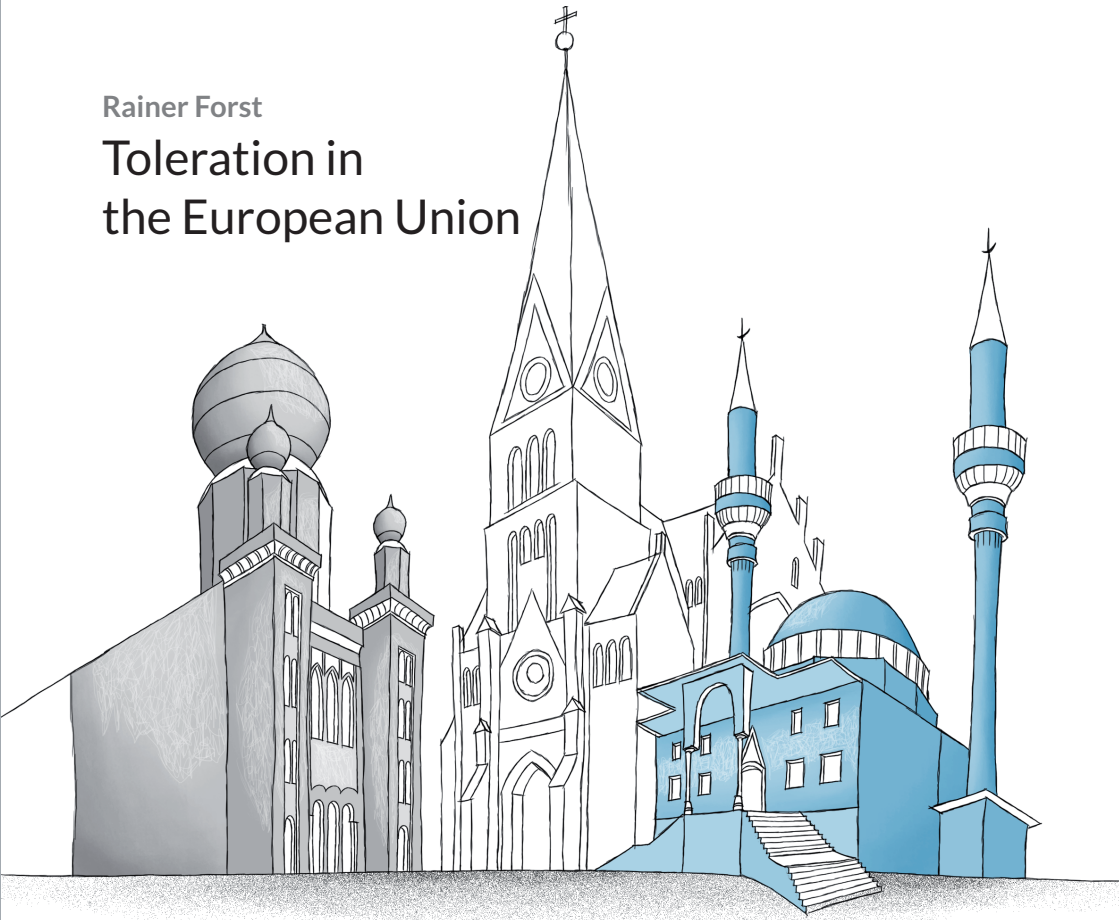


Rainer Forst

Toleration in the European Union



Proposal

In the EU, we should not tolerate member states restricting the right to religious freedom without proper reasons to do so. For example, laws banning certain forms of religious dresses such as headscarves or burqas based on certain ideas of “public order” are impermissible.

Motivation

The guarantee of basic rights to religious freedom within the member states and

the Union generally is a cornerstone of the rule of law. In order to protect these rights, the EU must ensure that its states are religiously neutral institutions, and the citizens have to tolerate each other’s views and practices as long as they do not violate basic rights. Thus laws (such as in Bavaria or in Italy) ordering Christian symbols to be placed in public buildings are as impermissible as are laws banning certain forms of religious dresses.

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— The European Union is an ambitious political project that needs to
T be seen within the context of European history – not just recent
European history, but also the long history of religious conflict,
— discrimination, and war since the 16th century. Thus, the for-
mation of a political union of former enemies represents a major achieve-
ment, and the guarantee of basic rights to religious freedom within the
member states and the Union generally (as declared in the European Con-
vention on Human Rights) is a cornerstone of that achievement.

Today, however, this achievement sends an ambivalent – and perhaps even paradoxical – message regarding the question of religious freedom and toleration. On the one hand, one can argue that the EU should not tolerate any infringements of rights to religious liberty by its member states. On the other hand, enforcing toleration will be seen as an intolerant move by the Union with respect to the autonomy of member states. Hence, debates about crucifixes and burqas point to deeper questions about the identity of the EU.

Two conceptions of toleration

To clarify the terms we are using, a few conceptual remarks are in order. The concept of toleration involves three components. Let us consider what we mean when we say that we “tolerate” something, such as the opinion of a friend or the practices of a group. We say this only when something bothers us about this opinion or these practices. Thus the first component of toleration is that of *objection*. We object to convictions or practices that we tolerate as wrong or bad. Otherwise, our stance would be one of indifference or affirmation, but not of tolerance.

To this, a second component must be added, that of *acceptance*. It specifies reasons why what is wrong or bad should nevertheless be tolerated.

The acceptance reasons do not cancel the reasons for objecting. They stand alongside them and tip the balance in favor of toleration.

Finally, a third component must be considered, that of *rejection* – thus once again negative reasons. These mark the limits of toleration. Evidently, these negative reasons must be more serious or weighty than the first-mentioned reasons for objecting, since they cannot be trumped by acceptance considerations.

The task of toleration is to establish the correct order and balance among these three components. The reasons in play can have different origins. All three can have religious sources, such as when one objects to a different religion as false, but tolerates it in the spirit of peace until it leads to blasphemy. The reasons can also be of different kinds, however, such as when a religious objection stands opposed to acceptance and rejection reasons that appeal to human rights, such as the right to freedom of religion versus the right to bodily integrity.

Continuing the analysis, we must distinguish between different *conceptions* of toleration that have evolved historically. Here, I will cite just two. The first I call the *permission conception*. We find it in the classical toleration laws, such as in the Edict of Nantes (1598) or the English Toleration Act (1689). Toleration according to this conception is an authoritarian attitude and practice that permits minorities to live according to their faith within a framework prescribed unilaterally by the permission-giving side. All three components – objection, acceptance, and rejection – are in the hands of the authorities, and the tolerated are marked and indulged as second-class citizens and, hence, reliant on the protection of the monarch.

In modern times, by contrast, a horizontal conception of toleration developed over the course of the long history of democratic revolutions: the *respect conception*. The key idea in this case is that toleration is an attitude of citizens towards each other who know that they do not agree on central issues of the good life, yet still accept that their shared institutions must be based on norms that all free and equal persons can share

and that are not simply stipulated and legislated by the (contestable) system of values of only one group. Tolerance is the virtue of tolerating beliefs and practices with which one does not agree but which do not violate any principles that reflect the equality and freedom of all.

Democratic toleration

For a democratic European Union, the authoritarian, vertical permission conception is not a plausible option. Rather, a European understanding of toleration regards it as the political and social (horizontal) virtue that accompanies equal rights to religious liberty. That means that the state does not “grant” permission to minorities to live according to their beliefs, but that they have a *right* to do so within a democratic regime. Thus, citizens ought to tolerate all the different forms of life to which they object as long as these do not violate basic principles of democracy and human rights.

Two conclusions can be drawn from this in today’s EU, but they point in opposing directions, thereby leading to the paradox mentioned above. The first conclusion is that there must be no discrimination against persons based on religious grounds; they enjoy equal rights as citizens regardless of their religion. The state must be a religiously neutral institution. Thus, laws (such as in Bavaria or Italy) ordering Christian symbols to be placed in public buildings are as impermissible as are those banning certain forms of religious dress, such as headscarves or burqas. This also applies to the headscarves of schoolteachers, since a teacher has the personal liberty to wear a religious symbol, whereas the state does not have the right to declare some religious symbols to be official symbols of the state’s “identity”.

Still, in cases such as “Lautsi and others v. Italy” (2011) and “S.A.S. v. France” (2014), the European Court of Human Rights has ruled that countries like Italy or France enjoy a “wide margin of appreciation” when it comes to laws regarding hanging crucifixes in classrooms (as in the first case) or banning the wearing of burqas in public because of their own interpretation of the national public order and its basic values

(as in the second case). From the perspective of equal human rights, this is unacceptable.

But here the second conclusion regarding toleration comes in. Many people argue that the EU is a political union in which different national political communities should tolerate the manifold ways in which they regard and manifest their respective political identities even if that leads to unequal treatment of different religions.

From the perspective of equal rights, this argument is mistaken. A political union that rests on a consensus about fundamental human rights and liberties must regard the rights of minorities as essential, for that is the very point of having basic rights: They protect minorities. A European Union that forgets this disregards its own principles and history. In short, the right to religious liberty trumps the demands for its restrictions based on a certain notion of a public order even if the latter is supported by the majority of citizens. Democratic toleration does not and must not mean that majorities declare their religious views or symbols as dominant and public symbols, while minorities are simply tolerated as second-class citizens. Rather, traditional notions of public order and political symbols need to be revised. For truly democratic toleration requires *equal respect* and standing for majorities and minorities, and this status of equality calls for toleration of views and practices even if they are widely regarded as objectionable, such as wearing a burqa.

Some objections

A number of objections can be raised against this argument, and have indeed been raised in the Twelve Stars online debate. They involve fundamental questions about the nature of the European Union and what European citizenship means.

First, does the argument wrongly assume that the EU is not just a political and economic union, but also a cultural one? Does the EU overstep its competence if it enforces a certain view of religious liberty on member states? I do not think so. The European Convention on Human Rights

(1953) as well as the more recent Charter of Fundamental Rights of the European Union enshrine basic rights to religious liberty, non-discrimination and equal treatment. Thus, these rights are fundamental to the normative order of the EU, and it follows that the Union has a duty to make sure that they will not be violated.

Second, the argument above means that the state rests on secular principles and is neutral with respect to religions. Thus, it cannot make some religious symbols its own. But that does not mean that teachers working at state schools, for example, cannot wear religious symbols (compatible with their professional function) because, in such cases, these are personal symbols of a religious identity, not state symbols.

Third, the argument implies that religious practices that violate basic human rights ought not to be tolerated. Thus, a counterargument goes, if wearing the burqa is an oppressive practice – because women are forced to wear it, because it is a sign of gender inequality generally, because it is a sign of the rejection of democracy, etc – to tolerate it is wrong. In reply, I agree that oppressive social practices ought not to be tolerated, whether religious or not. But the above-mentioned interpretations of wearing a burqa cannot be generalised, since the practice can mean different things to different people, including those who wear a burqa, and many Muslim women assert that it is their decision to wear it. So, although a democratic legal state has to be alert to structures of gender oppression and protect minorities within minorities against patriarchal domination, it seems wrong to generalise in the above-mentioned way and legally impose one interpretation on a complex practice. To tolerate that practice does not mean that you leave your objections behind; it just means that you accept a limit on generalising them.

Finally, some people worry that enforcing basic rights and widening the limits of toleration in the suggested way represents too great a challenge to the socially dominant values and attitudes within certain countries and potentially leads to its opposite, namely, to increased resentment and opposition against minorities. In another paradox, this objection states that too much tolerance leads to a backlash of intolerance.

This may be true in an empirical, sociological sense, but what are the consequences for a normative order built on certain principles? Are we to restrict the scope and validity of basic principles when they go against the prejudices or values of majorities? What would be the result for the rights and liberties of minorities if we chose such a path? I believe that the history of struggles for toleration shows that those societies which aimed at institutionalising norms of equal respect developed peacefully and productively, while policies of domination led to enduring conflicts. But apart from such sociological considerations, the normative ones are decisive: Justice and equal respect ought to trump resentment and prejudice when it comes to shaping public policy.

Conclusion

The future of the EU as a normative order of peaceful and just social cooperation depends on majorities' and minorities' agreeing on principles of equal respect and toleration that are fair to all those involved. This means not only that many Christian majorities in European countries must be more tolerant, but also that change will be required from members of minority groups with, for example, patriarchal or exclusivist views. But this change is demanded by justice, not by the "Leitkultur" of a dominant group.

For background information on how the proposal fits with the EU's political agenda and procedures, see www.twelvestars.eu/CMV/Rainer-Forst.

Further reading

Forst, Rainer. *Toleration in Conflict: Past and Present*. Cambridge: Cambridge University Press, 2013.