivated oppression within the family or in other social domains must nevertheless be uncovered and combated wherever it occurs; yet this must not be done at the cost of a double stigmatization of those affected.

7.3

It is sufficient from the perspective of permission toleration not to prohibit or to openly discriminate against ways of life involving same-sex partnerships[11]; however, equal treatment in such central institutions as marriage is rejected. The claim is that these institutions rest upon the evaluative convictions of the overwhelming majority of citizens, and these are not subject to negotiation on arbitrary grounds. From the perspective of the respect conception, by contrast, equality of legal status is required insofar as the rights of others are not thereby impaired, and it is not observable that they are in such cases. To grant certain persons equal status with respect to an institution is not to question or weaken the latter, but rather the opposite.

7.4

In the case of the prohibition of antidemocratic parties, the picture is complex. From the vantage point of the permission conception, tolerating them may be justified on pragmatic grounds to avoid even greater harm. From the perspective of the respect conception, by contrast, it is clear that such parties cannot expect toleration when they contravene basic rights and democratic procedures or when they are devoted to abolishing the latter and they cannot complain about intolerance on the part of the constitutional state (since they do not recognize its norms). However, even then there may be pragmatic reasons for tolerating such groups. It follows that here the respect conception itself involves a moment of permission, albeit with the important difference that the principle of equal respect remains fundamental.

8

In order to arrive at a normative judgment of such conflicts in which the fundamental understanding of democracy and toleration among citizens is addressed, it is not sufficient to fall back on an "established" or "modern" understanding of democracy, for clearly this is precisely what is *in dispute*. The classical justifications of toleration—for example, the argument from freedom of conscience—are of no help here either.[12] For, first, the argument from freedom of conscience is ambiguous with regard to the difference between the permission and respect conceptions; second, it often states that conscience *cannot* be coerced, a claim which has often been doubted on empirical grounds, as already by Augustine. In his opinion, *terror* (*lat.* fear, alarm, dread)—and today there are a range of methods for inflicting it—can at least "liberate" dissenters from false convictions and "open" their eyes for the truth. Or, third, the argument states that one must not coerce conscience, where in support it was traditionally argued that conscience is the work of God alone and hence that freedom of conscience is actually grounded in the individual relation to God (which is why, according to Locke, atheists and Catholics could not lay claim to such a freedom).[13] However, such a justification cannot be generalized in a pluralistic society. This argument is contestable even in its more moderate liberal, post-Millian guise, according to which one can find one's own good only autonomously, through one's own efforts and insight. For there may be paths leading to the "good life" in which personal autonomy does not play a dominant role—Augustine was convinced of this. The free, the autonomous, and the good life are distinct phenomena and the justification of the respect for autonomy and freedom embarks on a risky path when it relies on a specific thesis about the "good life."[14] Moreover, this line of argument leaves open what can and cannot count as an "autonomously chosen" conviction.

9

In order to find the right justification of toleration, we must start from a certain understanding of the basic problem of toleration, namely, the question of which reasons are sufficient for *justifying* certain liberties or restrictions on liberty in the political context—that is, the question of power and coercion. Norms that bestow or restrict such liberties make the claim to be *reciprocally* demandable and to enjoy *general* legitimacy, a claim that implies the criteria of reciprocity and generality. Reciprocity then means that one cannot refuse to grant another person certain demands that one makes for oneself (reciprocity of contents) and that one must not assume that others share one's evaluative conceptions and interests—especially not by appeal to "higher truths," which are precisely *not* shared (reciprocity of reasons). Generality ultimately means that all of those affected must be able in principle to share reasons for regulations governing the realm of toleration and freedom that can be legitimized in general terms.[15] Toleration in this sense is a discursive *virtue of justice* because it is founded on a principle of the justification

of just(ified) norms. Thus, justice is the resource that invests the normatively dependent concept of toleration with substance.

The virtue of tolerance, thus understood, has two components, a *normative* one and an *epistemic* one. The normative component consists in recognizing the basic *right to justification* of others in contexts of justice, a right that implies a duty of reciprocal-general justification. Being tolerant then means that, when one's reasons for or against a specific regulation are *not* sufficient to satisfy the criteria of reciprocity and generality, one recognizes that one's convictions fall short of justifying a general obligation, even though one can continue to regard them as good and right. Put differently, this means recognizing that one's ethical position encounters other ethical positions that one takes to be *false* though they are neither *unreasonable nor immoral*, so that one does not have sufficient reasons for strongly rejecting the other convictions or practices. This weighing up of reasons for objecting, accepting, and rejecting against each other involves a complex form of self-overcoming and self-relativization while maintaining one's own position.

This already points to the second component, for this self-relativization must also be explained in epistemological terms, specifically with the aid of an insight into the *finitude of reason*. "Reasonable" persons not only recognize their duty to justify but also that ethical conflicts can arise between positions that, although not irrational, may be neither verifiable nor falsifiable in purely rational terms. The insight into the possibility of such *reasonable disagreements*[16] makes toleration possible. For one continues to regard one's own position to be correct, yet at the same time recognizes that, in the conflict with other positions that are also rationally tenable, it does not offer sufficient reasons to justify a generally binding regulation. This constitutes the core of the required self-relativization. And with regard to religious convictions, for example, it does not call for skepticism or relativism but for a distinction between *faith* and *knowledge*, such as was developed most convincingly, in my opinion, by Pierre Bayle—who, moreover, was the first to connect this with a duty to provide reciprocal normative justifications of restrictions on freedom.[17]

10

This justification of toleration corresponding to the respect conception is the one best equipped to resolve the paradoxes of toleration.

10.1

As regards the *paradox of the tolerant racist* it implies that minimal normative criteria and standards of rationality must be attached to objections. This means that, in cases of racism, the requirement that the racist should be tolerant is the wrong requirement because this would amount to regarding his objecting

prejudices as admissible within the social framework. But these judgments themselves are the problem: A racist should overcome his racist objections, not be tolerant. This also shows that toleration is not the best answer to intolerance in every case.

10.2

Therefore, the *paradox of moral toleration* should be resolved in such a way that a general form of democratic respect among citizens requires tolerating all convictions and practices that do not infringe on this respect, or on the principle of justification, even though one may otherwise object to them in whole or in part and regard them as ethically wrong.

10.3

The *paradox of drawing the limits* would be avoided if the reasons marking the limits of toleration themselves took their orientation from the principle of democratic respect and drew the limits where the right to justification or basic civil rights are violated.

11

Finally, the following should be borne in mind. Insofar as the respect conception represents the appropriate conception of democratic toleration, the point would be to organize political opinion-forming and decision-making institutions—and that includes the sphere of "civil society"—in such a way that the legitimate objections of minorities, for example, and of minorities *within* minorities, can be fed in appropriate ways into the political process where they can be brokered. In this way, manifestations of alienation from the political process would be avoided that are also a result of the fact that, all too often, it is the courts that first provide a forum for the standpoints of "nonconformists."

Toleration, in turn, comes into play here in two places: first, where in political processes there must be the willingness to allow positions one finds wrong to be expressed and to engage with them; and, most importantly, second, where it becomes apparent that one can only produce reasons for one's own position, *even if it be the majority position*, that can or even must count as fraudulent from the perspective of a minority, so that one must recognize that this justification is *not* sufficient. This is the difficult insight for which the concept of toleration stands. It indicates that tolerance is an essential democratic *virtue* of citizens as those who are subject to law and, above all, those who make the law—a virtue, of course, that is demanded equally of majorities and minorities.

I presented versions of this paper as the Stevens Lecture at Cornell University, at the Mellon Sawyer Seminar at the City University New York, and at University

Notes

1 Immanuel Kant, "An Answer to the Question: What is Enlightenment?," in *Practical Philosophy*, ed. and trans. Mary Gregor (Cambridge: Cambridge University Press, 1996), 21.

2 Comte de Mirabeau, Speech of August 22, 1789, quoted in Louis Barthou, *Mirabeau* (Freeport, NY: Books for Libraries Press, 1972), 195–96.

3 Thomas Paine, "Rights of Man," in *Rights of Man, Common Sense, and Other Political Writings*, ed. Mark Philp (Oxford: Oxford University Press, 1998), 136–67.

4 Johann Wolfgang von Goethe, *Maxims and Reflections*, trans. Elisabeth Stopp, ed. Peter Hutchinson (London: Penguin, 1998), 116 (translation amended).

5 The following, brief discussions are based on my systematic historical study: Rainer Forst, *Toleration in Conflict. Past and Present*, trans. Ciaran Cronin (Cambridge: Cambridge University Press, 2013), which contains an exhaustive discussion of the issues addressed here and of the examples that follow.

6 My analysis draws on Preston King, *Toleration* (New York: St. Martin's Press, 1976), 44–54.

7 I analyze further the conceptions of toleration in *Toleration in Conflict*, ibid., §2.

8 Quoted from Roland Mousnier, *The Assassination of Henry IV*, trans. Joan Spencer (New York: Scribner, 1973), 320.

9 See, in particular, the decision of the Federal Constitutional Court of May 16, 1995 (BVerfG, 1 BvR 1087/91), *Europäische Grundrechte-Zeitschrift* 22 (1995): 359–69, and the positions discussed there; for more detailed treatment, see Forst, *Toleration in Conflict*, ibid., §38.

10 On this, see especially the judgment of the Federal Constitutional Court of September 24, 2003 (BVerfG, 2 BvR 1436/02) (English translation: Retrieved September 24, 2011, from http://www.bverfg.de/entscheidungen/rs20030924_2bvr143602en.html).

11 Cf. the decision of the Federal Constitutional Court on "registered lifetime partnerships" of July 17, 2002 (BVerfG, 1 BvF 1/01). For a synopsis of the decision, see Russell Miller and Volker Röben, "Constitutional Court Upholds Lifetime Partnership Act," *German Law Journal* 8 (2002). Retrieved September 19, 2011, from http://www.germanlawjournal.com/article.php?id=176

12 On this, see Forst, *Toleration in Conflict*, ibid., §§5, 17, 18.

13 John Locke, *A Letter Concerning Toleration*, ed. James Tully (Indianapolis, IN: Hackett, 1983), 50f.

14 On this, see also Forst, "A Critical Theory of Multicultural Toleration," in *The Right to Justification* (New York: Columbia University Press, 2012), chap. 6.

15 For a more exhaustive treatment, see Part I of Forst, *The Right to Justification*.

16 John Rawls, *Political Liberalism* (New York: Columbia University Press, 2005), 54–58.

17 On this, see Forst, *Toleration in Conflict*, ibid., §18, and "Pierre Bayle's Reflexive Theory of Toleration," in Melissa S. Williams and Jeremy Waldron, eds., *Toleration and its Limits* (New York: New York University Press, 2008), 78–113.