**The inclusion of the other? Habermas and the paradox of tolerance[1]**

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**1. Introduction: The inclusion of the other and the paradox of tolerance**

In his most recent work, Jürgen Habermas has argued that it is possible to rethink, and thereby save, the concept and practice of tolerance and to avoid a paradox he identifies in other conceptions of tolerance. That paradox has two aspects.

The first 'is that each act of toleration must circumscribe the range of behaviour everybody must accept, thereby drawing a line for what can*not* be tolerated. … And as long as this line is drawn in an authoritarian manner, i.e., unilaterally, the stigma of arbitrary exclusion remains inscribed in toleration' (Habermas, 2004a: 6f; also Habermas, 2003a: 40f). There is no tolerance without intolerance. Indeed, in some cases, intolerance is what makes tolerance possible. For instance, if tolerated 'the Nazi régime' and 'the political ideologist who combats the liberal state' would undermine the tolerant society (Habermas, 2004: 7f). In these cases, the condition of possibility of tolerance is intolerance or a limit to tolerance. Habermas is looking for a way to establish this limit in a non-arbitrary and rational fashion.

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The second aspect of the paradox of tolerance concerns the relationship between the tolerating and the tolerated parties. Despite the objection requirement that you can only tolerate what you object to, 'the act of toleration retains an element of an act of mercy or of "doing a favor." One party allows the other a certain amount of deviation from "normality" under one condition: that the tolerated minority does not overstep the "threshold of tolerance"' (Habermas, 2003a: 40). The problem with tolerance, traditionally conceived, is that it involves a hierarchical, paternalistic relationship between a sovereign party unilaterally bestowing tolerance upon the tolerated party as an act of grace or benevolence (to be tolerant is also to have the power to be intolerant). Habermas therefore seeks to base tolerance in the symmetrical relations of public deliberations.

The two aspects of the paradox of tolerance – arbitrariness and paternalism – arise from the way in which the norms of tolerance are decided and justified. Traditional accounts and practices of tolerance rely on what Habermas calls 'the philosophy of consciousness' (or 'the philosophy of the subject'), in this case in the form of a 'unilateral' justification of tolerance. Habermas's solution is to think of the justification of tolerance as a dialogue among those affected by the norms of tolerance; this much also follows from his deliberative account of the rationality and validity of norms. Other deliberative theorists – James Bohman, Rainer Forst, Amy Gutmann and Dennis Thompson – have put forward similar arguments. Common to them is the idea that a norm is rational if it has been decided through the public use of reason among free and equal citizens, and if the addressees of the norm are able to understand themselves simultaneously as its authors. The rationality of the norms of tolerance depends on the characteristics of the relations among subjects rather than the characteristics of a particular subject. The paradox of tolerance is thereby dissolved: first, the decision to tolerate, and how, is not arbitrary but rational; and, second, the relationship between tolerating and tolerated is not hierarchical but one of equality and symmetry. In short, the answer to the paradox of tolerance is a deliberative conception of democracy where the other is included and tolerated without violating her otherness.[2]

Habermas distinguishes his deliberative approach to tolerance from liberal ones. This is not the place to rehearse the differences between liberal and deliberative approaches.[3] However, it is important to understand what Habermas wants to avoid in the liberal approach to tolerance in order to see what he is aiming at with his rethink of tolerance, whatever the merits of his critique of the rejected alternatives. From a

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[2] To paraphrase Habermas, 1998. For Habermas's recent writings on tolerance, see Habermas, 2003b; 2003a: 40-2; 2004a; 2005a: 347f; 2005b; 2005c: chapters 5 and 11.
[3] For debates between liberals and deliberative democrats on these issues in relation to tolerance, see Gutmann and Thompson, 1996: 60-3; Galston, 1999; Gutmann and Thompson, 1999: 251-3; Bohman, 2003; and Valadez, 2003: 122f.

Habermasian perspective, the problems with traditional liberal approaches are three. First, that with the private-public distinction, the relation of tolerance risks becoming a relation of indifference towards the other's private beliefs or actions. What is missing is an appreciation of the objection requirement. If one is indifferent towards or has a purely positive evaluation of an other, tolerance is superfluous (Habermas, 2004a: 10). Second, for Habermas, the point of tolerance is not to protect individual or collective identities and interests constituted prior to deliberations about, for instance, the terms of tolerance. Rather, interests and identities are partly constituted in the course of deliberation. Third, Habermas believes that a deliberative account of tolerance has the further advantage that it provides an answer to the problem of the justification of the norms of tolerance, which are tested in public deliberations among those possibly affected by them (similarly Forst, 2004: 76f; Bohman, 2003). The citizen can take up a non-strategic attitude vis-à-vis the norms and vis-à-vis other citizens, viewing others as equals in an open dialogue aimed at mutual understanding rather than obstacles to the fulfilment of already established interests.

This critique of liberalism is related to Habermas's critique of 'the philosophy of the consciousness'. At issue here is the source of (the rationality of) the norms of inclusion and tolerance. In liberal (and communitarian) approaches, tolerance emanates from a subject, whether an individual or a collective or the philosopher as a stand in for any of these. As a consequence, the decision to tolerate or not depends on the rationality of this subject, and the tolerated depends on the goodwill of the tolerating subject. With his dialogical account of tolerance, Habermas wants to avoid the potentially arbitrary distinction between tolerance and intolerance as well as the potentially paternalistic relation to the tolerated. The solution is *deliberative* democracy: 'reciprocal religious toleration called for by everyone must rest on universally acceptable limits of tolerance. This consensual delimitation can arise only through the mode of deliberation in which those involved are obliged to engage in mutual perspective-taking. The legitimating power of such a deliberation is generalized and institutionalized only in the process of democratic will-formation' (Habermas, 2003b: 5f).

While critical of existing conceptions and practices of tolerance, Habermas argues, it is not only possible but also necessary to rescue their normative content from a 'complete deconstruction'. Such a deconstruction, he argues, throws out the baby with the bathwater and leads to the *destruction* of tolerance.[4]

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[4] Habermas, 2003a: 41, translation modified (the English has 'straight deconstruction' for 'vollständige Dekonstruktion'). In another, but related context, Habermas (2005b: 5-13) criticises Christoph Menke's 'deconstruction' of the liberal ideal of equality, although he also distinguishes Menke's from Derrida's deconstruction. Forst (2004: 314) makes the same point in relation to Fish 1997.

The reference is to Derridean deconstruction. While there was some – mainly personal and political – rapprochement between Habermas and Derrida during the last years of Derrida's life (see Thomassen, forthcoming 2006), considerable differences remain between Habermasian critical theory and Derridean deconstruction. I will return to some of these differences in the concluding section of the paper. In the following, I am not interested in the concept of tolerance as such (if there is such a thing), but in Habermas's conception of tolerance and in what a deconstructive alternative may be. The following is neither a simple comparison of Habermas and Derrida nor an exposition of their respective works, but a deconstructive reading of Habermas's texts on tolerance inspired by Derrida's writings on hospitality (Derrida, 1999; 2000a; 2000b; 2003: 126-30; 2005a). Rather than a simple application of Derrida to Habermas, the deconstructive reading takes place neither entirely within nor entirely from an external point to Habermas's texts. It follows Habermas's conceptual scheme as far as possible, examining the various possibilities he is facing; but it also intervenes at the moment when it encounters an aporia – a non-passage, blind spot or undecidability – that remains irresolvable within the Habermasian conceptual scheme. I hope to show that there is a mutual contamination between tolerance and intolerance, where the latter simultaneously makes the former possible and limits it. As a result, the distinction between them cannot be rationalised. In addition, and *contra* Habermas, tolerance is both made possible and limited by a certain paternalism and sovereignty on the part of the tolerating party. However, the non-rationalisability of the threshold of tolerance and the irreducibility of inequality does not necessarily result in the outright rejection of the concept and practice of tolerance. The *deconstruction* of tolerance is not its *destruction*.

## 2. Inclusion through distinction

Despite Habermas's critique of the liberal public-private distinction, another and not unrelated distinction is central to Habermas's conception of tolerance, and it is therefore necessary to examine this distinction in detail before moving on to dealing explicitly with his writings on tolerance. The distinction is one between political and ethical societal integration; indeed, for Habermas, inclusion and tolerance is made possible by this distinction. Habermas's answer to what John Rawls refers to as 'the fact of pluralism' – the persistence, in contemporary societies, of a plurality of ethical conceptions of the good demanding equal respect – may be described as liberal because it rests on a distinction between the right and the good, between political and ethical reasons. This suggests that questions raised about liberal approaches in general also apply to Habermas, most importantly, the neutrality (or not) of the tolerating political community vis-à-vis the tolerated ethical subcultures and the equality among the various ethical subcultures.

Habermas (1998: 40) seeks 'a *nonlevelling* and *nonappropriating* inclusion of the other *in his otherness*', because '[c]itizens who share a common political life also are others to one another, and each is entitled to *remain* an Other' (Habermas, 2001: 19; see also ibid., 73 and 1998: 139). It is with this aim in mind that Habermas makes the distinction between ethical and political integration, which is related, but not reducible to a distinction between moral and ethical aspects of practical questions (Habermas, 1993: 8, 11-14; Habermas, 1996a: 159-64, 565 n3). The ethical point of view concerns what is good for me (or us) in the long run, that is, (collective) goals relative to a particular subjective history, tradition or way of life, whereas the moral point of view concerns what is equally good for all and, as such, not relative to a particular subject. Moral reasons trump ethical ones, and so the emphasis is on – moral and rational – self-legislation rather than self-expression. Moral inclusion is egalitarian and potentially universal, and it is possible, at least in theory, to reach a rational consensus on moral questions, whereas there is a limit to the public use of ethical reasons, which are always and at least in part, relative to a particular subject, whether an individual or a collective (Habermas, 1996a: 309). The moral point of view is not neutral, however. It has normative implications, because it is internally related to a concept of autonomy as rational self-legislation. Yet, since this concept of autonomy is mediated by the public use of reason – as *rational* self-legislation – it is not just one (ethical) value among others, but neutral vis-à-vis different ethical values (Habermas, 1998: 99f).

The ethical-moral distinction forms the background for what is, in the context of tolerance, the more important distinction Habermas makes between ethical and political societal integration, or ethical and political reasons (Habermas, 1996a: 104-18; Habermas 1998: chapter 8; and, for the latest formulation, Habermas, 2004b). If there is no complete overlap between a political unit and a particular ethical conception of the good – and in today's pluralist societies there is no reason to believe there would be such an overlap – then it is necessary to conceive of the political unit as a political project to be embarked upon in common by the citizens. Political inclusion takes place at the level of procedural and legal norms of public deliberation and not at the level of any substantive notion of the good life (values), from which it must be distinguished (Habermas, 1996a: 256, 513; Habermas, 1998: 118, 224f). This is evident, for instance, in Habermas's (1998: 225f) proposal for a 'constitutional patriotism', that is, the identification with (interpretations of) the principles of constitutional democracy.

A political community along these lines will not exclude *a priori* persons with different values or ethical backgrounds. 'Inclusion', Habermas (2001: 73) writes 'means that the political community stays open to include citizens of any background without confining those *Others* within the uniformity of a homogeneous national community.' Only if

the *political* culture remains distinguished from and neutral vis-à-vis *ethical* conceptions of the good life, can the former include different conceptions of the good life without disadvantaging some of them, and only then are the relations among different forms of ethical life symmetrical. For instance, the exclusion or inclusion of immigrants and refugees cannot be based on ethical (cultural, ethnic, and so on) grounds, only on political ditto, and what is demanded of new immigrants is political, not national, acculturation (Habermas, 1998: 228-32). Inclusion at the political level allows for difference and otherness at the ethical level, but the inclusion of the other in her ethical difference is conditional on her acceptance of the ethical-political distinction and on her acceptance of the common political culture: 'to tolerate … requires a common standard. In the case of a democratic community, this common value base is found in the principles of the constitution' (Habermas, 2003a: 41; see also Habermas, 2004a: 10f; and Habermas, 2005b: 26) and a political culture crystallising around a constitutional patriotism.

As mentioned above, the Habermasian, deliberative version of constitutional democracy

> contains as a doctrinal core the (Rousseauian-Kantian) idea of the self-legislation of voluntarily associated citizens who are both free and equal, … th[is] deontological idea of self-legislation or autonomy is neutral with respect to worldviews, provided that the different interpretations of the self and the world are not fundamentalist but are compatible with the conditions of postmetaphysical thinking (in Rawls's sense of "not unreasonable" comprehensive worldviews). (Habermas, 1996b: 1505; compare Habermas, 1996a: 445f)

A dogmatic, but rational kernel, because it excludes just those (fundamentalists) who do not accept modern pluralism and the burdens of reason (for a critique, see Rosenfeld, 1996: 811f). Fundamentalism, according to Habermas (1996: 223), refers to non-self-reflective 'rigid forms of life' aiming at the 'ultra-stability' of their identities. The fundamentalist worldview does not accept what Habermas refers to as the cognitive limits of life in modern, pluralist societies: that, as only one ethical conception of the good among others, it can only claim relative validity and must accept the equality of ethical conceptions of the good, and that, insofar as it is necessary to regulate relations among different ethical views, this regulation can only be valid when subjected to the public use of reason (Habermas, 1998: 223f; 2002: 151). The fundamentalist rejects the distinction between political and ethical integration; it is dogmatism with practical consequences, that is,

dogmatism supported by force in order to impose it on society as a whole (Habermas, 2003a: 31).

Of course, to the thus branded fundamentalist it is Habermas who is paternalistically forcing a particular lifeform upon her particular lifeform from the outside. To her, Habermas is equally guilty of a certain ultra-stability and violent imposition, namely the imposition of the ethical-political distinction. From a Habermasian perspective, the fundamentalist may be said to exclude herself, but the fundamentalist who cannot distinguish ethical and political will only be able to view this exclusion as if she is being excluded merely for being different. To the fundamentalist herself, she does not seem to have a right to remain other in her ethicality, because this right to remain other is conditional upon accepting the ethical-political distinction, something she cannot accept because it threatens her very existence as a 'full' person. She cannot be included in her ethical otherness as she understands the latter, namely not as distinguished from her political identity.

A good example of a fundamentalist from Habermas's own texts is someone who opposes abortion as a right (that is, women's right to choose) and believes that abortion should be illegal. This fundamentalist does not accept that her view on abortion is relative to an ethical way of life and must be limited by the pluralism of ethical points of view on abortion. Although the right to remain other is conditional upon acceptance of the ethical-political distinction, for Habermas, it is a harmless and rational conditionality as long as it reflects universal and rationally reconstructable structures of autonomy and equality. For instance, Habermas (1993: 59f) writes that, if it turns out that the question of abortion cannot be dissociated from particular ethical views, and it is, therefore, not a moral question, then that would merely raise the political question of how to order the co-existence of different ethical views in the equal interest of all. However, thinking abortion according to this distinction between ethical and political (or moral) is precisely what the anti-abortionist cannot do; for her, it is not a question of political procedure but of divine revelation transcending any ethical-political (or moral) distinction.

## 3. The ethical impregnation of the political: Blurring the distinction

'Ideally', Habermas (1996a: 154) writes, 'legal rules, too [like moral rules], regulate a matter in the equal interest of all those affected and to that extent give expression to generalizable interests.' Yet, Habermas admits that the facticity and positivity of a legal rule – its genesis in a particular society and the fact that, since it has only been validated by (some of) the members of that society, it can only claim relative validity – means that the validation of the legal rule is marked by the conditionality of an ethical perspective: 'the facticity of the existing context cannot be eliminated … On account of this relation to the *de*

*facto substratum of a legal community's will*, a volitional moment enters into the normative validity dimension – and not just into the socially binding character – of legal norms' (Habermas, 1996a: 155f; also 153). As a result, the law retains a non-rationalisable 'volitional moment' that cannot be dissolved in the networks of intersubjective deliberations, and 'even the rationally grounded political will retains a certain contingency insofar as it rests on context-dependent reasons' (Habermas, 1996a: 157). Political integration cannot be entirely abstract and distinct from ethical conditionality, thus undermining the arguably hierarchical distinction between political and ethical integration.

Although each political order supposedly interprets the *same* set of universal and rationally reconstructable rights, '[l]egal orders as wholes are also "ethically imbued [impregnated: imprägniert]" in that they interpret the universalistic content of the same constitutional principles in different ways, namely, against the background of the experiences that make up a national history and in light of a historically prevailing tradition, culture and form of life' (Habermas, 1998: 144). Hence, legal rules are split between the right and the good, between a universal and a particular content (for criticisms of Habermas's ethical-political distinction, see Bernstein 1996 and Rosenfeld 1996). However, the ethical impregnation of the political 'cannot detract from the legal system's neutrality vis-à-vis communities that are ethically integrated at a *sub*political level. … It is crucial to maintain the distinction between the two levels of integration', thus upholding the hierarchical character of the distinction. This account of the inclusion of the other 'in no way forbids the citizens of a democratic constitutional state to assert a conception of the good in their general legal order, a conception they already share or have come to agree on through political discussion. It does, however, forbid them to privilege one form of life at the expense of others *within* the nation' (Habermas, 1998: 225, my emphasis, and 220, emphasis in German original).

On the one hand, on the other hand: upholding the ethical-political distinction and blurring it.

On the one hand, when upholding the ethical-political distinction, Habermas risks reifying it, positing it as a norm prior to the public deliberations of the citizens who were supposed to determine the norms to which they are subject. This pulls him towards allowing challenges to the ethical-political distinction and in the direction of unconditional inclusion. This serves to include constituencies on an equal footing, yet, on the other hand, when accepting challenges to the ethical-political distinction, the equality among the ethical subcultures is also put in danger because a particular – fundamentalist – ethical subculture may occupy the political level so that it is no longer one among equals. He is therefore pulled in the direction of inclusion on the condition that you accept the ethical-political

distinction and the common political culture, that is, on the condition that the ethical-political distinction is fixed.

On the one hand, if the citizens were able to determine the constitutional principles all the way down, so to speak, because it is up to those possibly affected by the norms to decide them, the principles potentially multiply indefinitely, and you risk letting in those who would interpret the principles in excluding and 'fundamentalist' ways. So Habermas is pulled towards conditional inclusion, towards positing certain principles as universal, unavoidable and always-already presupposed, so that they are 'not … lost [dissolved: *auflösen*] in the spectrum of these different interpretations' (Habermas, 1996b: 1498). The conditionality is expressed as a hierarchical distinction between constitutional principles and interpretations of the principles. But, on the other hand, when fixing the principles, he runs the risk of reifying them, and this pulls him back from conditionality.

On the one hand, on the other hand. However, it would be wrong to read Habermas's texts simply as ambiguous or self-contradictory, as if what was lacking was the attention of the author or more rational principles and foundations. Inclusion and exclusion, unconditionality and conditionality (Derrida, 2000a; 2000b; 2003: 126-30; 2005b) are not simply opposed options, but stand in an undecidable relation, where the latter of each pair simultaneously makes possible and limits the former. Unconditional inclusion and openness require that we condition them in order to secure them; exclusion and conditionality help constitute a space of inclusion and equality. 'There can be no inclusion without exclusion', Habermas (2004: 6f) writes, and he (2004a: 7f) makes reference to the self-destructive inclusion of the Nazis in Germany in the late 1920s and early 1930s. The exclusions and conditioning are made in the name of inclusion and unconditionality, however. As a result, there is not only a contamination of inclusion and unconditionality by exclusion and conditionality; there is also a contamination in the opposite direction. Since the exclusion and conditions are made in the name of inclusion, equality and unconditionality, these exclusions open themselves to contestation at the very moment they are posited as necessary for inclusion and tolerance. (Here I am interested in intolerance and exclusions made in the name of tolerance and inclusion and not in those made in the name of other ideals or values.) As I shall argue below, this aporia or undecidability is equally present in Habermas's texts on tolerance.

There is a decisive difference here between Habermas's critical theory and the deconstructive approach, though. For neither Habermas nor Derrida, the 'necessity of self-assertion' (Habermas, 2004a: 7) on the part of the democratic and open, tolerant society simply destroys it. Yet, according to Habermas, we are dealing with a 'strange dialectic of the self-assertion of a "militant [*wehrhafte*: ready to defend itself]" democracy that is "prepared to defend itself"' (Habermas, 2004a: 7f). For Habermas, it is a dialectic that can

be rationally resolved in the deliberative self-legislation of free and equal citizens as laid out above. Derrida (2003: 94ff; 2000: 5; 2005b: 33-41); uses the term 'autoimmunity' to refer to the same problem, but, for him, democracy is (to use an expression from another context) 'at war with itself' when it tries to defend itself. That is, the defence of democracy and, by extension, inclusion and tolerance is only possible in ways that simultaneously limit democracy, inclusion and tolerance. To use a deconstructive phrase, the condition of possibility of inclusion and tolerance is simultaneously their limit. The relationships between inclusion and exclusion and between unconditionality and conditionality are undecidable: either/or *and* both/and, either inclusion or exclusion, but simultaneously both inclusion and exclusion. The undecidability cannot be dissolved in a rational principle or ground, for instance rational deliberations or a rational consensus.

A similar undecidability or aporia marks Habermas's conception of tolerance. Next, I shall examine in turn his attempts to dissolve the paradoxes of the arbitrariness of the threshold of tolerance and the paternalistic relation between the tolerating and the tolerated.

## 4. The threshold of  tolerance

Habermas's answer to the problem of how to decide the threshold of tolerance and how to relate to the limit of the tolerant society is a notion of deliberative democracy. Through the rational self-legislation of the citizens, the political community engages in a process of critical self-reflection where the 'self' – the subject of the democratic community – is dispersed in intersubjective relations of deliberation. Thus, Habermas (2004a: 7; 2003b: 5f) argues that those affected by the norms of tolerance – including the threshold of tolerance – must also agree to them, although he is not explicit as to who has to enter into dialogue and potentially agree. *If* there were only deliberation among those on the inside, then deliberation would add nothing to the justification of the norms of tolerance. *If* the threshold of tolerance were subjected to deliberation among those affected by it, this would include in the deliberations those who, according to Habermas (2003b: 3), cannot be tolerated: discriminatory and fundamentalist discourses that reject 'the principle of equal treatment of all citizens'. The deliberations would include those who are intolerant of others and of tolerance, thereby undermining tolerance. Their inclusion into the deliberations would undermine the terms that make the deliberations rational, among other things equality and mutual respect. In addition, it is difficult to believe that these constituencies would agree, in the deliberations, not to be tolerated, or that they would exclude themselves. The unconditional inclusion into the justificatory deliberations on the norms and threshold of tolerance undermines the possibility of justification.

Not only does tolerance require intolerance; the justification of the limit between tolerance and intolerance requires certain conditions and exclusions – that is, intolerance – to be set down in advance and beyond the reach of the justificatory discourse. These conditions are simultaneously the conditions of possibility and the limits of the rational justification of norms of tolerance. The conditions and intolerance must be prior to the justification of the tolerance/intolerance distinction and prior to the specification of what 'tolerance' and 'intolerance' mean in the first place. Or, in other words, the threshold of tolerance is both the outcome of the deliberations and posited prior to them. Either one opens up for disputes over the threshold and conditions of tolerance, for instance at infinite levels of meta-deliberations, thus risking undermining the possibility of tolerance; or a else philosopher, a subject in the know (Habermas, for instance) rationally reconstructs those conditions and hands them down to the deliberating citizens. Both solutions are problematic for Habermas, however. The former because it leaves us without a rationally determinable answer; the latter because it takes us too close to the paternalistic dangers of the philosophy of the subject. The self-reflective determination of the threshold of tolerance is caught in a double bind.

A similar problem emerges if one asks why tolerance is necessary in the first place. For Habermas, tolerance serves to include the other as an equal citizen among others. That would suggest that tolerance ameliorates a lack. Supposedly, tolerance adds to the equality of the public deliberations among equal citizens, that is, tolerance is necessary because particular citizens are not included as equals through other procedures. At the same time, however, the norms of tolerance are supposed to be grounded in those very deliberations that are insufficient for the inclusion of the other. The imperfectness that tolerance is supposed to ameliorate also undermines the possibility of a rational justification of the norms of tolerance. Tolerance must add something to the public deliberations on the law, which are lacking. Yet, as a result, the public deliberations cannot support the rationalisation of tolerance.

Another solution to the problem of the self-reflective determination of the threshold of tolerance by the tolerant society is suggested by Habermas (2004a: 13) when he writes that '[o]f course, these limits ['of what every one is allowed to do and to pursue'] themselves are often up for discussion, at which point the courts decide who must accept whose ethos – the majority that of the minority, or vice versa.' Yet, this merely pushes the problem of the rationality of the limits of inclusion onto the character of the court decision. From a deliberative perspective, this does not make things any easier because the decision is then at most only very indirectly rooted in public deliberations.

Finally, a constitutional, deliberative democracy, Habermas (2004a: 8) writes, 'can sidestep the danger of paternalism', which arises from a unilaterally imposed limit, by

tolerating civil disobedience. The latter adds a self-reflexive measure to the tolerant constitutional democracy by allowing citizens to question its current limits. Yet, this proposal does not escape the problems of the philosophy of the subject that Habermas wants to avoid. Civil disobedience is tolerated on 'two conditions': '[u]nder the proviso, of course, that the "disobedient" citizens plausibly justify their resistance by citing constitutional principles and express it by non-violent, i.e., symbolic means' (Habermas, 2004a: 9; also 2003a: 41f).[5] The tolerance of civil disobedience presupposes certain common principles and a subject interpreting them on behalf of both the tolerant society and the civil disobedient. It is tolerated on the condition that it does not undermine the fundamentals of constitutional democracy and the sovereignty of the state, and that it accepts a distinction between the principles themselves and interpretations of them. Yet the tolerance of civil disobedience is not only conditioned in this way, it must also have a certain unconditionality to it. It can only be a transgression if the civil disobedient is allowed some sovereignty in interpreting the principles of constitutional democracy. The sovereignty of both the tolerating and the tolerated is, thus, simultaneously asserted and taken away, a point that I will return to below.

## 5. The (In)Equalities of tolerance

Habermas notes the historical distinction between toleration and tolerance. Toleration refers to the asymmetrical (juridical) relation between the state and one or more minorities, and tolerance refers to a relation among constituencies or individuals placed at the same level (Habermas, 2004a: 5; 2003b: 2f). Although Habermas keeps referring to a relation between the (secular) state and a (religious) minority, he believes that his deliberative account of this relation renders it one of equality rather than hierarchy, tolerance rather than toleration, because the law is rooted in symmetrical public deliberations. However, as I will argue in this section, an element of asymmetry, inequality or paternalism between the tolerating and the tolerated parties nonetheless remains in Habermas's conception of tolerance.

In Habermas, the distinction between ethical and political is a hierarchical one, and tolerance is conditional on acceptance of the ethical-political distinction. Political reasons '*out-trump*' ethical ones (Habermas, 2004a: 11). As a result, ethical worldviews must relativise their validity claims, something which is part of a larger, progressive 'learning process' (Habermas, 2004a: 6). For Habermas, religion provides a privileged example of ethical worldviews and tolerance to the extent that sometimes the ethical-political and

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[5] See also Grundmann and Mantziaris's (1991) insightful critique of Habermas, which – because and despite of its Luhmannian perspective – has several points in common with the one put forward here.

religious-secular distinctions collapse into one (Habermas, 2004a: 15; 2003: 4-8; 2005a: 347f; 2005b: 24-8). He thinks of the development of society in this regard as a progression from pre-modern (religious) societies to modern, secular societies and, finally, to 'post-secular' societies (Habermas, 2005a: 346f). The latter recognise that religion is here to stay, but, importantly, only as one or more ethical worldviews among others and *within* a secular society. The post-secular stage therefore does not overturn secularism, but presupposes it. Similarly, ethical differences are tolerated as just that: as *ethical* differences within a shared political order. Despite their ethical and religious differences, the citizens must 'understand themselves to be citizens of one and the same political community', that is, living 'within the framework of a shared political culture' (Habermas, 2004a: 18). In conclusion, '[a] pluralistic society based on a democratic constitution guarantees cultural differentiation *under the condition* of political integration' (Habermas, 2003b: 10, my emphasis). Tolerance of ethical difference is conditional on the acceptance of the primacy and unity of the political order.

Modern religions, Habermas (2002: 150; 2005b: 26; 2003a: 31) believes, have to become reflexive, that is, accept that their validity claims are limited by secular and scientific knowledge, and that they share the social space with a plurality of other religions. The claims of religion must therefore be translated into political claims if they are to count as reasons for others than the believers of the religion in question, and if they are to have any (legitimate) place in the common political life of society. More generally, the particular languages of ethical worldviews are not excluded from the public domain,[6] but must be translated 'into a publicly accessible [political] language' (Habermas, 2005b: 28). Habermas (2005b: 24) distinguishes 'religious groups who adapt their doctrines and forms of life … to the secularization of state and society, in order to be able to assert themselves from inside the differentiated structures of modernity' from 'illiberal groups' who 'constitute an alien element' within liberal, secular society. The onus is on the ethical-religious constituencies to *adapt to* a society *within which* they are tolerated.

Habermas (1998: 225) refers to ethical groups as *sub*groups, that is, groups beneath the level of the political community as a whole. Since the ethical language of each subgroup will be relative to its particular context, the communication among the subgroups must so to speak go through the level of the political. Like other norms, the norms of tolerance must be the outcome of deliberative processes of reasoning, but the only reasons that can be good reasons for more than one subgroup are political reasons because these are not subject-relative reasons. However, through the process of tolerating ethical and religious differences, the latter are not only tolerated but also (and *thereby*)

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[6] See, for instance, his comments on the French head scarf case in Habermas, 2004a: 15.

marginalised through a hierarchical distinction that puts the political and the secular at the very centre (and as a fundament) and provincialises the ethical and the religious. Tolerance decentres and centres: it both creates an inclusive space and binds the ethical differences in a certain hierarchical relationship to the political community.

To sum up, although Habermas believes that tolerating must hurt in order to be worth the name, thus pulling him in the direction of unconditional tolerance, the pain should not cut too deep. It has to be at the ethical level and not at the level of the basic political principles of constitutional democracy. This is evident, for example, in the case of abortion, as mentioned above. Likewise, when Habermas (2005b: 26) writes that the differences in need of tolerance are '*persisting* disagreement[s]', these are ethical differences and not differences over, for instance, the ethical-political distinction itself. That distinction may be rationally determined, according to Habermas, but ethical disputes cannot be so because they remain tied to subjective perspectives and can therefore not be completely subjected to the force of the good argument in public deliberation. Their non-rationalisability, however, makes their tolerance necessary. But, as I have argued, this tolerance is conditional; it comes at the price of the marginalisation of the ethical differences relative to the political level of integration.

The (ethical or religious) tolerated must either relativise her claims so that they are only ethical, and not political claims to be enforced across society as a whole or translate her claims into the terms of secular, political society (Habermas, 2005b: 27).[7] While Habermas wants to put religious and non-religious worldviews on a par, he acknowledges that 'the costs resulting from tolerance are not distributed symmetrically between believers and unbelievers alike'. Even if non-religious constituencies are supposed to be open and to facilitate the translation, the translation is one-way: *from* religious and ethical reasons *to* secular and political reasons (Habermas, 2005b: 28).

However, this suggests an aporia discussed above in a different context: *either* the arrangement is biased in advance against the religious constituencies and ethical reasons, but in that case it cannot be in the equal interest of all, and it is difficult to see that the deliberations actually add anything to the justification of the norms; *or* what counts as a reason is not settled in advance and every reason has equal weight. In the first case, religious constituencies would, supposedly, accept neither the terms of the deliberations nor the norms of tolerance that are the outcomes of the deliberations. To be sure, the deliberations are conditioned to make them open and equal, but they are *also*, and *thereby*, closed off and asymmetrical.

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[7] One could argue that the effect of the relativisation of one's ethical claims amounts to at least a partial privatisation of them.

The equality among different ethical or religious worldviews depends on – is conditioned by – the hierarchical ethical/religious and political/secular distinctions. Indeed, the deliberations in which the norms and conditions of tolerance are decided take as their point of departure the acceptance of these fundamental terms. Tolerance, *qua* Habermas, then, involves two relations at the same time: first, between the political community and the ethical subgroups ('toleration') and, second, between different ethical subgroups ('tolerance'). Importantly, the former relation – which is asymmetrical – helps constitute the latter relation of equality among ethical differences: it is only in relation to, and relative to, the political that the ethical subgroups are equal and can engage in symmetrical deliberations. In this sense the hierarchical ethical-political relation is constitutive of the non-hierarchical relations among ethical subgroups. The ethical views are tolerable on the condition that they accept the primacy of the political (or of secularism in the case of religious subgroups), and that they relativise their claims accordingly.

Equality and inequality, unconditionality and conditionality – the relationship between the two sides of the pairs is not simply one of either/or as if they constituted two poles between which one had to choose. Nor is it simply one of more or less as if it was merely a matter of balancing the two or striking the right point on a continuum. Rather, the relationship between symmetry and asymmetry, and so on, is one of undecidability – *both* either/or *and* both/and - without which tolerance would not be possible. Either equality or inequality or asymmetry, for instance, but *simultaneously* both equality and inequality – equally 'contradiction' and mutual implication. Inequality makes possible and limits equality (both/and); and inequality in the name of equality exposes itself to contestation in the name of the latter (either/or). As a result, the conditions of tolerance – including the ethical-political distinction – are not rationalisable in the Habermasian fashion. Rather, what we have are different political negotiations of these conditions (norms, distinctions and so on), negotiations that are unstable and do not resolve the undecidability. Habermas's conception of tolerance is one such negotiation. What remains is to discuss whether the deconstruction of Habermas's conception of tolerance implies the destruction of tolerance.

## 6. The destruction of tolerance or a deconstructive tolerance?

Habermas seeks to solve – dissolve and resolve – the paradoxes of tolerance, and he believes that they are not insurmountable paradoxes. I have argued that he is unable to do this. However, *contra* Habermas (and Rainer Forst), the deconstruction of tolerance does not entail its destruction. The deconstructive reading of Habermas neither reduces tolerance to the expression and reproduction of existing relations of domination, as if tolerance made no difference, nor does it relativise everything. It is not an argument *against* tolerance, but an 'analysis' of the conditions of possibility *and* impossibility of the

Habermasian, deliberative conception of tolerance; such an argument, therefore, cannot be *opposed to* tolerance.[8]

At this point it may be useful to distinguish between different 'deconstructive' positions. For example, Stanley Fish, who has drawn on Derrida's work, provides a brilliant analysis of liberal attempts at justifying the limits of tolerance; yet, in his view those attempts simply reify what is already there, namely a liberal view of the good life presented as a theory of justice. His conclusion is that liberal conceptions of tolerance have 'not advanced one millimeter beyond Locke's' (Fish, 1997: 2258), to which one can only respond by asking whether he would just as well like to be tolerated by Locke as, say, by Habermas. I know what my answer to that question would be, although I do not expect to be able to give a Habermasian style rational justification for it. Inspired by Derrida, David Campbell argues that we need to turn away from tolerance because it does not give adequate consideration to difference, and because it reproduces relations of domination that marginalise the tolerated other. While I am sympathetic to his critique of tolerance and his alternative – affirmation of the otherness of the other, contestation rather than spatial appropriation of otherness, and so on – in the following, I would like to argue that this is also possible with tolerance, and that any alternative to tolerance would be marked by the same aporias that beset tolerance (Campbell, 1998: 205f).

Both Habermas and Derrida, both deliberative democracy and deconstruction, are concerned with decentring sovereignty and unilateralism, albeit in different ways. Habermas seeks to dissolve sovereignty and unilateralism in the intersubjective relations of free and fair deliberations. He believes it is possible to 'sublimate' the sovereignty and unilateralism of the subject in the 'subjectless forms of communication that regulate the flow of discursive opinion- and will-formation', thus avoiding arbitrariness and inequality (Habermas, 1996a: 486). This concerns the relation between law and politics. For Habermas, in a constitutional democracy properly understood, '[a] "constituted" (and not only constitutionally tamed) state power is legalized down to its innermost core, so that *law penetrates political power without remainder*.' In this case, 'there is no ruling subject, nourished by a prelegal substance, in the constitutional state' (Habermas, 2005a: 341, my emphasis). The force of (tolerant) law derives from the rationality of the *inter*subjective deliberative procedures of law-making, so that no *subjective* coup de force plays any role in the legal relation of tolerance. 'Toleration' is supposedly subsumed to 'tolerance'.

The deconstructive view, on the other hand, holds that it is impossible to go beyond the subject, sovereignty and unilateralism altogether, but that, at the same time, the

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[8] And, I hope, it is a *tolerant* reading of Habermas: a reading that follows, with an open mind, Habermas as far as possible, but also intervenes in and disturbs his texts, simultaneously opening and appropriating them.

sovereign – the *uni-* of *uni*lateralism, the subject of the philosophy of the subject – is never sovereign anyway: 'pure sovereignty does not exist', as Derrida (2005b: 101) writes. Although tolerance is always conditional, there is no tolerance without some unconditionality; although inclusion is limited through exclusion, the latter is made in the name of inclusion. At the very moment of the sovereign and exclusive self-assertion by a tolerant society, it is also put into question. Unconditionality/conditionality, inclusion/exclusion: there is a mutual contamination of the two sides. This is what Fish and Campbell miss in their analyses of tolerance: although tolerance (re)produces sovereignty, there is no tolerance that does not also institute a relationship of mutuality with the tolerated and an opening of the *uni-* to what is other and what the tolerating subject cannot fully control. To tolerate someone implies at least partial acceptance of the tolerated's sovereignty to decide what to believe and how to behave. Therefore, although tolerance (re)produces the sovereignty of the tolerating, it also produces the sovereignty of the tolerated. The sovereignty involved in the exercise of tolerance is not a one-way relation, and, since there is also a sovereignty *qua* freedom of the tolerated, it would be wrong to oppose sovereignty as such. The deconstructive move then consists in questioning any conditionality, exclusion or intolerance in the name of an unconditional openness, inclusion or tolerance, that is, in the name of the non-closure or unconditionality that accompanies the closure and conditionality. This is an empowering unconditionality or openness that allows for the contestation of the 'sovereign' tolerating party.

In Habermas's view, tolerance is better than intolerance. Yet, if, as I have argued, there is a mutual implication of tolerance and intolerance, it is not a question of *either* tolerance *or* intolerance, but also of both/and. Although we may believe that in a given context more tolerance is needed, it is impossible to take the side of tolerance simply *as opposed to intolerance*, because there is a mutual contamination of the two. Still, Habermas (2005b: 28) is seeking a rational justification for tolerance:

> a trace of imbalance does not place the justification of the principle [of deliberation as the foundation for deciding norms of tolerance] itself in question. For in light of the glaring injustice that is overcome with the abolition of religious discrimination, it would be incommensurate if believers [who are tolerated], because of their asymmetrically distributed burden, were to reject the demands for tolerance as such.[9]

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[9] The unequal burdens are, for instance, those put on citizens opposed to abortion living in a society with a liberal abortion policy, cf. Habermas, 2005b: 9.

Tolerance is better than intolerance, and therefore it needs the support of rational argument (a view echoed by Forst, 2003: 72; 2004: 314).

Fish has referred to the kind of endeavour Habermas is engaged in as 'theory': the search for a disinterested – general, universal, or principled – perspective and foundation. Fish opposes 'theory' to politics, that is, the idea that any resolution of, for instance, the aporia of tolerance is the result of a political negotiation and will inevitably be to the detriment of some. 'What this means', he writes, 'is that it cannot be a criticism of a political theory or of the regime it entails that it is unfair. Of course it is. The only real question is whether the unfairness is the one we want. The only real question, in short, is a political one' (Fish, 1997: 2256; see also Derrida, 1999: 21f; 2000a: 6-8, 10f). The aporias of tolerance, I have argued, do not lend themselves to empirical or conceptual resolution. The task, then, is not to search for rational justifications or foundations, but to analyse each case to see if tolerance is better than intolerance and to see which norms should govern tolerance. To speak of 'rational reconstruction' is to suppress the element of construction in what are different political negotiations of the aporia of tolerance, that is, of the undecidability between tolerance and intolerance, inclusion and exclusion, and so forth. This aporia cannot be avoided by leaving tolerance behind and instead opt for a different concept, for instance, hospitality. In one place, Derrida at first seems to be doing exactly that. He stages an opposition between tolerance, always conditional and implicated in relations of domination, and an unconditional hospitality capable of including the other in her otherness. But, moving to the concept of hospitality, he then finds that hospitality is itself simultaneously unconditional and conditional (Derrida, 2003: 127ff; compare 2002: 59f). Tolerance and hospitality are marked by the same unavoidable undecidability, but, since tolerance cannot be reduced to the unilateral exercise of sovereignty, the need to go beyond tolerance is less pressing. The concept and practice of tolerance cannot be confined to their historical expressions; it is always possible to renegotiate them, even if more so in some situations than in others.

The undecidability I have identified at the heart of Habermas's conception of tolerance raises the question of responsibility towards the tolerated and the not tolerated as well as the responsibility for the decision that negotiates but does not dissolve the undecidability (Derrida, 2005a: 6). Therefore it would be wrong, at this point, to start legislating and laying down the norms of tolerance to be applied in the future. Yet, starting from the reading of Habermas, I believe it is possible to make three general suggestions about an alternative, deconstructive approach to tolerance.

First of all, we are dealing with persisting disagreements and differences. Enrique Dussel has suggested that tolerance intervenes in the time between a subject's truth claim and the intersubjective consensus on the validity of that claim. However, he thinks of this

process as always moving from disagreement towards consensus, with the possibility of reaching consensus at some point in the future (Dussel, 2004: 327f). Although Dussel's paper is entitled 'Deconstruction of the Concept of "Tolerance"', his position is more deliberative than deconstructive. In a deconstructive notion of tolerance, I would argue, consensus should not be conceived as 'not-yet', but as 'to-come', in the sense given to it by Derrida (2005b: 86f) of an ever receding horizon that cannot be reached in the present or in any future present.

The disagreements are not only persisting, but also potentially fundamental: not just disagreements to be tolerated but also disagreements about the norms of tolerance and about the norms for deciding the norms of tolerance. In Habermas's terms, they may be, for instance, disagreements about the threshold of tolerance, the ethical-political distinction or the principles of democratic deliberations. For Rainer Forst (2003: 80), one reason for tolerance is that sometimes reason is insufficient to solve a disagreement, yet he does not extend the limitations of reason to the more basic questions of the conditions of tolerance and for deciding the norms of tolerance, which are arguably all the more difficult. On my view, then, these potentially more fundamental disagreements do no lend themselves to rational resolution. In addition, the distinction between different levels of disagreement – for instance, the ethical-political distinction – is often part of the disagreement.

Finally, tolerance must involve an active engagement with the other, including the religious other. Like Habermas, the deconstructive view is that identities and interests are not given prior to the process of determining the norms of tolerance, but rearticulated in the process of translating one's claims. But unlike Habermas, on my view, this extends to the norms of tolerance and basic principles. Additionally, if there is translation of claims into another language, it is not a one-way translation, but also a process where the terms of translation (that is, of tolerance) are themselves at stake. Whatever translation of ethical claims is going on is also a transformation of those claims and of the common language or framework of tolerance. I would emphasise this mutual translation that is also a transformation of the identities of the tolerating and the tolerated parties.

I would like to conclude on a note of caution, though. Fish (1997: 2324) rightly warns against 'the lure of self-consciousness': the idea that as long as we acknowledge the inherent limits of tolerance, we will somehow be able to avoid their exclusionary effects. In other words, that as long as we recognise that the other is really other, we will be able to take account of that in our inclusion of her and avoid violating her otherness. The danger would be to think of deconstruction as simply a better and more thoroughly self-reflective approach. Like Habermasian discourse ethics, deconstruction is concerned with the relationship to the other. Unlike Habermas, from a deconstructive perspective, the

inclusion – and tolerance – of the other in her otherness is ultimately impossible. She cannot be included or tolerated *and* remain wholly other. Derrida (2005b: 60) writes: 'pure ethics, if there is any, begins with the respectable dignity of the other as the absolute *unlike*, recognized as nonrecognizable, indeed as unrecognizable, beyond all knowledge, all cognition and all recognition'. The qualification 'if there is any' is not without importance: the 'pure', unconditional ethics is always articulated together with and through a certain conditionality. Hence, there is no 'pure ethics' or tolerance or inclusion of the other. A deconstructive approach to tolerance, then, will not be able to avoid exclusion or asymmetry – at most, it can negotiate these differently. Tolerance only works in a certain field of power relations where the tolerated can be determined as someone who can be tolerated (even if never fully determined). As a result, one must also ask questions of tolerance. For instance, one must ask how and why certain issues (religion, for example) are often articulated in terms of tolerance and others not. Here deconstruction merges with genealogy.

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