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## Two stories about toleration

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### I An ambivalent concept

On 18 March 2011, the Grand Chamber of the European Court of Human Rights reversed a judgment of its Chamber from 3 November 2009 in the case of *Lautsi v. Italy*, which had ruled that the Italian practice of displaying crucifixes in public schools violated the basic rights to freedom of education and to freedom of thought, conscience and religion.<sup>1</sup> Cases of this kind are typical in European societies<sup>2</sup> and they often exhibit similar structures. Whereas one party sees the crucifix (or cross) as a symbol of Christian faith, others reinterpret it as a symbol of Western culture generally and of its values. The Consiglio di Stato had accordingly held in the *Lautsi* case that the ‘crucifix is capable of expressing ... those values – tolerance, mutual respect, valorisation of the person, affirmation of one’s rights, consideration for one’s freedom, the autonomy of one’s moral conscience vis-à-vis authority, human solidarity and the refusal of any form of discrimination – which characterize Italian civilisation’ as well as the Italian constitution.<sup>3</sup> The Grand Chamber did not quite follow that path in its judgment; rather, it argued that the ‘passive symbol’ of the crucifix ‘cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities’ – and that thus the issue falls within the ‘margin of appreciation of the respondent State’.<sup>4</sup> Such cases raise a number of important issues about the traditions of Western societies and what

<sup>1</sup> Grand Chamber of the European Court of Human Rights, Case of *Lautsi and Others v. Italy*, 18 March 2011 (Application No. 30814/06).

<sup>2</sup> I discuss a similar one in the German context in ‘A Tolerant Republic?’ in J.-W. Müller (ed.), *German Ideologies Since 1945. Studies in the Political Thought and Culture of the Bonn Republic* (New York: Palgrave Macmillan, 2003), pp. 209–20.

<sup>3</sup> *Lautsi and Others v. Italy*, section 16.

<sup>4</sup> *Lautsi and Others v. Italy*, sections 72 and 70.

they mean, about religious or non-religious symbols, about state neutrality and about fairness to minorities. What is especially interesting, however, is that both sides of the conflict claim the virtue of tolerance for themselves: the defenders of the crucifix in the classroom see it as a symbol of toleration and find the critique of that practice intolerant of religion and social traditions, whereas the plaintiffs in such cases see that symbolic practice as a sign of intolerance toward religious minorities. Obviously, then, in such conflicts toleration is an important concept, yet its application is highly contested.

But maybe it is not only its application that is disputed. For if we look at these conflicts closely, they might also reveal an ambivalence concerning the interpretation of what toleration essentially means. For some, it merely implies that minorities are not forced to adopt a religion different from their own or to revere symbols of a different faith, while for others toleration is the virtue accompanying state neutrality. For the first party, toleration means that the majority does have the right to determine the character of schools, for example, as long as it leaves room for minorities to differ, while for others that right is an unjustifiable privilege and majoritarian exercise of domination. If that is what toleration means, they argue, Goethe was right when he said: ‘Tolerance should be a temporary attitude only: it must lead to recognition. To tolerate means to insult.’<sup>5</sup> So we encounter here an instance of a long-standing debate about toleration in our societies, a debate that attests to the ambivalence that inheres in that concept.

To gain a deeper understanding of this ambivalence, I want to tell two stories about toleration, a dark and pessimistic one and a bright and optimistic one, and I want to argue that from a sufficiently complex critical historical perspective, both of them are true. More than that, they are not just historically true, they still inform the contemporary meaning and practices of toleration. Toleration can be based on mutual respect, and it can also be an expression of disrespect and domination. On the basis of an analysis of this ambivalence, I will try to develop a normative justification for toleration that is based on an adequate understanding of democratic justice.

But before I start with my two stories a word about the general concept of toleration. Its core can be explained by the three components of

<sup>5</sup> ‘Toleranz sollte nur eine vorübergehende Gesinnung sein: sie muss zur Anerkennung führen. Dulden heißt beleidigen.’ J. W. Goethe, ‘Maximen und Reflexionen’, *Werke* 6, (Frankfurt: Insel, 1981), p. 507. I discuss the complex relation between toleration and recognition in my ‘“To tolerate means to insult”: Toleration, recognition, and emancipation’, in B. van den Brink and D. Owen (eds.), *Recognition and Power* (Cambridge University Press, 2007), pp. 215–237. In the following, I rely on parts of that text.

*objection, acceptance and rejection.*<sup>6</sup> First, a tolerated belief or practice has to be judged as false or bad in order to be a candidate for toleration; second, apart from these reasons for objection there have to be reasons why it would still be wrong not to tolerate these false or bad beliefs or practices, that is, reasons of acceptance. Such reasons do not eliminate the reasons of objection; rather, they trump them in a given context. And third, there have to be reasons for rejection which mark the limits of toleration. These limits lie where reasons of acceptance run out, so to speak. All three of those reasons can be of one and the same kind – religious, for example – yet they can also be of different kinds (moral, religious, pragmatic, to mention a few possibilities).

Obviously, this definition is very general, and the problems begin once these components are fleshed out: What can or should be tolerated, for what reasons, and where are the limits of toleration? Toleration as such, it seems to me, is a *normatively dependent concept*, one that is in need of other, independent normative resources in order to gain a certain content and substance – and in order to be something good at all. Hence an important aspect of every story about toleration is how the three components gain substantive content.

## 2 The story of the permission conception of toleration

My first story about toleration starts in sixteenth-century France. In the course of the second half of that century, the party of the *politiques* gained and propagated the conviction that the principle of *une foi, une loi, un roi* could no longer be sustained, for the price to be paid for oppressing the Calvinist minority of the Huguenots was too high, economically, politically and morally. Political unity could only be saved if the aim of religious unity was to a certain extent given up; *constituenda religione* and *constituenda republica* had to be separated and the monarch had to play the role of sovereign umpire and ruler. It took, however, a long time up until 1598

<sup>6</sup> With respect to the first two components, I follow P. King, *Toleration* (New York: St. Martin's Press, 1976), Chapter 1. G. Newey, in his *Virtue, Reason and Toleration* (Edinburgh University Press, 1999), Chapter 1, also distinguishes between three kinds of reasons in his structural analysis of toleration (which, however, differs from mine in the way these reasons are interpreted). For a more extensive discussion, see my 'Toleration, Justice and Reason' in C. McKinnon and D. Castiglione (eds.), *The Culture of Toleration in Diverse Societies* (Manchester University Press, 2003), pp. 71–85, and generally my *Toleranz im Konflikt. Geschichte, Gehalt und Gegenwart eines umstrittenen Begriffs* (Frankfurt, M. Suhrkamp, 2003; transl. forthcoming with Cambridge University Press as *Toleration in Conflict*).

before Henri IV issued the famous Edict of Nantes. This Edict clearly recognized the Huguenots as French citizens, though as citizens of a second class. They were granted the liberty to practice their religion only at specified places (not in Paris) and at certain times, and the Edict carefully explained which public offices they could hold, where and what kinds of schools and universities they could found and where they could build 'security zones' with armed forces. Hence the Calvinist minority became recognized and was protected by law, but at the same time the law fixed their position in a situation of being 'merely' tolerated, being dependent upon the goodwill of the authority and always taking second place after Catholics in everyday life. This kind of recognition/toleration, to be sure, was a great advantage compared to the prior situation (and later periods of oppression), yet it also meant a certain form of cultural and social stigmatization, political powerlessness and dependency.

This is the kind of toleration that Goethe had in mind when he spoke of the insult of toleration, and also what Kant meant when he criticized the 'presumptuous title of tolerant' (*hochmüthig*), and what lead Mirabeau to say that toleration is a sign of tyranny.<sup>7</sup> These quotations also show that the almost 200 years between the Edict of Nantes and the French Revolution had not altered the structure of this kind of toleration. For example, we also find it in the Toleration Act of 1689, right after the 'Glorious Revolution', which was declared to be 'an Act for Exempting Their Majesties Protestant Subjects, Dissenting from the Church of England, from the Penalties of certain Laws',<sup>8</sup> which shows that this act clearly defines which dissenters (Presbyterians, Independents, Baptists and Quakers) fall under these exemptions from the – still valid – laws of uniformity and conformity with the Church of England and which do not (the unitarian Socinians, for example, and of course atheists). Also, Catholics were excluded from toleration by the oath of allegiance that subjects of the king had to take. The result is a complex picture of inclusion and exclusion, of a majority and of various minorities, some of which were tolerated and some of which were not. Those who were tolerated were at the same time included and excluded; they enjoyed a certain recognition and security that the others did not have, but they were

<sup>7</sup> I. Kant, 'An Answer to the Question: "What is Enlightenment?"', in I. Kant, *Political Writings*, ed. H. Reiss, tr. H. B. Nisbet (Cambridge University Press, 1991), p. 58; Comte de Mirabeau, Speech in the National Assembly on 22 August 1789, discussing the *Declaration des droits de l'homme et du citoyen*, quoted in L. Barthou, *Mirabeau* (Freeport, NY: Books for Libraries Press, 1972), pp. 195–6.

<sup>8</sup> See the text of the Act in O. P. Grell, J. I. Israel and N. Tyacke (eds.), *From Persecution to Toleration* (Oxford: Clarendon, 1991), pp. 411–22.

dependent upon the protection of the monarch and thus had to show extreme loyalty. A complex matrix of power had developed that worked with different forms of recognition.

The same holds true of another example, which I want to mention briefly, the so-called *Toleranzpatente* of the Habsburg Emperor Joseph II in 1781 who – in contrast to his mother Maria Theresia who wanted to enforce religious unity – understood that in a time of intense religious strife the most rational form of exercising political power was a kind of discipline and peace through granting freedom: This ‘enlightened monarch’ was enlightened enough to know that toleration was the more effective policy toward powerful dissenters. Thus he granted the liberty of the *Privat-Exercitium* of religious duties (not the public exercise of religion) to three minority confessions: the Lutherans, the Reformed and the Greek Orthodox. It was exactly defined what they were allowed to do. For example, their churches could have neither bells nor entrances onto the street. This form of liberty, Joseph was convinced, would produce good subjects out of religious dissenters who would automatically have become political opponents if no toleration was practised. Toleration was the price to be paid for loyalty, and on the side of the subjects, loyalty was the price to be paid for certain liberties and security. Conformity in exchange for nonconformity.

Again, what we find here is the complex mixture of freedom and domination, of inclusion and exclusion, of recognition and disrespect that characterizes this conception of toleration, which I call the *permission conception*. According to it, toleration is a relation between an authority and a dissenting, ‘different’ minority (or various minorities). Toleration means that the authority 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. As long as their expression of their differences remains ‘private’ and within limits, and as long as these groups do not claim equal public and political status, they can be tolerated on both pragmatic and normative grounds; on pragmatic–strategic 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 normative grounds because the authority may find it wrong (and in any case fruitless) to force people to give up their deep-seated beliefs or practices. In short, toleration means that the authority that has the power to interfere with the practices of the minority nevertheless tolerates it, while the minority accepts its dependent position. Thus, speaking in terms of the three components of toleration, all three of them are being defined by the authority alone.

As I said, it is this conception that Kant, Mirabeau and Goethe criticize; toleration appears to be a strategic or at least a hierarchical policy, and the form of recognition that is granted to minorities both gives them certain liberties *and* turns them into dependent subjects and second-class citizens. Not rights but permissions are granted, and they can always be revoked (as the Edict of Nantes was in 1685). This form of toleration had *liberating* as well as *repressive* and *disciplining* effects (the latter in Foucault's sense): liberating because it clearly was an advantage as compared to the previous oppressive policies, repressive because to be tolerated meant to accept one's weak and underprivileged position, and disciplining because those policies of toleration 'produced' stigmatized, non-normal identities that were at the same time socially included and excluded.<sup>9</sup> The 'toleration' of the Jews from the Middle Ages to modern times is an obvious example of such forms of excluding inclusion; toleration always had to be paid for by stigmatization and by subservience.

If we look at the present discourses and practices of toleration through the lens of what I would call a *critical theory of toleration*, based on an analysis of repressive and disciplining forms of toleration, we see that the 'dark' story is not yet over.<sup>10</sup> For contrary to what many believe, the end of absolutism was not the end of the permission conception; rather, it is still very active and valid in our societies, though now in a different, *democratic* form: the tolerating authority now appears as the authority of a democratic majority. Of course, the authorities I mentioned in my three examples were also backed by overwhelming religious and political majorities, but within a democratic regime things look different, for now it is part of the very self-understanding of the regime that it grants basic equal liberties to all citizens – and that the citizens recognize each other as free and equal. Yet still in many contemporary practices of toleration, the permission conception has survived. I do not want to go into the many examples one could give for that, but only mention in

<sup>9</sup> On this point, see also W. Brown, *Regulating Aversion: Tolerance in the Age of Identity Politics* (Princeton University Press, 2006).

<sup>10</sup> See the examples I discuss in my *Toleranz im Konflikt*, Chapter 12, and 'A Critical Theory of Multicultural Toleration' in A. S. Laden and D. Owen (eds.), *Multiculturalism and Political Theory* (Cambridge University Press, 2007), pp. 292–311. I should note here that I use the term 'repressive tolerance' in a way that differs from H. Marcuse's classic essay 'Repressive Tolerance' in R. P. Wolff, B. Moore and H. Marcuse, *A Critique of Pure Tolerance* (Boston: Beacon Press, 1965), pp. 81–118. Whereas he calls a system of toleration 'repressive' that veils unjust relations of power in an ideological way by neutralizing real opposition (in ideas and practice), I call forms of toleration 'repressive' when they help to uphold unjustifiable relations of power by forcing those who are dominated to accept their inferior position.

passing that opponents of same-sex marriage laws often speak in favour of toleration but against equal rights in such cases (compare the slogan of the Christian Democratic Union in Germany in the context of the debate about a certain form of same-sex marriage: ‘Tolerance yes, marriage no!’). In the famous German (or Bavarian) crucifix case very similar to the *Lautsi* case, many citizens, politicians, courts and speakers for the churches found that to tolerate non-Christian minorities such that they are not forced to give up their beliefs is one thing, but to grant them equal public and symbolic status and remove Christian symbols from classrooms of public schools would be quite another: it would be anti-democratic, anti-religious and would jeopardize the very foundations of the Federal Republic.<sup>11</sup> Hence the power structure of this form of toleration is still very much at work: inclusion and exclusion, freedom and domination at the same time.

### 3 The story of the respect conception

But as I remarked earlier, there also is a second, more optimistic story about toleration – which begins in the Netherlands of the sixteenth century. In the course of the fights of the primarily Protestant provinces in the north against Spanish rule and the enforcement of Catholicism, we find two important developments in struggles for religious liberty, especially in the writings of the Calvinist monarchomachs such as Duplessis-Mornay. First, a natural right to religious liberty – as God-given – was proclaimed as a basic political right, and second, a king who did not respect this basic right had to be resisted, out of a sense of political *and* religious duty. Such a tyrant had broken both the *foedus* with God and the *pactum* with the people; religious liberty accordingly was not something *granted* by the rulers, it was a natural *right* given by God and thus a basic demand of political justice: there could be no legitimate state that did not grant this right. The revolutionary result of that claim was the splitting-off of the northern provinces in the ‘Union of Utrecht’ in 1579, leading to the new republic that would become an example of toleration in the seventeenth century.

As the story goes on, the revolutionary claim of religious and political liberty as a ‘birthright’ reappears in the context of the English Civil War. The opposition to the king was justified by a ‘fundamental law’ of justice that called for political and religious liberty; government was no longer directly instituted by God but by men in order to safeguard the natural rights given by God to men as a special kind of ‘property’. In the

<sup>11</sup> See my *Toleranz im Konflikt*, Chapter 12.

eyes of levellers like Lilburne,<sup>12</sup> this kind of God-given liberty meant that any exercise of power, be it religious or political, had to be justified to the people who were ‘affected’ (or better: ‘well-affected’) by the laws. The right to freedom of conscience was justified with the Protestant argument that conscience was directly bound to obey and follow God and not men: a theory of the free and at the same time unfree conscience (as the ‘work of God’, as Luther had said) that also figures prominently in Milton’s thought and later in Locke’s *Letter Concerning Toleration*. William Walwyn expressed this – in the debates between Independents and the Presbyterian majority in parliament – in a paradigmatic way:

That which a man may not voluntarily binde himself to doe, or to forbear to doe, without sinne: That he cannot entrust or refer unto the ordering of any other: Whatsoever (be it Parliament, Generall Councils, or Nationall Assemblies:) But all things concerning the worship and service of God, and of that nature; that a man cannot without wilfull sin, either binde himselfe to doe any thing therein contrary to his understanding and conscience: not to forbear to doe that which his understanding and conscience bindes him to performe: therefore no man can refer matters of Religion to any others regulation. And what cannot be given, cannot be received: and then as a particular man cannot be robbed of that which he never had; so neither can a Parliament, or any other just Authority be violated in, or deprived of a power which cannot be entrusted unto them.<sup>13</sup>

An early liberal argument of this sort for toleration is, however, highly ambiguous. On the one hand, the claim that there is a natural right to religious and political liberty does connect the demand for toleration with a radical demand for political *justice*, that is, the basic demand for the general justification of the exercise of political power. In this perspective, toleration is not merely an ‘exemption’ being ‘granted’ to some ‘non-normal’ subjects, but a general rule of the way citizens treat each other within the confines of natural right. We see here the glimpse of a new, different conception of toleration, the *respect conception*, according to which democratic citizens respect each other as legal and political equals even though they differ greatly in their ethical–religious views about the good and true way of life.

<sup>12</sup> See J. Lilburne, ‘Englands Birth-Right Justified’ (1645), in W. Haller (ed.), *Tracts on Liberty in the Puritan Revolution III* (New York: Octagon, 1965), pp. 257–308.

<sup>13</sup> W. Walwyn, ‘A Help to the Right Understanding of a Discourse Concerning Independency’ (1644/45), in J. R. McMichel and B. Taft (eds.), *The Writings of William Walwyn* (Athens, GA: The University of Georgia Press, 1989), pp. 136–7.



On the other hand, the argument for freedom of conscience based on the theory of the ‘unfree free conscience’ mentioned above is not only compatible with the permission conception of toleration, it is also potentially exclusive of those persons who do not have the right form of conscience: atheists and Catholics, for example, as Locke famously argued (and with him Milton, differing from the more tolerant Levellers and Baptists such as Roger Williams). In Locke’s first *Letter*, for example, it is clear that there can be no justified claim to the freedom *not* to believe in God. Indeed, we could call the fear that, without a particular religious basis, there could be no morality and no functioning state *Locke’s fear*<sup>14</sup> (shared by many later Enlightenment thinkers such as Montesquieu, Rousseau, and Voltaire) – a fear, to be sure, still very much present in contemporary societies. Cases like *Lautsi* – and the opposition to judgments to remove crucifixes or crosses – attest to that.

To continue our more optimistic story about toleration, we thus need to turn to a different voice in the historical discourse of toleration, one that questioned Locke’s fear (though not as a direct reaction to Locke): the Huguenot philosopher Pierre Bayle (writing in exile in Rotterdam).<sup>15</sup> In his *Pensées diverses sur la Comète* (1683)<sup>16</sup> he introduced the so-called ‘Bayle’s paradox’ by saying that religion was not necessary to support morality which rested on other motives (the desire for social recognition) and insights (of natural reason) independent of religious belief, and that religious fanaticism rather than atheism was the main danger for morality and the state. He even ventured the courageous idea that a ‘society of atheists’ would be possible – and possibly be more peaceful than religious societies.

What is more, one of Bayle’s decisive insights was that *mutual toleration* among persons with different religious beliefs could only be possible if there was an independent moral basis of respect among human beings that would rule out the exercise of religious force. In his *Commentaire philosophique sur ces paroles de Jésus-Christ ‘Contrain-les d’entrer’* (1686)<sup>17</sup>, he provides such a justification of toleration which avoids the problems

<sup>14</sup> ‘The taking away of God, tho but even in thought, dissolves all’; J. Locke, *A Letter Concerning Toleration*, ed. J. Tully (Indianapolis: Hackett, 1983), p. 51.

<sup>15</sup> I discuss Bayle’s view more extensively in my ‘Pierre Bayle’s Reflexive Theory of Toleration’, in M. Williams and J. Waldron (eds.), *Toleration and its Limits*. Nomos XLVIII (New York University Press, 2008), pp. 78–113.

<sup>16</sup> P. Bayle, *Various Thoughts on the Occasion of a Comet*, trans. Robert Bartlett (Albany: State University of New York Press, 2000).

<sup>17</sup> P. Bayle, *Philosophical Commentary*, trans. and ed. A. G. Tannenbaum (New York: Peter Lang, 1987).

that Locke's defence of religious liberty faced. From studying Augustine's famous arguments about the possibility and productivity of *terror* in freeing men from religious error and enabling them to see the truth 'from the inside', so to speak, if properly informed,<sup>18</sup> Bayle already knew what Locke had to acknowledge after being confronted with Jonas Proast's critique: that although authentic and sincere beliefs could not be directly produced by outward force, there were many other indirect ways to block men on a road of error and to make them turn around.

I readily grant that Reason and Arguments are the only proper Means, whereby to induce the Mind to assent to any Truth, which is not evident by its own Light: and that Force is very improper to be used to that end *instead* of Reason and Arguments ... But notwithstanding this, if Force be used, not in stead of Reason and Arguments, i.e. not to convince by its own proper Efficacy (which it cannot do), but only to bring men to consider those Reasons and Arguments which are proper and sufficient to convince them, but which, without being forced, they would not consider: who can deny, but that *indirectly* and *at a distance*, it does some service toward bringing men to embrace that Truth, which otherwise, either through Carelessness and Negligence they would never acquaint themselves with, or through Prejudice they would reject and condemn unheard, under the notion of Error?<sup>19</sup>

To avoid such counterarguments to a classic defence of the freedom of conscience, Bayle argued on normative grounds that every person had a moral duty to mutually justify any exercise of force – a duty that could

<sup>18</sup> For Augustine's justification of the duty of intolerance, see esp. his letter to Vincentius (letter 93), written in 408; Augustine, *Letters*, vol. II, tr. Sister W. Parsons (New York: Fathers of the Church Inc., 1953).

<sup>19</sup> See J. Proast, *The Argument of the Letter Concerning Toleration, Briefly Consider'd and Answer'd*, reprint of the edition of 1690 (New York and London: Garland, 1984), pp. 4–5. For a convincing critique of Locke on the basis of Proastian considerations, see esp. J. Waldron, 'Locke, Toleration, and the Rationality of Persecution' in *Liberal Rights. Collected Papers 1981–1991* (Cambridge University Press, 1993), Chapter 4. Where I disagree with Waldron, however, is his claim that Locke did not find a plausible counterargument to Proast. For that, however, Locke had to change his position and move towards the epistemological–normative argument that we find in Bayle (in superior form). In his later letters on toleration, Locke argues that the use of religious–political force is in need of mutual justification, and that Proast's main assumption of the undeniable truth of the Church of England is unfounded. See esp. Locke, *A Second Letter Concerning Toleration*, in *The Works of John Locke VI* (Aalen: Scientia, 1963), p. 111, where he asks Proast to put forth a mutually justifiable argument 'without supposing all along your church in the right, and your religion the true; which can no more be allowed to you in this case, whatever your church or religion be, than it can to a papist or a Lutheran, a presbyterian or anabaptist; nay, no more to you, than it can be allowed to a Jew or a Mahometan'.

be seen by the means of ‘natural reason’<sup>20</sup> – and he argued on epistemological grounds that in a case in which there was a stand-off of one religious reason versus another, there was no sufficient justification for using force on either side. And this not because Bayle was a religious sceptic (as many have thought), but because Bayle insisted on faith being *faith* and not knowledge: as long as there was no reasonably non-rejectable proof as to the truth of one religion or confession, the duty of mutual justification called for tolerance (but not for scepticism, for knowing that one’s faith ultimately is faith – based on ‘relative evidence’<sup>21</sup> – one has good reasons to regard it as true as long as it does not run against natural reason).<sup>22</sup> From that perspective, the claim of people like Bossuet,<sup>23</sup> who believed that they were in possession of the truth and therefore could legitimately exercise force – according to Augustine’s interpretation of the saying *compelle intrare* (Luke 14, 15ff.) – would turn into nothing but a pure and illegitimate exercise of domination. According to Bayle, in an argument about the norms and laws that are to regulate the common life, to assume precisely what is contested, namely the truth of one church rather than another, is ‘childish’ and ‘ridiculous’;<sup>24</sup> if such arguments were legitimate, ‘there would be no kind of crime which could not become an act of religion by this maxim.’<sup>25</sup> As Bayle points out, a society can only exist peacefully if there is a generally acceptable definition of right and wrong independent of struggles about the true church.<sup>26</sup>

<sup>20</sup> See Bayle, *Philosophical Commentary*, p. 30: ‘[B]ut if it’s possible to have certain limitations with respect to speculative truths, I don’t believe there ought to be any with regard to those practical and general principles which concern morals. I mean that all moral laws without exception, must submit to that idea of natural equity, which, as well as metaphysical light, *enlightens every man coming into the world* ... I would like whoever aims at knowing distinctly this natural light with respect to morality to raise himself above his own private interest or the custom of his country, and to ask himself in general: *Is such a practice just in itself? If it were a question of introducing it in a country where it would not be in use and where he would be free to take it up or not, would one see, upon examining it impartially, that it is reasonable enough to merit being adopted?*’ (Emphasis in original.)

<sup>21</sup> *Ibid.*, p. 93.

<sup>22</sup> Hence from a Baylean perspective, contrary to Brian Barry, *Justice as Impartiality* (Oxford University Press, 1995), p. 179, in matters of religion it seems quite possible and reasonable that ‘certainty from the inside about some view can coherently be combined with the line that it is reasonable for others to reject that same view’.

<sup>23</sup> See J.-B. Bossuet, *Politics Drawn from the Very Words of Holy Scripture*, tr. and ed. P. Riley (Cambridge University Press, 1999).

<sup>24</sup> Bayle, *Philosophical Commentary*, p.13.      <sup>25</sup> *Ibid.*, p. 47.

<sup>26</sup> *Ibid.*, p. 85.

In his famous *Dictionnaire historique and critique* (1696)<sup>27</sup>, Bayle carefully explained the distinction between knowledge and faith and the possibility of a form of ‘natural’ practical reason that would lead to an insight into the duty of mutual justification. Faith was not seen, in a fideist sense, as being *against* reason but, as Bayle said, as being *beyond reason* (*dessus de la Raison*): faith was not irrational, but at the same time reason could not prove the true faith.<sup>28</sup> Human reason had to accept its own boundaries and finitude and the unavoidability of (what Rawls later called) ‘reasonable disagreement’<sup>29</sup> in matters of faith. According to Bayle, those who would give up their faith because of that – because they cannot prove its truth in a demonstrative way – and would become sceptics or atheists are no good believers:

Once again, a true Christian, well versed in the characteristics of supernatural truths and firm on the principles that are peculiar to the Gospel, will only laugh at the subtleties of the philosophers, and especially those of the Pyrrhonists. Faith will place him above the regions where the tempests of disputation reign ... Every Christian who allows himself to be disconcerted by the objections of the unbelievers, and to be scandalized by them, has one foot in the same grave as they do.<sup>30</sup>

For our story, Bayle’s insights are essential. A justification of toleration such as Bayle’s does avoid the pitfalls of a traditional argument for the liberty of conscience, which are (a) that the claim *credere non potest homo nisi volens* (Augustine) does not provide an argument against the suppression of religious errors or against religious ‘guidance’ because it is possible that ‘mild’ force can bring about sincere beliefs, and (b) that such toleration could only extend to *authentic* religious beliefs (whereas a criterion for such beliefs seems to be lacking), and of course only to *religious* beliefs (and not to atheists). Bayle’s alternative justification also avoids, if we look at the recent history of liberal thought, the problems of the view that religious liberty as part of a wider notion of political liberty is justified because personal autonomy is a precondition for the good life, for only the life ‘lived from the inside’, on the basis of autonomously chosen

<sup>27</sup> Pierre Bayle, *Historical and Critical Dictionary*, Selections, trans. Richard H. Popkin (Indianapolis: Hackett, 1991).

<sup>28</sup> ‘[D]ifference in opinion seems to be man’s inherent infelicity, as long as his understanding is so limited and his heart so inordinate.’ Bayle, *Philosophical Commentary*, p. 141.

<sup>29</sup> See J. Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), pp. 54–66; C. Larmore, ‘Pluralism and Reasonable Disagreement’ in *The Morals of Modernity* (Cambridge University Press, 1996), Chapter 7.

<sup>30</sup> Bayle, *Historical and Critical Dictionary*, Third Clarification, p. 429.

values, could be good.<sup>31</sup> This is a plausible, though non-generalizable conception of the good life, for it is not clear whether a life lived according to traditional values that are not chosen but simply taken over in a conventional, non-critical way would be worse (i.e., subjectively less fulfilling and objectively of a lesser ethical value) than one that is autonomously chosen. The politically *free*, the personally *autonomous* and the ethically *good* life may be three separate things.

Of course, my alternative view also calls for a certain kind of respect for the autonomy of persons. Yet this kind of respect is not based on a particular *ethical* conception of the good, but on a *moral* notion of the person as a reasonable being with (what I call) a *right to justification*.<sup>32</sup> This right to justification is based on the recursive general principle that every norm that is to legitimize the use of force (or generally regulate social life) claims to be reciprocally and generally valid and therefore needs to be justifiable by reciprocally and generally non-rejectable reasons. *Reciprocity* here means that neither party makes any claim to certain rights or resources that are denied to others (reciprocity of content), and that neither party projects its own reasons (values, interests, needs) onto others in arguing for its claims (reciprocity of reasons). One must be willing to argue for basic norms that are to be reciprocally and generally valid and binding with reasons that are not based on contested 'higher' truths or on conceptions of the good which can reasonably be questioned and rejected. *Generality*, then, means that the reasons for such norms need to be shareable among all persons affected, not just dominant parties.

I should emphasize the word 'shareable' here, for the criteria of reciprocity and generality allow for judgements as to the justifiability of claims even if – as is to be expected – no consensus is to be found.<sup>33</sup> A few brief examples: Those who argue for the equal legal respect of intimate

<sup>31</sup> See W. Kymlicka, *Multicultural Citizenship* (Oxford University Press, 1995), p. 81. For a critique of Kymlicka's view, see R. Forst, 'Foundations of a Theory of Multicultural Justice', *Constellations* 4 (1997), pp. 63–71 (with a reply by Kymlicka in the same issue).

<sup>32</sup> On this point, see R. Forst, *The Right to Justification. Elements of a Constructivist Theory of Justice* (New York: Columbia University Press, forthcoming).

<sup>33</sup> I agree with J. Waldron, 'Toleration and Reasonableness' in C. McKinnon and D. Castiglione (eds.), *The Culture of Toleration in Diverse Societies* (Manchester University Press, 2003), pp. 13–37, that in a pluralist society there will always be contestation about the 'compossibility' of different ideals and practices of the good. And I do not want to suggest that I have developed what he radically doubts, a 'Kantian algebraic liberalism' that would provide a general formula for solving such conflicts in a clearly non-rejectable way. Yet I want to claim that with the help of the criteria of reciprocity and generality we can plausibly identify better and worse arguments for generally valid norms in many cases, looking at the claims and the reasons given. An argumentative 'asymmetry' (*ibid.*,

relationships between persons of the same sex may have, given the criterion of reciprocity, superior arguments as compared to those who argue on the basis of a mutually contestable, religious understanding of 'nature'. Those who want to forbid persons from wearing headscarves in schools (be they teachers or students) must be able to show how far the practice of wearing such symbols really violates basic rights and democratic principles. And those who want crucifixes to be put up in public classrooms by law need to show how far this is compatible with the equal rights of citizenship in a religiously pluralist political community. And it is questionable whether such arguments have been presented in the latter two cases.

The normative ground for this conception of toleration is the moral demand to respect each other's autonomy as a reason-giving and reason-receiving being. Whether those who are respected in that way will eventually lead an ethically better life can therefore be the object of disagreement; there must be no disagreement, however, about the duty of justification and the criteria of reciprocity and generality. This is the *normative* component of that justification of toleration, while the *epistemological* component consists of an insight into the finitude of reason: that reason is not sufficient to provide us with the one and only, ultimate answer about the truth of the good life which would show that all other ethical beliefs are false.

Most important in this context, however, is the insight that, according to this conception of toleration, to be tolerant implies the willingness and the capacity to distinguish between one's *ethical* beliefs about the true and good life and the general *moral* norms and principles one thinks every person, regardless of his or her view of the good, has to accept (or, better: cannot reciprocally and generally reject).<sup>34</sup> Bayle's theory clearly implies such a distinction, and looking at the history of toleration one may say

p. 30) of claims and reasons, then, is important for such judgments. Is the claim, to use Waldron's Rushdie-example, to be protected from blasphemous insult as strong as the claim to be protected from being threatened in life and liberty because of what you think and say? Can the first claim be generalized and supported with reciprocally valid reasons in the same way as the second? I doubt that it can. What seems to me undisputed, however, is that toleration is the attitude of those who are willing to engage in such arguments, who accept the criteria of reciprocity and generality and who accept in a given case that their arguments do not suffice to be the basis of general law. Still, given Waldron's justified doubts, it is important to add another reason for toleration connected to this: the toleration of those who see that a debate remains in a standstill and that therefore no side can show its claims and reasons to be superior. In such a case, toleration means to accept that other grounds for the regulation of a conflict have to be found, by way of compromise.

<sup>34</sup> On this distinction, originally drawn from J. Habermas's discourse ethics, and the difference of various 'contexts of justification' as well as of 'contexts of recognition'; see R. Forst, *Contexts of Justice*, tr. J. Farrell (Berkeley: University of California Press, 2002).

that such a differentiation, in theory as well as in practice, may be the greatest achievement within the discourse of toleration. It comes, however, at a certain cost, which makes tolerance (according to the respect conception as I sketched it) into a demanding *moral-political virtue*:<sup>35</sup> the cost is that in the case in which you cannot present reciprocally and generally non-rejectable arguments for your ethical judgements, you have to accept that you are not justified to make these judgements the basis for generally binding legal norms.<sup>36</sup>

#### 4 Toleration and democracy

Referring back to the three components of toleration, the main difference between the permission conception and the respect conception is that, according to the former, all three components are determined by the ethical views of the dominant majority or authority, while in the respect conception things look different. The *objection* may be based on one's particular ethical (or religious) views; the *acceptance*, however, will be based on a general consideration of whether the reasons for objection are good enough to be reasons for *rejection*, that is whether they are reciprocally and generally justifiable. If they turn out to be sufficient for a negative *ethical* judgement, but not for a negative *moral* judgement, the case for toleration arises: for then one has to see that one's ethical objection does not justify a moral condemnation and a rejection. This is the insight of toleration.

And this is why in a political context, toleration and democracy must be seen as components of political justice: of the imperative not to force others to live under norms and laws that cannot be adequately justified toward them. Toleration then is not just and not primarily a virtue of subjects of democratic law; it is primarily a virtue of democratic citizens as *lawmakers*. Toleration means, for example, that you come to see that even if you firmly believe that the cross is the symbol of the true faith, you also have to accept that it would be wrong to have it put up in classrooms of public schools by law. Such an insight is an insight of justice and of fairness toward minorities. Most often it does not come naturally; rather, such insights are generated in practices of social justification where the terms and relations of justification are such that minorities do have a chance to exercise what we could call the 'force toward the better

<sup>35</sup> On this point, see my 'Tolerance as a Virtue of Justice', *Philosophical Explorations* IV (2001), 193–206.

<sup>36</sup> Bayle himself, one should add, only saw this as a moral and civic virtue; politically, he stood in the tradition of the *politiques*, arguing for a strong sovereign like Henri IV.

argument'. So here, again, toleration is part of practices of power, but in a different way as compared to the hierarchical permission conception. The respect conception presupposes that the 'power of justification' that all those who are part of a social conflict can generate – a social and public form of power constituted by assent and agreement – is available such that minorities can develop sufficient argumentative strength to make their case heard and, in fact, effectively undeniable, if they fulfil the criterion of reciprocity and others don't – and if the public and political institutions are arranged such that this justificatory advantage becomes visible and counts. Hence a critical political theory of toleration has to focus on the *relations of justification* in a given society, that is the major discursive, formal and informal ways in which justificatory power can be generated, especially by minorities.<sup>37</sup>

As I already indicated, our story would be far too optimistic if we thought that historically this has become the dominant conception of toleration, which is neither true given the practices of toleration nor given the most important writings on toleration. Enlightenment thought before Kant hardly reached the height of Bayle's conception. Therefore, the general idea that the Enlightenment marked the highpoint of thinking about toleration and then also made the step *beyond toleration* by positively institutionalizing the right to religious liberty in the American and French Revolutions is mistaken. No doubt the idea of a basic right to religious liberty does take a decisive step beyond the permission conception of toleration, but it is wrong to assume that this takes one 'beyond toleration', for (a) toleration is still called for, as I said, but now on the horizontal level of citizens as authors and addressees of the law, and (b), from a critical perspective, the permission conception is still very much alive in the interpretations of what a right to religious liberty means: does it simply mean not being forced to give up one's minority religious views, or does it entail equal public and political status for minorities? In democratic states, the old absolutist permission conception is gone, but there is still a constant struggle going on between the democratic form of the permission conception and the democratic form of the respect conception. Hence, if we want to develop a genealogy of our sense and practice of toleration, both of my stories have to form a *single* one. Toleration is a dialectical concept.

<sup>37</sup> On this, see my 'First Things First. Redistribution, Recognition and Justification', *European Journal of Political Theory* 6 (2007), 291–304, and my *Justification and Critique* (Cambridge: Polity Press, forthcoming).