

The Law and the New Language of Tolerance

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The history of the idea of tolerance is marked by a rift between its original meaning and its modern one.¹ At first tolerance was understood as the effort made to put up with certain reprehensible acts or lapses with regard to society's values, since rules can never be respected at all times without life becoming unbearable. Conceived originally as a discretion on the part of authority, it progressively acquired the meaning of a "right to differ." "The idea that a free space must obligatorily be assured to each member of the community," writes Ghislain Waterlot, "is a relatively new idea that is fundamentally very modern."²

We have perhaps come to the threshold of a new stage of this history, in as much as today tolerance is facing new challenges. "Classical" tolerance, which posits one definition of societal good against another, continues to be put to the test, as we see in the issue of the Islamic veil.³ But this type of conflict – which is perhaps in the process of increasing in countries with immigrants – should not mask the magnitude that the question of tolerance represents in a democratic society. A democratic society is often considered more tolerant than others not because it is more virtuous, but because it is not content to put up with differences, but rather encourages or even engenders them. The difference is not merely external, such as the clash of foreign cultures, but also, if not especially, internal, with a society's own members becoming more different from each other by the day. It no longer involves conflicting institutionalized cultures, but also those individuals claiming to emancipate themselves from any dominant culture, be it national or foreign. Not only do communal customs begin to weaken in a democratic society, but they lose their hegemonic pretensions in

particular, that is, their ability to serve as a reference. Minorities are no longer ashamed, and the problem of tolerance becomes profoundly modified. In order to safeguard against the underlying complexities of a question continuously raised by the effusiveness of the well-intentioned, or the coldness of abstract reasoning, we would do well to begin with the issues currently debated in France. Beginning with a sociology of modern tolerance, what are the new stakes? How do the problems present themselves? On what occasions? How are they resolved?

It is not certain that one can separate the question of tolerance from that of democratic pluralism. The major antagonisms that run through our democracies today call into question not only beliefs, that is, concepts of good, but choices of lifestyle as well. The conflicts they generate are no longer only positive, although many cases do involve the role of arbiter, but also – and this is new – negative, with no one having the authority to solve them. What would be the criteria? It is no easier to come to an agreement on the nature of evil than it is on that of good. Such an uncertainty can be more clearly demonstrated by a shift into a more tangible criterion: the body and its health. This reformulation of the question of tolerance in contemporary society assigns another objective to the struggle for democratic tolerance, which at this point of time is perhaps more in need of mediators and interpreters than prophets or good apostles.

Conflicts in Conceptions of Good or in Choices of Lifestyle?

“Religious tolerance as it was discovered in the sixteenth and seventeenth centuries,” writes Paul Dumouchel, “remains the paradigm of tolerance. The various denominations of Christianity were not opposed to each other in an accidental or contingent fashion, but because each conceived of itself as the true interpretation of a universal religion.”⁴ Can we still think of modern tolerance as based on religious disagreement? When it opposed two rival versions of the same Christian faith, the trouble arose perhaps more from their similarities than from their differences. They

might debate the practice of mass or last rights, but they remained in agreement on the manner in which to eat, dress or love, that is, customs. This agreement has more to do with dogma than with the role of belief. In other words, the definition, scope and breadth of belief have changed. The distinction between belief and behavior has become more and more uncertain: into which category should sorcery be placed? Is it a religious practice? What about excision? It is certainly not tied to a religion – and notably not to Islam – but rather to a custom that certainly issues from a concept of good, but has absolutely no pretense to universality. And yet one speaks vaguely of the community of homosexual, African, Jewish or Gypsy minorities; but what do they have in common? Not being the majority? This negative definition is paradoxical, with these minority differences affirming each other in relation to a center that no longer exists, in relation to a majority that has itself lost all exclusive claim to citizenship.

Conflicts between beliefs do not have the same meaning in a society in which the majority professes one same faith; in a society in which the majority of its members are believers, even if not in the same thing; and in a society in which the majority don't believe in anything and do not govern their behavior according to a belief. No reflection on modern tolerance can forego a reflection on the new status of beliefs in our disillusioned societies. Can homosexuality or recourse to abortion be summed up as particular conceptions of good? No, it is rather a choice of lifestyle in which behavior is not necessarily universal, but which claims the same tolerance on the grounds of the same right to differ. The relationship between belief and behavior is not exactly the same today as it was in the eighteenth century; it has perhaps become inverted. Today, belief is less of an inspiration for any particular action than are individual behaviors such as drug use or homosexuality, which lead into particular symbolic universes. What causes the problem of tolerance to take an unforeseen turn is that it is confronted with the dislocation of the idea of belief and a diversification of behavior that resist the traditional categories that have previously defined tolerance.

Is it still possible to neatly compartmentalize the questions of multiconfessionalism, pluralism and multiculturalism? To cling to the paradigm of religious tolerance is to refuse to see the manner

in which the problems of democratic coexistence present themselves today. Indeed these lie not so much in the clash of many concepts of good, or even in the diversification of lifestyles, but rather in the conflict between these two. This is what the abortion question demonstrates: one side calls for its prohibition in the name of a *religious* good, the other side fights for its legalization in the name of a *political* one. The dialogue is all the more difficult since the sides do not speak the same language and do not situate themselves on the same level. It brings together a concept that lays claim to universalism, and an individual life choice which, like any public freedom, can never be universalized. A Christian can be opposed to the practice of abortion in the name of his personal convictions, but accept that it is permitted to those who desire it.

In a democracy, conflicts do not necessarily involve only the communities of believers, but likewise those groups of people united by the same life choices. The collective or communal nature of beliefs is more fluid since it confirms the phenomenon of the "New Age," which refers more to individual practice than collective belief. "An isolated individual whose concept of good is essentially opposed to that of his fellow citizens does not constitute a political problem, but rather one involving the police,"⁵ writes Dumouchel; but when the number of individuals who each have a different conception of good are no longer opposed to a majority but rather to other individuals each with his own way of conceiving good, this becomes a central political problem.

The neutrality of state defined by law translates, on the social level, into a moral equivalency: all behaviors, even those that were still considered deviant yesterday, are now placed on the same level. Democracies are all haunted by a *generalized scrambling of the norm*.⁶ Such a moral depressurization is of interest to the question of tolerance in that it produces certain consequences. It should perhaps be compared with a new intolerance (the term is used here in its psychological sense) of delinquency, pushing religious groups to become more demanding and demonstrative.

The evolution of democratic societies is contradictory: the more they liberalize themselves the less they accept transgression. In other words, the more tolerant they are in the modern sense of the term, the less so they are in its original sense. In the new penal code

that France has recently adopted, a certain number of infractions of a moral connotation, such as homosexuality between an adult and a minor, have disappeared, which might appear to qualify it as more liberal. But at the same time it includes other infractions such as sexual harassment, the aggravated incidence of domestic violence, or other serious incriminations such as putting other people into danger, which counterbalance this first impression. It shows itself to be more tolerant with regard to certain behaviors concerning individual freedom, but is more intransigent with others. It is both more liberal in reducing the number of general incriminations and more repressive in increasing the penalties. The history of intolerance would therefore not include its disappearance, but rather its migration toward new behaviors that are no longer accepted. While adultery is now socially tolerated, tobacco is becoming less and less so. Likewise all the richest and freest societies both in the north and in the south, and on both sides of the Atlantic, are showing a harsher and harsher attitude toward deviancy and delinquency. This is what the Americans call *Tough Penology*, that is, harsh criminology. Everywhere the prison population is rising in number and everywhere one sees a tendency to criminalize the social problems that society cannot otherwise control.⁷ One even sees our societies returning to reactions that have the look of sacrificial expiations, a return of the mechanism of the scapegoat in matters of sexual crimes in which children are the victims. In the repression of adultery, people used to condemn immorality; today they seek to exorcize the impulse to monstrosity. Child murder remains the last figure of absolute evil in a society that doubts its own values: "he at least was innocent!" cries René Char. This horror alone proves capable of raising the doubt that sets in with the identification of the offending and the offended parties, halting the indifferenciation into which the aggressor and the victim are usually plunged. In our society, which is slow to rise up in indignation, one must seek the spark of a shudder in such extreme cases of suffering and intolerability in order to find a consensus. Belgium was recently the theater of a particularly atrocious crime whose victims were three little girls. A large crowd gathered at the funeral, in a gesture of solidarity that hadn't been seen since the death of king Baudouin ...

Just as religious freedom is broadening, a new political demand is taking shape: that of publicly demonstrating one's faith. This demand does not bear solely on one's right to base one's conduct on one's own conscience, and thus on an abstention of the state, but on the possibility of proclaiming one's convictions and belonging to a community, that is, a positive recognition of one's uniqueness by the law. It used to be that people demanded to be heard by the state, now they demand to be recognized. As freedoms begin to become more established, what was once considered a freedom becomes converted to a right to differ. "One has the feeling that it is no longer conscience that must make its own way against the dominant norms, but that the norms must adapt themselves to the diversity of conscience."⁸ By changing the meaning, tolerance also changes language: it progressively abandons the moral register for the legal one. In so doing, it merely follows the movement of Western societies which no longer see themselves religiously or politically, but juridically. But doesn't this confusion with subjective rights risk killing the idea of tolerance? If a tolerated behavior is only conceived as a preamble to a recognized right, what remains of the political virtue of tolerance? How can we analyze this tolerance's linguistic progression from the moral, psychological and political ... to the juridical?

Positive or Negative Conflict?

The metamorphosis of the idea of tolerance follows the mutation of the political, that is, the conversion of a monarchy based on faith in a government, to rights founded on another idea of justice. In both cases, justice is the ultimate point of reference, but it does not mean the same thing. It evolves from a substantial content toward a more procedural definition. "Before the law, individuals are reputed to have beliefs, convictions and interests that define the *content* that justice is unaware of, since it is only justice, the arbiter of rival claims, not the tribunal of truth. Invalid as an instance of truth, civic power assumed the status of the state of law. Whereas divine right defines itself by a claim to truth, the right of the state of law is agnostic in the proper sense of the

word.”⁹ Paul Ricœur defines democratic intolerability as the confusion between justice and truth on an institutional level. But is it not a bit illusory to believe that communal life can be limited to pure procedure? Can a political community forego substantial communal values organizing its relationship to the world? Can one limit the government’s role in a democracy to arbitrating between two opposite conceptions of good? Should it not substitute itself for the absence of a communal concept of good? Problems arise as much from the excess of meaning as from the lack of it. Religious tolerance was tied to a universe still steeped in meaning; this is no longer the case in a world in which the heavens have been emptied. The problem is not limited to a *positive conflict* between two rival concepts of good: it takes the unexpected turn of a *negative conflict* in which no one is authorized to intervene in the realm of mores.

The absence of an instance of truth increases conflicts and ultimately reinforces the status of a third party, which is passed on to a new actor: the judge. In as much as conflicts are not resolved by tradition or mores, the opposing parties turn to the judge, the only arbiter available. In soliciting a civic authority to free themselves from the hold of a religious one, they paradoxically legitimize a new symbolical domination. Even the fiercest adversaries of the juridical, those who surrender some of their power to it, have recourse to it, simply because it is the only one. Justice is called upon to fill the place left empty by the religious, as if this void was impossible, and this moral silence too difficult to bear. The rise to power of the juridical, which becomes the necessary direction taken by all debates on tolerance, is one of the great events that characterizes the life of all democratic societies these last few years. It is occurring as much on the level of the entire political community, which more and more surpasses the boundaries of nation or government, as within the communities or internal subgroups of the government and among the individuals themselves. In all three domains, the juridical assumes the role once played by the religious.

It is possible to interpret the new relationship between the state of law and justice by transposing, term for term, that which Ricœur says about the relations between the political institution

and the Church in the predemocratic configuration: “the political asks the religious for *unction*, that is, the sign of the sacred; in exchange, the ecclesiastic institution asks the political for *sanction* from the secular show of force for that which it considers schism or heresy. This exchange between *unction* and *sanction* constitutes a reciprocal instrumental relationship, in which each of these institutions receives from the other that which it lacks: the spiritual might of the sacred for the political, the physical might of constraint for the religious, or rather, the ecclesiastical.”¹⁰ In what domains, indeed, does one see justice intermingling with the consent – if not the intentional request – of executive power? In questions concerning the human being, as in the definition of life and death from the perspective of bioethical issues, euthanasia, as in the Tony Bland affair in England,¹¹ adoption in India, sexual aggressions in Canada, transsexualism in France, abortion in the United States, the death sentence, as in South Africa, religious conflicts in the temple of Ayoda in India,¹² the crucifix in Bavaria,¹³ in short, in all the domains that house the *sacred*.

The final stage in the privatization of beliefs and the liberation from all traditions is the total disaffiliation of the democratic subject. This is because what awaits the individual emancipated from all collective belief is, for the most fortunate, the falling back on his most tangible interests, that is, narcissistic and financial interests – and, for everyone else, the plunge into psychological destruction. Such is the new picture painted by many people brought before the penal judge. The risk does not come exclusively from repression, but also from exclusion. A society is nothing more than an organized system of differences; it is the discriminating divergences that give individuals their “identities” and allow them to situate themselves in relationship to others. The “excluded” are excluded first and foremost from this system of differences; they are orphans of all social affiliation and therefore of all representation. They are deprived of any participation in a collective action, from the right to have rights and the benefit of any social solidarity whatsoever. It is therefore no longer possible to limit oneself to seeing delinquency as a simple form of asocialness; it must be recognized as a problem of socialization, as the number of contemporary pathologies (urban delinquency, drug addiction,

suicide etc.) bears out. The state of law should no longer merely make itself arbiter, but also tutor, a substitute for a failing symbolic function. Its difficulty no longer lies in showing itself to be tolerant and structuring. In truth, never has moral freedom been as great as it is today, but in turn never has public intervention into the lives of citizens – and notably into their internal life – been as strong, which is not the least paradoxical aspect of our day.

Another paradox of the current demands on the law consists of the use of legal proceedings as a symbolic instance of social recognition. The most patent example is that of the contract of civil union demanded by the homosexual community. In France, the relationship between two concubines, that is, two people of the opposite sex living together without being married, is a source of rights, notably social rights. How is it that someone can have Social Security take care of his concubine if he is heterosexual and not if he is homosexual? This undermines the equality of citizens before the law, which is an essential principle of justice. But in claiming the institution of this new statute of marriage, and under the pretext of fulfilling the democratic dogma of equality and impartiality, is not the homosexual community asking for a certain recognition by the juridical order? Is this the role of the law? Should it not rather limit itself to the preservation of free spaces in which people have the right to live as they wish to live, and restrain itself from according any moral sanction? It is not its role to pass judgment – even a positive one – on sexuality. The moral appreciation of homosexuality – ever since it has ceased to be repressed by the penal code – is nevertheless the domain of individual conscience and not the law. Herein lies the ambiguity of the claims for positive rights, and not merely for the freedoms for minorities. With regard to the claims made by minorities in the United States, Philippe Raynaud comments on, “the redoubling of the politics of special interests by a politics of recognition; the main goal is to make people admit that any given group, with its particular nature, is indeed part of the national community, whose internal diversity includes the secret counterpoint that it is not enough to be a formal citizen of the United States to be fully ‘American.’”¹⁴ The juridicalization – and worse still the constitutionalization – of public morals risks further straining the moral

conflicts of a society, with the victory of one position calling for the disqualification of the opposing party, which is seen as contradicting the fundamental values upon which the Constitution rests. The value of “conviction” of the weaker party risks no longer being recognized.

A Consensus on Evil

Democracy agrees more easily on the definition of absolute evil than on a concept of good, as the debate on revisionism currently stirring public opinion in France demonstrates. Must one tolerate the negationist discourse that contests the reality of the Shoah? French law – called the Gayssot law after its founder – restricts

“those who would contest the existence of one or more crimes against humanity such as they are defined by article 6 of the statute of the International Military Tribunal of Nuremberg, that is, the assassination, extermination, reduction to slavery, deportation, and any other inhuman act committed against civilian populations before or during wartime, or persecutions for political, racial or religious reasons, when these acts or persecutions, whether or not they constituted a violation of the rights of the countries within which they were perpetrated, were committed following any of the crimes recognized by the Tribunal or in conjunction with any such crime.”

The extreme right has fought unceasingly against this law, deemed “totalitarian.” A representative of the National Front¹⁵ publicly accused the creators of this amendment of being incapable of demonstrating the reality of the Shoah scientifically.

How to justify this exception to the freedom of expression that restrains the *contents* of speech, with which, in principle, democracy should not concern itself? Is it out of concern to protect a minority, in this case the Jewish community? The protection of the memory of the Shoah is part of what Ricœur calls a conflictual consensus on the part of all religions, notably among Jews and Catholics, even though some points of disagreement remain, as the issue of the Carmelites in Auschwitz demonstrates.¹⁶ Did not the Episcopal Conference of the Catholic Church in France just recently refer to the Jewish genocide as an “incontestable fact,” “an *indisputable* established fact”?

In departing from the principle of tolerance of all opinions, the law marks the importance of this event in a symbolic fashion, to some extent separating it from history in order to recognize its unique place. Genocide has not been directed at the Jewish people alone, and the limitation of the Gayssot law to the events of the Second World War alone is one of its weaknesses. This century's genocides – Armenian, Gypsy, Jewish, and, closer to home, Tutsi – of which the most extreme was the Jewish Holocaust, have allowed countries to come to an agreement on that which they do not want, in a sort of negative natural right. The parliamentary debates of the new penal code showed the capital importance that the crime against humanity has assumed in the contemporary juridical consciousness. The still recent memory of the Shoah has inspired the great texts on the human rights of the immediate post-war period, starting with the Universal Declaration of Human Rights of December 1948. A crime against humanity is a fundamental crime in that it symbolizes the extreme instance of intolerance of the other, that is, his systematic elimination as scientifically organized by a modern government. It embodies the modern evil of societies without transcendence, which is no longer the murder of the father, the Other, but of the other, the brother. In order to prevent its recurrence, nations founded the New International Juridical Order on Human Rights.

But this law has another, less obvious, justification: it also aims at preventing this crime from perpetuating its maleficence. The crime against humanity is a continuous crime,¹⁷ which still produces effects today. To deny the Shoah, indeed, is not merely an historical opinion; it continues this same crime by perpetuating it on the survivors, thus making the denier the posthumous accomplice of those who organized the Shoah and who left no traces with this goal in mind: indefinitely prolonging the suffering of the survivors. Negation, in fact, is part of the crime against humanity. Murder contains an intrinsic element of its own denial: this is also the reason that it is not an ordinary crime. The other is not only killed but destroyed, denied, made to vanish. Even his death disappears. Denial is the enabling factor of the crime against humanity. The premeditated destruction of proof that characterizes all these types of crimes does not stem from the very human desire to

escape punishment, but rather from the desire to complete the crime by making its proof impossible and thereby its torture indefinite for those who know that their forefathers were victims but cannot prove it. As the crime takes place it precludes any justice, that is, commemoration. It kills memory and prohibits mourning by making the injustice committed seem improbable, uncertain in both senses of the term, and, most importantly, unprovable.

The proof lies in the suffering of the survivors. They are condemned to bear an injustice that prevents them from living for generations. The initial crime is not only denied but it becomes immaterial, and the victims are transformed into non-beings. This produces the result of making survival difficult – if not impossible; such is the extent to which the children are victims of psychic confinement, without the possibility of symbolization. “Hence,” says a survivor of the Armenian genocide, “there cannot be any real intersubjective exchanges between the child and his surviving parent, who has become doubly ‘clandestine’ to himself: since he cannot integrate an important part of his life experience, but also because this has been erased from the world’s consciousness.”¹⁸ One might remember the moment of intense emotion at the trial of Klaus Barbie,¹⁹ when a victim told the court that at last she could sleep at night; having finally looked Barbie in the face her suffering had at last been given a name. The legislator’s concern is not the memory of past victims, but the protection of current victims, that is, the actual suffering of the children of survivors.

Hence the law does not defend an official version of history that would need assistance from justice to resist the proofs accumulated by an opposing party. But in fighting against the self-destructing mechanism of the material proof of a crime that its perpetrators organized to protect their own memory, it protects its own reference point.

The Body as Absolute Criterion

The question of tolerance is curiously raised most often in our societies when the body is at stake. One thinks at once of the question of abortion, which is one of the most important debates in

Western society today, or of the Islamic veil, which has provoked passionate debates in France, the Jehovah's Witnesses's refusal of blood transfusions during surgical procedures, and more generally the infinite number of bioethical questions raised by a medicine that catches all schools of thought off guard, subjecting them to radically forbidden problems. There is an unquestionable consensus around the integrity of the body. Beliefs and behaviors are tolerated on the condition that they don't compromise the integrity of the body. More precisely yet, it is with regard to the body of the child that the liveliest debates take place today. In a liberal government, the difficulties that cannot be resolved with regard to adults are done so through children. The issue of the Islamic veil has caused debates on integration according to the French model well beyond the case of young girls. The child constitutes the stake of power all the more since it is to him that the perpetuation of beliefs will be passed on, and since he cannot express an opinion himself. Never do the differences between cultures appear more clearly than in the places that respective cultures reserve for children. How many parents – foreign or not – are surprised if not shocked by the place justice grants to the words of children today.

Such an entrance into the debate does not perhaps favor tolerance. First of all, emotion gives bad council. Secondly, antagonism is not broached as such, but by its consequences. In a way one enters through the exit. It is always when lacking one of its aspects that people will argue a cause. The concentration on the body allows one to skip over deep motivations, failing to draw ties with a certain relationship with the world. Our societies have a hard time believing in beliefs, in imagining that they can inspire behaviors so heavy with consequences. While religious tolerance focuses – perhaps too much so – on ideas, today people think only of the body, without considering what conception of the world it sets into play. In short, this entrance suggests an exit on the same level, that is, physical or psychological health. People are more likely to seek assistance from scientific expertise than from philosophical reflection, and rather than Voltaire or Pierre Bayle, it is Professor Montagnier or François Dolto who are sought out.

The question of excision concentrates all these difficulties. It embodies the modern figure of the intolerable. We are far from the

days when World Health Organization, considered that “ritualistic operations ... are the result of social and cultural beliefs”²⁰ and therefore not within its jurisdiction. The practice is not broached as a whole, but only through the visible, that is, the marking of the body (would it be conceivable to discuss Western surgical practices without linking them to our concept of science?). It should be possible to contest this approach without immediately incurring the accusation of defending such practices. Would it be intolerable to denounce this diabolicalness? The debate is indeed paralyzed by the phantasms it awakens. Emotion brought to the extreme – what could be worse than the cold-blooded mutilation of a child – paralyzes any debate and hence encumbers any evolution through pedagogy and conviction. In highlighting the obviously intolerable mutilation while concealing, for example, that it is first and foremost a celebration organized in the hope of integrating the child, one precludes any internal evolution of the ritual. Without taking the time to listen, for example, one does not learn that in certain countries the women themselves draw the practice toward its end by limiting themselves to a simple prick, beading up a drop of blood, retaining only the social ceremony or the identifying benefit to the child.

The body remains the last stake of people who no longer believe in anything. This sacralization of the body is perhaps not without ties to the de-symbolization of current society and the challenging of beliefs in a general way. In the face of this consensus, devoid of any organizing principles, the legislator is thus condemned to limit himself to the *vital*, that is, to life pure and simple, held up as a value in itself, or more precisely, as a new subject of political concern. Biological life becomes the sole common denominator among men to whom the democratic consensus has given the freedom to be themselves, that is, different, but who can only remain so on the condition that they keep something in common. This is what Phillippe Raynaud calls the *new hygienics*, a “new configuration in which the norm presents itself, independently of all moralizing injunctions of the ‘traditional’ or ‘moralizing’ type, as the simple result of the taking into account of self-evident public interests and values that can be universalized: the forbidden arises from an objectively discernable danger.”²¹ Nevertheless, it

is the living that forms consensus. Life is the lowest common denominator among living men.

Will *bios* win out over *logos*? Certainly not, but it is its condition. This consensus on bodily integrity is indicative of the sole substantial principle of democracy: respect for the human individual. This principle, which is higher than all others, federates the consensus on evil and that which ties it to the body. "We have," writes Durkheim, "a cult of personal dignity that, like all other cults, has its own superstitions. It is thus a common faith, if you will, in as much as it is shared by the community, but it is individual in its object."²² The body is protected as a site of consciousness, the seat of general and therefore sovereign will. The capable man is both the condition of social intervention but also its ultimate goal. This is because without a subject of the law, without citizens, there is no general will, no deliberation and no space for collective action, no State. Is not the most intolerable aspect of excision not mutilation but the fact that it is practiced on someone who cannot consent freely? Would one have the same repulsion with regard to an adult woman freely accepting this rite (as is the case with young immigrants re-entering the country)? Probably not, since the intolerable in the excision of a child is more like the rape of a consciousness than a body.

Mediators and Interpreters

What distinguishes all forms of tolerance from its principle enemies, indifference and relativism, is the constant effort it demands.²³ "Tolerance," writes Joël Roman, "is not the reign of indifference, but rather the reign of democracy, not a moral posturing, but rather a civic contract, which requires not psychological predispositions but confidence in procedure and institutions." We find the same concern in Ricœur, who writes that "when one assesses what the State of law signifies by contrast, the theological void it implies, one should not be surprised at the lateness of its appearance in history, nor by its incompleteness. This is why I introduced it as the ideal type of modern liberal government. To tell the truth, it's a *veritable abstention of power* which is needed here."²⁴

How does this task present itself in concrete terms today? The difficulties no longer involve traditional examples, such as that of the parliamentary debate, which loses importance without, however, disappearing. The most crucial questions of democratic coexistence are decided by judges – notably constitutional judges – or by mediators or other experts on life sciences, given the importance of the body. Conflicts of values are thus resolved in our societies by the two least democratic branches of power, that is, by the administrative and judiciary powers. The attempt sketched here better to focus the modifications with which democracy colors the question of tolerance makes no theoretical claim, but has as its goal to outline the parameters of this new democratic task. This entails new actors, the learning of a new language and the institution of new sites.

What prevents religious tolerance from serving as a reference in our contemporary debates is that it speaks the language of morality and not that of the law, which has become the new grammar of democratic relationships. The juridical rises as common culture declines. The invasion of the law confuses registers and risks eventually suffocating all other points of view. No longer daring to speak of morality, the great principles of the Republic – Human Rights or the Constitution – are invoked. But this mixture of many political, moral and historical discourses into a single juridical language is dangerous. First of all it invites people to learn to speak the language of law in order to formulate political problems arising from democratic coexistence. The learning of this language is all the more pressing as it is the only way to block the new imperialism of jurists that is taking shape today. This will be better combated by recognizing its virtues and possible uses rather than by confronting it directly.

Hence the concern to give the floor back to its recipients, that is, the citizens. More than needing experts, the citizens need *interpreters*, not only to understand others, foreigners, but also to understand themselves. A multicultural society needs both linguistic and cultural interpreters. This is why one sees cultural mediators entering the children's court in Paris. Neither social workers nor jurists, they perform the task of helping the judge understand a given situation. Probably their work should be

expanded, their role clarified and a status created for these new interpreters, who make it possible to decipher a meaning, an invisible link that no longer has currency in our modern societies, in practices that initially shock us. But the society also needs interpreters for itself, to make a link with its invisible self. The democratic society that claims to be transparent is in reality more and more opaque. The visibility of every moment reinforced by the media diverts and often blinds it. It understands foreign cultures better than its own actions. This is because in a democracy, perhaps more than in any other society, recourse to the invisible is essential. For all societies, as for man himself, the beginning is as mysterious as the end. This is why it must be celebrated with a creation myth, epic, fable, or myth. What then is the social contract, the republican pact, if not a fictitious moment of democracy? What is deliberation if not the clarifying of common goals?

What does the close examination of the solutions that the jurists bring to major conflicts reveal? If one discounts the larger questions – most often solved by the constitutional process that calls for binary responses (authorization or prohibition of abortion, for example), one notices that justice often resorts to internal negotiation, discussion of each individual case. What demonstrates that the practice of law is less antidemocratic than it seems at first glance is that justice is more for than against the participation of the citizen. Indeed, justice proposes more the displacement than the resolution of the sites of confrontation. For example, one juridical determination specifies that authorizations of absence for religious celebrations not given as holidays may be granted by a departmental head on condition that this absence “remain compatible with the normal functioning of a department.” In another case pertaining to a request for exemption from scholastic obligations for the Sabbath, the Council of State, in a conciliatory frame of mind, decided that such exemptions were possible on condition that they remain compatible with the tasks inherent to the studies and respect for the public order of the establishment. Who in fact will make such decisions? Don't we in fact run the risk of being at the mercy of the whims of a departmental head if the procedures to be decided upon are not formulated conjointly? These solutions are only really satisfying if at the same time one considers the con-

ditions of a true democracy in the institutions. Why not generalize the council chambers to make such decisions collectively? This practice is spreading in schools, hospitals and numerous institutions. One thinks of the committees on medical ethics in each hospital, the school board and why not, one day, collective decisions in penal establishments as well? This is how tomorrow's democracy will evolve, by offering everyone, children, parents, religious authorities, and citizens, to participate in the respect for tolerance on a daily basis. This is no longer a matter concerning interpreters, but *mediators*. All that we have described no longer concerns a centralized, dramatized debate, settled by far-off representatives, but rather a proliferation of small interrelated deliberations to be sent to a judge in cases of disagreement, who in turn will send them back to the interested parties. This is the form assumed today in the struggle forever required by the idea of tolerance as a virtue to be rescued from the automatic turning back on oneself, from indifference, from skeptical relativism ... or from its diversion by the jurists!

Notes

1. G. Waterlot, *Tolérance et modernité, généalogie et destin d'un concept*, unpubl. thesis, Lille, 1996.
2. *Ibid.*, p. 8, n. 11.
3. This issue, which is still alive in France, raises the question of whether or not public schools may accept young muslim girls who come to class wearing the Islamic veil.
4. P. Dumouchel, "La Tolérance n'est pas le pluralisme," in: *Esprit*, 8/9 (1996), p. 175, n. 17.
5. *Ibid.*, p. 181, n. 28.
6. On this question see the debate between D. Moynihan and C. Krauthammer in: *Le Débat*, 81 (1994).
7. On this subject see A. Garapon and D. Salas, *La République pénalisée*, Paris, 1996.
8. D. Lochak, "For intérieur et liberté de conscience," in: *Le for intérieur*, Paris, 1995, p. 200.
9. P. Ricœur, "Tolérance, intolérance, intolérable," in: *Lectures I*, Paris, 1991, p. 300.
10. *Ibid.*, p. 296.
11. In this case, judges had to decide on the stopping of a respirator for a young victim of the collapse of a stadium in Sheffield, England.
12. In this case, the executive powers asked the supreme court to take a stand on the ownership of a mosque constructed over an ancient Hindu temple and

which had become, over the course of the years, a focal point of communal tensions in India.

13. Regarding the contested presence of the crucifix in Bavarian state schools.
14. P. Raynaud, "La Démocratie saisie par le droit," in: *Le Débat*, 87 (1995).
15. Which is to say, the extreme right of nationalistic and xenophobic France.
16. This conflict set into opposition a Catholic congregation wishing to erect a convent on the edge of the former concentration camp and provoked the wrath of Jewish groups.
17. Jurists distinguish between instantaneous infractions whose effects are immediately spent, such as murder, and continual violations which are repeated over and over, such as the possession of stolen goods.
18. J. Altounian, "Porter le nom d'ancêtres clandestins (trauma d'un génocide 'secret' chez les descendants des survivants arméniens)," in: *Violence et politique*, Paris, 1995, p. 155.
19. Klaus Barbie, head of the Gestapo in Lyon during World War II, was condemned for crimes against humanity in a trial 40 years after the fact (1987).
20. *Le Monde*, 22 August 1996.
21. P. Raynaud, "L'Hygiénisme contemporain et l'écologie: une permissivité répressive," in: *La Nature en politique ou l'enjeu philosophique de l'écologie*, Paris, 1993, pp. 138-49.
22. E. Durkheim, *De la division du travail social*, Paris, 1978, p. 48.
23. See G. Waterlot (note 1 above), pp. 39-41, 548.
24. P. Ricœur (note 9 above), p. 301, with my emphasis.