

# Some Comments on Toleration

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*Abstract.* My comments will focus basically on Leader's paper. First, I will make some semantic remarks about the uses of the word "toleration"; second, I will offer some criticisms of Leader's paper; and, finally, I will put forward the outline of a modest proposal.

## 1. Semantic Remarks

In my opinion, Walzer (1997), Garzón Valdés (1997) and Leader (1997) have to some extent stretched the meaning of "toleration" and of some related words, in comparison with the ordinary-language usage of these words. For example, Walzer (1997) defines "toleration" in such a way that it would make sense to utter a very odd sentence like the following: I am tolerating with enthusiasm a rendez-vous with Kim Basinger! The use of "toleration" in ordinary language, on the contrary, always implies a *prima facie* attitude of dislike, of disapproval, completely opposite to the attitude of accepting something with enthusiasm.

As far as Leader's use of "toleration" is concerned, one remark is in order: He often speaks of someone who should (or should not) tolerate the exercise of someone else's right. This way of speaking is far from common-language use, and further it seems at odds with Leader's definition of "toleration." In fact, generally speaking, the exercise of a right is neither perceived as anything wrong, nor as something one has the power to prevent.

As far as Garzón Valdés's use of "toleration" is concerned, some observations are in order. Garzón Valdés (1997, 127) writes that toleration is "a dispositional property"; indeed, as Garzón Valdés says, "a person can only prove to be tolerant by acting tolerantly on repeated occasions [...]. After all, we would not consider a person tolerant if she permitted an act only once, only to prohibit it, under the same circumstances, on the next occasion" (*ibid.*, 129). The last statement is certainly correct, but merely reflects the semantics of "tolerant person": In fact, in my opinion, the idea of a dispositional property over time does not form part of the concept of toleration (or

of the meaning of the verb "to tolerate"). A sentence like: "In that single circumstance, P tolerated the action X," or a sentence like: "In that single circumstance, P showed toleration," do not seem to me to be examples of a "stretched" use of "tolerate" and "toleration" respectively.

Furthermore, the adjective "tolerant" always expresses a positive evaluation, while the same does not always occur with the noun "toleration" or with the verb "to tolerate," which are sometimes used to express negative evaluations. On the one hand, statements in terms of toleration, or including the verb "to tolerate," can be mere factual sentences. On the other, a statement that includes the words "tolerant" or "intolerant" always expresses an evaluation.

This criticism, however, is probably not particularly relevant: The definitions of "toleration" (and of related words) offered by our three rapporteurs are obviously redefinitions, a type of stipulative definition. Accordingly, we could maintain that we should not criticise them because they depart from the use of these words in ordinary language, but only if, and in so far as, they are not useful in their context of application.

## 2. Remarks on Leader's Paper

In my opinion, Leader (1997) does not distinguish clearly between three levels of analysis (moral, political, and legal), and between three different situations in which the analysis has to be carried out.

1) The first situation is that in a society in which all members of the society are legally recognised as possessing fundamental rights, whose ascription is politically justified by a principle of horizontal toleration, in the sense defined by Garzón Valdés (1997). In this situation, there is no problem of toleration in society, there are only problems of partial and contingent conflict among different persons as to the exercise of one of their rights. These problems of conflict are not in any way different from problems which arise in the exercise of any other right (e.g., property rights or other rights *in rem*), even those whose political justification is not grounded on a principle of toleration.

2) The second situation is that in a society in which fundamental rights are integrally conferred, at the legal level, only on citizens, and, again, their ascription is politically justified by a principle of horizontal toleration. The non-citizens who live in that society enjoy only some, but not all, fundamental rights. This is the situation of all our societies: In this case the principle of toleration should justify politically the extension of fundamental rights to all residents.

3) The third situation is that in a society in which fundamental rights are not even integrally conferred on all citizens, at the legal level. Here, in my opinion, specific and serious problems of toleration arise: In this situation the principle of toleration should justify politically the recognition of fundamental legal rights for all members of society.

In light of the distinction I have just drawn, it is not clear what situation Leader is speaking about in his paper. Furthermore, what is the level of analysis at which Leader is operating? In the following, I interpret his argument as if he were speaking about the second situation (that of our societies), unduly mixing the political and legal levels.

Starting from this interpretation of Leader (1997), I will offer three critical remarks, which will strictly follow the structure of Leader's paper:

a) Leader criticises the "live and let live" conception of toleration, because it has, in his opinion, too narrow a range and fails to grasp real issues. In my opinion, "live and let live" is a moral or political conception of toleration, which, when transferred to the legal level in our societies, means "exercise your rights and let others exercise their rights," or "exercise your rights without infringing anyone else's rights." In a case of interference, when the exercise of my right clashes with the exercise of somebody else's right, there is a need for an authoritative decision, grounded on a balance of legal reasons, which weighs the comparative relevance of the different rights and interests involved in the conflict. In Leader's example of the use of a public park, the "live and let live" conception can politically justify the decision to impose some sort of compromise about the use of the park, if, and only if, both the religious people and the atheists are exercising a legal right. If this is the case, there is no legal problem of toleration involved here: We have only to solve a trivial issue of conflicting legal claims. In Leader's example of the sacristan dismissed by the Catholic Church in France because of his homosexuality, we are again faced, at a legal level, with an authoritative decision, grounded on legal sources, which solves an ordinary legal problem about labour relations between an employer and an employee. If we are looking for a political justification for this decision, we will easily find it in the "live and let live" conception of toleration, according to which the claim of the Catholic Church was a clear symptom of an intolerant attitude.

b) In general, I agree substantially with Leader's conception of democracy, if we understand it as a normative, regulating, ideal (it is not, in fact, a picture of an actual democracy, in which there are surely some important elements of oligarchy). I also basically agree with the idea that, if both liberals and non-liberals were to accept this conception of democracy, then they should also accept a principle of toleration. My point is: Why should non-liberals accept this conception of democracy, rather than accepting a principle of toleration directly? Are there any further reasons for accepting democracy and not accepting some principle of toleration? The reason may perhaps be that toleration is much more compatible with liberalism than with democracy: Accordingly, it would be easier for non-liberals to accept the second rather than the first. We should distinguish here, however, between the moral and the political levels. At the moral level, there is a real link between liberalism and toleration: A tolerant attitude is a necessary feature of the liberal mind. However, since the toleration at stake is not moral, but political, such a

connection between liberalism and toleration is only contingent and not necessary. The bias against toleration (like the reasons for toleration) is much older than liberalism. Consequently, we are still awaiting an independent justification of democracy, which might be easier to accept than the justification of toleration.

c) Leader (1997) presents three varieties of rights to toleration (respectively: basic, equal, and special rights to toleration). The status of these rights is doubtful: Are they moral, political, or legal rights? Are they some kind of mixture? Since the category "rights to toleration" is not recognised by positive law in our societies, it would be better, in my view, to speak of basic legal rights, whose political justification is grounded in a principle of horizontal toleration. The problems of toleration, to which Leader refers, seem to me better described as issues of partial and contingent incompatibility at the exercise of these basic rights.

Consequently, the first type of rights to toleration, basic rights, should be described as fundamental legal rights, politically justified via toleration. In Leader's example of "unorthodox" sexual preferences, my solution to the issue would be trivial: The majority shall not interfere with sexual preferences of individuals, because individuals have a basic right on this matter. A statute or judicial decision which interferes with the exercise of this right is legally (and politically) illegitimate.

As far as the second type of rights to toleration, equal rights, is concerned they belong, in my view, to the category of basic rights. In fact, an equal right is nothing but a right to equality, a meta-right recognised as basic in the constitutions of all our societies. As things stand, this case can be described in the same way as the previous one.

The third type of rights to toleration, special rights, raises issues that, once more, can be solved more simply and more precisely in terms of basic rights. Powerful groups are permitted to make for themselves the rules they like, so far as internal relationships between their members are concerned, provided these do not violate any indefeasible basic legal right of their members (if the right at stake is a defeasible right, the consent of a member could make the infringement lawful). In the example of Ms. Lovelace, however, I have some doubts about the Human Rights Committee's decision, though it is, of course, very hazardous to speak of it without full knowledge of the case. From the legal point of view, I do not see precisely what kind of right was violated by the Maliseet tribe's decision, since Ms. Lovelace was able to spend a part of her life outside the tribe without any difficulty as a married woman.

### 3. A Modest Proposal

Finally, I would like to outline a modest proposal, which can be expressed with the slogan: "Back to Thomasiaus." Christian Thomasiaus, a German philosopher and lawyer, working at the end of the seventeenth and the

beginning of the eighteenth centuries, built a typology of the normative principles which should guide human actions. These principles have to be arranged hierarchically. From the moral point of view, moral principles are at the top, and legal principles at the bottom, while from the legal point of view, the hierarchy should be reversed.

I propose to update this typology (in a Rawlsian way), and then to apply it to our societies. At the top of the moral scale, using Thomasiaus' terminology, we find the *honestum*: The principle of the *honestum* points out the ideal good everyone has to seek, i.e., his or her conception of the good life, as an individual or as a group (a family, an association, a culture, a religion, a people, and so on). For each individual the *honestum* represents the best, the greatest possible good to reach: peace with oneself, that is happiness, peace with one's culture, or with one's God, and so on.

At the bottom of the moral scale we find the *iustum*: The principle of the *iustum* points to an evil one has to fight against, the danger to avoid. This evil, this danger, nowadays as in Thomasiaus' times, is universal war: the war of all against all. The *iustum*, then, is the principle of law, the guarantee of basic rights for all, the precept of *neminem laedere*, of "do not do unto others as you would not have them do unto you." The *honestum* concerns the attainment of interior peace, or peace within the individual; the *iustum*, on the contrary, concerns the establishment and maintenance of exterior peace—peace among individuals.

To repeat: The idea is that, from the moral point of view, the *honestum* should be superior to the *iustum*. By contrast, from the legal point of view, the *iustum* should be superior to the *honestum*, for the sake of living in a society free from the nightmare of war.

Thomasiaus built an intermediate category, between the *honestum* and the *iustum*: the category of the *decorum*. We could update it too, saying that the *decorum* is the sphere of politics, the sphere of bargaining and trade-offs between the *honestum* and the *iustum*, the sphere of action of principles like *suum cuique tribuere*, and "do unto others as you would have them do unto you."

Without changing their conceptions of the good life, without changing their necessarily shared commitment to secure external peace, liberals and non-liberals have to come to terms in the field of *decorum*, in the field of politics, in the field of compromise.

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